What's Unconstitutional About Wrongful Life Claims? Ask Jane Roe . . .

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TORT law enables an individual to recover compensatory damages caused by another's wrongful conduct. Compensatory damages, in theory, put the injured party in the same position occupied before the injury occurred. This article proposes that a claim for wrongful life contradicts both the goals of tort law and the holding of *Roe v. Wade*.[1]

A wrongful life claim is asserted by the legal guardian of an infant born with a genetic disability that has been inherited or developed *de novo in utero*. Central to the claim is a showing that, had the infant's parents been given correct information, they would have aborted the pregnancy. Since the defendant in these cases did not cause the genetic mutation to occur, the damages sought are not for the genetic injury itself, but for being born. In simple terms, the infant is asserting that it would be better not to exist than to exist with a disability.

Unlike a claim for wrongful *life*, a wrongful *birth* claim can be brought by the parents for their economic recovery. The essence of the claim is that, but for the defendant's conduct, the parents would have aborted the pregnancy and would have avoided the extraordinary expenses of raising a disabled child. Wholly aside from philosophical debates about a claim by parents that they would prefer to have no child rather than a disabled child, the tort is consistent with the goals of tort law. That, however is not the case with a claim for wrongful life.

[1] 410 U.S. 113 (1973).

This article will first explore how a wrongful life claim is fundamentally different from a wrongful birth claim. It will explain the reasoning offered by courts in 38 states that have rejected wrongful life claims and will explore the strained rationale offered by the courts in the three states that permit recovery for wrongful life. It will argue that wrongful life claims are constitutionally impermissible because they are incompatible with the rationale that underlies the Supreme Court decision in *Roe v. Wade*.

I. Most States Reject Wrongful Life Claims

A. Distinction between wrongful life and wrongful birth claims

Wrongful life[2] is an action brought on behalf of the infant who suffers from the genetic disorder. The child claims that the physician or other healthcare provider (1) failed to perform accurate genetic testing prior to transferring an embryo or during pregnancy, or (2) failed to accurately inform the child's parents about genetic risks associated with maternal age, physical condition, family medical history, or other parent-specific circumstances. In a wrongful life case, the child does not allege that the negligence of the defendants caused a genetic injury. Instead, the child's claim is that the defendant's breach of the applicable standard of care precluded the parents from aborting the pregnancy.

Wrongful birth refers to a claim brought by at least the mother who alleges that she would have terminated her pregnancy or avoided conception altogether but for the negligence of the healthcare providers charged with preimplantation genetic testing, prenatal testing, or counseling the parents about the likelihood of giving birth to a child with a genetic abnormality. The underlying premise is that negligently performed or omitted genetic counseling or testing foreclosed the parents' ability to make an informed decision regarding whether to conceive a genetically disabled child or, in the event of a pregnancy, to terminate the pregnancy.

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[2] The term "wrongful life" was first used in Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964). *Zepeda* involved an action by a grown man against his father, claiming damages resulting from his illegitimate birth. *Id.* at 851; *see also* Stills v. Gratton, 55 Cal. App. 3d 698, 705, 127 Cal. Rptr. 652 (Cal. App. Ct. 1976) (denying claim for "wrongful life" brought by illegitimate child). Today, however, the term is generally understood to apply to an action by a child afflicted with a hereditary defect who alleges that but for the defendant's negligence he or she would not have been born and thus would not have had to suffer the defect.

Wrongful life and wrongful birth claims are both relatively recent developments. As recently as 1967, the law recognized neither wrongful birth nor wrongful life claims.[3] It was not until 1978 that the first court recognized a wrongful birth claim.[4] No State supreme court allowed a claim for wrongful life until 1982.[5] While the vast majority of jurisdictions now recognize a claim for wrongful birth, only three jurisdictions recognize any type of wrongful life claim. Despite recognizing wrongful life claims, none of those three jurisdictions permits a recovery of general damages for the actual injury (life) allegedly caused by the defendant's negligence.

Unlike wrongful life claims, the claim for wrongful birth is conceptually consistent with the goals of tort law. When medical professionals negligently fail to diagnose or inform parents that they will give birth to a child with potential defects, they have breached the standard of care owed to the mother[6] and deprived the mother of her constitutional right

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

[4] *See* Becker v. Schwartz, 386 N.E.2d 807, 813 (N.Y. 1978) (recognizing wrongful birth claims).

[5] *See* Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982) (recognizing wrongful life claims).

[6] It is unclear whether the father who is not generally a patient of the defendants is owed a duty of care from the defendants. *Compare* Smith v. Saraf, 148 F. Supp.2d 504, 523 (D. N.J. 2001) ("the right which lies at the heart of wrongful birth cases, while often referred to as the 'parents' right to terminate a pregnancy, is the right to have an abortion-a right which is vested exclusively in the pregnant woman."); *with* Lab. Corp. of Am. v. Hood, 911 A.2d 841, 851 (Md. 2006) ("That [the mother] could have made the decision [to terminate her pregnancy] by herself is not a basis for holding, as a matter of law, that no duty of care extended to [the father]."). *See also* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 67-68 (1976) (declaring unconstitutional a state law that required a husband's written consent before a married woman could receive an abortion unless a physician certified that the abortion was necessary to protect the woman's life); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 887-898 (1992) (invalidating a state law that required spousal notification before a married woman could receive an abortion).

to choose whether to carry her fetus to term.[7]

Difficulties arise when jurisdictions attempt to develop remedies for the tort of wrongful life. In the counterfactual world envisioned by this claim, the parent-plaintiffs would not experience the emotional joy or difficulty of raising a disabled child. Courts reach different results on whether the emotional joy of raising a disabled child should offset a damage award for the emotional pain and suffering.[8] Despite the difficulty that courts have faced fashioning a rule for noneconomic damages, the vast majority of jurisdictions recognize the right of at least the mother to maintain an action under these circumstances.

B. All but three courts have refused to recognize wrongful life claims

Thirty-eight states, by judicial opinion, statute, or both, have refused to recognize wrongful life claims.[9] In all of the court decisions

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[7] *Roe*, 410 U.S. at 163-164 (holding that a woman has a constitutionally protected right to decide whether to prevent the birth of a child prior to viability); *Casey*, 505 U.S. at 834 (reaffirming constitutional right of a woman to choose to have an abortion before fetal viability and to obtain it without undue interference from the State).

[8] *Compare* Lodato ex rel. Lodato v. Kappy, 803 A.2d 160, 161 (N.J. Super. Ct. App. Div. 2002) (ruling that a doctor in a wrongful birth case was not entitled to an offset of any jury award for emotional damage by the joy and benefit parents received from their child who was born with birth defects, and thus, trial judge erred in instructing the jury that doctor was entitled to consideration of the joy/benefit rule), *with* Blake v. Cruz*,* 698 P.2d 315, 320 (Idaho 1984) (requiring damages for emotional distress to be offset by "the countervailing emotional benefits attributable to the birth of the child"), *superseded by statute as stated in* Vanvooren v. Astin, 111 P.3d 125 (Idaho 2005).

[9] ARIZ. REV. STAT. ANN. § 12-719; ARK. CODE ANN. § 16-120-902; IDAHO CODE § 5-334; IND. CODE ANN. § 34-12-1-1; IOWA CODE ANN. § 613.15B; KAN. STAT. ANN. § 60-1906; MICH. COMP. LAWS ANN. § 600.2971; MINN. STAT. § 145.424; MO. REV. STAT. § 188.130; N.D. CENT. CODE § 32-03-43; OKLA. STAT. ANN. TIT. 63, § 1-741.12; 42 PA. CONS. STAT. § 8305; S.D. CODIFIED LAWS § 21-55-1; UTAH CODE ANN. § 78B-3-109; Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Walker by Pizano v. Mart, 790 P.2d 735 (Ariz. 1990); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988); Rich v. Foye, 976 A.2d 819 (Conn. Super. Ct. 2007); Garrison v. Medical Ctr. of Del. Inc., 581 A.2d 288 (Del. 1989); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992); Atlanta Obstetrics & Gynecology Grp. v. Abelson, 398 S.E.2d 557 (Ga. 1990); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987), *overruled on other grounds by* Clark v. Children's Mem'l Hosp., 955 N.E.2d 1065 (Ill. 2011); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986); Grubbs v. Barbourville Family Health Ctr., P.S.C., 120 S.W.3d 682, 690 (Ky. 2003); Pitre v. Opelousas Gen. Hosp., 517 So. 2d 1019 (La. Ct. App. 1987), *aff'd in part and rev'd in part on other grounds*, 530 So. 2d 1151 (La. 1988); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990); Kassama v. Magat*,* 767 A.2d 348 (Md. Ct. Spec. App. 2001); Strohmaier v. Assocs. in Obstetrics & Gynecology, P.C., 332 N.W.2d 432 (Mich. Ct. App. 1982),

considering wrongful life, the claim has been considered a negligence-based tort action. Because generally applicable common law tort principles apply, the plaintiffs must plead and prove the existence of a duty, a breach of that duty, as well as a causal relationship that exists between the breach of that duty and an injury. To date, no court has refused to recognize a wrongful life claim based upon the recognition that it is unconstitutional to hold that a duty of care is owed to a fetus prior to viability when under *Roe v. Wade* and its progeny, no duty is owed to a fetus before the fetus becomes viable. Rather, jurisdictions which have decided not to recognize wrongful life claims have done so based on reasoning that focuses on lack of a legally cognizable injury, the impossibility of calculating damages, and/or the lack of causal relationship between the defendant's conduct and the claimed injury.

Indeed, only two courts have mentioned in dicta that any putative rights owed to the fetus contradict the mother's rights to obtain an abortion. In *Rich v. Foye*,[10] a Connecticut state court briefly mentioned that "[r]ecognizing a claim for wrongful life can also be problematic because any theoretical fetal rights either to come to term or not are subject to the mother's legal rights pertaining to control of her pregnancy."[11] Additionally, the Oregon Supreme Court briefly noted the conflict between the child's claim and the parent's right to terminate the pregnancy:

> There can be no doubt that recognizing that a child in T's position has an interest in not being born is distinct from, and potentially at odds with, the parents' interests [in making informed reproductive choices] recognized above . . . Thus, recognizing a child's independent legal interest in being conceived and

abrogated on other grounds by Taylor v. Kurapati, 600 N.W.2d 670 (Mich. Ct. App. 1999); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988); Greco v. United States, 893 P.2d 345 (Nev. 1995); Smith v. Cote, 513 A.2d 341 (N.H. 1986); *Becker*, 386 N.E.2d 807 (N.Y. 1978); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985); Flanagan v. Williams, 623 N.E.2d 185 (Ohio Ct. App. 1993), *abrogated on other grounds by* Simmerer v. Dabbas, 733 N.E.2d 1169 (Ohio 2000); Tomlinson v. Metro. Pediatrics, LLC, 412 P.3d 133 (Or. 2018); Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986); Schloss v. Miriam Hosp., 1999 WL 41875 (R.I. Super. Jan. 11, 1999); Willis v. Wu, 607 S.E.2d 63 (S.C. 2004); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Glascock v. Laserna, 30 Va. Cir. 366 (Va. Cir. Ct. 1993); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975); Beardsley v. Wierdsma, 650 P.2d 288 (Wyo. 1982).

[10] 976 A.2d 819 (Conn. Super. Ct. 2007).

[11] *Id*. at 837 (citing *Roe*, 410 U.S. at 153).

born (or not being conceived and born) would create potential tension with the parents' legal interest in deciding whether or not to conceive and bear that child.[12]

However, this constitutional conflict was not the holding in either case. Both courts based their decision not to recognize such a claim on other grounds. Yet the law is clear: *Roe v. Wade* conclusively established that a fetus is not a person and has no legal rights prior to viability. Therefore, there is no duty to a fetus in the first trimester. Without a duty there can be no proximate cause and no damages, thus no liability.

As discussed more fully in Section II of this article, litigators should incorporate the constitutional argument set forth herein as the starting point when litigating wrongful life claims in those jurisdictions that have either allowed such claims to proceed or in which wrongful life is a matter of first impression.

C. The rationales for rejecting wrongful life claims to date

Some courts have rejected wrongful life by concluding that it is impossible to calculate general damages, such as pain and suffering, in such a case. *Gleitman v. Cosgrove* was the first wrongful life lawsuit.[13] In *Gleitman*, the child's mother consulted doctors when she was two months pregnant.[14] She informed her doctors that she had been diagnosed with German measles (i.e., rubella) one month earlier; the doctors negligently informed her that "the German measles would have no effect at all on her child."[15] The child was born blind and deaf.[16] Had the mother known the probabilities she would have aborted.[17] The court denied the child's wrongful life claim because he had no "damages cognizable at law."[18] In so holding, the court mentioned that "it is impossible to make such a determination."[19] *Gleitman* as well as many other courts have found that it is simply impossible to award damages based on the "Hobson's choice" between "non-existence

[12] *Tomlinson*, 412 P.3d at 151-152; *see also Viccaro*, 551 N.E.2d at 12-13 (holding that at least on "a theoretical basis, it is difficult to conclude that the defendant physician was in breach of any duty owed to [the child]"); *see also Glascock*, 30 Va. Cir. 366 (noting simply that the duty element was "not present").

[13] 227 A.2d 689 (N.J. 1967).

[14] *Id.* at 690.

[15] *Id.*

[16] *Id*

[17] *Id.* at 691.

[18] *Id.* at 692.

[19] *Id.*

and an existence with a defective condition."[20]

Traditional tort remedies are compensatory in nature, and the basic rule of tort compensation is to restore the injured party to the position that would have been occupied but for the defendant's wrongdoing.[21] In wrongful life claims, however, there is no allegation that, but for the defendant's negligence, the child would have lived a healthy, unimpaired life. Instead, the claim is that, absent the defendant's negligence, the child would never have been born. Therefore, the cause of action necessarily includes a calculation of damages dependent upon the relative benefits of an impaired life as opposed to no life at all. Many courts reason that no such comparison is possible because nonexistence is outside of human experience, and as such, it is "[a] comparison the law is not equipped to make."[22] In the words of former Chief Justice Weintraub's separate opinion in *Gleitman v. Cosgrove*: "Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so."[23] The Wisconsin Supreme Court aptly summarized the damages conundrum as follows:

> The normal measure of damages in tort actions is compensatory. Damages are measured by comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence. 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. This Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant plaintiff makes it logically impossible for a court to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies.[24]

[20] *Willis*, 607 S.E.2d at 67.

[21] *Siemieniec*, 512 N.E.2d at 697 (Ill. 1987).

[22] *Becker*, 386 N.E.2d at 812.

[23] *Gleitman*, 227 A.2d at 711.

[24] *Dumer*, 233 N.W.2d at 376; *see also Strohmaier*, 332 N.W.2d at 434 ("compensatory damages are measured by comparing the condition that the plaintiff would have been in but for the negligence

Some courts have also found a second justification for their dismissals of wrongful life claims—the impossibility of establishing the existence of harm. The New York Court of Appeals based its decision not to recognize wrongful life on both grounds when it held that (1) the plaintiffs suffered no legal injury, and (2) the plaintiffs' damages were impossible to measure.[25] During the court's ontological discussion of the cognoscibility of the plaintiffs' injuries, the court penned what has perhaps become the most quoted passage in wrongful life jurisprudence:

> 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. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. 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?[26]

Many other courts have rested their reasoning for rejecting wrongful life claims on the refusal to recognize that the child had suffered a legally cognizable injury.[27]

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with the impaired condition resulting from the negligence [and it is] impossible to weigh the difference between life with the suffered defects against the alternative of nonexistence").

[25] *Becker*, 386 N.E.2d at 812; *see also Nelson*, 678 S.W.2d at 925 ("[T]his is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has been damaged at all."); *Lininger*, 764 P.2d at 1210-1211 ("The difficulty that besets [the child's] complaint is not merely that damages are inherently too speculative to assess. While the discussion above compels that conclusion, the more fundamental problem is that we cannot determine in the first instance that [the child] has been injured.").

[26] *Becker*, 386 N.E.2d at 812.

[27] *See, e.g., Walker by Pizano*, 790 P.2d at 739-740 ("The difficult problem of quantifying general damages should not have prevented the courts from awarding such damages *if* in fact an injury had occurred. It is the genius of the common law that difficult damage questions are left to juries. . . . In our view, if an injury has

As part of their analyses, some courts have also woven policy considerations into their reasoning, such as protecting the sanctity of human life. For instance, in holding that the child had not suffered a legally cognizable injury, the Supreme Court of Illinois based its reasoning on the state's "legislatively expressed policy favoring childbirth over abortion."[28] The court stated that "the public policy of this State to protect and to preserve the sanctity of all human life, as expressed in section 1 of the Illinois Abortion Law of 1975, militates against the judgment that an individual life is so wretched that one would have been better off not to exist. We therefore hold that claims for relief for the wrongful life of congenitally or genetically defective children should not be recognized in this State absent clear legislative guidance."[29] A number of other courts have also relied on such policy considerations in deciding not to recognize wrongful life claims.[30]

The Supreme Courts of West Virginia and Indiana appear to be the only courts thus far to base their decision not to recognize wrongful life claims primarily on the

been caused by a breach of duty, then the child is entitled to the general and special damages that result. We believe, therefore, the limited recovery allowed by the courts recognizing the tort of wrongful life exhibits a fundamental casuistry in their reasoning. The conclusion that the child is impaired does not ineluctably imply that the child has suffered a legally cognizable injury. Principles of tort law require that the existence of injury be ascertained first; courts should allow the injury caused by defendant's negligence to define the damages recoverable, rather than allow impairment/damage the defendant did not cause to define the nature of the injury. . . . In the present case, defendants caused none of the impairments from which Christy suffers. The only result of their negligence was that Christy was born."); *Grubbs*, 120 S.W.3d at 689 ("[W]e are unwilling to equate the loss of an abortion opportunity resulting in a genetically or congenitally impaired human life, even severely impaired, with a cognizable legal injury.").

[28] *Siemieniec*, 512 N.E.2d at 701.

[29] *Id.* at 702.

[30] *See, e.g., Elliott*, 361 So. 2d at 548 ("[A] legal right not to be born is alien to the public policy of this State to protect and preserve human life."); *Blake*, 698 P.2d at 322 ("Basic to our culture is the precept that life is precious. As a society therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious.") (citations omitted); *Bruggeman*, 718 P.2d at 642 ("We are convinced that an action for wrongful life should not be judicially recognized in Kansas. It has long been a fundamental principle of our law that human life is precious. Whether the person is in perfect health, in ill health, or has or does not have impairments or disabilities, the person's life is valuable, precious, and worthy of protection. A legal right not to be born—to be dead, rather than to be alive with deformities—is a theory completely contradictory to our law.").

causation element. In *James G. v. Caserta*, the court held:

> Despite some factual relationship to the parents' wrongful birth claim, we do not believe that the child's wrongful life claim can be carried under the usual tort analysis as can the parents' wrongful birth claim. In this latter claim, liability rests on the physician's failure to initially diagnose the birth defect. The underlying premise is that prudent medical care would have disclosed the possibility of birth defects either prior to conception or during pregnancy. As a proximate result of this diagnostic failure, the parents were precluded from making an informed decision to either prevent conception or to make a subsequent informed decision to terminate the pregnancy. Within this same ambit of proximate cause is the foreseeability on the part of the physician that the child will be born with birth defects.
>
> Such an analysis cannot be made of the child's wrongful life claim. One of the underlying premises in this area of the law is that the birth defect is not curable while the child is in the fetal stage. Consequently, the physician is not being charged with the failure to cure the birth defect, but rather with the failure to give the parents information about it so that an informed choice could be made. This duty to inform does not extend to the unborn child as it is the parents' decision to risk conception or to terminate a pregnancy. We, therefore, conclude that in this jurisdiction, a claim for wrongful life does not exist in the absence of any statute giving rise to such a cause of action.[31]

Additionally, in *Cowe v. Forum Group, Inc.*, the Supreme Court of Indiana ruled:

> [T]he determinative issue is causation. An essential element in a cause of action for negligence is the requirement for a reasonable connection between a defendant's conduct and the damages which a plaintiff has

[31] 332 S.E.2d at 880-881.

> suffered. This element requires, at a minimum, causation in fact—that is, that the harm would not have occurred "but for" the defendant's conduct. The "but for" analysis presupposes that, absent the tortious conduct, a plaintiff would have been spared suffering the claimed harm. . . . Here we cannot find that but for [the defendant's] alleged negligence [the child] would have been spared the asserted harm[.][32]

A few other courts have placed some emphasis on the causation element even though their primary justification is on injury.[33]

D. Only three states allow wrongful life claims

Only California, Washington, and New Jersey recognize the tort of wrongful life, but all three have limited the child's damages to the cost of the extraordinary care caused by the birth defects.[34] In each case, the state law had already permitted parents under a wrongful birth theory to recover extraordinary damages incurred during the child's minority. However, a compelling motivation for each of the three courts to recognize wrongful life claims was the failure of the wrongful birth claim to provide for damages for the extraordinary expenses the child would incur after reaching his/her majority.

1. California

California was the first jurisdiction to recognize an action for wrongful life. In *Turpin v. Sortini*,[35] the doctor negligently diagnosed a couple's first child as having hearing within normal limits when in reality the child was deaf and the condition was hereditary.[36] Relying on the doctor's diagnosis, the couple gave birth to a second child who was also born deaf.[37] The child sued the doctor for both general and special damages.[38] In denying general damages, the court relied upon the same reasoning that the majority of courts in other jurisdictions have used to disallow wrongful life lawsuits: "(1) it is

[32] 575 N.E.2d 630, 635 (Ind. 1991) (internal citations omitted).

[33] *See, e.g., Atlanta Obstetrics & Gynecology Grp.*, 398 S.E.2d at 560-561 (Ga. 1990) ("The traditional tort analysis breaks down even further with the final prong, that of causation, as the defendants cannot be said to have caused the impairment in [the child]").

[34] *See Turpin*, 643 P.2d 954; Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983); Procanik v. Cillo, 478 A.2d 755 (N.J. 1984).

[35] 643 P.2d 954 (Cal. 1982).

[36] *Id.* at 956.

[37] *Id.*

[38] *Id.*

simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born, and (2) even if it were possible to overcome the first hurdle, it would be impossible to assess general damages in any fair, nonspeculative manner."[39]

However, the court ignored its own reasoning and awarded special damages to the child for the "extraordinary expenses for specialized teaching, training and hearing equipment."[40] The court found that it would be "illogical" to allow parents, and not the child, to recover for the costs of the child's medical care.[41] The court reasoned that (1) nonexistence can, in particularly severe cases, be preferable to life with defects;[42] (2) special damages were readily ascertainable;[43] and (3) the child's extraordinary, necessary medical expenses will place an inequitable burden on the child and her family.[44] Finally, the court held that an unborn child cannot make her own decisions, but reasoned that the child's parents could be trusted to decide in her interest whether she should be born.[45]

Of note, the *Turpin* court did not specifically overrule an earlier California case, *Curlender v. Bio-Science Laboratories*, in which the Court of Appeal, Second Appellate District, upheld a general damage claim for wrongful life.[46] In *Curlender*, the parents retained the defendants, a medical laboratory and a physician, to determine whether they carried Tay-Sachs disease.[47] The defendants provided the parents with inaccurate information regarding their status as Tay-Sachs carriers.[48] The child was subsequently born with Tay-Sachs disease, which caused substantial physical deformities, a significant intellectual disability, and severe pain; and the child's life expectancy was determined to be less than four years.[49] The court awarded the child general damages, citing the "dramatic increase, in the last few decades, of the medical knowledge and skill . . . [available] to avoid genetic disaster."[50] In so holding, the court imposed on those engaged in genetic testing a duty of care to the unborn, which has not been disputed in subsequent

[39] *Id.* at 963.
[40] *Id.* at 965.
[41] *Id.*
[42] *Id.* at 962-963.
[43] *Id.* at 965.
[44] *Id.* (stating that the child's receipt of necessary medical expenses should not depend "on the wholly fortuitous circumstances of whether the parents are available to sue and recover such damages").
[45] *Id.* at 962.
[46] 106 Cal. App. 3d 811 (Cal. Ct. App. 1980).
[47] *Id.* at 816 n.4.
[48] *Id.* at 815.
[49] *Id.* at 816.
[50] *Id.* at 826.

cases.[51] *Turpin* did, however, reject the *Curlender* court's rationale regarding general damages:

> The basic fallacy of the *Curlender* analysis is that it ignores the essential nature of the defendants' alleged wrong and obscures a critical difference between wrongful life actions and the ordinary prenatal injury cases noted above. In an ordinary prenatal injury case, if the defendant had not been negligent, the child would have been born healthy; thus, as in a typical personal injury case, the defendant in such a case has interfered with the child's basic right to be free from physical injury caused by the negligence of others. In this case, by contrast, the obvious tragic fact is that plaintiff never had a chance "to be born as a whole, functional human being without total deafness"; if defendants had performed their jobs properly, she would not have been born with hearing intact, but—according to the complaint—would not have been born at all.[52]

No subsequent cases in California have awarded general damages in a wrongful life action.

2. Washington

Washington followed California in recognizing a limited cause of action for wrongful life. In *Harbeson v. Parke-Davis*, three physicians failed to disclose the risk of birth defects associated with the mother's ingestion of the antiepileptic medication Dilantin during pregnancy.[53] As a result, the two minor plaintiffs were born suffering from fetal hydantoin syndrome.[54]

Much like California courts, the Washington Supreme Court acknowledged that "[t]he most controversial element of the [wrongful life] analysis in other jurisdictions has been injury and the extent of damages" and conceded that "measuring the value of an impaired life as compared to nonexistence is a task that is beyond mortals, whether judges or jurors."[55] Nevertheless, the court allowed recovery of special damages without explaining how the difficulty in determining the injury element had been overcome.

[51] *See, e.g., Turpin*, 643 P.2d 954.

[52] *Id.* at 961.

[53] 656 P.2d 483, 486 (Wash. 1983).

[54] *Id.*

[55] *Id.* at 496.

Instead, the court agreed with the *Turpin* court, which found that "'it 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.'"[56] Additionally, the court found that "extraordinary expenses for medical care and special training" were "calculable."[57]

3. New Jersey

Soon thereafter, the New Jersey Supreme Court in *Procanik v. Cillo*[58] reversed course from its previous position[59] on wrongful life claims and adopted the approach taken by California and Washington. The New Jersey Supreme Court disallowed a claim for general damages but awarded special damages to a child for failure to diagnose congenital rubella syndrome.[60] Just as in California and Washington, in denying general damages, the New Jersey Supreme Court recognized that "[t]he crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of [the child's] impaired existence."[61] Without explaining this discrepancy, the court reasoned: "Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction."[62]

Of note, the case was a particularly sympathetic one, as the parents' claim for wrongful birth action to recover the extraordinary expenses had been barred by limitations, leaving the prospect of no recovery. Noting that the financial impact of the child's impairment was felt not only by the parents but also the child, the court concluded that "[t]he right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the 'wholly fortuitous circumstances of

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[56] *Id.* at 495 (citing *Turpin*, 643 P.2d at 965).
[57] *Id.* at 496.
[58] 478 A.2d 755 (N.J. 1984).
[59] *See Gleitman*, 49 N.J. 22. Additionally, in Berman v. Allen, 404 A.2d 8, 12 (N.J. 1979), the New Jersey court revisited *Gleitman* and confirmed its rejection of a "wrongful life" action but on a more fundamental ground. It viewed *Gleitman* as resting primarily on the impossibility of ascertaining damages, which, in retrospect, the court found not to be a proper basis. Rather, the court held that the action was precluded because the child "has not suffered any damage cognizable at law by being brought into existence." *Id.* at 12.
[60] *Procanik*, 478 A.2d at 757.
[61] *Id.* at 763.
[62] *Id.*

whether the parents are available to sue.'"[63]

Many jurists have rejected the "reasoning" offered by the California, Washington, and New Jersey courts. They have ruled that those courts glossed over the injury element of wrongful life claims by simply deciding that the difficulty in calculating damages should not bar recovery by a disabled child. The opinions issued by the California, Washington, and New Jersey courts also share an internal inconsistency—general damages are too speculative and special damages are permissible for the same tort. As the Arizona Supreme Court observed:

> [T]he limited recovery allowed by the courts recognizing the tort of wrongful life exhibits a fundamental casuistry in their reasoning. The conclusion that the child is impaired does not ineluctably imply that the child has suffered a legally cognizable injury. Principles of tort law require that the existence of injury be ascertained first; courts should allow the injury caused by defendant's negligence to define the damages recoverable, rather than allow impairment/damage the defendant did not cause to define the nature of the injury.[64]

Similarly, Justice Ted Robertson of the Texas Supreme Court has noted:

> It is tempting to join these courts in fashioning some relief for a severely handicapped child, when that child may be burdened with crushing medical expenses for the remainder of his natural life.
>
> A court should not, however, discard established principles of tort law sub silentio in an attempt to reach a "right" result. Close examination of the California and Washington opinions reveals such an unexplained gap in the decisional reasoning.[65]

No court has considered whether wrongful life claims are unconstitutional based on *Roe v. Wade*[66] and its progeny. Indeed,

[63] *Id.* at 352 (quoting *Turpin*, 643 P.2d at 965).

[64] *Walker by Pizano*, 790 P.2d at 740.

[65] *Nelson*, 678 S.W.2d at 930 (Robertson, J., concurring).

[66] 410 U.S. 113 (1973).

none of the defendants in these cases challenged whether a duty of care was owed to the fetus at all.[67] As will be discussed below, a constitutional challenge based on duty should be the starting point when litigating wrongful life claims in those jurisdictions that have either allowed such claims to proceed or where wrongful life is a matter of first impression.

II. *Roe v. Wade* Provides that a Non-Viable Fetus is not a Legal Person under the Law

Wrongful life claims are irreconcilable with *Roe v. Wade*. Wrongful life claims are necessarily predicated on the contention that there is a duty of care owed to a fetus prior to viability.[68] This presupposes that a non-viable fetus enjoys legal standing. The courts that have recognized wrongful life claims sidestep this important part of the analysis.[69] Courts that have held that such a duty exists have described it as a duty to provide the prospective parents with information needed to decide whether to terminate the pregnancy.[70] Some courts simply conclude that "the duty owed to the parent inures derivatively to the child."[71] However, in order for the mother to choose to have an abortion, she must have access to that information prior to fetal viability. *Roe v. Wade* established that no such duty exists. Therefore, the courts permitting wrongful life claims have wrongfully held that a duty of care is owed by third parties to the embryo upon conception.

Our legal proposition can be summarized as follows: *Roe* established that a mother has an unfettered constitutional right to decide if the fetus will continue to exist beyond the first trimester.[72] *Roe* stands for the principle that a fetus does not have a legal right to

[67] *See Turpin*, 643 P.2d at 960 (providing that "defendants do not contend that they owed no duty of care either to James and Donna or to Joy"); *Procanik*, 478 A.2d at 760 ("The defendant doctors do not deny they owed a duty to the infant plaintiff, and we find such a duty exists."); *see also Harbeson,* 656 P.2d at 495 (equating the duty owed to the child with the duty to the parents in a wrongful birth cause of action: "The analysis whereby we arrived at our holding [regarding wrongful life] is similar to that which we used in considering the parents' wrongful birth action.").

[68] While the defendants did not challenge whether the defendant doctors owed a duty of care to the child, the Supreme Court of New Jersey in *Procanik* recognized that "[a]nalysis of the infant's cause of action begins with the determination whether the defendant doctors owed a duty to him." 478 A.2d at 760.

[69] *See supra* note 67.

[70] *See, e.g., Curlender*, 106 Cal. App. 3d at 829 ("The 'wrongful-life' cause of action with which we are concerned is based upon negligently caused failure by someone under a duty to do so to inform the prospective parents of facts needed by them to make a conscious choice *not* to become parents.").

[71] *See Walker by Pizano*, 164 Ariz. at 41.

[72] *Roe*, 410 U.S. at 163.

exist in the first trimester. Since the fetus has no legal right to exist during the period prior to viability, third parties cannot owe a duty of care to the fetus during that time period. As there is no way to reconcile wrongful life claims with federal constitutional law with respect to the duty owed to a fetus, federal constitutional law prevails, rendering wrongful life claims unconstitutional and invalid.

In *Roe v. Wade*, the United States Supreme Court held that a Texas abortion statute which prohibited abortions at all stages of pregnancy except when necessary to save the life of the mother was constitutionally invalid.[73] The Court found that the right of privacy, whether found in the Fourteenth Amendment's guarantee of personal liberty or the Ninth Amendment's reservation of rights to the people, was broad enough to encompass the decision whether to terminate a pregnancy.[74] Specifically, the Court ruled that the government may not prohibit abortions prior to viability and that the government regulation of abortion had to meet strict scrutiny because the right to abortion was a fundamental right.[75] As such, a woman is entitled to make the decision whether to abort the fetus free from overly restrictive state regulation.[76]

The Court in *Roe* rejected the contention that a fetus has rights that would limit a mother's right to privacy under the Fourteenth Amendment's guarantee of due process. Specifically, the Court did "not agree that, by adopting one theory of life [that a fetus's life and rights begin at conception], Texas may override the rights of the pregnant woman that are at stake."[77] The *Roe* decision does not recognize that, in the first trimester, a fetus is a "person" with a right to exist.[78] The Court held that while the state at some point has a valid interest in both the health of the mother and the fetus which allows the State to intrude on the woman's privacy,[79] the State's interest in protecting the mother's health becomes compelling only after the first trimester,[80] and the State's interest in protecting fetal health

[73] *Id.* at 164.
[74] *Id.* at 153.
[75] *Id.* at 155 (reiterating that where "fundamental rights are involved, . . . regulation limiting these rights may be justified only by a compelling state interest and . . . legislative enactments must be narrowly drawn to express only legitimate state interests at stake.").
[76] *Id.*
[77] *Id.* at 162.
[78] *Id.* at 158 (providing that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"); *id.* at 162 ("[T]he unborn have never been recognized in the law as persons in the whole sense.").
[79] *Id.* at 159-160.
[80] *Id.* at 163 ("With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first

becomes compelling only after viability.[81] Prior to the second trimester, there is no State interest which would justify interfering in the mother's abortion decision.[82] Moreover, there is not now, nor has there ever been, any judicial qualification of the type of life the State has an interest in protecting. The Supreme Court of New Jersey expounded upon this idea in *Berman v. Allen*,[83] when the court stated the following:

> 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 non-life. Concrete manifestations of this belief are not difficult to discover. The documents which set forth the principles upon which our society is founded are replete with references to the sanctity of life. The federal constitution characterizes life as one of three fundamental rights of which no man can be deprived without due process of law. Our own state constitution proclaims that the "enjoying and defending (of) life" is a natural right. The Declaration of Independence states that the primacy of man's "inalienable" right to life is a "self-evident truth." 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.
>
> State legislatures and thus the people as a whole have universally reserved the most severe criminal penalties for individuals who have unjustifiably deprived others of life. Indeed, so valued is this

trimester. This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.").

[81] *Id.* ("With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb.").

[82] *Id.* ("[F]or the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.").

[83] 404 A.2d 8 (N.J. 1979).

> commodity that even one who has committed first degree murder cannot be sentenced to death unless he is accorded special procedural protections in addition to those given all criminal defendants. Moreover, it appears that execution is constitutionally impermissible unless the crime which a defendant has perpetrated was one which involved the taking of another's life. Again, these procedural protections and penalties do not vary according to the presence or absence of physical deformities in the victim or defendant. *It is life itself that is jealously safeguarded, not life in a perfect state.*[84]

In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[85] the Supreme Court reaffirmed *Roe v. Wade* and the constitutional right of a woman to choose to have an abortion before fetal viability. In *Casey*, the constitutionality of The Pennsylvania Abortion Control Act of 1982, which imposed several obligations on women seeking abortions, was brought into question.[86] However, the case was really about whether *Roe v. Wade* would be overturned. The Supreme Court ultimately upheld *Roe v. Wade*.[87] However, the Court rejected the trimester framework of *Roe* and instead announced an undue burden analysis, whereby a law is held unconstitutional if it poses an undue burden on a woman at a stage of her pregnancy before the fetus has become viable.[88] Justice O'Connor, for the majority, wrote that the trimester framework was never intended to be the

[84] *Id*. at 12-13 (emphasis added; internal citations omitted).

[85] 505 U.S. 833 (1992).

[86] *Id*. at 833 ("At issue are five provisions of the Pennsylvania Abortion Control Act of 1982: § 3205, which requires that a woman seeking an abortion give her informed consent prior to the procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed; § 3206, which mandates the informed consent of one parent for a minor to obtain an abortion, but provides a judicial bypass procedure; § 3209, which commands that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband; § 3203, which defines a 'medical emergency' that will excuse compliance with the foregoing requirements; and §§ 3207(b), 3214(a), and 3214(f), which impose certain reporting requirements on facilities providing abortion services.").

[87] *Id*. at 834 ("Application of the doctrine of *stare decisis* confirms that *Roe*'s essential holding should be reaffirmed.").

[88] *Id*. at 873-876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

essence of the holding in *Roe*.[89] The essence of *Roe*, wrote Justice O'Connor, was that a woman's right to have an abortion is fundamental.[90]

In reaffirming *Roe*, the Court stated that, "as a matter of federal constitutional law, a developing organism that is not yet a 'person' does not have what is sometimes described as a 'right to life.'"[91] Once again, the Supreme Court recognized that there can be no act more discretionary than the decision whether to give birth. That decision is properly left to the woman in consultation with her physician or other healthcare provider.[92] Several lines of decisional law not involving wrongful life litigation recognize that a duty of care does not extend to a non-viable fetus.

Because an unborn fetus is not given the status of a legal "person" in our society, it is incapable of having rights. By way of analogy, it is often the case that not even a mother can be subjected to tort liability for injuries attributed to her decisions during pregnancy that may harm her unborn child. For instance, in *Remy v. MacDonald*, a child brought a negligence action against her mother for personal injuries incurred in an automobile accident that transpired prior to the child's birth.[93] The Massachusetts Supreme Court began its analysis by judicially noticing that,

> [a] fetus can be injured not only by physical force, but by the mother's exposure, unwitting or intentional, to chemicals and other substances, both dangerous and nondangerous, at home or in the workplace, or by the mother's voluntary ingestion of drugs, alcohol, or tobacco. A pregnant woman may place her fetus in danger by engaging in activities involving a risk of physical harm or by engaging in activities, such as most sports, that are generally not considered to be perilous. A pregnant woman may jeopardize the health of her fetus by taking medication (prescription or over-the-counter) or, in other cases, by not taking medication. She also may endanger the well-being of her fetus by not following her physician's advice with respect to prenatal care or by exercising her

[89] *Id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").
[90] *Id.* at 876.
[91] *Casey*, 505 U.S. at 913-914 (1992) (Stevens, J., concurring).
[92] *Roe*, 410 U.S. at 163.
[93] 801 N.E.2d 260, 262 (Mass. 2004).

> constitutional right not to receive medical treatment.[94]

However, the court ultimately refused to allow recovery for in utero injuries, and stated "there are inherent and important differences between a fetus, in utero, and a child already born, that permits a bright line to be drawn around the zone of potential tort liability of one who is still biologically joined to an injured plaintiff."[95] These holdings imply a determination that a mother does not owe a duty to an unborn fetus. There is logical tension between allowing claims for wrongful life but not for fetal personal injury claims against a mother.[96]

The same is true in those jurisdictions that allow wrongful life claims but do not allow wrongful death claims on behalf of an unborn fetus. For instance, the New Jersey Supreme Court concluded that the legislature did not intend to include a fetus within the definition of a "person" covered by the New Jersey Wrongful Death Act.[97] The failure to find a duty to the fetus in New Jersey's statutory scheme is wholly consistent with *Roe v. Wade*. Indeed, in *Alexander v. Whitman*, the plaintiffs challenged the constitutionality of the Wrongful Death and Survival Statute[98] as violating the Equal

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[94] *Id.* at 263.

[95] *Id.* at 266-267.

[96] *See, e.g.,* Carpenter v. Bishop, 720 S.W.2d 299, 300 (Ark. 1986) (negligent mother not liable for driving vehicle into bridge abutment and killing unborn child); Nat'l R.R. Passenger Corp. v. Terracon Consultants*,* Inc., 13 N.E.3d 834, 837-838 (Ill. App. Ct. 2014) (recognizing "compelling public policy reasoning" underlying refusal to hold mother liable in motor tort case involving death of fetus); Chenault v. Huie, 989 S.W.2d 474, 474-475 (Tex. Ct. App. 1999) (refusing to allow recovery of damages to a child attributed to mother's cocaine and alcohol use during pregnancy and refusing to "judicially create a legal duty that would have the effect of dictating a pregnant woman's conduct toward her unborn child"); Cullotta v. Cullotta, 678 N.E.2d 717, 721 (Ill. App. Ct. 1997) ("no cause of action can be stated for maternal prenatal negligence").

[97] Acuna v. Turkish*,* 930 A.2d 416, 426 (N.J. 2007) ("in construing New Jersey's Wrongful Death Act, this Court concluded that the Legislature did not intend to include a fetus within the definition of a 'person' covered by the Act.") (citing Giardina v. Bennett, 545 A.2d 139, 143 (N.J. 1988)); *accord Roe,* 410 U.S. at 158 ("the word 'person' . . . does not include the unborn"); *see also* State in Interest of A.W.S., 440 A.2d 1174, 1177 (N.J. Super. Ct. Juv. & Dom. Rel. 1980) ("The homicide and death by auto statutes, N.J.S.A. 2C:11-2(a) and 2C:11-5(a) do not express a clear intention on the part of the legislature to include a fetus within the protected class thereunder. Quite the contrary, the legislative history is indicative of an intention on the part of the legislature to exclude a fetus from the protected class."), *aff'd*, 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981).

[98] The court stated "it is clear by the implications of the holding in *Giardina* and by the language of the survival action statute itself that the New Jersey Legislature did not intend to provide the parents of unborn or stillborn fetuses with

Protection and Due Process Clauses of the Fourteenth Amendment because they deny a cause of action to the statutory beneficiaries unless a fetus survives past birth.[99] The Third Circuit disagreed with the constitutional challenge and reiterated the lack of a duty to a fetus during the period in which it is "unborn":

> Ms. Alexander can only establish a claim on behalf of her child under the Fourteenth Amendment if her child (and others similarly situated) fall(s) within the protections afforded "person[s]" as that term is used in the Fourteenth Amendment, and it is clear it does not. The Supreme Court has already decided that difficult question for us in *Roe v. Wade*. There, the Court expressly held that "the word 'person,' as used in the Fourteenth Amendment does not include the unborn." The Court held that "person" has "application only postnatally." That constitutional principle was more recently re-affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. There, Justice Stevens, writing separately from the joint opinion of Justices O'Connor, Kennedy and Souter, wrote that, as a matter of federal constitutional law, a fetus is a "developing organism that is not yet a 'person' " and "does not have what is sometimes described as a 'right to life.'" This principle "remains a fundamental premise of our constitutional law governing reproductive autonomy.[100]

Similarly, in Washington, parents can recover for wrongful life but cannot recover for the death of an unborn child. In *Baum v. Burrington*, Holly M. Baum sued a clinic and obstetrician-gynecologist alleging the wrongful death of twin, nonviable fetuses she miscarried.[101] Revised Code of Washington 4.24.010 then provided, in relevant part:

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a statutory cause of action for survival." 114 F.3d 1392 (3d Cir. 1997) (citations omitted); *see also* Thomas v. Ford Motor Co., 70 F. Supp.2d 521, 525 (D. N.J. 1999) ("while New Jersey courts have not addressed the issue, at least one federal court has ruled that the *Giardina* holding and the language of the Survival Act imply that an action brought on behalf of a deceased fetus pursuant to the Survival Act is similarly barred.").

[99] 114 F.3d 1392 (3d Cir. 1997).

[100] *Id.* at 1400 (citations omitted).

[101] 79 P.3d 456, 457 (Wash. Ct. App. 2003).

> A mother or father, or both, who has regularly contributed to the support of his or her minor child, and the mother or father, or both, of a child on whom either, or both, are dependent for support may maintain or join as a party an action as plaintiff for the injury or death of the child.
>
> ....
>
> In such an action, in addition to damages for medical, hospital, medication expenses, and loss of services and support, damages may be recovered for the loss of love and companionship of the child and for injury to or destruction of the parent-child relationship in such amount as, under all the circumstances of the case, may be just.[102]

The Washington Supreme Court had previously ruled in *Moen v. Hanson* that Section 4.24.010 permits recovery for the death of a viable fetus.[103] However, whether a nonviable fetus was included in the definition of a "minor child" was a matter of first impression.[104] The court determined that a nonviable fetus was not covered by the Act, and thus affirmed summary judgment for the defendants.[105] There is an incongruity in Washington law which prohibits parents from recovering on behalf of an unborn nonviable fetus but allows a child to recover under a wrongful life theory premised on a duty owed to a nonviable fetus.

As one final example, consider the following scenario: Parents who are unable to conceive a child on their own contract with a surrogate mother to carry their child to term. Assume that before the child becomes viable the surrogate mother decides that she does not want to spend another six months being pregnant and decides to abort the pregnancy. If the parents sought an injunction to stop the abortion, *Roe v. Wade* should defeat the parents' injunction. While the case did not involve the abortion issue, in *Matter of Baby M.*, a New Jersey state court struck down an abortion clause in a surrogacy contract prohibiting abortion except as allowed by the male promisor on the ground that its enforcement would violate the surrogate mother's constitutionally protected right, under *Roe v. Wade*, to decide whether to have an abortion.[106] It was clearly the court's view that the abortion

[102] RCW 4.24.010 (1998), amended in 2019.
[103] 537 P.2d 266, 267 (Wash. 1975).
[104] *Baum*, 79 P.3d at 458.
[105] *Id*. at 459-460.
[106] Matter of Baby M., 525 A.2d 1128, 1159 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part sub nom.* Matter of Baby M, 537 A.2d 1227 (N.J. 1988).

provision could not be enforced by an action for injunctive relief to prohibit an otherwise lawful abortion.

Since the state may not interfere with a woman's right to obtain an abortion prior to viability, and because the fetus itself does not have any rights during the period when an abortion may be performed, there is an obvious conflict with the contention in a wrongful life claim that a duty exists to the fetus from the moment of conception. The application of the Supremacy Clause renders wrongful life claims unconstitutional.[107]

III. Conclusion

One essential element of a tort is the existence of a legally enforceable duty owed by the defendant to the plaintiff. Unfortunately, both the courts that have rejected a wrongful life tort and the three courts that have recognized the tort have failed to address whether a duty is owed by a defendant to the fetus during the first trimester of its existence. Instead, the courts have directed their analysis to whether an injury exists when the claim is that no life would be preferred to a life with a genetic abnormality.

Roe v. Wade established as a matter of constitutional law that during the first trimester of a pregnancy, the fetus is not owed a duty of care. Without a duty, there can be no breach and thus no injury giving rise to damages. As plaintiffs continue to push courts that have either refused to recognize this tort or have not had the issue presented to it, defense counsel should raise the unconstitutionality of these claims. For counsel in the three states that have recognized this tort, we urge defense counsel to aggressively argue the unconstitutionality of the tort when it is asserted.

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[107] U.S. CONST. art. VI, cl. 2. ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."). State courts are bound to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("Every state legislator and executive *and judicial officer* is solemnly committed by oath taken pursuant to Art. VI, ¶3 'to support this Constitution.'") (emphasis added); James v. City of Boise, Idaho, 136 S. Ct. 685, 686 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law.").