

Things of Which We Dare Not Speak: An Essay on Wrongful Life

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ABSTRACT

American courts currently reject most wrongful life claims—claims that a medical provider’s negligence made it possible for the plaintiff, destined from conception to experience significant genetically derived disability, to be born. Courts give two main reasons for rejecting wrongful life claims. First, because human life is sacred, being born under any circumstances cannot constitute a recoverable injury. And second, even if the “sanctity of human life” does not prevent courts from comparing the values of disabled life and no life at all, the relevant calculations would lie beyond the capacities of courts to accomplish. This Essay suggests two ways around these difficulties. First, the sanctity-of-life position should be circumvented by attributing a nonbeliever’s outlook to the hypothetical reasonable person employed on a case-by-case basis to make the necessary life-versus-nonlife cost-benefit analysis. This analysis does not necessarily recommend agnosticism as a belief system in other contexts. But here, secular notions of fairness and efficiency support taking theology out of the picture. And second, in deciding whether a plaintiff’s disability is sufficiently severe to warrant recovery, the court should attach zero value to non-life and focus on the question of whether, from the plaintiff’s perspective at birth, the detriments of plaintiff’s disabled life outweigh its benefits. The relevant calculations, while often difficult, are not more so than in other traditional areas of tort. This Essay addresses the possibility that courts adopting its approach might relax the suggested legal standards, producing too many wrongful life claims rather than, as now, too few. In that event, courts or legislatures would be required to re-establish the necessary formal boundaries of wrongful life.

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INTRODUCTION

Would a severely disabled person ever be better off not having been born? Is it somehow obscene to ask such a question? These troubling questions are implicated in every wrongful life action claiming that a medical provider's negligence made it possible for the plaintiff, destined from conception to experience significant genetically derived disability, to be born. Perhaps understandably, American courts have refused to address the disabled-life-versus-nonlife issue on a case-by-case basis, even while acknowledging the sufficiency of plaintiffs' assertions that defendant medical providers failed to comply with applicable professional standards.¹ Our courts generally allow the parents of disabled children to recover in wrongful birth actions for the parents' own losses.² But they deny as a matter of law a child's

¹ For cases refusing as a matter of law to address the disabled-life-versus-nonlife issue, see *infra* note 3. See also *Turpin v. Sortini*, 643 P.2d 954, 964 (Cal. 1982) (referring to the "incalculable nature of both elements of this harm-benefit equation"). The text to which this note is appended avoids referring to allegations or proof of providers' negligence. Such a reference might imply that the provider owed the plaintiff-children a duty of care to avoid their disabilities. Under the rationales supporting many of these decisions, the defendants' violations of standards do not cause harm to the plaintiff-children and thus, defendants are not negligent toward those plaintiffs. See *infra* note 7 and accompanying text.

² See, e.g., *Chaffee v. Seslar*, 786 N.E.2d 705, 708 (Ind. 2003) (stating that the "vast majority of jurisdictions" allow wrongful birth recovery of pregnancy-related economic loss); *Viccaro v. Milunsky*, 551 N.E.2d 8, 11-12 (Mass. 1990) (parents may recover for emotional harm when child born with a disability, reduced by any emotional benefits to parents derived from child's

right to recover general damages in a wrongful life action for having been born with an inherited disability.³ This Essay questions the wisdom of such ironclad denials.

Courts advance several rationales for rejecting wrongful life claims. The main doctrinal reason relates to causation. To prove that a medical provider's negligence caused a disability-related injury, a wrongful life plaintiff must show that (1) but for the provider's non-conformance with professional standards, the parents would not have allowed the plaintiff to be conceived or, if already conceived, to be born⁴ and (2) such an alternative outcome—no life at all—would have been preferable to disabled life from the plaintiff's point of view.⁵ The greater difficulty, both conceptually and practically, for wrongful life plaintiffs lies in the second requirement. Especially in light of the transcendental value that many courts attach to human existence in this context, frequently referring to the “sanctity of life,”⁶ courts have con-

birth). Courts that recognize wrongful life claims must take care not to duplicate parents' wrongful birth recoveries. For a succinct summary of wrongful birth law, see JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 382–83 (9th ed. 2017). See generally Jennifer R. Granchi, *The Wrongful Birth Tort: A Policy Analysis and the Right to Sue for an Inconvenient Child*, 43 S. TEX. L. REV. 1261, 1265–72 (2002).

³ See, e.g., *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 701 (Ill. 1987), *overruled in part on other grounds by Clark v. Children's Mem'l Hosp.*, 955 N.E.2d 1065 (Ill. 2011); *Nelson v. Krusen*, 678 S.W.2d 918, 931 (Tex. 1984); *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978); *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967), *abrogated on other grounds by Berman v. Allan*, 404 A.2d 8 (N.J. 1979), *abrogation recognized by Hummel v. Reiss*, 608 A.2d 1341 (N.J. 1992); *Speck v. Finegold*, 408 A.2d 496, 508 (Pa. Super. Ct. 1979), *aff'd in part and rev'd in part*, 439 A.2d 110 (Pa. 1981), *superseded by statute*, 42 PA. CONS. STAT. § 8305 (2010).

⁴ All wrongful life complaints described in reported decisions include one or both of these allegations. See, e.g., *Becker*, 386 N.E.2d at 812 (“The . . . allegations of the complaint state that had the defendant not been negligent, the infant's parents would have chosen not to conceive, or having conceived, to have terminated rather than to have carried the pregnancy to term . . .”).

⁵ Even if our courts were willing to address this issue, *cf. supra* note 1 and accompanying text, the disability would have to be severe to warrant general damages given that life ordinarily brings benefits that should be offset against the detriments. *Cf. infra* notes 47–48 and accompanying text. A few courts have allowed recovery of special damages when plaintiffs' disabilities were relatively minor. See *Turpin*, 643 P.2d at 966. Deafness should not suffice to support general damages. See *infra* note 49 and accompanying text.

⁶ See, e.g., *Turpin*, 643 P.2d at 961 (“[C]onsiderations of public policy dictate a conclusion that life—even with the most severe of impairments—is, as a matter of law, always preferable to nonlife. The decisions frequently suggest that a contrary conclusion would ‘disavow’ the sanctity and value of less-than-perfect human life.” (emphasis added)); see also *Becker*, 386 N.E.2d at 812 (discussing that the disabled-life-versus-nonlife issue is “a mystery more properly to be left to . . . theologians.” (emphasis added)). Another major context in which the “sanctity of human life” plays a central role in the thinking of religious moralists is abortion. See, e.g., Richard Dawkins, *The God Delusion* 291–98 (2006). The Supreme Court applied a secular analysis in *Roe v. Wade*, 410 U.S. 113 (1973).

cluded that wrongful life plaintiffs have not suffered cognizable harm. Moreover, even if harm exists in theory, courts could not rationally calculate appropriate damages.⁷ Thus, our courts cannot bring themselves to consider whether any disability might be so terrible that never being born would, from the disabled plaintiff's perspective, constitute a preferable alternative. Commentators have criticized the very idea of considering such a possibility.⁸ Indeed, it would seem to follow from the view that life is sacred that the negligent medical provider may actually have done the severely disabled child a favor by allowing the child to be conceived and born when, had the provider not been negligent, the plaintiff's parents would have taken steps to prevent that from happening.⁹

Although a large number of scholars have addressed the issues raised by wrongful life claims, only a relative few have taken the central issue head on: whether courts should, and how they could, employ cost-benefit analysis to determine in a given case if circumstances justify the conclusion that nonlife is preferable to disabled life.¹⁰ And

⁷ See, e.g., *Becker*, 386 N.E.2d at 812 (“[I]t does not appear that the infants [in wrongful life cases] suffered any legally cognizable injury.”); *Nelson*, 678 S.W.2d at 925 (holding that it is impossible to rationally decide whether or not wrongful life plaintiff has been damaged); *Clark*, 955 N.E.2d at 1084 (“[T]here is no cause of action because the child, while burdened, cannot be said to have suffered a legal wrong.”). For an example regarding the “cannot calculate” issue, see *Turpin*, 643 P.2d at 963 (“[I]t would be impossible to assess general damages in any fair, non-speculative manner.”); *Becker*, 386 N.E.2d at 812 (“[W]rongful life demands a calculation of damages . . . [that] the law is not equipped to make.”). See generally Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. CIV. RTS.—CIV. LIBERTIES L. REV. 141, 161 & n.120 (2005).

⁸ See, e.g., Hensel, *supra* note 7 at 195 (“[W]rongful . . . life actions [constitute] a collective [psychological] threat facing all individuals with disabilities . . .”). See generally Darpana M. Sheth, *Better Off Unborn? An Analysis of Wrongful Birth and Wrongful Life Claims Under the Americans with Disabilities Act*, 73 TENN. L. REV. 641 (2006) (arguing that wrongful life actions are inherently incompatible with America's commitment to end discrimination against individuals with disabilities).

⁹ If one assumes for purposes of analysis that human beings receive the opportunity to enjoy a spiritual afterlife upon conception or birth, see *infra* notes 32–33, 38 and accompanying text, then the idea of “doing the plaintiff a favor” by allowing plaintiff to be conceived is not so far-fetched. Putting such a possibility aside and adopting a secular perspective, judges make short shrift of the “doing the plaintiff a favor” argument. See, e.g., *Fassoulas v. Ramey*, 450 So. 2d 822, 830 (Fla. 1984) (Ehrlich, J., dissenting) (arguing that in a wrongful birth case, the negligent doctor “did not do [the family] a favor”).

¹⁰ A fair, though relatively modest, sample of the wrongful life literature would include Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185 (1993); F. Allan Hanson, *Suits for Wrongful Life, Counterfactuals, and the Nonexistence Problem*, 5 S. CAL. INTERDISC. L.J. 1 (1996); Valérie Harrant & Nicolas Vaillant, *Compensation and Wrongful Life: A Positive Economic Perspective*, 13 J. LEGAL ECON. 1 (2006); Michael B. Kelly, *The Rightful Position in “Wrongful Life” Actions*, 42 HASTINGS L.J. 505 (1991); Michael B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense*

virtually none of these writers has explicitly developed the important role of theological perspectives in such analyses.¹¹ This Essay takes up the task, arguing that circumstances recur in which a hypothetical surrogate decisionmaker, acting for the disabled child and rejecting the notion that human life has transcendental value, might reasonably conclude as of the time of a particular wrongful life plaintiff's birth that the plaintiff would be better off never having been born. For a wrongful life claim to succeed under this suggested approach, a court need not determine that the actual living plaintiff before the court would be better off never having been born or that the plaintiff would at that time choose death as an alternative to continued life.¹² Instead, the argument here begins with the observation that the defendant provider negligently deprived the plaintiff's parents of the opportunity, partly for the sake of the then-unborn plaintiff, to make an informed choice regarding the desirability of the plaintiff's birth. Thus, it seems only fair that a court should give the plaintiff the opportunity after the fact to show that a hypothetical surrogate would have decided, at the

of a Tort, 62 *FORDHAM L. REV.* 1675 (1994); Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 *TUL. L. REV.* 397 (1992); Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 *LEGAL THEORY* 117 (1999); Joan Waters, *Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents*, 31 *DRAKE L. REV.* 411 (1982); Kathleen Gallagher, Comment, *Wrongful Life: Should the Action Be Allowed?*, 47 *LA. L. REV.* 1319 (1987).

Some writers have advocated, as does this Essay, reliance on cost-benefit analysis in reaching outcomes in wrongful life cases. See, e.g., JOEL FEINBERG, 1 *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 98 (1984) ("If the 'damage' caused by birth is relatively minor, say a clubfoot or a harelip, it might yet be a handicap, but . . . no rational person would prefer nonexistence to it. The question . . . then seems to be whether an inherited condition can be so severe . . . that, when compared with nonexistence . . . , it can be judged a *net* harm, or harm on balance."); see also JOEL FEINBERG, *FREEDOM AND FULFILLMENT* 17 (1992). To the surprise of the author of this Essay, neither Feinberg nor any of the other proponents of cost-benefit analysis recognize the significance of theological perspectives in the context of wrongful life. See Patrick J. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 *WASH. U. L.Q.* 919, 937 ("One can . . . legitimately compare the state in which plaintiff was not born with the present state in which plaintiff exists with certain defects."); Bonnie Steinbock & Ron McClamrock, *When Is Birth Unfair to the Child?*, 24 *HASTINGS CTR. REP.* 15, 18 (1994) (concluding, in a hypothetical wrongful life case in which the plaintiff is born with a withered arm, that "[w]e may suppose that while the child [through a proxy] wishes he didn't have a withered arm, he does not regret being born. . . . [In that circumstance] despite [the child's] suffering, . . . it would seem that the bad aspects [of disabled life] have been outweighed by the good.").

¹¹ See *supra* notes 8, 10. The author of this Essay has examined the sources and more than an equal number of others and can find no analyses of the roles of belief or nonbelief.

¹² As this Essay explains, see *infra* notes 51–54 and accompanying text, the crucial cost-benefit calculation advanced herein is based on the factual circumstances at the time of plaintiff's birth, together with reasonable projections. The fact that such circumstances may have unforeseeably changed for better or worse between the time of birth and the time of trial should not affect the outcome.

time of plaintiff's birth and on the plaintiff's behalf, that the plaintiff would have been better off never being born.¹³ When a living plaintiff makes a showing that nonlife would have been preferable, the plaintiff's life does not, of course, actually end. Nor does this Essay in any way intend to suggest it should. Instead, the plaintiff recovers against the defendant provider who wrongfully caused the plaintiff to be born in a significantly disabled state.

Moreover, this Essay argues that the hypothetical surrogate should be presumed to embrace an agnostic outlook regarding the existence of a caring God.¹⁴ Nonbelief represents a minority point of view in this country.¹⁵ But it is a rational view held by many persons and affords the plaintiff the opportunity for a balanced judicial response to the wrongful life claim. Current law, by embracing the "sanctity of human life," effectively eliminates any chance for the wrongful life plaintiff to recover general damages. Because defendants' negligence forces courts to speculate in these regards, in fairness courts should give plaintiffs the benefit of the doubt by attributing a nonbeliever's perspective to the hypothetical reasonable decisionmaker, thus allowing courts to consider, rather than requiring them summarily to dismiss, significantly disabled plaintiffs' actions.¹⁶

¹³ In American tort law, the idea is widespread that when an actor's negligent behavior renders it impossible to know what actually would have happened had the defendant taken adequate care, the plaintiff should be able, in fairness, to reach the jury with the assertion that the defendant's negligence caused the plaintiff's harm. *See, e.g.,* *Haft v. Lone Palm Hotel*, 478 P.2d 465, 467–70 (Cal. 1970) (allowing the decedents' representative to reach the jury with a claim that defendant negligently failed to provide a lifeguard at a pool who would have saved plaintiff's decedents who had drowned, even though there were no eyewitnesses). A current example is reflected in the so-called "heeding presumption" in products liability law. JAMES A. HENDERSON, JR. ET. AL., *PRODUCTS LIABILITY* 368–70 (Erwin Chemerinsky et al. eds., 8th ed. 2016) (noting that in many jurisdictions, when a defendant product manufacturer fails to provide adequate warnings, plaintiffs enjoy a rebuttable presumption that plaintiff would have heeded adequate warnings had they been given).

¹⁴ *Cf. infra* text accompanying notes 43–44.

¹⁵ *See infra* notes 39–40 and accompanying text. This Essay uses the term "agnostic" to refer to what Richard Dawkins refers to as a "category six" on a seven-category scale: "I cannot know for certain but I think God is very improbable, and I live my life on the assumption that he is not there." DAWKINS, *supra* note 6, at 50–51.

¹⁶ The core idea that defendant medical providers' negligence has forced courts to speculate carries over to supporting the court's willingness to decide whether a particular plaintiff would have been better off never having been born. After all, but for the provider's negligence, the parents would have prevented the plaintiff's conception or birth; it is only fair that the court be allowed to decide via a "reasonable surrogate" construct whether such a prevented decision would have advanced the interests of the disabled child. *See supra* note 13 and accompanying text.

In sum, this Essay offers a new perspective on a sensitive subject involving aspects of which, until now, most have dared not speak.

I. A BRIEF OVERVIEW OF WRONGFUL LIFE JURISPRUDENCE

A. *What Courts Have Done and Why*

The origins of wrongful life litigation involved healthy plaintiffs who alleged that medical providers' negligence in assisting their unwed parents before or during pregnancy caused plaintiffs to be born illegitimately. Courts have uniformly denied such claims as a matter of law.¹⁷ More recently, wrongful life plaintiffs typically claim to have been born with inherited conditions ranging from somewhat trivial physical difficulties to life-threatening, life-shortening mental and physical disabilities as a result of defendants' failures either to provide proper care or to warn of the relevant risks. Plaintiffs allege that such failures thwarted their parents' intent to prevent plaintiffs' births. American courts deny all such claims categorically.¹⁸ Some states have statutes to the same effect.¹⁹ A few courts, although denying general damages, allow disabled plaintiffs to recover limited elements such as pain and suffering and high costs of living, including medical and rehabilitation costs.²⁰

Our courts offer interesting explanations for why they reject wrongful life claims. Perhaps the most frequently advanced reason is that because the defendant made it possible for the plaintiff to experience life, albeit burdened with a serious disability, the defendant has not caused the plaintiff to suffer a legally cognizable injury.²¹ In reaching this conclusion, some courts rely on the "benefit rule," which ap-

¹⁷ See, e.g., *Stills v. Gratton*, 127 Cal. Rptr. 652, 656 (Cal. Ct. App. 1976); *Slawek v. Stroh*, 215 N.W.2d 9, 22 (Wis. 1974).

¹⁸ See *supra* note 7 and accompanying text. For extensive collections of reported decisions, see Hensel, *supra* note 7, at 161 n.118; Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 333 n.35 (2004).

¹⁹ See Pollard, *supra* note 18, at 333–34 n.36; see also John Lyons, *To Be or Not to Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions*, 34 VILL. L. REV. 681, 681 (1989).

²⁰ Only three jurisdictions—California, New Jersey, and Washington—have allowed special damages. See *Turpin v. Sortini*, 643 P.2d 954, 965–66 (Cal. 1982) (granting special damages for financial costs of coping with deafness); *Curlender v. Bio-Science Labs*, 106 Cal. Rptr. 3d 811 (Cal. Ct. App. 1980) (pain and suffering accompanying Tay-Sachs Syndrome); *Prokanic v. Cillo*, 478 A.2d 755, 762 (N.J. 1984) (granting special damages for extraordinary medical expenses incurred treating birth defects); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983) (granting special damages for extraordinary expenses associated with congenital defect).

²¹ See *supra* note 7.

plies more broadly than simply to wrongful life litigation.²² According to the rule, when a tortfeasor causes detriment to an interest of the plaintiff, the tribunal must offset the detriment by any benefit conferred by the defendant's actions upon the same interest.²³ Given the presumed "sanctity of life," courts view human existence on nearly any terms to be more valuable than nonexistence. Moreover, because no living human has consciously experienced being dead or never having been born, some courts insist that, whatever may be argued in theory, comparing disabled life with nonlife is an impossible undertaking.²⁴ One appellate court has observed,

Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of our understanding or ability to solve. . . . [This] cause of action . . . demands a calculation of damages dependent on a comparison between Hobson's choice of life in an impaired state and nonexistence. This the law is incapable of doing.²⁵

This Essay argues that the foregoing is an overly pessimistic appraisal of judicial capacity.

B. How Scholars Have Responded

Although some writers believe that our courts are correct in denying wrongful life claims, a larger number disagree with the status quo.²⁶ Several authors who argue that courts should not allow recovery do so on the ground that recognizing the tort would interfere with ongoing efforts to rehabilitate disabled persons and integrate them into the larger society.²⁷ A few scholars who favor recovery are ready

²² See RESTATEMENT (SECOND) OF TORTS § 920 (AM. LAW INST. 1977). See generally Eric A. Posner & Ariel Porat, *Offsetting Benefits* 14 (Coase-Sandor Inst. for Law & Econ., Univ. of Chi. Law Sch., Working Paper No. 675, 2014) (discussing benefit rule in general tort context).

²³ See *Turpin*, 643 P.2d at 964.

²⁴ See *Gleitman v. Cosgrove*, 227 A.2d 689, 711 (N.J. 1967) ("Man, who knows nothing of death or nothingness, cannot possibly know whether [plaintiff would be better off not having been born]. . . . To recognize a right not to be born is to enter an area in which no one could find his way."), *overruled in part by Berman v. Allan*, 404 A.2d 8 (N.J. 1979); see also *supra* note 7 and accompanying text.

²⁵ *Speck v. Finegold*, 408 A.2d 496, 508 (Pa. Super. Ct. 1979).

²⁶ Writers opposing wrongful life claims include those cited above in notes 8 and 9. Most of the writers cited in note 10 would prefer that courts allow, often with caveats, various forms of wrongful life claims.

²⁷ See *supra* note 8 and accompanying text.

to ignore the proximate causation requirement described earlier and have urged courts to treat wrongful life claims the same as prenatal injury claims, in which tortfeasors (often medical providers) injure viable fetuses who as a direct physical consequence suffer disabilities at birth.²⁸ This analysis is conceptually flawed. Unlike prenatal injury plaintiffs, wrongful life plaintiffs cannot so easily trace their injuries directly to the defendant providers because but for the providers' negligence, the plaintiffs would not have been born without disability, as with prenatal injuries, but would not have been born at all.

A minority of scholars, concluding that courts must satisfy the traditional requirement of proximate causation, characterize the central question in these cases to be variations on "[g]iven the serious disability caused by defendant's fault, would a reasonable person in the plaintiff's position prefer nonexistence over existence in such a disabled state?"²⁹ Some proponents of this approach argue that in order to recover, the plaintiff must be enduring a severe and irreversible disability.³⁰ For plaintiffs who are entitled to recover under these stringent standards, general damages for having been born in such a state should be awarded.³¹ Needless to say, this approach raises a number of questions, both practical and philosophical. How severe must the disability be to warrant recovery? How will the courts measure damages? What if the actual wrongful life plaintiff is sentient at time of trial and prefers to continue to live, even with the disability? Because this Essay proposes an approach to wrongful life that is similar to what these authors advocate, it defers these questions until the next Section. Before proceeding to that discussion, it will prove useful to

²⁸ See, e.g., Pollard, *supra* note 18, at 373 ("American courts should recognize that wrongful life cases are simply [run of the mill] malpractice cases involving fetuses . . ."); Gallagher, *supra* note 10, at 1319 n.1 (relying on prenatal injury decision involving a doctor's preconception negligence).

²⁹ See *supra* note 10 and accompanying text. The approach urged in this Essay would make the judgment as of the time of plaintiff's birth. See generally *supra* notes 12–13 and accompanying text; *infra* note 52 and accompanying text.

³⁰ See FEINBERG, HARM TO OTHERS, *supra* note 10, at 99 ("[N]ot all interests of the newborn child . . . qualify for [wrongful life] protection, but only those very basic ones whose satisfaction is known to be indispensable to a decent life. . . . [T]here are some inherited handicaps that are so severe that they doom a child's most basic future interests to defeat."). For a critique of Feinberg's analysis on the ground that it sets the bar too high, see Steinbock & McClamrock, *supra* note 10, at 15.

³¹ The only courts that currently allow wrongful life plaintiffs to recover do not award general damages. See *supra* note 20 and accompanying text. But plaintiffs in those jurisdictions may recover special damages without showing that nonlife is preferable to disabled life. Once a plaintiff makes such a showing, perhaps by satisfying Feinberg's criterion, see *supra* note 30 and accompanying text, general damages should be in order.

consider the outlines of the world view reflected in a large majority of both judicial decisions and scholarly commentary.

C. *The View of Human Existence Reflected in Current Wrongful Life Jurisprudence*

Judicial references to the “sanctity of life” suggest that the majority position on wrongful life is rooted in a belief in the existence of a caring God who created this world and continues to monitor human events with loving paternalism. According to several major religions, this belief system carries with it a corollary belief in a spiritual afterlife conditioned upon conception and accessible at the end of mortal life.³² In the context of comparing disabled life and nonlife, believers would find it difficult to calculate the monetary value of life, even life with a significant disability. And for a plaintiff whose parents if properly informed, would not have allowed the plaintiff to be conceived, the hypothetical forfeiture of an eternal afterlife as a consequence of preferring nonlife would be unthinkable. Preferring mortal life in those circumstances, even life in the form of a short, painful existence, would for a believer be the no-brainer of all no-brainers.³³ In the narrow context of making the choice between life and nonlife, only by removing the possibility of an afterlife from the calculation—by assuming away the existence of a caring God—would never having been conceived constitute a plausible alternative.³⁴ The next Part addresses this and related possibilities.

³² Christianity and Islam are by far the largest religions worldwide. See STEPHEN PROTHERO, *GOD IS NOT ONE* 28 (2010). Both emphasize the availability of life after death. See *id.* at 72 (Christianity); *id.* at 42 (Islam). Judaism, an important religion in the United States, refers to “God’s kingdom on earth” as an end-state of humankind’s existence. See HUSTON SMITH, *THE WORLD’S RELIGIONS* 301–02 (1991). Within Christianity, an unborn fetus’s access to heaven is implied in the Bible. See, e.g., *Psalms* 139:13–16 (from conception, an unborn fetus is known by the Lord); 2 *Samuel* 12:23 (upon the death of his unborn child, David observes that while the child cannot return to him, he will one day join the child in heaven).

³³ From a believer’s perspective, such a plaintiff will have become eligible for a spiritual afterlife upon the plaintiff’s misguided conception, see *supra* note 32 and accompanying text, and would presumably prefer to be conceived even if it were to lead to an undesirable interim of severely disabled mortal life. To be sure, abortion may be murder from a Christian perspective, but that circumstance relates to those who condone and commit abortions. From the fetus’s point of view, abortion with immediate entry into a desirable afterlife might be preferred over birth into a hellish mortal life.

³⁴ Wrongful life scholars have never developed this thesis explicitly. See *supra* note 11 and accompanying text. Thus, they have not addressed the prospects of an afterlife in their secular analyses, suggesting that they might agree with this author’s position if they had thought of it. This “radio silence” is referenced in this Essay’s title: “Things of Which We Dare Not Speak.”

II. A PROPOSED ALTERNATIVE APPROACH TO WRONGFUL LIFE

A. *A Rational, Widely Held View of Human Existence That Supports Recovery of General Damages for Wrongful Life*

If the sanctity-of-life concept constitutes an important obstacle to recovery of general damages for wrongful life under current law, the most straightforward way to begin to allow claims would be to suspend the underlying assumption that life is sacred. And a necessary step in achieving that suspension is to set aside, for the limited purpose of making the life-versus-nonlife calculation, belief in a caring God. This Essay does not advocate that anyone, including readers of these pages, should necessarily adopt atheism or agnosticism in their personal lives. Rather, as the next section explains, the more modest argument is that a court should, in the interests of both fairness and efficiency, attribute agnosticism to the proverbial “reasonable surrogate” to whom courts hypothetically delegate the choice, on the plaintiff’s behalf, between disabled life and nonlife.³⁵

In any event, once a caring God and the sanctity of human existence are removed from the legal analysis, human beings are seen as evolved, sophisticated extensions of the primitive origins of life on earth. Uncertainties persist regarding what may have kick-started the evolutionary process. Some adopt a “Deist” position in this regard: that God created the universe and adopted a passive, hands-off position thereafter.³⁶ Versions of such a Deist perspective, so long as they do not insist life is sacred, are consistent with the approach urged in this Essay.³⁷ Regardless of the underlying logic, if one rejects the premise of a caring God, less uncertainty surrounds the end of mortal human life: nonsentient eternal repose.³⁸ This last point is relevant to this analysis because it makes clear that, from the perspective of a nonbeliever, mortal life on this planet is not rendered more valuable by the promise of a spiritual afterlife to follow.

A majority of Americans claim to believe in some version of a caring God and thus presumably embrace the sanctity of human exist-

³⁵ See *infra* Section II.B.1.

³⁶ See DAWKINS, *supra* note 6, at 38.

³⁷ Some scholars suggest that, in light of its strongly secular aspects, Deism constitutes a fancy form of nonbelief. See *id.* at 60–61.

³⁸ For Christians, the English Burial Service, adapted from Genesis 3:15, sends the soul to the afterlife and returns the mortal remains back to the earth from whence they came: “Earth to earth, ashes to ashes, dust to dust.” THE EPISCOPAL CHURCH, THE BOOK OF COMMON PRAYER 485 (2007). For nonbelievers, the spiritual dimension falls away and all that remains (no pun intended) is the mortal part.

tence.³⁹ But tens of millions of our citizens admit to being nonbelievers, mostly atheists or agnostics, and it would not be surprising if their numbers were actually greater than are revealed in public opinion surveys.⁴⁰ Again, the point is not that nonbelief is the preferable view in other contexts. Instead, the point is that nonbelief is a rational perspective on human existence and clearly is one that courts should in fairness attribute to a hypothetical reasonable surrogate tasked with choosing between disabled life and nonlife. Once the assumption of nonbelief plays its part in facilitating a fair, reasonable choice regarding whether nonlife would have been preferable for a particular wrongful life plaintiff, for a majority of citizens—including judges, juries, and advocates—it falls out of the picture. The next Section explains why such an attribution of nonbelief is not only fair to all concerned, but also helps to achieve allocative efficiency.

B. Proposed New Rules of Decision for Wrongful Life Claims

1. New Rules Governing Liability for Wrongful Life

Here is a formal statement of the liability rule proposed in this Essay: One (other than the plaintiff's parents) who negligently or intentionally causes the plaintiff to be born with a significant disability is subject to liability for general damages if the plaintiff shows by a preponderance of evidence that a reasonable, nonbelieving surrogate acting in the plaintiff's interests with all relevant knowledge at the time of plaintiff's birth would have opted for the plaintiff not to have been born. Presumably, a reasonable person would choose nonlife only if the plaintiff's prospects judged at birth have a net-negative value.⁴¹ That answers to the life-versus-nonlife question should rest on cost-

³⁹ According to the 2014 General Social Survey, approximately eighty percent of respondents reported a religious affiliation. See MICHAEL HOUT & TOM W. SMITH, FEWER AMERICANS AFFILIATE WITH ORGANIZED RELIGIONS, BELIEF AND PRACTICE UNCHANGED: KEY FINDINGS FROM THE 2014 GENERAL SOCIAL SURVEY 1 (2015). It may reasonably be assumed that most of these believe in God. Cf. *supra* note 32 (Christianity and Islam, the largest religions worldwide, both include belief in God).

⁴⁰ In the 2014 General Social Survey, three percent of respondents identified as atheists and five percent identified as agnostics. See HOUT & SMITH, *supra* note 39, at 8. Assuming a total population of 330,000,000, approximately 26,400,000 are nonbelievers. Given the stigma that may attach to an admission of nonbelief, the number may be higher.

⁴¹ See FEINBERG, HARM TO OTHERS, *supra* note 10, at 98 (disability must be so severe that it causes plaintiff a "net harm, or harm on balance"). In making this calculation, one attaches a value of zero to nonlife and compares the plusses and minuses of plaintiff's disabled life. Recovery is appropriate if the minuses outweigh the plusses. In that event, the plaintiff receives a monetary judgment and continues a disabled life. See *supra* text accompanying note 13. If the disabled child-plaintiff is already deceased, a personal representative receives the judgment on behalf of the child's estate.

benefit balancing is not new, nor is the idea of hypothesizing a reasonable decisionmaker to advance the plaintiff's interests.⁴² One aspect that is new is the modifier "nonbelieving," which aims to avoid judicial reliance on a presumed "sanctity of human life."⁴³ Given that the defendant eliminated any opportunity for the plaintiff's parents to prevent the plaintiff's birth, it is unfair for courts to impose on all wrongful life plaintiffs a deeply personal value set—belief in a caring, supernatural being—that automatically tips the balance against recovery in every instance.⁴⁴ Fairness requires that courts attribute the rational, widely held view of agnosticism to the hypothetical reasonable person who serves as the plaintiff's surrogate. A subsequent discussion addresses the question of whether judges and juries are capable of calculating the appropriate levels of recovery.⁴⁵

Other features of the proposed liability rule remain to be considered. Why, for example, are the plaintiff's parents excluded from potential liability? The primary reason relates to the policy considerations that support traditional intrafamily immunities in other tort contexts.⁴⁶ More significantly, the proposed rule refers to "*significant* disabilities." What are they? Clearly they include severe disabilities that reduce plaintiffs to quasi-vegetative states in which life is devoid of enjoyment and secular meaning.⁴⁷ Also included are somewhat less severe disabilities such as those involving significant mental disability, virtually constant physical pain, or huge commitments to life-sustaining medical care that interfere significantly with a plaintiff's quality of life.⁴⁸ By contrast, "significant disabilities" should not in-

⁴² See *supra* note 10 and accompanying text (arguing cost-benefit analysis is appropriate); see also FEINBERG, FREEDOM AND FULFILLMENT, *supra* note 10, at 21 ("[I]t would be rational . . . for a proxy chooser, any representative of the best interests of an extremely impaired infant, to express on the infant's behalf the preference for nonexistence.").

⁴³ To this writer's knowledge, no other scholar has developed the theological dimension in connection with wrongful life. See *supra* note 11 and accompanying text.

⁴⁴ Cf. *supra* note 6 and accompanying text.

⁴⁵ See *infra* notes 63–67 and accompanying text.

⁴⁶ See generally AARON D. TWERSKI ET AL., TORTS 540 (4th ed. 2017) (intrafamily immunity helps prevent "family discord" and collusive litigation); HENDERSON ET AL., *supra* note 2, at 434–38; James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 502–03 (1976) (developing special duties owed by parents to children would exceed limit of adjudication).

⁴⁷ See FEINBERG, HARM TO OTHERS, *supra* note 10, at 98–99; see also FEINBERG, FREEDOM AND FULFILLMENT, *supra* note 10, at 17 ("In the most extreme cases, however, I think it is rational to prefer not to have come into existence at all, and while I cannot prove this judgment, I am confident that most people will agree that it is at least plausible. I have in mind some of the more severely victimized sufferers from brain malformation, spina bifida, Tay-Sachs disease, polycystic kidney disease, [and] Lesch-Nyhan syndrome . . .").

⁴⁸ See FEINBERG, FREEDOM AND FULFILLMENT, *supra* note 10, at 17 (including in those who

clude conditions of deafness or blindness experienced separately, with which most individuals cope quite well and that do not seriously threaten the plaintiff's ability to enjoy a fulfilling life. The question of how a reasonable, nonbelieving surrogate at the time of the plaintiff's birth would respond to the life-versus-nonlife conundrum is in many cases for triers of fact to answer. Appellate courts should, however, independently review with heightened scrutiny the adequacy of plaintiffs' proof regarding the seriousness of plaintiffs' disabilities lest wrongful life claims be too easily made out.⁴⁹ It is both necessary and reasonable to expect that, over time, more formally defined categories will emerge regarding which disabilities qualify as a matter of law in order to confine the wrongful life tort within predictable, fair, and efficient bounds.⁵⁰

As noted earlier, the fact that the living plaintiff appears at time of trial to be coping unexpectedly well with a serious disability, perhaps because of remarkable courage and determination, does not bar, nor should it diminish the value of, a valid wrongful life claim. Simi-

would be better off not being born "those who, from whatever cause, are born blind and deaf, permanently incontinent, severely retarded, and in chronic pain or near-total paralysis, with life expectancies of only a few years."). The author of this Essay does not believe that blindness or deafness experienced separately are sufficient, but Feinberg is referring to both disabilities in combination.

⁴⁹ In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the United States Supreme Court protected First Amendment values by requiring public figure plaintiffs in defamation actions against the media to prove that defendants acted with actual knowledge of falsity. *Id.* at 264. Twenty years later in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984), the Court adopted the so-called "independent appellate review" rule, whereby appellate courts rule, more-or-less *de novo*, on findings below to the effect that the defendants acted with actual knowledge of falsity. See generally Tung Yin, *Independent Appellate Review of Knowledge of Falsity in Defamation and False Statements Cases*, 15 BERKELEY J. CRIM. L. 325, 328–29 (2010) (discussing how the Supreme Court gave civil defamation defendants the benefit of "independent review," which is much less deferential to the factfinder than the review for criminal cases). The First Amendment requires independent review in defamation cases; in the context of wrongful life claims, independent review is justified by the risk of litigation going wild. See *infra* Section III.B; see also Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV., 813, 815 (1999) (arguing that "appellate judges should review *de novo* a jury's conclusion that a hostile environment pervades a workplace" lest confusion regarding the applicable legal standards persist).

⁵⁰ A similar process of rule evolution occurs regarding which activities qualify as "abnormally dangerous" for purposes of imposing strict tort liability. See HENDERSON ET AL., *supra* note 2, at 496 ("[A] few specific kinds of dangerous activity have over time become especially likely to be subjected to strict liability."). An analogous question arises in connection with wrongful death claims when the plaintiff has remarried since the spouse's death. See, e.g., Allen J. Hendricks, Comment, *Remarriage and Wrongful Death*, 50 MARQ. L. REV. 653, 655 (1967) ("[W]rongful death damages are not to be mitigated by [post-death] factors such as [the surviving plaintiff's] remarriage.").

larly, the fact that the plaintiff is coping unexpectedly poorly at time of trial, perhaps because of a downturn in the general fortunes of the plaintiff or the plaintiff's family, should not increase the value of a claim.⁵¹ The nonbelieving reasonable surrogate decides hypothetically based on the circumstances that confronted the plaintiff at birth, including reasonable projections based on those circumstances. No doubt in some cases the plaintiff's circumstances at the time of trial will come in as circumstantial evidence of likely future developments judged as of the time of plaintiff's birth.⁵² But, strictly speaking, the hypothetical reasonable surrogate makes the choice between disabled life and nonlife based on the facts, including reasonable projections, at the time of the plaintiff's birth.⁵³ Factors relevant to the projections regarding the plaintiff's foreseeable future would include assessments of the support systems, both economic and psychological, likely to be available in the future to help the plaintiff cope with the disability.⁵⁴

This Essay has argued that the proposed liability rule is fair to all concerned.⁵⁵ Would the proposed rule also help to promote allocative efficiency? The answer turns on whether recovery for wrongful life represents the shifting of social costs from plaintiff-victims who initially bear them to negligent actors who cause them, thereby internalizing those costs to tortious activities.⁵⁶ Leading torts scholars argue

⁵¹ Conceptually, the defendant's negligence impacts the successful plaintiff's interest in not being born with a significant disability at the time of birth. That is when the wrongful life tort is complete and thus all of the elements are in place with which to determine whether the plaintiff has made out a claim. Under the collateral source rule, unexpected good fortune after the plaintiff's birth that lightens the burden of the plaintiff's disability should not lower the value of the tort claim. See generally John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CAL. L. REV. 1478, 1483 (1966) ("[A] wrongdoer . . . should not be 'let off' from any portion of what is his due by the exertions and foresight of his victim or those who stood by him in his hour of need."). Similarly, unexpected bad fortune such as post-birth injury from an independent source that worsens the plaintiff's disability should not raise the value of the plaintiff's wrongful life claim, in part because such adjustments create perverse incentives for the plaintiff or the plaintiff's caretakers to make bad situations even worse.

⁵² These developments would be limited to the plaintiff's inherent capacity to cope with the disability and the sort of supportive family structure that would likely be available to the plaintiff. External post-birth events that are not causally related to these internal factors, such as winning the lottery or suffering significant financial setbacks, would not be reasonably foreseeable at time of birth and therefore would not be allowed into evidence. See *supra* note 41 and accompanying text.

⁵³ See Belsky, *supra* note 10, at 224 (comparing the deliberation of whether a life is worth living to the decision to discontinue life support where individual uses personal insights to assess the burdens and benefits of living).

⁵⁴ These factors, for better or worse, would legitimately affect the values to be attached to the plaintiff's future life with a significant disability. Cf. *supra* note 52 and accompanying text.

⁵⁵ See *supra* notes 13, 16 and accompanying text; see also *supra* text accompanying note 44.

⁵⁶ For an argument that being born with a significant disability constitutes compensable

that, in general, cost internalization via exposure to tort liability promotes allocative efficiency.⁵⁷ As the next Section explains, the extent to which the costs of a significantly disabled plaintiff's continued life exceed the correlative benefits as estimated at the time of the plaintiff's birth represents social loss no less worthy of concern from an efficiency perspective than the elements of loss traditionally addressed in tort analysis. Current law governing wrongful life produces inefficiencies by refusing, based largely on majority religious preferences and judicial overestimations of the difficulty of calculating damages, to shift these net social losses from victims who cannot effectively avoid or minimize them to medical providers who clearly can.⁵⁸ The liability rule proposed in this Essay, by contrast, embraces the agnostic perspective of a nonbeliever, allowing such important loss shifting to occur. Thus, allowing recovery for properly defined wrongful life claims would help to promote allocative efficiency as well as fairness.

2. *Workable Rules Governing Calculation of Damages for Wrongful Life*

As noted earlier, some commentators have argued that successful wrongful life plaintiffs should recover all of the costs associated with the disabilities made possible by defendant's breach of duty, calculated in the same manner as when a defendant's breach causes harm to, or ends the life of, a viable fetus or a living person.⁵⁹ While relatively simple to grasp, this approach ignores the differentiating feature of wrongful life claims: that defendants do not cause uninjured, living plaintiffs to suffer injury but rather help to cause plaintiffs to be born with disabilities that the plaintiffs were certain, upon birth, to incur from other (typically genetic) sources. The only rational approach to measuring a successful plaintiff's recovery under the approach urged

harm to the wrongful life plaintiff notwithstanding the fact that the alternative is not to be born at all, see FEINBERG, FREEDOM AND FULFILLMENT, *supra* note 10, at 3–36; *cf. supra* note 21 and accompanying text (plaintiffs invariably enjoy a net benefit from being born). Losses for which the parents seek recovery via wrongful birth claims are generally recognized to be social losses. See *supra* note 2 and accompanying text.

⁵⁷ See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS 26–28, 69–72, 95–96 (1970) (explaining that internalizing the costs of accidents to those who cause them reduces the number and severity of accidents (specific deterrence) and reduces the quantity of relatively dangerous, accident-causing activities (general deterrence)).

⁵⁸ Unborn children epitomize helpless victims. Wrongful life plaintiffs' parents may in some instances be efficient cost avoiders, notwithstanding the fact that in many cases they are ignorant victims of defendants' failures to warn. But other policy considerations suggest that such claims are ill advised. See *supra* note 46 and accompanying text.

⁵⁹ Some scholars mistakenly equate wrongful life with ordinary prenatal injury tort claims. See *supra* note 28 and accompanying text.

in this Essay is to do what courts thus far have refused to do: determine the net negative value of the plaintiff's projected life as of the time of plaintiff's birth, taking care not to duplicate awards to parents for their own losses.

In effect, this proposed approach to measuring wrongful life damages represents a version of the traditional "benefit rule," referenced earlier.⁶⁰ The traditional rule includes a requirement that the offsetting benefits must accrue to the same interest that incurred loss from defendant's wrongdoing.⁶¹ No such formal constraint plagues the approach advocated in this Essay. Under this new approach, the tribunal takes into account all of the relevant factors that at the time of plaintiff's birth could reasonably be expected to affect, for better or worse, plaintiff's projected quality of life. The significant disability with which plaintiff was born would be chief among the negative factors. Also included would be the likely absence of support structures, economic, emotional, and otherwise. Positive factors would include the plaintiff's family's unusual stability, higher economic status, and educational background.⁶²

III. PRACTICAL PROBLEMS THAT MIGHT ARISE IN APPLICATION

A. *Even If This Proposed Approach to Wrongful Life Makes Sense in Theory, Would It Be Workable in Practice?*

As indicated earlier, many courts have refused to award general damages for wrongful life, in part because they believe the necessary calculations would be impossible to make.⁶³ This position makes little sense in connection with assessments of the negative impacts of a disability on the quality and value of plaintiff's future life; many courts routinely perform essentially identical functions in cases involving disabling injuries to living persons.⁶⁴ And more generally, triers of fact perform difficult tasks of evaluation when they determine appropriate damages for pain and suffering⁶⁵ or award punitive damages.⁶⁶ One

⁶⁰ See *supra* notes 22–23 and accompanying text.

⁶¹ See *supra* note 23 and accompanying text.

⁶² See *supra* note 52–54 and accompanying text.

⁶³ See *supra* notes 24–25 and accompanying text.

⁶⁴ If a negligent defendant were to cause a living plaintiff to suffer a similar, catastrophic disability, courts would calculate the value of the associated losses, including loss of enjoyment of life. For cases and commentary, see HENDERSON ET AL., *supra* note 2, at 656.

⁶⁵ See *id.* at 650–51; see also Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 360–62 (2006).

⁶⁶ See HENDERSON ET AL., *supra* note 2, at 676–78; see also James A. Henderson, Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 GA. L. REV. (forthcoming 2018) (manuscript

mistake that some courts make regarding wrongful life is to assume that if they were to allow recovery of general damages, they would be required to assess the value of nonexistence and somehow compare it with the value of disabled life.⁶⁷ Bearing in mind that many of these same courts are including sanctity-of-life considerations in the mix,⁶⁸ it is little wonder that they are intimidated by the evaluative tasks that recognition of wrongful life claims appear to present. By avoiding both a religious perspective and the need to evaluate nonexistence, the approach urged in this Essay should prove sufficiently workable.⁶⁹

Of course, it is one thing for this Essay to avoid a religious perspective on paper, and quite another for deeply religious jurors to accomplish such avoidance. A partial solution to problems of belief-based juror bias and dysfunction might lie in allowing the parties during voir dire to remove potential jurors for cause whose religious beliefs are so intense as to interfere with their ability to follow the judge's instructions in much the same manner as prosecutors remove death-penalty opponents in capital cases.⁷⁰ Even assuming that courts would condone the removal from wrongful life juries of devout believers who are unable to overcome their biases, would less-than-devout jurors be able fairly to apply this Essay's approach? The answer must be in the affirmative. The American civil justice system often relies on jurors in tort cases to adopt perspectives that are in varying degrees foreign to them. Good examples stem from the reasonable-person standard in negligence litigation. Judges routinely ask jurors to determine the reasonableness of conduct in light of defendants' idiosyncratic characteristics other than basic mental prowess.⁷¹ Thus, fully sighted jurors in negligence cases apply a "reasonable blind person" standard to assess a blind defendant's behavior,⁷² and male jurors in

at 3–6 & nn.8–34), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009389 [<https://perma.cc/574C-7KUK>].

⁶⁷ See *supra* notes 24–25 and accompanying text. Under the rule in this Essay, the trier of fact determines whether the plaintiff's significantly disabled life has a net-negative value.

⁶⁸ See *supra* note 6 and accompanying text.

⁶⁹ See *supra* note 41 and accompanying text.

⁷⁰ See *Morgan v. Illinois*, 504 U.S. 719, 736 (1992) (holding that on voir dire a trial court must upon request ask prospective jurors of their views regarding capital punishment). See generally Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 156–57 (1989); Note, *Live Free and Nullify: Against Purging Capital Juries of Death Penalty Opponents*, 127 HARV. L. REV. 2092, 2113 (2014).

⁷¹ See generally HENDERSON ET AL., *supra* note 2 at 187–89; Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 (2012).

⁷² See O.W. HOLMES, JR., *THE COMMON LAW* 109 (1882) ("When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will

their sixties apply a “reasonable person” standard to assess the behavior of female defendants one-third their age.⁷³ Jurors could be expected to perform no less empathetically in wrongful life litigation along the lines outlined in this Essay.

B. Might This Essay’s Proposal Lead to Excessive Wrongful Life Litigation?

Would wrongful life claims pursued vigorously by the plaintiffs’ bar as outlined in this Essay lead to excessive litigation? Experience over the past several decades with the employment of genetic testing suggests that a flood of wrongful life claims might occur.⁷⁴ This Essay has already considered two elements of the proposed approach to wrongful life that should work to help contain such a possibility. First, the disability projected at the time of a plaintiff’s birth must be significant to the point of substantially interfering with the plaintiff’s predicted quality of life.⁷⁵ While such serious genetic disabilities occur frequently, they are not commonplace. And second, even when recovery is appropriate, all benefits projected to be derived from the plaintiff’s ability to experience life reduce the size of the plaintiff’s recovery.⁷⁶ Beyond these constraints, the likelihood of opening a floodgate would depend on how courts define defendant medical providers’ duties of care. Courts and commentators have not paid much attention to defining these duties in wrongful life litigation because difficulties with causation and calculation of damages have mooted any need for greater precision regarding providers’ fault.⁷⁷ Assuming that this Essay describes a principled pathway around the

not be held answerable for not taking them. A blind man is not required to see at his peril”); see also HENDERSON ET AL., *supra* note 2, at 188–89 (“Thus, if the defendant was blind at the time of the allegedly negligent conduct, the jury is to measure his conduct against that of a reasonably prudent blind person under similar circumstances.”).

⁷³ The “reasonable man” standard set forth in the RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965) has shifted to a “reasonable person” standard in the RESTATEMENT (THIRD) OF TORTS § 3 (AM. LAW INST. 2010).

⁷⁴ See Harrant & Vaillant, *supra* note 10, at 1 (“The use of diagnostic and genetic testing prior to and during pregnancy is becoming increasingly common, and with [it] . . . has come a significant increase in the number of wrongful birth and wrongful life lawsuits.”); Neil A. Holtzman, *Medical Professional Liability in Screening for Genetic Disorders and Birth Defects*, in 2 MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE 41, 41 (Victoria P. Rostow & Roger J. Bulgar eds., 1989) (“[E]xposure to liability will become greater as the magnitude of screening increases.”).

⁷⁵ See *supra* notes 47–49 and accompanying text.

⁷⁶ See *supra* notes 22–23 and accompanying text.

⁷⁷ See, e.g., *supra* notes 18–20 and accompanying text.

difficulties regarding causation and damages, a closer examination of the fault issue is appropriate.

When the defendant provider is either a medical specialist whom the plaintiff's parents retained to help prevent conception or manage the pregnancy, or a laboratory that conducted medical tests, the plaintiff's significant disability or an erroneous test result might make the defendant's negligence clear enough to support application of the *res ipsa loquitur* doctrine.⁷⁸ Although liability would be obvious in such instances, one may presume that trifecta combinations of obvious fault, significant disability, and absence of countervailing benefits do not occur frequently. And even when such regrettable combinations do occur, the parties may have contracted beforehand to limit the providers' responsibility.⁷⁹ Thus, if courts were to manage wrongful life litigation so that most of the cases reaching triers of fact involved clear acts of negligence on the part of medical specialists, no more than a moderate, slowly widening stream of claims-making should be expected.⁸⁰

The possibility of a widening stream becoming a raging river would increase if courts were to extend the reach of liability to include general medical practitioners caring for the plaintiffs' families with no focused concerns regarding the genetic implications of the plaintiffs' mothers' pregnancies. If such extensions were to occur, the alleged fault of providers would no longer be limited to having negligently performed medical rescues but would also include in virtually every instance of births with disabilities failures to proactively initiate rescue, often in the form of failing to identify the risks and warn the plaintiffs' families about them. This Essay's author has written elsewhere concerning the difficulties accompanying judicial reliance on

⁷⁸ See generally HENDERSON ET AL., *supra* note 2, at 237–52. The earliest move to replace *res ipsa loquitur* with strict liability in the context of commercially distributed products was Justice Traynor's concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944). For a discussion of the benefits of applying strict products liability to wrongful life suits, see Belsky, *supra* note 10, at 248–58.

⁷⁹ For more discussion on contracting out of tort liability, see generally HENDERSON ET AL., *supra* note 2, at 61–62. See also Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHL.-KENT L. REV. 379, 379–80 (2014). For a forceful argument favoring contracting out in a context close to wrongful life, see generally Richard A. Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, in 2 MEDICAL PROFESSIONAL LIABILITY AND THE DELIVERY OF OBSTETRICAL CARE, *supra* note 74, at 115.

⁸⁰ Virtually all of the reported cases to date have involved fact patterns closer to the one described in the text accompanying note 78.

failure-to-warn doctrine in products liability settings.⁸¹ There, virtually every distribution of a dangerous product supports a plausible claim of inadequate warnings.⁸² In the present context of wrongful life, were courts to combine an open-ended rescue regime with even a modest easing of the requirement that the plaintiff's disability be significant, wrongful life litigation might expand to the point that most births accompanied by nontrivial, genetically transmitted disabilities would plausibly support wrongful life claims.⁸³ These potentially destructive expansions need not occur, of course, and one could reasonably expect they would not. But if they should, it would be necessary for courts, or more likely legislatures, to establish the formal legal standards necessary to contain wrongful life claims within proper bounds.

CONCLUSION

American courts currently reject most wrongful life claims—claims that a medical provider's negligence made it possible for the plaintiff, destined from conception to experience significant genetically derived disability, to be born. These claims are fundamentally different from other negligence claims. In other contexts, if the defendant had not acted negligently the plaintiff would not have suffered injury: here, but for the defendant's negligence, the plaintiff would not have been born. Thus, wrongful life claims raise the troubling question of whether being born, even with a physical or mental disability, may be counted as a form of injury. Courts give two main reasons for rejecting wrongful life claims. First, because human life is sacred, being born cannot constitute a recoverable injury. And second, even if the "sanctity of human life" does not prevent courts from comparing the values of disabled life and no life at all, the relevant calculations would lie beyond the capacities of courts to accomplish.

This Essay suggests two ways around these difficulties. First, the sanctity-of-life position should be circumvented by attributing a nonbeliever's outlook to the hypothetical reasonable person employed on a case-by-case basis to make the necessary life-versus-non-life cost-benefit analysis. This analysis does not necessarily recommend agnosticism as a belief system in other contexts. But here,

⁸¹ See James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 266–67 (1990).

⁸² See Aaron D. Twerski & James A. Henderson, Jr., *Fixing Failure to Warn*, 90 IND. L.J. 237, 238 (2015).

⁸³ Cf. Epstein, *supra* note 79, at 131 (“[The medical] malpractice system [applied to obstetrical mishaps] tended to make every serious birth injury a tort suit . . .”).

secular notions of fairness and efficiency support taking theology out of the picture. And second, in deciding whether a plaintiff's disability is sufficiently severe to warrant recovery, the court should attach zero value to nonlife and focus on the question of whether from the plaintiff's perspective at birth, the detriments of plaintiff's disabled life outweigh its benefits. This decision should reflect reasonable projections at the time of plaintiff's birth, based on all known and knowable facts. The relevant calculations, while often difficult, are not more difficult than in other traditional areas of tort. This Essay addresses the possibility that courts adopting its approach might relax the suggested legal standards, producing too many wrongful life claims rather than, as now, too few. In that unlikely and unfortunate event, courts or legislatures would be required to re-establish the necessary formal boundaries of wrongful life.