Future People, Involuntary Medical Treatment in Pregnancy and the Duty of Easy Rescue

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I argue that pregnant women have a duty to refrain from behaviours (e.g. taking illicit drugs) or to allow certain acts to be done to them (e.g. caesarean section) for the sake of their foetus if the foetus has a reasonable chance of living and being in a harmed state if the woman does not refrain from those behaviours or allow those things to be done to her. There is a proviso: that her refraining from acting or allowing acts to be performed upon her does not significantly harm her. This duty does not presuppose that the foetus is a person. It is grounded on principles of respect for the interests of sentient beings and prevention of harm to future individuals. I give an argument for a general duty of easy rescue.

I

For over fifteen years now, there has been heated public, ethical and legal debate over whether pregnant women should be compelled to accept medical treatment in their foetus' interests.[1] Cases fall into two categories. The first category, which I will call restraint, is that of the state preventing women from engaging in lifestyles judged to be dangerous to their foetus. Maternal restraint has occurred predominantly in the United States. In the most celebrated case, Jennifer Johnson was sentenced to jail for twice delivering cocaine to a minor, based on the short period of time after birth when she had cocaine detected in her blood and before the umbilical cord was cut.[2]

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[1] G. J. Annas, 'Forced Caesareans: The Most Unkindest [*sic*] Cut of All', *Hastings Center Report* 12.3 (1982), p. 16; G. J. Annas, 'Pregnant Women as Fetal Containers', *Hastings Center Report* 16.6 (1986), pp. 13–15; G. J. Annas, 'Protecting the Liberty of Pregnant Patients', *New England Journal of Medicine* 316 (1987) p. 213; S. Faludi, *Backlash: The Undeclared War against American Women* (New York, 1991); T. E. Elkins, F. H. Anderson, M. Barclay, T. Mason, N. Bowdler, G. Anderson, 'Court-ordered Cesarean Section: An Analysis of Ethical Concerns in Compelling Cases' *American Journal of Obstetric Gynecology* 161 (1989), p. 150; D. Johnsen, D. 'A New Threat to Pregnant Women's Autonomy', *Hastings Center Report* 17.3 (1987), p. 33; L. Paltrow, 'When Becoming Pregnant is a Crime', *Criminal Justice Ethics* 9.1 (1990), p. 41; J. A. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy and Childbirth', *Virginia Law Review* 69 (1983) p. 405; N. K. Rhoden, 'Cesareans and Samaritans', *Law, Medicine and Health Care* 15 (1987), p. 118.

[2] *Johnson v. State*, 578 So. 2d 419 (Fla. 5th DCA 1991), rev'd 602 So. 2d 1288 (Fla. 1992).

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Attempts to confine other 'reckless' women have been made for a variety of reasons: taking illicit drugs, particularly cocaine,[3] sniffing paint, having sexual intercourse against medical advice, and failing to attend antenatal clinic.[4]

The second category of cases, which I will call invasive treatment, involves women who have been subjected to invasive medical treatment against their wishes for the sake of their foetus. Treatment has generally been caesarean section, though applications for involuntary blood transfusions have also been made.[5] Until the late 1980s–early 1990s, most applications made to courts for involuntary treatment in the foetus's interest were granted.[6] There have been over fifty cases in the United States of court-ordered caesarean sections since 1980.[7]

A reversal in this trend to override women's liberty began with the case of Angela Carder.[8] When dying of cancer and $26\frac{1}{2}$ weeks pregnant, the District of Columbia ordered a caesarean section on behalf of the foetus, on the basis of the state's interest in protecting the potentiality of human life. This decision inflamed legal commentators[9] and sections of the public. The American College of Obstetricians and Gynaecologists condemned the court decision.[10] Angela Carder's parents appealed after her death and the decision was overturned. The Court of Appeal stated that 'a foetus cannot have rights . . . superior to those of the person who has already been born'.

In England, there have been a number of involuntary or non-voluntary caesarean sections which have drawn professional and legal

[3] 'Drugged Mum Dooms Baby Zaria', *Herald Sun*, 14 April (2001), p. 19.

[4] See Gallagher for a review of a number of American cases in which women found taking drugs have been sentenced to jail for minor offences to protect their foetus (J. Gallagher, 'Collective Bad Faith: "Protecting" the Foetus', *Reproduction, Ethics and the Law: Feminist Perspectives*, ed. J. C. Callahan (Bloomington, 1995), pp. 343–4, 355).

[5] V. E. B. Kolder, J. Gallagher, and M. T. Parsons, 'Court-Ordered Obstetrical Interventions', *New England Journal of Medicine* 316 (1987), p. 1192.

[6] Kolder et al., 'Court-Ordered Obstetrical Interventions'. The most celebrated cases were: *Raleigh Fitkin-Paul Morgan Memorial Hospital v Anderson* (1964) 201 A 2d 537 (NJ Sup Ct), which involved the involuntary blood transfusion of a pregnant Jehovah's Witness in her and her foetus's interests. *Jefferson v Griffin Spalding County Hospital Authority* (1981) 274 SE 2d 457 (Sup Ct Georgia) ordered a caesarean section and blood transfusion against the mother's religious convictions in her and her foetus's interests. *In Re Madyun*, 114 Daily Wash L Rptr 2233 (DC Super Ct July 26, 1986) ordered a caesarean section in the mother and child's interests. Schulman J in *Winnipeg Child and Family Services Ltdv DFG* [1996] 10 WWR 95 (QB) was a Canadian case.

[7] J. Robertson *Children of Choice: Freedom and the New Reproductive Technologies* (Princeton, 1994), p. 87.

[8] G. J. Annas, 'She's going to die: The case of Angela C', *Hastings Centre Report* 18 (1988), p. 23; G. J. Annas, 'Foreclosing the use of force: AC reversed', *Hastings Centre Report* 20 (1990), p. 27.

[9] Annas, 'Foreclosing the use of force'.

[10] American College of Obstetricians and Gynaecologists Committee on Ethics, 'Statement on Court-Ordered Cesarean Section for Dying Woman', ACOG: Washington, D.C., 24 Nov. (1987).

censure, including the case of S, a born-again Christian,[11] which was overturned on appeal;[12] CH, a pregnant 41-year-old schizophrenic who was detained under the Mental Health Act; W, a woman with a history of receiving psychiatric treatment but who was not suffering from a mental disorder at the time; C, a fully competent woman who refused to have a caesarean because she had suffered backache and pain around the scar of a previous section.

The current legal trend is towards protecting the autonomy of the pregnant woman. The Royal College of Obstetricians and Gynaecologists has produced guidelines which state that: 'Obstetricians must respect the woman's legal liberty to ignore or reject professional advice, even to her own detriment or that of her foetus.'[13] Lady Justice Butler-Sloss of the English Court of Appeal said,

> The law is, in our judgement, clear that a competent woman who has the capacity to decide may, for religious reasons, other reasons or no reasons at all, choose not to have medical intervention even though the consequence may be the death or serious handicap of the child or her own death.[14]

Current ethical commentary has rejected forced interventions by focusing either on respect for the woman's autonomy or on the social determinants of her behaviour.[15] I will argue that respect for autonomy is not unrestricted. In some cases, forced interventions such as caesareans are justified to protect a foetus from injury. However, the justification need not rest on the view that the pregnant woman who refuses beneficial intervention is somehow impaired, incompetent or mentally ill, or on any foetal right to life, or in the state interest in protecting foetal life, but on a more subtle understanding of foetal interest and rights, and our moral obligations to future people.

II. LIBERALISM

According to Mill's liberalism, two principles, or 'maxims', determine the limits of state interference in individual action:

> The maxims are, first, that the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself. Advice,

[11] *Re S(adult: refusal of treatment*) (1992) 3 WLR 806.

[12] S. Ramsay 'UK Woman Wins Right to Refuse Caesarean Section', *Lancet* 351 (1998), p. 1498.

[13] RCOG Guidelines: Ethics, 'A Consideration of the Law and Ethics in Relation to Court-Authorised Obstetric Intervention', no. 1, April 1994, p. 14.

[14] F. Gibb, 'Women Have Right To Reject Caesarean, Court Rules', *The Times,* Thursday 17 March 1997, pp. 1–2.

[15] D. Hornstra, 'A Realistic Approach to Maternal-Foetal Conflict', *Hastings Centre Report* 28.5 (1998), p. 7.

instruction, persuasion, and avoidance by other people if thought necessary by them for their own good, are the only measures by which society can justifiably express its dislike or disapprobation of his conduct. Secondly, that for such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or legal punishment, if society is of opinion that the one or the other is requisite for its protection.[16]

I will call this second maxim

The Principle of Preventing Harm to Others.

The state is entitled to interfere with intervention I in A's life/behaviour to prevent harm to B in conditions C.

Conditions C constitute the necessary conditions which are together sufficient to justify state intervention in an individual's life. Mill did not, unfortunately, describe these conditions in detail but plainly believed that there were several justifications for state intervention. For example, the state is entitled to ensure that 'each person bear his share . . . of the labours and sacrifices incurred for defending the society or its members from injury and molestation'.[17] However, the state's power over individual choice extends beyond preventing acts which threaten the security of society. Mill argued that people's actions should not injure 'the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights'.[18]

Encroachment of [others'] rights; infliction on them of any loss or damage not justified by his own rights; falsehood or duplicity in dealing with them; unfair or ungenerous use of advantage over them; even selfish abstinence from defending them against injury – these are fit objects of moral reprobation, and, in grave cases, of moral retribution and punishment.[19]

Much of the debate over abortion and the refusal of treatment in pregnancy focuses on whether the foetus counts as 'another' individual or person[20] with interests and legally enforceable rights. If rights are

[16] J. S. Mill, *Principles of Political Economy* (New York, 1900), pp. 150–1.
[17] Mill, *Principles*, p. 132.
[18] Mill, *Principles*, p. 132. The subject of this essay is to describe the conditions under which the state's interference in a person's life is justified, not the conditions under which such interference is not justified. However, it should be said that Mill clearly believed that disapproval of an individual's choices was not sufficient ground for interference. This at least *prima facie* calls into question the position widely held by the medical profession and others (J. Seymour, 'A Pregnant Woman's Decision to Decline Treatment: How Should the Law Respond?', *Journal of Law and Medicine* 2 (1994), p. 27) that medical disapproval is sufficient grounds for withholding a medical intervention from a patient.
[19] Mill, *Principles*, p. 135.
[20] J. L. Lenow, 'The Foetus as a Patient: Emerging Rights as a Person?' *American Journal of Law and Medicine* 9 (1983) p. 1.

granted to the foetus, these are often said to be subordinate to those of the pregnant woman.[21] I will argue that even if the foetus is not a person and has no rights,[22] we may still owe it certain obligations and these obligations may entail that involuntary caesareans and other prenatal interventions are sometimes justified. My argument seeks to establish that the rights and interests of future individuals place significant constraints on the liberty of women to refuse treatment in pregnancy. Mill never considered explicitly the interests of future individuals. Liberals, I will argue, should extend the Principle of Preventing Harm to Others to include future individuals.

III. EXTENDING THE HARM PRINCIPLE: FROM HARM TO PRESENT OTHERS TO HARM TO FUTURE OTHERS

Consider the following example in which the Principle of Preventing Harm to Others justifies state intervention.

Example 1. Aromatherapy I

I am told by a herbalist that aromatherapy will prevent my recurrent headaches. I burn a strong incense in my apartment, even though there is no good reason to believe this will affect my headaches. The incense can be very dangerous to sensitive individuals, and a person in the apartment block goes blind as a result of the chemicals circulating in the air conditioning.

In order to protect others, the state is justified in preventing me from burning this incense. The principle of harm to others also applies to the future harm of presently existing individuals, as the following case illustrates.

Example 2. Aromatherapy II

The same as Aromatherapy I, but, although I move out of the apartment, the chemicals continue to leach out of the furnishings for many years. They cause one of the present inhabitants of my apartment block to go blind in five years.

[21] D. E. Johnsen, 'The Creation of Foetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection', *Yale Law Journal* 95 (1986), p. 611; Seymour, 'A Pregnant Woman's Decision to Decline Treatment', p. 27.

[22] Of course, the foetus is a sentient being after about 18–20 weeks' gestation (K. J. S. Anand, P. R. Hickey, 'Pain and its Effects in the Human Neonate and Foetus', *New England Journal of Medicine* 317 (1987) p. 1321, Royal College of Obstetricians and Gynaecologists' Working Party, Foetal Awareness, Oct 1997). We have an obligation not to inflict pain on sentient beings (P. Singer, *Animal Liberation* (London, 1990)). Whether or not the foetus is a person, we have an obligation to prevent or relieve its suffering. If caesarean section for obstructed labour would relieve foetal suffering, this is a reason to perform it.

Harm is no less serious because it is in the future *per se*. According to the principle of temporal neutrality, the mere location in time does not accord special significance to a benefit or injury.[23]

Not only should the Principle of Preventing Harm to Others be extended from present harm to the future harm of presently existing individuals, it should also be extended to cover harm to future individuals who do not exist at present.[24]

Example 3. Aromatherapy III

The same as Aromatherapy II, but, although I move out of the apartment, the chemicals continue to leach out of the furnishings for many years. They cause a future inhabitant (who does not now exist) to go blind in one hundred years' time.

There is no relevant difference between a future harm which befalls a now-existing individual and a future harm which will befall an individual who does not now but will exist in the future. Blindness is equally bad if it befalls two individuals in relevantly similar circumstances (that is, living in a similar culture, with similar social situations, with similar aspirations and professions, and so on), regardless of when it occurs, just as it is equally bad no matter where (in which country) it happens to occur. The badness consists in the blindness, and how it affects a life, and not when it occurs *per se*.

Thus liberals should extend the Principle of Preventing Harm to Others to cover future generations. This is consistent with the intuition that our liberty to live our own lives as we see fit does not extend to exhausting all natural resources to leave future generations much worse off.

IV. LIBERALISM AND FOETAL DISABILITY

It is relatively uncontroversial that it is impermissible to allow people to act in ways which cause great pain to their foetus now. However, if the liberal principle of harm to others applies to future people, it will apply to events which result in harm to the individual whom a foetus becomes, as the following case illustrates.

[23] H. Sidgwick, *The Methods of Ethics* (London, 1963), p. 111; T. Nagel, *The Possibility of Altruism* (Oxford, 1970), p. 60, 72; J. A. Rawls, *Theory of Justice* (Oxford, 1972), p. 293; R. M. Hare, *Moral Thinking: Its Levels, Method and Point* (Oxford, 1981), p. 105.

[24] See also: D. Mathieu, *Preventing Prenatal Harm: Should the State Intervene* (Washington DC, 1996); Robertson, *Children of Choice*, ch. 8.

Example 4. Blindness and Vitamin A

A woman takes excessive doses of Vitamin A, believing that they will keep her skin young, and knowing that this vitamin may make her child blind. She bears a child who is later found to be blind.

If the state is entitled to intervene in my burning incense in the cases of Aromatherapy, it is entitled to intervene to prevent this woman taking Vitamin A which causes an individual in the future to be blind, regardless of whether the foetus now has interests or rights. In this case, a child and later an adult will exist, and be worse off than he would otherwise have been if his mother had not taken Vitamin A.

A classic example of justified state restraint is the banning of the sedative thalidomide. This sedative had no significant adverse effects on women and was an effective drug. However, if taken during foetal gestation, it interfered with limb development. People exposed to this drug *in utero* have grossly deformed and shortened limbs. Rather than informing women of these possible effects and allowing them to choose whether to take this sedative, the state banned it in the interests of future people.

Thus, to the extent that a foetus will become a person, it is irrelevant whether a foetus is a person, and indeed when exactly it becomes a person. They have a *de facto* right and interest in not experiencing the harms which should not be inflicted on the future individual whom they will become.[25]

The argument so far justifies forcing pregnant women to refrain from certain actions which will harm the future child. However, liberals should also endorse more invasive involuntary treatment, as the following case illustrates. That is, liberals should require that pregnant women do certain things to prevent harm from occurring.

Example 5. Blindness and Rubella Vaccination

Vaccination rates fall dramatically. A rubella epidemic takes off. It is predicted that without a compulsory rubella vaccination programme, over 1,000,000 women will remain unvaccinated and 1,000 infants will be born blind. With a compulsory vaccination programme, no infants will suffer from rubella-induced blindness. Vaccination presents no risk to women.

If the state is justified in restricting access by pregnant women to the sedative thalidomide to prevent limb deformity in future individuals, then it is justified in requiring vaccination to prevent blindness in future individuals. In both cases, state intervention may result in some inconvenience and discomfort to women, and it may go against what they want, but the harm prevented justifies that intervention.

[25] In so far as these harms are irremediable.

The Principle of Preventing Harm to Others justifies not only state restraint, but also invasive treatment of people for the sake of future others.

V. FOETAL LIFE-ENHANCING VS. LIFE-SAVING TREATMENT

One objection to this argument is that liberals have traditionally supported women's choice to have an abortion based on their respect for personal autonomy. This support has sometimes been based on the argument that, because the foetus is not self-conscious and does not have cross-temporal desires for the future, killing it does not frustrate any of these desires, and so is not wrong.[26] Such permissive liberals might argue that if the state should not intervene in women's choices to prevent foetuses being killed (painlessly), then it should not intervene when these choices result in disability, especially if that disability is not worse than death.

I have argued that the state should prevent the injury of foetuses not on the grounds of foetal right to life, but on the grounds of the interests of future individuals. This argument is silent on whether we have a duty to bring into existence future individuals or whether individuals have an interest in being brought into existence, and whether it is wrong to kill foetuses. Thus this argument is consistent with the so-called permissive liberal case for abortion.[27] It is also consistent with, but not dependent on, the view that the foetus itself does not have an interest in continued existence.[28] It is consistent with the view that the foetus's own interests consist in not being in pain. However, the future individual who the foetus will become has different interests: that his or her life be as good as possible in a much broader sense, that life being as long and as rich as possible. On this analysis, if a future individual will exist with or without treatment, we should not significantly harm that life.

Thus, the injury/disabling of a foetus should be treated quite differently from the killing of a foetus. As far as maternal refusal of treatment goes, there is an important distinction between treatment which is necessary to save the foetus's life ('life-saving treatment')

[26] P. Singer, *Practical Ethics* (Cambridge, 1979); M. Tooley, *Abortion and Infanticide* (Oxford, 1983).

[27] However, if it can be shown that foetuses have a strong interest in continued existence, it would imply that abortion is wrong.

[28] The argument is also consistent with the reductionist view that what matters for personal identity is the connectedness and continuity of psychological states, and that the foetus is not closely connected in psychological terms with the later individual and so not closely connected in terms of personal identity (D. Parfit, *Reasons and Persons* (Oxford, 1984), sect. 103–5).

and treatment which is necessary to prevent a significant shortening of the length or impairment of the quality of the life of the person who the foetus will become in the future. Call these 'life-enhancing treatments'.[29]

If they are to be consistent, liberals who hold that abortion is permissible should accept that it is permissible for pregnant women to refuse foetal life-saving treatment.

However, I have suggested that they can consistently and should also accept that it is impermissible in some circumstances for a pregnant woman to refuse foetal life-enhancing treatment.

Consider the following two cases.

Example 6. P is thirty-six weeks pregnant. Severe placental insufficiency is diagnosed. Without immediate caesarean section, P's child will be born with cerebral palsy. P refuses caesarean section because she desires to experience the birth process.

Example 7. J is twenty-four weeks pregnant and is involved in a motor vehicle accident. She is severely injured though conscious and competent. She is bleeding profusely. She is a Jehovah's Witness and refuses a blood transfusion. Without a blood transfusion, she and her foetus will die.

On the present analysis, the state is not justified in compelling J to receive treatment. However, the state may be justified in compelling P to receive treatment.

This leads to a paradox: for some liberals, the death of a foetus matters less than its disability, even though that disability might not be worse than death. We should give priority to life-enhancing over life-saving treatment. This applies to restraint and also to invasive medical treatment.

The Royal College of Obstetricians and Gynaecologists seems to be aware of this distinction. In referring to the 'worrying policy preference for the rights of an unborn child over those of a pregnant woman', it asked, '[C]ould surgical intervention in the interests of the health and safety of the foetus, but not in its "vital interests," also be found to be lawful?'[30]

It is precisely (involuntary) surgery for the health and safety of the foetus, and not surgery in its vital interests, which I have suggested should be lawful.

[29] This is not quite accurate because a foetal life-enhancing treatment may save the life of the future person the foetus will become as, for example, when a treatment *in utero* prevents the person developing a fatal disease in middle age by, for example, deleting a cancer gene.

[30] K. Stern, 'Court-Ordered Cesarean Sections: In whose Interests?', *The Modern Law Review* 56 (1993), p. 243.

VI. HOW MUCH HARM IS IT JUSTIFIABLE FOR THE STATE TO INFLICT ON ONE PERSON TO PREVENT HARM TO ANOTHER?

According to Mill, harm to others is a necessary, but not sufficient, condition for justifying state intervention in an individual's life: '[I]t must by no means be supposed that because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that it always does justify such interference.'[31] When is it justifiable for the state to interfere with A's life with intervention I which inflicts a harm on A to prevent harm to B? When the cost to us of forgoing some activity is small (such as refraining from throwing our rubbish in public places) and the harm to others which thereby does not occur is great (prevention of serious disease), then liberals might require that the state prevent this harm. Likewise, when the cost to us of engaging in some activity is small (such as putting our rubbish in recycling bins), and the harm to others which is prevented is great, the state might compel us to engage in that activity.[32]

These examples suggest that one necessary condition for I to be justifiable is that the harm to B which I prevents is significant. However, this cannot be sufficient: damage to the interests of others does not alone justify interference in an individual's actions.[33] The state is not justified in requiring of a person that she give up her life for strangers who exist now or in the future. In some circumstances, it would be permissible for a mother to adopt a course of action which harms the foetus significantly. Let's assume that folic acid is necessary to reduce the chance of the foetus developing spina bifida. A mother has a malignancy. The best treatment uses a folic acid antagonist. It may be right for the woman to take the folic acid antagonist, even if this causes spina bifida in her foetus. (But, if she could use another drug which is equally effective, it should be impermissible to take the folic acid antagonist.)

This example suggests that the magnitude of the harm of I to A is also important in determining the justifiability of I.[34] There are several

[31] Mill, *Principles*, p. 150.

[32] The situation is more difficult when our actions change the identity of future individuals (Parfit, *Reasons and Persons*, part IV). The present argument is limited to interventions which harm the individual who will exist.

[33] Mill, *Principles*, p. 150.

[34] A point emphasized by Thomson (J. J. Thomson, 'A Defense of Abortion', *Philosophy and Public Affairs* 1 (1971), p 47). Thomson argues that we have a moral obligation to be Minimally Decent Samaritans, but not Good Samaritans. Our question is: when does the risk of harm to A become sufficiently small to make an act morally required and indeed so small that it might justify the state compelling a person to act in that way? Thomson argues that people cannot be compelled by law to risk their lives for others.

ways of describing the magnitude of 'harm to A' as a justifying condition for I:

The Maximizing View: the harm to A is less than the harm to B.[35]

The Threshold View: the harm to A is below some threshold value.

The Benefit View: the harm to A is offset by the benefits to A. Thus, while intervention I may harm A in some significant way, I is also beneficial in other important ways and overall I is in A's (and B's) interests.[36]

These putative necessary conditions for the justifiability of state interventions are decreasingly demanding of A. The least demanding account, the Benefit View, seems to be the one which has operated in at least the English judges' minds in authorizing caesareans. Many of the English decisions have involved cases in which treatment was thought to be in the interests of both mother and foetus, and at least not against the interests of the mother. This is why the Carder decision is in one respect different: the caesarean was noted as a contributory cause of death on the death certificate and was believed by some to have accelerated her death,[37] though by how much is not clear. The Court of Appeals stated that 'the rights of the foetus could not outweigh those of the mother'. However, it did leave open the possibility that the wishes of the mother might be overridden in exceptional circumstances, though it did not specify what these were. It would seem plausible to conclude, as Sir Stephen Brown did conclude in the S case,[38] that the one possible exception would be when surgery was in the overall interests of both foetus and mother.[39]

The state imposes quite large risks of death on some individuals when it decides not to spend resources on constructing traffic lights on a busy intersection in a local community because it calculates that the money could do more good elsewhere. It is, I have argued, legitimate for the state to cause some individuals to incur some risk of death, if small enough, to prevent great harm to others.

[35] Ten suggests that Mill intended something like this: 'the sacrifice a person is called upon to make is at least not greater, and perhaps much less, than the harm to the beneficiary' (C. L. Ten, *Mill on Liberty (*Oxford, 1980), p. 65).

[36] On this account, the justifiability of forced recycling and rubbish disposal is that it is not only in the interests of future generations, but in our interests as well.

[37] Gallagher, 'Collective Bad Faith'.

[38] However, the case of S involved life-saving rather than life-enhancing treatment. Thus my account is open as to whether treatment in this case was in the foetus's interests.

[39] Some of the difficulty in these cases stems from the fact that some commentators operate a subjective conception of interests, believing that a competent refusal of a treatment indicates that that treatment is not in that person's interests. Thus Rhoden writes that decisions about major surgery 'cannot rightfully be anything but subjective' (Rhoden, 'Cesareans and Samaritans'. Thus for Rhoden, every caesarean performed against a competent woman's wishes is against her best interests, even if it saves her life and that life is full and rewarding. This appears false, and is not the view which judges have taken in England. It is absurd to suggest that simply because a person wants to die experiencing a natural birth that such a natural birth is best for her.

It may be thought that such an account fails to give enough consideration to the psychological harm of being forced to undergo surgery against one's values. Some women have even gone so far as to describe such medical interventions as being like a kind of rape or torture.[40] Agreement might be achieved on when forced treatment is justified if a conception of interests could be agreed upon. However, it is hard to see how any agreed conception of interests, no matter how broad, could justify restricting access to high dose Vitamin A therapy and thalidomide, or compelling women to have rubella vaccinations, without collapsing maternal and foetal interests.

While juggling the concept of interests might resuscitate the Benefit View, I suspect that we will have to move to at least the Threshold View if we are to explain intuitions about the justifiability of I. The common-sense explanation of cases in which intervention I appears justified is that, when the harm to B which is prevented by I is great, I is justifiable if the harm to A of I is below some threshold of acceptability.[41] The Maximizing View seems too demanding: it would justify any interference in A's choices provided that an even slightly greater harm to B is prevented. This would justify the state removing one of A's kidneys if that kidney would save B's life. This gives too little weight to liberty.

There are two variants of the Threshold View. 'Harm to A' here could be interpreted as (i) net harm or (ii) as a single harm. Let's imagine, for argument's sake, that having one's deeply held values violated is worse than dying. And let's also assume that death is bad for the person who dies. A woman's labour is obstructed. Without an immediate caesarean section the baby will likely be severely brain damaged and the mother may die. She refuses an operation on religious grounds. A forced caesarean section may cause net harm to the mother (the harm of having one's values offended being greater than death), though when one takes into account the benefit of saving her life, the net harm may be small. According to the net harm variant, an operation might be justified.

The single harm variant of the Threshold View is less demanding. According to this condition, it is only justifiable to inflict a single harm to a person up to a certain threshold, regardless of any offsetting benefits. The idea here is that it may be that the violation of a person's deeply held values is too great an evil in itself, and the operation should not be involuntarily performed on this ground alone.

[40] Jean Robinson, personal communication.

[41] This corresponds to Thomson's minimally decent Samaritan (Thompson, 'A Defense of Abortion').

My own view is that the net harm variant is a necessary requirement for state intervention to be justified. However, in the absence of agreement on a conception of interests, the single harm variant would be less prone to abuse. On a single harm view, restraint will more frequently be justifiable than surgery just because it is less harmful in itself, regardless of its other effects.

VII. IS THERE A DUTY OF EASY RESCUE?

I have suggested that two necessary conditions for a state intervention, I, in a person's behaviour or life to be justifiable are:

- the harm to A of I is below some acceptable threshold, and
- the harm to B of not-I is great.[42]

Mill believed that another necessary condition for state intervention to be justified is that:

- A has a duty or obligation[43] to B.

One common objection to forced treatment of pregnant women is that pregnant women are in this respect the only group compelled to sacrifice their own interests for those of another person[44] and that this represents a form of discrimination.[45] Anglo-American law, it is claimed, does not recognize a duty of rescue.

Ethics, however, does clearly recognize a duty of rescue, as the following case illustrates.

Example 8. Forced 'Donation' of Blood

A process is discovered whereby cells in the peripheral blood are induced to return to a more immature form and to divide into all the components of blood. In effect, blood cells are caused to multiply. From one ml of blood, several litres can be produced. However the process of cell multiplication only works if the cells are healthy, and not already deprived of oxygen or exposed to metabolites from cell injury. Jane is admitted to the Emergency Department after a car

[42] This is consistent with Ten's interpretation (Ten, *Mill on Liberty*, p. 64). Ten suggests that in all Mill's examples, A can resume his or her life plan after preventing harm to B. 'No permanent obstacles are placed to their achievement of their aims and purposes in life' (ibid.). This is not very demanding of agents, and I will presently suggest more demanding alternatives. My own view is that it is reasonable to intervene in A's behaviour even if there is a chance that intervention will permanently frustrate A's goals, provided that that chance is small enough.

[43] Mill, *Principles*, p. 138. See italics in quote below.

[44] *McFall v Shimp* 10 Pa D and C 3d 90 (1978); N. Rhoden, 'The Judge in the Delivery Room: The Emergency of Court-Ordered Caesarean Sections', *Cal LR* 74 (1986), p. 1951; Bennett, 'Pregnant Women and the Duty to Rescue: A Feminist Response to the Fetal Rights Debate', *Law in Context* 9 (1991), p. 86. The situation is different in some European countries which recognize a legal duty of easy rescue.

[45] Johnsen, 'A New Threat'.

accident with severe haemorrhage. She requires an immediate transfusion of blood if she is to survive. She has a very rare blood type. The blood bank has none of that type. A call goes out over the hospital public address for donors, but it is unlikely that a donor will be found because only one person in a million has this blood type. Smith is in the Emergency Department with a sprained ankle. His hospital record shows that he has the compatible blood type. He is approached to provide blood but refuses. Doctors prick his finger against his will and catch a drop of blood. That drop saves Jane's life.[46]

Is it permissible for the state to remove a drop of blood from one person to save the life of another? It was Mill who said that 'every one who receives the protection of society owes a return for the benefit'.[47] What smaller return could be asked than a drop of blood to save a life?

Mill himself, as well as being an advocate for individual and women's interests in particular, wrote of the duty to save 'a fellow-creature's life, or interposing to protect the defenceless against ill-usage',[48] and the 'selfish abstinence from defending [others] against injury'.[49] Mill clearly believed that inaction can be a cause of harm and that intervention is justified to prevent harm to others.[50]

Indeed, such a duty does appear to exist already in our social norms. Most people now accept that it is not permissible for Smith to smoke in the workplace if his smoking affects Jones, who works at the desk nearby and has severe life-threatening asthma. More immediately relevant is the compulsory incarceration and invasive investigation of people suspected of having dangerous and communicable diseases such as Lassa fever. People with psychiatric illness can be treated against their will with invasive treatment if they are risk to others, even if they are competent.[51]

While such examples of legally enforceable duties to others are few, it is consistent with now widely accepted norms that such duties should be extended. For example, most people would accept that the reckless disposal of nuclear waste is wrong, even if leakage does not occur now but only in the distant future.

It might be objected that this argument begs the question of whether a duty to rescue others exists. A duty to others does not exist, it might be objected, simply because the benefit which could be offered to that person is great, and the harm to self is small. We need independent grounds in addition to establish that a duty exists.

[46] John Robertson has a similar example (Robertson, *Children of Choice*, p. 192).
[47] Mill, *Principles*, p. 132.
[48] As quoted in Ten, *Mill on Liberty*, p. 61.
[49] Mill, *Principles*, p. 135.
[50] Ten, *Mill on Liberty*, pp. 61–2.
[51] Mental Health Act 1983, England. Liberals would reject treating competent people against their will for their own benefit. Such acts may represent a legal pragmatism: if a mentally ill person is a risk to himself, he is more likely to be a risk to others.

The proper grounds for articulating a set of social duties is a difficult issue, and one which, fortunately, we need not resolve. For if anyone owes a duty to another person, a parent owes a duty to his or her child. As Mill put it,

> The fact itself, of causing the existence of a human being, is one of the most responsible acts in the range of human life. To undertake this responsibility – to bestow a life which may be either a curse or a blessing – unless the being on whom it is to be bestowed will have at least the ordinary chance of a desirable existence, is a crime against that being.[52]

Mill saw parental duties as encompassing both education and providing adequate material circumstances.

> I fully admit that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him . . . When, by conduct of this sort, a person is led to violate a distinct and assignable obligation to any other person or persons, the case is taken out of the self-regarding class, and becomes amenable to moral disapprobation . . . If, for example, a man, through intemperance or extravagance, becomes unable to pay his debts, or, having undertaken the moral responsibility of a family, becomes from the same cause incapable of supporting or educating them, he is deservedly reprobated, and might be justly punished. . .[53] (Italics mine)

However, another and perhaps more basic parental duty must be not to harm or disable one's child, to give it the best opportunities possible to have at least a reasonably good life. So, if the state is justified in preventing a person from giving his child a drug immediately after birth which will make it blind (even if the individual believed that his god commands it), it is equally wrong for him to give his child the same drug immediately before birth, or immediately before viability.[54] Indeed, as Mill recognized, parental duties extend beyond parents refraining from acting in harmful ways; they require parents actually making sacrifices for the sake of their children.

> It still remains unrecognised, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and if the parent does not fulfil this obligation, the State

[52] Mill, *Principles*, p. 163.
[53] Mill, *Principles*, p. 138.
[54] When does such a duty begin? At least when a decision is made to continue or carry the pregnancy. Keyserlink similarly remarks that 'since between the child when unborn and after birth there is continuity in all essential respects, then it would seem logical and just to assign to parents duties to their unborn children analogous . . . to those they have to their children' (E. W. Keyserlink, *The Unborn Child's Right to Prenatal Care. A Comparative Law Perspective* (Montreal, 1984), p. 103).

ought to see it fulfilled, *at the charge, as far as possible, of the parent*.[55] (Italics mine)

VIII. STRANGERS

What of people to whom we owe no special duties, the moral stranger? Should people be compulsorily vaccinated in the interests of the herd? Should a woman pregnant by rape also be compelled to refrain from damaging behaviours or accept foetal life enhancing interventions?

Where the risks are minimal or near zero, such interventions for the sake of complete strangers may well be justified. After all, fluoride is placed in the water because it has virtually no significant adverse effects (though paradoxically there is a risk of white speckling of the teeth from fluoride). Example 8, Forced Blood Donation, illustrates that we can be compelled to act for the sake of others when the costs are near zero. If vaccination were riskless, we should all be compulsorily vaccinated. While vaccination is not obviously compulsory at present, in many cases it is difficult to avoid: children require vaccination certificates to attend school, and school is compulsory.

IX. POSSIBLE PEOPLE

We have extended the liberal Principle of Preventing Harm to Others to include future others, people who will exist. Should we extend it further to include possible future people, that is, people who might exist? Here are two examples of how possible people can be harmed:

Example 9. Mutagenic Chemicals

A man works in a job involving exposure to chemicals which, though they do not harm him, damage his sperm and would cause him to have disabled children if he had children.

Example 10. A Chance of Survival

A foetus is in a transverse lie during established labour. Without immediate caesarean section the foetus will die. With caesarean section, though it may still die, there is a chance the foetus will survive and be normal. But there is also a chance it will survive and be disabled.

If the justifiability of state intervention is dependent on the magnitude of harm to others and to the person interfered with, then it is

[55] Mill, *Principles*, p. 160. This argument applies to childrearing in general. It could be argued that this infringes excessively on parental autonomy. Yet there are limits to parental autonomy, as child abuse and care legislation reflect. If parents are unable to provide adequate care for their children, the state is entitled to take over their care and in some cases punish the parents.

plausible that such justification is also dependent on the probability of those harms occurring.[56] If that is right, the justifiability of the state prohibiting men in Example 9 working with mutagenic chemicals turns on the probability that a man would have a child, given that he were exposed to these chemicals. The higher the chances, the greater the imperative for the state to intervene. Thus the state might prevent young men taking on the job involving exposure to mutagenic chemicals, but perhaps allow older men who have completed their families in stable relationships to undertake such occupations, though recognizing that there is a finite but smaller chance that they will have a further child.[57] The state, however, would have no justification (on this argument) in preventing exposure to chemicals which workers know cause them to be infertile.

Example 10 is more complex. Since non-treatment will result in the death of the foetus, the Principle of Preventing Harm to Others does not require forced treatment (unless one subscribes to the view that the death harms the foetus). If women are permitted to have abortions, they should be permitted to refuse treatment in such cases. There is one exception. If the intervention is associated with high foetal morbidity, the state should prevent treatment if the disability which results is severe, and worse than death.

X. FINAL REMARKS

According to the liberal Principle of Preventing Harm to Others, the state is entitled to interfere with intervention I in A's life/behaviour to prevent harm to B in conditions C. Three necessary conditions for a state intervention, I, to be justifiable are (conditions C):

1. The harm to A of I is below some acceptable threshold.
2. The harm to B of not-I is great.
3. A has a duty or obligation to B.

If A has no duty or obligation to B, then the harm to A must be zero or near zero.

This principle should be extended to cover future others, that is, it can be justifiable for the state to intervene in A's life for the sake of B even if B is a future individual. Rather than devaluing or disregarding

[56] As Mill recognized (Mill, *Principles*, p. 138).

[57] This assumes that the genetic damage is not identity-altering. If the damage is identity-altering, the state should only intervene when the disability which results causes the person's life to be so bad it is not worth living.

women's interests and rights,[58] this approach gives equal consideration to the interests of both present and future individuals.

In particular, I have distinguished between foetal life-saving and life-enhancing treatment. While permissive liberals may allow women to refuse foetal life-saving treatment, they should be more reticent to allow women's autonomy to extend so far that pregnant women can refuse foetal life-enhancing treatment. On this view, some instances of restraint and even invasive treatment of competent pregnant women may be justifiable under an extended liberal Principle of Preventing Harm to Others.

Why have liberals such as Mill not extended the harm principle to include future others? At least in Mill's time, the ability to predict and avoid future harm was limited. And the possibility of avoiding such harm even smaller. But today, there is a greater possibility of predicting accurately the effects of our actions and our omissions on future individuals. And with knowledge comes an imperative to act. There is no reason to treat the interests of future individuals any differently from those of present individuals. Mill himself saw the role of state intervention as promoting the general welfare and the viability of society over time.[59] Yet society in general benefits if we prevent its future members from being seriously disabled.

There are problems with suggesting that forced interventions can be justified for the sake of the foetus:[60]

- The existence of such threatening coercive interventions may deter women from seeking medical care altogether.[61]
- Our predictions of harm have been fallible. For example, in one of the most famous cases, that of Jefferson, while the court authorized a caesarean, the mother left hospital and had a normal delivery elsewhere.
- There has been a striking failure of due process so far in considering forced interventions in pregnancy. It is often difficult to represent women properly and to have an appropriate appeals procedure, given the emergency nature of many situations. In some cases, judges have not been presented with accurate information.

[58] Bennett, 'Pregnant Women', Rowland (R. Rowland, *Living Laboratories: Women and Reproductive Technologies* (Indianapolis, 1992), p. 123) and Annas, 'Pregnant Women as Fetal Containers' assert that attributing interests to the foetus has this effect.

[59] Mill, *Principles*, p. 132.

[60] See Robertson, *Children of Choice*, pp. 187–90.

[61] Beech BAL. Court ordered caesarean sections are discouraging women from seeking obstetric care. *British Medical Journal* 314 (1997), p. 1908. See also Gallagher (Gallagher, 'Collective Bad Faith') and Seymour, 'A Pregnant Women's Decision'.

- Women and minority groups disproportionately bear the burden of these interventions.

In response to the last point, Robertson has suggested that men who are complicit in actions resulting in prenatal harm should also be held accountable.[62] He extends this to a concept of parental duties postnatally, extending even to providing blood and perhaps even solid organs. Another broader response is to argue that a duty of easy rescue applies to all citizens, both women and men. Some European countries have such a legal duty of easy rescue, including Scandinavia, Austria and Germany. The contentious issue is not whether inconvenience or harm can be visited upon one person to benefit another, but how much harm is permissible.

These principles do not merely apply to restraint and caesarean section. They also apply to other interventions which will benefit the foetus. For example, the AIDS Clinical Trials Group (ACTG) Study 076 showed that oral zidovudine, administered to HIV-positive pregnant women in the United States and France, administered intravenously during labour, and subsequently administered to the newborn infants, reduces the incidence of HIV infection by two thirds. This regimen will save the life of one of every seven infants born to HIV-infected women.[63] Given that there is now an effective treatment to prevent the transmission of HIV from mother to baby in some cases, should all pregnant women be tested for HIV and given the ACTG regimen if they are positive? Currently, HIV testing is voluntary. However, women presenting to antenatal care are given blood tests without seeking their explicit consent for treatable communicable diseases like syphilis. Should HIV be added to this list? Should a pregnant woman who refuses to have a HIV test be compelled to have such a test in her foetus's interests?

Given that antiretroviral therapy has now been shown to delay the onset of symptoms and improve quality of life, arguably it is in the woman's interests to know whether she has HIV or not. The test is then in the baby's interests and arguably in the mother's interests. On the framework outlined, there is a strong ethical justification to test the pregnant woman, especially later in pregnancy when it is clear she intends to carry the baby to term. The legality of compulsory prenatal HIV testing has not been tested.

[62] Robertson, *Children of Choice,* p. 191.

[63] E. M. Connor et al., 'Reduction of Maternal-Infant Transmission of Human Immunodeficiency Virus Type 1 with Zidovudine Treatment', *New England Journal of Medicine* 331 (1994), p. 1173; R. S. Sperling et al., 'Maternal Viral Load, Zidovudine Treatment, and the Risk of Transmission of Human Immunodeficiency Virus Type 1 from Mother to Infant', *New England Journal of Medicine* 335 (1996), p. 1621.

Most mothers want to do the very best for their children. Many will make enormous sacrifices in an attempt to realize even a slim chance of making their children's lives better. But in those few instances when pregnant women make autonomous choices which result in great harm to their offspring, the state is justified in protecting the interests and rights of future generations.

My arguments do not establish that a pregnant woman has a general 'Good Samaritan' duty to save her foetus's life, as some have argued.[64] Such arguments either assume that the foetus is a person or that future individuals have an interest in being brought into existence. Both of these claims are controversial. My argument is more limited: in so far as a foetus is likely to survive, or has a reasonable chance of surviving, pregnant women have a duty to act in such a way that minimizes the harm to that future individual, provided those actions do not seriously harm them.

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[64] H. Draper 'Women, Forced Caesareans and Antenatal Responsibilities', *Journal of Medical Ethics* 22 (1996), p. 327; R. Scott, 'The Pregnant Woman and the Good Samaritan: Can a Woman Have a Duty to Undergo Caesarean Section?', *Oxford Journal of Legal Studies* 20 (2000), p. 407.