CHAPTER 9

DO CHILDREN HAVE THE RIGHT NOT TO BE BORN?

If the title tantalizes, it is meant to. Even those who accept that children have rights, and most now do⁠¹, may find the paradox puzzling. The designation of those not yet born as ‘children’ may be thought to embody a particular value position with which some may be uncomfortable. It is not intended to discomfort in this way. This is not an examination of the morality of abortion⁠². Why I call the as yet unborn ‘children’ will become apparent in the course of this paper, and it will have implications for abortion⁠³ though again I emphasize that is not my concern.

THE RIGHT TO BE A PARENT

The right to be a parent, to marry and found a family, as it is formulated in international documents⁠⁴, is commonly asserted. Thus, we can expect the Labour party to be attacked if it persists with its intention of removing NHS funding from IVF treatment⁠⁵. Of responsible parenthood we hear rather less⁠⁶. One of the rights I believe children have – and this is seldom invoked – is the right to responsible parents. But that is not, at least directly, my concern here. But responsibility, the moral correlative of rights, is in issue and must be addressed. Without in any way wishing to gainsay the right to have children, the question must be raised as to whether there are any circumstances in which it would be wrong to bring a child into existence. Are there circumstances in which life would be ‘demonstrably so awful’ (the test posited in the first English defective neonate case in 1981⁠⁷) that is would be unfair to subject a child to it, circumstances such that never to have been born would have been preferable to being born with particular disabilities? And if such circumstances exist, do potential parents have the duty not to procreate? It has taken a long time for us to conceptualise the parent-child relationship in terms of parental responsibility rather than as a bundle of parental rights⁠⁸. It will be a part of the argument of this paper that our moral reasoning could usefully employ the concept of parental responsibility⁠⁹ in this context too.

PARENTAL AUTONOMY AND ITS LIMITATIONS

² A thoughtful article on the intractable conflict involved here is Amy Gutmann and Dennis Thompson, ‘Moral Conflict and Political Consensus’, 101 Ethics 64 (1990).
³ In particular raising the question of whether there are circumstances in which it is morally right to terminate a pregnancy.
⁴ For example, the European Convention on Human Rights, Article 12 (‘Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of this right’). See also Cyril Hegnauer, ‘Human Rights and Artificial Procreation by Donor’ in (eds.) John Eekelaar and Petar Sarcevic, Parenthood in Modern Society (Dordrecht: Nijhoff, 1993, p. 207).
⁶ The change can be traced back to a Justice report, Parental Rights and Duties and Custody Suits (London: Justice, 1975). I was a member of the Committee.
⁷ As now found in the Children Act 1989 sections 2 and 3.
John Stuart Mill, writing in *On Liberty* many years before many of the problems I am addressing could have been anticipated, was aware of the problem. He wrote:

> It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society.\(^{10}\)

But, as Mill recognized for this ‘crime’ there was a relatively easy remedy\(^{11}\): ‘if the parent does not fulfil this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent’\(^{12}\).

**FEINBERG AND BIRTHRIGHTS**

For Mill this constituted a limitation to autonomy. It was not so much an application of his famous principle of ‘harm to others’\(^{13}\), as an additional justification for interfering with an individual’s freedom. But the contemporary philosopher Joel Feinberg, in the first of four volumes exploring the moral limits of the criminal law, which he entitles *Harm To Others*\(^{14}\), does examine the question under scrutiny using the concept of harm. He concludes, for reasons which will be discussed shortly, that biological parents ‘do not harm’ a child even if the child comes into existence in a state that makes a ‘life worth living’ impossible\(^{15}\). But it is still possible, he argues, to talk of a right not to be born. This refers to ‘the plausible moral requirement’ that:

> No child be brought into the world unless certain very minimal conditions of well-being are assured, and certain basic “future interests” are protected in advance, at least in the sense that the possibility of his fulfilling those interests is kept open. When a child is brought into existence even though these requirements have not been observed, he has been wronged thereby...\(^{16}\)

Feinberg’s concern is with ‘birthrights’\(^{17}\). So, if the conditions to enable him to fulfil his most basic interests are destroyed before he is born ‘and we permit him nevertheless to be born, we become a party to the violation of his rights’.\(^{18}\) Feinberg concedes that not all interests should qualify for prenatal legal protection\(^{19}\), only the very basic ones whose satisfaction is indispensable. But Feinberg’s list of these is compendious and difficult to take seriously. Harris called it ‘astonishing’\(^{20}\).

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\(^{11}\) But not a remedy which commended itself to too many in 1859 when *On Liberty* was published.


\(^{13}\) (New York: Oxford University Press, 1984).


\(^{18}\) *Idem.*
... severe mental retardation, congenital syphilis, blindness, deafness, advanced heroin addiction, permanent paralysis or incontinence, guaranteed malnutrition, and economic deprivation so far below a reasonable minimum as to be inescapably degrading and sordid...  

Feinberg clearly cannot intend this catalogue to be cumulative – it would be unimaginably cruel to be dealt all these blows. But if one examines each of these ‘ills’ individually, the implications would be, for example, that the very poor should never procreate, and nor should the congenitally blind or congenitally deaf because of the likelihood that offspring would also suffer from these disabilities. Children born in such circumstances would be ‘harmed’ – it is a disadvantage to be born deaf or to very poor parents – but would they be ‘wronged’ (remembering this is Feinberg’s test)? There are blind and deaf and even extremely poor people who lead happy and fulfilling lives and their children may do so too.

In a more recent article, Feinberg has concluded that it is possible to harm someone by being responsible for his being brought into existence. He says his inability to see this in Harm To Others resulted from his failure to clarify what it means to say that someone has been made ‘worse off’. But this can mean more than one thing. It could be interpreted to mean ‘worse off than he was before the wrongdoer acted’ (Feinberg designates this ‘the worsening condition’). But no one can be worse off than he was before he existed – it would be absurd to compare the individual before he existed with the individual after he existed. In some cases, however, the individual who has been harmed is not worse off than he was but worse off than he would have been, had the wrongdoer not acted as he did. This expresses, what Feinberg has called, a ‘counterfactual’ condition. The counterfactual claim amounts to saying that the individual would be better off not coming into existence, or ‘better off unborn’.

Better Off Unborn

But what is meant by saying that someone is ‘better off unborn’? It may help, as Steinbock suggests in Life Before Birth, to consider first what is meant by ‘better off dead’. This phrase, she suggests, means that ‘life is so terrible that it is no longer a benefit or a good to the one who lives’. In the case of a competent adult, the criterion by which to judge whether a person is better off dead is ordinarily whether the person himself considers life not worth living. But this is not a test that can be applied to infants. It is not just that they cannot express their preferences: they lack the intellectual equipment to have preferences. They cannot understand the choice between a severely handicapped existence and no existence at all. Therefore, it does not make any sense to ask what the infants would want, if they could only tell us. As Buchanan and Brock demonstrate clearly, the test of ‘substituted judgement’ is not applicable in the case of never-competent individuals.

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22 It is always difficult to use actual examples and rather boring to cite Beethoven. It is also embarrassing to think that on all the tests cited in this paper Stephen Hawkins, acknowledged to be one of the most brilliant men of this generation, would not have been born.
24 Ibid., p. 149.
25 Ibid., p. 150.
26 (New York, Oxford University Press, 1992), p. 120.
It now becomes possible to project this analysis onto the state of being better off not existing or ‘better off unborn’. The unborn cannot be consulted about whether they wish to be born, nor can an infant be asked whether his present existence is preferable to not having been born. It would be possible to raise a presumption in favour of life, any life. But there are surely lives that are demonstrably so awful that no one could possibly wish it on a child. These cases are rare. More common are those where the child is severely handicapped. Robertson considers the case of profoundly retarded, non-ambulatory, blind and deaf infant who will spend his time in a state institution and he comments:

One who has never known the pleasures of mental operation, ambulation and social interaction surely does not suffer from the loss as much as one who has. While one who has known these capacities may prefer death to a life without them, we have no assurance that the handicapped person, with no point of comparison, would agree. Life and Life alone, whatever its limitations, might be of sufficient worth to him.

A life that a normal individual might find intolerable might not be so awful for an infant who has experienced nothing else.

It is difficult, therefore, to make a choice based on the infant’s particular interests. But it is possible to offer the judgement of a ‘proxy chooser’.

Rather like a guardian ad litem, this person would act as an advocate of the child’s best interests. The proxy chooser cannot express the child’s own preferences, but neither should he allow his values to obtrude. Feinberg puts it thus:

[The infant] may not yet have any values, goals, ideals or aspirations, the stuff of which interests are made. But the proxy chooser is not therefore required to substitute his own, ascribing them hypothetically to the infant. Rather, he exercises his judgment that whatever interests the impaired party might have, or come to have, they would already be doomed to defeat by his present incurable condition. Thus, it would be irrational – contrary to what reason decrees – for a representative and protector of those interests to prefer the continuance of that condition to non-existence. The proxy might also express the retroactive preference, on the incompetent’s behalf, not to have been born at all.

Note there are two important features of the proxy’s choice. The choice of non-existence must be required by reason, not just in accordance with it. ‘A preference for non-existence over continued existence with a cut finger is clearly contrary to reason; a preference for non-existence to inescapable hideous torture might be required by reason’.

Feinberg offers us a thought experiment in which we are given the opportunity after death to be reincarnated, ‘but only as a Tay-Sachs baby with a painful life expectancy of four years to be followed by permanent extinction or [we] can opt for permanent extinction to begin immediately’. Feinberg is of the opinion that we would have to be ‘crazy’ to select the first

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29 Ibid., p. 254.
31 Ibid., p. 165.
32 Ibid., p. 164.
33 Idem
option and that if required to make the choice for a loved one we would also opt for immediate non-existence. Secondly, non-existence is rationally preferable only if all interests, present and future, are ‘doomed to defeat’ \(^{34}\). Such a test works optimally where there is chronic pain combined with such severe mental retardation that the child will not be able to develop any compensating interests. It is instructive to examine and compare the facts of the two well-known English cases.

**BETTER OFF DEAD**

The first, alluded to already, is that of ‘Baby Alexandra’ *(Re B)* \(^{35}\). She was born a Down’s Syndrome baby with an intestinal blockage. The Court of Appeal sanctioned surgery, which was thought to give her a life expectancy of 20 to 30 years (the normal life span of someone with Down’s). The test applied was whether it could be said that Alexandra’s life was demonstrably going to be so awful that she should be condemned to die, or whether it was so imponderable that she should be allowed to live \(^{36}\). This conclusion appears to be right and certainly as an application of the doomed to defeat’ test would fall clearly into the category where reason would prefer existence to non-existence. But the case also throws light on the problem of proxy choice. The decision in *Re B* was only taken by a court because parents, the most obvious proxy choosers, preferred their daughter to die. This was a preference they later came to regret and they successfully requested the return of Alexandra to their custody when she was ten months old \(^{37}\). This illustrates both the difficulties of proxy choice and perhaps also the dangers of leaving such decisions with parents. As such the case is an interesting test for the Goldstein, Freud and Solnit parental autonomy thesis \(^{38}\).

The second case is *Re J* \(^{39}\). J was a baby born prematurely at 27 weeks gestation. At birth he weighed 1.1 kg: he was not breathing, was placed on a ventilator and given antibiotics on a drip to avoid infection. When taken off the ventilator at three months he suffered repetitive fits and cessations of breathing requiring resuscitation by ventilation. The prognosis was severe brain damage arising from prematurity. The most optimistic neonatologist thought that there would be serious spastic quadriplegia. It was likely that J would never be able to sit up or hold his head upright; he would probably be blind and deaf, and would be most unlikely to develop even the most limited intellectual abilities. On the other hand, there was evidence that he would be able to feel pain to the same extent as a normal baby. Life expectancy at its highest was late teens, and probably would be considerably shorter. To the question what should be done if J suffered a further collapse, the first instance judge directed there should be no further ventilation, but the Court of Appeal held that a medical course of action could be approved which would fail to prevent death. There was, it held, no absolute rule that life-prolonging treatment should never be withheld except in the case of a terminally ill child. Nor, it said, was the ‘demonstrably so awful’ test, propounded in *Re B* \(^{40}\), to be treated as a quasi-statutory yardstick. While there was a strong presumption in favour of life, regard had

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\(^{34}\) Idem

\(^{35}\) [1981] 1 WLR 1421.

\(^{36}\) Ibid., p. 1424.

\(^{37}\) This was reported in *The Observer*, 5 December 1982.

\(^{38}\) *Before The Best Interests of The Child* (New York: Free Press, 1979). In *The Rights and Wrongs of Children* (London: Frances Pinter, 1983), I have criticized their thesis (see ch. 7); I show in particular the problems inherent in applying it to a case like *Re B* (see pp. 259-63).

\(^{39}\) [1990] 3 All E.R. 930.

\(^{40}\) *Op cit.*, note 35, p. 1421.
to be had to the quality of life, and to any additional suffering that might be caused by the life-saving treatment itself. In assessing the quality of life if treatment were given, the court thought the correct approach was to assess whether such a life judged from the child’s viewpoint would be intolerable to him. J’s case does surely come within Feinberg’s ‘doomed to defeat’ category as Baby Alexandra’s does not. But relatively few impaired new-borns will be like J and many more will have similar conditions and prognoses to Baby Alexandra. This demonstrates the limits of Feinberg’s test. Applied in the context of examining the right not to be born it would suggest that this right only exists, if at all, where the child when born would exist only at the very margins of life. And it would, of course, narrow the category of cases in which there could be said to be a right not to be born to a small proportion of those in Feinberg’s original list. It may be observed also, before we leave Re J, that the court applied the ‘substituted judgment test’, which, as already indicated, is difficult to sustain where the patient has never been competent. The court appeared to recognize this problem for it purported to apply the welfare principle but did so in such a way as to appear to equate the best interests of the child with a hypothetical projection of what that child would have wished if he had been fully competent.

A RIGHT NOT TO BE BORN?

It is easier to examine the dilemma of those ‘better off unborn’ from the perspective of the disabled new-born. But we must now take the problem back in time – how far is a matter of considerable controversy – and ask the question at the kernel of this paper whether it is morally right to bring into existence certain children or in certain circumstances to allow procreated but as yet unborn children to continue to exist. So much attention has focused on the morality of abortion (when women could be allowed to terminate their pregnancies) that our attention has been deflected from the equally interesting question – and one which in time may become more significant – as to when it would be morally wrong not to abort. Is a woman who as a result of an amniocentesis test finds her foetus has spina bifida acting ethically in continuing with her pregnancy? Or should she terminate her pregnancy and try again for a healthy baby? And if she is warned that she is always likely to give birth to a baby with a major disorder such as spina bifida, should she avoid conception?

The problem, initially conceptualised as one of problematic children is beginning to bifurcate into two. As Harris puts it: ‘The first involves an examination of potential children for their adequacy as children, and the second involves examining potential parents for their adequacy as parents... One dimension of the problem involves asking whether we might do wrong by bringing particular children into existence because of problems relating to ... the constitution of those children, in virtue of which we might expect them to have less than adequate or satisfactory lives. The second concerns the question of whether we might do wrong by permitting children to be brought into existence who will suffer from less than adequate

43 See John Harris, op. cit., note 20, ch. 3.
44 For example, Rosalind Hursthouse, Beginning Lives (Oxford: Basil Blackwell and Open University, 1987).
46 If we believe in the right to have a family, should she be rewarded for acting ethically by being admitted to a form of IVF treatment which will avoid the problem?
parenting. The latter question is the subject of an important new book *Who’s Fit To Be A Parent?* by Mukti Jain Campion. I will address this issue only briefly – and in passing. It is at the root of another right that needs exploration – the right to responsible parents. It is to the former question that I now turn and concentrate my attention. Different issues are involved in the two questions but we will see that the concept of parental responsibility ultimately unites them.

The complexity of the first question and the dilemma of understanding what is meant by acting in a parentally responsible manner is well brought out in two contrasting examples that Derek Parfit gives. He invites us to consider the dilemmas of two women:

The first is one month pregnant and is told by her doctor that, unless she takes a simple treatment, the child she is carrying will develop a certain handicap... . Life with this handicap would be probably be worth living, but less so than normal life. It would obviously be wrong for the mother not to take the treatment, for this will handicap her child...

... There is a second woman, who is about to stop taking contraceptive pills so that she can have another child. She is told that she has a temporary condition such that any child she conceives now will have the same handicap; but that if she waits three months she will then conceive a normal child. And it seems (at least to me) clear that this would be just as wrong as it would be for the first woman to deliberately handicap her child.

The first case is relatively uncontentious. It could be rendered more complicated if the simple treatment would harm the pregnant woman or if, as with AZT for those with HIV infection, undergoing the treatment now to help the unborn child would preclude subsequent treatment to assist herself. But the norm of parental responsibility would dictate that she should put her child first and undergo the treatment now for the child’s sake. I am reminded of the way the courts have come to import welfare into adoption decisions. Lord Hailsham in *Re W* said that ‘although welfare *per se* is not the test, the fact that a responsible parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor’. Just as the objectively reasonable mother would put her child before herself in deciding whether or not to agree to adoption, so, it may be argued, would she in Parfit’s first example.

The second case, however, is far from straightforward as Parfit himself acknowledges. When he discusses in *Reasons and Persons* attempts to persuade a 14-year-old girl to delay having a child he notes that we might say to her: ‘You should think not only of yourself, but also of

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48 (London: Routledge, 1995). I describe the book as important though I have considerable reservations both about its content and style.
50 But what if the ‘treatment’ alters the genetic composition of the child, changing its identity into that of a different person?
53 It is characteristic of Lord Hailsham to use the male pronoun even when the vast majority of cases (including the instant one) involved mothers.
your child. It will be worse for him if you have him now.\(^{55}\) As he shows, the weak link in this claim is the phrase ‘worse for him’, for clearly if she has a child later it will not be the same child. If the woman takes the advice she deprives a potential person, albeit one with a handicap, of the chance of having a life. It is his/her only chance. S/he may be glad to have the opportunity. Locke\(^{56}\), using a similar example\(^{57}\) to Parfit’s second case, invokes, what he calls the ‘Possible Persons Principle’, that is, ‘the principle that in judging the rightness or wrongness of an action or decision we need to take account not merely of those who actually do, or will, exist, but also of those who would have existed if there had been a different action or decision’.\(^{58}\) But acceptance of this principle would have enormous repercussions, not least for abortion. If, therefore, the second case can be explained by a more limited (or at any rate different) principle, it would be better to invoke this.

In seeking this it is well to remember Richard Brandt’s observation that ‘no person is frustrated or made unhappy or miserable by not coming to exist’.\(^{59}\) Appeal to the concept of deprivation may assist us to understand the difference between being born with a handicap and not being conceived. As Steinbock pithily puts it: ‘the point of morality is to make people... happy, not to make more happy people’.\(^{60}\) We may thus be able to conclude that the woman in Parfit’s second example also does the right thing if she postpones conception and avoids having an handicapped child. But suppose that the second woman is told that any child she bears, now or in the future, will be handicapped, should she avoid conception? Unlike the woman in the second case, she will be depriving herself of the interest of being a mother (though the value of this interest may be diminished in the circumstances), but again it cannot be said that she is depriving anyone else of life.\(^{61}\)

**WRONGFUL LIFE ACTIONS**

But if failing to have a child is not wrong, having a child may, in certain circumstances, be wrong. Indeed, the belief that a child may be wronged by being brought into existence in certain circumstances has given rise to so-called ‘wrongful life’ actions.\(^{62}\) The first was *Zepeda v. Zepeda* in 1963\(^{63}\). In this case a healthy infant plaintiff claimed that his father had injured him by causing him to be born illegitimately. The Illinois appellate court declined to permit recovery, fearing the floodgates would be opened to all manner of wrongful life suits brought by parties born under adverse conditions. It is a comment upon our times that a generation on from *Zepeda* and *Williams* it is dubious whether illegitimate (or non-marital) birth would even be considered adverse\(^{64}\). The American courts have since distinguished between being born under adverse conditions and being born with a severe handicap or fatal

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\(^{57}\) The ‘fated child’ who will inevitably die of a heart attack at 25.


\(^{61}\) On the difficult philosophical issues involved here see John Harris, *op. cit.*, note 20, pp. 66-68.


\(^{64}\) Illegitimate births now constitute a third of live births, about a 400 per cent increase since the days of *Zepeda*. 
disease. A clear statement of this distinction is found in the judgment of Justice Jefferson in *Curlender v. Bio-Science Laboratories*, a case where a child was born, suffering from Tay-Sachs disease:

A cause of action based upon impairment of status – illegitimacy contrasted with legitimacy – should not be recognizable at law because a necessary element for the establishment of any cause of action in tort is missing, *injury* and damages consequential to that injury. A child born with severe impairment, however, presents an entirely different situation because the necessary element of *injury* is present.65

But what constitutes an injury? Is to be born underweight because of the mother’s smoking whilst pregnant? Is to be born with a low IQ? Is to be born into ‘a polluted world infested with war and insecurity’?66 Or in 1945 rather than 1955? And, as the ability to manipulate genetic material develops,68 will it be an injury to be born X rather than Y, a boy rather than a girl, gay rather than heterosexual, with criminal propensities rather than integrity,69 with a defect uncorrected that could have been corrected?

The courts have not been receptive to wrongful life claims, though they have succeeded in a number of American states (California71, New Jersey72, Washington73) as well as in Israel.74 The English courts have rejected the concept. In *McKay v. Essex Area Health Authority*, the Court of Appeal expressed the view that ‘the difference between existence and non-existence was incapable of measurement by a court’.76 Ackner L.J. said that he could not accept that: ‘the common law duty of care to a person can involve, without specific legislation to achieve this end, the legal obligation to that person, whether or not in utero, to terminate his existence’. Such a proposition he thought, ran wholly contrary to the concept of the sanctity of human life. In New York ‘the fundamental right of a child to be born as a whole, functioning human being’ was briefly maintained,68 but that state’s Court of Appeals soon

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67 Heyd’s example (*idem*). But, of course, both 10 years later would be a different person.
70 This has been highlighted in the *Mobley* case in Georgia in 1995. On the CIBA Conference held in London in February 1995 see *The Guardian*: 14 February 1995.
75 [1982] 2 All E.R. 7711.
and forthrightly denied that there was any such right. The Congenital Injuries Act of 1976 now prevents such actions and Missouri also has enacted legislation banning lawsuits based on wrongful life, and others have passed laws limiting recovery of compensation.

It is not surprising that the courts should have had problems with the notion of wrongful life. That one should have thought it involved a retreat ‘into the meditation on the mysteries of life’, or that another should have thought the issues involved were ‘more properly left to the philosophers and theologians’. Their concerns are concrete, with establishing legal liability and calculating loss for the purposes of compensation. Mine in this paper are more abstract. It may be that if one can sustain a reasoned argument for a moral right not, in certain circumstances, to be born, that this will provide the foundation for a legal action in tort (or, though less attention has been given to this, for a criminal prosecution). My concern, though, is with moral entitlement and the moral duties of potential parents. Accordingly, I turn now to parental responsibility.

**PARENTAL RESPONSIBILITY**

Philosophical discussion of procreation has tended to concentration the rights of parents or potential parents (in the case of abortion on the rights of women). Perhaps this is not surprising: after all, until very recently, we tended to think in terms of parental rights rather than parental obligations. The furore over the Child Support Act 1991 is a latter-day manifestation of this. Discussion has focused on the right to have children, often in the context of population control. In an article entitled ‘Is There A Natural Right To Have Children’, Floyd and Pomerantz, who deny that there is such a right, briefly address the interrelationship between such a (putative) right and the right not to be born, but their concern is with the right to have children, not with the right not to be born. They do, however, observe that it is wrong for us to conceive a child that we know will ‘lead a short but miserable life... because [the child] has a right not to be born which outweighs our right to be parents’. But they do not develop this or indicate why this should be so. Harris’s essay, ‘The Right To Found A Family’, much of it subsequently incorporated into *Wonderwoman and Superman*, does address the problem and reaches the conclusion that the ‘desire’ to found a

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82 In Curlander v. Bio-Science Laboratories.
83 In Zeitov v. Katz, op cit, note 74.
84 Though this would involve overturning the Congenital Disabilities (Civil Liability) Act of 1976.
85 The strand in feminist philosophy which emphasizes the ethics of care (see Carol Gilligan, *In A Different Voice* (Cambridge, Mass: Harvard university Press, 1982) has been strangely muted on parental responsibility issues.
86 At least until the Gillick case (see [1986] A.C. 112.
88 As to which see Michael D. Bayles (ed.); *ethics and Population* (Cambridge, Mass: Schenkman, 1976).
90 Ibid., p. 136.
family is ‘constrained only by consideration for the fate for the children who will constitute that family’. Note, despite the title of his essay, the weaker concept of ‘desire’ has been substituted for ‘right’, and it is ‘consideration’ for children, rather than the stronger ‘responsibility’ that acts as a constraint. He does, however, state that where children are or will be severely handicapped, there ‘may be an obligation not to bring them into or allow them to continue in a world where the existence will be genuinely terrible’. The reason for this obligation is not developed. One of the few essays which does emphasize parental duties, Onora O’Neill’s ‘Children’s Rights and Children’s Lives’, does not address the decision to have children at all.

But we do now regard parental responsibility as integral to an understanding of adult (especially parent) – child relations. Does it therefore, cast any light on the constraints, if any, on having children? I believe it does. I also believe that the limitation imposed upon the exercise of parental autonomy by the Act which constitutes parental responsibility, the so-called minimum threshold condition of ‘significant harm’, may offer some clues as to what may be expected of those endowed with parental responsibility.

What does a principle of parental responsibility entail? It offers a normative standard by which to judge the decisions and actions of parents or those who wish to become parents. What it will look like will depend upon how it is justified. Eekelaar, writing of his parents’ moral obligation to care for their children, convincingly shows that contractarian theories, motivated at least in part by self-interest, cannot really account for the obligation to care. He found the true basis for those moral obligations in Finnis’ theory of human flourishing.

Eekelaar’s arguments have equal force in our context.

To exercise parental responsibility is to put the interests and welfare of children or future children above one’s own needs, desires or well-being. Welfare is, it must be accepted, an indeterminate and value-laden concept and the problems inherent in this cannot be ignored. But there is an irreducible minimum content to a child’s well-being, and these must be satisfied by anyone carrying out the role of, or purporting to become, a parent. The principle of parental responsibility requires that individuals should desist from having children unless certain minimum conditions can be satisfied. Responsible parents want their children to have good and fulfilling lives. They are prepared to forgo pleasures and make sacrifices to ensure their children are able to flourish. Despite the rhetoric of the Children Act, the principle here enunciated sits uncomfortably with the individualism and greed of the 1980s and 1990s. Is it any wonder that, as Etzioni puts it, society places more value on ‘Armani suits, winter skiing and summer houses than on education’?

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94 Ibid., p. 152.
95 Idem.
97 See, for example, the Children Act 1989 and the Child Support Act 1991.
98 That is the Children Act 1989 (see sections 2 and 3).
99 See Children Act 1989 s. 31(2).
104 The existence of which was denied by Margaret Thatcher.
What is the significance of this principle of parental responsibility as far as prospective parents are concerned? It means that the very young should not become parents (Derek Parfit’s 14-year-old mother example immediately springs to mind). It means that the old should also forgo the pleasures of child-bearing and rearing. I rarely agree with Virginia Bottomley but she was surely right to condemn the birth of twins to a 59-year-old woman on Christmas Day 1993. It means that pregnant women should not smoke or drink excessively and that drug addicts and women who are HIV-infected should not have children. Since we are talking of responsibility these are decisions that must be taken by parents. The state, insofar as it has a role in this at all, can only encourage and educate: there is no question of particular people not being allowed to have children or being punished for so doing.

Even so, some of these examples will be unpopular and condemnations suggesting that it encourages the policing of pregnancy will be heard. Yet we are in no doubt that child abuse is unacceptable. Why, therefore, should we be unprepared to condemn the use of noxious substances by pregnant woman or the willingness of women with HIV to pass on their illness to their children? On what test does not this behaviour also constitute child abuse?

I am not arguing for criminal sanctions nor necessarily for the removal of the child. Nor am I urging that there is any moral obligation, as part of parental responsibility, to abort a child (though there may be cases where the child’s life will be so unmitigatedly bad that a termination will be thought an appropriate exercise of parental responsibility). What I argue is that, for example, a woman who is HIV-infected has a moral obligation not to conceive a child. It is true that there is a good chance that she will not pass the virus on to her baby (the risk of actual perinatal HIV infection is between 20 and 30 per cent). It is also true that the severity of the disease varies widely: at its worst, the most severely afflicted children present with adult-style opportunistic infections in the first year of life and die a painful death a month or two after diagnosis. But others develop milder manifestations, are diagnosed later and live longer. According to Arras only a small percentage (10 to 20 per cent) of those born HIV-infected fit ‘the worst-case scenario’, and others live longer, ‘perhaps to the age of ten or beyond’. And the comments: ‘The longer these children live with a tolerable quality of life, the more their lives will be worth living. A child who lives at home, goes to school, and attends summer camp does not fall into the same category as a Tay-Sachs baby’.

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107 See The Independent, December 1993, it would be equally wrong for a man of that age to father a child, though, I concede, this is not uncommon.
109 Fetal harm is not the sole preserve of expectant mothers. See Joseph Losco and Mark Shublack, ‘Paternal-Fetal Conflict: An Examination of Paternal Responsibility to the Fetus’, 13(1), Politics and The Life Sciences 63 (1994) (and see the Symposium in 13(2)).
111 By emergency protection order.
113 Ibid., p. 365.
course, also true (indeed trite) that other inherited traits can be passed on to children by parents. Yet it remains the fact that, to use Children Act concepts, a child born to an HIV-infected mother (and probably a similarly-afflicted father) is likely to suffer significant harm. Even if the infection is not passed on, the child is likely to be orphaned when very young. Deliberately to conceive a child with the knowledge that you are HIV-infected is, I conclude, morally wrong. It is in the interest of such potential children not to be born. Whether this right should be upheld by requiring an abortion where an HIV-infected woman does conceive, deliberately are not, is more difficult. Clearly the law does (and should) permit abortion in these circumstances. The case for counselling such a woman to undergo a termination of pregnancy is strong. But would we say she has a moral obligation not to go through with her pregnancy? Would she be acting in a morally reprehensible way if she took the risk that her child would not inherit her infection and carried him/her to term? It may be thought to be an act of parental responsibility to have an abortion rather than possibly condemning the child to a short, bleak and, in our society, stigmatised life.

There are worse fates than to be born with HIV-infection but comparisons – with Tay Sachs or Huntington’s Chorea for example – are invidious. They are all diseases which it would be unfair and wrong to inflict upon a child, such that it may be argued that it would be wrong to bring a child into the world so infected. It could be said, using Feinberg’s revamped test, that such children are ‘doomed to defeat’, in the long-term if not immediately. But a comparison with the facts in Re J puts these problem cases into perspective. Feinberg’s test will give to too few the right not to be born. It will deny that right to many whose lives will be truly awful: as just two examples neither the HIV sufferer and the person who will between 35 and 50 succumb to Huntington’s disease fits Feinberg’s criterion. And the test by focusing on bad lives deflects attention from the very people who take the initial decisions – the parents.

To view the problem through the lens of parental responsibility is to focus on the decision-making process. It is to recognize the commitment involved in bringing a child into the world. It is to acknowledge that having children is an exercise of autonomous will and is (or certainly should be) a commitment to love, nurture and care. It is to accept that parents should want the best for their children. To exercise parental responsibility – I use the concept normatively rather than descriptively – is to plan parenthood sensibly and with the empathy for the needs of the child. It is not an exercise of parental responsibility to bring a child into the world who will suffer pain and agony and die a miserable death. It is not an exercise of parental responsibility to bring a child into the world when that child will be cruelly deprived of all or most of the basic goods of human flourishing.

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114 Nor can the quality of parenting be all that is should be given the health of the parent (most probably parents).
115 Under the latest legislation, the Human Fertilisation and Embryology Act 1990 until full term (see s. 37).
117 See ante, 168.
119 Ante, 167.
120 The decision to have a child always involves risk, which may be greater or lesser, depending upon known circumstances. For a discussion of this, albeit in a different context, see Carl F. Cranor, ‘Some Moral Issues In Risk Assessment’, 101 Ethics 123 (1990).