South Carolina Law Review

Volume 69
Issue 4 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 9

Summer 2018

First, Do No Harm

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Recommended Citation

Curtis J. Copeland, First, Do No Harm, 69 S. C. L. REV. 1007 (2018).

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FIRST, DO NO HARM

Published by Scholar Commons, 2018

I. INTRODUCTION

Beatrice Weisman, then eighty-three years old, suffered a stroke.[1] Her medical condition was such that she had to spend several weeks in the hospital, eventually becoming incompetent to make medical decisions on her own behalf.[2] Luckily, she had prepared advance directives, naming her husband William as the person responsible for making such decisions if and when she became unable to do so herself.[3] William, taking into account the wishes of the family, decided to formalize a do not resuscitate order: if Beatrice entered cardiac arrest, she should be allowed to die.[4] Upon finding Beatrice in cardiac arrest, medical professionals instead resuscitated her, breaking ribs and collapsing her lungs in the process.[5] What is Beatrice to

1. Paula Span, *The Patients Were Saved. That's Why the Families Are Suing*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/health/wrongful-life-lawsuit-dnr.html?mcubz=0.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

do? Her wish, expressed through her family's knowledge and close personal relationship with her, was to die.[6] This wish was overborne.

The major premise of Beatrice's claim, as with any other tort, is essentially that she is in a worse position than she would have been had her family's wishes for her been honored. The major point of friction comes in acknowledging that in order for this premise to hold true, it must also be true that Beatrice would have been better off dead. Shocking though it is, this acknowledgement is at the heart of modern medical autonomy rights and is required in order to vindicate these private rights through an appropriate cause of action. Although Beatrice Weisman and patients in similar situations have brought suit against medical professionals under theories such as battery,[7] these torts do not capture the nature of the harm inflicted, namely, prolonged life itself. Professor Oddi correctly asserts that the tort of battery would obviously lie where a patient withholds consent to certain treatments via a do not resuscitate order,[8] but the right violated in such a situation is not the right to be free from harmful or offensive contact—it is the right of self-determination.

Fundamental to the concept of liberty, as announced by the Supreme Court, is a patient's constitutional right to determine when, how, and even whether to receive treatment.[9] States have ushered in vehicles, such as durable powers of attorney, advance medical directives, and do not resuscitate orders to help facilitate the exercise of that right.[10] But what is to be done when health care providers fail to honor the dictates of those vehicles? This Note argues that the oft-contentious "wrongful living" cause of action should be recognized in South Carolina jurisprudence when a patient is kept alive against her properly documented will.

In making this argument, it is helpful to concurrently analyze the more robust body of law found in the "wrongful life" cause of action brought by or on behalf of a disabled child, who claims that but for a medical

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6. *Id.*

7. *Id.*; *see also* A. Samuel Oddi, *The Tort of Interference with the Right to Die: The Wrongful Living Cause of Action*, 75 GEO. L.J. 625, 649 (1986).

8. Oddi, *supra* note 7, at 636.

9. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (announcing that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment . . . ."); *see also* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

10. James Lindgren, *Death by Default*, 56 L. & CONTEMP. PROBS. 185, 185 (1993); *see also* S.C. CODE ANN. § 44-78-30 (2016) (do not resuscitate order); S.C. CODE ANN. § 44-77-50 (1991) (declaration of a desire for a natural death).

professional's negligence, he or she would not have been born.[11] The same injury lies at the base of both claims: life is an injury compared to death or non-existence.[12]

A multitude of courts have disavowed a distinct cause of action for wrongful life, with only four states allowing for recovery.[13] Generally, courts rejecting the action reason that a wrongful life suit is not cognizable primarily because (a) public policy mandates that life is not a legal injury, and (b) the measure of damages is so ethereal as to be outside the realm of legal determination.[14] The Supreme Court of South Carolina has applied both of these rationales in rejecting the wrongful life action,[15] while the District Court for the District of South Carolina rejected the damages argument twenty-four years earlier, noting that policy considerations alone precluded the action.[16]

This Note highlights that the nation has experienced a large moral attitude shift over the past several decades with respect to an individual right to die or refuse treatment.[17] This, along with several other considerations discussed below, should lead South Carolina courts to acknowledge that, in some instances, a life lived with great suffering may be compensable when the patient preferred their life to end.[18]

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11. *See, e.g.*, Becker v. Schwartz, 46 N.Y.2d 401, 412 (1978) ("[A] cause of action brought on behalf of an infant seeking recovery for wrongful life demands a calculation of damages dependent upon a comparison between the Hobson's choice of life in an impaired state and nonexistence.").

12. *See infra* note 66.

13. W. Ryan Schuster, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 WM. & MARY L. REV. 2329, 2330 (2016); *see also* Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15 (1978).

14. Willis v. Wu, 362 S.C. 146, 157–58, 607 S.E.2d 63, 69 (2004) (summarizing judicial sentiment surrounding wrongful life actions brought on behalf of infant).

15. *Willis*, 362 S.C. 146, 607 S.E.2d 63.

16. Phillips v. United States, 508 F. Supp. 537, 543 (1980) ("[T]he most potent arguments, in this court opinion, against 'wrongful life' claims are predicated on public policy considerations."); *see also* Adam A. Milani, *Better Off Dead Than Disabled?: Should Courts Recognize a "Wrongful Living" Cause of Action When Doctors Fail to Honor Patients' Advance Directives?*, 54 WASH. & LEE L. REV. 149, 198–215 (arguing that the recognition of a wrongful life cause of action will serve to disparage the physically and mentally disabled, due to the implicit judicial recognition that life with a disability may not be worth living).

17. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990); *see also* Milani, *supra* note 16, at 163–64 (acknowledging that the "increase of assisted suicide cases and the sheer number of right-to-die cases and statutes is not surprising given the fact that both public opinion polls and scientific studies showed that many people prefer not to be placed on life-support systems").

18. *See* Oddi, *supra* note 7, at 637 ("Once it has been established that a person has the right to die, medical personnel who might otherwise be under a duty to act on behalf of that

Medical autonomy rights currently include the constitutional right to refuse treatment resulting in death.[19] Further, some states' respect for citizens with terminal conditions has resulted in legislation that accommodates actively hastening the process of death.[20] It is therefore illogical for courts to continue to claim, "life, however impaired and regardless of any attendant expenses, cannot rationally be said to be a detriment."[21] The existence of do not resuscitate orders as an institution in hospitals is itself evidence that individuals make the cost-benefit analysis of life and death and often come to the opposite conclusion.[22] Violating a do not resuscitate order also entails another type of harm: *loss of bodily autonomy itself*, regardless of the harm associated with continued life in an impaired health state.

Part II of this Note will discuss several wrongful life and wrongful living cases, and the similar policy and practicality concerns that have been raised in both contexts that have led many courts to reject recognition. Part III will discuss the relevant distinctions that exist between a claim for wrongful life and a claim for wrongful living, and it will explore several policy considerations surrounding the wrongful living cause of action. Finally, Part IV will discuss the competency of jurors to determine appropriate damages awards in an action for wrongful living, given the widespread understanding in the United States that it is not necessarily a benefit to be kept alive, as many decisions have urged.

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person are not only relieved of that duty but also restrained by a diametrically opposite duty not to interfere with that person's right to die.").

19. *Cruzan*, 497 U.S. at 278.

20. *See* Gonzalez v. Oregon, 546 U.S. 243 (2006); *see also* OR. REV. STAT. § 127.897 (2015) (Oregon Death with Dignity Act); LEGISLATIVE POLICY & RESEARCH OFFICE, OREGON DEATH WITH DIGNITY ACT BACKGROUND BRIEF (2016) [hereinafter ODWDA BRIEF] (The brief notes that "[p]hysicians and families reported that patients have several reasons for requesting the prescription medication under the Act. These include concerns about losing autonomy, losing control of bodily functions, a decreasing ability to participate in activities that make life enjoyable and physical suffering. Also, many family members added that patients wanted to control the manner and time of their death.").

21. Lininger v. Eisenbaum, 764 P.2d 1202, 1212 (Colo. 1988) (child born with hereditary blindness); *see also* Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 226 (Ohio 1996) (patient suffered a stroke after having been kept alive against his expressed wishes).

22. *See* Lindgren, *supra* note 10, at 197.

II. JUDICIAL SENTIMENT REGARDING "WRONGFUL LIFE" AND "WRONGFUL LIVING" CAUSES OF ACTION

As discussed above, the wrongful life and wrongful living causes of action overlap in their reasoning behind the generalized statement that courts are not equipped to decide these types of cases and neither are juries.[23] Because South Carolina has not yet had the occasion to decide a case weighing the common law right to refuse unwanted medical treatment against the application of life-sustaining measures,[24] it is useful to analyze both bodies of law and then to distinguish the nature of each of these two claims for recovery.

A. Wrongful life and wrongful living cases from around the country

The first wrongful life suit was heard in 1963.[25] In *Zepeda v. Zepeda*, a claim was brought on behalf of an infant against his father.[26] The defendant had induced the plaintiff's mother to conceive a child although he was married to another woman; thus, the plaintiff was allegedly damaged for having been born an "adulterine bastard."[27] Although ultimately rejecting the wrongful life cause of action, leaving to the legislature the task of resolving potentially vast social consequences in recognizing such an action,[28] the court held that the plaintiff did in fact suffer an injury in being born out of wedlock.[29] The court in *Zepeda*, however, appeared to exercise its reticence with an open mind, stating that a more searching effort into the social consequences of a wrongful life action must take place before it can be maintained.[30]

Although *Zepeda* recognized that the plaintiff had indeed been injured through another's wrongful acts resulting in an impaired life, this conclusion

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23. See *Anderson*, 671 N.E.2d at 227, for an example of a court adopting the rationale behind rejecting the wrongful life action in a wrongful living case.

24. 12 S.C. JUR. *Death and Right to Die* § 8 (2017).

25. Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963).

26. *Id.* at 851.

27. *Id.*

28. *Id.* at 859.

29. *Id.* at 857–58 ("[I]t may be inconsistent to say, as we do, that the plaintiff has been injured by a tortious act and then to question, as we do, his right to maintain an action to recover for this act. This is done deliberately, however, because on the one hand, we believe that the elements of a willful tort are presented by the allegations of the complaint and, on the other hand, we approach with restraint the creation, by judicial sanction, of the new action required by the complaint.").

30. *Id.* at 859 ("If we are to have a legal action for such a radical concept as wrongful life, it should come after thorough study of the consequences.").

is often wholly rejected by a number of other courts in both wrongful life and wrongful living cases.

In *Blake v. Cruz*, the Idaho Supreme Court firmly rejected the wrongful life cause of action brought on behalf of an impaired infant, reasoning that life is not a compensable injury.[31] The plaintiff was born with various birth defects as a result of the defendant's negligent failure to diagnose the mother's rubella during pregnancy.[32] In rejecting the cause of action, the court claimed that recognizing a wrongful life claim would "do violence" to the purpose of law:

> Basic to our culture is the precept that life is precious. As a society [sic] therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious.[33]

The *Blake* court went further to say that even if the plaintiff had suffered a legally cognizable harm by virtue of having been born with defects as a result of the defendant's negligent acts, "the impossibility of measuring damages would in any event preclude recognition of the cause of action."[34]

The rationales expressed in *Blake* were mirrored in the wrongful living case of *Cronin v. Jamaica Hospital Medical Center*.[35] The plaintiff's decedent had properly executed a do not resuscitate order, which was on file with the hospital; nevertheless, the decedent was resuscitated against the mandates of the directive on two separate occasions.[36] In affirming the grant of the defendant's motion for summary judgment, the Appellate Division of the New York Supreme Court reiterated the notion that the "decedent did not sustain any legally cognizable injury as a result of the defendant's conduct" in keeping the patient alive.[37]

Similarly, in *Anderson v. St. Francis-St. George Hospital*, the Court of Appeals of Ohio held that "life is not a compensable harm; therefore, there is

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31. Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984).
32. *Id.* at 316.
33. *Id.* at 322 (quoted in Willis v. Wu, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004)).
34. *Blake*, 698 P.2d at 322.
35. Cronin v. Jamaica Hosp. Med. Ctr., 60 A.D.3d 803, 804 (N.Y. App. Div. 2009) (noting the lack of "any legally cognizable injury").
36. *Id.* at 803.
37. *Id.* at 804.

no cause of action for wrongful living."[38] The decedent in *Anderson* had a "no code blue" directive placed in his medical chart while in the hospital for chest pain.[39] Upon suffering a ventricular fibrillation, the decedent's nurse ignored the "no code blue" order and resuscitated the decedent with a defibrillator.[40] Although the court found evidence that the decedent "expressly refused treatment in a code-blue situation,"[41] the court rejected the wrongful living claim on the basis that the decedent suffered no injury by being kept alive against his will, citing the rule of the Ohio Supreme Court in the prior decision of *Bowman v. Davis* that a lack of life cannot be a legal benefit.[42]

Interestingly, on appeal the Supreme Court of Ohio held that the plaintiff could recover, yet only under a theory of negligence or battery.[43] The court nevertheless echoed Professor Oddi's argument for recognition of a distinct cause of action for wrongful living: "Because a person has a right to die, a medical professional who has been trained to preserve life, and who has taken an oath to do so, is relieved of that duty and is required by a legal duty to accede to a patient's express refusal of medical treatment."[44] The court in *Anderson* still managed to prevent any meaningful recovery for the patient's suffering by way of attacking causation through an intervening circumstance. Although the stroke may have been a foreseeable result of resuscitating the patient, the nurse merely caused him to survive a ventricular fibrillation.[45]

New Jersey has also refused to recognize the wrongful life action brought on behalf of a disabled child.[46] In *Berman v. Allan*, the court emphasized that the difficulty in measuring damages, although not in and of itself sufficient justification for the court's refusal to recognize the action, played a role.[47] The *Berman* court also echoed prior wrongful life decisions

38. Anderson v. St. Francis-St. George Hosp., 614 N.E.2d 841, 845 (Ohio Ct. App. 1992).

39. *Id.* at 843.

40. *Id.*

41. *Id.* at 844.

42. *Id.* at 845–46 (citing Bowman v. Davis, 356 N.E.2d 496, 498–99 (Ohio 1976)).

43. Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 228 (Ohio 1996).

44. *Id.* at 227.

45. *Id.* at 228.

46. Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979).

47. *Id.* (quoting Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)) ("In the case of a claim predicated upon wrongful life, such a computation would require the trier of fact to measure the difference in value between life in an impaired condition and the 'utter void of nonexistence.' Such an endeavor, however, is literally impossible.").

and predicated its opinion on the position that life is not a legally cognizable harm.[48]

B. The South Carolina wrongful life decisions of Phillips *and* Willis

Although there are no South Carolina cases in the wrongful living context, South Carolina has had occasion to consider the issue of wrongful life lawsuits brought on behalf of a disabled child in two instances.[49] The concepts expressed in the following opinions explore substantially similar questions of policy and practicality that are faced in the case of a do not resuscitate order violation. As such, they provide insight towards predicting the posture of South Carolina state courts when the time comes to hear a wrongful living claim.

In the first of these cases, *Phillips v. United States*, the District Court for the District of South Carolina granted partial summary judgment to the United States on the claim of "wrongful life" in a Section 1983[50] suit brought on behalf of a child with Down syndrome.[51] As an issue of first impression in South Carolina, the district court predicted what the Supreme Court of South Carolina would have decided and followed that projected reasoning.[52] The court was not persuaded by the fact that damages in a wrongful life action would be inherently difficult to measure, noting that "damages arguments are 'more a matter of policy than logic.'"[53] The *Phillips* court recited the United States Supreme Court's position while addressing this issue: "If a claim is legally cognizable, mere difficulty in the ascertainment of damages should be insufficient to preclude the action."[54]

Although the difficulty in measuring damages was of primary concern to the courts in cases like *Blake* and *Berman*, the court in *Phillips* recognized

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48. *Id.* at 11–12.

49. *See* Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980); Willis v. Wu, 362 S.C. 146, 607 S.E.2d 63 (2004).

50. *Phillips* was heard in federal court pursuant to 28 U.S.C. § 1346(b)(1), providing federal jurisdiction for claims against federal government employees such as the Charleston Naval installation staff. *Phillips*, 508 F. Supp. at 538.

51. *Id.* at 544.

52. *Id.* at 540.

53. *Id.* at 542 (quoting Alexander Morgan Capron, *Tort Liability and Genetic Counseling*, 79 COLUM. L. REV. 618, 648 (1979)); *see also id.* at 543 n.12 (discussing the irony of the artificial and speculative damage analysis required in diethylstilbestrol (DES) birth defect litigation: the condition the child would have been in but for the prescription of DES could be non-existence, because DES is prescribed to mothers to prevent spontaneous abortion in high-risk mothers).

54. *Id.* at 542 (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931)).

that the primary justification for rejecting the wrongful life action was based in public policy.[55] In summarizing the policy considerations of wrongful life precedent in other states, the court concluded that the wrongful life action stood inapposite to the fundamental policy of promoting the "preciousness and sanctity of human life."[56] The court appeared to leave the door open to recognizing such a claim in the future, however, noting that moral attitude shifts could provide a new perspective from which to analyze the issue.[57]

In *Willis v. Wu*, the Supreme Court of South Carolina nodded to the *Phillips* court for correctly predicting that a wrongful life claim would not be cognizable in the state.[58] However, the *Willis* court diverged from the *Phillips* opinion by stating that apart from the policy considerations, the difficulty in measuring damages would also be dispositive. "[A] jury necessarily would face an imponderable question: Is a severely impaired life so much worse than no life at all that [the plaintiff] is entitled to damages?"[59] The court summarized this hurdle as follows:

> Our civil justice system places inestimable faith in the ability of jurors to reach a fair and just result under the law, but even a jury collectively imbued with the wisdom of Solomon would be unable to weigh the fact of being born with a defective condition against the fact of not being born at all, i.e., non-existence. It is simply beyond the human experience.[60]

The *Willis* court did, however, acknowledge the temporal nature of the policy considerations as they were discussed in *Phillips*. Moral attitude shifts may provide a new perspective from which to analyze the issue.[61]

The general consensus across the courts is thus to decline recognition of the cause of action for both wrongful life and wrongful living. The stated reasons for doing so, as the South Carolina courts noted in *Phillips* and *Willis*, are based either on the premise that life itself, in whatever form lived, cannot be recognized as a legal harm for various policy reasons, or that the measure of damages in such a case would simply require too much from a jury.

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55. *Id.* at 543.
56. *Id.*
57. *Id.*
58. Willis v. Wu, 362 S.C. 146, 156, 607 S.E.2d 63, 67 (2004).
59. *Id.* at 162, 607 S.E.2d at 71.
60. *Id.*
61. *Id.*

These premises, however, stand in dissonance with the right to refuse treatment: how can a right exist when the citizen in possession of that right has no recourse when the right is violated?[62] The conclusory statement that public policy mandates rejection of the cause of action leaves much room for debate.

Further, the conclusion that difficulty in determining the appropriate measure of damages is grounds for rejecting the action is founded upon an inherently flawed premise. This conclusion is not only in stark opposition to tort law's historical trust in jurors[63] but also to the United States Supreme Court's rule, set forth in *Story Parchment Co. v. Paterson Parchment Paper Co.* and cited by the District Court for the District of South Carolina in *Phillips*: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a *perversion of fundamental principles of justice* to deny all relief to the injured person."[64]

III. SOUTH CAROLINA SHOULD BE PREPARED TO ADOPT THE TORT OF WRONGFUL LIVING WHEN MEDICAL PROFESSIONALS VIOLATE A DO NOT RESUSCITATE ORDER

As discussed above, a majority of courts considering the questions posed by wrongful life actions have responded by rejecting the validity of the claim.[65] Similarly, courts faced with a wrongful living cause of action have rejected the claim for many of the same reasons as those stated in the wrongful life context.[66] A thesis of this Note is that the adoption of reasoning from wrongful life cases in a wrongful living action is misplaced. Wrongful living plaintiffs are fundamentally different in that they have attempted to exercise their right of self-determination in refusing treatment. To the contrary, as the *Becker* court astutely noted in that wrongful life case,

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62. *See* Oddi, *supra* note 7, at 637 (discussing a presumed duty of medical professionals not to interfere with the right to refuse treatment).

63. *See Willis*, 362 S.C. at 162, 607 S.E.2d at 71 (discussing how the "civil justice system places inestimable faith in the ability of jurors," yet drawing a line and concluding that jurors are incapable of reaching a fair and just result in a wrongful life action).

64. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) (emphasis added).

65. *See, e.g.*, Phillips v. United States, 508 F. Supp. 537, 544 (D.S.C. 1980).

66. *See* Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 227 (Ohio 1996) (reconciling the wrongful living action with the wrongful life action and concluding that "[s]ome form of valuation of life pervades the legal issue" surrounding these claims).

there is no recognized right not to be born, even into a life of suffering and hardship.[67]

Notwithstanding the recitals in the South Carolina cases of *Phillips* and *Willis*, and the conclusions by many courts that (a) life is not a cognizable harm by virtue of public policy, and (b) the difficulty in measuring damages precludes an action where the harm may properly be characterized as life itself,[68] this Note seeks to probe the weaknesses of both premises as applied to wrongful living actions. In addition, this Note will attempt to distinguish the wrongful life cause of action from the wrongful living cause of action with the hope that a proper civil remedy may be afforded to individuals whose right of self-determination has been violated. The remedy for violating a patient's right of self-determination should properly meet the nature of the harm, as opposed to affording recovery within the limited causal scope of battery as was the case in *Anderson*.[69]

A. The individual right to refuse treatment, once established, is an exception to the state's interest in preserving human life: the latter should therefore not be used to delimit the former under the guise of public policy

The Supreme Court in *Cruzan* said that the state has an "unqualified interest" in the preservation of human life.[70] The interest is, however, quite qualified in context. The nature of the state's "unqualified interest" in the preservation of human life is limited by the facts of *Cruzan*, a situation in which the veracity of the patient's wish to refuse treatment was in question.[71] The state's interest in preserving human life presumably may not, therefore, be asserted to overcome the wishes of a patient who has properly recorded do not resuscitate orders or other advance directives.[72] Courts refusing to recognize wrongful living claims are in effect curtailing

67. Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (Wachtler, J., dissenting in part).

68. *See e.g.*, Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979) (finding that the difficulty in measuring damages and the non-recognition of life as a legally cognizable harm precluded the wrongful life action).

69. *See, e.g.*, Tucker v. Calmar S.S. Corp., 356 F. Supp. 709, 711 (D. Md. 1973) ("The fundamental goal of tort recovery is compensation of the victim, *i.e.*, to put the victim, insofar as money damages may do so, in the position he would have been absent the tort.").

70. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990).

71. *See id.* at 338–39 (Scalia, J., dissenting) ("An innocent person's constitutional right to be free from unwanted medical treatment is . . . limited to those patients who had the foresight to make an unambiguous statement of their wishes while competent.").

72. *See id.* at 281–82.

the constitutional right to refuse treatment by disallowing any recovery for a violation of that right.

The thrust of *Cruzan* is that a state may "safeguard the personal element of [the choice to refuse treatment] through the imposition of heightened evidentiary requirements,"[73] while affirming that individuals have a constitutionally protected liberty interest in the right to refuse treatment.[74] The state's interest in promoting the value of human life, therefore, is entirely inapplicable to wrongful living torts under *Cruzan* so long as the patient's advance medical directives or do not resuscitate orders are properly executed. What is the public policy furthered by the courts in refusing to recognize the wrongful living cause of action? How can life categorically fail to be a legal injury, when the United States Supreme Court has declared that individuals have a constitutional right to refuse treatment resulting in death?[75] Such a conclusion overlooks the fact that many Americans have weighed the costs and benefits of receiving life-saving treatment and thought otherwise.[76]

1. The state interest in preserving human life is not undercut by recognizing the wrongful living cause of action, assuming the execution of a do not resuscitate order was carried out in accordance within the applicable South Carolina statutes

Exercising the right to refuse treatment is inherently personal, and the existence of the right to refuse treatment that may result in death is an acknowledgement that each individual may decide for themselves when life is no longer worth living. Although the state has an interest in preserving human life,[77] this interest is properly served by the conditions placed by statute on executing a do not resuscitate order.[78] The detriment caused by saving a person who wished to die should therefore be considered a legal injury, because all policy concerns of the state may be taken into account during the process of executing an order.

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73. *Id.* at 281.

74. *Id.*

75. See Oddi, *supra* note 7, at 632–35, for a discussion of the state's permissible interest in preserving life.

76. *See* Lindgren, *supra* note 10, at 197.

77. *See, e.g.*, Oddi, *supra* note 7, at 632–35.

78. *See* S.C. CODE ANN. § 44-78-20(A)(2016) (setting forth the conditions precedent to proper execution of a do not resuscitate order and integrating the provisions of the Adult Healthcare Consent Act in the case of surrogate execution).

Professor Oddi compares the weight of individual and state interests at play in this situation: "The notion that the individual exists for the good of the state is, of course, antithetical to our fundamental thesis that the role of the state is to insure a maximum of individual *freedom of choice* and conduct."[79] Maximizing individual freedom of choice and conduct entails allowing recovery for wrongful living, because the counterbalancing state interest in preserving human life is already taken into account in the appropriate living will statutes. Allowing recovery will serve to bolster the freedom of choice already embodied in South Carolina's end of life treatment statutes.[80]

There seems to be no remaining policy justification that a South Carolina court may set forth to preclude a wrongful living claim, when the legislature appears to have taken all relevant policy concerns into consideration in passing the do not resuscitate order statutes.

B. The wrongful life tort is premised on vindicating the right to refuse unwanted medical treatment, not a notion that disabled or otherwise impaired lives are less valuable

Although it is necessary to acknowledge that a wrongful living plaintiff is arguing that death would have been more valuable than living in their impaired state, it is improper to extend this acknowledgement to third parties as a whole.

Executing a do not resuscitate order is a fundamentally personal decision based on a difficult cost-benefit analysis.[81] Acknowledging the rights of individuals to come to the conclusion that they do not want resuscitative treatment is in no way an expression that disabled persons' lives are less valuable in the aggregate sense. Professor Adam Milani argues that the wrongful living tort, in addition to the *Cruzan* decision, reflects a societal prejudice that disavows and devalues the lives of persons living with disabilities.[82] The Supreme Court of California acknowledged, in the wrongful life case of *Turpin v. Sortini*, the potential for absurdity in this line of reasoning:

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79. Oddi, *supra* note 7, at 632–33 (quoting *In re* Osborne, 294 A.2d 372, 375 n.5 (D.C. 1972) (emphasis added).

80. *Compare* Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984) ("As a society [sic] therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence."), *with Osborne*, 294 A.2d at 375 n.5 (arguing that maximization of freedom of choice and conduct should be a driving force of state policies).

81. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990).

82. *See* Milani, *supra* note 16, at 198.

> Although it is easy to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound basis for rejecting the child's tort action. To begin with, it is *hard to see how an award of damages to a severely handicapped or suffering child would "disavow" the value of life* or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.[83]

The *Turpin* court held that there was no basis in the law for concluding that, in all instances, an impaired life was always preferable to non-life.[84] The court supported its position by reference to the California Health and Safety Code,[85] which reaffirmed that patients have the right to refuse treatment, in part because treatment may sometimes rob the patient of dignity or otherwise be a source of pain and suffering while providing nothing of medical benefit.[86]

Professor Milani nonetheless asserts that both the wrongful living tort and the *Cruzan* decision sanction the notion that an impaired life is worth less than no life and are detrimental to the esteem of disabled people.[87] This argument is still flawed on two counts. First, as *Cruzan* indicated, exercising the right to die is a "*deeply personal* decision of obvious and overwhelming finality."[88] It is exactly the personal nature of the decision that prevents prejudice to the disabled, regardless of what assumptions must be made in awarding a wrongful life plaintiff a damages award. If we as a society awarded Beatrice Weisman a damages award for wrongful life,[89] it would not be premised on the principle that people with collapsed lungs and broken ribs would be better off dead in the aggregate. Rather, she should be awarded damages because she possessed and attempted to exercise a right of self-determination, which was thwarted.

Second, it flows from Professor Milani's argument that if both the wrongful living tort and the *Cruzan* decision prejudice the disabled, the fact

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83. Turpin v. Sortini, 643 P.2d 954, 954 (Cal. 1982) (emphasis added).

84. *See id.*

85. *See id.* (citing CAL. HEALTH & SAFETY CODE § 7186 (West) (repealed 2000)).

86. *Compare Turpin*, 643 P.2d at 954, *with* S.C. CODE ANN. § 44-78-15(2) (2016) ("'Do not resuscitate order for emergency services' means a document made pursuant to this article to prevent EMS personnel from employing resuscitative measures or any other medical process that would only extend the patient's suffering with no viable medical reason to perform the procedure.").

87. *See* Milani, *supra* note 16, at 198.

88. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (emphasis added).

89. *See* Span, *supra* note 1.

that *Cruzan* and the rights established by it are still the law in this country is justification enough for recognition of the wrongful living cause of action: The United States Supreme Court has already passed on the interests at stake and responded in the affirmative with respect to whether patients in dire straits may determine their fate if the proper procedure has been followed.[90] The existence of a legal right to refuse unwanted medical treatment is inseparable from a remedy for the violation of that right.

C. A large percentage of the population would not want life-saving treatment in various hypothetical circumstances. The public is keenly aware that life is not always preferable to death

South Carolina will hopefully be reluctant to accept the public policy rationale present in both the wrongful life and wrongful living cases discussed above when wrongful living arrives in South Carolina: that an action premised on life as an injury does violence to the policy of promoting the value of human life. This rationale is asserted at face value by many courts and is countervailed by extensive data regarding American citizens' end-of-life treatment preferences.[91]

A primary function of the judiciary is to protect political minorities, such as the disabled, from the driving forces of the popular majority.[92] If, as discussed above, disabled people are not disparaged by recognition of a wrongful living cause of action as argued by Professor Milani, then the public policy justification for rejecting the cause of action would only lie if it was perverse to the political majority's view.[93] Does the public actually believe that recognizing a cause of action in which death necessarily must be valued higher than life does violence to the sanctity and value of life itself? Perhaps part of the sanctity and value of life lies in the ability of a person to make decisions that will ensure that their life is lived in a dignified fashion, and on their own terms.

There is significant evidence that a majority of the population would not want to be kept alive in certain hypothetical circumstances and presumably would exercise their right to refuse treatment given the chance.[94] Professor

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90. *See Cruzan*, 497 U.S. at 281.

91. *See* Lindgren, *supra* note 10, at 197.

92. *See, e.g.*, United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

93. A policy interest could not conceivably be found where neither the majority nor the minority of any given classification is benefited.

94. Lindgren, *supra* note 10, at 197 (reviewing over 200 national opinion poll questions and concluding that the majority of Americans would prefer not to be kept alive if on life

Lindgren argues that, in accordance with the majority view on end-of-life procedures, better health care policy would be to set the default rule essentially in line with the strictures of a do not resuscitate order, and that patients should have to *opt in* to receive the aggressive life-saving measures employed in the modern age.[95]

As evidenced by the studies compiled by Professor Lindgren, sentiment regarding aggressive life-saving measures is not positive in every setting, and a majority of the sample population would assert their right to refuse treatment in various settings where very low quality of life or severe pain would otherwise result.[96] This sentiment has clearly manifested itself in the form of legislation allowing for the facilitation of those rights throughout the country, including South Carolina.[97]

Rights of patients—the majority of patients—should not be overborne by a vaguely-grounded proposition that vindicating that right head-on in a wrongful living claim would do violence to the purpose of law.[98] Surely, the South Carolina legislature's enactment of tools to facilitate those rights is evidence enough of the policy, law, rights, and duties to which the courts should adhere.

D. South Carolina medical professionals are under a duty to honor do not resuscitate orders, and liability for a breach of that duty should naturally follow

The South Carolina legislature has already taken steps to ensure that the rights of patients are honored when a do not resuscitate order has been properly executed.[99] A patient in South Carolina may direct their health care provider to execute a do not resuscitate order if they have a "terminal

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support systems or in a coma, or even if an irreversible condition would cause "a great deal of physical pain").

95. *Compare* Lindgren, *supra* note 10, at 186 ("If the patient's wishes are unknown, follow the course that most people would want for themselves in desperate end-of-life situations—a withdrawal of treatment to allow an earlier death."), *with Cruzan*, 497 U.S. at 263 (1990) (discussing the irreparable harm associated with an erroneous decision to withdraw life-sustaining treatment, and contrasting the remediable harm associated with the continuance of treatment against the patient's wishes).

96. Lindgren, *supra* note 10, at 197.

97. *See* S.C. CODE ANN. § 44-77-50 (2015); S.C. CODE ANN. § 44-78-30 (2016).

98. Blake v. Cruz, 698 P.2d 315, 322 (Idaho 1984); Willis v. Wu, 362 S.C. 146, 158, 607 S.E.2d 63, 69 (2004).

99. *See* S.C. CODE ANN. § 44-78-10 to -65 (2016).

condition."[100] Health care providers and emergency medical services personnel "*must* not provide resuscitative measures" when the patient has executed a do not resuscitate order or is wearing a do not resuscitate bracelet.[101] If, for presumably personal reasons, a medical service provider "cannot honor the order," they are directed to transfer the patient to a service provider who will honor the order.[102] The statute notably carves out several exceptions to civil and criminal liability for medical service professionals in the do not resuscitate process.[103] Most importantly with respect to the wrongful living tort is the following:

> No health care provider or EMS personnel is liable for damages, may be the subject of disciplinary proceedings, or may be subject to civil or criminal liability due to . . . initiating resuscitative treatment on a "do not resuscitate patient" if EMS personnel were unaware of the existence of the order or bracelet or if EMS personnel reasonably and in good faith believed the "do not resuscitate order" had been canceled or revoked or, where applicable, if the do not resuscitate bracelet has been tampered with or removed.[104]

Given the explicit exceptions from liability in the enumerated and finite circumstances described above, a proper inference may be made[105] that if EMS personnel (a) were aware of the existence of the do not resuscitate order; (b) did not have a good faith belief that the do not resuscitate order was cancelled or revoked; and (c) the do not resuscitate bracelet, if present, was not tampered with or removed, then civil liability may lie if resuscitative measures are employed.[106]

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100. *See id.* § 44-78-20(A) (2016); *id.* § 44-78-15(7) (defining terminal condition as "an incurable or irreversible condition that within reasonable medical judgment could cause death within a reasonably short period of time if life-sustaining procedures are not used").

101. *Id.* § 44-78-45(A); *see also id.* § 44-78-30(B) (do not resuscitate bracelet).

102. *Id.* § 44-78-45(B).

103. *Id.* § 44-78-35.

104. *Id.* § 44-78-35(3); *see also* S.C. CODE ANN. § 44-70-90 (2015) (providing similar exceptions to liability under the South Carolina Death With Dignity Act); *see also id.* § 15-32-230(A) ("[I]n a genuine emergency situation involving an immediate threat of death or serious bodily injury to the patient receiving care in an emergency department or in an obstetrical or surgical suite, no physician may be held liable unless it is proven that the physician was grossly negligent.").

105. The exceptions to liability under section 44-78-35 are presumably exhaustive under the statutory construction principle of *inclusio unius est exclusio alterius*.

106. *See* S.C. CODE ANN. § 44-78-35 (2016); *see also* Oddi, *supra* note 7, at 636 ("[I]f a person has a right to die by refusing to consent to medical treatment, correlatively one would

This inference fails to answer the question of under what theory a patient whose do not resuscitate order was violated may recover, in light of the South Carolina decisions in *Phillips* and *Willis*. First principles of tort theory provide an answer.[107] The cause of action must provide a remedy that captures the injury inflicted. In a wrongful living tort, the patient wished to exercise their right to refuse treatment and was thwarted by a medical professional. In that patient's mind, it can be assumed that a cost-benefit analysis was made, and that the patient decided that dying was more valuable than continued life resulting from a "process that would only extend the patient's suffering."[108] The appropriate remedy for the violation of a do not resuscitate order is to allow the civil justice system to capture this ephemeral analysis and put those patients, in monetary terms, in the position they would have wanted to be in but for the tort.

E. The existence of a right to refuse unwanted medical treatment necessitates a remedy at law for the violation of that right

The Supreme Court of the United States and the South Carolina legislature, as discussed above, have both acted to establish a competent, terminally ill person's right to refuse treatment, even if death will occur.[109] The establishment of this right is eroded towards nothingness without a direct and appropriate remedy.

The seminal case of *Marbury v. Madison* stands for the same proposition: the existence of a right is sufficient in and of itself to recognize a remedy at law for its violation.[110] The United States Supreme Court recognized in *Marbury* that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[111] Given the pervasive and accepted existence of a right to refuse treatment when certain prerequisites are satisfied, it follows that patients should be able to recover for wrongful living when their expressed desire to perish naturally is overborne. "[I]t is a general and

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be under a duty not to provide that treatment, and there would be consequences in tort for so treating.").

107. *See, e.g.*, Tucker v. Calmar S.S. Corp., 356 F. Supp. 709, 711 (D. Md. 1973) (discussing the fundamental goal of tort law as the vehicle by which a plaintiff is made whole by compensation that would put the plaintiff in the position they would be in but for the commission of the tort).

108. S.C. CODE ANN. § 44-78-15(2) (2016).

109. *Id.* § 44-78-45; Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 338–39 (1990).

110. Marbury v. Madison, 5 U.S. 137, 163 (1803).

111. *Id.*

indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."[112] The Court in *Marbury* reiterated that the government of the United States is one of laws, not of men, and warned that this high calling will go unanswered "if the laws furnish no remedy for the violation of a vested legal right."[113] This is an appropriate standard by which the efficacy of civil remedies should be evaluated, and the current justifications given for rejecting the cause of action for wrongful living are unpersuasive in light of the principles laid forth in *Marbury*.

F. The wrongful living tort is a necessary deterrent that will ensure that health care providers honor the dictates of their patients' end-of-life wishes

Correlative to the role of courts in providing compensation to those who have suffered legal injuries is the court's role in establishing deterrents against the undesirable behavior that gives rise to such injuries. In the case of willful, wanton, or reckless disregard for the mandates of a patient's do not resuscitate order, punitive damages ought to be available to future wrongful living plaintiffs in order to deter the health care industry as a whole from disregarding patients' wishes.[114]

It is important to recognize that several factors are present that incentivize health care providers to engage in aggressive life-saving treatment against the terms of a patient's do not resuscitate order. First, medical professionals are indoctrinated to adhere to a default rule of aggressive life-saving treatment from the outset of their training[115]:

> [F]rom medical school on, from their mentors' and their patients' expectations, their instincts are well trained to intervene to prolong life. Indeed, physicians are rarely challenged for intervening but often criticized for going slow. Physicians do not easily accept the conception that it may be best to do less, not more, for a patient.[116]

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112. *Id.* (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23 (1783)).

113. *Id.*

114. *See, e.g.*, Clark v. Cantrell, 339 S.C. 369, 379, 529 S.E.2d 528, 533 (2000) (noting that punitive damages compensate the plaintiff for the willful violation of private rights, and serve to deter similar future conduct by providing a warning to others).

115. *See* Lindgren, *supra* note 10, at 186–87.

116. EZEKIEL J. EMANUEL, THE ENDS OF HUMAN LIFE 91 (1991) (internal quotation marks omitted).

Thus, although doctors may be presumed aware of the doctrine of informed consent, withholding treatment that might save a patient's life is likely counterintuitive for many.

Second, and more ominously, researchers at Stanford University suggest that health care institutions have a financial incentive to provide life-saving treatment, especially in the common fee-for-services regime, regardless of the patient's wishes.[117] "The current fiscal system rewards hospitals and doctors for medical procedures and providing high intensity care to terminally ill persons," and does not "reimburse . . . conversations that elicit values and goals of care and what matters most to patients . . . at the end of life."[118]

Recognition of the tort of wrongful living is an appropriate method by which to counterbalance these forces in an effort to bring effect to patients' rights and wishes.

IV. THE DIFFICULTY IN MEASURING DAMAGES SHOULD NOT BAR RECOGNITION OF THE TORT OF WRONGFUL LIVING

The attendant difficulty in measuring damages that occur in a claim for wrongful living should not serve to preclude recovery for a violation of a patient's autonomy rights. While it is true that a claim for wrongful life and a claim for wrongful living both require some measure of the valuation of human life compared to a lack thereof,[119] this Note contends that it is a stretch too far to deem jurors incompetent to take on this task insofar as wrongful living claims are concerned.

A. The United States Supreme Court has admonished the argument that difficulty in measuring damages should preclude recovery

As discussed above, several courts have premised their rejection of wrongful life and wrongful living claims partly on the contention that the amount of damages suffered by the complaining party are too ethereal to measure with any degree of certainty.[120] This line of reasoning was rejected

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117. *See* Vyjeyanthi S. Periyakoil et al., *Do Unto Others: Doctors' Personal End-of-Life Resuscitation Preferences and Their Attitudes Toward Advance Directives*, PLOS One, May 28, 2014, at 8, http://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0098246&type=printable.

118. *Id.*

119. Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225, 227 (Ohio 1996).

120. Willis v. Wu, 362 S.C. 146, 162, 607 S.E.2d 63, 71 (2004).

by *Phillips*,[121] but was later adopted by *Willis*, and is therefore likely to be a large point of friction when South Carolina hears its first wrongful living suit.

In *Story Parchment*, cited by *Phillips*, the United States Supreme Court set forth its position on the matter.[122] *Story Parchment* was an action to recover damages caused by a price-fixing scheme in violation of the Sherman Act.[123] The trial court submitted to the jury the question of damages, to include, among other things, the difference between the amount realized by the plaintiff and the amount it would have realized but for the unlawful price-fixing conspiracy of the defendants.[124] The First Circuit held that no recovery could be had on this item of damages, in part because the jury would necessarily be relying on speculation and conjecture.[125] On certiorari to the United States Supreme Court, Justice Sutherland emphatically rejected this principle on behalf of a unanimous Court.[126]

The *Story Parchment* opinion concluded that some amount of damages, though they may only be approximate in nature, are recoverable so long as the damage itself can be shown to be the result of another's wrongful act.[127] Two primary justifications were given. First, a wrongdoer should not be entitled to complain that no recovery should result on the basis of uncertainty when the uncertainty is caused by the wrongful act.[128] Citing the Supreme Court of Michigan in the case of *Allison v. Chandler*, the United States Supreme Court declared that the risk of uncertainty justifiably lives with the wrongdoer and not the injured party.[129] Second, the *Story Parchment* court noted that jurors are the appropriate arbiters of admittedly uncertain measures of damages:

> Juries are allowed to act upon *probable and inferential* as well as direct and positive proof. And when, from the nature of the case, the amount of the damages can not be estimated with certainty, or only a part of them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case,

121. Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980).

122. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

123. *Id.* at 566.

124. *Id.* at 561.

125. *Id.*

126. *See id.* at 564–65.

127. *Id.* at 565 (quoting Gilbert v. Kennedy, 22 Mich. 117, 131 (1871)) (describing a rule that denies recovery to a party who has been injured by a wrongful act due to uncertain damages as "little less than legalized robbery").

128. *See id.* at 563.

129. *Id.* (citing Allison v. Chandler, 11 Mich. 542, 550–56 (1863)).

> having *any tendency* to show damages, or their probable amount; *so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit.*[130]

The Court then unequivocally stated that where a wrongful act necessarily gives rise to an injury that cannot be measured easily in monetary terms, "it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts."[131]

As noted above, the *Phillips* court adopted *Story Parchment*'s reasoning in that South Carolina wrongful life suit.[132] *Willis*, however, still refused to allow the cause of action for wrongful life to proceed, based in part on the assumption that jurors are incapable of understanding the value of never having been born.[133] Hopefully, future wrongful living plaintiffs in South Carolina will take solace in the stark and important difference between the *Willis* wrongful life suit and their pending wrongful living claim: while no juror can claim to know what it is like to never have been born, Professor Lindgren's studies suggest that a healthy cross-section of South Carolinians understand the deeply personal nature of a formal decision to refuse treatment and the violence to dignity associated with a wrongful living cause of action. Jurors are thus more likely to be able to associate a value to a wrongful living plaintiff's injuries with more certainty than they might in a wrongful life claim.

South Carolina jurisprudence nevertheless recognizes that "damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered . . . ."[134] However, case law applying this principle should not serve as a bar to recovery for wrongful living.

In *United Merchants & Manufacturers v. South Carolina Electric and Gas Co.*, the District Court for the Western District of South Carolina precluded recovery on the basis of the claim's speculation-prone damages.[135] In the claim for fraud and deceit, the plaintiff claimed that they were wrongfully deprived of their incentive to argue against a utility rate increase before the South Carolina Public Service Commission as a result of

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130. *Id.* at 564 (quoting *Allison*, 11 Mich. at 555).

131. *Id.* at 563.

132. Phillips v. United States, 508 F. Supp. 537, 542 (D.S.C. 1980).

133. Willis v. Wu, 362 S.C. 146, 162, 607 S.E.2d 63, 71 (2004).

134. United Merchants & Mfrs. v. S.C. Elec. & Gas Co., 113 F. Supp. 257, 261 (W.D.S.C.), *aff'd*, 208 F.2d 685 (4th Cir. 1953); 11 S.C. JUR. *Damages* § 5 (2017).

135. *United Merchants*, 113 F. Supp. at 261.

the defendant's representations.[136] Damages allegedly amounted to the difference between the rate at which the commission fixed and the plaintiff was required to pay, and the rate at which the commission would have fixed prices if the plaintiff had retained its incentive to argue before the commission.[137] While the court stated that damages must be susceptible to ascertainment with a "reasonable degree of certainty,"[138] the issue was whether the plaintiff could prove that the rate would have been fixed at a lower price but for the withdrawal of its objections to the rate increase.[139] "There is no showing in the complaint to indicate that a different conclusion would have been reached by the [c]ommission if the plaintiff had not withdrawn its appearance."[140] Thus, the plaintiff had failed to sufficiently allege a probability of proximately caused damages whatsoever.

While the court in *United Merchants* set forth principles of recovery that seem to favor rejection of a wrongful living claim in the future because damages may not pass muster within the "reasonable degree of certainty" language, the facts of *United Merchants* align more squarely with the law of causation: the plaintiff had not sufficiently alleged that its withdrawal from rate increase hearings was a causal factor in the resulting increased utility rates it ultimately had to pay.[141]

In a wrongful living claim, the injury sustained—that from which damages flow—is the violation of an established right, a situation where damages are awarded quite often.[142] The measure of damages is not uncertain with respect to probability, but rather due to the admittedly difficult cost-benefit analysis that jurors must undertake in evaluating the degree of harm suffered by the plaintiff. Unlike *United Merchants*, where damages were claimed based on the speculative proposition that injury *might* have been avoided but for a wrongful act, a wrongful living claim alleges damages due to a direct violation of the patient's rights. A jury need not undertake a probability analysis of whether some act affected the chain of events with enough likelihood to give rise to a damages award as they might have in *United Merchants*.

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136. *Id.* at 259.

137. *See id.* at 261.

138. *Id.*

139. *See id.*

140. *Id.*

141. *Id.*

142. *See, e.g.*, United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807, 810–11 (E.D. Pa. 1972) ("[C]onstitutional rights of a citizen are so valuable to him that an injury is presumed to flow from the deprivation itself."); *see also* Note, *Measuring Damages for Violations of Individuals' Constitutional Rights*, 8 VAL. U. L. REV. 357, 358–62 (1974) (discussing the development of standards for measuring damages in § 1983 suits).

South Carolina should accordingly adopt the reasoning in *Story Parchment* and *Phillips*: a jury should be able to hear the facts of a wrongful living claim and then be allowed to carry out its duty "to make the most intelligible and probable estimate which the nature of the case will permit."[143]

B. Damages could easily be measured based on the continued suffering that the patient presumably wished to avoid while deciding to execute a do not resuscitate order

A South Carolina statute lays bare the fact that, in certain circumstances, life-saving measures do nothing but prolong suffering and are not supported by any viable medical reason.[144]

The measurement of damages in a wrongful living case, although they may require an evaluation of the value of human life, are not nearly as difficult to gauge as they are in an action for wrongful life, and wrongful life decisions should be distinguished.[145] The pain and suffering of continued life after violation of a do not resuscitate order should be considered a reasonably foreseeable consequence of resuscitating a patient who has executed a do not resuscitate order.[146] Death is a process, and resuscitating a patient who has a do not resuscitate order alters that process in a direct causal fashion: it extends the patient's suffering, as evidenced by a South Carolina statute.[147]

Consider a survival action for wrongful death. It is a well-established rule in South Carolina jurisprudence that the representative of a decedent's estate may recover for the conscious pain and suffering that the decedent experienced prior to death, as long as the defendant proximately caused that pain and suffering.[148] The principle underlying wrongful death recovery of this type may be extended to encompass wrongful living recovery in a

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143. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931) (quoting Allison v. Chandler, 11 Mich. 542, 555 (1863)).

144. *See* S.C. CODE ANN. § 44-78-15(2) (2016).

145. Gleitman v. Cosgrove, 49 N.J. 22, 28 (1967) (noting that jurors cannot comprehend the utter void of nonexistence in relation to a claim for wrongful life).

146. *See* S.C. CODE ANN. § 44-78-15(2) (2016) (defining a do not resuscitate order as a vehicle by which patients may avoid procedures that would "*only extend the patient's suffering with no viable medical reason to perform the procedure*") (emphasis added); *see also* ODWDA BRIEF, *supra* note 20, at 2 (noting that avoidance of continued physical suffering is one of the many reasons patients wish their life to end).

147. S.C. CODE ANN. § 44-78-15(2) (2016).

148. *See, e.g.*, Rutland v. S.C. Dep't of Transp., 400 S.C. 209, 213–15, 734 S.E.2d 142, 144–45 (2012).

manner that juries are accustomed to. Citizens have a right to be free from conscious pain and suffering caused by another's wrongful acts, and the duty of medical professionals to honor the dictates of a do not resuscitate order establishes that failure to do so should be considered wrongful.[149]

When resuscitative measures are rendered against a patient's expressed will, their conscious pain and suffering thereafter should then be recoverable up until the time the patient was expected to die, or in the case of a survival action, did in fact die.[150]

This theory of damages would probably prove to be quite workable given that patients may only execute a do not resuscitate order if they have an incurable or irreversible condition that within reasonable medical judgment could cause death within a reasonably short period of time.[151] The scope of proximate cause could be limited by the use of experts and prior diagnoses to determine how long the patient is expected to live in their terminal condition,[152] similar to the methods used in wrongful death actions.

C. South Carolina recognizes that tort law places "inestimable faith" in the ability of jurors to associate an appropriate damages award to a plaintiff claiming noneconomic damages

Tort law is already riddled with noneconomic damages awards that are at best a monetary approximation of the harm suffered.[153] Without some level of speculation and heuristic value association that jurors take part in every day, the need for jurors to decide such questions would be non-existent.

The realm of punitive damages awards has garnered similar attention, with critics arguing that juries produce unpredictable and arbitrary awards that are not grounded by reason: "The absence of a rational pattern of punitive damages awards supports arguments for their elimination or limitation,"[154] an argument very similar to denying recovery for less than

149. S.C. CODE ANN. § 44-78-45(A) (2016) (mandating that medical professionals "must not provide resuscitative measures" to a patient who has executed a do not resuscitate order).

150. *See* Oddi, *supra* note 7, at 642 ("[I]f the treatment . . . undertaken in violation of the right to [refuse treatment] is then negligently performed, and the patient dies as a consequence of the negligent act, survival damages should be limited to . . . the period of survival.").

151. S.C. CODE ANN. § 44-78-15(7) (2016).

152. *Id.* § 44-78-20(A)(2) (requiring the health care provider's record to contain the time, date, and diagnoses giving rise to a patient's "terminal condition" status).

153. *See* 11 S.C. JUR. *Damages* § 20 (pain and suffering); *id.* § 21 (mental distress); *id.* § 23 (loss of enjoyment of life).

154. Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 624 (1997).

readily ascertainable compensatory damages. However, a study conducted using jury trial data from forty-five of the nation's most populous counties over the course of one year led researchers to conclude that concern over the unpredictability of jury awards is less warranted than commonly believed.[155] The study suggests that largely discretionary punitive damages awards are "one of the more explicable features of the legal system."[156] Juries may therefore prove to be competent to award appropriate damages in a wrongful living case, even when they have a range of discretion, though as Professor Neil Vidmar, an authority on jury issues at Duke University School of Law, puts it, "conventional wisdom is [that] juries are irresponsible, incompetent and don't know how to make an assessment."[157]

The *Phillips* court adeptly noted that precluding recovery because the measure of damages is uncertain is often a façade to further policy, not logic.[158] No concrete justification supplies a basis for drawing this "uncertainty" line where the courts have in cases discussed above, rendering this line somewhat arbitrary, and as the *Phillips* court suggests, the true rationale for rejecting the suits is likely based more on policy than practicality.[159]

1. Birth defect litigation spurred by DES involves the same type of damages analysis that the courts have condemned while rejecting the wrongful life cause of action

The court in *Phillips* rejected the argument that the difficulty in measuring damages suffered by a child in a wrongful life case should preclude the action altogether.[160] In doing so, it referenced the contradiction posed by DES litigation, wherein no such difficulty in measuring damages has been considered.[161] Because wrongful living damages consist of the proximate harm caused by violating a patient's right to refuse treatment—an easier value to establish than the "utter void of nonexistence" contemplated by wrongful life suits[162]—the anecdotal analysis in *Phillips* is further

155. *Id.*

156. *Id.*

157. *See* William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES (Aug. 6, 2001), http://www.nytimes.com/2001/08/06/us/a-study-s-verdict-jury-awards-are-not-out-of-control.html.

158. Phillips v. United States, 508 F. Supp. 537, 542 (1980) (citing Capron, *supra* note 53, at 648).

159. *Id.*

160. *Id.*

161. *Id.* at 543 n.12.

162. Gleitman v. Cosgrove, 49 N.J. 22, 28 (1967).

justification in support of the conclusion that difficulty in measuring damages should not preclude recovery for wrongful living.

As the *Phillips* court describes, damages suffered by an infant in pharmaceutically-induced birth defect cases is measured by the hypothetical condition of the child had her mother not received the drugs at issue, less the condition of the child as a result of her mother receiving those drugs.[163] DES litigation is unique in this class of cases, however, because it poses the same exact hurdle that many wrongful life courts have considered an insurmountable obstacle.

DES is administered to mothers to prevent the incidence of spontaneous abortions in high-risk mothers.[164] Therefore, the condition the plaintiff would have been in without administration of DES could be non-existence, and is therefore presumably a factor in determining the appropriate amount of damages.[165] Although it is merely a probability that the infant would not have existed but for her mother taking DES, so it is that the mother in a wrongful life action would have actually opted for an abortion if she had been put on notice of a defect her child may be born with. Both categories of litigation contain the same issue with regard to damages, yet it is inexplicably determinative only with respect to wrongful life. The *Phillips* court, noting the irony presented by DES litigation and the contrasting wrongful life opinions, said that even though damages measurements in DES litigation are "artificial and speculative," this barrier has "forestalled neither the measurement nor cognition of damages in these cases."[166] This differential treatment is probative on the issue of whether policy was silently creeping into the *Willis* court's purportedly practical reasoning.

The measurement of damages in wrongful life cases is also more remote to the ken of the average juror than they are in wrongful living cases. Even stipulating that no living person could be asked to associate a value with never having been born, today's citizens and jurors can likely understand the thought process that goes into executing a do not resuscitate order, and it is likely that many potential jurors will be inclined to execute one themselves.[167] South Carolina should therefore be reticent to adopt the rationale from wrongful life suits that difficulty in measuring damages should preclude recovery for wrongful living, as the Ohio Court of Appeals was inclined to do in *Anderson*.[168]

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163. *Phillips*, 508 F. Supp. at 543 n.12.
164. *See id.*
165. *See id.*
166. *Id.*
167. *See* Lindgren, *supra* note 10, at 197.
168. Anderson v. St. Francis-St. George Hosp., Inc., 671 N.E.2d 225 (Ohio 1996).

2. The Quality Adjusted Life Year (QALY) economic analysis method provides further insight into jurors' competency to place an appropriate value on impaired life versus death

The prevalence of economic analysis methods already employed by governmental agencies[169] when making health care intervention program decisions provides further insight into the public acceptance of the concept that life lived with severe impairment may be worse than death. Further, data collected points to the ability of citizens and jurors to attach value to impaired health states versus death and may therefore award appropriate damages in a wrongful living case. Although courts have claimed that life is not a legal injury and that valuation problems might preclude recovery altogether, these analysis methods tend to show that (a) society accepts that continued life may be a net detriment, and (b) the amount of that detriment is ascertainable.

The QALY method is employed to measure, in economic terms, the value assigned to life as a function of duration and quality.[170] A QALY is measured as the product of these two parameters, each of which is assigned a numerical value between zero and one.[171] For example, one year lived is assigned a value of one, and a perfect health state for that year is assigned a value of one, resulting in one QALY.[172] Shorter durations of life or impaired health states reduce this value accordingly. A difficulty emerges, however, when attempting to provide proper values for various health states because quality of life is inherently subjective, and different individuals may regard a given quality of life with varying levels of preference.[173]

To surmount this obstacle, researchers have gathered data from sample groups in order to more accurately portray the quality parameter in the QALY equation.[174] The results of these surveys are consistent with this Note's two major premises: that many people would prefer to end their life than continue living under certain circumstances and are also capable of

169. *Cost Effectiveness Analysis*, CTR. FOR DISEASE CONTROL & PREVENTION (2017), https://www.cdc.gov/dhdsp/programs/spha/economic_evaluation/docs/podcast_v.pdf.

170. *See* Matthew D. Adler, *QALYs and Policy Evaluation: A New Perspective*, 6 YALE J. HEALTH POL'Y L. & ETHICS 1, 1 (2006).

171. *Id.* at 2.

172. *Id.*

173. *See* Trine S. Bergmo, *Using QALYs in Telehealth Evaluations: A Systematic Review of Methodology and Transparency*, BMC HEALTH SERVICES RESEARCH 14:332 (2014); *see also* Paul Dolan, *Modeling Valuations for EuroQol Health States*, 35 MED. CARE 1095, 1095 (1997) (discussing the similar economic analysis method of health-related quality of life (HRQoL)).

174. Dolan, *supra* note 173, at 1095–96.

assigning a numerical value to that preference.[175] Surveyed individuals reported that particular impaired health states received a value below zero, meaning that death would be preferable to living any amount of time in that health state.[176]

Though courts have claimed that jurors are incompetent to determine an appropriate amount of damages in cases where the plaintiff would prefer to be dead or to have never existed at all, the utilization of QALY analysis shows that citizens are capable of assigning a fixed negative value to continued life in certain health states. What is the overriding difference between allowing jurors to assign a positive value to unimpaired continued life, and allowing jurors to assign a negative value to continued life in cases where the express wishes of the patient, if honored, would naturally result in death? The courts' policy pronouncements regarding the sanctity and value of all life, however impaired, provides the only conceivable justification for categorically excluding value assessments on life that are below zero. Data gathered from QALY studies, as well as the prevalence of patients who attempt to exercise their autonomy rights under various end-of-life treatment statutes, simply do not bear this out.

V. CONCLUSION

As the very first wrongful life case suggested,[177] a thorough study of the consequences of recognizing an action where life itself is the injury is still being undertaken. The interests in favor of recognizing the tort of wrongful living appear, however, to significantly outweigh the justifications that courts have provided for rejecting it in the past.

This Note makes no contention that life is not precious, or that those suffering would be better off dead. To the contrary, recognition of the wrongful living tort simply acknowledges that part of life's sanctity and preciousness is the ability to live with the maximum freedom of choice already afforded to citizens by law. The premise of this Note stands on the unassailable presence of the right to be free from unwanted medical treatment, even when that decision results in death. South Carolina already recognizes that receiving treatment may serve only to prolong suffering, with no medical benefit. Continued life after the violation of a do not resuscitate order should therefore be considered a legal injury, and an injury

175. Bergmo, *supra* note 173 ("It is possible to be in a health state worse than death with a negative quality index."); Dolan, *supra* note 173, at 1099 (noting numerous survey responses evidencing preference for death over certain health states).

176. *See* Bergmo, *supra* note 173, at 4–5.

177. Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963).

that should be accompanied by an appropriate remedy in South Carolina's civil justice system.

The difficulty in measuring a wrongful living plaintiff's damages is also unavailing, considering the widespread understanding that more years of life is not always preferable and that many people undergo the cost-benefit analysis of executing a do not resuscitate order each year.

The weighing of policy and practicality interests is certainly not easy, but South Carolina nonetheless should be ready to vindicate those whose right of self-determination has been violated.

Curtis J. Copeland

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