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# Procreation, Harm, and the Constitution

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## PROCREATION, HARM, AND THE CONSTITUTION

*Carter Dillard\**

### INTRODUCTION

This Essay provides relatively novel answers to two related questions: First, are there moral reasons to limit the sorts of existences it is permissible to bring people into, such that one would be morally prohibited from procreating<sup>1</sup> in certain circumstances? Second, can the state justify a legal prohibition on procreation in those circumstances using that moral reasoning, so that the law would likely be constitutional?

These questions are not new, but my answers to them are and add to the existing literature in several ways. First, I offer a possible resolution to a recent debate among legal scholars regarding what has been called the nonidentity problem and its relation to the right to procreate. Second, using that resolution, I provide a novel constitutional argument that at least begins to justify limiting the right to procreate.<sup>2</sup>

This Essay proceeds in three parts. Part I introduces the nonidentity problem, explains why it creates seemingly irresolvable dilemmas for constitutional law, and sketches out two opposing positions in the legal debate. Part II uses a common exception to the nonidentity problem to buttress Lukas Meyer's solution: the notion of threshold harm. If my argument holds true, one cannot admit there is such a thing as a life not "worth living" without endorsing the notion that future persons deserve lives above some minimum threshold of well-being. Finally, Part III analogizes threshold harm to the state's compelling interest in protecting the welfare of living children. It demonstrates that if the state can limit the fundamental right to parent children when the parenting would cause the children's lives to be

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\* Westerfield Fellow, Loyola University New Orleans, College of Law. This essay expands upon a paper I was invited to present at the American Philosophical Association's Annual Meeting in December, 2010. I am deeply indebted to Lukas Meyer, I. Glenn Cohen, Melinda Roberts, Michelle Meyers, David Wasserman, JoAnne Sweeny, Mary-Patricia Wray, and Matthew Glodowski for their comments and valuable work on earlier drafts. Special thanks to Marina Hsieh and Michelle Oberman for prompting me to consider these issues.

<sup>1</sup> For the purposes of this Essay, procreation refers to any voluntary act that is one of the two most proximate causes of a conception resulting in live birth.

<sup>2</sup> I assume for purposes of this Essay that the right to procreate is fundamental. I will limit my discussion to whether the state has any relevant compelling interests that might justify a legal limitation on the right and not discuss whether such a law might be sufficiently tailored to pass constitutional scrutiny.

below a defined threshold of well-being, then the state can limit the fundamental right to procreate.

### I. NONIDENTITY AND THE CONSTITUTION

Intuitively, having children in certain circumstances is morally problematic, specifically with regard to the children's welfare. For example, imagine a couple who has a child with Tay-Sachs disease. Under normal circumstances, the child will slowly deteriorate, both mentally and physically, suffering deafness, blindness, and paralysis, dying before the age of five.<sup>3</sup> The parents' reasons for having the child aside, this seems to harm the child—by virtue of the level of well-being afforded the child in its short life. But the nonidentity problem, as it has come to be called, runs counter to this intuition: acts that create a person cannot concurrently harm her because harm requires that she be made worse off than she was in the past or than she otherwise would be in the future, and without being created, neither of these conditions are obtained. The child afflicted with Tay-Sachs disease cannot have been harmed by being created because she did not exist before, and without being born, she would not have otherwise *been*.

In constitutional law, the nonidentity problem poses a myriad of challenges. For example, what if a state wanted to prohibit parents from intentionally having children with Tay-Sachs disease? Without harm to the person born, it is not entirely clear what legitimate or compelling state interests could be used to justify a law limiting the constitutional right to procreate.

John Robertson employs nonidentity to describe a broad scope for procreative liberty by negating, in a variety of scenarios, the interests a state might articulate in preventing harm to children born.<sup>4</sup>

Should persons with inadequate skills and no substitute rearers easily available still be permitted to reproduce? . . . [I]t would be difficult in those cases to show harm to offspring. After all, if not born to the parents possessing fewer child-rearing skills, the child would not have been born at all.<sup>5</sup>

If nonidentity means that children cannot be harmed by being born, the state cannot even rationally relate a law regulating procreation to its interest

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<sup>3</sup> Tay-Sachs Disease Information Page, NATIONAL INSTITUTE OF NEUROLOGICAL DISORDERS AND STROKE, <http://www.ninds.nih.gov/disorders/taysachs/taysachs.htm> (last visited June 16, 2010) (link). Though there is no preconception test to determine whether a potential child is certain to suffer from Tay-Sachs, prenatal diagnosis is available. *See id.*

<sup>4</sup> See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM J.L. & MED. 7, 24–39 (2004) (link).

<sup>5</sup> *Id.* at 29.

in child welfare, at least not with regard to the specific child whose birth is at issue.

In contrast to Robertson, Philip G. Peters argues that states can regulate advanced reproductive technology and limit the right to procreate by showing a compelling interest in preventing impersonal harm. Impersonal harm is the harm of having a less well-off child than one could have had (and hence causing a relative loss in overall utility), though the child herself is not worse off than she was before or than she otherwise would have been.<sup>6</sup>

Robertson and Peters represent two sides of this debate, with Robertson using a traditional person-affecting view of harm in contrast to Peters' impersonal approach.<sup>7</sup> The Supreme Court has offered no clear resolution. Perhaps the closest it came was in *Buck v. Bell*, where the Court at least implied that Carrie Buck, whose involuntary sterilization was at issue, might harm her future children by having them.<sup>8</sup> This background provides fertile ground for constitutional debate.

Using Lukas Meyer's typology,<sup>9</sup> I call one form of traditional person-affecting harm diachronic (being made worse off as compared to the past) and one form subjunctive-historical (being made worse off as compared to how one would have been, i.e., in a counterfactual life).

Nonidentity gets its sting because, in cases where it applies, neither of these two types of harm can be established. At the same time, as is discussed below, most commentators seem to recognize an exception to the nonidentity problem: Perhaps following Derek Parfit, who is responsible for first thoroughly developing the nonidentity problem,<sup>10</sup> those invoking the problem almost always admit that one can harm or wrong a child in creating her if her life is not "worth living."<sup>11</sup> That is, if a life is so bad, so full of misery, that it can be considered a bad thing overall just to be alive, then indeed the person created might be worse off than if she had never been created. This exception is common in discussions of nonidentity.<sup>12</sup>

<sup>6</sup> See Philip G. Peters, *Implications of the Nonidentity Problem for State Regulation of Reproductive Liberty*, in *HARMING FUTURE PERSONS: ETHICS, GENETICS AND THE NONIDENTITY PROBLEM* 317, 329 (Melinda A. Roberts & David T. Wasserman eds., 2009) [hereinafter HFP] (discussing the role of incest prohibitions in preventing harms to the community through substituting one set of children for another).

<sup>7</sup> Robertson rejects the impersonal approach in most cases. See Robertson, *supra* note 4, at 40 (noting the inapplicability of impersonal theories of harm to the regulation of assisted reproductive technologies).

<sup>8</sup> 274 U.S. 200, 207 (1927) ("It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.") (link).

<sup>9</sup> Lukas Meyer, *Intergenerational Justice*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* § 3.1 (Edward N. Zalta ed., rev. ed. 2008), <http://plato.stanford.edu/entries/justice-intergenerational/> (link).

<sup>10</sup> DEREK PARFIT, *REASONS AND PERSONS* 356–63 (1984).

<sup>11</sup> See, e.g., I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 *HASTINGS L.J.* 347, 347–48 n.1 (2008) (discussing the concept of a "life worth not living," in which the individual would prefer never to have come into existence) (link).

<sup>12</sup> See *id.* at 347–48 n.1.

The next Part shows that the life not “worth living” exception implies the existence of threshold harm. Threshold harm recognizes that causing the quality of a person’s life to fall below a certain level harms that person. Like the life not “worth living” exception, and unlike diachronic and subjunctive-historical harm, threshold harm is not subject to the nonidentity problem. This Essay seeks to disentangle the life not “worth living” exception from threshold harm. Although the exception implies the existence of threshold harm, the threshold itself is not simply determined by whether the life is “worth living.”<sup>13</sup> The concepts are distinct. Instead, threshold harm is best thought of as an externally comparative concept in which the threshold plays the role that the past, and the counterfactual life, play in the traditional forms of harm discussed above.

I argue that the life not “worth living” exception is merely an example of a life (far) below the threshold; the harm threshold can be set well above the level of a life not “worth living” and arguably to whatever level the state chooses. Moreover, by invoking the exception, commentators are implicitly recognizing and endorsing the concept of threshold harm. Finally, I argue that if the state can show its interest in preventing threshold harm through regulating procreation, and constitutional precedent supports that interest, we can begin to surmount the hurdles the nonidentity problem poses in constitutional analysis.

## II. MORAL REASONING: THRESHOLD HARM AND THE NOTION OF LIVES NOT WORTH LIVING

As articulated by Lukas Meyer, threshold harm is harm caused by bringing a person into an existence below some pre-identified level of quality of life.<sup>14</sup> Meyer and others have fully explored the notion of threshold harm.<sup>15</sup> Therefore, in this Part I simply wish to buttress the threshold harm argument in the following way: Theorists who would presumably object to the notion of threshold harm as a solution to nonidentity nonetheless recognize the lives not “worth living” exception to the problem. I argue that the reasons given for favoring the life not “worth living” exception over threshold harm are unconvincing; instead, the exception implies the existence of threshold harm and its usefulness in solving the nonidentity problem.

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<sup>13</sup> This was recently claimed by Ori J. Herstein in *The Identity and (Legal) Rights of Future Generations*, 77 GEO. WASH. L. REV. 1173, 1207–08 (2009) (link).

<sup>14</sup> Meyer, *supra* note 9, at § 3.1.

<sup>15</sup> See, e.g., Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 309–10 (2008) (summarizing Joel Feinberg’s view that certain circumstances can violate a child’s right to an “open future”) (link).

Both legal and moral theorists almost always acknowledge the life not “worth living” exception when invoking the nonidentity objection.<sup>16</sup> Usually, such a life, like that of the child born with Tay-Sachs disease, is so filled with misery that an objective observer would rather not live any life than live that life. Most theorists seem to regard the exception as self-evident and do not attempt to explain it.<sup>17</sup> Tim Mulgan, however, expressly accounts for the exception by noting that such lives are (1) worse than non-existence (which I refer to as preexistence<sup>18</sup>); (2) fall below a zero level, in that they are below some presumptive value we can simply assign to preexistence; or (3) are on the whole non-comparatively bad, in that the intrinsically bad states within the particular life outweigh the good.<sup>19</sup> Note on this last point that there is a comparison going on, in that the states within the life are compared, but as a whole the life itself is not compared to anything.

Regarding the first account, where such lives are worse than preexistence, many have argued that there is no value or disvalue in preexistence and that as such it cannot serve as a basis for comparison to life at all.<sup>20</sup> If that be the case, then there is no way to reasonably say that preexistence is preferable to Tay-Sachs, because there would be no basis from which to make the comparison. Although the life not “worth living” exception seems to refer to harm to the person created, it cannot do so by any reference to preexistence.

Regarding the second account, that such lives fall below a zero level, David Heyd rejects this analysis because “non-existence is given a *value* (zero), although there is no one to ascribe it to. Non-existence is neither good nor bad nor neutral for anyone, since good and bad can be ascribed only to metaphysically identifiable individuals.”<sup>21</sup> As Heyd puts it, we “cannot say that someone who has no bank account can be considered as having a zero balance!”<sup>22</sup>

If there is no value or disvalue in preexistence, and moreover we cannot reasonably assign preexistence a value (a zero, for instance), then the

<sup>16</sup> See, e.g., PARFIT, *supra* note 10, at 356–63; Cohen, *supra* note 11, at 347–48; Herstein, *supra* note 13, at 1198. Herstein denies that existence can be compared to non-existence. Herstein, *supra* note 13, at 1198–99 n.60.

<sup>17</sup> See, e.g., Cohen, *supra* note 11, at 347–48; Herstein, *supra* note 13, at 1198.

<sup>18</sup> Calling it nonexistence “loads the dice” because it implies a different quality of experience than existence. And upon what intuition or physical perception could we make that assessment? There does not seem to be any.

<sup>19</sup> See TIM MULGAN, *FUTURE PEOPLE: A MODERATE CONSEQUENTIALIST ACCOUNT OF OUR OBLIGATIONS TO FUTURE GENERATIONS* 10–13 (2006).

<sup>20</sup> See Meyer, *supra* note 9, at § 3.2; Herstein, *supra* note 13, at 1198–99 n.60. *But see* Nils Holtug, *Who Cares About Identity?*, in HFP, *supra* note 6, at 78–79 (assigning value to nonexistence based on a betterness relationship between situations obtaining in the real world and the abstract entity (which “exists” in the real world) representing a person’s nonexistence).

<sup>21</sup> David Heyd, *The Intractability of the Nonidentity Problem*, in HFP, *supra* note 6, at 15 (footnote omitted).

<sup>22</sup> *Id.*

exception is either accounted for as a non-comparative bad or is in fact comparatively bad—but by reference to something other than preexistence or the “zero level” that we might assign it. Between these two possible explanations, the latter is more convincing.

Intuitively, I care about the quality of my life when weighing the goods and bads within it. But I care more so when I compare my life as a whole to others’ lives, or even to imaginary lives. There are at least two reasons that using an external comparison is more intuitively compelling than exclusively using an internal comparison. First, the difference between internal states may be greater or lesser in others’ lives. So if I have a balance of +2 in my life, my life will look less good if I compare it to the life of a person with a balance of +5.

Additionally, without such comparison, I cannot know if my human life is as a human life should be. After a certain number of comparisons I start to realize that (let’s say I have Tay-Sachs), relative to some average, my life is marginal. It is not enough to say a short life afflicted with Tay-Sachs is awful because the bads outweigh the goods; it is awful relative to the balance of goods and bads in most human lives. This adds to the compelling nature of the comparison, because I now feel the different hurt of the comparison to the average—not any particularized other life. It seems worse to be far below the average than very far below some exceptionally good life.

Consider some points recently made by Jeff McMahan. McMahan argues that a life not worth living (what he calls “miserable”) is so by virtue of the fact that the intrinsically bad states within the life outweigh the good.<sup>23</sup> As discussed above, this approach is comparative, in that the states within the life are compared, but the life itself is not compared to preexistence, which is something McMahan seemingly deems impossible.<sup>24</sup> I would call this view of the life not worth living “internally comparative” in that there is a comparison within the life, but not to some standard outside of the life. McMahan then finds that “[t]he fact that acting against the reason [not to cause an individual to exist] would be bad in noncomparative individual-affecting terms seems insufficient to ground an individual-affecting reason not to cause a miserable person to exist.”<sup>25</sup> McMahan would, instead, like Peters, pursue a more impersonal approach.

I agree that the internally comparative approach seems insufficient. But rather than take the impersonal approach, or be stuck unable to refer to the past or any counterfactual, one could still be externally comparative by using threshold harm. The Tay-Sachs life seems not worth living because it is so relative to the threshold—it is worse than it should be. Whatever the

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<sup>23</sup> See Jeff McMahan, *Asymmetries in the Morality of Causing People to Exist*, in HFP, *supra* note 6, at 50.

<sup>24</sup> See *id.*

<sup>25</sup> *Id.* at 52.

threshold is, it is well above such a life, and the absence of a past or a counterfactual life, coupled with an intuition that the life is not worth living, points to the existence of that threshold.

This externally comparative approach is very different from Ori Herstein's recent explanation of Meyer's threshold harm, which Herstein views as non-comparative,<sup>26</sup> and which he finds too limited because "Meyer's version only recognizes harm to future people whose lives are not worth living."<sup>27</sup> This, in my opinion, conflates an example of a life below the threshold with the threshold itself. Herstein, however, does recognize what seems like an externally comparative approach to threshold harm, in the work of other theorists like Haavi Morreim and Ronald Green.<sup>28</sup>

I believe the intuitive force of the notion of a life not "worth living" comes from an implicit comparison we make to some external standard derived from our life experiences. This standard is the threshold at work in Meyer's notion of threshold harm. The life not "worth living" exception harms the person created because her life falls somewhere below this threshold standard. Rather than saying that preexistence is preferable to Tay-Sachs or that Tay-Sachs is a non-comparative bad, the theorist acknowledging this exception is implicitly referencing the threshold in threshold harm.

Without defining the threshold, this account might explain the life not "worth living" exception better than the alternatives above. It might also mean that anytime the exception is recognized the theorist is implicitly invoking and thereby acknowledging the notion of threshold harm.

Before explaining the legal constraints on procreation in relation to threshold harm, I want to make a few general points about threshold harm. First, threshold harm is not tautological because just as diachronic harm uses the past and subjunctive-historical uses a counterfactual, threshold harm also uses an extrinsic standard: the threshold.

There is no reason to think an intuitive threshold is a uniquely ad-hoc solution. Just like the past and a counterfactual, the threshold derives from life experiences, and to the extent nonidentity is premised on the absence of a past or a counterfactual life, it makes sense to search our experiences for some third explanatory form of harm.

Second, it is worth noting that threshold harm is a sufficient but not a necessary condition of harm: there are other forms of harm.<sup>29</sup>

Third, as I have said, I will not try here to fill in the content of what the threshold for harm may be. Meyer lists several possible approaches, using egalitarian, prioritarian, sufficientarian, and Rawlsian reasoning.<sup>30</sup> Elsewhere, I have suggested that in terms of domestic law in the U.S., state pa-

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<sup>26</sup> See Herstein, *supra* note 13, at 1207.

<sup>27</sup> *Id.* at 1208.

<sup>28</sup> See *id.* at 1208–1210.

<sup>29</sup> Meyer, *supra* note 9, at § 3.4.

<sup>30</sup> Meyer, *supra* note 9, at §§ 4.1–4.4.

rental “fitness” standards seem appropriate,<sup>31</sup> while under international legal obligations, the standards set out in the Children’s Rights Convention might prove a good starting point.<sup>32</sup>

Determining the threshold may simply be a matter of consensus-building through democratic law-making, fleshing out and crystallizing what people alive today intuitively regard as a baseline from which to determine harm for contingent future persons.

Next, I explore the challenge nonidentity poses for the application of constitutional law.<sup>33</sup>

### III. LEGAL REASONING: THRESHOLD HARM AND THE CONSTITUTION

In essence, the constitutionality of a law limiting procreation to prevent threshold harm to the children born depends on many factors, but primarily on whether courts will regard procreation as a fundamental right, as well as on how they will define its scope.<sup>34</sup> There may also be constitutional limits on how courts are permitted to define the right to procreate because of the unique power prospective parents have over their prospective children—a power that can lead to future children being treated as a class of property, in violation of constitutional principles.<sup>35</sup>

Nonetheless, laws limiting behavior protected as a fundamental right may be constitutional, assuming the law can be shown to be necessary to achieve some compelling government interest. Assuming *arguendo* that procreation, as defined above, is protected as a fundamental right, a state could still justify its law as constitutional upon such a showing. Philip G.

<sup>31</sup> See Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367 (2009) (demonstrating the moral and legal duty a prospective parent has to be fit when he or she has a child, a duty arising from or creating correlative claim-rights shared by the state and prospective children).

<sup>32</sup> See Carter Dillard, *Prospective Parents and the Children’s Rights Convention*, 25 AM. U. INT. L. REV. 485 (2010) (interpreting the Convention from a prospective-child-centered perspective, and exploring whether the Convention requires states to pursue policies that heighten prospective parents’ perceptions of the duties they owe their prospective children before having them).

<sup>33</sup> As an aside it is worth noting that despite the prominent role the nonidentity problem plays in academic debates, it is not clear that the problem—which catches up our intuition in a metaphysical puzzle—has anything to do with why, as a social policy matter, we tend to ignore the welfare of future people. Perhaps we suffer from a form of temporal myopia or are not sufficiently progressed to empathize with them, much the way we have trouble empathizing with animals.

<sup>34</sup> The right to procreate may be fundamental but also diminishes with each act of procreation, so that at some point procreating becomes a mere liberty-interest. See Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. & DEV. L.J. 1, 44–63 (2007) (treating the right to procreate as fundamental, but satiable at self-replacement); Carter Dillard, *Valuing Having Children*, 12 J.L. & FAM. STUD. 151 (2010) (exploring self-replacement as the only defensible objective value underlying the moral right to procreate) (link).

<sup>35</sup> See Carter Dillard, *Future Children as Property*, 17 DUKE J. GENDER L. & POL’Y 47 (2010) (arguing that the broad, modern, privacy-based version of the right to procreate is in tension with an embedded constitutional principle that prohibits one class of persons (prospective parents) from treating another (prospective children) as property) (link).

Peters has recently proposed that, just as the prevention of incest serves a sufficient state interest to limit the fundamental constitutional right to marry, a state can regulate advanced reproductive technology by showing a compelling interest in preventing harm to future persons.<sup>36</sup> However, Peters does not apply threshold harm, but rather uses an impersonal form of harm.

Before discussing how a state might use the prevention of threshold harm as a compelling interest to justify a legal limitation on procreation, we should clarify a few background issues that the discussion below implicitly raises but does not address.

First, if procreation is a fundamental right, the burden of proof is on the state to show a compelling state interest in preventing harm to future people. This Essay argues from that assumption. However, if a court deems the right less than fundamental, the burden of proof could be on would-be parents to show, to a high level of certainty, that procreation would not harm the child born.<sup>37</sup> If so, the nonidentity problem could cut against the would-be parents.

Second, regardless, a legal limitation on procreation could theoretically be based on a variety of moral reasons. Imagine a state bans a new reproductive procedure that is likely to result in lives not worth living. A couple challenges the law as an unconstitutional infringement of their unenumerated Fourteenth Amendment right to procreate. Assuming the right is fundamental, the state would then have to show that it has a compelling interest at stake. But because Mill's "Harm Principle" (the notion that the state cannot restrict behavior when that behavior does not harm others) is not part of the Constitution,<sup>38</sup> the state could base its prohibition on impersonal (or utilitarian), aretaic, contractalist and other forms of moral reasoning. No precedent clearly requires the law be based on the type of narrow person-affecting harm to which the nonidentity problem poses difficulty. In fact, along with *Skinner v. Oklahoma*,<sup>39</sup> *Buck v. Bell* is one of the only Supreme Court cases to deal directly with the constitutionality of a legal limitation on procreation—and it has never been overruled.<sup>40</sup> The *Buck* Court

<sup>36</sup> See Peters, *supra* note 6, at 320, 329.

<sup>37</sup> Under rational basis review of a substantive due process challenge "[a] statute is presumed constitutional and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 319–320 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (link).

<sup>38</sup> See Jamal Greene, *Beyond Lawrence: Metaprivacy and Punishment*, 115 YALE L.J. 1862, 1866–67 (2006) (rejecting the notion that *Lawrence v. Texas* reads Mill's harm principle into the constitution) (link). Mill himself at least implied that threshold harm might be a fitting standard by which to judge procreation. See JOHN STUART MILL, ON LIBERTY 104–06, 107 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859).

<sup>39</sup> 316 U.S. 535 (1942) (finding that a state law authorizing sterilization violated the defendant's right to equal protection).

<sup>40</sup> 274 U.S. 200 (1927). Moreover, this case was cited favorably in *Roe v. Wade*, 410 U.S. 113, 154 (1973) (link).

based its decision upholding the law in part on the constitutional permissibility of the state preventing procreation as a means of promoting general welfare.<sup>41</sup>

Third, it may be that Mill's "Harm Principle" seems to apply because of a background assumption at work: that procreation is a private and intimate, or autonomous, act. However, while that may be generally true of non-reproductive sex, the act of creating another person may be incompatible with notions of autonomy and self-determination,<sup>42</sup> in that a necessary condition of the act is the determination of some other life. Arguably, procreation is more akin to immigration than non-reproductive sex because it involves the entry of a person into the polity. No one thinks that immigration is a private or autonomous act.

Similarly, in terms of social contract theory, procreation may be more akin to immigration because members of a polity would need to consent to, and thus would have a compelling interest in, the addition of new members to the contract. The concept of a social contract is different from the modern juridical contract, but it makes little sense to use the concept at all if we think it is irrelevant to existing members who joins the contract as parties. Arguably, in this way, the state's compelling interest in procreation need not be about preventing harm at all.

However, with all of this said, let us assume that procreation is a private act protected as a fundamental right under the Constitution and that as such, the state must show a compelling interest in preventing harm (and comparative person-affecting harm in particular) to the children born in order for any law limiting procreation to be constitutional. How might a state use threshold harm moral reasoning to do this?

First, as I understand the notion of threshold harm, the claim is that it is the actual child that will be harmed by being brought into the sub-threshold existence. While the child is merely prospective at the time threshold harm is being assessed, the notion is based on avoiding future harm to what would be an actual person.

Second, as a matter of constitutional law, it is settled that the state has a compelling interest in protecting the welfare of living children.<sup>43</sup> And based on this interest, the state can terminate the constitutionally protected rights abusive or neglectful parents otherwise would enjoy over the care, custody, and control of their children. If the state interest is enough to over-

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<sup>41</sup> *Id.* at 207.

<sup>42</sup> See, e.g., S. L. Floyd & D. Pomerantz, *Is There a Natural Right to Have Children?*, in *SHOULD PARENTS BE LICENSED?: DEBATING THE ISSUES* 230, 230–32 (Peg Tittle ed., 2004) (challenging the notion that the right to procreate can be based on autonomy or self-determination).

<sup>43</sup> See, e.g., *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 263 (2002) (O'Connor, J., concurring in the judgment in part and dissenting in part) ("The Court has long recognized that the Government has a compelling interest in protecting our Nation's children.") (link).

ride the settled right to parent,<sup>44</sup> it will be enough to override the relatively unsettled right to procreate.

Is there a problem analogizing the state's authority to override the right to parent to its authority to override the right to procreate? If we assume the predictability of the harm to the child that will be born (for example, parents having a child they know, through prenatal testing has Tay-Sachs), other than the problem of nonidentity at issue here the only remaining objection may be that the state has a greater interest in stopping extant harms to living children than preventing future harms to future (or prospective) children. But while extant harms might be easier for the state to prove, there is no reason to think these harms are more objectionable—morally or legally—than future harms.<sup>45</sup> In fact, the state may have a greater interest in preventing harm than trying to remedy it. Future persons and the harm we would cause them exist legally and morally, even if not physically.<sup>46</sup>

Returning to our analogy of parental rights, the state can use its compelling interests in child welfare to suspend and even terminate the fundamental rights of parents to the custody and care of their children if the child lives and will continue to live under parenting conditions beneath a legally defined threshold known as “fitness.”<sup>47</sup> In the context of adoption or foster care,<sup>48</sup> a similar legal threshold prevents the state from allowing existing children to be placed in unfit parenting circumstances.

<sup>44</sup> Troxel v. Granville, 530 U.S. 57 (2000) (link); see Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283, 2298 (2007) (“[T]hrough the contours of procreative autonomy are not well defined, the contours of parental autonomy, by contrast, are.”) (link).

<sup>45</sup> [W]hat if I instead set the bomb to detonate a couple of hundred years hence, enough time to ensure that the future victims of my mischief are currently non-existent? Despite their current anonymity and non-existence, it is nonetheless living, breathing, interest-bearing persons who stand to suffer from my actions. Whether the bomb maims people tomorrow or the next century, do we not explain the wrongness of my act in exactly the same way? In both cases, we would say that it is for the potential victims' sake that I ought not plant the bomb, and it is their due that I refrain.

Aaron-Andrew P. Bruhl, Note, *Justice Unconceived: How Posterity Has Rights*, 14 YALE J.L. & HUM. 393, 414 (2002). For a description of the principle in law, see generally Dillard, *supra* note 35, at 65 (citing “the FDA’s preventative regulation of drugs or devices that cause birth defects, the prohibition of incest, the regulation of surrogacy contracts, trust law protecting unconceived beneficiaries, and recent preemptive no-procreation and no-custody probation orders” as examples of the state acting to prevent future harm to future persons).

<sup>46</sup> Dillard, *supra* note 35, at 63–67.

<sup>47</sup> See, e.g., Troxel, 530 U.S. at 68–69 (“Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to . . . question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

<sup>48</sup> Jehnna Irene Hanan, Comment, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 178–79 (1997); see also Storrow, *supra* note 44, at 2303–04 (discussing pre-placement fitness screening in adoption).

This is key. In furthering its compelling interest, the state is not limited to preventing living children from being made worse off than they have been in the past (diachronic). If that were the case, a child living in an unfit home could not be removed nor the parental rights terminated unless the home was in danger of becoming more unfit than it had been in the past. Showing that the home is simply unfit would not be enough. Nor is the state limited to preventing living children from being made worse off than they otherwise would have been (subjunctive-historical). If that were the case, the state could not terminate parental rights or remove a child from a home that, though unfit, provided a level of well-being below which the child would fall if not for the parents' actions, especially if circumstances were improving.

But these are not the constitutional tests. The right to care, custody, and control of one's children can be limited and even terminated by the state's compelling interest in children not living beneath a certain minimum threshold level of well-being. All that is needed is a showing that parenting in the home is unfit, that is, that life within it falls below some set of statutorily defined guideposts that create a standard of "minimally[] acceptable care," or circumstances which fall below "minimally adequate standards" including whether "there is a showing of parental unwillingness or inability to provide *basic* care for the child."<sup>49</sup>

For example, if the basic standard for feeding is three sandwiches a day (or the equivalent in relative nutritional value), and all the evidence showed that the parent was and had always been giving the child only two sandwiches a day, the state could not show that the child was being made worse off than she was before the parent began feeding her, or than she would have been without the parent feeding her. The same would be true even if the parenting had improved and the child's nutrition were increased to two and one-half sandwiches per day. Despite this, the state can still demonstrate unfitness in both cases by simply showing that the child is getting less than the threshold three sandwiches a day.

Therefore, as has been shown, (1) the notion of threshold harm accounts for harm to actual children as they are brought into certain existences in which their lives are below the relevant threshold level of well-being. Furthermore, (2) the state has a compelling interest in protecting the welfare of children, and (3) that interest allows the state to limit the fundamental right to parent children when the parenting causes the children's lives to be below a defined threshold level of well-being.

Unless the right to procreate somehow carries more weight than the right to parent, it follows that the state's compelling interest in protecting the welfare of children is a sufficient interest to allow the state to limit a fundamental right to procreate when the children's lives would be below a defined threshold of well-being. If the state's interest is in protecting child-

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<sup>49</sup> Storrow, *supra* note 44, at 2315–16 (quoting various sources).

ren, and the rights carry the same weight, there would be no reason to distinguish between the two.

It does not necessarily follow that whatever threshold the law uses to override the fundamental right to parent can also serve to override a fundamental right to procreate. But the question remains: If the state has an interest in preventing living people from existing below a certain minimum level of well-being, why would the state not have an interest in preventing future persons from being created into existences below that same level?

#### CONCLUSION

The notion of threshold harm provides a moral basis to support the claim that there are constraints on the sorts of existences it is permissible to bring people into. While many theorists would expressly reject threshold harm as a response to nonidentity, in light of the intuitive force of the life not “worth living” exception, the lack of value or disvalue in preexistence, and the limited intuitive force of the internally comparative approach, these theorists may nonetheless be implicitly invoking and validating threshold harm.

Furthermore, a state can constitutionally justify a legal prohibition on procreation in certain circumstances using the notion of threshold harm, because it accounts for what has been recognized as a compelling state interest: the prevention of children living in certain existences that fall below a given threshold level of well-being.