

Winter 1981

## The Effect of Legalized Abortion on Wrongful Life Actions

S. Stockwell Stoutamire

Follow this and additional works at: <https://ir.law.fsu.edu/lr>



Part of the Torts Commons

---

### Recommended Citation

S. S. Stoutamire, *The Effect of Legalized Abortion on Wrongful Life Actions*, 9 Fla. St. U. L. Rev. 137 (1981)

<https://ir.law.fsu.edu/lr/vol9/iss1/5>

This Comment is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).

# THE EFFECT OF LEGALIZED ABORTION ON WRONGFUL LIFE ACTIONS

S. STOCKWELL STOUTAMIRE

## I. INTRODUCTION

In 1973, the United States Supreme Court declared in *Roe v. Wade*,<sup>1</sup> that a fetus at any gestational age is not a legal person and consequently its life is not entitled to constitutional protection. Fetal life was weighed against maternal health, broadly defined by the Court to include the stigma of unwed motherhood and the stress of child raising,<sup>2</sup> and found to be of lesser importance. A woman and her physician were given sole discretion to decide whether fetal life should continue. The Court apparently did not foresee that the right to abortion would be exercised as a mother's sole prerogative. Its scheme provided that the decision to abort would be exercised by the physician in consultation with his patient.<sup>3</sup> After consultation, the physician was to exercise his discretion in determining whether abortion was in the best interest of the mother,<sup>4</sup> much in the same manner as he exercises his judgment whether extraordinary life-prolonging measures are appropriate in certain circumstances of terminal illness.<sup>5</sup> Unfortunately, medical literature has discouraged physicians from exercising their judgment in the area of abortion. Doctors incorrectly caution their colleagues that the Court gave women the right to abort and that physicians should not attempt to influence that decision.<sup>6</sup> Conse-

---

1. 410 U.S. 113, 156-59 (1973).

2. *Id.* at 153.

3. *Id.* at 163. Interestingly, the law is willing to use current medical standards in defining death, the point at which legal protection ends, *see, e.g.*, CAL. HEALTH & SAFETY CODE §§ 7180-82 (West Supp. 1980), and the medical community has pushed for this result. *See* Ad Hoc Committee of the Harvard Medical School, *A Definition of Irreversible Coma*, 205 J. AM. MED. ASS'N 337 (1968). By placing the abortion decision with the doctor, the Court accomplished the result it sought. The Court, however, left a trail of ambiguity as it declined to attempt a definition of life or leave that definition to accepted medical standards. 410 U.S. at 159.

The morality of abortion under traditional common law was based upon when pregnancy was known to exist, which at one time meant quickening. By the same common law logic, we are able through biochemistry to pick up [the fetus's] transmitted message announcing its existence . . . when it imbeds in the wall of the uterus.

B. NATHANSON, *ABORTING AMERICA* 206 (1979). Furthermore, the criteria used to determine death—pulse and brain waves—are detectable in the fetus by day 18 and day 43, respectively. *Id.* at 198, 200.

4. 410 U.S. at 163.

5. *See* 8 FLA. ST. U.L. REV. 111 (1980).

6. *See* Fletcher, *Ethics and Amniocentesis for Fetal Sex Identification*, 301 NEW ENG. J.

quently, the exercise of discretion by the physician has in most instances disappeared, and despite the Court's holding in *Roe*, women are deciding unilaterally whether to have abortions.

With the recent recognition of a new tort action, the freedom of the doctor or the mother to exercise their judgment as to abortion may be in jeopardy. A recent California decision granted a child a cause of action against the physician for negligence in allowing the child to be born. The court indicated in dicta that no reason existed for denying a child the same cause of action against his parents.<sup>7</sup> Such an action brought by an infant for damages suffered by it due to the failure of parents or doctors to prevent or terminate its life is characterized by most courts<sup>8</sup> and by this author as a wrongful life action. Except for instances of illegitimacy, these cases are generally brought against the physician for failing to exercise due care in a sterilization procedure, failure to advise of the availability of amniocentesis, failure to advise of or properly perform an abortion, or negligent genetic counseling.<sup>9</sup> Many of these suits are brought by children suffering from some deformity which was detectable in utero or genetically predictable.<sup>10</sup> But some actions are brought by healthy children who were simply unwanted.<sup>11</sup>

The California decision allowing the child's cause of action was predicated in large part on the legalization of abortion as evidenced by the court's reference to changes in public policy, changes in the law, and the "monumental implications" of *Roe*.<sup>12</sup> If this conceptual basis is sound and if other courts had followed it, a great difference in analysis might be expected in the wrongful life cases brought before and after the legalization of abortion. Actually, however, wrongful life actions have been rejected largely for

MED. 550, 551-52 (1979); Powledge & Fletcher, *Guidelines for Ethical, Social and Legal Issues in Prenatal Diagnosis*, 300 NEW ENG. J. MED. 168, 172 (1979).

7. *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477 (Dist. Ct. App. 1980).

8. See, e.g., *Stills v. Gratton*, 127 Cal. Rptr. 652 (Dist. Ct. App. 1976); *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. Ct. App. 1963), cert. denied, 379 U.S. 945 (1964); *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

9. See, e.g., *Elliott v. Brown*, 361 So. 2d 546 (Ala. 1978) (improperly performed vasectomy); *Stills v. Gratton*, 127 Cal. Rptr. 652 (Dist. Ct. App. 1976) (improperly performed abortion); *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967) (doctors failed to inform the parents of the possible effects of the mother's German measles).

10. See, e.g., *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967); *Park v. Chessin*, 400 N.Y.S.2d 110 (App. Div. 1977), modified and aff'd, 413 N.Y.S.2d 895 (1978).

11. See, e.g., *Stills v. Gratton*, 127 Cal. Rptr. 652 (Dist. Ct. App. 1976); *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. Ct. App. 1963), cert. denied, 379 U.S. 945 (1964); *Williams v. State*, 276 N.Y.S.2d 885 (1966).

12. *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477, 486-87 (Dist. Ct. App. 1980).

the same reasons in both eras: a difficulty in measuring damages, a public policy favoring life, and/or a belief that such actions should be established legislatively rather than judicially.<sup>13</sup> Rarely do the courts in these cases discuss the possible impact of the legalization of abortion: that doctors and parents now have a quick legal solution for any wrong that has been done to the fetus and failure to use that solution may be an affirmative defense in wrongful life actions.<sup>14</sup>

This comment will examine the wrongful life actions brought before and after the legalization of abortion and compare the rationales used by the various courts. Abortion as a defense to a claim of wrongful life will also be discussed. The cases examined in this paper involve only those brought on behalf of the infant. Many courts refer to malpractice actions brought by the parents as a wrongful life action but these are not included here. Many of the cases discussed involved actions brought by both the infant and the parent but only that portion of the opinion addressing the infant's alleged right of nonexistence will be discussed. All of these cases came before the courts on motions to dismiss or motions for summary judgment so the opinions are limited only to a determination of whether a cause of action has been pled.

## II. WRONGFUL LIFE AND ILLEGAL ABORTION

The case widely recognized as the first wrongful life action brought in the United States was also one of the few such actions ever brought against a parent. *Zepeda v. Zepeda*<sup>15</sup> involved a tort suit based on the theory of wrongful life brought on behalf of an infant against his father for causing him to be born illegitimate. The plaintiff sought damages for deprivation of the right to be legitimate, to have a normal home, to have a legal father and an inheritance, and for the stigma attached to bastardy. The trial court dismissed the suit for failure to state a cause of action and the plaintiff appealed.<sup>16</sup>

The appellate court framed the issue in terms of whether a tort

---

13. See, e.g., *Stills v. Gratton*, 127 Cal. Rptr. 652 (Dist. Ct. App. 1976); *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. Ct. App. 1963), cert. denied, 379 U.S. 945 (1964); *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967); *Becker v. Schwartz*, 413 N.Y.S.2d 895 (1978); *Karlsons v. Guerinot*, 394 N.Y.S.2d 933 (App. Div. 1977); *Dumer v. St. Michael's Hospital*, 233 N.W.2d 372 (Wis. 1975).

14. But see *Karlsons v. Guerinot*, 394 N.Y.S.2d 933, 937-38 (App. Div. 1977).

15. 190 N.E.2d 849 (Ill. App. Ct. 1963), cert. denied, 379 U.S. 945 (1964).

16. *Id.* at 851.

could be inflicted simultaneously with conception. At common law, birth was required as a prerequisite for an action in tort although other branches of the law, such as property and inheritance, recognized legal rights at conception. The court stated, "The law of torts has been hesitant in recognizing what medical science has long known, that life begins at the moment of conception, and what theology has longer taught, that from the moment of conception every human being has the rights of a human person."<sup>17</sup> the *Zepeda* court considered wrongful life actions to be an extension of prenatal tort actions. The latter had moved the time at which rights attach from the point of birth back to the point of viability, if the plaintiff were later born alive: "However, the exact time when viability occurs is uncertain. No medical authority can say with accuracy just at what moment a child can live when separated from its mother. . . . The law has slowly come to realize these uncertainties and the viability test is being abandoned."<sup>18</sup> The court concluded that no cause of action had been pled for two reasons. First, the plaintiff failed to aver the necessary prerequisites for a cause of action based on mental suffering and defamation. Second, even a legitimate child has no right to a normal home.<sup>19</sup> However, the court did consider bastardy to be an injury recognized by state law. In this regard the court stated: "[T]he quintessence of his complaint is that he was born and that he is. Herein lies the intrinsic difficulty of this case, a difficulty which gives rise to this question: are there overriding legal, social, judicial or other considerations which should preclude recognition of a cause of action?"<sup>20</sup> The court believed that the resolution of this question would have such far-reaching effects that it should be addressed by the legislature and not by the judiciary.<sup>21</sup>

The next wrongful life action arose in New York and was also predicated on bastardy. In *Williams v. State*,<sup>22</sup> the plaintiff com-

17. *Id.* at 852. *Roe v. Wade* would later disabuse courts of this belief.

18. *Id.* at 853. The viability test would later be resurrected by the Supreme Court in *Roe*, 410 U.S. at 160, although as used by *Roe*, it is a concept unknown to obstetrics. The *Roe* Court placed viability at 24 weeks, but medical discussion of viability is based on weight in grams and is constantly being pushed back by advances in medical technology. B. NATHANSON, *supra* note 3, at 207-08.

19. 190 N.E.2d at 855, 856, 859.

20. *Id.* at 857.

21. *Id.* at 859. *Slawek v. Stroh*, 215 N.W.2d 9 (Wis. 1974), included a cross-claim for wrongful life by a child against a parent. The *Slawek* court also believed the ramifications were such that the legislature and not the courts should define public policy in this area. *Id.* at 22.

22. 276 N.Y.S.2d 885 (Sup. Ct. 1966).

plained of being born out of wedlock to a mentally defective mother. The defendant in the suit was the institution in which the mother was housed and in which the assault on the mother occurred resulting in plaintiff's conception and birth. As in *Zepeda*, plaintiff here sought damages for deprivation of property rights, normal childhood and home life, and proper parental care, as well as for the stigma attached to bastardy.<sup>23</sup> The court concluded that such a suit was impossible to entertain since "[b]eing born under one set of circumstances rather than another . . . is not a suable wrong."<sup>24</sup> In a concurring opinion, Judge Keating recognized that the measurement of damages in a wrongful life action required an assessment of the value of life vis a vis nonexistence, rather than an assessment of the value of life as it is for the plaintiff and life as the plaintiff would have preferred, *i.e.*, legitimate. Had there been no wrong (the assault complained of), there would have been neither legitimate nor illegitimate life.<sup>25</sup>

The most famous of the early wrongful life cases and the first to wrestle with the unavailability of abortion was *Gleitman v. Cosgrove*.<sup>26</sup> The plaintiff in *Gleitman* sued for money damages for birth defects caused by German measles contracted by plaintiff's mother and for failure of the doctors to advise the mother about the possibility of defects so that the mother could have aborted the plaintiff.<sup>27</sup> The court stated that conception sets in motion biological processes which if undisturbed will produce a person; consequently, it was unnecessary to decide whether an unborn child was a person with the attendant right to be free from injury.<sup>28</sup> In this case, though, defendants did not disrupt the process. Rather, defendants' allegedly negligent conduct was in preventing plaintiff's "termination" before birth, an act assumed by the court to be legally possible.<sup>29</sup> This court found no cognizable action at law due to the difficulty measuring damages:

The right to life is inalienable in our society. A court cannot say what defects should prevent an embryo from being allowed life . . . . A child need not be perfect to have a worthwhile life.  
 . . . It may have been easier for the mother and less expensive

---

23. *Id.* at 886.

24. *Id.* at 887.

25. *Id.* at 888.

26. 227 A.2d 689 (N.J. 1967).

27. *Id.* at 690.

28. *Id.* at 691-92. *Roe* would later follow the same route to the opposite conclusion.

29. *Id.* at 692.

for the father to have terminated the life of their child while he was an embryo, but these alleged detriments cannot stand against the preciousness of the single human life . . . .<sup>30</sup>

In a dissenting opinion, Judge Jacobs expressed the view that a judicial system, which daily evaluates the monetary value of such indefinite injuries such as pain and suffering could likewise evaluate the damages in a case such as this.<sup>31</sup>

Another much-cited case involving German measles came out of New York. In *Stewart v. Long Island College Hospital*,<sup>32</sup> the infant plaintiff sued the hospital for negligence and malpractice in failing to perform a therapeutic abortion to prevent the plaintiff's handicapped life. Plaintiff's handicaps were allegedly caused by the German measles contracted early in the mother's pregnancy. The court found that the plaintiff had no remedy against a defendant whose only offense was a failure to consign the plaintiff to oblivion: "The ultimate wrong that can be committed is to cause another person's death. It would be the antithesis of these principles to require the defendant hospital to respond in damages to the infant plaintiff because it did not prevent the infant's birth."<sup>33</sup>

These early claims of wrongful life were rejected due to the difficulty in measuring damages, the errors in common law pleading, or the impropriety of judicial action. None of the courts found it necessary to struggle with the issue of when life began or its value. Yet some of these early courts appeared to recognize the value of life even at its earliest stages. The *Zepeda* court stated, "[M]edical science has long known, that life begins at the moment of conception, and . . . from the moment of conception every human being has the rights of a human person."<sup>34</sup> The *Gleitman* court added, "The right to life is inalienable in our society. . . . We are not talking here about the breeding of prize cattle."<sup>35</sup> Human life at whatever stage of development was considered precious by these courts.

In 1973, however, the inalienable right to life became something less than inalienable with the legalization of abortion. In *Roe v. Wade*, the Constitution was construed to contain a right to privacy protecting a woman's decision to terminate her pregnancy.<sup>36</sup> The

30. *Id.* at 693.

31. *Id.* at 704.

32. 296 N.Y.S.2d 41, 43 (Sup. Ct. 1968).

33. *Id.* at 46.

34. 190 N.E.2d at 852.

35. 227 A.2d at 693.

36. 410 U.S. at 152-54.

Court identified three state interests which had in the past been offered to support anti-abortion legislation: (1) to discourage illicit sexual conduct; (2) to protect the health of the woman; and (3) to protect the life of the fetus on the "theory" that new human life is present from the moment of conception.<sup>37</sup> Although the Court correctly noted that the Constitution does not specifically mention a right to privacy, it concluded that the right to privacy emerging from either the fourteenth or ninth amendments was broad enough to encompass a woman's decision whether to terminate her pregnancy.<sup>38</sup> So deciding, the Court then addressed claims that the fetus was a person whose right to life was protected by the fourteenth amendment. The Court could find nowhere in the Constitution a definition of the word person; however, "citizen," it noted, was defined as a person "born . . . in the United States."<sup>39</sup> In other places where the word "person" was used, it was obviously in a postnatal context. This fact, in conjunction with the observation that 19th century abortion practices were far less restricted than those in 1973, persuaded the Court that the word "person" in the fourteenth amendment did not include the unborn.<sup>40</sup> Furthermore, the Court found it unnecessary to determine when life begins, noting that if the trained minds of medicine, philosophy, and theology could not come to a consensus on this question, then the Court certainly was in no position to postulate an answer.<sup>41</sup> Correspondingly, neither could the State of Texas override the rights of the pregnant woman by adopting a particular theory of life.<sup>42</sup> With this groundwork laid, the Court established a scheme limiting a state's power to regulate or prohibit abortion. In the first three months of pregnancy the state has no legitimate interest in the abortion issue. During the second trimester, the state develops a compelling interest in the health of the mother. Not until the last trimester does a state interest in the life of the fetus emerge and then only to the extent that this interest does not conflict with the

---

37. *Id.* at 147-52.

38. *Id.* at 153.

39. *Id.* at 157 (citing U.S. CONST. amend. XIV, § 1).

40. *Id.* at 157-58.

41. *Id.* at 159. As an example, the Court further noted that the Stoics, the Jews, and most Protestant denominations believe that life begins only upon a live birth. Conversely, the common law focused upon "quickening" as the point of recognizable life. In addition, modern scientists vary in their focus upon conception, live birth, or the point of viability as the instant when life begins. *Id.* at 160.

42. *Id.* at 162.



health of the mother.<sup>43</sup> The health of the mother was defined by the Court to include the considerations of the taxing burden of child care and the stigma of unwed motherhood.<sup>44</sup>

In this way—by ignoring information available from modern obstetrics, gynecology, and embryology and by relying on 19th century attitudes toward the fetus and abortion—the Court caused the unborn to lose their legal personhood.<sup>45</sup> The rights of the author and readers do not innately exist, but rather they exist only because those around us care enough to see to it that we have them. Daniel Callahan, director of the Institute of Society, Ethics and the Life Sciences, points out that to state without substantiation (as did Justice Blackmun in *Roe*)<sup>46</sup> that the rights of the fetus should be left to personal conscience while the rights of the mother are proper matters for legislation is to stack the deck against the unborn.<sup>47</sup>

### III. THE LEGALIZATION OF ABORTION

The slippery slide from the first recognition of a right to privacy to the legalization of abortion was begun in *Griswold v. Connecticut*.<sup>48</sup> There, the Court held that enforcing the birth control ban in issue would have required outrageous government prying into the privacy of the home. Although the act of conception may take place in the privacy of the home, abortion is a public matter registered with the government by the completion of a fetal death certificate.<sup>49</sup> It should be realized that not all invasions of privacy are bad: the privacy of the white majority is invaded as they are required to respect the rights of the black minority and the privacy of parents is invaded as they are forbidden by law from physically abusing their born children. But under most laws in the United States, birth is the socially significant event which permits rights to accrue, although the only change which occurs in the fetus at

43. *Id.* at 163-66.

44. *Id.* at 153.

45. Although absence of brain wave and circulatory activity are indicators of the end of life, the significance of their presence during fetal life is largely ignored. Electrocardiographic evidence has been acquired from embryos as young as six-weeks old while electroencephalographic recordings have noted human brain activity in embryos at eight weeks. Nathanson, *Deeper Into Abortion*, 291 *NEW ENG. J. MED.* 1189, 1189 (1974).

46. *See* 410 U.S. at 154-55, 164.

47. CALLAHAN, *Abortion: Some Ethical Issues*, in *ABORTION, SOCIETY AND THE LAW* (1973).

48. 381 U.S. 479, 485 (1965).

49. B. NATHANSON, *supra* note 3, at 192, 212.

that time is breathing. "All other functions of a newborn baby, even crying, may occur within the womb."<sup>50</sup>

After *Griswold*, the Supreme Court in *Roe* greatly extended the newly discovered right to privacy to encompass a woman's right to abort. As expressed by Archibald Cox, an authority on constitutional law at Harvard, the *Roe* decision

fails even to consider what I would suppose to be the most compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of western civilization, not merely by guarding "life" itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death.<sup>51</sup>

The value placed on life has become a subjective determination which depends on the whims and personal desires of each individual; life no longer has intrinsic worth.<sup>52</sup> How did this change in public policy affect wrongful life actions?

#### IV. WRONGFUL LIFE AND LEGAL ABORTION

Until June of 1980, courts continued to deny a cause of action based on wrongful life despite the implications of *Roe*. The problem of measuring damages plagued the courts and some courts continued to emphasize a need for a deep-seated respect for life.<sup>53</sup>

The court in *Dumer v. St. Michael's Hospital*<sup>54</sup> phrased the claim there in a straightforward manner: "The plaintiffs allege that as a result of the negligent diagnosis by the defendants . . . Tanya Dumer was not aborted, to her personal injury . . ." <sup>55</sup> No cause of action on behalf of the daughter was found because the damages were considered immeasurable.<sup>56</sup> The survival of public policy favoring life of the unborn was apparent in Judge Hansen's dissenting opinion in which he expressed the belief that the parents' cause of action should also be denied. "The parent's cause of action is based on the claimed denial of their opportunity to termi-

50. *Id.* at 210.

51. A. COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 53 (1976).

52. B. NATHANSON, *supra* note 3, at 253.

53. *See Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477, 486 (Dist. Ct. App. 1980).

54. 233 N.W.2d 372 (Wis. 1975).

55. *Id.* at 374.

56. *Id.* at 376.

nate the life of their child while he was an embryo. Public policy is involved . . . 'It is basic to the human condition to seek life and hold on to it however heavily burdened.'"<sup>57</sup>

*Stills v. Gratton*<sup>58</sup> was apparently the first case brought by a healthy child in which doctors were sued for performing an abortion in a negligent manner. A therapeutic abortion was performed on plaintiff's mother in July, 1969. Despite this fact, plaintiff was born a healthy baby boy in January, 1970, and was characterized as "a joy to his mother."<sup>59</sup> The infant's pleadings alleged only that he was born out of wedlock and that this, for various reasons, affected him to his detriment. On the authority of *Williams* and *Gleitman* and without discussion of *Roe* the court concluded that the trial court's nonsuit was proper.<sup>60</sup>

In *Karlsons v. Guerinot*,<sup>61</sup> the mongoloid plaintiff argued that liberalization of abortion laws invalidated the prior holdings in New York to the effect that birth was not an actionable wrong. The court rejected this argument stating that prior actions had been rejected not because abortion was not legally available but because the actions did not involve a injury legally compensable in court.<sup>62</sup> The court concluded that judicial recognition of such a cause of action was impossible since damages could not be measured.<sup>63</sup>

The *Roe* decision almost had its first impact on wrongful life actions in New York in 1977. In *Park v. Chessin*,<sup>64</sup> an action was brought on behalf of a child who had died at age two of polycystic kidney disease. The doctors were charged with "wanton and gross disregard of known medical fact" in that they advised the parents that after the birth and death of a prior child with the same disease, the chances of having a future baby with the same disease was "practically nil" although the disease was known to be

57. *Id.* at 378 (quoting *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967)).

58. 127 Cal. Rptr. 652 (Dist. Ct. App. 1976).

59. *Id.* at 653-56.

60. *Id.* at 656-57.

61. 394 N.Y.S.2d 933 (App. Div. 1977).

62. *Id.* at 937-38.

63. *Id.* at 938.

64. 400 N.Y.S.2d 110 (App. Div. 1977), *modified and aff'd*, 413 N.Y.S.2d 895 (1978). See also *Becker v. Schwartz*, 400 N.Y.S.2d 119 (App. Div. 1977), *modified and aff'd*, 413 N.Y.S.2d 895 (1978), a companion case brought by a mongoloid child on the ground that the physicians were negligent in not advising her mother of the risk of Down's Syndrome in children born to women over 35 years of age, in order that the mother could have aborted the plaintiff.

hereditary.<sup>65</sup>

The trial court in *Park* found that the child was a potential being with essential reality at the time of the alleged misrepresentation and hence belonged to a class which the defendant could foresee and had in contemplation when the misrepresentation was made.<sup>66</sup> Furthermore, according to the trial court, the difficulty of measuring damages or the lack of precedent should not be an arbitrary bar to recognition of the action.<sup>67</sup> In affirmance, the appellate division stated:

[D]ecisional law must keep pace with expanding technological, economic and social change. Inherent in the abolition of the statutory ban on abortion . . . is a public policy consideration which gives potential parents the right . . . not to have a child. . . . The breach of this right may also be said to be tortious to the fundamental right of a child to be born as a whole, functional human being.<sup>68</sup>

Thus, this reasoning would appear to make *Roe* the foundation of a theory of law allowing children a cause of action against anyone, including their parents, for interfering with their right to be born without any defects.

In a dissenting opinion, Judge Titone noted that despite the fact that penal sanctions had been removed for abortion, the public policy of the state was one which favored life over nonlife and birth over nonbirth or nonconception. Further, he believed that the recognition of wrongful life actions should lie with the legislature which previously had acknowledged wrongful death actions.<sup>69</sup> He stated, "Essentially, a claim for 'wrongful death' is based on the premise that a life was terminated which should not have been terminated, whereas a claim for 'wrongful life' or 'wrongful birth' is predicated on the premise that a life has evolved which should not have evolved."<sup>70</sup> He characterized the action by the majority as not "keeping pace with social change, but rather [as] rushing into the adoption of a radical social concept having no basis in law, namely, that there may be a suable wrong stemming solely from the exis-

---

65. 400 N.Y.S.2d at 111.

66. *Park v. Chessin*, 387 N.Y.S.2d 204, 208 (Sup. Ct. 1976), *modified and aff'd*, 400 N.Y.S.2d 110 (App. Div. 1977), *modified and aff'd*, 413 N.Y.S.2d 895 (1978).

67. *Id.* at 211.

68. 400 N.Y.S.2d at 114.

69. *Id.* at 116-17.

70. *Id.* at 116.

tence of life."<sup>71</sup>

The appellate division's holding was appealed to the court of appeals on a certified question, consolidated with *Becker v. Schwartz*,<sup>72</sup> and modified. That court found two fatal flaws in plaintiffs' claims which had been initiated on behalf of their infants for wrongful life. First, the infants apparently had not suffered any legally cognizable injury since there was no precedent for recognition of the appellate division's finding that the child had a right to be born as a whole functional human being. The court stated that:

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. . . . Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?<sup>73</sup>

The second flaw identified by the court of appeals was the difficulty in measuring damages which would place the injured party in the position he would have occupied but for the negligence of the defendant.<sup>74</sup> The majority concluded that "[r]ecognition of so novel a cause of action, requiring, as it must, creation of a hypothetical formula for the measurement of an infant's damages is best reserved for legislative, rather than judicial, attention."<sup>75</sup>

In a concurring opinion Judge Fuchsberg reduced the issue to a more fundamental level: whether the plaintiff children would have preferred not to have been born at all. Recognizing that the answer to that question could not be known, Judge Fuchsberg found it unnecessary to proceed to the question regarding the uncertainty of damages.<sup>76</sup> Judge Wachtler, dissenting in part, noted the difficulty in the application of proximate cause.

71. *Id.*

72. 400 N.Y.S.2d 119 (App. Div. 1977), *modified and aff'd* 413 N.Y.S.2d 895 (1978).

73. *Baker v. Schwartz*, 413 N.Y.S.2d 895, 900 (1978). The value of life expressed here appears to be much greater than that expressed by the Supreme Court in *Roe*. See 410 U.S. 157-59.

74. 413 N.Y.S.2d at 900.

75. *Id.* at 901.

76. *Id.* at 903.

The theory is that if the doctor had advised the parents of the risk of bearing a handicapped child, and the availability of tests for detecting the disorder, the mother would have consented to the tests, the tests would have revealed the defect, the parents or at least the mother would have decided to have an abortion, the abortion would have been successfully performed and thus the child would not have been forced to lead a life of hardship.<sup>77</sup>

In Judge Wachtler's opinion, the cause was too attenuated for a finding of negligence. Furthermore, the question of whether the infant could have been legally aborted was considered by Judge Wachtler to be of "no practical significance" since there was no right not to be born and hence no right cognizable at law which the defendant could have violated.<sup>78</sup>

Modification by the New York Court of Appeals did not occur before the Alabama Supreme Court had to struggle with the reasoning set forth by the New York Supreme Court, Appellate Division, in *Park*. In *Elliott v. Brown*,<sup>79</sup> a deformed infant sued for negligent performance of her father's vasectomy. The trial court dismissed for failure to state a cause of action and the supreme court affirmed on the theory that although women possess the right to have abortions in certain circumstances, there is no legal right not to be born.<sup>80</sup> The *Elliott* court distinguished the appellate division's decision in *Park* on the ground that the state of the art in vasectomy surgery was not as advanced as in genetic counseling. A medically performed vasectomy was no guarantee that a child would not be born deformed.<sup>81</sup> As for the dicta in *Park* that there is a right to be born whole, the *Elliott* court queried, "[W]hat criteria would be used to determine the degree of deformity necessary to state a claim for relief. We decline to pronounce judgment in the imponderable area of nonexistence."<sup>82</sup>

New Jersey revisited its pre-*Roe* *Gleitman* decision in *Berman v. Allan*,<sup>83</sup> where a mongoloid plaintiff sued the doctors for failing to follow accepted medical standards when they did not inform plaintiff's mother about amniocentesis. This medical procedure would have revealed plaintiff's mongoloid condition and given her mother

---

77. *Id.* 904-05.

78. *Id.* at 905.

79. 361 So. 2d 546 (Ala. 1978).

80. *Id.* at 548.

81. *Id.*

82. *Id.*

83. 404 A.2d 8, 10 (N.J. 1979).

an opportunity to abort the plaintiff. The trial court granted summary judgment to defendants on the authority of *Gleitman*.<sup>84</sup> While appeal was pending before the appellate division, the supreme court certified the case on its own motion.<sup>85</sup> After reviewing that portion of *Gleitman* which had denied a cause of action due to the difficulty of measuring damages, the court concluded that this difficulty alone would no longer be a bar to a cause of action.<sup>86</sup> The court eloquently concluded, however, that no cause of action yet existed and that the plaintiff had suffered no legally cognizable damage:

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 . . . . The federal constitution characterizes life as one of three fundamental rights of which no man can be deprived without due process of law . . . . Nowhere in these documents is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings.

. . . .

No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose defects are less pervasive or less severe.

. . . .

Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life . . . . To rule otherwise would require us to disavow the basic assumption upon which our society is based. This we cannot do.<sup>87</sup>

The State of Pennsylvania addressed a claim of wrongful life in *Speck v. Finegold*.<sup>88</sup> Plaintiff's father and two siblings suffered from neurofibromatosis, a crippling disease of the fibrous structures of the nerves. After the father had an unsuccessful vasectomy and the plaintiff's mother had an unsuccessful abortion, plaintiff

---

84. *Id.* at 11.

85. *Id.*

86. *Id.* at 12.

87. *Id.* at 12-13 (citations omitted).

88. 408 A.2d 496 (Pa. Super. Ct. 1979).

was born with neurofibromatosis.<sup>89</sup> The lower court denied plaintiff's claim on grounds that the action was against public policy and that damages were so speculative as to be immeasurable.<sup>90</sup> On appeal, the superior court declined to frame the issue in terms of the sanctity of life: "The last vestige of this public policy view was eliminated in two cases decided by the Supreme Court of the United States [referring to *Griswold v. Connecticut* and *Roe v. Wade*]."<sup>91</sup> As to other policy reasons precluding recovery such as the remoteness of the injury, the possibility of fraudulent claims, and the snowball effect, the court found that judicial processes were capable of discerning credible claims. Nevertheless, the court found that the child's claims were not cognizable at law because there was no precedent that a child has a right to be born healthy and there was no way to measure the difference between impaired life and no life.<sup>92</sup>

In a concurring and dissenting opinion Judge Spaeth noted that if the plaintiff's neurofibromatosis had been caused by the doctors, then the infant may have had a cause of action, but without the causal link, the infant could not maintain its action against the defendants.<sup>93</sup>

It was not until June, 1980, that a court took *Roe* to its furthest possible extreme by stating dicta that those who are unqualified to be born either due to deformity or unwantedness can sue for their injury.<sup>94</sup> In *Curlender v. Bio-Science Laboratories*,<sup>95</sup> the issue confronting the court was what remedy, if any, was available to a genetically defective child born as a result of the defendant's negligence in conducting genetic tests of the plaintiff's parents. Plaintiff was born with Tay-Sachs, a degenerative disease of the nervous system characterized by loss of vision, mental underdevelopment, softness of muscles, convulsions, and a life expectancy of about four years. Plaintiff's parents were tested and given incorrect information about their status as carriers of Tay-Sachs. The date of the plaintiff's birth was unknown to the court thereby making it im-

---

89. *Id.* at 499-500.

90. *Id.* at 501.

91. *Id.* at 503.

92. *Id.* at 504, 508.

93. *See id.* at 512. *See also* *Stribling v. de Quevedo*, slip opinion (Pa. Super. Ct. Jan. 11, 1980) in which doctors were sued for failure of a tubal ligation resulting in plaintiff's conception and birth with dextrocardia, a condition in which the heart is farther to the right than normal. No cause of action was found on authority of *Speck v. Finegold*.

94. *Curlender v. Bio-Science Laboratories*, 165 Cal. Rptr. 477, 488 (Dist. Ct. App. 1980).

95. 165 Cal. Rptr. 477 (Dist. Ct. App. 1980).



possible for the court to determine if the plaintiff's parents had relied on the erroneous test results.<sup>96</sup> Plaintiff sought damages for cost of care, emotional distress, and deprivation of 72.6 years of life as well as punitive damages.<sup>97</sup> After reciting other wrongful life cases in which a cause of action was denied due to the impossibility of measuring damages, the court stated:

Of some significance with respect to this question [of damages in wrongful life actions] is the fact that in 1973, *Roe v. Wade* . . . was decided by the United States Supreme Court. The nation's high court determined that parents have a *constitutionally protected right* to obtain an abortion . . . . We deem this decision to be of considerable importance in defining the parameters of "wrongful-life" litigation.<sup>98</sup>

While conceding that a cause of action based upon impairment of status, as in the cases predicated on illegitimacy, should be denied due to the absence of injury and damages consequential to that injury, the court believed that a child born with severe impairment presented a different situation because the necessary element of injury was present. The facts of this case were characterized by the court as a true wrongful life action—one brought by an infant whose painful existence was the direct and proximate result of negligence by others.<sup>99</sup> Neither the impossibility of recovery nor the public policy in favor of life were viewed by the court as bars to a finding that the defendants owed the plaintiff a duty to use ordinary care in genetic testing. "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."<sup>100</sup> Addressing the fear that recognition of wrongful life actions would permit suit by infants against their parents, the court found no sound public policy protecting parents from "being answerable for the pain, suffering and misery which they have wrought upon their offspring."<sup>101</sup> In recognizing the cause of action, however, the court rejected the claim for damages based upon normal life expectancy, holding that damages should be considered in light of plaintiff's mental and physical

---

96. *Id.* at 480.

97. *Id.* at 481.

98. *Id.* at 483 (citations omitted).

99. *Id.* at 486.

100. *Id.* at 488 (emphasis in original).

101. *Id.*

condition at birth and her expected condition during her short life expectancy. On the other hand, the court found no reason based upon either public policy or legal analysis for rejecting claims for punitive damages in such actions if the prerequisites could be proved.<sup>102</sup>

If the *Curlender* decision survives the appellate process, its ramifications are staggering. Not only could amniocentesis and abortion become mandatory when a fetus is suspected of being less than perfect, but parents could be drawn into actions against physicians for contributory negligence or contribution if they refused amniocentesis and/or abortion.

### V. ABORTION AS A DEFENSE

Before *Curlender* bared this issue, several courts had alluded to the availability of abortion as a defense in wrongful birth actions brought by parents against a physician. A logical extension of this theory would be that in an action by an infant against a physician, the physician should be able to implead the parents on grounds of contributory negligence for failure to consent to an abortion. The first mention of this retaliatory action is found in Judge Weintraub's dissenting opinion in *Gleitman* where he noted:

Implicit, beyond [the child's] claim against a physician . . . is the proposition that a pregnant woman [knowledgeable about the fetus' deformities and not seeking] an abortion, and all who urge her to see the pregnancy through, are guilty of wrongful injury to the fetus, and . . . every day . . . the infant is sustained after birth is a day of wrong.<sup>103</sup>

In *Troppi v. Scarf*,<sup>104</sup> parents sued a pharmacist for negligently supplying the wrong drug to a mother who had requested oral contraceptives. The error resulted in the conception and birth of a healthy child. The trial court entered summary judgment for defendants reasoning that whatever damage plaintiff had suffered was offset by the benefit of having a healthy child.<sup>105</sup> At the suggestion that parents, who seek recovery for birth of an unwanted child, should mitigate damages by placing the child for adoption, the court stated that, "to impose such a duty upon the injured

---

102. *Id.* at 489, 490.

103. 227 A.2d at 711.

104. 187 N.W.2d 511, 512 (Mich. Ct. App. 1971).

105. *Id.* at 512-13.

plaintiff is to ignore the very real difference which our law recognizes between the avoidance of conception and the disposition of the human organism after conception."<sup>106</sup> In the wake of *Roe* and *Curlender's* application of *Roe* to wrongful life actions, one might be led to believe there no longer exists any great difference between the avoidance of conception and disposal of the human organism after conception but before birth. If this is so, the *Troppi* rationale precluding the mitigation of damages in such an action has been rendered obsolete.

Finally, in *Rivera v. State*,<sup>107</sup> an unsuccessful tubal ligation resulted in the conception and birth of a healthy child and a suit for malpractice by the mother. The court found that a valid cause of action had been pled and that the plaintiff's failure to abort did not preclude recovery. The court said, "The right to have an abortion may not be automatically converted to an obligation to have one."<sup>108</sup> The court added:

[W]e are of the opinion that a rule of law which required claimant to have an abortion would constitute an invasion of privacy of the grossest and most pernicious kind . . . . Just as the law may not impose the philosophy of one group upon the public at large, neither may it permit the public to invade the province of the individual in an area as private as sovereignty over one's body. We find that claimant had no obligation to mitigate damages by undergoing an abortion.<sup>109</sup>

Despite a lack of authority allowing the availability of abortion as a defense in wrongful life actions, a threat arises from *Curlender* that a public interest in perfect babies may one day outweigh the value of life, a value already severely jeopardized by *Roe*. *Curlender* may lead to a philosophy contending that bodily invasion is justified so that the parents of a less than perfect fetus must abort it for the public good and to mitigate any damages created by their negligence or the negligence of a physician.

A natural extension of this line of thought, of course, is infanticide. In the wake of *Roe*, several physicians are now promoting the idea that life protected by the Constitution should not begin at birth but rather at some point thereafter. This would allow

---

106. *Id.* at 519.

107. 404 N.Y.S.2d 950 (Ct. Cl. 1978).

108. *Id.* at 954 (quoting *Ziemba v. Sternberg*, 357 N.Y.S.2d 265, 269 (App. Div. 1974)).

109. *Id.*

newborns to be evaluated for perfection before their constitutional right to life attaches and disposed of if found wanting.<sup>110</sup> At the extreme, almost to the point of absurdity, a remedy in wrongful life actions could be developed that is less troublesome to the court than the immeasurable damages issues. Rather than attempting to measure life versus nonlife in dollars, the court could merely command execution of the unwanted or imperfect child who, according to the alter ego of its parents who brought suit on its behalf, wishes it were dead.<sup>111</sup> This extreme example merely demonstrates the gravity of the *Curlender* decision and the complications it could produce.

## VI. CONCLUSION

So it is that with *Roe* the law traversed from a belief that life began at conception and was legally protectable from that point, to a decree holding that the precise time at which life begins is unimportant because life is not legally protectable until the child breathes. This decree has arisen in the face of scientific information that life begins at least at implantation. And with *Curlender*, the right to privacy has been extended from a right to use contraception in the privacy of the home to the brink of coerced eugenic abortion.

If a cause of action for wrongful life is sustained, how do we value a life for which damages are to be awarded? Economically? If so, then we must ask whether an inmate in a home for the retarded is a greater drain on societal resources than the average college graduate. Or should the measure be usefulness to society? Using this alternative we must ask ourselves who among us can be sure that his or her life is useful to society.<sup>112</sup>

While the cost of caring for those less fortunate is a continuing

---

110. "Would it seem so difficult for modern persons to withdraw care from the defective newborn when they know that they might have done it only a few months earlier?" Fletcher, *Attitudes Toward Defective Newborns*, 2 HASTING CENTER STUD. 21 (1974). See Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 STAN. L. REV. 213 (1975). But see, Fletcher, *Abortion, Euthanasia, and Care of Defective Newborns*, 292 NEW ENG. J. MED. 75 (1975). In essence the value of the newborn hinges on the subjective response it stirs in other people, not on its intrinsic worth.

111. One indicia of what damages in dollars may be worth may be analogized from the test tube baby trial in 1978 in which prospective parents were awarded \$50,003 for destruction of their fertilized egg. *Del Zio v. Vande Wiele*, unreported case referred to in B. NATHANSON, *supra* note 3, at 215.

112. See Kass, *Implications of Prenatal Diagnosis for the Human Right to Life*, in ETHICAL ISSUES IN HUMAN GENETICS 185, 192-99 (1973).

problem society must face, it should not be resolved by denigrating the value of life. The result of the cases from *Zepeda* to *Curlender* has been the development of an idea that if a fetus is suspected of being mentally or physically deficient, or is even simply unwanted, it should casually be discarded with no concern whatsoever to the potential contributions the fetus might make after birth. The decision to be or not to be a member of the human community does not rest with the fetus, but rather, the decision is with us to decide to admit it to that community. No one is a human being by right of nature but only by being recognized as such by his fellow man.<sup>113</sup>

---

113. Paraphrasing *VERCORS, YOU SHALL KNOW THEM* (1953).