Child v. Parent: A Viable New Tort of Wrongful Life?

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During the past few decades, courts have increasingly been filled with litigation seeking to vindicate newly perceived or long neglected rights of individuals. In particular, previously unrecognized constitutional and tort law rights of children began receiving judicial acknowledgment.[1] At the same time, rights of parents received heightened protection from governmental intrusion through judicial expansion of constitutional doctrines of privacy and family autonomy.[2]

In 1973, the Supreme Court decision in *Roe v. Wade*[3] focused new attention on the balance between parental procreative rights and the power of the state to protect the rights of an unborn fetus. One corollary of the increased access to legalized abortion procedures after *Roe* was judicial recognition of a cause of action by parents against medical entities who negligently affected their decision to give birth or to seek an abortion.[4] Where an unwanted child brought suit against these same medical entities, however, courts almost unanimously rejected the child's cause of action.[5] Nevertheless, California recently entered unchartered judicial territory by becoming the first state supreme court to sustain a child's cause of action for wrongful life in *Turpin v. Sortini*.[6] In *Turpin*, a doctor was held liable for failure to diagnose a hereditary hearing defect in the plaintiff's older sibling, resulting in the plaintiff's subsequent conception and birth with the defect without her parents' knowing that the defect might reoccur.[7]

In upholding the child's wrongful life cause of action, the *Turpin* court affirmed in part[8] the earlier California Court of Appeals decision in *Curlender v. Bio-Science Laboratories*,[9] but then limited recovery to special

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1. See text & notes 96-103, 121-23, 165-70, 210-11 *infra*.
2. See text & notes 196-99, 216-27 *infra*.
3. 410 U.S. 113 (1973).
4. These actions, most appropriately denominated as "wrongful birth" suits, are more fully discussed at text & notes 13-26, 35-50 *infra*.
5. These actions, most appropriately denominated as "wrongful life" suits, are more fully discussed at text & notes 32-33, 54-61 *infra*.
6. No. S.F. 24319, slip op. at 30-31 (Cal. May 3, 1982).
7. *Id.* at 2-3.
8. *See id.* at 15-27.
9. 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980), *rev'd in part*, Turpin v. Sortini, No. S.F. 24319 (Cal. May 3, 1982).

damages.[10] *Curlender*, the first decision granting a wrongful life cause of action to be sustained on appeal, had gone one step further. In unsolicited dictum, the court purported that a child should be permitted to sue his parents where they had been properly advised of potential defects, but nevertheless chose to continue the pregnancy.[11] The California legislature rapidly responded by passing a statute barring a child's cause of action against its parents for conception or failure to abort.[12] Nevertheless, the *Curlender* court's postulated child-parent cause of action raised a diverse array of yet unexplored legal issues concerning the propriety and practicality of allowing judicial incursion into this realm of parental decisionmaking.

This Note will examine some issues of tort and constitutional law presented by the child-parent wrongful life suit. A brief synopsis of the torts of wrongful birth and wrongful life as they have been litigated in other relationships will introduce a description of the tort in the child-parent context. Initial obstacles to parent-child wrongful life suits arising from the doctrine of intrafamily immunity will be discussed in an analysis of the immunity doctrine's history and present interpretations. Questions concerning the nature of the parent-child wrongful life tort as negligent or quasi-intentional will also be addressed, leading to the conclusion that such a suit could most easily be brought in a negligence posture. The framework of a parental duty to abort a deformed unborn fetus will then be examined in light of the constitutional issues that necessarily define its parameters. This analysis will conclude that imposition of a parental duty to abort is unwarranted, both because of the indeterminate character of the child's right not to be born and because of the extreme intrusion such a duty would create upon parental constitutional rights of privacy, religion, and family autonomy. In addition, this Note will posit some potential practical difficulties militating against recognition of the child-parent wrongful life cause of action.

ISOLATING THE TRUE TORT OF "WRONGFUL LIFE"

The term "wrongful life" has been used broadly to describe an array of actions by parent and child concerning the contraception-pregnancy-birth process. The various actions now subsumed under the "wrongful life" label may best be analyzed by discussion of three categories: wrongful birth, wrongful status, and wrongful life, as distinguished by the disparate duties imposed and damages sought in each.

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10. Turpin v. Sortini, No. S.F. 24319, slip op. at 30-31.
11. Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d at 829, 165 Cal. Rptr. at 488.
12. *See* CAL. CIV. CODE § 43.6 (West 1982) which reads in full:

(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.

(b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.

(c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.

The Duty Imposed

Wrongful Birth. Suits brought by parents[13] against a doctor or other medical entity following the birth of an unwanted child may be described as "wrongful birth" actions. The basis of the wrongful birth suit is the defendant's interference[14] with informed parental decisionmaking concerning the initiation and continuation of pregnancy and subsequent birth.

Wrongful birth actions may be based upon negligent conduct by the defendant either before or after conception. Negligence need not occur at or even near the time of conception in order to be actionable.[15] Actions for wrongful birth based upon preconception negligence have arisen in a variety of situations. For example, medical professionals have been held liable for negligently dispensing tranquilizers instead of birth control pills,[16] failure to perform effective sterilization,[17] and failure to test for

13. The mother, depending upon the circumstances, is often the sole parental plaintiff. *See* Stills v. Gratton, 55 Cal. App. 3d 698, 701-03, 127 Cal. Rptr. 652, 653-55 (1976) (illegitimate child born to single parent after failed abortion); Debora S. v. Sapega, 56 A. D. 2d 841, 841, 392 N.Y.S.2d 79, 79 (1977) (rape victim bore unwanted child after physician's failure to diagnose pregnancy). Fathers have also been wrongful birth plaintiffs, however. *See* White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981) (court recognized both father's derivative action for loss of consortium if wife recovered and father's separate right to recover for his own emotional suffering from his wife's pregnancy if defendant's malicious conduct shown); Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 696 (E.D. Penn. 1978) (damages may be awarded to mother and father for bringing up a child born as result of negligent genetic testing); Berman v. Allan, 80 N.J. 421, 433-34, 404 A.2d 8, 14-15 (1979) (father's derivative claim for emotional damages recognized for deprivation of opportunity to accept or reject parenthood of monogoloid child); Karlsons v. Guerinot, 57 A. D. 2d 73, 84, 394 N.Y.S.2d 933, 937 (1977) (father and mother of mongoloid child may be awarded damages for negligent affliction of pain, suffering, and emotional distress caused by physician's failure to disclose risks of deformity).

Occasionally, the parents' cause of action has been joined by an ultimately unsuccessful claim by siblings of the unwanted child alleging diminished love and affection or financial resources. *See* Aronoff v. Snider, 292 So.2d 418, 419 (Fla. App. 1974); *cf.* White v. United States, 510 F. Supp. 146, 148 (D. Kan. 1981) (siblings unsuccessfully sought damages for "interference with established family relationships"); Ladies Center of Clearwater Inc. v. Reno, 341 So. 2d 543, 544 (Fla. App. 1977) (defendant in a wrongful birth suit brought by a mother after a failed abortion brought a third-party complaint against the unwed father for failure to employ contraception; and the court found that "illegal fornication has not yet been elevated to a tort in the eyes of the law").

14. Wrongful birth actions are often based in negligence. *See, e.g.*, Public Health Trust v. Brown, 388 So. 2d 1084 (Fla. App. 1980); Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980); Coleman v. Garrison, 327 A.2d 757, 760 (Del. 1974); Debora S. v. Sapega, 56 A.D.2d 841, 841, 392 N.Y.S.2d 79, 79 (1977); Howard v. Lecher, 53 A.D.2d 420, 420, 386 N.Y.S.2d 460, 461 (1976). Actions have also been filed on other theories, alone or in combination with negligence. *See* Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W.Va. 1967) (alleging negligence and breach of warranty); Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 356, 428 A.2d 1366, 1367 (1981) (alleging negligence and breach of express and implied warranties); Karlsons v. Guerinot, 57 A.D.2d 73, 75, 394 N.Y.S.2d 933, 934 (1977) (alleging eleven causes of action, including negligence, breach of contract, malpractice, and lack of informed consent); Rogala v. Silva, 16 Ill. App. 3d 63, 64, 305 N.E.2d 571, 572 (1973) (alleging breach of warranty); Custodio v. Bauer, 251 Cal. App. 2d 303, 308, 59 Cal. Rptr. 463, 466 (1967) (alleging breach of contract, negligence, and fraud); Ball v. Mudge, 64 Wash. 2d 247, 247, 391 P.2d 201, 202 (1964) (alleging negligence and breach of warranty).

15. In Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977), a cause of action was sustained by a woman negligently given an improper bloodtype transfusion which caused a deformity in a child conceived and born thirteen years later. *Id.* at 359, 367 N.E.2d at 1256. For an analysis of the *Renslow* case, see Note, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1435-39.

16. *See* Troppi v. Scarf, 31 Mich. App. 240, 243, 187 N.W.2d 511, 512 (1971).

17. *See* Harten v. Coons, 502 F.2d 1363, 1364 (10th Cir. 1974) (failed vasectomy); LaPoint v.

genetic defects[18] prior to conception.

Actions for wrongful birth based upon postconception negligence[19] have been filed against medical professionals for failure to conduct genetic screening[20] or amniocentesis,[21] or failure to properly interpret[22] or report[23] test results when there was an apparent danger of birth defects. Suits have also arisen for failure to detect a pregnancy after rape[24] or after birth control use[25] until so late that abortion had become dangerous to the mother's health. Finally, actions have been filed for failure to successfully complete an abortion.[26]

Wrongful Status. A second category of actions, though initiating the term "wrongful life,"[27] is more appropriately titled "wrongful status" ac-

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Shirley, 409 F. Supp. 118, 119 (W.D. Tex. 1976) (failed tubal ligation); Clegg v. Chase, 89 Misc. 2d 510, 511, 391 N.Y.S.2d 966, 967 (1977) (failed sterilization). For an extensive compilation of wrongful sterilization and other wrongful birth actions, *see* Trotzig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 14 FAM. L.Q. 15, 16-18 (1980). *See generally* Note, *Sterilization and Family Planning: The Physician's Liability*, 56 GEO. L.J. 976 (1968); Note, *Remedy for the Reluctant Parent: Physicians' Liability for the Post-Sterilization Conception and Birth of Unplanned Children*, 27 U. FLA. L. REV. 158 (1975); Note, *The Birth of a Child Following an Ineffective Sterilization Operation as Legal Damage*, 9 UTAH L. REV. 808 (1965).

18. Karlsons v. Guerinot, 57 A.D.2d 73, 75, 394 N.Y.S.2d 933, 934 (1977) (plaintiff gave birth earlier to a deformed child, but was subsequently neither tested for nor advised of possible risks involved in subsequent pregnancy).

19. An allegation by parents that they would not have proceeded with the pregnancy had they been advised of the possibility of genetic deformity is essential to prove causation in the wrongful birth tort. *See* Tortzig, *supra* note 17, at 23.

20. Karlsons v. Guerinot, 57 A.D.2d 73, 74, 394 N.Y.S.2d 933, 934 (1977) (failure to warn older mother of possibility of Down's Syndrome, followed by birth of mongoloid child).

21. Johnson v. Yeshiva Univ., 53 A.D.2d 523, 384 N.Y.S.2d 455 (1976), *aff'd*, 42 N.Y.2d 818, 820, 364 N.E.2d 1340, 1341, 396 N.Y.S.2d 647, 648 (1977) (failure to advise of and perform amniocentesis, followed by birth of deformed child).

Amniocentesis is a procedure by which amniotic fluid is withdrawn by syringe from the sac surrounding the fetus. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 70 (25th ed. 1974). Analysis of the fluid provides information concerning certain genetic diseases, such as Tay-Sachs or Down's Syndrome. *See* Trotzig, *supra* note 17, at 25. For an excellent discussion of the problems of the physician in determining whether to conduct amniocentesis and to divulge its results, *see* Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 671-73 (1979).

22. *See* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 693-94 (E.D. Pa. 1978) (parents advised after amniocentesis of no possibility of Tay-Sachs disease); Smith v. United States, 392 F. Supp. 654, 655 (N.D. Ohio 1975) (failure to diagnose rubella); Jacobs v. Theimer, 519 S.W.2d 846, 847 (Tex. 1975) (failure to diagnose rubella); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 769-70, 233 N.W.2d 372, 373 (1975) (failure to diagnose rubella). *See generally* Note, *Father and Mother Know Best: Defining the Liability of Physicians for Inadequate Genetic Counseling*, 87 YALE L.J. 1488 (1978).

23. Robak v. United States, 658 F.2d 471, 473 (7th Cir. 1981) (failure to inform pregnant mother of positive rubella test followed by birth of deformed child).

24. Debora S. v. Sapega, 56 A.D.2d 841, 841, 392 N.Y.S.2d 79, 79 (1977) (15-year-old rape victim bore unwanted child as result of physician's negligent failure to diagnose pregnancy).

25. Chapman v. Schultz, 86 Misc. 2d 543, 544, 383 N.Y.S.2d 512, 513 (1976).

26. Stills v. Gratton, 55 Cal. App. 3d 698, 701-03, 127 Cal. Rptr. 652, 653-55 (1976) (illegitimate child born after failed abortion); Ladies Center of Clearwater Inc. v. Reno, 341 So. 2d 543, 543 (Fla. App. 1977) (illegitimate child born after failed abortion); Speck v. Finegold, 268 Pa. Super. Ct. 342, 349, 408 A.2d 496, 500 (1979) (deformed child born after failed sterilization, failed abortion, and repeated assurances that abortion was successful).

27. The term "wrongful life" was first used in an unsuccessful suit by a child against his parents for his illegitimate birth in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

tions.[28] The typical case involves suit by a child against his parents alleging damages for his illegitimacy.[29] Although illegitimacy is the alleged harm suffered, the plaintiffs seek recognition not merely of a right to have illegitimacy itself prevented, but also of a right not to be born at all.[30] This characterization has resulted in both the "wrongful life" misnomer and unanimous judicial rejection of the cause of action,[31] which have often, been carried over into the third category of actions denominated "true" wrongful life suits.

Wrongful Life. An action brought by a severely deformed child against a third party[32] whose negligence resulted in failure by the child's parents to prevent conception or to obtain an abortion is a "true" wrongful life suit.[33] The negligent conduct is basically the same as that alleged in the wrongful birth suit, but is asserted by the child himself instead of by the parents.[34] Until the recent California decisions in *Curlender* and *Turpin*, wrongful life suits were uniformly denied.

The Damages Sought

Wrongful Birth. Recognition of the duty imposed in the various wrongful life causes of action is often integrally related to the measure of damages which the court is asked to assess. In a wrongful birth suit, the court may focus on assessing readily measurable damages sought by parents for a medical professional's negligence. Mothers in wrongful birth actions have sought damages for medical expenses,[35] pain and suffering during pregnancy and birth,[36] and loss of income.[37] Typical damages

28. *See* Note, *Wrongful Life and a Fundamental Right to be Born Healthy: Park v. Chessin; Becker v. Schwartz*, 27 BUFFALO L. REV. 537, 538 (1978).

29. *See, e.g.*, Pinkney v. Pinkney, 198 So. 2d 52, 53 (Fla. App. 1967), *rev'd on other grounds*, Brown v. Bray, 300 So.2d 669 (Fla. 1974); Zepeda v. Zepeda, 41 Ill. App. 2d 240, 245, 190 N.E.2d 849, 851 (1963), *cert. denied*, 379 U.S. 945 (1964); Slawek v. Stroh, 62 Wis.2d 295, 301, 215 N.W.2d 9, 21 (1974); *cf.* Williams v. State, 18 N.Y.2d 481, 482, 223 N.E.2d 343, 343, 276 N.Y.S.2d 885, 886 (1966) (suit by child against the state for negligently failing to prevent rape of mother in state mental institution).

30. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 258, 190 N.E.2d 849, 857 (1963), *cert. denied*, 379 U.S. 945 (1964) (child protested "not only the act which caused him to be born, but birth itself").

31. *See* cases cited in notes 27 & 29 *supra*.

32. The phrase "third party" in this context will be used to describe someone other than the child's parents, usually a doctor or other medical entity.

33. See LaPoint v. Shirley, 409 F. Supp. 118 (W.D. Tex. 1976); 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 (1968), *rev'd*, 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); Speck v. Finegold, 286 Pa. Super. Ct. 342, 408 A.2d 496 (1979).

34. At least one court, while adhering to traditional "wrongful life" terminology, purports that the action is basically nothing more than a "familiar medical or professional malpractice action." *See* Turpin v. Sortini, No. S.F. 24319, slip op. at 12 (Cal. May 3, 1982).

35. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 244, 187 N.W.2d 511, 513 (1971); Karlsons v. Guerinot, 57 A.D.2d 73, 75, 394 N.Y.S.2d 933, 934 (1977); Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 364, 428 A.2d 1366, 1371 (1981); Ball v. Mudge, 64 Wash. 2d 247, 248, 391 P.2d 201, 203 (1964).

36. *See, e.g.*, Troppi v. Scarf, 31 Mich. App. 240, 244, 187 N.W.2d 511, 513 (1971); Karlsons v. Guerinot, 57 A.D.2d 73, 75, 399 N.Y.S.2d 933, 937 (1977); Clegg v. Chase, 89 Misc. 2d 510, 511, 391 N.Y.S.2d 966, 967 (1977); Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 361, 428 A.2d 1366, 1371 (1981).

37. Clegg v. Chase, 89 Misc. 2d 510, 511, 391 N.Y.S.2d 966, 467 (1977); Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 364, 428 A.2d 1366, 1371 (1981).

sought by fathers include loss of consortium[38] and mental anguish[39] occasioned by the birth.

Where wrongful birth plaintiffs seek expenses for rearing the child, assessment of damages poses greater conceptual difficulty. Courts have questioned whether such damages may be awarded,[40] or even whether the wrongful birth cause of action may be maintained at all where such damages are claimed.[41] The deciding factor is often whether the child is born healthy or with a physical or mental impairment.[42]

Where an unwanted child is born unimpaired, damages for childrearing have sometimes been denied.[43] Such denials evidence judicial reluctance to shift the heavy financial burden of raising the child to the defendant while the parents enjoy the child's love, affection, and companionship.[44] A related theory is that joy and satisfaction conferred by the healthy child negate[45] or at least diminish possible parental recovery for costs of raising the child.[46] On the other hand, in the wrongful birth suit in which the child is born impaired in some way, the court may be more likely to award damages for the special costs[47] or even institutionalization[48] necessary to rear an impaired child. In addition, parents have

38. *See* White v. United States, 510 F. Supp. 146, 149 (D. Kan. 1981) (father could recover for loss of consortium if spouse recovered, and for emotional suffering, but only upon proof of defendant's malicious conduct); Custodio v. Bauer, 251 Cal. App. 2d 303, 309, 59 Cal. Rptr. 463, 467 (1967) (damages sought by father for injury to his "emotional and nervous system"); Ball v. Mudge, 64 Wash. 2d 247, 248, 391 P.2d 201, 203 (1964) (damages sought by father for loss of consortium).

39. Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 364, 428 A.2d 1366, 1371 (1981) (mental anguish claim by both parents of disabled child denied).

40. *See* Jacobs v. Theimer, 519 S.W.2d 846 (Tex. 1975) (limiting damages for raising the child to extra expenses occasioned by congenital defects); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 342 (1975) (limiting damages for raising child to extra expenses occasioned by congenital defects).

41. *See* Sorkin v. Lee, 78 A.D.2d 180, 182, 184, 434 N.Y.S.2d 300, 301, 303 (1980) (denying costs for raising healthy child both because such an award would penalize the defendant and because plaintiffs apparently failed to demonstrate mitigation of damages by failing to plead that they would otherwise have obtained an abortion); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518-19, 219 N.W.2d 242, 245 (1974) (denying costs of raising the child as against public policy).

42. See text & notes 44-49 *infra*.

43. *See* Public Health Trust v. Brown, 388 So.2d 1084, 1085 (Fla. App. 1980); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518-20, 219 N.W.2d 242, 245-46 (1974). *But see* Robak v. United States, 658 F.2d 471, 478 (7th Cir. 1981) (refusing to draw a distinction between healthy and unhealthy children for purposes of determining damages for expenses of childrearing); Mason v. Western Penn. Hosp., 286 Pa. Super. Ct. 354, 364, 428 A.2d 1366, 1371 (1981).

44. *See* P. v. Portadin, 179 N.J. Super. 465, 471, 432 A.2d 556, 558-59 (1981); Rieck v. Medical Protective Co., 64 Wis. 2d 514, 518-19, 219 N.W.2d 242, 245 (1974).

45. Berman v. Allen, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979); Terrell v. Garcia, 496 S.W.2d 124, 128 (Tex. Civ. App. 1973); Ball v. Mudge, 64 Wash. 2d 247, 250, 391 P.2d 201, 204 (1964).

46. Karlsons v. Guerinot, 57 A.D.2d 73, 79, 394 N.Y.S.2d 933, 937 (1977). For a discussion of cases in which damages were offset by the value of the child in wrongful birth actions, *see* Capron, *supra* note 21, at 638-39.

47. *See* Bishop v. Byrne, 265 F. Supp. 460, 463 (S.D. W.Va. 1967) (dicta); Cox v. Stretton, 77 Misc. 2d 155, 161, 352 N.Y.S.2d 834, 842 (1974); Ziemba v. Sternberg, 45 A.D.2d 230, 231, 357 N.Y.S.2d 265, 268 (1972).

48. *See* Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (parents' cause of action sustained for expenses necessary for care and treatment of impaired child born after mother had contracted rubella during pregnancy and was not warned by physicians of risks to child). It is estimated that the average cost of institutional care for a child is $35,000 per year. Over the

sought damages for the special trauma inherent in giving birth to a deformed child.[49]

In assessing the costs of childrearing, a difficult policy and measurement of damages assessment is required which most courts are extremely reluctant to make—a comparison of the value of life in an impaired state with the value of no life at all.[50] Though the request for damages in a wrongful birth suit is not framed in these terms, the assessment of damages for costs of raising the child necessarily implies the conclusion that nonlife is more desirable in some circumstances. This difficulty, analogous to those in wrongful life and wrongful status suits, in which assessment difficulties are more overtly recognized, may explain the variance between courts in awarding these damages in wrongful birth suits.

Wrongful Status. The damages sought in wrongful status actions present substantial practical and conceptual difficulties. The perceived impossibility of assessing damages based upon the value of impaired life versus nonlife seems to be the foremost concern.[51] Though the plaintiff in the wrongful status action purportedly suffers from mere illegitimacy rather than physically impaired life, the courts in such actions have nevertheless struggled with difficult questions concerning the relative worth of life versus nonlife, invariably resolving that illegitimate life is more valuable.[52] Thus, the Illinois court in *Zepeda v. Zepeda*,[53] the leading wrongful status case, felt compelled to reject the radical concept that life itself can be wrongful, and as a consequence also rejected the wrongful status cause of action.[54]

Wrongful Life. The wrongful life label reflects the decision that courts are asked to make in such suits—whether a duty should be imposed which recognizes that impaired life is worth less than no life at all. Until recently, courts unanimously rejected the true wrongful life cause of action.[55] The basis for judicial nonrecognition usually lies in the difficulty of assessing damages and rejection of the policy implied by the court's merely

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lifetime of a child, the cost may be as high as one quarter of a million dollars. *See* A. HOLDER, LEGAL ISSUES IN PEDIATRICS AND ADOLESCENT MEDICINE 42 (1977).

49. Karlsons v. Guerinot, 57 A.D.2d 73, 75, 394 N.Y.S.2d 933, 934 (1977). In *Karlsons*, physicians knew the mother had previously given birth to a child with a defect and that she was in high-risk age bracket for giving birth to a mongoloid child. *Id.* Nevertheless, the defendant failed to advise the parents of the possibility of a defect or to order genetic testing. *Id.* The parents' emotional suffering was perceived by the court to be a direct injury arising from the physician's failure to warn the parents. *Id.* at 79, 394 N.Y.S.2d at 936-37.

50. See discussion of such damages at text & notes 55-62 *infra*.

51. *See* Williams v. State, 46 Misc. 2d 824, 260 N.Y.S.2d 953 (1965), *rev'd*, 25 A.D.2d 907, 908, 269 N.Y.S.2d 786, 787 (1966), *aff'd*, 18 N.Y.2d 481, 223 N.E.2d 343, 276 N.Y.S.2d 886 (1966); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 436, 296 N.Y.S.2d 41, 46 (1968), *aff'd*, 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).

52. *See* Zepeda v. Zepeda, 41 Ill. App. 2d 240, 262, 190 N.E.2d 849, 851 (1963), *cert. denied*, 379 U.S. 945 (1964); Williams v. State, 18 N.Y.2d 481, 484, 223 N.E.2d 343, 344, 276 N.Y.S.2d 885, 887 (1966); Slawek v. Stroh, 62 Wis. 2d 295, 317-18, 215 N.W.2d 9, 21-22 (1974).

53. 41 Ill. App. 2d 240, 190 N.E.2d 849 (1963), *cert. denied*, 379 U.S. 945 (1964).

54. *Id.* at 262-63, 190 N.E.2d at 859.

55. See cases cited in note 33 *supra*; notes 57, 61 & 171-72 *infra*.

attempting to do so.[56] Another apparent difficulty lies in establishing the causal link between the defendant and the genetic defect in the child. Since generally the defendant was not responsible for creating the genetic defect itself, to assign damages based on the defect either imputes an erroneous causal link or simply assumes that the special costs attendant to the defect are the most logical means of computing inherently unmeasurable damages.[57]

The landmark New Jersey decision in *Gleitman v. Cosgrove*[58] illustrates typical judicial response to the damages assessment question in wrongful life actions. In *Gleitman*, a doctor allegedly informed a pregnant mother who contracted German measles that her child would not be affected by the disease.[59] The child was born severely deformed, and sued the doctor in negligence for failure to give his mother information that would have resulted in her obtaining an abortion.[60] The court denied the child's claim for wrongful life because of the impossibility of measuring "the difference between his life with defects against the utter void of nonexistence . . . ."[61] In addition, the *Gleitman* court felt that the mere attempt to assess damages might be the first step in sanctioning an Orwellian society of planned procreation, which could regulate human genetics like cattle breeding.[62] This and similar sentiments have resulted in judicial rejection of the wrongful life suit wherever it has been attempted, with the exception of California.[63]

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56. *See* Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 693 (1967).

57. *See* Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 769, 233 N.W.2d 372, 374-75 (1975). In *Dumer*, a wrongful life action by the child was dismissed primarily because of the impossibility of measuring damages. *Id.* at 771, 233 N.W.2d at 375-76. Yet even though the court recognized that the physician's negligence was not the source of the child's deformity, it acknowledged the possibility of a damages award in the parents' cause of action for the extra costs of raising the child resulting from the deformity. *Id.* at 776, 233 N.W.2d at 377. The majority opinion did not deal with this apparent contradiction. The dissenting opinion, however, recognized the inconsistency and therefore would have denied damages to the parents as well as to the child. *See id.* at 779-82, 233 N.W.2d at 377-80 (Hansen, J., dissenting), *citing* Gleitman v. Cosgrove, 49 N.J. 22, 31, 227 A.2d 689, 693 (1967). For more complete discussion of damages in the wrongful birth-wrongful life context, *see generally* Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Comment, *Busting the Blessing Balloon: Liability for the Birth of an Unplanned Child*, 39 ALB. L. REV. 221 (1975); Note, *Damages—The Not So "Blessed Event"*, 46 N.C.L. REV. 948 (1968); Note, *Unplanned Parenthood and the Benefit Rule*, 8 WAKE FOREST L. REV. 159 (1971).

58. 49 N.J. 22, 227 A.2d 689 (1967).

59. *Id.* at 24, 227 A.2d at 690.

60. *Id.* at 26, 227 A.2d at 692. The case was decided before Roe v. Wade, 410 U.S. 113 (1973), which first recognized a woman's right to choose to have an abortion. Although the trial court interpreted a New Jersey statute to mean that abortion could be procured only to save the life of the mother, 49 N.J. at 26, 227 A.2d at 691, the appellate court assumed for purposes of reviewing of the wrongful life claim that an abortion could be obtained by choice without criminal sanctions. *Id.* at 27, 227 A.2d at 691.

61. *Id.* at 28, 227 A.2d at 692. The court also rejected the parents' claim for emotional damages resulting from denial of an informed opportunity to abort the child. *Id.* at 31, 227 A.2d at 693. The court determined that the child would almost certainly prefer life in any condition to no life at all. *Id.* at 30, 227 A.2d at 693. The *Gleitman* decision was partially overruled in Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979), in which the New Jersey Supreme Court acknowledged the feasibility of computing damages, but retained its aversion to endorsing a public policy that non-life could ever be more precious than life. *Id.* at 429-30, 404 A.2d at 12-13.

62. 49 N.J. at 30, 227 A.2d at 693.

63. *Compare* Gildiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692, 694 (E.D. Pa. 1978); Berman v. Allan, 80 N.J. 421, 432, 404 A.2d 8, 12 (1979); Speck v. Finegold, 286 Pa. Super.

Child v. Parent Wrongful Life Actions

In light of the foregoing history of nonrecognition of the wrongful life suit, the dictum advanced by the California Court of Appeals in *Curlender v. Bio-Science Laboratories*[64] was an even more radical step into untrammeled territory than was the decision itself sustaining a third-party wrongful life suit. The *Curlender* court wrote:

> If a case arose where, despite due care by the medical profession in transmitting the necessary warnings, parents made a conscious choice to proceed with a pregnancy, with full knowledge that a seriously impaired infant would be born, that conscious choice would provide an intervening act of proximate cause to preclude liability insofar as defendants other than the parents were concerned. Under such circumstances, [the court can] see no sound public policy which should protect those parents from being answerable for the pain, suffering and misery which they have wrought upon their offspring.[65]

Although the California legislature in the wake of *Curlender* quickly blocked recognition of the child-parent wrongful life action,[66] the unique tort and constitutional issues raised warrant practical and philosophical exploration through avenues of both traditional and innovative legal theory. In addition, discussion of the practicality and propriety of recognizing the child-parent wrongful life suit remains for perusal.

PRELIMINARY CONSIDERATIONS IN BRINGING THE CHILD V. PARENT WRONGFUL LIFE SUIT

The Doctrine of Intrafamily Immunity

The first obstacle posed to a wrongful life suit by a child against his parent is encountered in the doctrine of intrafamily immunity. While there was no formal tort immunity between parent and child at common law, it burgeoned in America after its introduction in *Hewellette v. George*[67] in 1891. Citing no authority, the *Hewellette* court concluded that sound public policy forbids the disruption of families occasioned by judicial recognition of a child's tort suit against his parents.[68] For the next seventy years, nearly all American jurisdictions followed the *Hewellette*

Ct. 342, 364, 408 A.2d 496, 508 (1979) *with* Turpin v. Sortini, No. S.F. 24319 (Cal. May 3, 1982). *Turpin* avoided emotive language like that in *Gleitman*, and upheld the wrongful life cause of action. *See* slip op. at 30-31. It averted the life-nonlife assessment difficulty by denying recovery of general damages, and allowing only the easily assessable special damages accrued in providing extra care for the impaired child. *See id. See also* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 821, 830, 165 Cal. Rptr. 477, 489 (1981), *rev'd in part*, Turpin v. Sortini, No. S.F. 24319 (Cal. May 3, 1982) (recognizing a cause of action for wrongful life with limited general damages based on the shortened life expectancy of the child, special damages, and punitive damages).

64. 106 Cal. App. 3d 821, 165 Cal. Rptr. 477 (1981).

65. *Id.* at 829, 165 Cal. Rptr. at 488.

66. See note 12 *supra*.

67. 68 Miss. 703, 9 So. 885 (1891). In *Hewellette*, the court held that a child could not recover against her mother for wrongfully committing her to an asylum after she had been living in her mother's house in a parent-child relationship. *See id.* at 711, 9 So. at 887.

68. *See id.* Unlike actions for personal torts, suits concerning property rights by child against parent have always been freely recognized. *See, e.g.*, Preston v. Preston, 102 Conn. 96, 128 A. 292

rule.[69]

Courts have posed various reasons for barring a child from suing his parents.[70] The most commonly cited justifications are preservation of family unity and domestic serenity[71] and recognition of the need for parental discipline.[72] The underlying principle in such cases is that an "uncompensated tort makes for peace in the home."[73] The inherent flaw in this reasoning, however, is that once the tort has been committed and family members are willing to sue, family tranquility has probably already been interrupted.[74]

Another justification urged by courts in support of intrafamily immunity is the fear that parent and child might collude to defraud insurance companies.[75] This fear is logically contradictory to the disruption of family unity theory in that it envisions parent and child working together against insurance companies instead of feuding against each other. Absent insurance, it is also feared that a large recovery by one child might deplete the "family exchequer" so that family obligations to other children could not be met.[76]

Jurisdictions have accorded varying weight to these considerations, resulting in a broad spectrum of degree and interpretation of the intrafamily immunity doctrine. The probability of successfully instituting a child-parent wrongful life suit would thus vary according to the state of intrafamilial immunity in the jurisdiction in which it was brought.

A. *Analysis of Wrongful Life in Complete Immunity Jurisdictions*

While there has been a definite trend toward abrogation of intrafamily immunity,[77] half of the states have ignored heavy criticism[78] and continue to cling to the *Hewellette* doctrine. In these states, the child-parent wrongful life suit as the vehicle to abolition of immunity is a minimal

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(1925); Lamb v. Lamb, 146 N.Y. 317, 41 N.E. 26 (1895); Roberts v. Roberts, 145 Eng. Rep. 399 (1657).

Tort actions between minor brothers and sisters have also been allowed. *See* Overlock v. Ruedemann, 147 Conn. 649, 165 A.2d 335 (1960); Midkiff v. Midkiff, 201 Va. 829, 113 S.E.2d 875 (1960).

69. Brennecke v. Kilpatrick, 336 S.W.2d 68, 71 (Mo. 1960) (discussing the *Hewellette* rule and its following).

70. *See generally* Note, *Parental Liability for Prenatal Injury*, 14 COLUM. J. L. & SOC. PROBS. 47, 61-64 (1978), for discussion and rejection of eight major justifications for retention of intrafamily immunity.

71. *See, e.g.*, Barlow v. Iblings, 261 Iowa 713, 718, 156 N.W.2d 105, 109 (1968); Gilliken v. Burbage, 263 N.C. 317, 321, 139 S.E.2d 753, 757 (1965).

72. Emery v. Emery, 45 Cal. 2d 421, 429, 289 P.2d 218, 223 (1955).

73. Brennecke v. Kilpatrick, 336 S.W.2d 68, 71 (Mo. 1960), *quoting* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 101, at 677 (2d ed. 1955).

74. *See, e.g.*, Petersen v. Honolulu, 51 Hawaii 484, 488, 462 P.2d 1007, 1009 (1969); Sorensen v. Sorensen, 369 Mass. 350, 360, 339 N.E.2d 907, 913 (1975); Signs v. Signs, 156 Ohio St. 566, 576, 103 N.E.2d 743, 748 (1952).

75. Vaughan v. Vaughan, 316 N.E.2d 455, 456 (Ind. App. 1974); Barlow v. Iblings, 261 Iowa 713, 722, 156 N.W.2d 105, 110 (1968); Parks v. Parks, 390 Pa. 287, 296, 135 A.2d 65, 71 (1957).

76. *See* Barlow v. Iblings, 261 Iowa 713, 722, 156 N.W.2d 105, 110 (1968); Roller v. Roller, 37 Wash. 242, 245, 79 P. 788, 789 (1905).

77. See text & note 107 *infra*.

78. *See* criticism detailed in Note, *supra* note 70, at 61-64.

possibility. Nevertheless, certain arguments unique to the child-parent wrongful life suit may be persuasive in overcoming traditional arguments in favor of immunity. These arguments may be highlighted by an examination of several situations in which a wrongful life suit might be brought. In addition, such arguments may also provide persuasive policy justifications for or against allowing suit in jurisdictions where immunity has been abrogated.

Child v. Insurance Co. The most likely manner in which suit might be brought would be at the behest of insured parents of a deformed child.[79] If parents had no liability insurance, it is highly unlikely that they would urge appointment of a guardian ad litem for the child in order to pursue a lawsuit against themselves.[80] On the other hand, if parents were insured, they would likely favor being sued in order to realize the benefits under their insurance policy. In this case, family harmony would be enhanced rather than disrupted because an insurance recovery would ease the financial drain on other family members[81] by increasing rather than depleting the family exchequer.

It is precisely such willingness to sue, however, that resurrects the spectre of collusion[82] engendered by courts which refuse to abolish parent-child immunity. The insurance dilemma is further complicated because the facts giving rise to the child-parent wrongful life cause of action are not those typically embodied in risks of injury against which insurance seeks to protect. Unlike the typical child-parent personal injury case in which the accident is an unanticipated event, giving birth to a child with a known high risk of genetic defect involves a more calculated, intentional decision. The possibilities for collusion may thus be enhanced, at least where parents value having a deformed child over no child at all, but who are unwilling to bear the financial cost themselves.

Father v. Mother. A second possibility for bringing suit might occur when the father favored abortion over the objections of the mother, who consequently permitted the child to be born. In this situation, the father might act as the child's guardian to bring suit against the mother,[83] once

79. Assuming the availability of insurance against wrongful life, it would likely be desired primarily by those with known high-risk genetic factors whose personal or religious beliefs prohibited abortion. If insurance companies permitted purchase of policies by such parents the costs of insurance could easily skyrocket beyond reach of both parents with known and with unknown genetic risks.

Alternatively, insurance companies might deny coverage to high-risk parents, virtually guaranteeing that those who needed insurance most could not obtain it. Although the presence or absence of insurance should not necessarily be determinative of the existence of a wrongful life cause of action, it may well be a crucial consideration in the decision to bring suit.

80. *See* Hastings v. Hastings, 33 N.J. 247, 252, 163 A.2d 147, 150 (1960) ("we all know that realistically such [child v. parent tort] actions are never thought of, let alone commenced, unless there is an insurance policy . . .").

81. *Cf.* Goller v. White, 20 Wis. 2d 402, 412, 122 N.W.2d 193, 197 (1963) (citing the existence of insurance coverage as one justification for abolishing intrafamily immunity); Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 444, 386 A.2d 442, 443 (Super. Ct. App. Div. 1978) (citing as "universal" the rejection of the insurance collusion argument in parent-child immunity cases).

82. See text & note 75 *supra*.

83. *See* Williams v. Williams, 369 A.2d 669, 670 (Del. Super. Ct. 1976) (father acted as next

again engendering potential family disruption and even interference with constitutionally guaranteed decision-making by the mother.[84] Parental collusion against the insurance carrier is possible in this situation as well.[85]

Independent Guardian v. Parents. Finally, without insurance recovery incentive to institute litigation, parents might find themselves involved in a suit brought against them independently by a nonfamily next friend or guardian for the child. This circumstance might occur as a result of parental neglect of their duty to support the child.[86] If the child were severely or even marginally handicapped, for example, the cost of proper care at home might be prohibitive to many parents. Cost of institutionalization and professional care would be even higher. Typically, even parents who put their child up for adoption would have the continuing legal duty to pay such costs,[87] but might find them to be prohibitive. Insured parents in these unintentional neglect situations would, if they had not already initiated suit themselves, welcome a wrongful life action brought by an independent guardian in order to meet their financial obligations. In these circumstances, fears of disruption of family harmony and depletion of the exchequer would be inappropriate.[88] In addition, where suit was initiated by a third party on behalf of the child, the possibility of collusion[89] is also minimized.

A neglect or parental termination situation could also arise as a result of intentional parental conduct. An extreme situation would be where parents purposely failed to care for a severely impaired child at home. Lack of care could be motivated by a desire to relieve the child of the burden of his existence,[90] or the parents of the burden of caring for him. Alternatively, parents of the child who is institutionalized and perhaps awaiting adoption might refuse to pay for the child's care despite their ability to afford it.[91] In these circumstances, a guardian might seize the opportunity

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friend for his children in a suit against their mother); Silesky v. Kelman, 281 Minn. 431, 431-32, 161 N.W.2d 631, 632 (1968) (father acted as next friend for his children in a suit against their mother). Such a suit might even be brought by a father in retaliation for a paternity suit filed against him by the mother.

84. See text & notes 196-204 *infra*.

85. See text & note 75 *supra*.

86. *See* ARIZ. REV. STAT. ANN. §§ 8-201(11) & 8-241(A)(1) (Supp. 1981-82) (defining situations in which a child becomes "dependent" and thus subject to the jurisdiction of and disposition by the juvenile court); ARIZ. REV. STAT. ANN. § 8-533(A) (Supp. 1981-82) (permitting a petition for involuntary termination to be filed by any person or agency with a legitimate interest in the welfare of the child); ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1981-82) (creating a presumption of abandonment where the child is left without support or contact with the parent for six months or longer).

87. *See* ARIZ. REV. STAT. ANN. § 8-243 (1974) (requiring parents to pay costs of institutionalization if they are able).

88. See text & notes 71-74, 76 *supra*.

89. See text & note 75 *supra*. Suit against an uninsured, destitute parent would be ineffectual and thus unlikely.

90. *Cf. In re* Quinlan, 70 N.J. 10, 41, 355 A.2d 647, 664 (1976) (permitting parent as guardian of hospitalized child to direct termination of life support systems of child in persistent vegetative state). *But see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-11, at 936 n.8 (interpreting *Quinlan* as not extending to permit acceleration of "death that would clearly *not* be imminent if ordinary care were provided").

91. Motivation to pay institutional costs would likely be particularly low in this situation.

to recover a lump sum from the parents to create a fund to pay both present and future costs of the child's care.

In the foregoing situations, the parental relationship may essentially be deemed abandoned under typical statutory definition.[92] Without an ongoing family relationship, intrafamily immunity should pose no bar to institution of the wrongful life suit. These circumstances present probably the best case for recognizing "child v. parent"[93] wrongful life suits since the cause of action presents a mechanism to insure availability of funds to cover institutional costs for the child's care. The state and the taxpayer are thereby relieved of the burden of both repeated litigation for nonpayment and the costs of ongoing care.[94] In addition, such suits would encourage parental responsibility in decisionmaking by forcing them to face the financial consequences of their negligent or intentional[95] decision not to abort. These arguments concerning abolition of immunity may also serve as policy justifications where immunity has already been abolished in whole or in part.

B. *Analysis of Wrongful Life in* Goller *Jurisdictions*

The *Hewellette* doctrine was first abrogated in 1963 in *Goller v. White*.[96] In *Goller*, a twelve-year-old boy was injured while riding on a tractor operated by his foster parent.[97] The boy sued his foster father for negligence in failing to warn him about some protruding bolts and in failing to take him to the hospital promptly after the injury.[98] The court recognized the cause of action,[99] relying by analogy on judicial abrogation of husband-wife immunity,[100] child-parent suits in property and contract law actions,[101] existing exceptions to the immunity rule,[102] and the availability

92. ARIZ. REV. STAT. ANN. § 8-546(A)(1) (Supp. 1981-82) provides that a child has been abandoned upon "failure of the parent to provide reasonable support and to maintain regular contact with the child, including the providing of normal supervision, when such failure is accompanied by an intention on the part of the parent to permit such condition to continue for an indefinite period in the future." Where a child has been abandoned, the parents' rights to the child may be terminated. *See* ARIZ. REV. STAT. ANN. § 8-533(B)(1) (Supp. 1981-82).

93. Where the family relationship has been terminated, the "child v. parent" label is a misnomer.

94. The court in *Curlender* noted the high costs of genetic defects as an increasing part of the national health care burden. *See* Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 826, 165 Cal. Rptr. 477, 487 (1980).

95. See discussion at text & notes 128-36 *infra* concerning characterization of the tort as negligent or intentional.

96. 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

97. *Id.* at 404, 122 N.W.2d at 193. The trial court determined that the foster father acted *in loco parentis* to plaintiff, thus establishing a legal parent-child relationship. *Id.* at 409, 122 N.W. at 196.

98. *Id.* at 404, 122 N.W.2d at 193.

99. *Id.* at 413, 122 N.W.2d at 198.

100. *Id.* at 409, 122 N.W.2d at 196, *citing* Wait v. Pierce, 191 Wis. 202, 209 N.W. 475 (1926).

101. *Id.* at 410, 122 N.W.2d at 197; see note 68 *supra*.

102. 20 Wis. 2d at 409, 122 N.W.2d at 197. In general, exceptions carved out from the immunity rule include: Suits by emancipated children; suits against the estate of a deceased parent; suits for wilful or intentionally inflicted torts; suits for reckless or grossly negligent conduct; suits against a parent acting in the capacity of employer; and suits by an unemancipated child against a parent for injury to his property interests. *See* Williams v. Williams, 369 A.2d 669, 670 n.1 (Del. Super. Ct. 1976); Falco v. Pados, 444 Pa. 372, 380, 282 A.2d 351, 354 (1971); Hebel v. Hebel, 435

of insurance, minimizing potential family disruption.[103]

Abrogation of immunity in *Goller*, however, was not complete. The court retained parental immunity from suit for allegedly negligent acts: 1) committed in the exercise of "parental control and authority" over the child;[104] or 2) involving "ordinary parental discretion" concerning needs such as food, clothing, and medical expenses.[105] These exceptions evidence judicial reluctance to second-guess parental decisions concerning the degrees of supervision, freedom, and training given to the child.[106]

Since *Goller*, parental immunity has been abolished subject to exceptions in nearly half of all jurisdictions.[107] These jurisdictions differ, however, on whether abrogation of immunity is contingent upon the presence or absence of liability insurance.[108] At least one jurisdiction has limited abrogation of immunity to child-parent suits arising from motor vehicle accidents,[109] where insurance coverage is generally present.[110] Elsewhere, the existence of insurance has been held not to be determinative,[111] and instead the liability inquiry has focused on whether parents breached "a duty owed to the world at large, as opposed to a duty owed to a child within the family sphere."[112]

Assuming judicial abrogation of traditional intrafamily immunity, the plaintiff may still face the obstacle of proving that conduct does not fall

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P.2d 8, 15 (Alaska 1967); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 122, at 866-67 (4th ed. 1971).

103. 20 Wis. 2d at 411-12, 122 N.W.2d at 197.

104. *Id.* at 413, 122 N.W.2d at 198.

105. *Id.*

106. *See* Holodook v. Spencer, 43 A.D.2d 129, 135-36, 350 N.Y.S.2d 199, 204-05 (1973).

107. *See, e.g.*, Hebel v. Hebel, 435 P.2d 8 (Alaska 1967); Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970); Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 288 (1971); Williams v. Williams, 369 A.2d 669 (Del. Super. Ct. 1976); Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970); Rigdon v. Rigdon, 465 S.W.2d 921, (Ky. 1971); Deshotel v. Travelers Indem. Co., 257 La. 567, 243 So.2d 259 (1971) (direct action against insurer permitted); Sorenson v. Sorenson, 339 N.E.2d 907 (Mass. 1975); Plumley v. Klein, 388 Mich. 1, 199 N.W.2d 169 (1972); Silesky v. Kelman, 281 Minn. 431, 161 N.W.2d 631 (1968); Rupert v. Stienne, 90 Nev. 397, 528 P.2d 1013 (1974); Briere v. Briere, 107 N.H. 432, 224 A.2d 588 (1966); France v. A.P.A. Transport Corp., 56 N.J. 500, 267 A.2d 490 (1976); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192 (1969); Nuelle v. Wells, 154 N.W.2d 364 (N.D. 1967); Falco v. Pados, 444 Pa. 372, 282 A.2d 351 (1971); Wood v. Wood, 370 A.3d 191 (Vt. 1977); Smith v. Kaufman, 212 Va. 181, 183 S.E.2d 190 (1971); Lee v. Comer, 224 S.E.2d 721 (W.Va. 1976).

108. *Compare* Petersen v. City and County of Honolulu, 51 Hawaii 484, 462 P.2d 1007 (1970) (parent-child suits allowed regardless of the presence or absence of insurance coverage) *with* Williams v. Williams, 369 A.2d 669 (Del. Super. Ct. 1976) (parental immunity not applicable to extent of liability coverage) *and* Smith v. Kaufman, 212 Va. 181, 183 S.E.2d 190 (1971) (no parental immunity where statutory requirement of auto insurance coverage existed).

109. *See* Williams v. Williams, 369 A.2d 669, 673 (Del. Super. Ct. 1976). Ironically, the *Williams* court, while abolishing parental immunity "to the extent of the parent's automobile liability insurance coverage," claimed that "insurance cannot create a liability where no legal duty previously existed." *Id.* at 672. The Delaware Supreme Court subsequently refused to abolish parental immunity even where liability insurance existed in suits against parents for negligent supervision of children, since that area involved interference with the parental right to control and discipline. *See* Schneider v. Coe, 405 A.2d 682, 684 (Del. 1979). *But cf.* Elam v. Elam, 275 S.C. 132, 134, 268 S.E.2d 109, 110 (1980) (holding that restricting abolition of immunity to motor vehicle cases is unconstitutional).

110. *See* Briere v. Briere, 107 N.H. 432, 436, 224 A.2d 588, 591 (1966).

111. *See* Sandoval v. Sandoval, 128 Ariz. 11, 14, 623 P.2d 800, 802 (1981); Streenz v. Streenz, 106 Ariz. 86, 88, 471 P.2d 282, 284 (1970).

112. Sandoval v. Sandoval, 128 Ariz. at 14, 623 P.2d at 802.

within the delineated exceptions to abrogation. These exceptions protect conduct involving "parental control and authority"[113] or "ordinary parental discretion."[114]

Courts have found parental conduct to be within parental control and authority exceptions in a variety of cases. Most parental supervision cases exempt from liability conduct involving actual supervisory conduct, such as failure to supervise a six-year-old child who was hit by a car after alighting from a school bus[115] or one who was injured on an eleven-foot slide while his father watched a softball game.[116] One extreme case immunized parental conduct as supervisory when parents gave their son a motorcycle, knowing that he had impaired vision.[117] The other *Goller* exception, for "ordinary parental discretion," involves parental decisions concerning necessities such as the child's food, clothing, medical expenses and "other care."[118] It is often blurred with the parental "care and control exception" because of its broad language embracing such other care.[119] Cases litigated under the second *Goller* exception are thus generally of the same type as those under the first.

The decision to abort or to give birth to an impaired child does not fall clearly into either of the *Goller* exceptions. It is neither an "ordinary" decision involving care for the child's basic needs nor one directed at supervision aimed at improving or maintaining ongoing growth or activity of the child. Rather, the decision to abort involves elements which both exceptions seek implicitly to protect—parental discretion to make decisions about what is best for the child. The parental duty implicated in a wrongful life action involves not just how the child's life will proceed, but whether it will proceed at all. It is unlikely that a court would second-guess parents in perhaps the ultimate discretionary decision.

Nevertheless, it is precisely the importance of the decision of whether or not to abort that could lead courts to refrain from leaving parents entirely free from a duty to act reasonably. The conscious decision or negligent indecision which forces existence on a severely deformed child is a onetime determination with, in many cases, certain statistically calculable consequences for the child. If perceived to be a decision which entails psychological and financial burdens that should be borne by the person who brought on the child's existential predicament,[120] the imposition of a duty of care may not seem unreasonable.

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113. *See* Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

114. *See id.*

115. Lemmon v. Servais, 39 Wis. 2d 75, 76, 158 N.W.2d 341, 342 (1968).

116. Graney v. Graney, 43 A.D.2d 207, 209, 350 N.W.S.2d 207, 209 (1973).

117. Nolechek v. Gesuale, 46 N.Y.2d 332, 335-36, 385 N.E.2d 1268, 1271-72, 413 N.Y.S.2d 340, 343 (1978); *cf.* Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 447-48, 386 A.2d 442, 445, where a parent's failure to warn the child to "go away" from vicinity where a lawn mower was being operated was not within *Goller* exceptions. The *Gross* court determined that the issue of whether a *Goller* exception applies was one for the trial judge, not the jury. *Id.* at 448, 386 A.2d at 445.

118. *See* Goller v. White, 20 Wis. 2d 402, 413, 122 N.W.2d 193, 198 (1963).

119. *See* Sandoval v. Sandoval, 128 Ariz. 11, 13, 623 P.2d 800, 802 (1981); Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 447, 386 A.2d 442, 445 (1978).

120. *See* L. TRIBE, CHANNELING TECHNOLOGY THROUGH LAW 275 (1973).

C. *Analysis of Wrongful Life in Complete Abrogation Jurisdictions*

In a few states, most notably California, abrogation of intrafamily immunity is complete.[121] Complete abrogation states have adopted a "reasonable parent" standard[122] under which there are no areas of parental conduct which are excepted *carte blanche* from suit, as under the *Goller* rule.[123] Instead, parental conduct is examined against the reasonable parent standard in each case.

Child-parent suits for wrongful life would probably encounter the least initial resistance to judicial cognizance in jurisdictions where the "reasonable parent" standard has been adopted.[124] Unless the court perceives a parent's not having aborted a deformed fetus as prima facie reasonable, a case could be submitted to the jury for consideration.[125] A guiding objective cited by one court in adopting the reasonable parent standard was the elimination of cursory linedrawing occasioned by adherence to rigid exceptions that can exclude cases from jury consideration.[126] Courts may nevertheless consider the area in which parental conduct is exercised to define the parameters of liability for negligence.[127] If so, the same difficulties present in overcoming the *Goller* exceptions are posed.

Characterization of the Tort

In addition to, and perhaps even before hurdling the barrier of intrafamily immunity, the plaintiff in a child-parent wrongful life suit must determine how to characterize the tort for judicial resolution. The tort might be depicted as intentional, since the decision either to forego genetic counseling, or after obtaining counseling, to forego abortion, may be a conscious or deliberate choice.[128] While it might be said that there is intent to inflict the injury in that there is intent to give birth, it is probably not calculated to cause harm, nor is it a moral wrong in the traditional

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121. *See* Gibson v. Gibson, 3 Cal. 3d 914, 479 P.2d 648, 92 Cal. Rptr. 285 (1971); Anderson v. Stream, 295 N.W.2d 595 (Minn. 1980); Gaudreau v. Gaudreau, 106 N.H. 551, 215 A.2d 695 (1965); Graney v. Graney, 43 A.D.2d 207, 350 N.Y.S.2d 207, 212 (1973).

122. See cases cited in note 121 *supra*. In *Anderson v. Stream*, the court found that parental discretion may be adequately protected and arbitrary linedrawing eliminated by proper jury instruction on a "reasonable parent" standard. 295 N.W.2d at 598-99.

123. *See* Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 652-53, 92 Cal. Rptr. 288, 292-93 (1971). *See generally* Note, *The "Reasonable Parent" Standard: An Alternative to Parent-Child Tort Immunity*, 47 U. COLO. L. REV. 795, 806-11 (1976), for a detailed analysis of the reasonable parent standard.

124. See text & notes 121-23 *supra*.

125. While the jury in a negligence case is permitted to assess the facts giving rise to a standard of care, the court always reserves the power to decide whether the issue should be submitted to the jury. *See* W. PROSSER, *supra* note 102, § 37, at 205. The issue may not ever be submitted to the jury if the judge determines that the defendant's conduct is clearly in conformity with community standards. *Id.* at 207. Thus, if the court perceives that reasonably intelligent people could not differ as to the conclusion to be drawn, the issue becomes one of law for the court rather than a jury issue of fact. *Id.* at 208.

126. *See* Anderson v. Stream, 295 N.W.2d 595, 598 (Minn. 1980).

127. *See* Gibson v. Gibson, 3 Cal. 3d 914, 921, 479 P.2d 648, 652, 92 Cal. Rptr. 288, 292 (1971).

128. *Cf.* Zepeda v. Zepeda, 41 Ill. App. 240, 247, 190 N.E.2d 849, 852 (1963) (concluding that the defendant's act of adultery in conceiving the subsequently born illegitimate plaintiff was willful and perhaps even criminal).

sense.[129] Yet the law of intentional torts has not limited itself to hostile or harmful intent,[130] but may embrace other uncountenanced intentional invasions of another's interests.[131] In many instances, liability for an intentional tort has been imposed even where the aim was actually to help the plaintiff.[132]

In the wrongful life context, a parent may perceive that giving birth to a severely impaired child is beneficial as compared with ending its existence. Giving birth may thus be an intentional act done with altruistic motives. In the wrongful life case, the rightness or wrongness of failing to abort is not readily apparent and the "victim" is unable to express his viewpoint on the issue. Characterization of the tort as intentional might thus force the court to deal with the difficult question of motive. This difficulty could be avoided by deeming the tort to be one of negligence.

Characterization of the child-parent wrongful life tort might be as an action for negligent decisionmaking somewhat like that in traditional parent-child supervision cases.[133] When an intentional decision regarding parental supervision results in harm to the child, the conduct has been characterized as "an affirmative act" of negligence.[134] The decision's affirmative character, however, might not necessarily transform it into an intentional tort. But courts may simply be reluctant to ascribe an intentional character to acts between parent and child. This reluctance may arise because of the more malevolent connotations potentially attached by the lay public to such a label.[135] Dictating a reasonable standard of care for decisionmaking under negligence principles seems less repulsive, even though the ultimate result may be the same. Because of the greater likelihood of the latter characterization, this Note will discuss the child-parent wrongful life tort as one of negligence. The negligence posture also allows for more flexibility in defining duty, both in the individual case and as the conception of duty evolves over time.[136]

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129. *See* W. PROSSER, *supra* note 102, § 7, at 30. The tendency is to impose greater liability for stronger moral harms, though increased liability is also generally imposed for intentional invasion of another's rights, even by one who believes he is doing no harm. *Id.* at 30-31.

130. W. PROSSER, *supra* note 102, § 8, at 31.

131. *Id.*

132. *Id.*; *cf.* Clayton v. Dreamland Roller Skating Rink, 14 N.J. Super. 390, 398, 82 A.2d 458, 462 (1951) (defendant manipulated plaintiff's broken arm over her protest in an effort to set it); Johnson v. McConnel, 15 N.Y. 293, 294 (1878) (defendant broke plaintiff's leg when he intervened over protest to help plaintiff in a fight).

133. *See, e.g.*, Noelchek v. Gesuale, 46 N.Y.2d 332, 385 N.E.2d 1268, 413 N.Y.S.2d 340 (1978); Holodook v. Spencer, 43 A.D.2d 129, 350 N.Y.S.2d 194 (1973); Goller v. White, 20 Wis. 2d 402, 122 N.W.2d 193 (1963).

134. Gross v. Sears, Roebuck & Co., 158 N.J. Super. 442, 447, 386 A.2d 442, 445 (1978) (parents allowing child to remain in vicinity of functioning lawnmower was "the affirmative act of the parent in mowing the lawn," and was not immunized conduct under *Goller* exceptions).

135. For example, the idea that the parents' choice not to abort their child may be an intentional tort of the same denomination as assault and battery seems a miscategorization.

136. Since the existence of a duty depends upon external societal demands of what constitutes proper conduct, *see* W. PROSSER, *supra* note 102, § 31, at 146, and society's demands may change, duty may also change.

FRAMING A PARENTAL DUTY

Once beyond initial obstacles of intrafamily immunity and characterization of the tort, the court faced with a child-parent wrongful life suit must assess the more serious question of the extent of duty which a parent owes to the child. This duty must be ascertained within the unique confines of the family relationship, where the state must constitutionally tread very lightly if at all.[137] But the child-parent wrongful life cause of action also presents a unique conception of the child's rights, which may even be characterized as fundamental.[138] The child's interest and any implicated parental rights must therefore be balanced in order to define the legal duty.[139] While assessment of constitutionally implicated rights may be appropriate as a general policy consideration in deciding to recognize the child v. parent wrongful life cause of action, the extent to which such rights are binding as constitutional mandates is another matter.

Constitutional Limitations on State Action

The Constitution does not protect private conduct between individuals, but is rather a limitation on government.[140] Since the child-parent suit is based on action between private parties, the initial question presented is whether the mere imposition of a private tort judgment by the courts is a form of state action implicating constitutional strictures. Practically, the issue is whether the state must consider constitutional arguments raised by parents in defense of the wrongful life suit. If so, the duty must be drawn within constitutional parameters.

At least two Supreme Court cases support the view that the imposition of a tort judgment constitutes state action. In *New York Times v. Sullivan*,[141] the Court ruled that a state court's judgment in a libel case between two private parties is not exempt from constitutional challenge.[142] Rejecting the argument that the case involved private and not state action,[143] the Court held that a state rule of law, whether statutory or common law,[144] meets the test of state action.[145] The focus, the Court said, was "not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."[146]

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137. See discussion of the nature and judicial treatment of family rights at text & notes 196-227 *infra*. Limitations on fundamental rights are justified only when there is a compelling state interest. *See* Roe v. Wade, 410 U.S. 113, 144 (1973); Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969); Shapiro v. Thompson, 394 U.S. 618, 634 (1969), Sherbert v. Verner, 374 U.S. 398, 406 (1963). The Supreme Court has held that in the family realm, constitutional principles must "be applied with sensitivity and flexibility to the special needs of parents and children." Bellotti v. Baird, 443 U.S. 622, 634 (1979).

138. See discussion at text & notes 168-80 *infra*.

139. See discussion of such balancing at text & notes 209-11 *infra*.

140. *See* L. TRIBE, *supra* note 90, § 18-1, at 1147, for a full discussion of this concept.

141. 376 U.S. 254 (1964).

142. *See id.* at 265, 277.

143. *Id.* at 265.

144. In *New York Times*, the common law rule was supplemented by statute. 376 U.S. at 265.

145. *Id.*

146. *Id.*, *citing* A.F. of L. v. Swing, 312 U.S. 321, 322 (1941); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879).

In *Shelley v. Kraemer*,[147] the Court held that judicial enforcement of racially discriminatory restrictive covenants was state action. But the basis for the holding was not fully developed[148] and its rationale has therefore not generally been extended to cases other than those involving racial prejudice.[149] Nevertheless, it seemed that after *Shelley* and *New York Times*, state court enforcement of a judgment between private parties could constitute state action and thus violate constitutionally guaranteed rights. A shadow was cast on this interpretation, however, by some language in the more recent case of *Flagg Brothers, Inc. v. Brooks*.[150]

In *Flagg Brothers*, a woman was evicted from her apartment and the city arranged to have her belongings put in storage with Flagg Brothers.[151] Although the woman knew she could not afford the storage payments, she consented to the transfer since she was without practical recourse.[152] Pursuant to a state statute,[153] Flagg Brothers demanded payment upon threat that the furniture would be sold.[154] Ms. Brooks sued in federal district court for an injunction to prevent the sale and for a declaratory judgment that the sale would violate her constitutional rights of due process and equal protection.[155] She also sought tort damages under 42 U.S.C. section 1983.[156]

Instead of viewing the case as one presenting unconstitutional governmental rules, the Court examined the facts to determine the involvement of governmental actors.[157] Even though the state had codified the statutory provision involved,[158] the Court held that because no state officials were overtly involved in the actual sale of the property, there was no state action arising from denial of judicial relief by the state court.[159] The Court claimed broadly that it had "never held that a State's mere acquiescence in a private action converts that action into that of the State."[160] Neither *Shelley* nor *New York Times* was cited.

The child-parent wrongful life action arguably falls within the broad language of *Flagg Brothers*, which denies that mere imposition of a legal judgment constitutes state action. The *Flagg Brothers* pronouncement, however, can be distinguished in three ways. First, the case was argued on the theory that the warehouser himself had in effect become an agent of

147. 334 U.S. 1 (1948).

148. *See* L. TRIBE, *supra* note 90, § 18-6, at 1168.

149. *See* Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 498 n.56 (1962).

150. 436 U.S. 149 (1978).

151. *Id.* at 153.

152. *See id.*

153. N.Y. [U.C.C.] § 7-210 (MCKINNEY 1964).

154. Flagg Bros., Inc. v. Brooks, 436 U.S. at 153.

155. *Id.*

156. *Id.*

157. *See* L. TRIBE, *supra* note 90, § 18, at 105 (Supp. 1979).

158. See text & note 153 *supra*. Thus, the Court permitted enforcement not merely of a common law rule, but of a statutory rule. "It is quite immaterial that the State has embodied its decision not to act in statutory form." Flagg Bros., Inc. v. Brooks, 436 U.S. at 165.

159. 436 U.S. at 166. The Court also dismissed the contention that Flagg Brothers had been delegated an exclusive sovereign function. *Id.* at 160-63.

160. *Id.* at 164.

the state.[161] Thus, the decision did not directly deal with the issue of mere enforcement of state created rules.[162] Second, the case dealt with property rights between debtor and creditor. Such rights are seemingly of a less fundamental nature than the first amendment rights in *New York Times* or the equal protection rights against discrimination in *Shelley*, as well as the arguably fundamental right of the child in the wrongful life suit. The characterization of the right, then, may be a crucial starting point for the wrongful life analysis,[163] perhaps warranting a lower threshold for finding state action. Third, and probably most important, the statute in *Flagg Brothers* apparently required no prior court action in order for the allegedly unconstitutional sale to take place. In the wrongful life case, however, unconstitutional action would arise from the court's imposing a judgment, which could not only penalize the past exercise of parental rights, but chill[164] their exercise in the future as well.

A court presented with a child-parent wrongful life action should thus consider constitutional arguments by the private parties before it. Whether viewed as binding strictures on the judicial formulation of duty or as mere policy considerations, a host of constitutional rights are implicated by recognition of a parental duty to abort. In order to properly assess the extent of protection accorded to parental rights, the rights of the child or of the state as his protector must be appraised.

Interest of the Child

Though no court has ever recognized a child's constitutional right to be born whole and unimpaired, language in several state court decisions suggests an interest in the child of potential constitutional magnitude. These statements have appeared both in suits establishing fetal status as an injurable entity[165] and in later wrongful life suits against third parties.[166] The modern notion established in prenatal injury cases is that if the child is wronged, regardless whether before or after birth, he should be compensated.[167] The court in one such case stated that "justice requires . . . that a

161. *See* L. TRIBE, *supra* note 90, § 18, at 108 (Supp. 1979).

162. *See id.*

163. This analysis may explain the court's failure to cite *Shelley* or *New York Times*.

164. *Cf.* discussion of the chill cast on exercise of constitutional rights by vague statutes which fail to clearly delineate impermissible conduct in Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Giaccio v. Pennsylvania, 382 U.S. 399, 402 (1966); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

165. See text & notes 167-69 *infra*. In the early landmark case of Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884), a Massachusetts court proclaimed that a fetus was not a person in being, and thus was owed no duty of care. In succeeding years, however, the prevalent position has been recognition of the fetus as a separate entity from its mother. *See* cases cited in notes 167-69 *infra*. *See generally* 63 HARV. L. REV. 173-75 (1949) (detailing arguments for recognizing fetal injurability); *cf.* Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935, 937 (E.D. Pa. 1980) (fetuses are persons capable of sustaining "bodily injury" within the meaning of an insurance policy); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (injury to one-month fetus cognizable because it has separate existence from the moment of creation).

166. See text & notes 171-81 *infra*.

167. *See* Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 504 (1960); Sinkler v. Kneale, 401 Pa. 267, 273-74, 164 A.2d 93, 96 (1960); 216 S.2d 502, 503 (1966); Sylvia v. Gobielle, 101 R.I. 76, 79, 220 A.2d 222, 224 (1966). All states now allow suit by a child for prenatal injuries, *see* Note, *supra* note 70, at 52, though most require that the fetus be viable at the time the injury is sus-

child has a legal right to begin life with a sound mind and body."[168] Another court was more explicit, declaring that "natural justice demands recognition of a legal right of a child to begin life unimpaired by physical and mental defects resulting from the injury caused by the negligence of another. A manifest wrong should not go without redress."[169]

Although the foregoing statements were made in the context of suits against third parties for injuries to a fetus, such suits nevertheless sought to establish a duty to refrain from engaging in conduct that would cause the child to suffer the effects of the injury after birth. This concept has been magnified in past wrongful life suits against third parties which discussed the duty to prevent birth when life began with an inherently unsound mind or body because of genetic dysfunction.[170]

The companion cases of *Becker v. Schwartz*[171] and *Park v. Chessin*[172] were the only third-party wrongful life actions before *Curlender* and *Turpin* ever to be successful at the trial level. In *Becker* and *Park*, the New York trial court recognized a tortious injury to what they characterized as the child's fundamental right "to be born as a whole, functional human being."[173] The theory that the child could recover on the basis of its fundamental right to be born whole, however, was cursorily dismissed by the New York appellate court as unprecedented[174] and likely to cause suits for "less than a perfect birth."[175] Yet the notion that the child might have a fundamental right to be born unimpaired was not in itself rejected.

The California court in *Curlender* did not directly confront the issue of the child's fundamental right to be born whole.[176] Had it been clearly recognized, the right to be born whole would likely have been the basis for a child-parent wrongful life claim in California testing the efficacy of the *Curlender* dictum. Nevertheless, the implication is that the court must have discerned such a right. First, the *Curlender* court recognized that the injury was not the mere genetic affliction of the child, but rather was the birth of the child with the defect.[177] Thus, the court negated the possibility

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tained. *Id.* at 54-55. A possible problem with this requirement is that in some child-parent wrongful life cases the decision not to abort, and thus the infliction of the injury, may be made before the child is viable. But the decision arguably "continues" past the point of viability, as long as there is no abortion, until the child is born.

168. Smith v. Brennan, 31 N.J. 353, 364, 157 A.2d 497, 503 (1960).

169. Keyes v. Construction Serv., Inc., 340 Mass. 633, 635, 165 N.E.2d 912, 914 (1968).

170. See text & notes 171-81 *infra*.

171. 60 A.D.2d 587, 400 N.Y.S.2d 119 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

172. 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified*, 46 N.Y.2d 401, 386 N.E.2d 807, 413 N.Y.S.2d 895 (1978).

173. 60 A.D.2d at 88, 400 N.Y.S.2d at 114. In *Park*, plaintiffs gave birth to a child afflicted with severe kidney disease, after which they sought medical advice on whether subsequent children would also have the disease. *Id.* at 83, 400 N.Y.S.2d at 111. Physicians told them that the chances were "practically nil." *Id.* Later another child was born with the disease, and the parents sued for negligence on behalf of themselves and the child. *Id.* The claim in *Becker* was similar. 60 A.D.2d at 587, 400 N.Y.S.2d at 119-20 (parents and child sued for negligence in failing to provide sufficient information on which to base a decision to proceed with the pregnancy).

174. *See* Becker v. Schwartz, 46 N.Y.2d 401, 412, 386 N.E.2d 807, 812, 413 N.Y.S.2d 895, 900 (1978) (finding inappropriate as precedent the use of "similar words in another context").

175. *See id.*

176. *See* 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1981); text & notes 63-76 *supra*.

177. 106 Cal. App. 3d at 828-29, 165 Cal. Rptr. at 488.

that the child's injury was derived from interference with her parents' informed decisionmaking.[178] Second, the court explained that the focus of the injury was that the child "*exists* and *suffers*" due to the negligence of another.[179] The court acknowledged "a reverent appreciation of life [which] compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights."[180] The nature and extent of such "rights" were not, however, more fully delineated.

Subsequently in *Turpin*, the California Supreme Court left intact the foundation for a claim of a child's fundamental right to be born whole by refusing to hold that life is, as a matter of law, always preferable to no life at all.[181] Ultimately, however, it denied recovery on the general damages claim which had been framed to allege deprivation " 'of the fundamental right of the child to be born as a whole, functional human being without total deafness . . . .' "[182] The *Turpin* court did not explicitly deny the fundamental nature of the child's right, but rather found that determination of the existence of actual injury in each case, and the corresponding assessment of damages, was impossible.[183] There seemed to remain inherent appeal in the notion that the court should recognize in whatever way it could a child's right to be free from a life of suffering.

Assuming that a right to unimpaired life could be found, its source must be constitutionally derived in order to qualify it for serious constitutional balancing. Obviously the Constitution never mentions a child's fundamental right to be born whole. The characterization of the right as penumbral also seems unlikely. An indication of the Court's probable view of fetal rights may be found in *Roe v. Wade*.[184] *Roe* has been cited for the proposition that despite tort law concepts, the fetus has no cognizable legal rights.[185] But the Court's statements about viability do not warrant such sweeping application. The *Roe* Court merely seemed to say that in order to perfect any legal interest, a fetus must be born alive.[186] This reading is consistent with prenatal tort law cases.[187]

178. The theory that a child's rights may receive tortious injury derivatively through failure to provide his parents with information to facilitate informed decisionmaking has been advanced in Capron, *supra* note 21 at 630; Capron, *Informed Decisionmaking in Genetic Counseling: A Dissent to the "Wrongful Life" Debate*, 48 IND. L.J. 581, 582 (1973). For a criticism of the "informed decision-making" analysis of wrongful life actions, *see* Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U.L.Q. 919, 940-42.

179. 106 Cal. App. 3d 811, 829, 165 Cal. Rptr. 477, 488 (1981).

180. *Id.*

181. Turpin v. Sortini, No. S.F. 24319, slip op. at 19 (Cal. May 3, 1982).

182. *See id.* at 3, 26.

183. *See id.* at 22-27.

184. 410 U.S. 113 (1973).

185. *See generally* Transamerica Ins. Co. v. Bellefonte Ins. Co., 490 F. Supp. 935, 936 (E.D. Pa. 1980). In *Bellefonte*, the court determined which of two insurance policies acquired sequentially by a pharmaceutical company covered the child injured by drugs during gestation. The defendant asserted that during coverage under its pre-birth policy, the child was not a "person." *Id.* The court rejected this argument and ruled that, for purposes of tort recovery, a fetus is a person within the coverage of the insurance policy. *See id.* at 937.

186. *See* Roe v. Wade, 410 U.S. at 162.

187. See text & note 120 *supra*.

Under *Roe*, because an aborted fetus is never born alive,[188] it never acquires a legal right to be born alive and thus also no fundamental right to unimpaired life.[189] In the wrongful life situation, however, *Roe* would not bar recovery because the child is born alive. The child might be said to sustain an injury at either of two points—when the parents make the decision not to abort, or when the decision matures and he is actually born in an impaired state.[190] Whether the Court recognizes injury to the fetus before viability or conditions recognition of the injury upon live birth, the child's injury should still be cognizable because the child is born alive to suffer the injurious consequences.

Roe does not make clear whose interest is to be protected by restricting abortions in the latter two trimesters. Implications of *Roe* in the wrongful life context vary according to who holds the protectible interest. If the Court is protecting a health interest of the child, or at least a negative interest in his not existing with poor health, the state may arguably be justified in interfering with the parental decision in its *parens patriae* role.[191] If so, the question then becomes whether the child's health interest is so important that the decision to protect it may be removed from the parents and in essence assumed by the state through imposition of a tort duty to abort. The state's interest in the child's future health has been deemed compelling,[192] but its source and extent are unclear.[193] It thus appears from *Roe* that whatever interest the state has in the child, it has not been recognized as rooted in any personal rights of the child itself.[194]

Alternatively, the state's interest could be perceived as a less personalized interest in unimpaired life, analogous to the state interest in potential human life during the last trimester of pregnancy recognized in *Roe*.[195] The state might augment this interest by adverting to an interest in preventing the heavy financial burdens created by costs of care for deformed or handicapped children who would otherwise have been aborted.

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188. This inference may be flawed, as it is probable that not all aborted infants die before removal from the womb.

189. Whether the fetus has an individualized right to be born alive once the pregnancy reaches the third trimester, or whether the state has merely an option to protect "potential life" in general, is not fully clear. *See* 410 U.S. at 163-64.

190. The point at which the injury occurs may depend upon how the injury is perceived. If the injury arises from interference with the parent's decisionmaking perogative, *see* note 179 *supra*, the injury will occur at the time the decision was made or perhaps when it should have been made. If the injury involves a fundamental right to be born whole, *see* text & notes 168-81 *supra*, it will occur when the child is actually born with the impairment. *See also* discussion of the time of injury in Zepeda v. Zepeda, 41 Ill. App. 2d 240, 249-253, 190 N.E.2d 849, 852-55 (1963) (implying that injury to the child is possible even before it is conceived).

191. *Cf.* Stanley v. Illinois, 405 U.S. 645, 649 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

192. Colautti v. Franklin, 439 U.S. 379, 389 (1979). The Court's reference to its interest in the child as "compelling" did not arise from discussion of the substantive reason for the state's having an interest, but rather was mentioned in a discussion of viability prefacing a holding on the constitutionality of a statute requiring doctors to determine which abortion technique would result in the highest probability of the fetus being born alive. *Id.* The Court held the statute void for vagueness. *Id.* at 390.

193. See note 192 *supra*.

194. *See* Roe v. Wade, 410 U.S. 113, 162 (1973).

195. *See id.* at 159.

But whether belonging to the child or to the state, the right will be juxtaposed against more established parental rights.

Constitutional Interests of the Parent

Right to Privacy. Recognition of a wrongful life action by a child against his parents would impinge on several fundamental parental rights. Perhaps the most basic right implicated is the right to privacy of the mother. In *Roe v. Wade*,[196] the Supreme Court recognized that a woman's constitutional right to privacy protects her decision to have an abortion,[197] and thus impliedly her right not to have an abortion. This implication is particularly warranted in light of the Supreme Court's holding in *Skinner v. Oklahoma*[198] that the right to bear children is fundamental.[199]

The woman's right is qualified, however.[200] While the decision to abort is solely hers during the first trimester of pregnancy,[201] the interests of the state in protecting potential life and the health of the mother prevail over her right to choose an abortion as the pregnancy progresses into the second and third trimesters.[202] If an interest in potential life cannot defeat the fundamental parental right to privacy, it seems highly unlikely that an interest in nonlife could do so. If a woman is free to choose abortion in the first trimester for virtually any reason, it would be an inconsistent intrusion on her privacy to condone a tort action threatening her with liability for a carefully made decision[203] to bear the child.[204]

Past wrongful life decisions have also recognized the principle of pa-

196. 410 U.S. 113 (1973).

197. *Id.* at 153.

198. 316 U.S. 535 (1942).

199. *Id.* at 541, where the Court stated that "marriage and procreation are fundamental to the very existence and survival of the race."

200. "The pregnant woman cannot be isolated in her privacy." Roe v. Wade, 410 U.S. 113, 159 (1973).

201. 410 U.S. at 163. Subsequent decisions have ensured that the woman, in the first trimester at least, has full discretion to make the choice, even without her husband's consent. Planned Parenthood v. Danforth, 428 U.S. 52, 69-71 (1976); *see* Note, *supra* note 70, at 768. Nor may third-parties, such as parents, exercise a blanket veto over the decision to abort. *See* Planned Parenthood v. Danforth, 428 U.S. at 74; Bellotti v. Baird, 443 U.S. 622, 643 (1979). *See generally* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (discussing the rights of mother and fetus implicated by the *Roe* decision).

202. Roe v. Wade, 410 U.S. 113, 159, 163 (1973). The unborn child was not recognized in *Roe* as a person "in the whole sense." *Id.* at 162. The fetus itself is without rights to prevent an abortion in any of the three trimesters of pregnancy. *See id.* Even in the third trimester, after the state acquires an interest in its potential life, the state may nevertheless allow a properly conducted voluntary abortion. *Id.* at 163-64.

203. Professor Tribe has analyzed the *Roe* decision to mean that the court is actually creating a new model prescribing roles for decision-making. Tribe, *The Supreme Court 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10-11 (1973). Tribe's "Role Allocation Model" assumes that a violation of due process occurs "whenever the state either assumes a role which the constitution entrusts to another, or fails to assume a role the constitution imposes upon it." *Id.* at 15. Under this model, the *Roe* opinion suggests that in the first trimester, the decision to abort or to continue pregnancy is one constitutionally given to the parent, while protection of the health interests of the mother and child during the final two trimesters of pregnancy are assigned to the state under its *parens patriae* power. This interpretation also assumes that the fundamentality accorded to a woman's decision protects it so rigorously that any interest in preserving the fetus's existence is unable to overcome it. *See* Ely, *supra* note 201, at 935.

204. *See* Capron, *supra* note 21, at 653.

rental privacy. In several cases, defendant medical professionals asserted that plaintiffs had not mitigated damages because plaintiff failed to obtain an abortion once the defendant's negligence was discovered.[205] This argument has been rejected, however, on the reasoning that to convert the right to have an abortion into an obligation to do so would be a gross invasion of privacy.[206]

Freedom of Religion. A second constitutional right which would be intruded upon by imposing a duty in the child-parent wrongful life context is the parents' first amendment right to the free exercise of religion. While not every parent who might be sued for inflicting wrongful life has religious objections to abortion, it is likely that a significant number do. Actual or threatened imposition of a legal duty to abort, enforced through a tort judgment, would at the least have a chilling effect[207] on the exercise of religious beliefs.

The courts have been presented with a clash of state interests and religious beliefs on many occasions in the past from which several principles relevant to the parent-child wrongful life suit have emerged. In general, the Supreme Court has held that when the state interest is sufficiently compelling, it may interfere with religious practice, but not belief.[208] While the belief-practice distinction is perhaps more illusory than real,[209] it serves to focus the analysis of competing interests.

The clash between parental religious belief and religious practice has been adjudicated in a series of cases in which parents refused medical treatment for an endangered child. Parental blood transfusions have been ordered despite religious objections when there was a child dependent on the parent for support[210] or when the mother was pregnant with a child

205. *See* Rivera v. State, 94 Misc. 2d 157, 162-63, 404 N.Y.S.2d 950, 954 (1978); Ziemba v. Sternberg, 45 A.D.2d 230, 233, 357 N.Y.S.2d 265, 269 (1974).

206. *See* cases cited in note 205 *supra*. *But see* Sorkin v. Lee, 78 A.D.2d 180, 181, 434 N.Y.S.2d 300, 301 (1980) (denying damages in a wrongful birth suit for costs of raising the child because parents failed to allege that they would have obtained an abortion absent medical contraindications).

207. See note 164 *supra*. The potential stare decisis effect of a tort judgment could arguably chill the exercise of constitutional rights in much the same way as would a vaguely drawn statute.

208. *See* Reynolds v. United States, 98 U.S. 145, 166 (1878); *cf.* Hill v. State, 35 Ala. App. 404, 88 So. 2d 880, 885, *cert. denied*, 264 Ala. 197, 88 So. 2d 887 (1956) (snake handling prohibited despite contrary religious beliefs).

209. *See* L. TRIBE, *supra* note 90, § 14-8, at 838, commenting on Reynolds v. United States, 98 U.S. 145 (1878).

210. Superintendent of Belchertown State School v. Saikewicz, 370 N.E.2d 417, 425 (Mass. 1977) (court held that state interest in protecting third parties, particularly minor children, from emotional and financial damage outweighs decision of competent adult to refuse lifesaving or life-prolonging treatment); *cf. In re* Osborne, 294 A.2d 372, 375 (D.C. 1972) (blood transfusion order of lower court denied because parent had made material and spiritual provision for children).

It may be important to distinguish blood transfusion cases in which religious objections are interposed from other religious interference cases because technically, the religious belief prohibits only the consent to undergo the medical procedure, and not the actual treatment itself. *See* Application of President and Directors of Georgetown College, Inc., 118 App. D.C. 90, 92, 331 F.2d 1000, 1007 (1964). The *Georgetown College* court found that the patient's religious belief simply prevented her from consenting, though if the court were to order the transfusion, she felt it would not be her responsibility. *Id.*

whose health would be endangered by honoring the parent's wishes.[211] In sum, when there is a clearly perceived detriment to the child's health, the state will intervene to usurp parental decisionmaking even at the expense of interference with the exercise of religious beliefs. In the wrongful life case, the crux of the problem is that the injury to the child is not so readily apparent. In fact, its very imperceptibility has been the basis of near unanimous past judicial rejection of wrongful life suits.[212]

Weighing heavily against the chimerical right of the child are values seemingly at the core of religious belief,[213] among them that abortion is in fact infanticide.[214] To allow the state to enforce liability for failure to abort would be to penalize an individual for refusing to accept the belief that impaired life is worth less than no life at all. In addition, potential liability could in effect compel consent to a bodily intrusion[215] potentially believed by the mother to constitute murder.[216]

Family Autonomy. Finally, recognition of a child-parent wrongful life suit may also impinge significantly on the constitutionally guaranteed right of family autonomy. This right may be grounded in the first amendment right of association in the family, which is perhaps the "ultimate association."[217] There is probably no other right so uniquely personal to the fam-

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211. Raleigh Fitkin-Paul Memorial Hosp. v. Anderson, 42 N.J. 421, 423, 201 A.2d 537, 538 (1964), *cert. denied*, 377 U.S. 985 (1964). *Cf. In re* Green, 448 Pa. 338, 350, 292 A.2d 387, 392 (1972) (parents refused consent to blood transfusion necessary for polio operation and court remanded for determination of minor child's own wishes). For a criticism of the decision, *see* Richards, *The Individual, the Family and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 51-52 n.261 (1980). Also *compare* Prince v. Massachusetts, 321 U.S. 158 (1944) (parental and family interest in religious instruction is insufficient to outweigh state interest in the child's health under child labor laws violated by her distributing religious pamphlets).

212. See text & notes 33, 57, 61 & 73-74 *supra*.

213. See L. TRIBE, *supra* note 90, § 14-11, at 862, for an argument that the threat to a core belief presents a more serious intrusion on free exercise of religion than does a threat to a peripheral religious belief. *But see* Reynolds v. United States, 98 U.S. 145, 161 (1878) in which the court upheld anti-polygamy laws despite evidence that a refusal to practice polygamy when circumstances permit would result in eternal damnation. *Id.*

The position of the Catholic church is that life begins at the moment of conception. Roe v. Wade, 410 U.S. 113, 160-61 (1973). Thus, to abort a fetus is to kill a living child. Jehovah's Witnesses, a religious faith with approximately one-half million members in the United States, deem abortion a "serious wrongness." The Watchtower, August 1, 1977, at 480, col. 2, *cited in* Rivera v. State, 94 Misc. 2d 157, 163 n.6, 404 N.Y.S.2d 950, 954 n.6 (1978).

214. *See* authorities cited in note 213 *supra*. Religious groups are not alone in their objections to abortion. Recently, 50,000 abortion opponents staged a march in Washington, D.C., to demonstrate opposition to abortions and to lobby for a constitutional amendment to reverse *Roe* and implement a "pro-life" policy. Tucson Citizen, Jan. 23, 1981, at 1, col. 1.

215. The Supreme Court has indicated its revulsion to physical intrusions in the criminal search context in Rochin v. California, 342 U.S. 165, 172 (1952). The *Rochin* Court noted that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are so rooted in the traditions and conscience of our people as to be ranked as fundamental. . . ." *Id.* at 169, *citing* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). A right not to have the state threaten legal consequences for failure to abort could be equally fundamental in this sense. See note 213 *supra*.

216. This would clearly violate the oft-quoted passage from *West Virginia Bd. of Educ. v. Barnette* that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." 319 U.S. 624, 642 (1943).

217. *See* Tribe, *supra* note 203, at 34.

ily as the right to determine its composition,[218] including who family members should be and how many members there should be.[219]

The right to family autonomy has often been discussed in cases involving parental free exercise of religion where the governmental interest was held insufficiently compelling to warrant intrusion into the family realm. In *Pierce v. Society of Sisters*,[220] parents were given the right to decide whether their children should attend a private religious school rather than a public one.[221] Later, *Wisconsin v. Yoder*[222] held that parents could withdraw their children from public school in order to give them schooling in an integrated religious life at home.[223] The right to have a child study a foreign language was similarly established in *Meyer v. Nebraska*.[224] The essence of the right to family autonomy as interrelated with the right to religious freedom was summarized in *Meyer* as a right "to marry, establish a home and bring up children, to worship God according to the dictates of [one's] own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[225]

Although the parental right of family autonomy is fundamental,[226] as with other constitutionally guaranteed rights it is not absolute and must be balanced against interests of the state and the child.[227] The cases have not, however, resulted in any articulable standard for determining when parents have exceeded the rights of family autonomy and violated the ethical constraints of their role.[228]

Balancing Interests

A search for a method of balancing child and parent rights may suggest several tests. One model of child-parent rights assumes that the child has rights equal to an adult's, but that his parents or the state hold them in trust until his own powers of rationality are developed.[229] Thus, choices the individual would ordinarily make for himself as an adult may be made for him as a child in the manner which either his parents or the state per-

218. *Id.* at 34 & n.159.
219. *Id.*
220. 268 U.S. 510 (1925).
221. *Id.* at 534-35.
222. 406 U.S. 205 (1972).
223. *See id.* at 234.
224. 262 U.S. 390, 399 (1923).
225. *Id.* at 400. The Court found the right to be grounded in the liberty guaranteed by the fourteenth amendment. *Id.* at 399-400.
226. Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972); *see* Parham v. J.R., 442 U.S. 584, 602-03 (1979); Moore v. City of East Cleveland, 431 U.S. 494, 503-06 (1977).
227. *See* Bellotti v. Baird, 443 U.S. 622, 646-51 (1979) (interest of minor child balanced against those of the state and her parents in determining the role of each in obtaining an abortion); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (child's health interest as embodied in statutory prohibition against child labor held sufficiently compelling to outweigh parental religious interests); *cf.* Wisconsin v. Yoder, 406 U.S. 205 (1972), in which inclusion of the child's interest in the balancing process was noticeably absent. *See generally*, L. TRIBE, *supra* note 90, § 14-10, at 857.
228. For discussion of the philosophical source and extent of parental rights, *see* Richards, *supra* note 211, at 24.
229. *See* 2 J. STORY, EQUITY JURISPRUDENCE 581-83 (10th ed. 1870); Comment, *The Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669, 670 (1978).

ceives that he would choose if capable of rationally doing so himself.[230] Principles of legal paternalism require that interference in a decision made for one who is incapable of making rational choices is justified only if the decision is likely to lead to severe and irreversible interference with the individual's capacity for self-determination.[231]

In the wrongful life context, a decision to abort would certainly prevent the irreversible consequence of life with genetic deformity. Yet by making that decision, parents permanently preclude the child from any opportunity for further self-determination. Imposing a duty on parents to abort would be to shape this crucial decision not by private considerations of conscience, family character, and religious belief, but by the threat of civil liability. The inappropriateness of this intrusion on decision-making is heightened by the very imprecision of the child's interest itself.

PRACTICAL ENTANGLEMENTS

Even if wrongful life suits could overcome the barriers of characterization and parent-child immunity, as well as constitutional privacy, religious freedom, and family autonomy considerations, recognition of the cause of action would create many further potential difficulties. Initially, courts would have to determine at what degree of probability of genetic defect a decision to give birth rather than to abort constituted negligence. For example, perhaps a diagnosis of certain (100%) deformity would result in *per se* negligence for failing to abort, or a rebuttable presumption of negligence. But what if parents sincerely believed that a cure for the disease was forthcoming? If the probability of deformity slipped to ninety percent, would failure to abort then constitute negligence? What about sixty percent?

Would only certain types of deformed children be allowed to recover—for instance only those with severe and painful conditions? Perhaps the degree of disability to perform normal human functions would be determinative of liability. Or perhaps physical or even psychological pain would trigger liability. If so, how could the degree of suffering be ascertained?

Would suits be limited to children whose parents had actually obtained genetic counseling, or would the duty be extended further—to require parents to obtain the counseling initially? And if the duty were not extended, could parents who would otherwise have obtained counseling refrain from doing so to protect themselves from suit later on? Further, what if parents could not afford counseling? If a poor parent wanted to obtain a eugenic abortion, but was unable to afford it, what course could she take? Presently, a poor woman cannot obtain Medicaid funding for abortion if a state does not wish to give it.[232] Would poor women resort to

230. *See* Comment, *supra* note 229, at 670.

231. *See* Richards, *supra* note 211, at 24.

232. *See* Harris v. McRae, 448 U.S. 297 (1980) and Williams v. Zbaraz, 448 U.S. 917 (1980) (both cases upholding the Hyde Amendment allowing states not to fund abortions for the poor with Medicaid funds). If the child were recognized as a person for purposes of Medicaid funding,

dangerous self-abortion in order to avoid crippling future liability? Or would their poverty excuse their "negligence"?

What if amniocentesis were performed in the first trimester, but its results were not available until the second trimester, when abortion becomes more dangerous for the mother?[233] If the mother decided not to subject herself to the physical risk, would the child have a right to euthanasia at birth, assuming courts had recognized a "fundamental right to be born whole?"[234] What about liability to children injured by amniocentesis conducted by parents worried about subsequent liability for giving birth to a deformed child?

These are only a few of myriad difficult issues that child-parent wrongful life suits could present. The threat of Orwellian genetics looms high when the state presumes over parental protest that some individuals are better off dead than alive. Though the interest asserted is purportedly the child's, it is not difficult to envision expansion of eugenic abortion for the child's benefit to eugenic abortion for the public benefit. While "slippery slope" arguments should not by themselves insulate a wrong from vindication, in this case they are one more factor weighing against an already questionable incursion into parental decisionmaking.

CONCLUSION

The development of medical technology has increased the options for family planning by providing both detailed genetic screening procedures to detect possible future abnormalities and improved contraception and abortion techniques to prevent birth. Successful wrongful birth cases manifest judicial concern for creating a legal duty of care governing information that shapes the important decisions parents make in determining whether or not to bear a child. Extension of that duty one step further to govern the decisionmaking itself, however, is an excessive intrusion into the parental realm.

Intrusion into parental decision-making is typically prevented by variations of intrafamily tort immunity which may bar certain types of wrongful life actions at the outset. But for some kinds of cases, such as those brought after a breakdown in or severance of the child-parent relationship, the considerations are different. In such circumstances the wrongful life tort may be a particularly effective means of guaranteeing payment for the costs of caring for an impaired child whose parents refuse to take financial responsibility for their decision to give birth. Insurance coverage may ease the effects of this liability.

In other cases in which parents consciously choose to give birth despite risks of impairment to the child, constitutional considerations

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he could conceivably get funding for the abortion procedure on his own. This seems unlikely, however.

233. *See* Special Project, *Abortion Law*, 1980 ARIZ. ST. L.J. 67, 148. The authors point out that amniocentesis is usually performed in the fourteenth week, but that results are often not available until the twentieth week or later. *Id.* They then suggest that in such cases the state should extend perhaps the period for discretionary abortion beyond the first trimester. *Id.* at 149.

234. See text & notes 168-81 *supra*.

preventing state intrusion upon parental rights of privacy, free exercise of religion, and family autonomy should prevail. In light of the inherently undefinable and, at least at the present time, only reluctantly recognized right of a child to be born unimpaired, more established parental rights necessitate that the decision to deem nonlife more valuable than life be left to the parent rather than to a jury after the fact. Even if a state were willing to assume responsibility for making this judgment in lieu of the parent, the state would find itself on an anfractuous path fraught with slippery slopes and arbitrary linedrawing. Recognition of the child versus parent wrongful life cause of action would be only the beginning of more difficult and inappropriate incursions into the realm of childbirth and pregnancy, a realm which should best be governed by the parents.