

# Statutory Responses to “Wrongful Birth” and “Wrongful Life” Actions

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ABSTRACT: As a result of advances in medical technology and the legality of the practice of abortion, a new class of tort actions has developed. Named “wrongful birth” or “wrongful life” actions, they require a plaintiff to argue that but for the negligence of a doctor or medical personnel, a child would have been aborted. A number of states now recognize such actions, but a handful of states have specifically rejected the actions. This article describes the law of this handful of states, describing legislative responses to the wrongful life and birth actions and court judgements assessing challenges to these laws. From the description, it then outlines four major public policy purposes advanced by laws that prohibit the new actions: (1) decreasing medical costs, (2) discouraging abortion, (3) creating a barrier to eugenic campaigns, and (4) defending the sanctity of life.

## I. INTRODUCTION

A “wrongful life” claim is based on a legal fiction whereby an infant brings a case in which she is understood to be alleging that if it were not for the wrongful conduct of the defendant, the child would never have been born.<sup>1</sup> By contrast, a “wrongful birth” action is brought by the infant’s family member making the same allegation—were it not for the misconduct of the defendant, this child would not have been born.<sup>2</sup> The existence of such actions presuppose two realities, one medical and the other legal. The medical reality is the existence of sophisticated technology that allows a child to be diagnosed with birth defects or abnormalities before birth.<sup>3</sup> The second reality is that the claim would make no sense without legal access to abortion (otherwise, how could

the “wrongful” birth have been prevented?).<sup>4</sup>

In the mid-1960's an Illinois court held that a child's lawsuit against his father alleging that based on the injury of being born illegitimately stated a claim in tort. However, the court also noted that allowing damages could be so far reaching (by allowing all children born in less than ideal circumstances to sue their parents) that the court could not award damages in the case absent specific legislative direction.<sup>5</sup> Nearly two decades later California became the first state to recognize a wrongful life cause of action.<sup>6</sup> No state recognized a wrongful birth cause of action until after *Roe v. Wade*<sup>7</sup> was decided.<sup>8</sup> Texas was first to allow such a claim in 1975 followed a few years later by the New Jersey Supreme Court and other states.<sup>9</sup> Currently, twenty-two states recognize the wrongful birth cause of action and three states recognize a wrongful life action.<sup>10</sup>

Much has been written about the wrongful life and wrongful birth causes of action, including important critiques.<sup>11</sup> There has not been, though, an attempt to survey and assess the statutes preventing recognition of these causes of action. This article will briefly (1) describe the relevant statutes as well as challenges to them and (2) suggest policy (rather than purely legal) considerations advanced by the existence of these laws.

## II. SURVEY OF STATUTES

To date, there are nine states which have addressed wrongful birth and/or wrongful life causes of action in specific statutory provisions. In this section, these are discussed in turn.

### A. IDAHO

In a 1985 case, the Idaho Supreme Court was asked to recognize causes of action for wrongful birth and wrongful life.<sup>12</sup> The case involved a child born with a series of severe disabilities whose parents argued that if the mother had been diagnosed with rubella she would have aborted the child.<sup>13</sup> In assessing the wrongful birth claim, the court considered two considerations it felt argued for recognition of the claim: (1) “the societal interest in reducing the incidence of genetic defects” and (2)

allowing parents to make informed choices about abortion.<sup>14</sup> The court forthrightly noted that “[t]he injury in a wrongful birth claim is the birth of the child.”<sup>15</sup> Ironically, the court summarily refused to recognize the wrongful life claim, noting that allowance of such a claim is contrary to the policy that “life is precious.”<sup>16</sup>

Subsequently, the Idaho legislature took up the issue. In 1985, the legislature enacted a new statute addressing wrongful birth and wrongful life claims: “A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”<sup>17</sup> The bill also distinguished this prohibition from “wrongful conception” (negligence in performing a sterilization) and traditional medical malpractice claims.<sup>18</sup>

#### B. INDIANA

Indiana case law, like that in the majority of states, has specifically disavowed a wrongful life cause of action.<sup>19</sup> In 1998, the Indiana legislature enacted official policy on the wrongful life and birth causes of action. Indiana law now provides: “A person may not maintain a cause of action or receive an award of damages on the person’s behalf based on the claim that but for the negligent conduct of another, the person would have been aborted.”<sup>20</sup>

#### C. MICHIGAN

An appeals court in Michigan abolished the wrongful life claim in 1999 in a case involving a child born with disabilities including a “missing right shoulder, fusion of left elbow, missing digits on left hand, missing femur on the left leg and short femur on right.”<sup>21</sup> In its decision, the court noted that it did not want to “implicitly endorse the view that the life of a disabled child is worth less than the life of a healthy child.”<sup>22</sup> In addressing the wrongful life claim, the court cited with approval a New Jersey decision which stated, “[t]he sanctity of the single human life is the decisive factor in this suit in tort. Eugenic considerations are not controlling.”<sup>23</sup>

In the 2000 legislative session, the Michigan legislature acted to codify the decision.<sup>24</sup> It enacted a statute which singled out these causes of action by name:

(1) A person shall not bring a civil action on a wrongful birth claim that, but for an act or omission of the defendant, a child or children would not or should not have been born.

(2) A person shall not bring a civil action for damages on a wrongful life claim that, but for the negligent act or omission of the defendant, the person bringing the action would not or should not have been born.<sup>25</sup>

The statute further specified that “damages for daily living, medical, educational, or other expenses necessary to raise a child to the age of majority” would not be available in “a wrongful pregnancy or wrongful conception claim that, but for an act or omission of the defendant, the child would not or should not have been conceived.”<sup>26</sup> The statute provides that it “applies regardless of whether the child is born healthy or with a birth defect or other adverse medical condition.”<sup>27</sup> Like the Idaho statute, the Michigan law differentiates these claims from traditional medical malpractice claims which allege that an act or omission resulted in injury to a child.<sup>28</sup>

The legislative analysis of the bill specified that it was meant to codify the *Taylor* decision.<sup>29</sup> The analysis noted that the wrongful life and birth causes of action are “inimical to those who believe that abortion is wrong.”<sup>30</sup> The analysis further raised questions about the limitation on these actions (could they be used in cases of unsuccessful sex selection?) and the benefit of discouraging parents from arguing that a child shouldn’t have been born.<sup>31</sup> The bill would also “promote the value of life by recognizing that all children are valuable.”<sup>32</sup> The analysis further argued that wrongful birth cases “tacitly put a lower value on the lives of disabled persons.”<sup>33</sup>

#### D. MINNESOTA

Minnesota’s statutory response to the wrongful birth and life actions was enacted in 1982. Like Michigan’s law, the prohibition is very specific. The law provides:

No person shall maintain a cause of action or receive an award of damages on behalf of that person based on the claim that but for the negligent conduct of another, the person would have been aborted.

Wrongful birth action prohibited. No person shall maintain a cause of action or receive an award of damages on the claim that but for the negligent conduct of another, a child would have been aborted.<sup>34</sup>

Similar to other statutes, the Minnesota law specifically allows for malpractice actions based on defective contraception or sterilization.<sup>35</sup>

In 1986, the Minnesota Supreme Court ruled on a challenge to the law.<sup>36</sup> The plaintiffs, parents of a daughter born with Down's syndrome, successfully convinced the trial court that the wrongful birth statute was unconstitutional under the U.S. Supreme Court holding in *Roe v. Wade*.<sup>37</sup> At the supreme court, plaintiffs raised three claims: (1) the statute interfered with the right to abortion, (2) the statute violated state and federal equal protection guarantees and (3) the statute violated the Minnesota Constitution's open courts provision.<sup>38</sup> In regards to the first two claims, the court held that the plaintiffs had failed to show state action, had not established any interference with the right to abortion and were not members of a suspect class.<sup>39</sup> The court held that the parents had assumed the risks of childbearing and deferred to the doctor's judgement, noting that "doctors must be returned some leeway in exercising judgement affecting the treatment of their patients without fear of legal sanction."<sup>40</sup> In regards to the final claim, the court held that the open courts provision only applied to actions available at common law and that wrongful birth and life claims were the exclusive province of the legislature so they can be abolished without constitutional implication.<sup>41</sup>

#### E. MISSOURI

In 1986, the Missouri Legislature enacted legislation prohibiting wrongful life actions. The statutory section is titled, "No cause of action for wrongful life."<sup>42</sup> The first subsection is directed towards this specific matter: "No person shall maintain a cause of action or receive an award of damages on behalf of himself or herself based on the claim that but for the negligent conduct of another, he or she would have been

aborted.”<sup>43</sup> Although not specifically labeled, the subsection addresses wrongful birth claims: “No person shall maintain a cause of action or receive an award of damages based on the claim that but for the negligent conduct of another, a child would have been aborted.”<sup>44</sup>

#### F. NORTH DAKOTA

The relevant North Dakota statute is specifically addressed only to wrongful life claims: “No person may maintain a claim for relief or receive an award for damages *on that person’s own behalf* based on the claim that, but for the act or omission of another, *that person* would have been aborted.”<sup>45</sup> It also includes a definition of abortion: “the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead embryo or fetus.”<sup>46</sup>

#### G. PENNSYLVANIA

The Supreme Court of Pennsylvania recognized a wrongful birth cause of action in 1981 but declined to recognize the wrongful life claim.<sup>47</sup> In 1988, the legislature enacted a statutory response.<sup>48</sup> This law also addresses the proscribed actions by name:

(a) Wrongful birth. There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.

(b) Wrongful life. There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.<sup>49</sup>

The 1988 law also contained a section providing: “Where a person has,

by reason of the wrongful act or negligence of another, sustained injury while in utero, it shall not be a defense to any action brought to recover damages for the injury, or a factor in mitigation of damages, that the person could or should have been aborted.”<sup>50</sup> A unique component of the Pennsylvania law is its statutory definition of conception: “A person shall be deemed to be conceived at the moment of fertilization.”<sup>51</sup> This provision was the source of some controversy during the legislative debate.<sup>52</sup> As noted by a commentator, the utilization of the phrase “once conceived” seems to distinguish a wrongful conception cause of action from these prohibited claims.<sup>53</sup> This same commentator noted two “primary purposes” of the statute: (1) “it works as a tort reform measure” and (2) it “promotes the legislative policy of favoring childbirth over abortion.”<sup>54</sup>

This law has been challenged on a few occasions. In 1992, a Pennsylvania superior court held that the law did not constitute state regulation of abortion and did not have an affect on the abortion rights unless it could be understood to encourage doctors to interfere with a patient’s right.<sup>55</sup> The court noted that other laws punish lying or misrepresentation by doctors and concluded that there was no evidence of any encouragement of physician malpractice.<sup>56</sup> In concurrence, one judge endorsed the trial judge’s conclusion that the statute was supported by rational bases of (1) preventing a policy that views a birth of a child as a “damaging event for which someone should be punished” which would lead to the consideration of a disabled child as “better off dead and of less value” than a non-disabled child and (2) preventing medical personnel “from being coerced into accepting eugenic abortion as a consideration for avoiding” lawsuits.<sup>57</sup> This justice also suggested five additional bases on which the law could be upheld: (1) rebutting the view that any birth could be considered “as an evil or wrong,” (2) to prevent making the disabled “a lower class of citizens,” (3) to avoid dictating the appropriate practice of medicine to doctors, (4) to slow the increase of medical malpractice insurance rates, and (5) to free doctors “from liability for defects or handicaps for which the physician is in no way responsible.”<sup>58</sup>

In a case decided the next year in which the plaintiffs were parents of a child born with severe retardation and spina bifida, the superior

court ruled that the wrongful birth statute was not a burden on the right to abort.<sup>59</sup> The court also noted the state's valid interest in discouraging the labeling of a child as "better off dead" and in reining in malpractice claims as well as protecting fetal life.<sup>60</sup> The court also held that the distinction between pre and post conception negligence victims was justified by state interests in preventing eugenic abortions and curbing health care costs.<sup>61</sup>

A federal §1983 action brought by the parents of a child with spina bifida also implicated the statute, although the court decided there was no state action and granted summary judgement for defendants.<sup>62</sup>

#### H. SOUTH DAKOTA

South Dakota's response to the wrongful life and birth actions is contained in a series of sections in the state statutes. The first is directed to the wrongful life claim: "There shall be no cause of action or award for damages on behalf of any person based on the claim of that person that, but for the conduct of another, he would not have been conceived, or once conceived, would not have been permitted to have been born alive."<sup>63</sup> The inclusion of wrongful conception claims brought on behalf of the conceived child is unique to South Dakota law. The next section is aimed at wrongful birth claims: "There shall be no cause of action or award of damages on behalf of any person based on the claim that, but for the conduct of another, a person would not have been permitted to have been born alive."<sup>64</sup> Like Pennsylvania, South Dakota law further specifies that, "[t]he failure or the refusal of any person to prevent the live birth of a person may not be considered in awarding damages or in imposing a penalty in any action. The failure or the refusal of any person to prevent the life of a person is not a defense in any action."<sup>65</sup> Finally, the law provides that the prohibitions do not prevent more traditional medical malpractice claims of actual injury to a patient.<sup>66</sup>

#### I. UTAH

Utah enacted a statutory policy on wrongful life and birth actions in 1983. The policy is outlined in three separate statutes. The first describes state policy: "The Legislature finds and declares that it is the

public policy of this state to encourage all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all persons with a disability and all unborn persons.”<sup>67</sup> The second section addresses the wrongful birth and life claims: “A cause of action shall not arise, and damages shall not be awarded, on behalf of any person, based on the claim that but for the act or omission of another, a person would not have been permitted to have been born alive but would have been aborted.”<sup>68</sup> The final section addresses potential claims that would invoke a failure to abort: “The failure or refusal of any person to prevent the live birth of a person shall not be a defense in any action, and shall not be considered in awarding damages or child support, or imposing a penalty, in any action.”<sup>69</sup> Some legislative history suggests that this policy was established in response to the growing acceptance of the wrongful birth and life actions in other states.<sup>70</sup> Also, that it was meant to further the state’s interest in discouraging abortions.<sup>71</sup> Other interests advanced by the legislation are the prevention of unnecessary eugenic screening and protection of the rights of physicians and other medical personnel morally opposed to participation in abortion.<sup>72</sup>

A ruling on a challenge to the Utah law was issued in 2002.<sup>73</sup> In a divided opinion (two justice joining an opinion upholding the law with one justice concurring only in the result), the Utah Supreme Court upheld the law. The challenge alleged violations of (1) the Utah Constitution’s open courts clause, (2) state and federal due process and (3) state and federal equal protection.<sup>74</sup> Plaintiffs claimed that their doctors minimized the risk of their child being born with Down’s syndrome as subsequently occurred.<sup>75</sup> On the open courts claim, the court departed from previous precedent to establish a rule that if the law abrogates an existing legal remedy it must either provide an alternative remedy or eliminate “a clear social or economic evil.”<sup>76</sup> The defendants had argued that the law eliminated the evil of “the stigmatization of unwanted children” but the court held that the law did not abrogate an existing right so there was no need to examine the intent of the provision.<sup>77</sup> In regards to the due process claim, plaintiffs had argued that their constitutional right to an abortion was unduly burdened but the court found no undue burden because (1) the statute says nothing about

the choice to abort, (2) there are other ways to respond to medical negligence, (3) no studies indicate the statute has an effect on choices to abort, and (4) other abortion related laws place greater burdens than this law (i.e. waiting periods and parental notification).<sup>78</sup> Plaintiffs' equal protection claim was that the law was based on an improper distinction between the class of wrongful birth claimants and the class of wrongful conception claimants.<sup>79</sup> The court held that persons who would choose abortion are not a class under equal protection analysis and certainly not a suspect class.<sup>80</sup>

### III. POLICY CONSIDERATIONS

Statutes banning recognition of wrongful birth or wrongful life causes of action allow state courts to avoid legal problems associated with these kinds of actions. These include questions of causation (i.e. is the doctor responsible when a baby is born with disabilities?) and assessment of damages (i.e. is misfortune a redressable injury?). As noted in the cases stemming from these statutes and commentary on them, they also promote significant public policy considerations, four of which are discussed in this section.

#### A. LIMITING MEDICAL COSTS

A number of the cases reviewed above note that prohibitions on wrongful birth and life actions can contribute to a decrease in medical liability claims. The Minnesota Supreme Court argued that "doctors must be returned some leeway" in their decisions for treatment of patients "without fear of legal sanction."<sup>81</sup> One justice in Pennsylvania similarly noted that the statutes prevent courts from dictating proper practice to physicians especially where the doctors were "in no way responsible" for the defects or disabilities of the children.<sup>82</sup> Linked to the concern with allowing leeway to doctors in their practice is the possibility that the statutes could limit medical malpractice insurance rates<sup>83</sup> and thus curb health care costs.<sup>84</sup> These possibilities led one commentator to characterize Pennsylvania's law as working "as a tort reform measure."<sup>85</sup>

There is, of course, reason to be concerned about medical costs.

Governor Kenny Guinn of Nevada recently noted the dramatic increase in medical malpractice insurance rates in the past few years.<sup>86</sup> Obstetricians are among the specialists who pay the highest rates.<sup>87</sup> As a result, some obstetrics practices have been threatened<sup>88</sup> and as Governor Guinn notes Nevada has seen the closure of practices which has had “a real impact on access for many pregnant women.”<sup>89</sup> The American Medical Association argues that “medical liability adds billions to the cost of health care each year—which means higher health insurance premiums and higher medical costs for all Americans.”<sup>90</sup>

Restrictions on lawsuits for wrongful birth and life can help curb some of this excess. They exclude from liability injuries (such as genetic defects and disabilities) that could not have been prevented by the doctor and for which a doctor is not responsible. Thus, unlike other forms of tort reform which aim to limit damages when there is actual negligence or malpractice, these statutes exclude a class of cases where there is no allegation that a doctor caused a harm, only that she failed to report (or emphasize to the parents’ satisfaction) an existing disability or defect. As some courts have noted, if there is really negligence in this failure to report or diagnose rather than a mere disagreement over the doctor’s emphasis of risk, there are other avenues for recovery other than to allege that the doctor “wrongfully” allowed a child to be born. To the degree doctors are shielded from liability claims, their costs will begin to decrease—a savings that may be passed on to patients.

#### B. DISCOURAGING ABORTION

The cases also note that the statutes advance the state interest in discouraging abortion in favor of allowing unborn children to be born. One court noted that Pennsylvania’s statute offered protection to fetal life.<sup>91</sup> Commentary on the Utah law argued that it was meant to discourage abortion.<sup>92</sup> As the Michigan legislative analysis noted, the wrongful birth and life claims, relying as they do on the claim that “but for” negligence an abortion would have taken place, are inimical to those who believe abortion is wrong.<sup>93</sup> Thus, the laws can be characterized as “promot[ing] the legislative policy of favoring childbirth over abortion.”<sup>94</sup>

A concern with this argument is that challenges to the statutes are generally framed to include the allegation that the prohibition of wrongful life and birth actions constitute a barrier to, or undue burden, on the right to an abortion. Courts have noted that this claim is not valid on its face because the absence of an action does not prevent a person from obtaining an abortion. The public policy the laws pursue is the *discouragement* of the abortions not their prohibition (since prohibition has been foreclosed by the U.S. Supreme Court). The statutes express this discouragement by refusing to endorse the theory that the absence of an abortion is a wrong that can be redressed by a tort action.

Under the pro-abortion line of argumentation that says that abortion should be “safe, legal and rare,” certainly a legal policy that encourages abortion’s rarity cannot be objected to. An alternative argument that contends that anything that makes abortion less likely is a constitutional deprivation begins to sound ominously like the establishment of a right to a dead baby,<sup>95</sup> along the lines of some interpretations of civil rights laws which would find discrimination in any situation where any disparity of treatment regardless of its cause is a constitutional violation.<sup>96</sup> This can hardly be a valid jurisprudential theory.

### C. BARRIER TO EUGENICS

A third policy is the creation of a barrier to eugenic campaigns. An Idaho decision preceding the enactment of that state’s prohibition statute invoked the baldly eugenic argument that recognizing wrongful birth claims was supported by “the societal interest in reducing the incidence of genetic defects.”<sup>97</sup> In contrast, New Jersey refused to recognize the wrongful life claim because it held that “[e]ugenic considerations are not controlling.”<sup>98</sup> A Pennsylvania judge noted that recognition of the wrongful birth and life suits could have the effect of “coerc[ing]” medical personnel “into accepting eugenic abortion as a consideration for avoiding” lawsuits.<sup>99</sup> Another Pennsylvania court invoked a state interest in preventing eugenic abortions to support its finding that the state prohibition was constitutional.<sup>100</sup> The Michigan legislative analysis raised the specter of sex-selection abortions in its

discussion of the reasons for the Michigan law.<sup>101</sup>

The eugenic nature of the wrongful birth and life actions is made eminently clear if one were to imagine a scenario in which the parties, instead of being the parents or the child, were the state. Thus, the state would be arguing that the failure to prevent the birth of the child was an injury to the community (maybe as an added draw on the public fisc).

Richard John Neuhaus has defined eugenics as “the movement to improve and even perfect the human species by technological means” and notes that although the idea seemed to have been rejected in the mid-twentieth century it has made a comeback with, among other things, “new ways of using and terminating undesired human life.”<sup>102</sup> He points to the growing acceptance of the “termination” of “people suffering from quality of life deficiencies.”<sup>103</sup> The technological possibility of prenatal diagnosis “permits the weeding out, through abortion, of those fetuses carrying *undesired* genetic traits.”<sup>104</sup> This practice is an “established feature of prenatal care in the United States” and the practice is growing.<sup>105</sup> The President’s Council on Bioethics has noted that the practice is “a species of negative eugenics—elimination of the genetically unfit and a reduction in the incidence of their genes—albeit carried out voluntarily and on a case-by-case basis.”<sup>106</sup>

The link between abortion and eugenics has always been strong. One study reports that thirteen percent of women who had abortions cited fetal health problems as the most important reason they had an abortion.<sup>107</sup> The reported popularity of sex-selection motives in “family planning” suggests that this too may become a factor in eugenic efforts.<sup>108</sup> Prohibiting wrongful life and birth actions will not prevent this eugenic practice but it does prevent any state endorsement of it and shields physicians from liability when they do not participate in it. Thus it is a modest effort at shoring up the line against a more widespread genetic campaign.

#### D. INTRINSIC VALUE OF LIFE

The most commonly invoked public policy favoring the refusal to recognize the wrongful birth or life causes relates to the importance of signaling the intrinsic value of human life. This policy underlies the

concern with eugenics discussed above. The link between the message of the value of life and the recognition of these claims is indicated by the Idaho decision cited above which notes that in these cases, “[t]he injury in a wrongful birth claim is the birth of the child.”<sup>109</sup> In reaching a different conclusion, a Michigan Court of Appeals said that wrongful life suits “implicitly endorse the view that the life of a disabled child is worth less than the life of a healthy child.”<sup>110</sup> The court went on to say that: “If all life is presumptively valuable, how can we say that what we really mean is that all lives *except for the lives of the disabled* are presumptively valuable?”<sup>111</sup> The concurring opinion in the Pennsylvania case cited to often in the above discussion notes that the wrongful birth and life actions endorse the view that the birth of a child might be a “damaging event” and thus a disabled child would be treated as “better off dead and of less value” than a child without disabilities.<sup>112</sup> Other decisions and analyses note similar arguments favoring non-recognition of the actions.<sup>113</sup> Utah’s official statutory policy “encourage[s] all persons to respect the right to life of all other persons, regardless of age, development, condition or dependency, including all persons with a disability and all unborn persons.”<sup>114</sup>

In wrongful life and birth cases, the “harm” alleged is not caused by a doctor in the way that would be traditionally associated with medical malpractice cases where the allegation would involve some bad action or negligence that caused a patient to lose a limb, contract a disease, etc. In these cases, there is no allegation that the doctor caused the disability—so the alleged “injury” is the very existence of a disabled child. Thus, a wrongful life or birth action requires a party to allege and the law to ratify that a disabled child is a *per se* injury. While the law allows that a mother may choose to sustain the “injury” by not aborting (like a magnanimous traffic accident victim who chooses to forego personal injury litigation), in recognizing the wrongful birth or life claim, the law clearly labels the child’s existence an “injury” or “harm.” As the analysis of the Michigan bill states: “in wrongful birth cases, where the child has a genetic defect, the courts assume . . . that abortion is reasonable, although some parents might choose against it. This diminishes the worth of disabled persons and thus, it should not continue.”<sup>115</sup>

The distressing history of Nazi Germany reminds us that widespread assaults on life begin with the “acceptance of the attitude that there is such a thing as life not worthy to be lived.”<sup>116</sup> Indeed, Dr. Alexander reminds us that “[c]orrosion begins in microscopic proportions.”<sup>117</sup> Professor Robert Destro notes that an “approach to decision-making which accepts as its implicit starting point the proposition that death is in the ‘best interests’ of those who must live with certain disabilities will inevitably erode the protection existing law affords to disabled people.”<sup>118</sup>

The President’s Council on Bioethics describes how this is already happening. Its recent report notes that the existence of prenatal diagnoses “accompanied in many cases by subtle pressures, applied by counselors (and others) to prospective parents to abort any abnormal fetus—strongly implies that certain traits are or should be disqualifying qualities of life that justify prevention of birth.”<sup>119</sup> It leads to a belief that “admission to life is no longer unconditional, that certain conditions or traits are disqualifying” spurred by “a growing consensus, both in the medical community and in society at large, that a child-to-be should meet a certain (for now, minimal) standard to be entitled to be born.”<sup>120</sup> Thus, “[c]hildren born with defects that could have been diagnose in utero may no longer be looked upon as ‘Nature’s mistake’s’ but as parental failings.”<sup>121</sup> The Council points out that “the goal of eliminating embryos and fetuses with genetic defects carries the unspoken implication that certain ‘inferior’ kinds of human beings—for example, those with Down syndrome—do not deserve to live.”<sup>122</sup> This attitude can lead to “[t]he assumption that the genetically unfit ought to be prevented from being born embodies and incites a profoundly denigrating and worrisome attitude toward those who *do* get to be born.”<sup>123</sup> The Council observes:

In addition to changes in the parent-child relationship, there are reasons to be concerned about the wider social effects of an increased use of genetic screening and selection. There is, first of all, the prospect of diminished tolerance for the “imperfect,” especially those born with genetic disorders that could have been screened out. It is offensive to think that children, suffering from “preventable” genetic diseases, should be directly asked, “Why were you born?” (or their parents asked, “Why did you let him live?”). Yet it is almost as troubling to

contemplate that “defective” children and their parents may be treated contemptuously and unfairly in light of such prejudices, even if they go unspoken. Already, parents who have a child with Down syndrome are sometimes asked, “Well, didn’t you have an amnio? How did this happen?” Many of these parents are people who, for their own ethical reasons, have chosen to proceed with the pregnancy even after learning the results of genetic screening, electing to love and care for the children that it has been given to them to love. Yet as the range of detectable disorders increases, as adult screening becomes ubiquitous and every pregnancy is tested, and as the economic cost of caring for the afflicted remains high, it may become difficult for parents to resist the pressure, both social and economic, of the “consensus” that children with sufficiently severe and detectable disabilities must not be born.<sup>124</sup>

Much more troubling is the possibility that insurance companies might exert pressures on parents to abort children as a “cost-cutting” measure (i.e., to prevent paying for prenatal surgery).<sup>125</sup>

Of course, the focus in wrongful life and birth lawsuits is not on the personality of the child but in the great difficulties faced by the parents of children with severe disabilities. Even humanitarian motives, though, can lead to abuses as Lois Lowry demonstrates in her fictional account of a dystopia where in an attempt to alleviate suffering, disabled children and the elderly are eliminated.<sup>126</sup> In fact, this focus may serve to exclude other relevant information about the nature and intrinsic worth of children with disabilities. For instance, there is some empirical evidence that suggests that “siblings of children with disabilities were higher in cooperation and self-control than siblings of children without disabilities.”<sup>127</sup> Anecdotal information suggests other considerations that might be missed. A much admired colleague described an experience:

As a faculty member at the University of New Mexico, I paused in a hallway to eavesdrop on a special education class. What caught my attention was this line from the instructor: “Today, we will talk about MRs.” I hadn’t figured out what that acronym referred to until I listened for a few moments. Oh, he meant “mentally retarded.” I was already unsettled by the tone and content of the lecture because my youngest brother is a Down syndrome boy. Although I obviously knew he was “retarded,” we viewed him—then and now—as a person with identity and humanity. He was not an MR, to us, but was—well, he was Phillip. The lecture continued with descriptions of those who fell into the MR category and with descriptions of the varieties of causes of mental retardation.

However, the spirit of the discussion was to label and categorize the various conditions, and no condition described had the benefit of an example of a human face, of a person of worth. I could not find a “place” in all the categories to put my brother; there was no room for a Phillip.<sup>128</sup>

Similarly, a recent essay in the *Human Life Review* movingly describes the enrichment provided a family and community by the author’s daughter who has lived with a neurological degenerative disorder. None of this is meant in any way to minimize the difficulties, sometimes almost overwhelming, faced by children with severe disabilities but merely to suggest that there may be more to the equation. *National Review’s* editor Rich Lowry writes:

There is no denying the difficulties to be faced by children with Down syndrome and by their parents. The children will suffer mild to moderate mental retardation and have trouble speaking. More than half of babies with Down syndrome have a congenital heart condition. They are at higher risk for hypothyroidism and Alzheimer’s disease. But the future of such children can be looked at in a different way: Children with Down syndrome have an increased “risk” to have an uncommonly sweet disposition and an irrepressible sense of humor. They are an imminent “danger” to prompt those around them to understand the meaning of love and life more deeply.<sup>129</sup>

Again, the statutes surveyed here may not put a stop to the growing belief that some lives are not as valuable as others, but they remove the state imprimatur from the theory and may give some impetus to the effort to help people understand the worth and inherent dignity of all persons.

#### IV. CONCLUSION

Although not yet widely accepted, there are a small but significant number of states with legislative policies prohibiting the recognition of wrongful life and wrongful birth causes of action. Some have been subject to constitutional challenge, but never successfully.

For many, the initial reaction to the concept of wrongful birth and wrongful life lawsuits is disbelief or even dismay. This may stem from our intrinsic concern with labeling a life as “not worth living.” Clearly though, as a legal concept, the idea has gained a foothold. The statutory

response to these laws is a modest but salutary response to that development. It seeks to recover the “wisdom of repugnance”<sup>130</sup> at these kinds of claims. These laws support not only valid, but compelling policy interests and help hold the line against the growing moral darkness of a culture of death.

## NOTES

1. Gregory G. Sarno, “Tort Liability for Wrongfully Causing One to be Born,” 83 *A.L.R.*3d 15 (1978).
2. *Ibid.*
3. Christine Intromasso, Note, “Reproductive Self-Determination in the Third Circuit: The Statutory Proscription of Wrongful Birth and Wrongful Life Claims as an Unconstitutional Violation of *Planned Parenthood v. Casey*’s Undue Burden Standard,” 24 *Women’s Rts. L. Rep.* 101 (2003).
4. While this paragraph has enclosed the names of the actions in quotation marks to signal the author’s opinion that the terminology is fundamentally invalid, I have discontinued the practice through the rest of the paper to avoid distracting the reader.
5. *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. 1963).
6. *Turpin v. Sortini*, 643 P.2d 954 (1982).
7. 410 U.S. 113 (1973).
8. Shelley A. Ryan, “Wrongful Birth: False Representations of Women’s Reproductive Lives,” 78 *Minn. L. Rev.* 857, 859-860 (1994).
9. *Id.* at 860-861.
10. *Id.*; Kelly E. Rhinehart, “The Debate Over Wrongful Birth and Wrongful Life,” 26 *Law & Psychol. Rev.* 141, 142 & 152 (2002). States recognizing wrongful life are: California, New Jersey and Washington. Jurisdictions recognizing wrongful birth are: Alabama, Arizona, California, Colorado, Delaware, District of Columbia, Florida, Illinois, Kansas, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, South Carolina, Texas, Virginia, Washington, West Virginia, and Wisconsin.

11. See James Bopp, Jr., Barry A. Bostrom & Donald A. McKinney, “The ‘Rights’ and ‘Wrongs’ of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts,” 27 *Duq. L. Rev.* 461 (1989).
12. *Blake v. Cruz*, 698 P.2d 315 (Idaho 1985).
13. *Id.* at 316-317.
14. *Id.* at 318.
15. *Id.* at 319.
16. *Id.* at 322.
17. Idaho Code §5-334.
18. *Id.*
19. *Cowe v. Forum Group, Inc.*, 575 N.E.2d 630 (Ind. 1991).
20. Ind. Code Ann. §34-12-1-1.
21. *Taylor v. Kurapati*, 600 N.W.2d 670, 674 (Mich. App. 1999).
22. *Id.* at 681.
23. *Id.* at 685 (quoting *Gleitman v. Cosgrove*, 227 A.2d 689 (1967)).
24. 2000 Mich. Legis. Serv. P.A. 423.
25. Mich. Comp. Laws Ann. 600.2971.
26. *Id.*
27. *Id.*
28. *Id.*
29. House Legislative Analysis Section, “Prohibit Wrongful Birth/Life Lawsuits” (Dec. 5, 2000), p. 2.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. Minn. Stat. Ann. §145.424.
35. *Id.*
36. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10 (Minn. 1986).

37. *Id.* at 11.

38. *Id.* at 12.

39. *Id.* at 13-14.

40. *Id.* at 14.

41. *Id.*

42. Mo. Stat. 188.130.

43. *Id.*

44. *Id.*

45. N.D. Century Code 32-03-43 (emphasis added).

46. *Id.*

47. *Speck v. Finegold*, 439 A.2d 110 (Pa. 1981).

48. John Lyons, "To Be or Not to Be: The Pennsylvania General Assembly Eliminates the Wrongful Birth and Life Actions," 34 *Villanova L. Rev.* 681 (1989).

49. 42 Pa. Cons. Stat. Ann. §8305.

50. 42 Pa. Cons. Stat. Ann. §8306.

51. 42 Pa. Cons. Stat. Ann. §8305.

52. John Lyons, "To Be or Not to Be: The Pennsylvania General Assembly Eliminates the Wrongful Birth and Life Actions," 34 *Villanova L. Rev.* 681, 689 note 32 (1989).

53. *Id.* at 687. *See also Hatter v. Landsberg*, 563 A.2d 146 (Pa. Super. 1989) (statute does not bar wrongful conception claim).

54. *Id.* at 689, 695.

55. *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania*, 607 A.2d 1083, 1087 (Pa. Super. 1992).

56. *Id.* at 1088.

57. *Id.* (Wieand, J., concurring) (quoting statement of Senator Rocks in legislative debate as contained in lower court opinion).

58. *Id.* at 1088-1089.

59. *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 819 (Pa. Super. 1993).
60. *Id.* at 820-821.
61. *Id.* at 821.
62. *Flickinger v. Wanczyk*, 843 F. Supp. 32 (E.D. Penn. 1994).
63. S.D. Cod. Laws §21-55-1.
64. S.D. Cod. Laws §21-55-2.
65. S.D. Cod. Laws §21-55-3.
66. S.D. Cod. Laws §21-55-4.
67. Utah Code Ann. §78-11-23.
68. Utah Code Ann. §78-11-24.
69. Utah Code Ann. §78-11-25.
70. *Utah Legislative Survey—1983* 1984 UTAH L. REV. 115, 222 (1984).
71. *Id.* at 224.
72. William Shane Topham, “Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah’s Statutory Breakwater,” 1984 *Utah Law Review* 833, 857-858 (1984).
73. *Wood v. University of Utah Medical Center*, 67 P.3d 436 (Utah 2002).
74. *Id.* at 439.
75. *Id.*
76. *Id.* at 441.
77. *Id.* at 442.
78. *Id.* at 445-446.
79. *Id.* at 448.
80. *Id.* at 448-449.
81. *Hickman v. Group Health Plan, Inc.*, 396 N.W.2d 10, 14 (Minn. 1986).
82. *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania*, 607 A.2d 1083, 1088-1089 (Pa. Super. 1992) (Wieand, J., concurring).

83. Id.

84. *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 821 (Pa. Super. 1993).

85. John Lyons, "To Be or Not to Be: The Pennsylvania General Assembly Eliminates the Wrongful Birth and Life Actions," 34 *Villanova L. Rev.* 681, 689 (1989).

86. Kenny Guinn, "Malpractice Costs Jeopardize Care Access," *Roll Call* (July 7, 2003).

87. Jane Lerner, "Doctors Say Costs Driving Them Out," *Journal News* 1B (May 21, 2003).

88. "Skyrocketing Insurance Rates Threaten Butte, Montana, Obstetrics Practice," *Insurance Information Institute Database* (Sep. 21, 2003).

89. Kenny Guinn, "Malpractice Costs Jeopardize Care Access," *Roll Call* (July 7, 2003).

90. Journal of the American Medical Association, "Medical Liability Reform—NOW!" 4 (2004).

91. *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 821 (Pa. Super. 1993).

92. "Utah Legislative Survey—1983," 1984 *Utah L. Rev.* 115, 224 (1984).

93. House Legislative Analysis Section, *Prohibit Wrongful Birth/Life Lawsuits* at 2 (Dec. 5, 2000). See also Professor Lynn Wardle's argument that Utah prohibition protects rights of conscience of those opposed to abortion in William Shane Topham, "Wrongful Birth and Wrongful Life: Analysis of the Causes of Action and the Impact of Utah's Statutory Breakwater," 1984 *Utah Law Review* 833, 858 note 153 (1984).

94. John Lyons, "To Be or Not to Be: The Pennsylvania General Assembly Eliminates the Wrongful Birth and Life Actions," 34 *Villanova L. Rev.* 681, 695 (1989).

95. Cf. Hadley Arkes, *Natural Rights and the Right to Choose* (New York: Cambridge Univ. Press, 2002) (discussing the implications of opposition to a statute that would prevent the killing of children born alive after a failed attempt to abort them).

96. See *Nguyen v. I.N.S.*, 533 U.S. 53, 82 (2001) (O'Connor, J., concurring) for a rejection of this reasoning.

97. *Blake v. Cruz*, 698 P.2d 315, 318 (Idaho 1985).

98. *Gleitman v. Cosgrove*, 227 A.2d 689 (1967).
99. *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania*, 607 A.2d 1083, 1088 (Pa. Super. 1992) (Wieand, J., concurring).
100. *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 821 (Pa. Super. 1993).
101. House Legislative Analysis Section, *Prohibit Wrongful Birth/Life Lawsuits* at 2 (Dec. 5, 2000).
102. Richard John Neuhaus, "The Return of Eugenics" in *Guaranteeing the Good Life: Medicine and the Return of Eugenics*, ed. Richard John Neuhaus (Grand Rapids MI: Eerdmans, 1990), p.1.
103. *Id.* at 19.
104. The President's Council on Bioethics, *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (Washington, D.C., 2003), p. 31.
105. *Id.* at 32-33.
106. *Id.* at 34.
107. Aida Torres & Jacqueline Darroch Forrest, "Why Do Women Have Abortions?" 20 *Family Planning Perspectives* 169, 170 Table 1 (July/Aug. 1998).
108. See Claudia Kalb, "Brave New Babies," *Newsweek* (Jan. 26. 2004), p. 44 for a discussion of a surge in interest in sex selection of babies.
109. *Blake v. Cruz*, 698 P.2d 315, 319 (Idaho 1985).
110. *Taylor v. Kurapati*, 600 N.W.2d 670, 681 (Mich. App. 1999).
111. *Id.* (emphasis in original).
112. *Edmonds v. Western Pennsylvania Hospital Radiology Associated of Western Pennsylvania*, 607 A.2d 1083, 1088 (Pa. Super. 1992) (Wieand, J., concurring).
113. House Legislative Analysis Section, *Prohibit Wrongful Birth/Life Lawsuits* at 2 (Dec. 5, 2000) (the bill would "promote the value of life by recognizing that all children are valuable"); *Id.* (wrongful birth cases "tacitly put a lower value on the lives of disabled persons"); *Dansby v. Thomas Jefferson University Hospital*, 623 A.2d 816, 821 (Pa. Super. 1993) (the state has an interest in discouraging the labeling of a child as "better off dead"); *Wood v. University of Utah Medical Center*, 67 P.3d 436, 442 (Utah 2002) (defendants argued that the

law discourages “the stigmatization of unwanted children”).

114. Utah Code Ann. §78-11-23.

115. House Legislative Analysis Section, *Prohibit Wrongful Birth/Life Lawsuits* at 2 (Dec. 5, 2000).

116. Leo Alexander, “Medical Science Under Dictatorship,” 241 *New England Journal of Medicine* 39, 44 (July 14, 1949).

117. *Id.* at 45.

118. Robert A. Destro, “Guaranteeing the ‘Quality’ of Life through Law: The Emerging Right to a Good Life” in *Guaranteeing the Good Life: Medicine and the Return of Eugenics* 244 (Richard John Neuhaus, ed., 1990).

119. The President’s Council on Bioethics, *Beyond Therapy: Biotechnology and the Pursuit of Happiness* (2003), p. 34.

120. *Id.* at 34-35.

121. *Id.* at 35.

122. *Id.* at 50.

123. *Id.*

124. *Id.* at 54.

125. The portions of the wrongful life/birth statutes in Pennsylvania, South Dakota and Utah that address third party claims based on the “but for” claim may address this but this possibility might need to be addressed more specifically and/or added to some of the laws.

126. Lois Lowry, *The Giver* (Boston: Houghton Mifflin, 1993).

127. Barbara Mandleco, Susanne Frost Olsen, Tina Dyches & Elaine Marshall, “The Relationship Between Family and Sibling Functioning in Families Raising a Child with a Disability,” *Journal of Family Nursing* 9 (Nov. 2003) 365.

128. Terrance D. Olson, “Off to the Rescue: The Ultimate Engagement,” Address to the 2003 Families Under Fire Conference, Brigham Young Univ. at 2 (<http://ce.byu.edu/cw/fuf/archives/2003/Olson.Terrance.pdf>).

129. Rich Lowry, “Abortion Denies Everyone in Society,” *Seattle Post-Intelligencer* (Oct. 8, 2003), p. B6.

130. Leon R. Kass, “The Wisdom of Repugnance,” *New Republic* (June 2, 1997), p. 17.