Articles

PROTECTING THE UNCONCEIVED: NONEXISTENCE, AVOIDABILITY, AND REPRODUCTIVE TECHNOLOGY

Philip G. Peters, Jr.*

> The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desireable existence, is a crime against that being.[1]
>
> J. S. Mill

Under traditional causal analysis, reproductive technologies that unavoidably expose resulting children to emotional or physical injury do not harm the affected children unless their lives are worse than nonexistence. While the nonexistence comparison is a theoretically valid and even a useful way to identify some interests of the resulting children, this comparison is far too restrictive to identify all of those interests. Its harsh consequences as traditionally construed are inconsistent with our regulatory conduct and with our moral sensibilities. A reexamination of two concepts central to the nonexistence comparison, avoidability and nonexistence, is necessary for a more satisfactory identification of the interests of the children whose existence is made possible by reproductive technology.

The nonexistence comparison is most vulnerable to criticism whenever injuries associated with a reproductive practice could be avoided by modifying that practice in a way that results in the birth of a different (healthy) child. Failure to screen sperm donors is one example. Using paid, rather than gratuitous, donors may be another. Although screening would improve the outcomes by eliminating certain risky donors and their future offspring, a clinic's failure to screen would cause no harm under the nonexistence com-

---

© Philip G. Peters, Jr.

* Associate Professor of Law, University of Missouri-Columbia. Harvard University, A.B., 1972; University of California, Berkeley, J.D., 1976. Research for this article was partially funded by a grant from the University of Missouri Law School Foundation. I wish to thank Michael Bayles, Leonard Riskin, William Fisch, William Bondeson, Vickie Park and Robert Destro for helpful comments on previous drafts of this article.

1. M. BAYLES, MORALITY AND POPULATION POLICY (1980) (epigraph).

parison unless the resulting injuries are so severe that nonexistence would be preferable. This counterintuitive result occurs because screening would change the identity of the resulting children, substituting healthy children for injured children. As screening does not offer the would-be injured children the opportunity to be born healthy, their alternative to life with birth defects is nonexistence. Thus, the nonexistence test does not account for the opportunity to substitute a healthy child.

When injuries are avoidable by substitution, the nonexistence test should be replaced by direct consideration of the relative safety of the procreative options. Even though failure to substitute does not cause harm to any individual child under the nonexistence comparison, it causes genuine and unnecessary suffering to the future children as a class. This shortcoming of the nonexistence comparison should be remedied by rethinking the notion of avoidability to reflect the possibility of avoiding injuries by substitution.

The shortcomings of the nonexistence test also extend beyond cases of avoidability by substitution. Under the test, as traditionally applied, life is only considered worse than nonexistence when the burdens of life exceed the benefits. Sometimes, the test is analogized to medical treatment decisions for the seriously ill. Thus, only the most catastrophic injuries would justify prohibition of a reproductive technology. The Food and Drug Administration, for example, would not be entitled to consider severe birth defects unavoidably associated with a new fertility drug unless the burdens of the resulting lives outweighed the benefits. Not surprisingly, the FDA follows a stricter standard. It does not ask whether the resulting children would be better off dead. Never existing is not the same thing as dying.

Because of its harsh consequences, the nonexistence comparison is vulnerable from both utilitarian and rights perspectives. First, it ignores our desire to insure our children a minimum quality of life. Second, it ignores the possibility that intervention may be appropriate to protect against the violation of specific rights and interests of the unconceived, regardless of the net benefits of life itself. Both criticisms accord with common sense. Yet they reveal a paradox lying at the heart of the subject. Ultimately, both of these criticisms assume that preventing conception will sometimes be in the interests of a would-be child even when the benefits of life would outweigh its burdens. That conclusion, in turn, assumes that a child's interests should be calculated in a different manner before conception (when the alternative is nonexistence) than they are after birth (when the alternative is death). This distinction between never existing and dying is central to understanding the interests of the affected children. If it is legitimate, then traditional interpretations of the nonexistence comparison are underinclusive because they incorrectly borrow interest analysis for the living to decide the interests of the not-yet-conceived.

Several considerations support different treatment. For example, the risks of error are quite different when death is at stake. While erring on the side of life may be preferable when making medical treatment decisions for the living, erring on the side of nonexistence may be a more reasonable approach when regulating reproductive technology. The instinct for self-preservation may also play a role in the intuitive distinction between

nonexistence and death. This instinct may help explain how some individuals suffering birth defects could recommend that future lives like their own be prevented, even though they feel that their own lives are worth living. Death is a more terrible alternative than never existing. This is not surprising because death can harm actual people, while never existing can neither harm nor deny benefits to children who are never conceived. Because of these differences, a miserable life may be preferable to death, but not to nonexistence. A life that is worth living may not be worth having. Any application of the nonexistence comparison which overlooks this distinction threatens to underprotect the unconceived.

After a brief introduction to the debate over the harmfulness of reproductive technology, Part I examines the nonexistence test as traditionally construed and defends its use as a minimum standard of protection for the not-yet-conceived. Part II considers the arguments for supplementing the test in cases of avoidability by substitution. Part III then considers the arguments for reinterpreting the nonexistence test to permit greater intervention than traditional interpretations of the test would allow.

INTRODUCTION

Laws protecting the unconceived are much older than reproductive technology. Laws forbidding consanguineous marriage[2] and incest,[3] laws permitting the eugenic sterilization of the retarded, epileptic, poor, criminal and the insane,[4] and even laws barring interracial marriage[5] were probably all concerned, at least in part, with the well-being of the would-be children. Often misguided, many of these measures have since been invalidated,[6] repealed[7] or abandoned in practice. In recent years, however, medicine's increasing ability to intervene in the human reproductive process has refocused legal attention on the interests of the unconceived.

A wide variety of reproductive technologies now exist to combat infertility. The least exotic include medications intended either to induce ovulation or to prevent miscarriage or premature labor.[8] More controversial are medical procedures designed to permit noncoital conception, thereby sidestepping some fertility problems that prevent successful intercourse. These procedures include artificial insemination by husband (AIH), gametic

---

2. UNIF. MARRIAGE AND DIVORCE ACT § 207(a)(2)-(3) (1973); MO. REV. STAT. § 451.020 (1986).

3. *See* W. WADLINGTON, DOMESTIC RELATIONS 149-50 (1986); MO. REV. STAT. § 568.020 (1986).

4. Buck v. Bell, 274 U.S. 200 (1927); Poe v. Lynchburg Training School and Hosp., 518 F. Supp. 789 (W.D. Va. 1981); Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 65 (1984).

5. Loving v. Virginia, 388 U.S. 1 (1967); Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966).

6. Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of criminals); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage laws); Zablocki v. Redhail, 434 U.S. 374 (1978) (statute restricting remarriage by noncustodial parents with unmet support obligations).

7. Poe v. Lynchburg Training School and Hosp., 518 F. Supp. 789 (W.D. Va. 1981); *see* W. WADLINGTON, DOMESTIC RELATIONS 33 n.3 (1984).

8. *See infra* note 260.

intrafallopian transfer (GIFT)[9] and in vitro fertilization. Sometimes, these techniques are combined with the participation of third-parties in collaborative reproductive arrangements such as artificial insemination by donor (AID), egg or embryo transfer, and surrogacy.

Driven by increasing infertility among persons able to finance these innovative treatments,[10] the use of these infertility treatments is expanding. Between two and three million Americans may be unable to have babies without medical assistance.[11] Because infertility remains a problem with no single solution, efforts to develop new and more successful infertility treatments will continue.[12] Unfortunately, however, the potential joy these advances will bring to infertile couples is tempered by fears of the adverse affects these same advances will have on the conceived children.

Noncoital and collaborative reproductive technologies, particularly artificial insemination, in vitro fertilization and surrogacy, have generated a host of objections based on potential risks to the children so conceived.[13] Early critics feared that artificial inseminations and in vitro fertilization would cause birth defects. For in vitro fertilization, this concern cannot be conclusively rebutted even now.[14] And even though physicians have performed artificial insemination for decades, remarkably little data about its outcomes exists, perhaps due to family concerns about confidentiality.[15]

---

9. In this procedure, a laparoscopy retrieves the woman's eggs and transfer them to her fallopian tube along with her mate's sperm. Fertilization thus takes place in vivo. Robertson, *Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. CAL. L. REV. 939, 947 n.22 (1986) [hereinafter *New Reproduction*].

10. Robertson, *New Reproduction*, *supra* note 9, at 944-46. The Office of Technology Assessment reports that the only increase in infertility has incurred in the 20-24 age group, but that office visits for infertility went up about three times between 1968 and 1984. U.S. Congress, OFFICE OF TECHNOLOGY ASSESSMENT, INFERTILITY: MEDICAL AND SOCIAL CHOICES 5 (1988) [hereinafter, INFERTILITY].

11. INFERTILITY, *supra* note 10, at 3.

12. *Id.* at 6.

13. *E.g.*, Protection of Human Subjects, HEW Support of Human In Vitro Fertilization and Embryo Transfer: Report of the Ethics Advisory Board, 44 Fed. Reg. 35, 033 (1979) (citing fears that IVF children will be defective); Annas, *Fathers Anonymous: Beyond the Best Interests of the Sperm Donor*, 14 FAM. L.Q. 1 (1980) (artificial insemination); Walters, *Ethical Aspects of Surrogate Embryo Transfer*, 250 J.A.M.A. 2183 (1983); Fraser & Forse, *On Genetic Screening of Donors for Artificial Insemination*, 10 AM. J. MED. GENETICS 399 (1981) (possibility of birth defects); Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28-34; Kimmel, *The Case Against Surrogate Parenting*, HASTINGS CENTER REP., Oct. 1983, at 35-39; P. SINGER & D. WELLS, MAKING BABIES: THE NEW SCIENCE AND ETHICS OF CONCEPTION 33-35 (IVF) 56 (AID), 63-64 (embryo transfer), 66-67, 109 (compensation to collaborators) (1985) [hereinafter SINGER & WELLS]; Walters, *Ethics and New Reproductive Technology in an International Review of Committee Statements*, HASTINGS CENTER REP., June, 1987 (Special Supplement) (gamete sale). The absence of prior consent to these risks was repeatedly mentioned in connection with in vitro fertilization. *See* R. MCCORMICK, HOW BRAVE A NEW WORLD 330-33 (1981); P. RAMSEY, FABRICATED MAN 133-36 (1970) (AID); Kass, *Making Babies—The New Biology and the "Old" Morality*, 26 PUB. INTEREST 18, 26-30, 55-56 (1972)[hereinafter, *Making Babies*]; Kass, *"Making Babies" Revisited*, 54 PUB. INTEREST 32, 42-47 (IVF, including embryo transfer and surrogacy, are unconsented experiments for which the risks are not adequately known), 46 (risks of AID not sufficiently known) (1979); Ramsey, *Manufacturing Our Offspring: Weighing the Risks*, HASTINGS CENTER REP., Oct. 1978, at 6, 7 (IVF risks of physical defects and damaging publicity); Tiefel, *Human In Vitro Fertilization: A Conservative View*, 247 J.A.M.A. 3235, 3237-39 (1982); Ramsey, *Shall We "Reproduce"*, 220 J.A.M.A. 1346 (1972) (IVF).

14. Robertson, *New Reproduction*, *supra* note 9, at 992; SINGER & WELLS, *supra* note 13, at 34-35; INFERTILITY, *supra* note 10, at 302.

15. *See, e.g.*, Kass, *"Making Babies" Revisited*, *supra* note 13, at 46.

Meanwhile, each innovation creates new risks.

In addition to these risks of physical injury, commentators fear that the use of third-parties to contribute genes or gestation will expose the resulting children to psychological injury.[16] Moreover, many worry that the payment of collaborators, such as sperm suppliers and surrogates, will lead to the concealment of histories of infection or genetic disease. In fact, some observers believe that commercialization could also increase the risk of consanguineous matings, weaken the screening of rearing parents, scar the children who learn of it and destabilize family relations.[17] The threatened injuries, therefore, range from birth defects to infection and even to emotional handicap. Although artificial reproduction receives the most interdisciplinary attention, more straightforward infertility treatments such as drug or hormone treatments could likewise risk the well-being of future children. For example, the current generation of fertility drugs has increased the numbers of multiple births, thus placing the children at an increased risk of premature birth.

Proposed forms of regulation range from complete prohibition to quality-control regulation. Although actual legislative responses thus far have been cautious, the uproar generated by the *Baby M*[18] case is likely to quicken the pace of legislation dealing with many kinds of reproductive technologies.[19] Any attempt to regulate reproductive technology because of dangers to the unconceived children will likely restrict the competing procreative and privacy interests of parents and collaborators who wish to use the technologies.[20] Lawmakers must balance these procreative interests against the threat to the unconceived. If the constitution protects these parental interests, the extent of permissible regulation will depend on the existence and extent of compelling state interests in the proposed restriction. As the courts will likely give great weight to the state's interests in protecting the resulting children, the degree of permissible legislative intervention the courts will allow may turn on the threat which the fertility treatment poses to the unconceived. As a result, it is both legally and ethically important to

16. Robertson, *New Reproduction*, *supra* note 9, at 987, 995; *see* Kass, *"Making Babies" Revisited*, *supra* note 13, at 46-47 (erosion of family lines); INFERTILITY, *supra* note 10, at 304.

17. *E.g.*, Kass, *Making Babies*, *supra* note 13.

18. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227 (1988).

19. Many states have enacted legislation specifying paternity rights and obligations for artificial insemination, but few have directly addressed practices, such as donor screening or compensation, believed to be related to risks to resulting offspring. American Fertility Society, *Ethical Considerations of the New Reproductive Technologies*, 46 FERTILITY AND STERILITY, Supp. 1, 12S (1986); *see* UNIF. PARENTAGE ACT § 5, 9B U.L.A. 287, 301 (1973) and 1987 Supp. at 388. As of 1986, at least one state, Florida, had enacted a statute directly addressing in vitro fertilization and by 1988 another had outlawed the sale of embryos. INFERTILITY, *supra* note 10, at 13. A few states have enacted surrogacy legislation and many others are considering doing so. Andrews, *The Aftermath of Baby M: Proposed State Laws on Surrogate Motherhood*, HASTINGS CENTER REP., Nov. 1987, at 31; INFERTILITY, *supra* note 10, at 13-14. While most of the surrogacy legislation passed so far has been supportive or acquiescent, the few courts which have addressed the practice have refused to enforce contested contracts, partially because of concern for the interests of the affected children. INFERTILITY, *supra* note 10, at 13-14. The Food and Drug Act already authorized Food and Drug Administration supervision of fertility drugs for safety and efficacy.

20. For an example of this constitutional analysis, see Robertson, *New Reproduction*, *supra* note 9.

determine the circumstances under which risks to the unconceived give rise to a state interest in intervention.

The early critics of the emerging reproductive technologies implicitly rejected the nonexistence benchmark.[21] Typically, they concluded either that all risks induced by the technology were unethically imposed without the child's prior consent[22] or else that the risks of the technology should not exceed those ethically tolerated in natural conceptions.[23] Apparently, these criticisms had little impact on either scientists[24] or the emerging bioethical consensus. Because the nonexistence comparison has considerable theoretical appeal, both courts deciding wrongful life cases[25] and many respected scholars in the field of reproductive technology[26] have accepted the nonexistence comparison as the appropriate test of whether conception is harmful.

I. THE NONEXISTENCE COMPARISON

This Part first explores how traditional interest analysis resulted in the selection of nonexistence as a benchmark for measuring the risks unavoidably associated with life. Then it considers objections to the nonexistence test raised by courts and commentators examining wrongful life actions.

A. *Identifying the Affected Interests*

1. *Avoiding Harm*

Within the liberal tradition, causing unconsented harm to another person is considered the only legitimate basis for interfering with parental liberty.[27] In fact, most ethical theories incorporate a duty not to harm and many make it their cornerstone.[28] Because of its comparative nature, however, the concept of harm presents special problems in the context of the unconceived. Harm, both in lay and scholarly usage, typically means that a person is worse off than she was or would have been if not for the harmful

21. John Robertson is a notable exception. Robertson, *In Vitro Conception and Harm to the Unborn*, HASTINGS CENTER REP., Oct. 1978, at 13, 14. Interestingly, the nonexistence benchmark was appreciated immediately in the context of wrongful life cases. *E.g.*, Annas, *Righting the Wrong of 'Wrongful Life'*, HASTINGS CENTER REP., Feb. 1981, at 8, 9.

22. *See* note 249, *infra.*

23. *See* note 249, *infra.*

24. Tiefel, *Human In Vitro Fertilization: A Conservative View*, 247 J.A.M.A. 3235, 3238 (1982); Lappe, *Ethics at the Center of Life: Protecting Vulnerable Subjects*, HASTINGS CENTER REP., Oct. 1979, at 11, 12.

25. *See* text at notes 46-54, *infra.* For examples of scholarly support, see Bell & Loewer, *What is Wrong With "Wrongful Life" Cases*, 10 J. MED. & PHIL. 127, 140-41 (1985); J. FEINBERG, HARM TO OTHERS 98-99 (1984) [hereinafter HARM]; Capron, *Tort Liability in Genetic Counseling*, 70 COLUM. L. REV. 618, 657-60 (1979).

26. *See, e.g.*, Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 434 (1983) [hereinafter *Procreative Liberty*]; Robertson, *New Reproduction*, *supra* note 9, at 987-1000; SINGER & WELLS, *supra* note 13, at 59, 64; H. ENGELHARDT, THE FOUNDATIONS OF BIOETHICS 221-23 (1986) (hinting at exceptions). Authors whose perspectives differ are discussed in Parts II and III, *infra.*

27. HARM, *supra* note 25, at 11-12; Bayles, *Harm to the Unconceived*, 5 PHIL. & PUB. AFF. 292 (1976) [hereinafter *Harm to the Unconceived*]; J.S. MILL, ON LIBERTY, Chap. 1, para. 9 (1859).

28. T. BEAUCHAMP & J. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 106 (2d ed. 1983); ETHICS AND POPULATION xviii (M. Bayles ed. 1976); *see* HARM *supra* note 25, at 10-14.

act.[29] In tort doctrine, this meaning is embodied in the "but for" test.[30] A child may be harmed in this sense both by worsening her current condition and by interfering with her opportunities for improving her situation.[31]

Offensive conduct may sometimes setback one of a person's interests while advancing another. For example, defamatory statements may embarrass the victim and at the same time create opportunities for lucrative book or movie rights. In deciding whether conduct with mixed consequences is harmful, its positive and negative effects are typically aggregated to calculate its *net impact*.[32] To determine whether the conduct is harmful on balance, the harm done to one or more interests may be offset both by benefits to the same interest and also by benefits to different interests.[33] In the defamation example, the victim's financial advancements would have to be considered before we could conclude that he was actually harmed.

When applying this test to actions affecting unconceived children, the appropriate benchmark depends upon the avoidability of the injuries. When parental or provider actions cause future children to sustain avoidable injuries, the benchmark for identifying the extent of the harm is the healthier condition these children would have enjoyed but for those actions. For these children, the identification of harmful conduct presents no special problems. Consider the choice of an ovulation-inducing drug which is less dangerous to the mother than another available drug, but is more dangerous to the child. If the same child would have been conceived using either drug, then that

29. In the first volume of his comprehensive study of harm, Joel Feinberg provides a suitable description of the various ways in which interests may be harmed.

> All of them involve a kind of directional metaphor. To set back an interest is to reverse its course, turn it away, put it back toward the point from which it started. In terms of its associated goals, it is to reverse its progress, to put it in a worse condition than it was formerly in. To defeat an interest is to put it to utter rout, to set it back conclusively and irrevocably by destroying the conditions that are necessary for its advancement or fulfillment, as death for example can set back some interests once and for all. To thwart (or block or frustrate) an interest is to stop its progress without necessarily putting it in reverse; to successfully oppose it, and prevent it, at least for the time being, from making an advancement or improvement. To impede an interest is to slow its advancement without necessarily stopping or reversing it, to hinder or delay. Common to all these notions is the idea of a starting point or "baseline" from which the direction [and rate] of advance or retreat is charted and measured.

HARM, *supra* note 25, at 147. Although the terminology and conclusions contained in this article are often different from Feinberg's, this article borrows heavily from his exceptional study of harm in general and of harm to the unconceived in particular. He discusses harm to the unconceived in Feinberg, *Wrongful Life and the Counterfactual Element in Harming*, 4 SOC. PHIL. & POL'Y 145 (198 *) [hereinafter *The Counterfactual Element*]. This is an expansion of an earlier article entitled Feinberg, *Comment; Wrongful Conception and the Right Not to Be Harmed*, 8 HARV. J.L. PUB. POL'Y 57 (1985).

30. *E.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 206, 643 P.2d 954, 957, 182 Cal. Rptr. 337, 340 (1982); PROSSER & KEETON ON TORTS 266 (5th ed. 1984).

31. This resembles Feinberg's "counterfactual test" for harm. It is counterfactual because it calculates harm on the basis of the condition that would have existed if, contrary to fact, the conduct in question had not occurred. *The Counterfactual Element*, *supra* note 29, at 149.

32. *E.g.*, *The Counterfactual Element*, *supra* note 29, at 146; Bayles, *Harm to the Unconceived*, *supra* note 27, at 293; Bell & Loewer, *What is Wrong With "Wrongful Life" Cases*, 10 J. MED. & PHIL. 127, 131 (1985); PRESIDENT'S COMM'N FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE SUSTAINING TREATMENT 218 (1983) [hereinafter PRESIDENT'S COMM'N]; T. ENGELHARDT, THE FOUNDATIONS OF BIOETHICS 221 (1986) (burdens versus benefits).

33. *See The Counterfactual Element*, *supra* note 29, at 146-47; Bayles, *Harm to the Unconceived*, *supra* note 27, at 293.

child is harmed by birth defects associated with the choice of the more dangerous drug even if his life is worthwhile on the whole.[34]

However, a different benchmark is necessary when the actions causing the injury are also necessary for the child's conception or birth. For example, risky fertility drugs or other reproductive technologies, such as artificial insemination, in vitro fertilization, and surrogacy, may enable an otherwise infertile couple to conceive, but only at the risk of physical or emotional injury to the resulting child. The benchmark for these children shifts if they could not have been born without the risk of injury associated with their parents' fertility treatment. For these children, the only alternative to life with these injuries is nonexistence. Under traditional analysis, the resulting children suffer harm only if their life is worse than nonexistence.[35] Courts have used this analysis in cases involving the prenatal administration of the antimiscarriage drug diethylstilbestrol (DES) to pregnant women. If the drug was necessary for the birth of the affected child, reason the courts, then the defect is unavoidably associated with life itself and the nonexistence comparison applies.[36]

Surrogacy further illustrates the theoretical significance of avoidability. Assume that a *fertile* couple decides to use a surrogate to carry their *own* embryo. The couple might be motivated to use a surrogate by extraordinary health risks to the genetic mother associated with her pregnancy, such as those feared by Elizabeth Stern.[37] Or she might be motivated by her professional obligations. If this very child could have been carried to term by the genetic mother, then any additional emotional or physical injury to the child engendered by surrogacy would be harmful to the child. By contrast, if the employment of a gestational surrogate were necessary for birth of the child to an *infertile* couple, their decision to use a surrogate would expose the child to unavoidable risks. Under the nonexistence test, these risks would only be harmful if they threatened to make the child's life worse than nonexistence.[38] If the feared ill effects of surrogacy do not make life unworthwhile, then only the fertile couple may be said to have exposed their child to harm. Their child is harmed because the harm to it was avoidable.

---

34. The conduct may, nonetheless, be defensible, as where the chosen drug poses a slight additional risk to the child while considerably reducing potential maternal side effects. But all injuries associated with the choice count as harm and should be weighed against the justification. Of course, the benefits to the mother may also constitute benefits to the child, as where her health better insures proper childcare.

35. *See, e.g., Procreative Liberty, supra* note 26, at 440; *New Reproduction, supra* note 9, at 987-1000; SINGER & WELLS, *supra* note 13, at 59, 64; Bayles, *Harm to the Unconceived, supra* note 27, at 297-98; HARM, *supra* note 25, at 98-99; Parfit, *On Doing The Best for Our Children*, in ETHICS & POPULATION 100, 101 (1976); Capron, *Tort Liability in Genetic Counseling*, 79 COLUM. L. REV. 618, 657-60 (1979).

36. *See* Payton v. Abbott Laboratories, 386 Mass. 540, 557-60, 437 N.E.2d 171, 181-82 (1982); Phillips v. United States, 508 F. Supp. 537, 543 n.12 (D.S.C. 1980). This issue was also implicit in a recent wrongful life case, Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983), where a child born to an epileptic mother taking Dilantin (diphenylhydantoin) used a wrongful life theory.

37. *In re* Baby M, 109 N.J. 396, 537 A.2d 1227, 1235 (1988). In that case, however, Mrs. Stern did not contribute her own egg.

38. For example, a woman who has had a hysterectomy might prefer such an arrangement to adoption.

2. *Receiving Benefits*

In some cases, parents or providers who did not *introduce* the risk of birth defects may nevertheless have the opportunity to *avoid* expected birth defects. For example, mothers who have previously borne a child with a different Rh factor may prevent serious threats to the health of their subsequent offspring by taking the drug Rhogam after the initial pregnancy. In other cases, mothers can avoid or minimize injuries to their offspring that are likely to be caused by maternal illness (such as syphilis) by commencing treatment prior to conception.[39] In each of these cases, the parents have a preconception opportunity to advance their child's interests by *preventing a birth defect*. One can also readily imagine the future development of preconception treatments for parents or their genes that would benefit their future children by improving their children's talents, health or capacities to enjoy life.[40] If that occurs, the failure to use such technology would sacrifice an opportunity to *confer a benefit* on the child. In all of these cases, the child's interest entails receiving benefits rather than avoiding harm.

Unquestionably, future children have an interest in both avoiding birth defects and receiving other technologically feasible preconception benefits. Although much of the current literature ignores the harm-benefit distinction and implicitly assimilates nonbenefits to harms,[41] failure to distinguish harms from benefits is not theoretically significant when cataloging a child's affected interests.[42] As with harm, the avoidability of the injuries determines

39. Shaw, *supra* note 4, at 68 (syphilis), 85 (phenylketonuria).

40. *Id.* at 93-94 (possible preselection of sperm which do not carry defective genes).

41. Robertson & Schulman, *Pregnancy and Prenatal Harm to the Offspring: The Case of Mothers with PKU*, HASTINGS CENTER REP., Aug. 1987, at 23; Shaw, *supra* note 4; American Fertility Society, *supra* note 19, at 22S (inadequate support). The often elusive harm-benefit distinction is especially hard to draw in connection with the unconceived. For example, the failure to take Rhogam following the birth of a child with a different Rh factor defies easy classification. Certainly, it is a cause-in-fact of the injuries which a subsequent child may suffer. It is tempting to characterize the consequences of failure to take the medication as causing a set-back or harm. In fact, the act of conceiving under the circumstances may be viewed as a harmful act because it crystallizes risks which could have been avoided by prior medication. Yet, it seems farfetched to call a birth defect which will occur *unless* some *affirmative* action is taken a harm which was inflicted by the parents. At the time that the parental decision whether to take action to avoid this defect is made, the unconceived child faces a future with a birth defect. Failure to take action to prevent that defect does not set the child's prospects back from what they previously were and therefore does not appear to harm it in the ordinary sense of the term. No new risk of harm was created. *See* PROSSER AND KEETON ON TORTS § 56, at 373 (5th ed. 1984); Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. PA. L. REV. 217, 220-21 (1908). Most likely, this conduct constitutes nonbeneficent omission and not maleficent action.

42. But when the interests of the children are pitted against those of the parents, the normative force afforded to the act-omission and harm-benefit distinctions in the context of the living could conceivably be borrowed for analyzing preconception acts, as it has been in analyzing prenatal maternal conduct. *See* Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CALIF. L. REV. 1951, 1968-94 (1986); *see also* T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 158 (discussing how the harm-benefit distinction affects a mother's duty to her fetus). The rescue analogy has also been used in connection with abortion. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1593-1610 (1979); Thompson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). These distinctions could reduce the likelihood that a parental, provider or state duty will be found to protect the child's interests in preconception benefits. However, the significance of these distinctions for the unconceived is muted to some extent by the existing parental abuse and neglect laws, which impart not only a limited duty to avoid harming the child, but also a limited duty to prevent harm and to advance the interests of the child. Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 4-5 (1975). The law limits both the affirmative harm

the benchmark. Thus, failure to provide an available benefit impairs the child's interests. In these cases, the adverse impact on the child's interests is determined by comparing the child's actual life with the life she would have had if provided the benefit. No reference to nonexistence is needed. Therefore, both the infliction of avoidable harms and the failure to provide available benefits may be classified as *avoidable injuries* that *adversely affect* the child's interests. In neither case would the nonexistence test apply. If, however, the injuries were unavoidable because beneficence was not possible under the circumstances, then the nonexistence comparison governs.

3. *Abortion As Avoidance*

Arguably, the mother's constitutional right to abort her fetus dictates use of the nonexistence comparison even when injuries are avoidable.[43] Because she retains the postconception right to return the fetus to a state of nonexistence, nonexistence is arguably the benchmark for measuring harm to any child she bears. If we assume, for example, that the mother has used a fertility drug that is more dangerous to her child than an alternative drug and that she selected this drug to reduce risks to herself, and if we further assume that the same child would have resulted from either drug, then the *avoidability* of the additional danger posed by the chosen drug normally would dictate that any birth defects suffered as a result be treated as harmful to the child. However, the mother's right to abort that child introduces nonexistence as a possible alternative benchmark. As nonexistence was an option legally available to the mother, she could argue that birth causes no harm unless the resulting birth defects make the child's life worse than the legally available alternative—nonexistence.[44]

An obvious objection to this analysis is that it focuses only upon the consequences of her decision not to abort and not upon her decision to take the riskier drug. Although she might reply that her preconception decisions cannot determine the benchmark so long as she retains the subsequent legal right to choose nonexistence for the child, this response ignores the obvious interests of the living child in preconception actions. Had the mother taken the safer drug, the child could have been born without these injuries. Having foregone the option to abort, the mother remains responsible for her earlier choice. In short, the freedom to abort a fetus should not include the

---

(abuse) that parents can inflict and the independent harm that they may fail to prevent (neglect). Parents may also incur criminal liability under other criminal laws by failure to prevent injury to their children. W. LEFAVE & A. SCOTT, CRIMINAL LAW § 3.3(a)(1), at 203-204 (2d ed. 1986). Our society has already recognized the obligation to provide benefits to children and has assigned that obligation in the first instance to the parents.

Nevertheless, the distinction may retain its appeal for those who fear undue imposition upon parental, especially maternal, conduct. Rescue doctrine has explicitly recognized limits on the burdens imposed on the rescuer. As a result, the rescue analogy will likely retain some currency in any discussion of duty to the unconceived.

43. *Cf. Procreative Liberty*, *supra* note 26, at 446-47 (reconciling prenatal maternal obligations and the right to abort).

44. Even if she decides not to abort and her duty to avoid harms relates back to conception itself, the mere relation-back of such a duty would not determine whether healthy existence, on the one hand, or nonexistence, on the other, should be the relevant benchmark for ascertaining harm to the child.

freedom to harm a child.[45] Because the injury was avoidable, the harmfulness of her preconception actions should be measured by the traditional benchmark and not by the nonexistence comparison.

B. *Criticisms of the Nonexistence Test: Wrongful Life*

Not surprisingly, the intractable nature of this comparison between life and nonexistence has generated substantial controversy. Some critics have complained that the nonexistence test should be rejected because it is logically flawed and impugns the sanctity of life. This objection is commonly expressed by courts rejecting the use of this test in wrongful life actions. These cases involve claims by disabled children that the negligence of health care providers deprived their parents of the opportunity to take measures to prevent their conception or birth. In one example, negligence in diagnosing genetic abnormality in prior children allegedly misled the plaintiff's parents about the likelihood of genetic abnormality in future children.[46] In another example, the failure to diagnose a pregnant mother's rubella deprived her of the opportunity to abort her fetus.[47] Because the disabled children did not and could not allege that the negligence caused their birth defects, they alleged that negligence caused their birth and that life itself was harmful. Concluding that these claims depend upon a finding that life under the circumstances is worse than not existing at all, the great majority of courts deny the cause of action altogether for reasons associated with this novel aspect of the claim.[48]

Most of their misgivings can be loosely divided into three categories. The first, and least important, are philosophical doubts about whether the required comparison to nonexistence is logically possible[49] and whether du-

45. If the state imposes criminal or civil penalties against these mothers, the ironic and unfortunate result could be to encourage abortions of handicapped fetuses who would have had worthwhile lives. If this is considered worse than the harm prevented by deterring maternal misconduct, the conflict could be minimized by a regulatory approach attempting to prevent preconception access to dangerous drugs or reproductive arrangements and punishing the entrepreneurs but not the parents.

46. *E.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982) (deafness); Park v. Chessin, 60 A.D.2d 80, 400 N.Y.S.2d 110 (1977), *modified sub. nom.*, Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978) (polycystic kidney disease).

47. Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984).

48. *E.g.*, Phillips v. United States, 508 F. Supp. 537 (D.S.C. 1980); Goldiner v. Thomas Jefferson Univ. Hosp., 451 F. Supp. 692 (E.D. Pa. 1978); Smith v. United States, 392 F. Supp. 654 (N.D. Ohio 1975); DiNatale v. Lieberman, 409 So. 2d 512 (Fla. Dist. Ct. App. 1982); Moores v. Lucas, 405 So. 2d 1022 (Fla. Dist. Ct. App. 1981); Strohmaier v. Ob and Gyn Ass'n, 122 Mich. App. 116, 332 N.W.2d 432 (1982), *appeal denied*, 417 Mich. 1072, 336 N.W.2d 751 (1983); Alquijay v. St. Luke's-Roosevelt Hosp. Center, 63 N.Y.2d 978, 483 N.Y.S.2d 994, 473 N.E.2d 244 (1984); Rubin by Rubin v. Hamot Medical Center, 329 Pa. Super. 439, 478 A.2d 869 (1984); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985); Elliott v. Brown, 361 So. 2d 546 (Ala. 1978); Blake v. Cruz, 108 Idaho 253, 698 P.2d 315 (1984); Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 471 N.E.2d 530 (1984), *aff'd*, 113 Ill. 2d 482, 499 N.E.2d 406 (1986); Bruggeman v. Schimke, 239 Kan. 245, 718 P.2d 635 (1986); Azzolino v. Dingfelder, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987); Gleitman v. Cosgrove, 49 N.J. 22, 227 A.2d 689 (1967); Becker v. Schwartz, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 386 N.E.2d 807 (1978); Stewart v. Long Island College Hosp., 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 332 N.Y.S.2d 640, 283 N.E.2d 616 (1972); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984); Dumer v. St. Michael's Hosp., 69 Wis. 2d 766, 233 N.W.2d 372 (1975).

49. Gleitman v. Cosgrove, 49 N.J. 22, 29, 227 A.2d 689, 692 (1967); Stewart v. Long Island College Hosp., 58 Misc. 2d 432, 435-36, 296 N.Y.S.2d 41, 44-45 (1968), *modified*, 35 A.D.2d 531, 313 N.Y.S.2d 502 (1970), *aff'd*, 30 N.Y.2d 695, 332 N.Y.S.2d 640, 283 N.E.2d 616 (1972);

ties can be owed to the unconceived.[50] The second and most disturbing misgiving is that our society's respect for life is inconsistent with and threatened by any judicial acknowledgement that life may be undesirable.[51] Third are practical concerns about human capacity to apply the test in individual cases[52] or to determine damages with sufficient certainty.[53] Identifying the discrete focus of each of these complaints within the judicial opinions themselves is often difficult because courts commonly blend them together. Nevertheless, all of these concerns can be sufficiently answered to justify use of the nonexistence comparison as a benchmark for the regulation of reproductive technology even though courts have not yet approved of the test in wrongful life cases.[54] For reproductive technology, the nonexistence test should be used and supplemented, not rejected entirely.

1. *The Logical Possibility of Harm to the Unconceived*

The concern that life cannot "logically" be harmful is directly related to two beliefs: first, that one cannot sensibly speak of "being better off" by not existing, and, second, that duties cannot be owed to nonexistent persons. When viewed from the perspective of the not-yet-conceived, the statement that one is "better off" unborn does seem nonsensical. Because "it is necessary to *be* in order to *be better off*"[55] and because nonexistence is not a state of being, it is absurd to view birth as depriving an unconceived "person" of a preferred "state" of nonexistence.[56] Prior to conception, the potential child does not exist. Nonexistent persons have no rights or interests. They cannot be made better or worse off by virtue of laws designed to prevent their birth.[57]

Steinbock, *Wrongful Life*, HASTINGS CENTER REP., April 1986, at 17, 17-18; Tedeschi, *On Tort Liability for "Wrongful Life"*, 1 ISRAEL L. REV. 513, 529 (1966).

50. *See The Counterfactual Element, supra* note 29, at 154, 158.

51. *E.g.*, Blake v. Cruz, 108 Idaho 253, 259-60, 698 P.2d 315, 322 (1984); Bruggeman v. Schimke, 239 Kan. 245, 249-51, 718 P.2d 635, 639-40 (1986); Azzolino v. Dingfelder, 315 N.C. 103, 109, 337 S.E.2d 528, 532 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g. denied*, 319 N.C. 227, 353 S.E.2d 401 (1987).

52. *E.g.*, Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978); Gleitman v. Cosgrove, 49 N.J. 22, 28, 227 A.2d 689, 692 (1976); Becker v. Schwartz, 46 N.Y.2d 401, 411, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812 (1978); Nelson v. Krusen, 678 S.W.2d 918, 924-25 (Tex. 1984); Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1444-50.

53. Turpin v. Sortini, 31 Cal. 3d 220, 236, 182 Cal. Rptr. 337, 347, 643 P.2d 954, 964 (1982); Bruggeman v. Schimke, 239 Kan. 245, 251-52, 718 P.2d 635, 640-41 (1986); Blake v. Cruz, 108 Idaho 253, 258, 698 P.2d 315, 322 (1984). Goldberg v. Ruskin, 128 Ill. App. 3d 1029, 1035-36, 471 N.E.2d 530, 534-35 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 482, 656 P.2d 483, 496 (1983).

54. A useful article discussing these objections is by Nora K. Bell and Barry M. Loewer. Bell & Loewer, *supra* note 25.

55. *The Counterfactual Element, supra* note 29, at 158; Annas, *Righting the Wrong of 'Wrongful Life', supra* note 21, at 9 (nonexistence is a state in which there are no right or rightful expectations).

56. HARM, *supra* note 25, at 101.

57. Bayles, *Comments on "Protecting the Unconceived": Butchers, Bakers & Candlestick Makers*, in CONTEMP. ISSUES IN BIOMEDICAL ETHICS 101, 104, 107 (1978) [hereinafter *Comments*]. Nor is it accurate to say that the state can respect the "rights" of these nonexistent children. *Id.*; Bayles, Book Review, 4 LAW & PHIL. 423, 429 (1985) (critiquing Feinberg's thesis that harming requires the violation of a right); Jecker, *The Ascription of Rights in Wrongful Life Suits*, 6 LAW & PHIL. 149, 157 (1987). However, in a different society, such as one which believes in reincarnation

This objection is correct, but incomplete. Joel Feinberg points out that the nonexistence comparison does make sense when viewed from the perspective of the actual child who has been or would be born with the affliction. From that perspective, we can ask whether any rational being "would prefer not to exist than to exist in his state."[58] Balancing the burdens of life against the benefits, the child may conclude that nonexistence would be preferable. While this requires the assumption that a bad experience is worse than no experience at all, this assumption seems reasonable under the circumstances.

The comparison is, therefore, asymmetrical. Being disabled can be compared, at least in the sense of life's net worth, with nonexistence even though "being" unborn cannot be compared with anything.[59] While a child whose life is undesirable on balance has been harmed, a would-be child who is never conceived cannot be harmed because it does not exist.[60] Although this asymmetry may be novel, it is quite rational and adequately explains why the comparison to nonexistence for these purposes is logically possible.

Application of this best interests test in particular cases, however, presents additional problems. Unconceived children cannot be asked whether they would prefer not to be conceived in light of any risks associated with a particular reproductive technology. And sufferers of disabilities so severe that nonexistence may be preferable will ordinarily lack the capacity to consciously form and communicate their preference. If, as seems likely, they have never been competent, their proxy decisionmakers cannot use a "substituted judgment" test. This puts regulators considering controls on reproductive technology in the same position as the family and doctors who must decide whether and how to treat the seriously ill. In that field, the President's Commission recommended that a best interest test be applied from the patients' perspective.[61] But this does not escape the problem.[62] No one can truly know the patient's point of view. These difficulties place serious practical limits on the use of the living child's perspective to assess the best interests of the child not yet conceived.

Feinberg, consequently, proposes an imaginary exercise to make the task more manageable.

> Suppose that after the death of your body a deity appears to you and . . . proposes to you an option. You can be born again after death (reincarnated), but only as a Tay-Sachs baby with a painful life expectancy of four years to be followed by a permanent extinction, or you can opt for permanent extinction to begin immediately. I should think you would have to be crazy to select the first option.[63]

---

or presupposes the existence of souls which await conception, rights and interests might predate conception.

58. *Comments, supra* note 57, at 102; D. PARFIT, REASONS AND PERSONS 487 (1984).

59. Life cannot be directly compared to nonexistence. D. PARFIT, *supra* note 58, at 487.

60. *See* D. PARFIT, *supra* note 58, at 487; *see also Harm to the Unconceived, supra* note 27, at 298-99.

61. PRESIDENT'S COMM'N, *supra* note 32, at 135-36, 217-19.

62. Rhoden, *The Neonatal Dilemma: Live Births From Late Abortions*, 72 GEO. L.J. 1451, 1483 n.273 (1984); *see The Counterfactual Element, supra* note 29, at 163.

63. *The Counterfactual Element, supra* note 29, at 164.

Disabilities as grave as Tay-Sachs disease,[64] especially those combining profound retardation and either a painful disease process or invasive and painful life-sustaining procedures, should meet this test, notwithstanding the difficulties in approximating the actual burdens and benefits of life experienced by the disabled child. While regulators cannot escape the uncertainties inherent in the classification process, the obligation to avoid harming children through reproductive technology warrants the effort to draw the difficult lines.

The second and related concern is whether society can owe a *duty* to the unconceived not to harm them. Duties not to harm persons seem to presuppose their existence.[65] As applied to the unconceived or unborn, this presents a conceptual problem. The unconceived have no moral or legal right to be born even if they would be "better off" alive (*i.e.*, their life would be beneficial on balance).[66] Instead, their rights are contingent upon their actually being born[67] or at least becoming viable outside the womb.[68] But once born or viable, they may experience the effects of conduct that occurred at or before their conception. Thus, the harmfulness of conduct threatening the health of the unconceived crystallizes upon birth or viability. Its potential to harm is then realized. Although it is more accurate to describe this as harm to the resulting *children or fetuses* than to the unconceived person, it is in this special sense that we may speak of harm to the *unconceived*. Fairness dictates that their interests in avoiding these harms be acknowledged.

As a matter of both philosophy and law, the imposition of a conditional duty not to harm future children through acts occurring before birth and even before conception is now familiar. Actions based upon *prenatal* injuries to children, unknown before 1942, have now become well-established at common law.[69] Courts now also acknowledge that even *preconception* acts can harm children.[70] For example, in *Renslow v. Mennonite Hosp.*,[71] the court permitted a cause of action for injuries to a child due to the preconception transfusion of an Rh-negative mother with Rh-positive blood. Simi-

64. The Tay-Sachs child is doomed to a short and increasingly handicapped existence. The child appears well at birth and develops normally for six to eight months, when progressive psychomotor degeneration slowly begins. By eighteen months the child is likely to be paralyzed and blind, unable to take food by mouth, and suffer from constipation and bedsores. There are increasingly frequent convulsions that cannot be controlled by medication. The last few years of the child's life are usually spent in a vegetative state. Death typically occurs between the ages of three and five years, usually from infection. Steinbock, *Wrongful Life*, HASTINGS CENTER REP., April 1986, at 17.

65. Narveson, *Moral Problems of Population*, ETHICS & POPULATION, 59, 68 (1976); *see The Counterfactual Element*, *supra* note 29, at 153-54, 166-67.

66. *Harm to the Unconceived*, *supra* note 27, at 298-99 (no harm despite lost benefits); *see* note 57, *supra*.

67. Robertson, *supra* note 52, at 1420-34.

68. *See* Roe v. Wade, 410 U.S. 113 (1973). For those who believe that fetal rights begin at conception, this analysis can be modified to reflect that point of view. The modification will not alter the basic analysis.

69. *E.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946); Huskey v. Smith, 289 Ala. 52, 265 So. 2d 596 (1972); Robertson, *supra* note 52, at 1402, 1411-13; PROSSER AND KEETON ON TORTS § 55, at 368 (5th ed. 1984). Early suggestions that the injury must occur after viability have now been abandoned. *E.g.*, Wolfe v. Isbell, 291 Ala. 327, 280 So. 2d 758 (1973); Sana v. Brown, 35 Ill. App. 2d 425, 183 N.E.2d 187 (1962); Bennett v. Hymers, 101 N.H. 483, 142 A.D.2d 108 (1958); Robertson, *supra* note 52, at 1414-20; PROSSER AND KEETON ON TORTS, *supra* note 30, at 368-69.

70. *Contra* Gallagher v. Duke University, 638 F. Supp. 979, 982-83 (M.D.N.C. 1986).

71. 67 Ill. 2d 348, 367 N.E.2d 1250 (1977).

larly, in *Jorgensen v. Meade Johnson Laboratories, Inc.*,[72] a child born with Down's Syndrome had an actionable claim against the manufacturer of allegedly defective birth control pills that had been prescribed to the child's mother before conception and possibly caused the birth defect. While this duty not to harm children by preconception acts is conditioned upon their actual conception and is limited by ordinary rules of proximate causation,[73] children foreseeably injured by reproductive technology will meet both of these requirements.[74]

Accordingly, objections to the nonexistence test on the grounds of logical impossibility are unsound. Causing a harmful life can violate the rights and interests of the injured child.[75]

2. *The Sanctity of Life*

The sanctity of life objection to use of the nonexistence test reflects a series of related concerns. The first is a belief that the determination of whether life is better than nonexistence is a mystery beyond man's capacity. The second is a belief that all life is worthwhile. The third is a belief that the disadvantages of abandoning the presumption in favor of life will inevitably outweigh its advantages.

a. *The mysterious comparison*

The mysterious nature of the nonexistence comparison has profoundly troubled the courts and some commentators.[76] It has greatly contributed to the uniform judicial unwillingness to permit recoveries of general damages by disabled children in wrongful life cases. Because of it, the few courts permitting a limited wrongful life cause of action for extraordinary expenses stop short of allowing the jury to apply the nonexistence comparison.[77] While some judges concede that life is not always better,[78] no jurisdiction

72. 483 F.2d 237 (10th Cir. 1973). *Accord* Bergstreser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (negligence in preconception surgery on mother).

73. *See* Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (but not foreseeability alone); *The Counterfactual Element*, *supra* note 29, at 154.

74. Although these cases are authority for a preconception duty not to harm, they are not authority for the use of the nonexistence comparison to ascertain whether the child has been harmed. In each case, the child was born with an avoidable injury. With reproductive technologies designed to combat infertility, however, the treatment exposing the future child to danger will often be essential to the birth of the child. If so, the nonexistence benchmark or some substitute must be used. Even though these cases do not sanction the use of the nonexistence test, they do establish that the preconception timing of harmful conduct is no obstacle either to recognizing the harm or to imposing duties not to harm.

75. Whether such a duty *ought* to be imposed is a separate question which cannot be answered without a detailed examination of the interests of the parents.

76. *E.g.*, Tedeschi, *supra* note 49, at 529-30; Robertson, *supra* note 52, at 1444-45.

77. The singular exception is found in the opinion of the California Court of Appeals in Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980). This case permitted general damages, thereby necessitating the use of a test of overall harm. It was criticized as to damages by Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982). All of the courts permitting actions for wrongful life addressing the issue limit damages to extraordinary expenses and have dropped the nonexistence test for purposes of these damages. *See* text *infra* at notes 246-67 (attempting to explain these cases).

78. *See* text *infra* at note 91.

currently permits the jury to decide the question. Justice Weintraub of the New Jersey Supreme Court expressed the epistemological question in his eloquent manner:

> Ultimately, the infant's complaint is that he would be better off not to have been born. *Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.* . . . To recognize a right not to be born is to enter an area in which no one can find his way.[79]

In a much quoted paragraph, Judge Jasen of the New York Court of Appeals expressed the problem this way:

> Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence.[80]

Judge Jasen's challenge can be answered.[81] If the long-run burdens of life, such as the pain associated with a congenital affliction, outweigh the benefits of life, then a person can rationally prefer not to exist at all.[82] Conceiving a person doomed to suffer burdens beyond benefit can, in this sense, be said to harm that person. No knowledge of nothingness is necessary in order to conclude that these people have an interest in not existing.[83]

These harmful circumstances are not difficult to imagine. Nora Bell and Barry Loewer have poignantly observed that a twenty-year-old person given a choice "between a normal life that ends at age 30 and a similar life that lasts until age 40—the ten additional years being spent in excruciating pain" could rationally prefer the shorter life.[84] A frequently used example is Tay-Sachs disease, a genetically based enzyme deficiency that is characterized by self-mutilation and severe motor defects and leads to death in childhood.[85] Another is Lesch-Nyhan syndrome, a disease which involves uncontrollable spasms, mental retardation, compulsive self-mutilation, and early death.[86] Other candidates include polycystic kidney disease (invariably fatal in infancy)[87] and the more severe forms of spina bifida, brain mal-

---

79. Gleitman v. Cosgrove, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967) (Weintraub, C.J., dissenting in part) (emphasis supplied).

80. Becker v. Schwartz, 46 N.Y.2d 401, 411, 413 N.Y.S.2d 895, 900, 386 N.E.2d 807, 812 (1978).

81. *See, e.g., Harm to the Unconceived, supra* note 27; Bell & Loewer, *supra* note 25; *The Counterfactual Element, supra* note 29, at 158-59, 161-67.

82. *The Counterfactual Element, supra* note 29, at 101-02. In fact, a reasonable case can be made that the child has an interest in avoiding conception even when the burdens of life will not outweigh the benefits, so long as the life is very likely to be unhappy. *See* Part III. C., *infra*. Traditionally, however, benefit-burden comparison is used to give content to the nonexistence test.

83. This is true whether nonexistence is assigned a utility of zero or is not assigned a utility at all. M. BAYLES, MORALITY AND POPULATION POLICY 111 (1980) (no value); M. BAYLES, REPRODUCTIVE ETHICS 49 (1980) (zero utility for nonexistence); Bell & Loewer, *supra* note 25, at 140 (utility cannot be assigned to nonexistence, but a living person may have a utility in no longer existing); Comment, *Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597, 768 (1986) (zero utility).

84. Bell & Loewer, *supra* note 25, at 138.

85. *Id.* at 143 n.11.

86. T. BEAUCHAMP AND J. CHILDRESS, *supra* note 28, at 132.

87. Bell & Loewer, *supra* note 25, at 143 n.11.

formation or severe retardation, especially if combined with chronic pain, paralysis, incontinence, deafness or blindness.[88] While painful conditions form the most obvious examples, cognitive impairments that preclude the possibility of human relationships, such as anencephaly or injuries resulting in a persistent vegetative state, may also be strong candidates.[89] On the other hand, cleft palate, club feet, and Down's Syndrome would not be.[90] In between are the difficult cases.

As the Supreme Court of California conceded in *Turpin v. Sortini*, a case denying general damages to the afflicted child,

> Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with any confidence that in every case there would be a societal consensus that life is preferable to never having been born at all.[91]

This sentiment is also captured in our everyday experience. A commonplace example is the sentiment that the death of a very ill friend or relative was a blessing for the deceased as well as his family. Another occurs whenever a competent patient declines life-sustaining treatment. Humans can and do assess the net value of life.

b. *The precedent for balancing burdens against benefits: medical treatment cases*

In fact, the courts already acknowledge that the presumption in favor of life may be rebutted in appropriate cases. Competent patients, thus, have the right to refuse life-saving medical treatment.[92] For example, Abe Perlmutter wanted to have a respirator removed from his trachea, although he needed it to breathe. He was 73 years old, unable to move himself and expected to die within a "short time" of Lou Gehrig's disease. Death, he said, "can't be worse than what I'm going through."[93] The courts also permit rebuttal of the presumption in favor of life in cases involving incompetent patients whose wishes are unknown. In cases involving the irreversibly co-

88. *See The Counterfactual Element*, *supra* note 29, at 159; T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 132. Down's Syndrome clearly would not meet this standard. *See* Azzolino v. Dingfelder, 337 S.E.2d 528, 533, 315 N.C. 103, 110 (1985); Steinbock, *supra* note 49, at 17. Nor would congenital deafness meet this standard. *See* Turpin v. Sortini, 182 Cal. Rptr. 337, 346, 31 Cal. 3d 220, 229, 643 P.2d. 954, 962 (1982).

89. These cases are especially difficult to analyze in terms of the patient's interests because these patients may not form or experience interests (either in life or death) in a sense that we can vicariously appreciate. *See Imperiled Newborns*, HASTINGS CENTER REP., Dec. 1987, 5, 16. The question of standards has been discussed principally in connection with the withholding of medical treatment. *E.g.*, McCormack, *To Save or Let Die: The Dilemma of Modern Medicine*, 229 J.A.M.A. 172 (1974); Smith, *Quality of Life, Sanctity of Life: Palliative or Apotheosis*, 63 NEB. L. REV. 709, 732-38 (1984).

90. *See* note 88, *supra*.

91. Turpin v. Sortini, 31 Cal. 3d 220, 234, 182 Cal. Rptr. 337, 346, 643 P.2d 954, 963 (1982). *Accord* Azzolino v. Dingfelder, 71 N.C. App. 289, 300, 322 S.E.2d 567, 576 (1984), *rev'd*, 315 N.C. 103, 337 S.E.2d 528 (1985), *cert. denied*, 479 U.S. 835 (1986), *reh'g denied*, 319 N.C. 227, 353 S.E.2d 401 (1987).

92. Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); Satz v. Perlmutter, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (1980).

93. Satz v. Perlmutter, 362 So. 2d 160, 161 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (1980).

matose[94] and the terminally ill,[95] the courts often reach the consensus—long advocated by ethicists—that life is not always worth the price of living.

Most courts and commentators now agree that the presumption that every life has value *for the patient* is rebuttable.[96] But substantial disagreement exists over the specific criteria to use with incompetent patients when deciding whether treatment is worthwhile. The debate has been fueled by abusive "baby doe" cases where children with Down's Syndrome or mild spina bifida were denied life-saving treatment.[97] The adopted legal standards in various jurisdictions reflect the disagreement. While at least one jurisdiction permits trial courts and other proxy decisionmakers to apply a general benefit-burden analysis,[98] some critics doubt the feasibility of preventing abuse with general criteria.[99] In particular, the worth of the patient *to others* may permeate the decisionmaking process. Perhaps for this reason, other courts try to limit the burdens that may be considered.[100] In New Jersey, for example, the focus for patients who are incompetent but not comatose is upon pain and the imminence of death, to the virtual exclusion of other detriments such as physical and mental incapacity.[101] Similarly, the 1984 federal Child Abuse Amendments[102] and the subsequent child abuse regulations[103] limit withholding to cases in which either the child is irreversibly comatose, the treatment would be futile in terms of survival or the treatment would be inhumane under the circumstances.[104] Under these regulations, nutrition, hydration and medication may never be withheld. Several state legislators have made similar attempts to fashion a narrow list of proper cases for withholding treatment.[105]

Despite disagreement about where the line should be drawn, there is

94. *E.g.*, *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

95. *E.g.*, Supt. of Belchertown State School v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977).

96. Even many conservative commentators—some with a "sanctity of life" or "vitalist" perspective—appear to have come to this conclusion in the most compelling cases. *See, e.g.*, P. RAMSEY, ETHICS AT THE EDGE OF LIFE 191-93 (Tay-Sachs), 212-16 (Lesch-Nyhan disease and anencephaly)(1978); R. SHERLOCK, PRESERVING LIFE: PUBLIC POLICY AND THE LIFE NOT WORTH LIVING 100, 103 (1987); *but see* Destro, *Quality of Life Ethics and Constitutional Jurisprudence: The Demise of Natural Rights and Equal Protection for the Disabled and Incompetent*, 2 J. CONTEMP. HEALTH LAW & POL'Y 71, 111, 124 n.241 (1986).

97. Weir, *Pediatric Ethics Committees: Ethical Advisors or Legal Watchdogs*, 15 LAW, MED. & HEALTH CARE 99, 105 (1987).

98. *E.g.*, Barber v. Superior Court, 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983) (proportionality test).

99. *E.g.*, R. SHERLOCK, *supra* note 96, at 83, 170.

100. *E.g.*, *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981).

101. *In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985). A notable exception is made for comatose patients. *In re* Quinlan, 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976).

102. 42 U.S.C.A. § 5101 (West Supp. 1987) (Child Abuse Prevention and Treatment Act).

103. 45 C.F.R. § 1340 (1986).

104. 45 C.F.R. § 1341.15(b) (1987). By permitting medical treatment to be withheld where it would "merely prolong dying" or "otherwise be futile in terms of the survival of the infant," the law permits quality of life decisions at the margin. Weir, *supra* note 97, at 195.

105. As of 1983, "nineteen states had considered new legislation . . . and seven of the states had enacted statutes intended to prevent the occurrence of any more 'Baby Doe' cases." Weir, *supra* note 97, at 105; Feldman & Murray, *State Legislation and the Handicapped Newborn: A Moral and Political Dilemma*, 12 LAW, MED. & HEALTH CARE 156 (1984). For newborns, the choice of criteria is made more difficult by uncertainty in prognosis. Rhoden, *supra* note 62, at 1482-84.

virtually unanimous support for the withholding of painful life-extending treatment in the clearest cases because failure to do so would be malevolent to the patients themselves. Despite the risks of abuse, error and erosion of our respect for life, both courts and legislatures recognize that unconscionable harm would be inflicted by an absolute refusal to acknowledge that the extension of life in some cases does not benefit the patient.[106] The refusal of treatment cases are strong authority for use of the nonexistence comparison in the context of reproductive decisionmaking because the failure to scrutinize reproductive technologies believed to cause serious birth defects would be equally unconscionable.

Arguably, the authority of the withholding of treatment cases diminishes because they involve or ought to involve a slightly different issue. In the medical treatment cases, the court must determine whether a particular *treatment* does more harm than good. In deciding whether the treatment is in the best interests of the patient, the court need not decide directly whether the patients's *life* is worthwhile. Paul Ramsey argues that to focus on lives rather than treatment increases the dangers of opening the door to euthanasia.[107] An advocate of this distinction might use it to contend that treatments like artificial hydration and nutrition should not cease because they are unlikely to *inflict* harm upon a patient.[108]

But the distinction between treatment inflicting new pain and treatment continuing existing pain does not escape the necessity for placing a value on life itself. The determination of whether a treatment is beneficial inevitably requires consideration of the value of extended life to the patient. Painful chemotherapy is only harmful if the additional life expectancy it offers is not worth the pain. The net value of continued life with the treatment must be calculated to make this assessment. The same calculation determines whether life-extending treatments may be harmful even though the only pain they inflict is continued existence. Although the treatment will not inflict pain in the latter case, in both of them the treatment may prevent a death that is preferable to medically available life.[109] Describing the burden in terms of treatment, rather than life, cannot conceal the underlying net benefit assessment.[110]

---

106. For a trenchant criticism of the narrow discretion afforded to parents and providers under the various Baby Doe laws, see Weir, *supra* note 97, at 108 (citing babies with trisomy 18 or trisomy 13).

107. P. RAMSEY, *supra* note 96, at 171-88; T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 134.

108. *Cf.* Destro, *supra* note 96, at 120, 124 n.241. This view of the nutrition and hydration cases can be criticized for overlooking the painful and unpleasant complications that sometimes accompany an invasive regiment such as artificial feeding. *See* T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 134; Lynn & Childress, *Must Patients Always Be Given Food and Water?*, HASTINGS CENTER REP., Oct. 1983, at 17. The risk of these complications convinces even some conservative ethicists that metabolic support may sometimes inflict more harm than good. *Id.* at 18-19.

109. Even Paul Ramsey concedes that aggressive treatment which only prolongs the dying process may be foregone when the patient suffers irremediable pain. *See* note 96, *supra*. However, the shift in emphasis from the benefits of treatment to the benefits of life may raise the issue of euthanasia more visibly. T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 134.

110. *See* McCormick, *The Quality of Life, The Sanctity of Life*, HASTINGS CENTER REP., Feb. 1978, at 30, 33-34. Some critics prefer the language of treatment because they believe it is less likely to erode our respect for life. *Id.*

Thus, these medical treatment cases constitute precedent for similar net benefit assessment in the regulation of reproductive decisionmaking.

c. *Concerns about weakening social respect for life*

Courts have also voiced concerns that use of the nonexistence comparison, at least in wrongful life actions, would be "a repudiation of the value of human life."[111] The Idaho Supreme Court suggested that recognizing a wrongful life tort would violate the belief that life is precious.[112] Many judges believe that the basic and fundamental public policy "to protect and preserve life"[113] is at stake. In concluding that "life, even life with severe defects, cannot be an injury in the legal sense,"[114] these courts sometimes imply that a contrary conclusion would threaten respect for life and deny its value to disabled persons.[115]

The California Supreme Court offered the strongest judicial response to this argument. Tort relief, said the court, would show respect for these children by affirming that their interests may not be ignored with impunity.[116] It would suggest that they have equal legal rights and privileges. While each individual's worth is incalculable, the court recognized that conceiving a child does not always confer a benefit.[117] In these rare cases, wrongful life liability would effectuate, rather than subvert, equal respect. It need not lead society down a slippery slope towards abuse of the vulnerable in our society.

In discussing the distinction between withholding treatment and mercy killing, Beauchamp and Childress note that slippery slope arguments typically express two distinct concerns.[118] The first concern is that no defensible moral argument will support limitation to the initial case. The second concern is that morally defensible limitations on extension beyond the initial case, though normatively sound, will be ignored in practice. Both of these concerns reflect a fear that sanctioning some morally legitimate acts, may lead to the sanctioning of morally objectionable conduct. Viable distinctions might be ignored due to bias against handicapped individuals or concerns

---

111. Blake v. Cruz, 108 Idaho 253, 259, 698 P.2d 315, 321 (1984).

112. *Id.* at 259-60, 698 P.2d. at 322.

113. Elliott v. Brown, 361 So. 2d 546, 548 (Ala. 1978).

114. Azzolino v. Dingfelder, 315 N.C. 103, 109, 337 S.E.2d 528, 532 (1985), *cert. denied,* 479 U.S. 835 (1986), *reh'g denied,* 319 N.C. 227, 355 S.E.2d 401 (1987); *accord, e.g.,* Blake v. Cruz, 108 Idaho 253, 259-60, 698 P.2d 321-22 (1984); Bruggeman v. Schimke, 239 Kan. 245, 254, 718 P.2d 635, 642 (1986).

115. *See, e.g.,* Berman v. Allen, 80 N.J. 421, 429-30, 404 A.2d 8, 12-13 (1979); Phillips v. United States, 508 F. Supp. 537, 543 (D.S.C. 1980); Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment,* 100 HARV. L. REV. 2017, 2030 (1987) (discussing opposition to wrongful birth actions); *cf.* Kass, *Implications of Prenatal Diagnosis for the Human Right to Life,* in ETHICAL ISSUES IN HUMAN GENETICS 185, 188-90 (1973) (eugenic abortion will affect society's view of children with defects).

116. Turpin v. Sortini, 31 Cal. 3d 220, 232-33, 182 Cal. Rptr. 337, 344-45, 643 P.2d 954, 959-62 (1982). "Although it is easy to understand and to endorse these decisions' desire to affirm the worth and sanctity of less-than-perfect life, we question whether these considerations alone provide a sound basis for rejecting the child's tort action. To begin with, it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of legal and nonlegal rights and privileges accorded to all members of society."

117. *See* McCormick, *supra* note 110, at 34-35.

118. T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 120-26.

about the social resources dedicated to the seriously ill. Alternatively, the very use of the nonexistence test could weaken the moral fabric of society and thereby weaken its ability to resist ethically objectionable proposals.[119]

The first argument is a special kind of slippery slope argument. Applied to the nonexistence test, it assumes both that the nonexistence test may be extended beyond the unconceived to areas in which its use can be confidently identified as illegitimate and, at the same time, that no morally defensible basis will exist for distinguishing the new context. If indeed all of these conditions were met, society would either have to question its initial conclusion that application of the nonexistence test to reproductive technology was legitimate or else conclude that extending the nonexistence test to this new case is also morally legitimate. So viewed, this argument is not so much a slippery slope argument as a fear of missing something important in the initial decision—an error revealed by consideration of the test in other ethically indistinguishable contexts.

This argument may also reflect the fear that a mistaken precedent would be irreversible and would be extended to other ethically indistinguishable cases, thus compounding the error.[120] This danger dictates caution in taking jurisprudential steps as important as the recognition that some lives may be worse than nonexistence. Society should require strong evidence that the nonexistence test is both legitimate and necessary to protect the interests of the unconceived—so necessary that the risk of error is worth taking. But this fear is not an argument against adopting the nonexistence test once convinced that it is both correct and necessary.

What, then, explains the unwillingness of the courts to use the nonexistence test in wrongful life cases? Most plausibly, the courts do not believe that wrongful life actions are necessary to serve the goals of compensatory justice. As a result, they are not willing to take the risk that juries will misapply the nonexistence test with the danger that this error will spread to other ethically similar areas. Nor are they willing to risk extension of ethically sound applications of the test to ethically distinguishable contexts.[121]

The risk of misapplication is especially troublesome because of the compensatory nature of wrongful life actions. This setting may predispose jurors to make extremely liberal determinations that life is harmful on balance. Put simply, they will be much more tempted in the tort context to err on the side of finding life harmful. Jurors may inevitably base pain and suffering awards upon a comparison to normalcy (*e.g.*, the jurors' lives) and not solely on the extent to which the plaintiff's injuries are unbearable and exceed a minimally worthwhile life. If they did find life harmful, it might then be difficult to prevent spillover of their factual determinations to withholding of treatment cases.[122] Even if courts could resist erosion of their standards in medical treatment cases, the expectations and practices of families and even third-party payors of treatment costs could be influenced. Conceivably, the

---

119. *Id.* at 122-23.

120. *Id.* at 120-21; *see generally* Destro, *supra* note 96.

121. This is the second slippery slope concern.

122. This assumes that trial and appellate courts continue their traditional deference to jury factual determinations in tort actions.

increasing familiarity of the nonexistence comparison in wrongful life cases could also weaken objections to the application of this net interest analysis in other contexts, like involuntary euthanasia and infanticide, that pose substantially more risk of abuse and are ethically distinguishable. Use of the nonexistence test could also redefine our conception of normalcy and reduce our acceptance of the abnormal.[123] In this fashion, compassionate jury verdicts could weaken protection for disabled persons.

All of these possibilities are extremely speculative, but they may best explain judicial refusal to permit unrestricted wrongful life actions. The risks, however slight, are not needed to serve the goals of corrective justice. First, wrongful life actions would probably contribute little additional deterrence against provider negligence to that already provided by the parents' action for wrongful birth.[124] Second, awards of pain and suffering damages would do little to ease the plight of most children whose life is truly worse than nonexistence.[125] Thus, concerns about compensatory justice do not compel recognition of the cause of action for general damages. Extraordinary medical and childcare expenses, on the other hand, can be awarded without using the nonexistence test because the child's interest in adequate support warrants protection even if his life is not harmful on balance.[126] For these reasons, judicial reticence to take a chance that respect for life would somehow be irreversibly impaired by use of the nonexistence test is understandable. Even though wrongful life actions pose a less direct threat to perceptions about the sanctity of life than do refusal of treatment cases,[127] courts may reasonably conclude that this tort claim is not worth either the risk or the difficult line-drawing problems it presents.

By contrast, lawmakers contemplating regulation of reproductive technology cannot so readily avoid reaching the question of life's worth. Future children who may be at risk of suffering injuries associated with a reproductive technology are helpless to protect themselves. Absent some broader basis for identifying the interests of the unconceived, lawmakers must implement the nonexistence test if they hope to protect future children against irresponsible reproductive decisionmaking. As with decisions about the discontinuance of medical treatment, a good faith effort to give content

123. Ramsey, *Screening: An Ethicist's View*, ETHICAL ISSUES IN HUMAN GENETICS 149, 159 (1973).

124. But it certainly would provide some, reflecting cases where the child suffers greatly, but no extraordinary parental expenditures are entailed because the condition is not correctable. Capron, *supra* note 25, at 657-58. Moreover, a sound argument can be made for granting an afflicted child a cause of action in his own name, at least for medical costs, care-taking expenses and any services or products that would improve his quality of life. The child's access to this relief should not depend on the diligence of his parents in seeking remedies.

125. *See The Counterfactual Element*, *supra* note 29, at 160-61. In cases where life-sustaining medical treatment is needed, withholding that treatment may be the more appropriate remedy.

126. *See* text at notes 224-45, *infra*.

127. Anti-abortion forces may also object to those wrongful birth and wrongful life actions which depend upon an allegation that the fetus would have been aborted but for the defendant's negligence. At least two states have passed legislation prohibiting these actions. S.D. CODIFIED LAWS § 21-55-2 (Michie 1987); MINN. STAT. ANN. § 145.424 (West 1986). By permitting failed contraception actions but not actions based on negligent prenatal diagnosis, Minnesota appears to permit a claim that a child's life is worse than never-existing, but not that it is worse than termination by abortion.

to the nonexistence test may be necessary in order to protect against the suffering of future children. Hypothetical dangers of disrespect toward living disabled persons are insufficient to outweigh this necessity. In fact, these dangers seem less pronounced in the context of reproductive decisionmaking than in the medical treatment cases because withholding medical treatment causes actual people to die, while barring access to reproductive technology only prevents a person's birth.[128] Even if these fears were realistic, the better answer would lie in parallel community efforts to acknowledge and reinforce a commitment to the living, not in ignoring the future infliction of human suffering.[129]

Perhaps a more important concern about using the nonexistence test is that public regulation of reproductive technology using a best interests approach could serve as precedent for a broader state-mandated eugenics policy. Such a policy could conceivably extend to all reproductive decisionmaking, including childbirth decisions by high-risk fertile couples, and even to mandatory amniocentesis and abortion.[130] But there is no reason to believe that any relevant ethical distinctions between these different kinds of government intervention would be overlooked or ignored. While the nonexistence test may help evaluate the interests of the would-be child in each of these contexts, each context involves different competing parental interests. In addition, the community values at stake may vary from one context to another. The nonexistence comparison merely illuminates whether and to what extent the interests of the afflicted children would be adversely affected by conception and birth. It does not dictate that those interests always prevail over the competing parental interests or community ethics. But the nonexistence comparison enables us to identify the interests of these future children. For this reason, the nonexistence comparison is an essential component of any sound analysis of reproductive decisionmaking.

d. *Reconsidering the nonexistence comparison*

To summarize, sanctity of life concerns that have been raised in wrongful life cases do not dictate rejection of the nonexistence test in the context of reproductive technology. Although application of the test is difficult, it does not exceed human capacity. Lawmakers should abandon the erroneous assumption that the benefits of life always outweigh the burdens. As the courts already recognize in medical treatment cases, that presumption is unsound and threatens future children with unnecessary harm. The danger that use of the nonexistence comparison will result in erosion of respect for life and protection of disabled individuals warrants careful reflection before implementing the test, but the arguments for using the test to identify threats

---

128. Because of this factual difference, use of the nonexistence test to regulate reproductive decision-making would not add fuel to the debate over euthanasia. That controversy turns principally on the distinction between killing and letting die, not on the legitimacy or content of the nonexistence test itself. *See* T. BEAUCHAMP & J. CHILDRESS, *supra* note 28, at 116-26. For debate of the issues, see Kamisar, *Some Non-religious Views Against Proposed "Mercy-Killing" Legislation* and Williams, *"Mercy-Killing" Legislation-A Rejoiner*, in CONTEMP. ISSUES OF BIOETHICS 324-37 (2d ed. 1982).

129. *See* MacIntyre, in ETHICAL ISSUES IN HUMAN GENETICS 216 (1973) (discussion).

130. *Cf.* Capron, *supra* note 25, at 664, 665 n.199.

of harm to future children justify its use. Although courts have rejected the test in wrongful life cases, the need for its use is less acute in those cases and the dangers of misapplication are higher. In the context of reproductive technology, responsible oversight and regulation require application of the nonexistence test or some more protective substitute in behalf of the countless children who may otherwise be harmed. No amount of squeamishness can justify abandonment of this responsibility.

Quite possibly, responsible use of these technologies by would-be parents and medical professionals will minimize the need for intervention, but entrepreneurs may not always offer parents the options dictated by sound public policy. Furthermore, parental interests could conflict to some degree with the interests of the would-be child whenever parental convenience, cost and maternal risk are at stake. At any rate, responsible public monitoring of the medical market requires identification and appreciation of the interests of the would-be children. That task requires use of the nonexistence comparison or some substitute such as those discussed in Parts II and III, below.

II. AVOIDABILITY BY SUBSTITUTION

Despite the theoretical appeal of individual best interest analysis and the nonexistence comparison that it dictates, there are serious reasons to believe that it understates the cases in which intervention may be warranted on behalf of children at risk of physical or emotional injury associated with a reproductive technology. The nonexistence comparison is most obviously inadequate whenever parents or providers can avoid a risk of birth defects by substituting one would-be child for another. For example, artificial insemination clinics could reduce birth defects by screening their vendors. Doing so will result in the birth of different, healthier children than would be born without screening. But because different children would be born, the nonexistence test suggests that no harm is done unless the lives of the children who are conceived in the absence of screening are worse than nonexistence. For these children, the alternative to birth defects is nonexistence, not a healthier life. Even if the risks could be reduced at minimum cost and with little interference with procreative liberty, any regulation premised upon harm to the future children would be illegitimate under the nonexistence test.

By focusing exclusively on the individual interests of the affected children, the nonexistence test overlooks the interests of these future children as a class.[131] Collectively, they have an interest in avoiding these injuries. As a result, injuries that are *avoidable by substitution* should be treated as prima facie wrongs that require justification. Not surprisingly, both utilitarian[132] and rights-oriented[133] ethicists reach this conclusion in other contexts. Even

131. The class includes all those who might have defects and their healthy possible substitutes.

132. *See* D. PARFIT, *supra* note 58, part IV (1984) (seeking a comparative principle of beneficence broader than traditional person-affecting principles); Narveson, *Future People and Us*, in OBLIGATIONS TO FUTURE GENERATIONS 38, 47-50 (1978) (choose the happiest child); *cf.* Singer, *A Utilitarian Population Principle*, in ETHICS AND POPULATION 81 (1976) (accepting utility calculations to choose between alternative populations of the same size); *Harm to the Unconceived*, *supra* note 27, at 297-98 (Bayles would also intervene in cases of avoidability.).

133. *See*, *The Counterfactual Element*, *supra* note 29, at 168-173; Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 806-07 (1986).

though failure to substitute causes no apparent harm to any individual afflicted child as long as her life is worth living, the failure to avoid unnecessary human suffering is palpably harmful to the interests of the children so conceived as a class.[134]

This Part first reviews how the concept of avoidability serves as a limit on traditional interest analysis. It then advocates an expanded definition of avoidability which broadens the scope of legitimate state interest to include cases of avoidability by substitution.

A. *Avoidability*

The notion of avoidability plays a central role in unraveling the interests of the unconceived because the applicability of the nonexistence comparison depends upon the avoidability of the injury. Under traditional analysis, an injured child who could not have been born without the injury suffers no harm unless nonexistence would be preferable. If, however, the injury was *avoidable*, then its infliction harms the child, regardless of its severity.

Despite its beguiling simplicity, however, the notion of avoidability actually has some surprising complexities which may have significant consequences for legitimizing intervention based on the interests of the unconceived. In the context of birth defects, avoidability may have at least three meanings. First, a birth defect is avoidable in the broadest sense whenever parents could avoid it by avoiding conception altogether. An example of this occurs when parents can only conceive by using a fertility drug associated with birth defects. These parents can, of course, avoid the birth of the afflicted child by not conceiving. But because any child of theirs cannot be born at all without the risk of injury associated with the drug, his injuries are unavoidable if he is to exist at all. His only alternative to an afflicted life is nonexistence. Accordingly, the child suffers no harm by birth unless nonexistence would be preferable. For purposes of deciding whether to apply the nonexistence comparison, birth defects of this sort are *unavoidable*.

The second kind of avoidability describes cases in which *the injured child* could have been born without the injury. This might occur if two different fertility drugs were equally likely to induce ovulation, but one posed greater risk to the offspring and the other posed greater risk to the mother. Use of the drug more dangerous to the offspring would jeopardize the interests of the offspring in avoiding injury. When the injuries are *avoidable* in this sense, the nonexistence comparison is inappropriate because the options for this child were not limited to nonexistence, on the one hand, and life with the disability, on the other. Instead, this very child could have been born without the injuries. If the same child may be conceived or carried to term in two different ways, then she can be harmed by the choice of the more dangerous one, even if the injuries do not make life unworthwhile.

134. In addition to the examples given in the text hereafter, an interesting example is described by Leon Kass. A woman with oviduct obstruction can try either oviduct reconstruction or in vitro fertilization. If the risks for the child differ, this is a case of avoidability by substitution assuming that the options are likely to result in different children. Kass, *"Making Babies" Revisited*, *supra* note 13, at 36-37.

Avoidability can have a third meaning whenever the birth of an injured child could be avoided, but only by changes in conduct resulting in the birth of a *different* child. For example, clinics performing artificial insemination can prevent some birth defects by screening out high-risk donors, but by doing so they will prevent the birth of the children who would have suffered the extra birth defects. The clinics avoid the risks by substituting one would-be child for another. Similarly, parents carrying transmissible genetic disorders could avoid the birth of an injured child by using genetic material from another person. In these cases, if the birth of an injured child can only be avoided by *substituting* another child, the injured child's birth defect is *unavoidable for that child.* That child's only alternative to life with the birth defect is nonexistence. Under the logic of the nonexistence comparison, the injured children suffer no harm by failure to use the safe method unless the benefits of their lives are outweighed by the burdens. If the injuries are not that severe, then the interests of the individual injured children do not support intervention. Joel Feinberg draws an analogy between this third kind of avoidability and the case of a rescuer who breaks the arm of a person she rescues from certain death.[135] Although her actions result in an injury, the rescuer's actions—on balance—provide a benefit to the affected person (just as birth could be a net benefit to the unscreened insemination child).[136]

The dilemma posed by avoidability by substitution is well illustrated by Derek Parfit's provocative hypothetical case of a woman advised by her doctor not to become pregnant until she gets over a temporary illness that causes birth defects.[137] Though she could wait two months for the condition to pass, she ignores his advice and conceives a child who suffers the deformity. The harm to *this child* is unavoidable. If she had waited, *another child* would have been born. The child actually born could not have been born healthy. Arguably, the child actually born suffers harm only if her condition is worse than nonexistence. If the condition is not worse than nonexistence, then the child suffers no harm even though her mother could have waited and borne a healthy child.[138]

By contrast, if the mother could have prevented the injury to this child by taking medication,[139] the avoidability of the resulting birth defect would mean that her failure to act injured the child, regardless of the severity of the injuries. The comparative nature of traditional individual interest analysis, therefore, dictates dramatically different conclusions about the harmfulness

135. *The Counterfactual Element, supra* note 29, at 169-70; *see also* Parfit, *supra* note 35, at 101. While Feinberg does not use the concepts of avoidability employed in this article, he makes this analogy to Derek Parfit's example.

136. This assumes that the rescuer was not responsible for the victim's predicament. *The Counterfactual Element, supra* note 29, at 169 n.26.

137. Parfit, *supra* note 35, at 100.

138. *Id.* at 101; *Harm to the Unconceived, supra* note 27, at 297; *The Counterfactual Element, supra* note 29, at 168-69.

139. Parfit, *supra* note 35, at 103. Syphilis would be one such condition, although the blindness, mental retardation and other abnormalities which can result from transmission to the baby may be avoidable by treatment before or during pregnancy. Robertson & Schulman, *Pregnancy and Prenatal Harm to Offspring: The Case of Mothers With PKU,* HASTINGS CENTER REP., Aug. 1987, at 26. By contrast, AIDS also presents a risk of infected offspring, but the absence of treatment makes the risk unavoidable for the mother who wishes to bear her own child. *See id.* at 31.

of the mother's actions in these two similar situations. Yet both mothers seem equally irresponsible.[140] Both had equal opportunity to avoid human misery. Yet Parfit's mother benefits from a more forgiving test of whether she harmed her offspring merely because her avoidance changes the identity of the child. Should this factual distinction carry this much normative weight? Under traditional analysis, it must because the inquiry considers only the interests of the individual injured child.[141] Preventing the birth of Parfit's child would not serve her interests.[142] Moreover, if such a child is conceived, she is unlikely to regret being born,[143] even though she might conclude that it would have been better for her mother to wait to conceive.[144]

As another example, consider the infertile couple seeking sperm for artificial insemination from clinics that pay for sperm, rather than acquiring it gratuitously. If fears expressed about commercialization of third-party collaborations are correct, the offspring of these inseminations would face greater physical and, perhaps, emotional risks than if the sperm had been truly donated. In particular, concealment of genetic or medical history may be more likely when suppliers are compensated.[145] Even if these fears are well-founded, the individual children who suffer these injuries are not harmed unless their injuries make life unworthwhile. Except in the unlikely event that the couple could obtain the very same sperm gratuitously, the only way to avoid the risk is to obtain the sperm gratuitously from another supplier and bear a different child. The same analysis applies to the debate over the use of commercial surrogates. Even if altruistic and, by hypothesis, less risky surrogates could be located, no harm would result from the use of commercial surrogates under traditional analysis unless the feared injuries would make life unworthwhile. As a result, prohibiting commercialized collaboration cannot be justified on the basis of harm to the individual children unless the identical vendors be willing to collaborate for free[146] or unless the resulting injuries exceed the nonexistence threshold. The availability of a less risky noncommercial source of supply would not in itself invoke the more sensitive test of harm applicable to avoidable injuries.[147] Under this analysis, prohibitions on the payment of sperm donors, for example, cannot be justified on the basis of harm *to the afflicted child.*

By contrast, injuries caused by negligent failure to store sperm are harmful without reference to nonexistence because the same child can exist

140. *See The Counterfactual Element, supra* note 29, at 171-73.

141. This result would change, however, if a nontraditional benchmark were used to calculate individual interests. That is the subject of Part III.

142. In fact, in choosing to conceive or not to abort, her mother has chosen the option with optimum outcome for her. *See The Counterfactual Element, supra* note 29, at 170.

143. *Id.* at 170, 175; D. PARFIT, *supra* note 58, at 360.

144. D. PARFIT, *supra* note 58, at 360.

145. *E.g.,* Robertson, *New Reproduction, supra* note 9, at 1019. *See also,* Kass, *supra* note 13.

146. It seems more realistic to assume that a commercial market, at least for more intrusive collaborations like egg sale and genetic surrogacy, would yield a different mix of suppliers. If so, the risks associated with their sales would only be avoidable by substituting different vendors and different offspring.

147. Singer and Wells come to a different conclusion where an altruistic supply is available, but they do not rely exclusively upon the affected children's interest. SINGER & WELLS, *supra* note 13, at 65-68.

without the injury. These contrasting conclusions about the harmfulness of failure to screen sperm, on one hand, and failure to store it carefully, on the other, do not square with either the culpability of the conduct or its consequences. Yet, the problem of identifying the victim appears to preclude resorting to traditional "person-affecting" conceptions of injury to justify intervention.[148] Nevertheless, intervention seems warranted to prevent unnecessary human suffering whenever healthier children could be born with relatively minor interference upon the parents' liberty. If intervention truly does serve the interests of these children, a broader concept of their interests is needed.

B. *Harm Reconsidered*

One way to reconceive the children's interests is to redefine the concept of harm as it applies to *all* cases of unavoidable injury. For example, harm could be defined to include all attributes that are not normal. Under this test, conception harms children who suffer any birth defect[149] even if no healthier or happier child could be substituted. Because this redefinition extends well beyond the ethical dilemma posed by the opportunity to avoid an injury by substitution, however, it requires a justification with broader application than the failure to substitute. While plausible arguments exist for reinterpreting the nonexistence test to avoid the usual benefit-burden formula, those arguments are more elusive and less compelling than the case for recognizing the harmfulness of injuries that are avoidable by substitution.[150] These cases require a narrower rationale, one that focuses on the presence of safer alternatives.

One scholar suggests resolving the problem by reformulating the definition of harm to account for the possibility of substituting another child. Under this test, a child suffers harm when "the child is worse off than *the child the woman would (or might) otherwise have had,* if she had acted otherwise."[151] Like the previous definition of harm, this test also translates even minor injuries into harms, but it does so only in the context of avoidability by substitution. As Joel Feinberg correctly notes, this suggestion "seems to make a rather sharp departure from the concept of harming-wronging as it is normally and naturally employed."[152] More importantly, the reformulation suffers from its focus on the individual injured child. It purports to identify when *that child* suffers harm by comparing that child's condition with a *different,* healthier child who could have been substituted. Thus, the test assumes that the injured child could personally be harmed by the failure to bear a different child. But it does not explain how the injured child could be "worse off" by virtue of this failure. The conclusion that this child is

---

148. Parfit, *supra* note 35, at 101-02.

149. Alternatively, it could be defined to include all nonideal characteristics. Then conception would harm children who are homely, unintelligent or otherwise disadvantaged. *See The Counterfactual Element, supra* note 29, at 173; Feinberg uses this latter definition to illustrate the various kinds of lawsuits which could be generated if the nonexistence test were abandoned altogether as a test of harm in tort actions.

150. These arguments are the subject of Part III.

151. *See The Counterfactual Element, supra* note 29, at 174 n.29.

152. *Id.*

harmed is unpersuasive. The flaw in this redefinition is its focus on the individual child. Because it does so, the same identity problem that supports the nonexistence comparison defeats this definition.

C. *The Interests of the Resulting Children as a Class*

Although cases of avoidability by substitution do not present any special opportunities to improve the condition of the individual injured children, they do offer an opportunity to reduce human suffering in the class of children so conceived by selection of the safer procedure. For example, the overall outcomes of screened AID may be better than those for unscreened AID. If so, parents and providers could maximize the health of resulting children by utilizing the safer alternative.[153] To maximize the interests of the children as a class in this manner, *parents should chose to bear the child who is likely to suffer the least.*[154]

This proposition helps to explain why donor screening is widely recommended, despite the additional cost and effort required. It may also help to explain why surrogacies seem less justifiable when the rearing parents are fertile than when the rearing mother is infertile.[155] While parental choices between possible children may not victimize the child actually born,[156] the problem of identifying a victim should not obscure the actual increase in unnecessary human suffering that may flow from these reproductive decisions.[157] Perhaps, it would be fair to describe a persons's failure to avoid injuries by substitution as *victimless* yet, paradoxically, *person-affecting*. Because the comparison is between different potential children who individually would have no basis for complaint about birth, the act is victimless. But because the parents can choose between a child who will suffer and one who

---

153. The Parfit hypothetical may even have influenced the formulation of Bayles' theory of beneficence, as he uses it to illustrate the limits of the harm principle. *Harm to the Unconceived, supra* note 27, at 297. Nevertheless, he does not explicitly require as a precondition to his analysis that parents be able to have another child. *Id.* at 301.

154. *See* Narveson, *Future People and Us, supra* note 132, at 47-50, 53 (choose the happiest child). Because the unchosen child is never born, this principle avoids the difficult issue of distributive justice which could arise if it were applied to living children.

155. If she is infertile, this surrogacy may be the couple's only way to have a child genetically related to the father. If she is capable of carrying the child herself, however, she may be able to bear a child who faces fewer risks of emotional injury than the child whom the surrogate would bear. The risks in the first case are unavoidable. In the latter case, the risks are avoidable by substitution. Surrogacies due to health risk to the rearing mother may be similarly analyzed. (If the surrogate child is conceived using the mother's egg, however, the risks may be avoidable in the narrowest sense. *See* text at note 37, *supra*).

156. That will depend upon the severity of the injuries and whether nonexistence would be preferable. *See* D. PARFIT, *supra* note 58, at 359. Unless nonexistence would be better, the afflicted child would have no wrongful life action for damages for failure to substitute. *See also* Capron, *supra* note 25, at 656-57; *The Counterfactual Element, supra* note 29, at 169.

157. Cases in which the defects could have been avoided by taking actions to bear a different child violate the spirit animating our concerns about harming others, even when no specific victim can be identified. *The Counterfactual Element, supra* note 29, at 178. This direct correlation with human welfare distinguishes avoidability by substitution from existing victimless crimes in a compelling manner. It is certainly more compelling than the case for precluding private consensual sexual conduct, defaming the dead, and species extinctions that do not directly implicate the welfare of humans. *The Counterfactual Element, supra* note 29, at 172; *see* Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 674 (1949) (discussing laws prohibiting private sexual misconduct).

will not, their decision is indeed person-affecting in the novel and expansive sense dictated by the unique identity problems arising in connection with the unconceived. An analysis which focuses upon the collective interests of the class of children who could be born captures this insight.

The utilitarian defense of this position compares the happiness of the children who would be born using the safer procedure with the happiness of the children who would be born using the riskier procedure. Substitution of the happier children increases total social utility, even though no individual would be harmed using either procedure.[158] Putting the issue this way sidesteps the identity problem. Instead, this view permits consideration of unnecessary infliction of suffering on the *class* of possible children.[159] In a fundamental sense, this is an argument against both insensitivity and inefficiency in the use of procreative resources.[160]

Because the class interest approach compares the health or happiness of the two groups of possible children, it arguably assumes that causing a person to exist can benefit him.[161] But that controversial assumption is unobjectionable, at least in the narrow sense needed for this analysis. Even if we cannot directly prove that causing someone to exist is a benefit, we can coherently ask whether a person's life is or would be good.[162] This question permits comparisons of *how good* life is or would be for different children.[163] As a result, the likely happiness of the two groups of possible children can be compared.

The strength of this comparative approach also turns upon the reasonableness of considering the happiness of nonexistent children who will never

158. I am assuming a parental duty of beneficence to their children.

159. Parfit suggests that objections to such conduct appeal to a principle he calls "The Same Number Quality Claim" of "Q", which goes as follows:

> If in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life than those who would have lived. This principle does not claim that the child will regret her life, although she may agree that the birth of a healthier child would have been better. Nor does it imply that her mother should rationally regret having her child, at least if she loves her. But it does claim that the mother should have moral regrets because it would have been better to have the healthier child.

See D. PARFIT, *supra* note 58.

160. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 138 (3d ed. 1986). If a would-be afflicted child, Alan, and his would-be healthy substitute, Beth, could borrow some unit of utility against their future store of utility in order to pay their parents to be born, Beth would probably borrow and pay more than Alan because she has more utility to gain from birth. If all other things were equal, the decision to bear Alan would be a wasteful allocation of resources. The same resources could have been employed to conceive Beth, a child with a greater potential for happiness.

Of course, all other things are not equal. The parents presumably have some utility in their decision to bear Alan, even if it is nothing more than an interest in being careless or impatient. Even so, in many cases the parents' interests or utilities are unlikely to justify the desirability of their choice to the class of children. Parfit's case of the woman with a temporary illness is a good example. Failure to screen sperm donors is another.

My example bastardizes economic analysis by basing utility and willingness to pay on future happiness, not future earning capacity. The absence of a market in these utilities arguably insulates the parents and their providers from one social cost of their decision (the lost extra happiness of the substitute child). Sanctions, such as fines, could force parents and providers to consider them. Alternatively, society could preempt parental decisionmaking by making its own utility assessments and barring selected classes of conception which do not maximize benefits.

161. Parfit states that both views on this issue are defensible. Parfit, *supra* note 58, at 490.

162. *Id.* at 487-89; *see* Singer, *A Utilitarian Population Principle*, *supra* note 132, at 92-93.

163. *See* D. PARFIT, *supra* note 58, at 489.

be conceived unless the state intervenes. It implicitly imposes an obligation to consider the opportunity to benefit these potential children[164] and seems to imply an obligation to maximize social utility, perhaps by having as many children as possible. But a duty to substitute is narrower. It would not obligate parents to have children they do not want. This duty requires only that parents who do decide to have children "do a decent job of it."[165] Doing a "decent job" includes maximizing the health of the resulting children.[166]

Failure to avoid injuries by substitution also violates nonutilitarian norms against inflicting human suffering. It seems reasonable to suggest that inducing unnecessary human suffering is prima facie immoral. This nonutilitarian objection to failure to substitute is premised upon precisely the same moral concern as the utilitarian objection. Each avoids the nonexistence comparison by comparing the safety of one available procedure with the safety of another. Both objections require and give normative weight to this comparison of outcomes. Only by comparison can we identify whether unnecessary suffering will occur. Notwithstanding the conceptual riddles associated with the identity problem, failure to use an available lower-risk method of conception increases human suffering. State intervention to regulate this conduct would, therefore, reduce human misery.

D. *Implications for Reproductive Technology*

The children who will be conceived using reproductive technology have a collective interest in decisions such as whether to screen sperm or egg donors or whether to pay them compensation.[167] Their interest does not depend upon a finding that the injuries involved exceed the nonexistence threshold. Because this comparative approach does not require that the threatened injuries make life worse than nonexistence, it provides a basis for state regulation of many reproductive practices that are unassailable under the nonexistence test.

Not only would the use of reproductive technology be subject to greater scrutiny, but so too would the failure to use that technology when it offered the prospect of healthier children.[168] Medical technology will tend to in-

---

164. It treats the group of possible children they might have as a collective person or class which could be adversely affected by the parent's decision. *See* Parfit, *supra* note 35, at 103; D. PARFIT, *supra* note 58, at 359.

165. *See Harm to the Unconceived, supra* note 27, at 303 (making a slightly different use of this phrase).

166. Many of those who feel uncomfortable with parental failure to utilize the safer alternative may nonetheless reject this utilitarian explanation because they may fear the sacrifice implications of unrestrained utility analysis. The typical illustration of these implications assumes the possibility of saving many persons by sacrificing a healthy person to use his organs. J. FEINBERG, OFFENSE TO OTHERS 80 (1985). Both the average utility approach and the total utility approach have sacrifice implications if accepted in their entirety. M. BAYLES, MORALITY AND POPULATION POLICY 103-12 app.1 (1980). Fortunately, no such trade-offs are associated with the use of utility analysis here since no child is asked to suffer for the sake of the greater happiness of someone else. At any rate, utility analysis is indeed illuminating here, even if we reject its use in other contexts because of its sacrifice implications, because it helps identify and articulate the adverse effect on interests.

167. *See* note 155 (surrogacy), *supra*.

168. Carried to extremes, this would apply to the opportunity for unintelligent or ugly people to acquire better genes for their children either by acquiring donor gametes or by selecting their mates carefully. But the interests of the parents in autonomy and a genetic relationship with their children

crease the number of cases of avoidability by substitution by increasing the infertility treatments that are technologically feasible.[169] Consider, for example, parents with a known high risk of bearing a child with a birth defect (*e.g.*, defective gene carriers, AIDS-infected mothers, mothers who must take dangerous medications). They may now be able to collaborate with egg, sperm or gestation suppliers using artificial insemination, in vitro fertilization, embryo transfer, surrogacy or any combination of these to bear a child at less risk of injury. Except in the case of gestation-only surrogacy, a different, but probably healthier, child will be born.

The significance of treating failure to substitute as a prima facie basis for state action is not that it requires intervention, but that it requires justification. The interests of the children must still be balanced against those of the parents or providers.[170] The strength of the children's interests will depend upon the severity and probability of injury. The strength of the countervailing parental interests will vary with the nature of the specific parental interest invaded and the extent of interference with that interest. Examples of these interests include the inconvenience of contraception or delaying childbirth (as in the case of Parfit's mother), preference for a fertility regime with more risks for the child but a greater chance of conception,[171] avoidance of risk to the rearing mother (as in some uses of a gestation-only surrogate), financial considerations (such as the cost of donor screening or safer technologies), and preference for a child genetically related to the rearing parents (as with childbirth by high-risk parents or surrogates in lieu of adoption).[172] For example, a rearing mother's unique vulnerability to severe

will certainly outweigh the adverse consequences from use of their own genes in these cases. Likewise, it might be used to support parental selection of the sex of their offspring on the theory that one sex is more likely to be happy than the other. Here, the harmful social consequences would outweigh the interests of the children.

169. *See* Shaw, *supra* note 4, at 93-94 (a discussion of duty to use artificial insemination to avoid genetic defects), 85-86 (advocating embryo transfer to gestational surrogate for mothers with conditions which threaten the fetus *in utero*). Medical technology may occasionally relieve the dilemma of avoidability by substitution. For an example of technology making ethical analysis easier, consider the *fertile* couple which decides to hire a surrogate mother because of risks to the mother associated with pregnancy. Assume also that they decide to ask the surrogate to contribute her own egg. Let us also assume that the child could face less risk of emotional damage if carried to term by the rearing mother. If the child conceived in this way could not exist without the surrogate's collaboration, she is not harmed unless nonexistence would be preferable. By contrast, if the doctors or parents transferred the egg from the rearing mother to a surrogate any increase in risk would be objectionable because the same child could have been conceived by the rearing mother.

That irony is unraveled by the technological assumptions underlying the two hypotheticals. If technology permits transfer of the rearing mother's egg to the surrogate (in the gestational surrogacy hypothetical), then it may well permit transfer of the surrogate's egg to the rearing mother (in the genetic surrogacy hypothetical). If it is medically feasible for the rearing mother to obtain the egg or embryo from the surrogate and bear this very child herself at less risk to the child than if the surrogate bears it, then injuries related to surrogate gestation would be avoidable for this child and therefore would constitute harm to her interests.

170. *Procreative Liberty*, *supra* note 26, at 409 n.12, 428; Robertson, *Surrogate Mothers: Not So Novel After All*, HASTINGS CENTER REP., Oct. 1983, at 28-29.

171. This is only a failure to substitute if we assume that different children could be born.

172. *See e.g.*, *In re* Baby M, 109 N.J. 396, 413, 537 A.2d 1227, 1235 (1988) (discussing Mr. Stern's desires in light of the Holocaust's impact on his family); M. BAYLES, REPRODUCTIVE ETHICS 13 (1984) (genetic preference not rational); Kass, *"Making Babies" Revisited*, *supra* note 13, at 44 (deep-seated human desire). Objections to the birth of children whose injuries are avoidable by substitution also raises an old question in a new context. Should infertile prospective parents be denied access to a risky fertility treatment if children are available for adoption? *See* SINGER &

complications from pregnancy may justify the use of a surrogate. Although some or all of these parental interests may suffice to justify parental action in particular cases, the comparative approach to avoidability by substitution dictates that this showing be made.

III. Seeking a Broader Conception of Interests

Avoidability by substitution will sometimes be either unavailable or inappropriate.[173] If these cases are governed solely by the nonexistence test, then regulation of an egg-freezing program which uses the safest available procedures or an AID program using the best screening techniques available cannot be based upon the interests of the intended children even if the procedures are nonetheless associated with significant birth defects. Under traditional interest analysis, the affected children are only adversely affected if their injuries are so catastrophic that the burdens of life outweigh the benefits.

There is serious reason to doubt that the nonexistence test adequately expresses either the interests of these children or our sense of obligation to them. Is there any doubt that the Food and Drug Administration (FDA) would disapprove a fertility drug that produced birth defects similar to those associated with thalidomide even if the alternative for the affected children was nonexistence? Not only is the outcome of this regulatory decision certain, but it would surely be made with both societal and scholarly support. Alternatively, what if we learned that many children born via surrogacy were likely to suffer serious emotional handicaps? We would want lawmakers to consider injuries of this nature when assessing how and whether to regulate surrogacy. Despite our desire, however, doing so would not be legitimate under the nonexistence test as it is ordinarily construed.

If the compelling urge to take these lesser risks into consideration is legitimate, it must find its support in one or more principles that are even broader in application than the class interest analysis supporting regulation in cases of avoidability by substitution. This Part will consider several possible justifications for modifying or replacing the nonexistence test in a way that supports broader regulation on behalf of the afflicted children. The first is a consequentialist, or utilitarian, argument for insisting that the unconceived be offered a minimum quality of life. The next is a deontological, or

WELLS, *supra* note 13, at 44-46 (forcing adoption not likely to be successful; but no right to genetic offspring); Narveson, *Future People and Us*, *supra* note 132, at 49. The adoption option is not strictly analogous to the conception choices previously examined because it does not offer the parents the option of bringing into the world a genetically related child. However, similarities between the two choices exist. In adoption, as with other cases of substitution, needless suffering can be avoided by not conceiving the would-be affected child and by rearing another available child. In fact, the case for intervention is arguably stronger here because the children who will benefit are actually living, unlike Parfit's unconceived healthy child. The comparative perspective to avoidability by substitution requires renewed consideration of this option.

173. There are several situations in which avoidability by substitution might not justify state action. The most obvious is if failure to substitute is rejected as an independent basis for intervention. Even if it is accepted, it will not support intervention if the available substitute arrangement (such as surrogacy, artificial insemination or embryo transfer) would expose the child to equal or greater risks. In still other cases, the argument for substitution may be outweighed by offsetting parental or societal norms, as might occur if surrogacy or adoption were the only way to substitute.

rights, argument for intervention when an unconceived child would be doomed to serious rights violations in the event of conception and birth. Both perspectives inform our basic moral instincts to some extent; both accord with our belief that fertility drugs and surrogacy, to name just two examples, should be subject to regulation if they are associated with serious injuries, even if those injuries do not meet the nonexistence test as it is traditionally construed. Yet their legitimacy depends upon an answer to a riddle that lies at the heart of this issue. How can prevention of a life worth living be in the interests of the children whose lives would be prevented? Both the arguments ultimately require a conclusion that it may be wise to prevent the birth of children who will suffer serious injuries even though their injuries are not so severe that medical treatment should be withheld after birth. Thus, both arguments implicitly assume that different content can be given to a child's interests when the question is asked before conception (when nonexistence is the alternative) rather than after birth (when death is the alternative.) Both assume that a life worth living may not be worth having. This distinction must be defended before arguments for broader intervention can be accepted. The last section of this Part discusses that fundamental distinction and the reasons why it supports giving different content to the would-be child's interests when the choice is between existence and nonexistence than we give to a living child's interests when making the choice between life-extending medical treatment and death.

A. *Beneficence As a Basis for a Minimum Quality of Life Requirement*

Several social philosophers have suggested that our future children have an interest in enjoying a minimum quality of life.[174] This interest might sometimes justify the prohibition of reproductive technologies associated with injuries that are serious, but not so severe as to make life worse than nonexistence. For example, if children with Tay Sachs disease do not enjoy this minimum quality of life, then legislation to prevent their birth would be prima facie legitimate *even if* their lives were preferable to nonexistence.[175] Similarly, a fertility drug associated with serious birth defects could be disapproved by the FDA on behalf of the potentially affected children. Such a conclusion would not be legitimate using the traditional nonexistence test.

Persons who undertake to have a child, says philosopher Michael

174. Bayles, *supra* note 27, at 300-02; Morreim, *The Concept of Harm Reconsidered: A Different Look at Wrongful Life*, 7 LAW PHIL. 3, 24-25 (1988); Steinbock, *The Logical Case for Wrongful Life*, HASTINGS CENTER REP., April 1986, at 15; *see* Narveson, *supra* note 65, at 64, 68, 79; Feinberg, *Is There a Right to be Born*, in UNDERSTANDING MORAL PHILOSOPHY 215-19 (J. Rachels ed. 1976); Tiefel, *supra* note 13, at 238. Feinberg has since reformulated his test in conformity with the nonexistence comparison. *The Counterfactual Element*, *supra* note 29, at 158-59. Michael Bayles contends that state intervention in cases of "seriously handicapped or genetically defective" children can be justified even if their lives would be worth living in order to prevent the birth of children who would not be capable of achieving the minimum quality of life which the state ought to insure for all residents. Bayles, *supra* note 27, at 300-02; *see also* M. BAYLES, *supra* note 172 ("The principle of avoiding risk to the unborn is that it is prima facie wrong to take a substantial risk of a significant defect or handicap to an unborn child."). In the latter piece, Bayles also argues that the child's lack of an "equal opportunity with others in society" is a basis for supporting this principle. *Id.*

175. Bayles, *supra* note 27, at 302. Bayles also notes that other principles have to be considered before determining whether a particular law is warranted. *Id.*

Bayles, have "an obligation to do a reasonably decent job of it."[176] He draws an analogy between this duty and the legal duties arising out of rescue.[177] At common law, rescuers with no duty to rescue in the first place have a duty to act carefully once they undertake a rescue.[178] Generally, that duty entails not making the victim's situation worse, but a few cases also impose a duty to exercise due care to improve the victim's situation even if the rescuer has not made the situation worse.[179] By analogy, Bayles suggests, parents have no duty to conceive, but they have a duty to do so carefully once they undertake to conceive. In his view, this obligation extends beyond the avoidance of harm to the conferring of benefits. Thus, he postulates a parental duty to assure children of a *minimally good quality of life*, not just a life that is better than nonexistence.

It is easy to share Bayles' desire for greater protection of would-be affected children than is provided by traditional harm analysis. Indeed, his

---

176. *Id.* at 303 (but childbearing itself is nonobligatory).

177. His rescue analogy is only partially apt and obscures to some extent the source of the parental obligation of beneficence. Bayles relies upon several unusual cases imposing liability without express reliance upon a finding that the victim was made worse off by the rescuer's negligence. Bayles, *supra* note 27, at 303; *see* PROSSER AND KEETON ON TORTS § 56, at 381-82, 445 (5th ed. 1984). In these cases, landlords making gratuitous repairs were held liable for injuries resulting from their failure to make the repairs carefully. By analogy, parents and others who may attempt to benefit the unconceived by conceiving them might shoulder the additional moral and legal duty to do a "decent job" to advance their child's interests, even if the child is not harmed by conception.

But these cases are not as expansive as the use to which he puts them. They are much more orthodox than they first appear because detrimental reliance is generally present. In Olsen v. Mading, 45 Ariz. 423, 428-29, 45 P.2d 23, 25 (1935), the landlord had promised to repair the defective condition and had also reassured the injured tenant that the repair would "last forever". The tenant's detrimental reliance upon the landlord's promise and reassurance would suffice under current law to show that the tenant has been made worse off and to impose liability for failure to use reasonable care in the undertaking. PROSSER AND KEETON ON TORTS § 56 at 380 (reliance upon a gratuitous promise to help); *see also* RESTATEMENT (SECOND) OF TORTS § 362 (landlords) and § 324 (rescuers). At any rate, these cases represent a distinctly minority view. More importantly, such a duty would extend only to protecting the beneficiary against threatened set-backs, not to advancing their interests in a broader manner. In each of these cases, the landlord's liability was imposed because doing a decent repair would have avoided the set-back which ultimately befell the plaintiffs.

178. Traditional tort law imposes a duty to perform both obligatory and superogatory acts carefully. PROSSER AND KEETON ON TORTS § 56, at 378-82 (5th ed. 1984). Because parental conception and delivery of the child easily qualifies as misfeasance, rather than nonfeasance, it is not necessary to rely upon the law of rescue to impose upon the parents a duty of reasonable care. However, liability normally arises only where the plaintiff has been made worse off by carelessness. *See id.* at § 30, at 165 (damages an essential element), § 41 ("but for" causation), § 56, at 381 (cases requiring that rescuer make situation worse); RESTATEMENT (SECOND) OF TORTS § 7 comment b (harm defined) (1965), § 323 (gratuitous undertakings) and comment c (termination of services), § 903 (compensatory damages) (1979), *but see* § 323 caveat and comment e (1965). When tortfeasors negligently make things worse by increasing the risk, inducing detrimental reliance or depriving the victim of other aid, they may be liable for the damages they have caused. PROSSER AND KEETON ON TORTS § 56 at 380-82, 445 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 362 (negligent repair by lessor) (1965), § 323 (gratuitous undertakings) and comment c (termination) (1965). Detrimental reliance on a promise to benefit might suffice. PROSSER AND KEETON ON TORTS § 56 at 379-80; RESTATEMENT (SECOND) OF TORTS § 323 caveat (1975) (taking no position). Under orthodox caselaw, liability will not be imposed unless the victim is made worse off than he would have been but for the attempted rescue. Put differently, rescuers have a duty not to harm or set-back the interests of the victim, but not a duty to leave him in a better position than he would have enjoyed had they done nothing at all. Thus, harm—not beneficence—supports the tort. But Bayles is looking for a broader obligation, a duty to benefit the child, not merely a duty to avoid harming her. In this way, he hopes to justify intervention more freely than if parents had only a duty not to harm.

179. Bayles, *supra* note 27, at 303 (citing several cases from Prosser's hornbook).

belief that parents and the state have positive as well as negative obligations to these children is entirely appropriate.[180] But if the child's interests are calculated by weighing the benefits of its life against the burdens, then parents facing unavoidable[181] birth defects have *no opportunities for further beneficence* to the affected children. Ultimately, failure to conceive will not advance the interests of the would-be injured children. So far as we know, they have no utility in nonexistence per se. In conceiving these children despite the risks, the parents may or may not be doing a "decent" job of it, but they are certainly doing the *best* job that they can. So long as the child's life is worth living, her conception appears to be beneficial. And even if the birth itself is not viewed as a benefit to the child, the living child does not appear to be harmed if her life offers more benefit than burden. Conceiving these children, therefore, does not appear to violate a duty of beneficence to them so long as our utility assessments are based on the net utility of the lives of the individual resulting children.[182] Under traditional person-affecting utility analysis, no injury or wrong exists if no adversely affected individual can be identified.

Bayles attempts to cure this identity problem by suggesting the existence of a duty of beneficence toward the *class* of affected persons who, if born, would have worse lives than society aspires for them. A similar class perspective provides the basis for identifying the interests of future children in cases of avoidability by substitution. But class-interest analysis differs here because of the absence of a safer fertility treatment. Where no safer method is available, the use of a reproductive procedure likely to result in the conception of a child whose life is worth living has a more ambiguous impact on class interests.[183] While, on the one hand, the birth of each handicapped child increases the *total* good or happiness in society, each such birth also lowers the *average* happiness of the society.[184]

Although Bayles himself does not rely on traditonal utility analysis to support his idea that people ought not undertake tasks they cannot do satisfactorily, the negative impact of these births on average utility arguably supports his conclusion. The use of average utility calculations has obvious

---

180. Michael Bayles postulates an obligation of beneficence to support a duty to ensure that children have a minimally good life. By relying on a duty of beneficence, Bayles attempts to avoid the reliance placed by the harm principle on comparisons to nonexistence. Under his view, the greater social good resulting from such legislation is a prima facie basis for limiting the liberty of the parents particularly the liberty to conceive genetically damaged children. Bayles, however, does not describe his position as utilitarian.

181. Unavoidability may have many meanings. *See* text *infra* at notes 134-36.

182. At the same time, however, prohibition would harm the interests of parents seeking to have these children. Some of these parents will have no alternative ways to have other children. And even those who do have alternatives will suffer some restriction on their liberty from any prohibition. However, if these children were likely to become wards of the state, then a societal economic interest in preventing these births would exist. For a discussion of the strength of the state's interest in avoiding this burden, *see* Robertson, *New Reproduction, supra* note 9. At any rate, the justification for intervention must be found in harm to the interests of persons *other than the affected children.*

183. *See* M. BAYLES, *supra* note 166, at 103-12 app.I.

184. Conceivably, the sick children would take places otherwise filled by healthy ones. For example, parents could abort fetuses detected to have serious, but not harmful, defects and then conceive a healthy child. Or parents who face a temporary risk of birth defect could wait until the condition (say, an infection) has passed. These cases raise special problems that were the subject of Part II, *supra.*

appeal as a criterion by which to compare societies.[185] All other things being equal, most people would prefer to live in the society with the higher average level of well-being or happiness,[186] just as they might prefer to live in a society with higher minimum quality of life. For this reason, contractarian philosophers might well join with those utilitarians who use average utility as a criterion for public policy decisionmaking.[187]

Furthermore, an average utility approach, like a minimum quality of life threshold, can be defended as necessary to prevent "an ever downward slide of the happiness of society."[188] Without it, succeeding generations of parents would be free to conceive more and more children through risky fertility techniques or arrangements like surrogacy, even if the result were a less and less happy society. The result would be a more populous society than would otherwise exist, but also one with more suffering than the generations which preceded it.

This argument is vulnerable, however, to the criticism that it elevates abstractions over the circumstances of actual people. An illustration used by another social philosopher, Jan Narveson, pointedly demonstrates this problem. Imagine a very happy society.[189] Under the average utility approach, this society becomes less desirable each time that a happy child is born who is slightly less happy than the others. As Narveson states, "normally one would think that if you add something good to a good thing, without altering what was already there, then the result would be even better."[190]

Ultimately, average utility analysis assumes that a population *without* the disabled children is better or happier than one with them.[191] An equally persuasive argument can be made that the society *with* the additional happy children is happier or better. By hypothesis, each of these children has a happy life. Their net utility in life supplements the happiness of the other members of society. As long as it does not reduce the quality of life of the healthy people, the conception of children who are unavoidably less happy decreases no one's quality of life. Only average social utility would suffer. The only conceivable social benefit that would result from barring conception would be the pleasure of those who are living that results from a society

---

185. *See* M. BAYLES, *supra* note 166, at 105-07 (average utility preferable to total utility).

186. Narveson, *supra* note 65, at 78.

187. *Id.* at 77-78.

188. M. BAYLES, *supra* note 166, at 100. Written four years after his article *Harm to the Unconceived*, this book advocates a duty not to make it unlikely that future generations will have an equivalent quality of life. *Id.* at 3. Bayles rejects a minimum quality of life requirement in favor of the equivalency principle as a matter of population policy, but it is unclear how this position would affect his analysis of individual reproductive decisions as he leaves some doubt about how the principle would apply to individuals and he continues to limit a rescuer's duty to the protection of a minimum quality of life. *Id.* at 20-22 (equivalency principle), 23 (application to individuals) and 72-73 (rescue).

189. Narveson, *supra* note 65, at 74.

190. *Id.* A similar conclusion is reached by Peter Singer, *A Utilitarian Population Policy*, in ETHICS AND POPULATION 81, 84 (1976).

191. A similar mathematical idiosyncracy occurs whenever the death of a person with low capacity to enjoy life is at stake, as in many decisions about whether to withhold treatment to the seriously ill. The danger of using average utility calculations to make these decisions is self-evident. However, these cases may perhaps be distinguished because a living person may be harmed by withholding treatment while unconceived persons are not harmed by preventing their birth. For further discussion of the distinction between nonexistence and death, see Section C *infra*.

with fewer below-average people. That benefit has doubtful moral significance at best.

However, a minimum quality of life principle avoids this objection because it is more narrowly conceived than straightforward average utility analysis would dictate. Bearing a child whose life is merely expected to be below average in quality would not constitute a failure of beneficence. That would occur only if the impairment deprived the child of a life at or above the minimum.[192] Arguably, these children will not make society happier or better. Their lives may be worse than nonexistence, even if preferable to death. But if these children would, in fact, have a life worth living, then some novel method of calculating their interests is necessary in order to reach the conclusion that nonexistence would be preferable.

As John Robertson points out, a conclusion that these children are better off unborn suggests that after their birth they "would be better off dead than alive."[193] So construed, it appears to justify nontreatment and even mercy killing of persons whose lives do not meet this minimum threshold, as well as mandatory amniocentesis and abortion of fetuses with major defects. But his fears are only warranted if interest analysis for the unconceived is the same as interest analysis for the living. It is premature, however, to assume that the interests of the unconceived must mirror the interests of the living. Quite possibly, the regulation of reproductive technologies to protect future children is not fatally inconsistent with our conclusions about living sufferers, but instead reflects a legitimate difference between our assessment of children's interests when the test is applied *before conception* and our assessment when it is applied *afterward*. Perhaps never existing is preferable to a life with serious birth defects, even though life with those defects is preferable to death. If so, the state may have an interest in preventing those injuries even though the children will have lives that are worth living. That possibility is discussed in Section C, below, following consideration of rights-based criticisms of the nonexistence test in Section B.

B. *Segregating Invaded Interests*

The nonexistence test may also be criticized from a rights perspective.[194] As traditionally construed, the nonexistence comparison requires a finding that the burdens of life exceeds the benefits. Yet, many moral and legal requirements are intended to protect distinct individual rights and interests from invasion, regardless of the impact of the offending conduct on

---

192. It is probably fair to view this as a modified form of average utility analysis, especially if the threshold is tied to society's standard of living. Bayles' equivalency principle seems to dictate that the level rise with society's standard of living. So too does the method by which the level is chosen.

193. Robertson, *In Vitro Conception and Harm to the Unborn*, HASTINGS CENTER REP., Oct. 1978, at 13, 14.

194. This Section was inspired by the population ethics of James Woodward. Woodward, *The Non-Identity Problem*, 96 ETHICS 804 (1986); Woodward, *Reply to Parfit*, 97 ETHICS 800 (1986). For further related discussion see also, RESTATEMENT (SECOND) OF TORTS § 920 (1979) (special benefits rule); *The Counterfactual Element*, *supra* note 29, at 153 (using foreseeability analysis to avoid some offsets); Morreim, *supra* note 174, at 24-25, 32 (harmful condition violates child's rights regardless of net value of life). I principally discuss "interests" rather than "rights" because the label "rights" presupposes ethical and legal conclusions about the relationship of the children's interests to those of others. This paper is limited to examination of the interests of the unconceived.

the victim's overall well-being.[195] From a rights perspective, net interest analysis not only requires the questionable comparison of nonfungible benefits and burdens,[196] but it also improperly assumes that the state may only act to prevent or redress harms to specific interests when the victim is made worse off overall. This criticism of overall individual interest analysis is quite different from the previous objections. Whereas both the comparative approach to avoidability by substitution and the utilitarian case for a minimum quality of life standard call for broader and more sophisticated conceptions of beneficence and utility in order to resolve the identity problem, the rights perspective instead emphasizes an individual's distinct rights or interests and questions the monopoly of aggregate consequential considerations on moral assessment. From this view, it may be both wrong and harmful to violate someone's rights, even if the conduct benefits that person on balance.

Reproductive decisionmaking which dooms the resulting children to inevitable rights violations may be wrongful from this rights perspective, even if the lives of the resulting children would be worthwhile overall. For example, Paul Ramsey viewed experimental reproductive technology as violative of the child's right to informed consent.[197] Others view serious birth defects as violative of a child's right to some minimum quality of life.[198] The resulting child's right to support may also be threatened if his parents lack the assets or commitment necessary to provide proper care in the event of a complication commonly associated with the infertility treatment they need.[199] Still other rights may be ascribed to the unconceived whose violation would warrant intervention. If we afford rights such as these to the unconceived, then we must also consider whether it is wrong to conceive them when we know or suspect that their rights will not be fulfilled.

When the rights of *living* persons are violated, we readily conclude that the rights violations are not excused merely because they somehow improve the victim's overall condition. James Woodward uses the example of an airline that refuses to sell a ticket to a black woman because it racially discriminates.[200] The airline's conduct wrongs her even if the flight that she intended to board later crashes, leaving the would-be passenger better off overall due to the discrimination. Woodward suggests that something more is involved in this conclusion than the unforeseeability of the benefit or even the airline's evil intent.[201] The discrimination is wrong, he contends, because it is unfair and stigmatizing, regardless of its impact on the passenger's other interests.[202] It would be wrong even if it were well-intentioned. In some cases, he says, "people have relatively specific interests . . . that are not simply reducible to some general interest in maintaining a high level of well-

195. Woodward, *Reply to Parfit*, *supra* note 194, at 803.

196. *Id.* at 804 n.6 (questioning whether offsetting makes sense).

197. Ramsey, *Shall We Reproduce? I. The Medical Ethics of In Vitro Fertilization*, 220 J.A.M.A. 1346, 1347-49. *See* text *infra* at notes 249-55, 280-83 for discussion of this idea.

198. *See* Steinbock, *supra* note 49, at 15; Morreim, *supra* note 174, at 24-25, 32.

199. *See* Woodward, *The Non-Identity Problem*, *supra* note 194, at 815.

200. *Id.* at 810-11.

201. *Id.* at 802-03.

202. *Id.* at 811.

being."[203] Focusing in this way on the impairment of individual interests implies that persons can be wronged even if they are not worse off on balance for the offending conduct, at least not in any objective sense. The increase in overall well-being is not always an adequate excuse or justification.[204]

A rights perspective has the potential to improve our understanding of the interests of the unconceived. For example, it provides an unexpected justification for partial recoveries in wrongful life actions. But the insights are less conclusive when the rights violation can only be prevented by precluding the child's life itself. In those cases, the rights perspective encounters the same identity problems that complicate utility analysis. This section will first examine existing legal precedent for ignoring the beneficial effects of rights violations on living persons.[205] It will then explore the usefulness of a rights orientation for understanding the interests of the unconceived.

1. *The Special Benefits Rule*

The law already accords some weight to a rights perspective in the context of living victims. The tort "special benefit" rule limits a tortfeasor's ability to reduce the damages assessed against him to account for offsetting benefits conferred upon the plaintiff by the tortious conduct. Only benefits to the specific interests harmed by the tortious conduct may be used to offset injuries. The Second Restatement of Torts[206] explains that offset is inappropriate when the tortfeasor confers a benefit on a *different* interest.[207] For example, the recovery of a person seeking compensation for defamation is offset by any financial benefits resulting from the defamation (such as lucrative book or movie rights) only to the extent that she also seeks recovery for financial loss.[208] Similarly, a taxicab driver whose negligent driving causes his rider to suffer a disabling leg injury, but saves him from boarding a flight which later crashes killing all its passengers, may not reduce the passenger's recovery for his broken leg to account for his escape from death.[209] While the treatment of the taxicab case may also be explained as a matter of proximate causation,[210] the defamation hypothetical squarely illustrates how the

---

203. *Id.* at 809.

204. *Id.*

205. Woodward makes it a condition that such a theory of rights applies to same person cases as well as nonexistence comparisons. Woodward, *Reply to Parfit, supra* note 194, at 801.

206. "When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent equitable." RESTATEMENT (SECOND) OF TORTS § 920 (1979).

207. "Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited." *Id.* Comment b.

208. *Id.* comment b and illustration 4.

209. *See* RESTATEMENT (SECOND) OF TORTS § 920, illustration 8 (1979); *The Counterfactual Element, supra* note 29, at 150. But he might be able to avail himself of this offset if the passenger sought to recover for financial losses occasioned by his failure to arrive at his destination on time. RESTATEMENT (SECOND) OF TORTS § 920 illustrations 5 and 8 (1979).

210. *The Counterfactual Element, supra* note 29, at 153 (foreseeability test); *see* RESTATEMENT (SECOND) OF TORTS § 920 comment d (1979); Woodward, *Reply to Parfit, supra* note 194, at 802 (acknowledging relevance of foreseeability). Here, the tortfeasor is denied offset for fortuitous benefits.

special benefits rule restricts the aggregation of effects on distinct interests.

In fairness to both parties, the special benefits rule attempts to avoid windfalls to plaintiffs while at the same time protecting them from being forced to accept a trade of their interests for unwanted "benefits" conferred by the tortfeasor.[211] As expressed in the Restatement, tort law mediates this conflict by permitting offset only within the different categories of damage. Thus, a tort that reduces pain and suffering, on balance, may not be the basis for an award of pain and suffering damages. Likewise, an action yielding more financial benefits than it causes may not form the basis for an award of damages for financial loss. Because the type of benefit conferred in these cases closely resembles the type of harm suffered, the goal of avoiding forced trades is only slightly impinged, whereas the failure to aggregate would seriously risk a windfall to the plaintiff.

By contrast, offsetting financial losses or increased medical expenses to account for a reduction in future pain and suffering as a result of the tort could leave plaintiffs physically comfortable but impoverished. For example, unconsented surgery could cure a man of excruciating pain, but do so by cutting nerves in a way that reduces his coordination and thereby his ability to earn a living. Wrongful life cases also present this dilemma. A child may benefit from an act that gives him life, but suffer for lack of sufficient resources to obtain necessary medical care. Unfortunately, the benefits conferred cannot be reexchanged for the lost or missing assets. Prohibiting offset prevents this forced trade. At the same time, an award of damages will enhance deterrence by forcing the tortfeasor, rather than the victim or society, to absorb the financial costs engendered.[212] In addition, it may reduce resort to private retribution to redress these rights violations.[213]

The special benefits rule is significant because it signals a willingness to permit utilitarian "windfalls" to victims in a compensatory system of justice. The rule limits the extent to which the law is strictly consequentialist in nature by circumscribing the tortfeasor's ability to force a benefit on another person by violating his rights.[214] To that extent, it supports the use of rights

---

211. RESTATEMENT (SECOND) OF TORTS § 920 comment f (1979). The Restatement's Illustration 11 is illuminating. A landowner whose garden is wrongfully destroyed by a neighbor who builds a more valuable garage in its place may recover the amount necessary to remove the garage and restore the garden.

212. A similar analysis also explains the refusal to offset in cases of conduct that benefits the victim financially while causing great suffering, as where a defamation victim is emotionally broken but financially enriched. This case is less powerful because the court can only provide monetary relief.

213. *See* RESTATEMENT (SECOND) OF TORTS § 901 comment c (1979).

214. RESTATEMENT (SECOND) OF TORTS § 920 comment f (1979). However, the special benefit rule, at least as encapsulated in the Second Restatement, does not completely capture the significance of the rights perspective. Because the tort system is principally concerned with compensatory relief, the special benefits rule is generally expressed as a distinction between *types of damages* (such as pain and suffering versus pecuniary loss) resulting from the invasion of a single interest (such as freedom from injurious falsehood) rather than a distinction among the *various kinds of interests* that tortious conduct may affect. For example, the violation of one nonpecuniary interest (such as the right to make one's own medical treatment decisions) may result in the advancement of another nonpecuniary interest (such as the interest in good health). Yet a narrowly construed special benefits rule would not support judicial relief. In this respect, the focus of a rights approach on separate rights and interests is broader than the special benefits rule as illustrated by the Restatement.

The case of a patient who will not consent to a relatively safe, but important surgery which, in

analysis in appropriate cases.

Unconsented surgeries illustrate the point well. Regardless of whether compensatory relief would be appropriate in a given case, most observers would agree that a patient is wronged if surgery is performed against his will.[215] Most would probably agree as well that state action to prohibit such actions, if feasible, would be justified even if the patient were to suffer neither net financial loss nor an increase in pain and suffering.[216] The common law of battery reflects this rights perspective in important respects. The surgeon remains liable for battery[217] and because this is an intentional tort, the law allows the recovery of nominal damages.[218] Some courts also loosen proof requirements by permitting substantial general damages[219] and punitive damages[220] despite the absence of proof of actual harm. Furthermore, injunctive relief may be available if the initial battery is foreseeable or if repeti-

---

the eyes of all reasonable observers, is expected to have overall benefits outweighing its detrimental effects, provides a useful example of this point if we assume that he is far more likely to die without the surgery than to suffer complications or earlier death from it. Woodward, *Reply to Parfit, supra* note 194, at 803-04; *see* RESTATEMENT (SECOND) OF TORTS § 13 comment c (1965), § 892A illustration 2 (1979) (patient consents to exploratory surgery, but not to any further therapeutic surgery); Perry v. Hodgson, 168 Ga. 678, 148 S.E. 659, *conformed to,* 40 Ga. App. 117, 149 S.E. 91 (1929) (consent explicitly limited). Under the special benefits rule, any decrease in future pain and suffering resulting from unconsented performance of the surgery may be shown in mitigation of damages for pain and suffering caused by the surgery. RESTATEMENT (SECOND) OF TORTS § 920 illustrations 1 and 2 (1979); *see id.* § 905 illustrations 1 and 2. Presumably, any lost earnings or medical expenses caused by the surgery could be offset by showing that the surgery had also improved his future earning capacity or reduced his future medical costs. *See id.* comment b. If both types of damages are offset by greater benefits, then the patient would not recover any compensatory damages unless the jury awards compensatory damages for humiliation or other emotional distress. *See Id.* § 905 comments c and d (1979). Even then, he might not recover if these damages are subject to offset to reflect improvements in the patient's physical pain. However, there is no conceptual reason why humiliation damages could not be segregated from pain damages. While segregation may strike many courts as presenting too great a risk of windfall, there is some authority for a recovery. *See* Mohr v. Williams, 95 Minn. 261, 271, 104 N.W. 12, 16 (1905), *overruled on different grounds,* Genzel v. Halvorson, 248 Minn. 527, 80 N.W.2d 854, 859 (1957); Troppi v. Scarf, 31 Mich. App. 240, 255, 187 N.W.2d 511, 518, *leave to appeal denied,* 385 Mich. 753 (1971). McCandless v. State, 3 A.D.2d 600, 162 N.Y.S.2d 570 (1957), *aff'd mem.,* 4 N.Y.2d 797, 149 N.E.2d 530, 173 N.Y.S.2d 30 (1958) ($2,000 recovery allowed for patient in state mental hospital subjected to abortion without consent of patient or parents, despite resulting improvement of her mental health and avoidance of greater pain associated with childbirth). *See also* Boone v. Mullendore, 416 So. 2d 718 (Ala. 1982) (did not offset wrongful conception damages due to pain and mental anguish of pregnancy and loss of consortium to reflect the joys of parenting); *accord* Weintraub v. Brown, 98 A.D.2d 339, 470 N.Y.S.2d 634 (1983); Hartke v. McKelway, 707 F.2d 1544, 1557 n.16, *cert. denied,* 464 U.S. 983 (1983); Bushman v. Burns Medical Center, 83 Mich. App. 453, 268 N.W.2d 683, 687-88 (1978); *cf.* RESTATEMENT (SECOND) OF TORTS § 920 comment c and illustration 7 (1979) (benefits common to the community not used to offset by pecuniary losses). The key question is whether offset is necessary on the facts of the case to avoid unjust enrichment.

A number of courts deciding parental wrongful birth claims have reassessed the limits of the special benefit rule in several respects. *See* Hartke v. McKelway, 707 F.2d 1544, 1556 n.16, *cert. denied,* 464 U.S. 983 (1983).

215. Woodward, *Reply to Parfit, supra* note 194, at 804; *see* Woodward, *Paternalism and Justification,* 8 CANADIAN J. OF PHIL. supp. 67, 89 (1982).

216. For example, professional disciplinary proceedings might be appropriate.

217. RESTATEMENT (SECOND) OF TORTS § 13 comment c (1965).

218. *Id.* at § 907 comment a (1979); PROSSER AND KEETON ON TORTS § 9, at 40-41 (battery), § 18, at 119 (surgery) (5th ed. 1984). Punitive damages may also be awarded. RESTATEMENT (SECOND) OF TORTS at § 908 comment c (1979).

219. *See* McCandless v. State, *supra* note 214; D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 7.3, at 528-31 (1979); PROSSER AND KEETON ON TORTS § 2, at 14.

220. RESTATEMENT (SECOND) OF TORTS § 908 comment c (1979); PROSSER AND KEETON ON TORTS, § 2, at 15; D. DOBBS, *supra* note 219, § 3.9, at 208-10.

tion is likely.[221] The invasion of rights is, after all, "a tort in itself."[222] Ultimately, the patient's interest in autonomy is entitled to protection and redress even if the surgery is beneficial.[223] All told, the law clearly accords some respect to the rights perspective.

The case of unconsented surgery illustrates the intuitive appeal of an analysis capable of segregating interests for purposes of ascertaining harms that legitimate government intervention. Such a segregation of affected rights and interests forces more discrete identification of the particular consequences of challenged conduct and permits a conscious determination of whether the negatively affected interests should be insulated from aggregation. In these cases we must consider, for example, whether to elevate the patient's interest in autonomy, the airline passenger's interest in equal treatment or the libel victim's interests in her reputation over their interests in good health, financial security and even life itself. In the context of living persons, at least, a rights perspective provides illuminating insights.

2. *Applying the Rights Perspective to the Unconceived—Wrongful Life Actions Reconsidered*

In the context of the unconceived, separate interest analysis could conceivably provide a reason for parents not to conceive a child even if her life would, on balance, be worthwhile. Population ethicist James Woodward offers possible examples. If for some reason, such as substance abuse or mental illness, potential parents would be unable to fulfill their childrearing obligations, conception under these circumstances would doom the child to a violation of her right to support even if she would nonetheless have a life worth living.[224] Similarly, if we imagine that a couple who live in the wil-

221. *See* Tune v. Walter Reed Army Medical Hosp., 602 F. Supp. 1452, 1456 (D.D.C. 1985); Bartling v. Superior Ct., 163 Cal. App. 3d 186, 197 n.8, 209 Cal. Rptr. 220, 226 n.8 (1984); D. DOBBS, *supra* note 219, § 5.6, at 348-50, § 7.4, at 532-33.

222. PROSSER AND KEETON ON TORTS § 7, at 30 (5th ed. 1984) (discussing trespass).

223. In some cases, this analysis can be reconciled with a net interest approach. For example, some patients may, for religious reasons, prefer a likely death to surgery. Other patients may have incurable conditions that render continued life unworthwhile. In these cases, no separation of interests is necessary in order to recognize the subjective harmfulness of unconsented surgery. The doctrine merely insures the protection of *subjective* preferences against *objective* offset in cases where the two perspectives are most likely to differ. In other cases, however, no such reconciliation is possible. For example, it seems reasonable to assume that many patients who are cured by unconsented surgery will subjectively prefer this outcome to their prior condition, even if they were unwilling to take the risk of surgery. To conclude that these patients have been harmed overall requires one of two assumptions. Either the patient's independent interest in autonomy should not be subject to offset by the arguably greater net benefits from the surgery or else his interest in autonomy always has greater utility to him than the actual benefits from the surgery—a presumption which, if irrebuttable, has the same effect as precluding offset. Either way, the conclusion that unconsented surgery is wrong and ought to provide a basis for state intervention relies on nonutilitarian underpinnings. A rule utilitarian might justify this conclusion on the basis that these interests in autonomy will outweigh the benefits in most cases. But I believe that our sentiments would be the same even if this assumption could not be substantiated. Although the law governing civil and criminal sanctions for battery does not rely upon a showing of net detriment to the victim, it may serve utilitarian ends in other respects. For example, it may serve to keep the peace by reducing resort to self-help redress. And it may deter future rights violations that would in fact cause net harm to the victim. But I do not believe that the remedies would change significantly (except perhaps for punitive damages) if the redress did not serve these ends.

224. Woodward, *Reply to Parfit*, *supra* note 194, at 815; Parfit, *Comments*, 96 ETHICS 832, 860 n.55 (1986). Woodward uses this example to discuss the propriety of the mother's choice, not state

derness know that they will die from disease within a few years, then having children now might doom the children to death from starvation, exposure or disease upon the death of their parents. In such a scenario, it may be wrong to have these children even if their lives overall would be happy.[225] The interests of the affected children in proper care, Woodward suggests, are arguably independent of the other benefits they receive from birth and life itself. Parental knowledge that they will violate a duty to fulfill their obligation to provide proper support, under this view, is a reason for not having the children in the first place.

If this analysis is correct, parents should not utilize reproductive technology to bear a child whose life would be worthwhile if the technology is likely to cause injuries for which they could not provide adequate treatment and care. Even though the child might enjoy a net benefit from life, her independent interest in adequate support during dependency would be impaired if no one able to support her was willing to adopt her. Under these circumstances, either the child would suffer the violation of a right to beneficence during dependency or, alternatively, third-parties would be obliged to assume financial or childrearing responsibility.[226] Either wrong might warrant prohibition.

Surprisingly, segregating a child's interest in adequate treatment and care from other benefits of life finds implicit support in the holdings—if not the rationales—of cases that have permitted partial recoveries by handicapped children in wrongful life cases.[227] These cases signal an unwillingness to offset the benefits of being alive against the risk posed to the child's interest in support.

In the wrongful life cases, children born with birth defects have sued health care providers whose negligence allegedly resulted in their birth. For example, one physician failed to recognize that his pregnant patient had the German measles, thereby depriving her of the opportunity to abort as a precaution against the birth of a handicapped child.[228] In another case, a physician failed to diagnose the hereditary deafness of his patient's first child, thereby depriving the mother of the opportunity to prevent further births.[229] As a result, she had another deaf child. In these cases, the children do not allege that their provider caused the birth defects. Instead, they allege that

intervention. John Robertson also cites Onora O'Neill for support of the proposition that parents who lack capacity to rear should not beget. Robertson, *Procreative Liberty*, *supra* note 26, at 411-12. In the right set of facts, it might be possible to view a parent's continued, say, substance abuse as causing *avoidable* injury which, therefore, warrants intervention to force rehabilitation. But if the impediment to proper child rearing is irreversible as a practical matter, or its cure also threatens the child's interests, (for example, if the option were foster care) then the wrongfulness of conception under the circumstances remains an important issue. At least one court has denied a wrongful life claim under these circumstances. Foy v. Greenblott, 141 Cal. App. 3d 1, 190 Cal. Rptr. 84 (1983) (child of mentally ill mother sued institution where mother resided).

225. Woodward, *The Non-Identity Problem*, *supra* note 194, at 816-17.

226. Imposition of this burden would constitute an independent basis for intervention with parental liberty, even if the child's interests were not adversely affected. Robertson, *New Reproduction*, *supra* note 9, at 989-91.

227. Only the California Supreme Court has recognized the relevance of the special benefits rule. Turpin v. Sortini, 31 Cal. 3d 220, 238-39, 182 Cal. Rptr. 337, 348-49, 643 P.2d 954, 965-66 (1982).

228. Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984).

229. Turpin v. Sortini, *supra* note 227.

provider negligence resulted in their birth and that their birth is itself an injury due to the severity of their birth defects.

Because these children could not have been born without these defects, both courts and commentators[230] have recognized that their lives must be compared to nonexistence to determine whether they were harmed by birth.[231] As discussed in Part I, most courts refuse to permit any recovery by these children because of problems associated with this comparison.[232] However, courts in three jurisdictions[233] do permit the children a cause of action.[234] All have limited recovery to extraordinary medical or childcare expenses associated with the injury. These holdings have been criticized as internally inconsistent and confused on two counts. First, they allow recovery of extraordinary medical expenses, but not damages for pain and suffering.[235] Second, they allow recovery of medical expenses by children whose fates were clearly not worse than nonexistence.[236] For example, one child had Down's Syndrome[237] and another congenital deafness.[238] In fact, the courts permitting these claims have conceded that damages are not based upon a finding that the affected child's life was worse than nonexistence.[239]

Courts permitting the children to recover extraordinary expenses have steadfastly refused to award general damages. They have refused general damages for much the same reasons that other courts deny the action altogether,[240] especially the difficulty of determining whether a person's life is

---

230. *See* text at notes 49-66 *supra*.

231. *E.g.*, Robertson, *New Reproduction*, *supra* note 9, at 987-88 (regarding reproductive technology); Singer & Wells, *supra* note 13, at 59, 64; Tedeschi, *supra* note 49, at 529; Bell & Loewer, *supra* note 25, at 141.

232. *See* text *supra*, at notes 46-130.

233. Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982); Curlender v. Bio-Science Laboratories, 106 Cal. App. 3d 811, 165 Cal. Rptr. 477 (1980) (overruled as to general damages by *Turpin*); Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984); Harbeson v. Parke-Davis, Inc., 98 Wash. 2d 460, 656 P.2d 483 (1983).

234. In Illinois, however, the Supreme Court reversed an intermediate court's ruling allowing a cause of action. Siemieniec v. Lutheran General Hosp., 134 Ill. App. 3d 823, 89 Ill Dec. 484, 480 N.E.2d 1227 (1985), *rev'd*, 117 Ill. 2d 230, 111 Ill. Dec. 302, 512 N.E.2d 691 (1987). The Colorado Supreme Court has done the same. Continental Casualty Co. v. Empire Casualty Co., 713 P.2d 384, 394 (Colo. App. 1985), *aff'd on other grounds*, 764 P.2d 191 (Colo. 1988) *overruled*, Liniger v. Eisenbaum, 764 P.2d 1202, 1210 n.10 (Colo. 1988).

235. *E.g.*, Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755, 771 (1984) (Handler, J., concurring in part and dissenting in part); Robertson, *New Reproduction*, *supra* note 9, at 988 n.169; Bell & Loewer, *supra* note 25, at 136-41 (1985); Furrow, *Diminished Lives and Malpractice: Courts Stalled in Transition*, 10 LAW, MED. & HEALTHCARE 100, 103 (1982).

236. *E.g.*, Turpin v. Sortini, 31 Cal. 3d 220, 240, 182 Cal. Rptr. 337, 349, 643 P.2d 954, 966 (1982) (Mosk, J., dissenting); Siemieniec v. Lutheran General Hosp., 117 Ill. 2d 230, 89 Ill. Dec. 484, 512 N.E.2d 691, 700-01 (1987); Procanik v. Cillo, 97 N.J. 339, 370, 478 A.2d 755, 772 (1984) (Schreiber, J., dissenting in part); Nelson v. Krusen, 678 S.W.2d 918, 925, 930-31 (Tex. 1984); Robertson, *New Reproduction*, *supra* note 9, at 989 n.170; Comment, *supra* note 83, at 757; Comment, *Wrongful Life: A Legislative Solution to Negligent Genetic Counseling*, 18 U.S.F. L. REV. 77, 98 (1983); Note, *Turpin v. Sortini: Recognizing the Unsupportable Cause of Action for Wrongful Life*, 71 CALIF. L. REV. 1278, 1292 (1983).

237. Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984).

238. Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982).

239. *E.g.*, Siemieniec v. Lutheran General Hosp., 134 Ill. App. 3d 823, 834, 89 Ill. Dec. 484, 480 N.E.2d 1227, 1235 (1985) ("not a question of evaluating impaired existence vis-a-vis existence"), *rev'd*, 117 Ill. 2d 230, 111 Ill. Dec. 302, 512 N.E.2d 691, 700-01 (1987); Procanik v. Cillo, 97 N.J. 339, 353, 478 A.2d 755, 763 (1984) ("not premised on the concept that non-life is preferable to an impaired life").

240. *See* text at notes 48-66 *supra*.

worse than nonexistence and, if so, what damages are appropriate. Critics have rightly asked how these courts can justify awarding special damages if they are unwilling to determine whether life is better than nonexistence.

A plausible explanation is found in the refusal to aggregate the interests of an affected child. The injury to the child's interest in proper support, including medical care, is not offset by the presumptive benefits of being alive, even if these benefits make her life worthwhile overall. This conclusion finds support in the special benefits rule and the policies that support it[241] because the types of injuries and benefits involved may be treated as distinct (nonpecuniary benefits versus pecuniary needs). No amount of pleasure in life will buy the needed treatment or special care. Under these circumstances, a reasonable argument can be made that the child's interest in the finances for adequate care should be insulated from offset.

Because the benefits of being alive may not be used to offset the child's recovery of extraordinary expenses, the child's right of action does not depend upon a finding that her life was worse than nonexistence overall. Even if these benefits "outweigh" her financial needs, thereby making her life worthwhile on balance, she may still recover these expenses because they are not subject to offset. The nonexistence comparison is not relevant to this analysis. Therefore, judicial failure to insist upon a showing that life was worse than nonexistence is not internally inconsistent in the least. It simply reflects an assumption that the children have a right to adequate support, including appropriate health care, and a willingness to insulate this interest against offset by other benefits conferred by the tortfeasor.[242]

Separate interest analysis does, however, present some unique problems when applied in the context of the unconceived. One of them has special significance in wrongful life cases. If the consequence of fully respecting the child's rights would have been contraception and thus nonexistence (where child support costs are zero), then why not award her *all* of the childrearing costs associated with her existence, not just the *extraordinary* costs? The answer may lie in the benchmark utilized by this rights analysis. Under a rights approach, her current condition is measured against the state of affairs in which her rights are satisfied, not the state of affairs that would have existed had she not been born. The benchmark is not the alternative she had to life in her current condition (nonexistence) but the state of affairs in which her right to support is satisfied. The child's claim against the tortfeasor is not for the cost of childrearing per se, but instead, for making it likely (by permitting her conception) that she will suffer the violation of her right to support. Thus, she may recover only the amount necessary to protect her right to support. Although her parents may have wanted a child and understood their obligation to support it, they may be unable to bear the extraordi-

241. Turpin v. Sortini, 31 Cal. 3d 220, 238-39, 182 Cal. Rptr. 337, 348-49, 643 P.2d 954, 965-66 (1982).

242. This explanation answers the charge of internal inconsistency. It does not by any means resolve the issue of whether courts ought to make these assumptions about rights or offset or settle whether the cause of action ought to be rejected for other reasons. Those issues require separate consideration before firm conclusions can be drawn. The analysis here is intended only to suggest a perspective which may explain the cases permitting partial rsecovery.

nary costs of support associated with her affliction. This may partially explain their allegations that they would have avoided her conception or birth if they had been made aware of the risks. In such an instance, the provider's negligence jeopardized the child's right to support. If so, it may be impaired only to the extent of the *additional costs* associated with the disability. Accordingly, the tortfeasor is only assigned the parental duty of beneficence with respect to these costs.[243]

Admittedly, the special benefits rule works awkwardly here. For example, a judicial doctrine fully consistent with this analysis would also require a showing of financial need.[244] Despite this awkwardness, however, the policies underlying the special benefits rule may sanction this windfall. Additionally, one unique aspect of the wrongful life cases makes relief especially suitable. Unlike the birth defects themselves, the problem of medical costs can be solved by reallocating support costs to the party most responsible for the birth.[245] The ability to cure this rights violation by permitting a cause of action makes judicial adoption of a rights perspective especially appealing. By contrast, the cogency of this rights perspective is much more difficult to

---

243. An additional argument against offset exists in cases where the parents could, if adequately advised, have taken actions to avoid this birth and then conceived another child at less risk of injury. For these parents, the extraordinary expenses represent a minimum recovery, not subject to offset, because they presumably would have obtained the same benefits from the alternative child. Thus, their case for medical costs does not rely upon a segregation of interests. A case presenting a possible example of this situation is Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984), where the birth defect was caused by German measles during pregnancy.

But in cases where substitution is not available, the award of extraordinary costs to children whose lives are not worse than nonexistence must be justified by a doctrine like the separation of interests. The facts of Turpin v. Sortini, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 954 (1982), where the parents passed on hereditary deafness, illustrate this kind of case.

244. Even if no such showing can be made at birth, the cause of action ought to be available at any time that the family's financial circumstances change.

245. Because the child's interests will, in most cases, be congruent with those of the parents, the financial concern underlying the child's cause of action can also be resolved in most cases by giving the parents a parallel cause of action for these expenses. For this reason, one intermediate appellate court has limited the child's cause of action to expenses during her majority. Siemieniec v. Lutheran General Hosp., 134 Ill. App. 3d 823, 831, 89 Ill. Dec. 484, 480 N.E.2d 1227, 1233 (1985), *rev'd*, 117 Ill. 2d 230, 111 Ill. Dec. 302, 512 N.E.2d 691 (1987). Another has remarked that the child's action is for expenses during her majority as a practical matter. Turpin v. Sortini, 31 Cal. 3d 220, 237, 238 nn. 11 & 12, 182 Cal. Rptr. 337, 348 nn. 11 & 12, 643 P.2d 954, 965 nn. 11 & 12 (1982). Courts which deny the child a cause of action sometimes give the parents a right to recover the costs for the child's dependent majority as well. *E.g.*, Robak v. United States, 658 F.2d. 471, 478 (7th Cir. 1981); Blake v. Cruz, 108 Idaho 253, 259, 698 P.2d 315, 321 (1985). But by giving the child a cause of action for expenses during her entire lifetime, the courts can protect the child—and her independent interests—from the death of her parents, their failure to sue within the limitations period or their surrender of the child to another caretaker who needs the financial help. *See* Procanik v. Cillo, 97 N.J. 339, 478 A.2d 755 (1984) (parents' action barred by statute of limitations). Furthermore, the parents' recovery of out-of-pocket costs may be subject to offset by the intangible benefits of parenting, in a dubious application of the special benefits rule. Eisbrenner v. Stanley, 106 Mich. App. 357, 367, 308 N.W.2d. 209, 213-14 (1981); *but see* Blake v. Cruz, 108 Idaho 253, 258, 698 P.2d 315, 320 (1984) (offset apparently limited to damages for emotional distress); *cf.* Robak v. United States, 658 F.2d 471, 478 (7th Cir. 1981) (normal childrearing costs of impaired child not offset). In that event, they would be left without the resources to meet this child's special needs. Therefore, the child should always have an independent right to recover these funds. Parenthetically, it should also be noted that the child is a surrogate for her siblings, whose interests in parental beneficence may be impaired by the financial costs of the afflicted child. Procanik v. Cillo, 97 N.J. 339, 351, 478 A.2d 755, 762 (1984); *but see* Azzolino v. Dingfelder, 315 N.C. 103, 117, 337 S.E.2d 528, 537 (1985) (denying cause of action to siblings) *cert. denied*, 479 U.S. 835 (1986), *reh'g. denied*, 319 N.C. 227, 353 S.E.2d 401 (1987).

assess when preventing conception is the only way to avoid the rights violation.[246]

3. *The Limited Significance of the Right to Support Recognized in Wrongful Life Cases*

There are two principal reasons why the distinct interest in support recognized in these cases is not likely to play a central role in the regulation of reproductive decisionmaking. First, wrongful life cases arise in the context of third-party negligence. In that context, recognition of the child's distinct interest in support is significant because of the cost reallocating consequences. This could be important in the context of reproductive technology if a *doctor* fails to obtain the parents' informed consent to a fertility treatment that exposes the child to risks of injury. But this approach is much less likely to be significant when *parental* conduct is at issue. As long as the parents are willing and able to care for their children[247] (or the state or other private citizens are willing to do so without recourse), then the interests of the affected children in support can be protected without interfering with parental liberty. If not, the burden on the state of providing necessary care would itself justify interference without regard to the interests of the children.[248] Therefore, no new cases for intervention would be added by separate interests analysis.

Second, the legitimacy of segregating interests in the wrongful life tort actions does not demonstrate that segregation would justify state intervention to prevent the child's birth. The wrongful life cases hold only that the afflicted child's right to care and support should be protected. They accomplish this by making the tortfeasor provide the child's extraordinary expenses. No choice between nonexistence and a life with impaired rights must be made. In these cases, the threatened violation of rights (*i.e.*, inadequate resources for proper care) is curable by ordering the defendant to provide funds for the child's care.

When, however, the rights violations cannot be cured after birth, the sufficiency of the rights violation to justify intervention is much less clear. It is one thing to say that a defendant should bear a share of the childrearing expenses of a child who would not otherwise have been born and quite another to conclude that not being born would be better for the child if no such relief were forthcoming. In other words, it is one thing to say that a parent should not violate a child's rights and quite another to conclude that the likelihood of a rights violation justifies a prohibition of reproduction on the child's behalf.

That child might have a life worth living, perhaps even a happy life. To ignore this possibility seems a mistake. The case of the dying wilderness couple mentioned earlier makes the case against conception poignantly, but it does not compel the conclusion that conception is wrong if we truly believe that the lives of these children would be worthwhile. As another exam-

246. *See* Section B. 3, *infra*.
247. This raises insurability and risk-sharing issues that exceed the scope of this article.
248. Robertson, *New Reproduction*, *supra*, note 9, at 989-90.

ple, consider whether an unconceived black who is preordained to be born into apartheid, or worse into slavery, would be better off unborn. If his life would be unworthwhile on balance, the answer is easy. But if the evil perpetrated upon him is likely to be muted by some factors so that reasonable people, including other blacks in his family and community, conclude that his life is likely to be worthwhile or even happy, then one could reasonably conclude that the child's interests are violated only by the discrimination, not by birth.

4. *Preconception Rights: Informed Consent and a Minimum Quality of Life*

Several prominent ethicists believe that exposing the unconceived to risks associated with reproductive technology is unethical because the affected children have not consented to the risks.[249] The informed consent objection is most pronounced when a reproductive technology is experimental and the severity of the risk is not yet known. Thus, much of the debate about this issue took place in connection with the early use of in vitro fertilization. Until it can be reasonably assumed that the adverse affects of a novel reproductive technology will not be catastrophic, ethical objection to implementation of the new technology on humans is fully consistent with the nonexistence test.[250] On the other hand, once a convincing case can be made that the technology does not increase the incidence of catastrophic birth defects,[251] then intervention cannot be premised on probable harm to the child in the sense contemplated by the nonexistence comparison even if lesser injuries are associated with the technology. Yet, these critics still insist that no significant defects be induced.[252]

Although critics, such as Paul Ramsey, correctly note the fictional nature of substituted judgment in this context, they inadequately consider the likelihood that the resulting children would waive their objections to the unconsented procedure and ratify the decision to conceive them. In this respect, the situation of the resulting children is similar to that of temporarily incapacitated patients for whom emergency medical treatment decisions must be made. In both cases, a good faith attempt to assess the overall impact of the injury upon the patient's life seems proper and desireable.[253]

Interestingly, Ramsey rejects this analogy on the grounds that the infertility treatment for which consent is needed is not intended to treat the

249. *E.g.*, Ramsey, *supra* note 197, at 1347-49; Kass, *Babies by Means of In Vitro Fertilization: Unethical Experiments on the Unborn?*, 285 N.E.J.M. 1174, 1175-76 (1971); Kass, *"Making Babies" Revisited*, 54 PUB. INT. 32, 42-43 (1979).

250. I argue below that regulators should err on the side of intervention when deciding whether the injury would make life unworthwhile. *See* text at notes 266-71, *infra*.

251. Most of the discourse concerned the risk of injury induced by the technology. Thus, the benchmark was usually the risk of injury inherent in normal conceptions, although some commentators would accept risk similar to those associated with high risk natural pregnancies.

252. *E.g.*, Kass, *Making Babies*, *supra* note 13, at 29; Tiefel, *supra* note 13, at 3237.

253. In this respect, the unconceived child is like the emergency patient who is not competent to tell us his wishes about surgery. In deciding whether to wait until the patient regains consciousness or a family member can be located, an objective assessment of the patient's condition must be made. If delay risks significant harm, surgery is appropriate. In such a case, we assume that the patient would want us to act.

child.[254] Thus, he rejects implicitly the possibility that the child is indeed a beneficiary of the treatment or that the possibility of ratification matters. Although plausible, his viewpoint is regrettably incomplete because it does not consider the possibility that happy future children suffering from minor complications associated with the fertility treatment would ratify the decision to conceive them despite the risks of injury. Like the incompetent patient, the would-be child is incapable of exercising any autonomy rights and is likely to ratify a good-faith best interests assessment.[255]

A narrower rights claim is more plausible. Arguably, the use of reproductive technology is inappropriate only when it presents an unacceptable risk of denying the resulting children a minimum quality of life. Like the utilitarian argument for a minimum quality of life, however, a fully satisfactory theory must explain why it is wrong to bestow a life whose benefits exceed its burdens. Most likely, that explanation lies in the distinction between interest assessment for the unconceived and interest assessment for the living.[256] That possibility is the subject of the next section.

C. *Distinguishing Nonexistence From Death*

The preceding objections to the nonexistence comparison suggest that nonexistence may sometimes be preferable to life even if the benefits of that life would outweigh the burdens. They assume that nonexistence may sometimes be preferable, even though life with the affliction in question might well be preferable to death. What accounts for the urge to give different

---

254. Ramsey, *supra* note 249, at 1349-50; *see also* Kass, *Making Babies*, *supra* note 13, at 29-30; Tiefel, *supra* note 13, at 3237.

255. In paternalism and discrimination cases, the persuasive power of separate interest analysis has been tied, at least in part, to its insights about our interests—especially the interest in autonomy—and how we weigh or order them. In this sense, at least, it represents an empirical claim about human preferences that is tied closely to the value we place in making our own choices. Woodward, *Reply to Parfit*, *supra* note 194, at 803 n.4. In the airline discrimination case discussed above, the passenger presumably is willing to take the risk of airline fatalities in return for equal access to tickets. She, presumably, would rather not have that right violated, even though in some cases the violation could prove beneficial to her. If the risks are foreseeable, the airline should advise her of them so that she can make her own decision. We view this interest in autonomy as sufficiently important that the airline is not excused even in cases when the violation of rights operates to her benefit. The same analysis applies to the unconsented surgery. In each of these cases, the victim's interest in autonomy is insulated from hindsight and objective utility calculus. Because it is insulated in this way, the calculus is not strictly consequential. But it is at least based on presumptions about the preferences of the victims *at the time of decision*. The forced trade paradigm assumes either that the coerced trader "prefers", in this special sense, his state of affairs before the rights violation, including his autonomy, or at least that it would not be unfair to the wrongdoer to treat him as if the victim did prefer this. Thus, we ignore net benefits and permit these windfalls in order to protect against and reduce the violation of rights.

In the context of the unconceived, however, the victim does not exist at the time of decision. Here, the notions of autonomy and subjective preference so important to paternalism and discrimination cases have no direct parallel. Deciding to conceive the child does not deprive the child of the liberty to make that decision herself because the child does not exist. Instead, someone must decide on the child's behalf.

256. For example, nontreatment of the wilderness children for neonatal maladies would be unimaginable even if the parents' plight was known by all parties and there was no way to prevent them from taking their children back to the wilderness. Likewise, nontreatment of the black children born into apartheid could not be justified by their future prospects of rights violation. We would reach the same conclusion about children who suffer serious, but not catastrophic, injuries from the use of reproductive technology.

content to a child's interests when asking the question before conception rather than afterward?[257] The explanation probably arises out of the distinction between *not being born* at all *(nonexistence)* and *death*. Preconception regulation merely prevents the birth of children who would otherwise be born, offering nonexistence as the alternative to life. By contrast, the most vexing medical treatment decisions for seriously ill children offer probable death as the alternative to further life. In this difference lies the best explanation of why the harmfulness of a congenital affliction may be viewed differently when the question is asked before rather than after conception.

The antimiscarriage drug DES (diethylstilbestrol) illustrates the issue. DES has been associated with an increased incidence of cancer in the daughters of women who were administered the drug. Several reports also associate intrauterine exposure to the drug with congenital abnormalities, including heart defects and limb-reduction defects.[258] Although the daughters presumably will have lives worth living, they and others might well advocate discontinuance of the drug's use by pregnant women *even if* the manufacturer were able to show that these daughters would not have been born at all if not for the drug.[259] Few people would want the FDA to approve the drug merely because the unlucky children who suffer the complications would not be better off *dead*. Nor does the FDA use this test.[260] Similarly, most people would expect the FDA to disapprove a fertility drug

---

257. On the other hand, some writers have not yet acknowledged a distinction between nonexistence and death. For example, John Robertson asks whether the children "might find death preferable." Robertson, *New Reproduction*, *supra* note 9, at 988; *cf.* Feinberg, *The Counterfactual Element*, *supra* note 29, at 164 (comparing afflicted life to death in the context of wrongful life actions); Bell & Loewer, *supra* note 25, at 138 (assimilating nonexistence to death in connection with wrongful life actions).

258. Shaw, *supra* note 4, at 72; Shields, *Delayed Manifestation Injuries: The Statute of Limitations as a Bar to DES Suits*, 11 COL. HUMAN RTS. L. REV. 127, 127-28 and nn. 1-10 (1980); PHYSICIANS' DESK REFERENCE 1189-90 (1988).

259. The efficacy of DES has not been conclusively demonstrated. PHYSICIANS' DESK REFERENCE 1189 (1988); Letter to the author from Solomon Sobel, Director, Division of Metabolism and Endocrine Drug Products, Center for Drug Evaluation and Research, Public Health Service, Food and Drug Administration (April 19, 1988) [hereinafter Letter].

260. The Food and Drug Administration itself has never publicly expressed its opinion on the matter. Although at least three categories of drugs could potentially pose the issue (fertility drugs, antimiscarriage drugs and medications to prevent premature labor), only the ovulation-inducing fertility drugs have actually presented the issue and they have done so in an oblique way. Their use has not been causally linked with birth defects, but they do present a greater risk of multiple births. Letter, *supra* note 259; PHYSICIANS' DESK REFERENCE 1999-2001 (pergonal—20%), 1998-99 (metrodin—17%) (1988). With that risk comes a greater risk of prematurity and low birth weight. Letter, *supra* note 259. One complication associated with prematurity is respiratory distress. Lappe, *Ethics at the Center of Life: Protecting Vulnerable Subjects*, HASTINGS CENTER REP., Oct. 1978, at 11, 13. In the FDA's view, that risk does not warrant disapproval. Letter, *supra* note 259. Correspondence with the FDA suggests that it did not reach this conclusion by asking whether the maladies associated with prematurity resulted in a life that is harmful on balance. In its view, the fact that the alternative for these children (and their healthy peers) would be nonexistence does not play a "significant role" in its deliberations. Instead, all fetal risks are considered by the FDA and they must be "very small" for approval to be obtained. *Id.*; *see* 21 U.S.C.A. §§ 321(p), 355(b) & (d) (West 1972 & Supp. 1989) (requiring evaluation for safety and efficacy).

Unfortunately, it is not clear whether the FDA's risk-benefit analysis of these fertility drugs segregated the risks and benefits for the affected children from the benefits afforded to the parents of the healthy children whose lives are made possible by these infertility drugs and to the healthy children themselves. Possible inclusion of benefits to all affected parties (itself a subject for ethical analysis) makes it impossible to tease out the agency's assumptions about the net impact of prematurity on the affected children or the extent to which that adverse impact was discounted for infre-

which caused birth defects like those caused by thalidomide.[261] Reasonable people would say *both* that these drugs *should not be used* and also that the children suffering the adverse consequences of its use have lives worth living and *should be treated* vigorously.[262]

Our experience with drugs reminds us that nonexistence may be viewed as better than handicapped life if we are able to ask the question *before* administration of the drug, rather than after birth. Our sympathy for parents who abort fetuses detected to have genetic abnormalities confirms that belief, albeit in a very different context. These feelings are in dramatic contrast to our common concern that children who are actually born with congenital abnormalities, like Down's syndrome, not be denied life-saving treatment on the purported basis that their interests would be served by death.[263] Simply stated, we may reasonably conclude that some injuries which would not justify the withholding of treatment would, indeed, justify nonuse of fertility-enhancing arrangements.

As James Woodward observes, in a slightly different context:

> One can coherently think of one's life as fairly rich in whatever it is that makes life worth living (as a life at a very high level of welfare and one which most people would envy) and yet still think that it has fallen so far short of some ideal (*e.g.*, winning a Nobel Prize) that one would prefer not having been conceived to this failure. (Note that this is *not* the same as desiring to commit suicide or wishing one were dead.)[264]

While his example is extreme, his point is quite plausible if we substitute a crippling ailment in place of failure to win the Nobel Prize. Woodward is probably correct that people can and do feel this way.[265] Quite possibly, sufferers of a tragic disease, like cystic fibrosis, would recommend that others

---

quency of occurrence. As a result, no firm conclusions can be drawn about the weight assigned by the FDA to the risk of prematurity from the handling of these drugs.

However, a few cautious observations are warranted. Apparently, all risks, however small, are considered in the FDA's risk-benefit calculus. Less catastrophic risks are apparently not excluded on the grounds that they are inevitably associated with life itself. Thus, the FDA has not accepted the conclusion that only the most catastrophic injuries may be weighed. Furthermore, the FDA has not mirrored the "sanctity of life" view expressed by the Reagan administration in connection with the treatment of sick newborns. If it had, fertility drugs would have few if any limits based upon putative risks to the unborn. Thus, this administration has implicitly accepted the legitimacy of applying a different test for identifying the interests of the future child before conception than is applied thereafter. Whether it will act on that distinction, however, remains speculation because the fertility drugs were in fact approved despite the prematurity risks. Nevertheless, the FDA's methodology suggests that drugs would be disapproved even if the afflictions did not rise to the level of severity warranting nontreatment of newborns under the Child Abuse Amendments of 1984.

261. Thalidomide was a teratogenic drug prescribed for morning sickness. Shaw, *Conditional Prospective Rights of the Fetus*, 5 J. LEGAL MED. 63, 71 n.52 (1984).

262. Feinberg expresses a tentative skepticism that this distinction could be rational. *The Counterfactual Element*, *supra* note 29 at 165 and n.21. Other writers seem to have assumed that no such distinction exists. *See* note 26, *supra*. Paul Ramsey appreciated the distinction, but analyzed it differently. He concluded that medical treatment decisions for living children were different from decisions about infertility procedures because undergoing the risks of the infertility procedure was not necessitated by preexisting threats of harm to the child. Instead, it seeks to cure the parents' infertility. Ramsey, *Shall We Reproduce: I*, *supra* note 249, at 1349-50; Ramsey, *Shall We Reproduce: II*, *supra* note 113, at 1481.

263. *See* Rhoden, *The Live-Birth Dilemma*, *supra* note 62, at 1489 (pointing out the dual standard between abortion and medical treatment practices).

264. Woodward, *The Non-Identity Problem*, *supra* note 194, at 823.

265. *See* text at notes 272-76, *infra*.

likely to suffer their disease not be born. Absent access to data of this sort, lawmakers could reasonably reach such conclusions on behalf of the unconceived. In fact, this viewpoint probably accounts for many parental decisions not to conceive or to have amniocentesis and abort. Ultimately, it probably accords with most beliefs about fertility drug approval.

Several factors have potential to help explain the significance of the distinction between interest analysis for the unconceived and similar analysis for the living. The first is the risk of error. The second factor is the instinct for self-preservation. In combination with our intuitions about death and nonexistence, these factors help to explain why nonexistence may be preferable to a life of misery, even though death is not.

1. *The Risk of Error*

Preconception intervention based upon an erroneous assessment that children born with a new reproductive technology will experience catastrophic injury does no harm to the children whose lives are prevented. They are not harmed by nonexistence.[266] Nor does it deny them a benefit.[267] If, however, the technology is erroneously approved due to underestimates about the severity of the related injuries, the future children can suffer great harm. From the perspective of the future children, erring on the side of nonexistence is preferable.

By contrast, the interests of existing children dictate a cautious approach to medical treatment decisions in which errors are made on the side of life. Unlike nonexistence, premature death can both harm and fail to benefit.[268] We can harm children grievously by erroneously extinguishing their lives, just as we can harm them by erroneously prolonging them. Their interest in life is fundamental and erroneous extinction is irreversible. Its protection has implications for the protection of the lives of others in society because of the role of precedent on our law and consciousness. Because of the consequences associated with error in cases involving the living, strong policy reasons justify erring on the side of life, even though some treated children will suffer as a result.[269]

The factors calling for paternalistic error on the side of life for existing children are absent or reduced in the context of fertility treatments. Preconception decisionmaking can neither harm nor fail to benefit a child.[270] Overly stringent reproductive regulation can be reassessed because it is not final. Moreover, because of its patently different context from decisions about the living, cautious regulatory conclusions about the risks of reproduc-

266. Bayles, *supra* note 27, at 299; M. BAYLES, REPRODUCTIVE ETHICS, *supra* note 172, at 40; J. FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY 207-20 (1980).

267. Although no individuals are denied benefits, Michael Bayles reminds us that society's costs may be the same as with death if life counts as a benefit.

268. Michael Bayles correctly notes that these two features together may help make the distinction between nonexistence and death.

269. As a result some might suggest that treatment be withheld from the competent only when reason *dictates* it.

270. It can harm the parents and providers, of course. But the argument in the text is intended only to illustrate how the interests of the children have been previously underestimated and how risk of error concerns reveal their interest in protective regulation.

tive technology are unlikely to serve as precedent for treatment decisions regarding the living. This is especially true if the decisionmakers explicitly acknowledge their risk of error concerns. As a result, the state may legitimately wish to err on the side of nonexistence when assessing the interests of would-be children.

Burden of proof parlance offers a rough analogy. Whereas the burden of persuasion for withholding treatment ought to rest on those who seek to withhold the treatment, the burden of persuasion regarding risks of harm associated with conceptions ought to shift to those who wish to take the risks in question. The distinction could also be compared to a difference in standards of proof, requiring "clear and convincing" evidence in refusal of treatment cases and a mere preponderance of the evidence in preconception decisionmaking.[271] Either way, the distinction may dictate continued treatment for children whose injuries should have been prevented. In effect, the difference frees us to assert the interests of future children in a better minimum quality of life than we require in order to continue medical treatments.

This proposition may, however, be mistakenly viewed as threatening the lives and dignity of disabled individuals. In fact, similar arguments have been made against the withholding of medical treatment from the seriously ill and against allowing wrongful life actions. Quite the contrary is intended. The proposition rests, instead, on the assumption that factual and policy differences between decisionmaking for the nonexistent and decisionmaking for the living call for erring on the side of life for the living and on the side of nonexistence for the unconceived.

Of course, the significance of this risk-of-error approach should not be overstated. Although it gives lawmakers discretion whenever the preferability of nonexistence is in reasonable doubt, the ultimate question remains whether nonexistence is or may be preferable. In answering that question, risk of error concerns do not change the underlying comparison of burden versus benefit. They only provide a rationale for regulation when the answer is in doubt. Even under this more expansive application of the nonexistence comparison, most physical handicaps and emotional problems are not likely to support intervention. Moreover, even if doubts in application of the test are initially resolved in favor of a cautious conclusion that the affected children would be harmed, the degree of uncertainty reflected in this conclusion may properly be considered when the interests of the unconceived children are weighed against the procreative interests of the parents.

2. *The Instinct for Self-Preservation*

Certainly, the nonexistence of the would-be affected children deprives us of the ability to make a decision on their behalf by "putting ourselves in their shoes" as that concept is ordinarily used. As we lack the ability to apply a best interests test from the point of view of the unconceived, the

---

271. *E.g., In re* Conroy, 98 N.J. 321, 486 A.2d 1209 (1985); *In re* Barry, 445 So. 2d 365 (Fla. Dist. Ct. App. 1984); *In re* Storar, 52 N.Y.2d 363, 438 N.Y.S.2d 266, 420 N.E.2d 64, *cert. denied,* 454 U.S. 858 (1981). Oklahoma has statutorily imposed a clear and convincing evidence standard for proof of allegations that a previously competent person decided against artificial nutrition and hydration. HASTINGS CENTER REP., Sept. 1987 at 48.

perspective of the living toward death is arguably the only perspective available to us from which to judge whether the unconceived should be born. Quite possibly, sufferers of some conditions, such as cystic fibrosis or Huntington's Chorea, could believe that unborn victims of their condition would be "better off" unborn. Thus, the victims of a drug that caused birth defects like those caused by thalidomide might recommend intervention to preclude the birth of other victims. They might even conclude that they would rather not have been born, though they do not now wish to die. For example, some treated spina bifida patients reportedly believe it would be better not to treat similar infants.[272] Presumably, they would recommend that conception itself be prevented if possible. And in a recent case study, a patient with radial aplasia thrombocytopenia syndrome apparently believed that a child with his condition would be better off unborn and, perhaps, dead.[273] The living may thus distinguish between their own *death* and the *nonexistence* of future sufferers.

If most sufferers of a serious injury associated with a reproductive technology believe that the interests of potential future sufferers would be served by intervention to prevent their births, a reasonable argument can be made for adopting that view as a basis for public policy. It is, after all, the best approximation available of the perspective of the future sufferers. But if the preference of the sufferers for life dictates the conclusion that future sufferers would also enjoy lives that are worth living, then the wrongfulness of conceiving them cannot be identified using traditional conceptions of harm.

Conceivably, the dichotomy may be explained, at least in part, by the instinct for self-preservation. Consciously and unconsciously influenced by this instinct when considering their own fates, living sufferers may reach different conclusions when they consider the interests of future sufferers. Viewing death as terrible, they may see it as worse than a miserable life. Viewing nonexistence as basically neutral, they may prefer it to the same misery. Thus, the instinct of self-preservation, along with other related feelings like hope and faith, may explain the conclusion that a miserable life is worth continuing, but not worth receiving.

Arguably, however, the dichotomy between the living sufferer's feelings about his own interests and those of would-be children reveals an irrational inconsistency that ought to be ignored. The different recommendations are inconsistent because they take into account the role that self-preservation plays when assessing the value of life to the living sufferer,[274] but downgrade its potential to make the lives of future sufferers worth living as well. To the extent that the impact of instinct is discounted due to its involuntariness, arguably it casts doubt on the voluntariness of the decisions of living victims about their own medical treatment. This extension of the argument to the

272. DECISIONMAKING AND THE DEFECTIVE NEWBORN 248 (C. Swinyard, ed. 1978).

273. *Don't Let My Baby Be Like Me*, HASTINGS CENTER REP., Aug.-Sept. 1988, Special Supplement at 25. In his case, the disease had caused low platelet count and the absence of bone in his lower arms.

274. Satisfaction of subjective desires, whether rationally or instinctively based, presumably contributes to our personal utility and, thus, to the worth of our lives. In this sense, utility need not be intellectualized to be experienced and enjoyed. Its nonrationality alone does not diminish its potential materiality. That turns on the positive or negative nature of the experience.

living seems patently unacceptable, at least where the patients express a conscious, rather than reflexive desire to live. The threat this would pose to autonomy is too great. On the other hand, the propriety of respecting this instinct in living people may not be an adequate reason for subjecting the unconceived to the same misery. Perhaps the fruits of the instinct for self-preservation are sometimes suffered, rather than enjoyed. That future children might strive, once born, to live would not make their birth any less wrongful. It would simply doom them to suffer all the more. The desire of the current sufferers to live with the same misery ought not preclude respect for their conclusion that future sufferers ought not be born. Their views may represent the best reconciliation of their actual experience and the possible effects of the instinct on their cognition.

Obviously, we will need much more consideration of this issue by others more versed in psychology before firm conclusions can be drawn. In addition, more data about the beliefs of living sufferers should be gathered to test this hypothesis.[275] In the interim, I am inclined to accept this incongruity as reflective of human experience, rather than as an illogical or illegitimate inconsistency. As a result, lawmakers may reasonably conclude that some afflictions for which treatment would be rendered ought to be prevented, even if the alternative is nonexistence.[276]

3. *The Nonexistence Benchmark: Minimum Quality of Life Reconsidered*

The stakes of error and the instinct for self-preservation combine with related and equally intangible factors such as hope and faith to make death a more terrible benchmark against which to measure a handicapped life than nonexistence. These factors may lead us to conclude that a life of misery is endurable and preferable to death even though it would be better still never to have existed. When disabled life is compared against death, the patient faces a Hobson's choice that has no equivalent in reproductive decisionmaking. The distinction is best captured in the idea of unhappiness.[277] We do not for a moment confuse an unhappy life with a life that is not worth living. An unhappy life, even a miserable life, may not be a liability when measured against death. But a life of misery may fare much more poorly when pitted against not being born at all. People can be miserable even though their life

275. If living sufferers of a particular condition do *not* recommend intervention, the weight to be given to these recommendations is more difficult to assess. Though they have been asked the question "Should we try to avoid bearing children likely to suffer your fate?", they may unknowingly have answered the question "Would you rather be dead?" or even "Would you like to be killed or commit suicide?" Doubts about their ability to distinguish their fate from that of future sufferers certainly presents a problem in evaluating their answers. For the same reason, the absence of significant suicide or refusal of treatment data associated with a given affliction would tell us much more about the attitudes of these individuals toward their own deaths than about their feelings about the birth of future sufferers.

276. The same issue also arises when the sufferers of an affliction are never competent. In cases of birth defects that are this serious, we cannot rely upon the experiences of living sufferers to inform our judgment. But we may sometimes be able to extrapolate from the opinions of living sufferers of different, but similarly grievous, conditions.

277. Engelhardt discusses the possible use of a special notion of beneficence for the unconceived, but he views the choice as more aesthetic than moral. Engelhardt, *supra* note 26, at 223, 238.

has a positive utility as evidenced by both their own will to live and by common understanding. In that case, we cannot so easily presume that conception is preferable.[278] With the opportunity for preconception decisionmaking comes the need to use a different benchmark than we use for the living. The better benchmark, or break-even point, comes when the child has some minimum quality of life, such as a reasonable chance at happiness.

Still, the distinction between nonexistence and death has its own problems. One is that this distinction treats nonexistence and death as if they were different states or "places." Obviously, that claim cannot be empirically supported. Yet, any theory about the interests of not-yet-conceived children must make assumptions about nonexistence and death that cannot be directly confirmed. Traditional interpretations do this no less than the asymmetrical approach suggested here. They assume that the two states are identical. In some cases, as Sidney Callahan has phrased it, "emotion should tutor reason."[279] This is one of those cases where logic alone is not enough. Here, our moral instincts dictate that future misery should be avoided even if it is not so severe that it makes death preferable.

Another problem is that the standard would be extremely difficult to apply in individual cases. One person's minimum may be another's ideal. Thus, regulators using the nonexistence benchmark must remember that they are applying a minimum threshold, not an Aristotelian ideal of human perfection. They must also consider the environment in which the children are likely to live. For some injuries, the child's future fortunes will turn as much on availability of parent emotional and financial support as upon the severity of the injury. Despite these problems of application, however, the reinterpreted nonexistence comparison is no more difficult to apply than traditional burden-benefit assessment in which death is the benchmark.

An additional problem with the asymmetrical approach is the possibility that children whose lives are worth living might well ratify their conception. It seems, however, more reasonable to me to assume that the resulting children would ratify only their own *lives*, not the *decision to conceive* them or future sufferers. Thus, they might regret their birth, although they prefer continued life to death. Furthermore, I am more inclined to tolerate the problem of ratification than the counterintuitive results dictated by symmetrical treatment of nonexistence and death. That symmetry is inconsistent with deeply-held, common sense notions of the interests of the unconceived.

4. *Beyond a Minimum Quality of Life*

While a minimum quality of life requirement will seem disquietingly strict to those who reject the distinction between nonexistence and death, it may seem regrettably insufficient to those who view all technological risk-taking as unethical. Indeed, the FDA's policies may reflect the view that all

278. It is probably not coincidental that Narveson's criticism of average utility calculus assumes the birth of a *happy* person in an extraordinarily happy society, rather than the birth of a *miserable* person. *See* text at notes 230-31, *supra.*

279. Callahan, *The Role of Emotion in Ethical Decisionmaking*, HASTINGS CENTER REP., June/July, 1988, at 9.

significant risks are intolerable. But this position would force us to conclude that even happy lives may not be worth having if they are somehow imperfect or disadvantaged. In so doing, it ignores the benefits of life entirely. While the degree of protection offered by this view is attractive at times, it is seriously compromised by its failure to accord any weight to the child's happiness. Despite its consistency with FDA practice, the case for treating all unavoidable injuries as against the interests of the children so conceived is less persuasive than the arguments for protecting a minimum quality of life.

In addition, the view that any and all unconsented risks are unethical does not accord with our feelings about natural conception. Natural conceptions, particularly high-risk conceptions, are no less an unconsented gamble with birth defects than reproductive technology. Yet, no one has seriously contended that natural conception must be completely safe.[280] Instead, the troubling ethical question is how much risk to tolerate.

Perhaps, tougher scrutiny of reproductive technology than of natural conceptions is based on concerns about the cellular manipulation inherent in these medical procedures.[281] Concerns about unconsented and dangerous tampering do seem to lie beneath the surface of the consent perspective. In this respect, reproductive technology is different from natural conceptions in which the risks are intrinsic to the attributes of the sperm and egg.[282] It does seem relevant that these fertility methods may actually inflict damage upon a potentially healthy sperm, egg or embryo. But this basis for treating all induced injuries as impairments of the future child's rights or interests has serious shortcomings. In both cases, life without the injuries is impossible. Furthermore, the knowledge and intent of the parents may be the same. Nor is there any reason to believe that the risks from the active tampering associated with reproductive technology are any more objectionable from the point of view of the resulting child than are the risks associated with genetic defects. Although the objection to reproductive tampering echoes the act-omission distinction, the act of knowingly undertaking a high-risk pregnancy seems sufficient to minimize the normative weight of the distinction here. Ultimately, ascribing less responsibility to parents who run risks dictated by nature than to those who induce those risks themselves requires a fatalism or deference to God that I do not share. For me, the distinction is real, but not a sufficient basis for attaching different consequences here.

Alternatively, the greater leniency with which we seem to evaluate natural conceptions may simply reflect assumptions about the strength of the parents' procreative and privacy interests in the respective contexts. For example, we can regulate fertility drugs, AID and in vitro fertilization effectively without the invasive measures required to control natural conception and birth by high-risk couples. Drug disapproval is certainly a lesser violation of parental privacy and bodily integrity than forced sterilization or

280. McCormick, *supra* note 13, at 324.

281. Ramsey, *Manufacturing Babies*, *supra* note 13, at 8.

282. There are some similarities as well. For example, the risks from failure to screen sperm donors arise out of genetic defects, not cellular manipulation. Risks associated with the storage of sperm, by contrast, relate to manipulation.

abortion.[283] These differences could help to explain our very different societal treatment of high-risk natural conception, on one hand, and fertility drugs, on the other. Although the merits of this privacy analysis are far beyond the scope of this paper, privacy concerns do plausibly explain our tougher scrutiny of reproductive technology. Ideally, however, identification of the interests of the future children would precede the process of choosing among the competing interests of parent and child.

5. *Law and Morality*

Great care must be taken in the use of this minimum quality of life principle. Juxtaposed against our aspirations for the happiness of our children are both the countervailing interests of parents and providers and the danger that excessive insistence on perfection will undesireably alter our perspective toward children born with disabilities.

a. *Respect for the living*

Daniel Callahan correctly reminds us that the spirit with which we attempt to conquer genetic disease must preserve our appreciation for human diversity and our recognition that there is no single image of the perfect human.[284] Furthermore, our actions must not compromise our ability to love and nurture the very children whose existence we might try to prevent. Each of these children deserves to be loved as a perfect child. The threat to fulfillment of this latter ideal posed by a minimum quality of life goal is much more substantial than that posed by intervention in cases of avoidability by substitution. Substitution cases only require that parents exercise care in their choice among available infertility treatments. A minimum quality of life requirement, by contrast, questions whether the best that can be done is good enough.

Because a minimum quality of life requirement sets a more restrictive standard for deciding when a life is worth having than the traditional balancing of burdens and benefits, it could conceivably present a more dramatic threat to disabled children. This possibility may be reflected in the controversial parental decisions to withhold medical treatment from children with Down's Syndrome. Those parents or their providers may have had difficulty making the shift in benchmarks after the child was born.[285] Nevertheless, society's swift negative response to these cases suggests that this crucial distinction will survive erosion. The community is not likely to lose sight of the distinction between a quality of life perspective for the unconceived and one for the living.[286] The distinction is, after all, more natural than a symmetrical approach. In fact, we might cause more damage by ignoring this distinction than by recognizing it. Because there will be constant pressure to give

283. Michael Bayles calls this to my attention.

284. Callahan, *The Meaning and Significance of Genetic Disease: Philosophical Perspectives,* in CONTEMPORARY ISSUES IN BIOETHICS 580 (Beauchamp & Walters eds. 1978).

285. The minimum quality of life test was also misapplied. These children do not have miserable lives.

286. However, there is disagreement about whether it should be drawn at conception, viability or birth.

different content to the best interests test in the two contexts, even if ostensibly identical standards are being applied, the resulting hypocrisy could be more damaging than a clearly stated differentiation would be.[287]

Fortunately, there is no inevitable conflict between our desire to provide our future children with a minimum quality of life and our continued efforts to nurture and accept all those who fall short of our ideals. Both aspirations arise from our concern for the welfare of our children. And both support respect for disabled persons. Still, there is always the possibility that the lives of children whose injuries are serious will somehow be devalued by the idea that they would have been better off unborn. Because this possibility cannot be excluded, any regulatory intervention to further the interests of the children must follow careful consideration of the likely impact. Some regulatory contexts, perhaps the regulation of pharmaceuticals, may pose less risk of eroding our concern and care for the living than others.

b. *Societal and parental interests*

The tests discussed in this article deal only the interests of the resulting children. These interests provide a necessary, but not sufficient, basis for state intervention to protect the children. Before regulations are legitimately enacted, lawmakers must consider the strength of any other interests which would be adversely affected by the proposed regulations. A reasoned balancing of these interests requires both an attempt to quantify the risks associated with the procedure and also an assessment of the likely impact on the countervailing social interests.

Once an injury is classified as harmful, its probability must be estimated. The larger the probability of serious expression, the more powerful the basis for regulation. Comparison with the normal risks associated with natural conceptions seems a logical place to start, but it probably understates our willingness to expose children to injuries. Most of us would probably concede that parents who conceived children a decade or even a century ago acted ethically even though risks were much higher. Today we continue to delegate risk assessment to high-risk fertile parents. Unraveling the puzzle of tolerable risk levels will require the disentangling of a fabric of beliefs about survival of the species, the demographic health of society, the procreative rights of parents and the natural state of man.

Once risk levels are identified, the threat to resulting children must be balanced against the interests of parents and society which could be impaired by protective regulations. Sometimes, regulation will make procreation more difficult or more expensive. Other times, it could prevent childbearing completely. The strength of the parents' claim of procreative freedom will vary accordingly. Society may also have an interest in minimizing regulation. In addition to concerns about the corrosive impact of a minimum quality of life requirement on care of the handicapped, society may have interests in genetic diversity or population size that are inconsistent

287. A broader test of the childrens' interests would, of course, also increase the opportunity for bureaucratic control. *See* Furrow, *supra* note 235, at 5; Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Rationality*, 46 S. CAL. L. REV. 617, 644-45 (1973).

with close scrutiny of reproductive safety.[288] Concerns about the equal treatment of fertile and infertile couples must also be addressed before reproductive technology is regulated. In addition, lawmakers should consider the feasibility of enforcement and the possibility that intervention will cause black-market substitutes or other responses that are worse than the problem which initiated the regulations. And because hopeful parents have more in common with their future children than they have conflicts, sound ethical reproductive decisionmaking will often be better effectuated by enlisting parental help than by limiting parental options. With full information about risks, parents are likely to be even more cautious about risky fertility procedures than regulators using a minimum quality of life test. Thus, lawmakers would do well to monitor the adequacy of information that hopeful parents are provided before conception and to provide more assistance for children with special needs thereafter. All these factors will determine whether the risks associated with a reproductive practice ethically justify a legal response and, if so, whether legal measures are the most appropriate response to the objectionable practices.

CONCLUSION

Criticisms that the nonexistence comparison is unworkable or overinclusive are not persuasive. In reproductive technology as in the medical treatment cases, the comparison is an important tool for protecting the interests of the vulnerable. Because the regulation of reproductive decisionmaking arises in a quite different context from wrongful life cases, the refusal of courts to apply the nonexistence comparison in those cases is not sound authority for rejecting it here. The factors that best explain judicial unwillingness to utilize the nonexistence comparison in those cases are not present in the regulation of reproductive decisionmaking. While utilization of the nonexistence comparison to evaluate possible injuries does require us to concede that some children would be better off unborn and to draw the difficult lines associated with that conclusion, lawmakers must accept these responsibilities if they wish to protect the interests of the children.

In fact, the nonexistence test is underinclusive. It must be supplemented whenever safer reproductive conduct could substitute healthy children for the injured ones. When the interests of the prospective children as a class are considered, the actual human suffering associated with decisions to use the more dangerous procedure provides a legitimate basis for state intervention. The most understandable reason for reticence in accepting this view is discomfort about the wide array of cases to which a more rigorous standard of scrutiny would apply. Unquestionably, the comparative approach to avoidability by substitution forces answers to hard questions about the acceptable justifications for failure to substitute. The interests of future children justify the effort to answer them.

More difficult to evaluate are proposals to broaden the grounds for in-

288. The children whose lives would be prevented by regulation are not adversely affected by the regulations. But if their lives would benefit society, then society may have an interest in their birth, even though some of them will suffer birth defects.

tervention beyond cases of avoidability by substitution. Because a minimum quality of life threshold would justify intervention even when the birth defect could not be avoided by substitution, it lacks the normative force associated with parental failure to substitute a healthy child. In addition, it relies upon a theory of beneficence that has no parallel in cases involving the living. Instead, it assumes that a life worth living may not be worth having. Nevertheless, this view probably reflects commonly held beliefs about responsible reproductive decisionmaking. In fact, it taps a deeper insight about the asymmetrical way that we view the interests of the unconceived as compared to the interests of the living. A life of misery may be preferable to death, but never existing at all may be better still. Therefore, injuries which are likely to deny a child a reasonable opportunity for minimal health and happiness may harm the child, even if that life is not worse than death. If so, intervention to prevent the implementation of technologies likely to cause these injuries finds support in the interests of the would-be children.