Rethinking Wrongful Life: Bridging the Boundary between Tort and Family Law

Philip G. Peters Jr.

University of Missouri School of Law, petersp@missouri.edu
RETHINKING WRONGFUL LIFE: BRIDGING THE BOUNDARY BETWEEN TORT AND FAMILY LAW*

PHILIP G. PETERS, JR.**

I. WRONGFUL LIFE DOCTRINE ........................................ 400
   A. The Majority View ........................................... 401
   B. The Minority View ........................................... 402
   C. Barriers to Consideration of a Child Support Claim .................. 407

II. THE NORMATIVE BASIS OF THE CLAIM ...................... 411
   A. Fairness Between the Child and the Tortfeasor ................. 411
   B. The Inadequacy of Parental Actions for Wrongful Birth ............ 415
   C. Fairly Allocating Responsibilities Between the Parents and the Defendant .......... 418
   D. Avoiding the Disadvantages of Wrongful Life Suits .................. 420
   E. Summary ................................................. 420

III. BRIDGING THE BOUNDARY: DOCTRINAL ISSUES .......... 421
   A. Family Law .............................................. 422
      1. Conduct Causing the Life of a Child ................... 422
      2. Tortious Misconduct Giving Rise to Child Support Obligations .......... 425
      3. Summary ............................................ 427
   B. Tort Law .............................................. 429
      1. Rescue Doctrine ..................................... 429
      2. The Special Benefits Rule ................................ 430
         a. Advantages of the Special Benefits Rule ................. 434
         b. Disadvantages .................................... 437
      3. Reform of Wrongful Birth Doctrine ...................... 438

* Copyright © 1992 by Philip G. Peters, Jr.
** Associate Professor of Law, University of Missouri-Columbia. B.A., Harvard University, 1972; J.D., University of California at Berkeley, 1976. Research for this Article was partially funded by grants from the John K. Hulston Research Fellowship in Health Care Law and the Robert L. Hawkins, Jr. Faculty Research Fellowship. I wish to thank Marjorie Maguire Shultz and David Fischer for helpful comments on previous drafts and Catherine P. Wells for her comments on this Article's hypothesis.
IV. Policy Considerations ........................................... 441
   A. Fairness ............................................. 441
   B. Compensation ......................................... 443
   C. Social Consequences .................................... 444
      1. Impact on the Family .............................. 444
      2. Unbundling Parental Rights and Responsibilities ........................................... 445
      3. Deterrence .......................................... 448
      4. The Choice Between Tortfeasor Assistance and Charity ....................................... 451
   D. Policy Summary ............................................ 452

V. Conclusion ....................................................... 453

Because tort law is designed to insure compensation for harm, not adequate child support, tort law leaves children born as a result of tortious conduct inadequately protected. The problems and complexities associated with proof of harm in wrongful life and wrongful birth actions cause courts to significantly limit the recovery of compensatory damages. These limitations threaten to leave many families without the resources necessary to adequately provide for their children. To protect these children, lawmakers need to abandon their exclusive reliance on tort doctrine as it is traditionally construed.

Traditional tort law embraces an unduly narrow notion of corrective justice that fails to resolve wrongful life disputes satisfactorily. The unique circumstances associated with the creation of a new life bring into play another, broader paradigm of responsibility: one that resembles family law more than tort. From this perspective, children whose birth can be attributed to tortious conduct have a strong moral claim for supplemental child support whenever a tortfeasor’s interference with the procreative rights of the parents foreseeably results in the birth of a child and that child’s parents cannot provide adequate support. In such an instance, the tortfeasor’s misconduct has irreversibly changed the status quo. A child has been born, and that child needs support. This fact materially distinguishes the consequences of this tort from other “harmless” negligence and justifies an obligation to contribute to the child’s support.

Contrary to the assumption of courts that have decided the claims of children born due to tortious conduct, the obligation of tortfeasors to contribute to the support of the resulting children need not depend entirely on proof that the tortfeasor has
“harmed” the child by causing a life so bleak that life itself is harmful. This traditional tort requirement may be appropriate for resolution of the child’s claim for tort damages, but the child should not be asked to make this showing if the claim is instead for child support. Unlike tort damages, child support awards are not intended to compensate for harm. Rather, they are intended to protect the child’s welfare by fairly apportioning support responsibility among the responsible adults.

As long as courts overlook the unique location of these cases at the juncture of tort and family law, the children’s claims will not be properly evaluated. Negligence that results in the birth of a child raises issues that are central to both fields. It raises tort law concerns because the child’s claim turns on proof that the defendant’s conduct is careless or antisocial in a sense ordinarily regulated by tort law. At the same time, it raises traditional family law issues because it results in the birth of a child, which generates concerns about the adequacy of that child’s support. Neither field, standing alone, can provide the tools necessary for full and fair resolution of the resulting claims.

Unless a doctrinal bridge is built between the two fields, these cases are destined for incomplete consideration. As negligence cases, they seem to have no place in family law. As tort cases, on the other hand, their child support components are unwelcome. As long as we feel obliged to compartmentalize these claims into one field or the other, cases of negligently induced birth are destined to be handled inappropriately.

A blending of the two doctrines is necessary to provide these children with adequate and just protection. For this task, lawmakers will have to bridge the boundary between family law and tort. The resulting cause of action for backup or secondary child support should be a hybrid of tort and family law in which tort law defines the duty and family law the remedy. Carefully fashioned, it would result in a fairer and more subtle reconciliation of the rights and responsibilities of all the parties than existing tort law standing alone.

Without question, an action for backup child support would require an extension of existing legal doctrine. The normative basis for the claim is, however, powerful enough to justify re-examination of the doctrinal barriers. Although a boundary crossing of this sort has no direct analogies in family law or in tort, each field provides some important raw materials for building the necessary bridge. Indeed, courts that prefer to use famil-
iar doctrines could provide some of the same protections for these children by extending existing tort rules governing wrongful birth, rescue duties, or the calculation of damages. But these approaches have problems that make direct acknowledgment of a new tort-based action for child support superior.

Doctrinal and methodological barriers have hindered explicit consideration of a tort-based child support claim by either courts or scholars. Once a court characterizes a child's claim as a tort claim, the relevance of family law notions of financial responsibility and child welfare are overlooked. Even the few courts that allowed recovery by children born as a result of tortious conduct insisted on analyzing the claims exclusively as torts. Because these courts permitted partial recovery without proof that the children had been "harmed" by birth, they were destined to be harshly criticized as inconsistent with the tort rules used to decide them. Regrettably, but understandably, the judges deciding these cases did not articulate a noncompensatory rationale to support their intuitive sense of corrective justice.

Because the possibility of a nontort rationale for a wrongful life remedy has gone unmentioned, no court has thoroughly analyzed the merits of a claim for child support. This Article is intended to begin that discussion.

I. WRONGFUL LIFE DOCTRINE

The tort claims of children born as a result of tortious conduct have fared poorly in the courts. As every first-year law student knows, these claims foundered on the requirement that the plaintiffs prove some injury arising out of the defendant's conduct. In wrongful life cases, proof of injury requires a comparison between the child's current condition and the state that would have existed if no tort had been committed (nonexistence). No court has been willing to allow the factfinder to make this comparison between life and nonexistence. As a result, the three courts that permitted some recovery without making this comparison were characterized as unprincipled and result oriented. Neither these courts nor their critics appreciated that the relief allowed in those cases was better characterized as supplemental child support than as compensatory damages. Once the claims were characterized as torts, courts and commentators alike overlooked the claims's location at the border between tort and family law. Consequently, the analysis of these cases has
overemphasized the rights-based perspective of tort law and slighted the care-based perspective of family law.

A. The Majority View

Tortious conduct can cause the existence of a child in a surprising variety of ways. A physician, for example, may negligently perform a sterilization; or a geneticist may negligently fail to inform would-be parents that their future children are likely to be born with birth defects. These scenarios are typical of what have come to be called "wrongful life" cases. But these examples of alleged medical malpractice by no means exhaust the possibilities. In a recent Indiana case, for example, a mental health institution failed to take adequate measures to prevent the rape of one of its residents.¹ Tortiously induced childbirth could also result from a reckless or intentional tort, such as a fraternity brother "spiking" the fraternity punch bowl with drugs or an obstetrician concealing information about genetic defects because of his opposition to abortion.

For children who owe their lives to tortious conduct, the only alternative to life in their current condition is to have never existed at all. Under traditional causal analysis, they have been harmed by the defendant's tort only if their lives are worse than nonexistence.² Not surprisingly, the difficulties presented by the comparison between life and nonexistence have generated substantial judicial discomfort.³

Most of these judicial misgivings can be loosely divided into three categories: (1) concerns about the logical possibility that being born can be harmful; (2) doubts about the capacity of judges and jurors to apply the comparison between life and non-

³. The arguments against implementing this test are discussed at much greater length in a previous article. See Philip G. Peters, Jr., Protecting the Unconceived: Nonexistence, Avoidability and Reproductive Technology, 31 ARIZ. L. REV. 487, 497-510 (1989).
existence in individual cases in order to ascertain injury or calculate damages, and (3) fear that a tort action premised on the idea that being born with birth defects can be worse than never existing at all would impugn the sanctity of life. In my view, these objections are overstated. But no court—not even the three permitting recovery—has allowed the plaintiff the opportunity to prove that life under the circumstances was a net detriment. Absent that proof, most courts felt compelled to deny recovery.

B. The Minority View

The courts that allowed recovery faced a doctrinal


7. E.g., Blake, 698 P.2d at 322; Bruggeman, 718 P.2d at 639-40; Azzolino v. Dingfelder, 337 S.E.2d 528, 532 (N.C. 1985), cert. denied, 479 U.S. 835 (1986). For a further discussion of this contention see Peters, supra note 3, at 501-09.

8. See Peters, supra note 3, at 497-509.

They, too, were troubled by the comparison between life and nonexistence. Yet, they were convinced of the fairness of providing lifelong assistance for children born with congenital disabilities. To mediate this conflict, the three courts permitting disabled children to recover formulated an apparent compromise. On one hand, they permitted recovery without proof that the children's lives were harmful. On the other hand, they limited that recovery to the extraordinary expenses associated with the children's birth defects. The practical result was to assure the availability of financial resources, as Roger Dworkin has observed, "regardless of what becomes of the parents and even after the child reaches adulthood."

These cases were immediately criticized as internally inconsistent. Both advocates and critics of recovery were dis-

10. *Turpin*, 643 P.2d at 961-64; Procanik v. Cillo, 478 A.2d 755, 760-64 (N.J. 1984); *Harbeson*, 656 P.2d at 494-97. In addition to these courts, Louisiana and Massachusetts have recently left open the possibility of an action by a disabled child. See *Pitre* v. Opelousas Gen. Hosp., 550 So. 2d 1151, 1157 (La. 1988) ("Logic and sound policy require a recognition of a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health care services to the child's parents."). *Viccaro* v. Milunsky, 551 N.E.2d 8, 13 (Mass. 1990) ("We do not totally discount the possibility that we might impose liability for the extraordinary expenses of caring for a person like Adam after his parents' deaths, perhaps in order to keep such a person from being a public charge.").

11. One of the courts conceded it was not requiring proof that nonexistence would be preferable. *Procanik*, 478 A.2d at 763 ("not premised on the concept that non-life is preferable to an impaired life"); cf. *Siemieniec* v. Lutheran Gen. Hosp., 480 N.E.2d 1227, 1235 (Ill. App. Ct. 1985) ("not a question of evaluating impaired existence vis-a-vis existence"). *aff'd in part and rev'd in part*, 512 N.E.2d 691 (Ill. 1987). In another case, the child had congenital deafness—a condition unlikely to make life a net detriment. See *Turpin*, 643 P.2d 945 (allowing special damages for the extraordinary expenses attributable to congenital deafness).

12. Each denied general damages for pain and suffering. *Turpin*, 643 P.2d at 964; *Procanik*, 478 A.2d at 764; *Harbeson*, 656 P.2d at 496-97. The singular exception is found in the opinion of the California Court of Appeals in *Curlender* v. Bio-Science Lab., 165 Cal. Rptr. 477, 498-90 (Ct. App. 1980). In *Curlender*, the court permitted general damages, thereby necessitating the use of a test of overall harm. *Curlender* was overruled by *Turpin*.


pleased by the compromise. As Dworkin noted, "[i]t seems odd to . . . admit simultaneously that an injury has been inflicted on the child while denying full compensation for it."\(^{16}\) In the eyes of Justice Robertson of the Texas Supreme Court, on the other hand, courts allowing partial recovery had silently discarded the requirement of "legally recognizable injury" in an effort to reach the "right result."\(^{17}\) From either perspective, therefore, partial recovery seemed an unprincipled and inexplicable compromise.\(^{18}\) Melinda Roberts correctly pointed out that the remedy, if viewed as one meant to compensate for net harm done to the child, would overcompensate children with minor birth defects whose lives are clearly beneficial while often undercompensating those with the most catastrophic injuries.\(^{19}\) As a result, no state supreme court since 1984 has joined this line of cases. During the interim, three state supreme courts have overruled intermediate appellate court decisions that would have permitted recovery.\(^{20}\)

The three courts that allowed disabled children to recover extraordinary expenses did not explicitly defend the award of monetary relief as a form of child support. Nevertheless, the facts and language of the opinions permitting recovery are more consistent with an award of child support than with an award of compensatory damages. In each case, the court emphasized the

\(^{16}\) DWORKIN, supra note 13, at 98.

\(^{17}\) Nelson, 678 S.W.2d at 930. The Supreme Court of Colorado made a similar charge in Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988).

\(^{18}\) Dworkin views this result as a compromise reflecting the difficulty of deciding whether the child has really been injured by "having life with a defect." DWORKIN, supra note 13, at 98. As I read these cases, however, they do not limit recovery to close cases, nor are they premised on a colorable claim of overall harm. As a result, I view them as more consistent with an unstated obligation to help provide part of the child's support than with a compensatory recovery for harm done.


RETHINKING WRONGFUL LIFE

torfeasor's causal responsibility for the child's needs, not the presence or absence of harm. This is consistent with a child support perspective, but not with a tort perspective.

In Harbeson v. Parke-Davis, Inc., for example, the Washington Supreme Court said it preferred "to place the burden of those costs on the party whose negligence was in fact a proximate cause of the child's continuing need for such special medical care and training."\(^{21}\) Similarly, in Turpin v. Sortini, the California Supreme Court observed that the defendant's negligence had placed "a significant medical and financial burden on the whole family unit" and emphasized the importance of these expenses to the child's well-being.\(^{22}\) And in Procanik v. Cillo, the New Jersey Supreme Court said that recovery is "not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living."\(^{23}\) The court continued, stating that "[w]e seek only to respond to the call of the living for help in bearing the burden of their affliction."\(^{24}\) Thus, "[t]he right to recover the often crushing burden of extraordinary expenses visited by an act of medical malpractice should not depend on the 'wholly fortuitous circumstance of whether the parents are available to sue.'"\(^{25}\) As these quotations illustrate, all three courts emphasized the needs of the children and the defendants' duty to help insure that those needs were met. Because this responsibility appears to arise out of the defendant's responsibility for the life of the child, not proof of "harm" to the child, it resembles a child support obligation much more strongly than a tort liability.

Even more revealing is the language used in an intermediate Indiana appellate court opinion (since vacated) that allowed wrongful life recovery by a healthy child. In Cowe v. Forum Group, Inc.,\(^{26}\) a nursing home's negligent supervision of its mentally handicapped patients resulted in the rape of a profoundly

\(^{21}\) 656 P.2d 483, 495 (Wash. 1983).

\(^{22}\) 643 P.2d 954, 965 (Cal. 1982).


\(^{24}\) \textit{Id.}

\(^{25}\) \textit{Id.} at 762 (quoting \textit{Turpin}, 643 P.2d at 965).

retarded woman by another mentally ill patient. Jacob, the child born as a result, was apparently healthy, but his parents were unable to care for him. He was eventually placed for adoption. After noting that Jacob would not benefit from any recovery that his mother might receive in her own tort action against the nursing home, the court allowed him to proceed with a claim for "support" for the time between his birth and his adoption.\textsuperscript{27}
Like the three courts that allow recovery by disabled children, the \textit{Cowe} court declined to become engaged in a debate over the harmfulness of the child's life. Instead, it predicated recovery "on the needs of the living."\textsuperscript{28} "Jacob was born alive," said the court, "and lived a period of time without a parent to support him. Forum's negligence was allegedly the proximate cause of Jacob's situation."\textsuperscript{29} This language, too, is more consistent with an award of child support than one for tort damages.

In each of these cases, the court awarded only part of the tort remedy sought. As long as the relief was characterized as tort damages, it could be criticized as either inadequate or excessive, depending on one's viewpoint, and as unprincipled, regardless of one's viewpoint. But the mystery surrounding this unorthodox "compromise" disappears once the recovery is viewed as a rough form of supplemental child support rather than as compensatory damages. In each of these cases, the court assumed that the child's needs were in danger of being unmet. If these assumptions were correct, then supplemental support was necessary to help with the child's extraordinary expenses. Thus viewed, the defensibility of these holdings does not turn on proof that the child's physical condition is so bleak that life itself is harmful. Instead, it turns on a determination that the tortfeasor's responsibility for the birth of the child justifies calling on him to help with the child's support.

Regrettably, the courts granting recovery have not considered a child support rationale for their decisions. Only the Indiana intermediate appellate court opinion in \textit{Cowe} characterized the relief awarded as child support; even that court did not explain why child support was an appropriate remedy for a tort-based claim.\textsuperscript{30} In fact, the court dismissed Jacob's separate

\begin{itemize}
\item \textsuperscript{27} \textit{Cowe}, 541 N.E.2d at 965.
\item \textsuperscript{28} \textit{Id.} at 966.
\item \textsuperscript{29} \textit{Id.}
\item \textsuperscript{30} \textit{Id.} at 965, 967.
\end{itemize}
claim for "imputed paternity" without recognizing the relevance of family law to its decision.

Perhaps the closest a court has come to explicitly stating a rationale more consistent with child support than tort damages occurred in a recent Massachusetts case. In *Viccaro v. Milunsky,* the court dismissed a disabled boy's claim for extraordinary damages on the grounds that these damages could already be recovered by his parents. But the court reserved for future consideration the possibility of a cause of action for any expenses that could not be claimed by the parents. Said the court, "[w]e do not totally discount the possibility that we might impose liability for the extraordinary expenses of caring for a person like Adam after his parents' death, perhaps in order to keep such a person from being a public charge."  

Until the courts appreciate that the rationale for partial recovery lies outside the boundaries of tort law, they will remain vulnerable to criticism that their holdings are unprincipled. A noncompensatory remedy needs a noncompensatory rationale. Until a noncompensatory rationale is articulated, the harm requirement will continue to serve as a doctrinal obstacle to recognition of the children's claims in most states. Furthermore, in states that permit recovery without a noncompensatory rationale, the relief awarded will be incorrectly calculated. An award of all extraordinary child-rearing expenses has the potential to be excessive whenever parental resources are adequate to provide the necessary support and inadequate whenever parents lack resources for even ordinary support costs. Explicit recognition of a child support rationale would remedy these problems.

C. Barriers to Consideration of a Child Support Claim

No state high court has yet seriously considered a child support rationale for recovery. Indeed, lawyers rarely plead it, even as a secondary cause of action. The absence of any serious discussion suggests that the way lawyers, judges, and scholars think

32. *Id.* at 13.
33. For a further discussion of the appropriate limits on recovery, see *infra* text accompanying notes 57-68.
34. An alternative claim for child support would seem to provide an attractive fallback theory in the event that the wrongful life claim is rejected or the factfinder concludes that the defendant has caused the child no harm. Likewise, a child support count would seem attractive in states that have already rejected wrongful life tort actions altogether. A rare exception occurred in *Cowe,* 541 N.E.2d at 965-67; see also *Foy v. Green-
about this corner of law has obscured this potential claim altogether. Even the courts permitting recovery have not realized that their innovative holdings could be more persuasively defended if they looked beyond the traditional tort paradigm for support.

Alternative rationales for relief may have been overlooked because the initial wrongful life cases were tried, briefed, and decided as traditional tort cases. Once these claims were cast as tort actions, a chorus of courts, counsel, and commentators struggled with the genuinely difficult issues that surrounded their prosecution as tort claims. In pursuing these questions, nearly all parties have taken the doctrinal boundaries of existing tort law as given. Once they assumed that proof of harm was necessary to recovery, the rejection of these claims understandably became a matter of "logic" and "principle." From a tort perspective, sympathy for the needs of the children represented precisely the kind of emotionalism believed likely to bias the courts and to deflect them from their task of pronouncing objective rules and applying them neutrally.

These blinders are best illustrated by a comment made by the New Jersey Supreme Court. Even though this court had decided to allow the recovery of extraordinary expenses, it could not square its holding with the "logic" of traditional tort doctrine. "Law is more than an exercise in logic," said the court, "and logical analysis, although essential to a system of ordered justice, should not become an instrument of injustice." But that court's intuitions were no less logical than the harm requirement that it had abandoned. The problem faced by the New Jersey Supreme Court was not the absence of a logical basis for recovery, but the court's inability to look outside of tort law for its rationale. A similar narrowness of vision was demonstrated by the Indiana intermediate appellate court in Cowe. That court dismissed Jacob's imputed paternity claim without appreciating that its decision to award child support had indeed made the institutional defendant an imputed parent for support purposes.

Exclusive reliance on tort law has led to a mistaken assumption that relief would be inappropriate in the absence of

---

proven harm to the child. Although the harm requirement provides a serviceable benchmark for claims seeking compensatory damages, it is not an essential element of a claim for child support. Under current family law, child support obligations may also arise out of genetic parenthood, contract, consent and some kinds of tort-like misconduct. It would be a serious mistake, therefore, to make the harm or no-harm dichotomy the litmus test for all child support claims by tortiously conceived children.

Of course, wrongful life claims might not have fared any better if they had been initially labeled as claims for child support. Certainly, some judges have made pejorative comments about parental wrongful birth actions which indicate that they would be unreceptive to any theory that makes the tortfeasor into more of a "surrogate parent" than current law allows. Yet the absence of any serious judicial discussion of an independent support action casts doubt on the likelihood that the courts have actually given this possibility any extended consideration.

Perhaps the width of the chasm between tort and family law provides an explanation for the blinders. The two doctrines emphasize two very different perspectives about human responsibility. Although generalizations of this kind are always over-broad, it is fair to say that tort law has traditionally endorsed a relatively individualistic view of human responsibility. Tort law emphasizes traditional Millsian freedom of action, authorizing recovery when one individual has harmed another and denying it in most instances when the defendant has merely failed to help another person in need. This may be changing, but slowly and with considerable resistance. Later, I will suggest that tort law has some components that are consistent with an obligation to provide backup child support, but these components lie at the fringes of tort territory, not at its core. By contrast, family law deals with circumstances that emphasize the interdependence of individuals and the reciprocal responsibilities which arise as a result of this interdependence. The very different perspectives associated with tort and family law may have made it especially

37. For a discussion of family law doctrines that are consistent with backup child support, see infra text accompanying notes 83-93.
38. See, e.g., Fassoulas v. Ramey, 450 So. 2d 822, 823-24 (Fla. 1984); Reick v. Medical Protective Co., 219 N.W.2d 242, 244-45 (Wis. 1974).
40. See infra text accompanying notes 94-115.
difficult to see the family law issues in wrongful life cases and to build the necessary bridge between the two fields.

The difference in orientation between family law and tort doctrine resembles Carol Gilligan’s differentiation between rights- and care-based reasoning. The liberal tradition of individualism that tort law strongly reflects has been described as a product of rights-based thinking. Family law, by comparison, is more concerned with interdependence, relationships, responsibility, and adequate care. These values are associated with a care-based perspective. Gilligan associates these “different voices” with differences in the way men and women reason. Rights-based reasoning is more often the primary orientation of men than of women. Although tort-based child support claims do not present the issue of gender bias directly, our predilection for analyzing these cases exclusively in tort terms certainly forces us to ask whether the law governing wrongful life cases adequately appreciates the care-based perspective.

As Martha Minow has observed, the point is not to find “the new, true perspective; the point is to strive for impartiality by admitting our partiality.” Just as maturity in an individual requires a productive tension between the feminine ethos of care and the masculine ethic of rights, so, too, a mature jurisprudential approach to the claims of these children must reconcile competing perspectives without lapsing into categorical analysis. The task is not to choose between rights and relationships but to

41. Carol Gilligan, In a Different Voice 100, 160 (1982).
43. See Gilligan, supra note 41, at 160.
44. Id. at 100.
45. See, e.g., Finley, supra note 42, at 893-95 (describing ways that law reflects the dominance of the rights perspective and suggesting that it does so because men have had the political power to privilege their views). However, other female writers note that the empirical data does not appear to link these different voices with gender as strongly as was previously believed. See Deborah L. Rhode, Feminist Critical Theories, 42 Stan. L. Rev. 617, 624-25 (1990). Rhode also expresses concern that undue emphasis on this issue will obscure the differences among women, universalize a difference that may be a product of subordination, and reinforce dichotomous stereotypes about men and women. Id.
46. Martha Minow, Making All the Difference 376 (1990).
47. Id. at 376 n.9 (citing Gilligan, supra note 41, at 151-74).
consider anew whether the tortfeasor's responsibility for the existence of the child supports an obligation to provide supplemental assistance and, if so, to fashion a remedy that best protects the child without unfairly burdening the defendant.

II. THE NORMATIVE BASIS OF THE CLAIM

Children who are born because of tortious conduct have a strong moral claim against the wrongdoer for supplemental child support if their natural parents are unable or unobliged to provide adequate support themselves. Although tort law already provides tortiously conceived children some protection in jurisdictions that allow parents to recover child support expenses in an action for wrongful birth, the law governing wrongful birth places several limitations on parental recovery that may leave the affected children inadequately protected. A backup action for child support would help correct this deficit.

A. Fairness Between the Child and the Tortfeasor

The most compelling cases for imposing a child support obligation have three important characteristics. First, and most importantly, the defendant's conduct has foreseeably caused the birth of a child. This unique consequence of the tortfeasor's misconduct gives the tortfeasor a special causal and moral responsibility for the welfare of the resulting child. In this important respect, the defendant who causes a child's birth is unlike other tortfeasors whose conduct causes no harm. It distinguishes the wrongful life defendant from the careless school bus driver who wanders over the center line, but returns before any harm is done, or the babysitter who forgets to turn off the stove burner, but discovers this error before the children injure themselves. The bus driver and babysitter have engaged in harmless negligence that, as a practical matter, has left the status quo as they found it. Thus, they are not legally accountable. But when a tortfeasor's negligence causes a new child to be born, the status quo is gone forever. In its place, a new responsibility has been created—the responsibility to care for the resulting child.

This change in status quo materially distinguishes the tortiously induced birth cases from garden variety harmless torts. And this difference provides a legitimate basis for questioning our insistence on proof of harm before allowing any relief. Although the harm or no-harm dichotomy is serviceable enough
in ordinary contexts, it cannot account for a vital aspect of the wrongful life cases—the creation of a life. In wrongful life cases, the unique relationship between the tortfeasor and the child provides a basis for responsibility that cannot be adequately understood within the confines of traditional tort doctrine.

The tortfeasor’s unique relationship with the child justifies a legal obligation to the child as long as the birth of that child was a foreseeable consequence of the tortfeasor’s misconduct. Under traditional tort analysis, of course, no duty of care would be owed directly to the child unless the misconduct posed a foreseeable risk of harm as well. But when the remedy is child support rather than compensatory relief, the test of duty must be restated. Now the salient question is whether the birth of the child or, perhaps, the inadequacy of family resources, was a foreseeable consequence of the tort. If so, the tortfeasor’s liability for contribution toward the support of the resulting child raises none of the fairness objections that might exist if the birth of the child were not a foreseeable risk of the tortfeasor’s carelessness.

The second factor justifying recovery is that the defendant’s tortious conduct has deprived the parents of their ability to control their own reproduction. This occurs, for example, when a tortfeasor’s carelessness deprives parents of the medical information necessary to exercise their own judgment about bearing children or when a pharmacist carelessly fills a contraceptive prescription. It also occurs when a mental health facility negligently permits the rape of a resident. The more culpable or antisocial the conduct, the stronger the case for depriving the defendant of the ordinary insulation that third parties have tra-

48. See Palsgraf v. Long Island R.R., 162 N.E. 99 (N.Y. 1928); RESTATEMENT (SECOND) OF Torts § 281 & cmt. c (1965); see also Viccaro v. Milunsky, 551 N.E.2d. 8, 13 (Mass. 1990) (questioning the existence of a duty to the child).

49. In family law, for example, child support obligations do not ordinarily turn on proof that the child’s life is harmful. See infra text accompanying notes 76-80.

50. This outcome has certainly been foreseeable in the kinds of actions that have resulted in wrongful birth and wrongful life cases in the past. See, e.g., Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477, 479-81 ( Ct. App. 1980) (genetic tests were improperly administered and thus failed to disclose high probability of serious birth defects), overruled by Turpin v. Sortini, 643 P.2d 954 (Cal. 1982) (tests failed to reveal that parents were carriers of Tay-Sachs disease); Procanik v. Cillo, 478 A.2d 755, 758 (N.J. 1984) (German measles during first trimester); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486-87 (Wash. 1983) (pregnant woman's ingestion of anticonvulsive drug to treat epilepsy).

ditionally enjoyed from child support obligations. Furthermore, because their tortious conduct wrongfully deprives the parents of control over their reproductive decision making, these tortfeasors have forfeited their standing to suggest that parents be exclusively responsible for support of the resulting child, or that public assistance provide the necessary supplementation of family resources. These defendants are materially different from tortfeasors whose birth-inducing negligence does not deprive the parents of control over the decision to bear a child. As a result, the claim against a person who carelessly sterilizes a parent is stronger than one against an electric utility whose faulty maintenance leads to an electrical blackout and the ensuing conception of many unplanned children. This interference with parental control over reproduction justifies reallocating some of the support liability from the parents to the tortfeasor.

Third, many of the families who raise children born as a result of tortfeasor negligence will lack the resources necessary to provide adequately for the child, especially if the child or the parents are handicapped. Some families will have to deplete

---

52. Interference with parental decisionmaking will be easiest to recognize in cases where the parents did not want any more children at all or where they wanted to use medical technology to detect and abort a fetus with severe birth defects. In one category of cases, however, the suitability of recovery is more problematic. These cases would involve parents who want a child but undergo sterilization to avoid the birth of a disabled child. If carelessness in the sterilization procedure leads to the birth of a healthy child, the parent’s ultimate goals will have been accomplished, notwithstanding their provider’s negligence. The case for tortfeasor liability seems weakest here. Because the violation of duty to the parents has caused them no harm, they will not be able to collect damages and, for obvious reasons, are unlikely to seek any. Nevertheless, a plausible case for backup child support might be made on behalf of the child (rather than the parents) because a child is now alive who would not have been born but for tortfeasor carelessness in implementing the parent’s final choice. Under these circumstances, backup liability in tort is arguably a more appropriate source of assistance than welfare or charity, but I have serious doubts. For a further discussion of the choice between tortfeasor liability and public assistance, see infra text accompanying and following note 134.

53. Years ago, there were rumors of a high birth rate in New York City nine months after an electrical blackout. More recent reports suggest a similar result after the 1989 San Francisco earthquake. Ned Zemaned & Lucy Howard, Lights Out, NEWSWEEK, July 16, 1990, at 8. Proximate cause is the doctrinal vehicle used in tort law to analyze the role of intervening third-party conduct, like that of the parents here. As a general matter, the modern trend is for courts to hold the primary defendant accountable so long as the intervening conduct was foreseeable, even if it was culpable. See Keeton ET AL., supra note 2, § 44. Even so, intentional sexual intercourse by parents after a blackout would almost certainly be viewed as the kind of intervening conduct that cuts off the tort liability of the primary defendant. See id. (discussing parental failure to protect a child from dangers set in motion by others).

54. In 1980, the total cost of raising a child was estimated at between $100,000 and $140,000. Viviana A. Zelizer, Pricing the Priceless Child: The Changing
assets that are needed to meet less urgent, but vitally important, needs of other family members. The less the family is able to provide needed support, the stronger the child's claim against the tortfeasor to supplement family resources.55

It is hardly surprising that all three of the wrongful life cases allowing recovery have included children born with congenital birth defects. In these cases, the children's support needs were most likely to exhaust the resources of the family, especially if collateral sources of assistance were ignored. By allowing disabled children to recover, but limiting their damages to the extraordinary expenses associated with their disabilities, the courts intuitively fashioned relief to meet the child's needs.

Together these three factors point toward a class of cases in which the children are likely to have an especially powerful claim for assistance. They will display the following elements: (1) tortious interference with the procreative rights of the parents; (2) the foreseeable birth of a child who would not otherwise have been born; and (3) the inability of the legal parents to provide adequately for the child's ordinary or extraordinary support needs without inequitable sacrifices by other family members. Where these factors exist, backup support liability is appropriate unless other policy objections outweigh the normative claim.

Whether and how much relief is provided in an individual case would depend on the child's support needs and the adequacy of parental resources. In cases like Turpin, for example, courts would be obliged to inquire whether Joy Turpin's parents could provide for her special needs, taking into account the parent's resources and the parent's wrongful birth recovery from the defendant. If their resources were sufficient to pay for some

---

55. Similarly, the ease with which the tortfeasor can bear or distribute the cost of support also influences the appropriate size of the support obligation. As the marginal improvement in the welfare of the child from a larger award decreases and the marginal sacrifice to the defendant increases, the case for a larger award weakens. A similar balancing process is used to calculate child support awards in more ordinary family situations. In wrongful life cases, however, courts may wish to examine the potential burden on the defendants as a class, rather than as individuals, and to consider this collective ability to buy insurance or pass on the cost of liability. Otherwise, direct consideration of a defendant's assets could encourage providers to reduce their insurance coverage, at least insofar as it applies to wrongful life claims.
or all of her extraordinary expenses, then her recovery would be reduced accordingly. If, on the other hand, her parents were unable to afford ordinary or basic support costs, then her recovery would include her ordinary expenses also. Indeed, on the right set of facts, even healthy children might recover ordinary support expenses. As a result, explicit recognition of a child support rationale would result in a fairer and more precisely tailored remedy than is currently awarded in the three states that allow an action for extraordinary expenses.

B. The Inadequacy of Parental Actions for Wrongful Birth

To the extent that any jurisdiction allows the parents to recover either basic child-rearing expenses or extraordinary expenses in their parental wrongful birth action, it has already reassigned some child support obligations from the legal parents to negligent third parties and, to this extent, has satisfied the child’s claim against the tortfeasor as well. Nevertheless, several factors counsel against exclusive reliance on parental recovery in wrongful birth actions.

First, a few states bar some kinds of wrongful birth suits altogether, particularly those suits alleging that tortious conduct deprived the parents of the opportunity to abort.56 In those

56. See, e.g., Atlanta Obstetrics & Gynecology Group v. Abelson, 398 S.E.2d 557, 558, 563 (Ga. 1990) (parents not informed of prenatal test for Downs Syndrome); Szekeres v. Robinson, 715 P.2d 1076, 1078-79 (Nev. 1986) (birth of a healthy child). The courts in North Carolina and Missouri suggested that they will not recognize actions based on an allegation that the mother was deprived of the opportunity to abort.


(2) Missouri: Compare Wilson v. Kuenzi, 751 S.W.2d 741, 746 (Mo.) (no action for postconception negligence which allegedly deprived mother of opportunity to abort), cert. denied, 488 U.S. 893 (1988) and Mo. ANN. STAT. § 188.130 (Vernon 1986 & Supp. 1990) with Shelton v. St. Anthony’s Medical Ctr., 781 S.W.2d 48, 50 (Mo. 1989) (established liability for postconception negligence that deprived mother of opportunity to seek counseling before delivery) and Miller v. Duhart, 637 S.W.2d 183, 188 (Mo. Ct. App. 1982) (court would have allowed an action for preconception negligence if it had not been barred by the statute of limitations).

In addition, a number of states prohibit claims (1) based on negligent prevention of abortion, e.g., IDAHO CODE § 5-334 (1990); IND. CODE ANN. § 34-1-1-11 (Burns 1986 & Supp. 1990); MINN. STAT. ANN. § 145.424 (West 1989); MO. ANN. STAT. § 188.130 (Vernon 1986 & Supp. 1989); UTAH CODE ANN. § 78-11-24 (1987); (2) based on the birth of a child, regardless of impairment, see S.D. CODIFIED LAWS ANN. § 21-55-2 (1987); and
jurisdictions, no protection is afforded to the affected children.

Second, wrongful birth actions function only to resolve the tort dispute between the adults, not to evaluate or enforce any legitimate support obligations owed directly by the tortfeasor to the child. As between the adults, most courts conclude either that ordinary child-rearing expenses should not be recoverable, or that they should be reduced to reflect the benefits that the parents receive from the child. At least one state even offsets these benefits against the extraordinary medical expenses associated with congenital birth defects. As a consequence, the resulting awards are usually insufficient to assure adequate support of the child, especially if the child has serious medical problems. Even when the awards are combined with family resources, they may be insufficient to provide suitable support without requiring undue sacrifices from other members of the family.

In one especially poignant and illustrative Florida case, the court denied ordinary support costs to a family that had two children born with birth defects prior to the negligent performance of a vasectomy on the husband. As a result of the negligence, two more children were born, one of them handicapped. Because the husband was ill and unemployed, the entire family was on welfare. This case is an extreme example, of course, but less dramatic instances of inadequate wrongful birth recovery are surely common.

Third, an independent support claim may be needed in cir-

(3) based on the birth of a healthy child, see ME. REV. STAT. ANN. tit. 24, § 2931 (West 1990).

57. E.g., Boone v. Mullendore, 416 So. 2d 718, 721-23 (Ala. 1982) (damages for healthy child limited to actual expenses and injury associated with an unexpected pregnancy); Fassoulas v. Ramey, 450 So. 2d 822, 824 (Fla. 1984) (special upbringings costs associated with disabled child were allowed). These opinions may represent the majority, at least in cases where the child is healthy. See Johnson v. University Hosp., 540 N.E.2d 1370, 1375 (Ohio 1989) (finding child-rearing costs too speculative to be recoverable); James G. v. Caserta, 332 S.E.2d 872, 877-78 (W. Va. 1985) (same); KEETON ET AL., supra note 2, at 372 & n.58. (majority of courts deny child support for a healthy child). But cf. Burke v. Rivo, 551 N.E.2d 1, 3 (Mass. 1990) (parents of a healthy child, born after sterilization, could recover child-rearing expenses).


cumstances where the parents have forfeited or waived their own rights to recovery, because parents should not be permitted to waive the child’s rights. For example, parents who have surrendered the child for adoption will presumably lose their right to sue for child support as part of their own wrongful birth recovery.61 But the child who has been surrendered for adoption may still need support assistance, at least if the child suffers from serious birth defects. For these disabled children, a portable cause of action for the extraordinary expenses associated with the disability may help them obtain a propitious permanent placement or fund suitable foster care.

Nor is it clear that the child’s needs should be left unmet merely because the parents were contributorily negligent62 or tardy in filing their claims.63 Parents could decline to sue for many reasons, such as: (1) they live in a state that would force them to disparage the child’s value to avoid offset; (2) their state presumes that the benefits of parenting equal the costs; (3) they are unaware of the child’s likely future medical needs; (4) they had adequate resources or insurance to meet the child’s needs at the time of birth, but later suffer health or employment problems that threaten the care of the child; or (5) they lack the knowledge, mental capacity, or disposition to recognize and pursue their legal rights. Current mainstream doctrine offers no protection to children in these families. These children would be better protected with an action on their own behalf because the statute of limitations would ordinarily be tolled during all or part of their minority.64 This would provide them with protection simi-


62. See, e.g., Fassoulas, 450 So. 2d at 823 (parent’s recovery reduced because of their comparative fault in bearing a second disabled child following a negligent vasectomy).


64. See Procanik, 478 A.2d at 762 (statute of limitations does not apply to infant plaintiff; infant plaintiff may recover extraordinary expenses incurred during majority).
lar to that given to children who seek support from a deficient natural parent. In those cases, the child can ordinarily sue until emancipation or majority.65

There is an additional reason to consider a backup child support action. Parental recovery is sometimes limited to expenses incurred during the child's minority.66 Presumably, this limitation reflects the extent of the parents' legal support obligations.67 In those states, children who will need support or medical care beyond majority are unprotected by their parents' cause of action. They need an independent cause of action for postmajority support. Even in jurisdictions that permit parents to recover postmajority support, the children may need an independent cause of action if their period of dependency is likely to extend beyond the lives of their parents. That is because the parents' right to recover compensatory damages for postmajority support is likely to be limited to the expenses they will incur during their lifetimes.68 In addition, parental recovery will remain insufficient to the extent that it is subject to reduction to reflect the joys of parenting.

For all these reasons, the parents' wrongful birth cause of action currently offers insufficient protection to the resulting children to justify total reliance on it.

C. Fairly Allocating Responsibilities Between the Parents and the Defendant

Because each jurisdiction's wrongful birth doctrine already purports to strike a balance between the support obligations of the parents and those of the tortfeasor, a separate action for child support may be perceived as unfairly disturbing the existing equilibrium. However, a cause of action for backup child support that merely supplements parental support obligations, but does not supplant them, will do no injustice as between the tortfeasor and the parents.

The easiest cases for imposing secondary child support obli-

65. See infra note 77.
67. See Bani-Esraili, 505 N.E.2d at 948 (statutory limit on support liability for post-majority expenses). Some jurisdictions, by contrast, allow child support to run beyond a parent's death. See CLARK, supra note 15, § 17.1, at 718-19.
68. See Gallagher v. Duke Univ., 852 F.2d 773, 778 (4th Cir. 1988) (recovery limited to parental life expectancy); Viccaro v. Milunsky, 551 N.E.2d 8, 11, 13 (Mass. 1990) (parental recovery apparently limited to expenses "they will incur" before death).
gations on the tortfeasor will involve disabled children who seek to recover expenses likely to be incurred after the legal support responsibility of the parents has ended. These expenses could include either postmajority expenses or expenses likely to be incurred after the death of the parents. As long as the parents lack standing to recover these sums on the child’s behalf, tortfeasor liability directly to the affected child would simply fill a gap in existing law. It would not disturb any prior apportionment of legal responsibility between the parents and the tortfeasor. Instead, it would help ensure that a decent level of care is provided. Given the tortfeasor’s responsibility for the child, this allocation of support responsibility seems fair.69

The fairness issue is more complicated when children attempt to recover backup child support after their parents’ wrongful birth recovery has been reduced to reflect the benefits that the tortfeasor’s misconduct has bestowed on the parents. As a practical matter, a child’s recovery of additional support would ordinarily inure to the benefit of the parents, too. If the parents ought to bear these expenses rather than the defendant, a direct child support action on behalf of the child could provide a windfall to the parents and subvert the policies reflected in the state’s rules governing wrongful birth recoveries.70 No countervailing interest of the child seems to justify this unfairness so long as the parents have adequate resources to provide for the child.

But this objection to recovery by the child loses its force when the family lacks adequate resources to provide for the child’s needs. This seems especially likely to occur in cases where tortious conduct leads to the birth of a seriously disabled child. It hardly seems an unjust windfall to the parents for the child to receive backup support assistance after the family has exhausted its resources. The joys bestowed on the parents may be real enough, but they will not provide clothes, shelter, food, education, or medical care for the child.71 Under these circum-

69. The basis for extending the tortfeasor’s responsibility for a longer time than that of the parents is discussed further below. See infra text accompanying notes 117-18.

70. Although reduction of parental recovery to account for unwanted “benefits” may be unjust in some contexts, the proper way to correct this injustice is to revise the rules governing wrongful birth recovery. So long as these rules reflect current state policy regarding the appropriate allocation of responsibilities as between the adults, then recognition of an action by the child for additional support raises an obvious danger of injustice.

71. By similar reasoning, the child has a strong claim for backup child support whenever the parents’ action is barred or reduced by comparative fault or the statute of limita-
stances, the only windfall that the parents will receive is the joy of seeing their child adequately supported. As a matter of both fairness and public policy, this "windfall" seems preferable to inadequate care for the child or undue deprivation of other family members.

As long as the action is limited to backup support, the toughest allocation choices are not between the tortfeasor and the parents but between the tortfeasor and those who would otherwise bear the costs of inadequate family resources. Under current law, either the affected children will bear this cost in the form of inadequate support, or the cost will be absorbed by private and public charities. As discussed in greater detail below, the tortfeasor's culpability makes him a reasonable candidate to shoulder the responsibility for backup support. Because the child's legitimate claims for backup support can be recognized without materially disturbing the balance of equities between the tortfeasor and the parents, recognition of the child's claim for backup child support promises a better reconciliation of the rights of all of the parties than current tort law provides.

D. Avoiding the Disadvantages of Wrongful Life Suits

An independent action for supplemental child support would also avoid the major objections raised against wrongful life recovery. Unlike a child seeking compensatory damages, the child seeking support will not have to allege that she has a life that is worse than having never existed at all. Although she will still need to allege that her parents lost the opportunity to prevent conception or obtain an abortion, she will not need to prove that her life is a detriment. Instead, she need only allege that she is entitled to assistance from those adults responsible for her birth. As a result, a child support action will avoid the comparison between life and nonexistence, which has so troubled the

72. A trust on behalf of the child could be used, if necessary, to insure proper application of the funds. See Arche v. United States Dep't of Army, 798 P.2d 477, 486-87 (Kan. 1990) (discussing precedent for use of reversionary trusts to prevent misappropriation of damage awards by parents).


74. See infra text accompanying and following note 134.
courts in wrongful life cases. Nor will it impugn the legal presumption entertained in many wrongful life cases that all lives are worth living. In addition, the calculation of relief in a child-support action is relatively concrete and clearly within the competence of court and jury. In short, the child’s claim for support assistance sidesteps the major objections to wrongful life claims.

A cause of action for backup child support also offers a second advantage over wrongful life actions, which may be especially important in influencing courts to recognize this novel claim. Rather than focusing attention on the child’s handicaps to determine whether the life of the child is “wrongful” or “harmful,” the child support action emphasizes the child’s potential and obliges the defendant to help make that potential a reality. This emphasis on adequate care and support, rather than redress for harm, may help to shape positive social expectations about integrating disabled individuals into our society by emphasizing the need to provide them with the resources needed to achieve their potential. For these reasons, advocates for disabled persons who have criticized wrongful life claims in the past \(^{75}\) may be more receptive to a claim for backup child support.

On the other hand, the obvious shortcoming of an action for backup child support is the limited relief provided. Courts would also need to recognize a full wrongful life claim for compensatory damages to provide complete protection for a catastrophically injured child. Even if such a claim were recognized, however, general damages would be available only in the rare cases where the child’s injuries are so devastating that life itself is harmful. In other cases, a backup cause of action for child support would still be necessary to protect the child’s interests in adequate support.

E. Summary

Children have a strong normative claim for backup child support against individuals whose misconduct leads to their birth. When their families are unable to provide adequate support, resorting to the tortfeasor for backup support is a fair reconciliation of the respective rights of the child, the parents, and

75. See, e.g., Adrienne Asch, Reproductive Technology and Disability, in Reproductive Laws for the 1990's 69, 94 (Sherrill Cohen & Nadine Taub eds., 1989); Deborah Kaplan, Disability Rights Perspectives on Reproductive Technologies and Public Policy, in Reproductive Laws for the 1990's, supra, at 246-47.
the tortfeasor. Use of this family law remedy also sidesteps the major objections raised to wrongful life claims by the affected children.

III. BRIDGING THE BOUNDARY: DOCTRINAL ISSUES

Although a boundary crossing of this sort has no direct analogies in family law or tort, each field provides some important raw materials to build the necessary bridge. In tort, the rules that impose a duty to rescue on tortfeasors who have a special relationship with a person in need of assistance, or who have caused the victim’s predicament, are consistent with this new cause of action. So, too, are family law precedents for imposing child support responsibility on men who consent to insemination, who induce a woman to forego abortion or adoption, or who misrepresent their paternity to a child. While each of these analogies has its limits, they collectively suggest that an action for backup support can be reconciled with existing doctrine. Indeed, modification of several existing tort rules can be used as alternative vehicles for filling the gap between tort and family law. But each has problems that render it inferior to direct acknowledgement of a new tort-based action for child support.

A. Family Law

Unlike tort law, the family law governing child support obligations does not turn inexorably on proof that a child has been made worse off than she would have been but for the defendant’s conduct. Because the extent of support obligations is based on the needs of the child rather than on the extent of harm done to the child, family law appears to provide a more natural home than tort for child support claims by children who are born due to tortious conduct.

Family law child support awards are fundamentally different from compensatory damage awards in tort. They are intended to protect the needs of the child rather than to compensate the child for past harms. Child support awards are determined by the needs of the child, the resources of the persons who must contribute to the child’s support, and community standards about suitable care.76 They are not dependent on or lim-

ited by the amount of harm that the defendant has previously caused the child. Nor are they limited by tort statutes of limitations, or the availability of the legal parents to sue. Proper child support typically includes both the resources necessary to protect the child from harm (such as funds for polio vaccinations) and the resources necessary to make the child's future brighter than it would otherwise be (such as funds for education). Indeed, in the context of a growing child, the rather static distinction between harming the child, on the one hand, and merely failing to provide a benefit on the other, is extremely difficult to apply and of limited relevance. It oversimplifies the task of deciding how much of the child's opportunity for future well-being must be protected, nurtured, and advanced. Consequently, it is not surprising that the harm-benefit distinction is not the litmus test of a person's support obligations. In this respect, family law differs considerably from tort law. This difference makes family law a promising home for a child support action based on tortious conduct that causes the life of a child but does not harm the child.
In family law, however, no precedent currently exists for imposing child support obligations on tortfeasors who cause the birth of a child. Instead, child support obligations are normally imposed on other bases, such as genetic parenthood, consent, or an existing in loco parentis relationship with the child. Nevertheless, family law provides some mildly helpful precedent. First, one kind of tort-like misconduct already gives rise to child support obligations. When a man misrepresents his paternity to the child, the remedy for the wrong is the imposition of child support responsibility, not an award of compensatory damages. Second, family law imposes child support obligations when a man's conduct leads to the birth of a genetically unrelated child. The obvious example occurs when a husband consents to his wife's artificial insemination by donor sperm. Furthermore, courts would probably reach the same result if a man induced a woman to forego abortion with his promise to support the resulting child. Although these precedents do not compel the recognition of an action for backup child support by tortiously conceived children, they do provide some useful raw materials for building the necessary bridge between family law and tort.


82. At common law, the stepparent could end the obligation when no longer in loco parentis. E.g., Franklin v. Franklin, 253 P.2d 337, 340 (Ariz. 1953); Cleverger, 111 Cal. Rptr. at 711; In Re Fowler, 288 A.2d 463, 465-67 (Vt. 1972); see Clark, supra note 15, § 6.2, at 263-64. Some states impose a statutory obligation on stepparents. See id.
1. Conduct Causing the Life of a Child

Two entirely different lines of authority provide precedent for imposing support obligations on men whose conduct contribute to the birth of a genetically unrelated child. First, husbands who consent to their spouse's artificial insemination by donor sperm are obligated to support the resulting child. Second, a line of contractual estoppel cases suggests that a strong claim for child support will arise whenever a man induces a pregnant woman to forego abortion or adoption in reliance on his promise to support the child as his own. In neither of these circumstances is the man's support responsibility dependent on proof of harm to the child or limited to the extent of any such harm. In each, conduct causing the birth of a child gives rise to the obligation. In this important respect, these cases support the imposition of child support obligations on tortfeasors whose misconduct leads to the birth of a child, even if it does not harm the child.

These two lines of family law cases do differ from wrongful life cases in two material respects. While these differences weaken the analogy, they do not destroy it. First, the defendants in these family law cases, unlike defendants in wrongful life cases, typically have a stepparent relationship with the affected child. However, their legal liability does not turn, at least explicitly, on proof that the men actually assumed a de facto parent-child relationship with the child. Their liability arises out of their involvement in the birth of the child. As a result, the analogy survives this factual difference.

The strength of this analogy is more seriously limited by the second factual difference between these family law cases and wrongful life cases. In the artificial insemination and promise to support cases, the child support obligation of the defendant is based on a voluntary assumption of responsibility. In the case of a foregone abortion or adoption, for example, the man has not only induced the birth or retention of a child, but he has also

83. See supra note 81.
84. See Perkins v. Perkins, 383 A.2d 634, 636 (Conn. Super. Ct. 1977) (husband's promise to accept child deprived mother of opportunity to have the child adopted; thus, action for support was legitimate); T. v. T., 224 S.E.2d 148, 149 (Va. 1976) (husband talked wife out of adoption and promised to care for child as his own); see also Carter v. State Bureau of Child Support Enforcement, 444 A.2d 271 (Del. Super. Ct. 1982) (mistakenly believing the mother's assurances that child was his, the defendant persuaded the mother not to abort, but did not agree to support the child; an implied contract to support the child was not ripe for review).
agreed in advance to accept parental responsibility for support. Indeed, these cases are just a subset of a larger group of cases imposing child support obligations pursuant to contract.\textsuperscript{85} Arguably, contractual consent is also present in the insemination cases. As a result, these cases bridge the gap between family law and contract, not between family law and tort. A bridge may be easier to build at this border because contractual remedies are not exclusively based on proof of harm.

Still, the contractual basis for the artificial insemination cases should not be overstated. It is certainly not self-evident that a husband who has consented to insemination has actually agreed, implicitly or explicitly, to support the resulting child on the breakup of the household. Our societal decision to imply a promise to support from his consent to insemination is as much a statement of our beliefs about the obligations that ought to arise from his role in conception of the child, as it is an evaluation of the actual understanding of the parties. It is a statement about the responsibility of the consenting husband for the birth of the child and his resulting obligations to protect the interests of that child. Viewed this way, it is not surprising that neither the cases nor the statutes imposing parental responsibility require proof of an actual agreement about long-term child support.

So viewed, the consent-based cases are analogous to wrongful life cases in one important respect. Consent to insemination changes the status quo in a way that justifies liability for child support. So, too, does tortious conduct that causes the birth of a child. Even if the life of the resulting child is conceded to be a blessing, some assessment must be made of the defendant's obligation to contribute toward the new and ongoing responsibilities which the birth of that child entails.

Having said this, however, one important qualification must be made to the analogy. The family context in which husbands consent to artificial insemination is quite different from the relationship that exists between a wrongful life defendant and the aggrieved family. Those vast differences dictate quite different parental rights and responsibilities for husbands who consent to artificial insemination than would be appropriate for wrongful life defendants. For example, the statutory trend regarding artificial insemination is to transfer full legal paternity, not merely

\textsuperscript{85} E.g., Clevenger, 11 Cal. Rptr. at 712-16; L. v. L., 497 S.W.2d. at 841-42.
support obligations, from the sperm donor to the consenting husband. This complete reallocation of parental responsibility is intended to help assure a supply of donors and to treat the child like a natural offspring of the consenting couple, thereby protecting the best interests of the mother and child and fairly apportioning responsibility between the donor and the husband.

As I discuss further below, a complete transfer of paternity like this would ordinarily be inappropriate for tortiously induced births because the child has natural and legal parents who should assume the main parental roles. Nevertheless, the wrongful life defendant’s responsibility for a child’s birth seems sufficient to justify a lesser level of parental responsibility such as secondary liability for child support.

2. Tortious Misconduct Giving Rise to Child Support Obligations

Family law already imposes child support obligations as a remedy for some tort-like misconduct. These cases provide additional, although somewhat weaker, support for the tort-based child support action proposed in this Article. The courts impose this remedy when men interfere with the ability of a child to obtain support from the natural father, or when they mislead a stepchild into believing that they are the child’s natural father. Although several courts refuse to apply these doc-

87. See infra text accompanying notes 126-28.
88. Miller v. Miller, 478 A.2d 351, 354 (N.J. 1984) (stepparent opposed visitation by natural parent after his release from prison and refused the natural father's offers of child support); see also In re Marriage of Valle, 126 Cal. Rptr. 38, 40-42 (Ct. App. 1975) (husband accepted his brother's children from Mexico and raised them to age of 10 and 14 at the time of divorce, all the while treating them as his own and playing the role of "Daddy"; these actions effectively deprived the children of resort to the natural parent).
89. In re Marriage of Johnson, 152 Cal. Rptr. 121, 122-23 (Ct. App. 1979) (stepchild born 10 days before marriage and husband subsequently played role of father for six years); In re Marriage of Valle, 126 Cal. Rptr. at 40 (children of husband's brother who lived in Mexico); Clevenger, 11 Cal. Rptr. at 714-17 (child resulting from adultery); M.H.B. v. H.T.B., 498 A.2d 775, 776-77 (N.J. 1985) (Handler, J., concurring) (husband maintained close relationship with child resulting from adultery, petitioned for custody of all children including illegitimate). Estoppel under these circumstances arises when the stepparent has made this representation with the intent that the child act on it and thereafter, the child has detrimentally relied on the representation in ignorance of the truth. See Clevenger, 11 Cal. Rptr. at 714. Sometimes this theory is combined with one alleging an express or implied contract to support the child. See id. at 716. In other cases, it has supported recovery where no contract has been proven. E.g., Miller, 478 A.2d at 357-59 (no promise to sup-
trines in the absence of adequate proof, few have rejected them outright.90

Because these cases rely on the malice or carelessness of the stepparent as the basis for imposing support liability, they serve as precedent for tort-based child support obligations. Significantly, the remedy in the misrepresentation cases is a support obligation rather than compensatory damages for emotional injury. By mixing a tort-like wrong with a family law remedy, these cases straddle the fields of tort and family law in a way very similar to an action for backup child support. Furthermore, because the support obligation imposed in these cases appears to be secondary to that of the natural parent, it closely resembles the supplemental support obligation that this Article proposes for tortiously induced births.

Nevertheless, the analogy is weakened by the requirement that the child demonstrate some harm or detrimental reliance on the stepfather's words or actions.93 In this respect, the cases preserve the harm requirement, at least in theory, as a predicate to recovery even though the remedy is not harm-based. In addition, these cases typically involve stepparents who are or have been in loco parentis. Under these circumstances, the stepfather's representations of paternity may have served as a convenient basis for imposing parental responsibility on de facto fathers without acknowledging as much. If so, the analogy to tortiously induced births suffers further.

Notwithstanding these limitations, however, these cases demonstrate judicial willingness to offer a child support remedy for tortious conduct when it seems the appropriate remedy. For two reasons, the wrongful life cases provide an even better occasion for combining a tort duty with a child support remedy than the misrepresentation cases. First, the plaintiffs in the wrongful life cases, unlike those in the misrepresentation cases, cannot sue for compensatory damages in lieu of support. Second, the

90. E.g., P. v. S., 407 A.2d 244 (Del. Fam. Ct. 1978); Fuller v. Fuller, 247 A.2d 767 (D.C. 1968);
92. See M.H.B., 498 A.2d at 781; Miller, 478 A.2d at 359.
93. E.g., Clevenger, 11 Cal. Rptr. at 714, 716-17; Miller, 478 A.2d at 355.
tortfeasors in the wrongful life cases have interfered with parental decision making and caused the life of a child. By contrast, the defendants in the misrepresentation cases are not responsible for either the child’s existence or the child’s lack of adequate support. Given these differences, the justification for a child support remedy in the wrongful life cases is stronger than in the misrepresentation cases.

3. Summary

Family law provides a care-based orientation consistent with a secondary child support obligation in wrongful life cases. While family law has no directly analogous precedent, it does provide some useful raw materials for constructing the new cause of action. First, it imposes child support responsibility on nonparents who contribute to the birth of a child without requiring proof of harm to the child. Second, it sometimes imposes a child support remedy for tort-like misconduct. Admittedly, no family law doctrine combines the two lines of cases the way an action for backup child support would. This new claim would base child support on tortious conduct that causes the life of a child whether or not it harms the child. As a result, it would require an extension of tort and family law beyond existing precedent. Yet the existing family law doctrines described in this section, and the tort doctrines to be discussed in the next section, suggest that this extension is compatible with existing doctrine.

B. Tort Law

Although wrongful life claims have fared poorly in tort, the law of torts actually has some components that are surprisingly consistent with a tort-based duty to provide secondary child support. For example, the tort rules imposing a duty to rescue in special relationships provide a remarkably close, though inexact, analogy to the obligation of backup child support. The tort “benefits” rule also provides useful precedent for a support action. This rule permits the court to ignore some benefits conferred on the plaintiff by the tortfeasor. As a result, it permits recovery even if the tort confers a net benefit on the plaintiff. The analogy to wrongful life cases is obvious and was relied on by the California Supreme Court as a basis for providing partial relief in wrongful life cases.

With modifications, either the rescue doctrine or the benefits rule could serve as an independent basis for providing partial
relief in wrongful life cases. Courts that want to protect the affected children but are reluctant to construct a novel doctrinal bridge between tort and family law may, therefore, prefer to use these doctrines. Likewise, some courts may prefer to add child support to the remedies available in parental wrongful birth actions rather than recognize an independent action by the child for backup child support. Each of these routes would improve on the status quo; but each has limitations that makes an independent action for backup child support superior.

1. Rescue Doctrine

Tort law, of course, imposes no general obligation to act for the protection of others. At common law, the only general obligation owed to all other members of the community is to refrain from tortious acts that create an increased risk of harm to others. The law has, however, long recognized exceptions to this general rule in the most compelling cases. The courts are quite willing to impose an obligation to act for another's benefit when the relation between the parties is "of such a character that social policy justifies the imposition of a duty to act."
Sometimes, a relationship acquires this character because the defendant is responsible for the plaintiff’s predicament. At other times, a duty is imposed because the very nature of the relationship between the two parties challenges the individualistic assumptions that underlie the general rule. On this latter basis, innkeepers owe affirmative obligations to protect their guests, common carriers to protect their passengers, and even teenagers to protect their drinking buddies. An especially important factor in determining whether a “special relationship” of this sort exists is whether the person in need of assistance is dependent on the defendant. The second *Restatement of Torts* summarizes the trend this way: “The law appears . . . to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or mutual dependence.”

Because a tortfeasor who causes the birth of a child is responsible for the child’s very existence, the relationship between that tortfeasor and the child is a strong candidate for inclusion among those special relationships that give rise to an obligation to rescue. Even more than the child’s parents, the defendant is responsible for the child’s birth. That child now depends on adults for protection and support. Because the tortfeasor created this dependency, the imposition of a limited obligation to help protect that child from future harm by providing backup child support seems a reasonable response.

Tortfeasors who cause the birth of a child might, however, 

---

97. Indeed, if a defendant’s conduct puts the plaintiff in peril, he has a duty to act even if the conduct that created the risk was neither negligent nor intentional. See, e.g., Tubbs v. Argus, 225 N.E.2d 841, 842-43 (Ind. Ct. App. 1967) (passenger injured in defendant's car); Hollinbeck v. Downey, 113 N.W.2d 9, 12-13 (Minn. 1962) (hooked golf ball created duty to warn); *Restatement (Second) of Torts* § 321 (1965) (creating risk of injury); *id.* § 322 (injuring another and creating danger of further harm); *Keeton et al.*, supra note 2, § 56. When they create the need for help, these persons incur the responsibility to provide it. Similarly, voluntary rescuers must use reasonable care not to create new or additional dangers for the rescued person. See, e.g., Erie Ry. Co. v. Stewart, 40 F.2d 855, 857 (6th Cir.), cert. denied, 282 U.S. 843 (1930); *Restatement (Second) of Torts* §§ 323-324 (1965).

98. *Restatement (Second) of Torts* § 314A(2) (1965).
99. *Id.*
101. *Restatement (Second) of Torts* § 314 cmt. b (1965). This factor may help to explain the affirmative obligations of innkeepers, common carriers, employers, and especially of persons who take charge of helpless persons, *id.*, or who voluntarily take “custody of another under circumstances such as to deprive the other of his normal opportunities for protection,” *id.* § 314A (innkeeper, common carrier, custodian); *id.* § 314B (employer); *id.* § 320 cmt. b (depriving another of ability to protect self).
102. *Id.* § 314A cmt. b (1965).
contend that they are entitled to rely on the child’s parents to protect the child. But this contention is unpersuasive in the context of tortiously induced births, because the child’s parents have relied on the defendant in the first instance to avoid the birth of the child. It is unfair for the defendant to shift the entire financial burden to them merely because they have accepted responsibility to rear the child.

The tort law governing rescue, therefore, provides the best raw material from tort law for bridging the gulf between family law and tort and gives an unexpected pedigree to the claims of the resulting children. It should not be surprising that the borders of tort and family law are closest here. The rules imposing an obligation to rescue manifest the broadest conception of individual responsibility in tort law.

Having said this, however, an important caveat is necessary. Optimal handling of the children’s claims will still require the blending of this tort doctrine with the family law remedy of child support. In tort, the protection afforded to the child is limited to protection against future harm. This limitation on rescue obligations threatens to mire the child’s support action in a debate over whether the child is in danger of harm or merely wants an extra benefit from the tortfeasor. For example, the defendant might concede that malnutrition would harm the child but contend that vitamin pills are merely a benefit he is not obliged to provide. Used this way, the harm-benefit distinction seems likely to be a wooden proxy for minimally adequate care.

The more appropriate question is not whether the child is in danger of harm but whether the child’s needs are being fairly met. To answer this question, courts need to consider how much the child is likely to benefit from the requested care, the resources of the child’s family, and how much the defendant can fairly be asked to sacrifice. That assessment cannot be reduced

103. See id. § 314A cmt. f (1965) (“He is not required to give any aid to one who is in the hands of apparently competent persons . . . .”).

104. As a result, circumstances giving rise to an obligation to rescue are exceptions to the act-omission distinction. But they do not entirely escape the harm-benefit distinction because the two distinctions are not identical. Special relationships do, however, escape the harm-benefit distinction in one important sense. The defendant must protect the plaintiff from risks of harm that the defendant did not cause. In this sense, the defendant must do more than avoid harming the plaintiff. He must confer a benefit. On the other hand, the plaintiff need only be protected from harm by others. In other words, the benefit conferred by the defendant is to protect the plaintiff from harm. In this respect, the harm-benefit distinction is retained.
to the beguiling simplicity of an either-or distinction between harm and benefit.  

Yet, the harm-benefit distinction is likely to remain a doctrinal requirement so long as the action is viewed exclusively as one for compensatory damages in tort. It is here that lawmakers would do well to bridge the border between family law and tort. Although the rescue doctrine provides important raw material for imposing support obligations on a person whose misconduct results in a needy child, family law provides a more suitable source of supplies from which to construct the remainder of the bridge. For the remedy, lawmakers should look to family law governing child support. As discussed above, some courts have already done so in cases where a man misrepresents his paternity to a stepchild. In those cases, the remedy is child support, not damages for emotional distress.

2. The Special Benefits Rule

Of the three courts permitting recovery in wrongful life cases, only the California Supreme Court offered a doctrinal justification for its decision. In *Turpin v. Sortini*, the court cited the tort "benefits" doctrine as a basis for ignoring the benefits conferred by the tortfeasor, thereby permitting recovery in the absence of net harm to the child. Under this doctrine, only benefits to the specific interest harmed by the tortious conduct may be used to offset recovery and even then, only to the extent equitable. As a result, the benefits doctrine sanctions recovery for wrongful conduct even when the offending conduct has con-

105. Alas, the courts may still be obliged to engage in this task. With the gradual abrogation of intrafamily immunities, children will be allowed to sue their parents for torts. Because the parent-child relationship is likely to constitute a special relationship and, thus, give rise to a tort obligation to rescue the child from harm, the courts may eventually be obliged to decide whether the obligation to rescue extends beyond the obligation to protect the child from accidents and, if it does, which kinds of parental neglect give rise to "harm."

106. 643 P.2d 954, 965-66 (Cal. 1982).

107. The *Restatement of Torts* states the rule as follows:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

*Restatement (Second) of Torts* § 920 (1979). "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." *Id.* cmt. b. For a more detailed discussion of this doctrine, see Peters, *supra* note 3, at 526-34 (discussing the special benefits rule and its possible application to wrongful life cases).
ferred a net benefit on the victim. No tort doctrine so clearly tolerates noncompensatory recovery.

Not surprisingly, the California Supreme Court believed this rule provided useful raw material for fashioning relief in wrongful life cases when no net harm could be proven. That intuition is sound; the special benefits rule does illuminate the damages issues in the wrongful life cases. In particular, it provides a basis for finessing the comparison between life and non-existence. And if its application were expanded beyond the facts of *Turpin* to include recovery of both ordinary and extraordinary childrearing expenses, it would offer a potential alternative to an action for backup child support. However, this application of the benefits rule to wrongful life cases would resolve the dispute between the tortfeasor and the child without considering the defendant’s claim that the parents should share in the responsibility for support. Because of this, it presents a risk of excessive recovery. Consequently, an action for backup child support would be preferable.

a. Advantages of the Special Benefits Rule

The special benefits rule attempts to avoid windfalls to plaintiffs while at the same time protecting them from being forced to accept a trade of their interests for unwanted “benefits.” As expressed in the Restatement, tort law mediates this conflict by permitting offset within the same category of damage when it is equitable to do so, but denying offset for benefits conferred to a different interest than the one harmed. Thus, a tort yielding more financial benefits than it causes may not form the basis for an award of damages for financial loss. Because the type of benefit conferred closely resembles the type of harm suffered, the goal of avoiding forced trades is only slightly impinged, whereas the failure to aggregate would risk a windfall to the plaintiff. On the other hand, medical expenses caused by a surgery performed without the patient’s consent may not be offset to reflect the surgery’s success in reducing the patient’s pain. Otherwise, the plaintiff could be left physically comfortable but impoverished.

108. *See* *Restatement (Second) of Torts* § 920 cmt. f (1979). The Restatement’s illustration is illuminating. A landowner whose garden is wrongfully destroyed by a neighbor who builds a more valuable garage in its place may recover the amount necessary to remove the garage and restore the garden. *Id.* illus. 11.

109. *Id.* cmt. b, illus. 4.
Wrongful life cases also present this dilemma. A child may benefit from an act that gives him life but suffer from lack of sufficient resources to obtain necessary medical care. Unfortunately, the benefits conferred cannot be exchanged for the missing assets. Prohibiting offset prevents this forced trade. At the same time, it avoids the problems associated with the calculation of general damages in wrongful life cases.

Use of the benefits rule to defend recovery of extraordinary medical costs in wrongful life cases, however, invites two distinct criticisms. First, use of the rule arguably offends a common interpretation of the benefits rule. Because pecuniary gains conferred by the defendant’s action may be used to offset pecuniary losses incurred, the tortfeasor in a wrongful life case arguably should be entitled to reduce her liability for the child’s medical expenses by any financial benefits, such as the ability to earn money, conferred on the child by life itself. Yet the California Supreme Court never considered these possible future financial benefits to the deaf child who sued in *Turpin* when it permitted her to recover her extraordinary expenses.

This criticism can be answered in two ways. First, many disabled children will have no prospect of significant future financial benefits, such as wages or inheritance. Although the child may be eligible for governmental or charitable assistance, the tortfeasor is in a weak position to demand that the child rely on these sources of support. Given the tortfeasor’s role in the child’s birth, she is poorly situated to benefit from the willingness of others to rescue the child if she does not.\(^{110}\) Second, it may be inequitable to take future financial benefits into account even if they are likely. The second *Restatement of Torts* rightly recommends that recovery not be reduced to reflect benefits conferred by the tortfeasor when doing so would be unfair.\(^{111}\) There are two reasons why reduction of a disabled child’s recovery to reflect potential future earnings will often be inequitable. First, his future resources cannot be readily exchanged for the special facilities and care that he needs at present. Second, his future earnings will be needed to support him in the future. They should not be treated as surplus earnings for purposes of reducing the child’s recovery unless they are likely to exceed the sup-

\(^{110}\) For a further discussion of the choice between tortfeasor liability and public assistance, see infra text accompanying and following note 134.

\(^{111}\) *Restatement (Second) of Torts* § 920 cmt. f (1979); see Dan B. Dobbs, Remes: Damages, Equity, Restitution § 3.6, at 182 (student ed. 1973).
port needs that the plaintiff will have at the times he earns them. Accordingly, courts should be extremely reluctant to endanger the child's clear and immediate financial needs to reflect future surplus earnings that may never be realized.

A second problem with the use of the benefits rule is more troublesome. Even if the benefits conferred by the defendant are ignored, the plaintiff must still demonstrate harm to one or more of her interests in order to recover compensatory damages. Joy Turpin, for example, can only demonstrate harm to her distinct interest in medical care if having extraordinary medical needs is worse than never having existed. This reintroduces the very comparison that courts have tried to avoid.

One way to resolve this dilemma within the confines of traditional tort doctrine is to narrow the comparison. Rather than comparing the child's extraordinary expenses to the state of nonexistence, courts could compare the child's actual costs to the costs that would be incurred if the child had not been born. Because nonexistence would generate no medical costs, all the child's medical costs must be attributed to the tortious conduct. This approach avoids any attempt to calculate the overall value of the child's life. Thus, it avoids the philosophical and moral dilemmas raised by the claim that life itself can be harmful. In addition, this calculation is far more concrete than calculation of the extent to which a disabled child's suffering exceeds the joys of living. The California Supreme Court emphasized this concreteness when explaining its decision in Turpin.

As a result, both potential problems with application of the benefits rule can be resolved. However, courts that decide to follow Turpin in its use of the benefits rule should be careful to avoid the unduly narrow application of the rule suggested by that court. The case incorrectly suggests that only disabled children can recover, and only for their extraordinary expenses. Contrary to the court's assumption, a disabled child will also need help with ordinary costs, like food, clothing, and shelter,

112. When the special benefits rule is applied in ordinary cases, the plaintiff's adversely affected interest, like reputation, has been made worse off by the tortious conduct. So the special benefits rule does not necessarily dispense with the need to show harm to the individual interest for which recovery is permitted even though it does dispense with the need to prove net harm to the plaintiff's overall interests. The traditional conception of harm may still govern the way that compensable injury to an individual interest is identified and measured.

especially after the legal support obligation of the parents has ended.\textsuperscript{114} In some cases, even healthy children will have unmet support needs. Under the logic of the benefits rule, ordinary child support costs should also be recoverable at least to the extent that they exceed future surplus earnings. That is because ordinary support costs, like extraordinary ones, exceed the support costs that would have been incurred if the child were never born.\textsuperscript{115}

b. Disadvantages

If recovery using the benefits rule were expanded to include ordinary support expenses, it could serve as a potential substitute for recognition of an action for backup child support. This route to recovery offers the advantage of using existing doctrine. Unfortunately, it also presents a risk of excessive recovery. Sometimes the recovery of full child-rearing costs will be a fair result, as when a child’s parents are unable to support him or are no longer legally obligated to do so (as is often the case with post-majority expenses). An unfair outcome could occur, however, whenever the recovery of support expenses by the child would allow the parents to evade the limits on their own right to recovery imposed by wrongful birth doctrine.\textsuperscript{116} In those cases, the recovery of full child-rearing costs could result in an excessive award to the family as a whole unless the family can establish that they lack the resources necessary to protect the child’s interests.

To cure this problem, the courts would have to apply the benefits rule in a way that takes account of the child’s needs and the family’s resources. In essence, this would disguise what amounts to a new action for backup child support as a traditional tort action for compensatory damages. Explicit recogni-

\textsuperscript{114} Arguably, however, even these basic needs are “extraordinary” if the child is unable to provide them for herself after reaching the age of majority. They are all extraordinary in the sense that they exceed the needs a healthy child would have.

\textsuperscript{115} \textit{Turpin} rejected pain and suffering damages, in part, because these damages were likely to be offset by the emotional pleasures of life. But the court never addressed the merits of a claim for ordinary child support expenses, even though these costs, like extraordinary medical expenses, constitute “economic loss.” \textit{Turpin} v. \textit{Sortini}, 643 P.2d 954, 965 (Cal. 1982).

\textsuperscript{116} This could occur whenever the parents had standing to recover the costs in question but their recovery was limited or offset to reflect the joys of parenting or where recovery was barred or restricted due to defenses based on parental conduct. It will not occur in cases where the child recovers only those support expenses that arise after the legal support obligation of the parents has ended.
tion of an action for backup child support seems preferable for two reasons. First, use of the benefits rule to accomplish this result would require modifications that would seem unprincipled without a nontort rationale. Second, use of the benefits rule would obscure the most powerful and easily understood normative basis for recovery. Simply stated, some of these children will have support needs for which the person who has tortiously caused the child's birth is rightly held responsible. By obscuring this underlying rationale, the benefits approach will likely render the child's claim less compelling. Certainly, the unwillingness of any other court to follow the California Supreme Court in its reliance on the benefits rule supports this fear.

Until lawmakers look beyond tort law for their rationale, courts that permit recovery will remain vulnerable to criticism that their rulings are unprincipled. Furthermore, until tort rationales are supplemented, courts that allow recovery are unlikely to fashion proof requirements that are fair to all the parties. They are unlikely to appreciate that both disabled and healthy children will sometimes need help with ordinary expenses. They are also unlikely to recognize that their assumptions about a disabled child’s unmet needs may be unfounded. Recognition of an action for backup child support is, therefore, more likely to produce both a solid factual record concerning the suitability of relief, and a more precisely tailored monetary award than use of the benefits rule.

3. Reform of Wrongful Birth Doctrine

With several important modifications, the law governing parental wrongful birth actions could protect the affected children much more adequately than it does now. Use of wrongful birth actions to protect these interests in lieu of a new action for backup child support would have the advantage of borrowing and building on familiar doctrine. The countervailing disadvantage, however, is that the modifications necessary in order to eliminate the need for an independent claim for backup child support are difficult to rationalize as components of the parents’ wrongful birth action. As a result, an independent action on behalf of the children is preferable to relying entirely on reform of wrongful birth doctrine.

The first of four major doctrinal steps that would greatly improve the parents’ cause of action as a vehicle for protecting the children is to allow parents to recover for support costs
likely to be incurred beyond the child's majority and even beyond the death of the parents.\textsuperscript{117} Many states already allow postmajority support for unemancipated, disabled children,\textsuperscript{118} and others could improve the adequacy of their wrongful birth recovery by doing likewise. Under the logic of the harm requirement as traditionally interpreted, however, courts could award these additional damages to the parents in their tort action only if the parents were themselves legally obligated to provide this additional support. Extension of parental liability to exclude postmajority support and, to an even greater extent, the extension of recovery to include expenses likely to be incurred after the death of the parents, would require a major extension of parental responsibility with implications extending far beyond wrongful birth actions. For this reason, courts may reasonably refuse to endorse it.

A stronger case can be made for imposing postmajority child support on the tortfeasor than on the parents because the responsibility of the tortfeasor to the child arises out of antisocial conduct. This point is likely to be overlooked as long as parental wrongful birth actions are the exclusive vehicle for protecting the welfare of the children, because the tortfeasor's liability for support in wrongful birth actions is derivative of the parents' obligation. By contrast, an independent action that posits a direct tortfeasor responsibility to the child would permit the courts to consider whether the tortfeasor's misconduct justifies a postmajority support obligation, regardless of whether the parents, too, are liable for that support. For this reason, a new cause of action for backup child support seems superior to modifying the law governing parental wrongful birth actions.

The second reform that would improve the protection offered by parental wrongful birth actions is to insulate parental

\textsuperscript{117} To adequately protect an affected child, parental recovery for postmajority expenses would need to include both extraordinary expenses associated with any birth defects and also any ordinary expenses, like food, shelter and clothing, that the child cannot provide for himself because of his handicaps.

recovery of support costs from reduction for the joys of parenting. At least one state already does so in the belief that reduction of recovery to reflect forced benefits is unfair to the parents.  


120. Id. at 249.

However, in jurisdictions that believe that offset is necessary to avoid a parental windfall, this modification would protect the child at the expense of an apparent injustice between the adults. To defend it, these courts would have to acknowledge that the child has a separate noncompensatory interest in backup child support that justifies recovery when parental resources are inadequate—notwithstanding any joys bestowed on the parents. In substance, if not in form, this would amount to recognition of an independent tort action for child support on behalf of the child, rather than a rethinking of the parents' rights. As a result, this reform of wrongful birth doctrine seems less honest than direct recognition of an independent action for backup child support.

The third necessary reform would be to insulate the support portion of the parents' claim from defenses that should not bar the child from recovery. These might include rejection of the ordinary adult statute of limitations and insulation of the child support portion of the claim from comparative fault reduction to reflect parental negligence. Both of these modifications would provide the child with protections similar to those provided in an ordinary child support action against a natural parent. But both would appear unprincipled when extended to wrongful birth actions so long as the parents' action is perceived as a tort action by the parents to recover for their own harm.

Collectively, these reforms would form the equivalent of a new cause of action for child support. They would, however, hide it within a parental action that sounds exclusively in tort. Honesty and clarity counsel for separate recognition of the child's claim. Separation would also permit states that deny child support recovery altogether in wrongful birth actions to endorse an action for backup child support. In addition, an independent action would offer portability. Children who are abandoned or surrendered for adoption could use this portability
to obtain child care pending placement, and even after placement, if necessary. For these reasons, honest recognition of a new tort-based claim for child support provides a better way to protect the welfare of these children than exclusive reliance on modifications of wrongful birth doctrine.

IV. POLICY CONSIDERATIONS

The ultimate wisdom of recognizing a tort-based claim for child support is a question of values and of policy, not a matter of logic. Because this claim straddles the fields of family law and tort, its policy implications do not fit neatly into the traditional categories used to evaluate tort doctrine. Nevertheless, it is likely that many courts and commentators will reasonably ask how this proposed tort-based cause of action fares when measured against tort law's holy trinity: fairness, compensation, and social consequences (including deterrence). For that reason, the following policy discussion is organized around these goals.

A. Fairness

The fairness of the child's claim against the tortfeasor provides the most important argument for recognizing the claim. The tortfeasor's misconduct has irreversibly changed the status quo by creating a new life with new needs. The tortfeasor's culpability and his causal responsibility for the birth of a dependent child materially distinguishes his conduct from other harmless negligence. Furthermore, it justifies a novel approach to the issues of injury and relief that does not rely on proof of harm, but focuses instead on proof of the child's need for backup support.

As discussed in Part II, a carefully fashioned action for backup child support promises to fairly accommodate both the child's legitimate claim against the tortfeasor, and the tortfeasor's claim for a just allocation of support responsibility between tortfeasor and parents. Because this new obligation would backup the responsibility of the parents, rather than replace it, it should satisfy the concern of many courts that the liability of the defendant be both proportional to the misconduct and fairly apportioned with the parents.

Even jurisdictions that have voiced the strongest objections

121. In the case of a disabled child, for example, potential parents may be more ready to adopt if the medical expenses are provided by the tortfeasor.
to making tortfeasors into "surrogate parents" have been willing to transfer some obligations to the tortfeasor in the clearest cases. The Florida Supreme Court, for example, stated that parents have the sole obligation for supporting their children under Florida law and, on this basis, denied wrongful birth recovery of ordinary rearing expenses. The court, however, proceeded to allow parental recovery for the extraordinary costs associated with the child's birth defects. By doing so, it transferred a portion of the responsibility for the child's support to a third-party tortfeasor.\footnote{122} Notwithstanding its visceral objections to the re-allocation of support responsibility to a party who receives none of the benefits of parenting, the court tolerated just that result because re-allocation was fair under the circumstances.\footnote{123}

But because a new tort-based cause of action for support would permit recovery against a defendant who may not have caused any harm to the child, and who in the eyes of some, may have conferred a benefit on the child, this new action is likely to be challenged as an abandonment of the values that underlie the harm requirement. From this point of view, the harm require-

\footnote{122. Fassoulas v. Ramey, 450 So. 2d 822, 824 (Fla. 1984).}

\footnote{123. Courts routinely impose support obligations on tortfeasors to the extent that they can do so without running afoul of the harm requirement. When the negligence of a third party causes a child to suffer injuries likely to require costly medical care, the family can recover. While the child would recover for pain and suffering and loss of future wages, the parents will ordinarily hold the claim for medical expenses unless they waive it. See, e.g., Blue Cross/Blue Shield v. St. Cyr, 459 A.2d 226, 228 (N.H. 1983) (parents' claim viable rather than child's because parent liable for minor child's medical expenses); Davis v. Drackett Prods. Co., 536 F. Supp. 694, 697 (S.D. Ohio 1982) (applying Ohio law; joint child-parent action for medical care). Furthermore, when tortiously inflicted injuries to the parents threaten the welfare of their children, the children are protected by the ability of their parents to recover lost wages or the costs of substitute child care. If the injured parent dies before recovery, the children are protected by survival statutes, see \textit{Keeton et al.}, supra note 2, § 126, and wrongful death statutes, see \textit{id}. Increasingly, courts are also allowing children to recover for the loss of parental consortium. See, e.g., Ueland v. Pengo Hydra-Pull Corp., 691 P.2d 190, 191 (Wash. 1984); Theama v. City of Kenosha, 344 N.W.2d 513, 522 (Wis. 1984). \textit{Contra} Borer v. American Airlines, Inc., 563 P.2d 858, 860-61 (Cal. 1977); Northwest v. Presbyterian Intercommunity Hosp., 652 P.2d 318, 332 (Or. 1982). All seven of the states that recognized the claim as of 1988 had done so since 1980. See \textit{Dearborn Fabricating & Eng'g Corp. v. Wickam}, 532 N.E.2d 16, 16-18 (Ind. Ct. App. 1988), \textit{vacated}, 551 N.E.2d 1135 (Ind. 1990). Twenty-six states reject this claim. Finally, many courts allow parents to bring wrongful birth actions for some or all of their child support costs. See \textit{supra} text accompanying notes 57-59, 66-68. When harm can be demonstrated, therefore, courts readily protect children against tortious threats to their care. The major obstacle to recovery in wrongful life cases has been the requirement that the child prove harm, not a public policy against third-party contributions toward support of the child. The difficult question is not whether support obligations should ever be imposed on nonparents, but rather when and how much.}
ment states the moral limits of our responsibilities toward each other. This concern can be answered. Our legal system has always been ready to impose obligations that extend beyond the duty to avoid harm when the circumstances justify doing so. Tort law, for example, imposes a duty to rescue in special relationships regardless of whether the defendant has caused the plaintiff any harm. The benefits rule, also, has the effect of permitting recovery by plaintiffs who on balance have suffered no harm from the defendant’s actions. In family law, moreover, proof of harm has never been an absolute prerequisite to recovery. These existing doctrines illustrate the judiciary’s willingness to impose affirmative obligations that extend beyond the avoidance of harm when the equities justify it. The wrongful life cases are strong candidates for similar treatment.

An action for backup child support would serve the demands of justice while avoiding the problems that doomed the tort action for compensatory damages. Because it escapes the comparison between life and nonexistence, damages are calculable and do not require a finding that life itself is a legally cognizable injury. To the contrary, the orientation of the child support action is to enable the disabled, to focus on the future, not the past, and to emphasize the child’s potential, not her injury.

B. Compensation

The tort goal of compensation for harm, on the other hand, simply does not apply to the child’s claim for child support. Unlike the child’s wrongful life claim for general damages in tort, the child’s support claim is not designed to make the child whole or to redress past harms. Instead, it is intended to protect the child’s welfare by fairly allocating responsibility among adults morally responsible for the child’s birth. Thus, it serves a social policy objective more commonly associated with family law than tort. But it borrows from tort law its definition of the kind of conduct that ought to give rise to a support obligation. In this respect, it resembles child support actions based on misrepresentations of paternity, where the violation of a tort-like duty gives rise to an obligation of child support.

This goal of protecting the child’s welfare is not in conflict with the tort policy of compensation. It exists independently of that tort policy and supplements it. The judicial presumption that life is always a benefit may make compensatory damages
inappropriate, but it does not tell us whether the defendant should contribute to the child's support and, if so, to what extent. That question turns on the fairness of allocating responsibility to the tortfeasor and the social consequences likely to flow from liability.

In one respect, tort and family law compensation policies converge in this hybrid action. At the same time that it serves the family law goals of insuring adequate support from a responsible party, this cause of action allocates the catastrophic costs of tortious misconduct to a tortfeasor who can distribute that cost more broadly.

C. Social Consequences

Not surprisingly, a new cause of action for child support has the potential for both desirable and undesirable consequences. Given the strong normative arguments in support of the claim, the judicial reception that it ultimately receives is likely to turn on judicial beliefs about the desirability and probability of the potential consequences.

1. Impact on the Family

Tort liability for child support is likely to strengthen the families that receive it. It helps insure the resources necessary to fulfill the family mission successfully, without the potentially divisive allegations about the worthlessness of the child that encumber the pure tort actions for wrongful birth and wrongful life. In some cases, the prospect of tort assistance might even convince parents not to abort an unplanned pregnancy or not to surrender a handicapped child for adoption. And in cases where the parents surrender the child, support funds improve the prospects for a desirable placement.

Furthermore, the action for backup support raises no specter of future actions by children against their parents. Whereas wrongful life actions for compensatory damages could conceivably be asserted against careless parents (and their insurers), a backup action for child support would make no sense against parents who already owe the primary obligation of support to their children. As a result, children will not be suing parents under this new theory.

In addition, backup tort liability reinforces the provider's incentive to protect the parents' procreative rights. Because lia-
Rehabilitating Wrongful Life

...ility arises out of an initial breach of duty to the parents, the defendants will escape liability by exercising more care to respect parental wishes.

In some cases, however, the claim would provide an incentive for interference with parental reproductive choice. The risks are greatest in institutional settings where the tortfeasor's carelessness consists of failure to supervise the sexual activity of legally incompetent patients, thereby permitting an ill-advised conception. The threat of liability could conceivably induce overdeterrence, such as draconian policing of sexual activity of all institutionalized persons with borderline competency. This risk seems quite speculative because an action for backup support would only add marginally to the existing incentives posed by a potential wrongful birth action, but the risk cannot be dismissed. Courts that are, therefore, uncomfortable with a cause of action based on failure to monitor the consensual sexual activity of patients who lack legal competency could limit liability to cases of nonconsensual intercourse, such as the rape in Cowe.

Another potential effect on the family is the possibility that the tortfeasor might be assigned other parental rights or responsibilities. That is the subject of the next section.

2. Unbundling Parental Rights and Responsibilities

By its very nature, a new child support action will require courts to unbundle one of the parental responsibilities ordinarily associated with legal parenthood and to assign it to a third party on a theory borrowed from tort law. Although a new support action would add only incrementally to the existing tort and family law doctrines that already permit some similar unbundling of parental roles, this explicit unbundling of parental rights and responsibilities raises the question of what other parental rights or responsibilities should attach to the tortfeasor's conduct. If the relationship between the child and the tortfeasor justifies backup support liability, perhaps that rela-

---


125. See Foy, 190 Cal. Rptr. at 91-93 (rejecting liability for a mental health facility's failure to supervise consensual sex by residents because, among other things, liability would be too restrictive on patient institutional rights, but allowing a claim for failure to provide contraceptives and counseling).
tionship should also carry other rights or responsibilities. Tortfeasors might contend, for example, that payment of child support to a child whom the tortfeasor has not harmed is the kind of parental obligation that ought to carry with it parental rights such as visitation or medical decisionmaking.

These are not new issues. They arise most prominently in connection with the use of reproductive technologies such as artificial insemination by donor or the hiring of surrogates. In some of those circumstances, parties who are not genetically related to the child end up with parental rights as well as parental responsibilities. In tort cases, however, the harm requirement served as an ostensible limit on similar expansion of parental roles. In tort, no legal liability theoretically arose unless harm was caused and, even then, the tortfeasor's involvement was limited to financial redress of the harm done. This approach obviated the need to answer hard questions about any other parental responsibilities that ought to attach to tortious misconduct and, a fortiori, mooted any questions about the kinds of parental rights that the tortfeasor should enjoy.

Because a tort-based action for child support steps beyond the boundaries of traditional tort doctrine, the harm requirement no longer serves as a basis for sidestepping questions about parental rights and responsibilities. The questions will have to be addressed on their merits. But tortious conduct that results in the birth of a child raises these issues of the parental role in a quite different context than, for example, artificial insemination by a donor. Because of these differences, the cases in which it would be appropriate to expand the tortfeasor's parental role beyond responsibility for backup child support will probably be quite rare.

Two of the differences between wrongful life and reproductive technology cases are especially important. First, the tortfeasor's responsibility arises out of misconduct toward the


127. This approach worked tolerably well for ordinary tort cases, but even there it has received serious criticism. Simply stated, the criticism is that exclusive reliance on monetary awards permits tortfeasors to escape the consequences of their misdeeds too easily. As a result, Leslie Bender has advocated that they also be obligated to assist in the emotional and rehabilitative needs of their victims. Leslie Bender, Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 DUKE L.J. 848, 901-08.
child's family. This reduces the strength of any claim to parental rights by the tortfeasor notwithstanding the benefits of life conferred on the child by his misconduct. Second, the tortfeasor is a stranger to the family. This markedly distinguishes him from a husband who consents to his wife's artificial insemination with donor sperm. Instead, the tortfeasor resembles other categories of men on whom courts have imposed child support obligations without automatically assuming, at least explicitly, that other parental rights or parental responsibilities should automatically accompany that support. These men include de facto fathers who have interfered with access by the natural father, men who represented themselves to be the natural father of the child, and men who have encouraged a woman to bear and raise a child conceived by another man. Indeed, tortfeasors who induce a child's birth are much less closely connected to the affected families than any of these other groups of men and, as a result, less likely to be suitable as candidates for intimate rights or responsibilities.

Given the lack of any family relationship between the tortfeasor and the affected family, courts will rarely encounter good faith claims by the tortfeasor for visitation rights. If they are made at all, these claims will ordinarily be part of an overall negotiating strategy intended to reduce the ultimate settlement amount, not to obtain parental rights. The most likely exceptions to this generalization would be tortfeasors who are ordered to make periodic support payments rather than a lump sum. A few of these tortfeasors might desire a personal relationship with the child as well. Given the tortfeasor's initial misconduct and the lack of a freestanding personal relationship with the family, however, my own inclination would be to treat the choice of a periodic payment schedule as an insufficient basis on which to justify the bestowal of any visitation or custody rights. Alternatively, some courts might opt to award lump sums to avoid this possible entanglement.

Just as further parental rights will seldom be appropriate, neither should the tortfeasor have greater responsibilities. So long as the tortfeasor is a stranger to the child, the best interests of the child will rarely justify an order that the tortfeasor play a

---

128. Most of these cases have not addressed the issue. But in one, a stepfather, whose promises to a pregnant woman that he would treat the child as his own had helped induce the woman to marry him, was required to pay child support and given "reasonable rights of visitation." Perkins v. Perkins, 383 A.2d 634, 637 (Conn. Super. Ct. 1977).
greater role in raising the child. The strongest cases for expanding the tortfeasor’s role beyond financial support would arise whenever one or both of the natural parents is unable to rear the child. In the Cowe case, for example, a healthy child was born to two parents with serious mental incapacities. This scenario seems unlikely to occur with any regularity. But when it does, courts will need to examine these disputes on a case-by-case basis to decide whether the nature of the tortfeasor’s conduct and the present circumstances of the family dictate expansion of the tortfeasor’s role beyond backup child support. The prospect of this line-drawing may be unappealing to some courts, but if so, they can ameliorate this concern without rejection of the action altogether. Instead, those courts could award lump-sum recoveries and treat the parties as strangers thereafter.

3. Deterrence

A new tort-based cause of action for child support has the potential to provide additional incentives for greater care. The incremental deterrent effect that results will “foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice.”129 Two of the courts recognizing wrongful life actions for extraordinary support expenses have assumed as much.130 However, tort liability could also cause undesirable changes in provider behavior and in the cost and availability of some medical services. This danger constitutes the most serious disadvantage associated with this cause of action. Fortunately, there are several reasons to doubt that excessive deterrence will occur. In addition, the social benefits from the transfer of funds from provider to child are likely to be significant. As a result the risks should not preclude cautious experimentation with the claim.

Inappropriate responses could take several forms. For example, the nursing home in Cowe might be more inclined to seek sterilization of patients rather than improve its supervision. Or physicians whose negligence leads to the birth of a child might have even more incentive than is already provided by the specter of wrongful birth liability to encourage the mother to abort, especially if she is poor and likely to need backup child support.

130. Turpin v. Sortini, 643 P.2d 954, 966 n.15 (Cal. 1982) (“provide a comprehensive and consistent deterrent to negligent conduct”); Harbeson, 656 P.2d at 496 (see language quoted supra in text accompanying note 129).
support. But there is no evidence that wrongful birth doctrine has caused these results. A supplemental action for backup child support seems unlikely to materially increase that risk.

Because the risk of liability for backup support would be greatest in the treatment of poor patients (who are most likely to need backup support in the event of an unwanted birth), recognition of this action could also provide a disincentive to serve these patients. This potential impact is quite different from the disincentive effects of patient income in other malpractice actions. In other tort cases, potential liability is greatest when a high-income patient is injured because of the risk that the patient will lose earnings as the result of an injury. Nevertheless, I am skeptical that an action for backup support would deter the provision of service to poorer patients—as long as the providers are being paid for serving those patients. It might, however, provide further disincentives to providing unpaid medical care. Even so, this marginal disincentive is likely to be trivial relative to the existing disincentives to treating these patients. As a result, this risk seems to be outweighed by the risk of leaving the resulting children underprotected.

In addition to these potentially adverse consequences, a new cause of action for backup child support could also conceivably induce too much investment in otherwise desirable kinds of accident avoidance, like better equipment or training. This surprising possibility exists because a backup support action would impose liability where no "harm" has been proven. In this respect, child support liability arguably resembles punitive damages or fines. Like those remedies, backup support awards would not compensate for harm caused to the plaintiff. Thus, the threat of child support liability might create an incentive to invest an additional amount in the avoidance of accidents that do no harm to the plaintiff.\textsuperscript{131} The risk of additional damages

\textsuperscript{131} The eventual impact of noncompensatory costs like these is difficult to predict. The tortfeasor could avoid liability by exercising reasonable care. That might prevent undue defensive medicine. On the other hand, a tortfeasor with doubts about how their conduct will be judged in the future could invest additional time and money in accident avoidance because of the risk of support damages. If a potential defendant can reduce the chance of erroneously being adjudged negligent by taking more care, he may do so. Richard A. Posner, Economic Analysis of Law 176-77 (3d ed. 1986). The greater the liability, the more they are apt to spend. The availability of liability insurance may minimize this, at least if insurers fail to take steps to reduce the accidents caused by their insured (such as by charging loss-based premiums or supervising the risk management practices of their insurers). William M. Landes & Richard A. Posner, The Economic Structure of Tort Law 13 (1987).
could also drive premiums up and thereby make the medical services more expensive. In some cases, providers may stop offering the service. Even if they continue to offer it, the higher prices will reduce the affordability and, thus, the use of geneticists, obstetricians, urologists, and others whose carelessness can result in the birth of a child against parental wishes. Under traditional tort efficiency analysis, these consequences would be undesirable unless the harm caused by the unintended births outweighs the social costs of this additional investment in accident avoidance.  

There are at least five reasons to doubt that a backup action for support will induce undue accident avoidance. First, the defendant can avoid liability by exercising reasonable care. Second, noncompensatory damages, like child support, may be necessary to induce an ideal level of deterrence. Without these damages, tortfeasors may underinvest on the assumption that only a fraction of the persons affected by their negligence will actually seek and recover damages. To the extent that the tortfeasors believe this, they are likely to reduce their accident avoidance measures below the theoretically optimum level. Noncompensatory damages can counteract this temptation. As a result, noncompensatory damages may serve the risk-utility goals of tort law.

A third rationale for accepting the consequences of a child's support liability without proof of harm is implicitly provided by the benefits rule. Under the benefits rule, plaintiffs can recover damages that are not reduced to reflect the benefits conferred by the tortious conduct. The deterrence imposed under the benefit rule could, therefore, be greater than theoretically ideal because the defendant will have an incentive to invest amounts in accident avoidance that are much greater than the net harm caused by his tortious conduct. This risk is accepted because it is preferable to the inequities that would result if the defendant were allowed to reduce or defeat recovery. In effect, the victim is allowed to discount the value of the unsought benefits. Similar discounting of the benefits conferred by tortiously induced births

---

132. The fact that such carelessness may cause harm to the parents does not change this analysis. The net harm caused to the parents should be reflected in their recovery. The threat of this recovery will deter careless services. Any additional deterrence caused by liability to an unharmed party (like the child) would create the risk of excessive investment in accident avoidance.

133. Cf. LANDES & POSNER, supra note 131, at 160 & n.12.
RETHINKING WRONGFUL LIFE

is also appropriate because the long-term benefits to the child and to society are speculative and because these long-term emotional and financial benefits cannot be exchanged for the support that the child needs in the short-term.

Fourth, the marginal impact of this new cause of action on provider activity is likely to be insignificant. No floodgates of litigation will be opened. All disputes that would be candidates for this new cause of action already expose health care providers to the risk of wrongful birth liability. Because backup support actions will require proof that the child is likely to have unmet support needs, the viable cases for backup support will constitute only a subset of the wrongful birth cases.

Fifth, and perhaps most importantly, any efficiency analysis must consider how these child support awards will be spent. The presence or absence of harm to the child from birth itself is not the only relevant factor. For both humanitarian and utilitarian reasons, a society should adequately support its children. Only by doing so can society offer each child some threshold amount of opportunity, security, and welfare. Children require an investment of time, affection, and money to realize their potential for a productive and fulfilling life. That investment is likely to pay a substantial return. The greater the child’s need, the more likely that the return on a tortfeasor’s support payments will exceed the societal benefits expected if the funds were left in the hands of the tortfeasors and their patients. In that event, cost shifting is socially beneficial in addition to being fair.

4. The Choice Between Tortfeasor Assistance and Charity

The harder question is not whether backup support is socially desirable, but rather who should pay that cost. Under current law either the children and their siblings bear the cost in the form of inadequate support or else the cost is absorbed by public and private charities. In my view, the tortfeasor's lia-

134. See Fassoulas v. Ramey, 450 So. 2d 822, 824-30 (Fla. 1984) (Ehrlich, J., dissenting) (father out of work and family on welfare); Mears v. Alhadeff, 451 N.Y.S.2d 133, 134 (App. Div. 1982) (unwed mother on welfare after unsuccessful abortion); see also Viccaro v. Milunsky, 551 N.E.2d 8, 13 (Mass. 1990) (the Massachusetts Supreme Court hinted that it would impose support responsibilities if the affected child became a public ward). Conceivably, an argument could be made for rejecting these claims and thereby encouraging patients to obtain their own health insurance for their future children. But this argument overlooks the possibility that child support assistance may be necessary for nonmedical costs as well. No insurance pool exists for unanticipated child support costs. Even as to medical costs, an argument can be made that it is unfair to the parents and others in their
bility ought to precede that of the community and the children. The defendant's misconduct caused the birth of this child. As a result, it is inappropriate for the defendant to wash his hands of responsibility by claiming that his antisocial conduct conferred unsought benefits on the community.

Government funding would, however, offer its own advantages. Public assistance would avoid the risk of overdeterrence and keep the prices for these medical services down. In addition, the government would probably deliver these supplemental funds at lower administrative costs than would be incurred if children were encouraged to seek these funds through lawsuits.

But governmental assistance is likely to provide these children with only minimal subsistence. It is unfair to limit the children born because of third-party negligence to meager public assistance, and to subject them to the possible stigma and humiliation associated with welfare, when the tortfeasor responsible for the child's predicament is able to contribute toward the child's support. If taxpayer funds are to be spent, they should be used to improve access to medical services, like fertility services and prenatal care, prices for which might be raised by child support liability. This will address the access problem in those contexts that present it most poignantly, while continuing to pass the true costs of these services on to the patients who use them and the physicians who provide them.

D. Policy Summary

As a matter of fairness, the tortfeasor's culpability and his causal responsibility for the birth of a new and dependent human being justify the imposition of a duty to provide backup child support. Because this action would not base relief on proof of harm, it would not directly advance the traditional tort goal of compensating for such harm. It would, however, serve societal goals of assuring adequate support for the affected children. In doing so, it would spread the costs of this support on the providers and users of the medical services at issue.

The desirability of the resulting cost increases and possible changes in provider behavior is more difficult to assess. The risk

insurance pool to require them to pay for these costs, regardless of the transaction cost differential. Furthermore, the risk of negligence, such as a faulty vasectomy or amniocentesis, is simply too remote to realistically result in the purchase of additional health insurance coverage, given the many more immediate factors that determine whether a family is covered by health insurance and the extent of that coverage.
of undesirable changes in the treatment of poor patients or in the costs and availability of some services is genuine. On balance, these risks seem tolerable because there are several reasons to doubt that excessive deterrence will result. Furthermore, the social benefits from providing these resources to the resulting children are likely to be significant. If so, the ultimate policy question is whether tortfeasors or taxpayers should fund this supplemental child support. In my view, the tortfeasor is the better choice.

A tort-based action for child support holds the promise of serving the important societal objective of providing adequate care for children while avoiding the controversial issues that doomed wrongful life actions sounding in tort. The support action avoids the comparison between handicapped life and non-existence and, unlike wrongful life actions, focuses the courts and the parties on the task of helping the child fulfill his potential. At the same time, the support action will help families stay together and reinforce provider respect for parental choices.

V. CONCLUSION

Children have a strong normative claim against individuals whose misconduct leads to their birth. When their families are unable to provide adequate support, resort to the tortfeasor for backup support is a fair reconciliation of the respective rights of the child, the parents, and the tortfeasor. Thus far, both legal and methodological barriers have precluded scholarly or judicial consideration of this claim. The methodological obstacles have arisen because all of us have treated these claims exclusively as tort claims. This compartmentalization made it difficult to see the place of these actions at the borders of tort and family law. It also created legal obstacles because the characterization of the claims as tort claims subjected them to tort requirements that were ill-suited to do justice when a human life results from a tort.

Nevertheless, many of the raw materials needed to build the necessary bridge between tort and family law are already in place. Existing legal doctrines, such as the tort rules that impose a duty to rescue on tortfeasors who have a special relationship with the plaintiff, are consistent with this new cause of action. So, too, are family law precedents for imposing child support responsibility on men who consent to insemination, induce a woman to forego abortion or adoption, or misrepresent their
paternity to a child. Indeed, modifications of either rescue doctrine, the tort benefits rule, or wrongful birth doctrine could be used as alternative avenues for filling the gap between tort and family law. But each has problems that render it inferior to direct acknowledgement of a new tort-based action for child support.

The strongest cases for imposition of an obligation of backup support will display the following elements: (1) tortious interference with the procreative rights of the parents; (2) the foreseeable birth of a child who would not otherwise have been born; and (3) the inability of the legal parents to provide adequately for the child's ordinary or extraordinary support needs without requiring inequitable sacrifices by other family members. Where these factors exist, backup support liability is appropriate unless other policy objections outweigh the normative claim.

To be sure, this new cause of action raises a number of policy issues. Many have been discussed here, and others will surely surface as the idea of a tort-based claim is debated. Concerns about the probable impact of this obligation on provider behavior and about the implications of unbundling the traditional package of parental roles, in particular, raise legitimate questions about the ultimate desirability of the action. At this preliminary stage of the discourse, however, the advantages of this claim appear to outweigh the potential disadvantages.

In addition, this proposal invites follow-up questions about how this action would be implemented. Questions such as whether to consider collateral sources of support (like health insurance), whether to use lump-sum awards, and how to set the appropriate level of support must await another day. More voices will need to be heard on both the policy and doctrinal questions before final conclusions can be drawn.