WRONGFUL CONCEPTION: THE EMERGENCE OF A FULL RECOVERY RULE

> The entire history of the development of tort law shows a continuous tendency to recognize as worthy of protection legal interests which previously were not protected at all.[1]

"Wrongful conception"[2] is a form of medical malpractice claim that arises when a physician's[3] negligence, usually involving failed surgical sterilization procedures,[4] leads to the birth of a healthy but unplanned child. Within the last twenty-five years, courts in thirty-four states and the District of Columbia have recognized this cause of action;[5] only

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1. RESTATEMENT (SECOND) OF TORTS § 1 cmt. e (1965).

2. Terminology in the area of birth-related torts is sometimes confusing. The modern trend is to distinguish three separate causes of action that may arise when a defendant's negligence results in the birth of a child: "wrongful birth," "wrongful life," and "wrongful conception," also known as "wrongful pregnancy." Benjamin L. Locklar, Comment, Jackson v. Bumgardner: *A Healthy Newborn—A Blessing or a Curse?*, 12 AM. J. TRIAL ADVOC. 153, 154-55 (1988). For definitions and comparisons of these causes of action, *see infra* notes 24-33 and accompanying text.

3. In the great majority of wrongful conception cases, the defendant is a physician. Plaintiffs have also brought actions against hospitals, *see, e.g.*, Johnson v. University Hosps., 540 N.E.2d 1370 (Ohio 1989), and pharmacists, *see, e.g.*, Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971). Other possible defendants include manufacturers of contraceptive drugs or devices, laboratory technicians, and other health care professionals. Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311, 1311 n.2 (1982).

4. Most wrongful conception cases arise when a female plaintiff has undergone a failed tubal ligation or a male plaintiff has undergone a failed vasectomy. The plaintiff alleges negligence either in the performance of the procedure, *see, e.g.*, Jones v. Malinowski, 473 A.2d 429 (Md. 1984) (physician's failure to cauterize plaintiff's left fallopian tube resulted in an ineffective sterilization), in post-operative testing, *see, e.g.*, Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977) (physician erroneously advised plaintiff that the results of a post-vasectomy semen test were "negative"), or in advising plaintiff of the risk of failure, *see, e.g.*, C.S. v. Nielson, 767 P.2d 504 (Utah 1988) (physician failed to inform plaintiff that tubal ligation procedure was not "absolute in nature" and that alternative sterilization procedures existed with different success rates).

The cause of action can also arise in a variety of contexts other than voluntary surgical sterilization. *See, e.g.*, Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986) (physician failed to replace intrauterine device [I.U.D.] and to inform plaintiff of the omission); Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (physician erroneously informed plaintiff he had removed her fallopian tubes during exploratory abdominal surgery); Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) (pharmacist incorrectly filled prescription for birth control pills with a mild tranquilizer). *See* David J. Burke, Note, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Consideration*, 8 PACE L. REV. 313, 340-72 (1988) (appendix outlining state-by-state the leading wrongful conception cases decided through 1987). *See generally* A.S. Klein, Annotation, *Medical Malpractice, and Measure and Element of Damages, in Connection with Sterilization or Birth Control Procedures*, 27 A.L.R.3d 906 (1969 & Supp. 1991); Gregory J. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to be Born*, 83 A.L.R.3d 15 (1978 & Supp. 1991).

5. The first case to recognize a wrongful conception claim was Custodio v. Bauer, 59 Cal.

Nevada has judicially barred claims for wrongful conception.[6]

The central issue in wrongful conception cases is whether the plaintiffs may recover from the tortfeasor the costs of raising the child.[7] Most jurisdictions apply one of two rules that bar full recovery of child-rearing costs. Twenty-seven states and the District of Columbia hold that child-rearing costs are not recoverable,[8] following the "limited damages" rule.[9]

Rptr. 463 (Cal. Ct. App. 1967). *See* Burke, *supra* note 4, at 318-19. For a list of the leading cases on damages decided since 1967, see *infra* notes 8 and 12.

6. Szekeres v. Robinson, 715 P.2d 1076 (Nev. 1986) (but case permitted to go to trial on breach of contract theory).

7. TERRENCE F. KIELY, MODERN TORT LIABILITY: RECOVERY IN THE '90S § 8.18, at 425 (1990). Kiely identified this issue as among "the most important long-term developments in the areas of defenses and damages" that will result in significant change in tort law during the 1990s. *Id.* § 8.1.

8. Following is a list of the leading cases in states which do not permit plaintiffs to recover the costs of raising the child:

Alabama:	Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982).
Arkansas:	Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982).
Delaware:	Coleman v. Garrison, 349 A.2d 8 (Del. 1975), *overruled on other grounds by* Garrison v. Medical Ctr. of Delaware, 571 A.2d 786 (Del. 1989) (unpublished opinion; text in Westlaw).
Florida:	Fassoulas v. Ramey, 450 So. 2d 822 (Fla. 1984).
Georgia:	Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653 (Ga. 1984).
Illinois:	Cockrum v. Baumgartner, 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).
Indiana:	Garrison v. Foy, 486 N.E.2d 5 (Ind. Ct. App. 1985).
Iowa:	Nanke v. Napier, 346 N.W.2d 520 (Iowa 1984).
Kansas:	Byrd v. Wesley Med. Ctr., 699 P.2d 459 (Kan. 1985).
Kentucky:	Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).
Maine:	Macomber v. Dillman, 505 A.2d 810 (Me. 1986). This holding is codified at ME. REV. STAT. ANN tit. 24, § 2931.2 (West 1990).
Michigan:	Rinard v. Biczak, 441 N.W.2d 441 (Mich. Ct. App. 1989).
Missouri:	Girdley v. Coats, 825 S.W.2d 295 (Mo. banc 1992).
New Hampshire:	Kingsbury v. Smith, 442 A.2d 1003 (N.H. 1982).
New Jersey:	P. v. Portadin, 432 A.2d 556 (N.J. Super. Ct. App. Div. 1981).
New York:	O'Toole v. Greenberg, 477 N.E.2d 445 (N.Y. 1985).
N. Carolina:	Jackson v. Bumgardner, 347 S.E.2d 743 (N.C. 1986).
Ohio:	Johnson v. University Hosps., 540 N.E.2d 1370 (Ohio 1989).
Oklahoma:	Morris v. Sanchez, 746 P.2d 184 (Okla. 1987).
Pennsylvania:	Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982).
Tennessee:	Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987).
Texas:	Terrell v. Garcia, 496 S.W.2d 124 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 927 (1974).
Utah:	C.S. v. Nielson, 767 P.2d 504 (Utah 1988).
Virginia:	Miller v. Johnson, 343 S.E.2d 301 (Va. 1986).
Washington:	McKernan v. Aasheim, 687 P.2d 850 (Wash. 1984).
W. Virginia:	James G. v. Caserta, 332 S.E.2d 872 (W.Va. 1985).
Wyoming:	Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

The District of Columbia adopted the "limited damages" rule in Flowers v. District of Columbia,

Courts applying this rule permit plaintiffs to recover damages directly associated with pregnancy and birth,[10] but will grant summary judgment in favor of the defendant as to claims for child-rearing expenses.[11] Six states follow a "benefits" rule,[12] allowing plaintiffs to prove and recover the costs of raising the child, but requiring the jury[13] to reduce the plaintiffs' award by the value of the intangible benefits associated with having a child.[14] Despite the apparent judicial consensus that limitations on recovery of child-rearing expenses are appropriate,[15] both the "limited

478 A.2d 1073 (D.C. 1984). *See generally* Burke, *supra* note 4, at 340-72; Russell G. Donaldson, Annotation, *Recoverability of Cost of Raising Normal, Healthy Child Born as Result of Physician's Negligence or Breach of Contract or Warranty*, 89 A.L.R.4th 632, § 3 (1991).

9. *See* C.S. v. Nielson, 767 P.2d 504, 513 (Utah 1988); Johnson v. University Hosps., 540 N.E.2d 1370, 1375 (Ohio 1989).

10. These damages commonly include the mother's medical expenses, damages for pain and suffering in connection with pregnancy, childbirth, and recovery, and emotional distress stemming from the unexpected pregnancy; the mother's lost wages; and the husband's loss of his wife's consortium. Plaintiffs may also recover the cost of the failed sterilization and the cost of a second, successful sterilization. *See* Burke v. Rivo, 551 N.E.2d 1, 3-4 (Mass. 1990) (collecting cases and specifying elements of recovery allowed); Burke, *supra* note 4, at 320-21 (listing common elements of recovery).

11. *See, e.g.*, Hatter v. Landsberg, 563 A.2d 146, 150-51 (Pa. Super. Ct. 1989) (affirming summary judgment against plaintiffs on claim for child-rearing expenses, pursuant to holding in Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982), that costs of raising child are not compensable, but reversing summary judgment on counts seeking damages relating to pregnancy and birth).

12. The following states have adopted the "benefits" rule:

Arizona:	University of Ariz. v. Superior Court, 667 P.2d 1294 (Ariz. 1983).
California:	Stills v. Gratton, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976).
Connecticut:	Ochs v. Borrelli, 445 A.2d 883 (Conn. 1982).
Maryland:	Jones v. Malinowski, 473 A.2d 429 (Md. 1984).
Mass.:	Burke v. Rivo, 551 N.E.2d 1 (Mass. 1990).
Minnesota:	Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minn. 1977).

See generally Donaldson, *supra* note 8, § 5.

13. Whether a jury will find that the intangible benefits of parenthood outweigh its financial costs is highly dependent on the facts of each case; a jury could even find the plaintiff entitled to recover none of the costs of raising the child. *See, e.g.*, Morris v. Frudenfeld, 185 Cal. Rptr. 76 (Cal. Ct. App. 1982).

14. As authority for the "benefits" rule, these courts cite § 920 of the Restatement (Second) of Torts (1979). For the text of § 920 and criticisms of the use of § 920 in wrongful conception cases, *see infra* notes 95, 126-33 and accompanying text.

15. Courts applying the "limited damages" and "benefits" rules agree that child-rearing expenses should not be fully recoverable. They differ only in their approach to limiting recovery. In the "limited damages" decisions, courts hold as a matter of law that the plaintiffs may not recover child-rearing costs. *See infra* notes 86-92 and accompanying text. Courts adopting the "benefits" rule hold that the issue of whether the plaintiffs have suffered a net detriment is a jury question. In Beardsley v. Wierdsma, 650 P.2d 288, 296-97 (Wyo. 1982), Chief Judge Rose noted in a concurring opinion:

[T]hrough application of the "benefit[s] rule" the courts give recognition to the philosophy

damages" and "benefits" rules have been subject to criticism in the voluminous scholarly literature on wrongful conception[16] and in lively dissents in the cases themselves as distortions of ordinary tort recovery principles.[17]

Many courts have discussed a "full recovery" rule which would permit plaintiffs to recover child-rearing expenses without offset,[18] but until recently, courts unanimously rejected the "full recovery" rule.[19] However,

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that the costs and benefits associated with the introduction of an unplanned child to the family will vary depending upon the circumstances of the parents.... By recognizing these considerations, the "benefit[s] rule" encourages and entrusts the trier of fact with the responsibility of weighing and considering all of the factors associated with the birth of an unplanned child in a given 'wrongful pregnancy' case.

Id.

16. *See, e.g.*, David J. Burke, *Wrongful Pregnancy: Child Rearing Damages Deserve Full Judicial Considerations*, 8 PACE L. REV. 313 (1988); Robert A. Guttman, *Trends in Recognition of Future Child Rearing Expenses in Wrongful Conception Actions*, 8 J. JUV. L. 178 (1984); Lawrence P. Hampton, *The Continuing Debate Over Recoverability of the Costs of Child-Rearing in "Wrongful Conception" Cases: Searching for Appropriate Judicial Guidelines*, 20 FAM. L.Q. 45 (1986); Donna K. Holt, *Wrongful Pregnancy*, 33 S.C. L. REV. 759 (1982); Renee M. Ham, *Wrongful Conception: North Carolina's Newest Prenatal Tort Claim*—Jackson v. Bumgardner, 65 N.C. L. REV. 1077 (1987); Jeff L. Milstein, *Recovery of Child-Rearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167 (1983); Ada F. Most, *By What Measure? The Issue of Damages for Wrongful Pregnancy*, 16 N.C. CENT. L.J. 59 (1986); Lee Ann Nicholson, *Damages: Recovery of Damages in Actions for Wrongful Birth, Wrongful Life, and Wrongful Conception*, 23 WASHBURN L.J. 309 (1984); Sandra G. Sylvia, *One More Mouth to Feed: A Look at Physicians' Liability for the Negligent Performance of Sterilization Operations*, 25 ARIZ. L. REV. 1069 (1983); Note, *Judicial Limitations on Damages Recoverable for the Wrongful Birth of a Healthy Infant*, 68 VA. L. REV. 1311 (1982); Benjamin L. Locklas, Comment, Jackson v. Bumgardner: *A Healthy Newborn—A Blessing or a Curse?*, 12 AM. J. TRIAL ADVOC. 153 (1988); Brian McDonough, Note, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65 (1981); Nancy L. White, Recent Decisions, Flowers v. District of Columbia: *Another Court Refuses to Settle the Question of Damages in Wrongful Conception Cases*, 34 CATH. U.L. REV. 1209 (1985).

17. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 617 (N.M. 1991) (stating that the number of cases adopting the "limited damages" and "benefits" rules "gives a false impression of unanimity" because "[m]any of these decisions include strong dissents from one or more judges, criticizing the rationale of the majority and urging the adoption of a different rule").

18. *See, e.g.*, University of Ariz. v. Superior Court, 667 P.2d 1294, 1297 (Ariz. 1983); Garrison v. Foy, 486 N.E.2d 5, 8 (Ind. Ct. App. 1985); Byrd v. Wesley Med. Ctr., 699 P.2d 459, 461 (Kan. 1985); Kingsbury v. Smith, 442 A.2d 1003, 1006 (N.H. 1982); Johnston v. University Hosps., 540 N.E.2d 1370, 1376 (Ohio 1989); Smith v. Gore, 728 S.W.2d 738, 742 (Tenn. 1987); C.S. v. Nielson, 767 P.2d 504, 510 (Utah 1988); Beardsley v. Wierdsma, 650 P.2d 288, 291 (Wyo. 1982).

19. In Cockrum v. Baumgartner, 425 N.E.2d 968 (Ill. App. Ct. 1981), the Illinois Court of Appeals held that the plaintiffs could recover the costs of raising the child without offset. However, the Illinois Supreme Court reversed, adopting the "limited damages" rule in Cockrum v. Baumgartner, 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983). *See infra* notes 139-46 and accompanying text.

Many courts cite the landmark case of Custodio v. Bauer, 59 Cal. Rptr. 463 (Cal. Ct. App. 1967) as establishing a full recovery rule. *See, e.g.*, Byrd v. Wesley Med. Ctr., 699 P.2d 459, 461 (Kan.

in 1990, the Supreme Court of Wisconsin adopted the "full recovery" rule in *Marciniak v. Lundborg*,[20] and the following year the New Mexico Supreme Court did the same in *Lovelace Medical Center v. Mendez*.[21] In 1992, in *Girdley v. Coats*,[22] the Missouri Supreme Court refused to follow the trend, reversing the Missouri Court of Appeals' adoption of the "full recovery" rule.[23]

This Note argues that limitations on recovery of child-rearing expenses in wrongful conception cases stem from the erroneous notion that the cause of action devalues human life. Part I distinguishes the tort of wrongful conception from other birth related torts that may raise "sanctity-of-life" issues. Part II enumerates the policy rationales courts have given for adopting the "limited recovery" and "benefits" rules. Part III discusses the arguments against limitations on damages, demonstrating that such limitations violate the principles of tort recovery and fail to advance the considerations at stake in wrongful conception cases. Part IV analyzes the recent cases adopting the "full recovery" rule. Part V concludes that the emergence of a "full recovery" rule in wrongful conception cases signals a mature judicial understanding that invasions of the individual interest in controlling procreation deserve full compensation.

I. WRONGFUL CONCEPTION AND OTHER BIRTH RELATED TORTS

Modern cases in the area of birth related torts distinguish three separate causes of action when the plaintiff asserts that a tortfeasor has wrongfully caused the birth of another.[24] In "wrongful birth" cases, the

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1985); Smith v. Gore, 728 S.W.2d 738, 742 (Tenn. 1987). However, in a subsequent California Court of Appeals decision, the court adopted the "benefits" rule. Stills v. Gratton, 127 Cal. Rptr. 652 (Cal. Ct. App. 1976). The California Supreme Court has not settled the issue. *See* Smith v. Gore, 728 S.W.2d at 742.

Another case that courts sometimes cite as support for a full recovery rule is Bowman v. Davis, 356 N.E.2d 496 (Ohio 1976) (per curiam). *See* Smith v. Gore, 728 S.W.2d at 742-43. However, in Johnson v. University Hosps., 540 N.E.2d 1370, 1377 (Ohio 1989), the Ohio Supreme Court held that child-rearing expenses were not compensable. The *Johnson* court distinguished *Bowman*, stating that *Bowman* had not addressed the damages issue in wrongful conception claims. *Id.*

20. 450 N.W.2d 243 (Wis. 1990). *See infra* notes 160-63 and accompanying text.

21. 805 P.2d 603 (N.M. 1991). *See infra* notes 154-74 and accompanying text.

22. 825 S.W.2d 295 (Mo. 1992) (en banc).

23. No. 17117, 1991 WL 116734 (Mo. Ct. App. July 3, 1991). *See infra* notes 165-75 and accompanying text.

24. Locklar, *supra* note 2, at 154. Older cases often used the terms "wrongful life" and "wrongful birth" interchangeably in all birth related tort actions. *Id.*

parents of a child born with a birth defect or genetic disorder file suit against the physician, alleging post-conception negligence.[25] The plaintiffs claim that the physician negligently failed to diagnose the condition in time to allow them to abort the fetus.[26] Because the plaintiffs initially desired a child, the basis of the injury is not the conception of the child and the resulting pregnancy, but rather the birth of a child who would otherwise have been aborted.[27]

Early cases classified all birth related torts in which the plaintiffs were the parents under the rubric "wrongful birth." However, in *Sherlock v. Stillwater Clinic*,[28] the Minnesota Supreme Court coined the term "wrongful conception" to distinguish torts based on pre-conception negligence from other birth related torts.[29] In "wrongful conception" cases, the parents of a healthy child (or, sometimes, a child born with anomalies) allege that a physician's negligence resulted in an unwanted pregnancy.[30] Since the parents did not desire a child, the injury occurs at the point of conception.[31]

In contrast with "wrongful birth" and "wrongful conception" cases, the plaintiff in a "wrongful life" action is not the parents, but instead, the child himself or the child's representative. In a "wrongful life" suit, a child born with a birth defect or genetic disorder alleges that "but for" a physician's negligent failure to alert the parents of the child's condition, the parents would have aborted the child rather than giving birth.[32] Thus, the basic distinctions between "wrongful birth," "wrongful conception," and "wrongful life" are the identity of the plaintiff, whether the alleged negligence occurred before or after conception, whether the child was born healthy, and whether the child was planned.[33]

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25. *Id.*

26. *Id.*

27. Margaret J. Mullen, Comment, *Wrongful Life: Birth Control Spawns a Tort*, 13 J. MARSHALL L. REV. 401, 404 (1980).

28. 260 N.W.2d 169 (Minn. 1977).

29. *See* Note, *Wrongful Conception*, 5 WM. MITCHELL L. REV. 464, 476-80 (1979).

30. *See supra* notes 2-4 and accompanying text.

31. Sherlock v. Stillwater Clinic, 260 N.W.2d at 175.

32. Locklar, *supra* note 2, at 154.

33. Only children or their representatives may bring "wrongful life" actions; such actions always involve children born with birth defects. In contrast, parents may bring either wrongful birth and wrongful conception actions. Wrongful birth claims always involve children born with birth defects; actions for wrongful conception most commonly involve healthy children, but may also involve children born with birth defects. Phillip A. McAfee, *The Injury of Birth: Minnesota's Statutory Prohibition of Postconception Negligence Actions*, 14 WM. MITCHELL L. REV. 701, 711-12 n.53 (1988). The central distinction between actions brought by parents is in the timing of the alleged

Judicial recognition of each of these three causes of action depends on the interest the plaintiff asserts. In a wrongful life suit, the plaintiff alleges an interest in not being born with birth defects.[34] An essential element of the wrongful life claim is that the parents would have aborted the child if they had known of the fetal defects.[35] Thus, the plaintiff urges the court to accept the argument that no life is preferable to life with impairment, a position that is fraught with grave philosophical difficulties.[36] A majority of courts reject wrongful life claims.[37] Some juris-

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negligence. In wrongful birth cases, the alleged negligence occurs after conception; in wrongful conception actions, the alleged negligence is pre-conception. This distinction is significant because allegations of post-conception negligence always implicate the abortion controversy. *See infra* notes 39-48 and accompanying text. One commentator argues that the distinction between a planned or unplanned child "lacks contemporary significance and places the focus on the victim's culpability, rather than the tortfeasor's." McAfee, *supra*, at 711-12 n.53. However, whether the child was planned or unplanned is clearly relevant to the damages issue. Parents who initially desired to have a child were prepared to incur at least the normal costs of child rearing, and thus wrongful birth plaintiffs should logically recover only the extraordinary expenses of raising an impaired child. KIELY, *supra* note 7, § 8.18 at 427.

The development of genetic counseling technologies blurs any neat distinction between "wrongful birth," "wrongful life," and "wrongful conception" claims. *See generally* McAfee, *supra* at 706-08. If the parents of an impaired child received erroneous advice that they were not at risk of passing genetic abnormalities to the child, their cause of action would resemble wrongful conception because the alleged negligence occurred prior to conception; but it would also resemble a wrongful birth claim because they initially desired a child. A wrongful life claim based on pre-conception negligence would not differ substantially from one based on post-conception negligence, because the child's impaired existence would be the basis of the claim in either instance. However, a pre-conception claim would require the child to establish that the tortfeasor owed a duty to an unconceived child. Wrongful life claims based on pre-conception negligence have generally been more successful than those based on post-conception negligence. One commentator suggests that this is because causation is stronger in pre-conception cases. McAfee, *supra*, at 748-49 n.215.

Additionally, the birth related torts of wrongful birth, wrongful life, and wrongful conception differ from prenatal injury cases, in which a physician's alleged negligence causes physical injury to a normal fetus *in utero*. *See generally* Roland F. Chase, Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971 & Supp. 1991).

34. Patrick J. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, WASH. U. L.Q. 919, 935 (1979).

35. James Bopp, Jr., et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461, 463 (1989).

36. In the leading "wrongful life" case of Gleitman v. Cosgrove, 227 A.2d 689 (N.J. 1967), a child with nontreatable impairments sued the physician with whom the mother consulted after conception. The physician was negligent because he failed to detect the impairment, depriving the mother of the opportunity to abort the abnormal fetus. The court noted that if the physician had not been negligent, the result would not be a healthy birth, but no birth at all. Thus, the appropriate comparison for purposes of damage calculation is between life in an impaired state and no life at all. The *Gleitman* court concluded that to "weigh the value of life with impairments against the nonexistence of life itself" was impossible. *Id.* at 692. One commentator suggests avoiding the "being or nothingness" problem in wrongful life actions by compensating the child for the pain and suffering

dictions hold that damages would be unascertainable, while others hold that as a matter of law, life is preferable to nonlife.[38]

In wrongful birth actions, the plaintiffs assert an interest in the right to abort an impaired child.[39] In 1973, the United States Supreme Court held in *Roe v. Wade*[40] that a state may not completely deny a woman's right to have an abortion, and created a trimester framework to determine the scope of permissible state regulations.[41] The *Roe* decision did not compel recognition of the wrongful birth cause of action because the Constitution does not require state courts to provide a tort remedy for private interference with constitutionally protected rights.[42] However, in the wake of *Roe*, wrongful birth actions gained acceptance in the courts.[43] The Court's recent decision in *Webster v. Reproductive Health Services*[44] forecast important changes in abortion law that call into question the scope of the abortion right that forms the basis of a wrongful birth claim. The *Webster* decision clearly demonstrated that *Roe* does not prohibit a state from deciding to favor childbirth over abortion or from implementing that decision in tort law. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[45] the Supreme Cout upheld *Roe*'s central holding that a state may not prohibit a woman from terminating a pregnancy before viability, but struck down *Roe*'s rigid trimester framework and elevated the state's interest in protecting potential life.[46] The Court demoted the woman's interest in the abortion decision from a fundamental right that cannot be restricted except to serve a "compelling" state interest to an interest that is subject to regulations that do not

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the child experiences as a result of its defects, minus the benefits accruing to the child as a result of its birth. William S. Topham, Note, *Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater*, 1984 UTAH L. REV. 833, 839. However, this approach may not avoid complex philosophical inquiry because it still requires a calculation of the benefits of existence.

37. *See* Bopp, et al., *supra* note 35, at 462-63.

38. Topham, *supra* note 36, at 842 n.61.

39. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2017 (1987).

40. 410 U.S. 113 (1973)

41. *Id.* at 164-66.

42. Kelley, *supra* note 34, at 959. *See also* Bopp, et al., *supra* note 35, at 472.

43. Bopp, et al., *supra* note 35, at 467.

44. 492 U.S. 490 (1989).

45. Nos. 91-744 and 91-902, 1992 WL 142546 (U.S. June 29, 1992).

46. *Casey*, 1992 WL 142546, at *27. *See also* Linda Greenhouse, *High Court Affirms Right to Abortion But Allows Most of Pennsylvania's Limit*, N.Y. TIMES, June 30, 1992, at A1; Kathleen M. Sullivan, *A Victory for Roe*, N.Y. TIMES, June 30, 1992, at A15.

impose an "undue burden," defined as regulations "whose purpose of effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[47] *Casey* did not address whether a state may prohibit abortions performed because of fetal impairments; nevertheless, even if such abortions may not be specifically regulated, a state ban on wrongful birth claims probably would not constitute an undue burden on the abortion right.[48] Thus, states may reject wrongful birth claims without violating any constitutional guarantees.

Underlying the tort of wrongful conception is the interest of parents in controlling the size of their families,[49] an interest rooted in common law[50] that has come to enjoy constitutional protection.[51] Similar to wrongful birth cases, constitutional precedent does not compel the courts to recognize the wrongful conception cause of action.[52] However, the *Webster* and *Casey* decisions strengthened the argument that the courts should provide a remedy for invasions of the interest in contraception.[53] If a state has made a value judgment favoring childbirth over abortion, as many states have,[54] recognition of the tort of wrongful conception and

47. *Casey*, 1992 WL 142546, at *27.

48. Just as with wrongful conception, a state need not provide a text remedy to private interference with a consititional right. *See* notes 24-75 *supra* and accompanying text.

49. Note, *supra* note 29, at 466.

50. Wrongful conception cases generally rest on the invasion of a common law interest, rather than a constitutional right. *Id.* at 467 n.19. Early decisions in which the plaintiffs asserted a claim for damages based on negligently performed sterilizations concluded that voluntary sterilization was not contrary to public policy, and thus characterized the plaintiffs' interest in controlling procreation as a common law right. *Id.* at 467-69 (discussing Christensen v. Thornby, 255 N.W. 620 (Minn. 1934) and Shaheen v. Knight, 11 Pa. D. & C.2d 41 (1958)). Both of these cases denied relief, not because the interest in family planning did not deserve protection, but because of an implied public policy preventing parents from asserting the birth of an unplanned child as a legal injury. *Id.* at 469. The *Shaheen* court declared that "to allow damages for the normal birth of a normal child is foreign to the universal public sentiment of the people." 11 Pa. D. & C.2d at 45. This reasoning has prevailed, as more recent cases deny full recovery of child-rearing costs in wrongful conception cases. *See infra* notes 86-92 and accompanying text.

51. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). The *Griswold* court struck down a Connecticut statute prohibiting the use of contraceptive drugs and devices, holding that the statute invaded the fundamental right of marital privacy in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

52. *See supra* note 42 and accompanying text.

53. The *Casey* court explicitly reaffirmed the vitality of the line of cases beginning with *Griswold*, stating that "subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child." *Casey*, 1992 WL 142546, at *15.

54. *See e.g.*, MINN. STAT. ANN § 256B.011 (West 1982); N.D. CENT. CODE § 14-02.3-01 (1991 Replacement); PA. STAT. ANN. tit. 62, § 453 (Supp. 1991).

full recovery of proximately caused damages would be consistent with that value judgment,[55] because all wrongful conception plaintiffs have declined to abort, but rather have chosen to bear and raise a child whose conception they initially sought to prevent. Thus, courts which bar the cause of action or refuse to permit recovery of child-rearing expenses may "subtly encourage" such plaintiffs to choose abortion.[56]

For anti-abortion activists, the claims of wrongful life, wrongful birth, and wrongful conception not only implicate different interests, they also raise different moral questions. Anti-abortion activists argue that wrongful birth and wrongful life actions give rise to bioethical problems, whereas wrongful conception actions do not.[57] Wrongful birth and wrongful life, they argue, imply the moral judgment that life with physical impairment is not worth living; this "quality of life" standard, they believe, "is at odds with the concept of the moral equality of all human beings and the fundamental principles of justice which undergird the ethical and legal protection of life in Western society."[58] Further, the idea that a physically impaired child is better off not being born or that its family suffers harm from its existence may reinforce existing social prejudice against the handicapped.[59] Despite the fact that in every wrongful life and wrongful birth case the child exists and was not aborted,[60] anti-abortion activists fear that judicial recognition of these causes of action would create a legal duty for doctors to perform and for mothers to undergo abortions.[61]

In light of these concerns, the Americans United for Life Legal Defense Fund drafted model legislation prohibiting wrongful life and wrongful birth actions, but allowing claims for wrongful conception.[62] A variety of anti-abortion groups lobbied on behalf of this legislation in the

55. McAfee, *supra* note 33, at 733.

56. Wilbur v. Kerr, 628 S.W.2d 568, 572 (Ark. 1982) (Dudley, J., dissenting).

57. Bopp, et al., *supra* note 35, at 465-66. Bopp is General Counsel of the National Right to Life Committee. *Id.* at 461.

58. *Id.* at 512 (quoting Wilhelm Reich, *Life: Quality of Life*, in 2 ENCYCLOPEDIA OF BIOETHICS 836 (1978)).

59. *Id.* at 494 (quoting Valentine, *When the Law Calls Life Wrong*, 8 HUM. LIFE REV. 46, 52 (Summer 1982)).

60. "The reality of the 'wrongful-life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others." Curlender v. Bio-Science Labs., 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980).

61. Topham, *supra* note 36, at 857.

62. Note, *supra* note 39, at 2019 n.9.

state legislatures;[63] to date, seven states have enacted statutes based on the model.[64] These statutes prohibit any cause of action based on the claim that "but for" another's negligence, a child would have been aborted.[65] By phrasing the prohibition in terms of abortion, the drafters of the laws leave intact causes of action based on the claim that but for another's negligence, a child would not have been *conceived*; thus, the prohibitions only bar those birth related tort actions arising from post-conception negligence.[66]

Since the enactment of these statutes, defendants in wrongful conception cases have unsuccessfully argued that the statutes also preclude actions based on pre-conception negligence. In *C.S. v. Nielson*,[67] the defendant argued that the Utah Wrongful Life Act[68] barred a claim based on the conception of a child after a failed sterilization.[69] The Act set forth the State's right to life policy, prohibited causes of action based

63. *Id.* at 2018 n.6.

64. *See* IDAHO CODE § 5-334 (1990); IND. CODE § 34-1-1-11 (Supp. 1991) (barring wrongful life actions only); MINN. STAT. ANN. § 145.424 (West 1990); MO. REV. STAT. § 188.130 (1986); 42 PA. CONS. STAT. ANN. § 8305 (Supp. 1991); S.D. CODIFIED LAWS ANN. § 21-55-2 (1987 Revision); UTAH CODE ANN. § 78-11-24 (1987 & Supp. 1991).

65. *See supra* note 64.

66. *See* McAfee, *supra* note 33, at 703. One commentator vigorously argues that state bans on wrongful birth actions violate the Due Process clause of the Fourteenth Amendment. Note, *supra* note 39, at 2023-27. Such statutes intrude into the constitutionally protected right to consult with a physician in connection with the abortion decision in that they "licens[e] doctors to withhold information regarding a woman's risk of bearing a child with birth defects." *Id.* *See also* Topham, *supra* note 36, at 862-63 (arguing that Utah's statutory prohibition of wrongful birth actions "is violative of the spirit, if not the letter, of *Roe v. Wade* and related decisions" insofar as it "significantly encroaches on the parental right to make an informed procreative choice").

The only court to rule on the constitutionality of statutes barring wrongful birth actions held that the statutes are constitutional. In Hickman v. Group Health Plan, Inc., 396 N.W.2d 10 (Minn. 1986), the Minnesota Supreme Court held that a physician's allegedly negligent prenatal testing did not involve state action, and that Minnesota Statute § 145.424, barring wrongful life and wrongful birth actions, violated neither the United States nor the Minnesota Constitution. *See* Note, *supra* note 39, at 2019 (arguing that the *Hickman* decision was wrong.) *But see* Bopp, et al., *supra* note 35, at 472-73 (agreeing with the *Hickman* decision). *Hickman* was decided before the *Webster* and *Casey* decisions. *See supra* notes 44-47 and accompanying text. There is little doubt that these statutes are constitutional under *Casey*'s "undue burden" standard. *See supra* notes 45-48 and accompanying text. *See also* Rust v. Sullivan, 111 S. Ct. 1759 (1991) (holding that statute prohibiting recipients of federal funds from engaging in abortion counseling and referral do not unconstitutionally infringe on the doctor-patient relationship or the woman's right to make informed medical decisions).

67. 767 P.2d 504 (Utah 1988).

68. UTAH CODE ANN. § 78-11-23 to 78-11-25 (1987). For a discussion of the passage of the Utah Wrongful Life Act, *see* Topham, *supra* note 36, at 856-58.

69. *Nielson*, 767 P.2d at 507-08.

on the prevention of abortion, and eliminated as a defense in any action the claim that a person had failed or refused to prevent a live birth.[70] The Utah Supreme Court held that the statute only precluded wrongful life and wrongful birth actions.[71] Terming the instant claim as "wrongful pregnancy" based on deprivation of the decision not to *conceive* a child, the court held that the language of the Act did not bar the claim and that recognition of the cause of action did not contravene the state policy valuing human life.[72]

In *Hatter v. Landsberg*,[73] a Pennsylvania court examined the legislative history of a statute barring wrongful birth and wrongful life actions.[74] The court concluded that the legislature's express intent was to prohibit causes of action promoting abortions, not to bar wrongful conception claims arising from failed sterilizations.[75] Therefore, the court held that wrongful conception claims are actionable.[76]

Wrongful conception thus remains a valid cause of action, even in ju-

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70. The full text of the Act is as follows:

78-11-23. Right to Life—State Policy.

The Legislature finds and declares that it is the public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all handicapped persons and all unborn persons.

78-11-24. Act or omission preventing abortion not actionable.

A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.

78-11-25. Failure or refusal to prevent birth not a defense.

The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or in imposing a penalty, in any action.

UTAH CODE ANN. § 78-11-23 to 78-11-25 (1987).

71. *Nielson*, 767 P.2d at 508 ("[C]laims made by deformed or impaired children and their parents . . . for negligent medical treatment or advice which . . . deprived the parents of the opportunity of deciding to prevent *live birth* by choosing *to abort* a deformed or impaired fetus.").

72. *Id.* at 508-09. The court also held that the plaintiff could not recover the projected costs of rearing the child. *Id.* at 516.

73. 563 A.2d 146 (Pa. Super. Ct. 1989).

74. 42 PA. CONS. STAT. ANN. § 8305 (1988) provides:

(A) Wrongful Birth.—There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. . . .

(B) Wrongful Life.—There shall be no cause of action on behalf of any person based on a claim of that person, that, but for an action or omission of the defendant, the person would not have been conceived or once conceived, would or should have been aborted.

Id.

75. Hatter v. Landsberg, 563 A.2d at 150. ("The legislators also specifically state that this legislation was not intended to bar cases of 'wrongful conception' resulting from negligently performed sterilization.").

76. *Id.* The court also held that the damages issue was controlled by the Pennsylvania

risdictions which have sought to disfavor abortion by enacting statutes curtailing the other birth related tort actions, such as wrongful birth and wrongful life. Because wrongful conception is a cause of action based on the negligent invasion of an individual's interest in *preventing* conception, it does not raise the abortion issue or implicate "sanctity of life" concerns. Nevertheless, judicial attitudes that lawsuits for wrongful conception devalue human life have influenced courts to limit recovery of the expenses of raising the child.

II. THE "LIMITED DAMAGES" AND "BENEFITS" RULES

Despite widespread judicial recognition of the tort of wrongful conception,[77] until recently no jurisdiction permitted victims of medical negligence in connection with surgical sterilization to recover under the same principle governing damages in other tort actions—that tortfeasors are responsible for all damages proximately caused by their negligence.[78] Medical negligence in connection with sterilization is the proximate cause of both the birth of a child, and the expenses associated with raising her, because the birth of a child is precisely the consequence the parents sought to avoid in undergoing the sterilization procedure.[79]

Supreme Court's decision in Mason v. Western Pa. Hosp., 453 A.2d 974 (Pa. 1982), which held that child-rearing expenses were not recoverable. *Id.* at 150-51.

77. *See supra* notes 5 and 6 and accompanying text.

78. The central principle of tort damages is that "[o]ne injured by the tort of another is entitled to recover damages from the other for all harm, past, present and prospective, legally caused by the tort." RESTATEMENT (SECOND) OF TORTS § 910 (1979). "Legal cause" and "proximate cause" are interchangeable terms for the same inquiry—whether the torfeasor's act is "so closely connected with the result and of such significance that the law is justified in imposing liability." W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 263-64 (5th ed. 1984).

79. There are many tests of proximate cause. *Id.*, §§ 41-44. Each test seeks to identify consequences for which the defendant should be liable *beyond* those directly traceable to the precise risk presented by the defendant's conduct. Thus, under any of the prevailing tests, realization of the real risk the defendant's conduct presents constitutes proximate cause. Some courts have disallowed recovery for child-rearing expenses reasoning that the fact of pregnancy, and not the resulting existence of the child, constitutes the injury. *See, e.g.*, Jackson v. Bumgardner, 347 S.E.2d 743, 748 (N.C. 1986). However, a growing number of jurisdictions explicitly recognize that "an uninterrupted chain of causation exists between a negligently performed sterilization procedure and the foreseeable consequences of the conception, pregnancy, and birth of a child." KIELY, *supra* note 7, § 8.18 at 425. The argument that the parents' intercourse breaks the chain of causation between the defendant's negligence and the conception and birth of the child has been unsuccessful. *See* Custodio v. Bauer, 50 Cal. Rptr. 463, 472 (Cal. Ct. App. 1967) ("It is difficult to conceive how the very act the consequences of which the operation was designed to forestall, can be considered unforeseeable."). It is, of course, possible that other intervening or superseding causes could break the chain of causation. *See* Note, *supra* note 29, at 485-87.

However, the overwhelming majority of courts which have considered the damages issue in wrongful conception cases limit recovery of child-rearing expenses,[80] either by precluding them as a matter of law under the "limited damages" rule,[81] or by permitting the jury to reduce the award by the intangible benefits of parenthood under the "benefits" rule.[82] Most courts provide a truncated remedy in wrongful conception cases because they perceive claims for child-rearing expenses as the parents' denial of the value of their child's existence,[83] rather than as a legitimate claim for economic loss. Courts adopting the "limited damages" and "benefits" rules attempt to vindicate the value of the child by declaring the child to be a "blessing"[84] or a "benefit"[85] that fully or partially compensates the parents for their economic losses.

Courts that have adopted the "limited damages" rule deny recovery of child-rearing expenses by advancing a variety of rationales based on public policy.[86] Under the "limited damages" approach, courts declare either that the birth of a healthy child is not a legally compensable injury[87] or that, as a matter of law, the benefits conferred by the birth of the child outweigh the burdens associated with it.[88] A related theory, the

80. One commentator remarked that "this area of the law now seems to contain more rules for limiting wrongful [conception] damages than it contains wrongful [conception] cases." Note, *supra* note 3, at 1312.

81. *See supra* notes 8-11 and accompanying text.

82. *See supra* notes 12-15 and accompanying text.

83. Several courts have candidly admitted that they are "loath to adopt a rule, the primary effect of which is to encourage, indeed reward, the parents' disparagement or outright denial of the value of their child's life." Weintraub v. Brown, 470 N.Y.S.2d 634 (1983); *see also* Byrd v. Wesley Med. Ctr., 699 P.2d 459, 468 (Kan. 1985); Morris v. Sanchez, 746 P.2d 184, 188 (Okla. 1987).

84. The "blessing" concept derives from the early case of Christensen v. Thornby, 255 N.W. 620 (Minn. 1934), which held that a plaintiff who fathered a child after undergoing a vasectomy had received a "blessing." The court dismissed the case, implying that he had suffered no legally cognizable damage. This idea has carried forward into the more recent cases that recognize the validity of the plaintiffs' negligence claim, but provide recovery under the "limited damages" formula. *See* Topham, *supra* note 36, at 850-51.

85. The "benefit" concept is associated with cases following the "benefits" rule, which rests on the idea that the birth of a child is ordinarily, but not always, a benefit to its parents and that the jury is the proper body to measure the benefit on a case-by-case basis. *See* Troppi v. Scarf, 187 N.W.2d 511 (Mich. Ct. App. 1971) and cases cited in *supra* note 12.

86. *See* Burke, *supra* note 4, at 323.

87. *See, e.g.*, Fassoulas v. Ramey, 450 So. 2d 822, 823 (Fla. 1984); O'Toole v. Greenberg, 477 N.E.2d 445, 448 (N.Y. 1985); Byrd v. Wesley Med. Ctr., 699 P.2d 459, 468 (Kan. 1985); Macomber v. Dillman, 505 A.2d 810, 813 (Me. 1986); Morris v. Sanchez, 726 P.2d 184, 187-88 (Okla. 1987).

88. *See, e.g.*, Coleman v. Garrison, 349 A.2d 8, 13-14 (Del. 1975); Mason v. Western Pa. Hosp., 453 A.2d 974, 976 (Pa. 1982); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. 1973), *cert. denied*, 415 U.S. 927 (1974); Beardsley v. Wierdsma, 650 P.2d 288, 293 (Wyo. 1982).

"emotional bastard" hypothesis, posits that the child may one day discover that its parents sued to recover the expenses of rearing it, causing emotional harm.[89] Some courts believe that claims for child-rearing expenses not only devalue human life, but undermine the stability of the family unit.[90] The common thread in all of these policy rationales is that the plaintiffs asserted that the birth of the child was an injury and that courts should deny this claim out of respect for the sanctity of human life.[91] Any of these rationales could logically extend to deny recovery altogether; nevertheless, courts employ them only to deny recovery of child-rearing expenses, while permitting plaintiffs to recover other elements of damage.[92]

A minority of jurisdictions permit recovery of child-rearing expenses, but require the jury to offset the plaintiffs' award by the value of the intangible benefits conferred by the child.[93] One commentator has described this "benefits" rule as a balance between compensating the tort victim and preserving the primary position of the American family.[94] The rule derives from section 920 of the Restatement (Second) of Torts.[95]

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89. *See, e.g.*, Boone v. Mullendore, 416 So. 2d 718, 722-23 (Ala. 1982); Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982); McKernan v. Aasheim, 687 P.2d 850, 853 (Wash. 1984).

90. *See, e.g.*, Flowers v. District of Columbia, 478 A.2d 1073, 1077 (D.C. App. 1984); Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982).

91. *See* Morris v. Sanchez, 746 P.2d 184 (Okla. 1987). The *Morris* court stated:

> The majority of jurisdictions having considered this matter have concluded that, as a matter of law, the costs of raising the unplanned child may not be recovered in a medical malpractice action for negligent sterilization . . . . One thread connects the reasoning common to all these cases. That thread is the sanctity which must be placed on human life.

Id. at 187 (footnote omitted).

Several courts deny recovery, not due to the "sanctity of human life," but rather, because of suspicions that recovery of child-rearing expenses will represent a windfall to the plaintiffs. This can arise when: (1) child-rearing damages are too speculative, *see, e.g.*, McKernan v. Aasheim, 687 P.2d 850, 855 (Wash. 1984) ("We believe that it is impossible to establish with reasonable certainty whether the birth of a *particular* healthy, normal child damaged its parents.") (emphasis added); (2) an award of child-rearing expenses bears no proportion to the physician's culpability, *see, e.g.*, P. v. Portadin, 432 A.2d 556, 559 (N.J. Super. App. Div. 1981) (quoting Rieck v. Medical Protective Co., 219 N.W.2d 242, 244-45 (Wis. 1974) (recovery of child-rearing expenses would "create a new category of surrogate parent" because the parents would receive all the benefits of parenthood while the physician would have to shoulder all the costs)); and (3) awarding child-rearing expenses would promote fraudulent claims, *see, e.g.*, Beardsley v. Wierdsma, 650 P.2d 288, 292 (Wyo. 1982).

For rebuttals to each of these arguments, *see* Burke, *supra* note 4, at 330-36.

92. *See* Burke, *supra* note 4, at 330-32.

93. *See supra* notes 12-14 and accompanying text.

94. KIELY, *supra* note 7, § 8.18 at 425.

95. The Restatement provides:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was

Although section 920 requires that the offset be to the same interest,[96] courts applying the Restatement in the wrongful conception context argue that a strict interpretation of the rule would result in unjust enrichment.[97] In addition, these courts reason that the jury should be able to consider the fundamental values embedded in the parent-child relationship, as well as the dignity and sanctity of life when calculating a damage award.[98] Courts adopting the "benefits" rule believe that its virtue lies in its flexibility, because it permits the trier of fact to make a case-by-case determination of whether the plaintiffs have in fact suffered a loss, based on such factors as a family's size and income and the parents' age and marital status.[99]

Some courts adopting the "benefits" rule have imposed an additional limiting factor to the analysis: the parents' motivation in undergoing sterilization.[100] These courts generally classify the parents' interest as either eugenic, therapeutic, or economic,[101] and only allow recovery when the interest is economic.[102] While commentators have advocated a "motivational analysis,"[103] it is questionable, however, whether the motivation

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harmed, the value of the benefit conferred is considered in mitigation of damages to the extent that this is equitable.

RESTATEMENT (SECOND) OF TORTS § 920 (1979).

96. *Id.* at cmts. a, b.

97. University of Ariz. v. Superior Court, 667 P.2d 1294, 1299 n.4 (Ariz. 1983).

98. *Id.* at 1299.

99. *Id.* at 1300 (citing Troppi v. Scarf, 187 N.W.2d 511, 519 (Mich. Ct. App. 1971)).

100. *See, e.g.*, Jones v. Malinowski, 473 A.2d 429, 436 (Md. 1984); Burke v. Rivo, 551 N.E.2d 1, 5-6 (Mass. 1990); University of Ariz. v. Superior Court, 667 P.2d 1294, 1300 (Ariz. 1983).

101. *Jones*, 473 A.2d at 434-36.

102. *Id.*

103. Jeff L. Milsteen, Comment, *Recovery of Childrearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167 (1983). Milsteen advocated a "motivational analysis" that would focus attention away from the "child-as-injury" approach taken by courts adopting the "limited damages" rule. In his view, courts should inquire into the parents' motivation for undergoing sterilization to determine the specific interest they sought to protect; the court should then award damages based on whether the child's birth represented an actual damage to those interests. If the motive is therapeutic, i.e., to safeguard the mother's health, damages would never extend to normal child-rearing expenses because the plaintiff-parents did not undergo sterilization to save those expenses. *Id.* at 1191. If the purpose is eugenic, i.e., to prevent the conception of a genetically defective child, child-rearing expenses would likewise not be recoverable; if the child is actually born impaired, damages would extend only to the extraordinary expenses associated with raising an impaired child. *Id.* at 1192-94. Only when the parents seek sterilization for "pure[ly] economic" reasons does Milsteen advocate full recovery of child-rearing expenses: "The interest sought to be protected is a pecuniary one, and parents should be awarded damages for all provable financial injuries they sustain." *Id.* at 1194-95. If the parents' motivation for sterilization is "socio-economic," i.e., not purely economic but also to avoid burdens on lifestyle or career, the impaired interests would be more difficult to identify, but recovery would be substantially less than in the case

limitation comports with the tort damage principle that the tortfeasor is liable for all damage proximately resulting, not merely the foreseeable consequences.[104]

III. CRITICISMS OF THE "LIMITED DAMAGES" AND "BENEFITS" RULES

The rationales courts have used to deny or limit recovery of child-rearing expenses in wrongful conception cases have drawn criticism as "vague,"[105] "result-oriented,"[106] and "outstandingly unimpressive."[107] Cases and scholarly literature on wrongful conception have effectively rebutted these criticisms.[108]

The central criticism of the "limited damages" rule is that it misconstrues the nature of a lawsuit for wrongful conception. Wrongful conception cases, one dissenter recognized, do not concern whether the plaintiffs want to keep their child.[109] In contrast, plaintiffs in these cases seek compensation for the costs of raising a child they love and want to keep.[110] The injury is not the child itself, nor do the claimed damages relate to the child's value.[111]

When properly characterized as suits for economic injury, claims for child-rearing expenses neither degrade the child nor destabilize the emotional well-being of the family. Rather, denial of these expenses increases the financial strains on families faced with raising an additional, unexpected child.[112] In addition, some commentators argue that recovery rules which insulate tortfeasors from a portion of the expenses proximately caused by their negligence could dilute the standard of care in

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of "pure economic" motivation. *Id.* at 1195-96. Critics of a motivational analysis primarily argue that it would unduly complicate wrongful conception trials. *See* Note, *supra* note 29, at 505.

104. Note, *supra* note 29, at 505.

105. Burke, *supra* note 4, at 338.

106. Fassoulas v. Ramey, 450 So. 2d 822, 826 (Fla. 1984) (Ehrlich, J., dissenting).

107. Burke v. Rivo, 551 N.E.2d 1, 4 (Mass. 1990).

108. *See, e.g.*, McDonough, *supra* note 16; Philip Braverman, *Wrongful Conception: Who Pays For Bringing Up Baby?*, 47 FORDHAM L. REV. 418 (1978) (arguing against the "limited damages" rule and in favor of the "benefits" rule); Note, *supra* note 3; Burke, *supra* note 4; and Note, *supra* note 29 (arguing in favor of a full recovery rule). *But see* Diedre A. Burgman, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127 (1978) (arguing in favor of the "no recovery" rule).

109. Johnson v. University Hosps., 540 N.E.2d 1370, 1379 (Ohio 1989) (Brown, J., dissenting).

110. Marciniak v. Lundborg, 450 N.E.2d 243, 246 (Wis. 1990).

111. Jones v. Malinowski, 473 A.2d 429, 436 (Md. 1984).

112. Lovelace Med. Ctr. v. Mendez, 805 P.2d 603, 619 (N.M. 1991).

connection with sterilization procedures and undermine the deterrent purpose of tort damages.[113]

To the extent that some courts have precluded recovery of child-rearing expenses because of concern for the child's emotional well-being, critics of the "emotional bastard" theory[114] charge that it is simply implausible that a child would be less likely to discover a lawsuit to recover pregnancy-related costs than one to recover child-rearing expenses.[115] These skeptics also charge that it is ridiculous that the child will feel less of an "emotional bastard" if she learns that a court denied its parents recovery of child-rearing costs out of concern for her feelings.[116] Should the child learn of the lawsuit, the emotional effect is probably no greater than the effect on a child who otherwise becomes aware that her birth was an "accident."[117] Although some courts have attempted to control what information reaches the child,[118] others have concluded that it is the parents who must weigh the risks to the child's emotions in deciding whether to bring a lawsuit.[119]

Commentators have sometimes noted that courts which focus on the child as the product of the defendant's negligence ignore the importance of the plaintiffs' interest in family planning and their decision to undergo

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113. Several courts have noted that imposing some liability for wrongful conception is essential to promoting due care in connection with sterilization.

> A physician who assumes responsibility for a sterilization procedure at the request of a patient assumes a professional duty to render appropriate service, including testing and advice regarding the procedure, exercising the same standard of care applicable to other members of the medical profession in the community . . . . Immunizing physicians from liability for negligence in this area would be contrary to public policy, and we decline to do so.

C.S. v. Nielson, 767 P.2d 504, 508 (Utah 1988) (quoting Johnston v. Elkins, 736 P.2d 935, 939 (Kan. 1987)). The same court, however, adopted the "limited damages" rule. *Id.* at 509. A judge who dissented from the majority's holding on limited recovery stated that "the limited recovery rule dilutes the liability rule's deterrent effect." *Id.* at 521 (Durham, J., concurring and dissenting).

114. *See supra* note 89 and accompanying text.

115. Flowers v. District of Columbia, 478 A.2d 1073, 1079 n.1 (D.C. 1984) (Ferren, J., dissenting).

116. Boone v. Mullendore, 416 So. 2d 718, 724-25 (Ala. 1982) (Faulkner, J., concurring specially).

117. Custodio v. Bauer, 59 Cal. Rptr. 463, 477 (Cal. Ct. App. 1967).

118. Some courts have addressed part of their opinions to the child in order to clarify that the case implied no rejection of the child. *See, e.g.*, Rieck v. Medical Protective Co., 219 N.W.2d 242, 245-46 (Wis. 1974); Coleman v. Garrison, 349 A.2d 8, 14 (Del. 1975). Others have styled the case to protect the anonymity of the plaintiffs. *See, e.g.*, P. v. Portadin. 432 A.2d 556 (N.J. Super. 1981); James G. v. Caserta, 332 S.E.2d 872, 874 n.1 (W. Va. 1985); C.S. v. Nielson, 767 P.2d 504, 505 n.2 (Utah 1988).

119. University of Ariz. v. Superior Court, 667 P.2d 1291, 1300 (Ariz. 1983).

sterilization.[120] If the birth of a child is always an unqualified blessing, as one dissenter in a "limited damages" case noted, attempts to limit family size are irrational.[121] The fact that a child's parents initially sought to prevent the child's conception reflects their judgment that the potential benefits of having a child did not outweigh the burdens.[122] The parents' judgment should have an estoppel effect—the physician whose aid they sought in limiting conception should not later be allowed to deny the importance of that interest[123] or to assert that the unplanned child is actually a blessing.[124] In a particularly vehement dissent, Justice Opala of the Oklahoma Supreme Court argued that in view of the constitutional dimension of the right to limit procreation, there is more, rather than less, reason to award full compensation to victims of medical negligence in the performance of sterilization.[125]

Commentators also criticize the courts applying the "benefits" rule for sidestepping the limitations set forth in section 920 of the Restatement (Second) of Torts and for violating the underlying purpose of the rule. The purpose of section 920 is to prevent unjust enrichment,[126] not to allow tortfeasors to force victims to accept a benefit against their will.[127] Thus, section 920 contains two limitations: (1) the "same interest" limitation, and (2) the "equitable" limitation.[128] When properly applied by a court, the "same interest" limitation offsets the parents' recovery of child-rearing expenses only by the pecuniary benefits the parents may expect from the child;[129] in the usual case, such offset will be minimal.[130]

120. *See* Milsteen, *supra* note 103, at 1169-70; Johnson v. University Hosps., 540 N.E.2d 1370, 1378-80 (Ohio 1989) (Brown, J., dissenting).

121. Flowers v. District of Columbia, 478 A.2d 1073, 1079 n.2 (D.C. App. 1984) (Ferren, J., dissenting).

122. Burke v. Rivo, 551 N.E.2d 1, 4 (Mass. 1990).

123. Kelley, *supra* note 34, at 943. *But see* Cockrum v. Baumgartner, 447 N.E.2d 385, 388 (Ill. 1983) (presuming from the fact that the parents did not abort the child or place it for adoption that the intangible benefits of parenthood outweigh the "mere monetary burdens involved" (quoting Public Health Trust v. Brown, 388 So. 2d 1084, 1085-86 (Fla. Dist. Ct. App. 1980))).

124. Terrell v. Garcia, 496 S.W.2d 124, 131 (Tex. 1973), *cert. denied*, 415 U.S. 927 (1974) (Cadena, J., dissenting) ("The doctor whose negligence brings about such an undesired birth should not be allowed to say 'I did you a favor' secure in the knowledge that the courts will give to their claim the effect of an irrebuttable presumption.").

125. Morris v. Sanchez, 746 P.2d 184, 191-92 (Okla. 1987) (Opala, J., concurring in part and dissenting in part).

126. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 (Minn. 1977).

127. RESTATEMENT (SECOND) OF TORTS § 920 cmt. f (1979).

128. Note, *supra* note 3, at 1323-26.

129. The comments following § 920 clearly state that emotional benefits should not offset eco-

Should the parents seek to recover for the emotional distress of child-rearing, the emotional benefits received from the child would offset those amounts.[131] Some courts acknowledge that the "benefits" rule, as applied in wrongful conception cases, violates the "same interest" limitation, but assert that a stringent reading of the "same interest" limitation would produce unjust enrichment.[132] However, the fairness of a loose interpretation of section 920 is questionable, because it opens the door to allowing the tortfeasor to force a benefit onto the tort victim.[133]

Many judges have expressed concern with the courts' reliance on public policy to deny recovery of child-rearing expenses.[134] One judge remarked that it seemed "strange" that the majority had found a public policy against recovery of child-rearing costs, given both the state's policy in favor of family planning and the court's policy of compensating tort victims. The judge suggested that the "policy" was instead a reflection of the personal views of individual members of the court.[135]

Similarly, the Supreme Court of Tennessee criticized courts that precluded recovery of child-rearing expenses on public policy grounds as overstepping their authenticity by dictating public policy rather than law.[136] The court stated that the four relevant public policies were: (1) the constitutional value of the interest in controlling family size; (2) the balance between deterring medical negligence and ensuring that health

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nomic damages, nor should economic benefits offset emotional harm. Comment b to § 920 illustrates this principle as follows:

> Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted .... Damages to a husband for loss of consortium are not diminished by the fact that the husband is no longer under the expense of supporting the wife.

RESTATEMENT (SECOND) OF TORTS § 920 cmt. b (1979).

130. Sherlock v. Stillwater Clinic, 260 N.W.2d 169, 176 n.12 (Minn. 1977).

131. Note, *supra* note 3, at 1326. As a practical matter, it is unwise to claim emotional distress damages for rearing a healthy child. Even when the child is abnormal, the trend is to disallow claims for the parents' emotional distress. Topham, *supra* note 36, at 854. *See generally* Gregory G. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Tortiously Causing Another's Birth*, 74 A.L.R.4th 798 (1989).

132. University of Ariz. v. Superior Court, 667 P.2d 1294, 1299 n.4 (Ariz. 1983).

133. Burke, *supra* note 4, at 337.

134. *See, e.g.*, Fassoulas v. Ramey, 450 So. 2d 822, 826-27 (Fla. 1984) (Ehrlich, J., dissenting); Beardsley v. Wierdsma, 650 P.2d 288, 295-96 (Wyo. 1982) (Rose, C.J., specially concurring); Schork v. Huber, 648 S.W.2d 861, 864 (Ky. 1983) (Leibson, J., dissenting); Wilbur v. Kerr, 628 S.W.2d 568, 572 (Ark. 1972) (Dudley, J., dissenting); Smith v. Gore, 728 S.W.2d 738, 746-48 (Tenn. 1987).

135. Beardsley v. Wierdsma, 650 P.2d 288, 296 (Wyo. 1982) (Rose, C.J., specially concurring).

136. Smith v. Gore, 728 S.W.2d 738, 746 (Tenn. 1987). ("[M]any of the observations made by these courts were essentially philosophical discourses on the value of life without clear constitutional, legislative, or common law foundation.").

care providers continue to make surgical sterilization available; (3) compensation of tort victims; and (4) the State interest in "promoting stable, self-supporting families."[137] The court denied recovery of child-rearing expenses because various statutes in Tennessee impose the responsibility of supporting children upon their parents.[138]

A dissenting judge on the Kentucky Supreme Court summed up the views of judges skeptical of judicially-created public policy when he asserted that courts should allow recovery under traditional tort principles, reasoning that the Constitution protects the choice not to procreate, and noting the absence of a clear expression of public policy from the state legislature.[139]

IV. THE "FULL RECOVERY" RULE

Until recently, criticisms of the "limited damages" and "benefits" rules had little effect on judicial decisions in wrongful conception cases. One exception is the Illinois Court of Appeals' decision in *Cockrum v. Baumgartner*,[140] which held that the plaintiffs[141] could recover the costs of raising and educating the unplanned child without offset for the benefits of parenthood. The court observed that the case was indistinguishable from an ordinary medical malpractice action, "[e]thical and moral considerations aside."[142] In clear and persuasive language, the court refused to accept the defendants' argument that the public policy of Illinois deemed the birth of a healthy child a "precious gift, not a compensable

137. *Id.* at 748.

138. *Id.* at 750-51. This decision probably did not advance any of the policy goals identified by the court, particularly the state's interest in promoting stable, self-supporting families. The plaintiff was a 25 year-old divorced waitress with a ninth grade education. She became pregnant with a fifth child four months after delivering twins by caesarian section. During their birth, she had undergone a tubal ligation. She had never earned more than $5,000 per year. *Id.* at 740. The court noted the availability of Aid to Families with Dependent Children, and explained that as a condition of receiving such aid, the mother assigns her rights against the father of the child to the state for enforcement of his child support obligations. *Id.* at 750. Because the plaintiff was extremely impoverished and likely to rely on state assistance to raise the child, denial of child-rearing expenses probably shifted such costs onto the state, rather than placing them on the tortfeasors, who would be in the best position to prevent future instances of negligence in sterilization.

139. Schork v. Huber, 648 S.W.2d 861, 864-67 (Ky. 1983) (Leibson, J., dissenting).

140. 425 N.E.2d 968 (Ill. App. Ct. 1981), *rev'd*, 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).

141. Two cases, Cockrum v. Baumgartner and Raja v. Tulsky, were consolidated for purposes of appeal. Although the *Raja* case involved post-conception negligence, both presented the issue of whether child-rearing expenses were recoverable.

142. *Cockrum*, 425 N.E.2d at 969.

wrong."[143] The court of appeals determined that parents have a fundamental constitutional right to control their reproductivity. A decision not to have children, as an exercise of that right, did not denigrate the sanctity of human life.[144]

The Illinois Supreme Court reversed,[145] holding that full recovery of child-rearing expenses undermined the value of life.[146] The supreme court criticized the "full recovery" rule as an abstract and mechanical application of tort recovery principles unsuitable for the circumstances of a wrongful conception case.[147]

In 1990, the Supreme Court of Wisconsin, in *Marciniak v. Lundborg*,[148] made Wisconsin the first jurisdiction to decisively rule that plaintiffs in wrongful conception cases could recover the costs of raising a healthy child to the age of majority without offset for the benefits conferred by the child.[149] The Wisconsin court held that child-rearing expenses were foreseeable and proximate consequences of a negligently performed sterilization, and that none of the defendants' public policy

143. *Id.* at 970. The defendants relied on the decision of another division of the Illinois Court of Appeals, Wilczynski v. Goodman, 391 N.E.2d 479 (Ill. App. Ct. 1979). In *Wilczynski*, the plaintiff underwent an unsuccessful therapeutic abortion and sought to recover the costs of raising and educating the child in addition to the expense of medical and hospital treatment for the child. *Id.* The court denied child-rearing expenses, citing the Illinois Abortion Act of 1975. The Act expressed a right-to-life policy, condemned abortion, and established the intent of the General Assembly to prohibit abortions unless necessary to preserve the life of the mother if the United States Supreme Court ever modified or reversed its holdings on abortion. *Wilczynski*, 391 N.E.2d at 483, 487.

144. *Cockrum*, 425 N.E.2d at 970.

> The uniqueness of life is in no way denigrated by a couple's choice not to have a child .... Regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectible and need not be justified or explained. The allowance of rearing costs is not an aspersion upon the value of the child's life. It is instead a recognition of the importance of the parents' fundamental right to control their reproductivity .... [W]e are not persuaded that public policy considerations can properly be used to deny recovery to the parents of an unplanned child of the full measure of all damages proximately caused by a physician's negligence.

Id.

The court also rejected the "benefits" rule, commenting that courts should not use § 920 of the Restatement (Second) of Torts (1979) to offset the financial costs of parenthood by its emotional rewards, because "these rewards are emotional in nature and, great though they may be, do nothing whatever to benefit the plaintiff's injured financial interest." *Id.* (citation omitted).

145. 447 N.E.2d 385 (Ill. 1983), *cert. denied sub nom.* Raja v. Michael Reese Hosp., 464 U.S. 846 (1983).

146. *Id.* at 389 ("In a proper hierarchy of values, the benefit of life should not be outweighed by the expense of supporting it.").

147. *Id.* at 390.

148. 450 N.W.2d 243 (Wis. 1990).

149. *Id.* at 245.

considerations justified departing from the well-settled principle that tortfeasors are responsible in damages for such consequences.[150] The court perceived that the plaintiffs had filed the action to recover "the costs of raising the child, not to rid themselves of an unwanted child," and that they were attempting to enhance the child's life rather than to disparage it.[151]

In *Marciniak*, the court also declined to apply the benefit rule of section 920 of the Restatement (Second) of Torts, noting scholarly criticism that the offset of economic damages by the value of emotional damages conferred by the child violates the "same interest" limitation.[152] Providing its strongest and most original contribution to the cases discussing the benefits rule in wrongful conception actions, the court concluded that application of the benefits rule is inequitable.[153]

The following year, the Supreme Court of New Mexico adopted the "full recovery" rule in *Lovelace Medical Center v. Mendez*.[154] In *Mendez*, the defendants' position was similar to the arguments advanced by the defendants in *Marciniak*: for public policy reasons, the court should carve out an exception to the principle that defendants in medical malpractice actions must indemnify plaintiffs for the proximate consequences of their negligence by denying recovery of child-rearing

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150. The defendants argued that:

1. Child-rearing expenses are too speculative.

2. Allowing plaintiffs to recover these costs would be out of proportion to the culpability of the physician.

3. Awarding child-rearing expenses would render the child an "emotional bastard."

4. The effect of recovery would be to reward the parents for disparaging the value of their child's life, thus debasing the sanctity of life.

5. Recovery would shift the responsibility of parenting to the physician.

6. Allowing child-rearing costs would "enter a field that has no sensible or just stopping point."

Id. at 245-47.

151. *Id.* at 246.

152. *Id.* at 248-49.

153. The parents made a decision not to have a child. It was precisely to avoid that "benefit" that the parents went to the physician in the first place. Any "benefits" that were conferred on them as a result of having a new child in their lives were not asked for and were sought to be avoided . . . . [I]t hardly seems equitable to not only force this benefit on them but to tell them that they must pay for it as well.

Id. at 249.

154. 805 P.2d 603 (N.M. 1991). The New Mexico Supreme Court adopted the New Mexico Court of Appeals' opinion, which it reproduced in an appendix, but wrote a separate opinion on the question of the legal interests invaded when a sterilization is negligently performed and the measure of damages flowing from these invasions. *See infra* note 160.

expenses.[155] In declining to adopt the defendants' theories, the New Mexico Court of Appeals went a step further than the Wisconsin Supreme Court in *Marciniak*. The court reasoned that not only were the various rationales for denial of recovery of child-rearing expenses insufficient to justify departing from ordinary tort principles, but they were unsound as a matter of law and public policy.[156] Denial of recovery in the name of the "sanctity of human life" and "a concern for family" achieves a result which undermines these values.[157] Limitations on recovery could increase the financial strains that lead to divorce, causing the entire family to suffer.[158] The court also identified legal and policy flaws in the "benefits" rule.[159] New Mexico law disallows recovery for negligent damage to the intangible emotional benefits of family life, such as the parents' loss of the child's consortium; it would hence be illogical to permit defendants to reduce their liability by proving the existence of such emotional benefits.[160] From a policy standpoint, the court found the benefits rule unpalatable, because weighing the benefits and burdens of raising children at a trial encourages parents to denigrate their children and engages the jury in "distasteful moral determination."[161]

The New Mexico court also refused to engage in the "motivational analysis" adopted by some courts applying the "benefits" rule,[162] which would have required the plaintiffs to demonstrate that economic factors motivated their decision to seek sterilization in order to recover child-rearing expenses. Specifically, the court noted that a person's motivation for seeking sterilization is not conclusive as to whether an economic in-

155. *Id.* at 616.

156. *Id.* at 618.

157. *Id.* at 619. The court stated:

> Our philosophical respect for human life should not be allowed to obscure the fact that children need to be fed, clothed, housed, educated, and provided with medical care and other necessities. . . . We do not understand why a proper respect for human life would require us to reach a result that is, at best, callously indifferent to the needs of these parents and their children.

Id. at 619.

158. *Id.*

159. *Id.* at 619-20. The court noted that the "benefit" deduction violates the "same interest" limitation of § 920 of the Restatement (Second) of Torts.

160. *Id.* at 620.

161. *Id.* Because of this policy concern, the court not only held that the parents' recovery of child-rearing expenses may not be reduced by the value of the emotional benefits of parenthood, but also that the parents could not recover at all for the emotional and psychological burdens of child-rearing; thus, the court limited recovery for emotional pain and suffering to that associated with pregnancy and birth. *Id.*

162. *See supra* notes 100-04 and accompanying text.

terest is injured when the sterilization fails, and on a practical level, the motivation limitation would be difficult for a jury to apply and would encourage parents to reformulate their actual intent "after-the-fact."[163] Affirming the New Mexico Court of Appeals' adoption of the "full recovery" rule, the New Mexico Supreme Court adopted a strong stance in favor of the view that plaintiffs in wrongful conception cases assert interests that are worthy of full legal protection.[164]

Shortly after the *Mendez* decision, in *Girdley v. Coats*,[165] the Missouri Court of Appeals adopted the "full recovery" rule for reasons similar to those outlined in *Marciniak* and *Mendez*.[166] In contrast to Wisconsin and New Mexico, Missouri has an explicit pro-life policy[167] and statutorily prohibits "wrongful birth" and "wrongful life" actions.[168] The court found, however, that the existence of these statutes did not preclude actions for wrongful conception.[169] In addition to these statutes, defendants relied on the Missouri Supreme Court's decision in *Cruzan v.*

163. *Mendez*, 805 P.2d at 612.

164. The court stated that the district court, in holding that the Mendezes could not recover child-rearing costs, "was declaring, in effect, that their interests in financial security and in limiting the size of their family were not worthy of legal protection." *Id.* at 611. The New Mexico Supreme Court essentially adopted all of the court of appeals' conclusions in its opinion reversing the district court, but disagreed with its definition of the term "injury." The supreme court defined "injury" as "the invasion of any legally protected interest of another," and identified two separate interests invaded when a physician is negligent in connection with a failed sterilization procedure—the parents' interest in the economic stability of their family, and their interest in limiting family size. *Id.* at 609-10. The court concluded that the invasion of a party's economic interests in wrongful conception cases is as foreseeable and should be as compensable as financial loss occurring in other tort contexts, such as products liability and wrongful interference with business relations. *Id.* at 611. The court expressed uncertainty about whether the measure of damages flowing from the invasion of the parents' interest in limiting family size was different from or exceeded damages for economic injury; apparently, the court concluded that the damages consisted primarily of emotional distress damages. The court agreed that the court of appeals drew a sensible line by limiting emotional distress damages to those flowing from pregnancy and birth. *Id.* at 613. *See supra* note 161.

165. No. 17117, 1991 WL 116734 (Mo. Ct. App. July 3, 1991).

166. *Id.* at *1.

167. MO. REV. STAT. § 1.205 (1986). The Missouri statute provides that "[t]he life of each human being begins at conception" and that "the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state." *Id.* The Supreme Court refused to invalidate this statute in Webster v. Reproductive Health Servs., 492 U.S. 490, 506 (1989).

168. MO. REV. STAT. § 188.130 (1986) prohibits any person from bringing a cause of action based on the claim that that person or any other person would have been aborted. For a discussion of wrongful birth/life statutes and similar cases in which courts have held that they do not bar wrongful conception actions, see *supra* notes 62-75.

169. *Girdley*, 1991 WL 116734 at *2.

Harmon.[170] In *Cruzan*, the Missouri Supreme Court acknowledged the state's interest in the sanctity of life.[171] The *Girdley* court was not convinced that the state's pro-life and sanctity-of-life policies were relevant, but commented that they actually cut in favor of allowing recovery. Denial of recovery would result in an economic incentive to abort the unplanned child.[172]

Missouri's adherence to the "full recovery" rule, adopted in *Girdley*, was short-lived. The Missouri Supreme Court reversed, adopting the "limited damages" rule.[173] The court found persuasive the public policy rationales articulated by a majority of courts for precluding recovery of child-rearing expenses, including those which barred relief based on "sanctity-of-life" grounds.[174] A judge who dissented on the damages issue argued that recovery of child-rearing expenses would not undermine the sanctity of life; he advocated the adoption of the "benefits" rule.[175]

V. CONCLUSION

The *Girdley* case exemplifies the debate in wrongful conception cases. The weight of authority supports the "limited damages" rule, which holds that recovery of child-rearing expenses contravenes state public policies valuing human life.[176] Recently, the "full recovery" rule has gained some acceptance in the courts,[177] drawing its strength from commentators' and dissenting judges' arguments that the majority view misapprehends the nature of the tort of wrongful conception.[178] The "benefits" rule remains an intermediate, minority position that purports to permit jury consideration of both the tort victims' need for compensa-

170. 760 S.W.2d 408 (Mo. 1988) (en banc), *aff'd*, Cruzan v. Missouri Dep't of Health, 488 U.S. 555 (1990).

171. Cruzan v. Harmon, 760 S.W.2d at 419. The court defined the interest in the sanctity of life as "the principle that life is precious and worthy of preservation without regard to its quality." *Id.*

172. *Girdley*, 1991 WL 116734, at *4.

173. Girdley v. Coats, 825 S.W.2d 295 (Mo. 1992) (en banc).

174. The court cited Byrd v. Wesley Med. Ctr., 699 P.2d 459, 468 (Kan. 1985) (birth of healthy child not legally compensable harm); Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982) (recovery of child-rearing expenses "meddles with the concept of life and the stability of the family unit" and would render child an "emotional bastard"); Cockrum v. Baumgartner, 447 N.E.2d 385, 389 (Ill. 1983) (respect for life at heart of legal system). In addition, the court concluded that child-rearing damages were improper because they were speculative. *Girdley*, 825 S.W.2d at 297-98.

175. *Id.* at 299-302 (Turnage, Special J., concurring in part and dissenting in part).

176. *See supra* notes 12, 86-90 and accompanying text.

177. *See supra* notes 140-64 and accompanying text.

178. *See supra* notes 105-39 and accompanying text.

tion and the value of the child's life.[179]

The limitations most courts impose on recovery of child-rearing expenses in wrongful conception cases derive from the central concern that full recovery of these expenses would somehow devalue human life, and that by precluding them or permitting their reduction by the value of the child's life, the court upholds the sanctity of life.[180] Judicial manipulation of tort recovery principles to reach intermediate positions between outright denial of the plaintiffs' cause of action and full recovery reflects the courts' desire for balance between competing principles[181] and their search for fair results[182] in cases that appear to be about "unwanted" children.[183] Denial or limitation of recovery of child-rearing expenses is inequitable to wrongful conception plaintiffs and to the child in question

179. *See supra* notes 93-99 and accompanying text. One limitation courts have universally rejected is the avoidable consequences rule of § 918 of the Restatement (Second) of Torts (1979), which provides that "one injured by the tort of another is not entitled to recover damages for any harm he could have avoided by the use of reasonable effort," and which would require the plaintiffs in wrongful conception cases to mitigate their damages by aborting the child or placing it up for adoption. Most courts perceive that § 918 requires the plaintiffs only to take reasonable steps in mitigating of damages and find both abortion and adoption unreasonable. Flowers v. District of Columbia, 478 A.2d 1073, 1081-82 (D.C. App. 1984) (Ferren, J., dissenting). One court stated, "[w]e do not consider it reasonable to expect parents to essentially choose between the child and the cause of action." Marciniak v. Lundborg, 450 N.W.2d 243, 247 (Wis. 1990). Other courts have remarked that under the principle that the tortfeasor takes the injured party as he finds him, a defendant cannot complain if the plaintiff is the type of person who would be unwilling to abort a child or give it up for adoption. Troppi v. Scarf, 187 N.W.2d 511, 520 (Mich. Ct. App. 1971). Some states have enacted statutes prohibiting the failure or refusal of a party to undergo abortion to be a defense in any action or to be considered in awarding damages. *See, e.g.*, Morris v. Frudenfeld, 185 Cal. Rptr. 76, 80 n.2 (Cal. Ct. App. 1982) (citing CAL. CIV. CODE § 43.6, which bars wrongful life actions brought by a child against his or her parents and prohibits the "failure or refusal of a parent to prevent the live birth of his or her child" from being a defense or being considered in awarding damages in any action).

180. *See supra* note 94 and accompanying text.

181. Johnson v. University Hosps., 540 N.E.2d 1370 (Ohio 1989). The Ohio Supreme Cout remarked:

> [T]his has been one of the most difficult cases we have been called upon to decide . . . . Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position or station in life. We accomplish this balancing in this case while recognizing that our decision will be something less than universally accepted.

Id. at 1377. The court went on to choose the "limited damages" rule. *Id.* at 1378.

182. "The courts' search for compromise or intermediate positions in wrongful birth cases is remarkable in the light of virtually unanimous commentary that supports across-the-board recognition of the cause of action under 'traditional' negligence theories. The pull of an almost-forgotten and vaguely articulated notion of corrective justice remains strong." Kelley, *supra* note 34, at 963.

183. *See* Jackson v. Anderson, 230 So. 2d 503, 503 (Fla. Dist. Ct. App. 1970) ("This child is not to be thought of as unwanted or unloved, but as unplanned.").

because it leaves victims of negligently performed sterilization with one more mouth to feed at their own expense. Less than full compensation also defeats the compensatory purpose of tort law, which aims to place tort victims in a financial position equivalent to their position prior to the tort.[184]

Fortunately, the birth of a healthy child is ordinarily "an occasion for celebration rather than for litigation."[185] However, litigation may be appropriate if the parents can prove the child was conceived after a negligently performed sterilization. In recognition of the fact that such lawsuits do not imply rejection of the child, but rather seek compensation to provide for the child's needs, courts should abandon the "limited damages" and "benefits" rules and give full compensation in wrongful conception cases.

Jennifer Mee

184. RESTATEMENT (SECOND) OF TORTS § 910 cmt. a (1979).
185. Johnson v. University Hosps., 540 N.E. 2d 1370 (Ohio 1989).