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Joel R. Cornwell

*John Marshall Law School*

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# WRONGFUL LIFE AND THE PROBLEM OF EUTHANASIA

Joel R. Cornwell\*

## I. THE PROBLEM OF NOTHINGNESS

Blaise Pascal, a seventeenth century mathematician and philosopher, once remarked that judges wore robes for the purpose of hiding the inadequacy of the justice they dispensed.<sup>1</sup> Three centuries later, Felix Cohen, an attorney and philosopher, demonstrated the lengths to which modern judges go to hide their moral judgments beneath elaborate rhetoric.<sup>2</sup> By constructing a "heaven of legal concepts," Cohen argued, judges justify their decisions by appealing to abstract principles which appear to be logically compelling, but in fact are meaningless phrases which obscure the human interests at stake in the controversy.<sup>3</sup> Cohen termed such principles "transcendental nonsense."<sup>4</sup> In the recent case of *Goldberg v. Ruskin*,<sup>5</sup> the Illinois Supreme Court, following the lead of courts in ten other jurisdictions,<sup>6</sup> provided a classic example of transcendental nonsense. What, we might inquire, is the controversial moral judgment lurking beneath the rhetorical haberdashery, and why was the court so determined to conceal it?

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\* Copyright 1987 by Joel R. Cornwell. Assistant Professor, The John Marshall Law School; B.A. 1975, Duquesne University; M. Div. 1978, Yale University; J.D. 1983, Saint Louis University.

1. This is an interpretive paraphrase of *Pensée* number 307. PASCAL, THOUGHTS 109 (Trotter trans. 1910).

2. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

3. *Id.*

4. *Id.* at 821.

5. 113 Ill. 2d 482, 499 N.E.2d 406 (1986).

6. *Elliot v. Brown*, 361 So. 2d 546 (Ala. 1978); *Turpin v. Sortini*, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982); *Strohmaier v. Associates in Obstetrics & Gynecology*, P.C., 122 Mich. App. 116, 332 N.W.2d 432 (1982); *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); *Procanik v. Cillo*, 97 N.J. 339, 478 A.2d 755 (1984); *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); *Speck v. Finegold*, 268 Pa. Super. 342, 408 A.2d 496, *aff'd by an equally divided court*, 497 Pa. 77, 439 A.2d 110 (1981); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984); *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983); *Dumer v. St. Michael's Hospital*, 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

The legal issue in *Goldberg v. Ruskin* was whether a child could recover general damages on a theory of wrongful life. Jeffrey Goldberg was born with the hereditary affliction of Tay-Sachs disease. A child suffering from this disease appears normal at birth, but within several months begins to display symptoms of a degenerating nervous system. As the degeneration proceeds, the symptoms evolve into seizures, blindness, deafness, paralysis, and mental retardation. Within two to four years, the child dies. The disease primarily afflicts Jewish infants of eastern European ancestry. If both parents are carriers of the disease, the chances are one in four that the child will be afflicted. Carriers can be identified by a simple blood test. Jeffrey Goldberg's parents were not informed of the possibility that their child could be born with Tay-Sachs disease, and they were not informed that a blood test could identify them as carriers. Amniocentesis can reveal whether a fetus is afflicted. Jeffrey Goldberg's parents were not informed of the fact, and amniocentesis was not administered. The parents stated that they would have aborted the fetus had they known it was afflicted with Tay-Sachs. While allowing the Goldbergs to recover extraordinary medical expenses resulting from the child's illness, and damages for their own emotional distress, the trial court dismissed an action on behalf of the child to recover damages for his pain and suffering. The appellate court, with one justice dissenting, affirmed the dismissal.<sup>7</sup> In an opinion authored by Justice Miller, the Illinois Supreme Court affirmed the appellate court.<sup>8</sup> The supreme court noted that "[t]he nearly universal rejection by the courts of a child's recovery of general damages for wrongful life is based in the main on the value of life and the inherent difficulty in ascertaining a cognizable injury for which damages may be meaningfully awarded."<sup>9</sup> Distinguishing Jeffrey Goldberg's action and others predicated on a wrongful life theory from actions seeking damages because of a physician's negligence in treating a person in utero, the court quoted an opinion by Chief Justice Weintraub of the Supreme Court of New Jersey:

Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of nothingness, cannot possibly

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7. 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984).

8. 113 Ill. 2d 482, 499 N.E.2d 406 (1986).

9. *Id.* at 486, 471 N.E.2d at 407.

know whether this is so.

We must remember that the choice is not between being born with health or being born without it; it is not claimed that the defendants failed to do something to prevent or reduce the ravages of [the pregnant mother's] rubella. Rather the choice is between a worldly existence and none at all. . . . To recognize a right not to be born is to enter an area in which no one could find his way.<sup>10</sup>

The Illinois Appellate Court, quoting authority from New Jersey<sup>11</sup> and Washington,<sup>12</sup> had pointed to the same problem:

In a cause of action seeking recovery for wrongful life, the trier of fact would be required "to measure the difference in value between life in an impaired condition and 'the utter void of nonexistence.'" [citation omitted] Such a computation is "a task that is beyond mortals, whether judges or jurors." [citation omitted]<sup>13</sup>

By holding that a person may not recover damages from those responsible for depriving his parents of the opportunity to choose, on his behalf, nonexistence over a life of horrible suffering, these courts have not, as their rhetoric suggests, acquiesced to a science which necessarily precludes criteria for making such a choice. There was never a time when Jeffrey Goldberg's parents, the justices of the Illinois Supreme Court, or the author and reader of this page experienced the simultaneous afflictions of blindness, deafness, paralysis, and mental retardation. Nevertheless, the fact that we have not experienced these afflictions does not preclude us from imagining, albeit imperfectly, any one or several of these states, informed by other sense experiences (or deprivations of sense experiences) which provide approximations of blindness, deafness, paralysis, and retardation. On the other hand, there was a time when Jeffrey Goldberg's parents, as well as the justices of the Illinois Supreme Court, and the author and reader of this page did not exist. We cannot properly say that *we* have thus experienced nonexistence, for nonexistence, by definition, precludes a *we* to experience it. Nevertheless, the fact that we know there was not a *we* to experience anything at the time of the Norman conquest or

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10. *Id.* at 489, 499 N.E.2d at 409 (quoting *Gleitman v. Cosgrove*, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967) (Weintraub, C.J., concurring in part and dissenting in part)).

11. *Berman v. Allen*, 80 N.J. 421, 427, 404 A.2d 8, 12 (1979).

12. *Harbeson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 482, 656 P.2d 483, 496 (1983).

13. 128 Ill. App. 3d at 1035-36, 471 N.E.2d at 534-35.

Lincoln's second inauguration, together with our sense experiences (e.g., sleep) which provide an approximation of the cessation of all experience, enables us to imagine, albeit imperfectly, what it would be like not to exist.

We cannot know for certain what it is like to experience Tay-Sachs disease. We cannot know for certain what it is like not to exist. To assert that a comparison between experiencing Tay-Sachs disease and not existing cannot be made because "the utter void of nonexistence" precludes an empirical reference is to engage in nonsense for two reasons: first, because the assertion presupposes that a state we can know is necessarily preferable to a state we can only imagine; and second, because the assertion presupposes that *we* can know what it is like to experience Tay-Sachs. In fact, the actual individuals who experience Tay-Sachs disease are as incapable of comparing their impaired existence to nonexistence as the hypothetical individuals who have not been born are incapable of comparing their state to impaired existence. The legal valuation must always be made by someone who is not simultaneously blind, deaf, paralyzed, and mentally retarded.

## II. THE REAL PROBLEM

The question of when a person's suffering becomes great enough to outweigh the benefits of living at all is one which many sane and intelligent persons are forced to ask, and it is a question which, however painfully or incompletely or wrongly, these persons answer. Indeed, their right to answer this question has been held by courts in Illinois,<sup>14</sup> New Jersey,<sup>15</sup> Washington,<sup>16</sup> and four of the remaining eight jurisdictions cited by the *Goldberg* majority<sup>17</sup> to be

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14. *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

15. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

16. *In re Matter of Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

17. California (*Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986)); New Hampshire (*In re Caulk*, 125 N.H. 226, 480 A.2d 93 (1984)); New York (*In re Lydia E. Hall Hosp.*, 116 Misc. 2d 477, 455 N.Y.S.2d 706 (1982)); and Pennsylvania (*In re Yetter*, 62 Pa. D. & C.2d 619 (C.P. Northhampton 1973)). See also *Tune v. Walter Reed Army Medical Hosp.*, 602 F. Supp. 1452 (D.C. 1985); *Foody v. Manchester Memorial Hosp.*, 40 Conn. Supp. 127, 482 A.2d 713 (1984); *St. Mary's Hospital v. Ramsey*, 465 So. 2d 666 (Fla. Dist. Ct. App. 1985); *In re L.H.R.*, 253 Ga. 439, 321 S.E.2d 716 (1984); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984); *Leach v. Akron General Medical Center*, 68 Ohio Misc. 1, 426 N.E.2d 809 (1980); *Sherlock, For Everything There is a Sea-*

guaranteed by the United States Constitution. Karen Ann Quinlan's parents were held to have a right to choose, on their daughter's behalf, to discontinue a life support system that assured her continued respiration.<sup>18</sup> Robert Quackenbush was held to have a right to refuse a double amputation that was necessary to save his life.<sup>19</sup> Bernice Brooks was held to have a right to refuse a life-saving blood transfusion.<sup>20</sup> Elizabeth Bouvia was held to have a right to refuse a nasogastric tube that prevented her from starving to death.<sup>21</sup> In none of these cases did a court assert that because the individual had never experienced death, he or she, "know[ing] nothing of nothingness," was precluded from making a meaningful choice. But why was this issue not raised? The empirical references involved in the choice between accepting or refusing life-saving medical treatment are necessarily incomplete, since no one making such a choice will have experienced death. How is it that the choice between existence and nonexistence in the context of refusing life-saving medical treatment might be distinguished from the same choice in the context of refusing birth?

#### A. *An Emotive Perception*

One cannot validly distinguish these contexts by asserting that the person refusing medical treatment acts on his or her own behalf, while the person refusing birth necessarily acts on behalf of another. When an incompetent patient faces a choice between death and treatment that will entail a significant bodily invasion and sustain only a significantly impaired existence, others are permitted to make the decision on the patient's behalf.<sup>22</sup> Neither can one validly distinguish the contexts on the ground that refusing treatment involves a decision not to interfere with natural forces,

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son: *The Right to Die in the United States*, 1982 B.Y.U. L. REV. 545, 570-97; Comment, *The Right to Die: An Extension of the Right to Privacy*, 18 J. MARSHALL L. REV. 895, 897-904 (1985); Comment, *The Right to Refuse Medical Treatment: Under What Circumstances Does It Exist?*, 18 DUQ. L. REV. 607 (1980); Annotation, *Patient's Right to Refuse Treatment Allegedly Necessary to Save Life*, 93 A.L.R. 3d 67 (1978).

18. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 670-71 (1976).

19. *In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785, 790 (1978).

20. *In re Estate of Brooks*, 32 Ill. 2d 361, 205 N.E.2d 435, 442 (1965).

21. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1146, Cal. Rptr. 297, 307 (1986).

22. *E.g.*, *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976); *Matter of Welfare of Colyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983); *In re L.H.R.*, 253 Ga. 439, 231 S.E.2d 716 (1984); *In re Conservatorship of Torres*, 357 N.W.2d 332 (Minn. 1984).

while a decision to contracept or abort a diseased fetus involves a decision to contravene natural forces. In either situation, one may choose to let nature take its course or not, and one may contravene natural forces by choosing a medical procedure. In the case of a person ex utero, choosing a medical procedure will prolong an impaired existence, and not choosing a medical procedure will terminate the existence. In the case of a diseased fetus, choosing a medical procedure (abortion) will prevent an impaired existence, and not choosing the procedure will allow an impaired existence. The fact that abortion is a medical procedure which precludes, rather than prolongs life, cannot logically be of significance unless it is presupposed that the fetus, like the person ex utero, is already a living human being. Only when the presupposition is granted does the distinction between the two types of medical procedure become meaningful, for abortion then becomes a medical procedure which not merely precludes human existence, but terminates it. Abortion thus assumes the character of active euthanasia, and a claim of wrongful life becomes an action for denying a plaintiff's parents an informed choice of killing the plaintiff at a time when the killing would have been legal.

The emotive identification of a fetus as a human person is obviously antithetical to the standard of *Roe v. Wade*,<sup>23</sup> which precludes a nonviable fetus from being considered a person for constitutional purposes. The fact that an emotive sentiment is antithetical to a rule of law, however, does not eradicate the sentiment from human consciences. The identification of a fetus as a baby, though scientifically unverifiable, is nevertheless bolstered by certain perceptions which are well grounded in empirical sensation. It is a fact that one cannot distinguish on empirical grounds a prematurely born infant who can be sustained with the aid of machines from a fetus of the same maturity that remains in the womb.<sup>24</sup> It is also a fact that technological advances are making it

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23. 410 U.S. 113 (1973).

24. Cf. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 127-28 (1973):

Viability thus marks a point after which a secular state could properly conclude that permitting abortion would be tantamount to permitting murder, not because of some illusion that this biologically arbitrary point signals "any morally significant change in the developing human," and certainly not because of any (necessarily religious) notion that the fetus is intrinsically a human being from that tech-

possible for premature infants to be sustained at increasingly earlier stages.<sup>25</sup> The realization that a nonviable fetus in 1987 could be a viable fetus (and hence a legal person) in 1991 necessarily erodes the credibility of the *Roe v. Wade* standard, prompting feelings that it is both unscientific and unjust to tie the concept of personhood to the fortuitous state of medical technology. It is a fact that our society fixes the medical and legal end of personhood to the cessation of brain waves, and it is a fact that after the eighth week of gestation, long before the current threshold of viability, a fetus emits brain waves which would establish the fetus' legal personhood if it were in a comatose state outside the womb.<sup>26</sup> It is a fact that these empirical data expose fundamental inconsistencies in our society's professed morality, and it is a fact that these inconsistencies are recognized and appropriated, knowingly or unknowingly, in the consciences of those who make and administer the law. The result of this appropriation is an unarticulated predispo-

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nology-dependent point forward, but rather on the secular and quite practical ground that a state wishing to prevent the killing of infants simply has no way to distinguish the deliberate destruction of the latter from what is involved in postviability abortions. It is not only that such abortions lie *close* to infanticide, and hence not far from other horrors along the "slippery slope," but rather that, in every *functional* sense, they occupy the same place on that fabled plane (emphasis in original; footnotes omitted).

25. See Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 661 (1986). The Court in *Roe v. Wade* noted that fetuses ordinarily become viable at the twenty-eighth week of pregnancy, although it was possible to attain viability as early as twenty-four weeks. *Roe v. Wade*, 410 U.S. 113, 160. The current threshold of viability is usually listed as twenty-four weeks, and at least one expert has placed the threshold at twenty-three weeks. Rhoden, at 661. Fetuses have become viable as early as twenty-two weeks, and the World Health Organization, in its revised recommendations for the collection of perinatal data, lists twenty-two weeks as the age that distinguishes spontaneous abortion from birth. *Id.* Although it is doubtful that technology can be refined to a point where fetuses become viable earlier than twenty-two weeks without the development of an artificial womb, *id.*, medical experts have long predicted that an artificial womb would be developed before the end of the century. See Gorney, *The New Biology and the Future of Man*, 15 U.C.L.A. L. REV. 273, 285 (1968); Comment, *Choice Rights and Abortion: The Begetting Choice Right and State Obstacles in Light of Artificial Womb Technology*, 51 S. CAL. L. REV. 877, 880 (1978); Wallis, *Abortion, Ethics and the Law*, TIME, July 6, 1987, at 83.

26. Flower, *Neuromaturation of the Human Fetus*, 10 J. OF MEDICINE AND PHILOSOPHY 237, 239-41, (1985); see also Sokol & Rosen, *The Fetal Electroencephalogram*, 10 CLINICS IN OBSTETRICS AND GYNECOLOGY 123 (1974). This fact has prompted some commentators to suggest a revised standard for legal abortion, fixing the beginning of legal personhood at the eighth week of pregnancy. E.g., Goldenring, *The Brain-Life Theory: Towards a Consistent Biological Definition of Humanness*, 11 J. OF MEDICAL ETHICS 198 (1985); Cornwell, *The Concept of Brain Life: Shifting the Abortion Standard Without Imposing Religious Values*, 25 DUQ. L. REV. 471 (1987).



sition against rendering decisions that promote abortion,<sup>27</sup> and the result of this unarticulated predisposition is transcendental nonsense.

### B. *A Logical Perception*

A claim that a plaintiff has been legally injured because a defendant failed in his or her duty to prevent the plaintiff's conception or to provide the opportunity to extinguish the plaintiff's life in utero presupposes an objective standard against which courts can measure a plaintiff's pain and determine whether the pain is so great as to outweigh the benefits of living at all. Courts have recognized that the very concept of a calculus of suffering which could adjudicate an individual's life as "not worth living" has the effect of setting wrongful life actions in a unique category.<sup>28</sup> Although courts have articulated this uniqueness in terms of the epistemological problem of measuring the difference between existence and nonexistence, this measurement is not unique to wrongful life cases. What is unique about a tort action which posits an objective standard by which a legal judgment is rendered that a person would be better off not to exist is that the legal judgment logically compels a remedy that has nothing to do with compensatory damages. For this reason, it seems illogical even to characterize the legal action as a suit in tort.

Money as a recompense for pain resulting from a defendant's act makes sense only insofar as the money is perceived as enhancing, however meagerly, a life which has inherent value. The notion of a plaintiff's pain as a legally compensable state presupposes that the inherent value of the plaintiff's life has been diminished, and that the diminution can be measured and translated, however imperfectly, into money, but, most importantly, that the plaintiff's life still has *some* value to the plaintiff. If a plaintiff's life were to be determined, as a matter of law, to be not worth living, the plaintiff's injury would cease to be compensable with money, since the money, by definition, could not enhance the plaintiff's life. A

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27. The predisposition has in fact been admitted on rare occasions. See, e.g., *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110, 121 (per curiam) (Nix, J., dissenting) (recognizing the tort of wrongful life would create a policy favoring abortion, and such a policy is unfounded in public sentiment).

28. See *supra* notes 5-6 and accompanying text.

plaintiff whose existence is legally adjudged to be worse to the plaintiff than nonexistence can be compensated, so to speak, only by death, and it is this remedy that a court logically would be compelled to order.<sup>29</sup> Indeed, just as an adjudication that a life is "wrongful" would logically compel the court to order euthanasia, a plaintiff's claim that his or her life is wrongful would logically compel the plaintiff to commit suicide to prove the case, just as a tenant's claim that premises are uninhabitable compels the tenant to move.

There is, then, a meaningful difference between recognizing a right to refuse life-saving medical treatment and recognizing a right not to be born. The difference is that in the former instance an individual is logically *permitted* to commit suicide, and in the latter instance an individual is logically *compelled* to do so. This realization, like the emotive prejudice that identifies a fetus with a baby, is not necessarily operative at a conscious level of judicial decision making. Nevertheless, consciously or unconsciously, the realization is there, and judicial consciences are loathe to compel the legal remedy of death. The real problem underlying the bogus metaphysical problem of whether we can judge the comparative value of existence and nonexistence, when we lack an empirical reference for nonexistence, is the morality of euthanasia.

### III. WHY COURTS AVOID THE REAL PROBLEM

The numerous judicial assertions of a constitutional right to refuse life-saving medical treatment have had the effect of assert-

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29. Although courts considering the issue of wrongful life have commonly acknowledged the elementary principle that a plaintiff's remedy in tort is compensatory and that damages are calculated to restore an injured party to the position he or she would have occupied had the wrongful act not taken place, these courts have further acknowledged that but for the particular defendant's allegedly wrongful act the particular plaintiff would not exist and have proceeded to posit the impossibility of measuring the difference between impaired existence and nonexistence, apparently oblivious to the fact that the plaintiff could actually be placed in his or her unwronged state. *E.g.*, *Goldberg v. Ruskin*, 113 Ill. 2d 482, 499 N.E.2d 406, 409-10; *Turpin v. Sortini*, 31 Cal. 3d 220, 182 Cal Rptr. 337, 643 P.2d 954, 961 (1982); *Becker v. Schwartz*, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807, 812 (1978); *Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984). *But see* the lead opinion in *Speck v. Finegold*, 497 Pa. 76, 439 A.2d 110, 115 (1981), where Justice Flaherty argued that failing to compensate severely impaired plaintiffs by giving them money may, in the extreme event, cause such plaintiffs to commit suicide. This argument, of course, fails to recognize that a life which is truly wrongful, or, in Justice Flaherty's words, "intolerably burdensome," can be made right or tolerable only by death.

ing a right to commit suicide or be euthanized. The only prerequisite to asserting the right is the characterization of any agent that would keep the individual alive as "medical treatment." The numerous judicial assertions that courts and other mortals cannot measure the comparative value of existence and nonexistence have had the effect of denying a right to be euthanized in utero. In the former line of cases, courts have necessarily implied that human existence can become so painful that at a certain point it is better (or at least reasonable to believe that it is better) not to exist. In the latter line of cases, courts have implicitly denied the possibility that it is better not to exist. In neither line of cases have courts admitted that the effects of their decisions are to sanction acts of suicide and euthanasia in some contexts and to preclude them in others.

The lengths to which courts will go to avoid the admission is illustrated by the majority opinion in *Bouvia v. Superior Court*.<sup>30</sup> The petitioner was a twenty-eight-year-old quadriplegic who was mentally alert and fully cognizant of her situation. Unable to ingest solid foods without extreme discomfort, she refused to eat. When her weight loss approached a life threatening level, physicians at a public hospital inserted a nasogastric tube to supply her with nutrients, against the petitioner's will and contrary to her express written instructions. Several years earlier, the petitioner had attempted to starve herself to death, and on several other occasions she had expressed a desire to die. The appellate court nevertheless dismissed the trial court's finding that the petitioner was attempting suicide, noting that at the time of the petitioner's previous attempt at starvation she had the ability to ingest sufficiently nutritious solid foods, and that her condition no longer allowed this. "As a consequence of her changed condition," the court stated, "it is clear she has merely resigned herself to accept an earlier death, if necessary, rather than live by feedings forced upon her by means of a nasogastric tube."<sup>31</sup> This distinction between one who engineers her starvation by refusing to ingest nutrients by mouth and one who engineers her starvation by refusing to ingest nutrients by nasogastric tube is a nominal variation of the distinc-

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30. 179 Cal App. 3d 1127, 225 Cal. Rptr. 297 (1986).

31. *Id.*, at 1136, 225 Cal. Rptr. at 306.

tion between "hastening death" and "not prolonging dying,"<sup>32</sup> or between "killing" and "letting die,"<sup>33</sup> and is meaningless from a volitional standpoint. In both instances the subject intends and executes her own death even though she possesses the means to live. The distinction is meaningful only because the court considers the subject's pain in consuming nutrients in the respective situations, and thus presents a veiled moral judgment that the subject's diminished quality of life in the latter situation justifies a death-inducing act that was unjustified in the former situation.<sup>34</sup> This same moral judgment, of course, underlies any correlative characterization of an act as "not prolonging dying" as opposed to "hastening death," or as "letting die" as opposed to "killing."

The failure of courts to acknowledge the effects of the aforementioned decisions is due in part to the natural human tendency to avoid unnecessary conflict. Directly addressing the question of euthanasia would invite a wide range of criticism which would in turn create an unfavorable impression to a large segment of the populace. Indeed, the very term "euthanasia," connoting the horror of totalitarian regimes which have used the concept as a rationale for killing whomever they pleased, strikes a defensive chord in the collective unconscious. People feel an instinctive urge to choose life over death, and this instinct is projected onto others irrespective of the others' own urges. The knowledge that many helpless victims have been killed in the name of euthanasia reinforces the projection that anyone who would choose death is in fact a victim, out of his or her mind, helpless, bereft of the most fundamental human instinct. Judicial consciences appropriate and project this instinct. They also recognize, consciously or unconsciously, that there is no neutral philosophical principle upon which to ground it, and that any assertion that existence, no matter how painful, is invariably better than nonexistence can only be predicated on a nonscientific absolute which, to certain critics, would appear unconstitutional.

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32. See *infra* note 39.

33. See Atkinson, *Killing and Letting Die: Hidden Value Assumptions*, 17 *SOCIAL SCIENCE & MEDICINE* 1915 (1983).

34. The court's desire to avoid the issue may well have been fueled by the fact that aiding an act of suicide is a criminal offense in California. See *Bowvia*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. at 297.

The assertion that the state has a duty to preserve the lives of citizens who would rather be dead is based on the premise that the value of human life is beyond qualitative measurement. In other words, even though we can experience and evaluate pleasure and pain, we are incapable of drawing a line on the pleasure/pain continuum that would mark the point where nonexistence would be preferable to existence. From a scientific standpoint there is nothing to preclude us from drawing a line, for the question of life's worth is not scientific. It is, properly, a question of value, *i.e.*, a moral question. In order to impose the moral judgment that life's value is immeasurable, one must posit something greater than life, some "sanctity" against which one trespasses when one attempts to be the final judge of a human being's worth. One cannot, then assert that the sanctity of life (or its semantic equivalent) precludes euthanasia without appealing to a concept which is properly characterized as mystical or religious.<sup>35</sup> Employing such a concept would leave courts open to the charge of restricting people's first amendment right to privacy (*i.e.*, the right to choose death) by violating their first amendment right to be free of a government imposed religion.<sup>36</sup> It is understandable that courts, particularly those

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35. Even when the argument is recast in utilitarian terms, *see, e.g.*, Sherlock, *Liberality, Public Policy and the Life Not Worth Living: Abraham Lincoln on Beneficent Euthanasia*, 26 AM. J. OF JURISPRUDENCE 47 (1981), the argument is still mystical in the sense that it exalts a principle (life is of immeasurable value) to the level of a categorical rule divorced from actual events and the thought processes of specific human agents. In other words, the principle becomes an end in itself, and the resulting ethic is disconnected from the very emotive concerns, such as love and dignity, which compel humans to articulate the principle. *See* Churchill & Simañ, *Principles and the Search for Moral Certainty*, 23 SOCIAL SCIENCE & MEDICINE, 461, 462-63 (1986); Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of the Right of Privacy*, 17 ARIZ. L. REV. 474, 488-89 (1975). Although the realization that moral principles cannot act as ends in themselves is an insight popularly associated with modern philosophers, it is articulated also by Thomas Aquinas. *Summa Theologica*, q. 94, art. 4; Maguire, *A Catholic View of Mercy Killing*, BENEFICENT EUTHANASIA 34, 36-39 (Kohl ed. 1975). *Cf.* ARTISTOTLE, NICHOMACHEAN ETHICS 1094b.

36. *See generally* Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Lemon v. Kurtzman, 403 U.S. 602 (1971). A law complies with the establishment clause of the first amendment if (1) it serves a secular purpose, (2) it neither advances nor inhibits religion, and (3) it does not involve excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602, 612-13. Moreover,

[t]he modern Supreme Court . . . has treated the establishment clause as a directive to strike down all public acts, federal, state and local, whose primary purpose or predominant effect is to promote one religious group at the expense of others or even promote religion as a whole at the expense of the nonreligious—a position that in effect treats the nonreligious as a sect, the sect of nonbelievers.

American Civil Liberties Union v. City of St. Charles, 794 F.2d 265, 270 (7th Cir. 1986)

whose consciences are troubled by the concept of euthanasia, do not voluntarily enter this intellectual quagmire.<sup>37</sup> It is also understandable that judicial consciences are loathe to reject the notion that human life is sacred. If courts were to openly reject the notion and assert that the first amendment right to privacy encompasses a constitutional right to be euthanized, they would undermine an essential premise of liberal democratic government as it was envisioned by certain framers of the Constitution. The essential premise is that all lives, rich or poor, healthy or diseased, pleasant or painful, are of equal value.<sup>38</sup> And it is understandable that courts would not wish to enter the quagmire that would result from undermining this premise. For if all lives are not of equal value, and if we have no scientific standard against which to measure their value, and if we cannot employ a nonscientific standard for fear that it is religious, have we not, in Chief Justice Weintraub's words, entered an area in which no one can find his or her way?

The answer is that we have not, for each day people to whom courts afford the right to refuse life-saving medical treatment do find their way and measure whether, in the totality of their personal circumstances, it is better to exist or not to exist. If openly acknowledging the possibility that life may at some point cease to be worth living creates an insoluble dilemma, it is not because individuals feel that they cannot designate the critical point where life ceases to be worth the suffering, but because courts cannot designate such a point without appearing arbitrary. In refusing to recognize claims predicated on a theory of wrongful life, however,

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(citations omitted). The legal assertion that innocent sufferers do not have full dominion over their lives is, at a minimum, oppressive to atheists. Opponents of euthanasia were free to admit this in an era when the Supreme Court was less inclusive in its interpretation of whose beliefs were protected under the establishment clause. See, e.g., Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U. L. REV. 1171, 1187-88 (1956).

37. This is not to say that courts have not invoked the concept of sanctity without appearing to perceive a potential first amendment problem. E.g., *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341, 352 (1986) (quoting *Phillips v. United States*, 508 F. Supp. 537, 543 (D.S.C. 1980)).

38. See Sherlock, *supra* note 35. Noting that even a free society must at some point appeal to principles which its citizens are not free to challenge, Professor Sherlock argues that allowing a citizen the freedom to choose euthanasia would undermine democracy in the same manner as allowing a citizen the freedom to sell himself or herself into slavery. The threat to personal liberty arises from the impossibility of any commonly agreed upon standard for determining when life is not worth living, and the necessarily elitist character of any judgment of a life's worth. Cf. *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341, 352 (1986).

courts have done more than refuse to designate the point at which life ceases to be worth living. The judicial rhetoric which asserts that it is impossible to measure the comparative value of existence and nonexistence has the effect of also asserting as a matter of law that existence is invariably better than nonexistence, and imposes an arbitrary, unverifiable, mystical rule which logically precludes *anyone* from fixing the critical point.<sup>39</sup>

#### IV. THE CHOICE

Recognizing that the *Goldberg* majority had, under the guise of refusing to decide a philosophical issue, decided one, Chief Justice Clark's dissenting opinion stated that the court had no duty to decide philosophical issues<sup>40</sup> and that the question of whether Jeffrey Goldberg's life was worth living should be given to the trier of fact.<sup>41</sup> Although Chief Justice Clark's insight into the majority's rhetorical sleight of hand is accurate, his statement of the court's duty is fallacious. The dissent's open assertion that existence *is not* invariably better than nonexistence, and that a plaintiff who would be better off not to exist should receive money for existing is as philosophical in character as the majority's covert assertion that existence *is* invariably better than nonexistence, and so a plaintiff should not receive money for existing. Moreover, Chief Justice Clark commits a logical error by ignoring the fact that if nonexistence is better for a plaintiff than existence, a plaintiff's life has no value and cannot possibly be enhanced by money, just as the majority errs by failing to recognize the fact that if existence is better for a plaintiff than nonexistence, a plaintiff's life retains value

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39. Professor Sherlock, like the *Bouvia* court, would preserve a degree of personal freedom by perpetuating a distinction between "hastening death" and "not prolonging dying." Sherlock, *supra* note 35, at 64. This distinction, however, is meaningless from a scientific standpoint, and merely compels a court to characterize as "not prolonging dying" those self-destructive acts which the court finds morally acceptable, and to characterize as "hastening death" those self-destructive acts which the court finds morally unacceptable. See Atkinson, *supra* note 33. The characterization in either situation rests on an unarticulated moral judgment that a life is or is not worth living, and the court in either situation permits or precludes an act that is tantamount to euthanasia or suicide. Such unarticulated moral judgments by courts are no less elite or idiosyncratic than the articulated moral judgments made by individual citizens. Moreover, these unarticulated moral judgments present a greater threat to democratic society precisely because they are made and enforced with the illusion of moral neutrality.

40. 113 Ill. 2d at 486, 499 N.E.2d at 406, 410.

41. *Id.* at 488, 499 N.E.2d, 406, 412.

which can be enhanced by money.<sup>42</sup> Ironically, the rhetoric of the dissent, like that of the majority, illustrates the fact that philosophical questions are inextricably woven into the fabric of human life, and that answers to these questions must either be asserted or presupposed by any body that makes or administers human law. Therefore, it is the duty of courts to decide philosophical issues and to decide them in an open and honest manner. The cloak of transcendental nonsense will not suffice.

The real problem underlying both “wrongful life” and “right to refuse medical treatment” cases is a choice between preserving intact the theoretical foundation of liberal democracy that was embraced by many of the framers of the Constitution, thus denying the possibility of a constitutional right to choose nonexistence, or asserting such a right, thus recognizing the failure in the contemporary world of the principle that mortals cannot possibly possess the esoteric knowledge of when life is not worth living. In the eighteenth century of Locke and Jefferson, when antiseptic surgery and antibiotic drug therapy were unimaginable, one might plausibly have acceded to the emotive judgment that the state has a moral imperative to ensure that all medical procedures are exhausted in order to preserve any human life. Bending our emotive preferences to fit this same judgment in a world of dialysis machines and artificial respirators would seem to make little sense if the only obvious benefit is to preserve the integrity of eighteenth century rationalism.<sup>43</sup> This, we might presume, is why courts have,

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42. The logical barrier to recovering damages to enhance the value of a life that a plaintiff claims was wrongfully conceived or maintained in utero is one of proximate cause, since the life, being of constant value throughout any temporal span, was not diminished as a result of any person's act.

43. There are indications that a large percentage of Americans accept the notion that it is not desirable to preserve a human life at a cost that radically diminishes the quality of that life. The numerous judicial opinions asserting a right to refuse life-saving medical treatment, *supra* note 17, reflect this attitude, as does certain popular literature. *E.g.*, B. ROLLIN, *LAST WISH* (1985) (a moving account of the author's mother's suicide in the wake of a debilitating terminal illness). A New York Times/CBS News Poll asked the following question: “Medical technology now enables doctors to prolong the lives of many people who are terminally ill. Do you believe that doctors should stop using these techniques if the patient asks, even if that means the patient will die?” Seventy-seven percent of the respondents answered yes, fifteen percent answered no, and eight percent were undecided. Malcolm, *Many See Mercy in Ending Empty Life*, N.Y. Times, Sept. 23, 1984, at 56, col. 3-4. Since 1947, the National Opinion Research Center has asked a related question: “When a person has a disease that cannot be cured, do you think doctors should be allowed by law to end



in asserting a right to refuse life-saving medical treatment, allowed people to choose to die rather than to live in a state that they, and by implication the courts, have considered less than human. Since the right to choose death has been asserted in this context, there would appear to be no compelling reason for denying the right to others whose lives are equally impaired and whose desire to die is equally strong, but whose condition is such that they are incapable of committing a death-inducing act which may readily be characterized, according to our ordinary understanding of the term, as refusing medical treatment.

Courts have been right to reject claims for general damages predicated on a theory of wrongful life because constructing an objective standard according to which a life is adjudicated as unlivable would logically render the concept of money damages meaningless, and compel the remedy of euthanasia. Although courts have been right to refuse to construct an objective standard for determining when life is worth living, they have been wrong to reject, by their rhetorical characterization of the problem, the possibility of an individual making the determination for himself or herself. This is particularly true when these same courts, employing a different rhetorical characterization of the same problem, have exalted the same possibility to the level of a "right." Therefore, if a relative or legal guardian may decide on behalf of an incompetent elderly person that death would be preferable to impaired life, a parent should be allowed to make this same determination on behalf of a diseased fetus, even after the point where the fetus' brain activity would suggest that the fetus is a legal person.<sup>44</sup> If the parents are negligently denied the informed

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the patient's life by some painless means if the patient and his family request it?" In the 1947 survey, thirty-seven percent of the respondents answered yes. In 1973, slightly more than fifty percent answered yes, and in 1983, affirmative responses increased to sixty-three percent. *Id.* at col. 4.

A British study of attitudes among parents of children with Down's syndrome revealed that forty-eight percent favored euthanasia for "severely handicapped" children, though only thirty-three percent considered Down's syndrome a handicap severe enough to warrant euthanasia. Shepperdson, *Abortion and Euthanasia of Down's Syndrome Children—The Parents' View*, 9 J. OF MEDICAL ETHICS 152 (1983). The social class of the parents was a significant variable, with sixty-eight percent of parents in the higher social classes favoring euthanasia for "severely handicapped" children, and fifty-six percent favoring euthanasia for children with Down's syndrome. *Id.* at 155.

44. See *supra* note 26. Abortion of an otherwise healthy fetus of the same maturity, if it could properly be characterized as euthanasia, would be nonvoluntary euthanasia, i.e., the

opportunity to choose death on behalf of the child in utero, they should be compensated for the child's extraordinary medical expenses<sup>45</sup> and for their own pain and suffering, but not, on the

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deliberate killing of a person whose right to exist is deemed secondary to another persons' rights. See generally E. KLUGE, *THE ETHICS OF DELIBERATE DEATH* 133 (1981). Any attempt to construct an ethical basis for nonvoluntary euthanasia must begin with an attempt to define what it means to be a person, and this entails enumerating the definitive attributes of a being who can be said to possess a right to exist. The endeavor is problematic, however, because any attempt to define a person in terms of basic intellectual capacities has the effect not only of excluding certain brain damaged or severely retarded homo sapiens, but also of including certain members of other species. See Singer, *Unsanctifying Human Life*, in *ETHICAL ISSUES RELATING TO LIFE AND DEATH* 41 (J. Ladd, ed. 1979). Because this inclusion is emotionally unacceptable to most humans, legal rulemakers have tended to act uncritically on the assumption that "person" means "homo sapien."

The assertion that homo sapiens possess an inherent right to exist merely because they are homo sapiens asserts in a slightly varied form the notion that human life is "sacred." Moreover, even if this mystical assertion is accepted, the assertion does not in itself provide criteria for determining exactly when a given mass of protoplasm either becomes or ceases to be a homo sapien. The widespread acceptance of brain waves as the definitive criteria for determining when an organic body ceases to be a person would indicate that most members of society consider brain activity the most definitive characteristic of personhood. If measureable brain waves bestow personhood, a fetus acquires a right to exist at the eighth week of gestation. See *supra* note 26. If personhood is bestowed only by more complex brain activity associated with cognitive awareness, ex utero humans lose a right to exist when their brains fail to produce this activity, and logically they should be buried, cremated or used for scientific experiments even though their bodies continue to respire and convert nutrients. See D. LAMB, *DEATH, BRAIN DEATH AND ETHICS* 41-50 (1985). Thus, unless courts and legislatures are willing either to assert criteria for the beginning of personhood patently inconsistent with the criteria they assert for the end of personhood, or to assert criteria for the end of personhood which are emotionally unacceptable to most members of our society, abortion after the eighth week of pregnancy cannot be justified on the ground that a fetus is not a person. The only logical arguments for abortion at this stage would be (1) that the fetal person's potential quality of life is so diminished that the fetus, if capable of making the judgment on his or her own behalf, would choose not to live, or (2) that the fetal person's right to exist is secondary to the rights of others, notably the mother's right to privacy in her own body.

An ethic of nonvoluntary euthanasia, then, must delineate a hierarchy of values where the highest value is something other than the right of each individual not to be killed against his or her will. Because the right of some persons not to be killed necessarily conflicts at certain times with the survival interests of their societies, governments have always sanctioned the killing of persons under these circumstances. But it cannot reasonably be maintained that fetal persons presently pose a threat to the survival of our society. Subordinating any person's right to exist to any interest other than society's survival contradicts common notions of justice.

45. If, of course, the parents are unable to bring suit, the child should be compensated for medical expenses. See *Turpin v. Sortini*, 31 Cal. 220, 231, 182 Cal. Rptr. 337, 348, 643 P.2d 954, 965 (1982):

Although the parents and child cannot, of course, both recover for the same medical expenses, we believe it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child's own medical care. If

child's behalf, for the child's wrongful life. If, according to the same standards that courts employ in determining whether any incompetent patient has the right to refuse life-saving medical treatment, a court finds that the child's prognosis is indeed hopeless, and that it is sane and reasonable to characterize the child's life as "wrongful" or "unlivable" or "inhuman," the parents should, on the child's behalf, be allowed to choose death, just as they would have been allowed to choose it when the child was in utero.

It can of course be argued that judicial assertions of a right to refuse life-saving medical treatment are ill considered, and the courts should, instead, assert a state's duty to preserve life at all costs, regardless of the individual's will and regardless of the religious character of the assertion. Indeed, the transcendental nonsense upon which courts have relied in rejecting wrongful life claims might plausibly be interpreted as a veiled emotive affirmation of the concept of the sanctity of all human life. If this is in fact the case, and courts do not wish to allow the possibility of euthanizing severely impaired children, they have a moral obligation to say this, and to begin the task of rethinking not only the decisions asserting a right to refuse life-saving medical treatment, but also the concept of aborting fetuses whose brain activity would preclude euthanasia if the fetuses were outside the womb. In any event, the moral question must be honestly faced and the human interests delineated as accurately as possible, without appeal to the nonsensical rhetorical characterizations which have thus far allowed courts to impose a far-reaching moral judgment by asserting that no judgment can be made.

## V. SUMMARY AND CONCLUSION

In denying general damages for claims of wrongful life, courts have repeatedly employed the rationale that human beings, having never experienced nonexistence, are incapable of judging whether it is better not to exist than to exist in an impaired state. This rationale is merely a subterfuge to avoid the moral question of eu-

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such a distinction were established, the afflicted child's receipt of necessary medical expenses might depend on the wholly fortuitous circumstances of whether the parents are available to sue and recover such damages or whether the medical expenses are incurred at a time when the parents remain legally responsible for providing such care (footnote omitted).

thanasia, a question which compels a difficult choice between cherished principles. If courts assert that existence may at some point become so painful that a person would be better off not to exist, they undermine the principle that all lives are sacred and of equal value before the law. If courts assert that existence is invariably better than nonexistence, they undermine the principle that individuals have the right to control their own destinies. The numerous judicial decisions denying general damages for wrongful life have had the effect of affirming the former principle over the latter, and have logically precluded acts of suicide and euthanasia. The numerous judicial decisions asserting a constitutional right to refuse life-saving medical treatment have had the effect of affirming the latter principle over the former, and have actually sanctioned acts of suicide and euthanasia. Courts have concealed this sanction by asserting a distinction between the *act* of hastening death (or killing) and the *act* of not prolonging dying (or letting die). The *act* in either situation induces death, and the distinction presupposes a moral judgment that it is proper to induce death in some circumstances and not in others. By failing to acknowledge the effects of these decisions, courts have engendered considerable moral confusion.

The powerful judicial assertions that individuals possess a right to refuse life-saving medical treatment reflect what appears to be a growing popular sentiment that life is not invariably better than death and need not be preserved at a cost that radically diminishes its quality. If this principle is one courts wish to affirm, they have an obligation to affirm it openly and consistently. The courts have an obligation to employ the same criteria in determining whether a plaintiff's life is "wrongful" that they would employ in determining whether the quality of a patient's life is so diminished that the patient or the patient's guardian would be justified in refusing life-saving medical treatment. Thus, just as the patient or guardian of a patient facing a radically diminished quality of life is allowed the informed option of inducing the patient's death, so the plaintiff or guardian of a plaintiff whose life is adjudicated as "wrongful" should be allowed the informed option of inducing the plaintiff's death.

If, on the other hand, courts wish to affirm the principle that human life is sacred and immeasurable in terms of quality, they

have an obligation to affirm this principle in an equally open and consistent manner. Thus, just as a plaintiff or guardian of a plaintiff in a wrongful life action is precluded from measuring the comparative value of existence and nonexistence, so that the plaintiff is compelled to live, the patient or guardian of a patient in need of life-saving medical treatment also should be precluded from making the same qualitative measurement, and the patient should be compelled to receive treatment. The consistent application of the principle would also preclude abortions after the eighth week of pregnancy, when a fetus's brain activity would be sufficient to establish the fetus as a legal person if it were in a comatose state outside the womb. In any event, courts must acknowledge that the choice between precluding or allowing persons to judge the comparative value of existence and nonexistence entails a far-reaching moral judgment that can be neither verified by science nor neutralized by semantic formulations which connote a scientific methodology.