

A THEORY OF CHILD SUPPORT

SCOTT ALTMAN*

ABSTRACT

Child-support policy has long been a battlefield for warring couples and feuding interest groups. Beneath these disagreements lie fundamental questions about why parents rather than taxpayers should fund child-rearing costs, and how to distribute costs among parents fairly. This article evaluates theories of child support. It examines and rejects traditional theories, based on causation, children's vulnerability, and parental consent. It next evaluates less traditional accounts, which treat child-support duties as efficiency enhancing incentives, implicit insurance premiums, aids to gender equality, and punishment for parents who harm their children. These theories counsel increased public funding for children. Greater public funding might create more efficient incentives for procreation, facilitate more sensible insurance pools, and enhance gender equality. Greater public funding could be fair based on the benefit principle: taxpayers should fund children because and to the extent that children provide public benefits. The article also argues that child support should be assigned to private parties as damages for parental wrongdoing. Parents should be compelled to pay support when they harm children by failing to demonstrate love to the child, or by failing to establish a loving relationship with the child's other parent. Child support might punish and deter these wrongs, and might mitigate consequential harms to children.

1. INTRODUCTION

Child-support policy has long been a battlefield for warring couples and feuding interest groups. All sides believe that parents should be made to support their children,¹ though they agree on little else.

Individual disputes are acrimonious and politically charged. High income payers object to large child-support awards as unnecessary for child welfare, while recipients regard high awards as required by equality. Advocates for the poor complain that nearly all awards are unrealistically low. Fathers' rights groups object that most awards are excess-

*The Law School, University of Southern California, Los Angeles, CA 90089-0071, USA. For helpful comments and discussions, I thank Larry Alexander, Jennifer Arlen, Grace Blumberg, Brie Clark, John Eekelaar, Ira Ellman, Laura Fry, Ron Garet, Ariela Gross, Greg Keating, Marty Levine, Elyn Saks, Seana Shiffrin, Larry Simon, Matt Spitzer, Eric Talley, Alan Wertheimer, and participants in presentations to the Los Angeles Law and Philosophy Discussion Group, and the University of San Diego Law School.

ive, and complain that fathers should not have to pay support if they are not biological parents, or if they lack access to their children.

Systemic debates are no less charged. A large percentage of children being reared by single parents live in or near poverty. Feminists and conservatives alike blame this poverty partly on child support; children are poor because support is not paid and because awards are too low. Conservatives point to non-payment as evidence of deteriorating family values, caused in part by welfare dependence. Liberals and advocates for the poor identify the opposite connections among welfare, child support, and poverty: the child-support system indirectly contributes to child poverty because the supposed availability of child support rationalizes making children dependent on stingy welfare payments. Even worse, according to some on the left, the particular rules governing child support for poor families appear designed to control women's sexuality and to limit populations of colour.² Child-support awards create incentives to litigate over custody, perhaps harming children and making divorce more traumatic. Enforcement of child support, while better now than in the past, is very expensive, stigmatizes non-compliant parents as deadbeats, and leaves custodial parents dependent on a bureaucratic system that they cannot easily navigate.³

These disputes seem intractable partly because we lack a convincing theory of child support.⁴ Beneath many disagreements over child support lie more fundamental questions about why parents rather than taxpayers should fund child-rearing costs, and how to distribute costs among parents fairly. We need a theory of child support to answer questions about the level of public duty and the allocation of private responsibility.

The justification for child support might be thought obvious: meeting the needs of children without burdening taxpayers. Taxpayers should support children only to produce public goods (such as education funding) or to prevent suffering after parents fail to fulfil their own duties (such as welfare funding). I argue below that this simple argument is both circular and likely incorrect. Assigning parents primary responsibility in order to minimize tax burdens is itself justified only if children are more appropriately paid for by parents than by a broader community.⁵ On some plausible views, I will argue, taxpayers pay for too few of the costs of child-rearing.⁶

A theory must offer more than conclusions about public duty. We also need justifications for allocating support obligations among private parties. Questions raised include (a) which individuals should be asked to pay? Should support duties depend on biological connection, on having the rights of a parent, on seeking to be a parent, or on experiencing some of the benefits of parenthood? Perhaps grandparents and step-parents⁷ should pay, while unwilling parents, non-custodial parents,⁸ and parents whose children are concealed⁹ should not; (b) how

much support do parents owe? Must non-resident parents support their children at a level similar to their own standard of living?¹⁰ Do later commitments, such as payers' new families, justify child-support reductions?; and (c) how should governments enforce the duty? Are aggressive measures, including prison, and the moral outrage that accompanies the term 'deadbeat', justified?

Although many theories address these questions, I argue below that we should understand private child-support duties primarily as remedies for parental wrongs. Child support seeks to deter and punish certain behaviour, and to mitigate consequential harm to children. I identify two particular parental wrongs. First, parents who do not voluntarily pay support cause children to suffer by failing to demonstrate love to the child. I do not mean to equate love with money, or more money with more love, of course. But refusing to share resources with children in the context of divorce often demonstrates indifference to the child in a way that measurably harms them.

Second, failing to maintain a loving relationship with the child's other parent also harms children. Although I do not suggest that parents necessarily help children by remaining in an unhappy relationship, I argue that parents wrong children by permitting their relationships to become unhappy. The theory of child support advanced in this article is tort-like in the sense that it treats the main justifications for coercing parents to pay child support as deterring and punishing a wrong, and mitigating the consequences of that wrong for the child. It is not intended to argue for an actual tort system in which individual children sue their parents for damages based on individually demonstrated harm.

This article evaluates theories of child support and their application to public and private duty as follows. Part I examines three traditional theories, based on causation, children's vulnerability, and parental consent. Each has been used to argue against significant state responsibility; taxpayers do not cause children to exist, do not consent in advance to procreation, and are not well suited to meet children's needs compared to parents. Each theory has also been used to argue for equal division of responsibility between biological parents – who cause, consent to, and can provide for children in equal measure. I conclude that these theories offer useful ideas, but that they do not fully justify any conclusion about child support.

Part II evaluates less traditional accounts. These treat child-support duties as efficiency-enhancing incentives, implicit insurance premiums, aids to gender equality, and punishment for parents who harm their children. Each of these theories has instrumental goals (accounting for child-support rules as having good effects) and distributive justifications (showing that the costs for producing these effects are borne by someone who reasonably ought to pay for them).

I reach the following conclusions. First, several theories counsel increased public funding for children. Greater public funding might create more efficient incentives for procreation, facilitate more sensible insurance pools, and enhance gender equality. Greater public funding could be fair based on the benefit principle: taxpayers should fund children because and to the extent that children provide public benefits.

Second, who should be declared a parent, and how to allocate child-support liability between parents, cannot be decided based on efficiency or equality. The benefit principle provides a more promising account, suggesting that parents should pay support because they benefit from being parents. I nevertheless reject this principle. I argue instead for a theory of child support as damages for parental wrongdoing. Parents should be compelled to pay support when they harm children by failing to demonstrate love to the child, or by failing to establish a loving relationship with the child's other parent. Child support might punish and deter these wrongs, and might mitigate consequential harm to children. I also argue that viewing child support in this way has specific consequences for issues of support allocation, including who should be declared a parent, and how much child support parents owe.

2. TRADITIONAL THEORIES: CAUSATION, VULNERABILITY, AND CONSENT

Parents who support their children exhibit two virtues: being responsible for their actions, and caring for the helpless. Should parents who do not support their children be compelled to do so? Three theories favouring coerced payments have traditionally been advanced: Causation, vulnerability, and consent. These, I argue below, do not justify imposing child-support liability on parents rather than on the state, or particular allocations of liability between parents. But each fails instructively, providing hints toward more effective theories.

A. Causing Needs

'Procreation is more like running someone over in one's car than like signing a contract'.¹¹

Parents cause children to need care by procreating, much like drivers cause pedestrians to need care by running them over. Having created a need, according to the causation theory, parents are obligated to meet the need if they can.¹² Hilde and James Nelson advocate this view with the following analogy:

[S]uppose a woman is infertile, and can only conceive if she takes a certain drug. Suppose, further, that one of the side-effects of the drug is that, some years after conception, the resulting child will contract a hideous disease unless it is provided with an antidote which the manufacturers are capable of

supplying. Is there any doubt that they have a duty to make sure that the antidote is available?¹³

This story relies on readers' intuitions to conclude that the manufacturer should provide the antidote, and that the manufacturer's causal role justifies its duty. But causation does not really support this intuition. Although causation is relevant to legal and moral duties, it is neither necessary nor sufficient for a duty, and is generally an unappealing principle for distribution. Intuitions about the drug hypothetical stem from other elements in the story. We suspect that the manufacturer is especially well suited to provide the antidote, perhaps because no one else can do so, or can do so as effectively or cheaply. The manufacturer benefitted financially from creating the need it is now asked to meet. Perhaps it also committed some wrong – failing to warn the mother of the risks. And it is likely well suited to spread this cost among consumers, thus providing an insurance pool, and inducing manufacturers and consumers to take efficient levels of risk. All these factors counsel liability for the company.

Each of these added elements has significant appeal as a distributive principle, and is frequently the basis for legal liability. Being peculiarly able to prevent harms can create duties to prevent those harms, especially harm one caused, at least unless the cost is too great.¹⁴ Similarly, duties are common when someone commits a wrong while causing a need, or profits while causing a need, or agrees to meet needs, or perhaps is in a good position to spread losses associated with needs.

When these factors are absent, duties to meet needs one creates lose much of their intuitive appeal.¹⁵ Consider, for example: Procreating to Cure Cancer – Susan, a gifted cancer researcher, is pregnant. She has discovered a drug that will alter her child's genes so that the child will provide society a cure for cancer. The child will need an expensive treatment to survive. Susan and her child will not profit from the cure. Susan's employer will profit greatly, as of course will millions of people who will not die painful deaths from cancer.

Should Susan – who caused the need for expensive treatment – be obligated to pay for it? Or is this duty more properly assigned to her employer, or taxpayers, who benefit from this need? Assuming that Susan did nothing wrong, I see little reason to ask her alone to pay.

Similarly, child support seems inappropriate when causation is not accompanied by some other factor, such as parents' unique ability to care for children, parents' consent to support children, the benefits children provide parents, or the wrongs parents do to children.¹⁶ Of course, causation often is accompanied by one of these factors. For example, parents almost always benefit when causing children to exist. Parents have sexual pleasure, or at least the prospect of such pleasure, and often benefit in other ways. Isn't causation paired with benefit sufficient to justify private parental duty to pay support?

Benefits can justify duties. But the benefit principle has problems as a central reason for child support – problems that I elaborate below. For now, I note only that the benefit principle naturally invites inquiry into relative benefits and the proportionality of duty. The researcher in the Cancer Cure example likely benefits from creating a need. Perhaps she publishes a paper on the topic, which advances her career. Still, two factors would counsel holding her employer or taxpayers partly liable for meeting the child's need. First, the benefit she receives is small compared to the liability she is asked to accept. Second, it is small compared to the benefit received by others. Much the same can be true for parents. The benefits of sexual pleasure are fleeting. And although parents often benefit from rearing children, this benefit is not a benefit of causing needs. It is a benefit of having a relationship. Even as to this benefit, one might reasonably inquire who else benefits from procreation. I take up these topics, and other promising supplements to causation, below.

B. Vulnerability

'A parent has responsibility for feeding the child because the child is vulnerable to the parent's neglect; the child is vulnerable, in turn, because society assigns responsibility of feeding children to their parents'.¹⁷

Young children are vulnerable to anyone who shelters, clothes, and feeds them. Just as children's physical needs explain parents' duty to provide physical care, so too perhaps children's material needs justify imposing financial duties on parents. Welfare benefits or tax relief together with the income of custodial parents often fall short of the amount families believe they should spend to care for children. When parents fail to pay child support, some poor children's needs are not met.

The vulnerability argument does not really fit current practice. For example, many non-resident parents must pay support to children who live far above the poverty line. At least some of these payments must be used for purposes that are not plausibly called 'needs'. Poor children are not currently very dependent on child support because the government is reimbursed for welfare payments before children get much.¹⁸ But these details could be changed if vulnerability were a persuasive and primary justification for child support.

Vulnerability fails to justify child support, however, because the argument is circular. As the quote above suggests, children are vulnerable to non-support only because government benefits are set so low, or more generally because we conventionally assign primary support duties to parents. The argument from vulnerability cannot justify the conventional arrangements that make children vulnerable to parents unless it can somehow show that parents are especially well situated

to provide for their children's financial needs. Given the enforcement problems associated with child support, the opposite conclusion seems more reasonable: vulnerability counsels government, rather than private, support of children, because government funds can more reliably prevent hunger and similar material suffering.

C. Consent

The obligation to pay support can be grounded in implied consent. People choose to procreate, or at least to risk procreation, by having sex.¹⁹ As Onora O'Neill explains '[w]herever natural parents are the normal child rearers, decisions to procreate are (and are known to be) decisions to undertake the far longer and more demanding task of bringing up a child or arranging for its upbringing'.²⁰

Consent theory has some difficulty justifying current doctrines – though of course doctrines might be wrong. For example, the law sometimes demands child support even when consent is not given or is not well informed. Courts have ordered people who are victims of statutory rape,²¹ or are deceived about birth control,²² or about being the genetic father of a child born during marriage to pay child support.²³ O'Neill remarks that in some of these cases, parents accept the duty to care for the child either by welcoming the unintended pregnancy, or by not delegating the duty to another person.²⁴ This is an odd interpretation. That a victim of deceit keeps a child does not really show that the person chose to become a parent. Prior deceit constrains later choice, and therefore taints it. Even if it did not, child support obligors cannot always delegate their status. If a father wants the mother to have an abortion, and she does not, he remains liable for child support. If one parent wants to give up the child for adoption, but the other refuses, the dissenting parent must pay.²⁵

O'Neill's argument strains to treat sex as broad consent: I will support any child born even if I am not now informed about important circumstances and even if I cannot later delegate responsibilities. But sex could signal some lesser commitment. Why not interpret sex as a more limited consent? We could treat lying about birth control, or refusing to abort when the father asks, or refusing to place a child for adoption as consenting to assume sole financial responsibility for the child.²⁶

Arguments can be advanced against this narrow version of consent. Most powerfully, sometimes inducing two parents to remain responsible for a child's care benefits the child. Each parent acts as backup to the other and offers financial insurance. But relying on child welfare for this explanation means that the consent theory has absorbed the vulnerability theory to account for why we should treat sex as consent to support children.

There is nothing wrong with combining theories.²⁷ But treating sex as broad consent in order to protect children makes sense only if this

protects children well. Unless having two parents able to pay child support is more helpful to children than state support, the consent theory has not explained why we should treat sex as consent to child support.²⁸

This critique might be dismissed as relevant only to atypical cases. Most reproduction does not involve birth-control deceit or parents disagreeing over abortion or adoption placement. Support orders in these unusual cases might be mistakes, or might be justified by the need for simple rules. In the usual case, the consent inferred from sex looks a lot like actual consent. Although not everyone knows legal rules, or shares middle-class norms about parental responsibility, most parents act intentionally, knowing that their actions will be treated as consent. Those who do not know arguably should know. They had notice that commitments accompanied procreation. Surely they cannot complain about being asked to honour their commitments.

In one sense, the argument based on fair notice is correct. Most people asked to pay support knew or should have known that they assumed such a risk by having sex. But in a more important sense, widespread notice of a custom (such as assignment of support duties to parents) cannot truly justify the custom. Giving people adequate notice of rules does not justify promulgating the rules in the first place. Justifying child support as a truly fair demand on parents requires a good reason for having asked them to make those commitments as a precondition to procreating. Nothing in a theory of consent addresses this issue.²⁹ An adequate theory of child support must do so.

3. JUSTIFYING CHILD SUPPORT AS AN INSTITUTION

A theory of child support should provide reasons for or against making consent to child support a precondition to procreating, or for making children vulnerable to parental non-support. These reasons should explain, using some distributive-justice principle, who reasonably can be asked to pay for the costs of children. Promising principles include apportioning costs based on benefits received from children; imposing costs on wrongdoers; and perhaps a revised version of the vulnerability theory that asks for payment from those especially well situated to help children by paying.

Reasons for child-support rules might also include non-distributional goals. Rules could enhance the social co-operation needed for useful institutions, such as insurance against need. They might promote economic efficiency, or encourage specific behaviour that is thought desirable. If they cannot actually affect behaviour, they might express norms about procreation or parental action.

I consider below five theories of child support. First, I evaluate child support as part of a co-operative institution of intergenerational transfers that benefits people when they are vulnerable by taxing them when

they are not. This account treats child support as instrumentally aimed at a kind of insurance, and as distributionally fair because it is paid for by its beneficiaries when viewed over the long term. Although such theories are usually thought to justify duties for individual parents, I argue that the insurance perspective actually favours more public funding for children.

Second, I consider whether gender equality justifies child-support duties. Gender equality might counsel greater government support for children, though this conclusion rests on a controversial interpretation of equality.

Third, I discuss whether child support is an appropriate incentive for population control or family planning. This justification relies on inducing efficient behaviour as an instrumental goal. It too is usually thought to justify parental duties of support. However, cost internalization might counsel more public support for children.

Fourth, I examine the benefit principle as a justification for setting public support levels and for allocating private support duties. According to this principle, support should be paid by people who benefit from children, in proportion to that benefit. The benefit principle seems apt in discussing public support levels, and might justify increased public spending. I argue, however, that the benefit principle should be rejected as the basis for private child support, because it demeans the parent-child relationship.

Finally, I discuss several harm-based theories of child support. I argue that we should compel parents to pay support in order to deter and punish bad procreative behaviour and to mitigate consequences for victims.

The theories examined below cannot answer every question about child-support's scope. Indeed, the details of child-support rules necessarily depend on many factors, including administrative costs, political compromise, and tensions between the goals of child support and other important values.³⁰ The theories below nevertheless provide guidance on some important issues, including the extent to which taxpayers, rather than parents, should support children; the criteria by which we should identify someone as a parent; and the circumstances under which someone otherwise qualified as a parent should be relieved of support duties.

A. (P)repaying a Debt

Various theories treat child support as part of a co-operative institutional arrangement for intergenerational transfers. Some interpret child-support duties as prepayments for support during old age. Others interpret these duties as repayment for the benefit of having been supported as a child. According to both theories, people receive care and support when they are vulnerable. In exchange those same people pro-

vide care and support when they are able. This system is fair in the aggregate because everyone needs care as children, and reasonably expects to need care in old age. This arrangement thus creates an important benefit through co-operation.³¹ Compelling parents to pay support bolsters norms required for this co-operative benefit.³² For those uncomfortable with the language of bargains, similar arguments can be made for a duty based on gratitude to repay kindnesses given in the past, or anticipated in the future.³³

Despite its general appeal, intergenerational bargains offer little justification for coercing parents, rather than taxpayers, to pay child support. The argument makes more sense for direct provision of personal care than for financial support. Most people would gladly provide physical care to a relative or close friend if this act guaranteed that they would be reared by loving parents, or tended at a time of physical need by a trusted companion. The parallel financial bargain is less attractive. The argument turns child support into a form of insurance: I pay child support to get support in old age if I need it; or I pay child support to repay the fund that supported me as a child. Why would a reasonable person seek such a limited and financially random insurance pool? Rather than risk my old-age support on the uncertain income of a small number of children, I would prefer to place risk on the next generation. Indeed this insight may have fuelled the increasing public provision of retirement income and health insurance. Similarly, rather than place my financial support as a child at risk by making it depend on the financial success of one or two parents, I would prefer the safety of diversification. The intergenerational transfer theory therefore argues – all else being equal – for a system of public child support.³⁴

B. Equality

Combating gender inequality might justify private child-support duties. Among gender inequality's many sources is the fact that women often sacrifice more than men for sex and procreation: women typically take more responsibility for contraception; suffer the risks and pain of pregnancy, childbirth and abortion; and provide more child care, while giving up career advancement and leisure to do so. Child-support duties might promote gender equality.³⁵ Adequate child support funded in large measure by men combats women's subordination materially by making women somewhat less poor. It also symbolizes a commitment to the equal child-care obligations of men and women.³⁶

This argument embraces a somewhat result-based (and therefore controversial) account of equality. Even so, it says little about apportioning support duties between parents and the state, or when individual men should be relieved of duties.³⁷ All proposals for modifying child support impose some costs on fathers.³⁸ Because public funding might provide more money or more reliable money to custodial parents,

it could combat female poverty, and therefore promote gender equality, more effectively than traditional child support. Feminism thus likely points us no further than wanting generous child support funded, at least in part, by a tax on non-custodial parents.

Other interpretations of equality offer even less instruction. Procedural equality theories urge that law treat like cases alike, which requires an account of relevant similarity. One might think, for example, that men and women should be equally (or unequally) responsible for child support because they (un)equally cause children to exist, or (un)equally benefit from being parents.³⁹ Although equality norms might play important roles in such arguments, they are only persuasive if one accepts causation, or benefit, or some similar norm as the basis for the child-support duty. Only if parents should pay support because they cause children to exist (a point I disputed above) or because they benefit from children (a point I will dispute below), would it then make sense to ask whether they cause or benefit from children equally.

C. Encouraging Population Control and Family Planning

Allocating child-support duties between government and parents might affect family size, and hence overall population. Although ideal population size is controversial, as is the prospect of government influencing procreation, child-support policy is often understood in such terms.

One might expect that child-support duties would lead men⁴⁰ – particularly unmarried men⁴¹ – to use contraception.⁴² Those who are forced to pay child support might want to prevent second children, and those who merely observe child support might seek to avoid this duty. Alternatively, one might expect child support to have no effect. Sexual behaviour is notoriously hard to influence, and current penalties are not that severe. Child support could also lead women to be less careful with contraception or intentionally to have children they would not have in the absence of child support.

The few available empirical studies suggest that couples increase contraceptive use in response to increased child-support enforcement. One study examined child-support enforcement between 1980–1993 in all 50 states. It found that ‘states that do a better job of establishing paternity and collecting child support from non-resident fathers have lower non-marital fertility’.⁴³ Another study followed about 2000 teenage women over a period of 4–6 years. After controlling for a variety of factors, the study concluded that ‘Better paternity establishment . . . discourag[es] premarital pregnancies’.⁴⁴

If reducing population or encouraging family planning are desirable goals, these studies counsel imposing a duty of child support on non-resident parents who are not in long-term relationships. Further research is required to learn whether increased amounts of support

have greater effect, and whether the prospect of child support affects procreation by married or long-cohabiting couples.

Arguments for child support as a means to population control sometimes rely on economic efficiency as a goal. Child support is a way to internalize the costs of procreative decisions. In this respect, child support is like any tax on a socially costly activity. If children impose net costs on others, parents will choose to procreate too often. By imposing the costs of children on biological parents, the law induces efficient precautions against procreation – such as limiting sexual activity or using contraception carefully.⁴⁵

Of course, cost internalization does not necessarily favour private child support. Children benefit relatives and step-parents,⁴⁶ and – when they grow up to pay taxes and provide goods and services – society.⁴⁷ These benefits could be sufficiently large that we should be unconcerned about, or opposed to, internalizing all the costs of procreation. Perhaps child-support obligations induce people to procreate too little, depriving potential children of life, and society of productive citizens. In this case, efficiency might demand a subsidy for procreating.

Whether the external costs of children exceed their external benefits is an empirical question. The cost of public education, and of welfare payments to poor children, might lead people to assume that additional children harm society. There is evidence, however, that children create net benefits in the US. Public spending on children is a small fraction of spending on public goods and on the elderly. Because additional children reduce the per-capita cost of public goods and support for the growing older population, additional children in the US could create large external benefits. These benefits are likely increasing as the baby-boom generation ages and the cost of health care grows. One author calculated the present value of the net external benefit per child as more than \$100,000 in 1985.⁴⁸ A later study put this figure at closer to \$200,000.⁴⁹ Although these figures include virtually all public spending on children, they omit many external benefits that evade simple measurement, such as any benefit to the child for being alive or to friends and family.⁵⁰ The authors calculated net present value of a child by estimating the present value of taxes that the child and all their likely descendants will pay (taking account of the characteristics of the child likely to affect their own and their descendants' earning capacity), and then subtracting the present value of various government expenditures on this child and likely descendants.⁵¹

The main cost omitted from this calculation is possible harms from overpopulation, such as environmental degradation. Children might use so many common resources that the harms they impose exceed the benefits they confer. Further, we could acquire new citizens through greater immigration, rather than procreation. By choosing procreation, we arguably contribute to overpopulation elsewhere.⁵²

The arguments from overpopulation and potential immigration have some merit. Perhaps the US population exceeds efficient levels once global effects are considered. However reaching this conclusion would require weighing the marginal productivity of more US citizens against their marginal contribution to global problems. This is a highly debated issue, not subject to any simple resolution.⁵³ Given the large public benefits apparently produced by children, we should be cautious about uncertain contrary conclusions based on population growth. Even those who are convinced that environmental concerns justify shrinking the US population might not want this goal to dominate child-support policy, depending on their conclusions about distributional fairness, discussed below.⁵⁴

As to immigration, it might be best if the US reduced procreation and increased immigration. It is not genuinely persuasive as a policy argument. Significantly increasing immigration appears politically impossible. It would be disingenuous to make child-support policy based on the idea that we could do so, unless the child-support rules were actually coupled with vastly changed immigration norms.

Cost-internalization arguments sometimes focus on family planning, rather than on population size. According to Allen Parkman, private child support is better than government subsidies, because the latter 'encourag[e] the wrong people to become parents'.⁵⁵ By 'wrong people' Parkman means those who are not able to provide sufficient financial resources, or who are not willing to rear the child in a two-parent household.⁵⁶ Parkman explains:

[i]n addition to low earning capacities, single parents are less able to instill important social values in their children. Almost two-thirds of rapists, three-quarters of adolescent murderers, and the same percentage of long-term prison inmates are young males who grew up in fatherless homes. Children living in single-parent families headed by never-married young women have far higher delinquency rates than children who grew up in two-parent families.⁵⁷

Parkman's argument is overstated for several reasons. First, his claim that government subsidies induce people to procreate in non-ideal circumstances is controversial. Some recent studies find a correlation between welfare and out-of-wedlock births. But they find very small effects on the number or timing of births. To the extent that welfare encourages non-marital teenage births, it does so mostly by deterring marriage.⁵⁸

Second, that a large portion of troubled children and young adults were reared in single-parent homes, does not show that a large portion of children reared in such homes end up troubled. In fact, the majority of children reared in single-parent homes become productive, tax-paying, law-abiding, adults.⁵⁹ In the aggregate, children born to unwed mothers likely produce net external benefits.⁶⁰ Third, the bad outcomes

that stem from single-parenting often can be mitigated by more money, suggesting that greater investment might improve rather than worsen effects.⁶¹

This does not mean that society should encourage teenage parenting. If teenagers delay procreating, their children will still contribute. Indeed, they might contribute slightly more⁶² But if the majority of children born to teenage parents make net contributions to society, then the argument for encouraging delay cannot rely on cost internalization. It would rely instead on value maximization, with perhaps very different policy implications.⁶³

In summary, child-support duties probably reduce or delay procreation, at least for unmarried couples. However it is far from clear that we should embrace this goal for child support. Although the external costs and benefits of children are highly debated, increasing the population of the US might do more good than harm in the near future. Much of the good from additional children would be captured by the public. More study is needed to confirm the large external benefits of children. Questions about environmental impact, and the potential to substitute immigration for population growth, which complicate this analysis, must be addressed. Depending on how these issues are resolved, greater subsidies for parents could be justified. The size of such subsidies also requires some study.⁶⁴ At a minimum, it is clear that cost internalization provides no simple justification for withdrawing public funds, and imposing costs of children on parents.

D. Distributive Justice and the Benefit Principle

'When the state pays parents to take care of their own children, it favours large families over small families and couples with children over couples that prefer to remain childless. The state, however, should not engage in that sort of favouritism.'⁶⁵

'Other people's children, other classes' children – treated, increasingly, as their parents' expensive hobbies – hold diminishing appeal as the objects of public investment.'⁶⁶

People offend distributive-justice norms when their actions benefit themselves while imposing costs mostly on others. According to the benefit principle, justice requires people to pay for goods that benefit them.⁶⁷ The cost-internalization argument for child support can be restated in similar terms: if children impose net burdens on society, private child support would fairly distribute the costs of children to those who create and benefit from them. As the quotes above say, the state should not subsidize the expensive hobby of parenting.

Similarly, if children produce net external benefits, subsidies might be distributionally fair. Funding the cost of child rearing partly from tax revenues would prevent childless persons from unreasonably secur-

ing the benefits of other people's child rearing without paying for a fair share. It would also allow parents to spread the costs of child rearing over the course of a whole life, and it would provide a somewhat progressive distribution of costs.⁶⁸

The benefit principle might then explain why parents should be peculiarly obligated to support their children. When asked why they want children, people express a desire to have particular experiences, and to fulfil religious or familial obligations.⁶⁹ If parenting is an activity that adults pursue for pleasure or duty, should it not be paid for primarily by those who seek and gain these benefits? Children are partly private consumption.⁷⁰ So parents should be somewhat responsible for supporting their children. Child support is a users' fee.

If receiving the pleasures of parenting is a central justification for child support, should parents who benefit less pay less? One finds suggestions to this effect from surprisingly mainstream sources.⁷¹ Perhaps those who seek children's company (grandparents, step-parents) should pay support, while those who care not at all for children (unwilling parents) should have no duties?⁷²

In some settings, linking the duty of support with the benefit a parent gets from the child seems demeaning to children, as if children were toys for adult amusement rather than people to whom duties are owed.⁷³ Imagine if child support were actually paid on an hourly basis as the price of admission for visitation. Viewing procreation as consumption and child support as a users' fee clashes with how most parents understand their roles. People seek an evolving, intimate, life-long relationship that includes giving physical, financial, and emotional care, moral and intellectual guidance, and eventually friendship. Most parents support their children because financial support is a necessary element to a project of creating a person in the context of a loving relationship.

But we do sometimes seem to treat child support as a users' fee. Lawmakers and scholars have debated whether visitation interference should justify reductions of child support, and whether non-payment should justify reduced visitation. Less controversially, most states insulate from child-support duties people who get no access to their children, including sperm and ova donors, people whose parental rights have been terminated, parents who cannot locate their children (such as when the child has been kidnapped), and parents who voluntarily give up children for adoption – even if their children later need funds. Emancipation doctrine might even be understood as linking the benefits and duties of parenting. Children who will not abide by parental direction do not receive parental support.⁷⁴

Asking parents who benefit more from parenting to contribute more sometimes makes sense. But embracing the benefit principle to justify

child support would mean treating child support as a users' fee even when doing so demeans children.

Alternative accounts avoid treating child support as a users' fee. I argue below that some parents who complain that they benefit little from their children – because they lack access or because they do not want a relationship – caused these problems by their own wrongful behaviour.⁷⁵ Child support deters, punishes, mitigates and compensates for harms caused by parental wrongdoing. This explains why failure to benefit only sometimes seems a good reason to reduce child-support duties. We reduce or eliminate financial liability for sperm donors, parents who place children for adoption, parents of emancipated minors, and parents of hidden children because we accept the reasons these parents lack loving relationships that might make them want to support children voluntarily. In most other cases, I will argue, parents who do not want to support children, and who claim to benefit little from their relationships, deserve significant blame.

Before arguing for these theories, I must address an obvious objection. If charging parents for support in proportion to the benefit they receive demeans children, does not the argument for public funding advanced earlier demean them in the same way? Treating the external benefits created by children as a reason for public funding seems like treating the benefits to parents as a reason for private support.

This objection is not persuasive for two reasons. First, the benefits that children provide to taxpayers are the financial benefits of paying taxes and working to produce goods and services. I see nothing demeaning in asking that taxpayers pay for the support of citizens who will later repay the investment financially. The benefit parents receive from children – at least the benefit being discussed here – is emotional. Asking payment in exchange is demeaning not because it treats people as deserving support based on the good they produce, but because it treats an intimate relationship as a commercial transaction – as if parents should support children in order to get an emotional payback. Second, if the arguments below are persuasive, many parents who disclaim support duties based on the benefit principle have already wronged their children. Giving full effect to the benefit principle would deny meaning to the children's rights.

Those who dislike the benefit principle might still find attractive linking child-support duties with the exercise of parental rights. This connection might be justified as protecting family autonomy. Many people believe that greater government funding typically brings greater government regulation. Because most parents want to rear children with substantial control, significant parental support duties make sense as a political safeguard to their goals as parents. As John Eekelaar has argued, assigning parenting rights and support duties to those who typically want them offers many social and psychological benefits to

children.⁷⁶ Parents should support their children on this theory not because they benefit from parenthood, but because supporting children enhances exercise of parental rights.

This justification explains why individuals who seek to exercise parental rights should help to support children. But without more, it does not explain why individuals who do not want to assert parental rights should support children. John Eekelaar argues that parents who do not pay support should be made to do so to reinforce the allocation of support duties that benefits children and parents in typical families. Child-support enforcement helps the general rule not to lose authority.⁷⁷

This argument does not seem to me persuasive. It is true that most parents want to rear and support their children, and that a rule assigning this set of rights and duties to parents has many virtues. But these virtues might be accomplished by a rule that terminated parental rights of those who wanted neither to rear nor to support children. The argument from bolstering rules thus cannot explain whether the general explanation for assigning rights and duties to willing parents contains a reason for making a rule that lacks exceptions. Only if we are first persuaded that there are specific reasons not to permit adults to decline parental status would we then have reason to reinforce the rule.

E. Preventing Harm and Bad Behaviour

'I don't even get a Father's Day card'.⁷⁸

Child support might be used to punish parents who act poorly, to deter others from similar action, to mitigate harms, or to compensate victims.⁷⁹ What have those who must be ordered to pay child support done that deserves censure? In this section, I explore two answers: failing to demonstrate love to a child; and failing to provide the child with two parents who love each other.⁸⁰

(i) Insufficient demonstration of love

Parents who do not voluntarily pay child support demonstrate little concern for their children's welfare.⁸¹ They sometimes allow their children to suffer, and often prefer their own consumption to the desires of their children.⁸² Could this demonstration of indifference violate moral duties? A duty to demonstrate love for one's biological children (and perhaps also the children in one's home) by providing for them might be grounded in Natural Law.⁸³ Certainly most people feel love toward their own children, try to meet their children's needs, and share good fortune with their children.

Should we condemn, and demand payment from, those who either do not feel this way, or who overcome these natural feelings?⁸⁴ This argument faces at least two problems. First, unless people can control

their emotions, a duty to have loving feelings makes little sense. Second, even if the duty is restated as a duty to act like most parents, rather than to feel what most parents feel, the duty might place too much weight on the duty to act lovingly toward biological children or physically near children.⁸⁵ It isolates individual parents for punishment. But parents are not the only people who exhibit selfishness by visibly prospering while others suffer. We could condemn all reticence toward redistribution as a failure of loving behaviour toward children. Blame on this account would be appropriately on all the adults whose indifference allows millions of children to live in poverty.⁸⁶

A stronger justification for the parental duty to demonstrate love relies on protecting children from psychological harm. Perhaps parents owe children demonstrations of love that are psychologically important for child welfare and not adequately provided by delegates.

Child support could be part of such a duty. It seems intuitively plausible that children view non-payment of support as showing indifference to the child's welfare – or at least a strong preference for spending on other concerns. This indifference violates the expectation of parental love, and the need for being the object of special concern. Non-payment is thus at once betrayal of a social norm, and deprivation of a strong psychological need. Admittedly, feelings of betrayal might be caused by child-support laws themselves. If laws and other social institutions did not demonize non-supporting parents, children might feel less aggrieved by the loss. But at least sometimes non-payment traumatizes children for different reasons. In cases of divorce preceded by a well-established loving relationship, non-payment likely exacerbates the feeling of betrayal and abandonment experienced by the child from the physical departure itself.⁸⁷

Some research validates the idea that demonstrations of love, including paying child-support, benefit children. Children who receive support feel less rejected,⁸⁸ have fewer behavioural problems, and perform better in school. Child-support dollars provide a larger benefit on these measures than dollars from other sources.⁸⁹ Whether support causes these results is debated. For example, fathers who pay support also visit more, and have less conflict with the child's mother.⁹⁰ Scholars debate whether the low conflict, the support, the visitation, or the attitudes that lead to all these cause children to feel less rejected, and to perform better in school.⁹¹ Some studies suggest that children benefit from child support apart from the reduced conflict, the visitation, or the attitudes that caused these,⁹² and that some benefits would be present for fathers forced to pay child support.⁹³

The last conclusion should be regarded cautiously. Methodological problems prevent easy proof. And the idea that coerced payments benefit children psychologically seems counterintuitive. The most plausible reason that child-support dollars provide benefits (besides the benefits

of money) is that payments reaffirm parental love. Yet if children learn that the payments are coerced, how could such payments represent love?⁹⁴ Perhaps children do not always know, and perhaps some parents comply with child-support duties apparently without coercion, but would not do so but for the threat of prosecution.

In addition to its direct effects, voluntarily paid child support might benefit children indirectly. Paying child support might encourage non-custodial parents to establish and maintain loving relationships with their children. Non-custodial parents who do not pay child support tend to withdraw from their children generally.⁹⁵

Some evidence suggests that even coerced child support would induce visitation.⁹⁶ This depends on why visiting and paying support are correlated.⁹⁷ The correlation might reflect a common cause.⁹⁸ For example, love might cause some non-custodial parents to visit and to pay support. If so, inducing payments by uncaring parents would do little to induce visitation.⁹⁹ Alternatively, as Judith Seltzer and her co-authors explain:

noncustodial parents who pay support [might] visit more frequently to monitor the way custodial parents use the child-support money . . . [or] custodial parents [might] facilitate visits when they receive child-support, and hinder it when they do not.¹⁰⁰

Whether such visitation is valuable remains controversial, particularly since visitation induced by coerced child support might harm some children by increasing family conflict.¹⁰¹ But inducing more visitation might make children happier.¹⁰² It also could benefit fathers, who might be grateful if being forced to pay support led them to maintain relationships with their children.¹⁰³

Parents who pay child support seem to prevent psychological harm to children, both directly by demonstrating love, and indirectly by increasing the chances of healthy and regular contact. If studies demonstrating these effects are correct, then society has a good reason for imposing a duty of parental child support. Parents are uniquely well situated to demonstrate love and thereby prevent important psychological harm. Because being in a unique position to prevent a harm creates a *prima facie* duty to act, particularly for someone who caused the harm and knew about the likely need, non-payment is a *prima facie* wrong. Coerced child support is an apt punishment and deterrent. And it might prevent the harm from continuing.

Failing to demonstrate love for a child by paying support and visiting regularly is not always thought culpable. We allow sperm and ova donation, adoption placement, and in some places surrogacy. Only the last of these elicits much public condemnation for parents who create children they rarely see. But these practices are unlike simply drifting from one's child in several important ways. First, biological parents who donate sperm or who consent to adoption have reason to think their

children will not live in poverty. Families who adopt children, or acquire sperm or ova, have relatively high incomes and stable relationships on average. Although children reared by people other than their biological parents sometimes appear to suffer, the placement typically benefits the children, all things considered. Second, sperm and ova donation and surrogacy might be different from abandonment if one accepts certain theories about how procreation benefits children.¹⁰⁴ Children born to surrogates or through artificial insemination often would not exist if their genetic parents had been unable to disclaim support obligations. Third, terminating, rather than failing to establish, a loving parent-child relationship might be a particularly harmful act. Parents sometimes fail to support, and withdraw in other ways from, children they previously loved. Showing indifference toward a child because one no longer loves the other parent is a betrayal. Indeed, we sometimes impose child-support duties on people who act as parents even absent a biological connection for just this reason.

The arguments advanced for child support as a psychologically important demonstration of love are not intended as universal claims about human nature, or about the only legitimate way to organize family life. Perhaps in a society that regularly reared children in a communal setting, so that social expectations of family life placed less emphasis on parent-child interactions, the harm of overt parental indifference would be trivial. Similarly, if a state were so generous that children never lived at a lower standard of living than their absent parents, non-payment might have different meanings.¹⁰⁵ In such a society, the argument I advance would not be persuasive. I claim only that given the meanings that most children in our society are apt to give parental non-support, and the psychological harm this seems to produce in context, we have reason to treat non-support as harmful.

Child support is obviously not the main way that parents demonstrate love to children. Parents who try to show love through money usually fail. And one can certainly imagine a parent who demonstrates love without paying support. But surely this case is not common enough to justify a special exception to child-support duties. Parents who do not pay support often fail in many ways to show love to children – by not visiting, and by spending on themselves. Non-support is a culpable demonstration of indifference, not because money is the central means of showing love, but because those who do not support their children often show their indifference in this and many other less patent ways, all of which harm children.

The duty I posit is not a duty to love children, which is likely not something within one's voluntary control and therefore not an appropriate subject of moral obligation. Even if it were an appropriate moral duty, regulation of emotional response is neither a possible nor a proper role for government. Rather, I ground child support in a duty to show

love, even if one does not actually feel love. One might think a duty to feign love hypocritical; how can we have a duty to lie?

The question of hypocrisy is complex. It is not always wrong to act as if one loves a person one does not love. Certainly in the context of romantic love, dissembling is usually immoral. Feigning love to gain sex or a financially beneficial marriage defrauds the other person, depriving them of other potential relationships, and undermining the social basis for trust, all for reasons of selfish gain. Pretending to feel parental love is different. Children may benefit by having love demonstrated, even by someone who does not actually feel love toward them. Unlike a romantic love, children will not necessarily discover later that the parent did not love them. And in any case, the child will not feel that they should have sought another parent. Even if later feelings of betrayal are possible, it seems likely that children benefit more from demonstrations of love during childhood than they are harmed by possible discoveries of insincere loving acts. And I do not recommend insincerity for selfish motives. Perhaps any hypocrisy urged here differs little from common falsehoods that are thought morally justified. Acting as if one respects a colleague can be a harmless form of politeness, so long as it does not induce reliance that will later be disappointed. Certainly it would be terrible if all our relationships included feigned love or pretended respect. But my recommendation for a duty does not suggest that everyone should always pretend to love those they do not.

(ii) Insufficient love between parents

Perhaps parents owe children a home with two parents who love each other. On this account parents who are apt to divorce, or who never form a committed relationship, breach a *prima facie* duty to their children.¹⁰⁶ By exploring this possibility, I do not suggest that anyone has a duty to enter or remain in a bad marriage to protect children. Children sometimes are better served by separated parents than by parents who fight. Parents legitimately consider their own welfare in making decisions. Still, parents might breach a duty by allowing their relationship to deteriorate, or by procreating without good reason to think they can form a loving, stable relationship. Child support might mitigate harms to children from parental separation, and offer an incentive to make a marriage work.¹⁰⁷ As with the prior argument, I do not suggest that parents have a duty to feel love. I suggest a duty to act in specific ways, not to have particular feelings.

A duty to create and sustain a loving relationship with the child's other parent might be justified on child-centered grounds. There are disadvantages to children from divorce. Some of these also arise from children born to parents who never have long-term relationships. Many studies show that children of divorced or never-married parents are less happy and achieve less than children of married parents. These studies

are problematic when used to suggest that particular children would have been helped if their parents had remained married, because parents who divorce sometimes would have harmed children by exposing them to anger and unhappiness that is not so present among those who do not divorce.¹⁰⁸ But, the studies support the view that children would be happier if their parents had been sufficiently compatible not to want to divorce. Of course, as with the prior argument, I make no universal claims about all societies. Rather, children in our society suffer when their parents do not love each other.

Positing a duty to form and sustain a loving relationship invites many objections: does this make intentional single-parenting immoral? If many harms from non-formation stem from poverty, does this make procreation wrong for poor people? Is resisting adoption placement wrong when there is no hope for a traditional nuclear family?

These objections, while serious, do not seem to me fatal. The duty to provide a child with parents who love each other is at most *prima facie*. The right to procreate is regarded as fundamental (in US Constitutional law, as well as many human rights documents) because rearing children is central to many people's conceptions of the good. Were people unable to rear children in non-ideal conditions, many people would be denied this right altogether. Although exercising the right to procreate sometimes harms children, this harm might be justified by the benefit it brings to the parent. An argument along these lines surely justifies intentional single-parenting, procreation by poor people, and resisting adoption placement.

This justification for non-ideal procreation does not apply so strongly to parents who fail to create or sustain loving relationships. Many of them could have tried harder to preserve their marriages, or procreated only after establishing committed relationships. Further, if parents harm children justifiably in the exercise of their own rights, they have a duty to minimize the harm, which in some cases requires paying child support.

Even if failure to form and sustain a loving relationship is a wrong, some might object, why should it be a strict liability offence? The strictness might be thought inappropriate for two reasons. First, liability ignores relative blame: the non-custodial parent is not always primarily to blame for failure to provide parents who love each other. Child support seems to reward the custodial parent, who is also guilty of harming the child. Second, liability seems to be imposed without any fault at all: sometimes relationships deteriorate despite all reasonable efforts by both parents.

The first objection misdescribes child-support liability. Non-custodial parents are not alone responsible for child support. Rather, they share this responsibility with custodial parents. Child support is therefore less a reward for custodial parents, than a division of the liability for

wrongful behaviour. Admittedly, the division is inattentive to questions of relative fault in particular cases. But this outcome is in keeping with no-fault divorce as a practical way to handle difficulties of proof and to avoid the harms of litigating fault.

The second version poses a more serious difficulty. Why should marital dissolution – admitting its harms to children – be treated differently from various unfortunate facts that make people less well off than they might have been, but that were not caused by negligence or intentional wrongdoing? Why, in other words, should parents rather than children be made to bear the risk of unsuccessful marriages?

The objection about liability for blameless parents is important. But it applies to fewer cases than one might think. Those parents who never form long-term relationships should be held accountable for the predictable harms to children. Parents who do marry, or who otherwise reasonably expect an enduring loving relationship, often marry with less caution than they ought, and work less persistently at their relationship than they might. Of course, any reasonable person would be slow to judge marital conduct harshly, given the pervasiveness of human frailty in this area and the complexity of relationships involved. But because the stakes for children are high, society has reason to demand that parents expend substantial efforts in forming and maintaining well-functioning relationships. From this perspective, perhaps most children whose parents divorce should be entitled to complain that the parents did not find a way to be happier.

Some marriages end despite all reasonable efforts. In these cases, child support is not justified by the wrong of an insufficiently loving home. It may, nevertheless, be justified as on the failure-to-demonstrate-love theory explained earlier.

(iii) Implications of a harm-based theory

I believe a harm-based account of child support has promise. Parents should support their children voluntarily because failing to demonstrate love seems to cause psychological harms that no one else can prevent. Forcing payment might mitigate and deter the harm, and punish those who cause it. Support duties might express the importance of parental love by mandating its most objectively verifiable manifestation. Children also seem to suffer from non-formation or deterioration of strong loving relationship between their parents. Child-support duties could encourage care in maintaining relationships, and mitigate harm to children.

By treating compelled child support primarily as damages for a wrong, harm-based theories avoid the demeaning account of child support as a users' fee. Parents should be forced to pay support not because parents benefit from children's company. Rather, unwilling payers should be forced to pay support because they have failed to provide

children with something that children need, and that parents were in an especially good position to provide – love, regular attention, and a loving home.

Harm-based theories also have the advantage of accommodating seeming anomalies. Sperm donors and parents who place children for adoption absent themselves from their children no less than non-resident parents who had casual sex. And they may do so for selfish reasons. But they do not leave children so frequently in poverty or demonstrate a preference for their own welfare over the welfare of the child in such a patent way as do parents refusing to pay support. As well, there are strong social reasons to encourage adoption and, to a lesser extent, sperm donation. Parents who do not want to rear children should be encouraged to place children for adoption: the children will be better cared for by willing parents, and placement helps meet a large demand for adoptable infants. Sperm donation similarly helps to fill the needs of infertile couples and others. There is no comparable affirmative reason for encouraging fathers to avoid contact with children born from casual sex. Further, a child likely regards its father's absence differently in the context of casual sex than in the adoption case. Children who are placed for adoption sometimes are angry at their parents; but they also may think that their parents gave up access in order to find the child a happy home. When only one parent leaves, the idea that this was a sacrifice for the child's benefit is less easy for the child to believe.

Harm-based theories have consequences for the appropriate level of child support. A few scholars have argued that children should be supported at the same standard of living as the non-custodial parent.¹⁰⁹ No state demands such high payments. But most consider the non-resident parent's ability to pay.¹¹⁰ Although the idea that children should live as well as their parents has some intuitive appeal, it seems hard to justify apart from the harm-based theory. After all, the egalitarian impulse of child-support policy confines itself to the family unit. No one demands that children with divorced parents live as well as the richest person on the block, or even their richest uncle or grandmother. And few people demand redistribution from rich sperm donors.¹¹¹

The harm-based theory gives a reason for redistributing only from parents to their children. First, if child support is punishment for failure of voluntary sharing, then equalization of standards of living (or as close as is practical given other concerns, such as work disincentives) makes sense as a goal. Parents who love their children typically want their children to live as well as they do. By not visibly prospering more than the child, the parent demonstrates love to the child. Although I am not aware of psychological studies examining the harm of large wealth gaps between children and non-resident parents, given the findings on harm from non-payment of child support, it would not be sur-

prising to find harms from any form of perceived indifference. This is at least worth investigating. Second, insofar as child support is intended to punish, it makes sense that it should share characteristics with punitive damages, such as increasing for wealthier perpetrators. I do not equate the amount of harm parents do to children with the standard of living a child would have had in a marital home. I see no good way to measure the harm done to children in dollars. Rather, equalizing the standards of living is an attractive goal because it offers mitigation, deterrence, and punishment.

Although this theory seems promising, it has problems. It relies on uncertain empirical claims, and therefore demands further research. If we learn, contrary to initial findings, that voluntary child support benefits children little, that support does not promote visitation or that visitation harms children, and that living with two parents who love each other offers no advantage, then harm-based arguments for child support might fail.¹¹² We would lack both policy reasons for coerced support, and moral grounds for condemning non-payers as deadbeats. We might even consider – as David Chambers once suggested – abolishing mandatory child support.¹¹³ So far, empirical work counsels otherwise.

The two wrongs I discuss also raise controversial moral issues. In particular, the second theory – a duty to form and sustain a loving relationship with the other parent – diverges from many people's understanding of a right to intimate association. Reasonable people can certainly disagree on this issue. Readers who reject the second theory might still accept child-support as a wrong based on the first account – that failure to pay support harms children psychologically by demonstrating indifference rather than love.

The specific harms I identify might be thought insufficient to justify tort-like duties. Inaction, even in the face of patent need and the ability to meet it, usually creates no liability.¹¹⁴ Isn't failure to demonstrate love, or failure to create and sustain a marriage or long-term relationship, much like failure to rescue someone in need? I do not think the comparison is apt. Parents are not mere bystanders who happen to find themselves well-positioned to provide aid.¹¹⁵ Parents act intentionally and for their own benefit when they have sex, and do so knowing that this act causes (or risks causing) someone to need their aid, and that they will be in an especially good position to provide the assistance. The combination of an intentional self-benefitting act, causing a foreseeable need, and the predictable fact that one will be uniquely well situated to meet that need, are commonplace reasons for imposing duties to provide assistance.¹¹⁶

This argument undoubtedly sounds like I have now accepted the very claims I started the article by rejecting – justifications of child support based on causation, vulnerability, and consent. I think that I have

revised and improved those arguments. Causation alone, I argued, provides a poor reason for distributing costs. However, causation can be relevant. It distinguishes parents' failure to meet psychological needs, from a wider duty to act whenever one is well positioned to help someone. Vulnerability, I argued, does not justify private child support because parents are not especially well situated to support children. However, if my arguments are correct, parents are especially well situated to provide children with love and a loving home. Children are therefore genuinely vulnerable to parental deprivation of these goods in a way that children are not necessarily dependent on parents for money. Consent, I explained, does not fully justify child support absent an independent reason for demanding that parents accept this duty as a precondition to procreating. Children's psychological needs provide such a reason. We should often treat sex as consent to support children because children are less well protected from psychological harm when governments relieve parents of all support duties.

Harm-based theory might be thought hard to reconcile with the bulk of laws regarding parent-child relationships, which generally do not include remedies for the various ways parents and children can hurt each other. We do not, for example, provide children whose parents live together with a remedy if the parents do not love the children or each other enough. But child-support duties differ from most failures of love in ongoing family relationships. When parents live apart, the failure of a loving relationship between them is patent, as is the failure of love demonstrated by an unwillingness to pay support. Detecting harms in the intact family would be harder, and would require invasions of privacy.

My arguments might also be thought dangerously invasive of individual privacy and freedom. They dictate behaviour in intimate relationships and create tort-like remedies for those who misbehave toward intimates. Do they not set a precedent for other invasive rules? Should there be tort damages available against parents who do not visit? Against children who abandon parents in old age? Against friends who fail to exhibit loyalty?

I do not think my arguments need to have such intrusive consequences. First, a duty to show love by contributing funds is less intrusive than duties that force association (such as a duty to visit) or duties to refrain from hurtful speech. Second, many ways that the legal system might imagine regulating behaviour to protect vulnerable people would either involve invasions of privacy or undue discretion for state officials. Failures to pay money are not so hard to monitor and can be verified easily, so we need not fear arbitrary decisions.

For example, although my arguments might support a *prima facie* moral duty to visit children, they do not necessarily justify making such a moral duty into a legal duty through damage awards. There are many

practical problems – such as proving whether non-visitation was wrongful rather than excused because it was caused by interference of the custodial parent. It is not clear whether coerced visitation would benefit children, or whether any benefit would be worth the effort. Those coerced to visit might certainly behave badly in a way that harmed children. Forced visitation constrains life choices by some non-custodial parents (such as by limiting relocation) more dramatically than forced payments.

Although I think harm-based theory offers a sound justification for child support, and answers some questions about scope, it cannot answer other questions. For example, although the arguments about demonstrating love could apply to grandparents and step-parents, they are not so clear. Based both on convention, and perhaps on more basic psychological needs, children suffer less when a grandparent fails to demonstrate love. Although matters are likely varied for step-parents, a simple rule might be hard to fashion, and might have unwanted incentive effects.

Finally, the harm-based theory looks odd from the broader perspective of why caring parents – in intact families or not – support their children voluntarily. It might seem problematic to consider compelled child support as a punishment for wrongdoing, when parents who pay support voluntarily do not regard themselves as being punished, or as compensating children for a wrong. Although this seems unusual, it should not be decisive. First, insofar as not demonstrating love to a child is the wrong being punished, those who pay voluntarily have not committed the wrong, and should not take it as punishment. As to the wrong of failed parental relationship, I suspect that many parents in fact feel guilt over harm done to the child, and regard child support as in some measure penance, mitigation, and compensation.

4. CONCLUSION

I have argued for the following main points. We need a sound theory of child support that accounts both for the goals child support should pursue, and for the fairness of distributing financial obligations to particular adults. The theory should say something about what portion of child-care costs taxpayers should pay, how costs should be allocated between parents, and who should be designated a parent for support purposes.

Three traditional theories fail to answer these questions persuasively. Causation alone is a poor principle for allocating duties. Children's vulnerability and parental consent explain why parents may reasonably be asked to pay support only if one assumes the current child-support regime. But children would be less financially vulnerable if the state did not assign parents primary support duties. Sex would not constitute

consent to pay support if we did not conventionally assign it that meaning. Justifications for child support must explain why the state should make children vulnerable to parental default, or why we should make consent to support children a precondition to sex.

I considered five alternate theories of child support: insurance, equality, population control, the benefit principle, and harm prevention. I reached the following conclusions:

- (i) contrary to arguments often advanced, insurance (or debt repayment) counsels greater public funding for children than we currently have. Tax payers make a more sound insurance pool than do parents or children;
- (ii) although gender equality, understood in a particular way, counsels greater public funding for children, this account is likely more controversial than the others advanced. Gender equality does not have important implications for the allocation of child support between parents, save that any system of child support should tax fathers to some degree. Since this element is present in all proposals, it does little to adjudicate among them;
- (iii) encouraging population control and family planning could justify particular child-support policies. Some evidence indicates that child-support duties affect contraceptive use, at least among unmarried couples. However, it is not clear that population control should be a goal in the US. On the contrary, we might need more people because children provide significant net economic benefits to society. Answers to this question depend on how one interprets the importance of environmental harms, and the possibility of immigration. Encouraging family planning might justify child-support duties for teenage parents. But arguments for this conclusion depend on arguable distributive claims;
- (iv) the benefit principle adds a distributive-justice element to the question of public funding. If children represent a net economic harm to society, it would be unfair to ask tax payers to fund procreation. But if children represent a net benefit, public funding would distribute the cost of children more fairly to those who benefit from children. The benefit principle seems initially appealing as a criterion for allocating the costs of children between parents, and deciding who is a parent. But this theory often demeans children;
- (v) the parental duty to pay child support should instead be interpreted as a remedy for a harm. Parents who do not pay support wrong their children by failing to demonstrate love, and by failing to establish and maintain a loving relationship with each other. Both wrongs appear to harm children – though further research is needed. The harm-based theory has several virtues, including (a) explaining why parents should be peculiarly obligated to pro-

vide for children – parents act intentionally, causing children to need love and a loving home, and knowing that they will be especially well situated to provide these goods; (b) giving reasons for deciding who is a parent for child-support purposes; (c) offering reasons for how much child support is owed; (d) to some degree justifying the condemnatory attitude many people take toward non-payment;

- (vi) the theory can also be understood as a modified form of the consent and vulnerability theories. Although children are not naturally vulnerable to parents as a source of revenue, they are (given other structural elements in our society) peculiarly dependent on parents as a source of love and a loving home. Preventing psychological harms to children provides a reason for making consent to child support a precondition for sex.

NOTES

¹ See Chambers, D. (1995) 'Fathers, the welfare system, and the virtues and perils of child-support enforcement', 81 *Virginia Law Review* 2575, 2586–7 (describing bipartisan political support for aggressive, even punitive, child-support laws); Foley, E. (1996) 'Social justice and child poverty', 57 *Ohio State Law Journal* 485, 501 ('[T]he government should have the power to enroll a (nonpaying) father in a mandatory work camp if doing so is necessary to make the father pay off the debt').

² See eg Cahn, N. (1997) 'Representing race outside of explicitly racialized contexts', 95 *Michigan Law Review* 965, 976 (claiming that conditioning welfare payments on the mother's co-operation in establishing paternity, and then defining co-operation to require knowing information such as the father's social security number, appears to punish promiscuity); David Chambers, *supra* n 1 at 2588 ('The eagerness of conservatives to cut off young unmarried mothers and to pursue young unmarried fathers is almost certainly shaped by the fact that when most white Americans imagine an unmarried mother on welfare, the woman they picture is black'); Roberts, D. (1995) 'Irrationality and sacrifice in the welfare reform consensus', 81 *Virginia Law Review* 2607, 2619–22.

³ See 'For parents seeking relief, courts don't always help', *The Los Angeles Times* 12 October 1998 at 1 col 1; 'In 9 of 10 child-support cases, D.A. come up empty handed', *The Los Angeles Times* 11 October 1998 at 1 col 1.

⁴ See Garrison, M. (1998) 'Autonomy or community?: An evaluation of two models of parental obligation', 86 *California Law Review* 41, 45 (stating that current child-support guidelines 'lack an articulated theory of the support obligation to ground their design and justify their results'). Some people believe that child support is a basic moral duty that does not require further justification. See Houlgate, L. (1993) 'Ethical theory and the family' in D. Meyers, K. Kipnis, and C. Murphy (eds) *Kindred Matters: Rethinking the Philosophy of the Family* (attributing this position to W. D. Ross, and perhaps to John Ladd and Christina Sommers).

⁵ Cf Garrison, M. *supra* n 4 at 84 n 207 (1998) (arguing that utilitarian, egalitarian, and contractarian theories largely converge in supporting significant wealth transfers to children, but that '[n]one of these theories offers a direct explanation of why a parent instead of, say, the extended family or community, should shoulder the obligation to support a particular child'); Minow, M. (1993) 'All in the family and in all families: Membership, loving, and owing', 95 *West Virginia Law Review* 275, 308 (defending appropriate family obligations requires examining government obligations).

⁶ There have been many suggestions for how to increase taxpayer support for children without relieving parents of all duties. These range from child-support assurance plans, Garfinkel, I. (1992) *Assuring Child-support* (proposing a minimum payment to all children living with a single parent paid for in part by contributions from non-resident parents), to mandatory child-support insurance, Sugarman, S. (1995) 'Financial support of children and the end of welfare as we know it',

81 *Virginia Law Review* 2523 (proposing that social security be expanded to provide child-support insurance for children whose non-resident parents have worked enough to qualify), to European-style family allowances. See eg Folbre, N. (1994) *Who Pays for the Kids* 157–65 (describing family allowance programmes in Northwestern Europe).

⁷ Levy, R. (1993) 'Rights and responsibilities for extended family members', 27 *Family Law Quarterly* 191.

⁸ See Krause, H. (1990) 'Child-support reassessed: Limits of private responsibility and the public interest' in S. Sugarman and H. Kay (eds) *Divorce Reform at the Crossroads* 166 (arguing that we should impose a lesser financial obligation on non-custodial parents when we de facto limit their interests).

⁹ *Marriage of Walters*, California Court of Appeal Div 4 5 December 1997.

¹⁰ See Garrison, M. (1991) 'Good intentions gone awry: The impact of New York's equitable distribution law on divorce outcomes', 57 *Brooklyn Law Review* 621, 737; Minow, M. (1998) 'How should we think about child-support duties?' in I. Garfinkel, S. McLanahan, D. Meyer, and J. Seltzer (eds), *Fathers Under Fire* 302–307. Equal living standards has many practical problems as a goal. Minow notes four: (1) because two households cost more than one, there are fewer resources available; (2) states do not require parents in a single household to support children beyond subsistence; (3) child support benefits resident parents who have no claim to remain at the standard of living that would be available in a marital household; and (4) this goal treats as irrelevant the different emotional involvement in the two situations. Minow, *supra* at 307.

¹¹ Nelson, H. and Nelson, J. (1989) 'Cutting motherhood in two: Some suspicions concerning surrogacy', 4 *Hypatia* 85, 91.

¹² *Idem*. See also, Sidgwick, H. (1962) *The Methods of Ethics* 249 cited in J. Blustein, *Parents and Children: The Ethics of the Family* 143; Schrag, F. 'Children: their rights and needs', 237–39 in W. Aiken and H. LaFollette (eds) *Whose Child?: Children's Rights, Parental Authority, and State Power* (attributing a similar position to Fredrick Olafson).

¹³ Nelson, *supra* n 11 at 91.

¹⁴ See Jarvis Thomson, J. (1971) 'A defense of abortion', 1 *Phil. and Pub. Aff.* 47. Being uniquely well situated to prevent harms is not necessarily sufficient for legal duties to rescue. However when paired with causation, it is often sufficient. See *infra* n 120.

¹⁵ In part, this is because causation is notoriously ambiguous. One might as easily say that the mother caused the child to need an antidote in the hypothetical as that the drug company did. Without a supplementary distributive principle – such as wrongdoing, past profit, consent, or loss spreading, identifying the appropriate cause is not possible. See Perry, S. (1988) 'The impossibility of general strict liability', 1 *Canadian Journal of Law and Jurisprudence* 147, 159–68.

¹⁶ See Schrag, *supra* n 12 at 239–40.

¹⁷ Goodin, R. (1985) *Protecting the Vulnerable* 124. See also Blustein (1982) *supra* n 12 at 116 ('The needs of children are natural needs. . . . Through the institution of the family (or suitable substitutes), society sees to it that someone is in a position to do something about children's need-based claims. Individuals who assume the role of parent have a moral duty to perform their institutional duties, because they have a duty to satisfy the needs of those who are dependent on them.')

¹⁸ Federal child-support law mandates that child support collected from parents with children receiving welfare must be used to reimburse the government for welfare payments. Until 1996, Federal statutes mandated that the first \$50 per month should go to the child. 42 USC s 602(a)(8)(A)(vi). Since 1996, states have the option not to provide even \$50. See 'Personal Responsibility and Work Opportunity Reconciliation Act of 1996' (*Pub. L.* 104–93) s 302. Some states continue to provide the \$50. See eg California Welfare and Institutions Code s 11475.3.

¹⁹ Genetic relationship might be unnecessary for implied consent. In a recent California case, a married couple hired a surrogate mother to produce a child with donated sperm and ova. Before the child was born, the couple separated, and the former husband sought to avoid child-support payments on the ground that the child was not genetically his. He lost on appeal. *Buzzanca v Buzzanca*, 6 Cal. App.4th 1410 (1998).

²⁰ O'Neill, O. (1979) 'Begetting, bearing, and rearing', 25, 26 in O. O'Neill and W. Ruddick (eds) *Having Children: Philosophical and Legal Reflections on Parenthood*.

²¹ *San Luis Obispo v Nathaniel J.*, 50 Cal. App.4th 842 (1996).

²² See 'Parent's child-support liability as affected by other parent's fraudulent misrepresentation regarding sterility or use of birth control, or refusal to abort', 2 *ALR* 5th 337 (1992). For arguments against immunizing victims of birth-control deceit from child-support duties, see Young, E. (1983) 'Threshold issues associated with the parental obligation of child-support', 61 in J. Casetti (ed) *The*

Parental Child-Support Obligation; Sampson, J. 'Reconsidering the basic premises of child-support: A comment on in *re Pamela* P 69 in idem.

²³ Men must support even genetically unrelated children born during their marriages, unless they discover and object to the duty while the child is very young. One contrary, and short-lived decision received press coverage recently. See *The Los Angeles Times* 9 June 1997.

²⁴ O'Neill, supra n 20 at 28–9. Blustein makes a similar claim: if alternate caretakers cannot be found, and abortion is not possible, then parents 'have no option but to rear [the child] themselves. They may not have wanted to become parents and to be responsible for a child's care, but they decided not to avoid parental duties, and so incur them'. *Parents and Children*, supra n 12 at 145. Blustein does not say why a parent unable to locate a substitute or secure an abortion *decides* not to avoid parental duties. Presumably the parents assumed this risk by having sex.

²⁵ On refusal to abort as justification for non-support, see Young, supra n 22; Chambers, D. (1982) 'The coming curtailment of compulsory child support', 80 *Michigan Law Review* 1614, 1618–21; Hales, S. (1996) 'Abortion and fathers' rights' in J. Humber and R. Almeder (eds) *Reproduction, Technology and Rights* 5; Levy M. and Duncan, E. (1976) 'The impact of *Roe v Wade* on paternal support statutes: A constitutional analysis', 10 *Family Law Quarterly* 179; Swan, G. 'Abortion on maternal demand: Paternal support liability implications', 9 *Valperiso U. Law Review* 243.

²⁶ Chambers, supra n 25 at 1619. According to O'Neill, when a couple decides jointly not to give up a child for adoption, they implicitly consent to all child rearing responsibilities. Why not treat a parent who refuses to give a child for adoption as accepting all parenting responsibilities?

²⁷ Blackstone's famous quote on the topic seems to build on consent, causation, vulnerability, and natural law. See 1 Commentaries 435. Blustein bases parental obligations on causation, vulnerability and consent when he says: 'It is not merely because biological parents are the "cause of the child's existing in a helpless condition" that they are causally responsible "for the suffering and death that would result to it if neglected", but because child rearing is arranged in such a way that those who cause a child to exist are in a *special position to do something* to prevent this harm from occurring . . . [T]he duties of biological parents do not follow from the fact of procreation alone but from this fact together with the moral principle that people are responsible for the foreseeable consequences of their voluntary acts. . . . [C]aring for a child must be a foreseeable consequence of having one.' (emphasis added). *Parents and Children* supra n 12 at 146–7.

²⁸ The claim in text might be thought too quick. Sex at least arguably constitutes consent to child support. We might adopt this broad view of consent to help children in need. Taxpayers, though they might be in a better position to help children, do not even arguably consent to child support. So, if consent is needed for duties, and vulnerability provides a reason for interpreting consent broadly, perhaps parents should be liable for supporting their children. This conclusion, however, is problematic. One might equally argue that once public support laws are enacted, anyone who chooses to earn money, knowing about the income tax and subsidies for children, consents to support children by working. If this system provided for children more effectively, it too would construe ambiguous consent for the benefit of children.

²⁹ See Eckelaar, J. (1991) 'Are parents morally obliged to care for their children?', 11 *Oxford Journal of Legal Studies* 340–2 (noting H. L. A. Hart's view that the duty to support children arises from a social role, which itself can vary from one society to another, and emphasizing that the social practice of imposing these duties requires justification).

³⁰ A fine discussion of the competing interests involved with child-support rules is in *Principles of the Law of Family Dissolution: Analysis and Recommendations*, ch 3 Child support (Tentative Draft No 3 1998) (American Law Institute).

³¹ Becker and Murphy argue that because children cannot make enforceable promises, some parents have an incentive to under-invest in their children. Parents would be better off spending for their children's education rather than for their own retirements if they could count on the children to support them in old age. Because parents cannot rely on children for support, they may invest too little in education. This explains, say Becker and Murphy, why we have public funding for both education and retirements. By imposing payments on both ends, we avoid under investment. See Becker, G. and Murphy, K. (1988) 'The family and the state', 31 *Journal of Law and Economics*. 1 reprinted in Becker, G. (1991) *A Treatise on the Family* 362 (enlarged edn). They do not explain why bargaining failure leads to support payments funded by taxes, rather than coerced payments from parents, followed by coerced payments by children. The argument from diversification in text supplies one answer.

³² A theory of intergenerational bargains would, if persuasive, justify child-support rules somewhat different from those we now have. For example, theories of child support as repayment might impose child-support duties on people who have no children, but were well cared for them-

selves. And they might immunize from child-support obligations people whose parents abandoned them. Theories of child support as prepayment might allow individuals to opt out of the arrangement. Presumably a child whose parent abandons her will not be as likely to support the parent in old age. So long as the parent knows that this is the risk he is taking, why should he not take it?

³³ For an excellent recent account along these lines, see Loken, G. (1999) 'Gratitude and the map of moral duties toward children', 31 *Arizona State Law Journal* 1121. Loken relies on gratitude toward children for the joy they bring parents, gratitude toward one's own parents for their care, which creates a duty to care for their grandchildren, and gratitude toward the prior generation for their care, which creates a duty toward the next generation. Each of these arguments faces problems when accounting for child support. The first faces a problem in accounting for a duty for reluctant parents, who may benefit little from parenthood. See *idem* at 1191-2. The second and third make it difficult to know which allocation of duties between parents and society is most fair. The second is particularly problematic because some grandparents likely do not favour a duty of child support (at least not a duty of generous support) when their own child is a non-resident obligor. They may side with their own child in thinking that the support duty is too great. In these cases, gratitude toward them is a problematic basis for support. Finally, it is not clear that an obligation of gratitude can justify government coercion.

³⁴ The argument for public child support based on diversification of insurance could be undermined by the fact of political volatility. Although taxpayers make a secure source of funds for children, because they do not all die or become unemployed simultaneously, they might not really be secure source in the sense that legislation providing support can be repealed.

³⁵ Feminists might worry that child support – whether privately or publicly funded – has harmful incentives. According to Becker, child support works with marital property and alimony to encourage specialization within marriage, and to provide insurance in case of divorce or abandonment. Becker, *supra* n 31 at 44. If child support encourages women to spend time caring for children, rather than on their own human capital, it might exacerbate their vulnerability and dependence. But see Okin, S. (1989) *Justice, Gender and the Family* 180-3 (arguing that egalitarian family forms are more just, but that we must protect those who become vulnerable in other family forms.); Rutherford, J. (1990) 'Duty in divorce: Shared income as a path to equality', 58 *Fordham Law Review* 539. Cf Sugarman, *supra* n 6 at 2538 (noting that avoiding dependence is an argument given by the political right against state-funded child-support programmes, and that this is an odd position considering the lack of objection to becoming dependent on private child support).

³⁶ See Czapanskiy, K. (1991) 'Volunteers and enlistees: The struggle for parental equality', 38 *UCLA Law Review* 1415 (surveying the variety of ways family law treats fathers and mothers unequally).

³⁷ Feminist goals do not necessarily demand holding each father responsible for child support. Many feminists favour access to artificial insemination for single women who want to rear a child without a father. Holding every father financially responsible for his own children is not the only child-support policy that favours sex equality.

³⁸ Even if there were no principled reason for demanding such payments, the practical problem of moral hazard would mandate them. Unless a child-support system were to take the form of large child credits – available to all households with children – state support would likely be available only for single-parent households. Without charges on non-resident parents, public support would create incentives to separate or feign separation. See Garfinkel, *supra* n 6 at 144; Sugarman, *supra* n 6 at 2566.

³⁹ Some authors make this 'unequal causation' argument. Laws allow women to avoid child-support duties through abortion. Men, they claim, deserve a similar right. They do not mean that men should be able to compel women to have abortions. But, they argue, releasing reluctant fathers from support duties protects men's right to avoid procreation on an equal basis with women. See Hales, S. (1996) 'Abortion and fathers' rights' in J. Humber and R. Almeder (eds) *Reproduction, Technology and Rights* (Women have the ability through abortion to avoid long-term child-support duties. Equality demands that men have this option during pregnancy also). See also, Feaver, P. Kling, R and Plofchan, T. (1992) 'Sex as contract: Abortion and expanded choice', 4 *Stanford Law and Policy Review* 211 (sex should be presumed consent by father to support children born even if woman does not want abortion. But this background rule should be negotiable); Humber, J. 'Maternity, paternity, and equality' in *Reproduction, Technology and Rights*, *supra* at 38. ('At conception, both male and female share equally in the responsibility for the onset of pregnancy. If the woman decides not to have an abortion, her share of responsibility . . . increases significantly. This being so, it would be unjust for anyone to force the father to share equally with the mother in child-rearing activities. But this never happens. At most, the father is required to

provide child support . . . the mother provides financial resources . . . *and for everything else that the child requires* . . . this makes her share of the child-rearing activity far, far greater than the father's'). I do not accept this argument. Men are not entitled to equality insofar as abortion protects bodily integrity. Insofar as abortion protects procreative autonomy, men reasonably seek equal treatment. Choice deserves protection because procreation is a psychologically and morally central event in a human life. Financial immunity from the consequences of the event does not really protect the right. Additionally, if abortion is permitted because foetuses are thought not to be persons, the argument for equal access to the right of non-support fails. That law protects the right to prevent a person from existing does not mean that it must also allow people to avoid the consequences of procreation when a person does come to exist.

⁴⁰ I focus on men as potential payers and women as potential recipients in this portion of the article despite the growing number of mothers who pay child support. The incentives discussed arise from anticipating that one might pay or receive support. Given the percentages, it is unlikely that a man would anticipate receiving support. Further, the contraceptive effects are particularly likely for never-married and non-cohabiting parents. Among this group, mothers who pay child support are rare.

⁴¹ Child support would most likely influence men without long-term commitments. Couples not contemplating separation of course anticipate spending money to support their children. But they likely do not anticipate compelled child support from an absent parent. Most married couples dramatically underestimate the likelihood of their own divorce. Baker, L. and Emory, R. (1993) 'When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the time of Marriage', 17 *Law and Human Behavior* 439, 443. Nevertheless, during difficult periods of an ongoing marriage, the prospect of divorce, and therefore the rules governing child support after divorce, might have more influence.

⁴² See Parkman, A. (1997) 'The government's role in the support of children', 11 *Brigham Young University J. Pub. L.* 55, 64; Ooms, T. (1995) 'Strategies to reduce nonmarital childbearing', 241, 255 *Report to Congress on Out-of-Wedlock Childbearing* (Department of Health and Human Services) ('An important, if secondary, rationale for the new emphasis on paternity establishment is the belief that if all young unmarried men were convinced they must support any child they fathered for the next eighteen years, this would motivate them to either desist from nonmarital sex, or be more responsible about using contraceptives').

⁴³ Garfinkel, I., Gaylin, D., McLanahan, S. and Huang, C. (2003) *Will Child-support Enforcement Reduce Nonmarital Childbearing?* 16 *Jo. Population Economics* 55. See also Case, A. 'The effects of stronger child-support enforcement on nonmarital fertility', 191 in *Fathers under Fire*, supra n 10 (correlation between strong child-support laws, and low non-marital birth rate).

⁴⁴ Plotnick, R., Garfinkel, I., Gaylin, D. and McLanahan, S. (forthcoming) *Better Child-support Enforcement: Can it Reduce Teenage Premarital Childbearing?*, *Journal of Family Issues*.

⁴⁵ See eg Parkman, supra n 42.

⁴⁶ Chambers, D. 'Stepparents, biologic parents, and the law's perceptions of "family" after divorce', 102 in *Divorce Reform at the Crossroads* supra n 8.

⁴⁷ See George, R. 'On the external benefits of children,' in *Kindred Matters*, supra n 2 at 209; See also DeGeorge, R. (1990) 'Children and hobbies: A commentary on Joel Newman's "Taxes and the family"', 211, 214 in R. Moffat, J. Grcic, and M. Bayles (eds) *Perspectives on the Family* (rejecting the analogy between children and hobbies because '[n]ot only does society in general benefit from children; clearly those who do not have children also reap benefits therefrom').

⁴⁸ Lee, R. and Miller, T. (1990) 'Population policy and externalities to childbearing', *The Annals of the American Academy of Political and Social Science, World Population: Approaching the Year 2001* 7, 27.

⁴⁹ See 'The New Americans: Economic, demographic, and fiscal effects of immigration' 358-61 (1997). The authors of this chapter (including Ronald Lee) calculated the net present value of additional immigrants. For comparison purposes, they also calculated the present value of children born to families who were in the US for three generations or more. Children who would go on to graduate high school had a net present value of \$171,000. Those who later graduated from college had one of \$245,000. For a critique of the Lee and Miller method, see Ainsworth, M. (1990) Comment on 'Population Growth, Externalities to Childbearing, and Fertility Policy in Developing Countries,' by Lee and Miller, *Proceedings of the World Bank Annual Conference on Developing Economies*. 305.

⁵⁰ The calculation ignores the effects on a child that are passed through markets - called 'pecuniary externalities'. For example, additional children might produce and consume goods, or reduce average wages by increasing the labour supply. According to Lee and Miller, such pecuniary externalities are always pareto-optimal, because any harm done to one group in the market will

be offset by an equal or greater benefit to another group. See, *Population Growth, Externalities to Childbearing, and Fertility Policy in Developing Countries. Proceedings of the World Bank Annual Conference on Developing Economies* 275–7 (1990).

⁵¹ The taxes include property, income, and social security. Expenditures include education, social security, Medicare, AFDC, SSI, Medicaid, public safety, public works, and spending on congestible goods, such as roads, police, and parks.

⁵² Some people take the opposite view, arguing that immigration to countries without excess population undermines incentives to control population in the countries of emigration. See eg Hardaway, R. (1994) *Population, Law, and the Environment* 144.

⁵³ See eg Simon, J. and Kahn, H. (1985) 'Introduction' in J. Simon and H. Kahn *The Resourceful Earth* 1; President's Council on Sustainable Development, (1997) *Population and Consumption Task Force Report* (1997) (recommending a variety of steps toward stabilizing the US population).

⁵⁴ Distributional analysis is complicated. Environmental harms imposed by additional children in the US are likely felt outside the US, while the external benefits created are largely confined to the country. As a result, one might think that parents in the US provide uncompensated benefits to other US citizens, but also impose unfair environmental harms on people outside the US.

⁵⁵ Parkman, *supra* n 42 at 65.

⁵⁶ 'Paramount among the problems associated with welfare programmes are the incentives for unprepared and irresponsible parents to have children and the disincentives for parents to establish a two-parent household'. *Idem* at 55.

⁵⁷ *Idem* at 65–6.

⁵⁸ See eg Lundberg, S. and Plotnick, R. (1995) 'Adolescent premarital childbearing: Do economic incentives matter?', 13 *Journal of Labor Economics* 177, 192 ('Lowering welfare benefits by 20 per cent lowers the likelihood of a premarital birth from .063 to .046. . . . This effect is primarily due to the effect of welfare on the probability of marrying, given that the pregnancy is carried to term. Welfare has a small effect on pregnancy resolution and a negligible impact on premarital pregnancy'). But see Robins, P. and Fronstin, P. (1996) 'Welfare benefits and birth decisions of never-married women', 15 *Population Research and Policy Review* 21.

⁵⁹ Of children born to mothers who are 16–17 years old, more than 78 per cent graduate from high school. Delaying childbirth significantly might raise this to 83 per cent. See Haverman, R., Wolfe, B. and Peterson, E. 'Children of early child bearers as young adults' in R. Maynard (1997) (ed) *Kids Having Kids* 257–69. Of boys born to teenage mothers, about 10.3 per cent spend any time in prison. Delaying childbirth significantly might reduce this to 9.7 per cent. See, Groggier, J. 'Incarceration: Related costs of early child bearing, in *Kids Having Kids*, *supra* 231–43.

⁶⁰ The average child who does not graduate from high school has been estimated to produce a net external benefit of \$92,000. *The New Americans* at 359. Those who graduate produce larger benefits.

⁶¹ Dowd, N. (1997) *In Defense of Single Parent Families* 26.

⁶² One might think that teenage parents and their children would be much better off if only the teenagers delayed, because those who do delay are much better off. See *Kids Having Kids*, *supra* n 61. But this assumption ignores other differences between teenage parents and teenagers who do not procreate. There is some doubt about whether harms attributed to teenage motherhood are caused by early procreation, rather than by poverty and other factors associated with teenage childbearing. See Geronimus, A. and Sanders, K. (1992) 'The socioeconomic consequences of teen childbearing reconsidered', 107 *Quarterly Journal of Economics* 1187; Hoffman, S., Foster, E. M. and Furstenberg, F. (1993) 'Reevaluating the costs of teenage childbearing', 30 *Demography* 1. See also Merritt, D. (1996) 'Ending poverty by cutting teenage births: Promise, failure, and paths to the future', 57 *Ohio State Law Journal* 441, 455–61 (reviewing this literature).

⁶³ The central difference would be based on distributive-justice norms. As the text below explains, cost internalization is appealing in part because it attributes expenses to those who benefit from activities. Taxing parents when they produce children who impose negative externalities makes some sense because asking taxpayers to fund children who later impose more public costs seems unfair. If, however, children produce external benefits, asking the public to fund them seems distributively reasonable. If the public wants to increase this surplus, by inducing parents to create children who have even greater external benefits, distributive justice may counsel doing so at public, rather than parental, expense. So, for example, we might favour subsidies for teenagers who delay parenting, rather than taxes on those who do not.

⁶⁴ A subsidy is sufficient to promote efficient outcomes when it internalizes the entire external benefit. But such a large subsidy is not always necessary, and might not be ideal for several reasons. First, because parents receive private benefits from procreating, many will produce chil-

dren for less than this amount. Second, parents vary in the amount needed to induce procreation. Governments might try to price discriminate, offering modest subsidies to poorer families hoping to increase population size for a low cost, or offering larger subsidies to wealthier parents, hoping to gain larger public goods per child. Third, not every child produces the same benefit. Efficient outcomes would require a reasonable guess about individual children. Fourth, the maximum possible subsidy should be reduced by some figure for environmental harms. Fifth, if it were thought appropriate to include the benefit to the child for being alive, this element could increase the maximum appropriate subsidy. Sixth, the taxes needed to raise the subsidy create inefficiencies themselves. This creates a reason to effect the optimal number of children with the smallest effective subsidy. It means that the ideal number of children might be smaller than is otherwise thought, because efficiency requires that we minimize the combined harms of inefficient procreation and inefficiency caused by taxes.

⁶⁵ Foley, E. (1996) 'Social justice and child poverty', 57 *Ohio State Law Journal* 485, 507-8. See also idem at 485-6 (arguing that state funds for children should be matched by state funds to childless so that we are not subsidizing children more than other choices); Samansky, A. (1996) 'Tax policy and the obligation to support children', 57 *Ohio State Law Journal* 329, 372-4 (arguing that money spent by wealthy parents on children is a form of consumption); Alstott, A. (1996) 'Comments on Samansky', 57 *Ohio State Law Journal* 381, 386-8 (arguing that whether children are consumption is not a conceptual issue, but a matter that depends on advancing particular social purposes). But see George, R. (1987) 'Who should bear the costs of children?', *Public Affairs Quarterly* 1, 20 (calling the analogy between children and consumption goods 'a fallacy of numbing grossness').

⁶⁶ Cohen, J. (1995) 'Competitive and cooperative dependencies: The case for children 81 *Virginia Law Review* 2217-18.

⁶⁷ For a recent account of child-support as a matter of distributive justice, see Garrison, *Autonomy or Community* supra n 4.

⁶⁸ Because poorer people rear a disproportionately large number of children – and spend about the same percentage of their income on each child as do richer parents – the current costs of producing children is regressive.

⁶⁹ Selfish reasons – such as having fun or gaining love and companionship – are far more common than are other-regarding reasons, such as giving love or fulfilling a duty. See Hoffman, L. and Manis, J. (1979) 'The value of children in the United States: A new approach to the study of fertility', 41 *Journal of Marriage and the Family* 583-6. Some studies try to show what motivates procreation, rather than what people say motivates procreation. One such study finds that 'the social resource value of children [is] a prime motivator of childbearing.' Shoen, R., Kim, Y., Nathanson, C., Fields, J. and Astone, N. (1997) 'Why do Americans want children?', 23 *Population and Development Review* 333-49.

⁷⁰ See eg Estin, A. (1995) 'Love and obligation: Family law and the romance of economics', 38 *William and Mary Law Review* 989-1012 ('The decision to have children has become a question of consumer choice, a question of personal taste . . . Acting rationally, a couple will choose to have children only if they perceive parenthood as more enjoyable than the other pleasures their time and money can buy').

⁷¹ See Chambers, D. supra n 25 at 1624 ('[M]any fathers find the visitation relationship unnatural and unsatisfying . . . [O]ver time many fathers come to regard child support as a form of taxation without representation.' Chambers goes on to argue that if women's overall position in society improves, and other means of preventing poverty are found, we should terminate compulsory child support); American Law Institute 'Principles of the law of family dissolution', supra n 30 at 7 ('the residential parent also experiences disproportionate opportunity to enjoy a meaningful relationship with the child, an opportunity less available to the other parent. Thus . . . the residential parent's disproportionate provision of child care may be assumed to be roughly counterbalanced by the disproportionate relational benefits concomitant with residential child care'). Although the American Law Institute specifically rejects the idea that parents who benefit less should be relieved of financial duties, it embraces the unequal distribution of non-financial costs between custodial and non-custodial parents as appropriate *because* custodial parents benefit more from their connection to children.

⁷² One counter argument might adopt a sociobiological perspective. The benefits of procreating is in spreading one's genes. So men get the benefit even without the relationship. This argument might also justify child-support duties for grandparents, and other genetic relatives.

⁷³ See Estin, supra n 70 at 1080 ('Our society seems to have shifted increasingly toward a consumer approach to parenthood, in which children are viewed as increasingly similar to homes and

hi-fi sets. The risk of a linkage between child support and the parent-child relationship is that it serves to validate self-interest as the basis for legal obligation').

⁷⁴ Various explanations can be given for parents having rights to direct the upbringing of children – including rights to non-interference by the state, and to obedience from the children. Some of these are child centered. For example, according to Blustein (following Locke), parents are entitled to the obedience of children because parents have a duty to care for children, which they can only do effectively if children submit – in varied amounts depending on age – to the parents. *Parents and Children* supra n 12 at 110–13.

⁷⁵ An extreme version of parents forced to support children with whom they have little relationship is incarcerated parents. Although some parents in prison maintain relationships with their children, others do not. States nevertheless can impose support duties. These states recognize that the lack of a relationship with the child is the parent's fault. See Cavanaugh K. and Pollack, D. (1998) 'Child-support obligations of incarcerated parents', 7 *Cornell Journal of Law and Policy* 531.

⁷⁶ Eekelaar, supra n 29.

⁷⁷ Idem.

⁷⁸ 'A bill for back child-support' *Los Angeles Times* 13 October 1997 Part B p1 (comment by 74-year-old man asked to reimburse state for back support of child who received AFDC). The man quoted rarely made payments. Although the story provides little detail, one must wonder whether he might receive a yearly card had he supported his child.

⁷⁹ These theories differ from many uses of public funds to influence parental behaviour, which often penalize children while trying to deter their parents' alleged wrongs. For example, family caps for AFDC, or requirements that AFDC recipients co-operate in locating absent fathers, are sometimes defended as appropriate incentives. However, these rules impoverish innocent children whose parents are not deterred. See Cahn, supra n 2 at 976 ('AFDC is transformed into a condemnation of the mother's morality, rather than a programme for meeting the needs of children').

⁸⁰ I explore a third version of this argument – that parents harm children by causing them to exist – in another article. See Altman, S. 'Grateful victims: Can procreating violate a child's rights if the child benefits from the violation?' The claim that child support is compensation for this wrong was initially defended by Seana Shiffrin. See Shiffrin, S. (1999) 'Wrongful life, procreative responsibility, and the significance of harm', 5 *Legal Theory* 117.

⁸¹ Some fathers who appear not to pay child support are actually paying in secret to avoid having payments confiscated by the government to reimburse welfare costs. See Cahn, supra n 2 at 981–2.

⁸² See Estin, supra n 70 at 1075 ('[C]hild support reflects a tension between the ideal of family relationships based on altruism and the reality that individual self-interest is also a strong motive, particularly after a divorce').

⁸³ A useful discussion of Finnis' natural-law theory and child support can be found in Eekelaar, supra n 29 at 348–50. Eekelaar argues that Finnis' arguments based on the goods of friendship and promoting the child's opportunities to partake in the goods of life provide a strong justification for a duty to care for children, but do not dictate who should have that duty. This is a question of convention. Idem at 351.

⁸⁴ The argument might be thought circular: child support is justified as a punishment for those who do not support their children. Does this not presuppose the very duty that it tries to justify? The argument is not really so careless. If acting on particular motivations is morally required, and failures are appropriately punished, sometimes punishments will demand doing the very action that one should have done voluntarily in the first instance. A child who repeatedly fails to share toys might be made to hand a toy to a child who wants it. Forcing the toy transfer is justified as a lesson to the child that sharing voluntarily is appropriate.

⁸⁵ 'All the little ones of our time are collectively the children of us adults of the time, and entitled to our general care. That excessive regard of parents for their own children, and their dislike of other people's is, like class-feeling, patriotism, save-your-own-soul-ism, and other virtues, a mean exclusiveness at bottom'. Thomas Hardy: *Jude the Obscure*.

⁸⁶ See Eekelaar, J. supra n 29 at 348–52 (concluding that the wider community has a duty to care for children).

⁸⁷ Cf Kay, H. H. (1991) 'Commentary: Toward a theory of fair distribution', 57 *Brooklyn Law Review* 755–65 ('[T]he theoretical basis for child support appears relatively clear. The legal bond between parents and their children is not terminated by divorce . . . [perhaps] the law should impose a greater obligation on divorced parents . . . because of the danger that children of divorce will not enjoy the continued affection of the non-custodial parent').

⁸⁸ Wallerstein, J. and Huntington, D. 'Bread and roses: Nonfinancial issues related to fathers'

support of their children following divorce', 135, 153 in *The Parental Child-support Obligation*, supra n 22 (finding this correlation, but only when support is accompanied by a visiting relationship).

⁸⁹ McLanahan, S., Seltzer, J., Hanson, T. and Thomson, E. (1994) 'Child-support enforcement and child well-being: Greater security or greater conflict?' 250 in I. Garfinkel, S. McLanahan and P. Robins (eds) *Child Support and Child Well Being*.

⁹⁰ Child support might also benefit children more than maternal income if it permits mothers to work fewer hours and therefore to spend more time with children, or because mothers spend a higher proportion of child support than income from other sources on children. See Knox, V. and Bane, M. 'Child support and schooling' 287-8 in *Child Support and Well Being*, supra n 87.

⁹¹ Seltzer, J. (1994) 'Consequences of marital dissolution for children', 20 *Annual Review of Sociology* 235, 250-2.

⁹² McLanahan, supra n 89 at 250-3. But see, Graham, J., Beller, A. and Hernandez, P. 'The effects of child support on educational attainment', 317, 344 in *Child Support and Child Well Being*, supra n 87 ('initial indications that child-support income could bring even greater benefits than other income . . . are not borne out once we take account of the possibility that men who willingly pay child support are somehow different from those who will pay reluctantly after reform'); Wallerstein and Huntington, supra n 88 at 147 (noting that children with fathers who paid child support but did not visit resented the non-visitation, and saw little evidence of paternal interest and affection in the support).

⁹³ McLanahan, supra n 88 at 250-4 (finding that children whose parents had been married would benefit from coerced child support, but that children whose parents had not been married might be harmed due to increased conflict).

⁹⁴ Some people believe that attributing rights to children undermines the possibility of parents acting out of love by inducing those granted rights and assigned duties to conceive of their relationship in such terms. See eg Schrag, supra n 12.

⁹⁵ Seltzer, supra n 91 at 237 ('When marriages dissolve, men disengage from [their] children as they disengage from their former wives').

⁹⁶ Seltzer, J., McLanahan, S. and Hanson, T. (draft 1997) 'Will child-support enforcement increase father-child contact and parental conflict after separation?' in (forthcoming) I. Garfinkel, S. McLanahan, J. Seltzer, and D. Meyer (eds), *The Effects of Child-support Policy on Nonresident Fathers*. Some theories of non-payment also support the causal story. For example, Seltzer lists the following as reasons divorced fathers do not pay all the child support they owe: 'Fathers who live apart from their children miss many benefits of paternity . . . When fathers have less control over child rearing, they are less willing to "pay" for them . . . Fathers . . . feel uncertain about whether their child-support contributions directly benefit the children'. Seltzer, supra n 91 at 249 (citations omitted).

⁹⁷ See Chambers, supra n 25 at 1627 (suggesting that encouraging visitation might justify child-support duties).

⁹⁸ For a study trying to isolate five separate accounts of the relationship between child support and visitation, see Seltzer, J., Schaeffer, N. Homg-wen Charng (1989) 'Family ties after divorce: The relationship between visiting and paying child support', 51 *Journal of Marriage and the Family* 1013.

⁹⁹ Even this inference is controversial. Some people argue that commitment to children would be taught to resistant fathers through child-support enforcement. McLanahan *et al* in *Child Support and Well Being* at 251.

¹⁰⁰ Seltzer *et al* supra n 98 at 1015-16. They further suggest that visitation and child support might be complementary, which means that 'engaging in one behaviour increases the utility or benefits derived from the second behaviour'. *Idem* at 1016. This would be true of child support and visiting if 'non-custodial parents anticipate that seeing children will enhance the satisfaction that they get from paying child support, and if they expect that paying child support will enhance the quality of time they spend with their children'. *idem*.

¹⁰¹ Seltzer *et al* supra n 98.

¹⁰² It is not clear whether any system can be created that will coerce child support only in cases where this would benefit children. Chambers has suggested that we should treat child support enforcement as within the discretion of resident parents. We effectively do so for those not receiving welfare. Were we to do so for all parents, we might trust the judgement of custodial parents about whether encouraging visitation would benefit the child. But, as Chambers notes, this system could produce fraud. Custodial parents might disclaim a desire for enforcement in order to collect directly from the father, who would otherwise have to reimburse the state. See Chambers, supra n 1. at 2603.

¹⁰³ See McLanahan *et al* supra n 89 at 251 ('Although fathers may resist initially, over time they may come to value their role in the child's life and be grateful for having been forced to "do the right thing"').

¹⁰⁴ I discuss this at greater length in Altman, supra n 80.

¹⁰⁵ Generosity at this level is not likely, fair or wise. It would almost certainly impose costs on society far beyond the public benefits of children, and would create an incentive for some families to dissolve.

¹⁰⁶ See Brinig, M. (2000) *From Contract to Covenant*, 127. (Child support, particularly post-minority for college, as way to internalize harm done to child by divorce).

¹⁰⁷ There is some research showing that child support is a small deterrent to divorce. See Nixon, (1997) 'The effect of child-support enforcement on marital dissolution', 32 *Journal of Human Resource* 159. Although child support might, in theory, encourage divorce (or non-marriage) by allowing recipients to leave a marriage more easily, its effect in making divorce more expensive for payers appears to more than counter this effect.

¹⁰⁸ See Seltzer supra n 91 at 239.

¹⁰⁹ See eg Okin supra n 35 at 183.

¹¹⁰ A recent American Law Institute publication articulates as a goal for child support that the child 'enjoy a standard of living not grossly inferior to that of the child's higher income parent'. *Principles of Family Law* supra n 30 at 3.

¹¹¹ Shiffrin thinks that sperm donors should be available in case of poverty or special medical need. See Shiffrin supra n 80 at 144-5.

¹¹² I say 'might' because it is not clear that we could easily establish that voluntary payments do not help children. Even if studies fail to confirm this benefit, we might always wonder whether we have adequately separated those who pay voluntarily from those who pay based on coercion. After all, many of those who seem to pay without coercion may do so partly based on pressure.

¹¹³ Chambers supra n 25.

¹¹⁴ See Annotation, 'Duty of one other than carrier or employer to render assistance to one for whose initial injury he is not liable', 33 *American Law Review*. 3d 301 (1996).

¹¹⁵ The no-duty-to-rescue objection also ignores the fact that we do impose duties to rescue on people who have special relationships, possibly including parents. I do not place much weight on this claim, since this article is attempting to justify the special relationship of parents to children. However, one reason for having duties to act only when a special relationship exists is that general duties to act might be too diffuse to be effective. When we impose such duties on small numbers of individuals who are easy to identify, the duty may work better. On this ground, parents seem unlike strangers. See *Prosser and Keeton on Torts* (1984) 376 (5th edn) (explaining that the problem of establishing workable rules for 'situations where fifty people might fail to rescue one' have confined duties to lend aid to cases in which special relationships exist).

¹¹⁶ See eg *L. S. Ayers and Co. v Hicks*, 220 Ind. 86, 40 N.E.2d 334 (1942) (finding store owner liable for failure to assist child hurt on escalator, even though no negligence was found, because the store owner controlled and provided the escalator); *Szabo v Pennsylvania Railroad*, 132 NJL 331, 40 A.2d 562 (1945) (holding employer liable for failure to aid employee injured on the job even though no employer negligence contributed to the injury).