

Wrongful Life

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Is it wrong deliberately to bring into existence an individual whose life we can reasonably expect will be of very poor quality? Several philosophers do not think so, and for very similar reasons. In this article I want to expose their arguments to critical scrutiny with a view to defending an affirmative answer to the question above. I will carefully specify the kind of case they, and I, have in mind distinguishing it from others whose putative wrongfulness rests on different grounds. Hopefully my counter argument will shed light on the proper, and improper, ways to think about procreation.

Let me start by addressing the use of the word 'deliberately' in the opening question. Clearly a conscious decision to conceive a child can be made, though no such decision is guaranteed to yield the desired outcome. However as often as not conception is not deliberate although it may be very welcome after the event. In these cases the appropriate question will be: Is it wrong to proceed with a pregnancy whose outcome will be an individual whose life we can reasonably expect will be of very poor quality? In answering this question the putative wrongfulness of allowing such a person to come into being must be balanced against the putative wrongfulness of terminating the pregnancy. Any final judgment in these cases must thus await a determination of the moral permissibility or impermissibility of abortion. This is obviously controversial. So, to avoid these problems, I concentrate on cases where conception is deliberate. The most obvious are those involving artificial reproduction, such as in vitro fertilization (IVF) where preimplantation genetic diagnosis (PGD) permits the identification of the probabilities of any child coming to suffer from a particular disease or disability.

The qualification within the question signified by the words 'we can reasonably expect' is important to rule out cases where nobody could have been expected to know that the individual brought into existence would suffer from some very serious disease; or where the known risk of her doing so was very small. It is important to add that there are non-medical circumstances in which we can reasonably expect that somebody will enjoy a very poor life. These include being born into extreme poverty or to be brought up by

doi:10.1017/S0031819104000348

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very cruel, abusive, or neglectful parents. Of course such circumstances can change, and be changed. However we can still imagine being reasonably sure that they will not, and hence being reasonably sure that the individual brought into being will suffer a very poor life. In what follows I want to allow for both medical and non-medical grounds on which we could reasonably expect a created life to be of very poor quality.

I have framed the question in terms of an individual's life. It is possible that the person brought into being does not survive beyond her childhood. Nevertheless, even the child who does mature into adulthood has, I shall argue, a right not to suffer a very poor life. The child has this right in her own right and not just in the person of the future adult whose life is blighted. I shall thus speak of the case of a child whose life is very poor. I also speak in terms of rights, though the argument I advance does not depend on acceptance of the view that rights-talk is a proper part of the moral language we should use. We might equally speak simply of the wrongness of bringing into being an individual whose life will be very poor.

I

I start my argument that it is wrong deliberately to bring into existence an individual whose life we can reasonably expect will be of very poor quality by defending the 'birthright claim'. This is as follows. If a child should be guaranteed a set of rights then no child should knowingly be brought into existence lacking the reasonable prospect of enjoying these same rights. Feinberg defends something very similar:

if you cannot have that to which you have a birthright then you are wronged if you are brought to birth. Thus, if the conditions for the eventual fulfilment of the child's future interests are destroyed before he is born, the child can claim, after he has been born, that his *rights* (his present rights) have been violated. Moreover, if before the child has been born, we *know* that the conditions for the fulfilment of his most basic interests have already been destroyed, and we permit him nevertheless to be born, we become a party to the violation of his rights.¹

Following Feinberg, Bonnie Steinbock writes that 'it is a wrong to the child to be born with such serious handicaps that many very

¹ Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 99.

basic interests are doomed in advance, preventing the child from having the minimally decent existence to which all citizens are entitled'.²

In contradistinction to Feinberg and Steinbock I want to defend something more specific. Feinberg speaks of a child's general right to be born with a guarantee that her most basic interests will be fulfilled. He describes a child's 'right *not* to be born' as 'a compendious way of referring to the plausible moral requirement that no child be brought into the world unless certain very minimal conditions of wellbeing are assured'.³ Now one of the problems of both Feinberg's and Steinbock's approach is the multiplicity of those against whom the claim of rights violation can be made.⁴ For instance we could surely and plausibly hold ourselves responsible for 'permitting' a child we know will have a serious disability to be born, even though we have played no part in the conception of the child. Similarly, it is reasonable to think that Steinbock's stated view implies that we do a wrong to such a child by permitting it to be born and hence preventing her from having a minimally decent existence.

I want to understand the birthright claim as the claim to a right that any possible child has not to be intentionally and knowingly conceived with the reasonable prospect of not enjoying a life above a certain threshold. What that threshold is I shall come to in due course. The birthright claim is thus made against those who can and do play a direct causal role in the child's conception, in other words the prospective genetic and gestational parents.

The birthright claim rests on the following argument. I violate a child's given right, let us say her right to \emptyset , if I act so as to deny her the enjoyment of \emptyset .⁵ I also violate her right to \emptyset if I knowingly and avoidably put her into a situation where she cannot enjoy \emptyset (or cannot reasonably be expected to enjoy \emptyset). If I know that a future child will be incapable of enjoying \emptyset and I nevertheless act to bring her into existence then I knowingly put her in a situation where she cannot enjoy \emptyset . I thus violate the future child's right to \emptyset by knowingly bringing about her birth. This argument is valid and the birthright claim is thus warranted.

² Bonnie Steinbock 'The Logical Case for "Wrongful Life"' *Hastings Center Report* 16 (April 1986), 19.

³ *Harm to Others*, 101.

⁴ E. Haavi Morriem, 'The Concept of Harm Reconceived: A Different Look at Wrongful Life,' *Law and Philosophy* 7 (1988), 21.

⁵ I hold that the enjoyment of a right is more than its mere possession. I possess a right if it is recognized—morally or in law—that I have the right. I enjoy the right if I can, as a matter of fact, exercise the right.

Deliberately conceiving a child who will be born to desperate social and economic circumstances violates that child's birthright. So too does deliberately conceiving a child who will suffer a dreadful handicap. In what follows I want, first, to be clearer about the threshold below which a child's prospective life is so bad that it is a violation of her birthright knowingly and deliberately to bring her into existence. Second, I want to offer a critique of those who maintain that no wrong is done in conceiving a child whose life falls below this threshold so long as the life is worth living and her conception is, in a sense to be explained, unavoidable.

What is the threshold of acceptable existence? As we have seen Feinberg and Steinbock speak of the conditions for the fulfilment of basic interests. Others speak in terms of a minimally decent life. Kavka defines a 'restricted life' as one that is 'significantly deficient in one or more of the major respects that generally make human lives valuable and worth living'.⁶ Since my preferred mode of argumentative exposition is in terms of rights I shall define the threshold of a minimally acceptable life as one in which the child has the reasonable prospect of enjoying a good number of those rights possessed by all children. For the sake of the argument I shall take the United Nations Convention on the Rights of the Child as providing a useful list of these rights. I want to allow that what is meant by 'a good number' of rights is vague and also that some rights are more fundamental than others. Nevertheless it should be clear that there are imaginable lives which are very poor in the required sense and are so inasmuch as the child cannot enjoy a significant number of these rights she is entitled to enjoy.

II

The case I want to consider is of a child who will enjoy a life that falls below the threshold I have defined but whose life is still on balance worth living. For many people do not think it wrong deliberately and knowingly to conceive a child who will enjoy such a life. Let me carefully specify the kind of case I, and they, have in mind. It has two important defining features. First, the child's life is worth living but barely so. Her life is of less value than it would be if more of her rights were enjoyed. Nevertheless the child's life

⁶ Gregory Kavka, 'The Paradox of Future Individuals', *Philosophy & Public Affairs* 11 (2) 1981, 105. For the citation of other relevant and similar thresholds see Morriem, , 'The Concept of Harm Reconceived: A Different Look at Wrongful Life,' 24–5.

is not worse than non-existence. Now it is notoriously hard to specify exactly what this comparative claim means. It need not mean, for instance, that a child brought into being and faced with the prospect of such a terrible life would choose to commit suicide. Following a suggestion of Feinberg, I shall take it to mean this.⁷ A disinterested, fully informed and rational proxy adult choosing on behalf of the prospective child would prefer that the child should not be born rather than endure the life in question. 'Wrongful life' cases have principally been ones in which courts have been asked to consider whether the child's prospective life is worse than non-existence. However in the envisaged example the child's life is worth living even if barely so. It is better, just, than non-existence but it is worse than the life that would be had if enjoyment of most of her rights were guaranteed.

Second, the child cannot avoid being brought into existence. The unavoidability in question is to be understood in this sense. There is no possibility of a child being born to its prospective parents enjoying a better life than the one envisaged. Thus this is not the kind of case, made famous by Derek Parfit's ingenious examples, of the birth of a child with a handicap that could have been avoided had conception been deferred to a later time, or had the mother taken a relatively costless course of treatment at the time of conception.⁸ In these kind of cases we want to say that wrong is done by not deferring conception or by not taking the treatment since by doing these things a handicap-free child could have been conceived. The point Parfit seeks to make by means of this kind of example is that, although wrong is done by conceiving the handicapped child, no wrong is done to the child in question since if conception did not occur at the envisaged time then *this* child would not have existed. This is because Parfit holds it a necessary condition of X's personal identity that X was conceived within a particular time period and under certain specified circumstances. For Parfit an impersonal wrong is done in conceiving the handicapped child, but no wrong is done to the child conceived at that particular moment. This is the justly famous 'non-identity problem'.

However this is not the kind of example I am here concerned with. If the child is not conceived here and now, and under these circumstances, then there will be no child born to these parents. Or any child born to these parents, whenever and however conceived,

⁷ Joel Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', *Social Philosophy and Policy* 4(1) (1987), 145–78.

⁸ Derek Parfit, *Reasons and Persons* (Oxford: Clarendon Press, 1984), 357–66.

will enjoy substantially the same advantages and disadvantages. The birth is not unavoidable in the sense that the prospective parents could not decide either not to conceive or to terminate the conception. Rather it is unavoidable in the sense that a child with this miserable future life, that is enjoying the envisaged prospect of a barely endurable existence, is the only child that can be born to these parents.

So imagine that we know that any child of these parents will suffer a life that is only just worth living and that the only alternative is that they should have no child. Is a wrong done if the parents have such a child? As I indicated, many people do not think so. John Robertson is clear that 'bringing unavoidably handicapped offspring into the world does not harm them because there is no way for them to be born healthy'.⁹ Indeed he thinks that even if we know that a prospective parent will seriously abuse her child 'it is not clear that they will enjoy such a horrible life that they never should have been born at all, and thus are harmed by being born to an abusing mother'.¹⁰ John Harris is also clear that no wrong is done, and indeed that conception in the circumstances envisaged is in the best interests of the child. If a woman can only have a handicapped child and does have such a child then 'she is acting in the best interests of the child'. She 'wrongs no-one in having a handicapped child because it is in that child's interest to be born'.¹¹

The reasoning of Harris and Robertson about such cases follows from their possession of the two features just outlined. First, the life that the abused or seriously handicapped child endures is still better than non-existence. Thus 'even serious child abuse does not appear to cause a life of such unremitting suffering that its life is wrongful, e.g., that the child would have preferred no life at all'.¹² It is in the handicapped 'child's interests to be born' since 'although the child will inevitably suffer, it will have a life worth living'.¹³

Second, the birth is unavoidable in the sense indicated. If the prospective parents could conceive a non-handicapped child then they would be misusing their reproductive capacity if they produced a less than healthy child.¹⁴ Nevertheless if they can only

⁹ John Robertson, *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton: Princeton University Press, 1994), 152.

¹⁰ *Ibid.*, p. 82.

¹¹ John Harris, 'Wrongful Birth', M. E. Dalton and J. Jackson (eds.) *Philosophical Issues in Reproductive Medicine* (Manchester: Manchester University Press, 1990), 165.

¹² *Ibid.*, 248 (282 fn. 32).

¹³ Harris, *op. cit.*, 165.

¹⁴ Robertson, *op. cit.*, 171.

conceive a child who will be seriously handicapped or subsequently abused then they do no wrong in so conceiving. This point about how unavoidability is to be understood needs emphasizing. Harris is clear that where parents can avoid bringing suffering into the world 'by declining to have the disabled child and yet fulfil their desire to have a child by trying again for a healthy child then if they deliberately produce children with more than slight disability they are blameworthy'. However, he immediately continues, if 'the particular parent must have disabled children if they are to have children at all, then they will be blameworthy only if the children would be wronged by existence, that is, if they would find it not worth living.'¹⁵ In other words parents are not blameworthy and do no wrong by bringing into existence a child whose life is barely worth living so long as that is the only life a child of theirs can enjoy. They can avoid bringing such a life into being by not having a child. But if they are to have a child then they cannot avoid her suffering an existence that is barely worth living.

Avoidability is understood then in terms of the specified alternatives. In the case under consideration the alternatives are no child or a child with a less than minimally decent existence. In the case where Harris and Robertson admit of wrong being done the alternatives are no child, a child with a less than minimally decent existence and a child with at least a minimally decent existence. Melinda Roberts describes the contrast as between 'type 2-alt' cases and 'type 3-alt' cases. She too thinks no wrong is done to the child in the former case, that is one where the only alternative to a less than minimally decent but at least worth living existence is non-existence.¹⁶

Let me now turn to a discussion, in succession, of the two features of case being considered: a life better than non-existence and its unavoidability. With respect to the first feature some think that such a comparison is impossible to make in the sense that existence and non-existence are, strictly speaking, incomparable. Indeed very many 'wrongful life' suits have failed precisely because the courts have determined that no such comparison is possible.¹⁷ A New

¹⁵ John Harris, *Wonderwoman and Superman: The Ethics of Human Biotechnology* (Oxford: Oxford University Press, 1993), 90.

¹⁶ Melinda Roberts, *Child Versus Childmaker: Future Persons and Present Duties in Ethics and the Law* (Boulder: Rowman and Littlefield, 1998), 27 and 101.

¹⁷ 'Wrongful life' cases are brought by or on behalf of the individual whose life is allegedly worse than non-existence. By contrast 'wrongful birth' cases are brought by or on behalf of parents in respect of the avoidable birth of a child whose condition, e.g. extreme disability, allegedly causes them serious harm.

Jersey Supreme Court observed in a 1967 'wrongful life' suit: 'The infant plaintiff would have us measure the difference between his life with defects against the utter void of non-existence, but it is impossible to make such a determination'.¹⁸ The English courts have reasoned in an exactly similar fashion. *McKay v. Essex Health Authority* (1982) was a case for damages brought by an infant born to a mother who was infected with rubella in the early months of her pregnancy, a condition she alleged her doctors should have but failed to detect. A principal reason for rejecting the suit was the court's view that it could not measure the loss to the child by comparing her disabled condition with that of her never having been born. 'But how can a court begin to evaluate non-existence ... No comparison is possible'. 'The court ... has to compare the state of the plaintiff with non-existence, of which the court can know nothing; this I regard as an impossible task'.¹⁹

If a child's miserable life cannot be compared with her non-existence then we cannot speak of her interest in being born (as opposed to remaining unconceived). Hence her interests are not a consideration in the determination of the moral permissibility of her being brought into existence. The only relevant considerations would be the prospective parents' interests in having such a child, the public costs of supporting the parents in their wishes to have the child, and the interests of any third-parties such as the child's future siblings. Moreover, the child herself is not harmed by being brought into existence. A choice of action only harms someone if it makes her worse off than she would have been in the absence of the choice.²⁰ Morreim denies that all harms can be conceived of in terms of a making worse than what otherwise (in the absence of an action or event) would have been the case. Nevertheless she does acknowledge that 'all ascriptions of harm do involve comparison'.²¹ But if no comparison can be made then there can be no ascription of harm. If the counterfactual condition of non-existence cannot be compared with that of existence then it cannot be the case that the child is harmed by being born.

Not everyone does deny that existence and non-existence are incomparable. If they can be compared it seems clear that non-

¹⁸ *Gleitman v. Cosgrove*, 227 A. 2d 689, at p. 6982; quoted in Bernard M. Dickens, 'Artificial Reproduction and Child Custody', *The Canadian Bar Review*, 66 (1987), 55. Dickens comments that 'existence and non-existence *per se* may not be contrasted', *ibid.*, 56.

¹⁹ *McKay v. Essex Health Authority* [1982] ALR 2 771, at 787 and 790.

²⁰ M. Hanser, 'Harming Future People,' *Philosophy and Public Affairs*, 19 (1990), p. 52.

²¹ 'The Concept of Harm Reconceived', 23.

existence is very bad. It may not, as Cynthia Cohen argues, be as bad as death.²² But it is surely still very bad. Certainly it is sufficiently bad that existence, even if it falls below the minimal decency threshold, is preferable. Even a barely worthwhile life is better than none at all. Hence either non-existence and existence are incomparable in which case the question of whether the child who enjoys the miserable life is harmed does not arise. Or they are comparable and even a miserable life is better than none in which case the child is not harmed by being conceived. Indeed she benefits.

Turning to the second feature of the case being considered, the conception and birth of a child whose life is miserable is, to repeat, unavoidable only in the sense that if any child is to be born it cannot but be a child enjoying a barely worthwhile existence. Conception and birth are *not* unavoidable in the sense that contraception could not be used or a termination not sought. They can be but are not. Moreover the view of Harris and Robertson is that human beings should not be required to desist from conception or to secure a termination in this case. Better, they have a presumptive right to have children. As Robertson puts it, 'Procreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life.'²³ Essentially the right to have or not to have a child is a central liberty right. As such it can, at least for liberals, only be constrained by a harm principle or something similar. Thus, since by the argument already considered, giving birth to a child whose life is only barely worth living does not harm the child the prospective parents rightly exercise their presumptive procreative liberty right in having the child if that is what they choose to do. Its conception and birth are unavoidable in the sense that it is their moral entitlement if they wish to have children.²⁴

²² Cynthia Cohen, 'The Morality of Knowingly Conceiving Children With Serious Conditions: An Expanded "Wrongful Life" Standard', N. Fotion and Jan C. Heller (eds.) *Contingent Persons: On the Ethics of Deciding Who Will Live, or Not, in the Future* (Dordrecht: Kluwer Academic Publishers, 1997), 31-5.

²³ *Children of Choice*, 24.

²⁴ Note that the procreative liberty right in question holds a special significance for those who are strongly opposed to the use of contraception or to abortions. Their views raise interesting questions. But I will concentrate on those seeking artificial means of reproduction. For they wish to exercise their right to have children. Their situation is such that they cannot otherwise conceive and cannot thus choose in the normal course of events either not to reproduce or to reproduce.

For Robertson, Roberts and Harris, the parents who create a child—so long as it enjoys at least a barely endurable existence—do no harm and do no wrong. This seems to me to be deeply and obviously mistaken. Consider Gregory Kavka's example of the couple who produce a child they intend to sell at birth into slavery. Assuming that life as a slave is better than never existing, then—on the reasoning I have considered—they do not harm the child. Crucially in the absence of the offer from the slave owner they would not have a child. They were not planning to have one and do so only as a result of his offer. Thus their conception of the about-to-be-enslaved child is, in the requisite sense, unavoidable. I concur with Kavka in viewing their actions as morally 'outrageous'. This would be so even if they used the money from the slavery contract for selfless and morally commendable purposes.²⁵

Kavka thinks the couple err in 'misusing their reproductive powers'. I agree. Kavka construes this misuse in terms of their 'extorting' an unfair (excessive and unearned) price for the exercise of these powers. The couple give life to a child but charge the child too much for it. In my view the error in Kavka's approach is that it assumes that a fair price can be charged for the exercise of one's reproductive powers. Kavka himself glosses his claim with the further assertion that the seller of life 'improperly treats human life as a commodity to be passed out to the highest bidder'.²⁶ But this gloss suggests—correctly in my view—that it is not that a fair price should be charged for existence but that no price at all is appropriate. Existence is literally priceless. Taking Kavka at his own word, a price cannot both be excessive and unearned. If one has not earned the right to put a price on something then no price should be charged. A price can nevertheless be earned but excessive.

There are, I think, a number of background thoughts that may lend apparent but misguided support to the view that a price *can* be charged for bringing someone into being. The first is the Lockean theory of property whereby somebody owns whatever they have laboured on, 'mixed their labour with'.²⁷ Since procreation is arguably a labouring the procreators must own that which they create, namely the child. Further, it is entirely proper to alienate and to charge a price for the transfer of what one owns. Locke himself

²⁵ Gregory Kavka, 'The Paradox of Future Individuals', *Philosophy & Public Affairs*, 11 (2) (1981), 100–2.

²⁶ *Ibid.*, 108.

²⁷ John Locke, *Two Treatises of Government*, a critical edition with an introduction and *apparatus criticus* by Peter Laslett, revised edition (Cambridge: Cambridge University Press, 1963), II, Chapter V.

saw the implication of his own theory and laboured, unpersuasively, to block it.²⁸ Contemporary neo-Lockeans, such as most notably Hillel Steiner, have also recognized the implication and sought in various ways to block it.²⁹

I think the Lockean theory does not have the implication in question, chiefly because if individuals do own what they produce then it is in virtue of the fact that they, at bottom, own themselves. Any human being, including a child, is self-owning. Whatever owns itself cannot be owned by others. I note here only that the Lockean theory casts a very long shadow over much thinking about the relationship in which a parent stands to its own children.

A second background thought is that somebody may properly charge another for continued existence, by supplying, for instance, a life-saving course of medicine. Here it is proper to talk of an unfair or excessive price being charged. This would be the case, for instance, if a person acquired monopoly control of, rather than invented or developed, a drug that others needed to stay alive.³⁰ Yet there is a fundamental and crucial asymmetry between bringing into existence and ensuring the continued existence of someone already alive. A price can be charged for the latter but not for the former. We do not owe our lives to our parents in the same way or in the same sense as we do to a rescuer, to a surgeon, or to the supplier of an anti-toxin.

The third background thought is that it is appropriate to charge *others than the resultant child* for the exercise of one's reproductive powers. The reason is that any such exercise is a use of one's own bodily powers whose costs—the expenditure of time, the attendant discomfort and pain, the postponed opportunities of pursuing other ends, etc.—are voluntarily incurred and, in principle, merit compensatory payment. Indeed those who enter into surrogacy contracts determine a proper price for such services. But while it is appropriate for a surrogate mother to charge an aspirant parent for the use of her reproductive powers it is not appropriate to fix a price for existence that the resultant *child* must pay.

A final brief comment on this matter is appropriate. The vast majority of those who deliberately choose parenthood rightly regard the existence of a child of their own as sufficient recompense for the 'pains' of reproductive labour. The creative act of

²⁸ See the excellent critical discussion in Robert Nozick, *Anarchy, State, and Utopia* (Oxford: Basil Blackwell, 1974), 287–9.

²⁹ Hillel Steiner, *An Essay on Rights* (Oxford: Basil Blackwell, 1994), 241–8.

³⁰ Nozick, *op. cit.*, 181.

conceiving a future human being is its own reward. It does not have a further chargeable price. That is how most people view it. They are correct to do so.

III

Rather than quite literally cashing out the proper or improper use of reproductive rights in terms of a fair price for existence, we should think of a right with internal constraints. Adults have a presumptive procreative liberty right. This liberty right is rooted in the considerable interests adults have in bearing children.³¹ However there are internal constraints on its exercise. By an internal constraint I mean the following. A full and adequate specification of the right in question contains or immediately entails a list of the circumstances under which it may be exercised. By contrast an external constraint on a right is a contingent consideration—another right or other moral facts—which may or does limit or vitiate the exercise of the right. If there is a right to \emptyset the internal constraints specify what it is properly to \emptyset whereas the external constraints specify when it is not permissible, all things considered, to \emptyset .

Consider the right to drive that in the U.K. at least all qualified motorists in possession of a valid licence have. An external constraint on its exercise might be the government's determination that for security reasons certain roads must be blocked off. Or that noise levels have now reached such a high level that cars may no longer drive down particular residential streets. Here contingent considerations—security, noise pollution—are thought sufficiently weighty to constrain the exercise of the right to drive. By contrast an internal constraint on the right to drive specifies what the right to drive allows the rights-holder to do, namely drive a licensed, insured car on designated highways within the appropriate speed limits. A motorist who drives on a pavement does not exercise a right to drive which is appropriately constrained by considerations such as the safety of pedestrians. He simply does not exercise the specified right to drive.

Or consider the right to freedom of expression guaranteed by the First Amendment to the American Constitution and by Article 10 of the European Convention on Human Rights, incorporated into the law of the United Kingdom by the Human Rights Act 1998. Internal constraints on the right specify what forms of speech one

³¹ John A. Robertson, *op. cit.*, Chapter 2.

has a right to the free expression of. In the United States the Supreme Court has adopted the policy of categorizing certain forms of expression as falling outside the protection of the First Amendment. Thus, for instance, advertising is 'commercial speech' and has in past judgments been categorized by the Supreme Court as not a form of speech to which American citizens have a First Amendment right of free expression.

By contrast an external constraint on this right might be given by considerations of the public good. An individual could thus be prevented from the expression of a view—the expression nonetheless counting as a form of protected speech—on the grounds that under the circumstances it constitutes a clear and serious harm to some public interest. Moreover courts could determine that a particular form of expression falling within the scope of the right is nevertheless entitled to less protection than other forms of expression. Less weighty considerations of the public good would be needed to trump the right to this form of expression than would be necessary to set aside the right to other forms. Thus it might be determined that commercial speech *is* a form of expression protected by the First Amendment but one requiring less protection than other forms also so protected.

Internal constraints in the above examples specify the action types that fall within the scope of a right. But there is no reason why an internal constraint should not take the form of a requirement or duty incumbent on those who possess a right in their exercise of that right. For instance, Robert Nozick argues that the Lockean proviso—leave as much and as good for others—internally constrains the right of property acquisition. So when the proviso is transgressed it is not the case that the right to property is overridden by other considerations. 'There is no such external (and *ad hoc*?) overriding. Considerations *internal* to the theory of property itself, to its theory of acquisition and appropriation' explain why the right in question cannot be exercised.³²

I maintain that the right to procreate is internally constrained and in the following manner. An adult may exercise his or her reproductive powers to bring a child into being only if the child in question has the reasonable prospect of a minimally decent life. Steinbock and McClamrick speak in this context of 'a principle of parental responsibility' which requires of individuals that they 'refrain, when possible, from having children if they cannot give them a decent chance of a happy life'.³³ Onora O'Neill similarly

³² Robert Nozick, *op. cit.*, 180–1 (second emphasis added).

³³ B. Steinbock and R. McClamrock, 'When is Birth Unfair to the Child?', *Hastings Center Report*, Nov–Dec 1994, 18.

argues that ‘the right to beget or rear is not unrestricted, but contingent upon begetters and bearers having or making some feasible plan for their child to be adequately reared by themselves or by willing others. Persons who beget or bear without making any such plans cannot claim that they are exercising a right’.³⁴ She thinks that someone who conceives a child with no such plan does not exercise the right to procreate. Just as someone who publicly advertises his wares may not exercise a right to free speech and an unlicensed driver who drives an uninsured car on public roads does not exercise a right to drive a vehicle

Any parent who intentionally and knowingly brings into existence a child whose prospect of life is better than non-existence yet below the threshold does wrong. It is not that harms are done to the future child which somehow outweigh or override the exercise of the right to procreate. The parent does not exercise that right, and thus does not do something that is presumptively morally permissible. The child is wronged by being born even if it is not harmed. The child is wronged in that it has a right to be given the reasonable prospect of a life, one that is not just barely but is sufficiently worth living and meets the specified threshold. This right, the child’s birthright, is the corollary of the prospective parent’s duty to exercise its procreative liberty in the manner specified by its internal constraints.

It is not a problem that an action may wrong another but not harm, indeed may even benefit, them. Consider the broken promise that rebounds to the benefit of the promisee, or the theft of the airline ticket for a flight that crashes killing all on board.³⁵ Thus I am happy to say that the parents who bring into existence a child knowing that she will enjoy a less than minimally decent life wrong the child even if they do not harm the child—either because non-existence cannot sensibly be compared with her miserable existence or because, *ex hypothesi*, her miserable existence is better than non-existence. The parents violate the child’s birthright to a minimally decent existence.

IV

In the concluding section of this article I want to do three things: meet an important objection to my claim, clarify whether it is always

³⁴ Onora O’Neill, ‘Begetting, Bearing and Rearing’, O. O’Neill and W. Ruddock (eds.), *Having Children: Philosophical and Legal Reflections on Parenthood* (Oxford: Oxford University Press, 1979), 25.

³⁵ James Woodward, ‘The Non-Identity Problem,’ *Ethics* 96 (1986), 804–31.

wrong to create an individual who may be reasonably expected to lead a very poor life, and to state what follows from my claim. The objection is that my claim appears circular or unsubstantiated.³⁶ There is a duty not to bring miserable children into existence because they have a right not to be brought into such an existence. The duty's warrant derives from the birthright that in turn is either simply asserted or justified by appeal to the idea that we ought not to create barely worthwhile lives, that is that we are under the duty correlate with the putative birthright.

There is a reply to this charge. It is that thinking of the right of procreative liberty, as internally constrained in the manner suggested, is warranted whereas thinking, as Harris and Robertson do, of the right as only externally constrained by a harm principle is not. The warrant is to be found in the idea of consistency. Here I follow and expand on some comments of Onora O'Neill.³⁷ She points out how Robertson and Harris both see the exercise of procreative liberty as simply a mode of making exclusively personal choices. Harris follows Ronald Dworkin who views the right of procreative autonomy as guaranteed by the First Amendment right of free self-expression.³⁸ Harris explicitly echoes Dworkin when he writes that 'the sorts of freedom which freedom of religion guarantees, freedom to choose one's own way of life according to one's own most deeply held beliefs, are also at the heart of procreative choices.'³⁹

Onora O'Neill rightly comments that reproductive choice 'is not best seen on the model of the exercise of a liberty right, such as a right to freedom of expression' but adds only that this is because reproduction 'aims to create a dependent being, and reproductive decisions are irresponsible unless those who make them can reasonably offer adequate and lasting care and support to the hoped-for child.'⁴⁰ This may well accord with many people's considered judgment but it sounds question-begging. Moreover Harris and Robertson will surely respond that the presumptive liberty right they defend is *not* unconstrained. It *does* take account of the interests of the future child. A child whose reasonable life prospects are

³⁶ Morreim, *op. cit.*, 22.

³⁷ Onora O'Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002), 60–3.

³⁸ Ronald Dworkin, *Freedom's Law* (Oxford: Oxford University Press, 1996), 104–5.

³⁹ John Harris, 'Rights and Reproductive Choices', John Harris and Søren Holm (eds.) *The Future of Human Reproduction: Ethics, Choice and Regulation* (Oxford: Clarendon Press, 1998), 35.

⁴⁰ *Autonomy and Trust in Bioethics*, 61 and 62.

worse than non-existence is harmed if brought into being. A parent also does wrong if she could—at no unreasonable cost to herself—create a child whose prospects of life are significantly better than those of the child she does conceive.

Thinking as O'Neill does certainly accords with our broader intuitions about the value and point of using our reproductive powers to bring another human being into existence. However more can be said to defend this way of thinking against Harris and Robertson along the following lines. A right of procreative liberty is one of a set of rights that the adult human being may be presumed to possess. The exercise of any of these rights cannot be at the expense of another's rights, that is be such as to subvert or vitiate the possession or enjoyment of another's rights. But that is precisely what would be the case if the right to procreate could be exercised so as to bring into being a child incapable of enjoying *her* rights. The same essential claim can be made in terms of interests. Grant that human beings do have a fundamental interest in the creation of their own offspring and that it is proper not to seek to frustrate the enjoyment of this basic interest. However its satisfaction cannot be at the expense of another human being's enjoyment of *her* most basic interests. But that is precisely what would be the case if a human being knowingly and deliberately conceived a child whose own life is likely to fall below a minimum specified in terms of interests.

The birthright is to the enjoyment of a significant number of the rights possessed by any child. A parent would not do wrong by creating a child who might be reasonably expected not to enjoy one of her rights. Wrong is done when the child's life falls below a threshold which has been identified as the secure enjoyment of a *good number* of her rights. It is conceded that this is somewhat indeterminate. Yet it should be transparently clear that exercising *one* liberty right in such a fashion and with the consequence that another human being cannot enjoy *most* of her rights is wrong.

Is it always wrong deliberately to bring into being an individual whose life may reasonably be expected to be very poor? There are two very different circumstances which might give us pause. The first is when bringing someone into existence arguably serves a very great public good, or averts a very great public harm. Imagine, at the extreme, that after some awful catastrophe only two couples on earth remain. They know this is the case and that any child each couple can conceive will enjoy a barely acceptable existence. They had not otherwise planned to conceive. If one thinks, reasonably, that the continued existence of the human species is, *ceteris paribus*,

a very great good and, further, that the only chance of its continuing in these circumstances is if the couples have children then the couples are permitted to conceive. Indeed arguably they are obliged to do so.

A less extreme situation is one in which the continued existence of a society or a culture or a tribe is similarly dependent upon the birth of one or more children to members of the group. These children will enjoy a less than minimally decent existence. It could be argued that bringing children into being in these circumstances is also permissible. However I am far less sure that the continued existence of the group is an evident good, in the way that the continuation of the species is, that outweighs the wrong done to the children.

The second type of circumstance in which it might not be thought wrong, all things considered, to create a barely tolerable life is where the situation of the future child is not attributable to any actions by her parents. Imagine then that the child will be born to extreme poverty and that this condition can reasonably be explained as the result of the actions, individual and collective, of human beings other than the parents. In short it is not the parents' fault that they are very poor and that any child they have will suffer a very poor life. Should they be denied a choice to have a child that is available to those richer than they are? If it is wrong that they can only do wrong by having a child, is their having the child really wrong?

However the wrongfulness of having the child in these circumstances does not transfer from the parents to those responsible for their poverty such that the parents act blamelessly in conceiving a child whose life will be very poor. Their decision to have the child is deliberate. It is not done under duress. Not having the child does not threaten their life; it merely frustrates an admittedly central interest of theirs. That they cannot have a child without doing wrong is the result of the wrongful actions of others. This provides a moral reason to change their economic circumstances. It does not exempt them from blame if they do have the child.

Consider a very rich and avid stamp collector, Smith, who needs a particular and unique stamp to complete his collection. It has been his whole life's ambition to do this. The stamp in question is not available for purchase because at some point in the past it was stolen, and has passed subsequently into the hands of another collector, Jones, who is unwilling to sell it. Smith would be wrong to steal the stamp from Jones. That this is the only way for Smith to possess the stamp, and complete his life ambition, is the result of a past wrong. This fact is a moral reason for changing the status of the

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stamp, warranting the state, for instance, in taking the stamp from Jones. But the same fact does not give us a reason to think Smith's act of theft any the less wrong.

The practical upshot of my claim is simple. Assisted reproduction should not be available to couples where one can be reasonably sure that any child they will conceive will enjoy a life that falls below the specified threshold. In the case of couples who do not need assistance in conceiving things are obviously more complicated. Where conception was unintended but subsequently welcomed we cannot, to repeat, determine whether wrong, all things considered, is done by allowing the pregnancy to continue. This is because such a judgment requires a determination of the moral permissibility or impermissibility of abortion. Those who deliberately create a miserable life are blameworthy. But it should be recognized that appropriate practical measures are limited and most likely ineffective.

However consideration should be given to the compulsory sterilization of those who can only bring into existence persons whose lives will fall below the threshold. The principal moral reason against the compulsory sterilization of anyone is that it abrogates their procreative liberty right. However those who can only conceive persons whose lives will be very poor cannot exercise this right. For this right is internally constrained by the requirement that anyone conceived will be born to lead a life that can reasonably be expected to be a minimally decent one. One does not do wrong in abrogating a right that cannot be exercised. One may do wrong in other respects but cannot do so in this regard.

To conclude: the minimum threshold entitlement of any child is the secure enjoyment of a good number of those rights that are listed in the United Nations Convention on the Rights of the Child. This is every child's birthright. A parent does wrong in knowingly bringing into existence a child who will not enjoy most of these rights. Acting in this wrongful way she does not exercise a procreative liberty right since that right is internally constrained by the obligation to ensure that any child will be guaranteed at least the adequate life which these rights circumscribe.⁴¹

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⁴¹ An earlier version of this article was presented as a paper to a conference on the new reproductive technologies at the University of Giessen. I am grateful to those present, including John Harris and John Robertson, for their comments at the time and subsequently. The paper was also presented to a seminar at the University of Lancaster, and I am grateful to my philosophy colleagues, John O'Neill, Alison Stone, Cain Todd, Rachel Cooper, and Garrath Williams, for their very helpful critical suggestions.