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IN DEFENSE OF WRONGFUL LIFE: BRINGING POLITICAL THEORY TO THE DEFENSE OF A TORT

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In this Article, Post-doctoral Associate Michael Laudor defends the tort of wrongful life as a valuable cause of action by developing a philosophy that addresses issues of intergenerational justice. To do so, he first explores the problems of future interests and analyzes the limitations of both standard and utilitarian concepts of harm. Laudor next considers the legal dilemmas arising from claims that the births of certain children are harmful. Laudor finally constructs a notion of harm that enables courts deciding whether to remedy injuries suffered by future generations to recognize wrongful life as a legitimate cause of action.

INTRODUCTION

IN Genesis, God commands humanity to "be fruitful and multiply." God later covenants with Abraham, telling him that he "will make of him a mighty people, numberless as the stars in the heaven." Theologically, the production of future people, once God starts things off, is both a given and a blessing, both a natural part of the continuity of humanity and a morally correct fulfillment of God's wishes. Religious faith makes it clear that we are obligated to future generations and that, in the timelessness of God, future people are as important as we are.

The comfortable certainty of faith, however, does not describe just how we are obligated to future people or what specific actions or inactions our obligations may entail. We may well wonder what we owe to a person whom we cause to be born or to those harmed by the birth of a person whom we cause to be born. Within the ambiguity-laden world of rational political theory, questions like these are extremely difficult, if not impossible, to answer. We not only have to determine what resources or knowledge we ought to bestow on a predictably existent future generation of a specific size, but also whether the generation will come into existence and what size it will be. Our decisions have a determining impact on almost all relevant aspects of the generations, and the individuals, to come.

The theories and principles which we often employ to make important decisions seem woefully inadequate to guide us in our problems with posterity. The conceptual complexity of future people's interests poses problems both for individual moral choice and for social and population

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policy considerations. Derek Parfit, in his seminal works on future generations,[1] provides a solution in the realm of individual choice, but only by leaving his principle vulnerable to sanctioning objectionable policy considerations.

In Part I of this article, I will explore the general problems of future interests and will demonstrate that standard conceptions of harm generate intuitively objectionable implications.[2] Section A will describe the problems inherent in one standard conception of harm, the notion that harms must be ascribed to particular individuals. Section B will discuss Parfit's solution, as well as his recognition of the shortcomings of the conception of harm embodied in standard forms of utilitarianism. Section C will point out the failures of some attempts to reformulate utilitarianism. Finally, Section D will briefly summarize the roots of the problems of future people's interests.

The courts of America, as well as moral and political theorists, have been grappling with posterity without providing satisfactory solutions. The courts face legal dilemmas arising from claims that the births of certain children are harmful. One promising tack for answering some of the questions is the fairly recent definition of "wrongful birth" and "wrongful life" as torts, or legally recognized harms. This approach has come under attack because it poses great challenges to our normal conception of individuals' interests.

In Part II of this article, I will argue that our normal conception of interests deserves to be challenged and that a careful construction of tort law, coupled with a flexible use of some traditional moral theories, gives us one of the better current tools for justly answering some very difficult questions. In the context of wrongful life cases, I will suggest a solution to the problems posed by future interests for individual moral choice and I will, unlike Parfit, suggest a solution which does not obviously justify objectionable choices for social and population policy. Section A will show how the courts have applied the law of harms, or tort law, to wrongful life cases. Section B will briefly place the wrongful life issue in the context of the harm problem discussed in Part I. Section C will propose a reconstruction of identity-specific harm to allow justice to be done

1. *See* Derek Parfit, *Future Generations: Further Problems*, 11 Phil. & Pub. Aff. 113 (1982) [hereinafter Future Generations]; Derek Parfit, *On Doing the Best for Our Children*, *in* Ethics and Population 100 (Michael D. Bayles ed., 1976). For a fuller treatment of Parfit's theories, see generally Derek Parfit, Reasons and Persons (1984).

2. Throughout the harm discussion in Part I and the entire article, I will deliberately create a false dichotomy, one that indicates that Parfit's utilitarianism and my opposing intuitionism are our only choices in grappling with future interests. I have chosen not to discuss Bruce Ackerman's radical egalitarian suggestions such as ensuring equal genetic endowments for all. *See generally* Bruce A. Ackerman, Social Justice in the Liberal State (1980). I also do not address John Rawls' implication that, behind the veil of ignorance, no one knows which generation he or she would be a member of. *See generally* John Rawls, A Theory of Justice (1971). I have chosen not to address these concepts because they are not needed to contend with Parfit, in the realm of philosophy, and because intuition, in the work of juries and others within the realm of law, plays such a great role.

in wrongful life cases. In Section D, I will defend the wrongful life tort against attack on other legal grounds, proving, finally, that the tort is a useful tool of justice.

I. GRAPPLING WITH POSTERITY: THE FUTURE AND NOTIONS OF HARM

One basic formulation of the future generations problem can be simplified and expressed as our need to decide whether it is obligatory, or morally compulsory, for us to create future people at some cost to ourselves. This question has many far-reaching implications, including issues of population policy and whether we have an obligation to prevent the extinction of our species. It also poses, in its present form, great challenges to our normal conceptions of individuals' interests.

A. *The Failure of the Identity-Specific Approach*

Our intuition tells us that, other things equal, it is better for a couple to have a happy child than a severely deformed, wretched one. If their choice results in a wretched child rather than a happy child, then we would like to say that they have done wrong. Thomas Schwartz, however, presents an argument that leaves an ordinary approach to moral choice completely silent in just such a case, as well as in some interesting cases involving generations further in the future.[3]

Schwartz's theory of obligation to posterity is a flat denial of obligation.[4] He writes, "we've no obligation extending indefinitely or even terribly far into the future to provide any widespread, continuing benefits to our descendants."[5] Schwartz defends this assertion with the argument that any policy that would have widespread effects would also affect the composition of the future generation.[6] Using his example, if we followed an uncontrolled population policy rather than a strict population control program, it is mathematically demonstrable that, after a few generations, there is virtually no individual born who would have been born had the alternative policy been adopted.[7]

The adoption and enforcement of an uncontrolled population policy change enough factors, like the moment of conception or the number of children per couple, so that different gametes meet and the population is composed of different particular individuals than those who would have been created otherwise. Assuming that uncontrolled population growth produces a significantly lower quality of life for the future generation than the restrictive policy, we would like to say that this policy choice

3. *See* Thomas Schwartz, *Obligations to Posterity*, *in* Obligations to Future Generations 3 (R.I. Sikora & Brian Barry eds., 1978) [hereinafter Obligations to Future Generations].

4. *See id.* at 3.

5. *Id.* (emphasis omitted).

6. *See id.*

7. *See id.* at 4.

harms the generation and that the policy choice thus is morally objectionable. Schwartz, however, maintains that the choice is not morally objectionable.[8] Schwartz believes in what Derek Parfit calls a "person-affecting" concept of harm[9] and what James Fishkin calls an "identity-specific" concept of harm.[10] Therefore, Schwartz can never harm a future person if his policy affects the conditions of conception because no *particular individual* is ever made worse off than he or she otherwise would have been.

This limitation, stemming from the identity-specific view of harm, applies in the happy child versus the wretched child case as well. If a couple could conceive a deformed, unhappy child now or wait and conceive a happy child later, we would normally think it somehow incumbent upon them to wait. Schwartz, however, would not think it morally incumbent upon them to wait. The couple harms no one, in the identity-specific sense, by conceiving the wretched child because the child is not worse off than he or she otherwise would have been. That child, in fact, otherwise would not have been born.

The conclusion that no harm is done to the future generation or to the child is, nevertheless, counterintuitive. This conclusion arises, however, from fairly plausible premises. It need not be unreasonable to define moral obligation in terms of not harming particular people, and Schwartz's assumptions about biology and varying personal identity seem correct. That these premises lead to an obviously counterintuitive stance on the child-bearing case caused Gregory Kavka to term this case the "paradox of future individuals."[11]

The conclusion certainly is paradoxical. Schwartz himself even tries to escape from the implications of his own argument by claiming that people who presently hold preferences for a happy future might, in pursuing their own satisfaction, contribute to the welfare of future generations.[12] I maintain, however, that Schwartz cannot escape by providing a particular substitute for something his own moral principle ought to do. If he came up with some external preference in the child example, say that the couple had a preference for healthy children and so did not conceive the wretched child, he still would not have patched the hole in his theory. His theory *justifies* having the wretched child; whether the couple actually has the child is irrelevant. Intuitively, we know that having a wretched child, rather than an alternative healthy child, is somehow terribly wrong. Schwartz eliminates the alternative child from consideration, eliminating the choice. I might, and Parfit certainly would, discard

8. *See id.*

9. *See* Future Generations, *supra* note 1, at 149.

10. *See* James S. Fishkin, *Justice Between Generations: The Dilemma of Future Interests*, *in* 4 Social Justice: Bowling Green Studies in Applied Philosophy 24 (Michael Bradie & David Braybrooke eds., 1982).

11. Gregory Kavka, *The Paradox of Future Individuals*, 11 Phil. & Pub. Aff. 95 (1982).

12. *See* Schwartz, *supra* note 3, at 12-13.

the person-affecting notion of harm, or merge it with some other principle, rather than accept Schwartz's argument.

B. *Parfit's Solution: Identity-Independence and Utilitarianism*

Parfit's conclusions, from discarding the person-affecting notion, are very interesting. He redefines harm so that an individual need not be made worse off, only that some persons will be worse off than they or others would have been.[13] Roughly, for the future generation policy choice, Parfit claims that if the same number of lives would be lived under either choice, it would be intrinsically worse if those who live are worse off than those who otherwise would have lived.[14] He moves to what Fishkin calls an "identity-independent" notion of harm,[15] one in which a particular individual need not be made worse off. It will suffice if *any* individual will be made worse off. The impartiality of this kind of notion of harm is a familiar feature of Utilitarianism. Indeed, Parfit looks to a utilitarian solution to the future generation problem.[16]

At first, this approach might seem promising. It allows a moral obligation principle to forbid the couple from having the wretched child, because utilitarian consideration weighs the disutility of the wretched child as negative and the utility of the happy child as positive. Utilitarianism does not care which child, in particular, has the experience. Rather, the theory focuses on the utility or disutility of the experience. In fact, Parfit suggests using a fully comparative view of benefits, deciding which of two alternative policies would benefit people most, and implementing that policy.[17]

Choosing greater net benefits is a straightforward utility maximizing principle. Parfit recognizes, however, that this will not work without many restrictions, if it will work at all.[18] Considering benefits in the classical utilitarian sense of total utility forces us to promote the creation of future people until the last person produced is indifferent between living and not living. This principle forces us to prefer a huge, wretched population to a smaller, happy one, as long as the quantity of the huge population allows its total utility to exceed the total utility of the smaller population. Parfit calls this preference "the repugnant conclusion."[19]

Considering benefits in the manner prescribed by average utility forces us to declare it wrong to have happy children. If a child were to have a happy life, a life well worth living but not quite as happy as the average

13. *See* Future Generations, *supra* note 1, at 140-48.

14. *See id.*

15. *See* Fishkin, *supra* note 10, at 25.

16. *See* Future Generations, *supra* note 1, at 146, 169-72.

17. *See id.* at 125. If the choice is between policy X and policy Y, he suggests that we find all the benefits and losses from having X rather than Y, and all the benefits and losses from having Y rather than X, and then choose the policy with greater net benefits. *See id.*

18. *See id.* at 125-28.

19. *Id.* at 142.

life, utilitarianism forces us to say that it is wrong to have this child. His or her birth will lower the average utility of the population. The repugnant conclusion and the immorality of a happy child are as counterintuitive as sanctioning the couple's choice in the wretched child case. Total and average utilitarianism, in their usual constructions, offer no solutions to our problem.

Parfit attempts a number of restrictions, but ultimately concedes that he cannot establish a principle to apply to future generations.[20] He is so distressed by his own and Schwartz' conclusions, however, that he is convinced that we must discard the person-affecting notion of harm.[21] He proposes some principle X, a utilitarian principle which he cannot give in specific form.[22] He writes that "[i]t will be about human well-being, and the quality of life, but it will not claim that what is morally most important is whether our acts will affect people for good or bad, better or worse."[23] For fear of counterexample, or just the sheer difficulty of the problem, Parfit cannot formulate this general principle of benefits or moral obligation. He advocates the adoption of an identity-independent notion of harm as the major step necessary to avoid counterintuitives like the wretched child.[24] Despite the obvious counterexamples to the standard forms of utilitarianism, Parfit seems to feel that some kind of utilitarianism, because of its identity-independent approach to harm, will work.

C. *The Failure of Restricted Utilitarianism*

Some braver souls attempt specific formulations of restricted utilitarianism, but their proposals yield counterintuitive results. Each formulation attempts to evaluate future people's interests against current people's interests. This evaluation is crucial if we are to make social policy choices. Recall the question of whether we are morally obliged to create future people at some cost to ourselves. The particular restrictions of utilitarianism can change dramatically the nature of the costs and obligations involved. If we can discount future interests relative to current interests, for example, the sacrifices that might be required of us in terms of resource preservation or population control will be smaller than if future interests are equal to our own.

Robert Scott believes that "one good solution to the present-future aggregation problem is provided by a classical or total utility principle which discounts effects on future people."[25] Scott believes, correctly, that all purely utilitarian principles are vulnerable to counterexamples

20. *See id.* at 133.
21. *See id.* at 152.
22. *See id.* at 171.
23. *Id.* at 171-72.
24. *See id.* at 148-57.
25. Robert Scott, Jr., *Environmental Ethics and Obligations to Future Generations*, *in* Obligations to Future Generations, *supra* note 3, at 74, 75.

that demonstrate how the principles legitimate injustice.[26] A standard example, for classical utilitarianism, might be a case where we judge a prohibition on racially mixed marriages as good, because the preferences of a mostly white southern town are such that a mixed marriage produces great disutility.

Any case where utilitarianism requires predatory redistribution may produce injustice. For example, if a doctor can save five ill people by killing one healthy person and distributing his or her organs among them, classical utilitarianism would, in a very unrestricted construction, expect the doctor to kill the healthy person. Scott also believes that "any correct moral code will contain both a utilitarian and a justice principle . . . the justice principle will presumably save it from the justice-counter-examples."[27] I agree with Scott that utilitarian principles are vulnerable to claims about injustice and I also accept as a possibility his claim that a moral code may be an intuitionistic balancing between two or more principles. I think, however, that his justice principle has an impossible task to accomplish because it must, in addition to eliminating justice-counter-examples, defend a violation of the most basic tenets of utilitarianism.

Scott draws his main argument for discounting from John Rawls, who offers a way to prevent a total utility principle from demanding the creation of future people until the next one produced would not experience any net utility.[28] Scott summarizes Rawls' argument:

> Rawls suggests that total happiness utilitarians might want to discount effects on future people in order to avoid what Rawls takes to be a counterintuitive consequence of total happiness utilitarianism. According to Rawls, because there could be so many people in future generations and so many future generations, situations might arise where utilitarian principles would dictate imposing extreme sacrifices on the people of the present generation so as to slightly increase the total happiness of future generations. However, if the happiness of future people were discounted, this result could be avoided. Hence, says Rawls, a total happiness utilitarian could improve his theory by incorporating discounting.[29]

If the discounting were severe enough, that is, if the satisfaction of future people is weighed sufficiently less heavily than the satisfaction of current people, total utilitarianism does escape its usual counterintuitive conclusion about producing more people. Discounting could also prevent Parfit's repugnant conclusion, for as long as the huge, wretched population is a future population, discounting could reduce the total utility compared with the small, happy population's total utility.

Scott, however, misuses Rawls when he pretends that Rawls' conclusion is that discounting can help a total happiness utilitarian "improve

26. *See id.* at 76-77.
27. *Id.* at 77.
28. *See id.* at 85-86.
29. *Id.* at 84 (citation omitted).

his theory."[30] It is true that Rawls says something like this in *A Theory of Justice*.[31] Rawls, however, reaches his real conclusion on the very next page:

> We may find that to achieve justice between generations, these modifications in the principle of utility are required. Certainly introducing time preference may be an improvement in such cases; but I believe that its being invoked in this way is an indication that we have *started from an incorrect conception*.[32]

Rawls hardly says that discounting improves the theory of total utilitarianism. Rather, he claims that the theory is a misconception and that discounting might help prevent one of the counterintuitive results that misconception generates.[33] Rawls even says that "time preference has no intrinsic ethical appeal. It is introduced in a purely *ad hoc* way to moderate the consequences of the utility criterion."[34]

Scott takes Rawls to mean that discounting improves total utility principles.[35] I claim that Rawls is far too gentle when he says that discounting has no "ethical appeal."[36] Discounting the interests of future people, in fact, is ethically unappealing. It is intrinsically wrong. If we look at how discounting works in general, it is very clear that we will not want to use it in comparing future and current people's interests.

We make economic investment decisions, for example, by determining the present discounted value of the investment. This assumes that a person A, who lives in period T, has a rate of time preference such that, other things equal, he or she prefers an amount Q in current consumption to the same amount in the next period. If A knows the interest rate he or she could earn, and the number of periods the investment will cover, A can find out the present discounted value of foregoing Q and investing it in a given project: Present Discounted Value = The Summation, as T goes from O to N, of $Q/(1+R)^T$. This equation will tell A the present value of *his or her own* future consumption from the investment. The comparison is between different periods, but between *one individual's* possible present and future utility. It is A who could have Q now, and A who could have whatever the investment gives him or her in later periods.

When we discount the interest of future people, however, it is not a question of one individual A consuming now or at some future time. We are, instead, saying that individual A's consumption or utility matters more than some future unknown individual B's consumption or utility. A is not being preferred to B because of his or her caste. A is simply

30. *Id.*
31. *See* Rawls, *supra* note 2, at 297.
32. *Id.* at 298 (emphasis added).
33. *See id.* at 297-98.
34. *Id.* at 298 (emphasis added).
35. *See* Scott, *supra* note 25, at 84-85.
36. Rawls, *supra* note 2, at 298.

preferred to B because A is a current person and B is a future person. A is preferred to B because Rawls introduces discounting in "a purely *ad hoc* way,"[37] and because Scott finds it convenient. I do not.

One of the most appealing aspects of utilitarianism is its claim to impartiality. The impartiality of an identity-independent view of interests is what draws Parfit to utilitarianism in his principle X.[38] The utilitarian does not care which person experiences the utility or disutility, but rather cares about how much utility is being experienced. Discounting the interests of future people, as long as the discounting is based solely on time preference and not on the probabilities of future effects, destroys this impartiality. Suddenly, the utilitarian cares very much that the particular current individual, A, experience utility relative to the particular future individual, B. A, simply because he or she lives at an earlier time than B, is a Brahmin, and B is an untouchable. This is why I claimed above that Scott's justice principle would have to defend a violation of the most basic tenets of utilitarianism.

While Scott does not offer a justice principle, he claims that "the classical utilitarian principle with future discounting when it is part of a moral code which includes some plausible principle of justice provides a satisfactory solution to the present-future aggregation problem."[39] I think that no plausible principle of justice, unless it starts out by setting Scott's discount rate equal to zero, will even begin to make Scott's proposal a satisfactory solution. If the principle did set the discount rate equal to zero, to which Scott would obviously object, he would be left with classical utilitarianism and the rest of some justice principle. Scott incorporates discounting because he recognizes the problems that classical utilitarianism has with future generations. Unfortunately, what he incorporates is intrinsically unjust. There is no reason why a current person's general interests should be viewed as more important than a future person's general interests.

Despite its well-known disadvantages, classical utilitarianism without discounting finds an advocate in Leonard Sumner, who tries to defend it by claiming that it will not produce the repugnant conclusion.[40] He claims that utilitarianism is self-restricted by its fully comparative nature.[41] Sumner stresses that the classical theory will only recommend expanding the population when that is genuinely the *best* way to increase total utility.[42] He argues:

> The classical theory bids us consider population expansion as one possible method of maximizing the welfare of a given society. Changes in

37. *Id.* (emphasis added).

38. *See* Future Generations, *supra* note 1, at 154, 172.

39. Scott, *supra* note 25, at 86.

40. *See* L. W. Sumner, *Classical Utilitarianism and the Population Optimum*, *in* Obligations to Future Generations, *supra* note 3, at 91, 96.

41. *See id.* at 98.

42. *See id.* at 103.

> the population level are so closely interlocked with other social changes that no expansionist policy will be just a population policy; it will also contain provisions affecting the well-being of already existing individuals. Similarly, non-expansionist alternatives will not aim solely at the purely negative goal of no increase but will also feature programmes designed to raise the overall level of social utility. . . . It must . . . be remembered that the classical theory is fully comparative . . . population expansion will be dictated only when it promises a *greater* overall return than *any* non-expansionist policy.[43]

The requirement that a population expansion must promise a *greater* overall return than *any* other policy allows Sumner's classical utilitarianism to escape the repugnant conclusion if we accept Sumner's view that the planet has already passed the stage where "further growth is the *best* means of promoting human welfare."[44]

For now, let's grant Sumner his assumption and the conclusion that the fully comparative nature of classical utilitarianism precludes the repugnant conclusion. I maintain, nevertheless, that Sumner's formulation produces a standard counterintuitive result. The strictness of the claim that a population expansion provides the greatest contribution to total utility of any available action makes Sumner's proposal vulnerable to a variant of the counterexample usually associated with the average utility principle. Suppose a couple may conceive a child who will be happy, but not ecstatic. Suppose also that the people of this couple's generation are made particularly happy by jogging and tanning—so happy, in fact, that the gain in total utility from the birth of the child couldn't possibly match the gain from running in the sun.[45] Sumner's proposal makes it wrong for the couple to have the happy child as long as it is possible for people to run in the sun.

Of course, it is implicit in Sumner's proposal that the child be in a set of possible children greater than the set E, where E is the number of children needed to produce either zero or negative population expansion. If all the happy children whom people want to conceive do not add up to enough to represent a population *expansion*, Sumner will not object to their conceptions or births. If, however, enough children are desired so that a population expansion would occur if all were born, the above example holds. Sumner will object to the birth of happy children.

Average utility principles object to the birth of happy children if their happiness is below the average level. Sumner's principle objects to the birth of happy children if they would represent a population expansion when some other action, like jogging, would add more to total utility. Either way, the result is counterintuitive. We should not object to the birth of happy children who will lead lives well worth living simply because a lower average utility or a larger population would result. Proba-

43. *Id.* at 103-04.
44. *Id.* at 104.
45. We might imagine some extremely warped version of California to be this society.

bly the only case in which the birth of a child is terribly objectionable is when the birth produces a terribly miserable child, as in the wretched child case. A happy child, by definition, would not provide such a case.

I also wonder what kinds of injustice would result if Sumner *did* try to limit the production of children to the set E, where no population expansion would occur. Suppose there are more desired, possibly happy children than spots in the set E. Will people be allowed to have children on a first-come, first-served basis? What just method will there be to decide which possible people will be included in E and which possible people will not be allowed to come into existence? I can imagine all kinds of nightmare scenarios, with some biased notion of which parents provide superior endowments more likely to raise total utility, applied in the decision. Perhaps there would be no room for African-Americans or Jews in set E. Regardless of this speculation, I think it is clear that Sumner's escape from the repugnant conclusion only leads him into other counterintuitive conclusions. Classical utilitarianism simply does not give an answer to our future generation problems.

D. *The Complexity of Future Interests*

Whether the restriction on utilitarianism is discounting or stressing fully comparative decisions, the results are unsatisfactory. Although an identity-independent notion of harm, embodied in utilitarianism, provides grounds for objecting to the morally wrong individual choice of the wretched child, it produces counterintuitive results for social policy. This is the root of Parfit's dilemma. Parfit's difficulty in giving his principle X a specific form probably stems from the fact that no construction of utilitarianism, *because* of its identity-independent approach to harm, will be free from devastating counterexamples.

The problem of the repugnant conclusion is still unresolved, but James Fishkin points out yet another problem.[46] Fishkin argues that the "replaceability" argument will always provide objections to a consistent application of identity-independent notions of interest.[47] He provides a science-fiction case which supposes that "[a]n entire population is secretly and/or instantaneously and painlessly *replaced* by other persons, perhaps copies, who have certain desirable properties. If we are utilitarians, we might imagine the replacements to be more efficient utility maximizers."[48] Fishkin argues, correctly, that an identity-independent notion of harm gives us no reason to object to this objectionable case.[49]

In fact, there are even more objectionable cases where identity-independence might *require* us to kill people if they could be replaced with more efficient utility maximizers. Ironically, the identity-independence

46. *See* Fishkin, *supra* note 10, at 26.
47. *See id.* at 26-27.
48. *Id.* at 27.
49. *See id.*

which allows utilitarianism to escape from Parfit's attacks makes it vulnerable to Fishkin's attacks. The problem of interest and the problem of future generations' interests become even more complicated, for both identity-specific and identity-independent notions of interest can entail counterintuitive conclusions.

II. DEFENDING JUSTICE: REDEFINING HARM FOR THE TORT OF WRONGFUL LIFE

In addition to presenting a frustrating tangle for theorists, the difficulty of formulating a satisfactory, specific theory of people's interests has disturbing empirical implications. In this Part of my article, I will discuss individual injustices resulting from our courts' reliance on a traditional, identity-specific view of harm. I will also propose a principle that will allow the courts to avoid sanctioning injustice in individual choice, without producing counterintuitive results for population policy questions.

A. *Wrongful Life: The Courts and a Problematic Tort*

The courts, and the State, have a long-standing commitment to the preciousness of life. In the first wrongful birth case, *Christensen v. Thornby*,[50] this commitment thoroughly dominated the court's ruling. Dr. Thornby performed a vasectomy on Mr. Christensen that failed.[51] As a result, despite Thornby's assurances of Christensen's sterility, Christensen's wife became pregnant and bore a child.[52] Mrs. Christensen had been told that child-bearing might kill her.[53] Mr. Christensen sued Dr. Thornby claiming that he experienced great anxiety and expense, both before and after the birth, which his wife survived.[54] The court's opinion drew heavily on Genesis in denying Christensen's claim:

> The purpose of the operation was to save the wife from the hazards to her life which were incident to childbirth. It was not the alleged purpose to save the expense incident to pregnancy and delivery. The wife has survived. Instead of losing his wife, the plaintiff has been *blessed with the fatherhood of another child*.[55]

The court essentially conducted an intuitive cost-benefit analysis of Christensen's position and decided, among other things, that the "blessing" of another child outweighed the anxiety experienced.[56] The court did not view the birth as wrongful; indeed, birth could not be wrongful.

The issue in wrongful birth cases like *Christensen* is how the birth of a child harms others, often the child's parents. In wrongful life cases, how-

50. 255 N.W. 620 (Minn. 1934).
51. *See id.*
52. *See id.* at 621.
53. *See id.*
54. *See id.*
55. *Id.* at 622 (emphasis added).
56. *See id.*

ever, the issue is how the birth of a child harms the child itself. In recent wrongful life cases, plaintiffs have asked courts to decide whether having a wretched child, rather than no child at all, is terribly wrong. The prevalent responses have been negative.[57] These courts appear to ground their decisions, like Schwartz's argument, in identity-specific notions of harm, as well as in the tradition, exemplified by *Christensen*, of promoting life.

Berman v. Allan[58] incorporated both wrongful birth and wrongful life claims. Shirley Berman gave birth, at the age of thirty-eight, to Sharon Berman who was born with Down's Syndrome.[59] Shirley Berman's gynecologist and obstetrician never informed her about amniocentesis, nor did they perform the procedure.[60] Shirley claimed that, had she known about amniocentesis, she would have undergone the procedure, discovered Sharon's condition, and aborted the pregnancy.[61] The Bermans brought a medical malpractice action claiming wrongful birth in that Shirley had been deprived of the option of making a meaningful decision about aborting.[62] The Bermans also brought a claim on behalf of Sharon, alleging wrongful life in that she would have been aborted but for the doctors' negligence.[63] The court recognized the parents' claim but not Sharon's.[64]

Justice Pashman, writing for the court, noted both identity-specification and a special value of life:

> Sharon does not contend that absent defendants' negligence she would have come into the world in a normal and healthy state. . . . Rather, the gist of the infant's complaint is that had defendants informed her mother of the availability of amniocentesis, Sharon would never have come into existence. . . .
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> . . . .

57. Numerous state courts refuse to recognize the wrongful life cause of action. *See, e.g.*, Elliot v. Brown, 361 So. 2d 546 (Ala. 1978) (refusing to recognize wrongful life cause of action); Walker v. Mart, 790 P.2d 735 (Ariz. 1990) (same); Lininger v. Eisenbaum, 764 P.2d 1202 (Colo. 1988) (same); Garrison v. Medical Ctr. of Del., Inc., 581 A.2d 288 (Del. 1989) (same); Kush v. Lloyd, 616 So. 2d 415 (Fla. 1992) (same); Blake v. Cruz, 698 P.2d 315 (Idaho 1985) (same); Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (same); Cowe v. Forum Group, Inc., 575 N.E.2d 630 (Ind. 1991) (same); Bruggeman v. Schimke, 718 P.2d 635 (Kan. 1986) (same); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (same); Wilson v. Kuenzi, 751 S.W.2d 741 (Mo. 1988) (same), *cert. denied*, 488 U.S. 893 (1988); Azzolino v. Dingfelder, 337 S.E.2d 528 (N.C. 1985) (same), *cert. denied*, 479 U.S. 835 (1986); Smith v. Cote, 513 A.2d 341 (N.H. 1986) (same); Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (same); Ellis v. Sherman, 515 A.2d 1327 (Pa. 1986) (same); Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984) (same); James G. v. Caserta, 332 S.E.2d 872 (W. Va. 1985) (same); Dumer v. St. Michael's Hosp., 233 N.W.2d 372 (Wis. 1975) (same); Beardsley v. Weirdsma, 650 P.2d 288 (Wyo. 1982) (same).

58. 404 A.2d 8 (N.J. 1979).

59. *See id.* at 10.

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.* at 13.

> One of the most deeply held beliefs of our society is that life—whether experienced with or without a major physical handicap—is more precious than non-life. . . . Nowhere . . . is there to be found an indication that the lives of persons suffering from physical handicaps are to be less cherished than those of non-handicapped human beings.[65]

The court implicitly held that, had Sharon been aborted and the Bermans had a healthy daughter a year later whom they named Sharon, the first Sharon still would "never have come into existence."[66] Although both children would have been named Sharon, there would have been fundamental differences of individuality between them in addition to one having Down's Syndrome and the other being healthy. The two children would be genetically different, and therefore as different in appearance and temperament as any siblings. Thus, the identity-specific notion of individuals' interests limits the choice to a child with Down's Syndrome or no child at all. There can be no replacement for Sharon. Given this choice, the court asserted the special value of life, regardless of conditions, as "more precious than non-life."[67] According to the court, Sharon has not been harmed. In legal terms, she has not "suffered any damages cognizable at law" by being born.[68]

Berman is a typical wrongful life case, if there can be a typical case in an area where factual circumstances take myriad forms, in that the weight of legal authority denies wrongful life as a harm or as a cause of action in tort law.[69] Only California, New Jersey, and Washington recognize wrongful life as a cause of action.[70] While all three states recognize the claim of wrongful life, however, they differ in their calculation of damages.[71]

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65. *Id.* at 11-13.

66. *Id.* at 11.

67. *Id.* at 12.

68. *See id.*

69. For a survey of the case law refusing to recognize the wrongful life cause of action, see *supra* note 57.

70. *See* Turpin v. Sortini, 643 P.2d 954, 966 (Cal. 1982); Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984); Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 486 (Wash. 1983) (en banc).

71. The court in *Procanik* held that a wrongful life cause of action did exist, but limited damages to special recovery of such burdens as extraordinary medical expenses attributable to the child's affliction. *See Procanik*, 478 A.2d at 757. The court refused to grant general damages as a remedy due to their complexity and an implicit sanctity of life argument. *See id.* at 763. The *Procanik* court also denied recovery for the infant's emotional distress. *See id.* at 764; *cf.* Zepeda v. Zepeda, 190 N.E.2d 849, 855 (Ill. App. Ct. 1963) (denying wrongful life cause of action noting, in dicta, plaintiff's failure to seek damages for mental distress and emotional suffering on infant plaintiff's behalf), *cert. denied*, 379 U.S. 945 (1964).

The court in *Turpin* also held that the plaintiff could not recover general damages in a wrongful life action because of the difficulty in determining whether the child, in fact, suffered an injury in being born impaired rather than not being born. *See Turpin*, 643 P.2d at 964, 966. The court noted that it would have been impossible to assess general damages in a fair, nonspeculative manner. *See id.* at 964. Nevertheless, the plaintiff re-

In *Harbeson v. Parke-Davis, Inc.*,[72] Leonard Harbeson, a member of the United States Air Force, and Jean Harbeson, an epileptic, had two daughters suffering from growth deficiencies, developmental retardation, wide-set eyes, low-set hairline, and other physical and developmental defects.[73] Jean Harbeson took Dilantin to control her epilepsy throughout the period of her daughters' conception and birth.[74] Air Force doctors prescribed Dilantin, and three of these doctors had assured the Harbesons that the only risks associated with use of the drug during pregnancy were a cleft palate and temporary hairiness.[75] In fact, Dilantin induced the birth defects.[76] The Harbesons claimed that, if they had known the true risk of birth defects, they would not have had the children.[77] They brought malpractice actions against the Air Force doctors claiming wrongful birth and, on behalf of their daughters, wrongful life.[78]

The Supreme Court of Washington recognized both claims as valid causes of action.[79] Justice Pearson, delivering the court's opinion on wrongful birth, recognized the "right of parents to prevent the conception or birth of children suffering defects. . . . [P]hysicians owe a duty to parents to preserve that right."[80] He also noted that wrongful birth actions "conform[ ] comfortably" to tort law, and are a "logical and necessary development."[81] Justice Pearson found that wrongful birth claims involve particular, easily recognizable examples of the basic elements of tort law.[82] He wrote:

> [W]rongful birth will refer to an action based on an alleged breach of the duty of a health care provider to impart information or perform medical procedures with due care, where the breach is a proximate cause of the birth of a defective child. We do not in this opinion address issues which may arise where the birth of a healthy child is allegedly caused by a breach of duty owed to the parents.[83]

The court extended the notion of birth as injury to the wrongful life claim and rejected the arguments of the *Berman* court.[84] The discussion

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covered special damages. *See id.* at 966. By contrast, the *Harbeson* court found a more complete cause of action to exist and allowed the plaintiff to recover full damages, including general damages. *See Harbeson*, 656 P.2d at 497.

72. 656 P.2d 483 (Wash. 1983) (en banc).

73. *See id.* at 486.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.* at 488, 493.

80. *Id.* at 488.

81. *Id.*

82. Any basic text on torts, or available first-year law student, can identify the necessary elements for a negligence action to be duty, breach of duty, injury, and proximate cause. *See* William L. Prosser, Handbook of the Law of Torts § 30, at 143 (4th ed. 1971).

83. Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 488 (Wash. 1983) (en banc).

84. *See id.* at 495-97.

of wrongful life was simplified as "the child's equivalent of the parents' wrongful birth action."[85] The court specifically disagreed with the *Berman* court's argument extolling the preciousness of life, saying that a wrongful life action "does not appear to us to be a disavowal of the sanctity of human life."[86] In fact, the *Harbeson* court disavowed the sanctity of life, at least in the overriding, unrestricted conception of sanctity recognized by the *Berman* court.[87]

The *Berman* court claimed unequivocally that life, in all its forms, is always more precious than non-life.[88] By recognizing a wrongful life cause of action, the *Harbeson* court defined handicapped life as an injury, an injury meriting compensation from the physicians whose negligence caused the injury.[89] The injury, it is worth stressing, is not the handicap. It is the *life* itself, the fact of being born to experience the handicap, that the court defined as an injury.[90] The Harbesons' claim that they would not have had the children if they were aware of the risk of defects is central to this definition. If they had claimed that they definitely would have had the children, the doctors' negligence would have caused the defects, but not the birth. The courts would have had to compare a defective child to a healthy child to assess damages, not a defective child to no child. The court would have defined the injury to be the inducing of defects, not the inducing of life.

The definition of life as an injury, of being born as a harm relative to not being born, "disavows" the notion that life is always more precious than non-life. The *Harbeson* court sought only to help a deformed child by forcing a negligent physician to help pay for the child's health care. The tort framework in which the court made its decision, however, requires some injury, some harm, for negligence to have occurred. Since the injury, in wrongful life cases, is birth, the court's acceptance of wrongful life as a cause of action relies on the assumption that non-life can be preferable to life.

Philip VanDerhoef, analyzing the *Harbeson* decision, maintains that courts should not recognize wrongful life claims because of the difficulty in determining that "birth is an injury to a deformed child."[91] VanDerhoef, like the *Berman* court, asserts society's deeply rooted belief in the special value of life:

> Society's belief in the sanctity of life permeates the documents on which our society is founded. The Declaration of Independence declares man's 'unalienable' right to life to be a 'self-evident' truth, and the United States Constitution characterizes life as one of the three

85. *Id.* at 494.
86. *Id.* at 497.
87. *See id.* at 496-97.
88. *See* Berman v. Allan, 404 A.2d 8, 12 (N.J. 1979).
89. *See* Harbeson v. Parke-Davis, Inc., 656 P.2d 483, 494-95 (Wash. 1983) (en banc).
90. *See id.*
91. Philip J. VanDerhoef, *Washington Recognizes Wrongful Birth and Wrongful Life—a Critical Analysis*, 58 Wash. L. Rev. 649, 669 (1983).

> fundamental rights deserving special protection. . . . States universally reserve the highest penalties for persons depriving others of their right to life. . . .
>
> The sanctity of any given life is not dependent on the condition of that life. . . . The amount of protection given to a person's life does not vary with the degree of his or her defects. . . . The wrongful life cause of action contradicts our fundamental concern for the sanctity of life . . . .[92]

VanDerhoef's argument restates a traditional intuitive recognition of the value of life. He agrees with the *Berman* court's refusal to decide that nonexistence could be preferable to a handicapped life.[93] Despite the easy, intuitive appeal of the sanctity of life, the *Harbeson* court's decision may prove to be the more attractive.

B. *Wrongful Life and the Two Notions of Harm*

VanDerhoef's arguments, like the *Berman* court's and like Thomas Schwartz's, are rooted in identity-specification, in the definition of harm as making a particular individual worse off than he or she otherwise would have been. Because the plaintiffs in wrongful life cases otherwise would not have been born, it is difficult to assert that they are worse off for having entered the world with a handicap than not having entered it at all. One way of escaping this dilemma, and of allowing ourselves to object to examples like the wretched child case, is to redefine our fundamental notion of harm. As the discussion of utilitarianism in Part I of this article reveals, moral theory does not necessarily involve identity-specific notions of interests.

From the utilitarian perspective of identity-independent interests, the doctors who caused the birth of Sharon Berman or the Harbeson girls did wrong, because an alternative child, free of defects, might have been born later and experienced greater utility than the defective child. The *Berman* court's assertion that the possibilities were a defective Sharon or no Sharon at all collapses under an identity-independent notion of harm. Utilitarianism would not care if a particular Berman child were replaced with another Berman child. The abortion and replacement of Sharon by a child better equipped to experience utility, in fact, is the preferred choice under utilitarianism.

Unfortunately, although identity-independence allows us to object to producing a wretched child rather than a healthy one, a consistent application of this notion of harm would be disastrous. Identity-independence allows us to object too strongly. Every defective child might have grounds for a wrongful life claim against his or her parents, doctors, and the state for failing to abort.[94] Perhaps states would settle these claims

92. *Id.* at 670-71.

93. *See id.* at 669.

94. *See, e.g.*, Zepeda v. Zepeda, 190 N.E.2d 849 (Ill. App. Ct. 1963), *cert. denied*, 379 U.S. 945 (1964). In *Zepeda*, an early wrongful life case, Joseph Zepeda sued his father,

by killing the children and ordering parents to replace them with healthy children, either by procreating or adopting. When people are viewed as vessels of utility, with no intrinsic value or sanctity, all sorts of counterintuitive results arise. We can justify predatory redistribution, forced population expansion, and forced abortion depending on whether we seek to maximize the total or average utility. A consistent application of identity-independence, then, does not provide a satisfactory answer to our questions.

C. *A Reconstruction of Identity-Specific Harm*

If, for the moment, we accept that the *Berman* court and VanDerhoef

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Louis Zepeda, for causing him to be born an adulterine bastard. *See id.* at 851. The complaint averred that "the defendant is the plaintiff's father; the defendant induced the plaintiff's mother to have sexual relations by promising to marry her; this promise was not kept and could not be kept because, unbeknown to the mother, the defendant was already married." *Id.* The complaint alleged that

> the promise was fraudulent, that the acts of the defendant were willful and that the defendant injured the plaintiff in his person, property and reputation by causing him to be born an adulterine bastard. The plaintiff seeks damages for the deprivation of his right to be a legitimate child, to have a normal home, to have a legal father, to inherit from his father, to inherit from his paternal ancestors and for being stigmatized as a bastard.

Id. The lower court dismissed the suit for failing to state a cause of action. *See id.*

On appeal, the court held that the complaint *did* allege the commission of a tort but affirmed dismissal noting that

> lawmaking, while inherent in the judicial process, should not be indulged in where the result could be as sweeping as here. The interest of society is so involved, the action needed to redress the tort could be so far-reaching, that the policy of the State should be declared by the representatives of the people.

Id. at 859. The court did not reject the cause of action as not to be found in tort law, but rather because of policy considerations. The court intuitively weighed legitimacy versus illegitimacy and found that not enough harm occurred to outweigh the benefit of life. *See id.* at 856. The court, however, suggested that it might have reversed the dismissal if Joseph Zepeda had included in his complaint the element of mental suffering. *See id.* at 855.

The *Zepeda* court moved, primitively, in the direction of an identity-independent view of harm, relying on a case in which the court allowed a woman to maintain an action for financial damages suffered by her as a result of a fraud perpetrated on her mother before the mother's marriage and the woman's own conception. *See id.* at 854 (citing Piper v. Hoard, 13 N.E. 626 (N.Y. 1887)). Commenting on the plaintiff in *Piper*, the court noted:

> "she [was] the very person injured by the fraud, and, although not *individually in the mind* of the defendant when he perpetrated that fraud, yet, as filling the position of heir to her father, she belongs to the class which defendant had in contemplation when he represented to the mother that the heir of Frederick would have the farm. In this way it may be claimed that defendant had in view the plaintiff . . . ."

Id. at 854-855 (quoting *Piper*, 13 N.E. at 630) (emphasis added).

The *Zepeda* fact pattern is quite different from that of *Berman*. Despite both being wrongful life cases, a social impairment such as illegitimacy may be far more bearable than a physical impairment. The *Zepeda* court was also of another time, particularly in tort law, and parental immunity may well have been in the back of the justices' minds. The result might have been different today. *See* Grodin v. Grodin, 301 N.W.2d 869 (Mich. Ct. App. 1980) (reasoning that action lies at common law for negligently inflicted prenatal injury and finding no immunity).

are correct to ground their views of wrongful life claims in identity-specific notions of harm, we still do not have to find, as they do, that wrongful life is not a harm. We simply have to accept, as the *Harbeson* court implicitly does, that non-life may be preferable to life and that wrongful life will be harmful. Justice Pashman, for the *Berman* court, made a moving argument about the difficulty of accepting this concept.[95] He wrote:

> We recognize that as a mongoloid child, Sharon's abilities will be more circumscribed than those of normal, healthy children and that she, unlike them, will experience a great deal of physical and emotional pain and anguish. We sympathize with her plight. We cannot, however, say that she would have been better off had she never been brought into the world. Notwithstanding her affliction with Down's Syndrome, Sharon, by virtue of her birth, will be able to love and be loved and to experience happiness and pleasure—emotions which are truly the essence of life and which are far more valuable than the suffering she may endure. To rule otherwise would require us to disavow the basic assumption upon which our society is based.[96]

According to the *Berman* court, life is inherently valuable because it brings love, happiness, and pleasure.[97] This inherent value outweighs the negative experience of Down's syndrome.[98]

Like the *Christensen* court,[99] the *Berman* court conducts the intuitive cost-benefit analysis, almost on utilitarian grounds, and finds that the happiness and pleasure experienced will outweigh the pain and anguish.[100] This kind of cost-benefit analysis parallels that required by the Second Restatement of Torts, which notes that any benefits which arise from the harm should be considered against claims for damages.[101] The Second Restatement demands that we weigh the value of life against the harm of experiencing the defect.[102] The *Berman* court, using this formulation, found the weight of her life heavy enough to prevent Sharon's birth from being considered a harm.[103] The *Berman* court may well be right. A child afflicted with Down's Syndrome may lead a happy life given proper care. Philip VanDerhoef, however, would generalize the *Berman* court's weight of the gift of life to preclude any wrongful life claims, including the Harbesons'. VanDerhoef might claim that Sharon, if anything, owes the doctors money.

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95. *See* Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979).

96. *Id.*

97. *See id.*

98. *See id.*

99. *See supra* notes 50-56 and accompanying text.

100. *See id.*

101. *See* Restatement (Second) of Torts § 920 (1977). Thus, if a doctor harms a child by enabling him or her to be born to experience a defect, the doctor also gives the child the benefit of life.

102. *See id.*

103. *See* Berman v. Allan, 404 A.2d 8, 13 (N.J. 1979).

There is a threshold, once we have accepted identity-specific notions of harm, when non-life becomes preferable to life. A hypothetical case is instructive to explore the implications of this position. If we determine that a severely deformed, wretched life is worse than no life at all, we can object to the couple's choice in the wretched child case.[104] While we may not want to make this determination in all cases, in some instances we may want to very much. Suppose there is a defect X that results in a child's brain and nervous system being incapable of experiencing pleasure. Suppose this defect results in a terribly painful existence of up to four years, when the child dies. Suppose the pain is terrible enough so that the child either screams in agony or is kept unconscious by drugs. I doubt that the *Berman* court would have denied Sharon's wrongful life claim if she suffered from defect X instead of mongolism. Even VanDerhoef might find that a wrongful life claim based on a doctor's failure to notify a high-risk patient of amniocentesis, if amniocentesis could detect defect X, would not contradict our fundamental concern for the preciousness of life. Or, perhaps, he would recognize that even a fundamental concern may sometimes be overpowered by another fundamental concern. A concern for not torturing others might overpower a concern for promoting life.

Unfortunately, there are many actual cases that involve real versions of defect X, and the inability of children suffering to claim damages is very disturbing. Many of these cases involve painful, and ultimately fatal, hereditary diseases. In *Park v. Chessin*,[105] the parents of a child afflicted with polycystic kidney disease sued for wrongful birth and wrongful life.[106] Hetty Park gave birth to a baby suffering from polycystic kidney disease who died approximately five hours after being born.[107] She and her husband were worried that any other children they might

104. One court has recently given strong, if oblique, support to the notion that a wretched enough life could be wrongful enough to justify removing parental rights if the parents wish to keep the child alive and suffering. *See Baby dies while still on life support*, New Haven Reg., Aug. 13, 1993, at 6. The parents of Terry Jr., a brain-damaged two-month old child, refused to let him die despite his doctor's recommendation. *See id.* Terry was born four months prematurely, weighed two pounds, seven ounces, and received morphine every six hours to relieve the pain caused by blood on his brain. *See id.* A probate judge ruled that the parents were incompetent to decide what was best for their son and granted guardianship to a great-aunt who agreed to follow doctor's recommendations. *See id.* The boy died while still attached to a ventilator after the court ruled that the baby's parents could not block the guardian from ordering his life-support disconnected. *See id.*

If a doctor or parent negligently caused Terry Jr. to live to experience his condition, perhaps a cause of action for wrongful life would obtain. The court here found non-life preferable to life. Few of us, in Terry Jr.'s condition, would contest that finding. Guido Tedeschi, in a brilliant early discussion of these issues, points out that "life is not always in the nature of a blessing . . . ." G. Tedeschi, *On Tort Liability For "Wrongful Life,"* 1 Isr. L. Rev. 513, 515 (1966).

105. Becker v. Schwartz, 386 N.E.2d 807 (N.Y. 1978) (consolidating Becker v. Schwartz and Park v. Chessin) [hereinafter Park v. Chessin].

106. *See id.* at 809.

107. *See id.*

have would also suffer from the disease and asked Dr. Chessin, the obstetrician who treated Mrs. Park during her first pregnancy, to assess the risks.[108] He erroneously informed them that polycystic kidney disease was not hereditary and that there was virtually no chance of their having a second child afflicted with the disease.[109] The Parks had a second child who also suffered from the disease and lived two and one-half years.[110] The Parks sued Dr. Chessin for damages on behalf of the second child for wrongful life and, for themselves, for wrongful birth.[111] The court recognized the parents' claim but denied the child's.[112]

The *Berman* court's cost-benefit reasoning, poignantly phrased with respect to Down's Syndrome, simply does not apply to the *Park* case. The Park child knew only the brief, painful battle against the disease, and then death. Another clear example urging the determination that life can be a harm involves children afflicted with Tay Sachs disease.[113] Parents of infants born with Tay Sachs have made very compelling cases urging courts to recognize the wrongful life cause of action.[114]

In order to allow objections to lives that are this painful, I suggest a reformulation of identity-specific harm. This conception of harm normally requires that a harm make a person worse off than he or she otherwise would have been. In wrongful life cases, we might want to consider harm as something that makes a person worse off then he or she otherwise would *not* have been. We might abide by a basic moral obligation principle that our actions must not make a person worse off than he or she otherwise would have been. We might also recognize a corollary Birth Principle demanding that we not cause to be born people whose

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108. *See id.*

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.* at 812-13.

113. Tay Sachs, which is a progressive and ultimately fatal disease of the nervous system, is a nightmarish affliction that renders infants capable of experiencing only pain until they die between the ages of two or three. *See* Duncan's Diseases of Metabolism: Genetics and Metabolism 456-58 (Philip K. Bondy, M.D. & Leon E. Rosenberg, M.D. eds., 7th ed. 1974). Tay Sachs primarily affects Jews of Eastern European descent. *See id.* at 456.

114. *See* Howard v. Lecher, 366 N.E.2d 64 (N.Y. 1977); Curlender v. Bio-Science Lab., 165 Cal. Rptr. 477 (Ct. App. 1980). In *Howard*, Mrs. Howard charged her obstetrician with failing to take a proper medical history, failing to recommend tests for Tay Sachs, and failing to inform her that her child would have Tay Sachs. *See Howard*, 366 N.E.2d at 65. She claimed that she would have had the child aborted, had she known, rather than watching the child suffer, and die within two years, from the disease. *See id.*

In *Curlender*, a medical testing laboratory had told the parents of an infant suffering from Tay Sachs that they were not carriers of the disease. *See Curlender*, 165 Cal. Rptr. at 480. The parents, on behalf of their child, charged that the inaccurate information affected either their decision to conceive or their decision not to have an amniocentesis and possibly abort. *See id.* As a result of being born only to experience Tay Sachs, the child suffered from, among other things, loss of motor control, mental retardation, and convulsions. *See id.* at 480-81.

lives are clearly worse than non-existence.[115] Rather than viewing a doctor's malpractice leading to the birth of an infant with Tay Sachs as a blessing, we could view it as a morally wrong, harmful, and legally tortious act that robs the victim of the blessing of non-existence and forces the child to face unendurable pain. Similarly, in the wretched child case, the couple's decision not to wait and instead to have a wretched child becomes wrong. That child suffers a worse fate than he or she otherwise would have faced because the state of nonexistence is preferable to utter wretchedness. Although the *Harbeson* court does not state it as such, an

115. Despite Tedeschi's thoughtful arguments, he seems to fail to recognize that this simple, yet awesome, determination is within the power of human hearts, minds, and souls to reach. Thus his thoughtful, provocative piece ends almost fliply, with the claim that his entire, or immediately preceding, "line of thought" makes, through a virtual non sequitur, "it unnecessary to consider, in concrete cases, whether it would have been preferable for the child not to be born, *a problem which admits of no solution*." Tedeschi, *supra* note 104, at 538 (emphasis added).

In the empirical realm, there is no need to suggest an answer to the question of who will determine the threshold, or the cut-off, where life is worse than non-life. That line need not be formally determined. Rather the courts can determine, on a case-by-case basis, whether or not the child in question was harmed by having been born. This kind of individualized determination is exactly what the courts are best at, and what juries exist to do.

Timothy Dawe also advocates allowing the cause of action. *See* Timothy J. Dawe, Note, *Wrongful Life: Time For a "Day in Court,"* 51 Ohio St. L.J. 473 (1990). Dawe suggests an expedient quantifying:

> The proposed scheme would have a different assignment system. Nonexistence would be valued at zero, while life without defects would retain its high positive value. Life impaired with defects would be assigned values in a range spanning from positive numbers just below that assigned to life without defects, down to negative values for the most serious of impairments. While most impaired conditions would still fall above nonexistence in value and thus result in no real injury, others that were the most severe and tragic, symbolized by negative numbers, would fall below the value of nonexistence and would thus be classified as an injury.

Id. at 496. Later in this article, I will discuss the expediency and instrumental reasoning that Dawe and others bring to the discussion. *See infra* note 144.

I have published from the perspective of a jurisprudence of caring in the past. *See* Michael B. Laudor, *Disability and Community: Modes of Exclusion, Norms of Inclusion, and The Americans with Disabilities Act of 1990*, 43 Syracuse L. Rev. 929 (1992). This article is a different enterprise. With respect to the vindication of a right, which the *Zepeda* court and others have explicitly recognized yet refuse remedy for its violation, I do not find Dawe particularly helpful. Although I agree with him that the wrongful life cause of action should generally be recognized, I object to the rigidity of his proposed schema.

It is not at all clear to me that life impaired with defects should reach, at their highest values, a point just below life without defects. A person with Down's Syndrome who experiences love, joy, and the concatenation and summation of relationships often is incapable, through an almost holy innocence, of experiencing or understanding the painful sorrows and complex anxieties that beset most unimpaired people. Thus they may arguably lead a life deserving a higher value than unimpaired life. The experience of a severely impaired life may be so vastly different from one person to another that I find the rigidity of Dawe's valuations an impediment. He is at least trying, however, to head in the right direction.

intuitive redefinition of harm along the lines similar to these must underlie its decision. This is what allows birth to be defined as an injury.

The recognition of the Birth Principle in no way leads to the counter-intuitive consequences that Parfit's proposed solution to wretched child cases produces. Accepting that a child has the right not to be born into a condition that makes life worse than non-existence promotes neither the repugnant conclusion nor the replaceability criticisms. We reach the repugnant conclusion when a principle requires us to prefer a huge, wretched population to a smaller, happier one if the utility of the large population exceeds that of the smaller. Identity-specific notions of interests, as Schwartz points out, do not allow us to consider the total or average utility of a population in determining whether or not someone is harmed.[116] Rather, we must consider how an action affects individuals, not some aggregate that interests us.

While avoiding the repugnant conclusion, the Birth Principle does not require us, as Schwartz's unrestricted identity-specification does, to be indifferent in choices affecting future possible people. This principle does not allow us to choose a policy that will result in lives clearly worse than non-existence. A policy choice that might lead to one of Parfit's populations prevents us from choosing wretchedness. As for replaceability, the Birth Principle does not allow us to object to a life on the grounds that another life might be preferable. We may object only when non-life is preferable. Thus, the fact that a fairly happy child might be replaced with an ecstatic child is irrelevant to our behavior. Our general moral obligation principle prevents us from acting in such a way that the fairly happy child would be made worse off. We cannot replace him or her with *another* child and claim that we have not caused the first child harm. This is the great strength of identity-specific notions of interest.

I am concerned, primarily, with solving the problem of objecting to wrongful lives, so I will not fully develop a defense of my principle in the area of social and population policy. Demonstrating that my solution avoids the consequences of Parfit's suggests that the Birth Principle, coupled with identity-specific interest, does not obviously generate counter-intuitive results.

D. *The Last Defense of Wrongful Life*

VanDerhoef objects to the *Harbeson* decision even if birth is an injury, but his arguments are less forceful than his impassioned, if misguided, claim that no life is harmful. The most common attack can be crudely expressed as an assertion of the impossibility of general damages and a difficult harm definition in tort. VanDerhoef rejects the wrongful life claim on another basic element of negligence—that of duty.[117] He writes:

116. *See* Schwartz, *supra* note 3, at 4-5.
117. *See* VanDerhoef, *supra* note 91, at 672.

> [E]ven if birth with defects is an injury, there is a second prerequisite to establishing a duty: the plaintiff must have a right to legal protection of his interests. No duty can be imposed on the physician unless the unborn child has a legally protected right to be born free of defects. . . . There are several indications that such a right does not exist. First, there is no precedent for recognizing a right to be born as a whole, functional human being. Second, the United States Supreme Court has cast doubt on the possibility that an unborn child has any legally protected rights, by denying that an unborn child has a legally protected right to life. Finally, "rights" exist between persons as legal entities in society. They do not exist between persons and non-persons. As legal non-persons, unborn children are incapable of having rights. Thus, the right to be born healthy is a necessary prerequisite to the imposition of a duty on the physician in a claim for wrongful life, but the existence of such a right has not been established.[118]

First, we need not recognize the "right to be born free of defects."[119] Recognition of such a right would create obviously counterintuitive cases, as well as raise frightening questions about the responsibility of parents, doctors, and the State to define and prevent the supposed defect.[120] Fortunately, the right needing recognition in wrongful life claims is far less dangerous to recognize. All we need is a right to be born not tortured, not miserable, not utterly wretched—a right not to be born in such a state that we would have been better off never to have existed.

Second, the Supreme Court has not denied that an unborn child has a legally protected right to life. The Court has implied, in effect, that such a right is overpowered by a woman's right to privacy.[121] It could be overpowered in the same way by a right not to be born wretched. The "Supreme Court[, however,] has cast doubt on the possibility that an unborn child has any legally protected rights, by denying that an unborn child has a legally protected right to life."[122] A right *not* to have a life worse than non-existence could exist independently of a right to life.

Finally, although rights usually exist between persons, they also exist between persons and corporations, between persons and governments, even between persons and animals. An unborn child is not a non-person in the same sense that a chair or table is. The child has the potential of being a person.[123] Any act that moves the child from potential person to

118. *Id.* (footnotes omitted).

119. *Id.* (footnote omitted).

120. For example, I wear glasses and have been nearsighted since birth. My friend Pat stutters. Might anyone argue that we were robbed of a right to be born free of defects by not being aborted? Ku Klux Klan members might, out of concern for the preservation of such a right, try to prevent the birth of any child with the "defect" of being African-American.

121. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (implying that right of privacy encompasses decision to terminate pregnancy).

122. VanDerhoef, *supra* note 91, at 672.

123. The *Zepeda* court knew what it was doing when it stated that "the only theory of recovery to be considered on this appeal is whether the complaint states a cause of action in tort." Zepeda v. Zepeda, 190 N.E.2d 849, 852 (Ill. App. Ct. 1963), *cert. denied*, 379

actual person *must* occur before the child is actual. If the harm lies in becoming actual, the child will not experience the harm until he or she is born. The harm will be experienced by persons, or as VanDerhoef says, "legal entities in society."[124] It cannot be just to claim that a negligent doctor is not negligent simply because there is some lag time between the negligent act and its consequences. VanDerhoef's rejection of duty is not persuasive.

As for the core attack, the court in *Zepeda v. Zepeda*[125] knew that it was acting strangely when it attacked the wrongful life cause of action on the grounds of the complication of awarding general damages.[126] Bearing in mind that an action for damages is implicit in any action that is

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U.S. 945 (1964). The court found that the defendant had committed a tortious act and "not only a moral wrong." *Id.* The *Zepeda* court went quickly to the actual or potential life questions involved by asking if "a tort [can] be inflicted upon a being simultaneously with its conception." *Id.* The court went further, asking "what if the wrongful conduct takes place before conception? Can the defendant be held accountable if his act was completed before the plaintiff was conceived?" *Id.* at 853.

The court concluded that, in fact, it is possible to incur " 'a conditional prospective liability in tort to one not yet in being.' " *Id.* (quoting Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884), *overruled by* Torigian v. Watertown News Co., 225 N.E.2d 926 (1967)). Thus the court notes that "[i]t makes no difference how much time elapses between a wrongful act and a resulting injury if there is a causal relation between them." *Id.*

The *Zepeda* court used several hypothetical cases to illustrate its point. *See id.* The court posited:

> Suppose, before the child was conceived, a manufacturer negligently made a space heater and sold it to a retailer who retained it in his store. After the infant's birth his mother purchased the heater and used it in the room of her child who was burned because of its faulty preparation. Would there not be a right of action against the manufacturer despite the fact the negligence took place before the child was conceived? In the hypothetical case the child was injured after birth. Lest this fact be given undue importance, let us proceed a step further. Suppose a manufacturer prepared and sold a drug for human consumption which had not been adequately tested; that, while it was beneficial for the purpose intended, it proved to be harmful if taken by women in the very early stage of pregnancy in that it arrested the development of infants' bodies, causing them to be born with abnormal arms or legs. Would not a child so born have a right of action in tort? In the second case the child was injured soon after conception. So let us go still further and take a third suppositive case, where the wrongful act also takes place before conception but the injury attaches at the moment of conception. Physicists and geneticists declare that thermonuclear radiation can so affect the reproductive cells of future parents that their offspring may be born with physical and mental defects. If a child is born malformed or an imbecile because of the genetic effect on his father and mother of a negligently or intentionally caused atomic explosion, will he be denied recovery because he was not in being at the time of the explosion?

Id. at 853-54 (citations omitted). The court concluded that "[i]f the plaintiff was conceived before the completion of the act he became a living, human organism concurrently with the wrongful act. If his conception took place after the act, he was a *potential being with essential reality at the time of the act.*" *Id.* at 855 (emphasis added).

124. VanDerhoef, *supra* note 91, at 672.

125. 190 N.E.2d at 849.

126. *See id.* at 858.

called a tort,[127] it may be inconsistent to deny, as we do, the right to maintain an action to recover for this act. The *Zepeda* court noted that "[r]ecognition of the plaintiff's claim means creation of a new tort: a cause of action for wrongful life. The legal implications of such a tort are vast, the social impact could be staggering."[128] This fear of the "slippery slope" arises, in fact, in many areas of the law.[129] But it is not just the question of where it will lead that creates the stumbling block that has only special damages awarded in *Turpin v. Sortini*[130] and *Procanik v. Cillo*.[131] It is, as Tedeschi puts it, the idea that general damages are impossible to determine.[132]

At the risk of beating a dead horse, *Williams v. State*[133] reflects again the sticking point of harm recognition. Judge Keating, in his concurrence, reveals precisely this concern.[134] He is troubled by the difficulty of permitting recovery when the very act that caused the plaintiff's birth was the same one responsible for whatever damages she has suffered or will suffer.[135] He noted that "[d]amages are awarded in tort cases on the basis of a comparison between the position the plaintiff would have been in, had the defendant not committed the acts causing injury, and the position in which the plaintiff presently finds herself. . . . It is impossible to make that choice."[136]

Timothy Dawe tries to help the courts see that damages can be awarded by only recognizing more intuitively tangible and understandable types of impairment.[137] He writes:

> To avoid the "open floodgates" possibility that the *Zepeda* court feared so much, the injury alleged would have to be a physical one, such as genetic or congenital impairment, and not merely an "impaired status" injury such a [sic] illegitimacy. This distinction of the *Curlender* court seems valid, considering the more ephemeral nature of "status" impairments and the likelihood that they can be reversed. In contrast, the physical injuries resulting from severe defects are likely to remain throughout the plaintiff's life.[138]

This is an expediency argument, one designed, in a way, to keep the courts' minds off the central issue, the possibility of life, of being born to experience whatever defects, as the harm. It is also intrinsically unfair,

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127. *See* Prosser, *supra* note 82, § 1, 2-4.
128. *Zepeda*, 190 N.E.2d at 858.
129. The more recent furor over reproductive technologies reflects this concern for the "slippery slope." *See* Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 Wis. L. Rev. 297, 300-01 (1990).
130. 643 P.2d 954 (Cal. 1982).
131. 478 A.2d 755 (N.J. 1984).
132. *See* Tedeschi, *supra* note 104, at 529-30.
133. 223 N.E.2d 343 (N.Y. 1966).
134. *See id.* at 344 (Keating, J., concurring).
135. *See id.* at 345.
136. *Id.*
137. *See* Dawe, *supra* note 115, at 496-97.
138. *Id.*

as mental illness may fit neither into the physical or status categories, and would therefore not be grounds for action despite its often severe and crippling effects.

It is probably better to try to meet the core problem head on, as the Court of Appeals of Michigan did in *Troppi v. Scarf*.[139] The court considered the civil liability of a pharmacist who negligently supplied the wrong drug to a married woman who had ordered an oral contraceptive and, as a consequence, became pregnant and delivered a normal, healthy child.[140] Although I am admittedly less comfortable with categorizing this case as wrongful life, rather than wrongful birth, I am in agreement with Judge Levin's argument about determining odd and thorny damages.[141] He wrote:

> Uncertainty of Damages. Of the four items of damage claimed by plaintiffs, each is capable of reasonable ascertainment. The medical and hospital expenses and Mrs. Troppi's lost wages may be computed with some exactitude. Plaintiffs' claimed pain and anxiety, if not capable of precise determination, is a component of damage which triers of fact traditionally have been entrusted to ascertain. As to the costs of rearing the child until his majority, this is a computation which is routinely performed in countless cases.
>
> It should be clear that ascertainment of *gross* damages is a routine task. Whatever uncertainty attends the final award arises from application of the benefits rule, which requires that the trier of fact compute the dollar value of the companionship and services of an unwanted child. Placing a dollar value on these segments may well be more difficult than assessing damages, for, say, Mrs. Troppi's lost wages. *But difficulty in determining the amount to be subtracted from the gross damages does not justify throwing up our hands and denying recovery altogether.*[142]

Judge Levin makes the crucial point that we have long entrusted the triers of fact to find ways to quantify things that are intuitively not possible to quantify.[143]

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139. 187 N.W.2d 511 (Mich. Ct. App. 1971).

140. *See id.* at 512-13.

141. *See id.* at 520-21.

142. *Id.* (second emphasis added).

143. This notion of successful, "impossible" computations is well expressed in an alienation of affections case which has been overruled. *See* Bearbower v. Merry, 266 N.W.2d 128 (Iowa 1978), *overruled by* Fundermann v. Mickelson, 304 N.W.2d 790 (Iowa 1981). The court noted:

> The difficulty of translating damage to intangible rights into money judgements has deterred us not at all in other law areas. We recognize violation of the intangible right of privacy as an actionable tort. We permit actual damages to be awarded for the intentional infliction of emotional harm. We have held a plaintiff could sue for damages for emotional distress arising from breach of a funeral service contract. We early allowed money compensation for mental pain as a component of damages for a physical impact tort. . . . [W]e held a wrongful death case jury could assign a dollar value to the loss of companionship and society of a minor child.

It remains unclear why we allow valuation of the absence of a would-be present child while denying as impossible the valuation of the presence of a would-be absent child.[144] Damages determinations are nothing but the best efforts of human triers of fact to find justice while searching for clarity into murky or black water. Yet we have found, routinely, such

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Id. at 133 (citations omitted).

144. Philip Peters offers an excellent discussion of finding a duty in tort. *See* Philip G. Peters, Jr., *Rethinking Wrongful Life: Bridging The Boundary Between Tort and Family Law*, 67 Tul. L. Rev. 397 (1992). Peters, noting the courts' discomfort with establishing damages and remedy in wrongful life cases and drawing the connection to family law, suggests finding a remedy in family law for a claim where there is still a duty in tort law. *See id.* at 399. Peters would replace the wrongful life cause of action with a "backup action for child support." *Id.* at 411. This solution would force the physician responsible for a child's birth and experience of injury to assist parents in meeting their disabled children's expenses. *See id.* at 412. Peters finds, in the special benefits rule, "a basis for finessing the comparison between life and nonexistence." *Id.* at 434.

I do not find this finessing particularly attractive and, instead, advocate meeting the problem head on. Peters and I, however, are not so far from each other initially. He writes:

> Because tort law is designed to insure compensation for harm, not adequate child support, tort law leaves children born as a result of tortious conduct inadequately protected. The problems and complexities associated with proof of harm in wrongful life and wrongful birth actions cause courts to significantly limit the recovery of compensatory damages. These limitations threaten to leave many families without the resources necessary to adequately provide for their children. To protect these children, lawmakers need to abandon their exclusive reliance on tort doctrine as it is traditionally construed.

Id. at 398. Here we agree. I, unlike Peters, would reconstrue the notion of harm underlying the courts' difficulty and stay within tort law. Peters instead looks to the blurry boundaries of tort and family law and attempts to find a solution in family law—a move I find instinctively dangerous. To reach for a tort-based cause of action by adding the complexity, regarding children, of family law when a logical extension of tort law might do the job is risky. *See, e.g.*, DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189 (1989) (finding only sufficiently compelling interest can permit state to interfere with liberty interest of parent); *In re* Gault, 387 U.S. 1, 17 (1967) (justifying considerable state control over family by noting that "a child, unlike an adult, has a right 'not to liberty but to custody' ").

Peters treats wrongful life cases principally as involving third parties such as physicians and fails to address effectively those cases that are intra-familial. Thus, Peters will walk with me a puzzlingly limited distance. He writes:

> [T]he obvious shortcoming of an action for backup child support is the limited relief provided. Courts would also need to recognize a full wrongful life claim for compensatory damages to provide complete protection for a catastrophically injured child. Even if such a claim were recognized, however, general damages would be available only in the rare cases where the child's injuries are so devastating that life itself is harmful.

Peters, *supra*, at 421. While *Harbeson* may be just such a case, Peters, perhaps inconsistently, appears to criticize it. See *id.* at 412 n.50. He also notes:

> An action for backup child support would serve the demands of justice while avoiding the problems that doomed the tort action for compensatory damages. Because it escapes the comparison between life and nonexistence, damages are calculable and do not require a finding that life itself is a legally cognizable injury. To the contrary, the orientation of the child support action is to enable the disabled, to focus on the future, not the past, and to emphasize the child's potential, not her injury.

Id. at 443. While his point may be appealing, it ignores the stark fact that certain chil-

determinations an acceptable and necessary part of tort law. More generally, viewing a wrongful life case as occurring within, or at least having a great input upon, a family, we can look to a great authority for general approval. Prosser writes:

> [T]he law of torts is concerned not only with the protection of interests of personality and of property, tangible or intangible, but also with what may be called "relational" interests . . . . An interference with

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dren have no future. *See supra* note 104 (discussing Terry, Jr.); *supra* notes 113-114 (discussing children with Tay Sachs disease).

The very structure of Peters' article, his separate discussions of tort and family law, shows how he goes astray, particularly with respect to claims by children against their parents. Indeed, intra-familial tort immunity is virtually dead. *See, e.g.*, Gibson v. Gibson, 479 P.2d 648, 648 (Cal. 1971) (abolishing parental immunity); Anderson v. Stream, 295 N.W.2d 595, 600 (Minn. 1980) ("Our system of justice places great faith in juries, and we see no compelling reason to distrust their effectiveness in the parent-child context."); Balts v. Balts, 142 N.W.2d 66, 75 (Minn. 1966) (finding doctrine of parent-child immunity as defense in tort no longer valid); Nolechek v. Gesuale, 385 N.E.2d 1268, 1277 (N.Y. 1978) (Fuchsberg, J., concurring) (noting that "each parent-child case [should] be decided by answering . . . [w]hat would an ordinarily reasonable and prudent person—taking into account the parent-child relationship—have done in similar circumstances?"); Burnette v. Wahl, 588 P.2d 1105, 1119 (Or. 1978) (Linde, J., dissenting) (stating that emotional harm which demurrer admits plaintiff has suffered is monetarily compensable); Glomb v. Glomb, 530 A.2d 1362, 1366-67 (Pa. 1987) (holding parents who negligently hired babysitter jointly and severally liable for child's brain damage resulting from sitter's intentional conduct); Goller v. White, 122 N.W.2d 193, 198 (Wis. 1963) (abrogating parent-child immunity except in limited cases). Thus the great trilogy of early intra-familial immunity cases no longer holds. *See, e.g.*, Hewellette v. George, 9 So. 885, 887 (Miss. 1891) (holding that societal and familial tranquility justify parent-child tort immunity), *overruled by* Glaskox v. Glaskox, 614 So. 2d 906 (Miss. 1992); McKelvey v. McKelvey, 77 S.W. 664, 664 (Tenn. 1903) (refusing to award damages to minor child for personal injury inflicted by stepmother), *overruled by* Davis v. Davis, 657 S.W.2d 753 (Tenn. 1983); Roller v. Roller, 79 P. 788, 789 (Wash. 1905) (rejecting child's tort claim against parent for injuries inflicted during parent's rape of child), *overruled by* Borst v. Borst, 251 P.2d 149 (Wash. 1952). The intertwining of family and tort law that Peters sees as necessary to construct has, in great measure, occurred. For a useful discussion in this area, see Martin J. Rooney & Colleen J. Rooney, *Parental Tort Immunity: Spare the Liability, Spoil the Parent*, 25 New Eng. L. Rev. 1161 (1991).

Another disagreement I have with Peters is the constant expediency, or instrumental rationality, of his perspective. While I recognize that this stems from a care-based jurisprudence, and I consider the writings of Carol Gilligan and Martha Minow in my own work, Peters goes too far. Peters ignores that the *Harbeson*, *Turpin*, and *Procanik* courts thought they were doing justice when he claims that they "intuitively fashioned relief to meet the child's needs." Peters, *supra*, at 414. They were righting a perceived wrong. I find myself wondering if Peters has heard of a declaratory judgment. Indeed, I am disturbed by his lack of attention to dignity, to the right to recover from a wrong.

The Supreme Court has recognized the need for dignity and the right to be treated justly. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261 (1970) (extending due process rights to recipients of benefits of entitlement programs). In his famous dissent, Justice Burger expressed an agonizing tension: given a finite pool of resources devoted to welfare, each notice of benefit termination, each hearing, could mean less money going to needy recipients and, consequently, less people fed. *See id.* at 284 (Burger, J., dissenting). Children whose lives are wrongful have been harmed. Under a proper understanding of that harm, the courts should be fashioning remedies. They should not rely on a mixture of tort and family law that denies compensation for harm and merely provides support from a third party if and only if the parents need the money to meet their expenses.

> the continuance of the relation, unimpaired, may be redressed by a tort action; and of this the relations of the family are a conspicuous example.[145]

The attack on the difficulty of determining general damage awards as a ground for not recognizing a wrongful life cause of action remains unpersuasive.

CONCLUSION

Although it is different to have a life ended than never to have lived at all, the courts have moved toward a recognition that non-life can be preferable to life. In a much publicized case, *Cruzan v. Missouri Department of Health*,[146] the Supreme Court upheld the right of parents to show by clear and convincing evidence that their child would refuse life-prolonging measures.[147] The Court has also let stand a lower court's affirmation of such a right in *In Re Quinlan*.[148] Underlying these decisions was the notion that, if the child involved could have spoken for herself, she would have made the same decision. The same notion, given the redefinition of harm and the ensuing recognition of a right to be born to a life not worse than non-existence, should provide a framework for wrongful life cases.

There is no excuse for denying wrongful life as a cause of action. The child, usually represented by parents or a guardian, will have a tremendous burden of proof. In addition to the tort elements of duty, breach, and proximate cause, the child will have to convince the finders of fact that his or her particular life is worse than never having been born. Each case, however, should be tried on its merits and not excluded from the courts by a blanket rejection of the wrongful life cause of action. An infant suffering from Tay Sachs would seem to have little trouble making a case.[149] My intuition suggests that the court would reverse its decision to deny a wrongful life cause of action in the *Park* case.[150]

VanDerhoef and others attack the *Harbeson* court's decision, but its decision is enlightened and humane. The wrongful life cause of action, when the proper underlying concept of harm is applied, is a testament to the ability of our courts to pursue, even in the modern jungle of advancing medical technology, the time-honored principle of a remedy for every wrong.

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145. Prosser, *supra* note 82, § 124.

146. 497 U.S. 261 (1990).

147. *See id.* at 285.

148. 355 A.2d 647 (N.J.), *cert. denied*, 429 U.S. 922 (1976).

149. *See supra* notes 113-14 and accompanying text (discussing children afflicted with Tay Sachs disease).

150. *See* Park v. Chessin, 386 N.E.2d 807, 809 (N.Y. 1978) (discussing child suffering from polycystic kidney disease).