ARTICLES

SUITS FOR WRONGFUL LIFE, COUNTERFACTUALS, AND THE NONEXISTENCE PROBLEM

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Biomedical science and technology often make it possible to know in advance whether a child will be born with certain defects or hereditary diseases. It has long been known that women who contract German measles during the first trimester of pregnancy are likely to bear children with severe birth defects. Now amniocentesis, ultrasound, and other prenatal tests enable detection of Down's syndrome and numerous other congenital diseases and disorders. Prospective parents may even undergo genetic testing prior to conception, in order to determine if they are carriers of Tay-Sachs disease or other deleterious genetic conditions that may show up in their children.

These techniques bring with them the possibility of their wrong or incompetent application. German measles may be misdiagnosed, faulty testing may yield erroneous results, and prospective parents who are at special risk may not be warned and counseled to have the indicated tests performed. Negligence of these sorts is sometimes followed by the birth of a defective child who, if knowledge of its condition had been available, would have been aborted or perhaps not even conceived. This may lead to a lawsuit against the laboratory, physician, or other negligent party.

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I. WRONGFUL BIRTH AND WRONGFUL LIFE

Two types of suits may be initiated in these circumstances, distinguished primarily by the identity of the plaintiffs. In suits for *wrongful birth* the plaintiffs are parents, who claim that the negligence caused them to suffer the extraordinary expense and emotional strain of having a defective child whose birth could have been prevented. Suits for *wrongful life*, on the other hand, are brought by or on behalf of disabled children themselves. Their claim is that but for the negligence of the defendant they would have been aborted, and thus they were harmed by being born.

Children have been known to sue their own parents for wrongful life. In the first such suit, *Zepeda v. Zepeda*, a healthy young man sued his father for allowing him to be born illegitimate.[1] In the great preponderance of cases, however, the defendants in wrongful life suits (as in wrongful birth suits) are laboratories, physicians, or other health care providers whose negligence, it is claimed, resulted in the birth of impaired children.

Although they raise a number of moral and legal problems,[2] suits for wrongful birth do not pose the conceptual difficulties of interest here, and we will consider them further only in passing. On the other hand, the plaintiffs' claim in wrongful *life* suits—that it would have been better (for them!) if they had never been born—releases a flood of difficult existential and logical questions. Among them: Do people have a right not to be born? Is nonexistence preferable to impaired existence? What calculus can be applied to figure out just how much better off a person would be if she or he had never been born, in order to determine the amount of damages to be paid in a wrongful life suit?

These mind-boggling questions make wrongful life suits intensely interesting from the philosophical and social scientific perspectives as well as the legal one. The nonexistence claim—"it would be better if I had never been born"—is paradoxical. One state of the "I" in that claim is plain enough: it is the impaired individual who brings the suit.

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1. 190 N.E.2d 849 (Ill. 1963). In a reversal of the commonly-heard threat by people who consider themselves to have been wronged to "sue the bastard," in *Zepeda* the bastard sued. It was to no avail, however, because the court disallowed recovery on the grounds that otherwise it would be "flooded with suits for wrongful life brought by everyone born under conditions he or she regarded as adverse." Bonnie Steinbock, *The Logical Case for "Wrongful Life"*, HASTINGS CENTER REP., Apr. 1986, at 15, 16.

2. *See*, James Bopp, Jr. et al., *The "Rights" and "Wrongs" of Wrongful Birth and Wrongful Life: A Jurisprudential Analysis of Birth Related Torts*, 27 DUQ. L. REV. 461 (1989).

But what of the preferable, alternative state—the "I" who would never have been born, perhaps not even conceived? What kind of a "being" is it who never was and never will be? What rights or status can such a bit of non-being possibly have?

This article aims to chart a course around these perplexing problems. My contention is that the paradox of the nonexistence claim in wrongful life suits can be avoided if they are conceptualized more in terms of actual injuries suffered by living individuals and caused by the negligence of others, and less in terms of the imagined condition a plaintiff would have been in if the negligent conduct had not occurred. I will attempt to establish this by reviewing the fate of wrongful life suits in the courts, considering and criticizing some efforts to come to terms with their paradoxes in the legal literature, analyzing the nature and use of counterfactual comparisons in personal injury actions, and developing my own position. My ultimate conclusion will be that wrongful life suits are misleadingly named and errantly framed, but that they nevertheless raise legitimate causes of action. If my proposed reformulation is valid, these suits may be reclassified as unexceptional actions for prenatal torts.

II. WRONGFUL LIFE IN THE COURTS

To bring the issues into concrete focus, consider the facts in *Procanik v. Cillo*.[3] When she was in the first trimester of pregnancy, Rosemary Procanik informed her obstetrician that she had recently been diagnosed with measles. The obstetrician ordered tests, misinterpreted the results, and told her that she had nothing to worry about. Thus reassured, Mrs. Procanik continued her pregnancy. Her son, Peter, was born with the multiple birth defects of congenital rubella syndrome. Peter Procanik sued for wrongful life.

Clearly the obstetrician's error led to a tragedy: but for the misdiagnosis, Peter Procanik would not have been brought into the world suffering from multiple birth defects. But even in circumstances as unequivocal as these, a cause of action for wrongful life is difficult to establish. The primary objective of compensation in tort law is to restore an injured party, insofar as this is possible, to the condition he or she was in before the injury occurred, or would have been in if the injury had not occurred. To this end, the "counterfactual test" is

3. 478 A.2d 755 (N.J. 1984).

applied.[4] That is, a comparison is drawn between the plaintiff's present state and the state the plaintiff would have been in had there been no injury. This clarifies the nature and scope of the injury and assists in determining compensation.

In a wrongful life action, if the injury had not occurred the plaintiff would never have been born. The comparison is thus between the plaintiff's present, impaired state, and nonexistence. Rationality is stretched, perhaps beyond the breaking point, by any attempt to use this comparison to establish that the plaintiff has suffered any injury at all, much less to use it as a basis for calculating appropriate compensation. Can it be held that Peter Procanik was injured by negligent conduct when the only alternative for him, if the negligence had not occurred, is that he would never have been born? How much money should be paid to make up the difference between existing with his multiple birth defects and not existing at all?

Hence, suits for wrongful life pose a dilemma. On the one hand are issues of common sense, compassion, and fairness. The negligent behavior of the defendant has caused preventable medical expenses, pain, and suffering. It seems entirely just to fix responsibility for the injury and to allow a remedy for the tragedy. On the other hand, it is conceptually problematic in wrongful life cases to conclude that the defendant caused the plaintiff injury and to exact compensation when, but for the defendant's conduct, the plaintiff would not exist.

A. The Affirmative Path

The courts have adopted different strategies in addressing the dilemma. Rarest is to tilt heavily in the direction of common sense, compassion, and fairness. The most far-reaching decision for the plaintiff among the landmark cases is *Curlender v. Bio-Science Laboratories*.[5] A couple named Curlender had genetic tests to determine if they were carriers of Tay-Sachs disease, a severe genetic disorder that produces retarded development and death, usually by the age of four. Although the laboratory had recently been told by a leading authority that the test they were using was unreliable, they assured the Curlenders that they were not carriers. The Curlenders proceeded to have a daughter, Shauna, who was afflicted with the disease. She sued for wrongful life, and the California Court of Appeals allowed her to

4. Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 Soc. Phil. & Pol'y 145, 149 (1986).

5. 165 Cal. Rptr. 477 (1980).

seek special damages for extraordinary medical expenses, general damages for pain and suffering, and also punitive damages against the negligent laboratory.

This solution to the dilemma requires ignoring the conceptual paradox associated with the nonexistence claim, and the court made no bones about that:

> It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. . . . [P]laintiff, however impaired she may be, has come into existence as a living person with certain rights.[6]

B. The Middle Way

The *Curlender* approach has not been perpetuated. Considerations of logic and justice for defendants have moved most courts to confront the nonexistence paradox. One strategy has been to steer a course between the horns of the dilemma, allowing certain damages but not others. The cost is logical inconsistency. So in the case we have highlighted, *Procanik v. Cillo*, the New Jersey Supreme Court explicitly set aside the conceptual perplexities of the nonexistence issue for purposes of awarding damages for extraordinary medical expenses and wrote, in language reminiscent of *Curlender*, that

> [l]aw is more than an exercise in logic, and logical analysis, although essential to a system of ordered justice, should not become a [sic] instrument of injustice. . . . We need not become preoccupied . . . with these metaphysical considerations. Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living. We seek only to respond to the call of the living for help in bearing the burden of their affliction.[7]

But then, in the same decision, the court turned around and appealed to precisely those metaphysical considerations in *disallowing* general damages for pain and suffering:

> Tragically, his only choice was a life burdened with his handicaps or no life at all. . . . The crux of the problem is that there is no rational way to measure non-existence or to compare non-existence with the pain and suffering of his impaired existence. Whatever theoretical appeal one might find in recognizing a claim for pain and suffering

6. *Id.* at 488.

7. *Procanik*, 478 A.2d at 762-63.

> is outweighed by the essentially irrational and unpredictable nature of that claim.[8]

In 1982, the California Supreme Court's ruling in *Turpin v. Sortini*[9] contained the same contradiction. Justice Mosk pointed it out in an acid dissent:

> An order is internally inconsistent which permits a child to recover special damages for a so-called wrongful life action, but denies all general damages for the very same tort. While the modest compassion of the majority may be commendable, they suggest no principle of law that justifies so neatly circumscribing the nature of damages suffered as a result of a defendant's negligence.[10]

C. THE NEGATIVE PATH

The third solution to the dilemma is to be so entirely swayed by the nonexistence problem as to disallow suits for wrongful life entirely. This is, in fact, the majority stance. Outside of California, New Jersey and Washington,[11] the courts refuse to hear wrongful life suits, and a number of state legislatures have barred them by statute.[12] For example, in *Siemieniec v. Lutheran General Hospital*,[13] involving a child with hemophilia, the Illinois Supreme Court overturned a ruling by the Court of Appeals that allowed (as with *Turpin* and *Procanik*) special damages for extraordinary medical expenses. The supreme court held that the nonexistence problem is so intractable that in Illinois wrongful life suits do not qualify as a cause of action of any sort. This may quell the metaphysical objections to wrongful life claims, but it turns a blind eye to considerations of compassion and fairness for plaintiffs who must live with birth defects attributable to negligent conduct.[14]

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8. *Id.* at 763.

9. 643 P.2d 954 (Cal. 1982).

10. *Id.* at 966.

11. The governing cases in New Jersey and California, respectively, are *Procanik* and *Turpin* and, in Washington, Harbeson v. Parke-Davis, Inc., 656 P.2d 483 (Wash. 1983).

12. *See* Michael B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense of a Tort*, 62 FORDHAM L. REV. 1675, 1687 (1994); John Lyons, *To Be or Not to Be: The Pennsylvania General Assembly Eliminates Wrongful Birth and Life Actions*, 34 VILL. L. REV. 681 (1989); Martha C. Romney & Dorothy Duffy, *Medicine and Law: Recent Developments*, 25 TORT & INS. L.J. 351, 360-66 (1990); Todd Ulmer, *A Child's Claim of Wrongful Life: A Preference for Nonexistence*, 38 MED. TRIAL TECH. Q. 225, 226 (1992).

13. 512 N.E.2d 691 (Ill. 1987).

14. In denying wrongful life claims the courts often also appeal to the principle of natural law, enshrined in the Declaration of Independence and the Constitution, that life is a supreme

III. SOLUTIONS IN THE LEGAL LITERATURE

Many works in the legal literature support the denial of a cause of action for wrongful life suits.[15] The logical paradox of nonexistence is commonly cited as a reason for this.[16] Commentators who argue that wrongful life suits should be actionable must find a way around the nonexistence paradox. In this section I critically review a few attempts to do this.

A. When Nonexistence Is Preferable to Living

The most direct way to deal with the nonexistence problem is to accept it at face value and to hold that, for certain plaintiffs, never having been born really would be preferable to living. This is probably the most common strategy in the legal literature. Its distinctive feature is to limit wrongful life actions to birth impairments that are utterly debilitating. Scholars who take this position—Joel Feinberg,[17] Timothy Dawe,[18] John Harris,[19] Alan Belsky,[20] Michael Laudor[21]—generally hold that wrongful life suits should be allowed only in cases of impairments so severe that it is not difficult to imagine that the plaintiff would prefer to be (or, if the plaintiff is beyond preferring, would be better off) dead.

One advantage of this position is that it holds when the consequences of the defendant's conduct are aggregated. In a wrongful life suit the defense could argue that even if the so-called negligent conduct caused the plaintiff to be born in a condition requiring extraordinary medical expense and entailing a certain amount of pain and suffering, that same conduct also conferred life itself on the plaintiff.

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good and thus, that the courts should not venture to judge that certain lives are not worth living. *See Siemieniec*, 512 N.E.2d at 698-700; Smith v. Cote, 513 A.2d 341, 352-53 (N.H. 1986).

15. *See e.g.*, Bopp, Jr., et al., *supra* note 2; Charles A. DeGrandpre, *Lex Loci: Smith v. Cote*, 27 N.H. B.J. 247 (1986); Patrick J. Kelley, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 4 Wash. U. L.Q. 919, 934-42 (1979); Note, Turpin v. Sortini: *Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 Cal. L. Rev. 1278, 1286-96 (1983).

16. Other considerations are that these suits make physicians excessively vulnerable to legal action, and that they tend to encourage the practice of abortion.

17. *See* Joel Feinberg, *Harm to Others*, *in* 1 The Moral Limits of the Criminal Law 99 (1984).

18. Timothy Dawe, Note, *Wrongful Life: Time for a "Day in Court"*, 51 Ohio St. L.J. 473, 495 (1990).

19. John Harris, Wonderwoman and Superman: The Ethics of Human Biotechnology 95-97 (1992).

20. Alan J. Belsky, *Injury as a Matter of Law: Is this the Answer to the Wrongful Life Dilemma?*, 22 U. Balt. L. Rev. 185, 229, 233, 267 (1993).

21. Laudor, *supra* note 12, at 1692-97.

On balance, the benefits received by the plaintiff can be said to outweigh the harm, and thus, there should be no damages assessed against the defendant. However, for a child born with Tay-Sachs disease[22] or some other condition so terrible as to make life not worth living, aggregating the consequences of the defendant's conduct would still amount to net harm to the plaintiff, and thus a ruling for the plaintiff would be in order.

This advantage notwithstanding, the strategy encounters several problems. One is that it does not really come to grips with the issue. It compares impaired living with being dead rather than with never having been born, which is not precisely the same thing.[23]

Another problem: even if this way of framing the issue were allowed, some critics would disagree on the grounds that living, no matter with what pain or limitations, is preferable to not living. Not everyone holds this opinion, but instructive dialogue between those who do and those who do not is unlikely because the disagreement is at the level of bedrock assumptions.

A third difficulty with this solution that has been noted by one of its adherents, John Harris, is that a lawsuit is scarcely the appropriate remedy for people who ardently desire death over an utterly intolerable life.[24] Better to ease their lot, he suggests, by legalizing voluntary euthanasia.[25]

Finally, this scheme would allow a cause of action only for persons who are so totally incapacitated that, beyond the cost of their maintenance, they could never benefit from or enjoy compensation. Meanwhile individuals born with less severe impairments (say, deafness or no arms) who could put the payments to some positive use (for, perhaps, special equipment or training) would be denied all recovery because their lives, even if somewhat hindered, are clearly worth living. Harris, recognizing this implication of his own position, closes his discussion with a tentative suggestion that wrongful life actions be removed from the domain of liability law altogether.[26]

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22. *See supra* note 5 and accompanying text.

23. For a useful distinction between never having existed and death, see Philip G. Peters, Jr., *Protecting the Unconceived: Nonexistence, Avoidability, and Reproductive Technology*, 31 ARIZ. L. REV. 487, 489 (1989).

24. HARRIS, *supra* note 19, at 95-96. However, deterrence of future negligence may justify suits in these circumstances.

25. *Id.* at 96.

26. *Id.* at 96-97.

B. The Right to Be Born a Whole, Functioning Human Being

A second strategy for legitimating wrongful life actions is Elizabeth Collins' proposal to shift their designation from wrongful life to wrongful impairment.[27] Her objective is to move the focus from the fact of the plaintiff having been born to the fact that the plaintiff was born with an impairment. She suggests that children be allowed to pursue claims for wrongful impairment when wrongful conduct has 1) altered the natural course of prenatal development, 2) denied parents the opportunity to have prenatal treatment for reasonably treatable defects, or 3) denied parents the opportunity either not to conceive the child or to terminate its existence. In essence, Collins' strategy is to combine actions that currently go under the names of wrongful birth and wrongful life (3 above) with those for prenatal torts (1 and 2). She argues that current wrongful life claims may be redefined as claims for wrongful impairment on the basis of a right "to be born a whole, functioning human being."[28] She doubts that the courts would go so far as to award compensation for the child's entire existence on the basis of this right, but thinks they could well use it to justify damages for costs directly occasioned by the impairment.[29]

I share the goal of including wrongful life claims among other actions for prenatal torts, but I am not persuaded that this can be accomplished in terms of a right to be born a whole, functioning human being. First of all there is the practical problem that certification of such a right would open the gates to a flood of lawsuits from persons who claim that one or another of their mental or physical endowments does not come up to the standard of a whole, functioning human being. On the theoretical side, Collins' proposal does not provide any novel way of coming to grips with the nonexistence paradox. For some of her "wrongful impairment" plaintiffs (those who currently sue for wrongful life), the counterfactual alternative to their having been born less than whole, functioning human beings is not to have been born at all. A great many people who were born with impairments (deafness, mental retardation, absence of one or more limbs), would insist that their lives are preferable to nonexistence, and

27. Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. Fam. L. 677, 706-08 (1984).

28. *Id.* at 706.

29. *Id.* at 706-07.

public opinion would concur. For such cases, Collins gives no account of how a right to be born a whole, functioning human being can legitimate a judgment that the defendant's negligent act resulted in net injury to the plaintiff when that same act conferred the greater good of life itself upon the plaintiff. Thus while Collins' proposal points in a promising direction, it takes us no closer to demystifying or avoiding the logical and metaphysical conundrums raised by claims for wrongful life.

C. The Interests and Rights of the Unborn

Several creative proposals for reconceptualizing wrongful life suits have been advanced by Philip G. Peters, Jr.[30] Most relevant to this discussion is his suggestion that unborn children be considered not as individuals but as a class:

> By focusing exclusively on the individual interests of the affected children, the nonexistence test overlooks the interests of these future children as a class. Collectively, they have an interest in avoiding these injuries. As a result, injuries that are *avoidable by substitution* should be treated as prima facie wrongs that require justification.[31]

If, in accordance with Peters' innovative suggestion, we consider all future children as a class, then we may say that the *class* is wronged when one of its members is brought into being in an impaired state. It would be better for the class if that impaired member were replaced with another, fitter member of the class. The overall result of such substitutions would be to avoid unnecessary human suffering and to increase human happiness.[32]

The advantage of Peters' way of thinking about wrongful life suits is that shifting the identification of the injured party ameliorates the nonexistence problem. In the conventional approach, it is improbable to claim that Joy Turpin (the plaintiff in *Turpin v. Sortini*, who was born deaf) was injured by being brought into existence, when the only alternative for her is not to exist at all. It is less improbable to claim that the class of future children was injured when Joy Turpin was brought into existence, for the readily intelligible alternative for that class is the birth of a different, unimpaired child.

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30. Peters, *supra* note 23; Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging the Boundary Between Tort and Family Law*, 67 Tul. L. Rev. 397 (1992).

31. Peters, *supra* note 23, at 510 (footnotes omitted).

32. *Id.* at 516-17.

However, Peters' solution rests on the questionable proposition that there is such a thing as a class of future or possible children with certain interests. At first blush this is intuitively intelligible. It is closely allied, for example, with the widely endorsed idea that we should leave the world in good condition for future generations.

Upon closer scrutiny, however, the proposition does not hold up well. The class of future children is a class of which no member now exists.[33] It is entirely reasonable to say that they will have interests and rights when they come into existence, but one cannot say that they have rights and interests *now*.[34] I mean this quite literally: even to *say* that nonexisting beings have certain rights and interests involves a contradiction in terms, for there can be no such thing as a "nonexisting being." Because they do not now have rights or interests, one cannot claim that their rights or interests are infringed when one of their number comes into existence in an impaired state.[35] On a more practical level, to know precisely what the interests of future children will be or what they will think qualifies as a birth defect requires knowledge of the future conditions of human life, and that knowledge is unavailable.[36]

Although problems with the notion of the rights and interests of the unborn make it difficult to accept Peters' proposal at face value, he has made an important contribution by moving the debate over wrongful life suits to new ground. In what follows I will not be so radical as to argue that the injured party in a wrongful life suit is someone or something other than the impaired child. But I will suggest that the nonexistence problem stems from viewing plaintiffs and

33. It is of course possible to speak of the class of fetuses, but Peters explicitly limits his discussion to those future children who have not been conceived. *Id.* at 488-89, 500.

34. *See* Richard T. DeGeorge, *The Environment, Rights, and Future Generations, in* ETHICS AND PROBLEMS OF THE 21ST CENTURY 95-96 (Goodpaster & Sayre eds., 1979).

35. Peters recognizes this problem but holds that the unconceived have an interest in avoiding conduct happening now that will crystalize in actual harm to them upon their birth or viability. Peters, *supra* note 23, at 500. But this does not necessitate attributing rights and interests to the unconceived, because this situation can be addressed in terms of the rights and interests of the living. The right of a plaintiff born alive to recover for prenatal injuries attributable to negligent conduct that occurred before the plaintiff was conceived has been recognized in Renslow v. Mennonite Hospital, 367 N.E.2d 1250 (Ill. 1977), and Yaeger v. Bloomington Obstetrics & Gynecology, Inc., 585 N.E.2d 696 (Ind. 1992). Hence I remain unconvinced of any need or justification for holding that beings who do not yet exist presently have rights or interests.

36. For example, congenital deafness was the issue in the 1982 wrongful life suit Turpin v. Sortini, 643 P.2d 954 (Cal. 1982), but many people today do not consider deafness to be a disability, and some view it as desirable. *See* Edward Dolnick, *Deafness as Culture*, 272 ATLANTIC MONTHLY 39 (1993); John Rennie, *Grading the Gene Tests* 270 SCI. AM. 88, 97 (1994); Andrew Solomon, *Defiantly Deaf*, N.Y. TIMES MAG., Aug. 28, 1994, at 40.

their impairments from a certain perspective, and that a different perspective makes it possible to consider their claims without evoking the metaphysical and logical problems of nonexistence. Before charting a way that wrongful life claims *can* rationally be recognized, however, I want to argue from considerations of fairness that they *should* be recognized.

IV. AN ARGUMENT FROM FAIRNESS

Laura Walker's obstetricians negligently failed to perform appropriate laboratory tests which would have revealed that she had contracted German measles during the first trimester of her pregnancy. Thus they failed to warn her of the potential damage to the fetus. Had she been aware of these matters she would have aborted the fetus, but instead she bore a daughter, Christy, who suffered from severe birth defects stemming from rubella syndrome. Suit was brought on Christy's behalf for wrongful life on the grounds that the obstetricians' negligence deprived her mother of the opportunity to terminate the pregnancy, resulting in Christy being born in an impaired state. In a decision that aligned Arizona with most other jurisdictions in disallowing wrongful life suits,[37] the supreme court of that state denied Christy a cause of action on the ground that life itself is not an injury and therefore, by being born, she suffered no injury at the hands of the defendants.

Kristy Sylvia was also born with multiple birth defects from congenital rubella syndrome. In her case, the complaint was that her mother's physician negligently failed to prescribe gamma globulin during her pregnancy, notwithstanding his knowledge that she had been exposed to German measles. The Rhode Island Supreme Court held that Kristy had a right of action against the negligent physician for a prenatal tort.[38] The difference between the two cases is that for Kristy Sylvia a course of action (prescription of gamma globulin) was available that would or might have counteracted the effects of her mother's exposure to German measles before the fetus was damaged, thus enabling Kristy to be born without birth defects. In Christy Walker's case, the physicians' alleged misconduct occurred after her mother's German measles had probably already damaged the fetus, and the only options for her were therefore being born with birth defects or abortion—that is, not being born at all.

37. Walker v. Mart, 790 P.2d 735 (Ariz. 1990).
38. Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966).

This juxtaposition of cases highlights the question of fairness in the widespread refusal to recognize actions for wrongful life. Christy Walker actually exists, no less than Kristy Sylvia. She suffers no less, and from precisely the same kind of defects, that originated at the same point in prenatal development and for the same reason. Christy Walker is no less in need of special care, and she faces a life equally filled with extraordinary expenses and special challenges and obstacles. Her obstetricians acted at least as negligently as Kristy Sylvia's. And yet a remedy is available to Kristy Sylvia but not to Christy Walker. This hardly seems fair.

Even as they argue for dismissal of the action, jurists recognize this or something akin to it, noting that in wrongful life cases principles of justice are at odds with a compassionate response to a tragic situation. Thus, from the *Walker* court: "We are sympathetic to the dilemma such a rare situation presents, but we cannot subvert fundamental legal principles to permit a cause of action when no injury exists."[39] And Justice Schreiber warned in his dissenting opinion to *Procanik v. Cillo*[40] that "sympathy for a handicapped child and his parents should not lead us to ignore the notions of responsibility, causation, and damage that underlie the entire philosophy of our system of justice. It would be unwise—and, what is more, unjust—to permit the plaintiff to recover damages from persons who caused him no injury." Those few courts that have recognized wrongful life actions seem also to be torn between a compassionate response to those who suffer and the difficulty of dealing with the nonexistence problem in a legally sound manner. Ambivalently, they ignore the nonexistence problem as they sympathetically provide some remedy to wrongful life plaintiffs by allowing them to seek special damages for extraordinary expenses, but then they stress the nonexistence issue in a legally principled argument to deny general damages for pain and suffering for the very same tort.[41]

V. THE EVOLUTION OF PRENATAL TORTS

It is possible, however, that legal principles are changing. The law seems to be in the midst of an evolutionary process of recognizing the rights of the unborn, and the apparently unfair rejection of wrongful life claims may reflect the fact that the process is unfinished. In

39. 790 P.2d at 741.
40. 478 A.2d 755, 773 (N.J. 1984).
41. *See supra* notes 7-10 and accompanying text.

1884 Justice Holmes set a precedent in *Dietrich v. Inhabitants of Northampton*[42] that a plaintiff could not recover for personal injury that occurred prior to birth because an unborn child is not a separate entity from its mother. Then, in 1946, *Bonbrest v. Kotz*[43] inaugurated what William Prosser called "a rapid series of cases, many of them expressly overruling prior holdings, [that] have brought about what was up till that time the most spectacular abrupt reversal of a well settled rule in the whole history of the law of torts."[44]

Bonbrest established a duty to unborn children from the time of their viability. Seven years later *Kelly v. Gregory*[45] held that an unborn child is considered to be a separate entity from its mother at conception and could thus recover for harm negligently inflicted on it at any time during gestation. More recently some courts have allowed recovery to persons who suffer from injuries caused by negligent conduct that occurred before they were conceived. So in *Renslow v. Mennonite Hospital*[46] the Illinois Supreme Court allowed Leah Ann Renslow to bring suit against physicians and a hospital for injuries resulting from a blood transfusion negligently administered to her mother at age 13. (The transfusion caused her mother to develop antibodies that attacked Leah Ann's Rh-positive blood when she was conceived eight years later, causing permanent damage to her various organs, brain, and nervous system.)[47]

The story of this evolutionary process is the extension of the duty to others in an expanding series of prenatal conditions. Under the Holmes precedent no duty to the unborn was recognized at all. Then, progressively, duty to others was extended to fetuses: first after the point of viability and then from the moment of conception. Following that—a step perhaps not yet fully settled—is recognition of a duty to persons who suffer injury from negligent conduct that occurred before they were conceived. Next, the duty may be extended to those who would not have been born if the injury had not occurred, *i.e.*, to plaintiffs in suits for wrongful life. As Alan J. Belsky interprets it, "this

42. 138 Mass. 14 (1884).

43. 65 F. Supp. 138 (D.D.C. 1946).

44. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 336 (4th ed. 1971).

45. 125 N.Y.S.2d 696 (1953).

46. 367 N.E.2d 1250 (Ill. 1977).

47. The question of preconception torts is not definitively settled, for they have been allowed by some courts while others have been unwilling to extend tort concepts so far. For example, in Ablala v. City of New York, 429 N.E.2d 786 (N.Y. 1981), the court dismissed Jeffrey Ablala's claim that a negligently performed abortion on his mother seven years prior to his conception resulted in his severe prenatal brain damage.

expanded notion of duty is important in wrongful life cases because the medical provider's independent duty now extends to the unborn or unconceived child to disseminate accurate information to those who have control over her genetic fate."[48]

It appears, then, that the law of prenatal torts may be evolving in such a way that the legal principles standing in the way of acceptance of wrongful life suits may be losing their force. This is a welcome development, for our comparison of the cases of Christy Walker and Kristy Sylvia suggests that the widespread denial of a cause of action for wrongful life is unfair. But a satisfactory solution to the dilemma of wrongful life suits must include a theoretical argument for how and why the legal principles impeding recognition of these actions can be rationally set aside. To that task we now turn.

VI. AN ARGUMENT FROM THEORY

The New Hampshire Supreme Court unequivocally enunciated the fundamental legal principles at issue here in its ruling that wrongful life suits are not actionable: "We will not recognize a right not to be born, and we will not permit a person to recover damages from one who has done him no harm."[49] The threat to both of these principles springs from the nonexistence paradox: how can a defendant's action be said to constitute an injury to a plaintiff when, but for the defendant's action, the plaintiff would never have been born? It is time to confront that paradox squarely.

It is common procedure in personal injury suits to apply what Joel Feinberg calls the "counterfactual test": to compare the plaintiff's actual condition with the condition the plaintiff would have been in had the defendant's alleged misconduct not occurred.[50] The nonexistence paradox in wrongful life suits is brought to the fore by the counterfactual test because, if the defendant's negligent conduct had not occurred, the plaintiff would not exist. Let us look more closely at how the counterfactual comparison is used in order to locate just where the force of the nonexistence paradox in wrongful life suits is felt.

48. Belsky, *supra* note 20, at 215.

49. Smith v. Cote, 513 A.2d 341, 355 (N.H. 1986).

50. Feinberg, *supra* note 4, at 149.

A. Counterfactuals and Compensation

Making the comparison is often helpful in pursuing the primary objective of compensation in tort law: to restore an injured party to the condition he or she was in before the injury occurred, or would have been in if the injury had not occurred. However, in suits for wrongful life—and, indeed, other actions involving prenatal injuries—such restoration is meaningless or impossible. Certainly there is no intention to restore the plaintiff to his or her pre-injury status, which was that of a fetus or even unjoined gametes. Moreover, because their impact is already present at birth, prenatal injuries affect the entire course of life, usually quite decisively. Therefore it is very unlikely that monetary compensation could "restore" the plaintiff to a condition remotely resembling what would have been the case if the injury had not occurred. Compensation for prenatal torts of any sort is designed rather to cover the costs of extraordinary expenses incurred because of the injury, to ease pain and suffering, to act as punishment for gross negligence, and to deter future negligence.

Feinberg maintains that problems pertaining to compensation raise the most powerful problems for wrongful life suits.[51] Even those jurisdictions that recognize actions for wrongful life limit damages to extraordinary expenses incurred as a result of birth impairments. They shy away from awarding general damages for pain and suffering because they can divine no way to compare the pain and suffering the defendant actually experiences with the void of nonexistence that would have been her lot if the injury had not occurred.[52] This, of course, is another example of the counterfactual comparison foundering on the nonexistence problem.

The *Walker* court, however, held that wrongful life suits pose no special difficulties in the area of compensation. In concert with Justice Mosk's dissent in *Turpin*,[53] the court argued that if a wrongful life plaintiff suffers injury resulting from a breach of duty, the defendant should be entitled to general as well as special damages, and that juries are entirely competent to determine the amount of those damages.[54]

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51. *Id.* at 159-61.

52. Turpin v. Sortini, 643 P.2d 954, 963 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755, 763 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 496 (Wash. 1983).

53. *See supra* notes 9, 10 and accompanying text.

54. Walker v. Mart, 790 P.2d 735, 739-40 (Ariz. 1990).

I share the view that wrongful life suits raise no special problems so far as determination of compensation is concerned. Counterfactual comparisons for this purpose need not evoke the nonexistence paradox. No comparison at all is necessary to calculate the amount of expenses for medical treatment, care, equipment and training attributable to the injury; one need only add up the bills actually received.[55] Placing a monetary value on pain and suffering is no more difficult in wrongful life suits than in any suit for prenatal torts. In all such cases, it is a matter of placing monetary value on the plaintiff's burden of living with a birth impairment. If a counterfactual comparison is helpful in making this determination, it is unnecessary to imagine as the hypothetical alternative the condition *that particular individual* would have been in if the injury had not occurred. Rather one can compare the plaintiff's actual condition with the condition of *any person* who is free from the impairment: a person who does not have Tay-Sachs disease, is not deaf, and so on.[56] That same exercise could easily be joined with consideration of the grossness of the negligence for the purpose of deciding if punitive damages are to be assessed.

Therefore, the nonexistence paradox need not come into play with those aspects of wrongful life cases pertaining to compensation.

B. Counterfactuals and Determining Injury

Another use of the counterfactual test is for assistance in determining the nature and extent of injury. In the landmark cases for wrongful life, there is no question that the plaintiff's birth defects constitute an injury. Nor is it disputed that the defendants acted negligently by misreading test results, misdiagnosing maternal illness, and so on. But a principle of tort law is that "a negligent act is not in itself actionable, and only becomes the basis of an action where it results in injury to another."[57] The critical question in wrongful life actions is whether the defendant's negligence resulted in injury to the plaintiff. The counterfactual test may be applied to help answer this question, and when it is, wrongful life suits run into the mind-boggling nonexistence paradox. The actual, impaired condition of the plaintiff is compared with the condition the plaintiff would have been in if the negligence had not occurred. In wrongful life cases, if the negligent

55. *See Turpin*, 643 P.2d at 965.

56. For a more complete discussion of this issue, see *infra* notes 65-66 and accompanying text.

57. 57A Am. Jur. 2d *Negligence* § 143 (1989).

act had not occurred the plaintiff would have been aborted, and, thus, would not be in any "condition" at all. Most courts have been unwilling to conclude that the plaintiff suffered injury at the hands of the defendant's admittedly negligent act when, but for that act, the plaintiff would never have been born. The supreme courts of Illinois,[58] New Hampshire,[59] and Arizona,[60] for example, explicitly based their rejection of wrongful life claims on precisely this point.

To recap, this is the basic situation with reference to wrongful life actions: 1) the legal principle most pertinent to their status is that a negligent act is actionable only if it results in injury to another; 2) applying the counterfactual test in an effort to clarify the nature of injury in a wrongful life suit leads to the nonexistence paradox; 3) the nonexistence paradox dissuades most courts from determining that the defendant's negligent act resulted in injury to the plaintiff; and 4) therefore, they dismiss actions for wrongful life. If an analysis is to be developed in terms of which wrongful life actions are recognized, it must proceed along a line of reasoning alternative to that just presented.

C. The Ambiguity of "Injury to Another"

Such an alternative line of reasoning may be located by exploring an ambiguity in the principle that a negligent act is actionable only "where it results in injury to another."[61] The principle can be interpreted in two ways, and the difference is crucial to wrongful life cases and the application of the counterfactual test to them. If the principle is understood in one way, the counterfactual test raises the nonexistence paradox, which, as we have seen, leads to the conclusion that claims for wrongful life should not be allowed. But if the principle is understood in the other way, the counterfactual test does not raise the nonexistence problem, and, thus, the impediment to allowing suits for wrongful life is effectively removed.

One meaning of "where it results in injury to another" is that the defendant's negligent act injured the plaintiff. This formulation focuses on the plaintiff as a person, and it generates the line of reasoning developed in the preceding paragraphs: the counterfactual test amounts to a comparison between the plaintiff's actual condition and

58. Siemieniec v. Lutheran General Hospital, 512 N.E.2d 691, 700-01 (Ill. 1987).
59. Smith v. Cote, 513 A.2d 341, 352-55 (N.H. 1986).
60. Walker v. Mart, 790 P.2d 735, 740 (Ariz. 1990).
61. *See supra* note 57 and accompanying text.

the condition the plaintiff would have been in "but for" the defendant's negligence, thus evoking the nonexistence paradox.

The other meaning of "where it results in injury to another" is that the defendant's negligent act caused the plaintiff's injuries. This is different from saying that the negligent act injured the plaintiff, and it produces an entirely different result. Although the *Walker* court declared explicitly that "defendants caused none of the impairments from which Christy suffers,"[62] I think it can be demonstrated that they indeed did cause them. Consider, for a moment, an impairment as a thing in itself and apart from the plaintiff as a person: just a case of Tay-Sachs disease, congenital rubella syndrome, or deafness. We may then ask if the defendant's negligence resulted in that injury. The counterfactual test now involves comparing the actual state of an *impairment* with the condition that impairment would have been in if the negligent act had not occurred. In a wrongful life action the comparison would take this form: but for the defendant's negligent conduct the fetus would have been aborted and this particular injury would not have come into being—this case of deafness or whatever would not exist. Therefore the defendant's negligence *did* cause the plaintiff's injury.[63]

D. Avoiding the Nonexistence Paradox

Note especially that this latter way of looking at the situation does not raise the nonexistence paradox. When the focus is on the injury in its own right rather than on the plaintiff as a person, the comparison between what is actually the case and what would have been the case if the negligence had not occurred concerns, quite simply and straightforwardly, the presence or absence of a birth defect. It does not boggle the mind to say that a birth defect has been caused by the defendant's negligent conduct when, but for that conduct, the defect would not exist. In fact, as will be developed in detail later, precisely this counterfactual comparison is regularly applied and universally accepted in prenatal injury suits such as that brought by

62. *Walker*, 790 P.2d at 740.

63. Belsky holds a similar position:

> A genetic counselor who negligently withholds or discloses erroneous genetic information proximately causes the resulting child's handicapped condition since dissemination of accurate information would have allowed the parents to avoid the birth. Although the provider does not cause the impairment in the literal sense, she causes the *birth* of a child with impairment and, thus, unilaterally transforms that impairment into absolute reality for both parents and child. *Belsky, supra* note 20, at 221.

Kristy Sylvia. The important point for now is that, from the perspective proposed here, it can *also* be applied to "wrongful life" actions such as that brought by Christy Walker.[64]

Of course, the analysis cannot end with disembodied injuries, for there inevitably are persons who "have" them, suffer from them, and may bring suit for them. However, to *begin* the analysis from the perspective of injuries rather than persons makes it possible to think about "wrongful life" actions without raising the nonexistence paradox and, therefore, without doing violence to the legal principle of causation of injury. Let us now engage in that thinking and attempt to construct a more complete account of what these actions look like when viewed from this perspective.

E. An Injury-Based Approach to "Wrongful Life"

Because the analysis begins from the perspective of injuries, when a birth-impaired individual brings suit for "wrongful life," the first question to be adjudicated is: "Was this impairment caused by the defendant's negligent conduct?"[65] As we have seen already, this question can be answered by considering the counterfactual situation of what would have been the case had the defendant not acted negligently. If it is determined that the defendant acted negligently in, for example, not informing prospective parents of the probability of their child being born with birth defects, and if the parents would have elected abortion had they been properly informed, then it can be concluded that the defendant's negligent conduct did in fact cause the impairment. That is, but for the negligent conduct, the impairment would not have come into being.

If the answer to the first question is affirmative, the second question for adjudication arises: "To what extent does the impairment harm the defendant?" It is essential to answer this in order to decide on damages, the fourth element in the traditional negligence framework. Again the counterfactual test can be used to reach an answer. However, great care must be taken in phrasing it. If an effort is made to determine the extent of the harm by comparing the condition the plaintiff is actually in with the condition he would have been in but for the defendant's negligence, the nonexistence paradox rises again: if the negligent act had not occurred the plaintiff would have been

64. *See supra* notes 37-38 and accompanying text.

65. For the sake of simplicity, this question is shorthand for the first three elements in the conventional negligence framework: duty, breach, and causation.

aborted and, therefore, would not exist. Thus, we are in danger, after having taken great pains to avoid the nonexistence paradox with reference to the question of whether the negligence resulted in injury to the plaintiff, of falling back into it when consideration turns to damages.

But the counterfactual as phrased above is not just inconvenient to someone who is trying to argue (as I am) that "wrongful life" suits should be recognized. More important, it is a theoretically flawed and practically misleading way of formulating a counterfactual test. Demonstrating this requires a brief digression on the nature of counterfactuals. Then we will be in a position to suggest a preferable form of the counterfactual to be used for purposes of determining damages in "wrongful life" actions.

For *any* use of a counterfactual test, and not just in "wrongful life" suits, how do we know the alternative to what actually happened? In the prenatal injury case *Sylvia*, for example, the defendant physician was negligent in not prescribing gamma globulin to Kristy Sylvia's mother although the physician was aware that she had been exposed to German measles during the first trimester of her pregnancy.[66] The counterfactual alternative to what actually happened would be for the physician to have prescribed gamma globulin. But how do we know that? Obviously we cannot know it from the act of that particular physician prescribing gamma globulin in that particular situation, because that is precisely what did *not* happen and we cannot gain information from a non-event. Equally obvious, we do know it because that is the commonly accepted and approved practice actually followed by *other* physicians (perhaps also this physician at other times) in *other* situations like this one. Similarly, if we want to imagine, as a counterfactual, Kristy Sylvia's condition if she did not suffer from congenital rubella syndrome, it is impossible to do that directly because Kristy always has and always will suffer from that disorder. Rather, we look at the actual condition of *other* girls who are similar to Kristy in age and other characteristics but who do not suffer from congenital rubella syndrome, and we say, as our counterfactual alternative, that if Kristy did not suffer from rubella syndrome she would be *like that.*

Thus, I suggest that while the typical formulation of a counterfactual test compares the actual circumstances of an individual or event

66. *See supra* note 38 and accompanying text.

with alternative *hypothetical* circumstances of that *same* individual or event, the hypothetical side of the comparison is inevitably derived from the *actual* circumstances of *other* persons or events. Nothing would be lost, and much confusion would be avoided, if the derivative step were omitted and comparisons were explicitly drawn between the actual situation before the court and other actual situations that differ from it only in the matter under litigation.

This sort of comparison is in fact commonly made. In deciding whether a person has behaved negligently or recklessly, it has long been standard procedure to compare her behavior with what the generic "reasonably prudent" person would have done in those circumstances. And, it scarcely need be said, the only way we know what the generic "reasonably prudent" person would have done in those circumstances is from our repeated experience of what real people whom we take to be reasonably prudent actually do in circumstances like that.

Now let us return to the question of determining the extent of harm done to the plaintiff in a "wrongful life" action. To frame a counterfactual comparison of the plaintiff's actual state with the state that plaintiff would have been in but for the negligence leads to the nonexistence paradox and, as I have just argued, is also unsound and misleading. A preferable formulation of the counterfactual test would be to compare the condition of the birth-impaired "wrongful life" claimant with the condition of other persons in roughly similar circumstances but who do not suffer from that birth impairment. That comparison can be effectively used to measure extraordinary expenses as well as pain and suffering occasioned by the injury suffered by the plaintiff. Thus, it can be of aid in determining both special and general damages. Most important, framed in this way, the counterfactual test does not even remotely evoke the nonexistence problem and, therefore, it raises no logical impediment to allowing "wrongful life" actions.

E. Distinguishing This from Other Solutions

At this point it is useful to identify two important differences between this analysis and others that have also favored recognition of "wrongful life" actions. For one, it avoids the inconsistency pertaining to damages in the *Turpin*, *Procanik*, and *Harbeson* decisions.[67] As has

67. *See supra* notes 7-10, 52 and accompanying text.

just been demonstrated, under the present analysis general damages in these actions pose no special difficulty, being calculated in the same way as in other personal injury suits. Again, many commentators who favor cognizance of "wrongful life" actions can justify doing so only when plaintiffs are in such an excruciatingly painful or vegetative state that it is not difficult to imagine that not existing truly would be preferable to the miserable existence they lead.[68] One important advantage of the focus in this analysis on impairments, and especially its avoidance of the nonexistence paradox, is that actions can also be intelligibly brought for impairments not so severe as to make life not worth living. Whether the impairment is deafness, missing limbs, or Tay-Sachs disease, on this analysis liability for the impairment can be determined and damages can be fixed according to the severity of the injury and the grossness of the negligent conduct.

VII. CONCLUSION: FROM WRONGFUL LIFE TO WRONGFUL IMPAIRMENT

It has doubtless been noticed that, since our analysis of these actions began several pages ago, the phrase *wrongful life* has been placed in quotation marks. This is because, on the analysis we are developing, "wrongful life" is a misleading term. The claim should not be that the plaintiff was injured by being born, or would be better off not existing. Questions about the hypothetical nonexistence of the plaintiff do not come up at all because it is an inescapable given that the plaintiff *does* exist in an impaired state. The issue is whether or not the plaintiff's impairments are attributable to the negligence of another. Therefore, the appropriate claim is for "wrongful impairment" rather than for "wrongful life."

Note especially that the claim as we have redefined it—being born with impairments attributable to the negligence of others—is identical with the claim that is made in prenatal injury cases that have long been recognized as actionable, such as in *Sylvia*. The reason for this—and it is my most general conclusion—is that when considered from the injury-oriented perspective proposed here, there is nothing special (or especially vexing) about so-called "wrongful life" actions. They turn out to belong in an unexceptional way to the category of prenatal injury actions. To illustrate this, let us once more contrast *Sylvia* (an ordinary prenatal tort case) with *Walker* (a "wrongful life" case, which we would now redesignate as wrongful impairment).

68. *See supra* Part III A.

Remember that, as these cases were actually decided, Kristy Sylvia was allowed to recover but Christy Walker's suit was dismissed, which seems unfair.[69] Our injury-oriented perspective recommends a different outcome.

Both Kristy Sylvia and Christy Walker were born with impairments stemming from congenital rubella syndrome. In both cases, a counterfactual analysis authorizes the conclusion that, but for the negligent conduct of the defendants, their *impairments* would not exist: Kristy Sylvia's would not because timely treatment would or might have prevented the fetus from being damaged; Christy Walker's would not because abortion would have prevented the already-damaged fetus from coming to term. As it happened, however, both children *were* born, both suffer from injuries attributable to the negligence of others, and both seek a remedy. In both cases, a second counterfactual analysis, comparing the conditions of the plaintiffs with the conditions of other persons similar to them in other respects but who do not suffer from congenital rubella syndrome, makes it possible to measure the severity of their injuries and, on that basis, to determine special and general damages. In a result that has an advantage of fairness over the actual disposition of these cases, both plaintiffs may recover.

As stated at the outset, common sense, compassion, and fairness favor the admissibility of suits for "wrongful life." I have attempted to bolster these sentiments by proposing a theoretical perspective in terms where these actions do no violence to any legal principle, and therefore should be recognized. The upshot of this argument is that "wrongful life" suits are more appropriately understood as actions for wrongful impairment, that so conceptualized they raise no paradox, and that they should take an unremarkable place among other actions for prenatal torts.

69. *See supra* notes 37-38 and accompanying text.