DO POSSIBLE PERSONS HAVE RIGHTS?

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Introduction[1]

"Wrongful life" is an action brought by a defective child who sues to recover for pecuniary or emotional damages suffered as a result of being conceived or born with deformities. In such cases, plaintiff alleges that the negligence of a responsible third party, such as physician, hospital, or medical laboratory, is the proximate cause of plaintiff's being born or conceived and thus being compelled to suffer the debilitating effects of a deformity. For example, a physician may fail to inform prospective parents of the risk of transmitting some genetic defect, or fail to inform a pregnant couple of the availability of amniocentesis or ultrasound techniques to check for fetal abnormalities. Then the physician's negligence proximately causes plaintiff's conception or birth, assuming that plaintiff's parents would not have conceived or born a child had they been properly informed. Plaintiff does not sue to recover for the deformity, rather it is claimed that life itself is a wrong to plaintiff; hence, the name "wrongful *life*."

The present essay explores how the language of rights enters into wrongful life suits and critically evaluates rights appeals in these cases. The goal of section one is to explain the way in which courts invoke the idea of a right not to be born in the course of arguing on plaintiff's behalf, and then to show how this position implicitly assumes that *possible persons* have such a right. Section two is devoted to the task of assessing the adequacy of the general view that possible persons have rights. In particular, I put forward reasons for doubting that the view in question is one we can plausibly hold.

I

Judges frequently employ the vocabulary of rights to defend their holdings in wrongful life suits. The right explicitly invoked is a right not to be born or conceived with important opportunities foreclosed (hereafter abbreviated as "a right not to be born"). Arguments deployed on behalf of plaintiffs typically ascribe such a right in connection with damage assessment. Courts often find the

task of assessing damages to plaintiffs troublesome, because the traditional approach to measuring damages apears unworkable in the wrongful life context. The traditional approach is to compare the condition of plaintiff before and after injury, and then to compensate plaintiff for the difference between these two states. The underlying rationale is to return plaintiff to the position plaintiff would have been in, but for the negligent act; in legal parlance, the injured party is "restored" or "made whole again." The obvious problem encountered by courts in attempting to apply this standard in wrongful life cases is that the wrong done to plaintiff is life itself; therefore, the court sees its task as one of measuring the difference between nonexistence (plaintiffs' position but for the negligent act) and life with defects (plaintiff's position after the negligent act).

In earlier rulings, the court has denied a right not to be born for lack of recognizable damages.[2] Later rulings generally do make a determination of damages and do recognize a right not to be born.[3] For instance, in *Renslow v. Mennonite Hospital*, Justice Moran recognizes "a right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother." The court reasons that a child not conceived at the time a negligent act was committed has a legal claim against the tortfeasor for injuries resulting from their conduct: "We. . .find it illogical to bar relief for an act done prior to conception where the defendant would be liable for the same conduct had the child unbeknownst to him been conceived prior to his act."[4] Thus, the basis for maintaining that plaintiff is entitled to receive a compensatory remedy is the assertion that plaintiff has a right that holds against the negligent third party.

I want now to turn to the issue of an implicit rights ascription and to show that ascribing a right not to be born implicitly assumes the position that possible persons have rights. By "possible persons," I mean those persons who might exist at some future time. The position that possible persons have rights thus involves claiming that such possible future persons, whether actual or not, have rights simply in virtue of their status as possible.

My reasons for thinking that ascribing a right not to be born to plaintiff logically entails that possible persons have such a right is the following.

(1) If a person, *p*, is the bearer of a right, *r*, then *p* is the bearer of *r* regardless of whether *r* is or is not successfully exercised.
(2) Suppose that some person, *p*1, who exists at the present time has a right, *r*1, not to have been conceived or born with important opportunities foreclosed; and suppose further that *p*1 has some deformity (e.g., spina bifida) that would inevitably foreclose important opportunites for *p*1.

(3) Given (2), it follows that if *p*1's parents knew about her spina bifida beforehand and if it were also the case that *p*1's right not to be conceived or born with certain opportunities foreclosed had been successfully exercised, then *p*1 would never have come into existence--i.e., *p*1 would be a possible person who never exists rather than a possible person who exists.
(4) Then, given (1), if the actual person, *p*1, has a right not to have been born with certain opportunities foreclosed, so does the possible person that *p*1 "would have been" (so to speak) if *r*1 had been successfully exercised.

The first premise in the foregoing argument is the crucial step in establishing the conclusion in (4). But the point being made there appears, at least upon reflection, to be one that is typically taken for granted whenever rights assertions are made. After all, if at time t1, I assert that Jones has a legal right to a fair trial, then at time t1+n after a fair trial has been held, what I would be inclined to say is that Jones has received that which Jones had a right to receive. It is hardly plausible to maintain that in a case such as this, where rights are *successfully* exercised, rights lose their force. We do not suppose, in other words, that an individual's rights come and go, so to speak, depending upon whether the rights in question are or are not successfully exercised in the particular context in which they arise. But, if this is so, if it follows that if, for example, a plaintiff has a right not to be born with important opportunities foreclosed, then whether this right is or is not successfully exercised does not alter plaintiff's possession of the right in question. And, generally speaking, we can say that whenever the violation of some individual's rights also brings about the coming into existence of that individual, the individual in question would bear the right in question even if the rights violation had not taken place. It would seem, then, that attributing rights to actually existing persons does, in special contexts of this sort, involve implicitly attributing rights to possible persons.[5]

These remarks suggest that the ascription of rights to possible persons is more widespread than one might, at first blush, suppose. Indeed, discussions that invoke a right not to be born (and thus implicitly invoke the rights of possible persons) are not uncommon in the literature of jurisprudence,[6] philosophy,[7] and medicine.[8]

II

In this section, I turn to the question of whether a commitment to the rights of possible persons is defensible. I first present an argument designed to show that such a commitment is not defensible. Next, I suggest a possible response to this argument

and argue that this response is unsuccessful. I conclude that we should not predicate rights of possible persons. Establishing this also shows that we should eschew the practice of ascribing a right not to be born to plaintiffs in wrongful life suits.

An argument that attests to the falsity of the position that all possible future persons have a right not to be born or conceived is the following.

(1) Possible persons fail to satisfy the family of requirements that are typically put forward as a basis for rights. For example, they do not actually or potentially possess interests or the capacity to reason or free will or the capacity to suffer or some combination of the above.
(2) Then, if possible persons have rights, this can only be because they possess some other morally significant quality or set of qualities.
(3) The feature of possibly possessing the attributes described in (1) is the only other quality that all possible persons share that might be thought of as a basis for the possession of rights.
(4) Yet the feature of possibly possessing the attributes such as those mentioned in (1) is not only a feature had by possible persons who will exist at some future time, but also a feature had by possible persons who will at no time exist.
(5) Given (4), the feature of possibly possessing the attributes described in (1) is not a sufficient condition for the ascription of rights, since it is absurd to suppose that individuals who will never exist in the actual world have rights.

The central claim in the argument stated above is that it is absurd to ascribe rights to persons who never exist just because these persons possibly possess interests, sentience, free will, and so on. That this is so becomes obvious upon reflection. For no acts we could perform will ever affect these individuals. Consequently, with respect to these individuals, we will never be in a position to injure them by infringing their interests or causing them pain or limiting their freedom. Thus, these aspects of their personality (interest, the capacity to suffer, free will) do not stand in need of protection.

One way of responding to the argument I am suggesting may be as follows.[9] Suppose I perform some action and am clear about its implications for each of a range of possible future histories of the world. Suppose further that different individuals exist in each of these possible histories. Of course, I am ignorant about which of these histories will be the actual history of the world; this will depend upon many factors that I do not control. I might know, however, that my action will have disastrous consequences in ninety nine per cent of the possible future histories of the world.

Now, according to the argument described earlier, persons who exist in each possible history of the world do not have rights that hold against me, in virtue of their possibly possessing morally important qualities. But, to the extent that the future history of the world is undetermined at the time I perform the action in question, it could be argued that persons possibly affected have possible or "hypothetical" rights: if they exist, then they have rights. Notice that hypothetical rights are different from future rights, since the if-then clause is not being used to indicate temporal succession. It is not being suggested that *when* they exist possible persons will have rights. The suggestion is rather that persons who possibly possess such qualities as interests, sentience, free will, and so on, *presently* possess suigeneris rights: if they exist, then they have rights. In the context of wrongful life, the right attributed to plaintiff would thus be: if plaintiff exists, then plaintiff has a right never to have been born.

Despite the relative advantages of the revised view, there are a number of reasons for doubting that possible persons have suigeneris rights. First, it could be argued that the multiplication of rights that this account entails is not acceptable. We should avoid ascribing rights to an infinite number of individuals--such as the possible persons who would exist if Jones conceives a child in one hour or in two hours or in three hours, and so on.

Second, it could be maintained that the improved account fails, because it confers rights on those possible persons who only have, for example, a .00000000000001 per cent chance of ever existing. For instance, it may be thought that present persons are not required to consider how their acts affect the person who would exist if the Queen of England and the President of the United States conceived a child tomorrow, given that the likelihood of these two conceiving a child tomorrow is remote.

Finally, the above problems can be skirted by opting for the alternative position, namely, that only persons who actually exist in the future have rights; persons who will never exist have no rights of any kind at all. Support for the alternative conception might be gained by distinguishing between two different senses in which the future can be said to be indeterminate: epistemic indeterminacy and metaphysical indeterminacy. By "epistemic indeterminacy," I mean the view that at the present time the future history of the world is determined, but no one is in a position to know which of many possible future histories is identical with the actual future history. I shall use the term, "metaphysical indeterminacy," to refer to the view that at the present time the future history of the world is indeterminate. Once the distinction between epistemic and metaphysical indeterminacy is made, it could then be argued that the only reason for ascribing suigeneris rights to never existing persons is that metaphysical indeterminacy is true. The argument

then proceeds to show that the future is not metaphysically indeterminate; it is only epistemically indeterminate. The conclusion is that possible persons do not possess suigeneris rights. The general reason for thinking that metaphysical indeterminancy is necessary to show that possible persons have contingent rights is simply this. In order to justify the position that possible persons possess special rights, there must be some unique feature about those individuals which is the basis for attributing special rights to them. What is required to support the view that possible persons have conditional moral status is that their existent status is itself conditional. It is not enough to suppose that their existent status is determined already, but we are ignorant about it. After all, moral status is generally not regarded as parasitic upon human knowing. If possible persons have suigeneris rights, possession of these special rights is based on some metaphysical feature they possess, rather than on epistemic features of us.

The arguments sketched above suffice to show that there are no rights whatsoever (either ordinary or suigeneris) that all possible persons possess. The downfall of the view that possible persons have rights is that such a view grants rights to non-actual persons in addition to granting rights to actual future persons.

By clarifying what is entailed by the ascription of rights to possible persons, the above discussion has also revealed an important practical lesson: entry into the court system of tort cases involving wrongful life claims is based upon a confused conception of rights. Ascribing a right not to be born to plaintiffs in these suits entails rights ascriptions to persons who never exist. This realization should have a sobering influence on plaintiffs suing to recover for being born with certain handicaps. It should also convince juries that prosecuting attorneys must provide an alternative basis for their allegations against defendants or concede to the defense.

Notes

1 A draft of this paper was presented in Santa Fe, New Mexico to the Southwest Texas and New Mexico Philosophical Society during the Spring of 1987. I am grateful to all those who attended the conference and provided me with helpful feedback.

2 See, for example: *Becker v. Scwartz*, 386 N.E. 2d. 815; *Gildner v. Thomas Jefferson University Hospital*, 451 F. Supp. 692 (1978); and *Gleitman v. Cosgrove*, 227 A. 2d 692 (1967).

3 Although a number of courts have recognized a right not to be born, as of this writing only three states have actually granted recovery to plaintiffs in wrongful life suits: California, Washington, and New York.

4 *Renslow v. Mennonite Hospital*, 367 N.E. 2d 11255. See also *Berman v. Allan*, 410 A. 2d. 12 (1979) and *Curlander v. Bio-Science Lab*, 165 Cal. 477 (1980).

5 Dr. Mark Strasser has suggested to me that there may well be an important distinction between cases in which negligence proximately causes plaintiff's *birth*, and cases in which negligence proximately causes plaintiff's *conception*. In the former cases, successful exercise of plaintiff's right would not result in plaintiff never existing, since plaintiff would have *existed* in a fetal state. Nonetheless, successful exercise of a right not to be born could still involve ascribing rights to possible *persons*, where personhood refers to individuals who possess capacities generally recognized as prerequisite to the possession of moral or legal rights.

6 See, for example, Case Comment, "Personality in Illinois Prenatal Tort Law" *Valpariso University Law Review* 12: 603. (Spring, 1978); Harry F. Klodowski, "Wrongful Life and a Fundamental Right to be Born Healthy: Park V. Chessin; Becker v. Schwartz" *Buffalo Law Review* 27: 537. (1978); Note, "Father and Mother Know Best: Defending the Liability of Physicians for Inadequate Genetic Counseling" *Yale Law Review* 87: 1488. (1978); Thomas Rogers, "Wrongful Life and Wrongful Birth: Medical Malpractic in Genetic Counseling and Prenatal Testing" *South Carolina Law Review* 33: 713. (1982).

7 Philosophers who discuss a right not to be born include George Annas, "Righting the Wrong of Wrongful Life" *Hastings Center Reports* 11 (February 1981); Joel Feinberg, "Is There a Right to be Born?" in Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton UP, 1980); Trudy Govier, "What Should We Do About Future People?" in Jan Narveson ed., *Moral Issues* (Oxford: Oxford UP, 1985).

8 See Joseph Healey Jr., "The Legal Obligations of Genetic Counselors;" Aubrey Milunsky, "Prenatal Genetic Diagnosis and the Law;" and Margery Shaw, "The Potential Plaintiff: Preconception and Prenatal Torts" all in Milunsky and Annas eds., *Genetics and the Law II* (New York: Plenum, 1980). See also W. Curran, "Tay-Sachs Disease, Wrongful Life, and Pre-ventative Malpractice" *American Journal of Public Health* 67 (1977).

9 This way of responding to the argument against ascribing rights to possible persons was pointed out to me by Dr. Laurence Bonjour.