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## ***Wrongful Life* in the Age CRISPR-CAS: Using the Legal Fiction of "The Conceptual Being" to Redress Wrongful Gamete Manipulation**

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# *Wrongful Life* in the Age of CRISPR-CAS: Using the Legal Fiction of “The Conceptual Being” to Redress Wrongful Gamete Manipulation

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## ABSTRACT

Virtually all ‘wrongful life’ actions (claims brought by children for pre-birth injuries) are denied. The basis for this doctrine pivots around the refusal to allow recompense for actions which cause harm, but also result in the child’s birth. We, therefore, are faced with a legal lacuna, where children suffering serious harms as a result of the latest reproductive technologies are legal orphans. This Article details the avenues of potential harm caused by modern reproductive technologies, which I call wrongful genetic manipulation (WGM), where the injured child would have no right of action. To address this void, I create a novel remedy via a legal fiction, “the conceptual being,” which would enable these children to bypass current restrictions and claim an expanded class of damages, including pain and suffering, emotional injury, and unjust enrichment.

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“[P]recedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion . . . .”<sup>1</sup> – Oliver Wendell Holmes

## I. INTRODUCTION

Four days after Thanksgiving, 2018, the world was stunned to learn that an American-educated Chinese scientist named He Jiankui (*Heh Jee-an-qway*), altered the genes<sup>2</sup> of twin girls, Lulu and Nana.<sup>3</sup> Using the CRISPR-Cas 9 technology, the scientist removed a portion of a gene responsible for Human Immunodeficiency Virus (“HIV”) development. In Nana, he removed both copies of the gene CCR5,<sup>4</sup> ostensibly conferring HIV immunity on the child. In Lulu, only one copy was removed—which would still leave her vulnerable to the disease. The world was outraged and He Jiankui is apparently under some form of arrest.<sup>5</sup>

While the world sorts through the ethical concerns,<sup>6</sup> let us take a look at the legal dilemmas in a thought-experiment involving hypothetical

1. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35 (Harvard Univ. Press 2009) (1881).

2. See Helen C. O’Neill & Jacques Cohen, *Live Births Following Genome Editing in Human Embryos: A Call for Clarity, Self-Control and Regulation*, 38 REPROD. BIOMEDICINE ONLINE 131, 131 (2019) (“Despite doubts over the veracity of the claims, there is decent evidence to suggest that Jiankui He and his team have indeed edited embryos, and transferred the embryos to patients with the intention to establish pregnancy. This intent is cause for great concern.”).

3. See Marilynn Marchione, *Chinese researcher claims first gene-edited babies*, AP NEWS (Nov. 26, 2018), <https://bit.ly/2r4cvyn>.

4. C-C motif chemokine receptor 5 (gene/pseudogene) is associated with resistance to HIV. See *CCR5 gene*, *Genetics Home Reference*, U.S. NAT’L LIBR. MED., <https://ghr.nlm.nih.gov/> (last visited Feb. 13, 2020).

5. See Mindy Weisberger, *Chinese Scientist Who Claimed to Edit Babies’ Genes May Be Under House Arrest*, LIVE SCI. (Jan. 3, 2019), <http://bit.ly/2sgsqOa>; see also Xavier Symons, *He Jiankui Fired, accused of forging ethics review*, BIOEDGE (Jan. 28, 2019), <http://bit.ly/2XLfQlz> (noting that He Jiankui has also been fired from his position at the Southern University of Science and Technology). “At the end of last year, he was sentenced to three years in jail and fined Rmb3m (\$430,000).” See Hannah Kuchler, *Jennifer Doudna, Crispr scientist, on the ethics of editing human*, FIN. TIMES (Jan. 31, 2020), <https://on.ft.com/3bdgI8S>.

6. See O’Neill & Cohen, *supra* note 2, at 132 (“In the UK and the USA, it is illegal to implant genome-edited human embryos . . . . [B]ut a National Academy of Science (NAS) Report . . . published in 2016, advised in favour of applying cytoplasmic donation in women at risk for transmitting mitochondrial disease. In the UK, . . . the Nuffield Council on Bioethics (2018) . . . report on ‘Human Genome Editing and Human Reproduction’, . . . goes further than the NAS report, stating that they found no categorical moral objection to germline genome editing . . . [and] set[s] out principles upon which the technology might be permitted in some circumstances.”); see also NUFFIELD COUNCIL ON BIOETHICS, *GENOME EDITING AND HUMAN REPRODUCTION: SOCIAL AND ETHICAL ISSUES*, at vii (2018), available at <https://bit.ly/2tdxDXq> (noting in the updated report that “[t]he central question which this Report sets out to address is whether such [gene-editing] interventions would be ethically acceptable. Our conclusion is that [such] interventions . . .

twins re-named Nulu and Lana.<sup>7</sup> Flash forward 25 years: Nulu, misunderstanding the efficacy of the procedure, engages in unprotected sex and becomes infected with HIV. Lana has given birth to a son who suffers some horrific disease—perhaps something like Lesch-Nyhan syndrome (caused by a mutation of the HPRT gene)<sup>8</sup> as a consequence of his mother’s genetic alteration. Putting aside the statute of limitations issues: Can the sisters sue? Can Lana’s son sue?

The short answer is: no, at least as the law stands today.

Theoretically, various breaches of the standard of care undoubtedly could be leveled against the doctor, e.g., in Nulu’s case for failure to perform the procedure properly. In all three situations, one could claim a lack of informed consent, a failure to comply with internal rules and regulations prohibiting these procedures, and a failure to conform to the general standard of care in the medical (genetics) community. Nevertheless, the claims would all fail.

In Nulu’s case, the claim would fail on causation grounds.<sup>9</sup> Although Nulu might be able to claim she was misled and prove the misrepresentation led her to become infected, the causal connection is tenuous: Nulu’s hypothetical HIV was not directly caused by the procedure. In Lana’s case, any claim would fail on the damage issue, as most courts disallow *wrongful life* claims, which is a claim related to her being born. In Lana’s son’s case, the claim might fail on lack of duty grounds.<sup>10</sup>

But in the case of Lana’s son—we have a compound problem. Had the doctor not performed the procedure on Lana, her embryo would not have been implanted and she never would have been born—and hence she

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could be ethically acceptable, provided . . . two principles are satisfied: first, that such interventions are intended to secure, and are consistent with, the welfare of a person who may be born as a consequence, and second, that any such interventions would uphold principles of social justice and solidarity”); see generally Carolyn Brokowski, *Do CRISPR Germline Ethics Statements Cut It?*, 1 CRISPR J. 115 (2018), available at <http://bit.ly/37VnZIK> (reviewing 61 ethics commentaries on gene-editing).

7. See *The He Lab, About Lulu and Nana: Twin Girls Born Healthy After Gene Surgery as Single-Cell Embryos*, YOUTUBE (Nov. 25, 2018), <https://bit.ly/2qOf4rF> (noting that the twins are being called Nana and Lulu “to protect their privacy”).

8. See Rosa J. Torres & Juan G. Puig, *Hypoxanthine-guanine phosphoribosyltransferase (HPRT) deficiency: Lesch-Nyhan Syndrome*, 2 ORPHANET J. RARE DISEASES, Dec. 8, 2007, at 1, 6, available at <http://bit.ly/2nKvijV>.

9. See 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, 52 (1999) (noting that “an individual who does not interfere with the body’s natural processes will be immune from liability if an adverse result occurs”).

10. See *Viccaro v. Milunsky*, 551 N.E.2d 8, 12–13 (Mass. 1990) (rejecting the child’s claim for wrongful life for failure to diagnose his mother’s heritable genetic condition on duty grounds, while allowing the mother’s claim for wrongful birth). *But see Monusko v. Postle*, 437 N.W.2d 367, 369 (Mich. Ct. App. 1989) (allowing recovery for the child’s claim in a pre-conception tort case, noting that a duty to a plaintiff who was not in being at the time of a wrongful act does exist).

couldn't sue. Of course, if Lana hadn't been born, neither would her son. And, as most courts rejecting similar claims have said, it is better to be born with a disease than not to be born at all.<sup>11</sup> The thought that Lana's son would never have been born at all—regardless of horrific injuries associated with a hypothetical Lesch-Nyhan syndrome<sup>12</sup>—is an anathema to the courts, hence his claim, as well as his mother's, fails under the prevailing judicial sentiment rejecting *wrongful life* claims.<sup>13</sup> Moreover, because Lana herself would never have been born but for the genetic intervention, she would be denied her claim of *wrongful birth* (the parents' claim for the costs incident to raising a disabled child), which is typically allowed,<sup>14</sup> even as the child's claim for *wrongful life* is not.

For many, new technologies provide a dream-fulfilled, enabling “barren” parents to have a child. For some, the end results are a nightmare. Among the most heartbreaking are those where the designated embryo is implanted in the “wrong parent.”<sup>15</sup> At least one such case resulted in a

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11. See, e.g., *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 275 (E.D. Pa. 2009); *infra* notes 147–48 and accompanying text; see also *Becker v. Schwartz*, 386 N.E.2d 807, 811–12 (N.Y. 1978).

12. The disease usually occurring almost exclusively in males, manifesting in moderate cognitive disability, and self-immolation. People with Lesch Nyhan syndrome usually cannot walk, require assistance sitting and generally die in the first or second decade of life. See *Lesch Nyhan syndrome*, NAT'L INST. HEALTH, <https://bit.ly/37vOhRd> (last visited Jan. 26, 2020).

13. See *Norman v. Xytex Corp.*, 830 S.E.2d 267, 269 & n.7 (Ga. Ct. App. 2019) (noting that “Georgia law recognizes only those claims in which the alleged negligence resulted in undesired conception,” concepts which the judge commingles with *wrongful birth*); see also Final Order Granting Defendant's Motion to Dismiss at 2, *Collins v. Xytex Corp.*, No. 2015-CV-259033, 2015 WL 6387328, at \*2–3 (Ga. Super. Oct. 20, 2015) (authored by the same judge deciding the lower level Norman case, who therein stated, “[t]his claim most closely . . . fits a claim for wrongful birth – and so is not allowed. The reason for this is . . . [that] courts are ‘unwilling to say that life, even life with severe impairments, may ever amount to a legal injury’”); Barbara Pfeffer Billauer, *The Sperminator as a Public Nuisance: Redressing Wrongful Birth and Life Claims in New Ways (Aka New Tricks for Old Torts)*, 42 U. ARK. LITTLE ROCK L. REV. 1, 1 (2019) [hereinafter Billauer, *Sperminator*] (suggesting such the children's claims for wrongful life be brought under public nuisance theory if the resultant injury presents a public health hazard, as well as an individual harm).

14. Although not in Georgia. See *Norman*, 830 S.E.2d at 269–70. But see Barbara Pfeffer Billauer, *Re-Birthing Wrongful Birth Claims in the Age of IVF and Abortion Reforms*, 50 STETSON L. REV. (forthcoming Nov. 2020) (manuscript at 8–9) [hereinafter Billauer, *Re-Birthing*], available at <http://bit.ly/34qDq9T> (discussing, *inter alia*, the impact of abortion reform on the rights of redress for wrongful birth claims, with specific focus on the sub-genre of cases, where the physician improperly performs a sterilization procedure resulting in the birth of a healthy child).

15. See *ACB v. Thomson Med. Pte. Ltd.* [2017] SGCA 20 (Sing.) (describing a Caucasian couple who sought IVF intervention to create a child born from gametogenic material of both parents, but instead, the IVF facility substituted the intended sperm with that of a non-Caucasian male, resulting in the birth of a mixed-race child); see also Sarah Gregory, *US couple launch lawsuit after ancestry test reveals sperm mix-up*, BIONEW (Aug. 12, 2019), <http://bit.ly/2rp4R5n>.

protracted custody dispute.<sup>16</sup> As to how much the child suffered from the two-year shuttle between biological parents and gestational mother, it is too early to tell. However, it appears this child, too, has no redress—at least not against the sperm bank causing the problem. Other cases exist where children are born with horrible genetic diseases<sup>17</sup> or a highly increased risk of serious mental illness due to sperm bank error.<sup>18</sup> These children, too, are currently denied recompense.<sup>19</sup>

For the past 50 years, American courts generally have refused to hold doctors (or sperm banks) liable to unwanted children,<sup>20</sup> whether born diseased or not.<sup>21</sup> Most often, the precipitating cause in these cases was the failure to properly abort, sterilize, or inform the parent of genetic problems suffered by the child, thereby depriving the parents of the freedom to avoid having children—or denial of their right to abortion.<sup>22</sup> The latter group of cases uniformly pivot around the fact that the defendant's acts did not actually cause the harm.

The reasons articulated for rejecting the child's *wrongful life* claim range from judicial fear of entering some philosophical quagmire regarding “whether it is better never to have been born at all than to have been born with even gross deficiencies,”<sup>23</sup> to the concern of offending the disabled community,<sup>24</sup> to reliance on Derek Parfit's Non-Identity Problem

16. See, e.g., *Perry-Rogers v. Obasaju*, 723 N.Y.S.2d 28 (N.Y. App. Div. 2001); *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

17. See *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 271 (E.D. Pa. 2009); see also Ariana Eunjung Cha, *The Children of Donor H898*, WASH. POST (Sept. 14, 2019, 4:06 PM), <https://wapo.st/2ppswSC>.

18. See, e.g., Final Order Granting Defendant's Motion to Dismiss, *Collins v. Xytex Corp.*, No. 2015-CV-259033, 2015 WL 6387328, at \*3 (Ga. Super. Oct. 20, 2015).

19. See Billauer, *Sperminator*, *supra* note 13, at 25–26 (examining the lacuna in legal remedies in *wrongful birth* and *wrongful life* cases, and contemplating solutions).

20. See, e.g., *Zepeda v. Zepeda*, 190 N.E.2d 849 (Ill. App. Ct. 1963) (the first recorded case involving a *wrongful life* claim, here concerning an illegitimate child suing his father for being born); see also Strasser, *supra* note 9, at 33–34.

21. See Billauer, *Sperminator*, *supra* note 13, at 23–24; see also Chen Meng Lam, *Damages for Wrongful Fertilisation: Reliance on Policy Considerations*, 24 DEAKIN L. REV. 139, 142 (2019).

22. See Billauer, *Re-Birthing*, *supra* note 14, at 7–12.

23. See *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978); see also *Greco v. United States*, 893 P.2d 345, 348 (Nev. 1995) (rejecting the *wrongful life* claims of a child born with congenital injuries due to negligent failure to diagnose rubella *in utero* and allow the mother the opportunity to abort the fetus) (citing *Becker*, 386 N.E.2d at 812).

24. See Sagit Mor, *The Dialectics of Wrongful Life and Wrongful Birth Claims in Israel: A Disability Critique*, 63 STUD. L. POL. & SOC'Y 113, 115, 118, 120, 131–36 (2014); see also Jillian T. Stein, *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in “Wrongful Birth and Wrongful Life Claims*, 40 SETON HALL L. REV. 1117, 1119 (2010) (noting that *wrongful birth* suits “stigmatize[] the disabled community by implying that parents and disabled children are harmed by the deprivation of the free exercise of procreative choice when a birth results in a disabled child . . .”); Sofia Yakren, *“Wrongful Birth” Claims and the Paradox of Parenting a Child with a Disability*, 87 FORDHAM L. REV. 583, 583 n.23 (2018) (“Actions like ones for *wrongful birth* that lead to the vilification of handicapped persons should be denied on policy

(“NIP”),<sup>25</sup> another philosophical approach. In these cases, courts have said that no damages exist, as any life is better than none,<sup>26</sup> refusing to countenance the full impact of denial of the parental right of abortion. These holdings have infected cases where the negligence did, in fact, cause the harm, and abortion was not the sought-after alternative. Thus, the present state-of-affairs is that children born with genetic diseases as a direct consequence of reckless genomic manipulation or negligent supply of defective genetic material are denied legal recourse.

Enter He Jiankui. We can assume he will be crucified, if only by the court of public opinion. We can also presume the promulgation of advisories, recommendations, and regulations of various degrees of enforceability banning the procedure, at least temporarily.<sup>27</sup> But that will not help Nulu, Lana or her son—or the progeny of any other (rogue) investigator. These children will simply suffer without redress. And the outcry will have little impact on legal doctrine. More issues incident to intentional manipulation of the genome, selection of designer-gene babies, attempts to “fix the helix,” and reckless perpetration of genetic errors via in vitro fertilization (“IVF”) are sure to unfold. Unfortunately, the law does not have a viable remedy in sight.

Isn't it time the law caught up with technology?

The rejection of *wrongful life* claims is well-settled and well-researched.<sup>28</sup> Others have attempted to remedy the legal lacuna in the child's rights—to no effect. Recent articles address the situation based on

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grounds alone,” (quoting 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. REV. 535, 609–10 (1995)). Similarly, many disability rights advocates agree that prenatal testing and selective abortion, which are promoted by wrongful birth suits, stigmatize disability. See Erik Parens & Adrienne Asch, *Disability Rights Critique of Prenatal Genetic Testing: Reflections and recommendation*, in PRENATAL TESTING AND DISABILITY RIGHTS 3, 12–17 (1999).

25. The Parfit Non-Identity Problem has been used by courts to argue that children born as a result of negligence (for example, a negligent tubal ligation resulting in pregnancy), have no *wrongful life* tort claim. The doctrine claims that as the child would not have existed but for the negligence, he suffers no injury. See W. Ryan Schuster, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 WM. & MARY L. REV. 2329, 2356–62, 2356 n.137 (2016); see also DEREK PARFIT, REASONS AND PERSONS 351–61, 366–71, 374–79 (1986); *infra* Part IV.

26. See, e.g., *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 271 (E.D. Pa. 2009), *aff'd*, 374 F. App'x 319 (3d Cir. 2010).

27. See Brokowski, *supra* note 6, at 1.

28. See, e.g., Alexander Morgan Capron, *Informed Decisionmaking in Genetic Counseling: A Dissent to the “Wrongful Life” Debate*, 48 IND. L. J. 581, 598–99 (1973); Alexander Morgan Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 622–25, 634–36 (1979); see generally 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. REV. 535 (1995); Patrick J. Kelly, *Wrongful Life, Wrongful Birth, and Justice in Tort Law*, 1979 WASH. U. L.Q. 919 (1979); G. Tedeschi, *On Tort Liability for “Wrongful Life,”* 1 ISR. REV. 465 (1967).



the philosophical underpinnings—i.e., Parfit’s Non-Identity Problem, (the NIP)<sup>29</sup> but the argument is based on a faulty understanding of the philosophy, as I demonstrate here, and hence, must fail on its face.

Most recently, Professor Dov Fox proposed a very intriguing and novel cause of action, called Reproductive Negligence,<sup>30</sup> which focuses on the mother’s claims. Professor Fox’s article was written before He Jiankui’s exploits laid bare the bizarre situation where a childbearing a genetic disease could be created through the fault of a third party, yet have no legal recourse.<sup>31</sup> It remains to be seen how this new claim can be calibrated to address the latest techno-glitches. A 1999 article by Professor Mark Strasser presented a different, holistic understanding of the situation; looking at the child’s claim as well as the mother’s. Therein, Professor Strasser explains that the legal reasoning rejecting the *wrongful life* claim is specious.<sup>32</sup> But most courts reject Professor Strasser’s analysis. Nevertheless, the flaws in legal reasoning that Professor Strasser raises have become even more apparent and egregious in light of modern reproductive technology, and its resultant children.

This Article addresses the child’s claims for harms caused by these newer technologies, e.g., where the harm is caused by direct—but faulty—manipulation of DNA-base pairs via genetic engineering, or even via older, currently popular technologies such as Pre-Implantation Genetic Testing (“PGT”),<sup>33</sup> embryo selection and implantation via IVF, or where switched, defective, or inappropriate gametes are supplied for the purposes of embryo creation.<sup>34</sup> The latter class of cases might arise due to failure to vet or screen gamete-suppliers or properly test gametogenic material, or due to methodological deficiencies in the technique itself.<sup>35</sup> Currently

29. See, e.g., W. Ryan Schuster, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 WM. & MARY L. REV. 2329, 2356–62 (2016) (rejecting Aaron-Andrew P. Bruhl’s views on the Non Identity Problem from a rights standpoint as discussed in Aaron-Andrew P. Bruhl, *Justice Unconceived: How Posterity Has Rights*, 14 YALE J.L. & HUMAN. 393, 397 (2002)).

30. See generally Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149 (2017) (proposing a novel tort theory that broadens the existing parameters of negligence claims pertaining to reproductive claims, as well as incorporating various malpractice theories under the umbrella concept he proposes).

31. See *infra* Section III.A.

32. Strasser, *supra* note 9, at 75–76.

33. See *infra* notes 50, 51, and Section II.A.

34. For example, those causing or likely to cause heritable diseases in future generations which may not be noticeable or observable in the first generation of transmission.

35. See Patricio Ventura-Juncá et al., *In vitro fertilization (IVF) in mammals: epigenetic and developmental alterations. Scientific and bioethical implications for IVF in humans*, 48 BIOLOGICAL RES., Dec. 18., 2015, at 1, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4684609/>; see also *Epigenetics: Can IVF affect your baby’s genes?*, YOUR IVF JOURNEY, <https://bit.ly/2QAwalR> (last visited Dec. 30, 2019); Rachel Montgomery, *IVF temporarily changes babies’ epigenetics*, BIONEWS (Sept. 9, 2019), <https://bit.ly/2tfKh8t>.

enveloped within the ambit of *wrongful life*, these harms result in disease, disability, or increased risk thereof in the resultant child, causing pain, suffering, and emotional angst. In conjunction with other articles I have written,<sup>36</sup> this Article is the first to propose how existing law and legal theory can be used to address the current legal lacuna. In this Article, I create a legal fiction, the *conceptual being*, to bring a damage suit under the guise of a recognized claim of pre-conception tort.<sup>37</sup> To avoid being prey to the toxic atmosphere surrounding the words *wrongful life* (which conjures the courts' abortion-aborrence), I will henceforth use the term *wrongful genetic manipulation* ("WGM") to describe these cases.

Part I of this Article introduces the legal problems presented by the current technology. Part II provides an overview of the relevant medical procedures that can "give birth" to abuses, and illustrates the ensuing legal problems presented by current law. Part III revisits Professor Strasser's approach, illustrating the faulty reasoning rejecting the older *wrongful life* claims in the modern context. Additionally, Part III disentangles past dicta and relates these arguments to children born of WGM (whether via faulty sperm supply, IVF, preimplantation testing, or genetic manipulation à la He Jiankui), demonstrating the dicta-factual mismatch. Part IV goes further and explores the misuse and misunderstanding of Parfit's Non Identity Problem (NIP), a discussion that has thus far not been properly addressed in the legal context. Part IV also explains that Parfit, himself, would have championed recovery for Lana and her son, as well as illustrates the inherent inconsistency of rejecting *wrongful life*, but allowing *wrongful birth* claims in these cases, the current state of the law.<sup>38</sup>

Part V offers a novel solution to redress harms wrongfully created by WGM. I do so by creating a legal fiction, *the conceptual being*, authorized to bring suit for WGM on behalf of the harmed child. This legal entity can now seek an expanded retinue of damages including pain, suffering, emotional angst, medical monitoring, and unjust enrichment.

## II. AN INTRODUCTION TO GENETIC MANIPULATION

Advances in assisted reproductive technologies ("ART")<sup>39</sup> have progressed exponentially in the years following the IVF of Louise Brown

36. See generally Billauer, *Re-Birthing*, *supra* note 14 (discussing the incongruity of rejecting conventional remedies in wrongful birth cases); Billauer, *Sperminator*, *supra* note 13 (discussing lack of remedies for pre-birth wrongs occasioned by IVF facilities).

37. See *infra* Section V.B.

38. See generally Billauer, *Re-Birthing*, *supra* note 14 (discussing the anachronistic reasoning behind precluding wrongful birth cases disallowing damages for unwanted children who are born healthy).

39. According to the Centers for Disease Control and Protection ("CDC"), assisted reproductive technology ("ART") consists of all clinical treatments and laboratory procedures conducted with the intent of conceiving, such as in vitro fertilization ("IVF"), sperm, oocyte, or embryo donation, and gestational surrogacy. See *Implementation of the*

in 1978.<sup>40</sup> Newer technologies, such as intracytoplasmic sperm injection (“ICSI”),<sup>41</sup> mitochondrial transfer (colloquially known as “three-parent-children”),<sup>42</sup> and in vitro gametogenesis (“IVG”) via somatic cell nuclear transfer (“SCNT”),<sup>43</sup> are gaining notice.<sup>44</sup> “Tandem IVF” is marketed to attract older women with low fertility.<sup>45</sup> Uterine transplants open the door for men to become pregnant.<sup>46</sup> As of this writing, the first transplantation of a uterus from a deceased donor enabled a woman to give birth.<sup>47</sup>

#### A. Pre-Implantation Genetic Testing (PGT)

Non-negligently caused genetic diseases in neonates are commonly attributed to the age-related quality of parental gametogenic materials or family history of disease. Non-technology-driven harm—which may or may not be negligent—may also accrue via, for example, administration

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*Fertility Clinic Success Rate and Certification Act of 1992 – A Model Program for the Certification of Embryo Laboratories*, 64 FED. REG. 39,374 (July 21, 1999).

40. See JUDITH DAAR, *THE NEW EUGENICS: SELECTIVE BREEDING IN AN ERA OF REPRODUCTIVE TECHNOLOGIES* 5, 19, 185 (2017).

41. See June Shannon, *Starting a Family: the different types of IVF*, IRISH TIMES (Feb. 20, 2016, 3:08 AM), <https://bit.ly/2likdWF>.

42. See Michael Cook, *Tandem IVF: anything to guarantee a baby*, BIOEDGE (Aug. 26, 2017), <https://bit.ly/2lykDlV>.

43. See Hannah Bourne et al., *Procreative Beneficence and In Vitro Gametogenesis*, 30 MONASH BIOETHICS REV. 29, 30–31 (2012) (noting “[r]ecent research suggests that it may become possible to derive gametes (eggs and sperm) from human stem cells *in vitro*, a process which we will term *in vitro* gametogenesis (“IVG”). IVG would allow the creation of stem cells from a patient’s somatic (body) cells, and these stem cells could then be used to generate a plentiful supply of eggs or sperm in the laboratory”).

44. See generally Paula Amato et al., *Three-Parent IVF: Gene Replacement for the Prevention of Inherited Mitochondrial Diseases*, 101 FERTILITY & STERILITY 31 (2014) (discussing the technique involved in implanting the nuclear genome from the pronuclear stage zygote of a woman affected with mitochondrial disease in an enucleated donor zygote).

45. See Cook, *supra* note 42. In Tandem IVF, which is used in women over 40, the woman’s own eggs are fertilized and combined with donor embryos. In cytoplasmic tandem IVF, the nucleus of the mother’s egg is injected into an enucleated donor egg to rejuvenate it. This practice is banned by the U.S. Food and Drug Administration (“FDA”). *Id.*; see also *Mitochondrial Replacement Therapy: Considering the Future of U.S. Policy on “Three-Parent IVF,”* HARV. L. PETRIE-FLOM CTR. (Apr. 17, 2019), <https://bit.ly/36bZPIW> (providing videos and a written summary of a panel policy discussion, which reviewed “the latest technological developments, the regulatory barriers, and the ethical challenges affecting the clinical application of MRT”); Emily Mullin, *Patient advocates and scientists launch push to lift ban on “three-parent IVF,”* STAT (Apr. 16, 2019), <https://bit.ly/2sqoCkK> (“In the U.S., the procedure is effectively banned because of a congressional amendment passed in 2015 that’s been renewed every year since.”).

46. See Dani Ejzenberg et al., *Livebirth after uterus transplantation from a deceased donor in a recipient with uterine infertility*, 392 LANCET 2697, 2704 (2018).

47. *For the First Time in North America, a Woman Gives Birth After Uterus Transplant From a Deceased Donor*, HEALTH ESSENTIALS: CLEVELAND CLINIC (July 9, 2019), <https://cle.clinic/30VNhd0>.

of oocyte-stimulating hormones as a component of ART.<sup>48</sup> Similarly, congenital harm can also be caused by negligent failure to properly implement technologically-driven medical interventions, as discussed below.

Until recently, detecting congenital abnormalities was limited to prenatal diagnosis involving examining fetal images, or testing embryonic fluid or fetal tissue. The most familiar techniques (in increasing order of risk) are ultrasound, amniocentesis, and chorionic villous sampling.<sup>49</sup> In these cases, the fetus is usually well on its way toward personhood, as the techniques cannot be performed until the pregnancy is well on its way—the fifth week for ultrasound, and fifteen weeks for amniocentesis. At this stage, the physician’s negligence takes the form of failing to recommend testing or providing wrongful information of test results, thereby depriving the parents of the right of abortion. It is these cases from which the dogma rejecting *wrongful life* claims was born.

Added to the technologies of baby-making, are emerging tools for both baby-selection and pre-baby repair which increase the likelihood of negligent interventions.<sup>50</sup> These include biopsy-facilitated PGT,<sup>51</sup> non-invasive preimplantation screening (“NIPS”),<sup>52</sup> intra-pregnancy fetal-

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48. See Santiago Munné, *Status of preimplantation genetic testing and embryo selection*, 37 REPROD. BIOMEDICINE ONLINE 393, 394 (2018) (“One potential source of aneuploidy rate variability is hormonal stimulation . . .”); see also Ernesto Bosch et al., *Regimen of ovarian stimulation affects oocyte and therefore embryo quality*, 105 FERTILITY & STERILITY 560, 562 (2016).

49. See Jeffrey R. Botkin, *Prenatal Diagnosis and the Selection of Children*, 30 FLA. ST. U. L. REV. 265, 278 (2003).

50. The older term “preimplantation genetic diagnosis” (“PGD”) referred to situations where either or both parents have a known genetic abnormality and testing is performed to determine if the embryo also carries a genetic abnormality. “Preimplantation genetic screening” (“PGS”) also referred to techniques where embryos from presumed chromosomally-normal genetic parents are screened for aneuploidy (an abnormal number of chromosomes). These terms are no longer used and PGS is now called “preimplantation genetic testing for aneuploidies” (“PGT-A”). See Botkin, *supra* note 49, at 280; see also Chun-Kai Chen et al., *New perspectives on preimplantation genetic diagnosis and preimplantation genetic screening*, 53 TAIWANESE J. OBSTETRICS & GYNECOLOGY 146, 146–48 (2014); Munné, *supra* note 48, at 393–95.

51. See Munné, *supra* note 48, at 393 (“Since last year, preimplantation genetic screening (PGS) and preimplantation diagnosis (PGD) were re-termed preimplantation genetic testing (PGT) . . .”); see also Martine De Rycke, *Singling out genetic disorders and disease*, 2 GENOME MED., NO. 74, Oct. 2010, at 1,1 (noting that PGD was first performed in 1990, although “so far, no detrimental effects of the procedure have been observed”); Chen et al., *supra* note 50, at 146–50. But see Amber R. Cooper & Emily S. Jungheim, *Preimplantation Genetic Testing: Indications and Controversies*, 30 CLINICS LABORATORY MED. 519, 519–31 (2010), available at <https://bit.ly/36oAKK0>.

52. See C. Farra et al., *Non-invasive pre-implantation genetic testing of human embryos: an emerging concept*, 33 HUM. REPROD. 2162, 2162 (2018) (“The accurate genetic screening of pre-implantation embryos currently entails the use of technically challenging and biologically invasive biopsies of the human embryos . . . Circulating cell-free embryonic DNA . . . present in the blastocoel fluid . . . has lately been sought as an attractive source of genetic information.”).

reconstructive surgery (also called “prenatal surgery”),<sup>53</sup> IVF, where donor sperm or egg is deliberately selected pre-conception (perhaps via internet catalog) by a would-be parent based on a set of personal preferences (i.e., “the parent picks”), and SCNT, which can create an embryo that is a clone of the parent.<sup>54</sup>

Where negligent embryo-examination, testing, creation, and treatment occur pre-gestational onset and result in a child who sustains injury or harm, that child is impoverished of legal remedy or damages. Similarly, in cases where the negligence involves passive harm (e.g., failure to test the fetus or failure to accurately inform the parents regarding the test results), and the sought-after remedy is abortion which fails, the child’s claim would not survive.<sup>55</sup> By comparison, where direct and causal negligence occurs after gestational onset but prior to birth (i.e., during pregnancy), the born-alive child seeking damages would, in fact, have a viable cause of action.<sup>56</sup> This dichotomy begs for examination.

Of late, due to modern technology, the diagnostic timeline has advanced. Along with recent innovations comes the additional potential for harm. Thus, embryo-testing is now being done prior to gestation, with selecting genetically-preferred embryos for uterine implantation being the ultimate goal. It is at this stage we begin focusing our investigative lens—first examining the PGT process,<sup>57</sup> which takes place at an IVF center. Here, donor sperm (either known or procured via a sperm bank) fertilizes the egg. After reaching the blastocyst stage, “an eight to twelve cell mass – [one] cell is removed for analysis . . . [and] can then be analyzed to determine if there are any genetic abnormalities . . . . Embryos without genetic defects would be transferred to the uterus in hopes of initiating a pregnancy.”<sup>58</sup> This new technology has the ability to select embryos more

53. *Prenatal Surgery*, ENCYCLOPEDIA CHILD. HEALTH, <https://bit.ly/2MHj12K> (last visited Nov. 30, 2019).

54. See Bourne et al., *supra* note 43, at 35.

55. See generally Kathleen A. Mahoney, *Malpractice Claims Resulting from Negligent Preconception Genetic Testing: Do These Claims Present a Strain of Wrongful Birth or Wrongful Conception, and Does the Categorization Even Matter?*, 39 SUFFOLK U. L. REV. 773 (2006) (discussing the impact of timing of the negligence on the viability of the cause of action).

56. See discussion *infra* Part IV.

57. See Glenn L. Schattman & Kangpu Xu, *Preimplantation genetic testing*, UPTODATE, <https://bit.ly/2mVbWfV> (last updated Dec. 10, 2019) (explaining that there are three stages of preimplantation genetic testing, and all involve in vitro fertilization (“IVF”), biopsy of the gametogenic material, testing and transfer of selected fresh or frozen-thawed embryos into the uterus).

58. *Preimplantation Genetic Diagnosis (PGD)*, GENETICS & IVF INST., <https://bit.ly/2leL8CH> (last visited Nov. 30, 2019) (“After embryos are created in the laboratory, they are grown for five to six days . . . [after which a biopsy] is done on all appropriately developing embryos. Biopsy involves removing a few cells from the trophoctoderm, or the layer of cells that is ‘hatching out’ of the embryo. . . . The embryos are stored while genetic material inside the removed cells is tested for abnormalities.”).

likely to survive pregnancy and produce viable children. However, in addition to the ability to select preferred genetic material, the procedure also provides a vehicle to introduce injury and compromise the genetic material of the nascent embryo. In other words, PGT “requires multiple steps and manipulations of gametes and embryos in order to select unaffected embryos for transfer and subsequent potential pregnancy.”<sup>59</sup> As diagnostic techniques become more prevalent and complicated,<sup>60</sup> the potential for error increases.<sup>61</sup>

Damage to the embryo can occur during an improperly performed biopsy procedure,<sup>62</sup> or cell removal process,<sup>63</sup> or via poorly maintained culture media, or from contaminants in plastic implements.<sup>64</sup> Without standardized protocols, guidelines, and quality control of IVF facilities<sup>65</sup> (or gene editing labs), it becomes difficult—if not impossible—to determine the cause<sup>66</sup> and frequency of laboratory-related damage, and assess what is considered negligence.<sup>67</sup> While most laboratories report good results, the current use of PGT is primarily directed at detecting abnormalities at the chromosomal level which is easier,<sup>68</sup> compared to

59. See Cooper & Jungheim, *supra* note 51, at 30.

60. See Susannah Baruch et al., *Genetic testing of embryos: practices and perspectives of US in vitro fertilization clinics*, 89 FERTILITY & STERILITY 1053, 1053 (2008) (noting that “[m]any clinics currently provide PGD for controversial indications such as sex selection”).

61. *Id.* at 1055; see also VICTORIA CHICO, GENOMIC NEGLIGENCE: AN INTEREST IN AUTONOMY AS THE BASIS FOR NOVEL NEGLIGENCE CLAIMS GENERATED BY GENETIC TECHNOLOGY 9–10, 73, 139 (Sheila A.M. McLean ed., 2011).

62. See Danilo Cimadomo et al., *The Impact of Biopsy on Human Embryo Developmental Potential during Preimplantation Genetic Diagnosis*, 2016 BIOMED RES. INT’L, JAN. 28, 2016, at 1, 2.

63. See *Pre-implantation genetic diagnosis (PGD)*, HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, <http://bit.ly/2nmXL3L> (last visited Sept. 27, 2019) (noting that the UK-based Human Fertilisation and Embryology Authority website advises that “[a]lthough an embryo can develop normally even when it has had a cell removed, there is a possibility that some embryos may be damaged by testing, which means they would need to be discarded . . . . In addition, PGD is not 100% accurate so there’s a small chance the tests may not work or may give the wrong information”).

64. See Munné, *supra* note 48, at 394; see also David Mortimer et al., *Cairo consensus on the IVF laboratory environment and air quality: report of an expert meeting*, 36 REPROD. BIOMEDICINE ONLINE 658, 658 (2018).

65. See Billauer, *Sperminator*, *supra* note 13, at 31–34.

66. Poor laboratory practice—without standard q/a-q/c procedures—could also generate errors. See *What is Preimplantation Genetic Screening (PGS)?*, FERTILITY CLINICS ABROAD (Dec. 6, 2016), <https://bit.ly/2nn4Qgl> (explaining the procedure involving pipetting embryos); see also *IMT Matcher*, IMT INT’L at 5, 6, <https://bit.ly/39vtLS8> (describing poorly cleaned pipettes resulting in switched embryos in IVF treatments).

67. See Heidi Ledford, *CRISPR babies: when will the world be ready?*, NATURE (June 24, 2019), <https://go.nature.com/2Ok0vFG>.

68. Munné, *supra* note 48, at 393–96 (noting that “90% of cases performed are for PGT for aneuploidies (PGT-A) . . . [and i]n the USA, we estimate that 40% of cycles are now accompanied by PGT-A, and that number is increasing”).

testing at the genetic or DNA level. As PGT advances, tests will become more cumbersome and results more complicated to interpret,<sup>69</sup> further increasing the likelihood of error. Because IVF laboratories are not subject to the same stringent regulations and enforcement mechanisms applicable to other public health facilities,<sup>70</sup> errors also occur when normal embryos are incorrectly (read negligently) discarded and abnormal ones implanted.<sup>71</sup> Ethical concerns involving mandatory screening also arise,<sup>72</sup> as do concerns regarding eugenic implications.<sup>73</sup> Harms resulting from these activities result in injured children who are, with rare exceptions, bereft of legal remedy

### B. CRISPR: To Fix the Helix

Newer technologies have the capacity to generate additional benefits but also may cause additional problems, including at the informed consent level.<sup>74</sup> For the time being, however, many of these techniques are

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69. This especially true for tests involving susceptibility genes, such as the BRCA 1, which while it may increase lifetime risk to 80%, this is only the case in those who are carriers or who actually develop the disease (that is to say it is a retrospective evaluation, rather than predictive). Hence, the gene cannot be said to be causal of the disease.

See DENIS ALEXANDER, GENES, DETERMINISM AND GOD 272–73 (2017); see also *Embryo checks “should be widened,”* BBC NEWS (May 8, 2006, 11:36 AM), <https://bbc.in/2rIgsWJ>.

70. See Fox, *supra* note 30, at 152. But see Kuchler, *supra* note 4 (discussing FDA oversight of CRISPR studies). See also *Crispr-gene editing regulation tracker*, GENETIC LITERACY PROJECT, <https://bit.ly/2T8483T> (last visited Feb. 24, 2020).

71. Munné, *supra* note 48, at 394 (noting that typically the error rate is low).

72. See Margaret Fischer, *Mandatory legislation for the screening of newborns for PKU in the United States*, 9 MENTAL RETARDATION, no. 5, Oct. 1971, at 25; see also G. J. Annas, *Mandatory PKU screening: the other side of the looking glass*, 72 AM. J. PUBLIC HEALTH 1401–03, Dec. 1982. In the U.K., over 400 conditions have been approved for screening. See *Pre-implantation genetic diagnosis (PGD)*, *supra* note 63.

73. See *Embryo checks “should be widened,”* *supra* note 69 (noting that “[t]he [U.K.] Human Fertilisation and Embryology Authority currently allows embryos to be screened for inherited diseases such as cystic fibrosis” and two inherited cancer conditions—familial adenomatous polyposis (“FAP”), a type of bowel cancer, and cancer of the retina using pre-implantation genetic diagnosis (“PGD”). Following a government report recommended screening for susceptibility genes linked to cancer, stakeholders objected and the director of the group Comment on Reproductive Ethics said: “PGD is currently nothing more than a weapon of destruction, aimed at the ruthless elimination of any embryo which does not conform to eugenic concepts of perfection.” Additionally, Rachel Hurst, of Disability Awareness in Action, said: “If you say that it’s OK to say that you can eliminate embryos which would lead to disabled people, you’re saying that disabled people are not people. And you’re saying that their quality of life is not worth living, which is discriminatory and extremely prejudicial”); see also DAAR, *supra* note 40, at 219–61. See generally NHS COMMISSIONING BD., CLINICAL COMMISSIONING POLICY: PRE-IMPLANTATION GENETIC DIAGNOSIS (PGD) (2013), <http://bit.ly/2nVAemg>; Brendan Parent, *CRISPR Lit the Fire: Ethics Must Drive Regulation of Germline Engineering*, A.B.A. (June 29, 2017), <http://bit.ly/2ng0zLq>.

74. See Sam Sherratt, *Podcast Review: Genome edited babies – Science Weekly*, GUARDIAN, BIO NEWS (Feb. 4, 2019), <http://bit.ly/2mqwd8R> (reporting on a panel of experts’ condemnation of He Jiankui’s genetic manipulation and noting that “[w]hatever

experimental.<sup>75</sup> However, with easy accessibility of CRISPR<sup>76</sup>, we are no longer operating in the theoretical realm. And while the technology to create genetically-preferred children already exists, this technology also has the potential to introduce harm, at both the genetic and somatic levels. Moreover, we are not far off from dealing with sequelae of IVG, which would allow not only genetic tampering, but also the creation of a plentiful supply of eggs or sperm in the laboratory via a patient's somatic (body) cells.<sup>77</sup> This technology has the potential not only to allow tinkering with currently existing genes, but to create gametes, *ab initio*, with genes of our own making, opening the door to even more harms.

In the context of genetic manipulation, à la He Jiankui, we just do not know what can happen. Genome editing, for which CRISPR-Cas is one tool,<sup>78</sup> involves deletions, insertions, or modifications of the genome at a specific site of a DNA sequence. Gene therapy makes use of this therapy to eradicate a particular disease by eliminating or “fixing” a gene responsible. But the technique is not perfect. One report noted that the CRISPR-Cas 9 technique caused damage (unintended deletions or rearrangement) in 20% of cells<sup>79</sup> and several authors, both legal<sup>80</sup> and scientific,<sup>81</sup> have expressed concern over its safety<sup>82</sup> and assessment of

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the supposed justification for the research, the necessity of informed consent is not negotiable”).

75. Farra et al., *supra* note 52, at 2162–67.

76. See *CRISPR 101: Your Guide to Understanding Crispr*, SYNTHEGO, <https://bit.ly/2IOpcyt> (last visited Sept. 22, 2019).

77. Bourne et al., *supra* note 43, at 30.

78. Analogous research concerning the p53 protein claims that the protein “helps regulate growth and proliferation of cells [acquiring] the nickname ‘the guardian of the genome.’ Until recently it was believed it protected against carcinogenesis, but it now seems that a particular form of p53 would have the opposite effect by promoting cancer in some instances.” See Catharine Paddock, *Antitumor protein can sometimes promote cancer*, MED. NEWS TODAY (Feb. 4, 2019), <http://bit.ly/2q8vcUP> (citing Jinchul Kim et al., *Wild-Type p53 Promotes Cancer Metabolic Switch by Inducing PUMA-Dependent Suppression of Oxidative Phosphorylation*, 35 *CANCER CELL* 191 (2019)).

79. *The safety of CRISPR-Cas9 gene editing is being debated*, *ECONOMIST* (July 19, 2018), at 64, <https://econ.st/2OEFOnU> (reporting on a study by Allan Bradley published in *Nature Biotechnology*). However, the Nuffield Council on Bioethics states that “in some circumstances the genetic engineering of human sperm, eggs or embryos could be morally acceptable” for removing heritable diseases or reducing genetic predispositions for cancer.” *NUFFIELD COUNCIL ON BIOETHICS*, *supra* note 6, at 76.

80. See James Lawford Davies, *The Regulation of Gene Editing in the United Kingdom*, A.B.A. (June 29, 2017), <https://bit.ly/36hgBGo>.

81. Melissa Healy, *Q&A: Why geneticists say it's wrong to edit the DNA of embryos to protect them against HIV*, *L.A. TIMES* (Nov. 26, 2018, 6:15 PM), <https://lat.ms/2mJpqXS> (reporting on an interview with Dr. Michael Snyder, Director of Stanford University's Center for Genomics and Personalized Medicine).

82. See ROBERT PLOMIN, *BLUEPRINT: HOW DNA MAKES US WHO WE ARE* 132 (2018) (noting that edited human embryos have not been investigated sufficiently for off-target editing effects); see also Ledford, *supra* note 67; *Research Highlights: CRISPR*, *BROAD INST.*, <http://bit.ly/35P25VQ> (last visited Dec. 1, 2019); see also Kuchler, *supra* note 4, (noting Dr. Doudna's concern regarding reassembling the cut DNA base pairs).



long-range consequences.<sup>83</sup> Thus, we know genes are often assigned more than one job—a phenomenon known as pleiotropism<sup>84</sup> (when a single gene affects a number of observable traits in the same organism).<sup>85</sup> But we don't know how this plays out at the DNA-level,<sup>86</sup> where CRISPR-Cas is deployed. Although we hope the Cas-enzyme component is unleashed at the precise target, we cannot be sure that it doesn't have “off-target effects.”<sup>87</sup> Nor at this point can we be sure that when “knocking out” a slice of DNA responsible for one deleterious condition, we aren't inadvertently causing another.<sup>88</sup> Even He Jiankui, who says he “addressed this concern,” couldn't be sure—admitting that despite various tests to make sure this did not happen, “there might be one potential off-target mutation.”<sup>89</sup> And that's only in the area of the genome he surveyed—leaving another 20% unaccounted for.<sup>90</sup>

It can take a very long time to determine if off-target events have occurred over multi-generations if the germ line is affected. So, although Lana (our hypothetical twin)<sup>91</sup> may never contract HIV, she may still bear a child with a different and laboratory-created genetic disease. But we will not know for sure until her child is born, and even perhaps sometime afterward.

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83. See Brokowski, *supra* note 6, at 122 (quoting National Institutes of Health (“NIH”) Director Francis Collins, who is staunchly opposed to germ line editing in any form and who “cite[d] as problematic ‘unquantifiable safety issues, ethical issues presented by altering the germline in a way that affects the next generation without their consent, and a current lack of compelling medical applications justifying the use of CRISPR/Cas9 in embryos’”).

84. PLOMIN, *supra* note 82, at 70, 116–17, 133.

85. ROBERT C. KING ET AL., A DICTIONARY OF GENETICS 342 (Oxford Univ. Press, 7th ed. 2006).

86. *CRISPR 101: Your Guide to Understanding Crispr*, *supra* note 76 (explaining that CRISPR utilizes a precisely constructed slice of gRNA which guides an excision enzyme, the CAS protein, to the specific DNA targeted for modification. Once the CAS protein gets to the right place, it recognizes the DNA targeted for excision by identifying a spacer motif downstream from the target. After the DNA is transfected, the efficiency of the operation is assessed by subjecting the newly transcribed genome to software analysis).

87. Munné, *supra* note 48, at 395 (noting that regarding “editing via CRISPR, it remains to be seen if off-target effects are present,” although reports are proliferating of a host of off-target effects, both positive and negative).

88. *Id.*; see also PLOMIN, *supra* note 82, at 70, 116–17, 133.

89. *A maverick researcher claims to have created GM children*, *ECONOMIST* (Dec. 1, 2018), <https://econ.st/2E1imfT>.

90. *Id.*

91. See *supra* Part I.

### III. THE WRONGFUL RAP ON WRONGFUL LIFE

#### A. *The Legal Lacuna*

Some two-score cases have been brought for WGM in the United States mostly against sperm banks. Except in the rare case,<sup>92</sup> the child's claims for *wrongful life* have been rejected outright, some not even brought, as a successful pursuit of the claim is considered unattainable.<sup>93</sup>

#### 1. Wrongful Life and Wrongful Birth—What is the Difference?

Lawsuits seeking recovery for damages accruing pre-birth<sup>94</sup> include tort claims<sup>95</sup> for *wrongful life*<sup>96</sup> and *wrongful birth*.<sup>97</sup> Strictly speaking, *wrongful life* is the child's claim for being born with a disease or disability.<sup>98</sup> Parents seeking damages (for, *inter alia*, cost of child-rearing<sup>99</sup> or extra care) bring *wrongful birth* cases.<sup>100</sup> An additional claim,

92. See, e.g., *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 359 P.3d 841, 855 (Wash. Ct. App. 2015) (allowing special damages for “‘extraordinary expenses for medical care and special training,’ which are calculable with certainty, [and] . . . recoverable by a child claiming wrongful life” (quoting *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 496 (Wash. 1983) (en banc))).

93. See Billauer, *Sperminator*, *supra* note 13, at 26–27, 36–43.

94. See generally Gregory G. Sarno, Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R. 3d 15 (1978).

95. See *Szekeres v. Robinson*, 715 P.2d 1076, 1077–79 (Nev. 1986) (suggesting these claims could be brought as breach of contract); see generally *ARB v. IVF Hammersmith* [2018] EWCA (Civ) 2803 (appeal taken from QB) (Eng.), available at <https://bit.ly/35bqYdM> (denying a claim for *wrongful life/birth* that was brought under a U.K. contract theory); Alexandra Elizabeth Kilduff, *The Birth of a Tort Liability Theory? Legal Remedies for Families of Children Who Inherit Genetic Diseases from Gamete Donors* (May 1, 2014) (unpublished student paper) (on file with Seton Hall Law), available at <https://bit.ly/2KXD6rv> (discussing remedies for children born with genetic diseases as a result of WGM).

96. *Quinn v. Blau*, No. CV96325691S, 1997 WL 781874, at \*2 (Conn. Super. Ct. 1997) (“‘Wrongful life’ generally refers to actions brought on behalf of children, as distinguished from ‘wrongful birth,’ which generally refers to actions brought by parents.”).

97. See, e.g., *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967), *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); see also *James G. v. Caserta*, 332 S.E.2d 872, 879 (W. Va. 1985); Billauer, *Re-Birthing*, *supra* note 14, at 3–4, 14, 32.

98. See *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982) (en banc) (allowing a modified—restricted—*wrongful life* claim); see also Alan J. Belsky, *Injury as a Matter of Law: Is This the Answer to the Wrongful Life Dilemma?*, 22 U. BALT. L. REV. 185, 189 (1993); Strasser, *supra* note 9, at 44–45.

99. Generally, child-raising costs are limited to parents with children born with a disability, although in the U.S. a handful of courts have allowed it for healthy children as well. Outside the U.S., Australia and South Africa allow child-rearing for healthy children, as apparently does the Netherlands. See Billauer, *Re-Birthing*, *supra* note 14, at 5–23.

100. See Billauer, *Re-Birthing*, *supra* note 14, at 3–4, 14, 32; see also *Wrongful Birth*, BLACK’S LAW DICTIONARY (3d ed. 1933); *Wrongful Life*, BLACK’S LAW DICTIONARY (3d ed. 1933).

*wrongful conception*, refines the category and refers to the parents' "lost chance" to avoid birthing a *healthy child*<sup>101</sup> (e.g., when the physician fails to properly perform a sterilization procedure depriving parents of the right to abortion).<sup>102</sup> A fourth cause of action, called *dissatisfied life*, has been brought by healthy but illegitimate children who allege injury by virtue of their illegitimacy.<sup>103</sup> Other legal variants and definitions also exist,<sup>104</sup> and courts (and the press)<sup>105</sup> routinely commingle terms.<sup>106</sup>

In fact, *wrongful life* has been characterized as one of the most controversial pregnancy-related torts.<sup>107</sup> Even the conception (pun intended) of the phrases *wrongful life* and *wrongful birth* has generated confusion.<sup>108</sup> Hence, we find "the tort of *wrongful life* means different things to different courts,"<sup>109</sup> while "[t]he term *wrongful life* has attracted significant criticism."<sup>110</sup> This situation bespeaks a problem with conceptualization of the claim itself. As the Supreme Court of Massachusetts stated,<sup>111</sup> the labels of *wrongful life* and *wrongful birth* "are not instructive."<sup>112</sup> In cases against sperm banks, some courts have used

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101. See *Becker v. Schwartz*, 386 N.E.2d 807, 810–11 (N.Y. 1978) (defining "wrongful conception" as a claim for an unsuccessful surgical birth control procedure resulting in the birth of an unplanned, but healthy child, whereas a "wrongful birth" includes a child's claim for illegitimacy); see also Richard E. Wolff, *Wrongful Life: A Modern Claim Which Conforms to the Traditional Tort Framework*, 20 WM. & MARY L. REV. 125 (1978) (discussing claims based on illegitimacy).

102. Thomas DeWitt Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 718–19 (1982).

103. See, e.g., *Zepeda v. Zepeda*, 190 N.E.2d 849, 857 (Ill. App. Ct. 1963), cert. denied, 379 U.S. 945 (1964).

104. See, e.g., Ralph R. Frasca, *Negligent Beginnings: Damages in Wrongful Conception, Wrongful Birth and See also Wrongful Life*, 19 J. FORENSIC ECON. 185, 185–86, 190 (2006) (referring to the tort as "wrongful pregnancy," explaining that "wrongful birth" pertains to birthing an unhealthy child, explaining that "wrongful conception" applies to the birth of any unplanned child, and explaining that "wrongful pregnancy" refers to birthing (or denial of the right to abort) a healthy child); Billauer, *Re-Birthing*, *supra* note 14, at 7–8.

105. See, e.g., Rosalind English, *Damages for wrongful life refused*, UK HUM. RTS. BLOG (Jan. 10, 2019), <https://bit.ly/2nn7tyD>.

106. *Moscattello ex rel. Moscattello v. Univ. of Med. & Dentistry of N.J.*, 776 A.2d 874, 879 (N.J. Super. Ct. App. Div. 2001) (recognizing a factual basis for a *wrongful life* claim where a mother relied on a doctor's statement that she was not at risk to bear genetically disabled children and carried her pregnancy to term).

107. Strasser, *supra* note 9, at 29.

108. Rogers, *supra* note 102, at 715.

109. Kilduff, *supra* note 95, at 30.

110. CHICO, *supra* note 61, at 74 (citing JOHN KENYON MASON, *THE TROUBLED PREGNANCY: LEGAL WRONGS AND RIGHTS IN REPRODUCTION* 7 (MARGARET BRAZIER & GRAEME LAURIE EDS., 2007)).

111. *Viccaro v. Milunsky*, 551 N.E.2d 8, 9–10 & n.3 (Mass. 1990).

112. *Id.*

*wrongful life* language to describe the parent's *wrongful birth* claim.<sup>113</sup> Other courts have limited *wrongful life* claims to situations arising out of physician negligence,<sup>114</sup> which should exclude its applicability in sperm bank cases, but doesn't. Negligent performance of PGT has been classified as *wrongful conception* in some states and *wrongful birth* in others.<sup>115</sup> For the sake of clarity, I (like others) use *wrongful birth* as the umbrella claim for actions brought by a parent, and *wrongful life*<sup>116</sup> to refer to claims brought by children with disease or disability or at an increased risk thereof.<sup>117</sup>

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113. See Final Order Granting Defendant's Motion to Dismiss, *Collins v. Xytex Corp.*, No. 2015-CV-259033, 2015 WL 6387328, at \*2 (Ga. Super. Ct. Oct. 20, 2015) (noting that the mother's claim "most closely . . . fits a claim for wrongful birth – and so is not allowed. The reason for this is . . . [that] courts are 'unwilling to say that life, even life with severe impairments, may ever amount to a legal injury'"); Complaint for Damages, *Norman v. Xytex*, No. 2017CV298536 (Ga. Super. Ct. filed Nov. 30, 2017), available at <https://bit.ly/2Qhc011>.

114. See *Miller v. Johnson*, 343 S.E.2d 301, 303 (Va. 1986) (discussing a wrongfully performed abortion case wherein the court noted that "[s]ome confusion has existed in the terminology . . . involving actions in which negligence is alleged to have resulted in the birth of a child. . . . A wrongful birth action is brought by parents on their own behalf, seeking damages resulting from the birth of a defective child after a failed abortion or the failure of a physician to advise the parents of risk of genetic or birth defects and thereby allow an informed decision as to termination of the pregnancy. A wrongful life action is a similar action brought by or on behalf of the defective child for the physician's failure to warn of potential defects or failure to prevent or terminate the pregnancy in light of known risks. Most courts have rejected this theory that the life of the defective child is worth less than the child's nonexistence" (emphasis added) (internal citations omitted)).

115. *Mahoney*, *supra* note 55, at 776 (noting that North Carolina and Minnesota treat negligent preconception genetic testing as wrongful conception; Colorado and Washington categorize genetic testing negligence as wrongful birth, while Indiana and Nevada treat such actions as ordinary malpractice).

116. Marten A. Trozig, *The Defective Child and the Actions for Wrongful Life and Wrongful Birth*, 2 J. LEGAL MED. 85, 85 (1980) ("The only distinctions between the two actions concern who may bring the actions, and the subsequent success of the actions."); see also *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1154 (La. 1988) (arising when an albino child was born after a failed sterilization procedure, damages were sought by both parents seeking *wrongful birth* damages, and by the child claiming *wrongful life*. The parents' claim was allowed; the child's was not—although it was rejected not on "sanctity of life" grounds but on lack of foreseeability of the child's injury).

117. See *Strasser*, *supra* note 9, at 30; see also *Yakren*, *supra* note 24, at 587 (discussing the emotional strain of bringing a *wrongful birth* claim. *Yakren* echoes Professor Fox's approach [noted earlier] by "broadening the analysis of emotional distress to reflect and legitimize mothers' paradoxical feelings about their children [and] reframing the harm to mothers as loss of reproductive choice rather than as the birth of a flawed child [thereby] . . . expanding available economic damages to include plaintiff-mothers' unexpected childcare responsibilities").

Simply stated (perhaps overly so), *wrongful birth* claims are generally allowed,<sup>118</sup> while *wrongful life* claims are not.<sup>119</sup> Generally, the child's *wrongful life* claim is dismissed as an anathema on morality grounds<sup>120</sup> in many countries around the world<sup>121</sup> and in most states in the United States. Three states in the United States do explicitly recognize the claim: California,<sup>122</sup> New Jersey,<sup>123</sup> and Washington,<sup>124</sup> although

118. See, e.g., *Berman v. Allan*, 404 A.2d 8 (N.J. 1979) (denying the child's *wrongful life* claim but allowing the parent's claim for emotional damages under the rubric of *wrongful birth*). As of 2006, 42 jurisdictions provided for these types of suits, with only Nevada affirmatively predisposed to oppose them. See *Emerson v. Magendantz*, 689 A.2d 409, 415–16 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part). But see *Norman v. Xytex*, 830 S.E.2d 267, 269 & n.4 (Ga. Ct. App. 2019) (citing *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 559 (1990)) (declining to recognize *wrongful birth* cases in Georgia, but excepting wrongful conception cases from that determination).

119. See, e.g., *Kassama v. Magat*, 792 A.2d 1102, 1104–05 (Md. 2002) (discussing a case where the plaintiffs' claim that the defendant failed to properly advise them of blood test results indicating a heightened possibility that the child might be afflicted with Down's Syndrome. The child sought damages for "'wrongful life' . . . based on the premise that being born and having to live with the affliction is a disadvantage, and thus a cognizable injury, when compared with the alternative of not having been born at all—[and] that an impaired existence is worse than nonexistence . . ."); see also Michelle McEntire, *Compensating Post-Conception Prenatal Medical Malpractice While Respecting Life: A Recommendation to North Carolina Legislators*, 29 CAMPBELL L. REV. 761, 770 & n.66 (2007).

120. See *infra* Section III.B.2.a.

121. See, e.g., Congenital Disabilities (Civil Liability) Act 1976, c. 28, § 2(b) (Eng.); *McKay v. Essex Area Health Authority* [1982] 1 QB 1166 at 1177–78 (Eng.); Harvey Teff, *The Action for "Wrongful Life" in England and the United States*, 34 INT'L & COMP. L.Q. 423, 426 n.23 (1985). Some claim the *McKay* court misinterpreted the law. See Anthony Jackson, *Wrongful Life and Wrongful Birth: The English Conception*, 17. J. LEGAL MED. 349, 366 (1996).

122. The first decision to allow wrongful life arose in *Curlender v. Bio-Science Labs.*, where the California Court of Appeals held that:

The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.

165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980), *disapproved by* *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982) (en banc) (limiting the holding to special damages for the extraordinary expenses).

123. See *Geler v. Akawie*, 818 A.2d 402, 413 (N.J. Super. Ct. App. Div. 2003) (citing *Berman v. Allan*, 404 A.2d 8, 14–15 (N.J. 1979)) *abrogating* *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967); see also *Procanik v. Cillo*, 478 A.2d 755, 762 (N.J. 1984) (holding that "a child or his parents may recover special damages for extraordinary medical expenses incurred during infancy, and that the infant may recover those expenses during his majority").

124. See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 495 (Wash. 1983) (en banc); see also *Stewart-Graves v. Vaughn*, 170 P.3d 1151, 1160 (Wash. 2007) (en banc) ("In recognizing a wrongful life claim, this court reasoned that it would be anomalous to permit

Minnesota also allows *wrongful life* in certain circumstances.<sup>125</sup> These international and intranational disparate resolutions raise questions regarding the legitimacy of different holdings based on differing views of morality.<sup>126</sup>

The importance of the *wrongful life* claim is that it incorporates the child's life-long damages for pain, suffering, fear, and related emotional angst, along with economic loss—claims which together typically generate higher awards. These higher awards often have a deterrent effect on the objectionable conduct of a defendant—especially in conjunction with claims for punitive damages.<sup>127</sup> By comparison, the parents' *wrongful birth* claim (especially as currently circumscribed) has little if any “teeth” in that these claims are generally limited to peri-pregnancy damages and, in the rare case, emotional harm incident to the pregnancy.<sup>128</sup>

Attempts to re-configure the tort have also failed. Couching the *wrongful life* claim as a product liability claim fails to recognize that product liability actions also require a damage component, and it is the damage aspect of the claim that courts find wanting. The court in *Donovan v. Idant Laboratories* made this precept abundantly clear.<sup>129</sup> Some legal commentators claim that predicating the analysis on damages “puts the cart before the horse and allows the difficulties of [damage] assessment to

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recovery by parents alone.”); *Wuth ex rel. Kesser v. Lab. Corp. of Am.*, 359 P.3d 841, 846 (Wash. Ct. App. 2015) (resulting in a 50 million dollar award as a result of a doctor's failure to diagnose chromosomal translocation in IVF embryos for both the child's *wrongful life* and the parent's *wrongful birth* claim).

125. See *Molloy v. Meier*, 679 N.W.2d 711, 722–23 (Minn. 2004) (explaining that claims for *wrongful life* were allowed when the negligence caused the parents to conceive a sick child, distinguishing it from negligence claims which prevents parents from suing to abort a child).

126. See JANET L. DOLGIN & LOIS L. SHEPHERD, *BIOETHICS AND THE LAW* 185–87 (4th ed. 2018) (noting that California, New Jersey, and Washington's recovery is limited to recompense only for the special damages occasioned by the disability, and that 23 states have approved of *wrongful birth* either by virtue of case law or legislation).

127. See Zenon Zabinski & Bernard S. Black, *The Deterrent Effect of Tort Law: Evidence from Medical Malpractice Reform* at 27–28. (Nw. Law & Econ. Research Paper No. 13-09), <https://bit.ly/2SSvsn7> (finding that patient safety worsens after cap adoption limits on recovery). See generally Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116 (1968) (noting the deterrence effect of high-level punitive damages).

128. Child-raising costs have also been allowed for children born with a disability, and a few courts have allowed it for healthy children as well. See Billauer, *Re-Birthing*, *supra* note 14, at 3.

129. See Billauer, *Sperminator*, *supra* note 13, at 25; see also *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256 (E.D. Pa. 2009), *aff'd*, 374 F. App'x 319 (3d Cir. 2010).

determine the existence of a right of action.”<sup>130</sup> This may be a more cogent line of analysis, perhaps, but one which still does not provide a solution.<sup>131</sup>

Bifurcating the claims of parent and child into two discrete categories further compounds the problem. Courts recognize that the parents’ *wrongful birth* claim essentially arises as a result of medical malpractice (e.g., failure to properly sterilize, abort, or inform)<sup>132</sup> and causes two different (and mutually exclusive) types of damage, i.e., birthing a healthy,<sup>133</sup> but unwanted child, and birthing a child with a disease or disability. The child’s *wrongful life* claim, however, bundles all manner of causal scenarios, lumping together different harms (e.g., being born illegitimate, being born diseased or disabled, and being born with an increased risk of disease). These different harms arise from different causes. In some cases, they arise indirectly, such as when the physician fails to counsel the parents that the child suffers a genetic defect. In other cases, a technician might directly cause the genetic defect, perhaps during the biopsy in a PGT procedure. In still other cases, the IVF technician might indirectly harm the resultant child by implanting the wrong sperm or embryo in an IVF facility. In the case of CRISPR-Cas, the embryologist might directly cause the damage via the negligent selection of genes to be altered or faulty DNA editing.

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130. See Jane E. S. Fortin, *Is the “Wrongful Life” Action Really Dead?*, 9 J. SOC. WELFARE L. 306, 310 (1987); see also Bernard Dickens, *Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law*, in LEGAL ISSUES IN HUMAN REPRODUCTION 80–86 (Sheila A.M. McLean ed., 1989); Julie F. Kowitz, *Not Your Garden Variety Tort Reform: Statutes Barring Claims for Wrongful Life and Wrongful Birth are Unconstitutional Under the Purpose Prong of Planned Parenthood v. Casey*, 61 BROOK. L. REV. 235, 255 (1995); Paul H. Mitrovich, *Ohio Wrongful Pregnancy, Wrongful Birth, and Wrongful Life Law Needs to be Revisited to Obtain a More Equitable Result and Consistency of Law*, 33 OHIO NORTHERN U. L. REV. 623, 637 (2007); Deana A. Pollard, *Wrongful Analysis in Wrongful Life Jurisprudence*, 55 ALA. L. REV. 327, 341–42 (2004).

131. Paradoxically, even though denying the cause of action, the court in *Bruggeman v. Schimke* refused to consider the damage aspect as the defining element of the claim. See *Bruggeman v. Schimke*, 718 P.2d 635, 642–43 (Kan. 1986) (“Damages do not create a right or cause of action. The ‘cause of action’ is the wrong done, not the measure of compensation for it.” (quoting *Hoard v. Shawnee Mission Med. Ctr.*, 662 P.2d 1214, 1226 (Kan. 1983))).

132. See David D. Wilmoth, *Wrongful Life and Wrongful Birth Causes of Action – Suggestions for a Consistent Analysis*, 63 MARQ. L. REV. 611, 612 (1980) (citations omitted) (“There are two basic varieties of wrongful life actions. The first involves a child born out of wedlock who claims another’s tortious conduct caused him to be born and suffer the stigma of illegitimacy. The second, and more common type of wrongful life action, is brought by or on behalf of a physically or mentally impaired child against a physician whose alleged negligence caused the child’s birth.”).

133. In *Slawek v. Stroh*, the infant-plaintiff was born a normal child, although illegitimate. She sued her putative father for embarrassment, humiliation, and the lack of social standing she would endure—and lost. See *Slawek v. Stroh*, 215 N.W.2d 9, 21–22 (Wis. 1974) (refusing to recognize as enforceable a cause of action for *wrongful birth* or *wrongful life*).

This state of affairs enables courts to affix any of the myriad reasons raised for rejecting the *wrongful life* claim to situations where it is inapt,<sup>134</sup> cementing the status quo barring recovery. Given that recent technology has generated a host of circumstances not contemplated at the time the *wrongful life* doctrine was created in the 1960s<sup>135</sup> or in the years over which it developed<sup>136</sup> and its rejection entrenched,<sup>137</sup> the time has come to revisit this situation.

A brief review of the early cases seeking *wrongful life* for supplying defective or inappropriate sperm by a sperm bank is instructive. These cases enable us to understand the impropriety of rejecting the claim in the context of WGM occasioned by wrongful tampering with gametogenic material or supplying defective genetic material (sperm, oocytes, or embryo) to create a child.

The first case seeking recovery for the child's pain and suffering for WGM, *Johnson v. Superior Court (California Cryobank, Inc.)*,<sup>138</sup> was brought against a sperm bank. Therein, Brittany Johnson claimed damages for her Autosomal Dominant Polycystic Kidney Disease allegedly caused by defective sperm contributed by an anonymous donor. The Johnsons claimed the sperm bank sold the defective sperm even though the sperm bank operators knew it came from a donor with a family history of disease. Notwithstanding the clear failure to disclose and the ostensibly direct causal connection between the disease and the sperm bank which supplied sperm, the court ruled the child's claims constituted *wrongful life* and therefore denied the claims.

The second reported case, *Paretta v. Medical Offices for Human Reproduction*,<sup>139</sup> was brought a year later in New York. Here, the child was born with cystic fibrosis. Again, the disease was allegedly caused, at least in part, by an anonymous supplier—in this case, an egg donor who

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134. See Mark E. Cohen, Note, *Park v. Chessin: The Continuing Judicial Development of the Theory of "Wrongful Life,"* 4 AM. J.L. & MED. 211, 215–17 (1978) (referring to a situation where the child sues a doctor seeking redress for its being alive—not for damages incident to being living, albeit in a compromised fashion caused by a sperm bank or medical researcher).

135. See, e.g., *Gleitman v. Cosgrove*, 227 A.2d 689, 691–92 (N.J. 1967), *abrogated* by *Berman v. Allan*, 404 A.2d 8 (N.J. 1979) (“In light of changes in the law which have occurred in the 12 years since *Gleitman* was decided, the second ground relied upon by the *Gleitman* majority can no longer stand in the way of judicial recognition of a cause of action founded upon wrongful birth.”).

136. See, e.g., *James G. v. Caserta*, 332 S.E.2d 872, 879 (W. Va. 1985).

137. See *Phillips v. United States*, 508 F. Supp. 537, 538, 540–41 (D.S.C. 1980) (denying a child's *wrongful life* claim where the defendants failed to advise his mother of a Down's Syndrome diagnosis, the court noting that “[t]he overwhelming majority of those cases have refused to recognize the validity of ‘wrongful life’ claims”).

138. See *Johnson v. Superior Court*, 95 Cal. Rptr. 2d 864, 867 (Cal. Ct. App. 2000) *abrogated on other grounds* 124 Cal. Rptr. 2d 650, 653 (Cal. Ct. App. 2002).

139. *Paretta v. Med. Offices for Human Reprod.*, 760 N.Y.S.2d 639, 641–42 (N.Y. Sup. Ct. 2003).



carried the gene for the disease. Again, this fact was apparently known to the Reproduction Center, but was not disclosed.<sup>140</sup> Neither was the father tested for the disease, a critical factor, since both parents must be carriers for the disease to manifest in the offspring. Again, the court determined the child did not have the right to sue for *wrongful life* because such a case would grant the IVF child rights not possessed by naturally born children.<sup>141</sup>

The third case, *Donovan v. Idant Laboratories*,<sup>142</sup> was also occasioned by an allegedly defective gene supplied from an anonymous sperm supplier which the sperm bank took pains to hide.<sup>143</sup> Here, the child, also named Brittany, was born with the genetically-transmitted Fragile X syndrome. In fact, Brittany Donovan's Fragile X syndrome was apparently proven to be due to the genetic input of the sperm supplier. Nonetheless, the court ruled the damages sounded in *wrongful life* which was not recognized.<sup>144</sup>

Because the claims were denied in all three cases, the precise facts resulting in providing the purportedly defective gametes cannot be ascertained. In *Johnson*, the logical assumption is that the sperm bank was not careful in its recordkeeping or accepted inappropriate donors. In *Paretta*, while there is no evidence, it may be possible the facility assumed that because active cystic fibrosis can only be transmitted if both parents have the gene, the center could take the risk the father was not a carrier, and "get away" with supplying defective gametes (in this case, oocytes) for a "hidden" genetic disorder. The sequence of events leading to Brittany Donovan's Fragile X cannot be apprehended. Possibly, it is due to failure to screen and test the donor; it is equally possible the gene was damaged during the IVF procedure itself. We will never know.

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140. *Id.* Similar cases which did not result in suit exist, suggesting there may be many more such cases of which the legal community is unaware. See Billauer, *Sperminator*, *supra* note 13, at 35.

141. See Yaniv Heled, Comment, *The Regulation of Genetic Aspects of Donated Reproductive Tissue—The Need for Federal Regulation*, 11 COLUM. SCI. & TECH. L. REV. 243, 265–66 (2010) (citing *Paretta*, 760 N.Y.S.2d at 643–48) (noting that the court left some claims open and allowed the case to proceed. Because of this determination coupled with fear of punitive damages, the case settled for a whopping 1.3 million dollars).

142. See *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 271 (E.D. Pa. 2009), *aff'd*, 374 F. App'x 319 (3d Cir. 2010); see also *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 375–76 (Wis. 1975). See generally *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967).

143. See *Donovan*, 625 F. Supp. 2d at 267–68 (holding the delay in making the causal connection between the sperm and the child's disease cost the mother her *wrongful birth* suit which became time-barred); see also Martha Henriques, *Sperm bank warns against tracing anonymous donor via DNA test*, BIO NEWS (Feb. 4, 2019), <https://bit.ly/39vdWeh> (discussing the use of commercial databases to establish paternity and the fact that, at least one sperm bank warned parents not to do this. Northwest Cryobank reportedly warned a parent whose child underwent DNA testing against contacting the donor or his relatives).

144. *Donovan*, 625 F. Supp. 2d at 271, 275–76.

A full defense of these claims, had they been allowed to survive, would have seen the defendant facilities laying bare their laboratory protocols or prudent practice procedures—or proving the disease occurred through events outside their control or under the control of others. From a public health standpoint, the more we learn about the causes of IVF or PGT errors, whether from negligence or not, the better we can implement safeguards to prevent future problems. The impetus to crash the judicial barricade on *wrongful life* claims for WGM, therefore, becomes imperative.

## 2. Untangling the Scenarios Birthing the Legal Claims

To understand why *wrongful life* claims are rejected, I first identify circumstances “giving birth” to the claim. I then untangle the different legal rationales rejecting its use. Unraveling the factual and legal matrices demonstrates that the objections do not correlate with cases where children are born diseased or disabled as a result of modern technology or WGM, as opposed to the physician malpractice of the earlier cases.

As we have seen, the multiplicity of legal claims associated with reproductive harm reflects the multiple scenarios generating them, as well as the different outcomes. Historically, *wrongful birth*<sup>145</sup> (and *life*)<sup>146</sup> claims arose when a parent would have preferred to abort a child during pregnancy,<sup>147</sup> a first category or level of harm. In some such cases, the parents were advised that the fetus was sound when anomalies resulting in serious illness/or disease were not detected in time to abort.<sup>148</sup> In a second category of harm, parents were simply not advised to seek testing when parental medical history would have so indicated.<sup>149</sup> In a third type of case, the parents simply decided they did not want a child, and their wishes were frustrated due to physician negligence.<sup>150</sup> This type of reproductive wrong includes failed sterilization or faulty abortion where an unwanted (but healthy) child was born.<sup>151</sup> Regardless, all cases in this category involve a physician’s negligence.<sup>152</sup> In most cases, the parent’s claims are recognized,<sup>153</sup> but damages may be circumscribed if the child is born

145. See Billauer, *Re-Birthing*, *supra* note 14, at 9–10.

146. The third reported wrongful life case is *Gleitman*, 227 A.2d at 692.

147. See, e.g., *Phillips v. United States*, 508 F. Supp. 537, 540 n.5 (D.S.C. 1980).

148. See, e.g., *Greco v. United States*, 893 P.2d 345, 346–48 (Nev. 1995).

149. See *Phillips*, 508 F. Supp. at 538–40 (discussing birthing a child with Down’s Syndrome).

150. See, e.g., *Emerson v. Magendantz*, 689 A.2d 409, 410–11 (R.I. 1997).

151. See *id.* at 410–14.

152. See *id.* at 411.

153. See, e.g., *Berman v. Allan*, 404 A.2d 8 (N.J. 1979) (overruling *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967)). The *Berman* court allowed the mother’s *wrongful birth* claim against a physician for failing to recommend amniocentesis which would have detected the child’s Down’s Syndrome and allowed damages for peri-pregnancy-related claims (claims triggered during pregnancy) including emotional distress, as well as medical

healthy.<sup>154</sup> As stated earlier, in virtually all cases the child's *wrongful life* claim was denied.<sup>155</sup>

A second category of reproductive harm also involves pre-birth physician malpractice, here where a physician negligently performs surgery *in utero* to correct a congenital abnormality, and either causes harm or fails to correct the deformity. As in the first two of the situations described above, the harm may not be caused by the physician, but rather is not remedied or alleviated by the doctor. This category differs from the one above only because here the child would be able to recover. The reasoning for the disparity can only be understood by referring to the philosophical realm and Parfit's NIP, discussed in Part IV.

In a third category of harm, negligence again occurs pre-birth and results in a child born with harm, disease, disability, or heightened risk thereof. This category, however, does not involve physician malpractice and has a more proximate relationship between act and consequence. This category manifests in three guises: (1) when embryos<sup>156</sup> or gametes<sup>157</sup> are switched or wrongfully implanted;<sup>158</sup> (2) when the embryo is fertilized with sperm (or oocytes) from a genetically compromised supplier (donor)<sup>159</sup> because of poor screening<sup>160</sup> or poor testing procedures,<sup>161</sup> and (3) when the wrong embryo is selected after PGT.<sup>162</sup> In the first situation,

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and other costs the parents would incur in raising, educating, and supervising the child. *Id.* at 15.

154. See, e.g., *Emerson*, 689 A.2d at 415–16 (Bourcier, J., concurring in part and dissenting in part).

155. See, e.g., *Becker v. Schwartz*, 386 N.E.2d 807, 808–11, 814 (N.Y. 1978).

156. See, e.g., *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 21 (N.Y. App. Div. 2000).

157. See generally *ACB v. Thomson Medical Pte Ltd and others* [2017] SGCA 20 (Sing.) (creating a new cause of action called “loss of genetic affinity,” where the potential father's sperm was switched, and the parents were denied the opportunity to jointly parent child biologically related to both of them).

158. See, e.g., *Andrews v. Keltz*, 838 N.Y.S.2d 363 (N.Y. Sup. Ct. 2007) (concerning switched sperm at an IVF facility resulting in the birth of an interracial child). The court in *Andrews* denied recovery in an action brought for medical malpractice. *Id.* at 365. The case differs from *ACB v. Thomson* in that the aggrieved party here was not the putative biological parent, and the damage was simply a different ethnicity from that of the putative father, rather than substitution of a different genetic package altogether. See *ACB v. Thomson Medical Pte Ltd and others* [2017] SGCA 20 (Sing.).

159. See, e.g., *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256 (E.D. Pa. 2009).

160. See Final Order Granting Defendant's Motion to Dismiss, *Collins v. Xytex Corp.*, No. 2015-CV-259033, 2015 WL 6387328, at \*2 (Ga. Super. Oct. 20, 2015); see also Order on Defendant's Motion to Dismiss, *Norman v. Xytex Corp.*, No. 2017-CV-298536 (Ga. Super. Ct. June 13, 2018), available at <https://bit.ly/2toClSe>.

161. See, e.g., *Paretta v. Med. Offices for Human Reprod.*, 760 N.Y.S.2d 639, 641–42 (N.Y. Sup. Ct. 2003).

162. See Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 303, 318, 320 n.124 (2008); see also *IVF: Second Couple Sue After Clinic “Uses Wrong Embryos,”* BBC NEWS (July 11, 2019), <https://bbc.in/2MVvSVM>. For background on PGT, see Baruch et al., *supra* note 60, at 667.

the child may be born without physical harm—the damage to the child would be the trauma of a custody battle or being of a different racial mix than its parents. In the remaining situations, the child is born with a disease (usually an inherited one)<sup>163</sup> or an increased risk of disease.<sup>164</sup> The *Xytex* suite of cases, of which I have previously written at length,<sup>165</sup> is illustrative. In that scenario, at least 26 women were shocked to learn their 36 children were sired by a man, Donor 9623, who had a history of criminal incarceration and a severe and possibly hereditary mental illness, in this case, schizophrenia.<sup>166</sup> This latter feature could subject the individual offspring to an increased risk of developing the disease if the father's disease is the heritable form, and if so, conferring a high likelihood that four children of the 36 children born of Donor 9623 sperm would, in fact, suffer the disease (compared to a background level of none or one).<sup>167</sup> This is but one example of the WGM class of harm where the wrongfulness is supplying improperly selected genetic material for the purpose of creating an embryo.<sup>168</sup>

A variant of the above-designed WGM occurs in the case of PGT, where the parent deliberately selects a genetic signature for the child, one which society calls an impairment, e.g., deafness.<sup>169</sup> Although the selection may be done by a parent (who is *sui generis* by virtue of parental immunity), the “actor” who constructs, selects, and implants the embryo, is a member of the medical profession. Nevertheless, the child would be barred from suit. The reasoning might include traditional rationale such as lack of duty on the part of the physician. Alternatively, the conventional rationale for rejecting the *wrongful life* claim is premised on the assertion that this particular child would not have been born at all, had the child not been born deaf.<sup>170</sup> Thus, because the parents would not have selected this embryo for implantation had it not carried the gene for deafness, that child owes its existence to its disability. In other words, this particular child would not have been born, had it not been deaf, because the parents would

163. See, e.g., *Donovan*, 625 F. Supp. 2d at 262–63.

164. See *supra* note 110 and accompanying text.

165. See Billauer, *Sperminator*, *supra* note 13, at 35–42.

166. Schizophrenia is heritable in some 50–80% of cases. *Id.* at 38, 43–47. In the *Xytex* situation we do not know if Mr. Aggeles's condition was of the non-transmissible or heritable variety. Family history is not determinative, in that a heritable mutation may affect an individual without it previously occurring in his lineage.

167. *Id.*

168. See, e.g., *Andrews v. Keltz*, 838 N.Y.S.2d 363, 367 (N.Y. Sup. Ct. 2007) (explaining that although the court “recognized the ‘very nearly uniform high value’ which the law and mankind have placed upon human life . . . it cannot be said, as a matter of public policy, that the birth of a healthy child constitutes a harm cognizable at law” (quoting *O'Toole v. Greenberg*, 477 N.E.2d 445, 448 (N.Y. 1985))).

169. See Smolensky, *supra* note 162, at 299, 303, 318, 320 & n.124.

170. *Id.* at 304–05.

not have selected him or her for implantation. Here, we would have a distinct conflict between parental choice and the child's rights.<sup>171</sup>

We have a third variant of WGM, where actual damages are caused during the course of PGT. Here, either an error is made and a defective embryo which should have been discarded is mistakenly implanted, or damage is caused to the genome itself during the PGT biopsy or the IVF procedure.

Finally, we have a fourth variant of WGM: the case of active genetic tampering. For now, this is mostly available only at the clinical-testing or rogue investigator-researcher level. But active genetic engineering no longer lies in the theoretical realm, and we must now grapple with harm resulting from human-designed embryos, à la He Jiankui. The question of whether parents have a right to design their child-of-choice is an ethical and moral one outside the scope of this Article. However, the question of what happens if the procedure is done improperly or goes wrong and produces a child with defects or disabilities is a legal one.

This Article addresses the legal lacuna faced by the child harmed as a result of WGM, be it via IVF, PGT, parental choice, or gene-editing. In denying those children redress, courts ransack the holdings of cases which I claim are irrelevant, applying their reasoning robotically to cases that are outside the factual purview giving rise to the opinion. I thus continue the inquiry by identifying the approaches used to reject the child's *wrongful life* claim. Before so doing, the first level of inquiry is to note that cases giving rise to rejecting that claim stem from physician malpractice and generally pertain to an ultimate remedy of abortion sought by the parents. After cementing this fact, I investigate the hydra-headed approach courts use to reject *wrongful life*. The first is a public policy approach that contains four discrete and distinct sub-arguments.<sup>172</sup> The second approach impleads the philosophical doctrine of Derek Parfit's Non-Identity Problem, which essentially is a standing argument, and is discussed in Part IV. In Part V, I begin to assemble a solution.

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171. While disability rights groups champion such activity, would they sound in the same way in the case of parents selecting an embryo purely for the sake of being a spare organ or tissue repository for themselves or other siblings? At present the practice for creation of immuno-compatible siblings who, themselves, are not at risk of developing genetic disease is, under certain circumstances, legitimate in the U.K. See CHICO, *supra* note 61, at 9–10. For further reading; see generally JODI PICOULT, MY SISTER'S KEEPER (2004), a fictional story based on a true-life incident where parents birthed a child for the purposes of creating a genetically compatible tissue source.

172. The flaws of using public policy considerations in this context are set forth in Lam's comprehensive article. See generally Lam, *supra* note 21 (discussing the use of public policy as a basis to support holdings in reproductive negligence decisions in the context of the loss of the genetic affinity claim espoused by the court in the Singapore case of ACB v. Thomson Med. Pte. Ltd. [2017] SGCA 20 (Sing.)).

## B. Untangling the Bases for Rejecting Wrongful Life

### 1. The Who Dunit Discrepancy

As the court in *Emerson v. Magendanz* noted, the *wrongful life/birth* claim is “nothing more and nothing less than a medical malpractice cause of action.”<sup>173</sup> At least one court noted the term “wrongful” is inapt, as “any ‘wrongfulness’ lies not in the life, the birth, the conception or the pregnancy, but in the negligence of the *physician*.”<sup>174</sup> The rationale for rejecting *wrongful life* claims in cases against a physician,<sup>175</sup> where the argument is the failure to facilitate abortion or prevent pregnancy, are plainly inapposite where the child is born as a result of WGM. For one thing, the bad actor in these latter cases is usually not a physician (who has taken the Hippocratic Oath, “first do no harm”) amenable to malpractice claims, but rather a profit-generating sperm bank, an ego-driven or publicity-seeking researcher,<sup>176</sup> or a parent with a bias they wish to saddle on their child. Overall, policy reasons limiting medical malpractice claims are thus irrelevant, as are concerns over the regard in which the medical profession is held.<sup>177</sup> Thus, we find the opinion in *Berman v. Allan*,<sup>178</sup> noting that “[w]e would be remiss if we did not take judicial notice of the high esteem which our society accords to those involved in the medical profession [because] . . . [p]hysicians are the preservers of life,”<sup>179</sup> is clearly inapt in the context of PGT laboratories, profit-mongering IVF facilities, or any other form of gene-manipulation which is not performed by health-care physicians.

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173. See *Emerson v. Magendanz*, 689 A.2d 409, 415–16 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part) (citing *Miller v. Johnson*, 343 S.E.2d 301, 304 (Va. 1986)); see also Pollard, *supra* note 130, at 327 (noting that “[w]rongful life refers to a negligence claim asserted by a child who suffers from birth defects, . . . resulting from a physician’s malpractice in failing to inform the mother of potential birth defects, either preconception or during pregnancy, and consequently, depriving her of the option of avoiding conception or terminating the pregnancy” (internal citations omitted)).

174. *Viccaro v. Milunsky*, 551 N.E.2d 8, 9 n.3 (Mass. 1990) (emphasis added).

175. See *Galvez v. Fields*, 107 Cal. Rptr. 2d 50, 57–58 (Cal. Ct. App. 2001) (holding that a *wrongful life* action is “one form of a medical malpractice action” and an “impaired child may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment from which he or she suffers”). A “wrongful life” claim is one “brought on behalf of a severely defective infant, *against a physician*, . . . contend(ing) that *the physician* negligently failed to inform the child’s parents of the possibility of their bearing a severely defective child, thereby preventing a parental choice to avoid the child’s birth.” See *Phillips v. United States*, 508 F. Supp. 537, 538 n.1 (D.S.C. 1980) (alteration in original) (emphasis added).

176. See Healy, *supra* note 81.

177. See Pollard, *supra* note 130, at 327 (“From its inception, wrongful life jurisprudence has relied on an inaccurate description of tort policy to deny recovery to children suffering unnecessarily as a direct result of medical malpractice.”).

178. *Berman v. Allan*, 404 A.2d 8, 13 (N.J. 1979).

179. *Id.*

We also have a causation-truncation problem. In cases against physicians, the doctor may have harmed the mother,<sup>180</sup> but generally, there is no direct causal connection between the physician's acts and the child's harm.<sup>181</sup> As the health-economist, Ralph Frasca, noted in cases of reproductive wrongs occasioned by physician negligence, "[t]he injury, the birth, is the same in wrongful birth and wrongful life suits."<sup>182</sup> In most *wrongful life* claims brought to date, the malpractice results in the birth, not the defect.<sup>183</sup> Thus, as the court noted in *Harbeson v. Parke-Davis*:

The child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence [and] his failure to adequately inform the parents of the risk . . . has caused the birth of the deformed child. The child argues that *but for* the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity.<sup>184</sup>

By comparison, in the case of WGM, the harm suffered by the child is directly caused by the sperm bank's defective product, the laboratory's negligence, or the researcher's malfeasance. Another crucial difference in harms generated as a result of WGM is that the objective of the technology is to have a child, not to prevent one from being born, the gravamen of physician-induced *wrongful life* and *birth* cases. Thus, "[t]he injury in the wrongful birth or wrongful life suit is the denial of a choice that would have resulted in abortion . . . . An abortion is the foregone desired outcome."<sup>185</sup> And this brings us to the abortion argument, the subject of the next section.

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180. It is not claimed that the defendants failed to do something to prevent or reduce the ravages of rubella, which was the gravamen of *Gleitman v. Cosgrove*, 227 A.2d 689, 691 (N.J. 1967), *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979); *see also* *Greco v. United States*, 893 P.2d 345, 347 (Nev. 1995) (presenting a similar fact pattern).

181. *Bruggeman v. Schimke*, 718 P.2d 635, 638 (Kan. 1986) ("The child does not allege that the physician's negligence caused the child's deformity. Rather, the claim is that the physician's negligence . . . has caused the birth of the deformed child . . . [and] but for the inadequate advice, it would not have been born to experience the pain and suffering attributable to the deformity." (quoting *Cont'l Cas. Co. v. Empire Cas. Co.*, 713 P.2d 384, 392 (Colo. App. 1985))).

182. Frasca, *supra* note 104, at 195.

183. *Id.* at 186.

184. *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983) (en banc) (quoting Thomas Keasler Foutz, "*Wrongful Life*": *The Right Not to Be Born*, 54 TUL. L. REV. 480, 485 (1980)). Nevertheless, even here, the *Harbeson* court allowed recovery for the child's claim. *See id.* at 497.

185. Frasca, *supra* note 104, at 195. The argument that but for the action, the child would not have been born cannot be countenanced, as there is an affirmative obligation that s/he who even gratuitously assumes a duty has an obligation to perform it in a non-negligent fashion. *See* RESTATEMENT (SECOND) OF TORTS § 324A (AM. LAW INST. 1965).

## 2. The Public Policy Argument: Any Life is Better Than None

The seminal case rejecting *wrongful life* is *Becker v. Schwartz*,<sup>186</sup> although it was not the first such case to do so. In 1975, the Supreme Court of Wisconsin reached the same result,<sup>187</sup> as did the New Jersey court in *Gleitman v. Cosgrove* in 1967.<sup>188</sup> Muddling together a bunch of reasons for their decision, the *Becker* decision, addressing a malpractice suit against a physician for failing to disclose genetic risks,<sup>189</sup> rejected the claim by couching it in public policy terms.<sup>190</sup> We are not specifically told which public policy was involved, but when parsed out, the argument has distinct moralistic tendencies that subsume four discrete perspectives lumped together. These are: (1) that abortion is an anathema; (2) that a supreme reverence for the “sanctity of life” governs;<sup>191</sup> (3) the fear of trespassing on the philosophical inquiry regarding the mysteries of life versus non-life and quantification of damages precludes the claim;<sup>192</sup> and (4) that no child has a claim for a right to be free from genetic defects.<sup>193</sup>

### a. The Ghost of Abortion

The harm parents allege here is a violation of the parental right to terminate the pregnancy—i.e., the right *not* to have the child, or the denial of their right to abortion. Illustrating the bleeding impact of abortion-repugnance which infects the child’s claim for damages, we have the British case of *McKay v. Essex Area Health Authority*.<sup>194</sup> Therein, the

186. *Becker v. Schwartz*, 386 N.E.2d 807, 811, 813 (N.Y. 1978) (sustaining the mother’s *wrongful birth* claim for failing to advise her to be tested during pregnancy, thereby denying her the right to abort a child born with Down’s Syndrome—minus claims for emotional distress—but denying the mother’s claim for *wrongful life*).

187. *See Dumer v. St. Michael’s Hosp.*, 233 N.W.2d 372, 375–76 (Wis. 1975) (rejecting the child’s claim for *wrongful life* in a medical malpractice action for failure to diagnose *her mother’s rubella during her pregnancy*).

188. *Gleitman v. Cosgrove*, 227 A.2d 689, 692–93 (N.J. 1967) *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979). Of course, when *Gleitman* was decided abortion was not yet legalized. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973).

189. *See Becker*, 386 N.E.2d at 810.

190. *Id.* (“Any such resolution, whatever it may be, must invariably be colored by notions of public policy . . .”). This is also true in the United Kingdom, where public policy barred granting damages for the birth of a healthy child. *See McFarlane v. Tayside Health Board* [2000] 2 AC 59 (SC (HL)) (Scot.); *Rees v. Darlington Memorial Hospital Mem’l Hosp. NHS Trust*, [2003] UKHL 52 (appeal taken from Eng.).

191. *See Cockrum v. Baumgartner*, 447 N.E.2d 385, 388 (Ill. 1983) (explaining that many courts demonstrate an “unwillingness to hold that the birth of a normal healthy child can be judged to be an injury to the parents” because such a notion “offends fundamental values attached to human life”).

192. *See Speck v. Finegold*, 439 A.2d 110, 115 (Pa. 1981).

193. *See Donovan v. Idant Labs.*, 625 F.Supp.2d 256, 275 (E.D. Pa. 2009), *aff’d*, 374 F. App’x 319 (3d Cir. 2010).

194. *McKay v. Essex Area Health Authority* [1982] QB 1166 at 1173, 1185 (Eng.) (holding the only duty to the child was not to directly injure it, in a case where the parents were denied proper genetic counseling).



court noted that although the doctor owed a duty to inform the mother of the desirability of abortion, the application of such duty to the child would not be countenanced. “Such a duty [the court held] was contrary to public policy because it would ‘put doctors under a subconscious pressure to advise abortion in doubtful cases.’”<sup>195</sup> Judges have used this rationale to reject the child’s *wrongful life* claim, all the while—incomprehensively—parents are allowed to present their *wrongful birth* claim.<sup>196</sup> This illogical leap might account for decisions opining that “the danger that doctors would be under subconscious pressures to advise abortion in doubtful cases through fear of an action for damages, is, we think, a real one,”<sup>197</sup> or “if [*wrongful life*] actions were allowed, a doctor would be obliged to urge a woman to have an abortion if there was the slightest chance that her child would be born defective,”<sup>198</sup> resulting in rejection of *wrongful life* claims.<sup>199</sup>

In case there is yet any doubt of the potency of the anti-abortion sentiment driving these cases, one commentator made it patently clear:

Make no mistake. These cases are not about birth, or wrongfulness, or negligence, or common law. They are about abortion . . . . For those who cannot accept the premise [that abortion is a legal choice for a woman, they claim that], no one should ever be compensated for injury just because the choice of abortion has been thwarted.<sup>200</sup>

To be sure, these anti-abortion sentiments have generated outrage, and some judges have castigated the fear-mongering involved:<sup>201</sup>

Recognition of a cause of action for the negligent performance of lawful medical procedures certainly will not encourage or promote sterilization or abortion. Any reference in this context to the salutary

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195. See CHICO, *supra* note 61, at 75, 185; see also Athena N. C. Liu, *Wrongful life: some of the problems*, 13 J. MED. ETHICS 69, 70 (1987).

196. See *Speck*, 439 A.2d at 113–16.

197. *McKay v. Essex Area Health Authority* [1982] QB 1166 at 1187 (Eng.).

198. Robert Lee, *To Be or Not to Be: Is That the Question? The Claim of Wrongful Life*, in BIRTHRIGHTS: LAW AND ETHICS AT THE BEGINNINGS OF LIFE 172, 185 (Robert Lee & Derek Morgan eds., 1989) (alteration in original).

199. *McKay v. Essex Area Health Authority* [1982] QB 1166, 1187 (Eng.).

200. Carol Sanger, *The Lopsided Harms of Reproductive Negligence*, 118 COLUM. L. REV. ONLINE 29, 45 (2017) (alteration in original) (citing *Schloss v. Miriam Hosp.*, No. C.A. 98-2076, 1999 WL 41875, at \*4 (R.I. Super. Ct. Jan. 11, 1999)).

201. Lee, *supra* note 198, at 185 (“[T]his seems a particularly sinister form of the defensive medicine argument, since it asserts that doctors will respond to wrongful life actions by acting unlawfully. There is no other way to describe actions such as ‘urging’ abortion or advising it . . . . Not to allow compensation to A, on the basis that it might cause B to engage in unlawful activity at the expense of C, is a form of moral blackmail which the judiciary would decry in many other contexts. If uttered by any other critic, this type of allegation concerning the likely behaviour of doctors would be met by resentful indignation on the part of the medical establishment.”).

public policy . . . favoring childbirth over abortion is nothing more than a red herring.<sup>202</sup>

Indeed, some courts hold that if abortion is a right, but not one for which a plaintiff could seek redress for negligence performance, “that right would be hollow indeed.”<sup>203</sup> But these are minority opinions which have yet to gain traction. A reciprocal perspective with the same outcome results from arguing the converse premise, not against abortion *per se*, but in favor of a public policy favoring birth.<sup>204</sup> This line of reasoning has been rejected as contradicting *Roe v. Wade*.<sup>205</sup> Nevertheless, it is a prevailing undercurrent.

Decisions denying *wrongful life* claims arise under the specter that an increase in abortion would be the (horrible) result.<sup>206</sup> Although the reasoning may be relevant in failed sterilization or abortion cases,<sup>207</sup> the rejection is inapplicable in WGM cases, where the parent actively desires a child—not an abortion. In these cases, the parent is denied the right to parent—which includes the right to select a co-parent of choice.<sup>208</sup> Unfortunately, the child’s claim has been couched as the right not to be born, which courts find an anathema (discussed below), rather than as damages for pain and suffering or the right to have genetic defects remedied. It is not surprising then, that judges, who we might assume are evenly divided in their views on abortion, might subconsciously use a “blessings of children” argument<sup>209</sup> to avoid a resolution which would encourage abortion. With this in mind, let us restate the problem as it would arise in WGM cases:

The issue is not compensation for an unwanted child with a disability, but the birth of a wanted child who, as a direct consequence of a negligent act, has a disability. When such a child sues for *wrongful life* against a sperm bank (or a researcher or laboratory), it is not because the parents wanted to abort that child. In this case, the parents have already taken steps

202. *Speck v. Finegold*, 439 A.2d 110, 118 n.2 (Pa. 1981).

203. *Id.* at 114.

204. *See id.* at 114.

205. *See id.* at 117 (“Whether we personally like it or not, the clear and simple fact is that the medical procedures . . . sought . . . are perfectly legal in this Commonwealth . . . [and] the issue here presented is not whether the public policy of Pennsylvania favors birth over abortion . . . .”); *see also* *Roe v. Wade*, 410 U.S. 113, 117, 128, 142 n.55. (1973).

206. *See Speck*, 439 A.2d at 118 n.5. However, today, the choice includes a third option, genetic surgery, and hence even the typical failure to diagnose or test during pregnancy does not bring with it the same outcome as previously. Abortion or birthing a child with a defect are not the only two alternatives anymore. *See Sarah DeWeerd, Prenatal gene therapy offers the earliest possible cure*, NATURE (Dec. 12, 2018), <https://go.nature.com/2Ci05sF>.

207. Although this rationale is personally objectionable.

208. Billauer, *Sperminator*, *supra* note 13, at 65–67.

209. *Emerson v. Magendantz*, 689 A.2d 409, 419 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part).

to assure, as much as nature can, that their child will be healthy (leaving aside for the moment the parents who want to create a child with a disability, such as deafness). The parent, however, did not intend for this particular child to be born, a child saddled with deficits—not due to an act of nature—but due to someone’s negligence.<sup>210</sup> Nor does the child claim that s/he would have been better off not being born. All that is sought is damages for being harmed by the defendant’s malfeasance.

Surely, the rationale offered by Judge Flaherty in *Speck v. Finegold*<sup>211</sup> applies doubly in this context:

[W]hen existence is foreseeably and inextricably coupled with a disease, such an existence, depending upon the nature of the disease, may be intolerably burdensome. To judicially foreclose consideration of whether life in a particular case is such a burden would be to tell the diseased, possibly deformed plaintiff that he can seek no remedy in the courts and to imply that his alternative remedy, in the extreme event that he finds his life unduly burdensome, is suicide.<sup>212</sup>

The child in the WGM case seeks redress then not for being born, but for a life with a foreseeable disability or increased risk of a genetic disease. Hence, where there is no recognized legal remedy and the child finds “his life unduly burdensome [the alternative is not abortion, but rather], is suicide.”<sup>213</sup> Denying legal redress to that child would indeed be “unfortunate.”<sup>214</sup>

To circle back to the public policy aspect of the abortion issue, it is also worth noting that societal views underpinning public policy change. Past surveys indicated that about half of the country not long ago believed abortion was truly abhorrent and morally wrong,<sup>215</sup> and courts predicated

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210. See generally R.A. Lenhardt, *The Color of Kinship*, 102 IOWA L. REV. 2071 (2017) (noting a case where the plaintiff sought a white sperm donor and was impregnated with sperm from a black man, subsequently giving birth to a bi-racial child). The *Cramblett* case results in the same physical outcome as *ACB v. Thomson Med. Pte. Ltd.* In the former case no cause of action was recognized; in the latter, the claim of “loss of genetic affinity” was created. The difference factually was that in the *Thomson* case, the father, too, sought a child with a genetic connection. It must also be noted that the claim for loss of genetic affinity can be abused when the lawsuit is not predicated on a genetic infirmity but on selection-criteria gone wrong: girl instead of boy, blue eyes instead of brown, white skin instead of black. It can be argued, of course, that the parents ordered a particular type of child, and not getting what they ordered, they should have the right to sue. Interestingly, should a rare stone or book have been ordered from a catalogue, and the wrong stone or book is sent, the buyer would be allowed to sue. Why, then, when it comes to the most precious commodity, children, is this right denied?

211. *Speck*, 439 A.2d at 115.

212. *Id.*

213. *Id.*

214. *Id.*

215. See Ariana Eunjung Cha, *How Religion is Coming to Terms with Modern Fertility Methods*, WASH. POST (Apr. 27, 2018), <https://wapo.st/2NxxkILS>; see also *Speck*, 439 A.2d at 121 (“It is the faith of some that sterilization is morally wrong, whether to keep

decisions disallowing *wrongful life* claims on that basis. As one judge noted, “I can think of no issue where the residents . . . are more divided than the question of abortion. Moreover, there is a legislatively expressed policy favoring childbirth.”<sup>216</sup> The judge added, “[c]learly, there is not the unanimity of opinion in regard to either sterilization or abortion that would justify embracing a cause of action for ‘wrongful birth’ or ‘wrongful life.’”<sup>217</sup> This opinion, however, was written almost 40 years ago.

But mores are changing. For example, one 2018 report noted that a statistically significant percentage of Americans (56%) are pro-choice (up from 51%, not five months earlier).<sup>218</sup> As of 2019, that figure increased to 61%,<sup>219</sup> while only 38% are pro-life.<sup>220</sup> Further, and by comparison, 80% of Americans view IVF as morally acceptable.<sup>221</sup> It would thus behoove courts going forward to promote the safety of IVF (and all types of WGM), via a policy favoring deterrence via damages.

#### b. “The Sanctity of Life” vs. “The Quality of Life”

An alternative formulation of the abortion anathema presents itself in the “sanctity of life” argument. This doctrine holds “that the value of human life always exceeds all other values and that all human life is equal.”<sup>222</sup> The perspective pervades decisions outlawing *wrongful life* and

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(a) wife from having children or for any other reason.” (alteration in original) (quoting *Shaheen v. Knight*, 11 Pa. D. & C.2d 41, 43 (Pa. Ct. Com. Pl. 1958)); *Abortion War; Late-Term Abortions*, ECONOMIST, Aug. 24, 2019, at 20; *The Interminable Abortion War*, ECONOMIST, Feb. 16, 2019, at 27, available at <https://econ.st/37DGCQq>; *What explains Donald Trump’s war on late-term abortions?*, ECONOMIST, Aug. 24, 2019, at 20, available at <https://econ.st/2QMMDDJ>.

216. *Speck*, 439 A.2d at 121 (Nix, J., dissenting).

217. *Id.*

218. See Cha, *supra* note 215.

219. See Michael Lipka & John Gramlich, *5 facts about the abortion debate in America*, PEW RES. CTR. (Aug. 30, 2019), <https://pewrsr.ch/2LayWMO>; see also Dov Fox, *Abortion, Eugenics and Personhood in the Supreme Court* (San Diego Law Sch., Legal Studies Research Paper No. 19-405, 2019), available at <https://bit.ly/2QpHz9x>.

220. See Lipka & Gramlich, *supra* note 219 (“About six-in-ten U.S. adults (61%) said in a 2019 survey that abortion should be legal in all or most cases, compared with 38% who said it should be illegal all or most of the time.”); see also *Most Voters Don’t See a Threat to Roe v. Wade*, RASMUSSEN REP. (Jan. 23, 2019), <https://bit.ly/2MqjD20>.

221. Cha, *supra* note 215 (“The Pew Research Center found in 2013 that, while Americans are divided on the morality of abortion, nearly 80 percent of U.S. adults consider IVF morally acceptable or not a moral issue – a finding that holds regardless of gender, political affiliation or religion.”).

222. CHICO, *supra* note 61, at 76 (noting that although the “sanctity of life” is in decline, “[courts] refuse . . . to impose a duty of care on public policy grounds on the basis that it would make an ‘inroad on the sanctity of human life’” as the value of human life always exceeds all other values). *But see* *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 488 (Cal. Ct. App. 1980) (holding that “[u]nconstrained by religious convictions concerning the sanctity of life, . . . [t]he reality of the ‘wrongful-life’ concept is that such a plaintiff both exists and suffers” (emphasis omitted)).

*birth* claims,<sup>223</sup> also under the guise of public policy.<sup>224</sup> In this iteration, the courts recast the child's claim not as suffering a damaged life, but as "suffering any life at all," i.e., "the infant plaintiff [asserts] . . . not that [she] should have been born without defects but [rather] that [she] should not have been born at all . . ."<sup>225</sup> As the court in *Berman v. Allan* noted, "[o]ne 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."<sup>226</sup> Similarly, in *Harriton v. Stephens*,<sup>227</sup> the High Court of Australia refused to hold that the child's present life with disabilities represented a loss that should be recognized as constituting actionable damages.<sup>228</sup> Further, in *Azzolino v. Dingfelder*,<sup>229</sup> the court held that "[w]e are unwilling to say that life, even life with severe [impairments], may ever amount to a legal injury."<sup>230</sup>

To support rejecting *wrongful life* on moral grounds predicated on the "sanctity of life," one author brought down the quote from Ecclesiastes<sup>231</sup> that "anyone who is among the living has hope— [and]even a live dog is better off than a dead lion."<sup>232</sup> Unfortunately, the author did not delve deeply enough into Jewish teachings. These writings identify four types of people who do not have such hope and hence are considered as if dead: a poor person, a person affected by skin disease (מְצוֹרָה, *metzora*), a blind

223. See ABORTION, MEDICINE, & THE LAW 1498–99 (J. DOUGLAS BUTLER & DAVID F. WALBERT EDs., 6th ed. 2016).

224. See CHICO, *supra* note 61, at 75–76, 82, 173.

225. *Berman v. Allan*, 404 A.2d 8, 11 (N.J. 1979) (quoting *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967)); see also *Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 275 (E.D. Pa. 2009).

226. *Berman*, 404 A.2d at 12 (quoting *In re Quinlan*, 355 A.2d 647, 652 & n.1 (N.J. 1976)).

227. *Harriton v. Stephens* [2006] HCA 15, 98 (Austl.).

228. See CHICO, *supra* note 61, at 74 n.12 ("We are not told which precise policy is at issue but [Stephenson LJ] makes specific reference to 'the sanctity of life.'"); see also Lee, *supra* note 198, at 185.

229. *Azzolino v. Dingfelder*, 337 S.E.2d 528, 534 (N.C. 1985); see also *Wilbur v. Kerr*, 628 S.W.2d 568, 570 (Ark. 1982); *Atlanta Obstetrics & Gynecology Grp. v. Abelson*, 398 S.E.2d 557, 561 (Ga. 1990). But see *Turpin v. Sortini*, 643 P.2d 954, 962 (Cal. 1982) (en banc) (stating that "while 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'").

230. *Azzolino*, 337 S.E.2d at 534; see also *Andalon v. Superior Court*, 208 Cal. Rptr. 899, 907–08 (Cal. Ct. App. 1984) ("It is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born."); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wa. 1983) (en banc), *aff'd on other grounds*, 746 F.2d 517 (9th Cir. 1984).

231. See Francis Sohn, Note, *Products Liability and the Fertility Industry: Overcoming Some Problems in "Wrongful Life,"* 44 CORNELL INT'L L.J. 145, 156 (2011).

232. ECCLESIASTES 9:4. But see 2 TALMUD BAVLI: NEDARIM § 64b (Yisroel Simcha Schorr & Chaim Malinowitz eds., 2000) (expounding on the concepts enumerated and providing the scriptural sources for the holdings of the Babylonian Talmudic masters).

person, and one who is childless,<sup>233</sup> suggesting that at least for legal purposes,<sup>234</sup> compensation for such suffering, if not for living, is justified.

Today, a half-century after the first *wrongful life* cases were decided, the “sanctity of life” no longer enjoys the same societal veneration it once did.<sup>235</sup> This is especially so when children are born disabled, diseased, or with severe physical or mental challenges.<sup>236</sup> Today’s society voices a distinct respect for “the quality of life” which must be balanced against its sanctity. This theme repeatedly surfaces in current fiction as novelists compose stories illustrating lives so horrific such that to sentence someone to “serve” out this type of life without recompense would be “cruel and unusual.” In this vein, euthanasia has gained limited acceptance in parts of the United States and in some countries in Europe.<sup>237</sup> Interestingly, economic considerations are sometimes recognized as a valid basis to determine whether a life is worth maintaining at the public’s expense, even

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233. The sources for the Talmudic determination are: “A poor person is accounted as dead” is derived from Exodus 4:19 which says, “for all the men are dead who sought [your] life” (interpreted to mean that they had been stricken with poverty); a person affected by skin disease (מְצוֹרָה, *metzora*) is accounted as dead, derives from Numbers 12:10–12 which says, “[A]nd Aaron looked upon Miriam, and behold, she was leprous (מְצוֹרָה, *metzora*’at). And Aaron said unto Moses . . . ‘[I]et her not . . . be as one dead . . . .’” “The blind are accounted as dead,” derives from Lamentations 3:6 which says, “He has set me in dark places, as they that be dead of old.” “[O]ne who is childless is accounted as dead” derives from Genesis 30:1, where Rachel said, “Give me children, or else I [am dead].”

234. In practice, religious physicians often hold out hope for a patient until the last breath is taken. Interview with oncologist Dr. Yasher Hirshaut, (Aug. 11, 2018) (notes on file with author). In Israel, this approach manifests in a reverence for human life that transcends ethical and cultural norms of other countries. Shulamit Almog & Sharon Bassan, *The Politics of Pro and Non Reproduction Policies in Israel*, 14 J. HEALTH & BIOMEDICAL L. 27 (2018) at 50 (noting that “[t]o create life is no less important than to preserve life in any form, even in the medical aspect . . . the barrenness disease or the infertility disease is no less fatal than cancer”). See also *Gleitman v. Cosgrove*, 227 A.2d 689, 691 (N.J. 1967), *abrogated by Berman v. Allan*, 404 A.2d 8 (N.J. 1979); see also *Greco v. United States*, 893 P.2d 345, 347 (Nev. 1995); see generally Barbara Prainsack, *Negotiating Life: The Regulation of Human Cloning and Embryonic Stem Cell Research in Israel*, 36 SOC. STUD. SCI. 173 (2006) (discussing the cultural priority and policy of creating life in Israel, in some respects due to the Holocaust experience).

235. Anne Gilmore, *Sanctity of life versus quality of life – the continuing debate*, 130 CANADIAN MED. ASS’N J. 180, 180 (1984) (noting that “health care professionals are at the centre of a debate that juxtaposes the strongly held belief that any kind of life is better than no life at all, with the principle that life is worth saving and respecting only if it passes some test of fitness and value”).

236. See JONATHAN GLOVER, *CHOOSING CHILDREN: GENES, DISABILITY AND DESIGN* 6–27 (2006).

237. See, e.g., An Act to amend the Criminal Code and to make related amendments to other Acts (medical assistance in dying), S.C. 2016, c 3 (Can.), available at <https://bit.ly/2SW1rCW>.

justifying euthanasia.<sup>238</sup> These baser considerations are condoned—so long as abortion is not!<sup>239</sup>

Social views are often best captured in literature. In 1987, Octavia Butler wrote a science fiction story about children who sustained a horrific, genetically-transmitted disease caused by cancer drugs ingested by their parents. The story is loosely based on Lesch-Nyhan syndrome introduced at the outset of this Article.<sup>240</sup> This is an X-linked recessive disease, passed on by mothers to their sons, just as our hypothetical Lana might pass on to her son.<sup>241</sup> Children suffering from the disease self-immolate. They also sustain neurological deficits and intellectual disability. These desperate lives, however, are not limited to fiction<sup>242</sup> and I can only hope those who claim that any life is worth living, no matter what, never read Butler's gruesome depiction of what a ghoulish life of uncontrollable self-mutilation might be like and recognize that life itself can, indeed, be intolerable.<sup>243</sup>

c. The Mysteries of Non-Life Argument and its Corollary-Quantification of Damages

A corollary of the “sanctity of life” argument (where any life is better than none) is the “mysteries of life argument” (i.e., we cannot know what “no life” means, so we cannot evaluate consequent damages). Here, the courts take a flying pass, claiming that: “[w]hether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly left to the philosophers and the theologians.”<sup>244</sup> Recently, the Supreme Court of Ohio echoed this sentiment, stating: “because [*wrongful life*] claims force courts to weigh the value of being

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238. See Barbara Pfeffer Billauer, *Case-studies in Bioethics Briefs: The Right to Die and Refuse to Die* (Aug. 16, 2017) (unpublished manuscript) (on file with author), available at <https://bit.ly/39zGxz8>; *Death with Dignity: When euthanasia is imposed by a third party*, 14 *BIOETHICS LEAFLET* 31, 31–35 (2016) (Isr.), available at <http://bioethicsnews.zefat.ac.il/inner.aspx?id=316&cat=64> (unpublished English manuscript) (discussing the David Dunn case, where a hospital denied life-prolongation technology to a sentient patient who expressly did not wish to die).

239. A position rejected by Judge Bruce Kaufman in *Speck v. Finegold*, where he noted that “[t]he question is not the worth and sanctity of life, but whether the doctors were negligent in their surgical attempts at vasectomy and abortion.” See *Speck v. Finegold*, 439 A.2d 110, 117 n.1 (Pa. 1981) (opinion of Kauffman, J.) (quoting *Speck v. Finegold*, 408 A.2d 496, 503 (Pa. Super. Ct. 1979)).

240. OCTAVIA E. BUTLER, *THE EVENING AND THE MORNING AND THE NIGHT* 69 (1991).

241. A situation addressed by Parfit. See *infra* Part VI.

242. See Faith Ridler, ‘All I want for my birthday . . . is to DIE’: The heartbreaking plea of 11-year-old daughter who is in constant pain due to incurable bladder condition, *DAILY MAIL* (Jan. 19, 2019, 12:57 PM), <https://dailym.ai/2Mj8TT0>.

243. See *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 489–90 (Cal. Ct. App. 1980), *disapproved by Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982) (en banc).

244. *Becker v. Schwartz*, 386 N.E.2d 807, 812 (N.Y. 1978).

versus nonbeing, courts have been reluctant to recognize this cause of action.”<sup>245</sup>

Or as the court in *Gleitman* couched it:

Ultimately, the infant’s complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so. We must remember that the choice is not between being born with health or being born without it . . . . Rather the choice is between a worldly existence and none at all . . . . To recognize a right not to be born is to enter an area in which no one could find his way.<sup>246</sup>

But philosophy Professor David Heyd admonishes that “there is really nothing to know here, even for philosophers,”<sup>247</sup> and castigates such judicial reasoning as a cop-out, chastising judges who think philosophers possess some superior or privileged access to this kind of knowledge. At least one court even called the “fear to tread” argument nothing more than court-admitted incompetence.<sup>248</sup> Professor Heyd concurs: “[w]e do not understand ‘the unknown’ simply because there is nothing about it to understand. . . . [N]o one has anything interesting to say... [and] the conceptual coherence of the claim should concern *both* philosophers and judges.”<sup>249</sup>

When the “sanctity of life” and the mystery of life excuses are extinguished, courts must look elsewhere to eviscerate the damage claim for these reproductive harms. A tangent of the mysteries of life corollary is now invoked, called the “*the value of life conundrum*.” Courts denying *wrongful life* claims explain their rationale as the impossibility of valuing that which we consider priceless: life, itself. This approach strikes me as the height of disingenuity, as every wrongful death case involves valuing

245. *Hester v. Dwivedi*, 733 N.E. 2d 1161, 1164 (Ohio 2000) (citing *Bowman v. Davis*, 356 N.E. 2d 496, 499 n.3 (Ohio 1976) (emphasis added)).

246. *Gleitman v. Cosgrove*, 227 A.2d 689, 711 (N.J. 1967) (Weintraub, C.J., dissenting in part); *see also Phillips v. United States*, 508 F. Supp. 537, 541 (S.C.D.C. 1980) (reviewing the state of law on wrongful life claims and discussing *Gleitman v. Cosgrove* in depth).

247. David Heyd, *Are “Wrongful Life” Claims Philosophically Valid?: A Critical Analysis of a Recent Court Decision*, 21 ISR. L. REV. 574, 583 (1986) [hereinafter *Are “Wrongful Life” Claims Philosophically Valid?*] (essentially calling the judges chicken (my word) and exposing their hiding behind the philosopher’s curtain even as they rely on social and moral reasoning to make their decision). It should be noted that Professor Heyd personally opposes the wrongful life claim but on different grounds than espoused by the judiciary or by Parfit himself. Email interview with David Heyd, Professor, Hebrew Univ. of Jerusalem (Dec. 2018).

248. “[T]he [*Becker*] court declared itself incompetent to decide whether it is better never to have been born than to have been born even with gross deficiencies . . . .” *Speck v. Finegold*, 408 A.2d 496, 408 (Pa. Super. Ct. 1979) (quoting *Becker v. Schwartz*, 386 N.E.2d 807 (N.Y. 1978)).

249. *Are “Wrongful Life” Claims Philosophically Valid?*, *supra* note 247, at 583–84.



a human life. Further, courts have acknowledged the difficulties in quantifying damages is not a bar.<sup>250</sup> Yet, here it is, surfacing in a twisted iteration and rejected. Thus, by framing the child's claim as one for being alive,<sup>251</sup> which they consider a blessing,<sup>252</sup> and focusing on the restorative purpose of negligence, judges reject the claim as incalculable.

In essence, [the child] claims that her very life is "wrongful." . . . [However, t]he primary purpose of tort law is that of compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others. As such, damages are ordinarily computed by "comparing the condition plaintiff would have been in, had the defendants not been negligent, with plaintiff's impaired condition as a result of the negligence."<sup>253</sup>

But since the alternative is nonlife, courts say calculating the infant's damages is impossible:<sup>254</sup>

No one knows what it is like not to be born. Consequently, it is impossible to know or even speculate on the correct compensation in wrongful life. What dollar amount equates "to be" with "not to be?" Where these suits have been denied, the rationale has often rested on the speculative nature of the damage calculation or a public policy denial that life can ever be wrong. It is perceived by some courts to be against our social and moral underpinnings to consider life a wrong. Life is not an injury; therefore, it must inevitably be considered a good.

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250. *Id.*

251. Frasca, *supra* note 104, at 187, 199 (explaining that the harm incident to *wrongful life* and *birth* is "independent from the negligence" of a physician and the true harm is "the birth of the child").

252. Emerson v. Magendantz, 689 A.2d 409, 419 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part).

253. Berman v. Allan, 404 A.2d 8, 11–12 (N.J. 1979); see WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 336, 335–38 (4th ed. 1971); see also Harry F. Klodowski, Jr., Comment, *Wrongful Life and A Fundamental Right to be Born Healthy: Park v. Chessin; Becker v. Schwartz*, 27 BUFF. L. REV. 537, 555–59 (1978).

254. Becker v. Schwartz, 386 N.E.2d 807, 810 (N.Y. 1978); see also Kassama v. Magat, 767 A.2d 348, 363–69 (Md. Ct. Spec. App. 2001) (holding that there is no cause of action for wrongful life "because it is an impossible task to calculate damages based on a comparison between life in an impaired state and no life at all"), *aff'd*, 792 A.2d 1102 (Md. 2002); 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. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. Would claims be honored, assuming the breach of an identifiable duty, for less than a perfect birth? And by what standard or by whom would perfection be defined?").

It is a contradiction to award damages for life while maintaining laws against assisted suicide and euthanasia.<sup>255</sup>

Of course, it must be noted that assisted suicide and euthanasia are generally illegal, and abortion is not. But no matter.

Thus, one focus in cases rejecting *wrongful life* is that damages cannot be calculated because the child's claim is not to have been born at all. As the court in *Gleitman* notes, "[t]his Court cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he should not have been born, the infant makes it logically impossible . . . to measure his alleged damages because of the impossibility of making the comparison required by compensatory remedies."<sup>256</sup>

Similarly, the court in *Williams v. State* noted that:

[T]he defendant [did not commit] the acts causing injury, and the position in which the plaintiff presently finds herself. The damages sought by the plaintiff in the case at bar involve a determination as to whether nonexistence or nonlife is preferable to life as an illegitimate with all the hardship attendant thereon. It is impossible to make that choice.<sup>257</sup>

The *ipse dixit* posture of this opinion can be seen by comparing the vituperative and contrary opinions in *Speck v. Finegold*.<sup>258</sup> *Speck* presents a virtually identical fact pattern as *Berman*, *Becker*, and *Gleitman*: a malpractice suit against physicians for failing to prevent the birth of a child with a congenital (and foreseeable) injury. Three of the six sitting judges in *Speck* would allow the child to sue for *wrongful life*; three oppose it. Three judges wrote separate opinions, pulling no punches. The rationale behind the opinions clearly reflects the judges' idiosyncratic views, highlighting the personal opinions driving the opinion. Thus, while one judge opined that "[i]n the case of a claim predicated upon wrongful life, such a computation would require the trier of fact to measure the difference in value between life in an impaired condition and the 'utter void of nonexistence,'"<sup>259</sup> another judge reached the diametrically opposite conclusion:

I reject the proposition that our law is so rigid and inflexible that, to recognize a cause of action here, we must conclude that [the plaintiff] would have been better off had she never been born. The reality is that

255. Frasca, *supra* note 104, at 196.

256. *Gleitman v. Cosgrove*, 227 A.2d 689, 692 (N.J. 1967).

257. *Williams v. State*, 223 N.E.2d 343, 345 (N.Y. 1966) (Keating, J., concurring).

258. *Speck v. Finegold*, 439 A.2d 110, 114 n.5 (Pa. 1981).

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

*she exists* and that her existence is . . . “foreseeably and inextricably” coupled with a painful and disfiguring disease.<sup>260</sup>

Still, another judge flat out calls “[t]he view that we cannot calculate the value of existence as compared to nonexistence” as “hyper-scholastic” nonsense.<sup>261</sup> Judge Kauffman goes even further. Specifically rejecting the idea that the court is asked to enter the realm of the metaphysical, Judge Kauffman states, “[b]efore us, unfortunately, is a living and breathing, but incurably diseased, deformed and suffering human being who never had a chance to be born healthy and who will be in need of extraordinary medical and other special care for the rest of her days.”<sup>262</sup> He then opines that “[f]or the majority . . . to turn their backs on this *existing* child and to disregard her *actual* suffering and exceptional need for medical and other assistance is a calloused and unjust act.”<sup>263</sup>

In concluding this section, the *Curlender* opinion resounds. Therein, the court held that “there is not universal acceptance of the notion that . . . ‘religious beliefs,’ [regarding the “sanctity of life”] rather than law, should govern the situation.”<sup>264</sup> Instead, “the dissents have emphasized that considerations of public policy should include regard for social welfare.”<sup>265</sup> The court went on to note that:

[i]t is neither necessary nor just to retreat into meditation on the mysteries of life, . . . [before concluding that they] need not be concerned with the fact that [if the defendant had] not been negligent, the plaintiff might not have come into existence at all . . . the reality of the “wrongful-life concept” [was] that such a plaintiff both exist[ed] and suffer[ed].<sup>266</sup>

But that approach seems to have died with the decision.

Again, it must be recalled that in the WGM cases brought thus far—against sperm banks for implanting the wrong embryo or improperly tested sperm—the child is not claiming the right not to be born. Rather, the child asserts her/his right to have her/his genes selected with due care, or at least as designated by its mother. The child seeks damages for harm occasioned by the lack thereof. The child further claims the right not to be diseased,

260. *Speck*, 439 A.2d at 118 n.3 (opinion of Kauffman, J.) (noting that damages cannot be measured with exactitude and precision).

261. *Id.* at 115 (opinion of Flaherty, J.).

262. *Id.* at 118 (opinion of Kauffman, J.).

263. *Id.*; *see also* *Turpin v. Sortini*, 643 P.2d 954, 961–62 (Cal. 1982) (en banc) (“[I]t is hard to see how an award of damages to a severely handicapped or suffering child would “disavow” the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society.”); JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 357 (8th ed. 2012).

264. *Curlender v. Bio-Science Labs.*, 165 Cal. Rptr. 477, 486 (Cal. Ct. App. 1980).

265. *Id.* at 486–87.

266. *Id.* at 488.

not to be saddled with a gene that s/he will pass on to her or his offspring, and not incur risks of disease in excess of that to which the general population is subjected. The claim that such damages cannot be calculated is specious—the comparison is between a child born with cystic fibrosis, fragile X syndrome, polycystic kidney disease, or increased risk of schizophrenia, for example, and a child born without these anomalies and diseases, not some inchoate claim not to have been born at all.

d. Restorative Justice vs. Deterrence

A policy articulating that damages are incalculable cannot be based on judges' "idiosyncratic" and personal (religious?) views.<sup>267</sup> For such an objection to have legal weight, it must be translated into some recognizable legal framework. Two such contexts are attempted. One is that the claim is not capable of achieving restorative justice. The other is that there is no guaranteed right to be free from genetic defects.<sup>268</sup> The reformulated damage aspect of *wrongful life* (i.e., that it fails to further the legal function of restorative justice)<sup>269</sup> is inapplicable in our context because restoring the infant-plaintiff to non-birth is not the issue here. As Justices Flaherty and Kauffman note in *Speck*,<sup>270</sup> the child is born harmed and "[i]t would be bizarre to argue that [the] plaintiffs . . . are not injured."<sup>271</sup>

Additionally, restorative justice is not the only, nor necessarily the primary, objective of tort law.<sup>272</sup> As explained in *Speck*, the duty of care is imposed not only "to compensate the victim," but to "deter negligence" and "encourage due care."<sup>273</sup> Significantly, the court noted:

267. *Speck v. Finegold*, 439 A.2d 110, 119–20 & n.4 (Pa. 1981) (Nix, J., dissenting).

268. Billauer, *Sperminator*, *supra* note 13, at 56.

269. After all, the child is alive. Many courts believe that being alive can never be said to constitute a harm. See *Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984) ("Our decision to allow the recovery of extraordinary medical expenses is not premised on the concept that non-life is preferable to an impaired life, but is predicated on the needs of the living."); see also *Andalon v. Superior Court*, 208 Cal. Rptr. 899, 909 (Cal. Ct. App. 1984) (Evans, J., concurring) ("[W]e conclude that while a plaintiff-child in a wrongful life action may not recover general damages for being born impaired as opposed to not being born at all, the child—like his or her parents—may recover special damages for the extraordinary expenses necessary to treat the hereditary ailment.") (citing *Turpin v. Sortini*, 643 P.2d 954, 966 (Cal. 1982) (en banc)); see generally *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483 (Wash. 1983) (en banc) (allowing both *wrongful birth* and *wrongful life* actions, and holding that recognition of these claims encourages due care in genetic counseling and prenatal testing and neither undermines the "sanctity of life" nor disparages people with disabilities).

270. *Speck*, 439 A.2d at 116 (opinion of Flaherty, J.).

271. *Id.* As Judge Kauffman pointedly notes, "[a]ny argument that this life of suffering is not the natural and probable consequence of appellees' misconduct is rank sophistry." *Id.* at 118 (opinion of Kauffman, J.).

272. See HOLMES, *supra* note 1, at 35–36.

273. *Speck*, 439 A.2d at 114

[This] “prophylactic” factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive . . . . [T]o deny plaintiffs even the opportunity to present their case in a court would be to grant an unjustifiable and unfair windfall to the defendants, who would escape liability for the harm resulting from their alleged negligence.<sup>274</sup>

As one commentator said, “without damages there can be no deterrence. Negligent beginnings is a unique area of law where deterrence, rather than victim compensation, is the driving force for damages.”<sup>275</sup>

#### IV. THE PHILOSOPHER’S STONE: PARFIT’S NON-IDENTITY PROBLEM INFECTS THE LAW

##### A. *Parfit’s Non-Identity Problem: A Standing Argument*

The fourth rationale for voiding claims for *wrongful life* vests in the tangled theories of Derek Parfit’s Non-Identity Problem,<sup>276</sup> also known as the “paradox of [the] future individuals.”<sup>277</sup> This philosophical concept which has been co-opted by the law<sup>278</sup> deals with “the new field of the ethics regarding future people,”<sup>279</sup> including “whether people can complain [about] having been born in an inferior condition to that of *other* people who could have been born in their stead had we acted differently.”<sup>280</sup> Whether this concept is appropriate for legal uses is the subject of this section.

274. *Id.* at 114–15; see also *Harbeson*, 656 P.2d at 483, 496.

275. See *Frasca*, *supra* note 104, at 199; see also *Speck*, 439 A.2d at 115; *Wuth ex rel. Kessler v. Lab. Corp. of Am.*, 359 P.3d 841, 865 (Wash. Ct. App. 2015).

276. See Michael B. Laudor, *In Defense of Wrongful Life: Bringing Political Theory to the Defense of a Tort*, 62 *FORDHAM L. REV.* 1675, 1676–80 (1994); see also W. Ryan Schuster, *Rights Gone Wrong: A Case Against Wrongful Life*, 57 *WM. & MARY L. REV.* 2329, 2356–62 (2016).

277. David Benatar, *The Wrong of Wrongful Life*, 37 *AM. PHIL. Q.* 175, 175 (2000) (quoting Gregory S. Kavka, *The Paradox of Future Individuals*, 11 *PHIL. & PUB. AFF.* 93 (1982)).

278. See, e.g., *Tedeschi*, *supra* note 28, (suggesting that children have a cause of action against their parents for pre-birth injuries).

279. David Heyd, *Parfit on the Non-identity Problem, Again*, 8 *LAW & ETHICS HUM. RTS.* 1, 1, 2 n.3 (2014) (noting that Heyd also discusses the concept, creating the term “Genethics”) [hereinafter *Parfit on the Non-Identity Problem*]; see also David Heyd, *The Intractability of the Nonidentity Problem*, in *HARMING FUTURE PERSONS: ETHICS, GENETICS AND THE NONIDENTITY PROBLEM* 3, 4 (Melinda A. Roberts & David T. Wasserman eds., 2009).

280. *Parfit on the Non-Identity Problem*, *supra* note 279, at 2. Professor Heyd reminds us that “there is the further and not irrelevant question about reproductive choices

In a more convoluted manner of expression than that used by the *Becker* court, this view claims that the child-plaintiff would not have been born<sup>281</sup> but for the misfeasance or malpractice. Hence, as I would paraphrase it in legal parlance, the child lacks standing to sue, since but for the negligence, the child would not have been born. Framing the issue this way highlights the distinction between claims that could be brought for malpractice<sup>282</sup> and claims for WGM (including sperm bank malfeasance, e.g., switched sperm, embryo or implantation of inapt gametogenic material). In the former case, the child who exists would never have existed at all;<sup>283</sup> in fact, no child would have existed. In the latter case, *someone* would exist in whose shoes this child stands, although perhaps not this particular child. Thus, in a twist of causal consequences, but for the negligent acts, this particular plaintiff would not be here. The standing issue is similar, but not the same. In the former case, no one would have existed. In the latter, it would have been a different person, but someone would exist to bring a claim. This distinction is critical in developing a resolution, as will be seen in Part V.

Getting back to Parfit, it is important to note that Parfit's thought-experiment originates in the context of evaluating societal decisions that are made now, but affect generations in the future (not whether a parent should take steps to avoid birthing a genetically impaired child).<sup>284</sup> Perhaps Parfit's initial concern might be said to be similar to that raised by *Becker* and *Donovan*—i.e., is it better to be born or not to be born—but on a global or societal level. However, this is not the issue in WGM cases. Here, the question is whether it is better for an individual to be born with a genetic defect or without one. Or, where the child is born with a genetic defect that greatly increases the risk of disease over the background level, does that child have a right to sue—not for some hypothetical increased risk, but for the constant unremitting fear the disease will occur? Should

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whose alternatives are just avoiding completely the conception of new children." *Id.* at 13. While opposed to this right for the individual, Heyd does acknowledge that the world (a.k.a. society) might have an interest in promoting this, thus cohering with my advocating using public nuisance theory to sustain such a claim. *See id.* at 3; Billauer, *Sperminator*, *supra* note 13, at 60.

281. *See* JOHN A. ROBERTSON, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES 75–76 (1994) (“[I]n many cases of concern the alleged harm to offspring occurs from birth itself. . . . Preventing harm would mean preventing the birth of the child whose interests one is trying to protect.”); *see also* Dov Fox, *Luck, Genes, and Equality*, 35 J.L. MED. & ETHICS 712, 713 (2007) (“[I]t makes little sense, . . . to consider whether the person resulting from genetic selection from among multiple potential lives is better or worse off on account of any pre-natal interventions taken on her behalf.”).

282. What Professor Fox calls “procreation imposed.” *See* Fox, *supra* note 30, at 154 n.24, 185–93; *see also* Billauer, *Re-Birthing*, *supra* note 14, at 7–15.

283. Notwithstanding the criticality of this concept as a means to reject the *wrongful life* claim, there is a body of cases (pre-conception tort), which allows claims when children have not been born, or even conceived. *See infra* Section V.B.

284. PARFIT, *supra* note 25, at 364.

that child be allowed recovery for medical monitoring, other prophylactic costs, and the annoyance of being subjected to the same? Parfit deals with this issue separately. But what Parfit actually says is not what others say he says.<sup>285</sup> In fact, Parfit rejects the idea that actively creating the type of harm which is the subject of WGM and *wrongful life* cases should not be redressed.

First, Parfit rejects the notion that a dichotomous answer is always possible in this context.<sup>286</sup> Second, Parfit notes a distinction when the activity in question creates a different person than intended—as opposed to one which fails to generate any person at all. His reasoning derives from his focus on the number of persons ultimately born (i.e., whether decisions made today will affect the number, not merely the identity of people born centuries down the road). By comparison, as stated above, in WGM cases the question is not whether any child will be born (as it is in the failed sterilization/abortion cases), rather, it is whether this particular child—having this particular genetic defect—will be born. In this situation, the total number of birthed children is the same. But, if harm can be avoided in one of these birth outcomes, failure to do so, Parfit would say, should be compensable.<sup>287</sup> Here, Parfit discusses blame which can be translated into providing for damages in negligence: “We can deserve to be blamed for harming others, even when this is not worse for them.”<sup>288</sup> How much more would Parfit subscribe to this theory when the outcome is, in fact, worse for the resultant child, and when some third party negligently causes that harm?

When it comes to preventing harm, Parfit goes further, indicating that whether this is done pre-conception or during pregnancy, there is no difference.<sup>289</sup> This view is at odds with the prevailing legal opinion. Going

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285. Email interview with David Heyd, Professor, Hebrew Univ. of Jerusalem (Dec. 2018). Professor Heyd, however, “out-Parfit’s” Parfit and subscribes to the NIP doctrine. See *Are “Wrongful Life” Claims Philosophically Valid?*, *supra* note 247, at 582. The *Zeitsov* case, CA 518/82 *Zeitsov v. Katz*, 40(2) SC 85 (1986) (Isr.), has since been overruled. See CC (Hi) 745/02 *Hammer v. Prof. Amit* (2006) (Isr.) (following Professor Heyd’s view).

286. See PARFIT, *supra* note 25, at 352 (“We are inclined to believe that any question about our identity must have an answer, which must be either Yes or No . . . I reject this view. There are cases in which our identity is indeterminate.”).

287. *Id.* at 364.

288. *Id.* at 370–72 (“[B]eneficence and human well-being, cannot be explained in person-affecting terms. Its fundamental principles will not be concerned with whether our acts will be good or bad for those people whom they effect.”).

289. *Id.* at 368–69 (“If there will be people with some handicap, the fact that they are handicapped is bad.’ . . . [When] there [is] a different group of handicapped people [[t]he people in the first group would not be worse off than the people in the second group would have been [if both groups are handicapped].”). If Parfit believes there is no difference in comparing two groups of handicapped persons, would he not believe that in comparing handicapped versus non-handicapped, promoting the latter is the better moral good? *Id.* at 369 (“[W]e ought to choose to cure [one] group only if they have a stronger

full circle to the morality approach which contends that some life—even one with a deficit—is better than no life, Parfit castigates a mother who passes on an inheritable disease to a son, but who could have avoided this by selecting to have a daughter via IVF—which she eschews.<sup>290</sup> If an act can prevent disease, such as properly performed genetic selection, Parfit contends that this is the moral approach. In other words, a different child without disease is a better result than a child who is afflicted.<sup>291</sup>

In sum, those championing the NIP do not specifically rely on the “morality/sanctity of life” approach. They would also support a child’s claim if the child is harmed *in utero*, as opposed to one harmed prior to implantation during the fertilization process. Thus, if the genetic intervention were attempted *during* pregnancy and that intervention went wrong, an ensuing child could bring a claim.<sup>292</sup> Only because the same action occurred prior to implantation—with the possibility that another embryo could have been implanted in its stead with a different child being born—does the child who was in fact born lose the right to sue under the NIP. The law agrees.<sup>293</sup>

#### B. Damages for Injury In Utero

Paralleling the current state of denying recovery in *wrongful life* cases is the development of cases for prenatal torts. In early legal lore, all prenatal torts were excluded from compensation because the conceptus was regarded as part of its mother and, therefore, its claims were subsumed by hers.<sup>294</sup> Similarly, at one time killing a fetus *in utero* would have been considered property damage, compensated according to the wealth of the family.<sup>295</sup> However, perhaps foreshadowing Professor Fox’s bold venture into new-tort creation,<sup>296</sup> some half-century ago “common law rule suffered a ‘spectacular[ly] abrupt reversal’” unprecedented in the whole history of the law of torts.<sup>297</sup> Sometime during the early 1970s courts determined that “no one is to be denied compensation for injury merely

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claim to be cured . . . If Pre-Conception Testing would achieve results in [just] a few more cases, I would judge it to be the better programme.”).

290. *Id.* at 375–76.

291. *Id.*

292. See Smolensky, *supra* note 162, at 324 n.147, 332.

293. See Johnson v. Superior Court, 95 Cal. Rptr. 2d 864, 867 (Cal. Ct. App. 2000); see also Johnson v. Superior Court, 124 Cal. Rptr. 2d 650, 666 (Cal. Ct. App. 2002).

294. Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 15, 17 (Mass. 1884).

295. See Barbara Pfeffer Billauer, *Abortion, Moral Law, and the First Amendment: The Conflict Between Fetal Rights & Freedom of Religion*, 23 WM. & MARY J. WOMEN & L. 271, 301–06 (2017).

296. See generally Fox, *supra* note 30.

297. Sohn, *supra* note 230, at 158 (quoting WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 336 (4th ed. 1971)).



because the harm was inflicted before that person's birth."<sup>298</sup> That broad sweeping language, however, was to be revoked if used to recompense a child seeking damages for the harms caused by WGM.

Today, most jurisdictions expand legal protection afforded to the unborn where the injury occurs during pregnancy,<sup>299</sup> or even before conception,<sup>300</sup> a feature with direct applicability to WGM cases, as will be discussed below. It is important to note that in these *in utero* cases, a negligent tortfeasor is liable for *all* damages proximately resulting from her or his negligence, including the costs of raising that child.<sup>301</sup> Generally speaking, then, all foreseeable harm is compensable if it is caused during pregnancy and the harmed child is born alive.<sup>302</sup> The dicta in *Bonbrest v. Kotz* seems to go further, impliedly rejecting the often sublimated notion

298. *Id.* (quoting DAN B. DOBBS, *THE LAW OF TORTS* § 288 (2000)); *see also* *Sylvia v. Gobeille*, 220 A.2d 222, 224 (R.I. 1966) (discussing a child that was born with physical defects allegedly because defendants negligently failed to prescribe gamma globulin for the mother during her pregnancy, notwithstanding defendant's knowledge of her exposure to German measles, noting that "justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body," and that "[i]f the wrongful conduct of another interferes with that right, and it can be established by competent proof that there is a causal connection between the wrongful interference and the harm suffered by the child when born, damages for such harm should be recoverable by the child." (quoting *Smith v. Brennan*, 157 A.2d 497, 502-03 (N.J. 1960))). *But see* *Greco v. United States*, 893 P.2d 345, 346 (Nev. 1995) (holding that a child born with severe deformities from undiagnosed rubella during her mother's pregnancy was not permitted to maintain a cause of action).

299. *See, e.g.*, *Hornbuckle v. Plantation Pipe Line Co.*, 93 S.E.2d 727, 728 (Ga. 1956) (holding that a child injured before birth may bring a cause of action); *Amann v. Faidy*, 114 N.E.2d 412, 417-18 (Ill. 1953) (examining a case in which a fetus suffered prenatal injuries, was born alive, and then died of those injuries, was held within state's wrongful death act); *Grp. Health Ass'n, Inc. v. Blumenthal*, 453 A.2d 1198, 1207 (Md. 1983) (recognizing the general principle of right of action for prenatal injuries); *see also* Gerard M. Bambrick, *Developing Maternal Liability Standards for Prenatal Injury*, 61 ST. JOHN'S L. REV. 592, 593 n.4 (1987) ("The child, if he is born alive, is now permitted in every jurisdiction to maintain an action for the consequences of prenatal injuries, and if he dies of such injuries after birth an action will lie for his wrongful death." (quoting W. KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 55, at 368 (5th ed. 1984))).

300. *See Preconception Tort as a Basis for Recovery*, 60 WASH. U. L. Q. 275, 285-86 (1982) (citing *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250 (Ill. 1977)).

301. *See Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981); *see also* *Woods v. Lancet*, 102 N.E.2d 691, 694 (N.Y. 1951) (giving a history of pre-birth damage holdings and noting that "while legislative bodies have the power to change old rules of law, nevertheless, when they fail to act, it is the duty of the court to bring the law into accordance with present day standards of wisdom and justice rather than 'with some outworn and antiquated rule of the past'. . . . We act in the finest common-law tradition when we adapt and alter decisional law to produce common-sense justice").

302. *See Bonbrest v. Kotz*, 65 F.Supp. 138, 140-41 (D.D.C. 1946) (noting that "the wrongful act which constitutes the crime may constitute also a tort, and if the law recognizes the separate existence of the unborn child sufficiently to punish the crime, it is difficult to see why it should not also recognize its separate existence for the purpose of redressing the tort." (quoting *Montreal Tramways Co. v. Léveillé*, [1933] S.C.R. 456, 464 (Can.))).

that a *wrongful birth* action can subsume those claims presented by the *wrongful life* claim:

If a child . . . has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a very heavy burden of infirmity and inconvenience without any compensation therefor.<sup>303</sup>

Such is the holding in the thalidomide cases, for example, where children were eventually compensated for injuries the drug caused them during gestation.<sup>304</sup> British statutes implement this notion into law, making it patently clear that the “child, if born alive, may sue for injury in-utero,”<sup>305</sup> and “[i]f a child is born disabled as the result of such an occurrence before its birth . . . and a person . . . is . . . answerable to the child in respect of the occurrence, the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable . . . .”<sup>306</sup>

This approach has been applied to injuries occurring even before conception,<sup>307</sup> a feature with direct applicability to WGM cases, as will be discussed in greater detail in the following section. For now, it is noteworthy to add that the English statute extends the concept to damage accruing from IVF (and in sperm bank) cases:<sup>308</sup>

In any case where a child carried by a woman as the result of [any of several fertility treatments] is born disabled,<sup>309</sup> [and] the disability results from an act or omission in the course of the selection . . . of the embryo carried by her or of the gametes used to bring about the

303. *Id.* at 141–42.

304. See Harold Evans, *Thalidomide: how men who blighted lives of thousands evaded justice*, GUARDIAN (Nov. 14, 2014, 2:11 PM), <https://bit.ly/1xZ02rq>.

305. Dominic Wilkinson et al., *Protecting Future Children from In-Utero Harm*, 30 BIOETHICS 425, 425–26 (2016).

306. Congenital Disabilities (Civil Liability) Act 1976, c. 28, § 1(1) (Eng.), <http://www.legislation.gov.uk/ukpga/1976/28>.

307. See *Preconception Tort as a Basis for Recovery*, *supra* note 300, at 286.

308. *Id.*; see also HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990, c. 37, § 44 1A(1)–(2) (Eng.), <http://www.legislation.gov.uk/ukpga/1990/37>.

309. The British Fertilisation and Embryology Authority is quite cognizant of the profit-making motivation of these enterprises, with the press calling them “IVF rip off clinics.” See Kamal Ahuja & Nick Macklon, *The HFEA statement on add-ons in IVF can turn hope into reality*, BIOETHICS (Feb. 4, 2019), <https://bit.ly/2tADKoJ> (noting that “The HFEA [is] . . . insisting that all fertility treatments be ‘offered ethically’ . . . [by] seeking to create a culture of change among fertility professionals in the UK that protects patients from potential exploitation . . .”).

creation of the embryo, and a person is under this section answerable to the child in respect of the act or omission, *the child's disabilities are to be regarded as damage resulting from the wrongful act of that person and actionable accordingly at the suit of the child.*<sup>310</sup>

### C. *Paradoxes in Pregnancy (The DES Cases)*

With the foregoing in mind, it is easy to see that there is something circular and vaguely disquieting behind the reasoning adduced from the NIP to defeat *wrongful life* cases in the context of WGM, i.e., the “defected” child cannot sue because but for the negligence s/he would not have been born. The negligence has put the prospective plaintiff in a Schrodinger’s cat situation: the plaintiff is both injured and barred from suit *because* of that injury. In other words, but for the negligence, the child would not have the injury. However, the child also would not be alive to sue and, in fact, that child would not have been born at all. Thus, the injury is *being born*, a condition necessary both for the child’s life as well as for her/his inclination to bring suit. In other words, but for this negligence, the child would not have been born, and so s/he cannot sue. Had the child been born without a defect, there would be no reason to sue, so the actual damage is being born with a defect, not whether the child is born at all. Alternatively, it can be said that the injury confers on the child the unfortunate position of having been harmed, while the harm (being born with a defect) renders the child powerless to sue. Indeed, it might be said that this child is deprived of the right to sue precisely because that child lacks standing to sue, thus illustrating the circular reasoning identified at the outset of this paragraph.

The NIP, therefore, creates a situation of trichotomous legal results, illustrated below. If the injury occurred prior to implantation, the child is deprived of redress. However, if the same injury happened by human intervention *in utero*, the child would be able to sue because that child’s identity has already been cemented. It must be recalled that basic negligence law holds that it is not the act that gives rise to suit, but the consequences of the act. That maxim falls flat, however, when the NIP

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310. HUMAN FERTILISATION AND EMBRYOLOGY ACT 1990, c. 37, § 44 1A(1) (Eng.) (emphasis added); see also ROSALIND English, *IVF Doctor not liable for failing to warn parents of genetic disorder in child—Australian Supreme Court*, UK HUM. RTS. BLOG (May 21, 2013), <https://bit.ly/2N7Y8VR> (“Since 1999 (MacFarlane v. Tayside Health Board) such [claims] have been refused on grounds of public policy – for the birth of a healthy baby, that is. As far as disabled children are concerned, parents can [seek] the additional costs attributable to the disability . . .”). *But see* Waller v. James [2013] NSWSC 497 (Austl.) (suggesting that an IVF case presents as per Professor Fox’s typical pregnancy-imposed case. The court in *Waller v. James* did not find the fertility doctor liable for failing to advise the parents of the “‘myriad range’ of genetic conditions” because the fertility doctor, whose expertise was not genetics, “had been retained to assess a fertility assistance problem,” not to advise regarding genetic conditions).

infiltrates law. In these cases, the act and its consequences are the same. The differences are the locus of the harm—was it in a test-tube, a petri dish, or *in utero*—as well as the timing of the negligence—pre- or post-implantation or gestation.

To illustrate the situation: let us assume the harm this child suffers was caused post-fertilization, a state analogous to post-conception. Consider a child born deaf. Generally, this would be considered “an act of God” and a lawsuit—by the mother or the child—would not lie. Now, let us say the mother is tested during pregnancy for a defect indicating deafness. The mother claims she cannot raise a deaf child and would abort the fetus if tests show deafness. Assume, further, that the doctor or geneticist fails to detect the abnormality and a child is born deaf.<sup>311</sup> Again, no lawsuit for *wrongful life* exists, and only a limited claim for damages<sup>312</sup> accrues under classic *wrongful birth* analysis for depriving the mother of a “right” to abort.

However, if the mother took antibiotics during pregnancy, and this was the proximate cause of the deafness, the child would well be able to bring an action—certainly against the pharmaceutical manufacturer, if not the physician for prescribing the drug. All ensuing damages, including a lifetime of pain and suffering, would be compensable. Now assume, instead, that the fetus has a genetic defect causal for deafness that could be rectified during pregnancy. Assume the child is operated on *in utero*, but the operation was performed negligently and this child, too, is born deaf. According to the prevailing theory, this child, too, would be able to bring suit because there is no non-identity problem.

Now, imagine several embryos are produced during an IVF procedure. The embryos are tested pre-implantation, but the wrong embryo, one carrying a gene for deafness, is implanted. According to the NIP, this child could not sue because but for its implantation, it would not have been born.<sup>313</sup> The muddled and confusing situation arising when the same injury is caused by the same doctor or sperm bank but results in different holdings is the stuff that invites Supreme Court reviews and law review articles and demands legal resolution.

The disparity of results presented by the NIP is further illustrated by the Diethylstilbesterol (“DES”) litigation: “During 1938–1971, U.S. physicians prescribed DES to pregnant women to prevent miscarriages . . . . As a result, an estimated 5–10 million pregnant women

311. Sarah-Kate Templeton, *Deaf demand right to designer deaf children*, SUNDAY TIMES (Dec. 23, 2007, 12:00 AM), <https://bit.ly/39JUvhQ>.

312. See *Emerson v. Magendenz*, 689 A.2d 409, 412 (R.I. 1997).

313. See Smolensky, *supra* note 162, at 301, 331; see also PARFIT, *supra* note 25, at 352.

and the children born of these pregnancies were exposed to DES.”<sup>314</sup> In 1971, DES was identified “as a cause of a rare vaginal cancer in girls and young women who had been exposed to DES before birth (in the womb).”<sup>315</sup> Similar to the thalidomide cases, these children were allowed to sue. But the DES cases differ from thalidomide (or other drugs ingested *in utero* causing harm), even though ingestion of the drug by their mothers also occurred during pregnancy, because DES was used *to prevent* miscarriage. This means that but for the consumption of the drug, the offspring of DES mothers likely would not have survived pregnancy. In fact, the drug harmed the very children it was designed to foster.<sup>316</sup>

In the DES cases, even though but for the negligence, the children would not have existed, the courts allowed them to sue.<sup>317</sup> In fact, in these cases, American courts actually expanded the capacity to sue pharmaceutical manufacturers, both broadening the statute of limitations<sup>318</sup> and establishing a novel concept of recovery: the concept of market share liability. Under this novel theory, where mothers could not identify the brand they ingested, the entire industry was considered liable and all manufacturers were held accountable. The damages each manufacturer paid were calculated on a pro-rata basis of their market share.<sup>319</sup> This innovative concept was judicially created so that manufacturers could not hide under the claim that their product was unidentifiable.<sup>320</sup>

It bears repeating that in the DES cases, these children (as in the case of those born of WGM) likely would not have been born but for the defendants’ negligent actions, and their mothers’ ingestion of the drug. Strictly speaking, the NIP should kick in here, too. However, not only are these daughters allowed to sue for the harms they sustained, but the burden

314. See *DES History*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://bit.ly/2lOPuk9> (last visited Jan. 5, 2020).

315. *Id.*; see also Marieke Veurink et al., *The History of DES, Lessons to Be Learned*, 27 PHARMACY WORLD & SCI. 139, 139–43 (2005).

316. *DES History*, *supra* note 314 (“In 1953, published research showed that DES did not prevent miscarriages or premature births. However, DES continued to be prescribed until 1971. In that year, the Food and Drug Administration (“FDA”) issued a Drug Bulletin advising physicians to stop prescribing DES to pregnant women.”).

317. *But see* *Payton v. Abbot Labs*, 437 N.E.2d 171, 181–82 (Mass. 1982) (offering a confusing result where recovery was circumscribed along the same lines as the NIP rationale).

318. *In re N.Y. Cty. DES Litig.*, 678 N.E.2d 474, 476, (N.Y. 1997) (expanding the time allowable to sue).

319. See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 669 (1926).

320. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 925 (Cal. 1980) (pioneering market share liability in diethylstilbestrol (“DES”) cases where identification of the manufacturer of the drug that injured a plaintiff is impossible. DES was a “drug administered to plaintiff’s mother . . . for the purposes of preventing miscarriage”); see also *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1070 (N.Y. 1989) (adopting market share liability in DES cases).

of proof for establishing liability has been relaxed; they need not even prove the identity of the defendant manufacturer, and their statute of limitations has been enlarged.

Now let us compare this situation to that of Lana, from our introductory hypothetical. Lana's genes were genetically altered, but she, herself, sustains no diagnosable harm. Instead, she gives birth to a child with a causally-related genetic disease. Part II illustrated that this child could not recover, as the claims have been squirreled away under the theory of *wrongful life*. But the divergence of WGM cases with general negligence law becomes even more clearly apparent in this context. Not only would the child be barred from suit, but so would Lana. Thus, although the *wrongful birth* claim—i.e., the parent's claim for damages when their child is born harmed—is allowed in most jurisdictions,<sup>321</sup> it is not allowed here. Why? Because the NIP infection has spread. Not only would the child not have been born but for the genetic intervention—but neither would Lana.

The wordsmithing involved in side-stepping liability becomes apparent when comparing language from *Gleitman v. Cosgrove*:<sup>322</sup>

The semantic argument whether an unborn child is “a person in being” seems to us to be beside the point. There is no question that conception sets in motion biological processes which if undisturbed will produce what everyone will concede to be a person in being. If in the meanwhile these processes can be disrupted, resulting in harm to the child when born, it is immaterial whether before birth the child is considered a person in being. And regardless of analogies to other areas of the law, justice requires that the principle be recognized that a child has a legal right to begin life with a sound mind and body.<sup>323</sup>

Yet, notwithstanding such august language, the court denied the child's recovery because the claim was couched as one preventing the mother from obtaining an abortion, which would have terminated the child's existence. In other words, the court framed the case as one claiming that the child's very life was wrongful, “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>324</sup>

321. See, e.g., *Emerson v. Magendantz*, 689 A.2d 409, 422 (R.I. 1997).

322. See *Gleitman v. Cosgrove*, 227 A.2d 689, 691–92 (N.J. 1967) (citing *Smith v. Brennan*, 157 A.2d 497, 503 (N.J. 1960) (where a child *in utero* received injuries when his mother was in an automobile accident)) *abrogated by* *Berman v. Allan*, 404 A.2d 8 (N.J. 1979). *Gleitman* was also a failure to advise the mother that her German measles could affect the fetus she was carrying at the time, denied also on lack of causation grounds. *Id.*

323. *Id.* at 692–93. While the court in *Gleitman* denied recovery for wrongful life, it is to be noted that this case arose prior to *Roe v. Wade* conferred the right of abortion on the mother. *Id.*; see also *Roe v. Wade*, 410 U.S. 113 (1973).

324. *Gleitman*, 227 A.2d at 692.

## V. THE WAY FORWARD

There are three ways out of this conundrum. First, the courts can recognize the error of their ways and allow recompense under traditional tort theory. Second, an entirely new approach can be constructed, such as Professor Fox's reproductive negligence. The latter will undoubtedly take time for traction to root, but is probably more likely than expecting the judiciary to do an abrupt about-face. As one prescient law student wrote in a similar context, "the weight of precedent is simply too great, and the emotional and ethical pull of the subject too strong for the American courts to correct themselves and do justice to children born disabled due to the negligence of another."<sup>325</sup>

Or we can create a third or hybrid solution, one utilizing or repurposing existing legal theory and tailoring it to the present conundrum. With this approach in mind, we proceed:

The difference between WGM and reproductive malpractice cases (stemming from failure to prevent pregnancy or allow its termination) has been dissected above. In cases of WGM, we have parents who want a child—and a child who is *not* claiming a right not to be born. Instead, both are claiming damages for the defects related to the child's birth which are directly caused by third parties. The remaining obstacle is circumventing the NIP, which bars the child's right to sue because but for the negligence *this* child would not have been born.

The similarity between this situation and the DES cases is obvious. Hence, it behooves courts to realize that WGM cases are a disparate branch of case law where different legal outcomes are generated by the same situation, meaning injured children and harmed parents are barred from bringing suit in some cases and not others. Nevertheless, another route exists to allow the child's recovery: the time-honored method of creating a legal fiction.<sup>326</sup>

### A. *The Legal Fiction and the Legal Person*

To begin, we need an entity capable both of suffering harm and eligible to sue. In other words, we need a legal person.<sup>327</sup> "To be a legal person is to be the subject of rights and duties."<sup>328</sup> Strictly speaking, the child born of WGM is a legal person, as that child clearly has rights and duties. But, according to philosophers, the legal person we have here, the

325. Sohn, *supra* note 230, at 172.

326. See VISA A.J. KURKI, A THEORY OF LEGAL PERSONHOOD 20–22 (2019) (explaining that a legal fiction is a "consciously false statement" designed to create a status of personhood enabling rights where otherwise they may be lacking, and in answer to the question: "Who is the Law for?" . . . noting the "protection of moral persons is the point of law, and such persons should be recognized as legal persons").

327. See generally Bryant Smith, *Legal Personality*, 37 YALE L.J. 283 (1928).

328. *Id.*

child, has not been harmed, or if the child has been harmed, the negligently created harm also occasioned the child's birth, nullifying the capacity to sue.<sup>329</sup> With all due respect to the philosophers, clearly, this child has been harmed. But no matter, to humor the philosophers we can create a "legal person" who has both been harmed and also has the right to sue for such harm—via a legal fiction.<sup>330</sup>

To create such a legal person, what "we really need to do is to overhaul the doctrine of personality . . . [and] point out some of the non-legal factors which have found their way into the discussion . . ." <sup>331</sup> "What 'person' signifies in popular speech, or in psychology, or in philosophy or morals, would be irrelevant . . ." <sup>332</sup> Paradoxically, we might recognize that philosophy may not be well-suited to address the legal dilemma presented here. <sup>333</sup>

Let us return to focusing on the legal status of this hypothetical person. "For legal science, the notion of person is and should remain a purely juridical notion."<sup>334</sup> "[P]ut roughly, 'person' signifies what law makes it signify,"<sup>335</sup> or to paraphrase Humpty Dumpty,<sup>336</sup> in law, "'person' means what the law makes it mean . . ." <sup>337</sup> The "legal person" is defined as: "the subject of rights and duties."<sup>338</sup> Or, "[t]o confer legal rights or to impose legal duties, therefore, is to confer legal personality."<sup>339</sup>

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329. I suggest it is time to disavow the philosophical connection in the legal context. Thus, as the scholar John Dewey writes: "[I]t is even more markedly true that old non-legal doctrines which once served to advance rules of law may be obstructive today. We often go on discussing problems in terms of old ideas when the solution of the problem depends upon getting rid of the old ideas, and putting in their place concepts more in accord with the present state of ideas and knowledge." See Dewey, *supra* note 319, at 657.

330. *Legal Fiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("An assumption that something is true even though it may be untrue, made esp. in judicial reasoning to alter how a legal rule operates.").

331. Dewey, *supra* note 319, at 658.

332. *Id.* at 656.

333. The infiltration of the NIP into law in this situation may be another example of philosophy co-opting the law when it is wholly inapt, as occurred in the *Daubert* case when the lawyers conscripted Popper's definition of science to the legal arena. As I have previously shown, Popper's view of science was derived from the world of quantum physics and is wholly inapt to the sciences of the courtroom: biology, chemistry and Newtonian (simple) physics. See generally Barbara Pfeffer Billauer, *Admissibility of Scientific Evidence Under Daubert: The Fatal Flaws of 'Falsifiability' and 'Falsification'*, 22 B.U. J. SCI. & TECH. L. 21 (2016).

334. Dewey, *supra* note 319, at 659 (quoting Leon Michoud, *La Notion de Personnalité Morale*, 11 REVUE DU DROIT PUBLIC 1, 8 (1899) (Fr.)).

335. *Id.* at 655.

336. LEWIS CARROLL, *THROUGH THE LOOKING GLASS* 205 (Dial Press 1934) (1871) ("'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

337. Dewey, *supra* note 319, at 659 ("Considerations extraneous to law are here nominally excluded . . .").

338. See Smith, *supra* note 328, at 283.

339. *Id.*



Reciprocally stated, “[p]redictability of societal action . . . determines rights and duties and rights and duties determine legal personality.”<sup>340</sup> And “to term a ‘natural’ person a person<sup>341</sup> in the legal sense is to confer upon it a new, additive and distinctive meaning . . . .”<sup>342</sup>

We create our legal person, then, merely by conferring legal rights on the entity,<sup>343</sup> as was done with the creation of the corporate entity.<sup>344</sup> Thus, prior to the embodiment of the legal fiction casting the corporation as a “body” with rights and obligations, that entity was a conglomeration of individuals, confederated by a contract, but nothing more.<sup>345</sup> But now, by virtue of legal abracadabra,<sup>346</sup> the corporation is a fictional entity now conceived of as a person, with rights.<sup>347</sup> Those rights include whatever the law deigns to bequeath to it,<sup>348</sup> including the right to sue for harms suffered.

Similarly, we will create a legal fiction to stand in for the child born of WGM; let us call it the *conceptual being*. We now assign the *conceptual*

340. *Id.*

341. The term “person” derived from the Latin “persona” or “mask” and implies some sort of considered affect one designs to effect, i.e., a mask. *See* *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 n.13, 141–43 (D.D.C. 1946) (noting the inanity of blindly following precedent, the court traced the origin of disallowing prenatal torts to the outdated legal fiction that a child *en ventre sa mere* was part and parcel of the mother. In its opinion, the court quoted Mr. Justice Holmes who said “‘the life of the law has been not *logic*: it has been *experience*’ and here we find a willingness to face the facts of life rather than a myopic and specious resort to precedent to avoid attachment of responsibility where it ought to attach and to permit idiocy, imbecility, paralysis, loss of function, and like residuals of another’s negligence to be locked in the limbo of uncompensable wrong, because of a legal fiction, long outmoded”). It is befitting that to redress the far-reaching effects of this outmoded legal fiction, a new one should be substituted in its place, i.e., “the conceptual being.”

342. Dewey, *supra* note 319, at 657.

343. Smith, *supra* note 327, at 283.

344. Dewey, *supra* note 319, at 655–73.

345. *See* Lawrence Solum, *Legal Theory Lexicon: Persons and Personhood*, LEGAL THEORY BLOG (Oct. 6, 2019, 6:26 PM), <https://bit.ly/35F9JSq> (“Both corporations and natural persons are legal persons, but they have different sets of legal rights and duties. Nonetheless, legal personhood is usually accompanied by the right to own property and the capacity to sue and be sued.” (citing JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 115–131 (1909))).

346. *Abracadabra* derives from the Kabbalistic intonation “Avra C’Dabra,” meaning “I will create according to what I say”; or “will create as I speak,” i.e., that the act of speech will magically create new realities. *See* Julian Sinclair, *Abracadabra*, JEWISH CHRON. (July 5, 2018, 4:00 PM), <https://bit.ly/36sh3kG>.

347. Smith, *supra* note 327, at 284 (“[A] legal person, therefore, . . . [is] ‘any being to whom the law attributes a capacity of interests and, therefore, of rights. . . .’” (quoting JOHN WILLIAM SALMOND, *JURISPRUDENCE* 273 (5th ed. 1916))).

348. Dewey, *supra* note 319, at 669 (“The dialectic of the courts, under the pressure of social facts, was equal to declaring that corporations, while artificial and fictitious, nevertheless had all the natural rights of an individual person, since after all they were legal persons.”).

*being* the right to avenge injuries suffered by it,<sup>349</sup> or the person in whose shoes s/he stands. We do this even if the harms were not directed to the legal party, but rather (for instance) to his or her mother, or the person in whose stead s/he was born. We can imagine, should the courts wish to entertain theological implications, that the *conceptual being* was endowed with life precisely for the purpose of holding the perpetrator responsible for wrongs done to it (and others).

The next step involves timing. We now assign “legal person” status<sup>350</sup> to our *conceptual being* at a point after its gestation, such that the act responsible for its coming into being is truncated from the act which both causes it to be born (fertilization) and its suffering harm. In other words, we divide and break the causal chain between the act causing life (uniting sperm and egg) and the act causing harm (negligent manipulation, wrongful choice of gamete, or wrongful implantation). We do so by designing the legal birth of the *conceptual being* (along with the rights incident to it) to arise *after* its metaphysical birth or conception. That the negligent acts occur prior to conception (or in this case, fertilization) does not void the exercise, as the law allows redress for harms even in those cases.<sup>351</sup>

We can confer on this *conceptual being* additional rights—any and all we desire—because, after all, it is a fiction.<sup>352</sup> Direct action by the *conceptual being* would certainly be permitted.<sup>353</sup> Her claims could include unjust enrichment,<sup>354</sup> such claims being one of the beacons of

349. *Id.* at 659 (“The word signifies simply a *subject of rights-duties*, [*sujet de droit*] a being capable of having the subjective rights properly belonging to him.” (alterations in original) (internal quotations omitted) (quoting Leon Michoud, *La Notion de Personnalité Morale*, 11 REVUE DU DROIT PUB. 1, 8 (1899) (Fr.))).

350. Lawrence Solum, *Legal Theory Lexicon: Persons and Personhood*, LEGAL THEORY BLOG (Oct. 6, 2019), <https://bit.ly/2sY7rQM> (noting that “the term ‘person’ is a normative (legal, moral, or ethical) term, which refers to a moral and/or legal status that creatures or other bearers of human-like capacities can share with normal adult humans . . .”).

351. *See infra* Section V.B. The body of pre-conception tort cases arises out of negligence directed at the mother which later harms the child. In WGM, by comparison, the harms are directed at an embryo or gamete which later becomes the child. The difference in the situations surfaces in the context of the NIP because the acts of negligence in WGM both cause the harm and the birth. In the pre-conception cases there is no direct connection between the harm to the mother and birth of the particular child. Nevertheless, it is curious that this body of law has not been raised in the sperm bank cases referred to at the outset.

352. Dewey, *supra* note 319, at 668 n.17 (“If the corporate personality is imaginary, there is no limit to the characteristics and capacities which may be attributed to that personality.” (quoting Arthur Machen, *Corporate Personality*, 24 HARV. L. REV. 253, 347–48 (1910))).

353. *See* Robert H. Johnson, *Shareholders’ Right to Direct Recovery in Derivative Suits*, 17 WYO. L.J. 208, 208–13 (1963).

354. *See* Scott v. Pro Mgmt. Servs. Grp., 2 N.Y.S.3d 90, 91 (N.Y. App. Div. 2015) (“Plaintiff’s unjust enrichment claim is direct, and not derivative . . . Further, plaintiff’s allegations that defendants were enriched by their receipt of revenues and other

direct actions<sup>355</sup> in corporate litigation.<sup>356</sup> And what more could qualify as unjust enrichment than a sperm bank that acts negligently, charges exorbitantly, and is shielded from legal exposure?<sup>357</sup> The *conceptual being* could also claim derivative damages where the parental choice of gamete was interrupted (switched or not as represented), resulting in harm to both parent and child. This claim would be modeled after a loss of consortium claim in personal injury actions,<sup>358</sup> as “the law has long recognized that a wrong done to one person may invade the protected rights of one who is intimately related to the first.”<sup>359</sup> The same rationale could be used to bolster the claim of the *conceptual being* who is suing in the stead of the hypothetical child who would have been born had different gametes been selected.

### B. *Pre-Conception Injury to the Rescue*

We have already seen that an infant has a cause of action for prenatal torts.<sup>360</sup> A body of case law expands this recovery to cases where the negligence occurred not only *in utero*, but even pre-conception.<sup>361</sup>

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consideration at his expense, and that it is against equity and good conscience to permit them to retain such consideration without adequately compensating him, are sufficient to state a claim for unjust enrichment.”); *see also* Georgia Malone & Co. v. Rieder, 973 N.E.2d 743, 745–46 (N.Y. 2012); Gjuraj v. Uplift Elevator Corp., 973 N.Y.S.2d 172, 173 (N.Y. App. Div. 2013).

355. For more on distinguishing derivative actions from direct ones in corporate litigation, *see* WENJING CHEN, A COMPARATIVE STUDY OF FUNDING SHAREHOLDER LITIGATION 15–51 (2017).

356. *See, e.g.,* Scott, 2 N.Y.S.3d at 91; *Shareholder Has Standing to Assert Unjust Enrichment Claim*, SCHLAM STONE & DOLAN LLP: COM. DIVISION BLOG (Jan. 19, 2015), <https://bit.ly/2kFYHuH>.

357. Billauer, *Sperminator*, *supra* note 13, at 48.

358. *See, e.g.,* Dini v. Naiditch, 170 N.E.2d 881, 888, 892 (Ill. 1960) (allowing a derivative action where a wife is entitled to damages for loss of consortium due to the negligent injury of her husband since the law has long recognized that a wrong done to one person may invade the protected rights of one who is intimately related to the first).

359. Renslow v. Mennonite Hosp., 367 N.E.2d 1250, 1255 (Ill. 1977) (citing Dini v. Naiditch, 170 N.E.2d 881 (Ill. 1960)); *see also* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 20–22 (1953) (noting the nature of the relationship between the parties harmed dictates a limited area of transferred negligence).

360. *See, e.g.,* Huskey v. Smith, 265 So. 2d 596, 596 (Ala. 1972).

361. *Id.*; *see also* Renslow, 367 N.E.2d at 1251, 1255–56 (holding that a child who was entitled to bring a cause of action for negligence occurring before here conception which caused her damage, in this case mistyped blood); *see also* Cowe v. Forum Grp., Inc., 541 N.E.2d 962, 964–68 (Ind. Ct. App. 1989) (holding that a child injured *in utero* may seek damages for prenatal torts), *aff'd in part and vacated in part*, 575 N.E.2d 630 (Ind. 1991); *Pay Me Now or Pay me Later: The Question of Prospective Damage Claims for Genetic Injury in Wrongful Life Cases*, 23 IND. L. REV. 753, 753–54 (1990); *cf.* Pitre v. Opelousas Gen. Hosp., 530 So. 2d 1151, 1157 (La. 1988) (“[W]e reject defendant’s arguments calling for a categorical denial of any duty . . . to protect an unconceived child from being born with a birth defect. . . . [E]ach person owes a duty to take reasonable care to avoid acts or omissions which he can reasonably foresee would be likely to injure a present or future member of society. . . . Additionally these defendants are in a much better

Although relevant and elucidative, some of these cases are still somewhat distinguishable from the ones we deal with here, because the harm to the child is not related to the fact of its birth. When a legal variant of the NIP rationale was invoked, however, recovery has been denied on a similar rationale.<sup>362</sup> Nevertheless, even when denying recovery, the dicta is compelling. For example, as one court noted, “[t]he persons at whose disposal society has placed the potent implements of technology owe a heavy moral obligation to use them carefully and to avoid foreseeable harm to present or future generations.”<sup>363</sup> These cases also tell us that “[l]ogic and sound policy require a recognition of a legal duty to a child not yet conceived but foreseeably harmed by the negligent delivery of health care services to the child’s parents,”<sup>364</sup> citing risk spreading, prevention, and deterrence functions of law as rationale.<sup>365</sup>

In fact, there is precedent for allowing recovery for pre-conception torts in instances reminiscent of those before us. Courts have specifically held “that it is not necessary that the legal duty be owed to one in existence

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position than the victims to analyze the risks involved . . . and to either take precautions to avoid them or to insure against them.”). Nevertheless, the court denied the child’s claim on foreseeability (legal causation) grounds. *See Pitre*, 530 So. 2d at 1162.

362. *See Viccaro v. Milunsky*, 551 N.E.2d 8, 9, 11–12 (Mass. 1990) (denying claims of a child born with a genetic defect but allowing the parents’ claim for negligent preconception counseling which led the child’s birth—including emotional damages). “[Because the child] would not have been born if the defendant had not been negligent, [hence] there is a fundamental problem of logic if [the child] were allowed to recover against the defendant in a negligence-based tort action.” *Id.* at 12–13. *See also Payton v. Abbott Labs.*, 437 N.E.2d 171, 181–82 (Mass. 1982) (an early DES case where recovery was partially denied on the basis that “[t]he provider of the probable means of a plaintiff’s very existence should not be liable for unavoidable, collateral consequences of the use of that means”). The *Payton* analysis bears mention. Finding the comparison to *wrongful life* cases as not “compelling” because the plaintiffs were not claiming the child would have been better off not being born, the court nonetheless embraced these holdings, although the court did recognize a claim of *in utero* harm if the drug was not related to the plaintiff’s birth. *Id.* at 181–85. The dissent of Chief Judge Hennessey is remarkable: “[T]he majority’s affirmative answer provides a negligent manufacturer of a life sustaining product with an excuse from liability whenever it can show that its product probably saved a plaintiff’s life.” *Id.* at 191 (Hennessey, C.J., dissenting).

363. *Pitre*, 530 So. 2d at 1157 (“When a physician knows or should know of the existence of an unreasonable risk that a child will be born with a birth defect, he owes a duty to the unconceived child as well as to its parents to exercise reasonable care in warning the potential parents and in assisting them to avoid the conception of the deformed child. . . . [Further,] . . . persons at whose disposal society has placed the potent implements of technology owe a heavy moral obligation to use them carefully and to avoid foreseeable harm to present or future generations.”). Moreover, it should be noted that “[t]he moral factor is important in the appreciation of causation.” *Id.* at 1159 (citing F.H. LAWSON, NEGLIGENCE IN THE CIVIL LAW 64 (1962)).

364. *Id.* at 1157; *see also Bergstreser v. Mitchell*, 577 F.2d 22, 24, 26 (8th Cir. 1978) (allowing the child’s preconception tort allegedly occurring as a result of negligent uterine repair years earlier). *But see Albala v. City of New York*, 429 N.E.2d 786, 787 (N.Y. 1981) (denying recovery to a plaintiff child with severe brain damage resulting from negligent perforation to the mother’s uterus).

365. *See Pitre*, 530 So. 2d at 1157.

at the time of the wrongful act.”<sup>366</sup> Thus, in *Renslow v. Mennonite Hospital*,<sup>367</sup> “the negligent force . . . was set in motion years prior to plaintiff’s conception. . . . [But] the appellate court found no reason to deny a cause of action to a person simply because he had not yet been conceived at the time of the wrongful conduct.”<sup>368</sup> Therein, the court allowed the child “not conceived at the time negligent acts were committed against its mother, [to] have a cause of action against the tortfeasors for its injuries resulting from their conduct[.]”<sup>369</sup> Additionally, in *Walker v. Rinck*, the Indiana Supreme Court held that “a child has a viable cause of action for injuries allegedly resulting from the negligence of a physician and a medical laboratory prior [to his] conception.”<sup>370</sup> However, the court took pains to explain that the framing of the claim was dispositive. Noting that the Indiana statute specifically prohibits suits “based on the claim that but for the negligent conduct of another he would have been aborted,”<sup>371</sup> the court rejected the defendant’s attempted commingling of *wrongful life*, which is barred, with *pre-conception torts*, which are allowed.<sup>372</sup> Similarly, the significance of framing and timing surfaces again in *Monusko v. Postle*.<sup>373</sup> Therein, the child was born with Rubella-associated defects because of a claimed failure to test and immunize her mother prior to the child’s conception,<sup>374</sup> similar to the situation in *Greco v. United*

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366. *Renslow*, 367 N.E.2d v. Mennonite Hosp., 367 N.E.2d 1250, 1251, 1256 (Ill. 1977) (citing Piper v. Hoard, 13 N.E. 626 (N.Y. 1887); Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963); Jorgensen v. Meade Johnson Labs., Inc., 483 F.2d 237 (10th Cir. 1973); Park v. Chessin, 387 N.Y.S.2d 204 (N.Y. Sup. Ct. 1976)); see also Fleming James Jr., *Scope of Duty in Negligence Cases*, 47 NW. U. L. REV. 778, 788–89 (1953); Note, *The Impact of Medical Knowledge on the Law Relating to Prenatal Injuries*, 110 U. PA. L. REV. 554, 566 n.77 (1962) (allowing a child’s recovery where her mother had been transfused with Rh incompatible blood nearly a decade before her conception, sensitizing the mother and causing the child’s disability).

367. See *Renslow*, 367 N.E.2d at 1251.

368. *Id.*; see also Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1435–38 (1979).

369. *Renslow*, 367 N.E.2d. at 1251, 1256. In dicta apt for the cases against sperm banks, the court noted, “[w]e believe that there is a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child’s mother.” *Id.* at 1255.

370. *Walker v. Rinck*, 604 N.E.2d 591, 592 (Ind. 1992).

371. *Id.* at 593 (quoting IND. CODE § 34-1-1-11 (repealed 1998)).

372. *Id.* at 593–94.

373. *Monusko v. Postle*, 437 N.W.2d 367, 368–69 (Mich. Ct. App. 1989).

374. *Id.* at 368–69 (asking “[w]hether there was a duty under these circumstances [failing to administer a rubella vaccine pre-pregnancy, where the child was born with rubella-syndrome] to a plaintiff who was not in being at the time of a wrongful act[.]” to which the court concluded in the affirmative, claiming existence of a duty derives from foreseeability of harm: “The question of duty depends in part on ‘foreseeability—whether it is foreseeable that the actor’s conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.’” (first quoting *Renslow v. Mennonite Hosp.*, 367 N.E.2d 1250, 1260 (Ill. 1977) (Dooley, J., concurring); then quoting *Moning v. Alfonso*, 254 N.W.2d 759, 765 (Mich. 1977)).

*States*.<sup>375</sup> In the former case, the child's claims were allowed, in the latter (where the mother's rubella during pregnancy was not detected) the child's claim for *wrongful life* was denied.<sup>376</sup>

*Jorgensen v. Meade Johnson Laboratories, Inc.*<sup>377</sup> is also analogous to the situation before us. Therein, the plaintiff alleged that a birth-control product ingested by his wife altered her chromosome structure.<sup>378</sup> After ceasing ingestion of the pill, the woman conceived and birthed twins born with Mongolism.<sup>379</sup> The plaintiff claimed damages for the children's personal injuries including retardation, deformity, and pain and suffering as a result of their mother's ingesting the drug prior to conception.<sup>380</sup> The Tenth Circuit ruled that "the pleading should not be . . . limited to effects or developments before conception," and upheld the children's claim.<sup>381</sup>

Significantly, the court in *Jorgensen*<sup>382</sup> refused to await legislative action to allow the claim. Pointedly noting the traditional role of the highest court of a state is to determine the common law of that state, the opinion applies this role even if such determinations result in innovative growth of the common law.<sup>383</sup> "The strength and genius of the common law [says the court] lies in its ability to adapt to the changing needs of the society it governs."<sup>384</sup>

In sum, where negligence occurs pre-conception, liability has been recognized. The harm is not to a specific individual, but to *any child* eventually born of this negligence, and the potential universe of post-negligent plaintiffs is unbounded. Legally speaking, *any* child harmed by pre-conception injuries should be able to sue for damages. The NIP only rears its ugly head when a specific child is harmed by the pre-conception or pre-gestation injury. This occurs via interposing the negligent act causing the child's harm with an act occasioning the child's birth. In some pre-conception tort cases, courts refuse to saddle defendants with liability if their negligent acts were inextricably intertwined with the infant's birth. However, a parallel body of cases, the DES literature, allows children born

375. *Greco v. United States*, 893 P.2d 345, 347–51 (Nev. 1995).

376. *See id.* at 351; *see also* *Womack v. Buchhorn*, 187 N.W.2d 218, 223 (Mich. 1971).

377. *See generally* *Jorgensen v. Meade Johnson Labs., Inc.*, 483 F.2d 237 (10th Cir. 1973) (reinstating suit on behalf of children allegedly injured as the result of mother's birth control pill usage).

378. *Id.* at 239.

379. *Id.* at 238.

380. *Id.*

381. *Id.* at 239; *see also* *Bergstreser v. Mitchell*, 577 F.2d 22, 25–26 (8th Cir. 1978) (holding that under Missouri law a child stated a cause of action against two doctors in a hospital for injuries allegedly sustained as the result of a negligently performed Caesarean section upon the child's mother several years prior to the child's birth).

382. *See Jorgensen*, 483 F.2d at 237.

383. *Id.*; *see also* *Brooks v. Robinson*, 284 N.E.2d 794, 797 (Ind. 1972).

384. *Walker v. Rinck*, 604 N.E.2d 591, 594 (Ind. 1992) (quoting *Brooks*, 284 N.E.2d at 797).

as a result of negligence (and injured pre-birth) to raise a claim for damages. Taking these holdings in concert suggests that precedent exists where the legal outcome is vastly different from the philosophical, even though the type of damages is similar or at least analogous. The unfortunate wrinkle posed by the NIP, then, can be dealt with by creating the fictional *conceptual being*.

## VI. CONCLUSION

The rejection of *wrongful life* in WGM is clearly a holdover from cases involving wrongful deprivation of abortion and the societal ambivalence—or even anathema—surrounding that right. These cases are wholly aberrant in the instant context. Neither a claim of the “sanctity of life” nor its mysteries should preclude a child born suffering negligent harm occasioned pre-implantation from suing. In fact, a retinue of cases exists which specifically provides such a right where the mother is injured pre-conception, causing harm to a child subsequently born in a genre of cases called pre-conception injury. At least four states—Illinois, Michigan, Indiana, and Louisiana—and two federal circuit courts—the Eighth and Tenth—allow for pre-conception injuries.<sup>385</sup>

In conclusion, the ban against *wrongful life* in WGM cases (i.e., where gametes were switched or damaged prior to implantation) is entirely misplaced. The rationale given for denying such claims is irrelevant in the context of harm caused by modern reproductive technologies used to facilitate conceiving or birthing a child. First, under the misplaced guise of morality, courts refuse to assign blame in these cases, thereby leaving it to philosophers to sort it out, when at least some philosophers clearly believe that wrongdoing—is wrong. Second, morality and law demand that the wrongdoer—especially one making a profit—offer recompense for harms caused, if only for the purpose of deterrence. Third, reliance on Parfit’s NIP is misapplied in these cases. Parfit is well-concerned with preventing children from being born with a disease, even if another child is born in her/his stead. When the issue is no child versus a different, but healthy, child, Parfit clearly comes down in favor of the second choice.

Let us now revisit the implanted embryos of He Jiankui, imagining they sustain some future injury caused by his faulty manipulation of their DNA. But for He Jiankui’s selection of these embryos for experimentation, they would not have been implanted and, hence, would not have been born. Under the present understanding (and rejection) of *wrongful life* claims, the children should be precluded from suit. Yet, would the law shield the notorious He Jiankui after he has been thoroughly

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385. See *supra* Section V.B.

lambasted by the press<sup>386</sup> and the scientific community?<sup>387</sup> It appears not. Why, then, should his actions be legally protected?

While society wrings its hands and wags its finger at perpetrators of what it calls genetic abuses, this Article argues that recent advances in technology, including PGT and IVF along with genetic engineering resulting in genetic errors, warrant resurrecting the *wrongful life* claim reformulated as WGM. Brought by a fictional person, the *conceptual being*, these claims would sound in negligence, unjust enrichment, as well as nuisance.<sup>388</sup> These claims would fill a deterrence function as well as provide restorative, corrective, and “therapeutic justice.”

Other concerns remain. Amongst the thorniest are the conflicting rights of the disabled community, which champions foreclosing or limiting genetic testing and selection, and rejects the children’s claims,<sup>389</sup> alongside those who fear the eugenics implications. Layered over bioethical issues are tensions in legal doctrine and policy. What happens when the diseases are discovered decades after the wrong? Does conventional legal doctrine, such as a statute of limitations, trump redress available to the wronged parties?<sup>390</sup>

The continued and rapid advance in the field of genetic engineering and the lacuna in legal avenues of redress signal that much work in the legal arena awaits us.

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386. See, e.g., Healy, *supra* note 81.

387. See, e.g., Jim Stump, *Human Embryo Gene Editing: We Need to Think This Through Carefully (An Interview with Francis Collins)*, *BIOLOGOS* (Dec. 12, 2018), <https://bit.ly/2kWdMl0>.

388. See Billauer, *Sperminator*, *supra* note 13, at 38–48.

389. See, e.g., *Embryo Checks “should be widened,” supra* note 73.

390. Or is some sort of tolling provision, such as envisioned in the asbestos and DES cases, warranted?