WASHINGTON UNIVERSITY
LAW QUARTERLY

VOLUME 1979 NUMBER 4 FALL

WRONGFUL LIFE, WRONGFUL BIRTH, AND JUSTICE IN TORT LAW*

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The emergence of modern birth control methods and the January 1973 recognition by the United States Supreme Court of a constitutional right to an abortion[1] have increased the number of persons engaged in aiding couples who want to avoid the birth of a child. These persons include doctors who prescribe contraceptives or perform sterilizations or abortions, pharmacists who fill contraceptive prescriptions, manufacturers who produce contraceptive drugs and devices, and genetic counselors who provide couples with information about the risks of producing a defective child and the means to prevent inherited disorders.[2] This rapid social change has focused attention on a newly significant legal problem: should those who undertake[3] to aid couples in

* This paper was written for the Genetic Counseling Task Force, funded by the Pope John XXIII Medical-Moral Research and Education Center. Another version of this paper will be published by the Task Force as an appendix to their report. The author thanks Professors Frank W. Miller, Stanley Paulson, and Jules B. Gerard for their helpful comments on an earlier draft of this paper.

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1. Roe v. Wade, 410 U.S. 113 (1973).

2. *See generally* Neel, *The Coming of Age of Genetic Counseling*, in CONTEMPORARY GENETIC COUNSELING 1 (National Foundation-March of Dimes, Birth Defects: Original Article Series, Vol. IX, No. 4, 1973); Sly, *What is Genetic Counseling?*, in CONTEMPORARY GENETIC COUNSELING 5 (National Foundation-March of Dimes, Birth Defects: Original Article Series, Vol. IX, No. 4, 1973).

3. The question of when a person should be judged to have accepted such an undertaking is an important and difficult one, and is beyond the scope of this paper. That question is critical in determining whether an obstetrician should be liable for failure to counsel amniocentesis in

preventing the birth of a child by contraception or abortion be liable in tort for damages when something goes wrong and an "unwanted" child is born?[4]

Any unwanted birth conceivably could lead to two different law suits against one who undertook to aid the parents in preventing that birth. The parents could sue, claiming that the unwanted birth and subsequent responsibilities of parenthood caused them physical pain, emotional distress, and economic loss, or the child himself could sue, claiming that his birth caused him to have to live a life filled with physical or mental pain or both. For convenience, commentators have labeled the parent's lawsuit an action for "wrongful birth" and the child's lawsuit an action for "wrongful life."[5] The gist of both actions is the allegedly wrongful failure to prevent the birth of the unwanted child. In neither case does the plaintiff claim that the defendant caused the child physical harm. Thus, for example, a suit by a child born because defendant-doctor negligently failed to diagnose rubella in the pregnant mother in time to afford her the opportunity to abort the fetus damaged by the rubella would be a suit for wrongful life,[6] and a suit by the parents of an "unwanted" child against a doctor for negligently performing an ineffective abortion would be a suit for wrongful birth. A suit by a child against the manufacturer of a drug for injury *in utero* caused by his mother's taking that drug while pregnant, however, would not be a suit for wrongful life, because the manufacturer's conduct caused physical harm to the child. Similarly, a suit by the mother for injury to her caused by a drug she took during pregnancy would not be a suit for wrongful birth.

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pregnancies with a higher-than-normal risk of a defective fetus. Most of the discussions of the tort liability of genetic counselors simply ignore this critical threshold question.

4. Much has been written on this topic. The leading articles include: Capron, *Informed Decisionmaking in Genetic Counseling: A Dissent to the "Wrongful Life" Debate*, 48 IND. L.J. 581 (1973); Tedeschi, *On Tort Liability for "Wrongful Life,"* 1 ISRAEL L. REV. 513 (1966); Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58 (1970).

5. Although this terminology has not been accepted by everyone, see Kass & Shaw, *The Risk of Birth Defects*: Jacobs v. Theimer *and Parent's Right to Know*, 2 AM. J. L. & MED. 213, 241-43 (1976), most commentators use this terminology. *See, e.g.*, Note, *Wrongful Birth in the Abortion Context—Critique of Existing Case Law and Proposal for Future Actions*, 53 DEN. L.J. 501 (1976); 41 ALB. L. REV. 162 (1977). *See also* Sherlock v. Stillwater Clinic, — Minn. —, — n.3, 260 N.W.2d 169, 172 n.3 (1977).

6. *See, e.g.*, Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 296 N.Y.S.2d 41 (Sup. Ct. 1968), *aff'd on wrongful birth issue*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S. 2d 640 (1972); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975).

The first appellate opinion in a wrongful birth case was published in 1934.[7] In that case, the Minnesota Supreme Court rejected a claim for damages caused by the birth of a healthy child following defendant-surgeon's unsuccessful vasectomy operation on the child's father. The first appellate opinion in a wrongful life case was published in 1963.[8] In that case, an Illinois court of appeals rejected an illegitimate child's claim for damages against his father for his illegitimacy at birth. Since these decisions, plaintiffs have brought a number of wrongful birth and wrongful life cases.[9]

The wrongful life and wrongful birth claims present novel and troublesome questions of law to the courts. Those questions take us ultimately to the fundamental issue of growth and change in the law of torts: when should courts recognize a new cause of action in tort? This paper is an attempt to articulate and analyze possible answers to this basic question and to explore the implications of each answer for the wrongful birth and wrongful life cases.

I. Criteria for Judicial Recognition of New Causes of Action

English common-law courts did not start with a set of criteria for recognizing new causes of action. Originally, the creation of a new writ or the extension of an old writ may have been seen not so much as the recognition of a new legal "right," but as an extension of the jurisdiction of the King's Courts over kinds of disputes previously decided by local or ecclesiastical courts.[10] After the writ system had solidified, "new" causes of action developed through a slow and gradual process of extension of the recognized writs by incremental analogy.[11] This

7. *See* Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934).

8. Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

9. *See* notes 57-58, 81-82, 99 *infra* and accompanying text.

10. *See* T. Plucknett, A Concise History of the Common Law 353-78 (5th ed. 1956); *cf.* H. de Bracton, On the Laws and Customs of England f. 413b 1268 (n.p., n.d.) (S. Thorne trans., vol. IV, 289 (1968)) ("If [a writ] goes beyond existing law, provided it is in accordance with reason and not contrary to law, it must be sustained, provided it has been granted by the King and approved by his council, . . . for it is the king's duty to provide an adequate remedy to repress every wrong.").

11. T. Plucknett, *supra* note 10, at 381, notes:

> [S]ubstantive law was discussed in terms of procedure. The rights of the parties will be expressed in the form of writs and pleading: the plaintiff in given circumstances can bring a particular writ, but if he does, the defendant in certain other circumstances may

process discouraged broad generalizations about the criteria for recognizing new causes of action precisely because the process took so long, and proceeded in so many small, incremental steps, that no one in the midst of the process need recognize what the courts were doing.

In the history of the Anglo-American law of torts, the early part of the nineteenth century saw a great change in the nature of chasms bridgeable by the judicial method of incremental analogy. The collapse of the former distinctions between the writs of trespass and case gave rise to a new classification system based on the distinction between intended and unintended harms and the further subdivision of unintended harm into categories of negligently or recklessly inflicted harms and "faultlessly" inflicted harms for which courts would nevertheless hold an actor liable.[12]

The new classification did not drastically alter the previous process of development by incremental analogy for intentional harms because actionable intentional harm was subdivided into older categories (such as assault, battery, and false imprisonment) based on the nature of the interest with which the defendant intentionally interfered. The "umbrella" intentional tort (prima facie tort), based solely on the nature of defendant's conduct and not on the nature of the interest affected, gained little headway either as an overall classification to replace the older categories or as a broad catchall for virtually every intentionally inflicted harm.[13] Consequently, the process of development by analogy proceeded slowly in the intentional tort field. It remained for litigation to identify new protectable interests, such as "privacy" and "mental

use a particular plea. Gradually there will come slight modification as cases a little outside the ambit of the traditional forms are brought in, either by construction or by a modification of the forms. The result is a change in substantive law, but the machinery of the change, and its technical expression, will be in the rules about writs and pleadings.

12. *See generally* S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 344-52 (1969); Prichard, *Trespass, Case and the Rule in* Williams v. Holland, 1964 CAMBRIDGE L.J. 234; Roberts, *Negligence: Blackstone to Shaw to ? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191 (1965).

13. Despite the backing of the American Law Institute (RESTATEMENT OF TORTS § 870 (1939); RESTATEMENT (SECOND) OF TORTS 49-60 (Tent. Draft No. 22, 1976)), the courts have not generally adopted the prima facie tort theory. Of the relatively few instances in which it has been applied, most were cases of interference with economically advantageous relationships. *See generally* Note, *The Prima Facie Tort Doctrine*, 52 COLUM. L. REV. 503 (1952). Professor Epstein, in a brilliant commentary, suggests that courts should clarify the precise nature of the personal interests protected under the prima facie tort doctrine and recognize that it is harm to those interests, not the defendant's intention, that provides the basis for the cause of action. Epstein, *Intentional Harms*, 4 J. LEGAL STUD. 391 (1975).

tranquility per se," and for litigants to fight the battles over extending tort liability to intentional interference with those interests, though both sides recognized, at least implicitly, that the struggle would determine the creation of a new cause of action.[14]

On the negligence side of the new classification, however, the process of development changed drastically. Because the classification isolated the nature of defendant's conduct as the critical factor affecting liability, the courts could and did extend liability by the process of incremental analogy to cases in which the interest harmed by defendant's negligent conduct had never before received judicial protection.[15] This change in the magnitude of judicial change by incremental analogy obviously increased the potential harm from any one decision. It therefore behooves both courts and commentators to develop criteria for determining when "new" causes of action should be granted.

Before one can formulate criteria for judicial recognition of a new cause of action in tort, however, one must determine the underlying purpose, rationale, or principle of tort law. Jurists and scholars have proposed many different underlying principles;[16] others have argued that no common principles undergird tort liability.[17] At one level of generality, perhaps all would agree that the purpose of tort law is to provide a mechanism for the just allocation of burdens occasioned by harm one person causes another.

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14. *See, e.g.*, Hadley, *The Right to Privacy*, 3 NW. L. REV. 1 (1894); Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49 HARV. L. REV. 1033 (1936); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

15. *See* S. MILSOM, *supra* note 12, at 351-52 (1969):

> More than language was at stake. There is nothing special about applying a general principle to a new situation. It is not a great legal step like creating a new tort, sanctioning a new writ. Judges who would have hesitated long over the latter have not hesitated to bring new kinds of facts within the ambit of negligence. But the two processes are in reality the same. To hold that a duty of care exists in a situation that has not previously arisen involves precisely the decision that was taken in sanctioning a new writ. The difference is in its apparent magnitude.

16. *See, e.g.*, G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26 (1970) ("The principal function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents."). *See generally* J. FLEMING, AN INTRODUCTION TO THE LAW OF TORTS 1-23 (1967) (tort law should endeavor to impose costs of accidents on those best able to spread the cost over those benefiting from the activity causing the loss); A. HARARI, THE PLACE OF NEGLIGENCE IN THE LAW OF TORTS 19-29 (1962); O. HOLMES, THE COMMON LAW 85-88 (M. Howe ed. 1963) (basic principle of tort liability is objective moral blameworthiness of defendant).

17. *See, e.g.*, 1 T. STREET, THE FOUNDATIONS OF LEGAL LIABILITY: A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW xxv (1906), *cited in* A. HARARI, *supra* note 16, at 21; P. WINFIELD, PROVINCE OF THE LAW OF TORTS 5 (1931), *cited in* A. HARARI, *supra* note 16, at 21 n.10.

Agreement on this broad statement of purpose suggests that the basic disagreements between tort theorists may be reducible to disagreements over the nature of justice. Although one can use any number of different theories of justice to analyze tort questions,[18] two theories express the principal divergent approaches taken by tort theorists: (1) justice in tort law consists of correcting private injustice by requiring reparation from one who harms another by unexcused conduct contrary to the reasonable expectations of the victim;[19] and (2) justice in tort law consists of allocating the burden of accident costs in a way that maximizes the community's total happiness.[20]

A. *The Corrective Justice Theory*

The key to the first theory is the notion of private injustice—the failure of defendant to give plaintiff what is "due" him.[21] What is "due" is

18. Professor George Fletcher, for instance, argues that tort law should implement a principle of fairness patterned on John Rawls' first principle of justice. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

> [W]e all have the right to the maximum amount of security [from harm] compatible with a like security for everyone else. . . . Compensation is a surrogate for the individual's right to the same security as enjoyed by others . . . . [T]he paradigm of reciprocity . . . require[s] us to grant compensation whenever [a] disproportionate distribution of risk injures someone subject to more than his fair share of risk.

Id. at 550-51.

19. Notions of corrective justice similar to this theory seem to underlie the sophisticated tort theories of Professor Richard Epstein and Professor George Fletcher. Professor Epstein's analysis is flawed, however, by his formal adherence to an ordinary-language approach to the question of justice and responsibility in tort law and his consequent refusal to analyze any further the conception of justice with which he works. Professor Epstein gives us no reason to believe either that the ordinary-language basis for ascribing responsibility should be adopted by the courts as the basis of tort liability or that he has adequately captured the ordinary-language method of ascribing responsibility. *See* Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974). *See also* Kelly, *Causation and Justice*, 1978 WASH. U.L.Q. 635. Professor Fletcher, on the other hand, attempts to superimpose on the basic notion of corrective justice a rigidly egalitarian conception of justice based on the reasonable expectations of the parties. This attempt leads him to save his theory by making analytically unsupportable and unexplained assumptions (such as equating the risk to others of keeping a domesticated pet with the risk to others of having children or friends). Fletcher, *supra* note 17, at 547-48. Of course, these risks are equivalent only in the sense that they are created by conduct that is ordinary, accepted, and thus expected in the community.

20. *See, e.g.*, G. CALABRESI, *supra* note 16; J. FLEMING, *supra* note 16; James, *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549 (1948).

21. One could, of course, object that to decide questions of legal liability based on an analysis of what conduct was "due" or "owing" the plaintiff is to beg the question. To decide whether to impose liability, after all, is to determine what conduct is "due" or "owing." The objection, however, misconceives the nature of the basic argument. The argument does not proceed from an assumption of legal obligation to a conclusion of legal obligation, but proceeds from an assess-

the conduct that plaintiff can reasonably expect of that defendant.[22] The customs, mores, and laws of the society in which plaintiff and defendant live create, condition, and qualify those expectations. The tort action is not primarily to vindicate or enforce society's standards, but to redress or correct a private wrong and thus vindicate plaintiff's claim to respect for his personal dignity. What that respect requires in any particular case depends on the cultural context that defines what plaintiff can reasonably expect of others. This analysis explains how the law of torts can claim to be based on common morality even though it employs objective criteria of fault to support liability when defendant's conduct is not morally blameworthy in the ordinary sense. If the moral basis for tort law is the notion of private injustice, the law is primarily concerned with righting a private wrong and only secondarily with punishing or deterring a blameworthy offense against the society's moral code.

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ment of one's obligations under the principles of private justice to the conclusion of legal obligation. Those principles, based on the nature of an individual's claims to dignity and respect within a particular social context, are not themselves empty or circular. Certain facts about the society's customs, morals, and laws and the relationship between the parties not only are relevant to the application of the principles of private justice, but also weigh in the decision whether to impose legal liability; thus, the process of applying these principles to the facts can be analyzed and evaluated as in other noncircular natural-language arguments.

The critic could also respond that the private justice principle just pushes the circularity to another level. If law influences plaintiff's reasonable expectations, the court always can justify any result it chooses by a self-fulfilling assessment of plaintiff's reasonable expectations. This objection simply ignores the fundamental tenet of our legal system that requires courts to decide cases on past, not future, events. The relevant reasonable expectations of plaintiff remain those that he held before the decision of his particular case.

22. The analysis in this section follows closely the analysis of private justice in H. SIDGWICK, THE METHODS OF ETHICS, ch. V, bk. III (5th ed. 1893), *reprinted in* JUSTICE AND SOCIAL POLICY: A COLLECTION OF ESSAYS 6-11 (F. Olafson ed. 1961). Sidgwick's "natural expectations" corresponds to this author's use of the term "reasonable expectations." This author parts company with Sidgwick on his conclusion that the ideal component in the ordinary conception of justice is necessarily utilitarian. The following analysis also has affinities with Roscoe Pound's concept of the "second jural postulate of civilized society," as explained in R. POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 86 (rev. ed. 1954):

> [I]n civilized society men must be able to assume that their fellow men, when they are in a course of conduct will act with due care, that is, with the care which the ordinary understanding and moral sense of the community exacts, so as not to impose an unreasonable risk of injury upon them . . . .

The basic difference between the analysis in this paper and that of neo-Hegelians like James Coolidge Carter, Roscoe Pound, and Benjamin Cardozo, who also stress the relationship between justice and societal custom, is in the nature of the ideal conception of justice and its relationship to history. This author is not persuaded that mankind is ever progressing toward the ideal. In cases in which current customs and mores are not dispositive, the judge's task is not to divine the current of history, but to determine what respect for human dignity requires.

The initial problem with this first theory of justice in tort law is its analytical separateness from the second theory of justice. More specifically, why should the courts attempt to correct private injustice? If the goal of correcting private injustice derives solely from the more general social goal of maximizing the community's total happiness, then the first theory of justice collapses into the second.[23] Two answers could be given to this question.

First, one could argue that the correction of serious private injustice is a primary, "primitive" goal of government requiring no further justification beyond the strongly-felt conviction of the community that certain wrongs ought to be remedied—"there ought to be a law."[24] This argument seems to equate what is with what ought to be; that is, it uses the prevailing customary patterns of conduct in the community to force those who cause injury by ignoring those patterns of conduct to redress the injury and thus restore the "good" social order.[25] The principal objection to this rationale is that it simply affirms and perpetuates current social arrangements, customs, and mores, without providing any justification for desirable legal progress toward a better or more just society. There is no reason a priori to think that society's current customs, mores, and laws express the perfect formula for respecting human dignity.[26]

The second and more persuasive response to this attack on the corrective justice theory[27] would proceed as follows. Each person's char-

23. Professor Calabresi's arguments against the corrective justice theory seem to collapse the theory into the second theory of justice. *See* G. CALABRESI, *supra* note 16, at 289-308.

24. *Cf.* R. VON JHERING, THE STRUGGLE FOR LAW 29 (Lalor trans. 1879) ("the struggle for his right is a duty of the person whose rights have been violated, to himself").

25. *Cf.* J. CARTER, LAW: ITS ORIGIN, GROWTH AND FUNCTION (1907) (law contrary to custom is unjust and ultimately ineffective). Carter seems to believe that ideal justice will be achieved in history. *See* note 21 *supra* for the distinction between this author's views and Carter's position.

26. For instance, this response could support liability in the following case in which society's customs and mores are clearly unjust:

> In the country of Minerva members of a particular tribe are thought to be outcasts, and expected not to talk to members of other tribes. Defendant, a member of the outcast tribe, who knows full well the probable result of his conduct, talks to plaintiff, with resulting damage to plaintiff in loss of reputation and status, everyone assuming that plaintiff must have initiated the conversation.

27. This response is based on arguments derived from Plato. *See* PLATO, THE LAWS. *The Laws* is an extensive commentary on the practical limitations imposed by "necessity" on the achievement of ideal justice in any particular historical community. This is perhaps most clearly evident in that part of Plato's discussion in which the Athenian Stranger discusses the limitations on the achievement of ideal justice even in a newly established colony. Chief among these limitations is the necessity to start a colony with grown men and women who have already been educated. *Id.* at Steph. 739-40.

acter is formed to a large extent by experience. One is influenced by one's family and education and the customs, mores, and laws of one's community. These influences in a particular historical community shape one's expectations about the conduct of others within that community, which in turn influence one's own conduct. Thus, to a large extent, one's place in a particular historical community gives content to one's personal identity. If an ideal conception of justice requires respect for an individual's dignity in light of his particular historical identity, then private injustice occurs when Y causes harm to X by conduct contrary to X's reasonable expectations. This result would follow even though the societal customs, mores, or laws on which those expectations depend do not themselves measure up to the ideal standard of respect for each one's dignity. Under this kind of ideal theory of justice, one can legitimately claim the right to be treated by others in the community in the way that people ordinarily treat others in that community. The official in a system of corrective justice who deals with past conduct and past harms must recognize such legitimate claims. The way to move toward the ideal is not by formulating rules of corrective justice as if the ideal were already achieved, but by educating the members of society to a higher conception of human dignity. Through this kind of education, the customs, mores, and laws of the society may be changed. When these changes have altered the reasonable expectations of the people in the community, but not before, the officials in a system of corrective justice may justly change the specific rules of corrective justice to embody the higher conceptions of the dignity of man now embodied in the society's culture.[28]

This response to the tension between customary and ideal justice subtly modifies the answer to the question of why courts should attempt to correct private injustice. The notion of respect for personal dignity as the solution to the problem of ideal justice provides, at least implicitly, an answer. Without a governmental mechanism for redressing private injustices, one wronged by another could obtain redress only if he were himself powerful enough or were allied with others collectively powerful enough to force the wrongdoer to compensate him for the wrong. This method of redress not only would lead to faction and discord, but also would tend ultimately to distort the fabric of ordinary social life. The friendless and powerless could not expect

28. *See* J. CARTER, *supra* note 25, at 322-23.

consideration and respect from others.[29] The alternative state made possible by a system of government-administered corrective justice is thought to be better not because it necessarily will result in greater total happiness,[30] but because it better corresponds to our basic understanding of the equal dignity of all men and women.

Two conclusions derive from this analysis. First, in using the customs and mores of the community to determine the reasonable expectations of plaintiff in a system of corrective justice, the judge neither certifies the validity nor enforces the substance of those customs and mores; rather, the judge determines only that they have conditioned plaintiff's expectations about the conduct of others. Thus, a judge in administering corrective justice may, without loss of personal moral integrity, rely on a societal custom of which he disapproves. Second, the traditional tort principle that one owes no duties of affirmative conduct to strangers[31] can be seen as an essential conclusion from this theory of corrective justice. Dissenters from the prevailing orthodoxy become subject to liability only if they act in ways contrary to the reasonable expectations of others in the community. The dissenter is not required to act in ways inconsistent with his sense of human dignity. To this extent, therefore, the corrective justice theory protects against the system's denial of defendant's claims to dignity and respect as an independent moral agent. Theoretically, the rules of corrective justice will not coerce anyone into *acting* against his conscience.

The above analysis suggests a two-step process for determining whether to recognize a new cause of action in tort. First, the court must determine whether defendant has "wronged" plaintiff; that is, whether defendant harmed plaintiff by conduct manifesting insufficient respect for plaintiff's personal dignity. The key to this determination is a judgment about what conduct plaintiff could reasonably expect from defendant in light of the customs and mores of the society. In addition,

29. Plato's Athenian Stranger suggests early in the dialogue that the greatest good of the state is peace, goodwill, and friendship among men. PLATO, *supra* note 27, at Steph. 625c-629. Compare Plato's position with Aristotle's notion that political justice is possible only in a community of equals, where rational principle rather than man rules. ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 6.

30. There is no reason to believe a priori that it would. Under utilitarian theories, if enslaving one would maximize total social utility, that slavery would be just. *See* J. SMART & B. WILLIAMS, UTILITARIANISM: FOR & AGAINST 141-44 (1973).

31. *See generally* Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability* (pts. 1-2), 56 U. PA. L. REV. 217, 316 (1908).

the court should ask what interest of plaintiff defendant's conduct endangered. The degree of care that we expect of others commonly differs according to which of our interests their conduct endangers.[32] Interest analysis thus sharpens the search for plaintiff's reasonable expectations in light of the mores of the society and tends to tie the search back directly to the underlying concern for vindicating plaintiff's claim to be treated with respect for his dignity. The court should remember, however, that plaintiff's reasonable expectations are the controlling concern; the court's focus on the interests endangered is only an analytically subordinate method of identifying plaintiff's reasonable expectations.

After the court has determined that defendant "wronged" plaintiff, it must decide whether recognition of a cause of action would do more harm than good. This determination requires a balanced prudential judgment, for the pursuit of certain social goals may limit and qualify the pursuit of others. Although the determination may take into account the foreseeable results of recognizing a particular cause of action, the decision is not necessarily the result of a utilitarian process because the criteria for prudential judgment may derive from notions that do not depend on the utilitarian precept of maximizing total happiness.

In reaching a balanced prudential judgment, the court must evaluate claims by defendant for judicial respect of his personal dignity or similar claims by defendant on behalf of others not directly before the court. Judicial acceptance of excuses—defenses that limit the scope of the negligence cause of action—most clearly illustrate the balancing process. In these defenses, defendant implicitly admits that he harmed plaintiff by conduct contrary to plaintiff's reasonable expectations, but claims freedom from liability because of additional facts that show plaintiff could not have expected him to act any differently under the circumstances; thus, it would be unfair to hold defendant responsible for something he could not have been expected to avoid. Courts accept some excuses, such as sudden emergency,[33] youth,[34] physical handicaps,[35] or unforeseeable physical impairment,[36] but reject others, such

32. *See* Austin, *A Plea for Excuses*, in PHILOSOPHICAL PAPERS 175 (2d ed. 1970).
33. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 168-70 (4th ed. 1971).
34. *See generally id.* at 154-57.
35. *See generally id.* at 151-52.
36. *See* Cohen v. Petty, 65 F.2d 820 (D.C. Cir. 1933).

as poor judgment[37] or insanity.[38] To those seeking to rationalize tort law in terms of personal moral blameworthiness of defendant, these different results appear incongruous. If, however, one views the process as the prudent reconciliation of two competing claims of justice, the different results tend to make sense.[39] In reconciling these claims, courts may explore the comparative strength of competing claims for respect and consider whether the good from preventing injustice to defendant is outweighed by the possibility of positive injustice in administering the claimed excuse. The probability of error in determining the excusing facts[40] and the relationship between the proposed excusing condition and plaintiff's reasonable expectations[41] may also influence this prudential judgment.

A similar process should take place when courts decide whether to recognize a new cause of action. The court must reconcile plaintiff's and defendant's claims to respect for personal dignity when plaintiff alleges injury caused by defendant's unexpected conduct. One helpful tool to evaluate the relative strengths of the competing claims is to define clearly the personal interests of plaintiff affected by defendant's conduct and the personal interests of defendant and others that would be affected by judicial recognition of the proposed cause of action. These latter interests include defendant's interest in avoiding an incorrect judgment of liability because of the courts' incompetence to determine certain questions raised by application of the announced standard,[42] the interests of defendant and others in maintaining harmo-

37. *See* Vaughan v. Menlove, 132 Eng. Rep. 490 (C.P. 1837).

38. *See* RESTATEMENT (SECOND) OF TORTS § 283B (1965). *See generally* W. PROSSER, *supra* note 33, at 153-54.

39. For a similar explanation of the selective individualization of the negligence standard in criminal negligence cases, see G. ERENIUS, CRIMINAL NEGLIGENCE AND INDIVIDUALITY 170-73 (1976).

40. This seems to be the strongest argument for rejecting the insanity defense in torts. *See* RESTATEMENT (SECOND) OF TORTS § 283B, Comment b (1965).

41. When a child engages in a dangerous activity ordinarily undertaken only by adults, some courts refuse to recognize the excuse of youth. *See* Dellwo v. Pearson, 259 Minn. 452, 107 N.W.2d 859 (1961). *See generally* RESTATEMENT (SECOND) OF TORTS § 283A, Comment c (1965).

42. Courts, for example, have traditionally refused to allow recovery for negligently inflicted emotional harm unaccompanied by any physical impact. *See* Victorian Rys. Comm'rs v. Coultas, 13 App. Cas. 222 (P.C. 1888).

> [I]n every case where an accident caused by negligence had given a person a serious nervous shock, there might be a claim for damages on account of mental injury. The difficulty which now often exists in case of alleged physical injuries of determining whether they were caused by the negligent act would be greatly increased, and a wide field opened for imaginary claims.

nious and supportive family relationships,[43] the interests of judges and defendants in avoiding systematic misuse of the cause of action by those whom the courts never intended to benefit,[44] and the interests of members of society in avoiding unsettling and disruptive changes in customary patterns of behavior caused by the threat of liability under the proposed cause of action.[45] These competing claims deserve careful consideration. A simple appeal to traditional principles of negligence thus may obscure rather than illuminate the underlying problem of prudential judgment.

B. *The Social Utility Theory*

The analysis from the second conception of justice is much simpler. The only question that the courts need resolve is whether recognition of the proposed cause of action would maximize social utility. Different commentators have approached the task of answering that question in different ways. Professor James[46] and others[47] presented a theory that employed the subsidiary, highly controversial theory of the marginal utility of money to support the conclusion that accident costs should be placed on those best able to insure against them; hence, losses should

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Id. at 225-26. Courts have rejected this limitation in cases in which the causal relationship between defendant's conduct and plaintiff's emotional injury was so clear that the reason for the general rule seemed inapplicable. *See, e.g.*, Strazza v. McKittrick, 146 Conn. 714, 156 A.2d 149 (1959); *cf.* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973) (courts are not suited for establishing product safety standards in products liability cases).

43. Courts, for example, have refused to recognize a cause of action against the husband for negligent infliction of bodily harm on the wife. Similarly, courts have refused to recognize a negligence cause of action for bodily injury to a child caused by the father, or vice versa. The principal reason for this limitation was the concern that recognition of the cause of action would destroy the peace and harmony of the home. *See generally* W. PROSSER, *supra* note 33, at 862-66 (criticizing the rule as applied to intentional torts on ground that little peace and harmony remains to be destroyed after aggravated intentional harms). The rule has been gradually eroded, primarily because the prevalence of liability insurance lessens the possibility of family disruption by lawsuits (although it concomitantly increases the risks of collusion and fraudulent claims). *See, e.g.*, Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); McCurdy, *Torts Between Persons in Domestic Relations*, 43 HARV. L. REV. 1030 (1930).

44. This concern led many courts to abolish the cause of action for breach of promise to marry. *See* Brown, *Breach of Promise Suits*, 77 U. PA. L. REV. 474, 493 (1929); *cf.* Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 L. & CONTEMP. PROB. 326, 338-39 (1966) (attack on right-to-privacy cause of action).

45. *See generally* Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131 (1977). *But see* Helling v. Carey, 83 Wash. 2d 514, 519 P.2d 981 (1974).

46. James, *supra* note 20.

47. *See, e.g.*, J. FLEMING, *supra* note 16.

be spread in small increments over a large group of people. Professor Calabresi[48] elaborated a more subtle theory, which focused on sophisticated notions of deterrence and efficient allocation of resources to determine the best cost-avoider. Both these elaborations, of course, would demand significant changes in prevailing tort law to make it more "just." Professor Posner, on the other hand, employed the utilitarian theory of justice to support what he took to be traditional negligence law.[49]

Most of these theorists studiously avoided analyzing the concept of justice. More sophisticated theorists recognized that one factor to be considered in judging the probable results of adoption of a particular rule is whether the rule violates the community's "primitive" (pre-utilitarian?) sense of justice to such an extent that harmful social consequences outweigh the benefits otherwise derivable from its adoption.[50] These utilitarian theorists break down the distinction between the pursuit of ideal social justice and the more limited pursuit of corrective justice within a particular historical society. Under these theories, consequently, one need not decide whether defendant "wronged" plaintiff. It is enough that any rule imposing liability on defendants under these circumstances would tend to maximize social utility.

These theories, however, present two central problems. First, they assume that courts, in administering a tort system, can accurately predict the consequences of adopting a particular rule. In complex systems such as societies, the intended consequence is rarely, if ever, the only consequence. Even with all the facts, one cannot accurately predict the social consequences of proposed rule changes; moreover, courts, which were developed to resolve disputes between two individuals, have difficulty discovering all facts relevant to that prediction.[51]

The second and more fundamental problem with these theories is that they support results contrary to concepts of justice based on respect for the personal dignity of individuals. The classic example comes from the criminal law, in which utilitarian theories could support pun-

48. G. CALABRESI, *supra* note 16.

49. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

50. *See* G. CALABRESI, *supra* note 16, at 291-308.

51. This problem in utilitarian theories played a prominent part in the brilliant attack by Professors Blum and Kalven on Professor Calabresi. Blum & Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967).

ishment of those known to be innocent.[52] In tort law as well, utilitarian theories could support the imposition of liability on one who did all that plaintiff could reasonably have expected of him. Even one who acted appropriately in light of the prevailing customs and mores of the society could be held liable in some circumstances because liability would, in someone's judgment, ultimately tend to maximize social utility. In automobile accident or product liability cases, for example, utilitarian theorists argue that because defendant will either be insured or occupy market position enabling him to pass the cost of the judgment on to those benefiting from the enterprise, the ultimate burden of liability will not be borne by defendant but by those who benefit from the activity causing the injury. This argument is unpersuasive. In a state without compulsory liability insurance, defendant may or may not have liability insurance. Under the basic premises of the utilitarian argument, however, the court cannot consider the absence of liability insurance in determining whether to impose liability, for to do so would defeat the ultimate social goal by providing a strong incentive not to obtain liability insurance. The theory thus requires the sacrifice of "innocent" defendants without liability insurance even though under the terms of the theory itself imposition of liability is not justifiable by reference to the result in that case.

This apparent injustice reflects the deeper flaw in utilitarian theories of justice. If any just rule tends to maximize total social utility, traditional concerns about the just treatment of individuals as individuals are irrelevant. If the justice of a rule is determinable only by reference to the ultimate result, *any* means to the end of maximum social utility is just, regardless of what that rule entails in the treatment of individuals. In the example of automobile liability insurance, it seems unjust to impose liability on innocent defendants, whether or not they have liability insurance, because they can reasonably expect to be free from liability for harm caused by "unavoidable accident."[53]

The law of torts is changing rapidly, and neither theory of justice can explain all the law, although both theories have had their influence. The law of negligence as it originally developed and as it is administered (by the jury, under very general instructions concerning the con-

52. *See* Mabbot, *Punishment*, 40 MIND 152 (1939), *reprinted in* JUSTICE AND SOCIAL POLICY 39 (F. Olafson ed. 1961).

53. In the traditional sense of harm, an "unavoidable accident" results from no one's "fault." *See generally* Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).

duct of the reasonable, prudent person)[54] is explainable and justifiable under the theory of corrective justice. The reasonable man standard and the assumption of risk defense both focus on the basic corrective justice concept—plaintiff's reasonable expectations. Much of the law of strict products liability and some newer developments in the law of negligence (such as restrictions on the assumption of risk and contributory negligence defenses) seem explainable in terms of the second theory. Because both theories have their adherents and influence the development of the law, both will be used to analyze and evaluate the arguments for and against the proposed causes of action for wrongful life and wrongful birth.

II. "WRONGFUL LIFE"

In wrongful life cases defendant is accused of wrongful conduct in failing to prevent the avoidable conception or birth of plaintiff; defendant is not accused of causing specific avoidable physical harm to plaintiff. Thus, for example, a suit by a child born because defendant-doctor negligently failed to diagnose rubella in the pregnant mother in time to afford her the opportunity to abort would be a suit for wrongful life, as would a suit by a child against a doctor for negligently performing an ineffective abortion;[55] a suit by a child against the manufacturer of a drug for injury *in utero* caused by his mother's taking the drug while pregnant would not be a suit for wrongful life, nor would a suit against a physician whose negligent transfusion of plaintiff's mother with incompatible RH blood before plaintiff's conception caused plaintiff harm when conceived.[56] Each of these four hypotheticals shares a common characteristic: plaintiff at the time of defendant's wrongful act and resulting injury could have had no conscious expectations about defendant's conduct. This fact, however, does not make the first theory of justice in torts inapplicable. To grant redress for harm caused by conduct insufficiently respectful of plaintiff's personal dignity, the courts use a standard of general community expectations about appropriate conduct, embodied in the reasonable person standard. Ordinarily in a wrongful life suit, defendant's conduct is contrary to the

54. *See, e.g.,* MISSOURI APPROVED JURY INSTRUCTIONS, No. 11.02 (2d ed. 1969): "The term 'negligence' as used in these instructions means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances."

55. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976).

56. *See* Renslow v. Mennonite Hosp., 40 Ill. App. 3d 234, 351 N.E.2d 870 (1976).

expectations of plaintiff's parents. The question then becomes whether that conduct can also be said to have wronged the infant-plaintiff.

Under the first theory of justice, that question would be answered by determining whether defendant's conduct and its effect on an interest of plaintiff can be said to have "wronged" plaintiff. To find a "wrong," the interest affected must be closely related to plaintiff's personal identity, and hence his personal dignity. Under the old forms of action the nature of the affected interest had direct legal significance, for only harm to the interests defined by those forms of action could support liability. When the old forms of action broke down, the legal relevance of plaintiff's interest changed: formerly, it provided a basis for determining when a private injustice had occurred; now, it is formally useful only in determining whether compensable damages flow from defendant's negligence. It is not surprising, then, that principles from the law of damages have figured prominently in the arguments for and against judicial recognition of the wrongful life cause of action.

Three different interests of plaintiffs have been isolated to formulate arguments for and against recognition of the proposed wrongful life cause of action. The first and most obvious interest is plaintiff's interest in not being born under certain unfavorable conditions, such as with birth defects or as an illegitimate. In each of the cases in which the court saw this as plaintiff's interest (every wrongful life case[57] except two[58]), the court rejected the proposed cause of action. Commonly, these courts relied on the following argument, first formulated by Pro-

57. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976) (normal child born despite attempted abortion); Pinkney v. Pinkney, 198 So. 2d 52 (Fla. Dist. Ct. App. 1967) (child born illegitimate) (overruled in Brown v. Bray, 300 So. 2d 668 (Fla. 1974)); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (child born with birth defects due to mother's having rubella during pregnancy); Williams v. State, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 885 (1966) (illegitimate child born to mother who was sexually assaulted while a patient in state mental institution); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970) (same), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975) (child born with physical deformities and mental retardation due to mother's having rubella during pregnancy).

58. Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977) (following *Park*); Park v. Chessin, 88 Misc. 2d 222, 387 N.Y.S.2d 204 (Sup. Ct. 1976), *modified*, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977) (affirmance on wrongful life issue). The New York Court of Appeals recently reversed the *Park* and *Becker* wrongful life holdings in a review of the two decisions published in a consolidated opinion. Becker v. Schwartz, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978). *See* notes 69-77 *infra* and accompanying text.

fessor Guido Tedeschi:[59]

> Under traditional tort standards, recovery in negligence requires a showing of damage. Damage is loss or detriment, determined by comparing the present position of the victim with his ideal position had the injurious event not occurred. There can be no damage in a wrongful birth case because it is logically impossible to say that plaintiff has suffered a loss or detriment when the ideal position for purposes of comparison is one in which plaintiff would not exist.[60]

Tedeschi's argument depends on the claim that the idea of loss or detriment logically entails some continuity of personal identity. Thus, Tedeschi concludes:

> The aphorism that "it would be better for man not to have been born" . . . may be given some meaning by interpreting it as a finding that the balance between happiness and misery in life is negative . . . but not literally as a comparison of a person's condition with the condition of not-being, as in the latter state there is neither happiness nor misery whatsoever.[61]

Tedeschi's statement that it is *logically* impossible to discover damage in a wrongful life case may be too strong. At bottom, his argument reduces to the claim that the loss or detriment required in the negligence cause of action must be a loss to an identifiable person who would exist absent defendant's wrongful conduct, but without some harm that he now suffers.

A law student note[62] published in 1970 criticized Tedeschi's argument for joining two separable questions. The student argued that the

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59. Tedeschi, *supra* note 4.

60. Compare the following analysis by Bernard Williams in *The Makropolous Case: Reflections on the Tedium of Immortality,* in B. WILLIAMS, PROBLEMS OF THE SELF 82 (1973):

> None of this—including the thoughts of the calculative suicide—requires my reflection on a world in which I never occur at all. In the terms of "possible worlds" (which can admittedly be misleading), a man could, on the present account, have a reason from his own point of view to prefer a possible world in which he went on longer to one in which he went on for less long, or—like the suicide—the opposite; but he would have no reason of this kind to prefer a world in which he did not occur at all. Thoughts about his total absence from the world would have to be of a different kind, impersonal reflections on the value *for the world* of his presence or absence: of the same kind, essentially, as he could conduct (or, more probably, not manage to conduct) with regard to anyone else. While he can think egoistically of what it would be for him to live longer or less long, he cannot think egoistically of what it would be for him never to have existed at all. Hence the sombre words of Sophocles "Never to have been born counts highest of all . . ." are well met by the old Jewish reply—"how many are so lucky? Not one in ten thousand."

Id. at 87.

61. Tedeschi, *supra* note 4, at 530.

62. Note, *supra* note 4.

question of whether the "traditional tort damage framework"[63] can be used to determine damage in a wrongful life case may be answered apart from the question of whether the courts can value the damage thus determined. There is no logical reason why the traditional technique of comparing two states of affairs cannot be used to determine damages in a wrongful life case. One can, after all, legitimately compare the state in which plaintiff was not born with the present state in which plaintiff exists with certain defects. The only remaining question is one of valuation. Common sense tells us that nonexistence could be preferable to life with certain defects.[64] Thus, it should be possible in some cases to assign a negative value to existence. By assigning a zero value to nonexistence, then, one could value damages.

Although the student did not present it, the following hypothetical argument supports his position:

> We can easily think of cases in which the ideal state compared to plaintiff's present state is one in which plaintiff would not exist. Plaintiff, suffering from a fatal disease, refuses to consent to an operation that would cure the disease while permanently and painfully crippling him. The surgeon operates after plaintiff lapses into a coma. We could certainly countenance a tort suit in which the damages are measured by comparing plaintiff's present state with the ideal state in which he would not exist.[65]

This argument and the student's argument suggest that Tedeschi erroneously concluded that it is logically impossible to determine damages by comparing an ideal state in which plaintiff does not exist with plaintiff's present state. Furthermore, the denial of recovery in a wrongful life case must be based on a similarly unsupportable judgment that the joys of living *always* outweigh the sorrows.

The student's plausible counterargument and the surgery hypothetical supporting his position also suggest that the force of Tedeschi's argument derives from a more fundamental concept than the comparative basis for determining the extent of damages. That more fundamental concept is the notion of personal dignity underlying the corrective justice model of torts. That concept relates personal dignity to personal identity in historical, social, and physical contexts.[66] Each person has dignity as he or she is, and, in some sense, *because* of who

63. *Id.* at 62.
64. *Id.* at 65, 74-75.
65. I am indebted to Richard Danzig and James O'Fallon for this argument.
66. *See* text accompanying notes 21-22 *supra.*

he or she is.[67] Because defendant's conduct determined only whether, not how, plaintiff exists, the court cannot say that defendant's conduct impaired plaintiff's dignity without making the self-contradictory assumption that plaintiff, because of who he or she is, has no dignity.

The revised argument also avoids the problem in the hypothetical supporting the student's argument. Recovery could be granted in the hypothetical because the doctor's operation on plaintiff without the latter's consent constituted an affront to plaintiff's dignity. In ignoring plaintiff's express wishes, the doctor wronged him, and the court may measure the enormity of that wrong by comparing the current pain and suffering that plaintiff wanted to avoid with the apparent peace of the grave. In contrast, this reasoning does not support recovery in the wrongful life case because defendant's conduct cannot have violated any express desires or wishes of an unborn plaintiff.

The hypothetical surgery case and the wrongful life case could be analogized, however, by assuming that the court in the wrongful life case simply substitutes an objective judgment about the desirability of plaintiff's life for the patient's subjective judgment in the surgery hypothetical. If most people would choose not to be born, given the plaintiff's prospects, then we can assume that plaintiff would have chosen not to be born had he been given the choice. This argument nevertheless leads to an incongruity: in the name of personal dignity we judge that another should not have been born; but that judgment itself is an affront to his dignity. This incongruity suggests that one cannot assign an "objective" preference to the unborn plaintiff. Ordinarily, courts find objective standards of conduct by looking for the ordinary or usual response to common experiences. Because no one can choose not to be

67. R.S. Downie and Elizabeth Telfer, in analyzing what it means to speak of persons as ends rather than as means, conclude:

> So far we have tried to show that respecting a person as an end means regarding him and treating him as something which is not merely useful but also valuable in itself. The task which remains is that of trying to explain what is meant by a thing's or a person's being valuable in itself in those cases which cannot be explained by equating this description with "desirable in itself."
>
> Roughly, a situation which is desirable in itself is one which should be *brought about* because of what it is, while a thing which is valuable in itself is one which should be *cherished* because of what it is. The expression "because of what it is" suggests not only why it is valuable but also what cherishing it amounts to; to cherish a thing is to care about its essential features—those which, as we say, "make it what it is"—and to consider important not only that it should continue to exist but also that it should flourish. Hence, to respect a person as an end is to respect him for those features which make him what he is as a person and which, when developed, constitute his flourishing.

R. DOWNIE & E. TELFER, RESPECT FOR PERSONS 15 (1969).

born, the "preference" in the student's argument cannot be objective in the ordinary sense. It simply masks a highly subjective judgment. In his argument the student emphasizes cases in which plaintiff is mentally retarded. Clearly, the author defines himself as an intelligent, thinking being. Given the choice between nonexistence and existence as mentally retarded, the author would choose nonexistence. What the student—or anyone else but the affected child—would choose should not be decisive, however, unless we are prepared to adopt a thoroughgoing paternalism that would justify killing the mentally retarded for their own good. The objective preference argument thus contradicts the fundamental principle in our society that the life of each human being, whether handicapped or not, is valuable and deserves respect and protection.[68]

This shift from plaintiff's viewpoint to that of someone else, implicit in the student note, was made explicit in a 1973 article by Professor Alexander Capron.[69] Professor Capron argued that the infant-plaintiff in a wrongful life case should have a cause of action because defendant's negligence deprived plaintiff's parents of their right to make an informed decision about whether to have the child. According to Capron, the child can sue, even though only the parents' interests seem to be a stake, because the parents make that decision on behalf of the

68. *See* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979). The *Berman* court rejected the proposed wrongful life cause of action by a child suffering from Down's Syndrome. The court supported its holding, not by the Tedeschi argument about impossibility of measuring damages, but by reference to the fundamental societal principle that the life of each person, whether handicapped or not, is precious and deserves the respect and protection of the law. The *Berman* court therefore concluded that the wrongful life cause of action cannot be recognized because the infant plaintiff "has not suffered any damage cognizable at law by being brought into existence." *Id.* at —, 404 A.2d at 12.

69. Capron, *supra* note 4. In addition to the problems discussed in the text, Professor Capron's basic argument for recognizing the parents' "right" to full information from the genetic counselor seems to be just a subtle form of bootstrapping. Basically, Professor Capron first argues by analogy to the informed-consent-to-treatment cases that there is a "right" to be an informed decisionmaker, and that this right should be recognized in genetic counseling cases. He then turns around and argues that legal recognition of this right is "just" because it treats similar cases similarly. By deriving his proposed rule from a right generalized from other kinds of cases, Professor Capron avoids the onerous task of justifying his argument from analogy. In legal arguments from analogy one ordinarily identifies the basic principles behind analogous cases and then focuses on the factual differences between the present case and the allegedly analogous cases to see whether competing principles implicated by the different facts support a different result in the present case. Professor Capron avoids this process by talking in terms of a "right" formulated in terms general enough to apply to both cases. This method boils down to the simple assertion that the cases are similar because they are similar.

child. Capron solved the problem of turning an injury to the parents' interests into an injury to the child only by assuming that the parents, in deciding not to have a child, acted on behalf and in the interests of the child they decided not to conceive. This assumption breaks down for the same reasons that the simpler student argument fails. If the purported interest in not being born cannot be related to the child's personal dignity, it is difficult to see how the parents' decision not to have a child can be said to have been made on behalf of and in the best interests of the child they decided not to have. Once the connection between the parents' reproductive decision and the interests of the child they decide not to have is severed, Professor Capron's argument reduces to the unpersuasive claim that the child should have a cause of action because the parents have been injured by the child's birth. This, of course, makes little sense.

A similar flaw infects the reasoning of the only court[70] to recognize the proposed cause of action for wrongful life. In *Park v. Chessin*[71] defendant-obstetricians gave plaintiff-mother erroneous advice about the probability of giving birth to a defective child. The New York intermediate appellate court held that the child had a cause of action for wrongful life:

> [Courts have not previously recognized the cause of action.] But cases are not decided in a vacuum; rather, decisional law must keep pace with expanding technological, economic and social change. Inherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the right, within certain statutory and case law limitations, not to have a child. This right extends to instances in which it can be determined with reasonable medical certainty that the child would be born deformed. The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole functional human being.[72]

The court's reasoning is unpersuasive.[73] Recognition of the mother's constitutional right to an abortion is only relevant to the question of

70. On December 11 and 12, 1977, the Appellate Division, Second Department of the Supreme Court of New York decided two cases that recognized the wrongful life cause of action. Becker v. Schwartz, 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *aff'd as modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *aff'd as modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

71. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *aff'd as modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

72. *Id.* at 88, 400 N.Y.S.2d at 114.

73. Indeed, the New York Court of Appeals reversed the Appellate Division's recognition of

whether defendant's conduct injured a legally protected interest of the parents.[74] The intermediate appellate court in *Park* is no more successful than Professor Capron in deriving the child's cause of action from an injury to the parents' interests. The court asserts only that "the breach of [parents' right not to have children] may also be said to be tortious to the fundamental right of a child to be born as a whole functional human being."[75] By invoking this "right" of the child, the court refers indirectly to *Woods v. Lancet*,[76] in which the New York Court of Appeals recognized a child's cause of action for tortiously inflicted prenatal injuries. The analogy to *Woods*, however, is flawed because the child in *Park*, unlike the child in *Woods*, suffered from an incurable, unpreventable genetic disease: she never could have been born completely healthy. Defendants could not have prevented or cured the child's defect. The *Park* child's "right" to be born whole, therefore, is only a right in an Orwellian sense: because this child never could have been born without the genetic defect, her "right to be born whole" imposes a corresponding duty on defendant to prevent her birth. Ironically, then, the "right to be born whole," as elaborated by the New York intermediate appellate court, entails death or nonexistence for the holder.[77]

Happily, the New York Court of Appeals overturned the intermediate appellate court's aberrant decision on the wrongful life issue in *Park v. Chessin*[78] and rejected the analogy to *Woods v. Lancet*. The court reasoned that defendant in *Park*, unlike *Woods*, did not cause the child's defect.

Inasmuch as utilitarian tort theories are not tied to a principle of

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the wrongful life action in the *Park* and *Becker* cases. 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

74. *See* notes 136-49 *infra* and accompanying text.

75. 60 A.D.2d at 88, 400 N.Y.S.2d at 114.

76. 303 N.Y. 349, 102 N.E.2d 691 (1951).

77. One is tempted to explain the aberrant result in *Park* by reference to a number of extraneous factors: (1) as ultimate beneficiaries, the parents raised the wrongful life issue in a survival action, which blurred the distinction between wrongful life and wrongful birth cases; and (2) counsel evidently argued the case poorly, because Justice Titone in dissent equated wrongful life and wrongful birth cases and urged rejection of both kinds of actions on the basis of the public policy favoring "life over nonlife and birth over nonbirth or nonconception," 60 A.D.2d at 90, 400 N.Y.S.2d at 116—a public policy that presumably would justify statutes prohibiting contraception. *Cf.* Griswold v. Connecticut, 381 U.S. 479 (1965) (statutes prohibiting sale of contraceptives held unconstitutional).

78. *See* note 73 *supra* and accompanying text.

corrective justice, the lack of any private injustice to plaintiff in the wrongful life cases would not necessarily disqualify the proposed cause of action under those theories. If ultimate social utility would be maximized by imposition of liability on defendants in wrongful life cases, liability should be imposed. Because the typical defendant in wrongful life cases is a doctor who enjoys superior knowledge, skill, and market position, both social insurance and best cost-avoider theories presumably could support imposition of strict liability.

This argument, however, suffers from the same problems as the wrongful birth strict liability theories discussed later,[79] as well as from three additional dilemmas. First, the theory supports recovery by the parents in a wrongful birth action; thus, the problem of wasteful and inefficient double recovery looms large, particularly because the trier of fact would likely find that the additional uncompensated harm to infant-plaintiff consisted of pain and suffering—a species of harm that most utilitarian tort theorists argue should not be compensated, particularly when the dignitary aspects of the claimed injury (and consequently, the spectre of private vengeance in the absence of judicial remedy) are weak. Second, recovery by the parents may be contrary to the community's "primitive sense of justice" and hence weaken the law as an effective instrument to promote social utility. Third, recognition of the wrongful life cause of action insults the infant-plaintiff. The decision to sue for wrongful life ordinarily is made not by plaintiff, but by the parents charged with plaintiff's care and education. The court then determines whether nonexistence would be preferable to infant-plaintiff's life. If plaintiff prevails, the result is a formal judicial declaration that it would have been better if plaintiff had not been born. Under the utilitarian theory, why should the state protect the child's life after it formally declares that the child would have been better off if he did not exist?[80] How can the child achieve any sense of dignity when both the state and his parents deny that his existence has any value? Would not the parents' formal rejection of the child's worth necessarily affect the depth of their subsequent commitment to his care and nurture?

79. *See* notes 150-54 *infra* and accompanying text.

80. *Cf.* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979) (wrongful life cause of action violates basic societal principle of equal respect and legal protection for all human life).

III. "WRONGFUL BIRTH"

A. *The Corrective Justice Theory*

1. *Arguments Favoring the Cause of Action*

Parents in wrongful birth cases ordinarily allege that defendant failed to take steps to prevent the conception or birth of the child after expressly or impliedly undertaking to help the parents avoid conception or childbirth. Parents, for example, have sued a druggist who negligently filled a prescription for birth control pills with tranquilizers[81] and doctors who negligently performed sterilization operations.[82]

Parents typically claim to have suffered a private injustice. Defendant, who failed to perform his undertaking, has frustrated the parents' reasonable expectations, and the unwanted conception or birth of the child has impaired important personal interests. The mother's interest in maintaining her emotional and physical well-being may have been harmed by the emotional and physical pain of pregnancy and childbirth. The parents' interest in economic well-being may have been injured by the costs of pregnancy, childbirth, and childrearing. The parents' interest in personal autonomy may have been impaired by defendant's failure to provide the parents with either the information needed to make informed reproductive decisions or the assistance required to implement reproductive choices. Because these interests so closely relate to the parents' personal identities, conduct by defendant that runs contrary to the parents' reasonable expectations constitutes a private injustice. An estoppel argument buttresses this conclusion. By undertaking to help the parents avoid conception or childbirth, defendant recognized the importance of these interests to the parents. Defendant should not be allowed to deny the importance of those interests in a subsequent lawsuit for failure to perform his undertaking properly. The ordinary wrongful birth cause of action thus seems to meet the first criterion for recognizing a cause of action under the corrective justice theory.

Arguments against judicial recognition of the cause of action under this theory focus on the second criterion: would recognition of the proposed cause of action cause more harm than good? At first glance, however, judicial practice seems inconsistent with the corrective justice

81. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

82. *See, e.g.*, Christensen v. Thornby, 192 Minn. 123, 255 N.W. 620 (1934); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

theory: courts that reject the wrongful birth cause of action use technical arguments drawn from the law of damages. A closer examination, however, reveals that underneath those damage arguments lie concerns both for preventing wholesale injustice by courts possibly incompetent to sort out valid from invalid claims and for preventing harm to third persons caused by recognition of the proposed action. The following discussion analyzes the technical damage arguments in relation to these underlying concerns.

2. *Arguments Against the Cause of Action*

Damages in tort cases are compensatory. The trier of fact first compares plaintiff's current position with the position in which he would have been had defendant acted properly, and then determines the award needed to put plaintiff in that position.[83] Damage awards, however, cannot restore a lost arm or blot out pain and suffering; rather, they represent the purely economic harm attributable to the loss (medical expenses, lost wages, impaired earning capacity) plus an amount to compensate for the intangible, noneconomic detriment of pain and suffering, recognizing that any translation of pain into dollars is necessarily conjectural in the absence of a market for pain or its surcease.[84]

The problem in applying the compensatory damages standard to wrongful birth cases stems from the special benefit rule. That rule, a simple elaboration of the basic principle of compensatory damages,[85] requires the trier of fact to subtract from total damages the value of any special benefit conferred on plaintiff by defendant's wrongful conduct.[86] Courts thus use the special benefit rule to limit recovery to cases in which actual private injustice occurs. In applying the special benefit rule to the wrongful birth case, the factfinder would have to assign a dollar value to the intangible benefits of parenthood—the joy of watching a child develop and grow, the love given and the love returned—and then subtract that amount from the sum of the economic cost of giving birth to and raising a child and the dollar value of the pain and suffering of pregnancy, childbirth, and parenthood.

83. *See* C. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 560-62 (1935).

84. *See* J. STEIN, DAMAGES AND RECOVERY: PERSONAL INJURY AND DEATH ACTIONS 16-17 (1972).

85. *See* T. SEDGWICK, 1 A TREATISE ON THE MEASURE OF DAMAGES 98 (9th ed. A. Sedgwick & J. Beale 1912).

86. *See* C. MCCORMICK, *supra* note 83, at 146-48; RESTATEMENT OF TORTS § 920 (1939).

Problems with this calculation led the New Jersey Supreme Court originally to reject a wrongful birth action brought by parents of a defective child. The court reasoned in *Gleitmon v. Cosgrove* that triers of fact were incompetent to weigh the "intangible, unmeasurable, and complex human benefits of parenthood" against the "alleged emotional and money injuries" from parenthood of a defective child.[87] A Michigan appellate court attacked this reasoning in the leading case of *Troppi v. Scarf*.[88] In that case defendant-pharmacist negligently filled plaintiff's oral contraceptive prescription with tranquilizers, causing plaintiffs to produce a normal, healthy, but unplanned child. Plaintiffs claimed damages for the wife's lost wages, medical and hospital expenses, the pain and anxiety of pregnancy and childbirth, and the economic costs of rearing the child. The court reasoned that these items of damages were no different than those that courts have traditionally compensated.[89] Furthermore, the trier of fact could be trusted to value compensable benefits because this valuation involves precisely the same factual issues that Michigan courts previously had left to the trier of fact in a prior interpretation of the Michigan wrongful death act under which parents received compensation for loss of the companionship and services of a deceased child.[90] Because courts had previously entrusted to the trier of fact each individual item of damage or benefit entering into the calculation of net damages under that act, the court could again leave this calculation to the trier of fact.[91]

The *Troppi* court's argument succeeded only because it focused attention on the individual components of the net damage calculation and away from the calculation itself. That calculation, however, is the issue. The basic fear is that triers of fact in wrongful birth cases cannot accurately make the determination required by the special benefit rule; therefore, they cannot sort out valid from invalid claims and could cause more injustice than they would cure. The *Troppi* court's argument does not allay these fears. The *Troppi* court cited cases[92] in which the courts allowed the trier of fact to assign dollar values to relatively

87. Gleitman v. Cosgrove, 49 N.J. 22, 29, 227 A.2d 689, 693 (1967), *overruled by* Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979).

88. 31 Mich. App. 240, 187 N.W.2d 511 (1971).

89. *Id.* at 246, 187 N.W.2d at 513.

90. *Id.* at 262, 187 N.W.2d at 521.

91. *Id.*

92. Goodwin v. Ace Iron & Metal Co., 376 Mich. 360, 137 N.W.2d 151 (1965); Routsaw v. McClain, 365 Mich. 167, 112 N.W.2d 123 (1961); Wycko v. Gnodtke, 361 Mich. 331, 105 N.W.2d

intangible items of damage when it was already clear, if the trier of fact believed plaintiff's version of what happened, that defendant's conduct had harmed plaintiff. In each instance, the court allowed the trier of fact to value intangible injuries in determining total, not net, damages. Under those circumstances, the irreducibly conjectural character of the valuation did not bother the court. The risk of overvaluation of intangible elements of damage could justifiably fall on the wrongdoer who had clearly harmed plaintiff, and even if the trier of fact undervalued the intangible elements of damage, the judgment at least repaired plaintiff's tangible economic losses.

The wrongful birth case is different. To determine net damages the trier of fact must offset one intangible (the joy and love brought by the child) against the sum of another intangible (the sorrow and pain of pregnancy, childbirth and parenthood) and certain tangible economic losses. Furthermore, in cases in which the unplanned or unwanted child is living with the parents at the time of the trial, the trier of fact must forecast future intangible benefits and detriments. Given these peculiarities in wrongful birth cases, the ordinary justification for permitting the trier of fact to determine intangible items of damage breaks down. Courts cannot tell solely by examining plaintiff's version of what happened whether a jury believing plaintiff's evidence would find that the defendant harmed plaintiff. The jury must offset one intangible against another before it can determine that defendant harmed plaintiff at all. Delegation of this determination would empower the jury to decide, by balancing values arbitrarily assigned to intangibles, whether the conditions exist to allow it to assign values to intangibles. The need for judicial control over essentially lawmaking decisions thus justifies a special rule of law to determine which kinds of cases should go to the jury.[93]

A second feature of the net damage calculation that undercuts the

118 (1960); Howard v. City of Melvindale, 27 Mich. App. 227, 183 N.W.2d 341 (1970); Wolverine Upholstery Co. v. Ammerman, 1 Mich. App. 235, 135 N.W.2d 572 (1965).

93. This problem vanishes, of course, in a wrongful birth case, if one identifies a legal right—the right to choose whether to abort an unborn child, or the right to choose whether to employ contraceptive measures—that is impaired by the defendant's negligence. *See* Note, *supra* note 5, at 501. Because one might deem any interference with that right a harm, the traditional justification for letting the jury assign values to intangibles would then apply. This analytical ploy seems suspect. The only "right" protected by the traditional negligence cause of action is the right to be free from negligent infliction of actual physical or economic damage. The proposed exception to this general rule for negligent impairment of a woman's reproductive choices, therefore, would have to be based on constitutional grounds. The constitutional argument for judicial recognition

Troppi analysis is the relationship between the offsetting intangibles. It is at once a fact and a mystery that the pain and the joy of parenthood are inextricably bound together. We worry about our children and grieve at their suffering and their failures because we love them. That love is the source of the joy and the sorrow of parenthood. Most parents would find it odd to be asked to count up the joys on one side of parenthood and the sorrows on the other, as if the one did not in some fundamental sense depend on the other. The courts that rejected a cause of action for wrongful birth, both before and after *Troppi*, seem to reflect this common understanding that isolating and weighing the joys and sorrows of parenthood is impossible.[94] One could object, of course, that separability may depend on the facts of the individual case. Judges should not enshrine their personal experience of parenthood in a general rule that would prevent other, less fortunate parents from proving that under their circumstances[95] the unplanned child was a net detriment.

The process of proving that an unplanned child is a net detriment raises a third objection to the net damage calculation. The child, a nominal stranger to the litigation, may be hurt. The judgment of liability in a wrongful birth case would stand as an official, public pronouncement that the child's existence is a net detriment to his parents, despite all the love and joy he offers them. The child's discovery of this judgment could devastate his sense of self-worth and his relationship with his parents.[96] This effect on the child points to a deeper flaw in the

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of a cause of action for wrongful birth is very weak. *See* notes 136-49 *infra* and accompanying text.

94. *See, e.g.,* Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Ct. App. 1973), *cert. denied*, 415 U.S. 927 (1974).

95. *See* Troppi v. Scarf, 31 Mich. App. 240, 256-57, 187 N.W.2d 511, 518-19 (1971); Kass & Shaw, *supra* note 5, at 227-34; Note, *supra* note 5, at 516-18.

96. The court in Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974), clearly perceived this problem. After rejecting a proposed wrongful birth action by plaintiff-parents against their obstetrician for negligent failure to diagnose pregnancy in time for a safe abortion, the court added the following note, apparently addressed to the child:

> Since the child involved might some day read this decision as to who is to pay for his support and upbringing, we add that we do not understand this complaint as implying any present rejection or future strain upon the parent-child relationship. Rather we see it as an endeavor on the part of clients and counsel to determine the outer limits of physician liability for failure to diagnose the fact of pregnancy.

Id. at 520, 219 N.W.2d at 245-46. The same problem troubled the Minnesota Supreme Court in Sherlock v. Stillwater Clinic, — Minn. —, 260 N.W.2d 169 (1977). Although the court felt "compelled" by "obedience to the rule of law" to recognize the parents' cause of action for wrongful birth, the court added:

wrongful birth cause of action. As the court in *Coleman v. Garrison*[97] observed, judicial recognition that "under certain circumstances a child would not be worth the trouble and expense" would tend to contradict our traditional affirmation of the ultimate value of each human life.[98]

These three problems with the wrongful birth damage calculation provide weighty reasons for rejecting the proposed cause of action. Other weighty reasons, however, support recognition of this action. Defendant's wrongful conduct frustrated the reasonable expectations of plaintiffs and resulted in the unwanted birth of a child. The accompanying pain and expense of parenthood is pain and expense that plaintiffs had intended to avoid and that defendant undertook to help them avoid. If the child is defective, the increased pain and expense are even more compelling reasons for imposing liability.

3. *Intermediate Positions*

a. *Recovery limited to damages from pain and expense of pregnancy and childbirth*

After *Troppi* most courts[99] and commentators[100] followed the Michigan court's lead and analyzed away the conflict of principles in the proposed wrongful birth cause of action. A number of courts, however, attempted to formulate intermediate positions to accommodate the

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> [W]e are not unmindful of the deep and often times painful ethical problems that cases of this nature will continue to pose for both courts and litigants. It is therefore our hope that future parents and attorneys would give serious reflection to the silent interests of the child and, in particular, the parent-child relationships that must be sustained long after legal controversies have been laid to rest.

Id. at —, 260 N.W.2d at 176-77 (footnote omitted).

97. 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

98. *Id.* at 761.

99. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976); Custodio v. Bauer, 51 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967); Anonymous v. Hospital, 33 Conn. Supp. 126, 366 A.2d 204 (Super. Ct. 1976); Jackson v. Anderson, 230 So. 2d 503 (Fla. Dist. Ct. App. 1970); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Betancourt v. Gaylor, 136 N.J. Super. 69, 344 A.2d 336 (1975); Ziemba v. Sternberg, 45 A.D.2d 230, 357 N.Y.S.2d 265 (1974); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

100. *See* Kass & Shaw, *supra* note 5; Thayer, *Liability to a Family for Negligence Resulting in the Conception and Birth of a Child*, 14 ARIZ. L. REV. 181 (1972); Comment, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1975); Note, *Misfeasance in the Pharmacy: A Bundle of "Fun, Joy and Affection?"*, 8 CAL. W.L. REV. 341 (1972); Note, *supra* note 5, at 501; 38 BROOKLYN L. REV. 531 (1971); 3 CUM.-SAM. L. REV. 220 (1972); 76 DICK. L. REV. 402 (1972); 3 SETON HALL L. REV. 492 (1972); 47 TUL. L. REV. 225 (1972) 40 U.M.K.C. L. REV. 264 (1971-72); 13 WM. & MARY L. REV. 666 (1972).

competing principles. In *Coleman v. Garrison*[101] a Delaware court argued that plaintiffs in wrongful birth cases should recover damages only for the expense and pain of pregnancy and childbirth, not for the expense of raising the child.[102] In *Sherlock v. Stillwater Clinic*[103] the Minnesota Supreme Court reached a similar, though less drastic, conclusion. It allowed the wrongful birth cause of action, but held that any benefits to the parents from the child's aid, comfort, and society could be offset against only the costs of rearing the child.[104] Parents who claimed damages only for the expense and pain of pregnancy and childbirth could thus avoid any application of the special benefit rule.

The *Coleman* court gave the following three reasons for its rule: (1) the net damage from raising a child is necessarily speculative; (2) parents who keep an unwanted child rather than give it up for adoption should be estopped from asserting that the detriments of parenthood outweigh the benefits; and (3) any judicial judgment that a child is a net detriment to its parents would be contrary to fundamental public morality.[105] The *Sherlock* court was moved by the harm to the child and the parent-child relationship from the parents' claim that the child was a net detriment.[106] The court reasoned that this consideration could not justify the complete rejection of the wrongful life cause of action, but expected its special offset rule to deter parents from seeking recovery for the costs of child-rearing.[107]

At first glance, the *Coleman* solution seems perfect. By turning the wrongful birth cause of action into one for "wrongful pregnancy," the court can continue to affirm the ultimate value of human life yet accommodate the traditional tort law demands for redress of injury caused by departures from customary and expected standards of behavior. On closer examination, however, the *Coleman* arguments appear flawed.

The estoppel argument cited by the *Coleman* court [108] is unpersua-

101. 327 A.2d 757 (Del. Super. Ct. 1974), *aff'd*, 349 A.2d 8 (Del. 1975).

102. *Id.* at 761-62.

103. — Minn. —, 260 N.W.2d 169 (1977).

104. *Id.* at —, 260 N.W.2d at 176.

105. 327 A.2d at 761.

106. — Minn. at —, 260 N.W.2d at 177. *See* notes 96-98 *supra* and accompanying text.

107. — Minn. at — n.15, 260 N.W.2d at 177 n.15.

108. *See* text accompanying note 105 *supra*. The *Troppi* court dealt with a similar issue when it rejected defendant's argument that plaintiffs should have mitigated damages through abortion or adoption. Troppi v. Scarf, 31 Mich. App. 240, 257-60, 187 N.W.2d 511, 519-20 (1971). As a

sive. The mother may decide to keep the child to avoid both the heartache of giving up her child and the social disapproval visited on mothers who give their children up for adoption. Thus, one of the "benefits" weighed by plaintiffs in deciding whether to keep the child is the avoidance of a harm that would result from the alternative. That defendants' wrongful conduct forces plaintiffs to choose between unpalatable alternatives should not estop plaintiffs from claiming that the chosen alternative caused them harm.[109] Put simply, the avoidance of injury from giving up one's child for adoption is not an offsetting benefit of parenthood.

The *Coleman* and *Sherlock* courts' treatment of the special benefit rule is also unpersuasive. The special benefit rule seems to require courts to subtract the benefits of parenthood from total damages, even when damages are limited to the harms from pregnancy and childbirth, because parenthood follows pregnancy and childbirth. The *Coleman* and *Sherlock* courts thought otherwise: both emphasized that the *Restatement of Torts*[110] limits the special benefit rule to cases in which the interest benefited is identical with the interest harmed. The courts' attempt to separate the interest in avoiding pregnancy and childbirth from the interest in avoiding parenthood, however, is unconvincing. First, separability can be shown only by emphasizing the possibility of giving up the child for adoption; thus, whatever persuasive force emanates from the separability argument derives solely from the seriously flawed estoppel argument discussed above.[111] Second, the broad "same interest" language adopted by the *Restatement of Torts* to express a limitation on the special benefit rule goes beyond the cases on which the limitation was apparently based.[112] Those cases all dealt with the

practical matter, the issues may be indistinguishable, but the court's argument in *Coleman* is properly understood as one of estoppel, because it argues that plaintiffs' retention of the child evidences a judgment that the benefits of parenthood outweigh detriments, not that plaintiffs should have mitigated damages by aborting the child or placing it up for adoption.

109. *Cf.* Troppi v. Scarf, 31 Mich. App. 240, 257-60, 187 N.W.2d 511, 519-20 (1971) (similar rejoinder to the mitigation argument).

110. RESTATEMENT OF TORTS § 920, Comment b (1939).

111. *See* notes 108-09 *supra* and accompanying text. Thus, the *Troppi* court, which rejected the estoppel argument in its mitigation of damages guise, had little trouble in also rejecting the separable interest argument. "Since pregnancy and its attendant anxiety, incapacity, pain, and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the 'same interest' rule." 31 Mich. App. at 255, 187 N.W.2d at 518 (1971).

112. Comment b to § 920 contains no reference to cases, and Professor Seavey, the reporter for this section, published no commentary on this section. In his personal copies of preliminary drafts

rule that any increase in the market value of plaintiff's land caused by an improvement on defendant's land does not reduce the damage to plaintiff's use and enjoyment of the land attributable to that improvement.[113] The increased market value is only a benefit to plaintiff in case he sells. If he chooses not to sell, no offsetting benefit exists, and defendant's wrongful act should not force plaintiff to sell to mitigate damages. The principle behind these cases is the same as that used above to reject the *Coleman* court's estoppel argument, and therefore, undermines rather than supports the *Coleman* court's proposed rule.

Finally, the *Coleman* "wrongful pregnancy" rule seems to yield exactly the wrong result in an action against a genetic counselor for the birth of a defective child. Plaintiffs in this type of case would not be particularly interested in avoiding the pain and expense of pregnancy and childbirth; rather they would want to avoid the birth of a defective child. To allow damages for the pain and expense of pregnancy and childbirth, but not for the special expenses attributable to the child's defect, would ignore both plaintiffs' expectations and the specific interest harmed by defendant's conduct.

b. *Recovery limited to special expenses attributable to birth defects*

The Texas and Wisconsin courts have adopted a second solution to the conflict of principles in the wrongful birth case. These courts deny recovery in wrongful birth cases when the unplanned or unwanted child is normal and healthy.[114] When defendant's wrongful conduct prevented the parents from seeking an eugenic abortion, the courts authorize recovery, but limit damages to the special expenses occasioned by the child's defect.[115]

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of this section, however, preserved at Harvard Law School's Library, a number of typed and scribbled citations appear. Preliminary Draft #1, Group 5—Damages (dated Dec. 13, 1937), and Preliminary Draft #3, Group 5—Damages (dated Mar. 21, 1938). Adoption of the "interest" language at the time of the third draft probably reflects the influence of Dean Pound's "jurisprudence of interest" on the Harvard contingent.

113. *See* Harvey v. Georgia S. & F. R.R., 90 Ga. 66, 15 S.E. 783 (1892); Marcy v. Fries, 18 Kan. 353 (1877); Ewing v. City of Louisville, 140 Ky. 726, 131 S.W. 1016 (1910); Brown v. Virginia-Carolina Chem. Co., 162 N.C. 83, 77 S.E. 1102 (1913).

114. *See* Terrell v. Garcia, 496 S.W.2d 124 (Tex. Ct. App. 1973), *cert. denied*, 415 U.S. 927 (1974); Hays v. Hall, 477 S.W.2d 402 (Tex. Ct. App. 1972) (dicta), *rev'd on other grounds*, 488 S.W.2d 412 (Tex. 1972); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 219 N.W.2d 242 (1974).

115. Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

The Wisconsin court gave no reason for this distinction.[116] The Texas court objected "to an award based upon speculation as to the quality of life and as to the pluses and minuses of parental mind and emotion" when the alleged injury is the birth of a normal, healthy child.[117] The objection thus does not apply when the child has birth defects: "The economic burden relate[s] solely to the physical defects of the child . . . [and] lie[s] within the methods of proof by which the courts are accustomed to determine awards in personal injury cases."[118] The Texas court's reasoning is unpersuasive. Courts had previously rejected recovery in wrongful birth cases because they could not weigh the intangible benefits of parenthood against the intangible detriments. No one ever doubted that courts could measure the tangible economic burden imposed by parenthood. In the eugenic abortion case, for example, the court under the Texas approach could add the measurable expense attributable to the child's defect to the previously measurable economic burden, but would still run aground on the problem of weighing the offsetting intangibles.

Although the court's stated reasons seem inadequate, one can defend the result. Oddly enough, that defense would single out as a virtue what three prior commentators[119] thought to be an error in the Texas position. Defendant's wrongdoing caused the birth of a defective child, but did not cause the defect. Had defendant acted properly, plaintiffs would not have had the child. Thus, under the ordinary compensatory damage standard, the trier of fact would determine the extent of damages by comparing the present state of plaintiffs—the parents of a defective child—with their alternative state—a couple without this child. Instead, the Texas court compared plaintiff's present state with an impossible state in which they would have had a normal child. The Texas court thus adopted a new measure of damages contrary to the traditional compensatory damage standard.

This unusual measure of damages has two distinct advantages. Under this standard the jury does not have to weigh intangible benefits

116. Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975). The court merely noted the factual difference between this case and the prior case: "[In *Rieck*, plaintiffs] sought to recover the entire expense of raising a normal, healthy but claimed unwanted child during its dependency. Here the parents sue only for the expense occasioned by the congenital defects." *Id.* at 775, 233 N.W.2d at 376.

117. 519 S.W.2d at 849.

118. *Id.*

119. Kass & Shaw, *supra* note 5, at 234-39; Note, *supra* note 5, at 511.

and detriments to determine whether there is legal injury. The court determines as a matter of law that injury occurred, and asks the jury to measure only the tangible expense attributable to the child's defect. Furthermore, because the jury is never asked whether, all things considered, the child is more of a burden than a joy to his parents, the court avoids the potentially damaging judgment that the child is a net detriment to his parents.

Any compromise can be attacked from two directions, and the Texas court's compromise is no exception. Those who favor denial of the wrongful birth cause of action under any circumstances would argue that the Texas approach avoids a case-by-case adjudication of net detriment by embodying in a legal rule the cruel judgment that a defective child is always a net detriment[120] and a normal child is always a net benefit. The Texas court, however, did not intend its measure of damages to be compensatory under the ordinary tort standard; it is difficult, therefore, to see how the distinction between normal and defective children embodies any judgment that defective children as a class are net detriments to their parents. The Texas court simply recognized that most people would rather avoid the special anguish and expense associated with a defective child, regardless of the ultimate balance between benefits and burdens. By holding that the birth of a defective child constitutes legal injury to those who wanted to avoid that birth, the court just protects the expectations of the parties—expectations that are consistent with the common assumptions of the community. By adopting an avowedly noncompensatory measure of damages, the court provides a remedy for an obvious wrong and avoids the unfortunate consequences of net detriment determinations otherwise required by a rigid compensatory damage scheme.

One could respond to this argument with an attack on the noncompensatory measure of damages used by the Texas court. First, whenever the costs occasioned by the child's defect exceed the net compensatory damages, defendant is treated unjustly, for he must pay more than the harm he caused. Conversely, whenever the net compensatory damages exceed the costs occasioned by the child's defect, plaintiff is treated unjustly. Second, common-law damage principles afford

120. The dissenting judge in the Wisconsin case attacked the majority for adopting a legal distinction between normal and defective children that "smacks too much of a Hitlerian 'elimination of the unfit' approach." Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 780, 233 N.W.2d 372, 379 (1975).

no basis for a noncompensatory damage standard. Under our legal system courts in tort cases do not impose noncompensatory punitive damages without first finding that defendant's conduct was malicious or outrageous.[121] The Texas noncompensatory standard, then, is an infringement on the legislative prerogative to impose fines for wrongful conduct.

In cases that fall within the Texas rule, however, plaintiffs have indicated by their conduct that they wanted to be parents of a normal child, and defendant undertook to help them achieve that goal. If defendant had acted properly, plaintiffs would have had the opportunity to achieve that goal, either by contraception plus adoption or by an immediate abortion and a subsequent pregnancy. The Texas rule merely attempts to put plaintiffs in the position they *expected* to be in with defendant's help. The contract measure of damages—expectation damages—thus supports the Texas rule. Because the malpractice cause of action originally was a tort-contract hybrid based on the implied undertaking of a member of a common calling,[122] no serious obstacles impede adoption of a contract measure of damages when the tort measure of damages proves unsatisfactory. Moreover, because the proposed measure of damages attempts to put plaintiff in the position originally intended by both parties, adoption of the expectation standard results in no injustice to either party.

Those in favor of recognizing the wrongful birth cause of action in all cases could argue that because plaintiffs in the ordinary wrongful birth action had indicated their intention not to have any children and defendant undertook to help them achieve that aim, the expectation damages argument supports a cause of action for wrongful birth of a normal child. Furthermore, insofar as the Texas compromise depends on a community consensus that the unwanted birth of a defective child is a serious harm, one can just as well argue that the widespread use of contraception and abortion indicates a community consensus that, under certain circumstances, the unwanted birth of a normal child is a serious harm. The arguments used to defend the Texas compromise against attacks from one side thus eliminate any defense against attacks from the other.

121. *See generally* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517 (1957).

122. *See generally* McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 550-57 (1959).

But this, of course, is not true. In the wrongful birth suit for the birth of a normal child, the expectation measure of damages is necessarily the same as the compensatory measure of damages: plaintiffs wanted to avoid the birth of any child. Thus, no principled basis is available to avoid the net compensatory damage calculation, with all its unfortunate consequences. Furthermore, the strength of the community consensus about the harm or its severity to plaintiff's personal interest or, indeed, to the relative importance of the interest at stake, may differ greatly if the unwanted child is defective rather than normal. Rejection of the wrongful birth cause of action for the birth of a normal child is not based on a logical deduction, but on a prudential judgment that the harm from authorizing the jury to make the net damage calculation outweighs the benefits from enforcing the expectations of the parties. One may reach a different judgment on this issue than the Wisconsin and Texas courts, but it seems clear that courts must balance significantly different considerations in deciding whether to allow a cause of action for wrongful birth of a defective child than it balances in deciding whether to allow the cause of action for wrongful birth of a normal child. One cannot simply reject the Texas approach as internally inconsistent.

c. *Recovery limited to contraception wrongful birth cases*

A court could allow the wrongful birth cause of action when defendant's conduct prevented contraception, but bar the action when defendant's conduct prevented an abortion. Before *Roe v. Wade*[123] and *Doe v. Bolton*,[124] the reasons for this distinction were persuasive. First, most states prohibited abortion by criminal statutes that reflected the fundamental policy that all human life is precious. To allow recovery in tort for denial of the opportunity to abort would violate this fundamental public policy.[125] Furthermore, to prove that defendant's conduct caused injury, plaintiff would need to show that she would have aborted the child had defendant acted properly. Arguably, plaintiff could never prove that defendant's conduct was the proximate cause of

123. 410 U.S. 113 (1973).

124. 410 U.S. 179 (1973).

125. *See* Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 283 N.E.2d 616, 332 N.Y.S.2d 640 (1972); *cf.* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (policy recognized, but not tied to abortion statute).

her injury while the state criminal law prohibited abortion.[126] Finally, the wrongful birth suit for denial of the opportunity to abort is potentially more damaging to the child and his relationship to his parents than the suit for contraceptive failure. Parents in an abortion case contend that they would have aborted *this* child had defendant acted properly. The child existed as a genetically independent, separate human being during pregnancy,[127] and could reasonably identify with himself in the womb.[128] Thus, the parents' revealed intention to abort is a more serious threat to the child's sense of worth and his relationship with his parents than the parents' revealed intention to avoid conception in the contraception wrongful birth cases.

The Supreme Court in *Roe v. Wade*[129] and *Doe v. Bolton*,[130] however, arguably weakened the bases for this distinction by adopting guidelines that invalidated the criminal abortion statutes in all fifty states. Commentators argued after *Roe* and *Doe* that the public policy and proximate cause arguments against the abortion wrongful birth cause of action fell with the statutes on which they were based.[131] Careful analysis, in their view, revealed that the public policy and proximate cause arguments are equivalent. A statute that made abortion a criminal act did not necessarily preclude abortion: plaintiff could have proven by a preponderance of the evidence that, had defendant acted properly, she would have obtained a legal abortion outside the state or an illegal abortion within the state.[132] Because she might prove that defendant's conduct was the cause in fact of her injury, the flat ban on recovery under the proximate cause rubric must be based on policy considerations going beyond simple causation theories. Those policy considerations, in the days before *Roe v. Wade*, were not

126. *See* Gleitman v. Cosgrove, 49 N.J. 22, 48, 227 A.2d 689, 703 (1967) (Francis, J., concurring); Jacobs v. Theimer, 519 S.W.2d 846, 850-51 (Tex. 1975) (Daniel, J., dissenting).

127. *See* L. AREY, DEVELOPMENTAL ANATOMY 58 (7th ed. 1965).

128. *Cf.* B. WILLIAMS, PROBLEMS OF THE SELF 1, 19 (1973) (bodily identity is always a condition precedent to personal identity).

129. 410 U.S. 113 (1973).

130. 410 U.S. 179 (1973).

131. *See, e.g.,* Kass & Shaw, *supra* note 5, at 220; Note, *supra* note 5.

132. *Cf.* Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967) (three out of four judges in majority assumed that plaintiff's mother could somehow have obtained an abortion, yet rely on public policy against abortion to support rejection of proposed wrongful birth cause of action); Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (because plaintiffs' allegations of proximate cause were not contested at summary judgment stage, court would assume that plaintiff's wife would have obtained legal abortion somewhere had defendant-physician informed her of birth defect risk).

difficult to identify. Because abortions were generally illegal, and thus patently contrary to public policy, it would also have been contrary to public policy to award damages for the allegedly wrongful denial of the opportunity to abort. After *Roe* and *Doe*, then, the proximate cause-public policy arguments fall because the state no longer has a public policy against abortion.

The commentators' argument, however, suffers from its assumption that the state legislatures repealed the criminal abortion statutes and thus rejected the prior public policy against abortions. Abortion on demand nationwide was adopted by judicial decision, however, not by democratic vote, so the question becomes whether the constitutional interpretation adopted in *Roe* and *Doe* precludes the states from implementing a public policy against abortion by distinguishing between abortion and contraception wrongful birth cases. The controlling case is *Maher v. Roe*,[133] in which the Court upheld a legislative classification that provided indigents with medical care for childbirth but not for abortion.[134] The Court justified the distinction between childbirth and abortion on the ground that the state had a legitimate interest in protecting potential human life.[135] The *Maher* argument could be applied to support the distinction between abortion and contraception in wrongful birth cases: the state does not by the classification interfere directly with the pregnant woman's abortion decision; the state's legitimate interest in protecting potential human life, therefore, suffices to sustain the distinction against equal protection attack.

Plaintiffs in abortion wrongful birth cases would attempt to distinguish *Maher* by pointing out that the availability of free medical care only for childbirth may very well influence an indigent pregnant woman's decision whether to abort or carry to term; thus, the classification can be said to advance a public policy to protect potential human life. The distinction between abortion and contraception in wrongful birth cases, on the other hand, cannot advance that public policy; a pregnant woman's inability to recover damages from one who negligently or intentionally deprives her of the opportunity to abort, or who negligently performs an ineffective abortion, would not influence her decision to abort or carry to term. The only reason for the distinction, therefore, is hostility toward abortion. The classification is thus uncon-

133. 432 U.S. 464 (1977).
134. *Id.* at 479.
135. *Id.* at 474.

stitutional, even under the *Maher* analysis, for it interferes directly with the abortion decision by punishing those who would seek an abortion.

The weakest part of this argument is plaintiffs' contention that the classification does not advance the state's interest in protecting potential human life. If all the Constitution requires to sustain the classification is a conceivable rational relationship between the classification and a legitimate state interest, the distinction between abortion and contraception in wrongful birth cases would be constitutional. Surely, the legislature could reasonably assume that provision for a wrongful birth cause of action for contraception cases, but not for abortion cases, would have some deterrent effect: some women might choose childbirth over abortion because the legal protection against malpractice is greater in childbirth; some women before conception might choose contraception rather than abortion as a family planning device because of the differences in legal protection against malpractice. Because alternative, more direct methods to achieve these goals (such as education about contraception) may impose less of a burden on the abortion decision, the distinction might not withstand any stricter scrutiny than the conceivable rational relationship test, but under *Maher* this test arguably controls the issue and the proposed distinction would be constitutional.

B. *Alternative Theories Supporting the Wrongful Birth Cause of Action*

1. *Constitutional arguments*

One commentator[136] and two courts[137] have argued that courts rejecting the cause of action for wrongful birth in either abortion or contraception cases unconstitutionally interfere with the woman's right to privacy recognized in *Griswold v. Connecticut*,[138] *Roe v. Wade*,[139] and *Doe v. Bolton*.[140] If this argument is sound, courts could not use the compensatory damage arguments analyzed above[141] to reject the pro-

136. Note, *supra* note 5.

137. Sherlock v. Stillwater Clinic, — Minn. —, 260 N.W.2d 169 (1977); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976). *See also* Troppi v. Scarf, 31 Mich. App. 240, 253, 187 N.W.2d 511, 517 (1971) (relying on *Griswold* to support constitutional right to wrongful birth cause of action for failed contraception).

138. 381 U.S. 479 (1965).

139. 410 U.S. 113 (1973).

140. 410 U.S. 179 (1973).

141. *See* notes 83-98 *supra* and accompanying text.

posed cause of action for wrongful birth, but would have to recognize the cause of action. Two arguments have been advanced to support this conclusion.

First, if defendant's wrongdoing precludes plaintiff from the opportunity to choose an abortion or an effective contraceptive, the state court's subsequent refusal to grant a damage remedy is a delegation of power to private individuals to bar access to abortion or contraception, similar to the spousal consent requirement held unconstitutional in *Planned Parenthood v. Danforth*.[142] This argument is unpersuasive. The spousal consent statute in *Planned Parenthood* flatly prohibited abortion unless the husband consented. Thus, a woman unable to get her husband's consent was precluded by law from obtaining an abortion. Refusal to recognize a cause of action for wrongful birth, on the other hand, does not constitute governmental interference with the woman's right to contraception or abortion. The Constitution does not require state courts to grant tort recovery for private interference with the exercise of constitutional rights. Furthermore, defendant's conduct in wrongful birth cases could not meet the requirements of the federal civil rights statute[143] that authorizes civil actions for certain private interferences with federal constitutional rights.[144]

Second, the court's denial of the proposed wrongful birth cause of action is arguably a denial of equal protection. To treat a wrongful birth cause of action differently than similar causes of actions based on the constitutional right to abortion and contraception, the state must demonstrate a compelling state interest.[145] Because the arguments for recognition of the proposed cause of action fairly evenly balance those arguments against the proposal,[146] no compelling state interest can be found. This argument also is unpersuasive. In *Maher v. Roe*[147] the Supreme Court upheld the constitutionality of a state statute that au-

142. 428 U.S. 52 (1976).

143. 42 U.S.C. § 1985 (1976).

144. *See* Griffin v. Breckenridge, 403 U.S. 88 (1971). The *Griffin* court interpreted 42 U.S.C. § 1985(3) to reach private conduct, but only when that conduct involved a specific intent to deprive the plaintiff of his rights on "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." 403 U.S. at 102. In the ordinary wrongful birth case based on a negligence theory, the defendant would have neither the requisite intent nor the invidiously discriminatory animus required by the statute.

145. *See* Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971); Bowman v. Davis, 48 Ohio St. 2d 41, 356 N.E.2d 496 (1976).

146. *See* notes 54-80 *supra* and accompanying text.

147. 432 U.S. 464 (1977).

thorized free maternity care for indigents, but refused to fund non-therapeutic abortions for indigents.[148] The Court found that the distinction drawn between abortion and childbirth did not directly interfere with an indigent woman's constitutional right to decide whether to abort; rather, the distinction reasonably related to a constitutionally legitimate state interest in protecting potential human life.[149] The same analysis applies here. The distinction between ordinary tort cases and wrongful birth cases does not directly interfere with a woman's constitutional right to choose contraception or abortion. Consequently, a rational relationship to any legitimate state purpose will justify the distinction. The purposes discussed above—avoidance of speculative damage awards, avoidance of injury to a third party from the litigation, and avoidance of inconsistent judgments—certainly constitute legitimate state interests to support the distinction between wrongful birth cases and other tort cases.

The constitutional arguments for judicial recognition of the wrongful birth cause of action are seriously flawed. Those cases which recognize a constitutional right to contraception and abortion merely reinforce the argument that the parents in the ordinary wrongful birth case have suffered a private injustice through conduct by defendant contrary to their reasonable expectations; those cases do not require the courts to recognize the cause of action.

2. *Strict Liability Theories*

The most popular argument against strict liability for medical accidents is the difficulty in proving that medical treatment rather than disease caused any particular result.[150] That argument probably does not apply in most wrongful birth cases. If the sterilization operation or the abortion procedure is not successful, the subsequent birth of a child can be traced directly to defective, though perhaps nonnegligent, medical care. Similarly, in genetic counseling cases expert testimony could help the courts determine whether the genetic advice was wrong.

148. *Id.* at 479.

149. *Id.* at 475-77. Somewhat surprisingly, in light of its prior opinion in *Roe v. Wade*, the Court found constitutionally permissible the purpose to encourage childbirth over abortion.

150. *See* Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUNDATION RESEARCH J. 87, 141-47; Keeton, *Compensation for Medical Accidents*, 121 U. PA. L. REV. 590, 597 (1973); King, *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213, 1224 (1975).

Both the "best cost-avoider" and the social insurance theories could be used to support imposition of liability on surgeons who fail to sterilize or abort successfully and genetic counselors whose inaccurate genetic advice resulted in the birth of a defective child. Under these theories the court could impose liability without finding defendant negligent. It would be enough under Calabresi's best cost-avoider theory that the surgery was unsuccessful or that the genetic advice was inaccurate. Liability should be imposed because the surgeon or the counselor, as the case may be, is in a better position than his patients to act to avoid the unwanted result. It also would be enough under the social insurance theory that the surgery was unsuccessful or the advice was incorrect. Liability should be imposed because the surgeon or the genetic counselor can insure against liability for unsuccessful surgery or incorrect advice and pass the cost of insurance on to those who benefit from surgery or genetic counseling.

Two arguments can be made against the strict liability proposal, however, based on the two general weaknesses in utilitarian theories—the assumption that consequences are predictable and the justification of results that deny respect to individuals' personal dignity.

Imposition of strict liability on surgeons and genetic counselors on either the best cost-avoider theory or the social insurance theory could lead to unacceptable consequences neither intended nor predicted. The adoption of the social insurance theory in product liability losses led to dramatic increases in product liability insurance costs and the refusal of insurance companies to underwrite some kinds of product liability risks.[151] Adoption of strict liability for surgeons and genetic counselors in wrongful birth cases would run the risk of forcing insurance cost so high that many potential defendants might be unable to obtain liability insurance and many potential patients might be unable to obtain desired services. The imposition of a strict liability standard in wrongful birth cases could also have unfortunate effects on the practice of surgery or genetic counseling itself. Because the most significant threat of liability is from suits by parents of defective children, genetic counselors might be inclined to resolve every diagnostic or counseling doubt in favor of the solutions (avoiding conception, aborting the possibly affected fetus) that would minimize their risk of liability, rather than pro-

151. *See* 1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, PRODUCT LIABILITY: FINAL REPORT OF THE INSURANCE STUDY, ES 3-7; ch. 2, 13-22; ch. 3, 4-14 (1977).

mote the best interests of the patient.[152] Surgeons might refuse to perform sterilization operations, or dramatically increase the price of such operations.

Most importantly, however, imposition of strict liability on nonnegligent genetic counselors seems to deny the counselor's and the patient's claims to personal dignity. The counselor could claim that it is unfair to impose liability on him when his conduct fulfilled the reasonable expectations of his patient. To impose personal liability on him because he is a good insurance conduit or the best cost-avoider treats him as a pawn in a utilitarian game rather than as a responsible moral agent within society.[153] Moreover, the patient who cannot choose lower-cost genetic counseling—without built-in insurance against the results of incorrect counseling—could claim that no demonstrably good reasons exist for impairing his personal autonomy.

Recent commentators have discussed extensively the question of strict liability for medical accidents.[154] To date, however, no court has imposed liability under a strict liability theory, and the question of liability in wrongful birth cases has always been raised in the context of a negligence or malpractice theory. The logic of the utilitarian theory of justice, however, ultimately points toward a no-fault system.

IV. CONCLUSION

Recent medical and legal developments have increased both the number of cases in which a person attempts to help a couple prevent conception or childbirth and the number of cases in which such attempts are unsuccessful. Faced with the inevitable claims for legal re-

152. Professor Calabresi recognizes this problem of optimal medical care as the central problem in a no-fault system for medical malpractice. Calabresi, *supra* note 45. Professor Calabresi's "solution," presented ostensibly as a joke, would require mandatory participation in health maintenance organizations, including mandatory life insurance and wage maintenance insurance. Professor Calabresi attempts to disarm us by clucking over the extremely high economic costs and interference with individual liberty that his "joke" would necessarily entail. Ultimately, however, the joke is on us, for Professor Calabresi evidently seriously supports this proposal. *Id.* at 141.

153. *See* Epstein, *supra* note 150, at 105.

154. *See* Calabresi, *supra* note 45; Carlson, *A Conceptualization of a No-Fault Compensation System for Medical Injuries,* 7 L. & SOC'Y REV. 329 (1973); Keeton, *supra* note 149; O'Connell, *No-Fault Insurance for Injuries Arising from Medical Treatment: A Proposal for Elective Coverage,* 24 EMORY L.J. 21 (1975); Ross & Rosenthal, *Non-Fault-Based Medical Injury Compensation,* in U.S. DEPARTMENT OF HEALTH EDUCATION & WELFARE, APP. VOL., REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 450 (1973).

dress for such failures, the courts have had to decide whether to recognize new causes of action for "wrongful life" or "wrongful birth."

Courts using arguments drawn primarily from the law of damages have unanimously rejected the cause of action for wrongful life and have adopted several damages positions on the wrongful birth cause of action. These results make little sense in terms of the formal law of damages and the modern view of negligence as an all-pervasive principle of liability. If one sees the courts' different arguments in these cases as unarticulated expressions of traditional corrective justice theories, the results make more sense: the wrongful life claim fails to meet the first prerequisite for recognizing a cause of action (a private injustice to plaintiff); the wrongful birth claim meets the first prerequisite, but presents the courts with a difficult prudential judgment of whether recognition of the cause of action would cause more harm than good.

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 still remains strong.

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VOLUME 1979 NUMBER 4 FALL