

## It's a Wonderful Life

Romen Perry

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# IT'S A WONDERFUL LIFE

Ronen Perry†

*"It's a Wonderful Life," the title of Frank Capra's classic 1946 movie, seems to encapsulate a fundamental all-American conviction. Unsurprisingly, several courts and jurists have applied the movie-title maxim as the ultimate retort to one of the most intriguing questions in modern tort discourse: Is it possible to say that a severely disabled child has been harmed by the mere fact of being born? Wrongful life claimants answer in the affirmative, whereas Capra's aphorism makes a compelling counterargument. In my opinion, the contrasting views represent equally legitimate subjective beliefs rather than objective truths, so neither may ever prevail. Without a satisfactory solution from conventional wisdom, the life-as-injury debate may be the Gordian knot of tort law. The purpose of this Article is to cut, rather than untie, the knot: Allow the child to recover without challenging or validating the deep-seated perception of life.*

*Part I shows that hostility to liability in tort for wrongful life is almost universal, crossing lands and seas. Part II argues that this demurral is ultimately rooted in the absence of one of the central components of the cause of action. A tort action must fail because of the inability—both logical and practical—to establish "harm" under the traditional definition of this term. Part III opines that because the Gordian knot of tort law cannot be untied, it must be cut altogether. We must replace the traditional tort framework, which gives rise to an insoluble problem, with a more promising contractual framework inspired by the celebrated case of *Hawkins v. McGee*. In my view, the child may base an action on the claim that the defendant promised the parents that the child would be born without a certain defect and that the promise went unfulfilled. In formal terms, the child is an intended third-party beneficiary of the contract between the parents and the consultant in which the latter warranted birth without a particular disability. The warranty of the future child's physical integrity and health, an integral and inseparable part of the contract, should form the basis of the child's cause of action.*

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#### INTRODUCTION

The title of Frank Capra's classic 1946 movie seems to encapsulate a fundamental all-American conviction.<sup>1</sup> Unsurprisingly, several

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<sup>1</sup> IT'S A WONDERFUL LIFE (Liberty Films 1946).

courts and jurists have applied the movie-title maxim as the ultimate retort to one of the most intriguing questions in modern tort discourse: Is it possible to say that a severely disabled child has been harmed by the mere fact of being born? Wrongful life claimants answer in the affirmative, whereas Capra's aphorism makes a compelling counterargument. In my opinion, the contrasting views represent equally legitimate subjective beliefs rather than objective truths, so neither may ever prevail. Without a satisfactory solution from conventional wisdom, the life-as-injury debate may be the Gordian knot of tort law. The purpose of this Article is to cut, rather than untie, the knot: Allow the child to recover without challenging or validating the deep-seated perception of life.

A wrongful life action is a tort action of a disabled child against the person whose negligence enabled the child's birth.<sup>2</sup> The defendant may be a genetic consultant, a doctor, or a medical institution (hereinafter "the consultant") who failed to reveal the risk of congenital disability under circumstances where knowledge of the risk would have induced the mother to avoid conception or to terminate pregnancy. The defendant may also be a consultant who negligently performed a procedure aimed at preventing the conception or birth of the child under circumstances that portended the risk of birth defects.<sup>3</sup>

Two assumptions premise a wrongful life action. On the one hand, the consultant's negligence did not cause the impairment. It may have derived from a variety of sources, *inter alia*, a chromosomal aberration such as a missing, superfluous, or defective chromosome;<sup>4</sup> heredity;<sup>5</sup> fetal exposure to dangerous factors not imputable to the consultant: mechanical<sup>6</sup> (e.g., a knock), biological<sup>7</sup> (e.g., embryonic infection by microorganisms or viruses), chemical<sup>8</sup> (e.g., toxic sub-

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<sup>2</sup> See Michael A. Berenson, Comment, *The Wrongful Life Claim—The Legal Dilemma of Existence Versus Nonexistence: "To Be or Not to Be,"* 64 TUL. L. REV. 895, 895–96 (1990) (discussing the various forms that causes of action can take in wrongful life claims).

<sup>3</sup> *Id.* at 895–97.

<sup>4</sup> The most frequent chromosomal aberration is Down syndrome. See J.L. Tolmie, *Chromosomal Disorders*, in *PRENATAL DIAGNOSIS IN OBSTETRIC PRACTICE* 33, 35–41 (M.J. Whittle & J.M. Connor eds., 2d ed. 1989).

<sup>5</sup> Sickle cell disease, Tay-Sachs disease, and thalassaemia are examples of genetic diseases. See J.M. Connor, *Genetic Assessment and Counseling*, in *PRENATAL DIAGNOSIS IN OBSTETRIC PRACTICE*, *supra* note 4, at 1, 3.

<sup>6</sup> See, e.g., Keeler v. Superior Court, 470 P.2d 617, 618 (Cal. 1970), *superseded by statute*, CAL. PENAL CODE § 187(a) (West 1999), *as recognized in* People v. Taylor, 86 P.3d 881 (Cal. 2004) (analyzing the intentional attack on a pregnant woman's womb under the California statute defining murder).

<sup>7</sup> See A.A.M. Gibson & W.J.A. Patrick, *Fetal Pathology*, in *PRENATAL DIAGNOSIS IN OBSTETRIC PRACTICE*, *supra* note 4, at 176, 195.

<sup>8</sup> See, e.g., M.J. Whittle & P.C. Rubin, *Exposure to Teratogens*, in *PRENATAL DIAGNOSIS IN OBSTETRIC PRACTICE*, *supra* note 4, at 161, 161 (noting the impact of the thalidomide disaster on views regarding drug ingestion during pregnancy).

stances, hormones, or medicines given to the mother), or physical (e.g., exposure to excessive heat or radiation); pathological disturbance to the pregnant woman's amniotic sac, hindering the supply of nutrition and oxygen to the fetus;<sup>9</sup> or a combination of factors.

On the other hand, absent negligence, the plaintiff would not have been born at all—conception would not have occurred or pregnancy would have been terminated. The defendant's negligence is manifested in one of the following: (1) failure to reveal the risk of a congenital disability or failure to properly report it prior to conception, primarily within the framework of genetic counseling;<sup>10</sup> (2) failure to reveal the risk or failure to properly report it within the framework of medical tests conducted during the pregnancy (e.g., amniocentesis<sup>11</sup> or ultrasonography<sup>12</sup>) or in light of information received regarding the pregnant woman's exposure to deleterious factors (e.g., rubella<sup>13</sup>) or medication endangering the fetus;<sup>14</sup> or (3) negligent performance of an abortion<sup>15</sup> or a contraceptive procedure<sup>16</sup> where there is a real risk of a child being born disabled.

Courts generally classify actions brought under these circumstances according to the plaintiff's identity—the parents' action and the child's action. The parents' action is generally referred to as a "wrongful birth" action.<sup>17</sup> The parents claim that the consultant's negligence has forced them to shoulder the unanticipated costs of car-

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<sup>9</sup> See, e.g., D.A. Aitken & M. Rae, *Biochemical Diagnosis of Inborn Errors of Metabolism*, in *PRENATAL DIAGNOSIS IN OBSTETRIC PRACTICE*, *supra* note 4, at 115, 117–18 (discussing diagnosis of metabolic disorders via amniotic fluid analysis).

<sup>10</sup> See *Curlender ex rel. Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 480 (Cal. Ct. App. 1980) (entertaining a claim by plaintiffs who sued a laboratory hired to help determine potential risks of genetic defect in their offspring); *Park v. Chessin*, 386 N.E.2d 807, 809 (N.Y. 1978) (entertaining a claim by plaintiffs who sued doctors for supplying bad advice regarding potential genetic defects); Connor, *supra* note 5, at 6.

<sup>11</sup> See, e.g., *Azzolino ex rel. Azzolino v. Dingfelder*, 337 S.E.2d 528, 530 (N.C. 1985) (entertaining a claim by a plaintiff who sued doctors for not informing her of the existence of the test); see also *Alquijay v. St. Luke's-Roosevelt Hosp.*, 473 N.E.2d 244, 245 (N.Y. 1984) (entertaining a claim for negligent application of the amniocentesis test).

<sup>12</sup> See, e.g., *Mickle v. Salvation Army Grace Hosp.*, [1998] 166 D.L.R.4th 743, 749 (Can.).

<sup>13</sup> E.g., *Blake ex rel. Blake v. Cruz*, 698 P.2d 315, 316–17 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 2004), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005); *Smith ex rel. Smith v. Cote*, 513 A.2d 341, 342–43 (N.H. 1986); *Procanik v. Cillo*, 478 A.2d 755, 757 (N.J. 1984), *rev'd*, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988); *Gleitman ex rel. Gleitman v. Cosgrove*, 227 A.2d 689, 690–91 (N.J. 1967), *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 373–74 (Wis. 1975).

<sup>14</sup> See, e.g., *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 486–87 (Wash. 1983) (plaintiffs alleged that the prescription of Dilantin caused "fetal hydantoin syndrome").

<sup>15</sup> E.g., *Speck ex rel. Speck v. Finegold*, 439 A.2d 110, 113 (Pa. 1981), *superseded by statute*, 42 PA. CONS. STAT. ANN. § 8305 (West 2007).

<sup>16</sup> E.g., *Edwards v. Blomeley* (2002) N.S.W.S.C. 460 (Austl.), *available at* [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/460.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/460.html).

<sup>17</sup> Berenson, *supra* note 2, at 898–99.

ing for an abnormal child and that the child's birth in a defective state wrought them emotional harm.<sup>18</sup> The child's claim is for "wrongful life"<sup>19</sup> and is the focus of this Article.

Assuming both are actionable grounds, three differences separate wrongful life from wrongful birth. First, the parents cannot bring suit in their own name for the child's nonpecuniary damage (pain and suffering).<sup>20</sup> Second, only the child can claim damages for the cost of special treatment mandated by the disability when the law no longer expects the parents to bear these costs, for example, after the child reaches majority or following the parents' death.<sup>21</sup> Third, the limitation period for the child's claim tolls until majority, allowing the child to bring a claim long after the parents' claim has expired.<sup>22</sup>

For the purposes of this Article, I distinguish between two categories of cases. The first comprises cases in which a woman, either alone or with her spouse, decides to conceive or give birth in reliance on the defendant's representation that her child will be born without defect.<sup>23</sup> As the child is born disabled, it transpires that the defendant's representation was negligent.<sup>24</sup> These cases assume that the woman would have refrained from giving birth but for the negligence.<sup>25</sup> In this category, we may further distinguish between negligence before and after conception. For example, assume that prospective parents attempt to conceive, relying on genetic consultation that allays the fear of a prospective child suffering from a congenital defect.<sup>26</sup> It transpires that the consultant was negligent and a disabled child is born.<sup>27</sup> In this case, negligence precedes conception.<sup>28</sup> Now assume

<sup>18</sup> See *Speck*, 439 A.2d at 113–14 (recognizing causes of action for emotional distress under governing principles of tort law).

<sup>19</sup> Berenson, *supra* note 2, at 897.

<sup>20</sup> See Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 190 (1993) (explaining that parents of plaintiffs who bring wrongful life claims bring "wrongful birth" claims on different bases of liability).

<sup>21</sup> See *id.* at 204. Note, however, that in certain jurisdictions the parents are obliged to support their children as long as the children are incapable of supporting themselves. See, e.g., CAL. FAM. CODE § 3910(a) (1994). This is also the case in Germany. See Basil Markesinis, *Reading Through a Foreign Judgment*, in *THE LAW OF OBLIGATIONS: ESSAYS IN CELEBRATION OF JOHN FLEMING* 261, 269 n.35 (Peter Cane & Jane Stapleton eds., 1998) ("[I]n German law the obligation of maintenance continues for life and does not, as in many American jurisdictions, come to an end upon the child attaining majority.").

<sup>22</sup> See, e.g., *Procanik v. Cillo*, 478 A.2d 755, 764 (N.J. 1984), *rev'd*, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988) (allowing the child's claim brought after the parents' claim had expired).

<sup>23</sup> E.g., *Blake ex rel. Blake v. Cruz*, 698 P.2d 315, 316 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 2004), *as recognized in Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* at 255.

<sup>26</sup> See, e.g., *Park v. Chessin*, 386 N.E.2d 807, 809 (N.Y. 1978).

<sup>27</sup> See, e.g., *id.*

<sup>28</sup> See, e.g., *id.*

that a pregnant woman contracted rubella and was unaware of the danger to the embryo due to the family doctor's negligent misdiagnosis.<sup>29</sup> Out of ignorance, she decided to give birth to a child who suffered from defects stemming from her illness.<sup>30</sup> This is a case of postconception negligence.<sup>31</sup>

The second category comprises cases where the parents, aware of the risk of congenital disability, intended to avoid conception or birth yet the defendant negligently performed an act intended to prevent conception (e.g., supplying effective contraceptives) or an abortion. As in the first category, the defendant's negligence brought about the birth of a child who could not have been born without a defect, not the defect itself. The main difference is that the defendant's negligence in this second category manifests in a substandard act rather than in a misrepresentation.

*Speck v. Finegold* was a case of this kind.<sup>32</sup> Mr. Speck suffered from a grave hereditary disorder (neurofibromatosis).<sup>33</sup> Following the birth of two daughters suffering from the same disease, he and his wife decided to avoid having more children.<sup>34</sup> Mr. Speck requested that Dr. Finegold perform a vasectomy, and the doctor subsequently informed Mr. Speck that the operation succeeded. Nonetheless, Mrs. Speck conceived a short time later.<sup>35</sup> The couple approached Dr. Schwartz and asked him to perform an abortion.<sup>36</sup> Dr. Schwartz informed Mrs. Speck that he had performed the abortion successfully, but once again there had been medical negligence, and she gave birth to a girl suffering from the same disease.<sup>37</sup> The parents brought an action against the negligent doctors in their own names and in their daughter's name.<sup>38</sup> The trial court rejected the child's suit.<sup>39</sup>

Although the two categories are practically identical from a tort-law perspective, the distinction between them is of major importance in this Article. My central thesis concerns only the first category. The alternative conceptual framework proposed herein cannot overcome the difficulty raised by cases belonging to the second category.

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<sup>29</sup> See, e.g., *Blake*, 698 P.2d at 316 (entertaining a lawsuit for plaintiff whose doctor failed to test properly for rubella).

<sup>30</sup> See, e.g., *id.*

<sup>31</sup> See, e.g., *id.*

<sup>32</sup> 439 A.2d 110 (Pa. 1981); see also *Elliott v. Brown*, 361 So. 2d 546, 547 (Ala. 1978) (considering a failed vasectomy).

<sup>33</sup> *Speck*, 439 A.2d at 112.

<sup>34</sup> *Id.* at 112-13.

<sup>35</sup> *Id.* at 113.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 112.

<sup>39</sup> *Id.* at 113.

Having adequately clarified the factual background of wrongful life claims, we can now turn to the legal sphere. Part I shows that wrongful life claims have ultimately failed in most Western jurisdictions. Part II explains that the universal reluctance to allow these claims is an inevitable result of the attempt to establish the child's right against the consultant within the traditional conceptual framework of tort law. Part III argues that framing the child's claim as an action in tort has been an unfortunate mistake and that we could avoid the fierce disputes triggered by wrongful life claims through an innovative use of an alternative conceptual framework. The dogmatic tort-based discourse has been regnant for about four decades,<sup>40</sup> but we must not bestow it eternal life.

## I

### A COMPARATIVE OVERVIEW

Wrongful life cases seem to fall within the ordinary medical malpractice paradigm: a doctor fails to comply with a professional standard of care, resulting in pain, suffering, and unplanned costs.<sup>41</sup> It is not surprising, therefore, that claims for wrongful life have been framed as actions in tort, regardless of the jurisdiction.<sup>42</sup> Yet the traditional tort framework seems quite unpromising to the typical plaintiff. Nearly all Western jurisdictions have categorically denied wrongful life claims.<sup>43</sup> Even in the very few jurisdictions where a daring court allowed recovery, a negating statutory or judicial reaction usually followed.<sup>44</sup>

The following comparative overview thus serves an extremely important goal. It enables us to grasp the intensity of hostility toward tort actions for wrongful life. The nearly universal consensus is compelling evidence of some kind of inherent dissonance between wrongful life claims and the conceptual framework of tort law. At this stage, I do not endeavor to explicate the nature and origins of such dissonance; I use comparative law simply to substantiate its existence.

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<sup>40</sup> It apparently began in *Gleitman ex rel. Gleitman v. Cosgrove*, 227 A.2d 689, 693 (N.J. 1967), abrogated by *Berman v. Allan*, 404 A.2d 8 (N.J. 1979). See Belsky, *supra* note 20, at 191–92, 191 n.15 (describing the first application of “wrongful life claims” in the medical malpractice context in a 1967 New Jersey case).

<sup>41</sup> See Belsky, *supra* note 20, at 189–90.

<sup>42</sup> See *id.* (demonstrating that the cause of action in these cases fits within the rubric of tort). Certain jurisdictions also based the action on contract theory, but this did not change its true nature because the contractual obligation on which the claim hinged was practically identical to the duty of care in tort—namely the obligation to comply with a professional standard of care. See, e.g., *infra* note 135.

<sup>43</sup> See *infra* Part I.A (describing the majority of American jurisdictions as denying the viability of wrongful life claims and noting that only a few allow the cause of action).

<sup>44</sup> See *infra* notes 77–78 and accompanying text (describing the swift reversal by the New York Court of Appeals of an appellate decision allowing a wrongful life claim).



### A. Common-Law Jurisdictions

The conventional view in the United States is that a child born with congenital disabilities cannot claim damages from the person whose negligence resulted in the child's birth. The leading case is *Gleitman v. Cosgrove*,<sup>45</sup> decided by the Supreme Court of New Jersey in 1967. In that case, a pregnant woman informed her obstetrician that she had suffered from rubella during the first month of her pregnancy.<sup>46</sup> The doctor assured her that this would not affect her fetus although he knew that twenty percent of fetuses exposed to the virus during the first trimester would be born disabled.<sup>47</sup> The woman consequently gave birth to a child who suffered from vision, hearing, and speech disabilities.<sup>48</sup> The court denied the child's claim for wrongful life.<sup>49</sup>

Following *Gleitman*, wrongful life claims have been denied by the courts in more than twenty states: Alabama,<sup>50</sup> Arizona,<sup>51</sup> Colorado,<sup>52</sup> Delaware,<sup>53</sup> Florida,<sup>54</sup> Georgia,<sup>55</sup> Illinois,<sup>56</sup> Kansas,<sup>57</sup> Kentucky,<sup>58</sup> Louisiana,<sup>59</sup> Maryland,<sup>60</sup> Massachusetts,<sup>61</sup> Nevada,<sup>62</sup> New Hampshire,<sup>63</sup>

<sup>45</sup> 227 A.2d 689 (N.J. 1967).

<sup>46</sup> *Id.* at 690.

<sup>47</sup> *Id.* at 691.

<sup>48</sup> *Id.* at 690.

<sup>49</sup> *Id.* at 692.

<sup>50</sup> *E.g.*, *Elliott ex rel. Elliott v. Brown*, 361 So. 2d 546, 548 (Ala. 1978).

<sup>51</sup> *E.g.*, *Walker ex rel. Pizano v. Mart*, 790 P.2d 735, 740-41 (Ariz. 1990) (en banc).

<sup>52</sup> *E.g.*, *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1210-11 (Colo. 1988) (en banc).

<sup>53</sup> *E.g.*, *Garrison ex rel. Garrison v. Med. Ctr. of Del. Inc.*, 581 A.2d 288, 293-94 (Del. 1990).

<sup>54</sup> *E.g.*, *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992).

<sup>55</sup> *E.g.*, *Spires v. Kim*, 416 S.E.2d 780, 781-82 (Ga. Ct. App. 1992).

<sup>56</sup> *E.g.*, *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 702 (Ill. 1987); *Goldberg v. Ruskin*, 499 N.E.2d 406, 410 (Ill. 1986).

<sup>57</sup> *E.g.*, *Bruggeman ex rel. Bruggeman v. Schimke*, 718 P.2d 635, 642 (Kan. 1986).

<sup>58</sup> *E.g.*, *Grubbs ex rel. Grubbs v. Barbourville Family Health Ctr., P.S.C.*, 120 S.W.3d 682, 689-90 (Ky. 2003).

<sup>59</sup> *E.g.*, *Pitre v. Opelousas Gen. Hosp.*, 517 So. 2d 1019, 1024-25 (La. Ct. App. 1987), *aff'd in part, rev'd in part*, 530 So. 2d 1151 (La. 1988).

<sup>60</sup> *E.g.*, *Kassama v. Magat*, 792 A.2d 1102, 1123 (Md. 2002).

<sup>61</sup> *E.g.*, *Viccaro v. Milunsky*, 551 N.E.2d 8, 12-13 (Mass. 1990).

<sup>62</sup> *E.g.*, *Greco ex rel. Greco v. United States*, 893 P.2d 345, 347-48 (Nev. 1995).

<sup>63</sup> *E.g.*, *Smith ex rel. Smith v. Cote*, 513 A.2d 341, 353-55 (N.H. 1986).

New York,<sup>64</sup> North Carolina,<sup>65</sup> Ohio,<sup>66</sup> South Carolina,<sup>67</sup> Texas,<sup>68</sup> Virginia,<sup>69</sup> West Virginia,<sup>70</sup> Wisconsin,<sup>71</sup> and Wyoming.<sup>72</sup> The legislatures of several states have explicitly barred wrongful life claims.<sup>73</sup> Some statutes provide that there shall be no cause of action based on the claim that but for the conduct of another, the claimant "would not have been conceived or, once conceived, would not have been permitted to have been born alive."<sup>74</sup> In other states, the statute only bars actions based on the claim that but for the conduct of another, the mother would have aborted the fetus.<sup>75</sup> However, these states' courts tend to deny recovery in cases of preconception negligence as well.<sup>76</sup>

Only a few states allow recovery. In 1977, the Appellate Division of the New York Supreme Court was the first to recognize a wrongful life cause of action in tort.<sup>77</sup> However, the New York Court of Appeals reversed the ground-breaking decisions a few months later.<sup>78</sup> In 1982, the Supreme Court of California allowed recovery in tort for wrongful

64 With regard to New York, see *infra* notes 77-78 and accompanying text. Note that a few courts held that the parents were entitled to compensation for the extraordinary cost of nurturing the child for as long as the child was incapable of independent life. See, e.g., *Kush v. Lloyd*, 616 So. 2d 415, 423-24 (Fla. 1992); *James G. v. Caserta*, 332 S.E.2d 872, 882-83 (W. Va. 1985).

65 E.g., *Azzolino ex rel. Azzolino v. Dingfelder*, 337 S.E.2d 528, 532-33 (N.C. 1985).

66 E.g., *Hester ex rel. Hester v. Dwivedi*, 733 N.E.2d 1161, 1166-68 (Ohio 2000).

67 E.g., *Willis ex rel. Willis v. Wu*, 607 S.E.2d 63, 71 (S.C. 2004).

68 E.g., *Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984).

69 E.g., *Glascocock v. Laserna*, 30 Va. Cir. 366, 369 (Va. Cir. Ct. 1993); *Barnes v. Head*, 30 Va. Cir. 218, 221-22 (Va. Cir. Ct. 1993).

70 E.g., *James G. v. Caserta*, 332 S.E.2d 872, 879-81 (W. Va. 1985).

71 E.g., *Dumer ex rel. Bloch v. St. Michael's Hosp.*, 233 N.W.2d 372, 375-76 (Wis. 1975).

72 E.g., *Beardsley v. Wierdsma*, 650 P.2d 288, 289 (Wyo. 1982).

73 See, e.g., IDAHO CODE ANN. § 5-334(1) (2004); IND. CODE ANN. § 34-12-1-1 (LexisNexis 1998); MICH. COMP. LAWS ANN. § 600.2971(2) (West Supp. 2007), *following* *Eisbrenner v. Stanley*, 308 N.W.2d 209, 212-13 (Mich. Ct. App. 1981), *abrogated by* *Taylor v. Kurapati*, 600 N.W.2d 670 (Mich. 1999); MINN. STAT. ANN. § 145.424(1) (West 2005); MO. ANN. STAT. § 188.130(1) (West 2004); N.D. CENT. CODE § 32-03-43 (1996); 42 PA. CONS. STAT. ANN. § 8305(b) (West 2007), *following* *Ellis v. Sherman*, 515 A.2d 1327, 1329-30 (Pa. 1986); S.D. CODIFIED LAWS § 21-55-1 (2004); UTAH CODE ANN. § 78-11-24 (2002).

74 S.D. CODIFIED LAWS § 21-55-1; see also MICH. COMP. LAWS ANN. § 600.2971(2); 42 PA. CONS. STAT. ANN. § 8305(b).

75 See, e.g., IDAHO CODE § 5-334(1); IND. CODE ANN. § 34-12-1-1; MINN. STAT. ANN. § 145.424(1); MO. ANN. STAT. § 188.130(1); N.D. CENT. CODE § 32-03-43; UTAH CODE ANN. § 78-11-24.

76 See *Cowe ex rel. Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 632-35 (Ind. 1991).

77 *Becker v. Schwartz*, 400 N.Y.S.2d 119, 119-20 (N.Y. App. Div. 1977), *modified*, 386 N.E.2d 807 (N.Y. 1978); *Park v. Chessin*, 400 N.Y.S.2d 110, 114 (N.Y. App. Div. 1977), *modified sub nom. Becker*, 386 N.E.2d 807.

78 See *Becker*, 386 N.E.2d at 812; see also *Sheppard-Mobley ex rel. Mobley v. King*, 830 N.E.2d 301, 305 (N.Y. 2005) (explaining that an infant plaintiff cannot maintain a cause of action for wrongful life); *Alquijay ex rel. Alquijay v. St. Luke's-Roosevelt Hosp. Ctr.*, 473 N.E.2d 244, 245-46 (N.Y. 1984) (holding that New York does not recognize a cause of action for wrongful life).

life,<sup>79</sup> and the Supreme Court of Washington followed suit the next year.<sup>80</sup> In 1984, the Supreme Court of New Jersey joined the minority and reversed *Gleitman*.<sup>81</sup> Despite recognizing wrongful life actions, these three courts allowed recovery only for the special costs incurred because of the plaintiff's condition, not for pain and suffering.<sup>82</sup> In Maine, the legislature has recognized a cause of action for wrongful life.<sup>83</sup> Finally, neither the Connecticut legislature nor the Supreme Court of Connecticut has addressed the issue, but lower courts of that state have released conflicting decisions.<sup>84</sup>

In England, the Court of Appeal initially resolved the question in *McKay v. Essex Area Health Authority*.<sup>85</sup> In *McKay*, a pregnant woman infected with rubella was unaware of the risk because the defendant's laboratory failed to diagnose her illness through blood tests.<sup>86</sup> She gave birth to a disabled girl in August 1975.<sup>87</sup> The Court of Appeal allowed the mother's claim for wrongful birth but unanimously rejected the child's action for wrongful life.<sup>88</sup>

In 1976, following the recommendations of a Law Commission,<sup>89</sup> Parliament enacted the Congenital Disabilities (Civil Liability) Act.<sup>90</sup> The Act stipulates that a child born with disabilities attributable to

<sup>79</sup> See *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982) (en banc). For a critical analysis of *Turpin*, see generally Kurtis J. Kearl, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CAL. L. REV. 1278 (1983). The Court of Appeal of California had recognized a cause of action two years earlier in *Curlender ex rel. Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 489 (Cal. Ct. App. 1980). The court in *Curlender*, unlike the court in *Turpin*, allowed recovery for pain and suffering. See *id.* at 489-90.

<sup>80</sup> See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 497 (Wash. 1983) (en banc). For a critical analysis of *Harbeson*, see generally Mark R. Attwood, *Harbeson v. Parke-Davis, Inc.: A Major Step Forward in the Evolution of Wrongful Life*, 10 J. CONTEMP. L. 203 (1984).

<sup>81</sup> See *Procanik ex rel. Procanik v. Cillo*, 478 A.2d 755, 765 (N.J. 1984), *rev'd*, 543 A.2d 985 (N.J. Super. Ct. App. Div. 1988). In 1992, a New Jersey court held that a person born prior to *Roe v. Wade*, 410 U.S. 113 (1973), could not bring a wrongful life action if the negligent conduct occurred during pregnancy. See *Hummel ex rel. Hummel v. Reiss*, 608 A.2d 1341, 1345-47 (N.J. 1992). Clearly, this qualification no longer has any practical significance.

<sup>82</sup> See *Turpin*, 643 P.2d at 964-66; *Procanik*, 478 A.2d at 761-63; *Harbeson*, 656 P.2d at 496-97.

<sup>83</sup> 24 ME. REV. STAT. ANN. tit. 24 § 2931(3) (2000), as applied in *Anastosopoulos v. Perakis*, No. CV-91-313, 1995 Me. Super. LEXIS 504, at \*11-16 (Jan. 27, 1995).

<sup>84</sup> See *Quinn v. Blau*, No. CV 96325691S, 1997 Conn. Super. LEXIS 3319, at \*22 (Dec. 10, 1997) (allowing a wrongful life claim); *Donnelly v. Candlewood Obstetric-Gynecological Assocs., P.C.*, No. 30 20 96, 1992 Conn. Super. LEXIS 1682, at \*3 (June 8, 1992) (rejecting a wrongful life claim).

<sup>85</sup> [1982] 1 Q.B. 1166 (Eng. C.A.).

<sup>86</sup> *Id.* at 1172-74.

<sup>87</sup> *Id.* at 1171-72.

<sup>88</sup> *Id.* at 1171.

<sup>89</sup> LAW COMMISSION, REPORT ON INJURIES TO UNBORN CHILDREN, NO. 60 (1974) [hereinafter *INJURIES TO UNBORN CHILDREN*].

<sup>90</sup> Congenital Disabilities (Civil Liability) Act, 1976, c. 28 (Eng.).

another person's fault may claim damages from that person.<sup>91</sup> Technically, the Act applies only to births after its enactment—July 22, 1976<sup>92</sup>—so it did not apply to *McKay*. Yet the *McKay* court interpreted the Act in *obiter dictum* as excluding liability for wrongful life where the defendant's conduct did not cause the disability.<sup>93</sup> The court based its interpretation on the purpose of the Act<sup>94</sup> as manifested in the Law Commission's report.<sup>95</sup>

The Act applies to births taking place after its enactment, and for any such birth, it replaces any law in force before its enactment "whereby a person could be liable to a child in respect of disabilities with which it might be born."<sup>96</sup> So a person born by that date cannot bring a wrongful life claim under *McKay*, and a person born after that date cannot bring such a suit according to the Act. Given the significant time elapsed since the legislative intervention, the importance of *McKay* in England lies in its interpretation of the Act in *obiter dictum* and not in its elaborate analysis of the preenactment common law. However, the latter has been influential in other British Commonwealth jurisdictions.

For example, although the Supreme Court of Canada has not addressed the issue,<sup>97</sup> several courts in British Columbia, Manitoba, and Ontario have dismissed wrongful life claims under the strong influence of *McKay*.<sup>98</sup> In Australia, the Common Law Division of the Supreme Court of New South Wales was the first to reject wrongful life claims,<sup>99</sup> followed by the Supreme Court of Queensland.<sup>100</sup> Both decisions relied heavily on *McKay*. Subsequently, the New South Wales

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<sup>91</sup> *Id.* § 1; *see id.* § 1(2) ("An occurrence to which this section applies is one . . . [where] the child is born with disabilities which would not otherwise have been present.")

<sup>92</sup> *Id.* § 4(5).

<sup>93</sup> *See McKay*, [1982] Q.B. at 1177–78, 1182.

<sup>94</sup> *See id.* at 1182.

<sup>95</sup> INJURIES TO UNBORN CHILDREN, *supra* note 89, at 34 ("We do not think that, in the strict sense of the term, an action for 'wrongful life' should lie.")

<sup>96</sup> Congenital Disabilities (Civil Liability) Act § 4(5).

<sup>97</sup> Dean Stretton, *The Birth Torts: Damages for Wrongful Birth and Wrongful Life*, 10 DEAKIN L. REV. 319, 349–50 (2005).

<sup>98</sup> *See, e.g., Jones ex rel. Short v. Rostvig*, [1999] 86 A.C.W.S.3d 980 (B.C. Sup. Ct.); *Arndt v. Smith*, [1994] 93 B.C.L.R.2d 220, 227 (B.C. Sup. Ct.); *Lacroix v. Dominique*, [2001] 202 D.L.R.4th 121, 131–33 (Man. C.A.); *Mickle v. Salvation Army Grace Hosp.*, [1999] 166 D.L.R.4th 743, 761–64 (Ont. Ct. Gen. Div.).

<sup>99</sup> *See Edwards v. Blomeley* (2002) N.S.W.S.C. 460 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/460.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/460.html); *Harriton ex rel. Harriton v. Stephens* (2002) N.S.W.S.C. 461 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/461.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/461.html); *Waller ex rel. Waller v. James* (2002) N.S.W.S.C. 462 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/462.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/462.html).

<sup>100</sup> *See Hayne v. Nyst* (1995) Q.S.C. 260 (Austl.), available at <http://www.austlii.edu.au/au/cases/qld/QSC/1995/260.html>.

Court of Appeal endorsed the views of the Common Law Division,<sup>101</sup> and the High Court of Australia upheld the rulings of the Court of Appeal.<sup>102</sup> The High Court of Singapore also found English precedent persuasive in holding that “[a]t common law, a disabled child has no cause of action for [wrongful life].”<sup>103</sup>

The Scottish Court of Session has not yet decided a wrongful life case.<sup>104</sup> However, it dismissed a claim against a statutory board empowered to make *ex gratia* payments for personal injuries resulting from crimes of violence by a child born out of incest with disabilities attributable to the consanguinity of her parents.<sup>105</sup> The court analogized to a wrongful life case because the child concerned could not exist in a nondefective state.<sup>106</sup> Based primarily on *McKay*, it held that the common law, “with logical justification, has set its face against the possibility of making an assessment of damages in a [wrongful life case].”<sup>107</sup> A year later, the same court allowed a wrongful birth action, stating that it expected the same result as in *McKay* if a wrongful life case were to come before a Scottish court.<sup>108</sup>

Israel seems to be the only common-law jurisdiction<sup>109</sup> that allows tort recovery for both special and general damages in a wrongful life action. In its landmark decision in *Zeitsov v. Katz*,<sup>110</sup> the Supreme Court held four-to-one that a severely disabled child may claim damages from the person whose negligence resulted in that child’s birth.<sup>111</sup> However, the majority disagreed as to the availability of the

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<sup>101</sup> See *Harriton ex rel. Harriton v. Stephens* (2004) N.S.W.C.A. 93 (Austl.), available at <http://www.austlii.edu.au/au/cases/nsw/NSWCA/2004/93.html>.

<sup>102</sup> See *Harriton ex rel. Harriton v. Stephens* (2006) 266 C.L.R. 52 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html>; *Waller ex rel. Waller v. James*, (2006) C.L.R. 136 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/16.html>.

<sup>103</sup> *Ju v. See Tho Kai Yin*, [2005] 4 Sing. L. Rep. 96, 120 (High Ct. Sing.), available at <http://www.singaporelaw.sg/rss/judg/49044.html>.

<sup>104</sup> Although the Scottish legal system is a mixed jurisdiction, its “law of delict” is quite indistinguishable from the common law of torts. See Stephen R. Perry, *Tort Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 57, 58 (Dennis Patterson ed., 1996).

<sup>105</sup> *P’s Curator Bonis v. Crim. Injuries Comp. Bd.*, 1997 S.L.T. 1180, 1200 (Outer House 1996).

<sup>106</sup> See *id.* at 1197–98.

<sup>107</sup> *Id.*

<sup>108</sup> *Anderson v. Forth Valley Health Bd.*, 1998 S.L.T. 588, 604 (Outer House 1997). Still, the parents in a wrongful birth claim recovered past and future special costs incurred by the child’s disability, including those incurred after attaining the age of majority. *Id.* at 606.

<sup>109</sup> Although the Israeli legal system may be regarded as a mixed jurisdiction (with numerous continental features), Israeli tort law is based almost wholly on common-law principles. See Israel Gilead, *Non-Consensual Liability of a Contracting Party: Contract, Negligence, Both, or In-Between?*, 3 THEORETICAL INQUIRIES IN L. 511, 531 (2002).

<sup>110</sup> CA 512/81 [1986] IsrSC 40(2) 85.

<sup>111</sup> *Id.* at 86.

new cause of action in cases of less severe disability and as to the calculation of damages.<sup>112</sup> These controversies remain unresolved.<sup>113</sup>

## B. Continental Jurisdictions

The steadfast reluctance to impose liability for wrongful life is also characteristic of most continental jurisdictions,<sup>114</sup> Germanic and Romanic alike. In 1983, the Supreme Court of Germany (*Bundesgerichtshof*) decided the issue in a case similar to *Gleitman and McKay*.<sup>115</sup> A pregnant woman infected with rubella gave birth to a disabled child.<sup>116</sup> She was unaware of the risk to her fetus because her doctor failed to diagnose the infection during the pregnancy.<sup>117</sup> Had she known, she would have undergone an abortion.<sup>118</sup> The court held that the child could not claim damages for wrongful life<sup>119</sup> and remained faithful to this view in subsequent cases.<sup>120</sup> Similarly, the Supreme Court of Austria (*Oberstergerichtshof*) rejected a wrongful life action stemming from a negligently performed prenatal ultrasound scan.<sup>121</sup>

Section 1382 of the French *Code Civil* states: "Any conduct of a man which causes damage to another obliges him by whose fault it occurred to make reparation."<sup>122</sup> In a few cases decided in 1996, the Supreme Court for civil and criminal matters (*Cour de cassation*) quite surprisingly allowed recovery for wrongful life under this Section.<sup>123</sup> In one case, prospective parents wanted to find out whether their off-

<sup>112</sup> See *id.* at 104, 126 (Ben-Porat, J., and D. Levin, J., holding that the plaintiff should be compensated only for severe damage); *id.* at 121, 123 (Barak, J., and S. Levin, J., holding that all damage, even if small, should be compensated).

<sup>113</sup> A. Ticho & G.A. Kreisberg, *New Trends in Obstetrical Ultrasound Malpractice Litigation in Israel*, 23 *MED. & L.* 725, 726 (2004) (noting the ongoing debate regarding the legal validity of wrongful life claims under Israeli law).

<sup>114</sup> See, e.g., John Anthony Eaton, *Wrongful Life Claims: A Comparative Analysis*, 35 *HONG KONG L.J.* 671, 680–81 (2005) (discussing the refusal of the European Commission on Human Rights to recognize a claim for wrongful life).

<sup>115</sup> Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 18, 1983, 86 *Entscheidungen des Bundesgerichtshofes in Zivilsachen* [BGHZ] 240 (F.R.G.), translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/german/case.php?id=679](http://www.utexas.edu/law/academics/centers/transnational/work_new/german/case.php?id=679).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Mar. 4, 1997, 50 *Neue Juristische Wochenschrift* [NJW] 1638 (F.R.G.).

<sup>121</sup> Oberster Gerichtshof [OGH] [Supreme Court] May 25, 1999, 1 *Ob* 91/99k, 72 *Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen* [SZ] No. 91 (Austria), translation available at [http://www.utexas.edu/law/academics/centers/transnational/work\\_new/austrian/case.php?id=1392](http://www.utexas.edu/law/academics/centers/transnational/work_new/austrian/case.php?id=1392).

<sup>122</sup> C. CIV. § 1382 (John H. Crabb trans.).

<sup>123</sup> For further discussion, see WALTER VAN GERVEN ET AL., *CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW* 116–18 (2000).

spring might suffer from a certain hereditary neurological disorder.<sup>124</sup> A genetic counselor assured them that no such risk existed, and the woman decided to conceive based on this representation.<sup>125</sup> She gave birth to a child with the neurological disorder, and the child brought suit against the counselor.<sup>126</sup> His claim succeeded.<sup>127</sup> In another French case, now commonly known as the *Perruche* case, medical personnel incorrectly informed a pregnant woman that she did not have rubella.<sup>128</sup> The error resulted from the combined negligence of her physician and the laboratory that examined her blood.<sup>129</sup> The woman gave birth to a severely disabled boy.<sup>130</sup> Once again, the court allowed the child's action.<sup>131</sup>

The Supreme Administrative Court (*Conseil d'État*) expressed a different opinion a year later in *Quarez*.<sup>132</sup> The defendants negligently performed an amniocentesis and failed to discover that the patient's fetus suffered from Down syndrome.<sup>133</sup> The court dismissed the child's claim for wrongful life mainly for lack of causation between the defendants' negligence and the child's disabilities.<sup>134</sup> Nonetheless, the *Cour de cassation* adhered to its initial stance. In 2000, it reaffirmed its earlier decision in the *Perruche* case after a lower court had dared to defy it.<sup>135</sup> The *Cour de cassation* reiterated the same views in five more cases the following year.<sup>136</sup>

However, this French revolution was short lived. The court's rulings sparked intense criticism from two different directions.<sup>137</sup> First,

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<sup>124</sup> Cour de cassation, Première chambre civile [Cass. 1e civ.] [highest court of ordinary jurisdiction, first civil chamber] Mar. 26, 1996, Bull. civ. I, No. 155, p. 109.

<sup>125</sup> *See id.*

<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> Cour de cassation, Première chambre civile [Cass. 1e civ.] [highest court of ordinary jurisdiction, first civil chamber] Mar. 26, 1996, Bull. civ. I, No. 156, p. 109.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> CE Sect., Feb. 14, 1997, Rec. Lebon 44. The case was brought before the Conseil d'État because the defendant (Centre hospitalier de Nice) was a state hospital.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* The Conseil d'État held, however, that the parents could recover for the special costs resulting from the child's disability throughout his or her life. *Id.*

<sup>135</sup> *See* Cour de cassation, Assemblée plénière [Cass. ass. plén.] [highest court of original jurisdiction, plenary assembly] Nov. 17, 2000, Bull.Ass.Plén., No. 9, p. 15. The court found that the defendants' negligence constituted breach of contract and based liability on contract theory.

<sup>136</sup> *See* Cour de cassation, Assemblée plénière [Cass. ass. plén.] [highest court of original jurisdiction, plenary assembly] Nov. 28, 2001, Bull.Ass.Plén., Nos. 15–16, pp. 30–33 (two cases); Cour de cassation, Assemblée plénière [Cass. ass. plén.] [highest court of original jurisdiction, plenary assembly] July 13, 2001, Bull.Ass.Plén., No. 10, p. 21–22 (three cases).

<sup>137</sup> *See France Rejects 'Right Not to Be Born,'* BBC NEWS, Jan. 10, 2002, <http://news.bbc.co.uk/2/hi/europe/1752556.stm>.

disabled people claimed that the court treated their lives as inferior to nonexistence.<sup>138</sup> Second, gynecologists, obstetricians, and ultrasonographers argued that those rulings induced them to recommend an abortion even where the fetus had a low probability of congenital disability.<sup>139</sup> They also maintained that insurance premiums had significantly increased, jeopardizing the incentive to provide prenatal medical services and, consequently, the availability of such services.<sup>140</sup>

The political pressures resulted in legislative reaction.<sup>141</sup> On January 10, 2002, the *Assemblée Nationale* adopted, in the first reading, a bill whereby no person might claim that he or she was damaged by being born.<sup>142</sup> The Act was ultimately passed on March 4, 2002,<sup>143</sup> placing France in line with the vast majority of Western jurisdictions.<sup>144</sup>

In 2001, the Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*) held that wrongful life claims cannot be allowed.<sup>145</sup> In 2004, the Italian Supreme Court (*Corte Suprema di Cassazione*) reached a similar conclusion.<sup>146</sup> In Belgium, although an appellate court has yet to discuss the question of tort liability for wrongful life, the Chamber of Representatives introduced a legislative proposal in January 2002 similar to that adopted in France.<sup>147</sup> This proposal has not yet been accepted.<sup>148</sup> Interestingly, in June 2002 the Brussels Court of

<sup>138</sup> See *id.*

<sup>139</sup> See *id.*

<sup>140</sup> See *id.*

<sup>141</sup> See *id.*

<sup>142</sup> *Assemblée nationale*, 11<sup>ème</sup> législature, texte adopté n° 757 (Jan. 10, 2002), proposition de loi relative à la solidarité nationale et à l'indemnisation des handicaps congénitaux, available at <http://www.assemblee-nationale.fr/ta/ta0757.asp> (last visited Nov. 19, 2007).

<sup>143</sup> Law No. 2002-303 of Mar. 4, 2002, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], Mar. 5, 2002, p. 4118. Section 1(1) provided that one cannot obtain damages only because of one's birth. The act was ultimately integrated into the Code de L'action Sociale et des Familles § L114-5.

<sup>144</sup> Section 1(1) also provided that it would be applicable to pending proceedings except for those in which "an irrevocable decision has been taken on the principle of compensation." However, the European Court of Human Rights held that insofar as it concerned proceedings pending on March 7, 2002, the date of its entry into force, § 1(1) violates Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which protects a person's right to peaceful enjoyment of his or her possessions. See *Draon v. France* [GC], no. 1513/03, [2005] ECHR 679 (Oct. 6, 2005); *Maurice v. France* [GC], no. 11810/03, [2005] ECHR 679 (Oct. 6, 2005).

<sup>145</sup> *Revista no. 1008/01-1* (June 19, 2001), reported by André G. Dias Pereira in *EUROPEAN TORT LAW* 2002, 350 (Helmut Koziol & Barbara C. Steininger eds., 2003).

<sup>146</sup> Cass., sez. tre, 29 July 2004, n.14488, *Foro It. I*, 12, 3327. I am grateful to Giovanni Comandé for sending me the official transcript of this case.

<sup>147</sup> *Chambre des représentants de Belgique*, 50<sup>ème</sup> législature, document parlementaire 1596 (Jan. 17, 2002), proposition de loi insérant un article 1383bis dans le Code civil précisant qu'il n'y a pas de préjudice du seul fait de sa naissance, available at <http://www.lachambre.be/FLWB/PDF/50/1596/50K1596001.pdf> (last visited Nov. 30, 2007).

<sup>148</sup> See *id.*



First Instance relied on the *Perruche* case in holding a doctor who failed to diagnose the malformation of a fetus, thereby depriving the parents of the opportunity to terminate the pregnancy, liable to the disabled child.<sup>149</sup>

There is only one exception to the general rejection of wrongful life actions in Western Europe. In 2003, the Court of Appeal of The Hague (*Gerechtshof Den Haag*) awarded damages to a child born with a severe chromosomal abnormality on the assumption that, but for the defendant's failure to inform the mother of the risk, the child would have been aborted.<sup>150</sup> The Court held, counter to biological reality, that the plaintiff's disorder resulted from the defendant's negligence.<sup>151</sup> On appeal, the Supreme Court of the Netherlands (*Hoge Raad*) affirmed, allowing the plaintiff to recover for her costs of living and for her pain and suffering.<sup>152</sup> So far, the legislature has not considered any reaction.<sup>153</sup> Still, this sole exception highlights the common view.

## II

### IDENTIFYING THE PROBLEM

#### A. The Conceptual Framework

Having explored the universal hostility to wrongful life claims, I will now critically appraise its reasons. My fundamental argument is that framing a child's suit against the consultant in wrongful life settings as an action in tort is a conceptual error. This claim stems from a profound understanding of the conceptual boundaries of tort law at the highest level of abstraction. Hence, it is immaterial whether wrongful life claims are based on negligence or on alternative torts. Having said that, it is possible to explain why tort law cannot recognize a wrongful life claim using the conceptual framework of the tort of negligence. Negligence is an abstract legal framework applicable to myriad situations, including new ones that legislatures or courts never contemplated.<sup>154</sup> Actions for damages in situations that fall outside the bounds of a specific tort may find their way to the basket tort of

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<sup>149</sup> Tribunal de première instance de Bruxelles [T.P.I.B.] [Court of first instance] Brussels, 7 juin 2002, [2002] R.G.D.C./T.B.B.R. 483, 483–84 (Bel.).

<sup>150</sup> See H.F.L. Nys & J.C.J. Dute, *A Wrongful Existence in the Netherlands*, 30 J. MED. ETHICS 393, 393–94 (2004).

<sup>151</sup> See *id.*

<sup>152</sup> Leids Universitair Medisch Centrum/Molenaar, *Hoge Raad der Nederlanden* [HR] [Supreme Court of the Netherlands], 18 maart 2005, NJ 209 (ann. LS) (Neth.).

<sup>153</sup> See Michael Faure & Ton Hartlief, *The Netherlands*, in *EUROPEAN TORT LAW 2005*, at 414, 422 (Helmut Koziol & Barbara C. Steininger eds., 2006).

<sup>154</sup> See *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, para. 151 (Austl.) (Kirby, J., dissenting), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> ("Part of the genius of the tort of negligence in the common law has been its malleability and versatility, which permit it to respond to the exigencies of changing times.").

negligence.<sup>155</sup> Thus, the limits of negligence represent, to a great extent, the boundaries of tort law. If a court disallows a wrongful life claim as an action for negligence, it is unlikely to allow the claim under a different tort. Using negligence as the conceptual framework for the analysis also coheres with common practice; in all common-law jurisdictions, wrongful life claims are litigated as actions for negligence.

The tort of negligence comprises four elements: duty of care, breach of the duty (substandard conduct), harm, and a causal relation between the breach and the harm.<sup>156</sup> My discussion is limited to three of the four. I shall assume that the duty of care has been breached—that the consultant failed to use the skill that a reasonable, intelligent, and competent person would have used or failed to adopt the degree of caution that such a person would have adopted under the circumstances. I do this for two reasons. First, the question of substandard conduct turns on the particular circumstances of each case. My central goal is to present the inbuilt flaws of the tort-based wrongful life action at its most abstract level. Therefore, the particulars of a specific consultant's conduct in a concrete case are only marginally important. Second, establishing breach of duty requires a discussion of the appropriate method of performing medical procedures, which should properly and naturally be left to those with the requisite expertise. In terms of logical order, the first issue to address is the existence of a duty of care. In the absence of duty there can be no breach, and without breach there can be no negligence.<sup>157</sup> Assuming that the duty has been breached, I will address the question of harm immediately thereafter. Finally, I will address the causal connection between the breach and the harm.

## B. Duty of Care

### 1. *The Formal Question: Legal Personality*

Under traditional common law, an individual acquires legal personality upon live birth.<sup>158</sup> Accordingly, a fetus does not have legal rights until the moment of birth, and nobody owes legal duties to it. Some may argue that the substandard conduct in a wrongful life context occurs at the prenatal stage when nobody owes a duty of care to

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<sup>155</sup> See *id.*

<sup>156</sup> See, e.g., RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §§ 3, 6–7 (Proposed Final Draft No. 1, 2005); 57A AM. JUR. 2D *Negligence* § 71 (2007); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 164–65 (5th ed. 1984).

<sup>157</sup> See KEETON ET AL., *supra* note 156, at 164.

<sup>158</sup> See, e.g., FRANCIS TRINDADE & PETER CANE, THE LAW OF TORTS IN AUSTRALIA 405 (2d ed. 1993); Timothy Stoltzfus Jost, *Rights of Embryo and Fetus in Private Law*, 50 AM. J. COMP. L. 633, 633–34 (2002); Ernest J. Weinrib, *The Passing of Palsgraf?*, 54 VAND. L. REV. 803, 807 (2001).

the fetus. Substandard conduct cannot constitute breach of duty in the absence of duty. Consequently, there is no adequate basis for liability.

For a number of decades, American courts refused to allow recovery by persons injured in utero, claiming that a fetus was an inseparable part of its mother's body and that it lacked independent legal personality.<sup>159</sup> In 1946, a court first held that a duty of care may exist with respect to a person who was still *en ventre sa mère* at the time of the substandard conduct, provided that the person was viable at that time and was ultimately born alive.<sup>160</sup> The underlying rationale for this change was that a fetus is entitled to protection from the moment it becomes an independent biological entity. Later rulings established that even a fetus that was not viable at the time of the substandard conduct was entitled to sue the tortfeasor following birth.<sup>161</sup> Today, a duty of care may exist even if the plaintiff had not been conceived at the time of the substandard conduct—provided that the plaintiff was subsequently born alive.<sup>162</sup> The central rationale is that a duty of care is based on the foreseeability of future harm to a certain type of persons, not necessarily to an existing and identifiable person.<sup>163</sup>

This development found similar expression in other legal systems. An Australian court held in 1972 that if a fetus sustained an injury during pregnancy due to carelessness, it would have a right to sue the tortfeasor after its birth.<sup>164</sup> The court noted that the question of fetal legal personality required no discussion because the cause of action rested on the postnatal harm that the plaintiff had sustained

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<sup>159</sup> The leading case is *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 17 (1884). See also *Allaire v. St. Luke's Hosp.*, 56 N.E. 638, 639–40 (Ill. 1900), *overruled by Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953); *Buel v. United Rys. Co.*, 154 S.W. 71, 72 (Mo. 1913), *overruled by Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953); Timothy J. Dawe, *Wrongful Life: Time for a "Day in Court,"* 51 OHIO ST. L.J. 473, 477 (1990); Anastasia Enneking, *The Missouri Supreme Court Recognizes Preconception Tort Liability: Lough v. Rolla Women's Clinic, Inc.*, 63 UMKC L. REV. 165, 169–70 (1994).

<sup>160</sup> See *Bonbrest v. Kotz*, 65 F. Supp. 138, 139–42 (D.D.C. 1946); see also *Keyes v. Constr. Serv., Inc.*, 165 N.E.2d 912, 915 (Mass. 1960); *Steggall v. Morris*, 258 S.W.2d 577, 581 (Mo. 1953); Enneking, *supra* note 159, at 166 n.9, 171–72.

<sup>161</sup> See, e.g., *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E.2d 727, 728 (Ga. 1956); *Torigian v. Watertown News Co.*, 225 N.E.2d 926, 927 (Mass. 1967); *LaBlue v. Specker*, 100 N.W.2d 445, 455 (Mich. 1960); *Bennett v. Hymers*, 147 A.2d 108, 110 (N.H. 1958).

<sup>162</sup> See, e.g., *Jorgensen ex rel. Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237, 240 (10th Cir. 1973); *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1255 (Ill. 1977); *Walker ex rel. Walker v. Rinck*, 604 N.E.2d 591, 595–96 (Ind. 1992); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1157–58 (La. 1988); *McNulty ex rel. McNulty v. McDowell*, 613 N.E.2d 904, 906 (Mass. 1993); *Lough ex rel. Lough v. Rolla Women's Clinic, Inc.*, 866 S.W.2d 851, 853–54 (Mo. 1993).

<sup>163</sup> See Mark L. Monopoli, *McNulty v. McDowell: Recognizing Preconception Tort in the Commonwealth?*, 29 NEW ENG. L. REV. 763, 779 (1995).

<sup>164</sup> See *Watt v. Rama*, (1972) V.R. 353, 361.

since his birth.<sup>165</sup> Later, Australian courts extended this principle to cases in which the substandard conduct occurred prior to conception.<sup>166</sup> A similar view pertains in Canada with respect to prenatal injuries.<sup>167</sup>

In England, the turning point came in 1976 with the enactment of the Congenital Disabilities (Civil Liability) Act.<sup>168</sup> The Act provides that a child born with disabilities attributable to a prenatal occurrence that affected the ability of one of the parents to produce a normal child, affected the mother during pregnancy, or affected the mother or child during birth may claim damages from the person at fault.<sup>169</sup> As noted above, the Act applies only to births taking place after its effective date.<sup>170</sup> Regarding births prior to that date, the Court of Appeal held in 1992 that an action in tort may exist for prebirth injuries.<sup>171</sup> The court explained that the plaintiff's injury was a foreseeable consequence of the defendant's substandard conduct and that the cause of action only crystallized upon the plaintiff's birth and simultaneous acquisition of legal personality.<sup>172</sup>

In my view, the fundamental solution to the legal personality question lies in the distinction between the duty of care and the duty to compensate a person injured by a breach of the duty of care. The first is an abstract duty that does not correlate with a specific right and does not relate to a specific potential victim. The second is a concrete duty that correlates with a specific right. It only crystallizes if the first duty is breached and a specific person sustains an injury. An injury may occur long after the substandard conduct and at a location remote from the place of that conduct, but there is no specific right against the wrongdoer until the occurrence of injury.

For example, if *A* manufactured a defective product, *B* purchased the product, and after a certain period *B* sustained an injury because of the defect, *B*'s right against *A* crystallized when the damage occurred. The duty of care that *A* owed to potential purchasers did not confer on *B* a concrete right against *A* until that time. If a person owes a duty of care to a class of potential victims and breaches that duty, and if none of the members of the class sustains an injury as a result, none of them will have any right against that person. As mentioned, the duty of care is abstract and does not per se confer concrete rights of action. Because the concrete right crystallizes when damage

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<sup>165</sup> See *id.* at 359–60.

<sup>166</sup> See *X & Y v. Pal*, (1991) 23 N.S.W.L.R. 26, 37.

<sup>167</sup> See *Duval v. Seguin*, [1972] 26 D.L.R.3d 418, 434 (Can.).

<sup>168</sup> Congenital Disabilities (Civil Liability) Act, 1976, c. 28 (Eng.).

<sup>169</sup> *Id.* § 1(2).

<sup>170</sup> *Id.* § 4(5).

<sup>171</sup> *Burton v. Islington Health Auth.*, [1993] Q.B. 204, 218–20 (Eng. C.A.).

<sup>172</sup> *Id.*

occurs, the plaintiff must have legal personality at this point, not beforehand.

This also applies to preconception and prenatal carelessness. Assume, for example, that a person carelessly builds a veranda and that a mother and her year-old child are injured two years later when the construction collapses. It would be nonsensical to claim that only the mother could recover damages simply because the child had not yet been born when the negligence occurred.<sup>173</sup> The builder owed a duty of care to all who might be on the veranda after its construction. On the other hand, law can only impose a duty to compensate with respect to persons actually injured by the collapse.<sup>174</sup> The fact that the minor did not exist—legally and physically—at the time of the carelessness is immaterial because the child does not claim that he or she had a concrete right against the defendant at that time. The same principle enables us to impose liability on a manufacturer of baby food even if the victim-baby's birth came long after the product left the factory.<sup>175</sup> That the plaintiff did not exist at the time of the carelessness will not frustrate the action. As above, the manufacturer owes a duty of care to all who may use the product, whereas the manufacturer only owes a duty to compensate with regard to persons who actually sustain injuries by using it.<sup>176</sup>

In cases where the defendant's misconduct caused the plaintiff prenatal injuries, *prima facie*, an additional difficulty arises. Such a plaintiff brings an action for injury incurred prior to birth—when the plaintiff had no legal personality. It may appear that if the concrete right arises with the occurrence of injury and at that time the victim had no legal personality, then no right can accrue. The conventional answer, however, is that the injury occurs only at the moment of birth, when the child begins to suffer from the effects of the impairment.<sup>177</sup> In a tort action for wrongful life, there is no need for a similar fiction. The plaintiff does not and cannot claim that the congenital disability is the injury complained of because the defendant did not cause the disability. The plaintiff's claim is that entry into a life of misery is the injury (hence the title of her action). That "injury" and the plaintiff's legal personality crystallize in tandem.

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<sup>173</sup> See Lough *ex rel.* Lough v. Rolla Women's Clinic, Inc., 866 S.W.2d 851, 854 (Mo. 1993).

<sup>174</sup> See *id.* (discussing the policy considerations inherent in tort liability).

<sup>175</sup> See *id.*

<sup>176</sup> See *id.*

<sup>177</sup> See, e.g., Harriton *ex rel.* Harriton v. Stephens (2006) 226 C.L.R. 52, para. 66 (Austl.) (Kirby, J., dissenting), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html>; TRINDADE & CANE, *supra* note 158, at 405–06.

## 2. *The Substantive Question: Legal Policy*

### a. *Claims Against Parents*

One of the major policy concerns that opponents of liability for wrongful life raise pertains to the possible—perhaps inevitable—expansion of the circle of defendants. This argument is two tiered. First, opponents maintain that it is unjust to impose liability for wrongful life on a stranger if one does not impose liability on the parents, assuming that they made a conscious choice to conceive and proceed with a pregnancy with full knowledge that a seriously impaired infant would be born.<sup>178</sup> According to Professor Tedeschi, “It would be difficult to justify the resulting discrimination which would hold a stranger liable, but not a parent.”<sup>179</sup>

On the second level, opponents contend that this extension of liability would have grave implications. One unwarranted consequence of allowing children to sue their parents is the ostensible interference with the integrity of the family unit.<sup>180</sup> The law might become an arena to exacerbate internal family conflicts, wreaking grief and animosity and severing the fabric of regular family life. One of the aims of the legal system is to protect the family unit, and conferring power on a child to wage a legal battle against the parents is inconsistent with that objective.<sup>181</sup> A similar consideration helped justify spousal immunity against tort claims, which was once a part of the common law.<sup>182</sup>

An additional result of recognizing the child's action against the parents is the damage caused to the child's emotional well-being by waging war against the parents in court.<sup>183</sup> Concern for injury to minors' feelings is not limited to children's suits against their parents. The parents' claim against a doctor whose negligence led to the birth of a healthy but unwanted child (wrongful conception or pregnancy)

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<sup>178</sup> See G. Tedeschi, *On Tort Liability for “Wrongful Life,”* 1 ISR. L. REV. 513, 517–18 (1966).

<sup>179</sup> *Id.* at 518; see also *Curlender ex rel. Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980) (explaining that children may hold parents liable in certain circumstances); *Harriton*, 226 C.L.R. 52 at paras. 205, 250 (Callinan, J., concurring); *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1181, 1188 (Eng. C.A.); Donna J. Long, *A Cause of Action for “Wrongful Life”: Pennsylvania's Judicial and Legislative Reaction*, 26 DUQ. L. REV. 967, 992–93 (1988) (noting concern that a wrongful life cause of action will impose a duty on parents to terminate “less-than-perfect” fetuses).

<sup>180</sup> See, e.g., *Edwards v. Blomeley*, (2002) N.S.W.S.C. 460, para. 119 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/460.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/460.html); *McKay*, 1 Q.B. at 1188 (Ackner, L.J., concurring); Long, *supra* note 179, at 993.

<sup>181</sup> Cf. *Hastings ex rel. Hastings v. Hastings*, 163 A.2d 147, 149–50 (N.J. 1960), *overruled by France v. A.P.A. Transp. Corp.*, 267 A.2d 490 (N.J. 1970).

<sup>182</sup> See CLERK & LINDSELL ON TORTS 187 (Anthony M. Dugdale et al. eds., 18th ed. 2000).

<sup>183</sup> See, e.g., *Edwards*, N.S.W.S.C. 460 at para. 119.

poses an even greater danger to the child's feelings. This type of action is based on the claim that the parents did not want their offspring, and it is easy to imagine the destructive effect of such a statement on a small child.

The third alleged consequence of recognizing the child's right of action against the parents is its inimical effect on parental procreative autonomy. Imposing liability on the parents for bringing a disabled child into the world interferes with their discretion regarding parenthood and, at the very least, violates their right to privacy.<sup>184</sup>

Do these implications justify excluding parental liability in tort? In my view, the desire to protect the integrity of the family unit cannot automatically preclude a tort action against a family member just as it does not preclude enforcement of family-law rights or recovery for breach of contractual obligations between family members. In addition, the actual causing of harm by a close family member may be far more inimical to regular family life than the litigation occurring in its wake. For example, it would be ludicrous to bar a person who endured physical violence or psychological harassment by a family member from filing an action solely to prevent an intrafamilial dispute.<sup>185</sup>

With regard to the child's welfare, the starting point should be that granting an injured party a right of action against the tortfeasor serves the interests of the former more than the denial of such a right. It serves the interests of the specific victim by compensating, at least in part, for the injury. And it serves the interests of all potential victims by deterring potential injurers from future misconduct. Combining these two considerations would have similar effects where the injured party is a child and the tortfeasor is a parent. In fact, the child's unique material and emotional dependence on a parent should justify extending—not restricting—the parent's duty of care to the child. The emotional effect of injury caused by a person whose devotion is the cornerstone of the child's life is immeasurably graver than that of equivalent injury that a stranger causes. While in principle a child's right of action against a parent may become a tool wielded by one parent against the other in an interspousal dispute, if it emerges that the action does not genuinely serve the child's best interests, a court can certainly strike such an action in limine.

We are thus left with the unwillingness to interfere with procreative autonomy. As distinct from the desire to protect familial integrity and the child's well-being, the need to prevent interference with pro-

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<sup>184</sup> See *infra* note 187 and accompanying text.

<sup>185</sup> Cf. Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1165–72 (1999) (discussing the erosion of the “family autonomy” principle in the contexts of domestic violence and child abuse).

creative autonomy is not relevant to all types of child-parent litigation. It applies only to claims based on a decision to procreate. In the landmark Israeli *Zeitsov* case, Justice Ben-Porat wrote that parental discretion is not unlimited: “[i]t suffices for [the court] to leave the parents with broad discretion, but if under particular circumstances there is a moral obligation to avoid giving birth—a different conclusion may be reached.”<sup>186</sup> The inevitable inference is that the parents’ decision to procreate may in principle provide the basis for a tort action by their children. I do not accept this view. Can there be circumstances where there is a moral obligation to avoid childbirth? Can we obligate parents to avoid procreation, and perhaps even to abort their fetus, against their will, against the dictates of their conscience, or in violation of their religious beliefs? I am skeptical as to whether a liberal Western jurisprudence can countenance any circumstances that could justify such blatant infringement of prospective parents’ rights.<sup>187</sup> In the absence of any satisfactory explanation, I am not convinced that one can curtail procreative discretion in a manner that will enable a child to sue the parents for giving her birth.<sup>188</sup> However, I need not decide the scope of procreative autonomy here because the two-tiered argument against liability for wrongful life fails at the first stage.

Whether special reasons militate against imposing liability on the parents for deciding to give birth to a severely disabled child should not affect third parties’ liability for enabling such birth. No direct analogy between parental liability and third-party liability is necessary, even if the complained-of consequence is the same. If certain considerations justify a distinction between various classes of wrongdoers,

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<sup>186</sup> CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 98.

<sup>187</sup> See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40 (1974) (“[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.”); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting that the right to have offspring is “one of the basic civil rights of man”). I am aware of John Stuart Mill’s observation that “[i]t is still unrecognized that to bring a child into existence without a fair prospect of being able, not only to provide food for its body but instruction for its mind, is a moral crime, both against the unfortunate offspring and against society.” John Harris, *The Wrong of Wrongful Life*, 17 J.L. & Soc’y 90, 90 (1990) (quoting JOHN STUART MILL, ON LIBERTY (1859)). But, this does not conform to prevailing views in Western societies.

<sup>188</sup> Cf. Alexander M. Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 661–66 (1979) (discussing the difficulties of creating a right of action for genetically impaired children against their parents); Anthony Jackson, *Action for Wrongful Life, Wrongful Pregnancy, and Wrongful Birth in the United States and England*, 17 LOY. L.A. INT’L & COMP. L.J. 535, 559 (1995) (“A woman’s choice to give birth to a child . . . should always be [viewed as] reasonable.”); Joan Waters, *Wrongful Life: The Implications of Suits in Wrongful Life Brought by Children Against Their Parents*, 31 DRAKE L. REV. 411, 415–25, 432 (1981–1982) (explaining that an affirmative duty to abort is irreconcilable with Supreme Court precedent regarding a woman’s right to privacy).



nothing precludes us from giving them legal effect.<sup>189</sup> The definition of the notional duty of care considers not only the type of injury, the types of victims, and the types of events but also the types of injurers.<sup>190</sup> The concept is flexible and accommodates differentiation between the various categories of injurers in accordance with the dictates of legal policy.

b. *A Duty to Kill the Fetus*

Certain opponents of liability for wrongful life argue that recognizing the child's cause of action where the consultant's misconduct occurred after conception is tantamount to imposing a duty to kill the fetus.<sup>191</sup> These opponents claim that when parents declare their intention to terminate pregnancy should the fetus be found defective, the consultant realizes that disclosing the existence of a defect will impel the parents to an abortion; if the law compels disclosure of that information, it effectively binds the consultant to cause the death of the fetus.<sup>192</sup> This "duty," the argument goes, is inconsistent with the principle of the sanctity of life.<sup>193</sup> It is also repugnant to the freedom of conscience because it forces consultants who morally oppose abortions to act against the dictates of their consciences.

However, this argument cannot stand. First and most importantly, the consultant's duty is to perform the examinations with competence and reasonable care. The consultant is under no obligation to perform an abortion even if the consultant is professionally competent to perform the procedure and the parents desire it.<sup>194</sup> Second, the consultant's professional opinion is not the final word. Transmitting information about the existence of a certain defect does not auto-

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<sup>189</sup> See *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, para. 132 (Austl.) (Kirby, J., dissenting), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> ("[J]ust because it is held that a wrongful life action lies against a negligent health care provider, it does not necessarily follow that such an action would lie against the mother. . . . If this Court were to hold that a wrongful life action existed in the present proceedings against the respondent, that decision would say nothing at all about whether such an action lay against the mother."); Jane E.S. Fortin, *Is the "Wrongful Life" Action Really Dead?*, J. SOC. WELFARE L., Sept. 1987, at 306, 309-10 (describing the mother's and doctor's disparate duties of care); cf. CAL. CIV. CODE §43.6(a) (2007) ("No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.").

<sup>190</sup> See *Harriton*, 226 C.L.R. 52 at para. 132 (Kirby, J., dissenting).

<sup>191</sup> See, e.g., *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1178-79 (Eng. C.A.) (Stephenson, L.J., concurring).

<sup>192</sup> Cf. *id.* (discussing the doctor's possible duties of care).

<sup>193</sup> See JOHN KEOWN, *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 128 (1995) ("[T]he principle of the sanctity of life is . . . the principle of the inviolability of innocent human life . . .").

<sup>194</sup> Cf. *Abortion Act, 1967*, c. 87, § 4(1) (Eng.) ("[N]o person shall be under any duty . . . to participate in any treatment authorised by this Act to which he has a conscientious objection . . .").

matically lead to the termination of pregnancy. The prospective parents must still make an informed decision to terminate the pregnancy on the basis of the information at their disposal.<sup>195</sup> We cannot construe the consultant's duty as a duty to kill the fetus if the discharge of that duty does not necessarily lead to abortion.<sup>196</sup> Third, regarding the violation of the consultant's freedom of conscience, perhaps a person who opposes abortion should not engage in a profession whose entire essence is to provide information that facilitates decisions regarding termination of pregnancies.

c. *Protective Medicine and Multiplicity of Abortions*

A ubiquitous claim is that recognizing wrongful life actions may cause both doctors and genetic consultants to give overly cautious advice to expectant parents to minimize the likelihood of liability, resulting in a proliferation of abortions of healthy fetuses. The English Law Commission expressed this concern in its 1974 Report on Injuries to Unborn Children, in the wake of which the Congenital Disabilities Act was passed.<sup>197</sup> Opponents of liability made similar arguments during the controversy that erupted in France prior to the passage of the law barring wrongful life suits.<sup>198</sup> Ultrasonographers claimed that because their examinations could not provide definite results, the readiness of the *Cour de cassation* to subject them to liability for failing to discover congenital defects could lead them to recommend an abortion even if the likelihood of a defect were slim.<sup>199</sup>

These claims regarding protective medicine are refutable in two ways. First, failure to discover a defect cannot per se result in tort liability.<sup>200</sup> If the consultant acted as a reasonable consultant under the circumstances, the consultant would not be liable, even if he or she failed to discover the defect.<sup>201</sup> Naturally, when adjudicating the

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<sup>195</sup> *Cf. Harriton*, 226 C.L.R. 52 at para. 112 (Kirby, J., dissenting) ("It would be impossible to comply with any such duty considering that medical practitioners can never compel an expectant mother to undergo an abortion. . . . If a mother chooses to continue a pregnancy or to conceive in the first place where a proper . . . warning has been given, that is her decision to make.").

<sup>196</sup> *Cf. id.*

<sup>197</sup> *See INJURIES TO UNBORN CHILDREN*, *supra* note 89, at 34 ("Such a cause of action, if it existed, would place an almost intolerable burden on medical advisers in their socially and morally exacting role. The danger that doctors would be under subconscious pressures to advise abortions in doubtful cases through fear of an action for damages is, we think, a real one."); *see also* CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 129 (Goldberg, J., dissenting).

<sup>198</sup> *See* BBC NEWS, *supra* note 137.

<sup>199</sup> *See id.*

<sup>200</sup> *See* KEETON ET AL., *supra* note 156, at 164-65.

<sup>201</sup> *See* *Azzolino ex rel. Azzolino v. Dingfelder*, 337 S.E.2d 528, 538 (N.C. 1985) (Exum, J., dissenting) ("A physician's responsibility is simply to exercise due care to provide the information necessary for the *patient* to make an informed decision. If physicians do this,

negligence question, a court will take into account scientific and technological limits and any uncertainties that are inherent in medical and quasi-medical examinations. As a result, the fear of liability in every case in which an examination fails to disclose a defect is unjustified.

Second, if the consultant's excessive caution leads to a healthy child being aborted, the parents may recover for damages incurred thereby.<sup>202</sup> In certain jurisdictions, the child's estate likewise may recover for pecuniary, and occasionally even nonpecuniary, damages.<sup>203</sup> The fear of liability for "wrongful abortion" provides a certain incentive against giving overly cautious advice.<sup>204</sup> Admittedly, this incentive is somewhat limited because the probability of discovering and proving negligence in wrongful abortion cases is clearly lower than the probability of discovering and proving negligence in wrongful life cases, and because the burden imposed on a person found responsible for wrongful abortion is not equivalent to the burden that awaits that person if found responsible for wrongful birth and life.<sup>205</sup> Given the immense importance of the endangered interest—the public interest in the protection of potential life—I contend elsewhere that the sanction for wrongful abortion ought to be stiffer.<sup>206</sup> But no one can deny that, even now, there is a legal incentive to refrain from giving overly cautious advice that might lead to an unwarranted abortion, which is further supplemented by the fear of reputational harm.

d. *Actions Based on Social, Legal, and Economic Disabilities*

Opponents of wrongful life claims further argue that allowing these claims may open the gates to a multitude of actions that derive from all types of social, legal, and even economic inferiority ("unsatisfactory life").<sup>207</sup> Where discrimination on the basis of, for example, race, religion, gender, or nationality plagues society, people belonging to those groups might file actions in tort against those responsible for their birth.

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they need not fear a lawsuit if parents bear . . . a child with congenital defects."); Carel J.J.M. Stolker, *Wrongful Life: The Limits of Liability and Beyond*, 43 INT'L & COMP. L.Q. 521, 533–34 (1994).

<sup>202</sup> See, e.g., *Johnson v. United States*, 810 F. Supp. 7 (D.D.C. 1993); *Breyne v. Potter*, 574 S.E.2d 916 (Ga. Ct. App. 2002); *Baker v. Gordon*, 759 S.W.2d 87 (Mo. Ct. App. 1988); *Martinez v. Long Island Jewish Hillside Med. Ctr.*, 512 N.E.2d 538 (N.Y. 1987). For a detailed analysis of the parental claims for "wrongful abortion," see Ronen Perry & Yehuda Adar, *Wrongful Abortion: A Wrong in Search of a Remedy*, 5 YALE J. HEALTH POL'Y L. & ETHICS 507, 517–23 (2005).

<sup>203</sup> See Perry & Adar, *supra* note 202, at 525–37.

<sup>204</sup> See *id.* at 545.

<sup>205</sup> See *id.* at 545–47.

<sup>206</sup> See *id.* at 547–84 (evaluating the effectiveness of various criminal and civil penalties on doctors as "wrongful abortion" deterrents).

<sup>207</sup> See, e.g., CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 100.

Justice Ben-Porat refuted this argument in the Israeli case of *Zeitsov*. She argued that “[t]here is no fear that . . . a minor’s action based on having been born to parents of an inferior race will be recognized . . . . [R]ecognition of such a claim would be . . . contrary to public policy and to the deeply rooted moral values of our society.”<sup>208</sup> Put differently, she believed that there was a substantive difference between wrongful life claims and unsatisfactory life claims in terms of the appropriate policy—a difference that may justify a categorical legal distinction.<sup>209</sup>

But what makes unsatisfactory life claims so markedly different? Conceivably, Justice Ben-Porat intended that a Western society could not tolerate discrimination based on race, gender, nationality, etc. Considering her argument, any claim that a particular group is inferior to another group is contrary to “public policy and to the deeply rooted moral values of our society,” and, as such, cannot be grounds for an actionable right.<sup>210</sup> However, this argument ignores the fact that all Western societies encompass groups that suffer repression despite the formal equality in law.<sup>211</sup> In some jurisdictions, certain groups face discrimination from the legal system itself.<sup>212</sup> If it is clear that discrimination exists, I see no reason for rejecting it as the basis for a civil action even if it may portray the state negatively.

Alternatively, Justice Ben-Porat may have intended that given the principle of the sanctity of life, the claim that a social, legal, or economic deficiency may make life inferior to nonexistence “contradicts public policy and the deeply rooted moral values of our society.”<sup>213</sup> However, this argument does not justify a categorical distinction between wrongful life claims and unsatisfactory life claims because it applies with equal force to each. If the principle of the sanctity of life precludes the argument that life may be inferior to nonexistence, we should reject wrongful life claims at the outset for lack of injury, regardless of the prospects of unsatisfactory life claims.<sup>214</sup> Accordingly,

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<sup>208</sup> *Id.* at 100.

<sup>209</sup> *Cf. Curlender ex rel. Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 486 (Cal. Ct. App. 1980) (“[T]here is a world of difference between an unwanted healthy child who is illegitimate . . . and the severely deformed infant plaintiff . . .”).

<sup>210</sup> *Zeitsov*, [1986] IsrSC 40(2) at 100.

<sup>211</sup> For example, women receive lower salaries than men for identical work. *See, e.g.,* Amelia K. Duroska, Note, *Comparable Work, Comparable Pay: Rethinking the Decision of the Ninth Circuit Court of Appeals in American Federation of State, County, and Municipal Employees v. Washington*, 36 AM. U. L. REV. 245, 245–46 (1986); Donna E. Young, *Working Across Borders: Global Restructuring and Women’s Work*, 2001 UTAH L. REV. 1, 3.

<sup>212</sup> For example, children born of a prohibited relationship under Jewish law (*mamzerim*), suffer from various restrictions under Israeli law. *See* Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT’L L. 135, 155 (2007).

<sup>213</sup> *Zeitsov*, [1986] IsrSC 40(2) at 100.

<sup>214</sup> *See infra* Part II.C.2.

the policy argument based on the fear of opening the floodgates is redundant.

Still, I would set aside this policy argument for a different reason. I agree with the opponents of wrongful life claims that if courts allowed such claims, unsatisfactory life claims might follow; but I do not consider this to be an adverse outcome. Grave social deficiencies may be as devastating to a person's well-being as physical defects. For example, the life of a person who, as a member of a depressed sector, is unable to acquire education, receive benefits and services from public authorities, work and earn a fair salary, own property, or participate in elections, is no better than that of a person suffering from serious physical disability. I am not convinced that there is a justification for a sweeping distinction between unsatisfactory life and wrongful life actions. So the fact that allowing liability for wrongful life may encourage actions for unsatisfactory life cannot in itself justify exclusion of liability for wrongful life. Moreover, I do not think that we should expect a deluge of unsatisfactory life actions, provided that courts judge these actions by the same criteria applied to wrongful life claims, particularly the need to show extreme suffering.<sup>215</sup>

e. *An Increase in Insurance Premiums and the Costs of Medical Services*

One of the common arguments against liability in tort for wrongful life is that allowing liability may significantly increase the insurance premiums paid by obstetricians, ultrasonographers, genetic consultants, and the like.<sup>216</sup> Increased insurance costs not only impose a heavy economic burden on the pregnancy consultants but also reduce the motivation of others to specialize and work in that field.

The response to this argument is quite simple. Tort liability inevitably imposes an economic burden on the tortfeasor.<sup>217</sup> If the fact that tort liability imposes an economic burden on the defendant could justify its negation, no liability would ever accrue. We do not exempt attorneys from liability for damages that their professional negligence does to clients, nor do we exempt negligent surgeons from liability for injuries to their patients, even though in both cases imposing liability on these professionals increases the premiums paid to in-

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<sup>215</sup> See Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 352-53 (2004) (explaining that some courts have indicated that pain and suffering could be the sole basis for a wrongful life claim).

<sup>216</sup> See Long, *supra* note 179, at 993; see also BBC NEWS, *supra* note 137.

<sup>217</sup> See Alexee Deep Conroy, Note, *Lessons Learned from the "Laboratories of Democracy": A Critique of Federal Medical Liability Reform*, 91 CORNELL L. REV. 1159, 1167 (2006) ("[H]igh malpractice premiums disastrously reduce the availability of care in certain areas and within certain specialties because premium costs are too high for physicians to remain in practice.").

surers.<sup>218</sup> Similarly, the anticipated increase in insurance payments should not justify negating liability in the case under discussion. Furthermore, it seems to me that the clients themselves will ultimately bear any increase in insurance costs, and thus the consultants' financial situation will not substantively worsen.<sup>219</sup>

Consequently, some may argue that raised consultancy fees occasioned by the rise in insurance premiums would harm potential parents because, as prices for services increase, the ability to consume them decreases. If prices go up, potential parents will be unable to receive all the information that they need to make informed decisions regarding procreation.<sup>220</sup> A somewhat related argument is that increased consultancy costs would reduce the number of examinations, leading to an increase in the number of congenitally disabled children. This means that allowing recovery by disabled persons may effectively increase the number of people born into lives of misery.<sup>221</sup> Furthermore, some may argue that the increased number of people born with severe defects places a heavy burden on the health system and on the public coffers.<sup>222</sup>

These arguments are unconvincing. In many cases, imposing liability on manufacturers or service providers in respect of harmed consumers leads to an increase in the price of their products or services.<sup>223</sup> Negating liability for that reason alone renders impossible the imposition of liability on manufacturers or providers of services for harms that they cause to consumers, at least as long as we consider the consumption of their products or services desirable. Negating liability by reason of the anticipated increase in the prices of products produced or services supplied by the tortfeasor would sound the death knell for products liability and professional liability, and such a result is unacceptable.

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<sup>218</sup> See *id.*

<sup>219</sup> See H. Richard Beresford, *The Health Security Act: Coercion and Distrust for the Market*, 79 CORNELL L. REV. 1405, 1418 (1994) ("If they can, employers will pass on their raised insurance costs to the public in the form of higher prices.").

<sup>220</sup> Cf. Heather S. Dixon, *Pelvic Exam Prerequisite to Hormonal Contraceptives: Unjustified Infringement on Constitutional Rights, Governmental Coercion, and Bad Public Policy*, 27 HARV. WOMEN'S L.J. 177, 222–23 (2004) (explaining the costs and difficulties for some women of receiving care during an unplanned pregnancy).

<sup>221</sup> Needless to say, children born with disabilities that have gone undetected due to the parents' inability to afford preconception and prenatal examinations would not have a defendant to sue for their suffering.

<sup>222</sup> See Serena Gordon, *Birth Defects Cost U.S. Billions*, HEALTHDAY, Jan. 26, 2007, <http://www.healthfinder.gov/news/newsstory.asp?docID=601329>.

<sup>223</sup> See, e.g., Patrick J. Norton, *What Happens When Air Bags Kill: Automobile Manufacturers' Liability for Injuries Caused by Air Bags*, 48 CASE W. RES. L. REV. 659, 681 (1998) (explaining that automobile manufacturers spread loss through increased prices and liability insurance).

In addition, the higher prices that imposing liability causes may be desirable. If the production cost of a certain service does not include expected harm to consumers, then the private cost of production is lower than its social cost. This may result in excessive production. Imposing liability will not cause market failure by reducing production to a suboptimal level; it will rectify a market failure through internalization of the social cost of production.<sup>224</sup>

With regard to the unavailability of relevant information to prospective parents, I should note that increasing consultation prices would not cause potential parents altogether to waive examinations intended to show the likelihood of the birth of a disabled child.<sup>225</sup> At most, it would lead them to waive examinations to detect relatively mild or rare defects.<sup>226</sup> Even today, due to the prohibitive costs, potential parents do not undergo tests that cover all possible congenital defects. Increasing the prices of examinations might simply induce expectant parents to be more circumspect regarding the tests that they choose to undergo. Logically, they would not skip a test aimed to detect a severe disability whose likelihood is not negligible<sup>227</sup> even if the price rose considerably. Ultimately, preconception and prenatal tests are limited in number and not prohibitively expensive, and the need for them arises relatively rarely.<sup>228</sup> In some countries, a national health system supplies them free of charge or at subsidized rates.<sup>229</sup>

The claim that the rise in consultancy fees would increase the number of disabled people is also problematic. First, it is quite speculative. I have already explained that potential parents would not waive the tests that detect severe defects even if the prices of examinations increased. In that case, the number of people born into "lives of misery" whose needs would impose a heavy burden on public funds

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<sup>224</sup> See Michael J. Miller, *Strict Liability, Negligence and the Standard of Care for Transfusion-Transmitted Disease*, 36 ARIZ. L. REV. 473, 504-06 (1994) (explaining the concept of cost internalization in the products-liability context).

<sup>225</sup> Cf. Nancy Press & C.H. Browner, *Risk, Autonomy, and Responsibility: Informed Consent for Prenatal Testing*, HASTINGS CENTER REP., May-June 1995, at S9, S11-S12 (explaining that women take certain prenatal tests for purposes of "reassurance" and to "do everything [they can] to help [themselves] and the baby").

<sup>226</sup> See *id.*

<sup>227</sup> For example, many hereditary diseases are far more frequent in certain groups than in others. Under those circumstances, a consultant will only perform the relevant tests when the parents belong to a high-risk group. See, e.g., Connor, *supra* note 5, at 3.

<sup>228</sup> In Western societies, the number of pregnancies per family is usually small. See Christopher Tietze, *Pregnancy Rates and Birth Rates*, 16 POPULATION STUD. 31, 35 (1962) (explaining that in some Western countries, most couples use contraception and thus only have two to three children). Moreover, parents likely seek preconception genetic counseling only once, as the parents' genetic structures do not change.

<sup>229</sup> See Kaisa Raatikainen et al., *Good Outcome of Teenage Pregnancies in High-Quality Maternity Care*, 16 EUR. J. PUB. HEALTH 157, 160 (2006) ("In some countries maternity care is provided free of charge . . ."), available at <http://eurpub.oxfordjournals.org/cgi/reprint/16/2/157>.

would not change dramatically. Furthermore, this claim reflects a chilling perspective on the value of life with disability. It evokes the feeling that society would prefer a world in which disabled people are not even born. The desire to prevent a "life of suffering" implies a collective decision on a matter that cannot be a subject for a collective decision: when is life so miserable that the individual would prefer to forgo it? The desire to save the high costs of treating a severely disabled person by preventing that person's birth implies that a disabled person is an unwanted societal burden.

f. *Interim Summary*

So far I have endeavored to show that policy considerations do not support the blanket rejection of tort liability for wrongful life. This might conclude our discussion of legal policy because, while policy factors may negate or limit the duty of care, it is unnecessary to positively support such a duty's existence by policy factors.<sup>230</sup>

Still, some claim that weighty considerations favor imposing liability for wrongful life. For example, we may deem imposing liability on a negligent consultant necessary to encourage consultants to exercise the requisite degree of care.<sup>231</sup> In my view, this claim is indecisive because recognizing the parents' right of action for wrongful birth creates a certain incentive to exercise reasonable care in preconception and prenatal consultation. Presumably, the marginal deterrent effect of allowing an additional action by the child would not be significant in most cases.

Another possible argument is that the child's action is a crucial means of preventing human suffering. Put differently, the unfortunate child should not be left without a remedy to ameliorate the suffering.<sup>232</sup> In my view, however, the need to mitigate the child's pain cannot in itself justify liability. Tort law is not a panacea for all the suffering in the world; it focuses on cases where the wrongdoing of a particular defendant caused harm to a particular victim.<sup>233</sup> I will endeavor to show that, in a typical wrongful life claim, the defendant's

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<sup>230</sup> Cf. RESTATEMENT (THIRD) OF TORTS, *supra* note 156, § 7(b) ("In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.")

<sup>231</sup> See, e.g., *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 496 (Wash. 1983) ("Imposition of a . . . duty to the child will similarly foster the societal objectives of genetic counseling and prenatal testing, and will discourage malpractice."); *Dawe*, *supra* note 159, at 491-92; *Pollard*, *supra* note 215, at 339, 367.

<sup>232</sup> See *Pollard*, *supra* note 215, at 337 (explaining that the goal of tort law is compensation for social wrongdoing and intangible harms).

<sup>233</sup> See Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT. L. REV. 1431, 1457 (2000) ("[T]raditional American tort litigation revolves around a particular victim seeking compensation from a particular injurer . . .").



wrongdoing has not caused damage to the plaintiff and thus the defendant cannot be subject to liability even if the plaintiff leads a life of horrible suffering. I believe that the remedy for suffering that does not arise from wrongful conduct must come from social-welfare mechanisms.

A more convincing argument concerns the notion of loss spreading. The consultant's capacity to spread the loss exceeds that of the child.<sup>234</sup> A consultant can easily purchase professional-liability insurance and spread the cost of insurance among clients. Effectively, this ensures double spreading: all consultants share the actual "damage" via the insurance system, and the individual consultant spreads the private-insurance cost among clients through the consultancy fee.<sup>235</sup> Thus, the explanation for the universal hostility to wrongful life claims does not stem from policy considerations.

### C. Harm

#### 1. *Definition of Harm*

The *Second Restatement of Torts* defines the term "harm," which is sometimes referred to as "damage" or "injury," as "the existence of loss or detriment in fact of any kind to a person resulting from any cause."<sup>236</sup> In other words, harm is any detrimental change in a person's state. It exists if the plaintiff's state following the defendant's substandard conduct is worse than the plaintiff's state in the absence of that conduct.<sup>237</sup> Comparing the two states is not only an essential precondition for liability; it also dictates the scope of damages once the issue of liability is no longer in question because the aim of tort damages is to restore the victim to the pretort condition (*restitutio in integrum*).<sup>238</sup> In a wrongful life claim, the appropriate comparison is between life with disability (plaintiff's current condition) and nonexistence (plaintiff's condition but for the defendant's carelessness).<sup>239</sup> The crucial question is whether one can speak of a detriment when contrasting a state of disabled existence to a state of nonexistence.

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<sup>234</sup> See Pollard, *supra* note 215, at 338.

<sup>235</sup> See James M. Parker, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639, 674-75 (1985).

<sup>236</sup> RESTATEMENT (SECOND) OF TORTS § 7(2) (1965). Note, however, that the Restatement distinguishes between "harm" and "injury." See *id.*

<sup>237</sup> See *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, para. 251 (Austl.) (Crennan, J.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html>.

<sup>238</sup> See RESTATEMENT (SECOND) OF TORTS § 901 (1979); cf. *Livingstone v. Rawyards Coal Co.*, 5 App. Cas. 25, 39 (1880) ("[I]n settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured . . . in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.").

<sup>239</sup> See Pollard, *supra* note 215, at 328-29.

## 2. Possible Grounds for Rejecting the Action

### a. Establishing Harm Is Logically Self-Defeating

In a well-known article published in 1966, Professor Tedeschi claimed that the harm complained of in wrongful life claims “does not fall within the legal—and logical—meaning of the term.”<sup>240</sup> The concept of harm derives from a comparison of the plaintiff’s condition following the defendant’s careless conduct to the plaintiff’s condition in the absence of such conduct. For our purposes, however, “no comparison is possible since were it not for the act of birth the infant would not exist. By his cause of action, the plaintiff cuts from under himself the ground upon which he needs to rely in order to prove his damage.”<sup>241</sup>

We can understand this argument in two ways. One sense is that the concept of harm premises on a comparison between two states of existence (but for and following the negligent conduct); because non-existence is not strictly a state of existence, it cannot operate as a basis for comparison.<sup>242</sup> In my view, this interpretation is overly technical. The other sense is that the plaintiff in a tort action requests restoration to the pretort position.<sup>243</sup> Were we to restore the plaintiff to the original position in a wrongful life claim, the plaintiff would lose legal personality and, therefore, any possible right against the defendant.<sup>244</sup> To rectify the “harm,” we must place the plaintiff in a position where there is no right for compensation. In other words, a wrongful life claim is logically self-defeating.

A critic of this line of argument posed the following question.<sup>245</sup> Assume that a doctor amputates a patient’s leg to save the patient’s life and it subsequently transpires that the patient’s life could have been saved by a less aggressive form of treatment (e.g., antibiotics). Can a court reject a suit against the negligent doctor on the claim that the act of which the plaintiff complains is the very act that enabled the patient to stay alive and file a suit? Clearly, the court would not deny

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<sup>240</sup> Tedeschi, *supra* note 178, at 529.

<sup>241</sup> *Id.*

<sup>242</sup> *Cf.* JOEL FEINBERG, HARM TO OTHERS 102 (1984) (“To be harmed is to be put in a worse condition than one would otherwise be in (to be made ‘worse off’), but if the negligent act had not occurred, [the plaintiff] would not have existed at all. The creation of an initial condition is not the worsening of a prior condition; therefore it is not a harm, no matter how harmful it is.”).

<sup>243</sup> See RESTATEMENT (SECOND) OF TORTS, *supra* note 238, § 901 cmt. a.

<sup>244</sup> *Cf.* Jost, *supra* note 158, at 634 (recognizing that legal personality exists from the point of birth in all states).

<sup>245</sup> See Thomas Keasler Foutz, Comment, “Wrongful Life”: *The Right Not to Be Born*, 54 TUL. L. REV. 480, 493–94 (1980).

liability just because the defendant's negligence bestowed life to the plaintiff.<sup>246</sup>

However, this critique fails to grasp the essence of the criticized argument. The logical argument assumes that the plaintiff would not have existed at all but for the defendant's negligence. This is not so in the case of the amputated leg. True, the defendant's conduct enabled the plaintiff to continue living, but had the defendant acted with reasonable care, the plaintiff would have had a *better* life because his or her leg would not have been amputated; the plaintiff would not have forfeited her very existence. Nonetheless, I can understand why the logical argument is not the dominant reason for denying wrongful life claims. Courts seeking to categorically dismiss actions of a particular sort will generally prefer to rely on more substantive argumentation. After all, the life of the common law has not been logic—it has been experience.<sup>247</sup>

b. *The Comparison Is Impossible*

Harm is a prerequisite for liability in tort and its extent dictates the scope of damages.<sup>248</sup> Harm is a negative difference between the plaintiff's condition following the defendant's misconduct and the plaintiff's condition in the absence of such conduct.<sup>249</sup> Thus, establishing harm entails a comparison between these two conditions.

One of the most frequent arguments in case law and legal scholarship is that wrongful life actions must fail because it is impossible to compare life with disability (the posttort condition) and nonexistence (the pretort condition).<sup>250</sup> The difference between life and nonlife is a metaphysical matter, extending beyond the limits of human knowledge. Life and nonlife do not have a common denominator that can be used as a basis for comparison. Hence, harm cannot be established, and no liability can ensue. The Supreme Court of New Jersey made this point in the seminal case of *Gleitman v. Cosgrove*: "The infant plaintiff would have us measure the difference between his life with defects against the utter void of nonexistence, 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."<sup>251</sup>

Fifteen years later, Lord Ackner expressed a similar view in the judgment of the English Court of Appeal in *Mckay*: "[H]ow can a court begin to evaluate non-existence, 'the undiscovered country from

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<sup>246</sup> See *id.*

<sup>247</sup> OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (1881).

<sup>248</sup> See RESTATEMENT (SECOND) OF TORTS, *supra* note 238, § 901(a).

<sup>249</sup> See *id.* § 901 cmt. a.

<sup>250</sup> See Pollard, *supra* note 215, at 328–29.

<sup>251</sup> 227 A.2d 689, 692 (N.J. 1967).

whose bourn no traveler returns?' No comparison is possible and therefore no damage can be established which a court would recognise. This goes to the root of the whole cause of action."<sup>252</sup>

Numerous courts and scholars endorse this view.<sup>253</sup> Admittedly, it has attracted several critiques; yet, none is persuasive. The first criticism leveled against this line of argument appears in Judge Jacob's minority opinion in *Gleitman*. Judge Jacob argued that, as courts cope with difficulties in quantifying damages on a daily basis, especially when nonpecuniary losses are concerned, they can overcome such difficulties in wrongful life cases as well. It is unjust to exempt a negligent party from liability purely due to difficulties in measuring the extent of harm.<sup>254</sup>

I agree that difficulty assessing damages arising primarily—but not solely—with regard to nonpecuniary losses should not deter courts from imposing liability. However, we must distinguish between cases in which the existence of harm is obvious even though an assessment of its scope is difficult and cases where it is impossible to determine whether harm actually occurred. Our familiarity with different states of existence enables us to compare them and identify a change for the worse in a person's life. When we need to compare two states of existence, the question of harm is not an insoluble mystery. The only problem is one of quantification, but inasmuch as it arises only

<sup>252</sup> [1982] 1 Q.B. 1166, 1189 (Eng. C.A.).

<sup>253</sup> See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978) ("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."); see also *Lininger ex rel. Lininger v. Eisenbaum*, 764 P.2d 1202, 1210 (Colo. 1988) ("[A] person's existence, however handicapped it may be, does not constitute a legally cognizable injury relative to non-existence."); *Garrison v. Med. Ctr. of Del. Inc.*, 581 A.2d 288, 293–94 (Del. 1989) (noting the impossibility of "identifying damages based on a comparison between life in the child's impaired state and nonexistence"); *Kush v. Lloyd*, 616 So. 2d 415, 423 (Fla. 1992) ("Clearly, the relative value of human existence over human nonexistence is not a matter cognizable under Florida tort law."); *Blake ex rel. Blake v. Cruz*, 698 P.2d 315, 322 (Idaho 1984), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 2004), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005) ("Blake has suffered no legally cognizable wrong by being born . . ."); *Goldberg v. Ruskin*, 499 N.E.2d 406, 409–410 (Ill. 1986) (declining to recognize a claim of wrongful life due to the "intractable problem of assessing damages"); *Greco ex rel. Greco v. United States*, 893 P.2d 345, 347–48 (Nev. 1995) (calling the wrongful life damages assessment "a calculation the courts are incapable of performing"); *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, para. 252 (Austl.), *available at* <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> ("A comparison between a life with disabilities and non-existence . . . is impossible."); *Kearl*, *supra* note 79, at 1286 ("[I]t is impossible to establish that the [wrongful life] plaintiff has suffered harm."). *But see* *Speck ex rel. Speck v. Finegold*, 439 A.2d 110, 115 (Pa. 1979), *superseded by statute*, 42 PA. CONS. STAT. ANN. § 8305 (West 2007); *cf.* *Bader v. Johnson*, 675 N.E.2d 1119 (Ind. 1997) (rejecting the "hyper-scholastic rationale" that wrongful life claims should be denied due to the impossibility of calculating damages).

<sup>254</sup> See *Gleitman*, 227 A.2d at 704; see also *Dawe*, *supra* note 159, at 491; Mark Strasser, *Wrongful Life, Wrongful Birth, Wrongful Death, and the Right to Refuse Treatment: Can Reasonable Jurisdictions Recognize All But One?*, 64 MO. L. REV. 29, 55–56 (1999).

after the question of liability has been decided, it cannot justify the negation of liability. The wrongful life setting clearly differs. To compare existence with nonexistence we need to ascertain the value of life itself (which is lost in the case of nonexistence), regardless of any pleasure or pain that a specific plaintiff endures. This, of course, is an impossible task. The problem is not just one of quantification.<sup>255</sup>

Several proponents of liability for wrongful life suggested valuing the state of nonexistence as "zero," which denotes the absence of any pain and any pleasure.<sup>256</sup> The next stage is to compare the plaintiff's current condition—according to a calculation of pain versus pleasure—with the "zero" baseline. If the aggregate suffering exceeds the aggregate pleasures, harm is established.<sup>257</sup> Though alluring at first blush, this approach is deficient because it presupposes, albeit elegantly, what needs to be proved, namely that life has no intrinsic value aside from that of net pleasures. Even if we concur that a plaintiff's suffering vastly exceeds pleasure in the current condition, this cannot compel the conclusion that the plaintiff suffered harm because proof of harm requires a comparison between the current condition and the state of nonexistence. In the latter, there are undeniably no pleasures and no pains, but there is also no life.

Proponents of liability for wrongful life argue that refusal to compare disabled life with nonexistence is unjust insofar as similar comparisons are acceptable in other areas of tort law.<sup>258</sup> For example, in cases of bodily injury, life with disability (*A*) is compared with normal life (*B*), while in cases of wrongful death, nonexistence (*C*) is compared with normal life (*B*). The ability to compare objects or values is transitive (in the mathematical sense). According to this argument, if we can compare between *A* and *B* and between *B* and *C*, then a comparison between *A* and *C* is also possible. So, theoretically, nothing prevents the comparison of disabled life (*A*) with nonexistence (*C*).<sup>259</sup>

However, this argument suffers from a mistaken conception of liability for wrongful death. The dependents of the immediate victim bring the primary action in cases of death, and the resulting damages express the dependents' personal losses.<sup>260</sup> A court need not compare existence and nonexistence.

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<sup>255</sup> See *Nelson v. Krusen*, 678 S.W.2d 918, 929 (Tex. 1984) ("[It] is not fatal to a cause of action in negligence that a plaintiff cannot prove the *quantum* of injury; but a plaintiff must always establish the *existence* of injury. This is an impossible burden for a 'wrongful life' plaintiff to meet.")

<sup>256</sup> See Foutz, *supra* note 245, at 497 (citing Note, *A Cause of Action for "Wrongful Life": [A Suggested Analysis]*, 55 MINN. L. REV. 58, 66 (1970)).

<sup>257</sup> See *id.* at 497-98; Pollard, *supra* note 215, at 355-56; Strasser, *supra* note 254, at 63.

<sup>258</sup> See Capron, *supra* note 188, at 649.

<sup>259</sup> See *id.*; Parker, *supra* note 235, at 672.

<sup>260</sup> See Perry & Adar, *supra* note 202, at 530-35.

A thornier question arises with respect to an action brought by the personal representative of the deceased for the latter's losses. Several jurisdictions allow the estate to recover for the loss of the victim's ability to enjoy life.<sup>261</sup> Prima facie, determining such damages requires comparing life and nonexistence. In my view, however, this has no bearing on wrongful life claims for three reasons. First, in cases of wrongful death, most jurisdictions do not allow recovery for loss of the enjoyment of life. Recovery is, therefore, an anomaly.<sup>262</sup> This casts some doubt on the practicability of the underlying comparison. Second, compensation for the loss of enjoyment of life, as its name attests, compensates for loss of enjoyment—not for the loss of life itself.<sup>263</sup> Such compensation does not require a comparison between life and its absence but rather a comparison between enjoyment and its absence. The calculus does not account for the intrinsic value of life. Third, even if courts were to award compensation for the loss of life itself and not only for the loss of enjoyment,<sup>264</sup> this would not improve a wrongful life claim's chances of success. Quite the opposite is true; if courts allowed recovery for loss of life in every case of death, we could say that the right to recover for loss of life expressed an unqualified preference for life over nonexistence, thereby removing any basis for an action for wrongful life.

Proponents of liability for wrongful life assert that recognizing the liberty to abort a defective fetus (eugenic abortion) expresses preference for nonexistence over life with disabilities, and if that conclusion is permissible in one area of the law, it may be permitted in another.<sup>265</sup> In my view, this claim is fallacious. The liberty to abort a fetus is not contingent on the superiority of nonexistence to life with disability. The liberty to abort does not protect the interest of the fetus—it protects the autonomy of the pregnant woman.<sup>266</sup> Although the expected suffering of the child may be one of the considerations that the prospective mother weighs in making her decision, it need not be the decisive one. She may, for example, base her decision on

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<sup>261</sup> See, e.g., *Ozaki v. Ass'n of Apartment Owners of Discovery Bay*, 954 P.2d 652, 667–68 (Haw. Ct. App. 1998); *Choctaw Maid Farms, Inc. v. Hailey*, 822 So. 2d 911, 922–23 (Miss. 2002); *Romero v. Byers*, 872 P.2d 840, 846 (N.M. 1994); see also Tina M. Tabacchi, Note, *Hedonic Damages: A New Trend in Compensation?*, 52 OHIO ST. L.J. 331, 331–36 (1991) (discussing the nature and availability of hedonic damages).

<sup>262</sup> See Perry & Adar, *supra* note 202, at 535–36 n.129.

<sup>263</sup> See, e.g., *McGee v. A C & S, Inc.*, 933 So. 2d 770, 774–75 (La. 2006) (describing damages for loss of enjoyment of life); 22 AM. JUR. 2D *Damages* § 231 (2007) (recognizing that loss of enjoyment of life is a separate element of damages in some jurisdictions).

<sup>264</sup> This may be the case in Arkansas. See ARK. CODE ANN. § 16-62-101(b) (2005) (“[A] decedent's estate may recover for the decedent's loss of life as an independent element of damages.”); *Durham v. Marberry*, 156 S.W.3d 242, 248–49 (Ark. 2004).

<sup>265</sup> See Harvey Teff, *The Action for “Wrongful Life” in England and the United States*, 34 INT'L & COMP. L.Q. 423, 433 (1985).

<sup>266</sup> See *Roe v. Wade*, 410 U.S. 113, 153–55 (1973).

the physical, emotional, and economic burden involved in raising a disabled child.<sup>267</sup> Even if the woman decides to terminate the pregnancy because she truly believes that the child's impairment would render the child's life worse than nonexistence, the law would give effect to her subjective decision without evaluating its objective validity. The objective validity of this decision cannot be ascertained.

A more plausible argument in support of liability for wrongful life pertains to the legal treatment of requests for euthanasia. Some claim that recognizing the right of a terminally ill person to forgo life-prolonging medical treatment<sup>268</sup> necessitates a decision that nonexistence is preferable to life in pain. They say that if a principled decision is possible in euthanasia cases, it is likewise possible in wrongful life cases.<sup>269</sup> This claim, admittedly, has a certain appeal. However, I think that a clear distinction exists between requests for euthanasia and wrongful life claims.

In a euthanasia case, the court is not required to objectively rule on the relationship between life in pain and nonexistence; rather, the court gives effect to the petitioner's subjective will<sup>270</sup> (although in certain cases that will is expressed by a guardian).<sup>271</sup> On the other hand, in a wrongful life claim, the court does not attempt to protect a person's right to prefer nonexistence to painful life but rather to determine whether the defendant's misconduct caused harm to the plaintiff. This requires an objective comparison between nonexistence and life with disability.<sup>272</sup> Moreover, in a euthanasia case, the

<sup>267</sup> Cf. *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, para. 247 (Austl.) (Crennan, J.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> ("The law does not require that considerations of the mother's physical and mental health, which may render an abortion lawful, should be co-incident with the interests of her foetus.")

<sup>268</sup> See, e.g., *In re Quinlan*, 355 A.2d 647 (N.J. 1976); *Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789, 789-90 (Eng. H.L.).

<sup>269</sup> See Constance F. Fain, *Wrongful Life: Legal and Medical Aspects*, 75 Ky. L.J. 585, 630-31 (1987); Jackson, *supra* note 188, at 566-67; Pollard, *supra* note 215, at 358-59; Teff, *supra* note 265, at 433-34; cf. *Harriton*, (2006) 226 C.L.R. 52 at para. 95 (Kirby, J., dissenting).

<sup>270</sup> See, e.g., *Cruzan ex rel. Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 271 (1990) ("[M]ost courts have based a right to refuse treatment either solely on the common-law right to informed consent or on both the common-law right and a constitutional privacy right."); see also *id.* at 278-79 ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions . . . . [We] assume that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition.")

<sup>271</sup> See, e.g., *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 419 (Mass. 1977); *In re Quinlan*, 355 A.2d at 651-52.

<sup>272</sup> See *Smith ex rel. Smith v. Cote*, 513 A.2d 341, 352-53 (N.H. 1986) (discussing the difficulty in applying the traditional tort concept of objective harm to the inherently subjective value of human life); see also Philip G. Peters, Jr., *The Illusion of Autonomy at the End of Life: Unconsented Life Support and the Wrongful Life Analogy*, 45 UCLA L. REV. 673, 692-95

plaintiff asks the court to prohibit artificial interference in the natural process of dying. Absent such intervention, death will occur sooner, and suffering will end. In a wrongful life claim, the court cannot put the plaintiff in the desired position or in an economically equivalent one.<sup>273</sup> Natural reality limits the court's power. One can permit a person to terminate his or her life, but one cannot place that person in the position he or she would have been in but for birth. Finally, a request for euthanasia, as opposed to a wrongful life claim, is not logically self-defeating.

c. *Life Cannot Be Inferior to Nonexistence*

One of the most common arguments against liability for wrongful life, especially in American case law, is that the plaintiff cannot establish actual harm because life—even one of great suffering—is always preferable to nonexistence.<sup>274</sup> In other words, the plaintiff's condition following the defendant's misconduct is indisputably and invariably preferable to the plaintiff's condition but for that conduct. For example, in *Berman v. Allan*,<sup>275</sup> the Supreme Court of New Jersey abandoned the formal rationale of *Gleitman* (“the comparison is impossible”) in favor of a value-based determination:

One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life. . . . No man is perfect. Each of us suffers from some ailments or defects, whether major or minor, which make impossible participation in all the activities the world has to offer. But our lives are not thereby rendered less precious than those of others whose defects are less pervasive or less severe.<sup>276</sup>

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(1998) (observing that wrongful life cases “contain no equivalent exercise of patient autonomy”).

<sup>273</sup> See *Gleitman ex rel. Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967), *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *cf.* *Walker ex rel. Walker v. Mart*, 790 P.2d 735, 741 (Ariz. 1990) (summarizing other states' inability to ascertain general damages in wrongful life actions).

<sup>274</sup> See Kearl, *supra* note 79, at 1279–80 (arguing that the majority in *Turpin* “rejected one rationale for denying wrongful life recovery that had been adopted by numerous other courts—that the plaintiff has suffered no legally cognizable injury because ‘considerations of public policy dictate a conclusion that life—even with the most severe impairments—is, as a matter of law, always preferable to nonlife’” (quoting *Turpin v. Sortini*, 643 P.2d 954, 961 (1982))).

<sup>275</sup> 404 A.2d 8 (N.J. 1979).

<sup>276</sup> *Id.* at 12–13; *see also* *Blake ex rel. Blake v. Cruz*, 698 P.2d 315, 321–22 (Idaho 1985), *superseded by statute*, IDAHO CODE ANN. § 5-334 (West 2004), *as recognized in* *Vanvooren v. Astin*, 111 P.3d 125 (Idaho 2005); *Cowe ex rel. Cowe v. Forum Group, Inc.*, 575 N.E.2d 630, 635 (Ind. 1991); *Bruggeman ex rel. Bruggeman v. Schimke*, 718 P.2d 635, 642 (Kan. 1986); *Kassama v. Magat*, 792 A.2d 1102, 1123 (Md. 2002); *Azzolino ex rel. Azzolino v. Dingfelder*, 337 S.E.2d 528, 532–33 (N.C. 1985); *Nelson v. Krusen*, 678 S.W.2d 918, 924–25 (Tex. 1984).



The absolute preference for life in the wrongful life context derives from the general principle of the sanctity of life. In the hierarchy of human interests, life is the most important. In the legal arena, its importance manifests, *inter alia*, in the existence of a constitutional right to life<sup>277</sup> and in the imposition of the gravest punishments for offenses of taking life.<sup>278</sup> Furthermore, the principle of the sanctity of life is indiscriminative—it applies equally to all. The lives of all human beings have equal intrinsic value and deserve maximum protection irrespective of the subjective quality of each life and the societal benefit generated by its protection.<sup>279</sup> If life is priceless and sacrosanct, its existence must always be preferable to nonexistence. Under all circumstances, “it’s a wonderful life.” Consequently, according to this argument, wrongful life claims must be categorically rejected.

The first critique of this line of argument is that the principle of the sanctity of life is not truly absolute—in certain cases other interests supersede it.<sup>280</sup> For example, recognizing a woman’s liberty to abort her fetus expresses a preference of her autonomy over the potentiality of life.<sup>281</sup> Acceptance of a euthanasia request also expresses the preference for individual will over life.<sup>282</sup> The abrogation of the offense of attempted suicide by many jurisdictions is another example of the qualified nature of the principle of the sanctity of life.<sup>283</sup> Even if, as concluded above, the liberty to abort and the right not to receive medical treatment do not, as such, express a legal preference for nonexistence over life with disability, they do express the relativity of the principle of the sanctity of life. If the principle is not absolute, it cannot serve as the basis for a blanket rejection of wrongful life claims.

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<sup>277</sup> See U.S. CONST. amends. V, XIV; see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life . . .”).

<sup>278</sup> See, e.g., 18 U.S.C.S. App. § 2A1.1(2)(A) (LexisNexis 2007) (“In the case of premeditated killing, life imprisonment is the appropriate sentence if a sentence of death is not imposed”); CAL. PEN. CODE § 190(a) (West 2006) (“Every person guilty of murder in the first degree shall be punished by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life.”).

<sup>279</sup> See, e.g., *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, paras. 259, 263 (Austl.) (Crennan, J.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> (“In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. . . . All human lives are valued equally by the law when imposing sentences on those convicted of wrongfully depriving another of life.”).

<sup>280</sup> See Parker, *supra* note 235, at 669–70.

<sup>281</sup> See *id.*

<sup>282</sup> *Id.* at 670–71.

<sup>283</sup> See *Harriton*, (2006) 226 C.L.R. 52 at para. 117 (Kirby, J., dissenting).

I tend not to accept this critique. Without taking any stand on the fierce battle between the pro-life and pro-choice movements, I find it clear that abortion rights rest on the assumption that a fetus is not a living person. So, in the eyes of pro-choice advocates, these rights do not compromise the sanctity of human life. Additionally, the right to forgo medical treatment and the impunity of attempted suicide simply reflect the notion that people can waive their own rights, including the right to life.

In any case, I think that we ought to reject the assertion that life is invariably preferable to nonexistence for another reason, namely that it is based on a comparison of two incomparable states. A court cannot objectively compare life with disability to nonexistence because the intrinsic value of life is a mystery—incapable of objective determination. The argument that life is always preferable to nonexistence is necessarily subjective, value laden, and rooted in personal beliefs (moral, religious, or other). It is not an objective argument based on a scientific examination of reality. Just as a person can sincerely believe that life is always preferable to its absence, that person can believe with the same degree of internal conviction that, under certain circumstances, nonexistence is preferable. Hence, the claim that extremely painful life is invariably preferable to nonexistence fails, not because the reverse is necessarily true, but because we lack the external data required for deciding between them.<sup>284</sup>

### 3. Possible Grounds for Allowing the Action

#### a. Life May Be Inferior to Nonexistence

Contrary to the prevalent view in American case law, the Supreme Court of California arrived at a revolutionary conclusion in *Turpin v. Sortini*,<sup>285</sup> holding that there are circumstances in which nonexistence is preferable to life: “[W]hile our society and our legal system unquestionably place the highest value on all human life, we do not think that it is accurate to suggest that this state’s public policy establishes—as a matter of law—that under all circumstances ‘impaired life’ is ‘preferable’ to ‘nonlife.’”<sup>286</sup>

<sup>284</sup> See Kearl, *supra* note 79, at 1287–88 (arguing that no conclusion is possible in deciding between life and nonexistence); cf. Teff, *supra* note 265, at 433 (“Paradoxically, this very premise logically entails the measurability *in principle* of non-existence . . .”).

<sup>285</sup> 643 P.2d 954 (Cal. 1982).

<sup>286</sup> *Id.* at 962; *see id.* at 963 (“[W]e cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.”); *see also* Cont’l Cas. Co. v. Empire Cas. Co., 713 P.2d 384, 393 (Colo. Ct. App. 1985), *rev’d*, 764 P.2d 1191 (Colo. 1988); Dawe, *supra* note 159, at 496; Parker, *supra* note 235, at 671–72. The court in *Turpin* did not allow recovery for pain and suffering due to the inability to answer the question of harm. 643 P.2d at 963–64. Yet it allowed recovery for the extraordinary expenses related to the plaintiff’s ailment. *Id.* at 965.

Two of the five judges in the Israeli case of *Zeitsov* endorsed this view. Justice Ben-Porat, with whom Justice D. Levin concurred, admitted that the principle of the sanctity of life may make it seem that "any kind of life, even if bound up with intense suffering and severe disabilities, is invariably better than nonexistence."<sup>287</sup> Nonetheless, she concluded that there are cases—albeit rare—in which a court can determine that a person would have been better off not being born: "Occasionally there is an accepted social presumption that a person would have been better off not being born into a state of grave disability."<sup>288</sup> The criterion for determining the existence of harm is the gravity of the congenital disability—only a particularly grave impairment may lead to the conclusion that nonexistence is preferable to existence,<sup>289</sup> so cases in which liability attaches will be exceedingly rare.<sup>290</sup>

This approach seems to raise a number of difficulties. *Prima facie*, the conclusion that life may be inferior to nonlife may uproot our deep-seated commitment to the sanctity of human life. The *Bundesgerichtshof* noted the danger of assigning a negative value to human life many years ago. In a seminal wrongful life case, it stated that given the bitter experience of Germany under the unrestrained National Socialist regime, "the practice of the courts in the Federal Republic does not permit, with good reason, any legally relevant judgment about the value of the lives of others."<sup>291</sup> The great fear was that ruling life with certain disabilities to be worse than nonexistence might lead to the conclusion that people with those disabilities *need not* live at all.<sup>292</sup>

I think this fear is somewhat exaggerated. There is a world of difference between a situation in which the state, on its own initiative, determines that nonexistence is preferable to existence for a particu-

<sup>287</sup> CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 95.

<sup>288</sup> *Id.* at 96. Justice D. Levin also noted:

[I]n principle, the point of departure is that life, even when impaired, is preferable to non-life. However[,] . . . there may be cases in which a child's defect is so grave that it may be said that "his life is not life" and that "it would have been better for him not to have been born."

*Id.* at 126.

<sup>289</sup> *Cf.* *Dawe*, *supra* note 159, at 496 ("Rather than a nonrebuttable presumption that no possible condition of life could be worse than nonexistence . . . the court would adopt a rebuttable presumption of preference for life.")

<sup>290</sup> *See* *Teff*, *supra* note 265, at 437 ("[O]nly in extreme circumstances would a plaintiff be successful in contending that he would have been better off not to have been born.")

<sup>291</sup> English translation was taken from B.S. MARRESINIS, *THE LAW OF TORTS: A COMPARATIVE INTRODUCTION* 149-50 (3d ed. 1997).

<sup>292</sup> *Cf.* *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1180-81 (Eng. C.A.) (Stephenson, L.J., concurring) ("To impose such a duty towards the child would . . . make a further inroad on the sanctity of human life which would be contrary to public policy. It would mean regarding the life of a handicapped child as not only less valuable than the life of a normal child, but so much less valuable that it was not worth preserving.")

lar person and a situation in which a person, out of free will, decides that nonexistence is preferable to his or her life and premises an action on that preference. Similarly, from the individual's perspective, using the argument that life with serious disability is inferior to nonexistence to justify the violation of his or her personal interest (by discrimination, imprisonment, or even elimination) differs significantly from using such argument to improve that individual's condition by awarding damages.<sup>293</sup>

All the same, any judicial expression of preference for nonexistence over life with disability may offend the dignity of people suffering from physical or mental impairments, especially those who lead satisfying and productive lives despite their disabilities.<sup>294</sup> Additionally, it may encourage intolerance toward the disabled.<sup>295</sup> These consequences are not only undesirable per se but also inconsistent with express federal policy.<sup>296</sup> I fear that the desire to compensate the suffering child and dissatisfaction with the consultant's carelessness may induce courts to accept wrongful life actions based on far-reaching and unrealistic "societal presumptions." For example, in *Azulai*, an Israeli court opined that there was a social convention to the effect that a child born with Down syndrome would have been better off not to have been born and that total blindness is a defect that makes nonexistence preferable to life.<sup>297</sup> Clearly, we may construe these value judgments as an expression of society's negative attitude toward people with disabilities.

Another possible critique of the *Turpin* approach is that it creates a threshold below which there is no liability by distinguishing extremely severe and slighter disabilities. In case of a slight imperfection, the consultant will be altogether exempt from liability despite

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<sup>293</sup> Cf. *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, paras. 121–22 (Austl.) (Kirby, J., dissenting), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html> (observing that awarding damages does not demean or lower, but empowers, the infant in the eyes of others).

<sup>294</sup> See *Edwards v. Blomeley*, (2002) N.S.W.S.C. 460, para. 75 (Austl.), available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/460.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/460.html) ("There are many disabled members of society who lead valuable and fulfilling lives notwithstanding their significant physical handicaps. These citizens, by their achievements, are a source of inspiration to others . . . . To all such persons the notion that non existence may be considered preferable to living with disabilities would surely be perceived to be offensive."); *Ellis v. Sherman*, 515 A.2d 1327, 1329 (Pa. 1986); *Harriton*, (2006) 226 C.L.R. 52 at para. 260 (Kirby, J., dissenting).

<sup>295</sup> See Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 144 (2005) ("Wrongful birth and wrongful life suits may exact a heavy price not only on the psychological well-being of individuals with disabilities, but also on the public image and acceptance of disability in society.")

<sup>296</sup> See Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000).

<sup>297</sup> CC (Hi) 4993/90 *Israel v. Azulai*, [1991] IsrDC 5751(2) 29, 34. However, the court rejected the claim for damages in this particular case, saying of the plaintiff, "[H]er life is a life, despite her disability." *Id.* at 34.

having been careless. Additionally, many disabled persons will remain uncompensated. The suffering of these people is admittedly less acute, but it is unclear why we should deprive them of any compensation, albeit smaller.<sup>298</sup> I find this critique unacceptable. In cases of a slight impairment, all agree that children are unable to contend that their lives are inferior to nonexistence. Therefore, life with slight imperfections cannot constitute “harm” under the accepted meaning of this term. In the absence of harm caused by carelessness, there can be no liability even if the plaintiff is suffering and the defendant was negligent. The inner structure of tort law justifies a distinction between extremely severe and slighter disabilities.

Even so, the *Turpin* approach must fail for the same reason set forth with respect to the *Berman* line of argument.<sup>299</sup> The idea that life under certain circumstances may be worse than its absence derives from a comparison of two incomparable states. When a particular judge holds that nonexistence is preferable to life with disability, that decision relies on a subjective belief and not on objective facts. In matters of belief, the judge’s personal view is as legitimate as the contrasting beliefs of others. For example, millions of people all over the world (among them a considerable portion of the American public) believe that there is an afterlife at the end of life in this world.<sup>300</sup> For these people, the claim that life with disability may be inferior to nonexistence is unacceptable because it totally ignores the afterlife.<sup>301</sup> The Babylonian Talmud relates that after Pharaoh had decreed that every newborn Israelite son was to be cast into the river, Amram, Moses’ future father, divorced his wife to avoid procreation and others followed his example.<sup>302</sup> His daughter reproached him, stating, *inter alia*, that Pharaoh’s edict only denied life in this world whereas Amram’s edict also deprived potential children of the World to

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<sup>298</sup> See *Harriton*, (2006) 226 C.L.R. 52 at para. 125 (Kirby, J., dissenting) (“In terms of legal principle, minor injuries are not apprehended as categorically different from non-minor injuries in ordinary personal injury cases. It is not apparent why such a distinction is necessary as a disqualification in wrongful life actions.”); CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 115 (Barak, J.).

<sup>299</sup> See *supra* Part II.C.2.

<sup>300</sup> Cf. Francis A. Boyle, *The Relevance of International Law to the “Paradox” of Nuclear Deterrence*, 80 *Nw. U. L. Rev.* 1407, 1431 (1986) (observing that many people in the United States military services believe in an afterlife).

<sup>301</sup> See *Edwards v. Blomeley*, (2002) N.S.W.S.C. 460, ¶ 75, available at [http://www.austlii.edu.au/au/cases/nsw/supreme\\_ct/2002/460.html](http://www.austlii.edu.au/au/cases/nsw/supreme_ct/2002/460.html) (“[T]here are many in society who believe that the gift of life affords the opportunity for life after death and to all such persons the notion that non existence may be preferable to life with disabilities, however severe, is surely unacceptable.”).

<sup>302</sup> 3 THE BABYLONIAN TALMUD, *Sotah* 12a (Isidore Epstein ed., A. Cohen trans., 1948). She also said that while Pharaoh’s decree concerned only male babies, Amram’s edict prevented the birth of males and females. *Id.* Finally, she said that because Pharaoh was wicked, there was doubt whether his decree would be fulfilled; because Amram was righteous, it was certain that his decree would be fulfilled. *Id.*

Come.<sup>303</sup> This anecdote reflects the view that even life without any pleasure that terminates in the cruelest fashion is preferable to nonexistence. Clearly, this belief is not shared by all, but its very existence buttresses the claim that preference of nonbeing to a life of suffering is not an objective determination. An objective judgment is impossible indeed.

The inability to compare disabled life with nonexistence gives rise to another problem. The comparison between life and nonlife is necessary not only to establish a cause of action but also to calculate damages. Tort damages aim to rectify the plaintiff's harm.<sup>304</sup> In a wrongful life case, this means that the defendant must place the plaintiff in a position equivalent to nonexistence. Just as we cannot evaluate nonexistence at the first stage, we are likewise unable to do so at the second. Put differently, even if we were to accept the value-laden opinion that nonexistence may be preferable to life with serious disabilities, we would nonetheless be unable to determine the scope of damages under those circumstances.

b. *Redefining Harm*

The attempt to resolve the question of harm has led us to a dead end. I have shown that establishing harm is logically and practically impossible, and that even if we were willing to make the necessary (and in my view impossible) comparison, we would not reach a conclusive answer. Any comparison between life and nonlife would catalyze a sharp dispute over the value of life, the settlement of which requires adopting a subjective, value-based conviction. Still, the empathy for the unfortunate child's suffering together with the disapproval of the defendant's misconduct prompted noble attempts to circumvent these difficulties.<sup>305</sup> In the Israeli case of *Zeitsov*, Justice Barak proposed the most radical solution, and Justice S. Levin concurred:

The doctor's notional duty of care requires him to exercise reasonable care so that the minor's life will be unimpaired . . . . [The minor's] legally protected interest is not in nonexistence, but in life without impairment. Accordingly, the harm for which the negligent doctor is responsible does not lie in causing life or in preventing nonexistence. The doctor is responsible for causing life with impairment . . . . [The] assessment of damages need not take into account

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<sup>303</sup> *Id.*

<sup>304</sup> See KEETON ET AL., *supra* note 156, at 164–65.

<sup>305</sup> I will not discuss in detail the attempt to evade these problems by separating special and general damages and allowing recovery only for special damages under the RESTATEMENT (SECOND) OF TORTS § 920 (1979). We must reject this approach, used by the Supreme Court of California in *Turpin v. Sortini*, 643 P.2d 954, 964–66 (Cal. 1982), because it confuses the question of harm (as a precondition for liability) with that of damages and practically disregards the former.

the state of nonexistence . . . . [The] doctor is responsible for causing a defective life, so the extent of the harm should be determined by comparing impaired life and unimpaired life.<sup>306</sup>

Rather than comparing disabled life with nonexistence, the judge should compare life with disability to life without disability.<sup>307</sup> This method seems to have a number of advantages. First, it enables the suffering child to recover from the careless consultant. Second, establishing harm does not involve metaphysical questions nor is it based on a value-laden, subjective preference. Third, assessment of damages after liability has been established is no longer impossible but is similar to the assessment of damages in ordinary bodily injury cases. Fourth, the proposed method does not distinguish between exceptional defects that may generate liability and other defects that may not. It exempts the courts from excruciatingly difficult decisions in borderline cases, and it prevents discrimination between differently disabled persons with respect to the right of action and between negligent consultants with respect to liability.

At first glance, this proposal seems to untie the Gordian knot of wrongful life claims. However, closer examination reveals its manifold weaknesses. First and foremost, this method does not comport with fundamental principles of tort law.<sup>308</sup> Harm is a detrimental change in the state of a person that exists if the plaintiff's state following the defendant's misconduct is worse than the plaintiff's state in the absence of that conduct. The only possible interpretation of this principle in a wrongful life claim is that the plaintiff must show that one's life is inferior to nonexistence. The proposed comparison uses an awkward legal fiction, an imaginary baseline, because the plaintiff never had a chance of being born without disability.<sup>309</sup>

Furthermore, tort law generally purports to compensate victims for harms caused, not to punish tortfeasors.<sup>310</sup> Compelling the defendant to put the plaintiff in a position that is economically equivalent to normal life is not compensation for harm that the defendant caused because normal life is evidently superior to the plaintiff's

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<sup>306</sup> CA 512/81 *Zeitsov v. Katz* [1986] IsrSC 40(2) 85, 116.

<sup>307</sup> See *Waller ex rel. Waller v. James*, (2006) 226 C.L.R. 136, para. 39 (Austl.) (Kirby, J., dissenting), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/16.html> ("Before this Court, counsel for the appellant contended that the appropriate 'comparator,' if one was required, was an ordinary person without [the congenital disability]."). However, the court rejected this contention.

<sup>308</sup> See KEETON ET AL., *supra* note 156, at 164–65.

<sup>309</sup> *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, paras. 269–70, 276 (Austl.), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html>; see also *Zeitsov*, [1986] IsrSC 40(2) at 89–90 (Ben-Porat, J.); *Stolker*, *supra* note 201, at 531.

<sup>310</sup> Punitive damages are an exception, which is irrelevant in ordinary wrongful life cases. *Cf.* KEETON ET AL., *supra* note 156, at 9 ("The idea of punishment . . . usually does not enter into tort law . . . .").

pretort position (i.e., nonexistence). Justice Barak opined that the principle of *restitutio in integrum* assumes that “if not for the wrong, the victim would still exist, whereas in our case if not for the wrong the victim would not exist. Consequently, damages should not aim to restore the *status quo ante*.”<sup>311</sup> I find this unconvincing. The purpose of tort damages is to restore the *status quo ante*. This is one of the most basic features of tort liability without which tort law would not be tort law. Courts cannot forego this principle ad hoc just because it is inconvenient for certain plaintiffs.

Moreover, as a collective mechanism for regulating human conduct, tort law must not impose duties that cannot be fulfilled. According to Justice Barak’s approach, the breached duty in a wrongful life setting is the duty “to exercise reasonable care so that the minor’s life will be unimpaired.”<sup>312</sup> However, this is a duty that the consultant could not fulfill because there was nothing the consultant could have done to enable the child to be born healthy.<sup>313</sup> Finally, the proposed definition of harm raises a new problem on the causal relationship level. The disparity between life with impairment and normal life, which expresses the plaintiff’s harm according to the proposed method, did not stem from the consultant’s carelessness. It was the result of a hereditary defect, fetal exposure to dangerous factors not imputable to the consultant’s fault, or the like.

The critique of Justice Barak’s approach from a public-policy perspective is less persuasive. One of the criticisms was that this approach imposes liability even where the plaintiff’s impairment is slight. If the infant is born with a relatively minor physical impairment, it is improper to determine that the defendant’s conduct caused harm because the very same conduct has given the child life. Life with a minor disability cannot be considered inferior to nonexistence.<sup>314</sup> Thus, recognizing a cause of action in cases of trivial impairments seems “contrary both to public policy and the principle of the sanctity of life.”<sup>315</sup> However, this argument ignores the fact that Justice Barak changes the baseline for comparison. He does not in any way assert that life with disability, minor or grave, may be inferior to nonlife. He merely states that normal life is preferable to life with disability. If we accepted his revolutionary definition of “harm,” recognizing the child’s harm would not be contrary to public policy.

Another criticism likewise relies on the fact that the proposed method does not distinguish between minor and grave defects. Some

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<sup>311</sup> *Zeitsov*, [1986] IsrSC 40(2) at 117.

<sup>312</sup> *Id.* at 116.

<sup>313</sup> *See id.* at 100, 105 (Ben-Porat, J.).

<sup>314</sup> *See id.* at 125 (D. Levin, J.).

<sup>315</sup> *Id.* at 104 (Ben-Porat, J.).



may argue that readiness to allow recovery for every less-than-perfect life may open the floodgates of litigation.<sup>316</sup> Any person who is unsatisfied with a particular feature with which one was born might bring an action against the consultants who failed to reveal it prior to birth. For example, a right of action would be available for people born with a tendency toward obesity or baldness, for those unsatisfied with their height or eye color, and even for those born with lower-than-average intelligence. The proposed method (as opposed to the *Turpin* approach) lacks any filtering mechanism, raising the specter of endless litigation.

I find this fear unjustified. In a typical wrongful life case, the consultant fails to discover the risk of a congenital disability or fails to report it to the prospective parents, thereby preventing a decision to avoid procreation.<sup>317</sup> I believe that most future parents would not undergo examinations intended to reveal insignificant risks in the first place (for either value-laden or economic reasons). Under these circumstances, the consultant would not be obliged to reveal and report such risks. Even if future parents sought to ascertain the likelihood of slight defects, it is doubtful whether knowledge of that possibility would induce them to avoid procreation. This means that the causal connection between the consultant's conduct and the ultimate "harm" would be uncertain. Finally, assuming *arguendo* that the parents would avoid procreation if they knew that their child would suffer from a slight impairment, I do not think that failure to disclose that risk could constitute actionable negligence. Negligence is the creation of an unreasonable risk, and the reasonableness of the risk largely depends on the expected harm.<sup>318</sup> When the expected harm is minuscule, it is difficult to find an unreasonable risk.

#### D. Causation

##### 1. *Causal Relation Between the Negligence and the Disability*

Opponents of liability for wrongful life may argue that the disability for which the action is brought does not flow from the defendant's substandard conduct but from factors outside the defendant's control, such as heredity, chromosomal aberration, or a pathological disorder in the pregnant woman's amniotic sac.<sup>319</sup> Consequently, the required causal connection between the defendant's negligence and the plain-

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<sup>316</sup> See *id.* at 106.

<sup>317</sup> See Berenson, *supra* note 2, at 895-97.

<sup>318</sup> See KEETON ET AL., *supra* note 156, at 164-65.

<sup>319</sup> Cf. Berenson, *supra* note 2, at 895-97 (describing a common wrongful life case involving genetic counseling).

tiff's harm does not exist. The *Cour d'appel de Paris* used this argument, which the *Cour de cassation* later rejected, in the *Perruche* case.<sup>320</sup>

This argument reveals a misunderstanding of the subject under discussion. Wrongful life plaintiffs do not contend that they would not have been disabled but for the defendant's negligence, but rather that they would not have been born. The causal connection required in tort law is between the defendant's misconduct and the plaintiff's harm, and the harm in wrongful life cases—if one can truly speak of harm—is the shift from nonexistence to life with disability, not the actual creation of the disability. Where it is clear that the parents were legally capable of and factually inclined to avoid procreation had they been aware of the true risk, one can say that the defendant's misconduct caused the "harm" because without it, the plaintiff's life (with the congenital disability) would have been avoided altogether.<sup>321</sup>

## 2. *Causal Relation Between the Negligence and Life*

### a. *The Right to Abort and the Right to Prevent Conception*

At the outset, I differentiated between two kinds of wrongful life claims. One relies on preconception negligence and the other on postconception negligence. This distinction is critically important in terms of causality. A crucial question in wrongful life (and wrongful birth) actions stemming from postconception negligence is whether the plaintiff's mother was permitted to abort the child, for otherwise it is impossible to claim that the child would never have been born but for the defendant's negligence.<sup>322</sup> Put differently, if the law does not recognize the liberty to abort a disabled fetus, there is no causal connection between the consultant's negligence and the child's life of suffering.<sup>323</sup> If there is no alternative of nonexistence, the basic precondition of liability is not met.

The question of the liberty to abort when neither the pregnancy nor the birth involves any danger to the future mother is indeed complex and controversial. There are currently three approaches to this issue in Western jurisdictions. The first absolutely prohibits, for moral or religious reasons, abortions that are unnecessary to save the

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<sup>320</sup> See *Cour de cassation, Première chambre civile* [Cass. 1e civ.] [highest court of ordinary jurisdiction, first civil chamber] Mar. 26, 1996, Bull. civ. I, No. 156, pp. 109–10; see also *McKay v. Essex Area Health Auth.*, [1982] 1 Q.B. 1166, 1178 (Eng. C.A.) (Stephenson, L.J., concurring).

<sup>321</sup> See Douglas E. Peck, *Azzolino v. Dingfelder: North Carolina Court of Appeals Recognizes Wrongful Birth and Wrongful Life Claims*, 63 N.C. L. REV. 1329, 1339 (1985); Teff, *supra* note 265, at 430 n.37.

<sup>322</sup> See *Hummel ex rel. Hummel v. Reiss*, 608 A.2d 1341, 1345–47 (N.J. 1992).

<sup>323</sup> See *id.*

woman's life.<sup>324</sup> States that impose blanket prohibitions on abortions effectively bar any action premised on the claim that, but for negligence, there would have been an abortion.

The second approach does not recognize a general right of abortion but permits termination of pregnancy in certain statutorily defined circumstances, usually within a certain time and under certain procedural constraints. The list of circumstances in which abortion may be acceptable is closed and without basket provisions. However, it normally includes the situation in which cogent reasons support the assumption that the child would suffer from a serious irremediable disability.<sup>325</sup> The other alternatives pertain primarily to the physical and mental welfare of the pregnant woman.<sup>326</sup> In those countries, a plaintiff can argue that if the consultant had revealed and reported his or her disabilities on time, the plaintiff's mother would have aborted.

The third approach recognizes a woman's absolute right to terminate her pregnancy, at least until a certain stage of gestation. For example, in the well-known case of *Roe v. Wade*,<sup>327</sup> the U.S. Supreme Court held that a pregnant woman has an absolute right to abort a fetus during the first trimester of her pregnancy and even after that (but prior to fetal viability) the state can only regulate abortion in ways that are reasonably related to maternal health.<sup>328</sup> Subsequent to viability, states may regulate and even proscribe abortion except where it is necessary for the preservation of the mother's life and health.<sup>329</sup> A woman's right to terminate her pregnancy before viability stems from the right to privacy, which the Fourteenth Amendment guarantees, or from the general protection of unspecified rights under the Ninth Amendment. A similar view, with varying gestational

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<sup>324</sup> This seems to be the case in Ireland. See Joan L. Larsen, *Importing Constitutional Norms from a "Wider Civilization": Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1324 n.180 (2004) (noting Ireland's general ban on abortion except where the pregnant woman's life is at risk).

<sup>325</sup> See, e.g., Abortion Act, 1967, c. 87, § 1(1)(d) (Eng.); Penal Law, 5737-1977, [Special Volume] LSI 85 (1978) (Isr.) (Section 316(a)(3) states that "[t]he [medical] committee may, after obtaining the woman's informed consent, approve the interruption of pregnancy if it considers it justified on . . . the . . . ground[ that] . . . (3) the child is likely to have a physical or mental defect.").

<sup>326</sup> See, e.g., Abortion Act, 1967, c. 87, § 1 (Eng.); German Penal Code (Strafgesetzbuch) § 218a; Penal Law § 316(a) (Isr.).

<sup>327</sup> 410 U.S. 113 (1973).

<sup>328</sup> See *id.* at 164-65.

<sup>329</sup> See *id.* In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a plurality of the Court rejected the "rigid trimester framework" but affirmed the "essential holding" of *Roe*: a woman's right to have an abortion prior to viability, a state's right to regulate or proscribe abortions subsequent to viability in order to protect its interest in the potentiality of human life, and a state's interest from the beginning of the pregnancy in protecting the health of the woman and the life of the fetus. *Id.* at 846, 878.

limits, prevails in other countries.<sup>330</sup> As long as the pregnant woman has an absolute right to abort her fetus, the later-born child may argue that if the consultant had revealed and reported the disabilities on time, the mother would have aborted.

The parallel question in wrongful life (and wrongful birth) actions that focus on preconception negligence concerns the parents' right to avoid conception by use of contraceptives, sterilization, or the like. If contraceptives or sterilization procedures were prohibited, any action of this kind would have to be dismissed *in limine*.<sup>331</sup> This issue appears much simpler than the abortion issue and is definitely not as controversial. However, this has not always been the case. In the past, one could not take for granted the right to avoid conception (other than by total celibacy), especially in legal systems that developed under strong religious influence.

In the United States, for example, the Supreme Court first recognized a right to use contraceptives in the mid-1960s. In *Griswold v. Connecticut*,<sup>332</sup> decided only eight years before *Roe v. Wade*, the Court examined the constitutionality of a state statute that prohibited the use of contraceptives. The Court ruled that this statute, when applied to married couples, violated their constitutional right to marital privacy.<sup>333</sup> Seven years later, in *Eisenstadt v. Baird*,<sup>334</sup> the Court analyzed the constitutionality of a statute that prohibited individuals from selling, lending, transferring, or displaying contraceptives. As an exception to the prohibition, the statute permitted doctors to prescribe contraceptives for married couples and pharmacists to supply contraceptives in accordance with these prescriptions.<sup>335</sup> The Supreme Court held that the statute violated the Equal Protection Clause of the Fourteenth Amendment by treating married and unmarried persons differently.<sup>336</sup> The Court also opined that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>337</sup> To conclude, in the appropriate cases, one can claim that one would not have been conceived but for the negligence of another.

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<sup>330</sup> See Larsen, *supra* note 324, at 1320. As Larsen notes, however, "the United States is one of only six countries in the world that allows abortion, without restriction as to reason, until the point of viability." *Id.*

<sup>331</sup> *Cf. Hummel ex rel. Hummel v. Reiss*, 608 A.2d 1341, 1345-47 (N.J. 1992).

<sup>332</sup> 381 U.S. 479 (1965).

<sup>333</sup> See *id.* at 484-86.

<sup>334</sup> 405 U.S. 438 (1972).

<sup>335</sup> *Id.* at 441.

<sup>336</sup> *Id.* at 443, 453-55; see also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (holding that the state cannot prohibit the sale of contraceptives to minors).

<sup>337</sup> *Eisenstadt*, 405 U.S. at 453.

b. *The Expectant Parents' Discretion*

An action in tort for wrongful life relies on the claim that the plaintiff would not have been born but for the defendant's negligence. Two assumptions premise this claim. First, the expectant parents *could* have prevented the plaintiff's birth had they so desired. I elaborated on this assumption in the foregoing subsection. Second, had the parents known of the disability or its likelihood, they *would* have decided to avoid conception or to terminate the pregnancy.

The nature of the expectant parents' decision had they possessed the relevant information is of particular importance.<sup>338</sup> Should it transpire that the parents would not have avoided procreation, it would be impossible to impose liability on the consultant.<sup>339</sup> The parents' decision would then be the proximate cause of the infant's birth in a state of disability and would sever the causal connection between the defendant's negligence and the plaintiff's "harm."<sup>340</sup> If, on the other hand, the parents' determination not to bring a disabled child into the world was clear and unequivocal, the defendant cannot raise the lack-of-causality argument. In fact, causation will not pose a problem even when there is no certainty with regard to the prospective parents' decision if there is a better-than-even chance that they would have avoided procreation.<sup>341</sup>

Cases in which the parents seriously contemplated avoiding procreation but in which it is impossible to show that there was a better-than-even chance that they would have decided not to procreate seem more problematic. In my view, courts may resolve such cases by a variation of the loss-of-chance doctrine.<sup>342</sup> The likelihood that the parents would have decided to procreate even if they had known about the risk of congenital disability would not negate the child's right of

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<sup>338</sup> See *Harriton ex rel. Harriton v. Stephens*, (2006) 226 C.L.R. 52, paras. 177–81 (Austl.) (Hayne, J., concurring), available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/15.html>.

<sup>339</sup> See *Curlender ex rel. Curlender v. Bio-Sci. Labs.*, 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980).

<sup>340</sup> See *id.*

<sup>341</sup> See RESTATEMENT (SECOND) OF TORTS, *supra* note 236, § 433B cmt. a (“[Plaintiff] must make it appear that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the harm.”).

<sup>342</sup> The loss-of-chance doctrine usually applies if a healthcare provider negligently fails to reasonably minimize a preexisting risk. Under this doctrine, the plaintiff is compensated for the extent to which the defendant's negligence reduced the plaintiff's chance of achieving a better outcome. See George J. Zilich, *Cutting Through the Confusion of the Loss-of-Chance Doctrine Under Ohio Law: A New Cause of Action or a New Standard of Causation?*, 50 CLEV. ST. L. REV. 673, 676 (2003); cf. Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1354 (1980) (“[T]he loss of a chance of achieving a favorable outcome or of avoiding an adverse consequence should be compensable and should be valued appropriately, rather than treated as an all-or-nothing proposition.”).

action (assuming that this right was not negated for other reasons). However, such likelihood would factor into the assessment of damages.<sup>343</sup>

### III

#### A NEW CONCEPTUAL FRAMEWORK

##### A. Theoretical Foundations

As I endeavored to show in Part II, the only convincing reason for denial of tort liability for wrongful life rests not on policy considerations but on the internal conceptual boundaries of liability in tort. The child's action will fail because of the logical and practical inability to establish "harm" under the accepted meaning of that term. In a wrongful life case, we are unable to compare the plaintiff's pretort condition with the plaintiff's posttort condition because we cannot assess the intrinsic value of life itself, which is absent in a state of nonexistence. Consequently, we are unable to determine whether the pretort condition was preferable to the posttort condition. Moreover, tort law aims to place the plaintiff in a position equivalent to the one the plaintiff would have been in but for the defendant's misconduct. Because we know nothing about nonexistence, the system cannot achieve this goal. Furthermore, the plaintiff cannot logically aspire to restore the status quo because turning the wheel back would not only negate the plaintiff's physical entity but would also negate the plaintiff's legal personality together with any right to compensation.

In this Part, I contend that while tort liability for wrongful life has been properly denied, it is possible and appropriate to allow recovery within an alternative conceptual framework, which bears a greater correlation to the child's real aspirations. In my view, the action should be based on the claim that the defendant *promised* the plaintiff's parents that, subject to specified uncertainties, the plaintiff would be born without a certain defect and that the promise was not fulfilled. The action's goal is to place the plaintiff, as closely as possible, in the position the plaintiff would have been in had the promise been kept, as in the celebrated case of *Hawkins v. McGee*.<sup>344</sup>

The proposed model focuses on the existence of an undesired disability (in contradiction to the defendant's promise) rather than on the existence of undesired life. It hinges not on an impossible

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<sup>343</sup> I do not contend that this proposal necessarily fits with existing law in all states. However, it may be a natural development of the law in jurisdictions that recognize the loss-of-chance doctrine.

<sup>344</sup> 146 A. 641, 644 (N.H. 1929) (holding that the plaintiff could recover the difference between the value of a good hand and the plaintiff's disabled hand, given that a doctor falsely promised the plaintiff that surgery would make the plaintiff's hand "a hundred per cent good").

comparison between life with disability and nonexistence but on the comparison between life with a certain disability and life without it. Undeniably, the plaintiff could not have been born healthy, so life without disability cannot serve as the baseline for comparison in a tort action for wrongful life. The only world in which the plaintiff would not have been born disabled is the one sketched out by the defendant. The idea of failure to keep a promise pertaining to a state of affairs leads us quite naturally to the realm of contract law.

The attempt to delineate the borders between tort law and contract law raises considerable difficulties. Most of the defining features that scholars traditionally relied on to differentiate the two branches of law seem insufficient. For example, some might argue that the difference rests on the origin of the obligation. In contract law, obligations are undertaken voluntarily, whereas in tort, obligations are imposed by law irrespective of the parties' consent.<sup>345</sup> This distinction, however, is not entirely complete. On the one hand, the court may impose obligations not explicitly agreed on by the parties (or annul obligations that were agreed on) in contract as well as in tort.<sup>346</sup> This occurs, *inter alia*, when a court supplies contractual terms—especially on the basis of justice<sup>347</sup>—or modifies an agreement based on abstract principles such as the duty of good faith<sup>348</sup> or public policy.<sup>349</sup> Similarly, certain contracts implicitly incorporate statutory rights that cannot be waived irrespective of the parties' true will.<sup>350</sup> Occasionally, a dominant party unilaterally determines the contents of the contract without any real weight given to the wishes of the opposing party (as is usually the case with standard contracts).<sup>351</sup> On the other hand, voluntariness seems to play a significant role in modern tort law. For example, voluntary assumption of responsibility is a crucial factor in establishing a duty of care with regard to negligent omissions<sup>352</sup> or purely economic loss.<sup>353</sup>

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<sup>345</sup> See TRINDADE & CANE, *supra* note 158, at 8.

<sup>346</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* § 5.5, at 346 (3d ed. 1999).

<sup>347</sup> See *id.* § 7.16, at 500 (discussing how courts use "basic principles of justice" to fill gaps in contracts).

<sup>348</sup> See *id.* § 7.17, at 504 ("Courts have often supplied a term requiring both parties to a contract to exercise what is called 'good faith' or sometimes 'good faith and fair dealing[ ]' . . .").

<sup>349</sup> See *id.* §§ 5.2–5.4, at 326–43 (discussing generally the policies courts have developed to modify contracts on grounds of public policy).

<sup>350</sup> See, e.g., MICH. COMP. LAWS §§ 418.815, 421.31 (West 1999) (creating nonwaivable rights in the Worker's Disability Compensation Act and in the Employment Security Act).

<sup>351</sup> See FARNSWORTH, *supra* note 346, § 4.26, at 297–303 (discussing various judicial responses to standard form contracts).

<sup>352</sup> See CLERK & LINDSELL, *supra* note 182, at 4, 310–13.

<sup>353</sup> See *id.* at 343–44; Christopher Harvey, *Economic Losses and Negligence—The Search for a Just Solution*, 50 CAN. BAR REV. 580, 600, 616, 620 (1972).

One might argue that the distinction between tort law and the law of contracts pertains to the notion of consideration. A person assumes a contractual obligation in exchange for a valuable consideration, whereas the law imposes a tort obligation on persons who have not received anything in return.<sup>354</sup> However, that distinction is somewhat limited because nominal consideration may be sufficient to create an enforceable contract in many jurisdictions<sup>355</sup> and certain types of undertakings are binding even without any consideration.<sup>356</sup>

One could also argue that contractual rights and correlative duties stem from the initial interaction between the parties, whereas rights and duties in tort law can exist between two parties who were strangers to one another prior to the occurrence of harm.<sup>357</sup> This distinction is also deficient. A contract for the benefit of a third party may confer rights on a person who did not communicate with the party that owes the correlative duty.<sup>358</sup> At the same time, the intensity of the pretort interaction between the two parties may be significant in establishing a duty of care in negligence.<sup>359</sup>

It seems to me that the most substantive and fundamental distinction between the two branches of law is the functional distinction: “[Many] contractual obligations are ‘productive’ in the sense that they are obligations to produce advantageous outcomes, whereas the law of torts is predominantly ‘protective’ in the sense that the obligations it imposes are usually obligations to avoid disadvantageous outcomes.”<sup>360</sup>

More precisely, tort law and the law of contracts deal with different types of bilateral interactions. Tort law deals with interactions in which one of the parties detrimentally changes the position of the other.<sup>361</sup> Contract law, on the other hand, deals with interactions in which at least one of the parties promised something to the other and in so doing created an expectation that did not formerly exist.<sup>362</sup> A person found liable in tort is required to place the victim in the position the victim would have been in but for the interaction between

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354 See TRINDADE & CANE, *supra* note 158, at 8.

355 See FARNSWORTH, *supra* note 346, § 2.11, at 69–72.

356 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 82–94 (1981).

357 See TRINDADE & CANE, *supra* note 158, at 7–8.

358 See FARNSWORTH, *supra* note 346, § 10.7, at 692–94.

359 Many common-law jurisdictions condition liability in negligence on pretort proximity. See, e.g., CLERK & LINDSELL, *supra* note 182, at 282–84; ALLEN M. LINDEN, CANADIAN TORT LAW 268–71 (7th ed. 2001).

360 TRINDADE & CANE, *supra* note 158, at 7–8.

361 See KEETON ET AL., *supra* note 156, at 6.

362 Cf. CLERK & LINDSELL, *supra* note 182, at 5 (contrasting the functions of contract and tort).



them.<sup>363</sup> A person found liable in contract must place the other party in the position the latter would have been in had the latter's expectation, which was the product of their interaction, been realized.<sup>364</sup>

This distinction between these two branches of law dictates the appropriate solution for the wrongful life challenge. Plaintiffs cannot expect a remedy that places them in a position they would have been in but for the defendants' substandard conduct. A plaintiff can, however, aspire to be placed as closely as possible to the position that the defendant promised he or she would occupy. Hence the proper conceptual framework for the action is contractual.<sup>365</sup>

Still, realizing that contract law is the appropriate conceptual framework for the child's action is only the first stage of the analysis. I must now show that the abstract notion can do a concrete legal garb. In my view, the legal formulation of the child's action would be that the consultant breached a contract for the benefit of a third party (the plaintiff) concluded between the consultant and the plaintiff's parents in which the consultant warranted that the plaintiff would not be born with a particular disability.<sup>366</sup> This claim derives from two doctrinal arguments that require further examination. First, within the contractual relationship between the consultant and the parents, the former guaranteed the accuracy of the representation made in the performance of the contract. Second, the contract between the consultant and the parents is for the benefit of a third party, namely the child whose birth occurred after the parties concluded the contract.

## B. Substantiating the Doctrinal Arguments

### 1. *Commitment to the Accuracy of the Representation*

#### a. *The Source of the Duty*

The first question to address stems from the nature of the obligation under discussion. Clearly, the contract between the consultant and the parents includes an implied duty of the consultant to provide

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<sup>363</sup> Expectation occasionally provides a basis for damages in tort. For example, a person liable for interference with a contract must compensate the plaintiff for "the pecuniary loss of the benefits of the contract." RESTATEMENT (SECOND) OF TORTS, *supra* note 238, at § 774A(1)(a). However, in these cases the expectation did not stem from the interaction between the plaintiff and the defendant. Rather, it existed irrespective of that interaction and, as such, formed part of the status quo that tort law protected.

<sup>364</sup> See, e.g., FARNSWORTH, *supra* note 346, § 12.8, at 784; R.D. Taylor, *Expectation, Reliance, and Misrepresentation*, 45 MOD. L. REV. 139, 140 (1982).

<sup>365</sup> One could argue that misrepresentation law may protect the expectation interest. See Michael B. Kelley, *The Rightful Position in "Wrongful Life" Actions*, 42 HASTINGS L.J. 505, 549-56 (1991). In my view, this constitutes an unwarranted extension of tort law.

<sup>366</sup> The consultant's warranty does not relate to any disability, only to the specific defects that the consultant promised to reveal. For example, if the prospective parents requested that the consultant examine the risk of Tay-Sachs disease, the consultant would not be liable for the birth of a child suffering from a polycystic kidney disease.

prenatal consultation according to accepted standards of expertise and care.<sup>367</sup> However, even though this implied duty doubtlessly exists and even though one can rarely dispute its breach in a wrongful life setting, its existence and breach cannot benefit the plaintiff for a simple reason. The breach of the contractual duty of care consists of the consultant's negligence in providing medical or quasi-medical services. Were it not for the breach, the parents would have received accurate information that would have changed their decision with regard to procreation, and they would not have given birth to the plaintiff. Following the breach of the contractual duty, the parents received inaccurate information and decided to bring the child into the world. The "harm" caused to the child by the breach of contract is the same "harm" that forms the bone of contention in a tort action—the disparity between life with disability and nonexistence.<sup>368</sup> So the violation of the contractual obligation to exercise reasonable care does not solve the problem.

The solution that I propose is based on an additional contractual obligation—an assurance of the *accuracy* of the representation concerning the potential child's state of health, which was ultimately found erroneous. In my opinion, this obligation derives from the contract between the consultant and the plaintiff's parents. Undoubtedly, the consultancy contract intended to provide the prospective parents with accurate and reliable information on which they could base their decision. The parents went to the consultant for definite information and not for speculative advice. They would not have visited the consultant in the first place had they not assumed they would receive accurate information. They would not have relied on the consultant's statement unless they had been convinced of its accuracy. The consultant plainly knew that the plaintiff's parents would make a fateful decision relying on the accuracy of the statement. The mutual understanding that the statement conforms to reality goes to the root of the contract—without some kind of commitment to its accuracy, the contract is futile. So we may say that the contract contains an implied warranty that the consultant's statement is true,<sup>369</sup> subject to certain qualifications to be specified below.<sup>370</sup> Arguably, the assur-

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<sup>367</sup> See, e.g., *Hegyves v. Unjian Enters., Inc.*, 286 Cal. Rptr. 85, 93 (Cal. App. 1991) (“[T]he doctor impliedly warrants competency . . .”); FARNSWORTH, *supra* note 346, § 7.17, at 509 (observing that a professional usually has a duty to make reasonable efforts).

<sup>368</sup> See *Rubin ex rel. Rubin v. Hamot Med. Ctr.*, 478 A.2d 869, 872 (Pa. Super. 1984) (rejecting the plaintiff's contractual wrongful life claim because it alleged the same harm that tort law protected against).

<sup>369</sup> The implied warranty may stem from the actual expectations of the parties, “an objective test of whether one party should reasonably have known of the other's expectation,” or “basic principles of justice.” FARNSWORTH, *supra* note 346, § 7.16, at 499–500.

<sup>370</sup> See *infra* Part III.B.1.

ance of accuracy may also derive from the duty of good faith to the extent that courts use this duty to protect the spirit of the contract.<sup>371</sup>

The idea that one who provides information to another may be bound by one's representation, at least after the recipient has relied on it, is not in itself novel. A striking example appears in the law of estoppel. Under the ancient doctrine of equitable estoppel (also known as *estoppel in pais*), a person who made a representation of fact with a reasonable expectation that the addressee would rely on it is precluded from alleging or proving facts that contradict that representation.<sup>372</sup> Insofar as the estopped party's representation binds that party, the other party is placed in the position that he or she would have been in had this representation been true. Even though this outcome resembles the one we wish to attain in the matter under discussion, the doctrine of equitable estoppel does not apply here because the child's action is not in any way based on the argument that the child has no disability.

A more pertinent manifestation is the concept of warranty in the law of contract. "A warranty is an assurance by one party to a contract of the existence of a fact upon which the other party may rely."<sup>373</sup> Clearly, such an assurance may be included in the contract explicitly.<sup>374</sup> However, it may also derive from express or implied representations of fact, as is frequently the case where one party makes a representation that induces the other to enter the contract.<sup>375</sup> In England, courts reached a similar result through the collateral (or ancillary) contract theory.<sup>376</sup> When a contracting party made a representation that did not appear in the ultimate contract but which induced the other to enter the contract, courts occasionally ruled that the representation was included in a preliminary contract, ancillary to the primary contract, on the basis of which the primary contract was formed. The ancillary contract thereby guaranteed the accuracy of the relevant precontractual statements.<sup>377</sup>

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<sup>371</sup> See, e.g., E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 672 (1963) ("Good faith performance has always required the cooperation of one party where it was necessary in order that the other might secure the expected benefits of the contract. And the standard for determining what cooperation was required has always been an objective standard, based on the decency, fairness or reasonableness of the community . . .").

<sup>372</sup> See FARNSWORTH, *supra* note 346, § 2.19, at 91-94; Silas Alward, *A New Phase of Equitable Estoppel*, 19 HARV. L. REV. 113, 113 (1905); Taylor, *supra* note 364, at 143.

<sup>373</sup> See *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946).

<sup>374</sup> See, e.g., *Carolet Corp. v. Garfield*, 157 N.E.2d 876, 878-80 (Mass. 1959); *CBS Inc. v. Ziff-Davis Publ'g Co.*, 553 N.E.2d 997, 998 (N.Y. 1990).

<sup>375</sup> See Steven Z. Hodaszy, Note, *Express Warranties Under the Uniform Commercial Code: Is There a Reliance Requirement?*, 66 N.Y.U. L. REV. 468, 468 (1991) (discussing U.C.C. § 2-313).

<sup>376</sup> See, e.g., *J. Evans & Son (Portsmouth) Ltd. v. Andrea Merzario Ltd.*, [1976] 1 W.L.R. 1078, 1081 (Eng. C.A.).

<sup>377</sup> See, e.g., *id.*

The most interesting question, however, is whether a court may find an implied warranty even when the representation was not made prior to the formation of the contract but during performance, as is the case in wrongful life settings. An illuminating insinuation exists in the case of *Quagliana v. Exquisite Home Builders, Inc.*<sup>378</sup> In that case, the plaintiffs desired to build a house in Salt Lake City with a view over a well-known valley.<sup>379</sup> They hired the defendant to prepare a construction plan before they found a suitable lot.<sup>380</sup> After finding a lot, they asked the defendant to ascertain its suitability for the planned house.<sup>381</sup> The defendant advised them that the lot was indeed suitable for the construction of a house with the requested view, and they consequently purchased that lot.<sup>382</sup> After construction began, it turned out that building the house as planned (with a view of the valley) was impossible due to relevant zoning ordinances and restrictive covenants.<sup>383</sup> Construction ceased.<sup>384</sup>

The Supreme Court of Utah held that, in advising plaintiffs that they had selected a suitable lot for the purpose of the contract and that they could properly place the house on it, the defendant warranted that a certain state of facts existed that did not truly exist.<sup>385</sup> Defendant's warranty was "analogous to that of one who warrants that a ship has already arrived at a certain port, thereby promising something impossible if, in fact, the ship has not arrived."<sup>386</sup> The court added that the warrantor, by making such a warranty, promised to pay damages if the facts were not as warranted—it was in fact an undertaking that the facts existed.<sup>387</sup> In other words, the court concluded that based on the essence of the contract, the defendant warranted the accuracy of the information that it gave to the plaintiffs during the performance of that contract.<sup>388</sup> If a warranty existed in *Quagliana* where providing the information was not the central purpose of the contract, such a warranty could also exist in the wrongful life setting where providing accurate information is the underlying purpose of the contract.

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378 538 P.2d 301 (Utah 1975).

379 *See id.* at 303.

380 *See id.*

381 *See id.*

382 *See id.*

383 *See id.* at 304.

384 *See id.* at 303–04.

385 *See id.* at 309.

386 *Id.*

387 *See id.*

388 *See id.*

b. *Limits of the Duty*<sup>389</sup>

As a rule, an implied contractual term must comport with the parties' reasonable expectations or with the essence of the agreement.<sup>390</sup> For this reason, the consultant's warranty of the accuracy of the representation cannot be unqualified.

Both parties are aware that the consultant's foresight is limited. The level of accuracy that the consultant may provide depends, for example, on the degree of scientific and technological progress, on inherent uncertainties in medical and quasi-medical tests, and on the limitations of human cognitive and analytical abilities. The consultant knows of some of these limitations and may disclose them to the expectant parents. To the extent that the consultant does so, the consultant explicitly changes the prospective parents' legitimate expectations, thereby qualifying the warranty and absolving himself or herself from any liability for inaccuracies deriving from such limitations. Yet a consultant who fails to do so implicitly assures the parents of the accuracy of the representation even when a mistake stems from those constraints.

On the other hand, factors of which the consultant is not and should not be aware at the time of consultation may also lead to mistaken conclusions. Assurance of the accuracy of the representation relies on the assumption that such factors do not actually exist. The reasonable consultant would not give an unqualified undertaking that an opinion is free of all mistakes if the consultant were aware of factors liable to impair its accuracy. Similarly, the expectant parents understand that the consultant's assurance is subject to reasonable presumptions about the degree of accuracy that can be reached in medical or quasi-medical consultancy. Refuting these presumptions removes the basis of the assurance itself. The conclusion is that the warranty does not apply where it transpires *ex post* that the mistake resulted from factors that the consultant, and those from whom the consultant received assistance (such as laboratory workers or technicians), did not know and should not have known when providing consultation.

Assume, for example, that the defendant performed a test or used equipment that the consultant and the scientific community considered reliable at the time of the consultation but which proved unreliable following scientific and technological developments. A reasonable consultant would not have guaranteed the scientific validity of the examinations performed, or the reliability of equipment, beyond the time of consultation. The expectant parents were also

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<sup>389</sup> See *supra* note 366 and accompanying text.

<sup>390</sup> See *supra* note 369 and accompanying text.

aware that the accuracy of the information that they received was subject to the scientific and technological limitations existing at the time of the consultation. The warranty of accuracy is based on the assumption that the examinations and the equipment are indeed reliable. If it transpires *ex post* that the presumptions were erroneous and that this was the cause of the consultant's mistake, then the warranty does not apply.<sup>391</sup> Still, the fact that the particular consultant has been unaware that the examinations or the equipment were not reliable at the time of consultation will not always limit the warranty because a reasonable consultant must keep abreast of scientific and technological discoveries and innovations pertaining to one's area of expertise.<sup>392</sup> Accordingly, where the consultant is unaware of the limitations of the examination or the equipment due to the consultant's own negligence, the qualification does not apply, and an action based on the warranty could succeed.<sup>393</sup>

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<sup>391</sup> A similar qualification applies in products liability law under the state-of-the-art defense. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d, (1998) ("[T]he test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe."); David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. ILL. L. REV. 743, 782-84 (1996) (explaining the use of the "state of the art defense" in products liability cases).

<sup>392</sup> See RESTATEMENT (SECOND) OF TORTS, *supra* note 236, § 299A ("[O]ne who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."); Laura D. Seng, *Legal and Regulatory Barriers to Adequate Pain Control for Elders in Long-Term Care Facilities*, 6 N.Y. CITY L. REV. 95, 104 (2003) ("[P]hysicians have an affirmative duty to remain updated on continuing developments in their field of practice.").

<sup>393</sup> Since the consultancy contract is based on the assumption that the consultant knows or should know of sources of uncertainty, the claim that a mistake resulted from a factor that the consultant did not know and should not have known at the time of consultation is a defense that the consultant must prove. One may argue that enabling plaintiffs to recover without having to prove the defendant's negligence confers on them an advantage that the law does not customarily confer on plaintiffs in medical malpractice cases. However, this argument overlooks two important facts. First, courts frequently shift the burden of proof of substandard conduct in ordinary medical negligence cases from the plaintiff to the defendant through the principle of *res ipsa loquitur* ("the thing speaks for itself"). See, e.g., *Ybarra v. Spangard*, 154 P.2d 687, 689 (Cal. 1945) ("Without the aid of the [*res ipsa loquitur*] doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's [sic] negligence, would be entirely unable to recover . . ."); *Anderson v. Somberg*, 338 A.2d 1, 5 (N.J. 1975) ("[W]here an unconscious or helpless patient suffers an admitted mishap not reasonably foreseeable and unrelated to the scope of the surgery . . . those who had custody of the patient, and who owed him a duty of care as to medical treatment . . . can be called to account for their default. They must prove their nonculpability, or else risk liability for the injuries suffered."). Second, the action here is not an ordinary medical malpractice action; it concerns the breach of an assurance of the existence of a certain state of affairs rather than the breach of an obligation to act in a certain manner.

## 2. *Contract for the Benefit of the Unborn*

So far, I have shown that the contract between the consultant and the plaintiff's parents contains a warranty that the consultant's representation with regard to the likelihood of the plaintiff's birth with disabilities is correct. I must now demonstrate that this warranty can also inure to the benefit of the child even though the child was not a party to the contract and was not even alive at the time of its formation.

We must analyze the child's right on two levels of abstraction. On the general level, we must ascertain whether a contract between *A* and *B* can confer a right of action on *C* even where *C*'s birth occurred after the formation of the contract. On the concrete level, we must examine whether the child—who was not a party to the contract—can benefit from the consultant's warranty of accuracy.

We start with the general question. Recall that under traditional common law, a child acquires legal personality upon live birth.<sup>394</sup> Consequently, a person not yet born at the time of the formation of a contract cannot be a party thereto. For the same reason, a contract may not confer any rights on a third party prior to birth. However, this does not necessarily imply that a contract between *A* and *B* cannot include a provision for the benefit of a third person whose birth will take place only after the formation of the contract. Evidently, the third party's right is contingent on birth and only crystallizes after the third party comes into the world and acquires legal personality.

The English legislature explicitly recognized this possibility within the Contracts (Rights of Third Parties) Act,<sup>395</sup> which came into force at the end of 1999. This Act heralded a revolution in English law by recognizing the power of a contract to confer rights on a person not party to the contract.<sup>396</sup> Section 1(3) explicitly relates to the status of a person who did not exist at the time of the formation of the contract. It provides that, to acquire rights under the contract, a non-party "must be expressly identified in the contract by name, as a member of a class or as answering a particular description, but need not be in existence when the contract is entered into."<sup>397</sup> Even persons who did not exist at the time that the parties formed the contract, such as an unincorporated company or an unborn child, may acquire rights under the contract after they come into existence.

The law in the United States has been similar to the current state of the law in England for decades. The fact that the parties did not know the identity of the third-party beneficiary when the contract was

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<sup>394</sup> See Jost, *supra* note 158, at 634.

<sup>395</sup> Contracts (Rights of Third Parties) Act, 1999, c. 31 (Eng.).

<sup>396</sup> Prior to this Act, the rule was that only contracting parties could base a claim on the contract. See *Tweddle v. Atkinson*, (1861) 121 Eng. Rep. 762, 764 (Q.B.).

<sup>397</sup> Contracts (Rights of Third Parties) Act § 1(3).

formed is immaterial.<sup>398</sup> Arguably, this should also be the case if the contracting parties did not know the beneficiary's identity because the beneficiary did not exist at the time of the contract's formation. It follows that a contract for the benefit of a third party may ultimately confer rights on a person who was not yet born at the time of the contract's formation. However, these rights are contingent on the beneficiary's birth because rights cannot be conferred on someone who lacks legal personality.<sup>399</sup>

American case law provides at least two examples of contracts that may confer rights on minors born after their formation.<sup>400</sup> The first is a surrogate-parenting agreement. In the famous *In re Baby "M"*<sup>401</sup> case, Mr. and Mrs. Stern and Mrs. Whitehead concluded such an agreement. Under its terms, Mrs. Whitehead was to be inseminated with Mr. Stern's semen, carry the child to term, and relinquish custody to the Sterns after delivery. However, Mrs. Whitehead refused to give up the child following birth. The Sterns filed an action to enforce the contract.<sup>402</sup> The court held that the surrogate-parenting agreement was valid and enforceable in principle, and that Mrs. Whitehead had breached that contract by refusing to relinquish custody of the child.<sup>403</sup> The main question was whether specific performance was appropriate under the circumstances,<sup>404</sup> and the court answered affirmatively.<sup>405</sup> Incidentally, the court held that a third-party beneficiary need not exist at the conclusion of the contract. In particular, although Baby M was not yet alive when the parties formed the surrogate-parenting agreement, there could be no doubt that it existed for the child's benefit insofar as it sought to "bestow life and

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<sup>398</sup> See 17A AM. JUR. 2D *Contracts* § 443 (2004); FARNSWORTH, *supra* note 346, § 10.3, at 679 ("[C]ourts have not required that the person to be benefitted be identified at the time the promise is made.").

<sup>399</sup> An individual with no legal personality cannot sue to enforce a breached contract right. See Jost, *supra* note 158, at 634 (explaining that "full legal capacity" does not attach until one reaches the age of majority).

<sup>400</sup> These examples do not provide an exhaustive list of the variety of contracts that may confer rights on minors born after the formation of such contracts. For example, several states recognize the concept of "covenant marriage." The children who benefit materially and emotionally from these covenant marriage contracts fall into the category of "beneficiaries." See, e.g., Katherine S. Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 64-65 (1998).

<sup>401</sup> 525 A.2d 1128 (N.J. Super. Ct. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1987).

<sup>402</sup> See *id.* at 1142-46.

<sup>403</sup> See *id.* at 1166.

<sup>404</sup> Under New Jersey law, specific performance is an equitable (discretionary) remedy.

See *id.*

<sup>405</sup> See *id.* at 1175.



provide for the child's best interests."<sup>406</sup> The child could thus seek redress under the contract.<sup>407</sup>

Another type of contract that may confer rights on a person not in existence at the time of the contract's formation is a contract for the provision of medical or quasi-medical services to a woman who intends to bring a child into the world so as to ensure that the child is born healthy. The courts have consistently held that at least the contractual duty to exercise due care in providing such services confers a correlative right on the expectant mother and on the child who is ultimately born as a third-party beneficiary.<sup>408</sup> A few examples will suffice to demonstrate this point.

In *Walker v. Rinck*,<sup>409</sup> a woman undertook blood tests during her first pregnancy out of fear that she had Rh-negative blood.<sup>410</sup> The tests erroneously showed that she had Rh-positive blood.<sup>411</sup> Consequently, she did not receive a substance intended to avoid the formation of harmful antibodies when a mother with Rh-negative blood gives birth to an Rh-positive child at the time of the birth of her first child.<sup>412</sup> In the aftermath, the woman gave birth to three children with congenital defects who later filed suits against their mother's physician and the laboratory that performed the blood tests.<sup>413</sup> The court explained that while the physician's duty to the patient arises from the contractual relationship between them, the physician may also owe a duty to a third party who benefits from the consensual relationship where the professional has actual knowledge that the services provided are, in part, for that person's benefit.<sup>414</sup> The plaintiffs in this case were the beneficiaries of the consensual relationship between their mother and her physician, and the latter knew that the treatment was intended to protect his patient's future children from being injured in utero.<sup>415</sup>

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<sup>406</sup> *Id.* at 1171.

<sup>407</sup> *See id.* at 1171-77; *see also* Barbara L. Keller, *Surrogate Motherhood Contracts in Louisiana: To Ban or to Regulate?*, 49 *LA. L. REV.* 143, 166 (1988).

<sup>408</sup> Several courts have held that the contract between the doctor and the mother may confer additional rights on the child. For example, in *Jones v. Jones*, 144 N.Y.S.2d 820, 826 (N.Y. Sup. Ct. 1955), the court stated that the child was a third-party beneficiary of the mother-doctor prenatal-care contract and that the child could consequently enjoy the doctor-patient privilege after birth. The court did not base its decision on this argument, however, because the same doctor eventually treated the child following birth, thereby making the child the doctor's patient for the purpose of the doctor-patient privilege.

<sup>409</sup> 604 N.E.2d 591 (Ind. 1992).

<sup>410</sup> *Id.* at 592.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.*

<sup>413</sup> *Id.* at 592-93.

<sup>414</sup> *Id.* at 594-95.

<sup>415</sup> *Id.*; *cf.* *Carucci v. Maimonides Med. Ctr.*, 641 N.Y.S.2d 725, 727-28 (N.Y. App. Div. 1996) (Altman, J., dissenting in part) (holding under similar circumstances that the child

In *Hegyesh v. Unjian Enterprises, Inc.*,<sup>416</sup> a woman was injured in a car accident. Two years after the accident, she conceived, but due to injuries sustained in the accident, her child was born prematurely with injuries related to the premature birth.<sup>417</sup> The child sued the employer of the driver who caused the accident.<sup>418</sup> Although the decision relating to the defendants' liability is not important here, the court made some significant incidental remarks. It observed that the doctor-patient contract contains an implied warranty of competency in rendering medical care and advice.<sup>419</sup> When a doctor gives care and advice to an expectant mother to ensure the birth of a healthy child, the child is "tantamount to a foreseeable third-party beneficiary of that contract" and as such, enjoys independent protection against incompetent treatment or advice.<sup>420</sup>

It is true that *Walker* and *Hegyesh* dealt with the existence of a duty of care in an action for negligence. Yet, the court's assumption in both cases was that a contract between a woman and her doctor could also confer rights on a child born after the contract's formation provided that the contract intended to protect an interest of the future child.

This leads us to the concrete question: can the child in a wrongful life setting seek redress on the basis of the consultant's warranty of accuracy as a third-party beneficiary of the contract between the consultant and the child's parents? A third party can acquire rights under a contract if it can be shown that the contracting parties intended to confer a benefit on that third party.<sup>421</sup> Some courts have held that intent to benefit the third party was insufficient and have required intent to confer a direct right against the promisor,<sup>422</sup> but the prevail-

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is akin to a third-party beneficiary of a contract arising out of the consensual relationship between the mother and her doctor).

<sup>416</sup> 286 Cal. Rptr. 85 (Cal. Ct. App. 1991).

<sup>417</sup> *Id.* at 86.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.* at 93.

<sup>420</sup> *Id.*

<sup>421</sup> See, e.g., *AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co.*, 420 F.3d 751, 755 (8th Cir. 2005); *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 982 (11th Cir. 2005); *Hamill v. Md. Cas. Co.*, 209 F.2d 338, 340-41 (10th Cir. 1954); *Sachs v. Ohio Nat'l Life Ins. Co.*, 148 F.2d 128, 130 (7th Cir. 1945); *Paducah Lumber Co. v. Paducah Water Supply Co.*, 12 S.W. 554, 555 (Ky. 1889); cf. RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (explaining that, in order to acquire rights under a contract as a nonparty, one must show that such a ruling is "appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance").

<sup>422</sup> E.g., *Colonial Disc. Co. v. Avon Motors Inc.*, 75 A.2d 507, 509-11 (Conn. 1950) ("[T]he ultimate test to be applied is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party . . ."); *Am. Pipe & Constr. Co. v. Harbor Constr. Co.*, 317 P.2d 521, 526 (Wash. 1957).

ing view is that intent to benefit suffices.<sup>423</sup> As in other cases, courts may deduce the parties' intentions from the contract in its entirety, construing it in light of the circumstances surrounding its formation.<sup>424</sup> Obviously, where an explicit contractual provision attests to the parties' intent to benefit a third party, the court will give effect to that provision. However, the absence of such provisions will not prevent third parties from proving that they were intended beneficiaries of the contract.

The law in England is quite similar to the law in the United States. In England, Section 1 of the Contracts (Rights of Third Parties) Act<sup>425</sup> states that "a person who is not a party to the contract . . . may in his own right enforce a term of the contract if (a) the contract expressly provides that he may, or (b) . . . [if] the term purports to confer a benefit on him," unless it appears—on a proper construction of the contract—that "the parties did not intend the term to be enforceable by the third party."<sup>426</sup> Under the Act, a third party may acquire rights under the contract in the absence of an express provision to that effect if there was an intent to benefit the third party. The Act establishes a refutable presumption that the contracting parties intended it to be enforceable by the third party if a contractual term purported to benefit that third party.

It seems to me that under the intent-to-benefit test, the child may have a contractual cause of action against the consultant. The consultant's warranty as to the accuracy of the representation obviously protects an important interest of the parents. It enables them to demand, in appropriate circumstances, the neutralization of any discrepancy between reality and the promised state of affairs. If the consultant warranted that the mother would give birth to a healthy child and this statement was mistaken, the consultant would have to place the parents in a position equivalent to parenting a healthy child.<sup>427</sup> Nonetheless, the warranty is also intended to serve the interest of the future child. When the consultant promises the expectant

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<sup>423</sup> See FARNSWORTH, *supra* note 346, § 10.3, at 678–79.

<sup>424</sup> See Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1712, 1770 (1997).

<sup>425</sup> Contracts (Rights of Third Parties) Act, 1999, c. 31 (Eng.).

<sup>426</sup> *Id.* § 1(1)–(2) (emphasis added).

<sup>427</sup> In principle, the parent could use this warranty in cases of a "reverse" mistake. If the mother decided to terminate her pregnancy or to not conceive based on the consultant's mistaken statement that her offspring would suffer from a certain defect, enforcement of the warranty would put her in a position equivalent to motherhood of a defective child. However, the mother's decision to avoid procreation effectively expresses her preference for nonparenthood over parenthood of an impaired child. This being the case, the warranted position would make her worse off than her current position, so there is no compensable harm. I assume, therefore, that under these circumstances, the mother would prefer to bring an ordinary action in tort that would place her in the position that she would have occupied if the consultant had not been negligent.

parents that their child will not suffer from a specific defect, this promise primarily, directly, and essentially concerns the state of the child.<sup>428</sup> The consultant promises that the child will not have a disability. The promise with regard to the state of the parents is derivative. Accordingly, if the representation proves incorrect, the consultant should have to place the child as much as possible in a position similar to that which the child would have been in had reality conformed to the representation.

Some may argue that parents seek the consultant's advice merely for their own sake because the parents are only interested in the possibility of having to bear the economic and emotional burdens involved in rearing a disabled child. Consequently, under such an objection, the consultant's warranty relates only to the position of the parents themselves and not to that of their future offspring. But this distinction seems contrived. Prospective parents who seek prenatal or pre-conception advice are not interested exclusively in their own future.<sup>429</sup> They are also, and primarily, concerned with their potential child's health. Parents naturally wish the best life for their child and want to ensure that their child will not live in constant pain. In addition, parents most likely do not want their child to cope with the crushing knowledge that they would have preferred not to have brought the child into the world had they known in advance what was ultimately revealed. If the consultant promised that their child would not suffer from a certain defect, then parents expect that promise to be kept in full. The consultant for his part understands this very well. Accordingly, if a disabled child is born, placing that child as much as possible in the promised position is a substantive and integral part of enforcing the warranty. We may thus say that the warranty is intended to benefit both the child and the parents. So according to the Anglo-American view, the child may enforce this warranty in his or her own name.<sup>430</sup>

### C. Advantages and Disadvantages

We observed that in the typical wrongful life setting, the consultant warrants the accuracy of his or her representation to the plaintiff's parents.<sup>431</sup> The child, as well as the parents, may enforce that war-

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<sup>428</sup> Cf. *Hegyesh v. Unjian Enters., Inc.*, 286 Cal. Rptr. 85, 93 (Cal. App. 1991) (“[A] woman who wishes to conceive and keep her child engages a physician . . . to ensure the birth of a healthy infant. The latter consideration is uppermost in the minds of both a woman and her doctor.”).

<sup>429</sup> See *id.*

<sup>430</sup> A contract may meet the intent-to-benefit test even if the parties' intent was not exclusively to benefit the third party, as the primary purpose of contracting parties is commonly to benefit themselves. See FARNSWORTH, *supra* note 346, § 10.3, at 679–80.

<sup>431</sup> See *supra* Part III.B.

ranty. This means that, if the representation is incorrect, the consultant must place the child (and the parents) in a position that conforms to the representation. True, the consultant's promise was that the child would come into the world without a certain disability whereas the child could not have been born healthy, and no one—including the consultant—can cure the child after birth. We cannot oblige the consultant to change reality, so as to make it conform to the statement. Still, nothing precludes awarding expectancy damages that would place the child in a position fairly equivalent to the one promised.<sup>432</sup>

This proposed model is clearly preferable to the *Turpin* approach. First, the child's cause of action does not rely on the impossible comparison between life with disability and nonexistence, which the traditional model requires. Second, recognizing the child's right does not necessitate a value judgment that may offend the dignity of disabled individuals and of the plaintiff in particular. Third, the assessment of damages is not an impossible task. Fourth, this proposed model does not discriminate between children with varying kinds of defects. Every child whose position differs from what the parents' consultant promised receives damages. Fifth, when a consultant provides information to a pregnant woman, contractual liability does not depend on the right to abort, which may, in certain legal systems and under particular circumstances, bar an action in tort. Sixth, there is no need to determine what the parents would have done had they known the truth in advance. Thus, we avoid a perplexing, speculative, and potentially vexing discussion. The warranty theory is also preferable to Justice Barak's approach in *Zeitsov* because it does not contradict the most fundamental principles of the branch of law on which it is based.<sup>433</sup>

It would appear that the central deficiency of the proposed model lies in its limited scope of application. The warranty theory applies only to the first category of wrongful life cases, namely cases where the plaintiff's parents decided to bring the child into the world following the defendant's representation that their child would not be disabled. This theory does not apply to cases like *Speck v. Finegold* in which the parents, being aware of the risk of congenital disability, wished to avoid procreation and the defendant was negligent in per-

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<sup>432</sup> See *Quagliana v. Exquisite Home Builders*, 538 P.2d 301, 309 (Utah 1975) ("By making such a warranty [in the context of property] the warrantor promises to pay damages if the facts are not as warranted . . ."); see also *Metro. Coal Co. v. Howard*, 155 F.2d 780, 784 (2d Cir. 1946) ("[A warranty] amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.").

<sup>433</sup> See *supra* notes 306–18 and accompanying text.

forming an act intended to prevent conception or birth.<sup>434</sup> In these cases, the defendant did not promise the parents a healthy child. The consultant promised, at the very most, that no child would be born at all. This takes us back to the starting point: is nonexistence (the promised state) better than life with disability (the current state)? In those cases, the fundamental difficulty that would arise in a tort action would also arise in a contract action. Consequently, in the second category of wrongful life cases, the child can recover neither in tort nor in contract. The plaintiff must be content with an indirect benefit from the parents' action for wrongful birth and with social-security benefits where available. It appears, therefore, that two types of indistinguishable cases are treated differently.

But this deficiency is facially apparent. The similarity between the two categories exists merely from a tort-law perspective. The factual and legal arguments in a tort action for wrongful life may be the same in both cases, so tort law should treat them equally. Yet, the second category is undeniably distinct from the first from a *contractual* perspective because only in the first category can one speak of a promise of a nondisabled child. This is a crucial distinction that justifies a different outcome within the framework of contract law.

A stronger criticism of the proposed model is that it has limited practical value because an express disclaimer can easily circumvent an implied warranty.<sup>435</sup> However, categorically renouncing the warranty seems highly unlikely. As explained above, the parents would not have gone to the consultant had they thought that the consultant would provide them with unreliable information. Including a disclaimer in the consultancy contract would simply render the consultant unemployed, as no one would turn to a consultant who is not committed to his professional statements.

Alternatively, a consultancy agreement could contain a provision whereby the contract does not confer benefits or rights of any kind on third parties. Still, potential parents will likely hesitate before turning to a consultant who attempts to shirk any responsibility toward their future child. It is true that parents would be more willing to accept this than a categorical disclaimer of the warranty. However, one cannot presume that potential parents would always agree to waive the contractual protection of their future child's interests.

I believe, therefore, that one of two things may occur. The first is that no consultant would insist on the above-mentioned provision be-

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<sup>434</sup> See *Speck ex rel. Speck v. Finegold*, 439 A.2d 110, 112–13 (Pa. 1981), *superseded by statute*, 42 PA. CONS. STAT. ANN. § 8305 (West 2007).

<sup>435</sup> See FARNSWORTH, *supra* note 346, § 2.20, at 101 (explaining that, in quasi contracts, courts will only imply terms where the agreement of the parties does not resolve the dispute).

cause the costs (loss of clients to competitors) would exceed the benefits (lower insurance premiums). The second, and more realistic, possibility is that certain consultants would require such a provision while others would not. Presumably, the fees of consultants that assume an additional risk (an action by the future child) would be higher. Under these circumstances, the expectant parents would have to decide whether to protect the interests of their future child for an additional cost by turning to a consultant who assumed the additional risk or to waive such protection. If they pay the extra cost, their future offspring will be able to enforce the warranty. If they do not, their child will not be able to sue the consultant at all. Either way, this result is a justifiable one because the risk of liability factors into the consultancy fee. Where the parents waive the child's right as a third-party beneficiary, the child can blame no one but the parents.

#### CONCLUSION

Part I showed that hostility to liability in tort for wrongful life is almost universal, crossing lands and seas. Part II argued that this demurrer is ultimately rooted in the absence of one of the central components of the cause of action. A tort action must fail because of the inability—both logical and practical—to establish “harm” under the traditional definition of this term. Part III opined that since the Gordian knot of tort law cannot be untied, it must be cut altogether. We must replace the traditional tort framework, which gives rise to an insoluble problem, with a more promising contractual framework. In my view, the child may base an action on the claim that the defendant promised the parents that the child would be born without a certain defect and that the promise went unfulfilled. In formal terms, the child is an intended third-party beneficiary of the contract between the parents and the consultant in which the latter warranted birth without a particular disability. The warranty of the future child's physical integrity and health, an integral and inseparable part of the contract, should form the basis of the child's cause of action. The main advantage of the contractual theory is manifest—it does not depend on a comparison between life with disability and nonexistence, which spells the doom of the traditional framework, but rather on a comparison between reality (life with disability) and the promised state (life without disability). This shift is critical both in establishing liability and in assessing damages.

The simplicity of the proposed solution, at least on the abstract level, gives cause for amazement. How is it that to this day all interested parties have overlooked this solution? I dare say that this is primarily the result of lawyers' intellectual conformism. Emphasis on the consultant's negligent conduct and the ubiquitous tendency to pre-

mise any action for a medical mishap on tort law in general, and the tort of negligence in particular, channeled both the plaintiffs and the courts into the realm of negligence law.<sup>436</sup> They thus diverted their attention from the unique features of the situation under scrutiny. These features unquestionably add an extra dimension to the legal relationship between the child and the consultant. But to the extent that the dogmatic discourse became increasingly entrenched and long lived, the chances of changing the focal point steadily, though regrettably, diminished.

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*Maybe life is wonderful in each and every case; maybe it is not worthwhile at a certain time or place; no answer to this riddle can objectively be set; but if you promise wondrous life, the promise should be kept.*

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<sup>436</sup> See, e.g., Berenson, *supra* note 2, at 895 (“Traditionally, such claims simply would be classified under the rubric of medical malpractice.”); Pollard, *supra* note 215, at 342 (“Wrongful life cases are grounded in medical malpractice . . . .”); Stolker, *supra* note 201, at 525 (“The wrongful life claim is regarded . . . as the frontier of medical malpractice litigation.”).



