

Session 23

Seana Shiffrin, 'Wrongful Life, Procreative Responsibility, and the Significance of Harm'

1 An unclear case of harm

A general philosophical question: What is **harm**? What is its relation to **benefit**?

- One reason it would be good to have an answer to this: we tend to think a person is morally entitled and should be legally entitled to seek compensatory damages iff she's suffered some harm.

[N.B.: *this is a question about what the law should be, not what the law is.*]

- There might be cases where it's unclear whether a person has been harmed and therefore whether she's entitled to seek damages.

Test case: Suppose Jimmy suffers a painful, debilitating, untreatable, congenital condition—in particular, a condition that he could not have been born without. Suppose further that his life is on the whole worth living (i.e. being alive is preferable to not being alive).

- **The normative question:** *Wrongful life suit?*¹ Can Jimmy seek compensation from those responsible for bringing him into existence, on the grounds that they've caused him a harm?
- **The conceptual question:** Does it make sense to think someone has a right which, had it not been violated, they wouldn't have had?

Common answer to the normative question: No: if the child is glad to be alive and could not have been born without the debilitating condition, then they haven't suffered any sort of all-things-considered harm.

- Other defenders of wrongful life suits accept that Jimmy would only be entitled to seek damages if his life were on the whole not worth living.
- Some might oppose wrongful life suits generally. One possible ground might be the hypothesis that every (human) life is worth living. But this is a separate question, which might not have the same bearing on our *general philosophical question* above.

Is the common answer correct?

- N.B. It's probably worthwhile to isolate the question we're asking here from various complications, in particular complications relating to the moral permissibility of possible ways of preventing bringing the child into existence, i.e. abortion.

- Does it help to focus on cases where the parents or the parents' doctor knew that in conceiving they'd generate a substantial risk of bringing about a child who suffers miserably, e.g. when it's known that both parents possess the *miserable debilitating gene*?
- Then we can allow that the alternative the child's living is not abortion, but the child's never having been conceived, and therefore sidestep questions about the permissibility of abortion.

A comparison case: the rescuer

Feinberg's analogy: holding parents or doctors liable for the burdens the child suffers is like holding a rescuer liable for breaking the arm of someone she rescues from drowning.

Feinberg: the breaking of the rescued person's arm was not genuinely harmful, because it was outweighed by the benefit of being rescued.

The rescuer case is comparatively clear: the rescued person shouldn't demand (or receive) compensation for her broken arm. If the little wrongful life case has no morally relevant differences from the rescuer case, then Jimmy shouldn't demand compensation.

Are there relevant differences?

2 The nature of harm and benefit

Consider the following claim:

The (other) continuum hypothesis: Harm and benefit exist on a single continuum. By definition, then, the more beneficial something is, the less harmful it is, and vice versa.

- ▷ This is plausibly the conception of harm and benefit that underpins a lot of rational decision theory.
- ▷ The overall utility or goodness of a possible state of the world is represented by a real number. Suppose you change the state of the world so that it includes some new event: if that event adds a positive number to the utility of the state of the world, it's a benefit; if it adds a negative number, it's a harm.

Two *comparative* models built on the continuum hypothesis:

¹ The word "wrongful" here might be misleading or confusing.

The historical model: some event *harms* a person if and only if it causes her to be worse off than she was before; an event *benefits* a person if it causes him to be better off than he was before.

[Comparison of beginning point vs. end point]

The counterfactual model: some event *harms* a person if and only if it causes her to be worse off than she would have been had the event not occurred; an event *benefits* a person if it causes him to be better off than he would be had the event not occurred.

[Comparison of end point with vs. end point without the event]

Shiffrin rejects the continuum hypothesis and rejects comparative models of harm and benefit that require its truth.

First objection:

- “[W]e often consider failing to be benefited as morally and significantly less serious than both being harmed and not being saved from harm” (Shiffrin 121).
- The counterfactual model doesn’t seem equipped to distinguish failing to benefit from failing to prevent harm or even from harming.
- The historical model can distinguish harming from failing to benefit (the latter might involve no change in utility), but not harming from failing to prevent harm.
 - ▷ (Historical models seem fairly implausible: they seem, at least prima facie, to treat *all* events as harming anyone who’s independently in a state of decline.)
- They also apparently equate removing a benefit with harming.

Second objection:

- Depending on your starting point, being put in a particular state is treated as a harm to some and a benefit to others.
- Indeed, being put into a state of utility 421 is a harm to *A*, who otherwise would have had utility 422; but being put in the state of utility 0 is a benefit to *B*, who otherwise would have had utility -5.

Shiffrin: If this is the case, we can’t explain the harm/benefit asymmetry: it’s much more important not to harm someone than it is to benefit them.

“Why should loss or setback of an interest pro tanto matter more than gain, especially if the resultant positions are identical and there are no relevant expectations and neither party is deserving?” (122)

Noncomparative models: harms and benefits are particular conditions: harms include pain, death, unhappiness, etc.; benefits include happiness, pleasure, knowledge, etc.

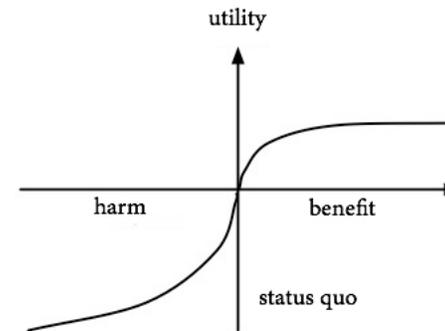
- Shiffrin’s view: harms are those conditions that create a “significant chasm or conflict between one’s will and one’s...circumstances” (123). What does this mean? Maybe: Harms prevent us from having or achieving what we want or exercising our agency as we want.
 - ▷ Question for Shiffrin: does this rule out the conceptual possibility of voluntarily harming oneself?

Putting harms and benefits on orthogonal scales allows us to explain the asymmetry between harm and benefit.

- *Possible objection to Shiffrin:* We can also generate some sort of asymmetry between harm and benefit while retaining a unified harm-benefit scale. We need to distinguish harm/benefit from disutility/utility.

(Compare: distinguishing money from utility. There’s still a unified money scale even though the difference in utility between \$10,000 and \$20,000 is not the same as the difference in utility between \$1,000,000,000 and \$1,000,010,000.)

1. First, establish a zero point on the scale. This might represent the “status quo” or reference point.
2. Second, harms have diminishing marginal disutility and benefits have diminishing marginal utility. There’s a function from the harm benefit scale to the utility scale that’s S-shaped.
3. Finally, assume (as we seem to) that harms have greater disutility than the equivalent benefit has utility.



Then harms are expected to generate greater differences in utility than proportional benefits.

Note, though, that this sort of model still clearly falls prey to the second objection. (*Is this really an objection, though, or simply a fact about our psychology?*²)

3 Benefitting v. preventing greater harm

The **morally relevant difference** between the rescuer case and the wrongful life case: in the former, the person who causes some harm prevents a greater harm. In the latter, the person who causes the harm also provides a benefit, but doesn't save anyone from a greater harm.

- Why? Shiffrin holds that not being conceived isn't a harm, because she is working from the premise that one doesn't exist before one is conceived.
- Shiffrin would presumably accept that if people do exist before they're conceived, and it's in their interest to be conceived, then her arguments about wrongful life cases will not apply.

Shiffrin's hypothesis: It's generally permissible to cause a lesser harm in order to prevent a greater harm. It's not generally permissible to cause the same sort of lesser harm in order to provide a pure benefit (i.e. a benefit that doesn't derive from prevent some harm).

Furthermore: in cases where someone does the latter, the person who's harmed should be able, at least in cases of substantial harm, to seek damages.

- **Example 1: the arm-burner.** It's permissible to burn someone's arm (without his consent) in order to avoid burning his face. It's not so clearly permissible to burn someone's arm (without his consent) in order to make his face staggeringly attractive.
- **Example 2: Wealthy and Unlucky.** Wealthy wants to give away some of his money; the only way he can do so is to drop gold bricks from a hot air balloon. Unlucky gets hit by a falling brick and breaks his arm. Had he not been hit by it, he wouldn't have gotten the brick at all.

Shiffrin focuses on the Wealthy and Unlucky case. Her argument: the wrongful life case has the same morally relevant features as the Wealthy and Unlucky case, and different morally relevant features from the rescuer case.

² See Tversky, A. & Kahneman, D. (1981). The Framing of Decisions and the Psychology of Choice. *Science*, 211, 453–458.

But the Wealthy & Unlucky case, on its most convincing telling, has some different moral features:

- Wealthy risks killing someone! Most of us would strongly prefer not to die for a gold brick. This element of risk is itself condemnable, and would be even if *no one* were hurt.

If we abstract away from that, is the case less clear-cut?

- On some views, financial benefits and bodily harm are **incommensurable** in such a way that there's no fact of the matter about whether one is benefited all things considered.

Is this different from Jimmy's situation, where those benefits that make life worth living for him might be of a very different kind from those things that make his life particularly burdensome?

An alternative explanation of the difference between the rescuer and Wealthy&Unlucky, that doesn't appeal to a benefit/harm asymmetry:

- The rescuer has the **hypothetical consent of the rescued**; Wealthy might not.
- Shiffrin's response, pt. 1: Even if you hold fixed the likelihood of consent, there's still an asymmetry! (*Is this true?*) The real difference is not in the probability of consent but in the relative weight of harms v. benefits.
- Shiffrin's response, pt. 2: Maybe it's generally more difficult to assess the likelihood of consent to achieve benefits because the value of different sorts of benefits is more a personal matter. But if this explains our verdict in the Unlucky/Wealthy case, it should carry over to the wrongful life case.

4 Degree of risk and liability

Shiffrin accepts that even if the risk is very low that Wealthy hits someone with his gold brick, Unlucky is still right to seek damages (136).

How does this carry over to the wrongful life case? Are low-risk procreating parents, who aren't negligent, still liable for any harms their child suffers as a result of having been brought into existence?

- Well, *all* harms are at least partly caused by having been brought into existence...
- Furthermore, almost everyone suffers some harms...
- But Shiffrin is happy to bite this bullet!

“[E]ven though procreators may benefit their progeny by creating them, they also impose substantial burdens on them... All of these burdens are imposed without the future child’s consent. This, it seems, is in tension with the foundational liberal, anti-paternalist principle that forbids the imposition of significant burdens and risks upon a person without the person’s consent... The imposition of significant burdens and risks is not a feature of exceptional or aberrant procreation, but of all procreation. Thus, restricting liability only to aberrant cases seems philosophically ad hoc” (136–7).

Questions:

- Is this such a big bullet to bite? Shiffrin notes that the view that all biological parents are responsible for harms their children suffer—and have violated their rights not to incur those harms merely for benefits (not greater harms) without consent—can do some explanatory work:

It explains and justifies the practice of legally mandating child support.

- After all, if procreation is morally unproblematic, Shiffrin argues, then there’s no reason why biological parents should have any more duty to see that their children are taken care of than anyone else (footnote 42).

Will this lead to an explosion of lawsuits? Shiffrin thinks it won’t:

1. First, plenty of families already provide adequate support.
2. Second, many families wouldn’t be able to provide more than they do. (What about adult children? My parents could probably give me more cash. Should I sue?)
3. Third, people often don’t demand what they’re morally owed from friends and family.
4. Fourth, if there is such an explosion, there’s no problem in restricting the set of cases that can be brought to court. (As with other moral harms that fall outside the scope of the judicial system.)

A general objection:

- Shiffrin’s argument has the following sort of structure.
 1. Most any case of procreation has the same morally significant features as the Wealthy/Unlucky case.
 2. In the Wealthy/Unlucky case, it’s appropriate for the harmed party to seek damages.
 3. So, in almost any case of procreation, it’s appropriate for the harmed party to seek damages.

- A very simple objection: we might be more confident in the falsity of the conclusion than in the plausibility of the premises.

So this argument could be dialectically inefficacious: one man’s modus ponens is another man’s modus tollens.

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Spring 2012

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