

## **Misconceiving the Misconceived Baby?: Joel Feinberg's Discussion of Derek Parfit's Misconceived Baby Example**

### **Introduction**

In his four-volume work on the moral limits of the criminal law, Joel Feinberg argues that it is not morally legitimate for the state to use the criminal law to limit the liberty of its citizens unless the criminalized action is one which wrongfully harms or wrongfully offends others. Yet in a rare departure from his usual position, Feinberg argues that Derek Parfit's clever case of the "misconceived baby"<sup>1</sup> is an instance where even a good liberal should agree to criminalize conduct which does not wrongfully harm (or wrongfully offend) anyone.<sup>2</sup> The case involves a mother who (1) is warned by her doctor that any child she conceives in the next month will have a terrible handicap, yet (2) conducts herself in such a manner that she soon conceives an individual who grows up to have a badly withered arm. In the way the case is described, the individual conceived would never have existed at all were it not for the mother's action, and the individual conceived does prefer his handicapped existence to non-existence. The case is an example of what Feinberg calls a "welfare-connected non-grievance evil," and although he usually argues against the criminalization of conduct that constitutes or causes such evils, Feinberg is willing to make an exception in cases of this sort.

This paper evaluates Feinberg's discussion of this case, and moves in two parts. After setting out Feinberg's framework for approaching Parfit's case in Part I, I will argue for two related claims in Part II. First, I argue that there is another plausible way to describe the "misconceived baby" than the way Parfit and Feinberg do. Second, I argue that Feinberg has significantly altered his liberalism by endorsing the criminalization of

the parents' behavior in Parfit's case, and has inadvertently opened a Pandora's Box of legal problems by treating this case the way he has.

## **Part I**

### **Locating the "Misconceived Baby" In Feinberg's Taxonomy**

To appreciate why this case presents a problem for Feinberg, it is helpful to have before us his somewhat technical definitions of a cluster of related terms. For Feinberg, an *evil*, in the most generic sense, is "any occurrence or state of affairs that is rather seriously to be regretted."<sup>3</sup> The only evils which are the appropriate concern of criminal legislation are *legislative evils*: "reasonably foreseeable or preventable consequences of human beings' actions or omissions."<sup>4</sup> An important sort of legislative evil is a *grievance evil*, an evil which is a ground of personal grievance.

The paradigmatic examples of grievance evils are those falling under Feinberg's technical definition of *harm*. For Feinberg, *harm* can be given either a general or a technical definition. The general definition is that *A* harms *B* whenever *A* adversely affects *B*'s interest. The more technical definition is that *A* harms *B* whenever *A* adversely affects *B*'s interest *and in so doing wrongs B*, that is, violates *B*'s right.<sup>5</sup> Feinberg argues that only this technical sense of harm can make plausible J. S. Mill's famous *harm principle*—"The only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others."<sup>6</sup>

Since the criminal law is but one form of social power in general and state power in particular, Feinberg's overarching project in his four-volume work on the moral limits

of the criminal law is narrower than Mill's project in *On Liberty*. Feinberg's own *harm principle* (or *harm-to-others principle*) thus reads:

it is always a morally relevant reason in support of a proposed criminal prohibition that its enactment would prevent harm to parties other than the persons whose conduct is to be constrained.<sup>7</sup>

Also, since harms are not the only sort of grievance evils, Feinberg supplements Mill's harm principle by other principles in order to justify criminalizing certain forms of *offenses* and certain forms of *exploitative injustices*. Nevertheless, Feinberg's overarching project in his four-volume work on the moral limits of the criminal law is to *defend* his version of the harm principle and to *argue* that no non-grievance evil is a proper target of the criminal law. The case of the misconceived baby is noteworthy because Feinberg argues that the non-grievance evil produced *is* a proper target of the criminal law.

Feinberg views this case as an example of a *welfare-connected* non-grievance evil. Such an evil "cannot be the ground of any particular person's grievance, yet it is a state or event whose evil character consists entirely in its adverse impact on human interests."<sup>8</sup> The possibility of such evils makes it necessary to distinguish between a *harmful* condition and a *harmed* condition. A *harmful condition* is "a state in which a person is handicapped or impaired, a condition that has adverse effects on his whole network of interests," while a *harmed condition* is "a harmful condition that is the product of an act of harming."<sup>9</sup> Clearly, the sense of "harm" involved in Feinberg's definition of "*harmful condition*" is that of his *general* definition of harm, while the sense of "harm" involved in Feinberg's definitions of "*harmed condition*" and "act of *harming*" is that of his *technical* definition of harm. For example, someone who voluntarily maims

his own body may have put himself in a *harmful* condition (after all, we may be correct in viewing his interests as adversely affected), yet since he got into that condition without his rights being violated (after all, he willingly consented to the self-mutilation), his resulting state was not the product of an *act of harming*, and hence his resulting state was not a *harmed condition*.

Feinberg's fullest definition of an *act of harming* requires more than adversely affected interest and violation of right. Among other requirements,<sup>10</sup> there is what Feinberg labels the *Counterfactual Test of Harming*. According to this test, *A* harms *B* only if "*B*'s personal interest is in a worse condition than it would have been had *A* not acted as he did." Certain cases do not satisfy this test, and hence do not qualify as harming. In such cases we must say that

a wrongdoer (*A*) did not harm another party (*B*) by putting him into a harmful condition.

While it is true in those cases that *A* wrongly produced a harmful condition in *B*, *B* is not in a worse condition than he would have been had *A* not acted as he did, for in that event, *B* would have been worse off still, on balance.<sup>11</sup>

### **Parfit's "Misconceived Baby" Example**

It is within the context of discussing puzzling cases where the counterfactual test is not met that Feinberg focuses on Derek Parfit's example of the "misconceived baby." The case of the misconceived baby is one "of wrongfully conceiving a child when there is an unreasonable risk that it will be born in a seriously harmful condition."<sup>12</sup> To grasp the subtle structure of this case, it will help to have a pair of examples before us; one which merely resembles Parfit's case, and one which accurately represents it. Imagine, then, the following two hypothetical scenarios, each having in common two features: (1)

a mother, *A*, is warned by her doctor that if she conceives a baby, *B*, in the next two months, it will be have a serious defect. Yet (2) *A* negligently (or recklessly) conceives *B* anyway, and *B* indeed has a serious defect.

In the first scenario, the following features are also true: (3) The defect is so bad that *B*'s life was not worth living. (4) Thus it would have been better for *B* had *B* never been conceived. (5) Thus *B* is in a worse condition than he would have been had *A* not acted as she did. (6) Thus the counterfactual test for harming is met. (7) Thus *B* is in a *harmed* condition.

I should note that in describing this first scenario with the concepts of “a life not worth living” and “being better off never having been conceived,” I am merely repeating these locutions from Feinberg and Parfit without meaning to endorse them. Whether such concepts can stand up to critical scrutiny is beyond the scope of this essay,<sup>13</sup> since this first scenario is not Parfit's case of the misconceived baby. To get Parfit's case we must consider a second example, where instead of (3)-(7), the following features (in addition to (1)-(2)) are true: (3') The defect is *not* so bad that *B*'s life was not worth living (e.g., *B* has a withered arm but prefers to live in this condition than not to live at all). (4') Thus it would *not* have been better for *B* had *B* never been conceived. (5') Thus *B* is *not* in a worse condition than she would have been had *A* not acted as she did. (6') Thus the counterfactual test is *not* met. (7') Thus *B* is *not* in a harmed condition, but is merely in a *harmful* condition.<sup>14</sup>

Feinberg gives a few other examples to elicit our intuitions about such scenarios. A variant of the first scenario finds a mad scientist *deliberately* creating babies who have miserable lives of pointless suffering. A variant of the second scenario (from Gerald

Dworkin) finds parents “negligently” conceiving a baby during a period of time in which such conceptions are well-known to be in danger of genetic defects. Another variant of the second scenario finds a mother deliberately, maliciously, and sadistically conceiving a baby with a defect just so she can enjoy watching it suffer, or so she can enjoy its extra dimensions of dependence on her.<sup>15</sup> Although Feinberg admits that these examples may be “contrived and unlikely,” and that criminalization of the actor’s conduct in each case might be “unjustifiable, for practical reasons, on balance,” he insists that the examples “are designed to show that there are conceivable circumstances in which criminalization even without a victim would be *legitimate in principle*.”<sup>16</sup>

I suggest Feinberg’s examples are not as “contrived and unlikely” as he thinks. There are scientists who have announced that they will unveil to the world their groundbreaking work of bringing to term a cloned human being. These scientists are being criticized for “pushing the envelope” merely for their own fame and glory, with a total disregard for the well-being of the humans produced. But one need not even look to ambitious scientists. In a May 12, 2002 article of *The Washington Times*, bioethicist John F. Kilner commented on a rather interesting case. A deaf couple unable to conceive a child on their own sought out a deaf sperm donor precisely because they wanted to have a child who was deaf. They wanted the child to have the trait of deafness so that their desires to have a child of a certain kind would be satisfied.

In any event, the problem confronting Feinberg in the case of the misconceived baby is that the parents did not technically *harm* anyone. Since the individual with the defect prefers his or her handicapped state to nonexistence, the counterfactual test is not satisfied; since the counterfactual test is not satisfied, there is no harm in Feinberg’s

technical sense. In *Harmless Wrongdoing* he considers three options for how a “good liberal” might solve this problem. First, a liberal could expand his notion of what counts as a grievance in order to cover cases like this, “in which a person experiences warranted and understandable resentment against a malicious incidental benefactor, even though he has not, on balance, been harmed or personally wronged by that evil person.”<sup>17</sup> Feinberg grants that “self-related resentment” is warranted, but he insists that this sentiment is different than “the sense of personal grievance” and hence cannot justify inflating the concept of “grievance” to cover the case. Second, a liberal might “boldly stand his ground” by admitting that the harm principle cannot support criminalization of “malicious (or reckless) conception.” Feinberg confesses that he could not employ this simple “stonewalling” approach with a clear conscience.<sup>18</sup> Third, a liberal might make “a clear categorical exception” to his liberalism: “for actions and omissions that lead to the existence of new human beings, and perhaps for these actions only, penal legislation based solely on a form of legal moralism would be legitimate.”<sup>19</sup>

Feinberg reluctantly takes the third option, and gives a cluster of related reasons to justify this move. Explaining why he thinks that liberalism can “bend without breaking” by carving out an exception here, Feinberg points to the extraordinary rarity of these cases in the real world and the extraordinary uniqueness of these cases in principle:

It is the only example we can have of a person’s being put in a harmful condition by the very act that brings him into existence, and the only example where determinations of harm require comparison of a given condition with no existence at all. No wonder it seems to call for special treatment!<sup>20</sup>

Feinberg also explains that his move, while “departing from the letter of liberalism,” is quite consistent with the “animating humane spirit” of the liberal’s harm principle. That

technical principle, as we saw above, captures two elements: adversely affected interests, and violations of rights. Feinberg notes that adverse effects on human interests

are apt to constitute or cause impediments to human fulfillment; setbacks to welfare interests, in particular, may lead to suffering and misery as well. No one should be at liberty to inflict such dire injuries on one's fellows.<sup>21</sup>

Although Feinberg thinks that this humane component must often take a backseat to considerations of autonomy, nevertheless it “can come to the fore” when autonomy is not at issue. Since cases of “wrongly conceived infants” do *not* involve autonomy (after all, “the infants did not decide to bring themselves into existence”), criminalization can be based on the “animating humane spirit” of liberalism:

This is not a case of suffering whose tolerance by the law is necessitated only by a respect for autonomy. It is rather a case of suffering whose tolerance by the law is necessitated by nothing at all.<sup>22</sup>

## **Part II**

### **A Metaphysical Point: Personal Identity and the Counterfactual Test**

A natural place to begin evaluating Feinberg's treatment of this case is to examine his pivotal metaphysical assumption that the choice before the mother was between (a) conceiving a handicapped individual *B* and (b) conceiving a totally different individual altogether. This assumption is clearly governing his treatment of the case:

the mother had only two options in respect to his birth. One was to do what she did, which led to his being born with the withered arm. The other was to obey the doctor, which would have led to his never having existed at all...if they [the parents] had acted otherwise...he [the baby] would not have been born at all.<sup>23</sup>

Furthermore, this assumption is what forces him to treat this case without invoking the harm-to-others principle. If, contrary to this assumption, the mother's choice was between (a) conceiving a handicapped individual *B* and (c) conceiving *B* in a non-handicapped state, the counterfactual test would be satisfied (this assumes, of course, that *B* handicapped would be worse off than *B* non-handicapped), and Feinberg could apply his harm principle straightaway.

At the bottom of this assumption is the belief that, in some hard-to-specify way, a person's *origin* is essential to that person's *identity*. Assume that sperm  $S_1$  and ovum  $O_1$ , unite at time  $T_1$  in location  $L_1$ , to form person  $P_1$ . Which of these is essential to  $P_1$ 's identity? In *Reasons and Persons*, Parfit writes, "If any particular person had not been conceived within a month of the time when he was in fact conceived, it is *in fact* true that he would never have existed."<sup>24</sup> Nevertheless, what he ultimately relies upon is the particular *combination* of sperm and egg rather than the particular *time* of that combination:

Each of us grew from a particular pair of cells. Each pair is an ovum and the spermatozoon which, out of millions, fertilized this ovum. Suppose that my mother had not conceived a child at the time when in fact she conceived me. And suppose that she had conceived a child within a few days of this time. This child would have grown from the same particular ovum from which I grew. But even if this child had been conceived only a few seconds earlier or later, it is almost certain that he would have grown from a different spermatozoon. This child would have had some but not all of my genes.<sup>25</sup>

Is Parfit right to claim that a different sperm-egg combination necessarily bring a different person into existence? What might be the basis of this claim? It is surely not based on the particular *matter* which constituted the sperm and egg. If my parents had eaten different food and breathed different air than what they ate and breathed in the

actual world, their gametes would eventually be constituted by different subatomic particles than the subatomic particles which constituted the sperm and the egg from which my embryonic body was produced in the actual world. But surely I would still exist even if the gametes which produced me were made of different subatomic particles.

Perhaps the basis of this claim is that the particular *form* or *structure* of these gametes, especially their genetic structure, is what is essential to me. But this too is open to challenge, since a person's genetic code does not seem to be an essential feature of that person. If my genetic code were to change, either from natural mutation or artificial genetic therapy, then I would plausibly be the same person before the change as I am after the change. Or consider Feinberg's example of the mad scientist. The way he describes the example, the scientist "creates test-tube embryos through *in vitro* fertilization from chemically altered sperm and ova. Then he reimplants them in the natural womb of a willing subject."<sup>26</sup> If we assumed that sperm and ovum were *genetically* altered, and if we assumed that *genetic* alteration does not prevent the sperm before the alteration from being strictly identical to the sperm after the alteration, then the individual created by the altered gametes is still strictly identical to the individual that *would have been* created by the unaltered gametes.

Other considerations also might overturn the assumption that origin is essential to personal identity. If it turns out to be true that I am a particular non-physical soul, perhaps I could come into being at the fertilization-event of  $S_1$  and  $O_1$ , or  $S_2$  and  $O_2$ , or  $S_1$  and  $O_2$ , etc. This contingent connection between souls and bodies is not inevitable for a believer in souls, for it might just be a brute fact about the nature of such souls (or about God's plan in creating them) that they come into being at only one particular intersection

of one particular sperm and one particular egg. Still, it seems at least *possible* that such souls could be metaphysically indifferent to the physical substrates in which they are exemplified.

Finally, as Geoffrey Madell points out, insisting on the necessity of origin for one's personal identity puts counterintuitive constraints on the possibility of twinning. Madell's central argument in his book *The Identity of the Self* is that the failure to appreciate the *subjective* dimension of persons "is responsible for the inadequacy of much contemporary writing on personal identity," and along the way he argues that "nowhere is this inadequacy, and its cause, more obvious than in the writings on this question of the necessity of origin."<sup>27</sup> Madell admits the plausibility of certain arguments by Graham Forbes, who claims that origin is essential to the identity of ordinary physical objects such as oak trees. Without this necessity of origin, Forbes claims, it would be possible for a given oak tree *O* to have grown from a different acorn ( $a_2$ ) than the acorn it in fact grew from ( $a_1$ ). Forbes argues that this possibility produces a problem of how to identify *O* in a possible world in which both  $a_1$  and  $a_2$  produce an oak tree, and no solutions to this problem are satisfactory.

Madell admits this line of argument for oak trees, yet rejects it for persons, in part because it drives Forbes to "ruling out as unintelligible the suggestion that one might have had an identical twin":

We ought to be reluctant to accept this as a possibility, [Forbes] claims, since there would be nothing whereby one could establish which of the twins in the possible world was identical with the untwined person in the actual world; the identity of one of the twins in the possible world with the untwined person in the actual world would be a bare metaphysical fact, in the sense that there is absolutely no discernable difference even in

principle between one's being identical with one of the twins and one's being identical with the other. Indeed there is not, but it must be troublesome to someone of Forbes' persuasion that one can so easily conceive of the possibility of having such a twin. Other people have them. Why should what is an actuality for some people be not even a logical possibility for me?<sup>28</sup>

Madell claims that recognizing the dimension of *subjectivity* helps solve this problem. Although from a third-person perspective there is no way of knowing which twin in the possible world is *me* (or indeed, whether *either* twin is me), from a first-person perspective such an identification would not be a problem. I would know which of the twins I was from the inside, and there would be a fact of the matter about which twin's experiences were *mine*.

In short, there are certain challenges for someone who assumes that origin is necessary for personal identity "across possible worlds." Dropping this assumption could allow Feinberg to cover the case of the misconceived baby by simply invoking the harm principle: the baby could be *harmed*, in the full-orbed sense of Feinberg's technical definition of harm, just in case it is worse off than it would have been had the mother not waited to conceive.

### **A Moral Point: The Slippery Slope Towards Eugenics**

This metaphysical point is complicated, and many will not find it convincing. But even if we set this point aside, there is another and more troubling point of concern with Feinberg's treatment of this case.

I believe that the ethical implications of Feinberg's willingness to criminalize these welfare-connected non-grievance evils are bigger than he bargained for. For

Feinberg seems to be implicitly committed to the following sort of (roughly put) principle:

*Principle of Appropriate Criminalization of Conception:* If conception during a time interval  $t$  is certain (or likely) to produce an individual with ill-being of kind  $k$ , then actions which produce an individual with this kind of ill-being during this time interval may appropriately be criminalized.

One way to see why this principle produces problems is to ask whether there is an important difference between (a) a mother who is told that any baby she conceives *during the next month* will be (or is likely to be) born with a genetic defect of kind  $k$ , and (b) a mother who is told that any baby she conceives *during her life* will be (or is likely to be) born with a genetic defect of kind  $k$ . Granted, the time interval in (a) is different than the time interval in (b). But does this difference in the *size of the relevant time interval* really mark a moral difference which must be respected by those impressed with Feinberg's analysis? Perhaps he could claim that conceptions in cases like (a) are *avoidable* whereas conceptions in cases like (b) are *unavoidable*. But this claim is implausible, for the sorts of activities which would make conception avoidable in cases like (a)—for example, abstinence, natural family planning, or artificial contraception—are the same sorts of activities which would make conception avoidable in cases like (b).

Many people fall into category (b): dwarf people, deaf people, handicapped people of many shapes and sizes. Many potential parents carry inherited genetic defects of various kinds and degrees of severity. Some of these defects skip generations, but others “never miss a beat” in that they are virtually guaranteed to be present in any of one's genetic offspring. If the difference between (a) and (b) is merely one of degree,

then *in principle* Feinberg's treatment of Parfit's case—which is an example of (a)—may legitimize similar treatment in cases like (b).

This sort of concern is compounded when we realize that genetic defects from “nature” are not the only predictable source of human ill-being. One's environment or “nurture” can sometimes be anything but nurturing. People can conceive a child into circumstances of varying degrees of poverty, scarcity, or social chaos. Not all families are nice families to grow up in, and the same could be said for neighborhoods, cities, and periods of time. If someone can be criminalized for conceiving a child when the likely risks of *genetic* difficulties are high and severe, it seems like a short step to have someone criminalized for conceiving a child when the likely risks of *environmental* difficulties are high and severe.

Thus another way to see why the above principle produces problems is to ask whether there is an important difference between (c) a mother who is told that any baby she conceives will be (or is likely to be) born with a withered arm, and (d) a mother who is told that any baby she conceives will be (or is likely to be) born into a dysfunctional and desperately poor social situation. Granted, the source of ill-being in (c) is different than the source of ill-being in (d). But does this difference in the *source of ill-being* really mark a moral difference which must be respected by those impressed with Feinberg's analysis? Ignoring for now the *avoidable/unavoidable* distinction mentioned earlier, perhaps Feinberg could claim that genetic defects are simply a special case of human misery, and therefore deserving of special treatment. While it is surely true that genetic defects call for our sustained and sympathetic attention, and while I do not want to downplay the difficulties faced by those with such defects, nevertheless we must also

recognize rather than downplay the difficulties faced by those born into dysfunctional social settings. Sometimes these conditions are even worse than the genetic ones. What is more difficult: being a deaf child that grows up communicating in sign language within his loving deaf family, or being a child with perfect hearing that grows up listening to the insults and curses his parents hatefully heap upon him year after year?

Admittedly, these are but sketches of the stages of a slippery slope. Perhaps they are but sketches of two distinct and independent slippery slopes. In any case, the sketches should be sufficiently foreboding to give us pause. If it is acceptable *in principle* to criminalize certain forms of parental conduct in cases like (a), what *in principle* can be said against criminalizing certain forms of ordinary parental conduct (e.g., a deaf couple making love) in cases like (b)? And if it is acceptable *in principle* to criminalize certain forms of parental conduct in cases like (c), what *in principle* can be said against criminalizing certain forms of ordinary parental conduct (e.g., a dysfunctional couple trying to have another child) in cases like (d)? I worry that very illiberal sorts of policies will be a logical outcome of Feinberg's reluctant endorsement of criminalizing the case of the misconceived baby. What might the penalty be for such procreative crimes? Mandatory sterilization? If so, what will keep this *penalty* from being employed as a tool to *prevent* procreative crimes before they occur? At the bottom of this slippery slope is the specter of certain classes of individuals finding themselves the unwilling participants in a state-sponsored form of eugenics. Whether the eugenics is negative (eliminating less "perfected" traits) or positive (promoting more "perfected" traits), these sorts of implications are not consistent with the "animating humane spirit" Feinberg sees behind the harm principle.

These concerns about slippery slopes have been noted by the courts outside of the context of the criminal law. One court, in responding to cases of tort law involving wrongful life lawsuits, remarked that by allowing some wrongful life lawsuits to succeed, they were disturbed by the possibility that “related suits” would be encouraged:

Encouragement would extend to all others born into the world under conditions they might regard as adverse. One might seek damages for being born of a certain color, another because of race; one for being born with a hereditary disease, another for inheriting unfortunate family characteristics; one for being born into a large and destitute family, another because a parent has an unsavory reputation...<sup>29</sup>

Again, at least when it comes to tort law and the imposition of liability on the parental parties, Feinberg himself is aware of the Pandora’s Box. He considers the suggestion that we should redefine “harm”, “grievance” and “victim” for the sake of *civil* lawsuits in order to hold the parents in Parfit’s example liable for the harmful conditions of their offspring. He quickly rejects this suggestion because of the potential slippery slope:

If we...insist that there is some relevant sense in which the infant in Parfit’s example has been *harmed* by his mother, that could have the unfortunate consequence of legitimizing wrongful life suits for such harmful states as illegitimacy, ugliness, below average intelligence, and the like, all of which are “harmful conditions,” but which, since all are rationally preferable to nonexistence, are not harms on balance. Therefore, if a writer were to advocate a special sense of “harming” just to permit wrongful life suits in cases like Parfit’s to be legitimized by the harm principle, the proposal would founder on these other examples where the harms are relatively insignificant. Minor harms could be awarded relatively minor but appropriate compensation, and the courts would be flooded with plaintiffs airing fancied “grievances” against their parents for providing them with disadvantageous environments or poor genetic inheritances.<sup>30</sup>

This seems quite right. But what is perplexing is that Feinberg goes on to recommend simply *abandoning* the view that the satisfaction of the harm principle is necessary for imposing liability on someone. Feinberg is surely correct that such a strategy allows for the Parfit parents to be “legitimately” prosecuted, but what seems just as certain is that this recommendation plunges us right back onto the slippery slope he had intended to avoid. And if this slope is a dangerous one for *civil* law, why should we think it is any different for the *criminal* law?

In fairness to Feinberg, he does claim that in these cases, there could be “practical reasons” which might render the use of the criminal law unjustifiable “on balance.” He admits that

...people can be presumed to have more than enough incentive to avoid producing impaired infants, quite without gratuitous threats from the state. And deliberate conception of foreseeably handicapped infants for selfish or sadistic reasons would be so rare and extraordinary that surely more economical means of dealing with it could be used than the cumbersome apparatus of the criminal justice system.<sup>31</sup>

Feinberg doesn't say what the “more economical means” are he has in mind, but perhaps they fall under the broader topic J. S. Mill discussed in *On Liberty*: “the nature and limits of the power which can be legitimately exercised by society over the individual.”<sup>32</sup> Perhaps these “more economical means” include social pressure from private associations or public opinion; perhaps they include the subtler uses of state power like taxation, licensure, and selective funding.<sup>33</sup> For example, health insurance managers, whether public or private, could conceivably want to cut costs by including statements in their policies which prevent participants with certain diseases from getting coverage for any future children they conceive with that disease. A couple considering parenthood, yet

with the knowledge that they have a chance of conceiving an individual with cerebral palsy, might be discouraged from even trying because they believe they could not take care of the medical bills of caring for such a child on their own. With the advances in our knowledge of genetic information, there will be economic pressures for insurance managers to craft policies specifically designed to discourage reproduction.

I view these extra-criminal methods of social pressure with a similar attitude of reluctance and resistance. Unfortunately, Feinberg is probably right that “more economical means” than the criminal justice system exist for crimping the reproductive liberties of handicapped, poor, uneducated citizens. However, this seems to provide yet another reason for not criminalizing such reproductive behavior to begin with. In my mind, criminalization risks adding the insult of criminal sanctions to the already effective injury of the other forms of social pressure.

## **Conclusion**

Derek Parfit’s ingenious case of the “misconceived baby” is clever and subtle. But it is far from science fiction, and it is by no means a mere thought experiment for philosophers and liberal jurists. I have suggested that there is another plausible way of understanding it which does not rely on the metaphysical assumption Parfit and Feinberg employ. Yet I have also bracketed this first suggestion in order to deal with Feinberg head-on, questioning whether his treatment of the case allows liberalism to “bend without breaking.” I argued that there are unattractive implications to creating such procreative crimes, and thus we are better off not creating such crimes to begin with.

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<sup>1</sup> First printed in Derek Parfit, “On Doing the Best for Our Children,” in M.D. Bayles, ed., *Ethics and Population* (Cambridge, Mass.: Schenkman, 1976), 100-115.

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<sup>2</sup> The relevant sections are in Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), 103 and following, and Joel Feinberg. *Harmless Wrongdoing* (Oxford: Oxford University Press, 1988), 26-33, 325-328.

<sup>3</sup> *Harmless Wrongdoing*, 18. “To say of such an event or condition that it is an evil is to say that it would be better (in some objective sense) if it did not exist or had never come to exist, that the universe would be a better place without it.”

<sup>4</sup> *Harmless Wrongdoing*, 18.

<sup>5</sup> *Ibid.*, xxviii-xxix. As he puts it in *Harm to Others*, A wrongs B “when [A’s] indefensible (unjustifiable and inexcusable) conduct violates [B’s] right.” (pg. 34).

<sup>6</sup> Mill, *On Liberty*, Chapter 1.

<sup>7</sup> *Harm to Others*, 187.

<sup>8</sup> *Harmless Wrongdoing*, 18-19.

<sup>9</sup> *Ibid.*, 26.

<sup>10</sup> *Ibid.*, 26. The full list of conditions are:

1. A acts (in a sense wide enough to include omissions and extended sequences of activity
2. in a manner which is defective or faulty in respect to the risks it creates to B, that is, either with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and
3. A’s acting in that manner is indefensible, that is, neither excusable nor justifiable; and
4. A’s action is the cause of an adverse effect on B’s self-interest (a “harmful condition”), which is also
5. a violation of B’s right; and
6. B’s personal interest is in a worse condition than it would have been had A not acted as he did.

<sup>11</sup> *Harmless Wrongdoing*, 26.

<sup>12</sup> *Ibid.*, 26-27.

<sup>13</sup> Although in fairness to Feinberg, he has explained and defended its coherence elsewhere (see Joel Feinberg, “Wrongful Life and the Counterfactual Element in Harming,” *Social Philosophy and Policy*, vol. 4., no. 1 (1986), pp. 145-78. See especially pgs. 159-167).

<sup>14</sup> Feinberg says, referring to the second example, “It clearly is nevertheless a state of harm, however we characterize its causal antecedents, since it does have adverse effects on the child’s interests.” *Harmless Wrongdoing*, 27.

<sup>15</sup> These examples are elaborated in *Harmless Wrongdoing*, 28-30.

<sup>16</sup> *Ibid.*, 30.

<sup>17</sup> *Ibid.*, 326.

<sup>18</sup> *Ibid.*, 326.

<sup>19</sup> *Ibid.*, 327. It is worth mentioning that in *Harmless Wrongdoing* Feinberg does not consider a fourth option: a good liberal could simply drop (or modify) the counterfactual test of harming. There are good reasons for such a move apart from this case. Feinberg notes the challenge of causal overdetermination: a reckless taxi driver A who, by badly injuring his passenger B in a wreck, nonetheless prevents B from catching a plane flight that eventually crashes, *does not wrong B* on the counterfactual test. (*Ibid.*, 26.) He treats the counterfactual test in more detail in “Wrongful Life and the Counterfactual Element in Harming,” but doesn’t seriously consider dropping or modifying it in *Harmless Wrongdoing*. In this regard, there is an interesting footnote in this earlier article. On pg. 174, Feinberg writes (n.29):

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“I have not had time to revise this essay to accommodate an important suggestion made by Wayne Sumner at the Ann Arbor conference at which this paper was read. Sumner, accepting an invitation I made to the audience to help me “better preserve my liberal purity,” suggests a way in which I might avoid, at least in Parfit-type cases, the view that liability without a properly harmed victim is morally legitimate after all. All that stands in the way of saying that the Parfit child has been harmed, he points out, is my counterfactual test for harming. Sumner therefore proposes that we modify that test (as I did, e.g., in cases of overdetermination) by casting it in an *impersonal* form. In the Parfit case, Sumner writes, “the child is worse off than *the child the woman would (or might) otherwise have had* would have been, had she acted otherwise.” This is an attractive suggestion to me because, in permitting me to be steadfast in support of the liberal doctrine of “no liability without a harmed and wronged victim,” it contributes to the greater overall coherence of my political philosophy, and on Sumner’s alternative account of harming, the Parfit baby *is* a “harmed and wronged victim.” The disadvantage of Sumner’s suggestion is that it seems to make a rather sharp departure from the concept of harming-wronging as it is normally and naturally employed. “How can I have wronged you when you admit that you are better off for what I did than you would otherwise be?” asks the Parfit mother. “Yes,” Sumner would have her child reply, “but I am not better off than the child you would have had a month later if you had waited.” This reply has the merit of establishing the child’s grievance, if that’s what we antecedently wish to do, but we might have some sympathy with the mother’s further response if she questioned what relevance *that* counterfactual has to the question of whether she harmed (wronged) the child by bringing him into existence. Still, I think the Sumner suggestion deserves further serious exploration. As my argument now stands, I seem to prefer (relative) linguistic purity to the (relative) moral purity required by my initial liberal commitment.”

<sup>20</sup> *Harmless Wrongdoing* 327.

<sup>21</sup> *Ibid.*, 327.

<sup>22</sup> *Ibid.*, 328.

<sup>23</sup> *Ibid.*, 27, 326. In both of these quotes, it seems Feinberg could have used the term “conceived” and its cognates instead of “born” and its cognates.

<sup>24</sup> Derek Parfit, *Reasons and Persons* (Oxford, Clarendon Press, 1984), 352.

<sup>25</sup> *Ibid.*, 352.

<sup>26</sup> *Harmless Wrongdoing* 28.

<sup>27</sup> Geoffrey Madell, *The Identity of the Self* (Edinburgh: University Press, 1981), 87-88

<sup>28</sup> *Ibid.*, 86-87.

<sup>29</sup> *Zepeda v. Zepeda*, 41 Ill.App. 2d 240, 190 N.E. 2d 849 (1963). Quoted from footnote 28 on pg. 173 of “Wrongful Life and the Counterfactual Element in Harming,”

<sup>30</sup> *Ibid.*, 173.

<sup>31</sup> “Wrongful Life and the Counterfactual Element in Harming,” 172.

<sup>32</sup> J. S. Mill, *On Liberty*, chapter 1, paragraph 1.

<sup>33</sup> Feinberg, *Harm to Others*, 3.