The idea that it might be a moral crime to have a baby, that it might be wrong to bring a new human individual into the world, is to many people simply bizarre. Having a baby is a wonderful thing to do, it is usually regarded as the unproblematic choice from the moral if not from the 'social' or medical point of view. It is only having an abortion and perhaps also refraining from having children, that is regarded as requiring justification. However, the idea that bringing a child into existence might be actually wrongful as opposed to simply inconvenient, embarrassing, dangerous, or distressing for the parents, is not new. John Stuart Mill produced what is still perhaps the clearest statement of what this wrong might be in his essay *On Liberty*.

**THE CRIME OF HAVING CHILDREN**

It is still unrecognized that to bring a child into existence without a fair prospect of being able, not only to provide food for its body but instruction for its mind, is a moral crime, both against the unfortunate offspring and against society.¹

Of course, the crimes to which Mill alludes are relatively easily remedied as Mill is himself aware. For he continues:

> [I]f the parent does not fulfil this obligation, the State ought to see that it is fulfilled, at the charge, as far as possible, of the parent.²

However, the powerful thought introduced by Mill involves the idea that one can harm people by bringing them into existence, and that this may also constitute a moral crime. It is precisely these ideas that are at the heart of the highly controversial and philosophically extremely interesting so-called 'wrongful life' law suits that have recently proliferated in the United States of America and are also appearing in the United Kingdom.

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WRONGFUL LIFE

The idea of ‘wrongful life’ is simply that an infant has been harmed and/or wronged by being brought to birth in a less than satisfactory condition or in adverse circumstances. Most of the cases to date involve very serious harmful conditions, although interestingly, the term ‘wrongful life’ was first used in a case in which a healthy infant claimed that he had been injured by being born to less than optimal parents, in this case, that his father had allowed him to be born illegitimate.3

Initially such actions did not succeed. For example, Gleitman v. Cosgrove4 involved a child who had been born a deaf mute and almost blind because his mother had contracted German measles during pregnancy, but the Supreme Court of New Jersey would not accept the plaintiff’s claim for damages against doctors who allegedly told the mother that German measles afforded no risk to her child.

However, the courts of California, Washington, and New Jersey have all now recognized the right of an infant with birth defects to collect damages in a wrongful life suit. The California case, Curlender v Bio-Science Laboratories,5 for example, involved a child born suffering from Tay-Sachs disease. The parents were awarded damages for having negligently been told they were not carriers of the disease. The claim in such actions is brought by or on behalf of the child and, as Bonnie Steinbock has explained:

The claim in a wrongful-life suit is not that the negligence of the physician was the cause of the impairment. It is, rather, that the physician, by failing to inform the parents adequately, is responsible for the birth of an impaired child who otherwise would not have been born and therefore would not have experienced the suffering caused by the impairment.6

There is a distinction which we should note between ‘wrongful birth’ and ‘wrongful life’ cases. In the former, it is usually the parents who bring an action against a physician for negligence the result of which is that they, the parents, have been deprived of an option to abort. ‘Wrongful life’ on the other hand refers to actions brought by or on behalf of infants for damages arising from simply having been born.7

We should also note that ‘wrongful life’ cases differ from those in which it is alleged that a mother may have damaged her child in utero by, for example, taking drugs or indeed by excessive alcohol or cigarette smoking during pregnancy. Such harms to resulting individuals as may flow from this conduct, while significant and interesting, are beyond the scope of our present concerns although they do of course concern analogous harms and wrongs.

WHAT IS AT STAKE?

The idea that one might be harmed or wronged by being brought into existence in a less than satisfactory state is very important indeed, for, as we have seen, it challenges many of our moral presumptions about having
children. Moreover, if the alleged wrong can give rise to legal actions for compensation, and perhaps also to criminal liability, then a number of further problems arise. All of these further problems are the subject of this paper.

First, we will have to consider whether in the light of such possibilities we are prepared to accept that the criminal or civil law is a fruitful or indeed an ethical mechanism to use, either as a way of attempting to reduce the number of children born with disability or as a way of compensating those who are so born. Moreover, so long as litigation is being used for these purposes, the identification of the precise nature of the alleged harm and wrong is crucial.

An initial problem here is, of course, to have some sense of just how unsatisfactory the condition of a child must be before it can claim to have been wronged or harmed by being brought to birth. At the moment it is infants with birth defects or impairments that bring such suits or have them brought on their behalf. But, as we have seen, even individuals who have supposed themselves to have been disadvantaged by illegitimacy have attempted to gain compensation for their supposed unsatisfactory state.

A further problem is now on the horizon. With the rise of biotechnology we have the possibility of genetic engineering being used to confer substantial advantages on engineered individuals or to remove substantial impairments, like susceptibility to disease, or perhaps the particular gene responsible for a genetic disorder. It may well be that children who today would be regarded as normal healthy children will in the future make claims that they have been wronged or harmed by being denied genetic enhancement or genetically engineered removal of impairment. To know whether this might ever be the case we must know precisely how to characterize the alleged wrong of wrongful life. For the crucial issue will be whether such individuals can validly claim that their condition may plausibly be regarded as constituting a harm to them or that they have been wronged by being brought to birth in such a state.

For these reasons we must turn first to the problem of characterizing the supposed wrongs at stake.

**WHAT IS WRONG WITH LIFE?**

Some judges in the United States of America have regarded claims for wrongful life as too logically puzzling to be sustained. As the judge in *Gleitman v Cosgrove* put it:

> We must remember that the choice is not between being born with health or being born without it: it is not claimed the defendants failed to do something to prevent or reduce the ravages of rubella, rather the choice is between a worldly existence or none at all. To recognize a right not to be born is to enter an arena in which no one could find his way.8

In the principal English case on wrongful life, *McKay v Essex Area Health Authority*,9 the Court of Appeal took the same line saying that "the difference between existence and non-existence was incapable of measurement by a court".10 Ackner LJ, in his judgment in that case, also said that he could not accept that:
the common law duty of care to a person can involve, without specific legislation to
achieve this end, the legal obligation to that person, whether or not in utero, to terminate
his existence. Such a proposition runs wholly contrary to the concept of the sanctity of
human life. 11

A leading English legal writer, Margaret Brazier, has noted that while the:

... Court of Appeal in McKay, said that the difference between existence and non-
existence was incapable of measurement by a court, the difference between the cost of
bringing up a healthy child and the cost of bringing up a disabled child can be measured with
some degree of accuracy. 12

The same conclusion has been reached by Mason and McCall Smith who conclude that "The comparison to be made is not that between non-existence and a deprived life but that between a defective life and one of a normal child." 13

While this may well be the right comparison to make in deciding what the child needs by way of compensation for being born disabled, the problem of knowing whether this disability may rightly be attributed to the actions, whether wrongful or not, of others remains. As does the equally pressing problem of determining whether the child may justly be said to have been injured or wronged by being brought to birth.

STEINBOCK'S VIEW

In her illuminating account of the whole issue of wrongful life, Bonnie Steinbock rightly rejects the spineless approach to the problem exhibited in Gleitman v Cosgrove and then reviews and rejects a number of the ways in which the courts of the United States of America have attempted to rationalize their solutions. She finally recommends what she calls 'the correct interpretation' of the way to characterize the infant's injury. The problem is to characterize just what injury an infant who has a restricted life, though still one worth living, has suffered by being born. Steinbock follows her compatriot Joel Feinberg in suggesting:

Talk of a 'right not to be born' is a compendious way of referring to the plausible moral requirement that no child be brought into the world unless certain very minimal conditions of well-being are assured. When a child is brought into existence even though those requirements have not been observed, he has been wronged thereby. 14

This is of course resonant of the passage from John Stuart Mill 15 quoted above and relies on the idea implicit in Mill and outlined above, that it can be a moral crime to do things to the pre-person (the human individual at any stage prior to the onset of fully fledged personhood whenever that is deemed to occur), or indeed to the possible person, including causing that individual to exist.

Steinbock interprets Feinberg's central idea as expressing the judgement that it is a wrong to the child to be born with such serious handicaps that many very basic interests are doomed in advance. Steinbock insists that 'While this is

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something less than a right to be born a whole functional human being, it is not dependent on the implausible view that a life with serious impairments is always worse than no life at all.  

Steinbock concludes that when very many of a child’s basic interests are doomed in advance then wrongful life suits should succeed. Steinbock is attracted to this solution because she regards it as avoiding the embarrassment of having to compare existence with non-existence and also the severity of having to say that an individual’s life must be so terrible that continued existence is worse than death in order that such an individual might plausibly be said to have been wronged by being brought into existence. The severity of such a view lies in the brutal reality that under current government policies in most of the world, and certainly in the United States of America and Great Britain, the disabled individual can only get financial support and compensation through litigation.

There seem to me to be two problems with Steinbock’s approach. One is that it is just the view that Steinbock calls implausible that is at the centre of Feinberg’s position and on which she partly relies. The other is that both Steinbock’s position and Feinberg’s take a somewhat perverse view of the distinction between harming and wronging.

For Feinberg, the child cannot claim to have been harmed unless it has been made ‘worse-off’, and it cannot be worse-off for having been brought into existence unless existence is, for that child, so terrible as to be not worth having. If this is right almost all wrongful life suits would fail, for most disabled children have lives that while restricted and blighted in many ways are still worth living. It is this fact, which means that such children have little hope of meaningful financial support and compensation that leads Steinbock to champion a less restrictive view. But can such a view be sustained? To see whether it can we need to examine Feinberg’s arguments at greater length.

**FEINBERG’S VIEW**

Joel Feinberg, in a major philosophical discussion of the idea of a wrongful life introduces a complex set of distinctions between what might count as ‘harming’, what might count as ‘wronging’, what might count as ‘doing wrong’, and in what circumstances these might legitimately interest the criminal law. One very important consequence of the way that Feinberg draws these distinctions, as we shall see, is to take the idea of ‘wrongful life’ out of the domain of the criminal law. It is likely that the way he draws the distinction, if accepted, would also take ‘wrongful life’ beyond the reach of civil liability, except in the rarest of circumstances, as the law in most societies presently stands. In suggesting: (i) that no harm has been done to the victim of ‘wrongful life’, and (ii) that no wrong has been done unless the consequences for the ‘injured’ (?) party are ‘so severe as to render his life not worth living’, Feinberg leaves the injured party with no legal complaint.

Feinberg clearly sets out his conclusions as follows:
1. In wrongfully conceiving the child despite the known risk of genetic deformity (say), A and/or C (the biological parents) do not harm B (the resultant infant), even if B comes into existence in a state that makes a ‘life worth living’ impossible. B has been born in a condition extremely *harmful* to it, but strictly speaking, that is not a *harmed* condition, not the effect of a prior act of harming. To be harmed is to be put in a worse condition than one would otherwise be in (to be made ‘worse off’), but if the negligent act had not occurred, B would not have existed at all. The creation of an initial condition is not the worsening of a prior condition; therefore it is not an act of harming, no matter how harmful it is.

2. Nevertheless, the wrongful act of A and/or C can wrong B even though, strictly speaking, it does not harm B, provided its consequences for B are so severe as to render his life not worth living. In that case B comes into existence with his most basic ‘birth rights’ already violated, and he has a genuine moral grievance against his parent(s). To the parent’s defence that the only alternative to so harmful an existence was the non-existence that would have followed their abstinence, the infant can make the rejoinder that non-existence was the preferred alternative, even though it would not have been a ‘better off’ condition of B. Any rational being, he might add, would prefer not to exist than to exist in such a state.8

Feinberg insists that the child has only been *wronged* where non-existence is preferable and has not been *harmed* at all, for the simple, and to Feinberg sufficient, reason that it has not been made ‘worse off’. Moreover, a less severely impaired child who would not prefer never to have been born has not on Feinberg’s view been either wronged or harmed. And this will be true, even though its disabilities might be very substantial, so substantial as to put the individual in a ‘severely harmed’ state. A mother who deliberately has a child knowing this will be the case is still however a wrongdoer although, and paradoxically, she has wronged nobody. Her wrong would, according to Feinberg, be that of ‘wantonly introducing a certain evil into the world, not... inflicting harm on a person’.19

Feinberg concludes that if ‘this result strikes the liberal reader as counterintuitive, his best recourse is to modify the harm principle so that it accepts as a reason for criminal prohibitions not only the need to prevent people from wrongfully harming other persons, but also the need to prevent people from wrongfully bringing other persons into existence in an initially harmful (handicapped) condition.’ And Feinberg adds that: ‘After careful consideration however the need for such a revision is not apparent to me.’20

There are a number of problems with the way in which Feinberg elects to analyse the idea of harm to which we will come in a moment. Some of these stem perhaps from his preoccupation with the connection between harm and criminal liability. However, it is not clear that we would always wish to exempt wrongful life from the criminal law.

Consider the case of selective termination, where as a result of induced superovulation or of the implantation of a number of fertilized ova, a woman becomes pregnant with perhaps five or more embryos, selective termination is sometimes considered. Surplus embryos are deliberately killed leaving perhaps two or at most three survivors. This is because it is believed that if all are allowed to go to term it is more likely that none will survive than would be the case if only two or three embryos are left in place. Suppose now that we can screen the embryos for genetic defects and select amongst them as to which to terminate. A mother or a doctor who deliberately chose to terminate the
healthy embryos and allow the disabled ones to come to birth would it seems to me not only have harmed those disabled individuals who were born, but would have done a wrong that might appropriately interest the criminal law. Feinberg would, however, have to think not, because he wishes to limit the interest of the criminal law by employing the harm principle and on Feinberg's version of that principle no harm would be done to the resulting handicapped individual by either the doctor or the mother in this case. Indeed, Feinberg would not only have to see no harm in terminating the healthy rather than the defective embryos but he would have to see nothing criminal in it either.

It is true that Feinberg would still regard what the mother and the doctor in such a case have done as profoundly wrong. He and I would agree that among the wrongs done is the wrong of 'wantonly introducing a certain evil into the world'. However, Feinberg thinks this is the only wrong done in such a case. It is the double insistence that neither the mother nor the doctor have done harm nor done anything which might legitimately be termed 'criminal', which seems perverse here.

The decision to 'criminalize' conduct is surely principally a question of the utility of so doing. The issue is most sensibly decided by weighing up the social, political, and moral consequences of using the apparatus of the criminal law and of imposing the stigma and social consequences of criminality on offenders, we should not predetermine this issue by deciding in advance that if conduct is not harmful it is not criminal.

Of course, the notion of criminality complicates the issue unnecessarily. We may well want to stop short of criminalizing all sorts of wrongful acts including wrongful harmings. And of course Feinberg might, not unreasonably, simply accept the consequence of having to regard selective termination of healthy embryos in favour of disabled embryos as neither harmful nor criminal for the sake of the utility of his approach as a whole. However, there does seem to be something wrong with the Feinberg approach to harming which is highlighted by the ease of selective termination.

If one is interested in 'the moral limits on the criminal law' (the subtitle of Feinberg's book) it is not unproblematic that a doctor and a mother who deliberately planned to bring into being handicapped rather than healthy children in the circumstances described, have done nothing that might reasonably interest the criminal law.

**HARMING, WRONGING, AND CRIMINALITY**

It is important to be clear just what is at issue here. Feinberg wants to distinguish the ideas of 'harming' and 'wronging' and wants to confine the interest of the criminal law to the domain of harming alone, leaving wrongdoing to the domain of the moral. For Feinberg the criminal law can be invoked to prevent or punish the doing of harm but not to prevent or punish the doing of wrong, unless that wrong also constitutes a harming.

Now Feinberg could of course claim that there is a sense in which any
wrongdoing harms society – makes society worse than it was before – and so all wrongdoings can interest the criminal law. But Feinberg would never make such a claim, for to do so would of course demolish his carefully drawn distinction.

So that if Feinberg’s distinction is to prove useful it must plausibly delineate an area of harming which is significantly a special type of wrongdoing such that the criminal law might reasonably interest itself in wrongful harming but not in non-harmful wrongdoing. However, it seems obvious that the criminal law cannot plausibly be excluded where people have not been made ‘worse off’ in Feinberg’s sense. There may be compelling social or political reasons why the criminal law might, in some circumstances, be interested in non ‘harmful’ wrongdoings. But more importantly, perhaps, Feinberg’s definition of harming is strongly counterintuitive and must of needs give way to an account which is both more plausible and does the work required with more economy.

WHAT IS IT TO HARM SOMEONE?

Feinberg insists that to be harmed is to be put in a worse condition than one would otherwise be in, that is to be made ‘worse off’ and in particular in these sorts of cases, worse off ‘in the special narrow sense that requires both setback interests and violated rights’. I want to say that to be harmed is to be put in a condition that is harmful. A condition that is harmful, Feinberg and I would agree, is one in which the individual is disabled or suffering in some way or in which their interests or rights are frustrated. The disability or suffering may be slight just as harms may be trivial. And of course what constitutes a disability may have to be defined relative to a particular population. In a population which has been genetically engineered to be resistant to all major infections including AIDS and hepatitis as well as heart disease, someone who has not been thus protected would be severely disabled.

I would want to claim that a harmed condition obtains wherever someone is in a disabling or hurtful condition, even though that condition is only marginally disabling and even though it is not possible for that particular individual to avoid the condition in question. For example, I have a rational preference not to lose the little finger of my left hand, and I have such a preference that my children should be born with all their fingers. I have this preference because the condition, although relatively minor, is a disabling and/or a hurtful one. If I lose that finger or my child is born without it, I and she are to that extent in a harmed condition. If my daughter had no option but to be born without a little finger, if she suffered from a genetic defect that involved having only four digits on her left hand, then for her it was life thus harmed or no life at all. It was not possible for her to have all her fingers. But to be born thus, albeit slightly, disabled is to be born in a harmed condition and one that she could have a rational preference to be without.

I say ‘could have’ rather than simply ‘has’ because the individual may, for all sorts of reasons, not have such a preference. In the particular circumstances
of the case, such a condition may be advantageous to the individual. In her nineties and looking back on a life drawing to its close, my daughter might be able to conclude that overall she has benefited from the lack of a finger. But it is still something disabling or hurtful, it still counts as being in a harmed condition.

So we can agree, for present purposes, that a harmed condition is one in which the individual is disabled or suffering in some way. This enables us to come to an interim conclusion.

**WHAT IT IS TO HARM SOMEONE**

*Where B is in a condition that is harmed and A and/or C is responsible for B's being in that condition then A and/or C have harmed B.*

In the case of wrongful birth, A and/or C not only caused B to be in a condition which is harmful but are also morally responsible for B's being in that condition. Therefore A and/or C have harmed B. A thus harms B whenever A puts B in a harmful condition. Where A is morally responsible for putting B in such a condition, then A is morally responsible for B's condition.

It might appear that the difference between Feinberg and myself here is both slight and, worse, merely semantic. Certainly we are not far apart but the small distance is significant and not 'merely' semantic though of course it is semantic.

My point is simply this. Where someone has caused another to be in a harmed condition and is moreover fully morally responsible for having caused such harm, it is natural and logical to say that they have harmed that other person. To deny this requires a special justification. Feinberg's justification must be that using words his way confers some theoretical advantage either in clarity, or by enabling subtle and important distinctions to be made, or in some other way. In particular Feinberg wants to make plausible the exclusion of the criminal law from cases where individuals have wronged one another but caused no harm. My concern has been to show that neither the exclusion of the criminal law nor the strain of denying that harm properly so called has been caused are either plausible or justified.

There is another point as well. It is that our normal sense of what it might be to wrong someone as opposed simply to harming them dictates that we draw the distinction in the diametrically opposed way to that preferred by Feinberg. And if we do so, we can the better see the appropriate place for the law in these questions.

**WRONGFUL LIVES BUT NOT WRONGED INDIVIDUALS**

What, then, is the wrong of wrongful life? It can be wrong to create an individual in a harmed condition even where the individual is benefited thereby. The wrong will be the wrong of bringing avoidable suffering into the
world, of choosing deliberately to increase unnecessarily the amount of harm or suffering in the world or of choosing a world with more suffering rather than one with less.22

Whether or not mothers and/or fathers should be blamed, and to what extent, for committing such a wrong is of course more problematic. And the further question of the extent to which they should be the subjects of litigation whether civil or criminal is even more problematic. I am inclined to think that where parents can avoid doing such wrong by declining to have the disabled child and yet fulfil their desire to have a child by trying again for a healthy child then, if they deliberately produce children with more than slight disability, they are blameworthy. If, however, the particular parents must have disabled children if they are to have children at all, then they will be blameworthy only if the children would be wronged by existence. That is, if they would find life worth not living. I offer these conclusions here simply to indicate some of the ramifications of the present discussion. My reasons for coming to these conclusions I have set out in detail elsewhere.23

For present purposes the important point is that the decision to have a child is not a wrong against the individual thereby created, if that individual has benefited overall by the decision or by the negligence. Now Feinberg would clearly accept the reasoning of this last sentence and this is, I think, why he wants to insist that no wrong is done unless it is plausible to regard the adversely affected individual as losing by the transaction. And this only happens in the case of creating an individual, where they would wish not to have been created at such a cost to themselves.

But this seems to turn the notions of harming and wronging literally upside down.

HARMING AND WRONGING

Adverse side effects, of treatment for example, are adverse effects even if in the circumstances they are worth enduring for the net benefits. Those treating patients who cannot give consent must be mindful that harmful treatments, treatments with adverse side effects, should only be used where there is no equally effective treatment available with less serious side effects and where the treatment advantages the patient overall. But the need to be mindful of these things is explained by the fact that the treatment does cause harm. Indeed, Feinberg’s own explanation of his conclusions seems to make the same point.

Feinberg at one stage of the argument wants to define the harms done to children allowed to come to birth with defects in terms of that child’s being deprived of ‘birth-rights’. He explains that:

[I]f before the child has been born, we know that the conditions for the fulfillment of his most basic interests have already been destroyed, and we permit him nevertheless to be born, we become a party to the violation of his rights.
Feinberg insists that the interests thus doomed must be very basic ones and concludes in fine style that:

[T]o be dealt severe mental retardation, congenital syphilis, blindness, deafness, advanced heroin addiction, permanent paralysis or incontinence, guaranteed malnutrition, and economic deprivation so far below a reasonable minimum as to be inescapably degrading and sordid, is not merely to have 'bad luck'. It is to be dealt a card from a stacked deck in a transaction that is not a 'game' so much as a swindle.24

This is an astonishing passage. Since no one person could be expected to be born with all these conditions they must be intended as alternates. Should congenitally deaf people who have happy lives decline to procreate and produce probably equally happy but deaf children, because to do so would be a swindle? Should the very poor not procreate at all? Of course such people choose to create harmed individuals but where the lives of the children, despite disability, may be expected to be well worth living it is hardly a swindle.25 Even if we take a more charitable view of what is meant here and assume Feinberg intends some combination of these conditions we get a scarcely more plausible scenario.

But the passage is astonishing for another reason which bears vitally on the issue of wrongful life. If deliberately to choose to produce a child with any of these conditions and perhaps others like them or even a combination of them, is to doom one of that child’s basic interests to defeat, then that choice has surely harmed the individual. Feinberg of course sees this for he says:

A child born with such handicaps is in a condition that we should not hesitate to call ‘harmed’ if it were not for the fact that it is not, like standard harms, a worsening of some prior condition . . . there is good reason to claim that he has been wronged to be brought into existence in such a state. (The state is a harmful one, even if it is not, strictly speaking, a ‘harmed’ one.)26

It is surely both natural and correct to say that the person who caused a harmed condition to obtain has caused harm, and to cause harm is, of course, to harm.

BENEFICIAL SELF-HARMING

There is nothing illogical or suspect about saying also that it can be in my interests to be harmed. Harming may constitute a net benefit. Although again, Feinberg seems to balk at this. When in the First World War soldiers deliberately shot themselves in the foot, or injured themselves in some other way so as to get what was called a ‘Blighty Wound’, one that would get them sent home to ‘Blighty’ and out of the fighting, they were guilty of an act of deliberate self-harming. Indeed were it not an act of self-harming, which may have disabled or handicapped the individual to some extent, it would not have secured the desired effect.

There is, of course, a nice ambiguity here between whether or not the self infliction of a Blighty wound renders the individual worse-off. Clearly the
soldier is worse-off than he was immediately before the wounding in the sense that formerly he was pain-free and unwounded and latterly, presumably, he is in pain and wounded. But since his prospects of premature death have receded he is in another sense better-off, better-off overall. Insistence on tying harm to the idea of being made ‘worse-off’ deprives us of the ability to characterize what is going on here as a self-interested act of self-harming. It is surely clearer and more consistent with what we wish to say in such cases, to describe the acts of these soldiers as acts of self-harming but acts by which they did not wrong themselves.

Again it is clear that the opposite way of drawing the distinction to that preferred by Feinberg is both the clearer and more useful.

Rational suicide, suicide in circumstances in which it is clearly in the subject’s own interests to die, or voluntary euthanasia in the same circumstances will be the limiting case here.  

Now all this is by way of answer to Feinberg’s own prior question: ‘how severe must the harm be to be a “worse off condition” than non-existence?’ But if this is the crucial question, there is an important difference between asking it of individuals who can have a view about the desirability of their own existence and asking it of others. Concerning children or adults in being who can have a view about the worthwhile nature of existence, the question can surely only be answered subjectively. A condition is worse than non-existence if and only if the subject would rather not exist than exist in such a condition. If this is right all the talk of basic interests being doomed and so on is redundant. For Feinberg believes that it is logically impossible for an individual to have been wronged by being brought to birth unless it is true that ‘non-existence was the preferred alternative’ – preferred, not preferable.

For individuals who cannot have a preference, however, the problem of how to assess whether existence is worth having must be decided by whether or not such a life has a favourable balance of satisfactions over miseries. It cannot be done by counting doomed fundamental interests because an individual may have a happy existence, an existence subjectively worth experiencing even though most basic interests have been doomed. But the point of asking such a question can only be to determine whether or not it would be right to bring into existence a person whose life would be like that. If the individual is already in existence the extent of the harm done them by being brought into existence in that condition is simply the extent of the disability. If life is so terrible for such a person that non-existence is clearly preferable then they should be killed. No moral person could stand by and see another creature suffer so much.

On the other hand, if the disability falls short of this high standard of misery, if I have been harmed by the dooming of one or more of my basic interests, then the damage has been done, whether or not as a consequence I would have preferred non-existence. If on balance existence is worth having even at such a cost then though I have been harmed I have not been wronged. On the other hand if it is not, I have been both harmed and wronged.

Here again we see that the compelling way to characterize what we would want to say in such cases is the very opposite to that which Feinberg’s analysis
leads. It is this consideration that leads Bonnie Steinbock to conclude, as we have seen, that:

The escape from this dilemma is to see that it is not necessary to maintain that the child would be better off never having been born in order to claim that he or she had been wronged by birth. Instead we can say that it is a wrong to the child to be born with such serious handicaps that very many of its basic interests are doomed in advance. . . . While this is something less than the right to be born a whole functional human being, it is not dependent on the implausible view that a life with serious impairments is always worse than no life at all.30

Steinbock wants the harms to be very serious indeed before she will allow that a child has been wronged by being brought to birth – so serious that they would constitute the doom of some of the child’s fundamental interests. Where this is the case she believes the child to have been wronged by life and thus to have the grounds for a successful wrongful life law suit.

HARMING IS NOT NECESSARILY WRONGING

We must recall a preliminary conclusion, that it is simply wrong to choose deliberately to increase unnecessarily the amount of net suffering or harm in the world. It is not, however, a wrong against the individual thus created if that individual is or would on balance be pleased to be alive at such a cost. This is why we can, in appropriate circumstances, blame the mother without thinking that she has wronged her child who has in fact benefited by her actions although, and this is important, the child has been harmed by what she has done. She has done harm, but she has wronged no-one.

Suppose a doctor was negligent in the sense of employing the wrong procedure given the diagnosis at which she had arrived but, because the diagnosis was in fact faulty, she had ended by benefiting the patient overall. Such a doctor has surely been negligent and as such might appropriately be disciplined by her profession. But she has not harmed her patient. The patient has no grounds for compensation because she or he has not suffered by the negligence. Quite the reverse. But the patient has perhaps been wronged because she or he has been placed at risk by being negligently treated. But there was no harm done.

Imagine a case in which there was no negligent medical practitioner, merely a mother. Suppose this mother has had a child she knew in advance would be disabled, but she reasonably believed that despite the disability the child would have a life worth living and if she wanted children, she had no alternative but to have such a child. Should her disabled child have a remedy in damages against her even though it has a life worth living and is glad to have been born? If there is injury, the mother has surely caused it, as much as, indeed more so than, any negligent doctor in a wrongful life suit. Indeed the issue of negligence is irrelevant. Suppose the child has resulted from the mother’s negligent use of contraceptives, does this make the resulting child more wronged?
It is difficult to believe that the mother has wronged her child. So far as her
relations with the child she has engendered go she has benefited that child. It
has a life worth living because of her choice. The idea that she might have an
obligation to compensate her child for benefiting her or him is a nonsense.

In such circumstances wrongful life cases are simply misconceived. Not
because the life in question has not been impaired, not because the individuals
are not suffering, not because they have not been harmed. It has, they are, and
they have: rather because it is not plausible to regard them as having been
wronged.

You do not wrong someone in benefiting them but you might harm them in
order to benefit them. But if so, you do not wrong them unless you violate their
will in order to do so. The mother giving life with some measure of disability to
a child who will find such a life worth having does not wrong her child. She is
like the doctor giving a life-saving drug which has damaging side effects but
side effects which are worth enduring for the sake of staying alive.

**SHOULD WRONGFUL LIFE SUITS SUCCEED?**

I think the answer to this question must be ‘no’ in all cases. First let us consider
the case in which, while harmed, the resulting individual has a life worth living.
The mother and/or the doctor may have harmed the child but if that child has
a life worth living, albeit a disabled one, then she or he has not been wronged
by being brought to birth, although the child has of course been thereby
harmed. She or he has not been wronged by being harmed because, like those
with ‘Blighty’ wounds or those who have to endure the harmful side effects of
beneficial drugs, they have received a net benefit from what has happened to
them and none of their rights have been violated. It is for this reason that the
present analysis of the difference between ‘harm’ and ‘wrong’ is superior to
that of Feinberg and others.

Secondly, we must consider the case in which the allegedly wronged
individual has a life she or he finds worth not living. In this case she has been
both harmed and wronged. But I think this individual should, even in such a
case, have no legal remedy. If resources can tip the balance and make her or his
life worth living then these should be provided by society because she or he
needs them and not because such an individual has a legal remedy which will
supply them.

If such resources will not make life worth living then there is no point in legal
action except to grant the patient the death she or he desires and to inhibit
other mothers and health professionals from bringing to birth individuals who
will similarly have lives that are worth not living. These latter considerations
may be important but can be achieved another way.

Rather than the unedifying spectacle of terribly disabled individuals suing
well-meaning but misguided parents and health professionals, we should
simply make clear that to bring a child into being who will have a life so terrible
that death is preferable is morally wrong. One way of signalling this fact in a
social context is by legislation, of course; but to punish individuals who transgress, whether by criminal action or civil wrong, seems merely gratuitously to increase human suffering.

If the rejection of wrongful life law suits seems harsh it need not be. The wrong is in the source of the remedy not in the logic of the argument. If we think that some people are really better off dead then we should make it easy for them to achieve the death they seek by legalizing voluntary euthanasia. Where the disability is so great that such individuals are incapable themselves of forming anything so sophisticated as a preference about life or death and where again their life is so terrible that mere existence is a cruelty then, again, we should give them a humane death by legalizing euthanasia in such cases.

Finally, if we think disabled children should be compensated for their disability then we as a society should compensate them. Their need should be the trigger for the compensation, not the claim that their need results from wrongdoing.

In short, the problem of disability should be seen as one of social justice. In particular we should not distinguish between those disabled people who are fortunate enough to have been wronged and therefore have a legal remedy available, and those whose disability is not a consequence of wrongdoing and consequently have no legal remedy nor a route to compensation.

NOTES AND REFERENCES

2 id.
7 id., p. 16.
8 See note 4 above.
10 See M. Brazier, Medicine, Patients and the Law (1987) 172. I am indebted here as so often for the generous and scholarly advice of Margaret Brazier.
11 id., p. 167.
12 id., p. 172.
13 See Mason and A. McCall Smith, Law and Medical Ethics (1987) 101.
15 Mill, op. cit., n. 1, p. 1; see also n. 5 above.
16 Steinbock, op. cit., n. 4, p. 19.
17 In Harm To Others. See also Derek Parfit’s major treatment of these themes in Reasons and Persons (1984) especially chs. 16 and 17.
18 id., p. 102.
19 id., p. 103.
20 id., pp. 103–4.
21 id., p. 102.
22 I have argued for this point at some length elsewhere. See my ‘Wrongful Birth’ in Philosophical Issues in Reproductive Medicine, eds. M. E. Dalton and J. Jackson

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(forthcoming), and in my *Ethics and Biotechnology* (forthcoming).

23 id.
25 See again my ‘Wrongful Birth’ (op. cit., n. 22) where I elaborate this point.
27 I ignore the pedantic issue of whether or not death can be a harm since it cannot strictly be experienced.
28 Feinberg, op. cit., n. 14, p. 98.
29 id., p. 102.
30 Steinbock, op. cit., n. 4, p. 19.