

The Nature of Rules on Abortion and Compensation for Defective Genetic Information: Wrongful Birth/Life Revisited— A Comparison with Copyright

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The main argument in this article is that the nature of a legal rule necessarily determines its ambit and that, in the case of wrongful birth/life claims, the legal rule, which consists their foundation is not always of such a nature, so as to allow a claim for damages. This is the case for breach of copyright fair use rules, which offers us an applied (by the courts) example of this argument.

Rules on Abortion, Rules on Assisted Suicide

The clearest cases where compensation for damages in tort is possible are the cases of the US rules on abortion and, secondary, on the right to forgo life-sustaining treatment.¹ In the first case of abortion, the US Supreme Court has held in *Roe vs. Wade*,² that the constitutional right to privacy encompasses the pregnant woman's right to elect an abortion (under certain circumstances). The Court emphasized that the right to an abortion not only exists, but is also 'fundamental' (therefore, it can be regulated only on the basis of a compelling state interest).³ In the second case, it is accepted that treatment against the will of a patient, even life saving, constitutes a battery.⁴ When the legal rule

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¹ This right exists, at least in theory, see Furtow B, Greaney T, Johnson S, Jost T and Schwartz (2000), *Health Law*, 2nd edition, West Group, St. Paul, Minn., p. 884. See also, in detail, Donohue J, "Wrongful Living: Recovery for a Physician's Infringement on an Individual's Right to Die", 14 *Contemp. Health L and Pol'y* 391, 1998.

² 93 US 705 (1973).

³ *Id.* at 728.

⁴ *Barber vs. Superior Court*, 195 Cal. Rptr. 484 (Cal. App. 1983). But see also *Allene vs. Flower Hospital*, 699 N.E.2d 560 (Ohio App. 1997), questioning whether the battery action is proper in this case or not. The Ohio Supreme Court held in *Anderson vs. St. Francis-St. George Hospital*, 671 N.E.2d 225 (Ohio 1996) that, whereas the resuscitation against the patient's order ('No Code Blue' was marked on his chart) did consist a battery, no more than nominal damages were awarded for the 'wrongful living', the pain and suffering etc. because the patient survived debilitated, after a subsequent stroke, for two years.

forming the basis of a tort action is framed as a rule 'awarding' a right, then there can be no doubt⁵ that this is a rule which, if violated, may in principle⁶ entitle the plaintiff to damages in tort.⁷

In other jurisdictions, the rules 'allowing' the termination of a pregnancy are not rules awarding a right to an abortion, similar to the right to own a house; they only provide for the decriminalization of an otherwise criminal act (termination) in some cases. In other jurisdictions, also, the matter of euthanasia is not treated in relation to a patient's right to forego life-sustaining treatment; rather, it is dealt with as part of a criminal statutory rule, which decriminalizes some forms of euthanasia. The question is, which is the particular judicial 'weight' of these rules? Which is their ambit? Do they reach as far as to allow tort damages, in cases where one is deprived of the chance to avoid criminal liability if they 'make use' of the rule?

The UK Abortion Act of 1967, for example, states⁸ that a person shall not be guilty of an offence under the law relating to abortion, when pregnancy is terminated by a registered medical practitioner if two registered medical practitioners are of the opinion, formed in good faith that the pregnancy has not exceeded its 24th week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, (a) Of injury to the physical or mental health of the pregnant woman or any existing children of her family; (b) That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman; or (c) That the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated; or (d) That there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped. What is important here is not the conditions of a legal abortion in the UK (to be precise, the conditions under which a physician or other person shall not be held criminally responsible for a termination) but the nature of the rule examined. The rule is clear: there nowhere in the statute any mention of a right to a termination; what we have is a *justification of an act originally criminal*, under certain circumstances.

The situation is exactly the same in the Greek law; abortion is legislatively dealt with only in the Greek Criminal Code, in the part where *crimes against life* are described and as we know, the position of a rule in the statutes is crucial to its systematic interpretation). The phrasing is similar to its English counterpart: 'The termination

But note that in *Anderson*, see previous footnote, the Court did find unacceptable that death is reasonably preferable to continued life and that continued life may *per se* warrant damages.

Even in the United States, where there can be no doubt that the right to an abortion is part of the constitutional right to privacy, there are states which declared, by statute, that wrongful life/birth actions are prohibited (for example, the Minnesota statute Ann. 145.424, which survived constitutional attack, *Hickman vs. Group Health Plan, Inc.*, 396 N.W.2d 10, Minn. 1986. In these cases, the ambit of the rule is expressly curtailed (or described) by the lawmaker, leaving no room for interpretation.

And perhaps, in contract—for example, the breach of a contractual agreement between a patient and a health care provider which included the order not to resuscitate, could lead to contractual damages.

15 and 16 Eliz. 2, c. 87, par. 1, Medical Termination of Pregnancy.

of pregnancy under the pregnant woman's consent shall not constitute a criminal offense if...⁹ (the lawmaker here lists the conditions, such as termination within 12 weeks of pregnancy, etc.).

Rules on euthanasia are also usually justifications of criminal liability for homicide. The famous Oregon law in the US, the only statute permitting assisted suicide, may look like it institutes a right to physician-assisted suicide, but if we look closer to the statute we see that it reads:¹⁰ '...Nothing in ORS 127.800 to 127.897 shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or active euthanasia. Actions taken in accordance with ORS 127.800 to 127.897 shall not, for any purpose, constitute suicide, assisted suicide, mercy killing or homicide, under the law... No healthcare provider shall be under any duty, whether by contract, by statute or by any other legal requirement to participate in the provision of a qualified patient of medication to end his or her life in a humane and dignified manner...'. Is this a statute conferring a right to a patient, to physician-assisted suicide? How can there be a right, if expressly and very clearly under the same statute, there is no one bearing the duty to respect or enforce this right?¹¹ And if there is no duty towards no person, then there simply is no one to sue, for failure to comply with this statute.

The situation is no different in many European states. The Swiss penal code, for example, deals with criminal sanctions; as specifically noted,¹² 'Art. 115 (on assisted suicide) is a criminal provision and, therefore, cannot create a right to assisted suicide...'. German law on the matter is also criminal,¹³ the same is true for Spanish law.¹⁴ In Sweden, there has been a change in the legislation, which expresses exactly the difference of rules to describe: the abortion statute, ordinarily a part of the criminal law legalizing abortion in certain circumstances, was replaced by an Act, which was based on the principle that every woman has the right to decide whether she will terminate a pregnancy or not (within certain time limits, etc.).¹⁵ The same change of legislation is reported for the Netherlands.¹⁶ A criminal statute decriminalizing abortion in certain cases is also the case for Belgium.¹⁷

Greek Criminal Code, Article. 304, paragraph. 4.

ORS 127.880 s. 3.14. Construction of Act, Oregon Death with Dignity Act.

Right is correlative to duty; where there is no duty, there can be no right...in order for a duty to create a right, there must be a duty to act or forbear...it is only to acts and forbearances that others have a right. We may have a duty to love our neighbor but he has no right to our love...", Chipman Gray J, *The Nature and Sources of the Law*, p. 8-9, (2d ed., 1921).

Guillod O and Schmidt A (2005), "Assisted Suicide under Swiss Law", *EJHL* 12, pp. 25-38, 31.

Meckler-Schwarze K (2005), "Legal Restrictions of Physician-Assisted Suicide", *EJHL* 12, pp. 11-24.

Spanish Penal Code, Art. 417 bis (abortion is illegal and a crime; exception: under certain circumstances, abortion is lawful).

Westwehall L, "Medical Law in Sweden, Kluwer International Law", *International Encyclopedia of Medical Law*, p. 103, Sweden.

Wekveld H and Hermans H, "Medical Law in the Netherlands, Kluwer Law International", *International Encyclopedia of Medical Law*, pp. 84-85, The Netherlands.

Wys H, "Medical Law in Belgium, Kluwer Law International", *International Encyclopedia of Medical Law*, p. 109, Belgium.

A Comparison with Copyright

Copyright rules may seem irrelevant to this discussion. They are not, as especially in copyright cases, we have some jurisprudence, which is also modern, on the scope of copyright exceptions (or exemptions, or justifications—they all perform the same function here).

Copyright is, as a technical term, the right to copy a book (a work, etc.), and a right which belongs to the author. The author determines for example whether she will publish her book and whether she will allow the book to become the script for a film. Copyright is a property right, which no one has, in principle the power to violate. However, copyright was always subject to exceptions, such as fair use or private use. Fair use means that parts of a copyrighted work may be used, without permission from the copyright owner, for reasons such as educational activities, literary criticism, news reporting, etc. Fair use is a defense to infringement, akin to a privilege: It acknowledges the elements of the tort, but affirmatively raises other important issues and policies.¹⁸ Private use is a term found in European jurisdictions (such as France, for example, or Greece)¹⁹; private use, as a defense to copyright infringement, means making a copy of another's work, which is not commercial and serves private interests. This copy, for private use, is a legitimate copy.²⁰

The question did rise, what is the exact legal 'weight' of the fair use/private use exception (or defense, or privilege, or even a right in itself, to copy with impunity). In France, an unfortunate user tried to make a copy of a DVD for his parents; he found out that the DVD was protected by technological means and that copying was impossible.²¹ Then, he sued for damages, arguing that he had a right to make a copy, which was infringed. In the district court, he lost: The court held that private copying is not a right and therefore, of insignificant to the consumers who complain about technological protection. The Court of Appeals reversed: Private copying is not a right, it is an exception, *but still*, it may not be totally ignored by the right holders: The complete blocking of the possibility to make a copy of a DVD was not legal. The case went to the Supreme Court, which declared (again) that there is *no right* to a private copy of a DVD (because in this case, it undermines the normal market exploitation of a title, which is expressly prohibited by the Berne Convention).²²

¹⁸ Miller A and Davis M (1983), *Intellectual Property, Patents, Trademarks and Copyright*, West Publishing Co., pp. 342-343.

¹⁹ Helberger N (2005), "Not So Silly after All—new Hope for Private Copying", www.indicare.org/tiki-print_article.php?articleId=132 and Helberger N (2004), "It's Not a Right Silly! The Private Copying Exception in Practice", *ENDICARE Monitor*, Vol. 1, n° 5, October 29, 2004; www.indicare.org/tiki-read_article.php?articleId=48. For Greece, see Kallinikou D, *Intellectual Property and Neighboring Rights*, 2005; Marinos M, *Intellectual Property*, 2004, p. 222 (on private copying as a limitation to copyright).

²⁰ Private use also has its limits: for example, private copying may not come into conflict with the legitimate interests of the rightholder (Berne Convention).

²¹ See Helberger N, "It's not a right silly!", as above.

²² Civ. le, 28 février 2006, pourvois n°05-15.824, et 05-16.002.

A private copy is just an *exception* to copyright. As such, it could not support an action for damages, in case where admittedly, the person claiming its force was prohibited from taking advantage of this exception.²³

Last Thoughts

Whether or not we agree with the resolution in the case of private use and copyright,²⁴ what seems to be clear is the judicial 'weight' of an exception vs. a right; the position of a claimant who was deprived of her right is quite different (feebler) than the position of a claimant who was prohibited from the advantage of an exception, or a justification. It is clear that their scope is very different. As mentioned above, jurisdictions have, in the case of abortion, amended the legal nature of the relevant rules, moving from an exception/justification of an otherwise criminal act (abortion) to the declaration of an individual right to privacy encompassing abortion. If the effects of the two legal regimes were the same, then there would really be no legislative reason for discussions, debates and in the end, legislative amendments. But certainly, it is one thing when a jurisdiction considers abortion a crime, permissible only under certain limited circumstances, and quite another, when a jurisdiction declares abortion as covered by the constitutional right to privacy—and hence, a right in itself, regulated, but still, a right. It is submitted that wrongful birth/life suits are available only in the jurisdictions, which have adopted the latter stand on abortion.

Wrongful birth/life suits have been controversial since they were first brought to the courts of any jurisdiction. They pose crucial questions about the way people think of rights, of life, of privacy, of disability and in the end, of a decent society.²⁵ To accept the legality of these claims in a society, which through its legislative body, has signaled abortion only as an exception, a justification of an otherwise criminal act, and therefore has set the scene of its own values, equals, among others, to the negation of the democratic process and the perversion of the rules to pursue legislatively unaccepted ends. The resolution is the same in the physician-assisted suicide cases, in which a jurisdiction could tolerate an action for damages, only where access to physician-assisted suicide consists an individual right and not in the states where only justifications favoring physicians 'legalize' an act otherwise called homicide-or murder. ❖

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²³ The French legal text which had to be interpreted, so that the existence or not of a 'right' to a private copy could be determined read as follows: "...once a work has been made available publicly, the author may not prohibit... copies or reproductions strictly reserved for the private use of the copier and not destined for a collective usage...", Art. L 122-5 of the French Intellectual Property Code. The courts had, therefore, to interpret what "the author may not prohibit" meant. "...In France, consumers have a "right" to make a copy of a copyrighted work for private usage. The word 'right' is in quotation marks on purpose, because the existence and extent of this 'right' is fiercely debated...", Maxwell W, Paris Appeals Court Rules DVD Anti-Copy Measures Illegal, Comments: (2005) EntLR, p. 230.

²⁴ The relevant analysis is beyond the scope of this paper; perhaps the proper resolution is that fair use/private use are not (or should not be) truly exceptions/justifications, but represent the exercise of a right to use another's work.

²⁵ Boris M (2004), "Wrongful Birth and Wrongful Life Actions", *EJHL* 11, pp. 55-59.