

# WRONGFUL LIFE, PROCREATIVE RESPONSIBILITY, AND THE SIGNIFICANCE OF HARM

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## I.

A wrongful life suit is an unusual civil suit brought by a child (typically a congenitally disabled child)<sup>1</sup> who seeks damages for burdens he suffers that result from his creation. Typically, the child charges that he has been born into an unwanted or miserable life.<sup>2</sup> These suits offer the prospect of financial relief for some disabled or neglected children and have some theoretical advantages over alternative causes of action.<sup>3</sup> But they have had

1. In these cases, the disability is not usually caused by events after conception, such as prenatal damage. Rather, the disability, the underlying genetic condition, or the relevant circumstances of conception are essentially linked to the child's identity or existence. So, he must claim that his *life* was wrongfully caused, not only his disability. Jeff McMahan argues that some significant prenatal damage, occurring early in pregnancy, may affect the identity of the child. If he is correct, then such cases should be classified with the cases typically associated with wrongful life litigation. Jeff McMahan, *Wrongful Life: Paradoxes in the Morality of Causing People to Exist*, in *RATIONAL COMMITMENT AND SOCIAL JUSTICE: ESSAYS FOR GREGORY KAVKA* 208–47 (J. Coleman & C. Morris eds., 1998).

2. Usually these suits are brought on behalf of children and allege that their parents' doctors were at fault for failing to inform the parents of a likely defect (knowledge of which would have forestalled creation), failing to prescribe effective contraception, or failing to perform an abortion properly. Cf. Lori Andrews, *Legal Regulation of Genetic Testing*, in *JUSTICE AND THE HUMAN GENOME PROJECT* 64 (T. Murphy & M. Lappe eds., 1994), n.2 (citing evidence that most potential parents abort upon discovering their potential child will suffer a serious disability). But in some jurisdictions, the suit may be brought against the child's parents, alleging that the parents should not have conceived or should have aborted.

3. Wrongful life suits have three main advantages over their more commonly recognized counterparts, namely wrongful birth and wrongful conception suits. These other causes of action are brought by parents against their doctor. They allege that owing to fault of the doctor, the parents conceived or gave birth to an unintended, often disabled, child. Their underlying theory suggests that parents may sue at-fault doctors only for medical and other expenses incurred up to the child's majority; parents may not be legally responsible for their *adult* children's care and, consequently, may lack standing to sue for lifetime expenses. Wrongful life suits permit the child to sue for lifetime expenses. Second, parental-plaintiff causes of action require parents to claim that having this child was bad for them. Even if true, once the child exists, such allegations could cause the child and her caretakers psychological harm. By contrast, wrongful life suits do not require parents to make public, negative claims about the worthwhileness of their child's existence *to them*. Finally, wrongful life suits permit children to sue their *parents* for callous or negligent creation, whereas, their counterparts focus only upon *medical* misfeasance. The ability to sue one's parents has little practical impact where families

only mixed, mostly negative, success.<sup>4</sup> They have, however, spurred considerable philosophical interest.<sup>5</sup> This attention, though, has been primarily focused on issues about the coherence of complaining about one's existence or its essential conditions. These suits also raise important, but less well-probed, philosophical questions about the morality of procreation and, more generally, about the moral significance of imposed, but not consented to, conditions that deliver both significant harms and benefits.

This essay takes up these latter questions. As far as they go, the standard defenses of these suits are persuasive, but they have been overly limited in two important ways. First, its defenders uniformly regard the class of justified claims as limited to those brought by people whose burdens (e.g., their congenital disabilities) make their lives overall not worth living.<sup>6</sup> Many regard it as implausible to defend suits by children who, despite having significant burdens, nevertheless enjoy overall worthwhile lives. Why? The argument goes that those particular children could not have been born without their putatively identity-linked disabilities. If their lives are overall worthwhile, then the children cannot reasonably resent their disabilities. For without them, the children would not exist at all and could not enjoy their overall worthwhile lives.

Second, liability is defended as appropriate only in aberrant cases in which procreation results from negligence, recklessness, or maliciousness toward the risks of creating a significantly burdened child. Fully voluntary procreative activity is not considered a sufficient predicate for the cause of action. This reflects, I suspect, the general presumption that, typically, procreation is a straightforward, morally innocent endeavor.

I argue that these limits are wrongly understood as grounded in *philosophical* justificatory rationales. Quite possibly, they could be supported by

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are intact and well-functioning, but may be practically significant in cases in which biological parents neglect their children or even fail entirely to exercise responsibility for them—as, most markedly, in cases of sales and donation of genetic material.

4. Only three states currently recognize the cause of action. Within these jurisdictions, the occasions of liability and the scope of damages have been significantly restricted. California originally approved suits even against parents who knew their child would be severely disabled, *Curlender v. Bio-Science Labs*, 106 Cal. App. 3d 811, 829 (1980), but the legislature subsequently precluded suits against parents. Cal. Civ. Code §43.6. Also, damages in wrongful life cases against physicians are limited to specific, not general damages. See *Turpin v. Sartini* 643 P.2d 954 (Ca. 1982) (declaring California rule); *Gami v. Mullikan Medical Center*, 18 Cal. App. 4th 870, 874 (1993) (reporting that New Jersey, Washington, and California all permit a cause of action for special damages).

5. See, e.g., Dawn Danzeisen and Edward Reitler, *Tort Law: Wrongful Birth and Wrongful Life Actions*, 11 HARV. J. L. & PUB. POLY 861, 859–65 (1988); Joel Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, in FREEDOM AND FULFILLMENT 3–37 (1992); Robert Goldstein, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 50–1, 166–7 n.34 (1988); Frances Kamm, *CREATION AND ABORTION* 173–4 (1992); John Harris, *WONDERMAN AND SUPERWOMAN*, 79–97 (1992); David Heyd, *GENETHICS* 1–39 (1992); Nancy Jeckers, *The Ascription of Rights in Wrongful Life Suits*, 6 LAW & PHIL. 149–65 (1987); Jeff McMahan, *passim*, *supra* note 1; Bernard Williams, *Resenting One's Existence*, in MAKING SENSE OF HUMANITY (1995).

6. See *id.* and McMahan, *supra* note 1, and McMahan, *Cognitive Disability, Misfortune, and Justice*, PHIL. & PUB. AFF. 5 (Spring 1996).

more practical, political concerns about the feasibility and utility of policies of broad liability. Later, I canvass a few reasons why even these practical concerns may be exaggerated.<sup>7</sup> I suggest that it would not be unfair to impose liability in a wider range of cases, were it possible and advantageous to do so. These grounds for expanded liability have implications for an array of other family law issues (e.g., those concerning innovative reproductive arrangements). They also reveal continuities between these cases and more standard norms of parental responsibility, providing a justificatory account for quite standard practices of child support.

In Sections II and III, I scrutinize, in turn, the two main limitations of prior philosophical defenses of wrongful life liability. I discuss theoretical issues of general moral interest about the imposition of conditions that both harm and benefit. I go on to connect this discussion to the case of creating children. I argue for the philosophical defensibility of a broader-ranging liability based on a more equivocal moral assessment of procreation. This approach would permit liability assessments for significant burdens associated with being created—even in cases in which the life is worth living and in which those responsible for creating did not have, nor should they have had, special knowledge that the child's life would feature unusual or substantial burdens. In Section IV, I briefly discuss some practical concerns. In Section V, I sketch some implications that the view developed in the prior sections has for family law issues; these relate to anonymity in adoption, sales and donation of genetic material, so-called genetic and gestational surrogacy, and developments in reproductive technology.

## II.

I begin from the (contested) assumption that it is possible that being created *can* benefit a person in part, or overall, should her life be sufficiently worth living, and that it is also possible that being created *can* harm a person.<sup>8</sup> I also assume that people do not exist in another form prior to

7. I confine my discussion to cases of fully voluntary procreation and I bracket concerns that a nonnegligible amount of procreation is not fully voluntary. I also bracket concerns that these burdens are not compensable. Sometimes, financial compensation can partly alleviate some burdens. Other goods, such as parental contact and information about one's family and the circumstances of one's creation, may also be valuable, albeit under-recognized, forms of relief. Apart from partly allaying the complainant's condition, recognition of liability may also have the salutary consequence of encouraging greater individual and cultural deliberation about the appropriate circumstances for and responsibilities attached to procreation.

8. For defenses, see Frances Kamm, *supra* note 5, at 173; Derek Parfit, *REASONS AND PERSONS* (1984), Appendix G. I also defend the view in *The Benefits of Existence*, unpublished manuscript. There is insufficient space to outline that defense here. The basic idea is that by being the direct cause of a person's being in a situation that intrinsically delivers harm, one harms that person; it is sufficient for this article, though, to assume that if one is the direct cause of a person's being in a situation that intrinsically delivers harm, then one is responsible for that person's suffering harm, even if one does not *harm* her.

conception. Therefore (nonexistent) potential children will undergo no harm if they are not created. Consider then a child who suffers from a serious, somewhat debilitating, untreatable, painful, congenital condition. Suppose that, nonetheless, her life is worth living and, therefore, that her life (the sheer elements of human existence and the particulars of her life) is an all-things-considered benefit to her. Does this mean that she should not be able to seek compensation for the burdens that are ineliminable aspects of this overall benefit?

Joel Feinberg has argued for precluding liability on the following grounds.<sup>9</sup> Assessing liability for the imposed burdens of this child's life would be like "holding a rescuer liable for injuries he caused an endangered person."<sup>10</sup> The rescuer may have to cause some injuries to save the endangered person. But, "the rescuer-defendant did not cause a condition that was harmful on balance, offset as it was by the *overriding benefit* of rescue. . . . [H]e cannot be said, therefore, to have harmed the [rescued person] (in the relevant full sense) at all."<sup>11</sup> Likewise, the benefits of existence are, by hypothesis, weighty enough to make the life worthwhile. In these cases, the benefits are, as in the rescue case, necessarily conjoined with the burdens imposed. The benefits offset the burdens and therefore the child lacks a good claim for recovery.

Despite its surface plausibility, this argument harbors implicit and questionable views about what harms and benefits are, their moral significance, and the symmetry of harms and benefits. First, I register some reservations about the rescue case's description. This introduces an extended treatment of more abstract, background issues about harms and benefits. This discussion will then support a distinction between the rescue case and wrongful life liability.

#### A. Comparative Models of Harm and the Rescue Case

There are two salient interpretations of Feinberg's argument. I suspect Feinberg holds the second position I describe, but the first position raises interesting issues and is appealed to frequently. First, Feinberg might be read as asserting that, in the rescue case, because an overall benefit has been conferred, namely the saving of a life, the injuries cannot be characterized as harm at all. I believe this idea, that one has not been harmed by the breaking of one's arm during an overall beneficial rescue, is mistaken. Notably, we still have the same impetus and the same sorts of reasons to alleviate the pain and to set the broken limb (i.e., the reasons typically

9. Jeff McMahan advances a similar argument in *Wrongful Life: Paradoxes*, *supra* note 1.

10. Feinberg, *supra* note 5, at 27.

11. *Id.* (emphasis added).

generated in response to harm). These reasons surface whether or not the person has been rescued from an even greater harm, harmed while receiving a greater benefit, or just has her arm broken for no compensating purpose.<sup>12</sup>

The tendency of some to believe otherwise, that the rescued person has not been harmed, may derive from the prominence of a certain comparative, symmetrical model of harms and benefits. To wit, many regard harms and benefits as though they represent two ends of a scale, like the scale of positive and negative numbers. Benefits are thought to be just like harms, except that harms are bad and benefits are good. On Feinberg's natural and attractive interpretation of this symmetrical picture, harms involve the setback of one's interests, whereas benefits involve the advancement of one's interests along a sliding scale of promotion and decline.<sup>13</sup> To evaluate whether an event has benefited or harmed a person, one compares, with respect to the fulfillment of his interests, either his beginning and his end points (historical models), or his end point and where he would have been otherwise (counterfactual models). If he has ascended the scale (either relative to his beginning point or alternative position), then he has been benefitted. If he moves down, then he has been harmed. Either way, one arrives at an all-things-considered judgment that either harm or benefit (but not both) has been bestowed. Thus, because he has been overall benefitted, he has not been harmed.

There are many difficulties with this model. First, it fails to accommodate, much less explain, some deep asymmetries between benefits and harms. For instance, we often consider failing to be benefitted as morally and significantly less serious than both being harmed *and* not being saved from harm.<sup>14</sup> This asymmetry is difficult to explain on a comparative model. For, within it, harming and failing to prevent harm do not *look* so different from failing to benefit. Variants that identify harm and benefit in terms of counterfactual comparison render them indistinguishable. The versions that draw historical comparisons between one's beginning and one's end point can, by contrast, mark some distinction between harming and failing

12. Of course, adherents of this view do not deny that the broken arm should be set. They can claim that it would be an important benefit to provide. My complaint is that thinking of it merely as a benefit can underemphasize its importance. Such characterizations are difficult to square with the moral priority of harm that manifests, in large part, in a strong priority, other things being equal, on avoiding or alleviating harms over bestowing benefits.

13. See, e.g., Joel Feinberg, HARM TO OTHERS 31–65 (1984).

14. The asymmetry between our reactions to at least some cases of failing to benefit and failing to prevent harm suggests that the harm/benefit asymmetry cannot be explained fully by reference to the distinction between doing and allowing. Both failing to benefit and failing to prevent harm may be cases of allowings and not doings. Nonetheless, there is often a strong asymmetry between our reactions to the two, even if the relevant relative comparisons on a welfare scale that result are comparable—that is, even if the size of the benefit foregone is comparable to the size of the harm endured. Likewise, the asymmetry remains even if one compares active harming to the active removal of a benefit—both doings.

to benefit.<sup>15</sup> Nonetheless, the distance between the end points that make it a harm rather than a failure to be benefited may be rather too small to account for the strength of our asymmetrical reactions.

Second, even if the beginning points (or the available alternatives) are morally arbitrary and not deserved, such views nonetheless count as a person's being relegated to a particular position by an event as a harm but count that event's depositing another person in that exact same position as a benefit. Suppose *A* could have been or was at a higher status,  $x + 2$ , and is lowered to  $x$ , whereas *B* could have been or was at a lower status,  $x - 2$ , and is elevated to  $x$ . On comparative accounts, *A* will have been harmed and *B* benefited, even though they are identically situated.<sup>16</sup> The problem becomes more pronounced if *A* moves from  $x + 2$  to  $x + 1$ , but *B* moves from  $x - 4$  to  $x - 3$ . On comparative accounts, *A* is harmed and *B* is benefited, even though *A* is better off, all-things-considered. If this were so, why should harm, per se, in this sense, be a special subject of moral concern and have greater priority than failures to be benefited?

Of course, frequently a loss itself can represent a harm in the morally significant sense. But this is for reasons related more to a person's strong attachment to or personal investments in her higher position than to the sheer comparison between her present state and her prior or alternative state. But the comparative model does not trade upon *A*'s investments or expectations in deeming her harmed. If being placed in a state can be either a harm or a benefit depending upon the affected person's prior or alternative positions, this again makes it mysterious why *harm* matters especially. Why should loss or setback of an interest *pro tanto* matter more than gain, especially if the resultant positions are identical and there are no relevant expectations and neither party is deserving?

A related manifestation of the model's difficulties lies in its failure to identify harm where it occurs. Contrary to this model's pronouncements, there may be an asymmetry between the criteria for benefits and harms. If an event makes someone very poorly off in absolute terms but, in doing so, it also somewhat advances a minor interest of hers, it seems strained to say

15. So can a different counterfactual account that identifies harm with a patient's being made worse off because of a (harming) *agent's* presence and benefits with improvements due to an *agent's* presence. Then, a patient could fail to be benefited by an *agent's* absence when her presence would have made him better off, but not harmed because the *agent* is not present. But it faces the problem that the historical accounts do—the conditions associated with harms and with failures to be benefited are not reliably distant enough from each other to make sense of there being a strong asymmetry between them. It also encounters other problems. It presupposes, by stipulation, that an *agent* cannot harm by omission, that natural events cannot harm, and even that an *agent* cannot fail (through absence or omission) to alleviate harm (because harm, on this view, depends on the *agent's* presence). Related appeals to action, *e.g.*, the distinction between doing and allowing, might be thought to buttress comparative accounts. I mention some difficulties for such appeals in *supra* note 14.

16. To question this result is not to say that if I *stole* 2 from *A* to give it to *B*, that their resultant states would be identical. The notion of *stealing* suggests the violation of a right and introduces considerations of desert that I mean to put aside. The right's violation might harm *A* even if the condition of being at level  $x$  does not, in itself, involve harm.

that she has been benefited. Rather, she has just been harmed, although an interest of hers has been partly advanced as well. But if it moves someone *very high* up the welfare scale or delivers a huge financial windfall to a person already comfortably well off, but simultaneously delivers a short episode of intense pain or a broken thumb, it seems the person has been both benefited and harmed; perhaps she is overall benefited, but nevertheless she is still harmed. This is some evidence for the view that whether harm has been done is not *entirely* a contextual, comparative matter. At least, that one has ascended the scale of overall interest satisfaction does not mean that one has not been harmed at all. (Whether one has been benefited, on the other hand, may be, in some circumstances, more dependent upon context.)

In light of these difficulties and others,<sup>17</sup> comparative models of harm and benefit should be reconsidered. It is beyond the scope of this article to present a complete, rival account, but I will make a few brief remarks about what one possible rival account might look like. Accounts that identify harms with certain absolute, noncomparative conditions (e.g., a list of evils like broken limbs, disabilities, episodes of pain, significant losses, death) and benefits with an independently identified set of goods (e.g., material enhancement, sensual pleasure, goal-fulfillment, nonessential knowledge, competitive advantage) would not generate these puzzles. Structurally, they would be better placed to accommodate these asymmetries. If one could, in addition, provide an account that explained what unified such items, why they were together classified as harm, one might make further inroads to support (and not just to make conceivable) the asymmetries.

The rival account I propose identifies a unifying connection between various conditions that represent harm. The main points of the essay do not hinge upon the details of this proposed account. They rely only on recognizing certain significant asymmetries between harms and benefits. Nonetheless, having an example of a noncomparative account may be useful. On my view, harm involves conditions that generate a significant chasm or conflict between one's will and one's experience, one's life more broadly understood,<sup>18</sup> or one's circumstances. Although harms differ from one another in various ways, all have in common that they render agents or a significant or close aspect of their lived experience like that of an endurer as opposed to that of an active agent, genuinely engaged with her circumstances, who selects, or endorses and identifies with, the main components of her life. Typically, harm involves the imposition of a state or condition that directly or indirectly obstructs, prevents, frustrates, or undoes an agent's cognizant interaction with her circumstances and her efforts to

17. I elaborate upon these difficulties and defend an alternate conception in greater depth in *Harm and Its Moral Significance*, unpublished manuscript.

18. By this I mean that the contents of one's life may well exceed the boundaries of one's conscious knowledge or even one's conscious experience. This has been thoroughly discussed in the literature on death. See, e.g., Thomas Nagel, *Death*, in *MORTAL QUESTIONS* 1–11 (1979).



fashion a life within them that is distinctively and authentically hers—as more than merely that which must be watched, marked, endured or undergone.<sup>19</sup> To be harmed primarily involves the imposition of conditions from which the person undergoing them is reasonably alienated or which are strongly at odds with the conditions she would rationally will; also, harmed states may be ones that preclude her from removing herself from or averting such conditions. On this view, pain counts as a harm because it exerts an insistent, intrusive, and unpleasant presence on one's consciousness that one must just undergo and endure. Disabilities, injured limbs, and illnesses also qualify as harms. They forcibly impose experiential conditions that are affirmatively contrary to one's will; also, they impede significantly one's capacities for active agency and for achieving harmony between the contents of one's will and either one's lived experience or one's life more broadly understood.<sup>20</sup> Death, too, unless rationally willed, seriously interferes with the exercise of agency. By constraining the duration and possible contents of the person's life, it forces a particular end to the person—making her with respect to that significant aspect of her life merely passive.<sup>21</sup>

I will say more later about benefits, and an important equivocation over their identification. Briefly, though, I use the term “pure benefits” to refer to those benefits that are just goods and which are not also removals from or preventions of harm. The central cases of *pure* benefits involve the enhancement of one's situation or condition, or the fulfillment of nonessential, but

19. The requirement of active, genuine engagement with one's circumstances is meant to reflect the sense that living and choosing inauthentically, according to a significantly mistaken conception of one's situation, one's good, or one's moral responsibilities, may do one harm.

20. Can this theory of harm account for harm to animals since, arguably, they lack wills? It depends, in part, on the sort of creature. When an insect loses a leg, it has been damaged. Sometimes we speak of damage as a form of harm; but this sense does not represent the sort of harm that tends to carry heightened moral significance and regarding which there is a special moral priority. Other animals, like cats and dogs, appear to suffer pain and to have at least rudimentary beliefs, intentions, and desires. In some sense, they have wills that conflict with pain and broken limbs; having a will in the sense required by this account does not require being a full-blown, morally responsible agent with the capacity to form a life plan. But, because they have fewer capacities, animals may not be subject to certain harms (*e.g.*, the frustration of long-term projects). Possibly, their harms are less morally significant than the harms suffered by beings with more sophisticated wills.

21. Thus, I do not think that natural deaths, ordinary inabilities, naturally contracted diseases and natural susceptibility to illness are precluded from being harms just because they are natural or ordinary conditions. These things impose states that generate strong reasons, of the sorts typical with harm, to act to avert or relieve them. These reasons and their basic degree of strength are not eliminated just because the conditions predictably happen to most or all. In some cases, normalcy matters because of how it affects one's abilities, though. What would be an inability in one context (*e.g.*, deafness may encumber communication in a predominately hearing environment) may not be an inability in another, where that condition is normal (*e.g.*, deafness in a sign-language culture). Of course, disabilities (as well as other sorts of harms) may enhance one's life in various respects, making it sharper and more directed. A loss of an ability or a threat to one's life, such as a heart attack, may come to make one value one's life more and provoke a greater level of engagement with it. The imposition of a disability may or may not be an *overall* harm. My point is just that they are, *pro tanto*, harms. In these cases, they are lesser harms that avert a greater harm or that catalyze a greater benefit.



perhaps important, interests. Such enhancement and fulfillment go beyond merely securing the minima that make one's life more than tolerable and susceptible to active identification. The list of goods mentioned earlier (material enhancement, sensual pleasure, goal-fulfillment, nonessential knowledge, competitive advantage) seems roughly right. Those items all involve goods, but the absence of them would not create the stark cleavage between one's will and one's experience, life, or circumstances that I suggest characterizes harm.<sup>22</sup>

To return to the rescue case, these considerations about harms and benefits suggest we should not deny that the (necessarily) broken limb is a form of harm. It imposes a condition of disability and inflicts pain. It seems to meet the criteria of harm, then, and does so irrespective of the concomitant benefits delivered alongside it; on these criteria, it can be harm even if, in some overall sense, the event makes the person better off. The rescued person has been harmed so as to prevent her suffering a greater harm. And, even if being saved is a sort of benefit, the fact that the rescued person enjoys an overall benefit does not mean that she is not also harmed.

One might suggest, however, that although the saved person suffers harm, the rescuer does not harm her at all. He breaks her arm to save her from a threat of greater harm. The threat of drowning or the terrible currents are responsible for the break; if anything, they harm her. That the rescuer's action is justified may seem to motivate this view; the rescuer does not cause harm because the threat of drowning and the terrible currents necessitate the break and are therefore responsible.<sup>23</sup> But as long as it is clear that the rescuer is not to blame, I am not sure what is gained by denying that the rescuer inflicts a lesser harm, whereas the denial seems in tension with recognizing *justified* harms and harming actions. Why deploy this "lesser harm" language at all? It registers that the rescuer's action was a serious one, in need of a special sort of justification. It also registers that the inflicted condition is serious and exerts significant moral force—the rescuee remains in need of attention or has gone through something difficult. It seems right to say both that the saved person has been harmed and that the rescuer has harmed her, although under special circumstances.<sup>24</sup>

22. The absence of *all* such benefits might, arguably, constitute a form of harm, but the absence of many possible benefits would not.

23. It is harder to start to make this argument in the cases I will go on to discuss where a broken arm is inflicted to bring about a greater, pure benefit, such as enhanced visual perception or large sums of (unneeded) money. For it is implausible to think that being without enhanced sight or without an extra \$5 million *necessitates* a broken arm.

24. On related, but narrower, grounds, one might resist the claim that because existence may deliver harms, the creator who causes a person to exist causes her harm. One might object that placing someone in a condition where she will necessarily suffer harm is not the same as causing her harm. In some sense, the condition inflicts the harm, not the agent. But this observation seems tangential to assessments of responsibility. If an agent places a patient in the path of an evident, oncoming avalanche that will break her arm, it seems fair to say that the agent harms the patient; at the least (and sufficient for my purposes), the agent is accountable

So, the first characterization of the rescue case should be rejected. The rescue benefits the saved person but delivers a harm to him as well. But, it is a distinct question what moral significance this harm has and whether there should be compensation for it. It seems right that the rescued person should not be compensated for this necessary, lesser injury. More likely, this is what Feinberg means when he contends there has not been harm in the “relevant full sense.” In these circumstances, the harms these injuries represent do not have the same moral significance that other impositions of harm have.

But we must take care how we identify this different moral significance. Another characterization of the rescue case seems prominent in Feinberg’s thought, offering another diagnosis about what makes the harms inflicted by the rescuer special and of different moral significance than other inflictions of harm. Feinberg suggests that the bestowal of an overall *benefit* explains the rescuer’s immunity. This then fuels his analogy to wrongful life cases. This analogy, however, illegitimately trades upon a common equivocation of “benefit.” In the rescue case, the injury is necessarily inflicted to prevent greater harm. Although we sometimes speak as though removing someone from harm *benefits* that person, it does not follow that the *beneficial* aspect of the saving does the moral justificatory work for inflicting the lesser harm. Rather, I believe the fact that a greater *harm* is averted performs the justificatory service. A more closely tailored reading of the rescue case is that it illustrates that when a person is unavailable for consent, it can be justified both to inflict a lesser harm upon her to avert a greater harm, and to refrain from providing compensation or apologies for one’s act.

This narrower interpretation raises the question whether unconsented-to harms inflicted as necessary incidents of the delivery of a *pure* benefit should be similarly assessed. I believe they should not. There is a substantial asymmetry between the moral significance of harm delivered to avoid substantial, greater harms and harms delivered to bestow pure benefits.

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and responsible for the harm the patient suffers—even if the agent does not break the arm directly through his action, does not seek the harm and even tries to prevent it (as may happen in cases of deliberate action resulting in foreseen, but unintentional harm). The placement may be a case of justified harm (supposing, *e.g.*, it averts greater harm to the patient). But whether the agent causes or is responsible for the harm seems distinct from issues of justification and blameworthiness.

One might distinguish making someone worse off from placing her in a harmful condition where she is no worse off. Some suspect that moral obligations *to the patient* extend only to refraining from the former, not the latter. Often, that one has not made another worse off plays a large role in justifying or excusing conduct that places another in a harmful condition, *e.g.*, where one inflicts lesser harm to avert greater harm, or where one *must* harm one of two parties and the harm to one is overdetermined. But this cannot reliably serve as a sufficient excuse or justification: for example, usually one may not break an innocent’s leg just because if one does not, another will. Further, one should not create a child whose life is overall not worth living, even though she is not made worse off. Of course, even if the *main* moral significance of harm derives from the qualities of the patient’s resultant condition and not her prior or alternative states, making someone worse off may have some independent moral significance. Often, it aggravates an offense. Sometimes, when it involves the violation of a right and the wrongful imposition of one person’s will on another, it will represent harm, even if the condition otherwise would not intrinsically be a harmful one.

Absent evidence that the person's will is to the contrary, it is permissible, perhaps obligatory, to inflict the lesser harm of a broken arm in order to save a person from significant greater harm, such as drowning or brain damage from oxygen deprivation. But, it seems wrong to perform a procedure on an unconscious patient that will cause her harm but also redound to her greater, *pure* benefit. At the very least, it is much harder to justify. For example, it seems wrong to break an unconscious patient's arm even if necessary to endow her with valuable, physical benefits, such as supernormal memory, a useful store of encyclopedic knowledge, twenty IQ points worth of extra intellectual ability, or the ability to consume immoderate amounts of alcohol or fat without side effects. At the least, it would be much harder to justify than inflicting similar harm to avert a greater harm, such as death or significant disability.

Such examples already suggest that we should not interpret the rescue case as demonstrating the principle that one may inflict a lesser harm on someone simply to benefit him overall, when he is unavailable to give or deny consent. Consider another and more fantastic example of inflicting a lesser harm for a greater benefit. The example differs from those just offered, in part by introducing benefits and harms of different currencies (whereas the prior examples dealt with physical benefits and physical harms). This is appropriate for my ultimate purpose, analogizing to wrongful life cases, because the benefits and harms presented by human existence are themselves of mixed currency. This example also incorporates other special features analogous to wrongful life cases, including the inability to communicate in advance with the beneficiaries, the risk of greater harm, and an inseparable connection between the harmful and beneficial aspects of the bestowal:

Imagine a well-off character (Wealthy) who lives on an island. He is anxious for a project (whether because of boredom, self-interest, benevolence, or some combination of these). He decides to bestow some of his wealth upon his neighbors from an adjacent island. His neighbors are comfortably off, with more than an ample stock of resources. Still, they would be (purely) benefitted by an influx of monetary wealth. Unfortunately, due to historical tensions between the islands' governments, Wealthy and his agents are not permitted to visit the neighboring island. They are also precluded (either by law or by physical circumstances) from communicating with the island's people. To implement his project, then, he crafts a hundred cubes of gold bullion, each worth \$5 million. (The windy islands lack paper currency.) He flies his plane over the island and drops the cubes near passers-by. He takes care to avoid hitting people, but he knows there is an element of risk in his activity and that someone may get hurt. Everyone is a little stunned when this million-dollar manna lands at their feet. Most are delighted. One person (Unlucky), though, is hit by the falling cube. The impact breaks his arm. Had the cube missed him, it would have landed at someone else's feet.

Unlucky may have his arm repaired for much less than \$5 million and benefits from the extra cash. He admits that all-things-considered, he is

better off for receiving the \$5 million, despite the injury. In some way he is glad that this happened to him, although he is unsure whether he would have consented to being subjected to the risk of a broken arm<sup>25</sup> (and worse fates) if he had been asked in advance; he regards his conjectured *ex-ante* hesitation as reasonable. Given the shock of the event and the severity of the pain and disability associated with the broken arm, he is not certain whether he would consent to undergo the same experience again.

Despite Unlucky's concession that he has been overall benefited, Unlucky's case is morally disturbing in a way the rescue case is not. I suspect this is because the harm Unlucky undergoes is not, as it is for the rescued person, in the service of preventing his suffering a greater harm; rather, it is to bestow a great benefit. These differences affect how we should react. First, surely Wealthy owes Unlucky an apology for the injury he inflicted, although the rescuer owes none.<sup>26</sup> Already, this marks an asymmetry between harm bestowed to prevent harm and harm bestowed to confer a pure benefit.<sup>27</sup> Second, if Unlucky were to approach Wealthy and ask him to bear the costs of restorative surgery, it seems that, morally, Wealthy ought to do so. If Wealthy refuses, then Unlucky should have a cause of action against Wealthy for inflicting unnecessary bodily injury. It seems an inadequate defense that Wealthy had already given Unlucky \$5 million and that this gift made Unlucky better off, even considering the broken arm. The fact that Wealthy was involved in benefiting (though nonconsensual) activity when he risked people's safety and broke Unlucky's arm should not shield him from liability for his voluntary, harmful, and risky behavior. Nor should Wealthy be insulated from liability because he could argue truthfully that *this* benefit could not have been bestowed without imposing the risk of the burden that was subsequently realized.<sup>28</sup>

The judgment that Wealthy should compensate Unlucky could be explained in two distinct ways. First, one might hold that Wealthy's action of

25. Some may think it clear, even rationally mandated, that they would agree to a high risk or even the certainty of a broken arm for this payoff. Of course, the example may be modified to the point where it is uncertain that consent would be granted; one may consent to a broken arm, but not to a broken leg, a gouged-out eye, or a year-long coma.

26. The rescuer is blameless and does not *owe* an apology. It would, however, be appropriate and good of him to feel and express regret for the injuries he caused.

27. To a close degree, these points also hold about harms inflicted to protect pure benefits. If the bricks were worthless, but dropped to protect (somehow) holdings of nonessential wealth, the deposits would have moral difficulties and require similar compensation. There may be differences in degree because there may be somewhat stronger reasons for inflicting harm to protect a vested benefit than to confer a new one. But as suggested in the text, loss alone, when distinguished from expectation, strong attachment, or identification, is insufficient to register as harm. I am grateful to Frances Kamm for prompting this point.

28. Perhaps the benefactor's intention distinguishes the rescue and the Wealthy case. The rescuer saves from duty or benevolence but Wealthy is probably relieving boredom; the benefit is merely a foreseen, welcome side effect. But procreators, like rescuers, have better intentions: they seek to benefit the child or, at least, to engage in a time-honored practice that has a generally beneficial side effect on the child and society. This suggestion ultimately exerts little force. It does not matter much, when assessing whether the rescuer should compensate for the unavoidable injuries, if the rescuer acted from benevolence, whimsy, or a desire to impress.

dropping the bullion at all was morally wrong, all-things-considered, because it risked and inflicted serious harm on nonconsenting individuals but was not in the service of a suitably important end (such as the prevention of greater harm to them). Consequently, he owes compensation to Unlucky because his action wrongfully caused Unlucky harm. A second, weaker position would also ground liability. It would hold that it would be wrong to drop the bullion unless the benefactor also willingly assumed responsibility for incidental harm inflicted in its delivery. On such a view, unconsented-to mixed benefactions (i.e., bestowals of significant harms alongside benefits) are all-things-considered morally permissible as long as any incidental harm is acknowledged and remedied. I am inclined toward the stronger position and believe that Wealthy acted immorally. This position better explains the sense that an apology is owed. But, on either explanation, Wealthy may be held accountable for the incidental harm he inflicts in the course of the delivery of the benefit.

It might be objected that liability seems justified because the \$5 million does not really compensate for the harm. Perhaps, that is, Unlucky mistakenly regards the event as an all-things-considered benefit. If that were the source of the assessment that liability is justified, though, then the case might yield a very different result if the cubes were worth more, say a billion dollars. Would the greater monetary value alter our moral assessment? I do not think that Wealthy's duty alters as the worth of the cube varies (although the greater the size of the gift, the more our sense of Unlucky's character might decline if he continued to demand what we agree is owed to him by right). One way to explain this reaction is to claim that benefit and harm are "incommensurable" and, for that reason, cannot be treated as items on a spread-sheet or sliding scale. Although I have expressed doubts about the sliding-scale view of benefits and harms, simply saying that benefits and harms are incommensurable is not sufficiently illuminating. A further answer may be provided by appealing to the heightened moral importance of harm and its special badness, and the difference between the assessment of harm from the first- and third-person perspectives.<sup>29</sup> Some decisions involving a willingness to endure harm are permissible from the first-person

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The motive will certainly affect our evaluation of his character, but it does not seem to influence our sense of whether he should compensate for the rescued person's loss. Likewise, with respect to liability, Wealthy's motive matters little. What matters is that he imposed risk and injuries on people without their consent and without the justifying reason that it was necessary to avoid a substantial harm. Nevertheless, if Wealthy's intention were altruistic, it might be wrong for Unlucky to demand that to which he had a right. When Unlucky is all-things-considered much better off, making such a demand would show a rigid, ungracious character. I discuss related issues, *infra*.

29. Thomas Scanlon, among others, has noted a related asymmetry: One may reasonably put much greater weight on a project from the first-person perspective than would reasonably be accorded to it from a third-party's viewpoint. A person may reasonably value her religion's mission over her health, but the state may reasonably direct its welfare efforts toward her nutrition needs rather than to funding her religious endeavors. Thomas Scanlon, *Preference and Urgency*, 72 J. PHIL. 655–69 (1975).

perspective that are not permissible or are more problematic from the third-person perspective. Harm is objectively bad in such a way that it is morally problematic to inflict (unsolicited) a significant level of it on another for the sake of conferring a benefit, although a person may reasonably decide to undergo the same level of harm to retain the same level of benefit. So, a related difficulty with the suggestion that \$5 million is simply insufficient compensation is that if we accept it, we would then have to condemn Unlucky as irrational were he to choose to endure a broken arm for \$5 million. Whether it would be irrational seems unclear and certainly less clear than the sense that it would be wrong for another to impose the broken arm on him.

Why is the imposition of harm by a third party special? One might appeal to epistemic difficulties. Prohibitions on inflicting harm may derive from the fact that outside parties often err or are uncertain whether a benefit really will outweigh a harm. This is often true but supplies an incomplete explanation—one that does not explain our reaction to Unlucky's case. Nor will it provide an explanation for the range of cases in which we would regard it as unreasonable for a third party to impose harm nonconsensually, but permissible and reasonable for the party who will endure the harm to elect to undergo it.

The analysis of harm I suggested provides a different answer. On this view, harm brings about a cleavage between a person's life and her will. When she actively decides to undergo a harmful condition, that cleavage is partially or perhaps entirely bridged by the operation of her will and control. The active engagement and operation of her will, in taking on and endorsing the imposition of harm, changes the significance of the harm into more of that associated with a mere cost. Thus, it may be permissible and rational for a person to agree to undergo a harm to receive a benefit, yet it may not be permissible for another party to impose the harm. (Or, on the weaker principle, it is not permissible to impose the harm without attempting specifically to remedy the harm.)

What if Wealthy claims that part of the \$5 million was anticipatory compensation? His aim was to give only \$3.5 million as a gift and to include an extra \$1.5 million to compensate recipients for the risk and any damage they endured?<sup>30</sup> This seems sophistic. Suppose that just after Unlucky retrieves the cube from the ground, a thief runs up and snatches the cube from him. Most of us would, I think, hold that Wealthy should repair Unlucky's broken arm and should be liable for such repair. But our reac-

30. See also Restatement of Torts, §920: "When . . . tortious conduct has caused harm to the plaintiff . . . and in so doing has conferred a special benefit to . . . the plaintiff . . . , the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable." My discussion may be read either as challenging this principle or offering a constrained reading of what constitutes equitable mitigation. Generally, the principle's actual applications depend on the more limited claim that I endorse: If harmful conduct averts greater *harm* to the plaintiff, then the averted harm should be considered in mitigation of damages.

tions would differ in a case that more straightforwardly involved the payment of compensation for harm. Suppose Unlucky sues Wealthy for an unrelated tort and wins (or settles). Wealthy hands Unlucky a suitcase of money as compensation that Unlucky accepts. As Unlucky walks off, a robber wrests the suitcase from him. Here, Unlucky cannot reasonably demand a replacement compensation package. These different reactions suggest there is some difference between the dropping of the bullion and the payment of compensation.

Perhaps the difference is that the “compensation-is-built-in” approach does not hold Wealthy seriously accountable for the risk and harm he imposed. In Wealthy’s case, the supposed “compensation” is not offered specifically as compensation to the injured party but the same-size benefit is delivered to everyone, in advance—not as a reaction to harm. To act as compensation for a wrong, the event marking the accountability or responsibility should genuinely acknowledge the harm and be, in some way, separate from the delivery of the harm.<sup>31</sup> Indeed, it seems particularly problematic in the bullion case that the instrument of harm is supposed also to function as the instrument of compensation. This confluence further undermines the compensation’s fully discharging moral accountability for the harm.

## B. An Objection: Hypothetical Consent

One might object to the foregoing arguments by appealing to hypothetical consent in one of two different ways. First, one might object that the asymmetry between the cases does not reflect a difference between harms and benefits. Rather, hypothetical consent can be inferred in the rescue cases but not in Unlucky’s case. While this may be true, I am not convinced that the appeal to hypothetical consent does the justificatory work. I suspect that the differing significance of harms and benefits grounds the different hypothetical consent results and makes them salient to us. On the same lights, the different significance that benefits, and particularly unchosen benefits, have grounds Unlucky’s reasonable *ex post* ambivalence. Notably, there seems to be a harm/benefit asymmetry built into our approaches to hypothetical consent where we lack specific information about the individual’s will. We presume (rebuttably) its presence in cases where greater harm is to be averted; in the cases of harms to bestow greater benefits, the presumption is reversed. One might claim that this is because the (predictive) likelihood of hypothetical or *ex post* consent is just higher in the harm cases than in the benefit cases. But this is an unsatisfying explanation.

31. This seems true when the harm is intentionally inflicted or inflicted through an intentional act aimed at the victim, *e.g.*, an action intended to benefit the victim. Where the harm is a foreseen but unintended side effect of a justified effort to benefit *third parties*, simultaneous compensation seems more acceptable.



Again, why is it more likely and why do we regard it as rational and as authorizing our other-regarding action? Mightn't it be because the special badness of harm makes consent the rational default position in the former case? So, regarding death, there is always some uncertainty that a patient would really want to avoid it and would be willing to endure a significant harm to avoid it. Complementary cases involving benefits of vast sums of money or suitably large conferrals of knowledge may approximate this degree of uncertainty. Yet even if the likelihoods of consent are the same, it still seems easier to justify imposing the lesser harm to avoid a patient's death than to bestow the benefit. It seems more likely that the differences between the cases are attributable to an antecedent asymmetry between the significance of harms and benefits.

Alternatively, one might challenge the view that Wealthy's actions are impermissible (even if he does not compensate). One might argue that, despite Unlucky's *ex post* hesitation, it is reasonable to infer Unlucky's hypothetical consent to his action (or that Unlucky's reported reaction renders the case's description atypical or implausible). I do not think it is clear that Unlucky would give his consent nor is it clear what test is relevant: that his consent is certain? rationally required? likely? Surely he is not rationally required to have or to risk having his arm broken for the money, were the bargain put to him directly. Many people reasonably refuse to endanger themselves for financial gain, even if they would value the rewards and even enjoy the benefit should their refusal not be honored. This also casts doubt on the certainty and the likelihood of Unlucky's consent.

But suppose his consent were likely. It is not clear what relevance this would have, especially to the liability question. For suppose it is as likely, or even more likely, that Wealthy would consent to liability if it were a condition of his activity. Why then would the fact that Unlucky might consent to no compensation entail that no compensation was owed? Could not an equally strong argument be made that compensation is owed, since Wealthy might consent to a compensation requirement? (And if Wealthy would not consent, shouldn't it matter whether his refusal would be reasonable?) It is not clear, then, that the question of what Unlucky *in particular* is *likely* to consent to should be determinative of the liability issue.

Further, I am not convinced of the principle that one may (without providing compensation) inflict serious harm (or risk) on a person to bring about her greater benefit if, based on the reactions of the general population, it is likely that she would consent. This deployment of hypothetical consent procedures is rather extreme. The hypothetical consent would be generic: It would not appeal to features of the individual or his attitudes toward risks and the relationship between harms and benefits. Generic hypothetical consent is, sometimes, regarded as appropriate—perhaps in the rescue case and perhaps to identify principles of justice. But in the rescue case, something of great objective significance is at stake. This may

be what generates a reasonable presumption that action is warranted. In the political case, generic hypothetical consent may be appropriate because consideration of the contractors' individual features would introduce morally arbitrary factors.

But on an asymmetrical account of harms and benefits, generic hypothetical consent may be less appropriate in deciding whether to harm for an individual's pure benefit. In part, the difference is that harm matters more, objectively, and in part it is that the valuation of benefits and the role benefits play within a life are more individual matters. In contrast to harm's avoidance, it is more important to identify, personally, the choiceworthy benefits and to realize them through efforts involving oneself. Further, individuals quite reasonably have different responses to available benefits, to trade-offs between them, and in their willingness to endure harm to enjoy them. What may be desirable for some may be alien, burdensome, or intolerable for others. These different responses reflect very personal decisions that mark the individual's distinctiveness. Where large benefits are at stake, hypothetical consent arguments are more plausible when they draw on specific evidence about the affected patient's unique will and personality.

One may argue, though, that the likelihood of consent is much stronger in the procreation cases than in Unlucky's case. After all, a *very high* percentage of people claim to be glad to have been born. I am not sure what to make of such claims, as there are people who do regret being born and find the burdens of their lives too great. Others are strongly ambivalent: They find their burdens are not entirely canceled out by the goodness of their lives and regard these burdens as ineliminable serious problems and intrusions. Although sometimes these reactions are unreasonable, it is hard to dismiss all these familiar, if unusual, reactions as wholly irrational.

Further, the procreation case is more complicated because, in contrast to the Unlucky case, the condition bestowed is one that cannot be escaped without very high costs (suicide is often a physically, emotionally, and morally excruciating option). Generic hypothetical consent seems especially difficult to justify where the imposed conditions are difficult to exit, if the patient complains about the harms imposed. Thus, four factors make the appeal to hypothetical consent problematic: (1) the fact that great harm is not at stake if no action is taken; (2) but if action is taken, the harms suffered may be very severe; (3) the imposed condition cannot be escaped without high costs; and (4) the hypothetical consent procedure is not based on features of the individual who will bear the imposed condition. Even if the high likelihood of hypothetical consent (and *ex post* consent) does justify procreation, it is still unclear, especially given these factors, why those who take this risk should not bear liability if the risk's dangers are realized—that is, if the beneficiaries do suffer serious burdens about which they complain.

## C. Wrongful Life Cases and Harming to Bestow a Pure Benefit

Thus, I am skeptical of moving from the claim that one may permissibly, without offering compensation, nonnegligibly harm another to save her from greater harm, to the purportedly analogous claim that one may permissibly, without compensation, subject a person to substantial harm or to nonnegligible risk of such harm to confer a pure benefit without that beneficiary's consent. This suggests that wrongful life cases should be distinguished from the rescue cases. While causing a person to exist may benefit that person, it does not save the potential person from any harm, much less from greater harm. Rather, if causing to exist does impose harms, the harms are part of a process that, at best, brings about a pure benefit. And benefits do not have the same moral significance and justificatory power as do harms. Causing another to exist may well be all-things-considered justified, but the conditions in which it may be justified seem different from those in which inflicting harm to prevent harm is justified. Specifically, this justification would yield a permission only if the bestower is accountable for harm that results.

There is a second, important dis-analogy between the rescue case and the wrongful life cases. If the rescuer fails, or refrains from rescuing, the drowning person will suffer a great harm. Her life will go for the worse, either through premature curtailment or impeded mental functioning. By contrast, if the benefit bestowed by creation is not conferred, the nonexistent person will not experience its absence; further, she has no life that will go worse. In this way, procreation also differs from the Wealthy case. In the Wealthy case, if Wealthy refrains from acting, in one sense, Unlucky will have a comparatively worse life (although he will not be harmed) because he will be without a sizable financial windfall. But, if procreation does not occur, there is no child whose life will go worse than it otherwise would had the benefit of existence been bestowed.

Thus, two distinctions are at play here. One is the distinction between the moral impetus to avoid and prevent harm versus the lesser, more confined, impetus to bestow benefits. The other is between the moral significance of failures to benefit existent people and nonexistent potential people. In most cases, the absence of a pure benefit is experienced by a person or, otherwise makes a difference in the content of his life. This difference plays a significant explanatory role in the strength of the moral impetus to bestow pure benefits. The contrast we can draw between *that* person's life with the benefit and without it, coupled with the urge to prevent inferior situations, I suspect, partly propels our sense of the moral impulse to bestow benefits.<sup>32</sup>

32. This is not to endorse comparative views of benefit. There are reasons to fret over such criteria—some similar to those rehearsed about comparative views of harm. Perhaps an event that does not improve a life *can* benefit a person. But, the *moral significance* of nonimproving benefits is importantly less. Harms may differ—a harm that does not make a life worse does not always have less or significantly less weight than harms that do worsen lives, marking another asymmetry between harms and benefits.

In the case of procreation, though, this sort of moral reason for beneficence is not generated, because the potential beneficiary does not exist. Even if the failure to bestow a benefit were on a par with harm (as counterfactual comparative views contend), the failure to be created is a “harm” that would never, even indirectly or as an opportunity cost, affect an *ongoing* person’s life. If the failure to impart them will have no influence on a life, benefits do not generate the same sort of moral reasons as those that compel us to avert and prevent harm that will affect a person. And they do not even generate the same reasons as are produced by pure benefits that would *improve* an ongoing life. Thus, this suggests a second reason why a permission to harm, without providing compensation, to prevent greater (experienced) harm, does not support the first limitation on wrongful life liability: The fact that the “harm” or absence of benefit represented by not procreating will not affect an existent person or her life in progress renders the benefit bestowed by creation far less morally significant.

Thus, both the asymmetry between harms bestowed to prevent greater harm and harms inflicted to bestow benefits, and the asymmetry between those benefits that do and those that do not improve a life, challenge the argument for requiring a wrongful life plaintiff to allege that he prefers not to have been created. Even if *that* plaintiff could not have been born and enjoyed the benefits of life without his particular, concomitant burdens, it does not follow that he should be the one to foot the bill for these burdens.<sup>33</sup> Because he did not assume them freely and they were not bestowed to prevent a greater harm or even an inferior situation, it may be entirely appropriate to lay responsibility upon the imposer.

### III.

Suppose we resolve the issue of Section II one way or another, either expanding the set of justified complaints we recognize or affirming the dominant view that only those overall harmed have a valid complaint. A second, distinct issue concerns whether only those who acted negligently or worse toward the foreseeable burdens their children would incur should be liable, or whether all those significantly participating in voluntary procreation should be liable for the harm their children undergo.

The prevalent view is that liability should be restricted. A dim eye is cast on procreation done haphazardly, as it is with any acceptable activity done haphazardly. In general, though, it is not viewed as a suspect, harmful, or

33. One might try to distinguish the Wealthy case by claiming that it was physically possible for Wealthy to bestow this benefit in a nonrisky way but that this is not true of procreating. The example’s details are meant to forestall this claim. Wealthy could not enter the island or bestow the benefit in a nonrisky way. Why should genetic impossibility be more morally significant than the obstructions Wealthy faces? The real charge behind the nonidentity problem is the idea that one may not complain about a burden unless it comparatively worsens one’s state. The Wealthy example is meant to challenge this; it is unclear what other reason there is to think the metaphysical impossibility at issue is morally important.

hazardous activity. In unusual cases, parents and others central to creation demonstrate abnormal, culpable motives (e.g., they are severely negligent or reckless with respect to unwanted or unwise creation). In these *special* circumstances, moral disapproval is deemed appropriate. Defenders of wrongful life liability believe this disapproval may legitimately translate into a legitimate complaint by the child.<sup>34</sup>

Although the dominant perspective has an intuitive familiarity and plausibility, I believe it is mistaken. I suggest a different moral perspective toward routine procreation, what I will call the “equivocal view.”<sup>35</sup> The view regards procreation as an intrinsically and not just epistemically a morally hard case. For it is not a morally straightforward activity, but one that ineliminably involves serious moral hazards. Although there is much to be said for it, it faces difficult justificatory hurdles because it involves imposing serious harms and risks on someone who is not in danger of suffering greater harm if one does not act. I then explore the implications of this perspective for the philosophically justified range of wrongful life suits. I argue that voluntary procreation should be sufficient to ground responsibility for the resultant harm children undergo because of their creation (should they complain), whether or not it is done particularly negligently or recklessly.<sup>36</sup>

If one shared all my intuitions about the Wealthy case, liability would not hinge upon whether he exercised due care in dropping the cubes. It should not matter with respect to his liability for compensatory damages whether he was negligent or reckless in his methods. (These factors, perhaps, are relevant to the assessment of punitive damages.) Even if he took the greatest care, he imposed risk of harm and injury on another without consent and without the justification that it was necessary to avoid a more substantial harm. Everyday procreation may be described in similar terms.

First, some preliminary observations. As previously noted, I assume it is both coherent and true that causing a person to exist *can* benefit and harm the resultant person. Furthermore, I assume that, in the vast majority of cases, causing a person to exist does actually provide an overall benefit to the resultant person. Nevertheless, even though procreators may benefit their

34. Whereas its opponents believe the child has no complaint. The disapproval is properly directed only at a defect in the character of the procreator or in the state of affairs that results, judged impersonally. See, e.g., Dan Brock, *The Non-Identity Problem and Genetic Harms*, 9 *BIOETHICS* 269–75 (1995); John Harris, *supra* note 5; and David Heyd, *GENETHICS* (1992), ch. 1.

35. I summarize the main grounds for this view here. I defend it in depth in *Consent and the Morality of Procreation* (unpublished D. Phil. thesis, Oxford University, 1993). Independently, David Benatar has advanced some related arguments that causing to exist imposes burdens on children in *Why It Is Better Never to Come Into Existence*, 34 *AM. PHIL. Q.* 345–55 (July 1997).

36. The argument I offer supports parental liability (and responsibility generally) for the essential, burdensome aspects of the child’s life—things like pain, disabilities, illnesses, moral burdens, the burdens posed by the necessity of death, and the typical risks of physical and psychological injuries that are run in a human life. I note here but bracket the question whether even partial parental responsibility is appropriate where an intermediate agent imposes some harm during the child’s life. One might hold parents partly responsible for such harms, because they exposed their children to the risk of harms imposed by others, or one might hold the intermediate agent fully responsible.

progeny by creating them, they also impose substantial burdens on them. By being caused to exist as persons, children are forced to assume moral agency, to face various demanding and sometimes wrenching moral questions, and to discharge taxing moral duties. They must endure the fairly substantial amount of pain, suffering, difficulty, significant disappointment, distress, and significant loss that occur within the typical life. They must face and undergo the fear and harm of death. Finally, they must bear the results of imposed risks that their lives may go terribly wrong in a variety of ways.

All of these burdens are imposed without the future child's consent. This, it seems, is in tension with the foundational liberal, anti-paternalist principle that forbids the imposition of significant burdens and risks upon a person without the person's consent. Doing so violates this principle even if the imposition delivers an overall benefit to the affected person. Hence, procreation is a morally hazardous activity because in all cases it imposes significant risks and burdens upon the children who result. The imposition of significant burdens and risks is not a feature of exceptional or aberrant procreation, but of all procreation. Thus, restricting liability only to aberrant cases seems philosophically *ad hoc*; there may be practical reasons for doing so, but one could justifiably acknowledge a much more expansive philosophical base for liability. One way to think about this view of procreation as morally problematic is to say that procreation violates the consent rights of the child who results. Creating a person imposes significant burdens and harms on that child without the child's consent and without meeting the specifications of the relevant exceptions; most notably, such imposition is not necessary to avert the child from suffering a greater harm.

This characterization raises many issues, which I will only briefly discuss here, about the structure of consent rights. One issue concerns whether the argument assumes that we must predicate consent rights of future, currently nonexistent people, and whether we may do so. One might deny that nonexistent people could have rights, because they do not exist, while also objecting that they must have rights for it to be possible for our contemporary actions to violate their rights. But as Joel Feinberg has pointed out, hiding a nondefusable bomb attached to a nontamperable time clock of seven years in a kindergarten would be clearly wrong. In part, it would be wrong because it violates the rights to life of the children who will die, even though they do not now exist and do not yet possess rights to life. One's action sets into motion a chain of events that will lead to the violation of the rights that will come to be held.<sup>37</sup> Likewise, the equivocal view does not require the predication of contemporarily held consent rights. Instead, one need only claim that the procreative acts will set into motion a series of events that will impose a set of significant, burdensome conditions on the person; being subject to these unchosen harms, assuming they persist so long, will violate the person's consent rights at whatever point these rights

37. Feinberg, *supra* note 13, at 97.

vest. (If I enroll my toddler now in a nonreversible career path (through mental indoctrination or a severe servitude agreement), her autonomy rights may not yet be violated, because she does not yet possess them, but the action is wrong now because they will be violated, immediately, upon their vesting.) Our moral duties emanate from the force these future rights exert on us now, not from any right predicated to be held by nonexistent persons. If our actions now set into motion causal chains that will result in a right's being violated in the future, this action is, at best, morally problematic. That the effect is not imminent and the future rights holder is not present at the time of our action matters little. Immediacy carries little moral importance as such. It may matter when nonimmediate harm may be prevented by intervening action. But here that does not hold true—these burdens and risks are not contingent ones, but attend every life.

Another important issue concerns whether the consent right can be said to be violated given that the child was unable, owing to her nonexistence, to give her consent at the time the action did and had to occur. It may be claimed that nonconsensual, beneficial action is unobjectionable when the affected person is absent or unable to consent. I do not think the fact of absence can support a completely satisfactory defense for many of the reasons given in the discussion of generic hypothetical consent in Section II. Briefly, I believe that the generally recognized exceptions to consent requirements, such as the rescue case, are plausible only when and because they are necessary to save a person from enduring or experiencing more significant harm. It would not be permissible to perform the substantially burdening surgery on an unconscious patient just to deliver a large, pure benefit, even if it were the only chance to do so. There is a substantial difference between the rescue case and the case involving Unlucky. In both cases, the affected person cannot be consulted, but in the former case, nonconsensual action will avert greater harm, whereas in the latter, a large but unnecessary pure benefit is bestowed. In the case of procreation, as with Unlucky, inaction may forego a benefit, the benefit of life, but there is no harm to avert. As I suggested in Section II, it is implausible to treat this opportunity cost for a pure benefit as a harm, especially when no person's ongoing life will go worse because of the missed opportunities. Thus, for similar reasons, we cannot infer from judgments about what it is permissible to do in the rescue case to the case of procreation.<sup>38</sup>

38. This consent-right argument does not entail the rejection of paternalism toward children. Much paternalism aims to prevent greater harm to children, either as children or as later adults. This coheres with the general presumption that action may be taken to prevent or alleviate greater harm when a person is unavailable for consent. Some paternalism aims merely to provide benefits, though. This may be permissible (depending on how significant the harm and how much more substantial the benefit) where the harm and the benefits do not extend beyond the point at which the child gains consent rights (or the relevant ones at the relevant strength). I think we are, however, properly hesitant to impose significant harms or limitations that extend beyond the child's minority, if imposed only to provide pure benefits—especially if they will be difficult to reverse, should the child come to disapprove of them, and if we are without specific evidence that the child favors the imposed condition.



I am not advancing the claim that procreation is all-things-considered wrong. It is consistent with these arguments to regard nonconsensual, burden-imposing actions as morally problematic but not always impermissible, or to regard procreation as a special case. All I mean to advance is the claim that because procreation involves a nonconsensual imposition of significant burdens, it is morally problematic and its imposer may justifiably be held responsible for its harmful results. Acknowledging such responsibility might help to explain why such action may be permissible. One might believe that imposing overall beneficial conditions that nonetheless involve significant burdens is permissible, when the beneficiary is unable to consent, if one attempts to alleviate or partially shoulder the burdens one imposes. Thus, one might hold that the unconsented-to burdens of life do not make it wrong to procreate *per se*, but rather wrong to procreate without undertaking a commitment to share or alleviate any burdens the future child endures.<sup>39</sup> I am not sure whether such justificatory arguments ultimately succeed, but it is not essential to the argument about liability that they be resolved. As long as the argument made the case that procreation had a *pro tanto* wrongful element, it would challenge the second common limitation on wrongful life litigation as overly restrictive. Voluntary procreation is not morally problematic only in unusual cases of negligent or reckless conception. In every case it involves a person imposing a risk upon another where the imposition is not necessitated by the need to avert greater harm.

Of course, one may agree that procreation is morally problematic without entertaining any notion of directly regulating it. Familiar arguments against state interference with rights of bodily autonomy and concerns about the terrific potential for state abuse would properly prevent consideration of such drastic measures. The equivocal view might, however, alter our understanding of the legal right to procreate. We would not see it as deriving directly from beliefs about the unproblematic nature of procreation. Rather, it would derive from more general rights against interference with one's body and sexuality and from deep skepticism about the possibility of benign use of government power in this context. Acknowledging a right to procre-

39. On this reading, the argument for parental responsibility and liability takes on a strict liability cast. Of course, a usual condition of strict liability is not present, namely that the activity is not normally engaged in. This condition, however, is theoretically difficult to justify where there is a large disparity in the type of burdens various people endure because of the activity. If one drew the stronger conclusion, that procreation is not fully justified by an assumption of responsibility for the burdens it imposes on the children, then the argument would operate more like one of intentional tort.

In many cases, another typical requirement of strict liability is not met: Usually, the genetic contribution to procreation is not a product placed on the market, except, notably, where the sperm (or eggs) is obtained from a sperm bank. Notably, the "donation" and provision of genetic material through such outlets should not be deemed (strict-liability exempt) "services," like blood provision. See, e.g., West's Ann. Cal. Health & Safety Code § 1606. Blood provision is deemed a service to promote blood donations and transfusions. No analogous public urgency is associated with assisted reproduction. Although the inability to produce genetically related progeny is a very serious matter for some, its importance does not approach that of the risk of death, particularly since, generally, the ability to parent (via adoption) is available.

ate, then, would not lend itself to an endorsement of procreation; nor would it entail any duties to assist or facilitate procreative activity. Thus, it is consistent with acknowledging a legal right to procreation to think that those who do engage in procreation, thereby imposing burdens on another person and running risks with her life, could reasonably bear some legal duties to compensate her or otherwise help to shoulder the costs of this imposition.

Such a view would not necessitate a radical change of practice. In most cases, the burdens of the typical life are fairly manageable. Further, most parents generally maintain relationships of emotional and financial support with their children. These relationships help children cope with their burdens and permit children to confront, hold responsible, show gratitude toward, and receive comfort and instruction from those who have given them this burden-riddled mixed benefit. In fact, the arguments of this and the prior section together help to explain the legal mandate behind these relationships and, in particular, behind mandatory child support.<sup>40</sup> Whereas, for those who believe that bestowing life is normally and fairly reliably a tremendously beneficial activity, and for that reason alone permissible, it should present something of a puzzle why parents who initiate a child's creation (generally the biological parents) should owe (morally or legally) child support. After all, they have given the child more of a benefit than any others—if further benefits must be bestowed, should not the onus be on others to step in as further benefit providers?<sup>41</sup> If, however, we acknowledge that initiating parents have caused harm to their children or even violated their children's rights through creation, it becomes easier to explain the fairness of levying duties of support upon parents beyond the assumed enormous benefit that procreation bestowed and beyond the minima necessary to make life worth living.<sup>42</sup>

40. For discussions of the problem of justifying child support, see Scott Altman, *A Theory of Child Support*, USC Law School Working Paper No. 98–13 (1998), and John Eekelaar, *Are Parents Morally Obligated to Care for Their Children?* 11 OXFORD J. LEGAL STUD. 340 (1991).

41. One may object that causing to exist *plus* minimal support is necessary for creation to bestow a benefit. Even so, this does not entirely solve the puzzle behind mandatory child support. Our expectations of parents go beyond provisions of minimal support. Many think they include duties to share resources more fully and for temporal periods beyond those necessary to ensure the child's functioning.

42. That children may be needy will not, alone, explain why the biological parents in particular are expected to fulfill the need. *Ex hypothesi*, with respect to *that* child, the parents have given it a great deal. So, shouldn't the general duties of benevolence and to respond to need weigh harder (or at least equally) upon others who have not benefited the child? One might explain parents' particular responsibility on the grounds that, otherwise, they will have imposed support responsibilities on others who did not consent to a child's creation. This argument has some, but incomplete, force. This explanation would ground a duty that biological parents owe to others to prevent their having to bear unsolicited financial expense. But it would fail to explain why biological parents also owe the support to their children and why their children may rightfully complain if the duty is shirked. Second, the concern about laying financial burdens on nonprocreating members of society is in some tension with the commonly held sentiment that creating people benefits the society by perpetuating it. For then it would seem that even nonprocreating citizens should assume large portions of the costs of the production and maintenance of this benefit.

This argument works most clearly to establish the theoretical soundness of entertaining a wider range of wrongful life suits against parents who initiate creation. They, most clearly, impose life upon their children. The case of doctors is more difficult because doctors are not the prime initiators of conception and because they have socially important duties to act as neutral, fairly noninterventionist agents who protect their patients' health. More needs to be said than there is room for to delineate the proper scope of physician liability—that is, whether doctors should be responsible for all cases in which they facilitate conception and birth or only when they act in dereliction of their medical duties. My tentative assessment is that when doctors act knowingly, recklessly or negligently, so that they cause the creation of a child that will suffer inequitable burdens;<sup>43</sup> or when they take unusual risks, for example, through experimentation with fertility drugs or reproductive technology meant to encourage or facilitate otherwise unlikely procreation, and the resulting child suffers from burdens attributable to the experimental techniques; or they fail to give sufficient information to prospective parents to permit them to make an informed choice about their procreative risks, doctors should bear some of the liability.<sup>44</sup> Otherwise, when doctors merely provide medical care to pregnant women and assist in delivery, liability should not be assessed. There the parents are fully responsible for the creation. To assess liability in those cases would create an enormous conflict between doctors' duties of care to patients and duties to future children.

#### IV.

This section moves beyond the theoretical argument for liability and comments on some more pragmatic concerns about such suits. Does the argument waged so far imply that *all* children may have causes of action? *In theory*, the answer is yes. However, four mitigating factors make an explosion of suits unlikely, even were this more expansive form of liability officially recognized.

First, the fact that most children experience their imposed lives as miraculous benefits suggests that few of those who have families that provide adequate support would want or need to sue. Second, for most children, there is little a court could provide that would make suits worthwhile. As noted above, most parents already provide support for their children to help them manage these burdens. For those with relatively minor burdens (in contrast to those born in difficult circumstances or with significant disabilities), parental support and acknowledgment of responsibility may be

43. Section IV discusses limiting liability to cases where children have inequitable burdens.

44. I note but leave aside the difficult issues concerning requirements to inform potential parents of emerging genetic testing measures. Permitting the parents to refuse invasive testing, though, should not give rise to a cause for action, for the same sorts of parental privacy and bodily autonomy rationales that ground a legal right to procreate and that should insulate doctors from liability for basic obstetric care.

all that is appropriate to expect. Attempts at further compensation may be worse for the child, as a good and full life generally requires learning and engaging in self-management of the typical burdens of life.

Third, additional moral and psychological barriers would typically forestall suits by children. An interesting, prevalent moral barrier, often occurring between friends and family members, prevents people from demanding what may be owed to them by right. In some cases, one may have a legitimate claim against another that the obligated person should voluntarily fulfill without request. Yet it would show a bad character and perhaps be wrong actually to make the claim. In some cases, a friend owes one money but it would be rude and petty to demand it. Or a friend may owe one gratitude or a display of admiration but it would be improper to ask for or elicit it. Likewise, demanding damages from one's parents where one has even only a decent relationship with them may exhibit rudeness, pettiness, and ingratitude; it may threaten the relationship, even if the substance of one's demand itself has some reasonable basis. These moral barriers are likely to forestall legal claims from being pressed except in those few but serious cases in which compensation is truly needed because the family relationship is either nonexistent or significantly inadequate.

Finally, courts could reasonably demarcate a narrower class of cases as judicially cognizable. We need not, and standardly do not, provide judicial relief for all moral claims. Courts might take into account the reasonable pragmatic aim of limiting litigation, the difficulties of assessing financial compensation in the everyday cases, and the general provision of care and other forms of nonfinancial, voluntary compensation that parents standardly provide their children. Such considerations might justify limiting wrongful life causes of action to those children who suffer disproportionately great burdens. Although everyone endures the burdens of moral agency, moderate stretches of pain, and the risks of suffering worse, some people are hampered by extra burdens—for example, ever-present significant pain, hindering disabilities, or life-threatening or shortening diseases. For these people, because their burdens are substantially stronger than those endured by the average individual, we might justifiably delineate them as the class eligible to pursue greater relief.<sup>45</sup>

It might be objected that when directed against parents, wrongful life suits unfairly penalize those parents whose offspring suffer greater disabilities than most but who acted no differently from parents whose offspring are better off. In some cases, this objection will be implausible where the

45. This delimiting approach has a distinct advantage over the even more limited theories of liability criticized; *see supra* note 3. These other theories require that courts find that a child's life is not worth living and either attempt to evaluate the degree to which life is worse than nonexistence or, like California, abandon the idea of actual damages. (These problems partially motivated some courts to reject wrongful life claims.) This suggested approach eliminates the need for such disturbing findings and simplifies damage assessment. All a court must find is that the child suffers from a disproportionate allocation of burdens. The court may award damages in much the same way as it awards damages to those who become disabled early in childhood.

plaintiff claims the parents neglected special, demonstrable risks that they, specifically, would bear an inordinately burdened child. Where the objection does exert force, though, there are two different lines of available, familiar response. One line maintains that this disproportionate burden is not unfair as each set of parents, *ex hypothesi*, freely undertook the risk that their child's life might be overburdened. An alternative insurance-oriented approach would tax all parents (perhaps progressively)<sup>46</sup> for their risk-taking and then distribute the proceeds to those children made worse off by procreation. This approach has the advantage of not unduly burdening the individual parents of a disproportionately burdened child, and by spreading costs it makes it more likely that burdened children will have adequate funds available to them. Although I am sympathetic to this approach, I will not attempt here to defend it. Importantly, the arguments for mandatory, parent-funded insurance schemes still rely on the same fount of argument that supports wrongful life liability without pooled risk.

## V.

The equivocal view also has ramifications for a range of other procreative practices, including adoption, surrogacy, and the use of reproductive technology.

What difference might such a view make in our assessment of adoption issues? Standard treatments often suppose that the link between biological parents and children is morally privileged, because, for instance, biological parents deserve relationships with their children since they created them, because children inherit their genetic material, or because the biological relationship is culturally, psychologically, or even inherently significant. Prominent adoption advocates such as Elizabeth Bartholet criticize these views and argue for the equal moral importance of the bond between children and adoptive parents.<sup>47</sup>

The equivocal view takes a further step and partly inverts the hierarchy of biological parents over traditional adoptive parents—that is, those who care for children but do not initiate their creation. On the equivocal view, biological parents perform a morally mixed act by imposing the risks, burdens, and benefits of human existence on their children, whereas traditional adoptive parents do not impose the risks and burdens of existence on those children. In the main,<sup>48</sup> they respond to existent children's needs

46. Here, of course, there are hard issues about whether those with genetic histories or behavioral patterns predisposing their children to be disproportionately burdened should shoulder higher premiums.

47. See, e.g., Elizabeth Bartholet, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993).

48. They do, of course, impose a particular relationship on the child that may have significant burdensome aspects. Usually, though, this relationship averts the greater harm of the child's lacking all parental relations.

but do not engage in the morally mixed activity of creation toward them. This inversion might, for example, make some difference in our approach to custody disputes between biological parents who have abdicated responsibility (or for other reasons failed to develop a relationship) for the child and adoptive or foster parents who have cultivated a strong relationship with the child. In some cases, we might allow a long-term bond with foster or adoptive parents, created from voluntarily assumed responsibility, to count for more than we do now; we might regard the fact of a genetic relationship as more of a mixed blessing, especially if the genetic parents have experienced lapses in responsibility, rather than as a very strong presumptive factor.<sup>49</sup> This is not to denigrate family reunification goals. They often facilitate children having strong familial relationships with those best suited to serve their needs. They also serve the pragmatic aim of encouraging temporarily beset parents to turn to the foster care system for assistance. But reunification goals predicated on the importance of genetic ties should not necessarily trump custodial claims arising from strong, committed relationships developed by adoptive or foster parents.

The equivocal view also generates new reasons to resist rigid anonymity and indemnity protections in genetic and gestational "donation" contexts. Legislation that encourages genetic donation by shielding the identities of contributors of genetic material and immunizing them from support requirements and liability may be misguided.<sup>50</sup> Those parents who sponsor the creation and assume custody in an assisted reproductive relationship might legitimately waive their rights for child support and the like against genetic contributors, the agency that arranges the contribution, and against gestational carriers. But they should not be able to waive the rights of the *child* to support or damages should that child be in need. The person (partly) causally responsible for the child's burdens has a duty of responsibility to that child that should not be waivable by a parent. Anonymity provisions currently protect even donors who are reckless toward or even knowledgeable of high probabilities that their offspring would suffer from debilitating genetic conditions.<sup>51</sup> Why should the donor, an integral, voluntary, participant in the creation process, be able to avoid responsibility for

49. This could support a different outcome in the Baby Jessica case in which, after two years of adoptive care, an infant was returned to her biological father who had been unaware of the child's existence and did not consent to her adoption. *In re Clausen*, 502 N.W. 2d 649 (Mich. 1993), stay denied, 509 U.S. 1301 (1993).

50. See, e.g., Cal. Civil Code §43.1.

51. These are not mere possibilities. A couple is currently suing a sperm bank, seeking the identity of a sperm donor who misreported his medical history and passed on an incurable kidney disease to the child who resulted from his sperm contribution. Julie Marquis, *Gift of Life, Questions of Liability*, L.A. TIMES, August 9, 1997, at A1. In another case, a man passed on the herpes virus to a surrogate and to the child she conceived, who suffers from severe disabilities. Rebecca Powers, *Surrogate Negligence Case Ready for Court*, THE DETROIT NEWS, Jan. 20, 1993, at 2. The Sixth Circuit found that the broker, lawyer, and doctors who facilitated the surrogacy arrangement had an affirmative duty of care and could be sued for negligence. *Stüver v. Parker*, 975 F.2d 261 (6th Cir. 1992).

the life he has created? The fact that the donor might not provide genetic material if he were susceptible to liability or support requirements, and hence the child might not have otherwise come into existence, is not, as we have seen, a sufficient reason to disclaim responsibility to the child for the burdens imposed by creation.

Should, then, biological parents who give their children up for adoption in the traditional manner (i.e., not through an arrangement crafted prior to conception) also continue to be financially responsible, as default supporters, for their children? In principle, the answer is yes, although two factors support waiving this responsibility and imposing more stringent duties on mere genetic contributors. First, traditional participants in the adoption system are less likely to have created intentionally; genetic contributors, however, almost uniformly have opted intentionally and, generally, voluntarily to participate in a creation arrangement. Further, unlike traditional biological parents who relinquish custody through the adoption system, genetic contributors often contribute to creation as part of a business or financial transaction. It seems only fitting that they should absorb the costs of their business activities. Second, it may facilitate adoptions that promote the child's best interests to waive support requirements; if biological parents remain susceptible for support payments, this may deter unfit parents from relinquishing custody; but in the genetic contribution context, liability may only deter creation in the first place, which will not harm the nonexistent, potential child.

Apart from financial liability, biological parents should assume moral accountability for the lives they create. As some argue, it *may* better promote children's psychological development and sense of stability to connect only with a single set of parents and not to have extra-familial relationships during childhood with nonparenting biological parents. Nevertheless, legal structures that permit biological parents, genetic donors, and gestational carriers to remain anonymous interfere with the child's opportunity to consult one's biological parents in adulthood. Those who participated in the initiation of a life should assume responsibility for it and should, at the least, be accessible to the child, at some point, to participate in a justificatory dialogue about the child's origins—that is, to discuss why the life was created, to relay familial history, and to listen to the child's account of his difficulties and burdens.

The equivocal stance also provides guidance for the resolution of disputes over genetic material, such as the dispute in *Davis v. Davis* about who should determine the fate of frozen embryos.<sup>52</sup> Where both genetic contributors cannot agree that (or where) the embryo should be implanted, the presumption should lie with affording the reluctant donor a veto against their use, on the grounds that if one of the parents does not want the child, is unwilling to assume responsibility for it, or judges that the

52. 842 S.W. 2d 588 (1992).



future child's interests are best served if it is not born, then that parent's decision should be deferred to. If burdens and the risk of further harm are imposed to bestow a benefit, without that person's consent, it should be done with the full confidence of each parent that such imposition is advisable and with their voluntary assumption of responsibility.<sup>53</sup> These grounds suggest, in contrast to the *Davis* court's holding,<sup>54</sup> that this veto should have dispositive force, even if one of the contributors lacks another means to create a biologically related child.

Finally, this approach has implications for the resolution of disputes arising out of so-called surrogacy arrangements. Many have argued that it is important to establish presumptive custody rules between contesting parties both seeking custody so as to forestall litigation, establish expectations, and protect children from prolonged disputes and possible severe interruptions in the continuity of care.<sup>55</sup> Less remarked upon is the importance of establishing presumptive rules demarcating duties of financial support and other forms of mandated responsibility in these complicated relationships. Without such clear rules in place, as these arrangements multiply, tragic scenarios in which the parties all attempt to disclaim custody and responsibility may more frequently occur. The sponsoring parents may divorce and one or both such parents may attempt to avoid both custodial and support obligations.<sup>56</sup> Or, emerging evidence of a child's disability (or perhaps race or sex)<sup>57</sup> may prompt sponsoring parents to renege on the agreement.

Frequently, all of the parties will have evinced improper attitudes by, in some ways, treating the child as an object of a bargain. Although the

53. It does not follow that fathers should be able to force their pregnant partners to abort. Here, child-regarding interests conflict with strong rights of bodily autonomy and concerns about gender domination. For much the same reasons that the state could not ban procreation, the state could not empower one parent to control the body of another. Support requirements could be imposed because the father voluntarily participated in activity that might create a child, the effects of which would not necessarily be reversible. Where one can revoke one's commitment to parenthood without harming a child or interfering with another's bodily integrity, however, that revocation should be respected. This also provides a further argument, in addition to bodily autonomy arguments, for recognizing surrogates' rights to abort, even if their contractual obligations may be otherwise fully enforceable.

54. See *Davis*, *supra* note 52, at 604 (suggesting that the absence of alternative means to procreate may be dispositive).

55. See, e.g., Martha Field, *SURROGATE MOTHERHOOD* 126 (1990).

56. In a California case, two sponsoring, "intentional" parents took genetic material from two anonymous contributors. The resultant embryo was implanted in a separate gestational carrier. Before the child's birth, the sponsoring father filed for divorce and sought to avoid support obligations for the child. To further his position, he contended that his ex-wife, the sponsoring mother, lacked custody rights, although she avidly claimed them, because she was not the genetic or gestational mother. A trial court ruled that the child was entirely without legal parents. An appellate court reversed, finding the father liable for support and the sponsoring mother to be the child's parent. *Buzzanca v. Buzzanca*, 1998 WL 102105 (Ca. 1998).

57. One biological father rejected a child he produced through a surrogacy relationship because the child was male. See, *Surrogate Mother Stunned as Dad Rejects One Twin*, CHICAGO SUN TIMES, April 24, 1988, at 1. Another planned to reject a child from a surrogacy relationship because the child was disabled. See Powers, *supra* note 51.

equivocal view provides grounds for resisting attempts to break all the child's ties with the gestational mother and the genetic parents, it also provides grounds for establishing a presumptive, possibly defeasible, rule to choose between the parties. At least as a default, custody and support rights should rest with the sponsoring parents, on the grounds that they initiated the creation and made an early commitment to parent and provide for the child.<sup>58</sup> Of course, genetic contributors and carriers may come to want to assume that commitment (and, if in the child's best interests, they should both be permitted and required to fulfill some parental functions such as revealing their identity, supplying medical histories, and serving as default parental figures). Nonetheless, the fact that earlier they viewed the creation as a financial transaction, not a responsibility-generating event, provides grounds for presuming that the sponsoring parents have had a stronger and less wavering commitment to the child's best interests and thus might better serve them.

The sponsoring parents' primary role in initiating creation with the intent to care for the child also renders them the preferred holders of a presumptive duty of support. It is important that such obligations attach at conception so as to discourage sponsoring parents from rejecting children with unwanted traits at birth. Making sponsoring parents responsible for children who are created at their behest provides security for children. It also encourages more careful thought and commitment in the initiation of creation. Approaches that leave it indeterminate or rest primary responsibility with the carrier or genetic contributor are less likely to promote this result. Carriers and donors, although morally subject to some duties of support and parental contact, are unlikely to be adequately prepared to assume primary custody or support obligations. Resting primary responsibility with them in cases of conflict is unlikely to discourage many from entering the relationships since most such relationships do result, uneventfully, in the child's placement with the sponsoring parents; the opposite outcome may not be readily anticipated.<sup>59</sup> Further, carriers are expected to attempt to cultivate emotional distance from the children they carry, to facilitate uncontested transfers. Although carriers should assume responsibility for the children they create if the children are in need, because the carriers' role asks them actively to distance themselves from the children, it is unlikely to serve children to rest the default support responsibility with carriers. By contrast, locating the default duties with the sponsoring parents would not subject them to conflicting psychological demands. They, like

58. This rationale is similar to that voiced in *Johnson v. Calvert*, 851 P.2d 776 (Ca. 1993), but does not, as the California court does, deny that the gestational carrier is a natural mother of the child or contend that natural motherhood is the key factor for custody.

59. Marjorie Shultz also makes this point in her more parent-oriented argument for intent-based approaches to parenthood determinations. Marjorie Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, WIS. L. REV. 297, 324 (1990). See also John Hill, *What Does It Mean to Be a 'Parent'? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. LAW REV. 353 (1991).

traditional biological parents, would be expected to assume responsibility for the child they create—whether or not their marriage undergoes strain or the child has undesirable traits.

## VI.

I have argued for a more equivocal stance toward procreation, one that recognizes that parents subject their future children to harm and substantial risk by bringing them into existence. Even if the creation is overall beneficial for the child, that is not alone a sufficient reason to refuse to impose liability. These arguments challenge some of the purported philosophical barriers against wrongful life liability and have implications for legal approaches to other issues involving parent–child relations.

Of course, strong and practical considerations exist against the imposition of wrongful life liability, but these considerations, and the practical alternatives to such liability, have been underscrutinized because of the perceived philosophical barriers to liability. Exploring these philosophical grounds for stronger norms of parental responsibility may orient the debate more toward assessing the most effective measures to promote children's welfare.<sup>60</sup>

60. I am grateful for the critical feedback of audiences at the USC Law Center and the UCLA Center for the Study of Women, and to members of a UCLA graduate seminar I taught about harm. For very useful conversations and written comments, I owe special thanks to Rick Abel, Scott Altman, Peter Arenella, Elizabeth Bartholet, Tyler Burge, Robert Goldstein, Mitu Gulati, Barbara Herman, Frances Kamm, Gillian Lester, Jeff McMahan, Michael Otsuka, Gary Schwartz, and Steven Shiffrin.