

Note

WHEN LIFE IS AN INJURY: AN ECONOMIC APPROACH TO WRONGFUL LIFE LAWSUITS

THOMAS A. BURNS

INTRODUCTION

Can life be an injury? Jurists, theologians, and philosophers have spilled much ink over this question.¹ Wrongful birth and wrongful life lawsuits are frequently debated in courts and academic circles. In broad overview, wrongful birth lawsuits are prenatal negligence suits brought by the parents of a deformed or retarded child against a doctor who negligently failed to diagnose or inform the parents about potential birth defects. Wrongful life lawsuits, on the other hand, are prenatal negligence suits brought on behalf of the deformed or retarded child against a doctor who negligently failed to diagnose or inform the child's parents about potential birth defects. Generally, courts dismiss wrongful life lawsuits because they fail to perceive that

Copyright © 2003 by Thomas A. Burns.

1. See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) (“Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and theologians.”); AUGUSTINE, *THE ESSENTIAL AUGUSTINE* 70 (Vernon J. Bourke ed., 1974) (arguing that understanding is more excellent than merely living or existing, because “even a stone exists, and a beast lives, yet I do not think that a stone lives, or that a beast understands[. . .] but he who understands assuredly both exists and lives”); DAVID HUME, *On Suicide, in* *FOUR DISSERTATIONS; AND, ESSAYS ON SUICIDE AND THE IMMORTALITY OF THE SOUL* 1, 21 (photo. reprint 2000) (1783) (“I believe that no man ever threw away life, while it was worth keeping.”); FRIEDRICH NIETZSCHE, *THE GAY SCIENCE* § 341, at 273–74. (Walter Kaufmann trans., 1974) (1882):

What, if some day or night a demon were to steal after you into your loneliest loneliness and say to you: “This life as you now live it and have lived it, you will have to live once more and innumerable times more; and there will be nothing new in it, but every pain and every joy and every thought and sigh and everything unutterably small or great in your life will have to return to you, all in the same succession and sequence”

Would you not throw yourself down and gnash your teeth and curse the demon who spoke thus? Or have you once experienced a tremendous moment when you would have answered him: “You are a god and never have I heard anything more divine.”

the child has suffered any legally cognizable injury: had the doctor not been negligent, the child would not exist.

This Note contends that wrongful life lawsuits should be cognizable because, when viewed through an entitlement model, they have the same economic consequences as wrongful birth lawsuits. To achieve this end, injury in wrongful life lawsuits should be conceived of as a financial injury to the individual child. When injury is thus conceptualized in a narrow, economic sense, the nonexistence paradox—comparing injured existence to nonexistence—dissolves. This reconceptualization would justify awarding special damages for medical costs and any punitive damages to the child, but would forbid recovery of general damages for pain, suffering, and emotional distress.

Currently, three courts have reached this result intuitively.² However, these three courts explicitly *ignored* the nonexistence paradox, essentially admitting that they preferred an approach of fairness.³ This Note resuscitates their conclusion via economic analysis by explaining that, in fact, not only is their conclusion both just and fair, it also comports with leading economic theory. Thus, to answer the opening question, life can be a compensable injury.

To this end, Part I elucidates wrongful life and wrongful birth, and introduces the nonexistence paradox. Part II examines the watershed cases of wrongful life and wrongful birth jurisprudence. Part III reviews the wrongful life literature and explains why attempts to circumvent the nonexistence paradox have failed. Part IV introduces the entitlement framework. Part V applies the entitlement framework to wrongful life claims and redefines injury.

I. PRENATAL NEGLIGENCE BACKGROUND

Wrongful life and wrongful birth are the latest developments in prenatal negligence jurisprudence. Initially, in the late 1960s, American law recognized neither parents' wrongful birth claims nor children's wrongful life claims.⁴ Within ten years, however, the law began

2. See *infra* Part II.F.

3. See *Procانى v. Cillo*, 478 A.2d 755, 772 (N.J. 1984) (Schreiber, J., dissenting) (“Once one acknowledges, as the majority has, that the child has no cause of action for general damages stemming from wrongful life, it is unfair and unjust to charge the doctors with the infant’s medical expenses.” (citation omitted)); *infra* notes 86–88 and accompanying text; *infra* note 95 and accompanying text.

4. *Gleitman v. Cosgrove*, 227 A.2d 689, 692, 693 (N.J. 1967) (holding that a child could not state a claim for wrongful life, and that his parents could not state a claim for wrongful birth).

to recognize parents' wrongful birth claims.⁵ Until 1982, no state supreme court permitted wrongful life lawsuits at all.⁶ Currently, no American jurisdiction permits a child to recover general damages for wrongful life lawsuits.⁷

A. *Defining Wrongful Life and Wrongful Birth*

Wrongful life is a unique and controversial kind of prenatal negligence lawsuit that is usually contrasted with wrongful birth. Wrongful birth claims are brought by the parents (generally the mother) against the doctor who gave prenatal treatment and negligently failed to diagnose or inform that the child would probably be retarded or deformed, thereby denying her the opportunity to abort.⁸ Wrongful life claims, on the other hand, generally arise when a child is born deformed or retarded and sues his doctor for negligently diagnosing or informing his mother about his condition, thereby denying his mother the opportunity to abort. As a practical matter, wrongful life claims are only brought when the parents are unavailable to sue for wrongful birth, as when the parents suddenly die or fail to sue during the statute of limitations.⁹

It is imperative to note that in neither wrongful life nor wrongful birth lawsuits did the doctor, strictly speaking, cause the child to become deformed or retarded. If, for example, a doctor had negligently or intentionally prescribed thalidomide to a mother, and this deformed or retarded her child, the doctor would be liable to the mother and the child for ordinary prenatal negligence. The real novelty of wrongful life and wrongful birth claims is that the child, tragi-

5. See *Becker*, 386 N.E.2d at 813 (recognizing parents' wrongful birth claim for the first time, but limiting their recovery to medical expenses, and forbidding them from recovering for psychic or emotional harm).

6. For the first case to recognize a limited wrongful life claim, see *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982).

7. Since 2000, the *Cour de cassation* (France's rough equivalent of the U.S. Supreme Court) has made headlines around the world with its rapidly developing wrongful life jurisprudence, *L'Arrêt Perruche*, in which the *Cour de cassation* has recognized a child's right to sue his doctors to recover general and special damages for negligently failing to diagnose or inform his parents about his potential deformation. Cass. ass. plén., Nov. 17, 2000, JCP 2000 II 10,438, available at <http://www.courdecassation.fr/agenda/arrets/arrets/99-13701arr.htm>.

8. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 55, at 370 (5th ed. 1984).

9. *E.g.*, *Procanik v. Cillo*, 478 A.2d 755, 762 (N.J. 1984) ("Here, the parents' claim is barred by the statute of limitations. Does this mean that Peter must forego medical treatment for his blindness, deafness, and retardation? We think not.").

cally, was already condemned to a deformed or retarded existence *before* the doctor negligently failed to diagnose or apprise the mother of the child's condition. So, to continue the thalidomide example, in a wrongful life or wrongful birth claim, the doctor would merely have been negligent in failing to tell the mother that her previous ingestion of thalidomide might deform or retard her fetus.

To summarize, wrongful life claims are brought by or on behalf of children; wrongful birth claims are brought by or on behalf of parents. Nevertheless, courts treat wrongful life and wrongful birth claims as having very different conceptual grounds. Since *Roe v. Wade*,¹⁰ courts have had no difficulty identifying which of the mother's rights was injured: her constitutional right to choose whether to carry her fetus to term.¹¹ Thus, when doctors negligently fail to diagnose or inform the mother of the child's potential retardation or deformation, they have injured the mother's right to choose. As a result, it is no longer controversial to award damages to parents for wrongful birth.¹² Wrongful life, on the other hand, creates enormous conceptual difficulties,¹³ because the nonexistence paradox prevents courts from identifying any right of the child that has been injured.¹⁴ As one court expressed the nonexistence paradox, "[t]he infant plaintiff is therefore required to say not that he should have been born without defects but that *he should not have been born at all*."¹⁵

10. 410 U.S. 113 (1973).

11. *See id.* at 163-64 (holding that a woman had a constitutionally protected right to terminate her pregnancy).

12. *See infra* notes 60-61, 69 and accompanying text.

13. F. Allan Hanson, *Suits for Wrongful Life, Counterfactuals, and the Nonexistence Problem*, 5 S. CAL. INTERDISC. L.J. 1, 4 (1996):

[S]uits for wrongful life pose a dilemma. On the one hand are issues of common sense, compassion, and fairness. The negligent behavior of the defendant has caused preventable medical expenses, pain, and suffering. It seems entirely just to fix the responsibility for the injury and to allow a remedy for the tragedy. On the other hand, it is conceptually problematic in wrongful life cases to conclude that the defendant caused the plaintiff injury and to exact compensation when, but for the defendant's conduct, the plaintiff would not exist.

14. *See, e.g., infra* notes 48-49 and accompanying text (describing one court's attempt to ascribe a fundamental right to children to be born as a whole, functional human being); *infra* Part III.A (describing Judge Handler's adequate parenting theory).

15. *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967) (emphasis added).

B. *The Nonexistence Paradox*

In all negligence actions, plaintiffs must plead and prove four elements: duty, breach, causation, and injury.¹⁶ In wrongful life and wrongful birth lawsuits, courts have no difficulty finding or accepting that (1) the doctor had duties running toward both the mother and the fetus, (2) the doctor breached those duties, and (3) if the doctor had not breached those duties, the mother would have aborted the fetus.¹⁷ However, the injury element is the real stumbling block for courts, and gives rise to the nonexistence paradox.

The nonexistence paradox, simply stated, is that that the child is claiming that it is an injury for him to be alive—that his very life is wrongful. Courts have addressed this concern in various ways. At first, because the general rule in tort when calculating damages is to make the plaintiff whole (i.e., return him to his former condition), courts dismissed wrongful life lawsuits because damages were impossible to calculate.¹⁸ This is because calculating damages required comparing the child's injured existence with nonexistence, and determining which was better and by how much. However, the impossibility-of-calculation rationale fell into disfavor, so subsequent courts justified their dismissal of wrongful life lawsuits because there was no “legally cognizable injury,” in addition to the immeasurable damages.¹⁹ Finally, the impossibility-of-calculation rationale was entirely abandoned, and courts rejected wrongful life lawsuits simply because they refused to recognize that the child had suffered a legal injury.²⁰

Using these policy reasons, courts have refused to find an injury because they wished to protect the sanctity of life,²¹ and because, as *mortal* judges, they felt that they lacked the competence to compare

16. KEETON ET AL., *supra* note 8, § 30, at 164–65.

17. See, e.g., Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 205–23 (1993) (explaining how the traditional tort framework applies to wrongful life lawsuits).

18. *Gleitman*, 227 A.2d at 692.

19. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

20. *Berman v. Allan*, 404 A.2d 8, 12 (N.J. 1979) (rejecting the impossibility-of-calculation rationale, but still denying a wrongful life claim because of the “different premise—that Sharon has not suffered any damage cognizable at law by being brought into existence”).

21. See, e.g., *id.* (“One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than nonlife.”).

deformed existence to nonexistence.²² Even the few courts that have permitted children to recover special damages in wrongful life lawsuits have denied general damages because of the nonexistence paradox.²³

II. THE GROWTH OF WRONGFUL LIFE AND WRONGFUL BIRTH JURISPRUDENCE

Wrongful life and wrongful birth have had turbulent formative years. Initially, neither claim was recognized. Then, wrongful birth was recognized, but not wrongful life. Finally, three courts recognized limited wrongful life claims to recover special damages. This Part traces the judicial life cycle of wrongful life and wrongful birth.

A. *Conception: Zepeda v. Zepeda*

An Illinois appellate court heard the first wrongful life claim in the world in *Zepeda v. Zepeda*.²⁴ A grown man sued his father for being “born an adulterine bastard.”²⁵ Previously, his father had “induced the plaintiff’s mother to have sexual relations by promising to marry her.”²⁶ However, the father broke this promise because he was already married to another woman.²⁷

22. *Becker*, 386 N.E.2d at 812. Of course, judges and commentators criticize these rationales. *Procanik v. Cillo*, 478 A.2d 755, 765 (N.J. 1984) (Handler, J., concurring and dissenting):

[T]he Court itself need not express a preference of life over nonlife but only understand that individuals in necessitous situations have the right to make that choice. We should acknowledge, therefore, that in determining whether the afflicted infant has a cause of action for wrongful life, the Court is neither compelled nor asked to assume a Hamlet role.

Michael B. Kelly, *The Rightful Position in “Wrongful Life” Actions*, 42 HASTINGS L.J. 505, 527 (1991) (suggesting that courts use “the injury argument to mask [their] underlying policy concerns”).

23. *Turpin v. Sortini*, 643 P.2d 954, 963–64 (Cal. 1982); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 496 (Cal. 1983); *Procanik*, 478 A.2d at 763.

24. 190 N.E.2d 849, 852 (Ill. 1963) (quoting an expert who could not find any similar claim having ever been raised anywhere). The court also coined the phrase “wrongful life.” *Id.* at 858.

25. *Id.* at 851. The plaintiff sued for damages “for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard.” *Id.*

26. *Id.*

27. *Id.*

Although the *Zepeda* court recognized that the father had duties running to his son (even before the son came into being),²⁸ the court dismissed the claim because it feared that many illegitimate children might bring suit, which would overwhelm the court system.²⁹ More importantly, the court worried that many circumstances into which children were born would be considered injuries.³⁰ For these reasons, the court felt that the legislature was a more appropriate forum than the judiciary to recognize claims for wrongful life.³¹

The *Zepeda* court's analysis is fascinating in light of subsequent wrongful life jurisprudence: it never squarely addressed the nonexistence paradox.³² Moreover, the court concluded that the plaintiff had suffered an injury.³³ Thus, the court found that all the elements of a tort had been satisfied, but still dismissed the claim.³⁴ In retrospect, this outcome is remarkable. Subsequent courts denied wrongful life claims because no tort occurred—not because a tort had occurred, but other policy reasons forbade them from recognizing it.

B. *Gestation*: *Gleitman v. Cosgrove*

*Gleitman v. Cosgrove*³⁵ was the first traditional wrongful life and wrongful birth lawsuit. Jeffrey Gleitman's mother consulted doctors when she was two months pregnant.³⁶ Although she informed them that she had been diagnosed with German measles (i.e., Rubella) one

28. *Id.* at 853–55 (analyzing three hypothetical prenatal torts in which the duty was breached before the child was conceived, and concluding that duties run to fetuses before conception).

29. *Id.* at 858 (suggesting that there were as many as 250 thousand illegitimate children—potential plaintiffs—in the United States in 1960 alone).

30. *Id.* (“One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation.”).

31. *Id.* at 859:

If we are to have a legal action for such a radical concept as wrongful life, it should come after thorough study of the consequences. . . . The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people.

32. *See id.* at 857 (omitting any discussion of the nonexistence paradox or sanctity of life concerns). The court's omission is surprising because, although the *Zepeda* court may have planted the seeds for later courts' holdings, things could have turned out very differently.

33. *Id.* (“Children born illegitimate have suffered an injury. If legitimation does not take place, the injury is continuous. If legitimation cannot take place, the injury is irreparable.”).

34. *Id.* at 857–58.

35. 227 A.2d 689 (N.J. 1967).

36. *Id.* at 690.

month earlier,³⁷ the doctors negligently informed her that “the German measles would have no effect at all on her child.”³⁸ Jeffrey was born blind and deaf.³⁹ Had Jeffrey’s mother known the probabilities, she would have aborted.⁴⁰

The court denied Jeffrey’s wrongful life claim because it was impossible to *measure* Jeffrey’s damages.⁴¹ It is imperative to recognize that, although the court noted the nonexistence paradox,⁴² it dismissed the claim not because Jeffrey did not suffer any injury, but simply because it felt that courts and juries lacked the competence to calculate Jeffrey’s damages accurately.⁴³ The court held that Jeffrey had no “*damages* cognizable at law,”⁴⁴ as opposed to later courts that would hold that the plaintiff suffered no *injury* cognizable at law.

The court likewise denied the parents’ wrongful birth claim, even though they “[stood] in a somewhat different position,”⁴⁵ because it was impossible to measure their damages.⁴⁶ The court also justified its wrongful birth holding on the grounds of administrability and the “countervailing public policy supporting the preciousness of human life.”⁴⁷

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 691.

41. *Id.* at 692 (“The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, but it is impossible to make such a determination.”).

42. *Id.* at 692 (“The infant plaintiff is therefore required to say not that he should have been born without defects but that he should not have been born at all.”); *see also id.* at 711 (Weintraub, C.J., dissenting in part) (“Ultimately, the infant’s complaint is that it would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.”).

43. *Id.* (“[I]t is impossible to make such a determination.”).

44. *Id.* (emphasis added).

45. *Id.* The position was different because “Mrs. Gleitman can say that an abortion would have freed her of the emotional problems caused by the raising of a child with birth defects; and Mr. Gleitman can assert that it would have been less expensive for him to abort rather than raise the child.” *Id.* at 692–93.

46. *Id.* at 692 (“[A] court would have to evaluate the denial to [the parents] of the intangible, unmeasurable, and complex human benefits of motherhood and fatherhood and weigh these against the alleged emotional and money injuries.”).

47. *Id.* at 693 (“The right to life is inalienable in our society. . . . A child need not be perfect to have a worthwhile life.”).

C. *The Birth of Wrongful Birth: Becker v. Schwartz*

In *Park v. Chessin*,⁴⁸ a lower New York court startlingly found that a child had the “fundamental right . . . to be born as a whole, functional human being.”⁴⁹ In *Becker v. Schwartz*,⁵⁰ the consolidated appeal,⁵¹ doctors negligently failed to inform one mother that, because she was thirty-seven years old when she conceived, her children were more likely to have Down’s syndrome.⁵² Other doctors negligently informed another mother that her chances of giving birth to a second child afflicted with fatal polycystic kidney disease were “practically nil.”⁵³ Both mothers then gave birth to children with birth defects.⁵⁴ Had they been properly informed, the first mother would have aborted, and the second mother would have never conceived.⁵⁵

The *Becker* court dismissed the resulting wrongful life claims because (1) the plaintiffs suffered no legal injury, and (2) the plaintiffs’ damages were impossible to measure. The court expressly disavowed the *Park* court’s bold holding.⁵⁶ In what has since become perhaps the most quoted passage in wrongful life jurisprudence, the *Becker* court cited sanctity of life concerns intertwined with its complaint that courts lack competence to administrate the complaints as the reasons for its decision:

Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.⁵⁷

48. 400 N.Y.S.2d 110 (N.Y. App. Div. 1977).

49. *Id.* at 114.

50. *Becker v. Schwartz*, 386 N.E. 2d 807 (N.Y. 1978).

51. *Park* was consolidated on appeal with *Becker v. Schwartz*, 400 N.Y.S.2d 119 (N.Y. App. Div. 1977), and the Court of Appeals of New York reconsidered *Park*’s holding the following year. *Becker*, 386 N.E.2d at 809.

52. *Becker*, 386 N.E.2d at 808.

53. *Id.* at 809.

54. *Id.*

55. *Id.* at 810.

56. *Id.* at 812 (“There is no precedent for recognition at the Appellate Division of ‘the fundamental right of a child to be born as a whole, functional human being.’” (quoting *Park*, 400 N.Y.S.2d at 114)).

57. *Id.*

Damages were impossible to measure because the wrongful life claims at issue required courts to make “a comparison between the Hobson’s choice of life in an impaired state and nonexistence.”⁵⁸ The court felt that “the law [wa]s not equipped to make”⁵⁹ this comparison.

However, the *Becker* court was cognizant of *Roe v. Wade*,⁶⁰ so it permitted the parents’ wrongful birth claims.⁶¹ Nevertheless, although the parents could recover special damages, the court forbade the parents from recovering “for psychic or emotional harm.”⁶² That is because the parents, as parents, would receive offsetting benefits.⁶³

In short, although the wrongful birth legal theory experienced a very troubled labor, it was finally placed into the world.

D. *The Tender Toddler Years: Berman v. Allan*

In *Berman v. Allan*,⁶⁴ the Supreme Court of New Jersey reconsidered *Gleitman*.⁶⁵ Doctors negligently failed to inform Sharon Berman’s mother about the availability of an amniocentesis test that would have detected whether Sharon was afflicted with Down’s syndrome.⁶⁶ Her mother would have aborted had she known Sharon was afflicted with Down’s syndrome.⁶⁷

The *Berman* court rejected Sharon’s wrongful life claim, but abandoned *Gleitman*’s difficulty-of-measuring-damages rationale.⁶⁸

58. *Id.*

59. *Id.*

60. 410 U.S. 113 (1973).

61. Unlike the child’s complaint, the parents’ damages were ascertainable. *Becker*, 386 N.E.2d at 813 (defining the parents’ damages as “the pecuniary expense which they have borne, and in *Becker* must continue to bear, for the care and treatment of their infants,” and differentiating these damages from the child’s damages because “[c]alculation of damages necessary to make plaintiffs whole in relation to these expenditures requires nothing extraordinary”).

62. *Id.*

63. *Id.* at 814 (“[P]arents may yet experience a love that even an abnormality cannot fully dampen. To assess damages for emotional harm endured by the parents of such a child would, in all fairness, require consideration of this factor in mitigation of the parents’ emotional injuries.”).

64. 404 A.2d 8 (N.J. 1979).

65. *Id.* at 10.

66. *Id.*

67. *Id.*

68. *Id.* at 12 (“Difficulty in the measure of damages is not . . . our sole or even primary concern.”).

Instead, the court held that Sharon suffered no injury at law because it wanted to preserve the sanctity of life.⁶⁹

E. First Words: Curlender v. Bio-Science Laboratories

In 1980, a California appellate court took another bold step in wrongful life jurisprudence in *Curlender v. Bio-Science Laboratories*.⁷⁰ Shauna Curlender was born with Tay-Sachs disease and had a four-year life expectancy because Bio-Science negligently failed to detect that her parents were potential carriers of this hereditary disease.⁷¹ Had Bio-Science detected this disease, the Curlenders would have either avoided conceiving Shauna or aborted.⁷² The parents and Shauna sued for medical expenses, emotional distress, and the deprivation of “72.6 years of her life.”⁷³

In permitting recovery for wrongful life, the court almost expressly admitted that it was *ignoring* the intellectual consequences of the nonexistence paradox:

The reality of the “wrongful life” concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. . . . [A] reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.⁷⁴

The court tailored damages to allow the child to recover general and special damages for the pain and suffering she experienced during her actual life span.⁷⁵ Moreover, the court also permitted the child to re-

69. *Id.* (“One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than nonlife.”). Nevertheless, the court was cognizant of *Roe v. Wade*, 410 U.S. 113 (1973), so it upheld the parents’ wrongful birth claims. *Berman*, 404 A.2d at 14. Although admitting that measuring damages would be troublesome, the court refused to follow *Becker*, and permitted the parents to recover general damages for their wrongful life claims. *Id.* at 15. Nevertheless, the court, citing windfall concerns, refused to let the parents recover special damages for medical expenses. *Id.* at 14.

70. 165 Cal. Rptr. 477 (Cal. Ct. App. 1980).

71. *Id.* at 480–81.

72. *Id.* at 480.

73. *Id.* at 481.

74. *Id.* at 488.

75. *Id.* at 489.

cover punitive damages in wrongful life lawsuits.⁷⁶ However, as the short life span of this opinion attests, the court went too far. The *Curlender* court suggested that *parents* should also be potential defendants in wrongful life lawsuits.⁷⁷ This case ultimately sowed the seeds for the highest courts of California, Washington, and New Jersey to allow children to recover special damages in wrongful life lawsuits, while forbidding recovery of general damages.

F. *The Adolescence of Wrongful Life: Turpin v. Sortini, Harbeson v. Parke-Davis, Inc., and Procanik v. Cillo*

1. *California*. The Supreme Court of California first considered wrongful life in *Turpin v. Sortini*,⁷⁸ in which a doctor negligently diagnosed a couple's first child as having hearing within normal limits; in fact, the child was stone deaf, and the condition was hereditary.⁷⁹ Relying on this diagnosis, the couple conceived and gave birth to a second child, who was also afflicted with deafness.⁸⁰ The child sued for special and general damages.⁸¹

Initially, the court criticized *Curlender* for obscuring the difference between ordinary prenatal negligence and wrongful life lawsuits.⁸² By failing to take the nonexistence paradox into account, the *Turpin* court reasoned, the *Curlender* court failed to award proper damages.⁸³ Nevertheless, the *Turpin* court also had strong words for other old-fashioned decisions:

76. *Id.* at 490.

77. *Id.* at 488 (suggesting that if parents consciously chose to proceed with a pregnancy while knowing that their infant would be born seriously impaired, parents should be liable in tort to their children). Of course, this is troubling, because *Roe* gives mothers a constitutionally enshrined right to make a largely unfettered choice whether to carry a fetus to term. 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."). If mothers were to face potential liability for choosing to give birth, this constitutionally protected choice would no longer be free.

78. 643 P.2d 954 (Cal. 1982).

79. *Id.* at 956.

80. *Id.*

81. *Id.*

82. *Id.* at 961.

83. *See id.*:

Because nothing defendants could have done would have given plaintiff an unimpaired life, it appears inconsistent with basic tort principles to view the injury for which defendants are legally responsible solely by reference to plaintiff's present condition without taking into consideration the fact that if defendants had not been negligent she would not have been born at all.

Although it is easy to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound basis for rejecting the child's tort action. To begin with, it is hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.⁸⁴

The court therefore fashioned a middle ground, permitting the child to recover special damages, but not general damages.⁸⁵

Judge Mosk immediately seized on this discrepancy, complaining that the majority opinion was "internally inconsistent"⁸⁶ because it failed to "suggest [any] principle of law that justifies so neatly circumscribing the nature of damages suffered as a result of a defendant's negligence."⁸⁷ The court effectively overruled *Curlender*, and Judge Mosk wished to continue with the *Curlender* rule.⁸⁸

2. *Washington*. The Supreme Court of Washington followed California's lead in *Harbeson v. Parke-Davis, Inc.*⁸⁹ The court found *Turpin* highly persuasive in considering the Harbeson children's wrongful life claim, particularly with regard to the rationale for awarding special damages.⁹⁰ Moreover, in addition to wishing to allocate these costs to the negligent doctors, the *Harbeson* court also

84. *Id.* at 961–62.

85. *Id.* at 965–66:

[I]t would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care. If such a distinction were established, the afflicted child's receipt of necessary medical expenses might well depend on the wholly fortuitous circumstance of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care.

86. *Id.* at 966 (Mosk, J., dissenting).

87. *Id.* (Mosk, J., dissenting).

88. *Id.* (Mosk, J., dissenting) ("I see no persuasive reason to either abandon [*Curlender's*] doctrine, or to dilute its effectiveness by limiting recovery to special damages.").

89. 656 P.2d 483 (Wash. 1983).

90. *Id.* at 495:

The child's need for medical care and other special costs attributable to his defect will not miraculously disappear when the child attains his majority. In many cases, the burden of those expenses will fall on the child's parents or the state. Rather than allowing this to occur by refusing to recognize the cause of action, we prefer to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training.

wished to deter negligent doctors.⁹¹ Finally, the court remained cognizant of the nonexistence paradox; that is why it only granted special damages, and not general damages.⁹²

3. *New Jersey*. In *Procanik v. Cillo*,⁹³ the Supreme Court of New Jersey concluded that a wrongful life plaintiff could recover special damages, but not general damages.⁹⁴ In reaching this conclusion, the court was especially persuaded by *Turpin*'s emphasis on fairness:

Law is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice. Whatever logic inheres in permitting parents to recover for the cost of extraordinary medical care incurred by a birth-defective child, but in denying the child's own right to recover those expenses, must yield to the inherent injustice of that result. The right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the "wholly fortuitous circumstance of whether the parents are available to sue."⁹⁵

G. *Culling Wrongful Life Themes*

The vast majority of American jurisdictions continue to dismiss wrongful life lawsuits because they fail to discern an injury. However, three maverick courts permit limited wrongful life claims that deny recovery of general damages (which include pain, suffering, and emotional distress) while granting special damages (which include medical expenses).⁹⁶ The elements of such wrongful life claims appear to be that a doctor breached a duty to the child by negligently depriving the mother of the opportunity to abort, and that this deprivation caused injury to the child because the mother would have aborted but for the doctor's negligence. Nevertheless, these maverick courts permit wrongful life claims purely on the basis of intangible notions of fair-

91. *Id.* at 496 ("Imposition of a corresponding duty to the child will similarly foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice.").

92. *See id.* ("We agree . . . that measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors. However, we do not agree that the impossibility of valuing life and nonexistence precludes the action altogether.").

93. 478 A.2d 755 (N.J. 1984).

94. *Id.* at 757.

95. *Id.* at 762 (quoting *Turpin v. Sortini*, 643 P.2d 954, 965 (Cal. 1982)).

96. None of the three courts addressed whether punitive damages should be available.

ness, failing to recognize that their conclusions also comport with leading economic theory.

III. FAILED ATTEMPTS TO CIRCUMVENT THE NONEXISTENCE PARADOX

Scholars have made several interesting and intriguing attempts to circumvent the nonexistence paradox, but all have failed to convince a court to adopt their approach. Among these suggestions are (1) holding doctors strictly liable, treating wrongful life like ordinary prenatal negligence, treating wrongful life as a misrepresentation case, and treating wrongful life like an injured parenting case; (2) analogies to end-of-life lawsuits and blending wrongful life with family law remedies; and (3) making the child's claim parasitic on the parents' wrongful birth claim. This Part explores such approaches and explains the shortcomings of each.

A. *Strict Liability, Ordinary Prenatal Negligence, Misrepresentation Law Analogy, and Impaired Parental Capacity*

One author suggests imposing strict liability on doctors "who disseminate avoidably inaccurate genetic information."⁹⁷ Strict liability entails "liability without fault."⁹⁸ The benefit of this approach is that it would reduce the child's burden of proving that his life is an injury, and prevent courts from tripping over the metaphysical paradox.

Another writer suggests treating wrongful life lawsuits as any other ordinary prenatal negligence lawsuit.⁹⁹ He essentially suggests treating injury as a thing-in-itself that happens apart from the plaintiff.¹⁰⁰ Thus, a doctor's breach of his duty can be said to proximately cause a case of Tay-Sachs disease or deafness to have come into being. The child then gets to recover general damages for these injuries-in-themselves, after the injuries are reattached to the plaintiff. The commentator believes that "[o]ne important advantage of the focus in this analysis on impairments, and especially its avoidance of the non-

97. Belsky, *supra* note 17, at 248.

98. KEETON ET AL., *supra* note 8, § 75, at 534.

99. Hanson, *supra* note 13, at 17 ("The most direct way to deal with the nonexistence problem is to accept it at face value and to hold that, for certain plaintiffs, never having been born really would be preferable to living.").

100. *Id.*

existence paradox, is that actions can also be intelligibly brought for impairments not so severe as to make life not worth living.”¹⁰¹

Professor Michael Kelly suggests using misrepresentation law to address wrongful life claims: “Borrowing from misrepresentation law, courts could seek to put the plaintiff in the position she would have occupied if the counselor’s diagnosis had been correct—as a child who does not suffer from genetic impairments.”¹⁰²

Finally, Judge Handler in his opinions has consistently advocated a theory of impaired or diminished parental capacity, to establish that the child has suffered an ascertainable injury.¹⁰³ Essentially, parents become so depressed after unexpectedly discovering that their child is deformed or retarded, that they become incapable of effective parenting. Judge Handler views the child’s injury as potentially parasitic on the parents’ injury.¹⁰⁴

Although these solutions are novel, the common shortcoming of all these approaches is that they merely allocate the entire loss to the doctor, thereby transforming doctors from medical services providers into insurers. Doctors are not capable of guaranteeing perfect children. There are many situations in which doctors would not breach the standard of medical care, but children would still be born with birth defects. When doctors have not breached the standard of medical care, they should not be held liable for the damages that proximately result. It would be unfair to hold doctors fully liable for injuries they did not create, and would tend to overdeter doctors. The doctor’s negligence caused the infant to come into being, but the doctor’s negligence did not cause the child to *develop* and *suffer from* a particular disease or deformity. To force doctors to pay general damages for conditions they did not cause is inappropriate.¹⁰⁵

101. *Id.* at 23.

102. Kelly, *supra* note 22, at 525.

103. *Procanik v. Cillo*, 478 A.2d 755, 767 (N.J. 1984) (Handler, J., concurring and dissenting) (“Not only must [parents] deal with the unanticipated shock of discovering that their child is handicapped, but also they must cope with the belief that but for their failure to decide their child’s fate they might have spared the child a life of affliction.”); *Berman v. Allan*, 404 A.2d 8, 19 (N.J. 1979) (Handler, J., concurring and dissenting) (“[T]he injury consists of a diminished childhood in being born of parents kept ignorant of her defective state while unborn and who, on that account, were less fit to accept and assume their parental responsibilities.”).

104. *Berman*, 404 A.2d at 19 (Handler, J., concurring and dissenting) (“Plausibly, the child’s injury and loss in the form of diminished childhood can be viewed as a derivative claim based solely on the parents’ injury.”).

105. Additionally, Judge Handler’s approach would require the problematic recognition of a right to adequate parenting.

B. *End-of-Life and Family Law Analogies*

Several commentators suggest that courts should treat wrongful life cases like end-of-life cases because both categories of plaintiffs possess similar interests.¹⁰⁶ The principle end-of-life case to which wrongful life is compared is *In re Quinlan*.¹⁰⁷ *Quinlan* created the substituted judgment doctrine, which allowed family members or other legal guardians to choose whether an individual in a vegetative state would choose to discontinue life support.¹⁰⁸ Wrongful life scholars contend that this rule should be extended to wrongful life lawsuits, because it shows an example of when the state's interest in preserving life is overridden by other concerns.¹⁰⁹ Moreover, as Professor Kelly contends, it is easier to choose nonexistence than death.¹¹⁰

Professor Philip Peters suggests using ethic-of-care-based family law rather than justice-based tort law.¹¹¹ This theory purports to explain the “unprincipled” results of *Turpin*, *Harbeson*, and *Procanik* by viewing the special damages remedy “as a rough form of supplemental child support rather than as compensatory damages.”¹¹²

106. *E.g.*, Belsky, *supra* note 17, at 223–34; Kelly, *supra* note 22, at 537–49. Ironically, other commentators who specialize in end-of-life cases also make the same comparison. However, they conclude that the two situations are different, because they do not want end-of-life cases to be treated like wrongful life cases—the blade cuts both ways. End-of-life scholars distinguish wrongful life for its lack of an equivalent treatment of patient autonomy. *See* Philip G. Peters, Jr., *The Illusion of Autonomy at the End of Life: Unconsented Life Support and the Wrongful Life Analogy*, 45 UCLA L. REV. 673, 692 (1998) (“[W]rongful life cases contain no equivalent exercise of patient autonomy. The sanctity of life argument is, therefore, qualitatively weaker in the end-of-life cases.”).

107. 355 A.2d 647 (N.J. 1976) (holding that a patient's privacy rights trump the state's interest in preserving his life).

108. *Id.* at 666.

109. *See, e.g.*, Belsky, *supra* note 17, at 227 (questioning why courts and legislatures respect the autonomy of patients who choose to end life support, but not that of handicapped children, because the “living patient is no more capable of concluding that death is preferable than is the handicapped child . . . capable of deciding that nonlife is preferable to life with disability”).

110. Kelly, *supra* note 22, at 542–43:

Whether because of our biological or genetic wiring or our training from birth, dying seems much harder to accept than never having been born. Nonexistence, never having lived, seems mild by comparison to death. . . . A rational person might prefer never to have been born, yet elect to continue living rather than face dying.

111. Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 TUL. L. REV. 397, 399 (1992) (suggesting that legislatures should blend family law and tort law so that tort defines the duties and family law defines the remedies of a wrongful life claim, thereby allowing courts to “provide these children with adequate and just protection”).

112. *Id.* at 406.

The shortcoming of the end-of-life approach is that the actual choice is vastly different. In end-of-life cases, courts are trying to protect a patient's right to choose what kinds of medical treatment he will receive, by using a subjective and objective test through a proxy. In wrongful life cases, it is much harder to identify how the infant would actually exercise its autonomy. Likewise, the shortcoming of the family law approach is that it requires legislative action rather than judicial action. It is unnecessary to go to a care-based model, when an individual rights model, properly informed by economic considerations and policies, achieves the same result.

C. Making Wrongful Life Claims Parasitic on Wrongful Birth Claims

Professor Alexander Capron suggests that the wrongful life claim would be viable if it were considered parasitic on the parents' claim.¹¹³

However, although that is true, that suggestion makes the wrongful life claim superfluous. The whole point of a wrongful life claim would be to allow recovery when the parents are unavailable to sue. Double recovery is not allowed. So, for example, if the statute of limitations had run out on the parents' wrongful birth claim, the child would not be able to assert a wrongful life claim that is parasitic on the parents' rights because the parents could no longer exercise those legal rights.

IV. AN ECONOMIC APPROACH:
THE ENTITLEMENT FRAMEWORK

Tort is a policy-driven field of law. Economic analysis informs tort policy by allocating liability where it should lie. This Part elucidates why the burden of paying medical expenses (i.e., special damages) but not pain and suffering (i.e., general damages) should fall on the shoulders of negligent doctors.

A. The Calabresi and Melamed Framework: Allocating Entitlements

Entitlements are protected by three different kinds of legal rules: property rules, liability rules, and inalienability rules.¹¹⁴ The state must

113. Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 652 (1979).

114. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089 (1972).

first decide *whom* to entitle.¹¹⁵ For example, the state could theoretically choose to entitle rapists over those who prefer bodily integrity.¹¹⁶ Once this initial decision is made, the state must enforce its entitlement.¹¹⁷

The second decision a state must make is *how* to entitle that person.¹¹⁸ The state has three choices. The state can choose a property rule, which requires “someone who wishes to remove the entitlement from its holder [to] buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”¹¹⁹ The state can choose a liability rule, which allows “someone [to] destroy the initial entitlement if he is willing to pay an objectively determined value for it.”¹²⁰ Finally, having chosen whether to protect the entitlement with a liability rule or a property rule, the state must choose whether the entitlement is transferable or inalienable.¹²¹

1. *Choosing Whom to Entitle.* Three policy considerations determine to whom entitlements should be given: “economic efficiency, distributional preferences, and other justice considerations.”¹²²

115. *Id.* at 1090:

Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of “might makes right”—whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail.

116. *Id.* at 1091.

117. *Id.*:

The need for intervention applies in a slightly more complicated way to injuries. When a loss is left where it falls in an auto accident, it is not because God so ordained it. Rather it is because the state has granted the injurer an entitlement to be free of liability and will intervene to prevent the victim’s friends, if they are stronger, from taking compensation from the injurer.

118. *Id.* at 1092.

119. *Id.*

120. *Id.* An “objectively determined value” means that the state will decide the objective value of the entitlement. *Id.*

121. *Id.* (“An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.”).

122. *Id.* at 1093. Guido Calabresi and Douglas Melamed criticize administrative efficiency as an insufficient reason to allocate entitlements. *See id.* at 1093 (conceding that the “administrative cost[] of enforcement” is a simple reason for allocating entitlements, but contending that “[b]y itself this reason will never justify any result except that of letting the stronger win”).

A given entitlement is economically efficient if it is both Pareto optimal and Kaldor-Hicks efficient.¹²³ Pareto *optimality* occurs when “any movement from an allocation would make at least one person worse off.”¹²⁴ Pareto *superiority* occurs when an allocation “leaves at least one person better off and no one is made worse off.”¹²⁵ Pareto optimality and superiority are usually contrasted with Kaldor-Hicks efficiency (also called wealth maximization). An allocation is Kaldor-Hicks efficient if “those individuals made better off by a policy or reallocation [were] made sufficiently better off that they could compensate those who are made worse off. The key here is that the compensation is ‘potential,’ not actual.”¹²⁶

By “Pareto optimal,” Melamed and Calabresi mean both Pareto optimal and Kaldor-Hicks efficient, because they would only choose allocations that are Kaldor-Hicks efficient, and then require the economic winners to compensate the economic losers. However, “what is a Pareto optimal, or economically efficient, solution varies with the starting distribution of wealth.”¹²⁷

Thus, there are five economic conclusions regarding economic efficiency: (1) entitlements should favor “knowledgeable choices between social benefits and the social costs of obtaining them, and between social costs and the social costs of avoiding them”;¹²⁸ (2) the cost of an activity should rest on the shoulders of the party best placed to analyze the costs and benefits of the activity to society; (3) in accidents, the party that can most cheaply avoid the injury should bear the costs; (4) if that party cannot be identified, the costs should be placed on the party with the lowest transaction costs; and (5) courts must decide whether to rely on the market or objective judicial valuations of the entitlement.¹²⁹

The second consideration is distributional preferences. Distributional preferences are less concrete than economic efficiency considerations, because they rely on a society’s “wealth distribution prefer-

123. *Id.* at 1094 (defining economic efficiency as entitlements that allocate resources in a way “that a further change would not so improve the condition of those who gained by it that they could compensate those who lost from it and still be better off than before”).

124. JEFFREY L. HARRISON, LAW AND ECONOMICS: CASES, MATERIALS, AND BEHAVIORAL PERSPECTIVES 50 (2002).

125. *Id.*

126. *Id.* at 59.

127. Calabresi & Melamed, *supra* note 114, at 1096.

128. *Id.*

129. *Id.* at 1096–97.

ences,” which take into consideration economic efficiency, caste preferences, and social judgments of individual worth.¹³⁰

The final consideration is a catch-all: “other justice reasons.”¹³¹ This is anything that is not an efficiency or distributional concern, and tends to mean some conception of intrinsic fairness.¹³²

2. *Choosing How to Allocate Entitlements.* Property rules should be the default rule for protecting an entitlement.¹³³ However, property rules plus voluntary transfer cannot be universally applied because transaction costs could prevent future transfer,¹³⁴ and an illiquid market could prevent accurate appraisal of the value of the entitlement. Thus, in cases in which there are high transaction costs, such as accidents,¹³⁵ liability rules are preferable.¹³⁶

A second situation in which liability rules should be chosen in lieu of property rules is when a liability rule would “facilitate[] a combination of efficiency and distributive results which would be difficult to achieve under a property rule.”¹³⁷ Often, it is cheaper and more efficient to promote distributional goals through collective valuation.¹³⁸

An inalienability rule should be selected when the transaction would result in significant costs to third parties (i.e., negative externalities), or “when external costs do not lend themselves to collective

130. *Id.* at 1098. The term “caste preferences” tends to mean social morality, or how society views itself.

131. *Id.* at 1102.

132. *Id.* at 1105 (emphasizing that “justice notions adhere to efficiency and broad distributional preferences as well as to other more idiosyncratic ones. . . . [that] though plausibly originally linked to efficiency, have now a life of their own”).

133. *See id.* at 1106 (suggesting that property rules are more economically efficient, except when transaction costs would prohibit efficient market transfers of the entitlement).

134. *Id.* (“Often the cost of establishing the value of an initial entitlement by negotiation is so great that even though a transfer of the entitlement would benefit all concerned, such a transfer will not occur.”).

135. *Id.* at 1108–09.

136. *Id.* at 1110 (“[A] very common reason, perhaps the most common one, for employing a liability rule rather than a property rule to protect an entitlement is that market valuation of the entitlement is deemed inefficient, that is, it is either unavailable or too expensive compared to a collective valuation.”).

137. *Id.* (“[U]se of a liability rule may allow us to accomplish a measure of redistribution that could only be attained at prohibitive sacrifice of efficiency if we employed a corresponding property rule.”).

138. *Id.*

measurement which is acceptably objective and nonarbitrary.”¹³⁹ Two other reasons for selecting inalienability rules are “self paternalism and true paternalism.”¹⁴⁰

B. The Coase Framework

This Section illustrates why the decision of whom to entitle with a property rule only matters economically when transaction costs are nontrivial.

1. *Pigouvian Liability: Internalize Externalities.* When activities have positive or negative externalities, agents fail to perceive the ultimate good or evil of their actions. Thus, agents underproduce or overproduce those activities that create positive or negative externalities. Socially optimal levels of such production would occur if government changed agents’ incentives by taxing activities that create negative externalities, and subsidizing activities that create positive externalities. In this way, agents would capture the benefit of their positive externalities and would bear the cost of their negative externalities.¹⁴¹

2. *Coase and Transaction Costs: Internalize Externalities Unless It Costs Too Much.* Pigouvian taxes and subsidies are superfluous when the agents who created or suffered the consequences of the harms can dicker costlessly over the costs and benefits of their activity.¹⁴² To illustrate, most Pigouvian economists favored holding polluters liable to those injured by their smoke, or taxing those pollut-

139. *Id.* at 1111.

140. *Id.* at 1113. Self paternalism is when an individual or group sets forth a prospective rule that will protect them in moments of weakness. *Id.* (citing as examples (1) Ulysses tying himself to the mast when his ship sailed past the Sirens, and (2) the Founding Fathers creating the Bill of Rights). Current examples include the voidability of contracts made while drunk or under duress. *Id.* True paternalism means that people cannot sell something because it is objectively not in their interest to sell it. *Id.* This is why American law forbids selling organs.

141. See generally ARTHUR CECIL PIGOU, *THE ECONOMICS OF WELFARE* (Transaction Publishers 2002) (1952) (developing a theoretical framework to analyze the efficiency of resource allocation).

142. Economists recognize that Pigouvian taxes and subsidies still work, but they are very difficult to implement as a practical matter because they are hard to assess at the correct level. For example, when government taxes, firms produce less because their marginal costs increase. If government taxes at the old quantity of production, the firm will be overtaxed. If government could tax at the new quantity of production, the Pigouvian tax would work, but it is nearly impossible for government to predict the firm’s new quantity of production.

ers.¹⁴³ However, when there are no transaction costs, the ultimate levels of pollution do not change whether polluters were made liable or the victims of pollution bore their own costs, because the polluters and victims would dicker until they reached the socially optimal balance between production of goods and pollution.¹⁴⁴ Thus, when transaction costs are trivial, it makes no economic difference to whom the entitlement is allocated.¹⁴⁵

Nevertheless, when nontrivial transactions costs exist (such as discovering what to purchase, from whom, on what terms, negotiating and drafting a contract, and enforcing the contract), then it matters to whom the entitlement is given. In such situations, a free market rearrangement of rights will not always occur, even when it would increase the value of production.¹⁴⁶

C. *Summarizing the Entitlement Framework*

The true first order decision is to determine whether there are transaction costs; otherwise, deciding whom to entitle is economically inconsequential.¹⁴⁷ If the state determines that meaningful transaction costs exist, then it should decide how to entitle. The strong default

143. R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 1–2, 26 (1960); see also *id.* at 27 (“What has to be decided is whether the gain from preventing the harm is greater than the loss which would be suffered elsewhere as a result of stopping the action which produces the harm.”).

144. *Id.* at 6 (“[T]he allocation of resources will be the same [when the damaging business is not liable for its injuries] as it was when the damaging business was liable for damage caused.”).

145. *Id.* at 8:

It is necessary to know whether the damaging business is liable or not for damage caused since without the establishment of this initial delimitation of rights there can be no market transactions to transfer and recombine them. But the ultimate result (which maximises [*sic*] the value of production) is independent of the legal position if the pricing system is assumed to work without cost.

Professor Coase thought it was imperative that “the rights of the various parties should be well-defined.” *Id.* at 19.

146. *Id.* at 16:

In these conditions [of transaction costs] the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other. But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved.

147. Calabresi and Melamed contend that the state must first decide whom to entitle. However, if there are no transaction costs and the entitlement is protected by a property rule, then the parties will be able to dicker to achieve the socially optimal result—no matter which party had the original entitlement.

choice should be for property rules, because private ordering of entitlements is generally more efficient and takes into consideration the actual parties' valuations better than a court's objective determination. However, property rules are inappropriate when significant transaction costs must be overcome for the market to accurately appraise the value of the entitlement. A prime example of when a property rule is inappropriate is accidents. Likewise, when a property rule would lead to an inequitable distributional outcome, then liability rules are better, because they permit judicial intervention to objectively assess the value of entitlements for weaker parties. Inalienability rules should be selected when transactions would result in negative externalities, or when the state wishes to paternalistically protect its citizens.

Once the state has decided *how* to entitle, it should decide *whom* to entitle based on economic efficiency, distributional preferences, and other justice considerations. The entitlement is efficiently allocated if there is a net social benefit, and economic winners are required to compensate economic losers. This implies that the cost should be borne by the party in the best position to calculate the social costs and benefits of using the entitlement, or the party that can most cheaply avoid the costs, or the party that can act in the market with the lowest transaction costs to correct errors in entitlement. The entitlement is distributed appropriately if it does not conflict with society's wealth distribution preferences. The entitlement conflicts with society's wealth distribution preferences if it is inefficient, upsets caste preferences, or interferes with social judgments of individual worth. An entitlement is consistent with other justice factors if it simply resonates with an inherent sense of fairness.

V. THE FINAL RITE OF PASSAGE: BRINGING WRONGFUL LIFE INTO ADULTHOOD

In economic terms, current wrongful life precedent actually means that doctors have an entitlement as to children (but not as to parents), to negligently or intentionally fail to diagnose a child's condition, and to negligently or intentionally fail to inform the mother of the child's condition.¹⁴⁸ However, I argue that this entitlement is

148. Although courts have nominally said that doctors owe duties not to be negligent in this fashion, courts have substantively reached the opposite conclusion—to speak of an unenforceable duty is to speak of an oxymoron. However, courts that have denied wrongful life claims have not justified their allocation of this entitlement in economic terms. *See supra* Part II.

properly allocated to the child and should be protected by a liability rule. Section A analyzes the wrongful life problem via the economic model sketched in Part IV, and demonstrates *why* this loss should be allocated to the doctor. Section B explains *how* this loss can be allocated to the doctor within the existing tort framework of duty, breach, causation, and injury, by setting forth a financial theory of injury.

A. Entitlements

1. *Transaction Costs.* The first inquiry is, assuming that a property rule protected an entitlement to negligently or intentionally fail to diagnose or inform a mother of her child's condition, whether there would be significant transaction costs.¹⁴⁹

Here, there would clearly be extraordinary transaction costs between the mother and the doctor. Asking a mother to set a value on the price of her child's health is almost impossible—a mother who has any affection for her offspring would not be able to set the price at which she would accept a retarded or deformed baby in lieu of a healthy baby. Because of a mother's inability to set a price on her baby's health, if a mother was required to purchase from a doctor his entitlement to negligently or intentionally fail to diagnose her child, negotiations would be extremely costly because one of the parties would not have a bottom line. Moreover, to be crude, no legal liquid market provides information to market participants about the going rate for a healthy newborn baby instead of a baby with birth defects.¹⁵⁰ Finally, drafting such a contract would be expensive because it is unlikely that either party would be satisfied with a form contract, given how personal and emotionally intense such decisions would be.

149. Obviously, to the extent a property rule would obtain, the parents would necessarily have to act as bargaining proxies for their unborn child. Property rule protection would be even more problematic because the unborn child cannot bargain on its own behalf.

150. *But cf.* Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978) (arguing for a market solution to the adoption problem of the baby shortage); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 72 (1987) ("So we [already] have legal baby selling today; the question of public policy is not whether baby selling should be forbidden or allowed but how extensively it should be regulated. I simply think it should be regulated less stringently than is done today."). For a sarcastic proposal for such a legal liquid market, see JONATHAN SWIFT, A MODEST PROPOSAL AND OTHER SATIRES 259–66 (Prometheus Books 1995) (1729) (noting that young healthy children are "a most delicious, nourishing, and wholesome food, whether stewed, roasted, baked, or boiled," and therefore suggesting, humbly and modestly, that poor Irish people should breed their children for consumption on the market, to prevent poor Irish children from burdening the public fisc).

2. *Property Rule or Liability Rule.* Because there assuredly would be significant transaction costs if the entitlement were protected by a property rule, it is necessary to determine what kind of rule should protect the entitlement.

Here, I argue that a liability rule should be employed to protect the entitlement. The mother would find it nearly impossible to determine her bottom line in negotiations. Thus, because of the transaction costs that this indecisiveness would cause, private ordering in the market would be unable to accurately assess the value of the entitlement. This should not be surprising, because, after all, when a court entertains a wrongful life lawsuit, the court is generally considering to whom to give an entitlement to commit an accident, and entitlements for accidents are best addressed via liability rules.

Moreover, a property rule would lead to an inequitable distributional outcome, because either doctors would undervalue the worth of their patients' children, or parents would overvalue the worth of their children. Given that doctors generally have much greater market power than their patients, mimicking the market would consistently undercompensate patients and overcompensate doctors for bearing risks. Thus, it is better for courts to intervene and collectively assess the value of the entitlement for both parties.

3. *Whom to Entitle: Economic Efficiency.* Now that a liability rule has been chosen to protect the entitlement, it is necessary to determine whom to entitle.

Here, the doctor should not be allocated an entitlement to negligently or intentionally fail to diagnose children or inform their mothers about the potential retardation or deformation, because to do so is inefficient, does not satisfy society's distributional concerns, and violates other justice considerations.

Placing children with birth defects into the world creates a net social cost, because such children require scarce medical resources and are not capable of contributing other resources to society. If the doctor is not held liable for the child's wrongful life, then this burden would probably be borne by the child's parents, by the child (as when the child has a trust fund), or, finally, by the state. This is inappropriate. Because the doctor has created this social inefficiency, the doctor should be required, *à la* Pigou, to internalize this negative externality by compensating the child. Note that this entitlement scheme merely gives doctors the same economic incentives to avoid negligent or intentional injuries as the wrongful birth entitlement scheme.

Doctors should bear the costs because they are in a better position to avoid the costs. Doctors are in the best position to calculate this potential social cost because only doctors have access to the necessary information (and technical ability to understand this information) to determine whether a child will be retarded or deformed. Furthermore, doctors are able to obtain liability insurance more easily than parents or fetuses: obstetricians are involved in many more births than are either the individual parents who give birth or the individual fetuses who are born. Doctors already obtain liability insurance for the rest of their medical practice, so this would only marginally increase the cost of the services they provide, whereas it would be very time consuming and expensive in terms of transaction costs for parents to purchase insurance that would provide for their child's expenses and their heartbreak if their child were born deformed or retarded. Because doctors incur fewer transaction costs in obtaining liability insurance, they can more cheaply diffuse the social costs of children with birth defects.

Moreover, requiring doctors to compensate children and parents provides an economic deterrent incentive for doctors to be more circumspect about avoiding negligent (or intentional) behavior. Because doctors are the only ones who could avoid this injury, doctors should be responsive to this economic incentive. Requiring negligent doctors to compensate children for their medical expenses (and deal with the hassle of defending lawsuits) would provide the same amount of deterrence as in wrongful birth lawsuits.

Although some might argue that there are enough other punishments to deter negligent doctors, such as losing medical board certification, two objections can be raised immediately. The first objection is that there are other prenatal negligence lawsuits. If nontort remedies were enough to deter doctors from being negligent, other prenatal negligence lawsuits would also be superfluous—but no one credibly argues that *all* prenatal negligence lawsuits are superfluous, so this argument is weak. The second objection is that medical licensing boards tend to revoke licenses only for intentional or grossly negli-

gent behavior, not for merely negligent behavior.¹⁵¹ But doctors carry insurance precisely to deal with negligent mishaps.

4. *Whom to Entitle: Distributional Preferences.* Doctors should not be entitled to negligently or intentionally fail to diagnose children or inform their mothers about potential retardation or deformation because, otherwise, inequitable distributional results would obtain. Patients are at a relative disadvantage to doctors in negotiating the transfer of this entitlement because they do not understand the relevant medical information as well as doctors, and because they are hopelessly lost in evaluating the financial value of their own child. Because there is no economic deterrent effect if doctors are granted this entitlement, such an entitlement scheme is socially inefficient because it would result in more children with birth defects who drain society's resources. Furthermore, whether or not such an entitlement would upset caste preferences, it would interfere with the parents' judgment of the individual worth of their child.

5. *Whom to Entitle: Other Justice Considerations.* Holding doctors liable in wrongful life lawsuits is consistent with "other justice considerations" because doctors are already held liable in wrongful birth lawsuits, and the two kinds of legal claims are economically indistinguishable. It simply seems unfair for children not to be able to recover their medical expenses when a doctor has clearly done something wrong.¹⁵² As the *Curlender* court recognized, "[t]he reality of the 'wrongful life' concept is that such a plaintiff both *exists* and *suffers*, due to the negligence of others. *It is neither necessary nor just to retreat into meditation on the mysteries of life.*"¹⁵³

6. *Administrability.* Administrability should not bar liability because courts and juries can easily determine whether a child is de-

151. See, e.g., N.C. GEN. STAT. § 90-14(a)(6) (2002) (revoking medical licenses for "[u]nprofessional conduct, including . . . departure from . . . the standards of acceptable and prevailing medical practice . . . [only if] the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective"). In practice, doctors do not forfeit their licenses for mere negligence, as illustrated by the absence of any such case under North Carolina law.

152. See Kelly, *supra* note 22, at 589 (concluding that "theories based on deterrence, cost-spreading, and *fairness* all seem to support permitting the child victim of a genetic counseling tort to recover" (emphasis added)).

153. *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980) (emphasis added).

formed or whether a doctor was negligent; courts and juries do this all the time. Moreover, courts and juries already perform these functions in wrongful birth lawsuits. The only difficult question is the highly esoteric one of whether life can be considered a legal injury. Whether life is an injury or whether life is not, courts would not have any additional difficulty separating meritorious lawsuits from fraudulent lawsuits.

7. *Summary.* Economic analysis illustrates that the child should be given the entitlement in wrongful life lawsuits to have the doctor avoid the negligent or intentional failure to diagnose or inform his mother about his potential retardation or deformation, just as parents are given the entitlement in wrongful birth lawsuits, and that this entitlement should be protected by a liability rule. The legal paradigm should accommodate this policy determination via the models in Section B.

B. *Connecting Entitlements to the Tort Paradigm: Charting a Legal Map to Circumnavigate the Injury Element*

If courts are to be taken at their word, the single tort element that prevents children from recovering for wrongful life is injury.¹⁵⁴ Economic considerations dictate that courts should hold doctors liable for their negligence when that result is compatible with the tort paradigm. The tort paradigm can achieve this result by construing the injury in wrongful life as an economic harm to the financial condition of the child. This would allow children to recover medical expenses (because those expenses constitute the injury) but not pain and suffering (because those costs collide with the nonexistence paradox).

1. *Model One: Recovery for Defects Depends on Income Streams.* The injury to the child should be construed as a financial injury. The doctor has condemned a severely deformed or retarded child to a life in which the child will never be economically self-sufficient—the child will be unable to support himself or pay for his medical expenses by exchanging his labor for wages. Thus, the doctor has quite literally injured the child's financial wellbeing by causing him to be born.¹⁵⁵

154. See *supra* Part II.

155. *Homo economicus* could rationally choose nonexistence over negative income. For an example of how an individual in American society may rationally choose death, see generally

When the injury is construed as a financial harm, it is easy to identify and calculate. For simplicity's sake, suppose that a child, before existence, has an income stream of zero dollars (because he cannot exchange his labor for income and has no expenses). Now, imagine that a jury determines that, after coming into deformed or retarded existence, a particular child has an income stream of negative \$750,000 (because he has no income but has considerable medical expenses). Thus, if this child were viewed through the narrow spectacles of economics, the child's injury becomes apparent. Here, the child would have suffered \$750,000 worth of injuries—the expenses that he will have to pay. The nonexistence paradox dissolves because the court does not have to weigh the benefits of existence against the unknowable costs of nonexistence. Here, there are cold, hard numbers with which to accurately calculate the extent of the child's injury.

To apply this model and determine whether the child is economically self-sufficient, juries should assess what the child's likely positive income stream would be, and subtract the child's likely negative income stream. If the negative income stream was greater than the child's positive income stream, the child should recover all of his special damages. However, if the positive income stream outstripped the negative income stream, then the child should recover nothing.

To make this model more concrete, suppose Mrs. Hudson, a single mother, is pregnant with triplets: Sherlock, Irene, and Moriarty. Mrs. Hudson asks Dr. Watson if there is any unusual possibility that any of her children would be born with *any* birth defects, because if so, she would abort. Dr. Watson negligently tells Mrs. Hudson that there is no unusual possibility that her children will be born with *any* birth defects. In fact, Sherlock is born with a cleft lip, Irene is born with a lung ailment that requires monitoring for the rest of her life, and Moriarty is born with polycystic kidney disease. Tragically, Mrs. Hudson dies during labor. Sherlock, Irene, and Moriarty sue Dr. Watson for wrongful life. Which of these plaintiffs would be able to make out a wrongful life claim under this model?

ARTHUR MILLER, *DEATH OF A SALESMAN* (Penguin Books 1999) (1949). Indeed, in this play, the protagonist rationally chose death over negative income, which is a slightly different choice. See also Christopher Bigsby, *Afterword* to MILLER, *supra*, at 111, 127 (responding to a spectator's remark that *Death of a Salesman* was a "time bomb under American capitalism" by agreeing and hoping that it was, "or at least under the bullshit of capitalism, this pseudo life that thought to touch the clouds by standing on top of a refrigerator, waving a paid-up mortgage at the moon, victorious at last").

Clearly, Sherlock would not be able to recover for wrongful life. Sherlock's negative income stream would be negligible because cleft lips only require minor cosmetic surgery to correct. On the other side of the equation, Sherlock's positive income stream would hardly be affected. Sherlock would still be economically self-sufficient because he could exchange his labor for wages. Sherlock's claim fails because his positive income stream outstrips his negative income stream.

Just as clearly, Moriarty would be able to recover for wrongful life. Moriarty's negative income stream would be substantial because he would require expensive and continual medical treatments during his short life. Because polycystic kidney disease is terminal at a very young age, Moriarty could never exchange his labor for wages. So his positive income stream would be nil. Because Moriarty's negative income stream outstrips his positive income stream, Moriarty's claim succeeds, and he would recover the entire cost of his medical treatments.

However, it is highly uncertain whether Irene would be able to recover for wrongful life. Irene's negative income stream may or may not be substantial because it is unclear how extensive and expensive this medical monitoring would be. On the other hand, Irene's positive income stream would be unaffected.¹⁵⁶ Thus, Irene's negative income stream may or may not outstrip her positive income stream. If the medical monitoring was more expensive than her positive income stream, her claim would succeed. If the medical monitoring was less expensive than her positive income stream, her claim would fail.

2. *Model Two: Recovery for All Defects.* The Irene problem reinforces that courts and juries incur transaction costs when determining which party should prevail. It would be costly for juries to determine as a factual question how severe an injury must be for the child to recover special damages for that injury. It would be no less costly for courts to determine as a matter of law which injuries cannot be compensated for with special damages. For example, there are many forms of deformity or retardation the development of which cannot be accurately predicted. Moreover, there are many cases in which children are afflicted with more severe and less severe forms of deformity and retardation. To require juries or courts to siphon these separate claims into different channels of compensation could be ad-

156. The jury's determination of Irene's positive income stream would probably depend on factors like socioeconomic status, parents' education, jobs, etc.

ministratively difficult and expensive. Thus, to avoid incurring these administrative costs, it might make more sense to permit all children to recover special damages for any deformity or retardation that afflicts them.

3. *Punitive Damages.* Under either model, the child could still recover punitive damages, so long as his claim succeeds, because punitive damages are designed to deter malfeasance, not to compensate injuries.¹⁵⁷ Thus, the nonexistence paradox is unrelated to punitive damages. Moreover, punitive damages in wrongful birth cannot be differentiated from punitive damages in wrongful life.

4. *Legal Authority.* Some legal authority has suggested that economic harms alone can be compensable without an actual physical or emotional injury. For example, a federal circuit court in a mass tort suit arising out of an airplane crash concluded that a hypothetical plaintiff who was not injured, but incurred costs in determining whether or not he was injured, could recover those medical expenses.¹⁵⁸ Courts could easily adapt this reasoning to permit children to recover.

5. *The Specter of Overcompensation.* If overcompensation is a concern, compensation would be limited by a number of factors. First, as an initial threshold matter, doctors would still never be liable unless they breached the medical standard of care. Second, judges at the

157. See *Ciraolo v. City of New York*, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) (“Punitive damages can ensure that a wrongdoer bears all the costs of its actions, and is thus appropriately deterred from causing harm, in those categories of cases in which compensatory damages alone result in systematic underassessment of costs, and hence in systematic underdeterrence.”).

158. *Friends for All Children v. Lockheed Aircraft Corp.*, 746 F.2d 816, 825 (D.C. Cir. 1984):

Jones is knocked down by a motorbike which Smith is riding through a red light. Jones lands on his head with some force. Understandably shaken, Jones enters a hospital where doctors recommend that he undergo a battery of tests to determine whether he has suffered any internal head injuries. The tests prove negative, but Jones sues Smith solely for what turns out to be the substantial cost of the diagnostic examinations.

From our example, it is clear that even in the absence of physical injury Jones ought to be able to recover the cost for the various diagnostic examinations proximately caused by Smith's negligent action.

This passage has been quoted frequently by other courts. *Day v. NLO*, 851 F. Supp. 869, 880 (S.D. Ohio 1994) (quoting with approval *Lockheed*, 746 F.2d at 825); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 824 n.26 (Cal. 1993) (same); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 977-78 (Utah 1993) (same).

summary judgment stage and jurors at the trial stage would be much less likely to believe a mother who claims she would have aborted her child because the child had a missing finger or a cleft lip, for example. Thus, plaintiffs would generally lose when suing for outrageous injuries. Third, the compensation required for more minor injuries would not be as expensive to the defendant. Thus, if a child recovers from deafness, the child would only recover for the costs of the medical treatments and special schooling he would require. Finally, a wrongful life claim has the same economic effect as a wrongful birth claim. Indeed, the only difference is that the statute of limitations is tolled in wrongful life claims, because the plaintiff is a minor. This proposed solution would only support recovery of special damages, not general damages, as recognition of the similarity of the two claims.

CONCLUSION

It is unfair for children with birth defects to suffer the consequences of their inability to support themselves financially. The entitlement framework illustrates why it makes little, if any, economic sense for doctors to be entitled, as to children but not as to parents, to negligently or intentionally fail to diagnose or inform parents about likely birth defects.

Currently, many courts are unable to see through the miasma of the nonexistence paradox and the fog of sanctity of life concerns to hold doctors liable to children for their special medical expenses. However, by narrowly conceiving the injury in an economic manner, courts can focus their inquiry to burn through the haze of the nonexistence paradox, causing its concomitant sanctity of life concern to dissolve and dissipate, and revealing the compassion and logic of requiring negligent doctors to lighten the burden of children with birth defects. Moreover, by identifying an analytic principle—financial harm—compensation is limited to the actual injury the doctor has created. As a result, doctors would not be overdeterred by this additional liability.

Because tort and economic policy support holding doctors liable for their negligence, tort should adapt to hold doctors liable. This Note attempts to blaze a new legal trail. If courts accept my invitation to perform this new form of analysis in wrongful life lawsuits, they would ultimately arrive at more economically justifiable and compassionate results. As odd as it may sound, in certain circumstances, life can and should be a compensable injury.