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Distinguishing Wrongful from "Rightful" Life

Melinda A. Roberts

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Persons contemplating parenthood are far more cognizant of their chances of having a handicapped infant than were their parents or grandparents. Women over thirty-five, for example, are likely to be aware that they have a significant chance of producing a Down’s syndrome infant and may choose to undergo amniocentesis. If the test reveals Down’s syndrome, the woman may legally choose to abort the fetus. Ashkenazi Jews are at risk of producing an infant with Tay-Sachs disease. Couples from this population may request genetic screening to determine whether they are carriers of the disease. If it is determined that both are carriers, they may choose abortion or decide to avoid pregnancy altogether. Finally, where the woman has suffered from certain diseases during her pregnancy, such as rubella or alcoholism, she may realize the risk of bearing a child with mental or physical handicaps and choose to terminate the pregnancy.

New medical technologies impose enormous burdens on members of the health care profession. Physicians are now called upon to identify and advise patients who are exposed to an increased risk of having a handicapped child, to help them implement an effective method of birth control if necessary and to test them to determine whether they are carriers of the disease or handicapping condition. In addition, the physician is expected to test the fetus to determine whether it is afflicted and to insure that it receives proper prenatal care or, where the parents choose, to perform an abortion.

Physicians have not always discharged these obligations in a satisfactory manner. In one case, the parents of a Down’s syndrome infant alleged that
the physician failed to inform them of the increased risk of an older mother producing a Down's syndrome infant, and that he additionally failed to advise them of the possibility of amniocentesis. In California, expectant parents, aware that they may be carriers of Tay-Sachs, wanted to be screened for the recessive gene. The laboratory that did the screening incorrectly reported that neither husband nor wife was a carrier, but the couple's child was nonetheless born with Tay-Sachs. In another example, a couple previously had one child with polycystic kidney disease, who died five hours after birth. They were advised that the disease was not hereditary and that the chances of having a second child with the disease were practically nil. The second child did have the disease, and survived for only two and a half years. A Texas couple had one child with Duchenne muscular dystrophy. When they learned of a second pregnancy, the physician assured them that the wife was not a genetic carrier of the disease. The second child was born with the disease. The couple argued that, had they received accurate information, they would have chosen abortion. In another case, parents who had already given birth to two children suffering from neurofibromatosis wanted to avoid pregnancy. But the vasectomy was negligently performed and ineffective; later there was a failed abortion. The third baby also was born with the disease.

When parents bring their own action in negligence against the physician in these cases, their claim is that but for the physician's negligence the infant would never have been born, and that the burden of raising a handicapped infant constitutes a legally cognizable injury. The parents' action is generally referred to as an action for wrongful birth. The wrongful birth action is well-established in present-day law.

4. Id.
6. Id.
7. Id.
9. Id. at 920.
10. Id.
11. Id. at 919.
12. Neurofibromatosis is a hereditary defect which results in developmental changes of the nervous system, skin, muscles and bones. The changes can be extremely disfiguring and there is no known treatment or cure. Speck v. Finegold, 497 Pa. 77, 81-82 n.2, 439 A.2d 110, 112 n.2 (1981).
13. Id. at 81-82, 439 A.2d 112-13.
14. Id. at 82, 439 A.2d at 113.
15. Id.
In contrast, the handicapped *child* in the same situation is typically not believed to have an action against the physician. Except in three cases, actions brought by the child against the physician, referred to as actions for *wrongful life*, have been rejected.

One argument for rejecting the wrongful life action is as follows: From the child's perspective, the physician, however negligent, can hardly be viewed as having *harmed* the child. All the physician does, through his negligence, is cause the impaired child to *exist*. The physician does not cause the *impairment*. Since existence, even in an impaired condition, is something to be desired instead of avoided, the physician's actions, even though negligent, do not *harm* the child.

This argument is one variation of what, in this Article, is called the "*rightful life argument*." It is on the basis of this argument that certain influential courts have rejected the wrongful life action, as discussed below. Still other courts reject the rightful life argument, yet nonetheless hold for the physician-defendant on the grounds that damages in such cases are too difficult to calculate. Finally, as noted above, a few courts have accepted the wrongful life action. These courts have adopted an *ad hoc* approach to the practical issue of setting damages.

The topic of wrongful life is, admittedly, not viewed by lawyers or legal
scholars as one of the pressing legal issues of the day. Courts that have considered the issue seem to be well-settled in their chosen diverse approaches. Nonetheless, from a theoretical point of view, none of these approaches represent a happy, or even coherent, resolution of the issue. Courts that accept the rightful life argument have not answered cogent objections to it. Courts that reject the wrongful life action on the grounds that damages are difficult to assess have not answered the question of why damages are so much more difficult to ascertain in this case than in other cases involving pain and suffering. Finally, courts that accept the wrongful life action and have fashioned certain ad hoc measures of damages seem to have espoused principles resulting in an incorrect assessment of damages in perhaps a majority of cases.

There is another reason, as well, why the rightful life argument deserves further consideration. The principles of the rightful life argument may be stated in perfectly general terms and, with only a modicum of sophistry, can be used to justify a wide range of questionable activities. These activities include irredeemably and pointlessly polluting the environment, the "practice of flesh eating" and engaging in a variety of infertility therapies, including in vitro fertilization, embryo transplant and surrogate motherhood. Of equal note is that, absent sophistry, a sound version of the rightful life argument may be used to justify certain harms caused in situations widely regarded as morally treacherous, e.g., where a pregnant woman, by ingesting alcohol or another drug to which she is addicted, causes harm to her unborn baby.

The purposes of this Article are (1) to identify and examine the rightful life principles as they are evaluated and either implemented or rejected in certain pivotal court opinions on wrongful life, (2) to construct a sound version of the rightful life argument and (3) to determine when such version of the rightful life argument can, and when it cannot, be implemented to justify particular harms in contexts other than that of wrongful life.

II. ARGUMENTS AGAINST WRONGFUL LIFE

Wrongful life actions are actions in negligence. It is well-established that proof of harm, injury, actual loss or actual damage is an element essential to any action in negligence. Several courts and scholars have argued that by law the wrongful life plaintiff cannot establish this particular element. If correct, this contention would bar any analysis of the wrongful life claim in terms of the law of negligence.

This Article will focus on the issue of harm. Other elements required by the law for proof of a claim in negligence have not been perceived as stum-
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Bbling blocks. Duty has received some discussion; breach and proximate cause practically none, and they will not be discussed here. Sections A and B below address, respectively, the logical coherence of the wrongful life claims that harm has been imposed and the validity of rightful life argument (pursuant to which no harm, or no unjustifiable harm, has been imposed).

A practical issue closely related to the issue of whether or not the wrongful life plaintiff has been harmed is how to measure damages. Whether damages can be rationally or reasonably calculated forms what may be thought of as a “fifth element” of the negligence action. Under the law of negligence, if a plaintiff cannot demonstrate with some certainty the extent of his loss, the court will not award him money damages. This “fifth element” is considered in Section C below.

A. Argument from the Incoherency of the Claim of Harm

Damages in negligence are determined by comparing the present position of the victim with his position had the injurious event not occurred. But in wrongful life cases the claim is that the plaintiff’s ideal position is one in which he does not exist. This fact led the court in Gleitman v. Cosgrove to object: “[t]he infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination. This court cannot weigh the value of life with impairments against the nonexistence of life itself.” Judge Weintraub, dissenting in part, explicates the point in a passage that is often cited: “Ultimately, the plaintiff’s complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether this is so.”

The strength of this position seems to be based on the point that it is impossible to imagine a situation in which the plaintiff does not exist and to ask what pleasures and miseries the plaintiff experiences in that world. To

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20. Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967). The ruling of Gleitman as to the wrongful birth issue was overturned by the New Jersey Supreme Court in Berman v. Allen, 80 N.J. 421, 404 A.2d 8 (1979). The wrongful life issue was addressed again in Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984). The New Jersey Supreme Court recognized the wrongful life action, and concluded that the child or his parents could recover special damages for “extraordinary medical expenses.” Id. at 352, 478 A.2d at 762. The court did not, however, extend recovery to general damages for “emotional distress” or an “impaired childhood.” Id. at 343, 478 A.2d at 757.


22. Gleitman, 40 N.J. at 63, 227 A.2d at 711 (Weintraub, J., dissenting in part).
the extent that someone is able (based perhaps on that person's own individual religious or metaphysical views of the universe) to picture the never-born plaintiff as nonetheless having some type of being, the assignment of a value to such a state of being would seem indeed to be beyond such person's capacity.

This analysis seems to be clearly correct. It does not, however, generate the desired conclusion that no assignment of a value to the "utter void of non-existence" can be made. Accordingly, one commentator puts aside the uncertain metaphysical doctrines pursuant to which the never-born plaintiff may have some type of being, and makes the straightforward proposal that, in a scheme in which the beneficial aspects of a particular individual's existence are assigned some positive number and the burdensome aspects some negative number, the value of zero can accurately be assigned to the state of nonexistence. The intuition behind this proposal is that the state of nonexistence involves neither pleasure nor misery for the plaintiff, and therefore there is no need to ask what pleasures and miseries the nonexistent plaintiff experiences. Then, as another commentator put the matter, "the proper method for determining what damages the infant-plaintiff has suffered should weigh the value of the detriments of his life, against the value of his life's benefits." On the basis of the gap between such a result and a neutral state, the finder of fact may award damages.

B. The Rightful Life Argument

The most interesting and difficult of the arguments against the action for wrongful life, and the one that will be the focus of this article, is premised on a claim concerning the value of human life. Life itself is so precious, it is argued, that conferring it can never constitute harm. The benefits of life will


24. Id. at 64-66.


necessarily outweigh the detriments. But without establishing harm, the wrongful life plaintiff has no claim in negligence, since harm is an element essential to the negligence action.

Thus, the court in *Becker v. Schwartz* argues:

[I]t does not appear that the infants [a Down’s syndrome baby in the main case and an infant with hereditary polycystic kidney disease in the companion case of *Park v. Chessin*] suffered any legally cognizable injury. . . . Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.\(^{27}\)

In *Berman v. Allan*, the New Jersey Supreme Court accepted this argument.\(^{28}\)

This argument is divided into two independent claims. The first claim is that life even with handicaps is superior to the absence of life. The *Becker* court seems to accept this Principle of the Preferability of Existence to Non-existence, which may be stated as follows:

P. Any state in which a person \(X\) exists is preferable from \(X\)’s point of view to any state in which \(X\) does not exist.

Principle (P) states that, between any two states, if a person exists in one but not the other, then the one state of existence is preferable from that person’s point of view to the other state of nonexistence.

The second claim apparently accepted by the *Becker* court is that, where the physician has caused (whether through negligence or not) the child to be placed in that particular child’s best possible state (even if it is, for that particular child, a life with handicaps), the child cannot be said to have suffered a “legally cognizable injury.” This principle may be referred to as the Principle of the Harmlessness of Any Preferred State\(^{29}\) and expressed as follows:

H. If state \(S\) is preferable from \(X\)’s point of view to any other state \(S^*\) accessible to \(X\), then imposing \(S\) on \(X\) does not injure or harm \(X\).

These principles together form one version of what may be called the “right-

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\(^{27}\) *Becker*, 46 N.Y.2d at 412, 413 N.Y.S.2d at 900, 386 A.2d at 812.

\(^{28}\) *Berman*, 80 N.J. at 428-29, 404 A.2d at 12.

\(^{29}\) The principle is reminiscent of Lebiniz’s reply to the traditional Argument From Evil. Lebiniz’s view, briefly, was that one cannot prove that God does not exist by pointing to perceived evil in the universe, for if such “evil” is necessary to produce the best of all possible worlds, it really is not “evil” at all. G. LEBINIZ, THEODICY: ESSAYS ON THE GOODNESS OF GOD, THE FREEDOM OF MAN AND THE ORIGIN OF EVIL (E. Huggard trans. 1952).
ful life argument." It is an argument to the conclusion that the plaintiff's life in a particular case is not per se harmful, but that it is "rightful."

The argument applies to the case of the genetically or chromosomally handicapped infant as follows: principle (P) yields the result that it is always better to live, handicapped or not, than not to live. And, since the wrongful life plaintiff must live with his genetic or chromosomal handicap or not at all, principle (H) yields that he has not been harmed by the physician who negligently permits his existence. His life is, therefore, "rightful." Since the argument applies to all wrongful life cases regardless of the degree of the defendant's negligence or the severity of the plaintiff's disorder, courts like the Becker court accept the claim that, as a matter of law, the wrongful life plaintiff cannot establish harm. Thus, such courts refuse to recognize a cause of action for wrongful life.

It should be noted that the rightful life argument, as stated, could not be used to defend against the negligent injury of a healthy fetus. In that case, life without handicaps is a state accessible to the infant. In the absence of the negligence, the infant would have been healthy. Principle (H) therefore does not apply, and the inference that the child has not suffered harm cannot be made.

It should be noted also that the rightful life argument, as stated, does not produce the result that, if the physician in a potential wrongful life situation is not negligent and successfully prevents the child from coming into existence, the child is harmed in some way. Indeed, it is clear that there are independent grounds for denying that any such child is harmed. One who does not and will never exist cannot suffer harm.

Thus, the rightful life argument, in conjunction with this final principle, places the wrongful life physician-defendant in a no-lose situation. Provided that he is negligent in no other way, the physician-defendant escapes liability whether or not he negligently fails to prevent the child's birth.

1. The Principle of the Preferability of Existence to Nonexistence. Some courts, including the Becker court, seem to link principle (P) with a "sanctity of life" principle. Thus, in the Becker decision there is the suggestion that to deny the principle that existence is always preferable to nonexistence is to ignore the "high value which the law and mankind has placed on human life, rather than its absence."30

But the inference is questionable. Does adherence to the sanctity of life principle really necessitate the view that the maximum possible number of lives should be brought into existence? Is the sanctity of life principle really

intended to be directed toward the protection of those who do not exist? A more reasonable view is that the sanctity of life principle entails merely that human beings already in existence, whether profoundly handicapped or not, are entitled to have their lives respected and not arbitrarily cut short or diminished.

Thus, a court may accept the wrongful life action without implying or suggesting that the child is "better off dead" or is harmed by being allowed to continue to live once he or she has been born. A court may sensibly find that failing to prevent a child from being born harms the child because the pain that will be accorded the child during its life exceeds any pleasure it will have. Yet, following the sanctity of life principle, the same court may recognize the enormous pain that would be inflicted on the child, or grave injustice that would be done to the child, by killing or "euthanatizing" him or her. The recognition of such wrong moots any question of what should become of the child now that he or she has been born.

Independent of the point that the sanctity of life principle provides no support for principle (P) is the observation that it appears on its face to be false. For surely there are extreme cases which involve so much suffering and so little hope that one is inclined to say that non-existence is preferable to existence. For courts, like the Becker court, to adopt a "see no evil" attitude toward such extreme cases is unjustifiable. 31

2. The Principle of the Harmlessness of Any Preferred State. Principle (H), like principle (P), is questionable. This principle, as noted above, is as follows:

H. If state S is preferable from X's point of view to any other state S* accessible to X, then imposing state S on X does not harm X.

Based on principle (H), if existence with a handicap is preferable to any other state accessible to the handicapped child, then permitting the child to come into existence in that flawed state does not impose any harm or actual loss on the child. In the case where the child is genetically or chromosomally handicapped, living free of the handicap is not a state accessible to the child, since that particular child could not have existed without that particular handicap. The alternative is not to live at all, a state which, under principle (P), is a nonpreferable state. Thus, it is by means of principle (H) that one arrives at the ultimate conclusion of the rightful life argument: since no

harm is done to the baby by the physician’s negligence, no action can be brought by the baby against the physician.

In contrast to principle (P), principle (H) has received little attention from courts or scholars. But principle (H) is clearly implicated in the Becker court’s conclusion that the wrongful life plaintiff has no action in negligence since, as a matter of law, the plaintiff has suffered no legally cognizable injury.32

Principle (H) as stated above would seem to be almost certainly false. For consider the results principle (H) generates when applied to the following hypothetical. A man is on the brink of starvation. Death is imminent. A motorist negligently runs him down; his arm is thereby broken. An ambulance is summoned, and he is rushed to the hospital where emergency treatment, including intravenous feedings, saves him from starvation. Since life with a broken arm, caused by the motorist’s actions, is preferable to no life at all, principle (H) entails that the motorist has in no way harmed the man. This result is, however, false. Even if the benefits the motorist fortuitously confers through his negligence outweigh the harm of the broken arm, that there has been harm is true. Therefore, principle (H) as written must be rejected.

The Becker court may have intended to espouse the closely related but much more plausible principle (H*) which, if applicable to a given set of facts, yields the result that any harm imposed is a justifiable harm:

\[ H^* \text{. If state } S \text{ is preferable from } X \text{'s point of view to any other state } S^* \text{ accessible to } X, \text{ then imposing state } S \text{ on } X \text{ does not impose any unjustifiable harm on } X. \]

In other words, where the physician has placed the child in his best possible state, whether or not through negligence, any harm thereby imposed is an unavoidable consequence of doing what is best for the child and is to be forgiven. This principle seems to capture the Becker court’s reasoning without denying the apparently true proposition that in bringing the infant into existence some harm has been done to the infant. Consider, again, the motorist example. Based on principle (H*), the harm the motorist imposes is justifiable since in imposing that relatively minor harm the motorist has saved a life. Yet there is no need to deny the fact that harm has been done.

Principle (H*) seems to be true and, in addition, fits well into the framework already established by the law of negligence. Under this law, the plaintiff need only prove harm to establish his prima facie case; he need not additionally establish that such harm is unjustifiable. The law then permits the defendant to argue that the harm in question is justifiable, in mitigation

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of whatever damages the plaintiff has already established. This principle is referred to as the "benefits rule." The crucial point is that under the benefits rule it is the defendant who must prove that the burdens suffered by the plaintiff are compensated for by the benefits enjoyed; the benefits rule does not provide that the plaintiff must show that the burdens suffered are not compensated for.

Thus, in wrongful life cases, the determination of whether the harm in question is justifiable will be a factual question to be settled by a consideration of (a) evidence presented by the plaintiff of harm and (b) mitigating evidence presented by the defendant of benefits bestowed. The harm is justifiable, and the defendant not liable, when and only when the harm imposed does not exceed the benefits bestowed. Although in many instances the defendant will be able to show that the damages the plaintiff proves are entirely mitigated by the benefits the plaintiff enjoys, in other instances, for example, those in which the plaintiff experiences extreme pain and suffering, damages should ultimately be awarded to the plaintiff. Contrary to Becker, it would never be the correct result to deny the plaintiff's claim in the absence of a showing by the defendant that the benefits the plaintiff enjoys are not exceeded by the burdens. Of course, courts may recognize the wrongful life action yet take the precautions ordinarily applicable in situations where there is a significant risk that the damage award may be disproportionately high.

C. Argument from the Unfairness of Defendant's Burden

It was argued above that the wrongful life plaintiff may easily show injury merely by pointing to whatever pain and suffering is associated with the disorder that afflicts him. It was then noted that the defendant is always permitted to argue that the benefits he has conferred upon the wrongful life plaintiff mitigate or, in certain instances nullify, the damages plaintiff has proved.

It may be argued that this concession to the rights of the defendant is inadequate. For often in the wrongful life case the benefits conferred by the defendant will outweigh the burdens imposed. For instance, neither Down's syndrome nor hereditary deafness is a disorder involving so much pain and so little hope that one could reasonably say that the child's burdens exceed

35. See infra text accompanying note 38.
the benefits that accompany his existence. Other disorders, of course, do not lend themselves to such chary commentary. But where the disorder is not so severe, it may seem unfair to require the defendant to show what is intuitively correct but extraordinarily difficult to demonstrate: that the advantages which accompany the infant's life exceed the disadvantages.

Courts that wish to recognize the wrongful life action have responded to this practical objection by permitting the plaintiff to recover only for special damages. Special damages include damages for the reasonable medical costs associated with the disorder but no additional damages for emotional distress or pain and suffering. This approach seems to alleviate any potential unfairness to the defendant, since such damages are easily provable. Having limited the plaintiff's action in this way, some courts then provide a safeguard to protect the plaintiff's position by precluding the defendant from appealing to the benefits rule. Thus, the court in *Turpin v. Sortini* writes that "the harm for which plaintiff seeks recompense is an economic loss, the extraordinary, out-of-pocket expenses that she will have to bear because of her hereditary ailment. Unlike the claim for general damages, defendant's negligence has conferred no incidental, offsetting benefit to this interest of plaintiff."37

This approach, while eliminating the thorniest of the purely practical issues involved in the wrongful life action, is problematic in that it will fail to produce the correct result in probably the majority of cases. Designed to serve the defendant, it may in fact have just the opposite result. Where the hereditary ailment is mild and it is entirely clear that the child's life is replete with advantage, the physician still has to pay. Certain plaintiffs will also be unfairly treated. Where the hereditary ailment is severe and accompanied by great pain, and the medical costs low, the damage award will fall dramatically short of providing the compensation recognized as proper within the torts framework, in which the goal is to place the plaintiff in the position he would have held but for the defendant's negligence.

Given then that the *Turpin* approach is unacceptable, two alternatives remain. One is to reject the wrongful life action. The better alternative is to permit the wrongful life action, but take the precautions ordinarily applicable in situations where there is a high risk that the damage award may be unjustified. The judge may need to be especially alert to the possibility that the damage award will require modification.38

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37. 31 Cal. 3d at 239, 643 P.2d at 965-66, 182 Cal. Rptr. at 348-49.
38. The judge under certain circumstances may give a judgment notwithstanding the
It is notable that in wrongful life cases courts and juries will be forced to confront questions that are not raised by routine negligence cases. Courts and juries are ordinarily forced to assess the bad rather than the good that has come from a negligent act. However, if courts and juries can calculate, roughly, the amount of pain and suffering a plaintiff will undergo during his lifetime in a routine negligence case, it is unclear why they cannot also calculate, roughly, to what extent such pain and suffering is offset by an enjoyment of life.

III. Other Applications of the Rightful Life Argument

The preceding section of this paper was in large part intended to establish that life is sometimes “wrongful,” since it is not always the case that life with handicaps is preferable to nonexistence. It should not be forgotten, however, that life in other such cases is not wrongful. The purpose of this present section is to examine situations in which the life in question may be considered to be, or may be argued to be, “rightful,” i.e., the harm in question is justifiable.

From the preceding discussions it may be concluded that the version of the rightful life argument that has the best chance of withstanding careful scrutiny is one that, first, rejects principle (P) altogether, thereby acknowledging that in certain instances to impose existence is to impose harm. Second, the argument must incorporate principle (H*) rather than the problematic principle (H). Then, if it can be established that a given state (e.g., existence with a certain disability) is preferable to any other accessible state (e.g., nonexistence), it may be inferred that no unjustifiable harm has been done, that is, that the life is “rightful.”

It is interesting that the rightful life argument suggests itself in so many contexts, including discussions of animal rights, the environment, surrogate motherhood and in vitro fertilization. But the distinction between situations in which the rightful life argument properly applies and those in which it does not is subtle, and, furthermore, the relationship between the rightful life principles and other exculpatory principles is complex.

To note one difficulty, suppose that in a given case the preferability of an actual state $S$ to nonexistence for a given individual $X$ has been established by weighing the benefits associated with state $S$ against the burdens. (For the purpose of this portion of the Article, the practical difficulty of measuring and comparing these quantities will be disregarded.) Principle (H*) does not produce the result, on the basis of this information alone, that imposing jury's verdict; remittitur is also a possibility, where the verdict is excessive. Bonura v. Sea Land Service, Inc., 505 F.2d 665, 669 (5th Cir. 1974).
S on X has not unjustifiably injured X. For principle (H*) generates nothing at all until it has been established that, for each and every state S* (not just the state of nonexistence) other than S accessible to X, S is preferable to S*. Thus, the first step in determining whether the rightful life argument can be properly applied must always be simply to identify all of the possible states accessible to the plaintiff. In the case of a genetically handicapped infant, the task is straightforward. In other instances, for example, fetal alcohol syndrome cases, the task is more complex.

A. IVF/ET, Prevention of Miscarriage, Neonatal Care, Surrogate Mothering

Physicians and other medical personnel may worry that the relatively new technology of in vitro fertilization coupled with embryo transfer (IVF/ET), developed in the face of rising infertility rates, may eventually be shown to increase the risk that the resulting infants will be handicapped and may expose physicians and other medical personnel implementing the treatment to greater liability. One question that arises is whether the rightful life argument would afford any safe harbor for such medical personnel if IVF/ET is eventually proven to increase the risk of handicaps.

Suppose that in a particular case the use of IVF/ET damages an embryo. The child into whom the embryo develops is irreparably harmed as a result of the damage, but the benefits of existence outweigh the burdens for the particular child. Assuming that IVF/ET has been correctly and carefully implemented to achieve an otherwise impossible pregnancy, the harm that it causes can be justified by appeal to the rightful life argument. This justification is available, since there is no state accessible to the infant in which the infant lives and is healthy.

An analogous argument may be given to justify harm caused by treating a pregnant woman with a particular drug for the purpose of preventing miscarriage. Assuming, first, that a miscarriage would be inevitable in the absence of treatment and the particular drug chosen for treatment involves fewer risks than other available drugs and, second, the infant’s existence is not so miserable that nonexistence is preferable to existence, the rightful life argument yields the conclusion that the infant’s existence is “rightful,” i.e., the harm caused justifiable.

In both of the preceding cases, the rightful life argument affords a defense only if the infant in question is not too badly harmed by the respective thera-

pies. The analysis changes when one is faced with the more unusual case in which nonexistence is preferable to existence. In such cases, the rightful life argument does not justify the harm imposed either by the physician administering IVF/ET or by the physician administering drugs to prevent miscarriage, since in neither case can it be established that flawed existence is the plaintiff's best of all accessible states.

However, exculpatory principles independent of the rightful life argument justify the harm imposed by the physician's actions in the miscarriage case but not the IVF/ET example, given only the further assumption that the physician reasonably, although falsely, believed at the time he administered the treatment designed to prevent miscarriage that it would permit a fetus for whom existence is preferable to nonexistence to be carried to term. In other words, traditional torts principles are at play: the physician has, reasonably, taken a small risk of imposing serious harm on the fetus in order to save a life. In this case, the "game," one might say, is "worth the candle."^40

In marked contrast, the physician administering IVF/ET imposes the particular risk not in order to avoid some harm which might otherwise befall his vulnerable patient but instead in order to bring the fetus into existence. The impact of this fact is that the physician cannot defend his conduct by appeal to traditional negligence principles. It is not a plausible defense to argue that, had he not imposed the risk, the fetus would never have existed. As noted earlier, it cannot harm someone to refrain from bringing him into existence.

The conclusion is that, in those unusual instances in which nonexistence is preferable to existence, neither the rightful life argument nor traditional torts principles afford the physician or other medical personnel administering IVF/ET, or for that matter the parents who make use of IVF/ET, any defense. An important complication arises with respect to the miscarriage cases for anyone who believes that the human fetus in its early stages is not a human being, or person. A consequence of this position, if correct, is that drugs designed to reduce the risk of miscarriage do not in fact always save the life of the human being, but rather in some instances keep the early fetus alive so that it may, later in pregnancy, develop into a human being. On this position, treatment in the early stages of a pregnancy designed to prevent miscarriage should be assimilated to the IVF/ET cases. Then, in instances in which the burdens of life exceed the benefits, neither the rightful life argument nor traditional torts principles would justify harm imposed incidental

to the treatment to prevent miscarriage. Thus, from a practical point of view, the issue of when a fetus becomes a person will be of great importance.

The treatment of infants within the confines of a Neonatal Intensive Care Unit (NICU) is comparable to treatment to reduce the risk of later miscarriages (or to treatment to reduce the risk of any miscarriage on the view that the human conceptus is a human being).\(^{41}\) Infants emerging from such treatment exhibit a proportionally higher rate of serious birth defects.\(^{42}\) Suppose that, in a given case, the benefits associated with life are outweighed by the pain and suffering brought on by the prolongation of life in the NICU. In such a case, the physician has taken the relatively small risk of imposing harm on an already existing infant in order to aid the infant. The harm, if it eventuates, will be considered justifiable on the basis of traditional negligence principles. In the usual case in which the benefits associated with life outweigh the pain and suffering imposed, the rightful life argument will protect the defendant-physician.

Not all infertility therapies are high-tech. Consider, for example, surrogate mothering. Melissa Stern, or Baby M,\(^{43}\) may undergo a certain amount of psychological pain due to the circumstances of her conception and the fact that she finds herself the object of several warring parents' conflicting desires. Nonetheless, presumably the benefits of her existence will, all things considered, outweigh the burdens. Given this balance, the question arises as to whether the rightful life argument justifies such pain, on the grounds that Melissa would not have existed had not her biological parents crossed traditional family boundaries, thereby generating the conflict from which she now suffers.

In contrast to cases of infants born with genetic disorders and of infants harmed through the use of IVF/ET and treatments designed to reduce the risk of miscarriage or save premature infants, any hardship imposed on Melissa would not seem to constitute a necessary accompaniment of existence. It seems likely that there is a state, other than the state of nonexistence, accessible to Melissa Stern in which she is not subject to such hardship. This state is accessible because her parents and parents' spouses could behave in a manner less likely to cause her harm. Thus, the harm imposed on Baby M

\(^{41}\) A difference is that here the physician is under a clear duty toward the infant, whereas his duty toward the fetus is unclear. Commonwealth v. Edelin, 359 N.E.2d 4 (Mass. 1976).


by their actions cannot be justified by appeal to the rightful life argument. The same point may be made about any instance of "nonmarital motherhood [or parenthood] by choice." Thus, to the extent that such parenthood is "by choice," if a child raised by a single parent or lesbian or gay partners were in any way thereby harmed, then, even if in the absence of the social situation in question the child would not have come into existence, the rightful life argument cannot be used to justify the harm. Exactly the same point may be made, of course, with respect to harms that derive from perfectly traditional family settings.

B. Research Involving Human Subjects; Genetic Engineering

Those who believe that the early human embryo is a human being may be troubled by research involving human embryos. The question of whether the rightful life argument justifies using human embryos as subjects in intrusive and intrinsically harmful research projects thus arises.

The proposed argument would be as follows: (1) the embryos in question would not have been brought into existence if it had not been for the fact of a research program's ongoing need for such embryos as subjects; in other words, they would not exist except as subjects in the research program; (2) it is preferable to exist as a subject of research than not at all; therefore, (3) any harm done to them is justifiable. But the argument is not persuasive. The rightful life argument does not "work" unless it is established that the subject's best possible state is that of a research subject. The premises (1) and (2) above, while true, do not yield this result, since accessible to the embryos in question, who are already in existence, is the state of being simply left alone, ex hypothesi a state preferable to existence as a research subject.

If the harm imposed by the research program cannot be justified by the rightful life argument or otherwise, and if in consequence such research programs are disbanded, embryos which would have been used as research subjects will simply not be produced or maintained. But there is nothing wrong with this result. To fail to bring an embryo into existence does not constitute harm. Of course, such research may be justifiable on other grounds. Justification may, for instance, be based in part on the view that early human embryos are not human beings.

Another case raising rightful life questions involves parents' selection of their children's genetic characteristics. Physicians may soon be able to locate problematic genes and replace such genes with their "healthy" counterparts. At that point, society will embark on a path which may eventually

lead to the technology of genetic enhancement, in which "better," not just healthier, genes are introduced.

Consider, for example, a case in which the parents choose to produce an eight-footer. Such a selection will render life worth living, let it be supposed, but is not optimal. The rightful life argument will not justify the harm imposed by such a selection, since there exists a preferable state accessible to the embryo on which the genetic grafting is performed, namely, that of receiving a gene that will lead to a height more nearly in the average range. It does not matter that the parents may claim, correctly, that they would never have the child to begin with had they not had the option of selecting a non-optimal trait, or that they will never have another child if they do not have the option in the future.

C. Maternal/Fetal Conflicts; Drug-Induced Harms

The question of the mother’s obligation toward the fetus is more complex where the mother in some legitimate sense cannot help her harmful conduct. Where the woman is not an alcoholic, but drinks through negligence or ire, the rightful life argument will not justify the harm imposed by the drinking if the baby is born with fetal alcohol syndrome. In such a case, life without the handicaps imposed was a state accessible to the infant, and the rightful life argument is therefore inapplicable.

But where the woman is strongly addicted to alcohol, the question of whether life without the handicaps associated with fetal alcohol syndrome was accessible to the infant is a difficult factual question. If the woman did not have the ability to refrain from drinking, or the ability to locate effective help to end her addiction, existence without handicaps is not a state accessible to the infant. The rightful life argument applies and the harm is justified.

Similar issues arise in any situation in which a pregnant woman, by ingesting a drug to which she is addicted, causes harm to her unborn baby. There have recently been reported instances of such women being criminally charged subsequent to giving birth to handicapped babies. The rightful life argument may afford them a defense. If the defendant in such a case is addicted to the drug that caused the harm, and did not have in any real sense the ability to refrain from using the drug, then the harm caused is unavoidable. The state of existence without handicaps is not a state accessible to the

infant, and the drug-induced harm is justified by application of the rightful life argument.

Clearly, whether the rightful life argument justifies a given harm will always hinge in part on whether the defendant could have done better than he or she did. This question, in turn, raises the classic debate of free will and determinism and, at least, requires the making of certain fine moral distinctions. Of all of the cases discussed in this Article, the instances of drug-induced harms most vividly illustrate the problem.

Does the observation that the alcoholic or other drug-dependant individual could have avoided imposing the harm simply by avoiding the pregnancy furnish ammunition to use against her? It does not, for it does not follow from this fact that, negligently or otherwise, permitting the pregnancy imposed an unjustifiable harm on the infant. The rightful life argument itself saves the woman, just as it saved the physician in the case where he has negligently failed to prevent the birth of the genetically handicapped infant, in each case under the assumptions that (1) the burdens accompanying life do not outweigh the benefits and (2) the burdens imposed are a necessary accompaniment of life itself. The infant’s life is rightful, since it could not exist without its handicap, and for it existence is preferable to nonexistence.

D. The Paradox of Future Individuals

What is called the Paradox of Future Individuals is predicated on the fact that widespread sustained environmental catastrophe, brought on by exploitation of the environment by and for the present generation to the detriment of future generations, would dramatically influence the particular constituency of those future generations. That one person rather than another is his parents’ child is highly sensitive to happenstance of an unimaginable complexity.

These facts trigger rightful life issues. Environmental exploitation does no wrong or unjustifiable harm to future generations, it may be argued, because the affected population would not have existed to begin with except for the fact of this environmental exploitation. And it is better to live in a polluted world than it is not to live at all. Therefore, any harm done to those future generations is justifiable.47

Is there some misstep here, or is the rightful life argument actually effective in this context? There seems to be no error. In this case, the subjunctive future population does not have, as an available alternative, life in an unpolluted world. Given the sensitivity of population identity to a vast array of

minute factors, the present population does not have the ability to bring that particular subjunctive population into existence except by such widescale exploitation of the environment. Assuming then that the pain and suffering associated with a badly polluted environment does not outweigh the benefits of existence for the majority of the population, the crucial premises of the rightful life argument are established. The conclusion is that any harm extreme (ironically, the more harm the better) environmental exploitation imposes on future generations is justifiable.

The Paradox of Future Individuals is called a paradox for very good reason. For it is an apparently valid argument, containing apparently true premises, leading to an apparently absurd result. But paradoxes generally have solutions. A solution here may be to recognize that the conclusion of the argument is not as absurd as it at first appears. Future generations may not have suffered unjustifiable harm, but from this fact it does not follow that no wrong has been done. This position is sensible if one adopts the view that the harm imposed and the conduct that produces that harm are distinguishable objects of moral evaluation. The one may be justified while the other is not. Thus it does not follow, from the fact that the pain and suffering future generations will endure is justified, that the act of irretrievably polluting the planet can be justified. The rightful life argument may justify the particular harm, but does not justify the conduct that produces it.

The Paradox of Future Individuals may thus be viewed as the basis for a reductio ad absurdum to the conclusion that a purely rights-oriented approach, as exemplified by the rightful life argument, may not suffice, in either the moral or the legal sphere. Some other principle is necessary, such as the utilitarian analogue of principle (H*) governing the justification of actions by looking to their consequences rather than the justification of harms. And that new principle will not be applicable in the present case, since one could do much better than produce a generation doomed to live in an irredeemably polluted environment.

E. The "Logic of the Larder"

We turn from human rights to animal rights, and see that many of the points that were made in the preceding sections have already been made in the context of discussions of animal rights many decades ago by Henry S. Salt in The Humanities of Diet.48 "It is often said, as an excuse for the slaughter of animals, that it is better for them to live and to be butchered

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than not to live at all." This premise suggested to Salt the following version of the rightful life argument, which Salt refers to as the "logic of the larder": since it is better to live than not to live, bringing an animal into existence creates certain obligations, e.g., the obligation to be consumed, on the part of the animal for the benefit of the persons who are responsible for its existence. The problem with the argument, according to Salt, is that it falsely assumes that there is something objectionable about the state of non-existence and thus falsely assumes that a good has been done to any animal brought into existence. He writes: "If there were any unkindness, or lack of kindness, in not breeding animals, the enormity of our sins of omission would be more than human conscience could endure."

To illustrate the absurdity of the contrary view, Salt offers an example:

We can imagine how the Philosopher, when he passes a butcher's shop, which, according to his showing, is a very shrine and center of humaneness, since without it there 'would be no pigs at all,' must pause in serene self-satisfaction to felicitate the pallid carcass laid out there, with a mockery of an ornamental orange in its mouth. 'I have been a benefactor to this Pig,' he must say, 'inasmuch as I ate a portion of his predecessor; and now I will be a benefactor to some yet unborn pig, by eating a portion of this one.'

Structurally, what Salt calls the "practice of flesh eating" is most similar to the examples of Baby M, research on human subjects and genetic engineering. There exists in each of these four instances an alternative, preferable state to the state of burdened existence. In each of these cases, this fact means that the rightful life argument will not justify the harm imposed. And with respect to each of these cases, Salt's point is appropriate: the fact that proscribing a particular practice will inevitably mean that certain persons, or animals, will never be brought into existence is not ethically significant, and mistakenly to think otherwise is to provide support for a plethora of questionable practices.

F. Summary

Three different classes of cases have been identified in the final section of this paper. In the first, the individual's options include only nonexistence and a seriously flawed existence. The factual test that must be applied on a
case-by-case basis to determine whether the resulting harm is justified (i.e., whether the rightful life argument can be used as a defense) is whether the benefits of existence outweigh the burdens. Cases belonging to this class include cases of genetically handicapped newborns, IVT/ET infants, perhaps babies whose mothers are given medication to reduce the risk of miscarriage earlier in pregnancy, perhaps babies whose addicted mothers use alcohol or other drugs during pregnancy and the example of future generations living in a polluted world.

In the second class, the affected individuals are those whose troubles arise after they have come into existence. In such cases, the rightful life argument may not apply (it will not in any case in which the burdens of life exceed the benefits), but the person subject to judgment may nonetheless be exonerated by traditional negligence principles. Such a person may be exonerated even in cases in which the burdens of the child's life exceed the benefits, provided that the bad result was not reasonably foreseeable and that the treatment was given to a human being already in existence, aside from for the purpose of introducing a new human being into existence. Cases belonging to this class include NICU babies and, perhaps, babies whose mothers are given medication to reduce the risk of miscarriage later in pregnancy.

In the third class, the individual's options are not exhausted by the states of nonexistence and a seriously flawed existence. In such cases, there exists a third state in which the individual both exists and is not burdened by the flaw in question. In such cases, the rightful life argument cannot be used as a defense. The person subject to judgment, while to be lauded for his role in bringing someone into existence, must still be condemned for any subsequent harm he has imposed. Cases belonging to this class include Baby M, human research subjects, the subjects of genetic engineering and, of course, Salt's swine.