Article

Regulating Reproduction: The Problem with Best Interests*

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INTRODUCTION

In 2010, a seventy-year-old woman named Rajo Devi Lohan and her husband Balla took $3000 in loans for in vitro fertilization (IVF) treatments in Baddhu Patti, India, to conceive their only child, Naveen, reportedly becoming the oldest mother in history.[1] When reports suggested Rajo was dying at age 72, commentators quickly condemned her actions and the harm

1. *World's Oldest New Mom Dying After IVF Pregnancy at Age 72*, FOX NEWS.COM (June 16, 2010), http://www.foxnews.com/health/2010/06/16/worlds-oldest-new-mom-dying-ivf-pregnancy-age/.

they would foist on her daughter, Naveen.[2] Should India have prohibited access to reproductive technologies beyond a certain maternal (and/or paternal) age, as several other countries have done?

This is but one among a series of pressing questions about reproduction: Should the State permit anonymous sperm donation? Should brother-sister or first cousin-first cousin incest between adults be made criminal? Should the State fund abstinence education? What underlies all of these seemingly disparate questions (and many others) is whether the State can permissibly attempt to influence our decisions about whether, when, and with whom to reproduce.

This turns out to be a question with far-reaching implications because such interventions take many forms, including criminal sanctions (e.g., incest laws), bodily intrusions (e.g., the sterilization of the institutionalized severely mentally retarded), the nonrecognition of certain types of contracts (e.g., the nonenforcement of surrogacy contracts in many states in the United States), government subsidization of informational programs (e.g., the funding of abstinence education), and the regulation of businesses assisting in reproduction (e.g., the U.K. law requiring that all sperm donors place identifying information in a registry available to donor-conceived children at age eighteen).

One prominent type of justification given for these (and a myriad of other) attempts to regulate reproduction is concern for the best interests of the children that will result from reproduction (sometimes also referred to as child welfare analysis). For example, in the debate over whether the State or physicians should restrict access to reproductive technology for unmarried individuals,[3] both sides cite to copious empirical literature on whether and to what extent children born into single-parent families suffer compared to those born into two-parent families.[4]

2. *Id.*

3. *See*, *e.g.*, N. Coast Women's Care Med. Grp., Inc. v. Superior Court, 40 Cal. Rptr. 3d 636, 642–45 (Ct. App. 2006) (denying fertility services to a lesbian woman due to her sexuality, marital status, or both); Andrea D. Gurmankin et al., *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 63–64 (2005).

4. *See also* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1022 (2003) (noting that studies showing advantages in

This focus on the best interests of the resulting child is, on the surface, quite understandable. In authorizing adoption, in determining which parent should have custody upon divorce, in determining when a child should be removed from its family of origin and put into child protective services, and in countless other areas of family law, the protection of the best interests of *existing* children serves as a powerful organizing principle that justifies state intervention.

While courts, legislatures, physicians, and commentators frequently speak in a parallel idiom to justify state regulation of reproduction, in this Article I show that such justifications are problematic. Drawing on insights from bioethics and the philosophy of identity relating to the so-called "Non-Identity Problem," I show why this form of justification, at least as typically stated, is fallacious. Unless the State's failure to intervene would foist upon the child a "life not worth living," any attempt to alter whether, when, or with whom an individual reproduces cannot be justified on the basis that harm will come to the resulting child, since but for that intervention the child would not exist. To put the point in the language of distinctions I have developed in earlier work,[5] legislatures, judges, and scholars problematically treat the reasons justifying state interference with an individual's right to remain the legal parent of an *existing* child as fully overlapping with the reasons justifying state interference with an individual's (potential) right to become a genetic parent and bring a child *into existence*.

The best interests argument acts as a smoke screen that prevents us from excavating the true justification for these

two-parent households "have nothing to do with biology," but instead are related to increased "income, supervision, and parental attention"); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 861–65 (2005) (claiming that detriments to offspring of having single parents persist even when income is controlled for). *Compare*, *e.g.*, Susan Golombok & Fiona Tasker, *Donor Insemination for Single Heterosexual and Lesbian Women: Issues Concerning the Welfare of the Child*, 9 HUM. REPROD. 1972, 1972 (1994), *with* Ethics Comm., Am. Soc'y for Reprod. Med., *Access to Fertility Treatment by Gays*, *Lesbians*, *and Unmarried Persons*, 86 FERTILITY & STERILITY 1333, 1334 (2006), *and* Holly J. Harlow, *Paternalism Without Paternity: Discrimination Against Single Women Seeking Artificial Insemination by Donor*, 6 S. CAL. REV. L. & WOMEN'S STUD. 173, 196–98 (1996).

5. *See* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140–41 (2008) [hereinafter Cohen, *Constitution*]; I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1122 (2008) [hereinafter Cohen, *Genetic Parent*].

kinds of interventions. My larger project is to show a "secret ambition" of best interests reasoning, whose significance "lies not in what it says but in what it stops us from saying."[6] That is, the way the "idiom takes the political charge out of contentious issues and deflects expressive contention away from the" law of reproduction.[7] Because these regulations of reproduction are often justified by appeals to child welfare, we should understand the dominance of that discourse as a palatable way of arguing for much more controversial (illiberal, eugenic, etc.) ideas. While I am not claiming that there is an intentional misrepresentation on the part of scholars, legislatures, etc.—reliance on best interests of the resulting child (BIRC) reasoning may be the product of a failure to adequately reflect on the issue, or what those disposed to psychoanalysis might call repression—I do view my project as an unmasking one wherein I seek to reveal the real arguments that *must* stand behind these policies if they are to be justified, and expose those arguments to full scrutiny.[8]

This Article proceeds as follows. I begin in Part I by offering a framework that describes the dimensions of the regulation of reproduction. I show why best interests reasoning—a justificatory idiom prominent in family law—seems from a political theory perspective to be a very appealing method of justifying government intervention in the reproductive area. I then show the subtle error made when transposing these arguments from the context of protecting already-existing children to the question of government programs that affect who will come into existence. Here I explain the Non-Identity Problem and show its implicit acceptance in the jurisprudence rejecting the wrongful life tort.

In Part II, I show that a wide swath of state interventions aimed at altering when, whether, and with whom we produce

6. I borrow the term "secret ambition" from Dan Kahan's deployment of it in respect to "deterrence," Dan Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 415–16 (1999), although the idea obviously predates the term.

7. *Id.* at 417. More precisely, Kahan's claim is that "the rhetoric of deterrence displaces an alternative expressive idiom that produces incessant illiberal conflict over status" such that "[c]itizens of diverse commitments converge on the deterrence idiom to satisfy social norms against contentious public moralizing; public officials likewise converge on it to minimize opposition to their preferred policy outcomes." *Id.*

8. In this respect my approach differs from Kahan's, whose attitude toward the "secret ambition" of deterrence is more mixed. *Id.* at 477–500.

are nevertheless frequently justified (by courts, legislatures, and scholars) on precisely the BIRC justification that the Non-Identity Problem suggests is problematic. I review examples of the (mis)use of this reasoning to support policies such as abstinence education, the prohibition on brother-sister incest, the barring of anonymity in sperm and egg donation, the preventing of reproductive technology access for single individuals, and others. In so doing I introduce a new distinction between what I call "perfect" and "imperfect" Non-Identity Problems, and show that in the perfect cases BIRC justifications are a normative nonstarter.

In Part III, I consider three attempts to reformulate the BIRC justification in a way that is not self-defeating and can support the types of interventions I have discussed in Part II. The first attempts to expand the category of lives not worth living for which no Non-Identity Problem occurs. The second draws a distinction between perfect and imperfect Non-Identity Problems and suggests BIRC reasoning is only problematic for the perfect cases. The third adapts a framework offered by philosophers for the wrongfulness of creating children with lives not worth living that does not rely on BIRC-type reasoning by appealing to what they call "non-person-affecting principles" and "same-number substitutions" of higher for lower welfare persons. I show that each is problematic as a BIRC substitute for a number of reasons. Finally, I briefly examine what significance these normative criticisms of BIRC and its three reformulations have for the constitutionality of these laws.

If BIRC and its reformulations fail, are these regulations of reproduction wholly unjustified? In the conclusion, I briefly plot four very different ways of justifying the regulation of reproduction on substitute theories relating to legal moralism, virtue ethics, reproductive externalities, and wronging-while-overall-benefiting. Developing these theories and their problems is a task I undertake in a companion paper that will come out in a different issue of this Journal.[9]

If the argument I make here succeeds, it shows that a large swath of the judicial, legislative, and academic discourse about regulating reproduction is incoherent and that many regulations of reproduction are, based on the justifications given for them and reasonable reformulations thereof, normatively and

9. I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. (forthcoming Apr. 2012).

(to a lesser extent) constitutionally problematic. Once BIRC justifications are rejected, it becomes apparent that either these forms of reproductive regulation are unjustified or quite different sorts of justifications must be relied on, carrying disturbing illiberal or eugenic premises. My aim is nothing short of re-writing our way of thinking about the regulation of reproduction.

I. THE REGULATION OF REPRODUCTION AND THE ATTRACTION OF (AND PROBLEM WITH) BEST INTERESTS REASONING

In this Part, I set out a taxonomy of state interventions aimed at influencing reproductive technology. I show that one form of justification for intervention, what I call Best Interests of the *Resulting* Child (BIRC) reasoning, has been transposed from family law where its analogue, Best Interests of *Existing* Children reasoning, serves as one of the organizing principles. I show that it is an attractive kind of justificatory move, in political philosophical terms, because it marshals a particular kind of third-party effect as a ground for limiting autonomous action: harm to a vulnerable third party to whom parents stand in a fiduciary relationship—their child. I then demonstrate why reasoning associated with the Non-Identity Problem makes this transposition problematic. Finally, I show that my argument has implicitly been accepted in one area of U.S. law: the rejection of wrongful life tort suits in almost every state.

All this serves as a prelude to showing in the next Part that, despite this problem with BIRC justifications, a large number of interventions that seek to influence whether, when, and with whom we reproduce are indeed justified by courts, legislatures, and scholars on exactly this problematic ground.

I should make clear up front that my starting point about human reproduction is a modestly libertarian view; the State has to offer some justification for limiting individuals' reproductive choices, although I am open to such justifications taking many different forms.[10]

10. While I think this is an intuitive and logical starting point that matches the preconceived notions most of us have about our reproductive lives, it is not the only possible one. We could instead hypothetically begin with a view that individuals have no freedom to reproduce except in the cases where the State grants them that privilege and start by asking whether a particular instance of reproduction is one that the State should justifiably permit. That flip would certainly change things rhetorically, but the same intellectual

A. THE THREE DIMENSIONS OF STATE INTERVENTIONS AIMED AT INFLUENCING REPRODUCTION

I find it useful to describe State attempts to influence reproduction through a taxonomy with three dimensions I have come up with, which I will return to throughout the Article.

The first dimension is the *target reproductive decision* (or simply "target" for short) the State seeks to influence. For our purposes we can crudely distinguish three such targets: whether, when, and with whom individuals reproduce.[11]

Programs that sterilize the severely mentally ill or deny access to reproductive technologies to those over age fifty affect *whether* these individuals will reproduce. Abstinence education aims to delay reproduction by teenagers or other unmarried individuals and thus influences *when* individuals reproduce. Prohibitions on brother-sister incest, programs aimed at carrier screening for Tay-Sachs or other heritable genetic disorders, and statutes barring sperm donor anonymity attempt to influence *with whom* individuals reproduce.

The second dimension goes to *the means by which the State seeks to influence* the target decisions ("means" for short). These interventions can roughly be ordered from strongest to weakest in terms of their level of intrusion. *Physical alteration* is the most intrusive, for example, sterilization of the severely mentally retarded. *Criminal prohibition* is also extremely intrusive, for example, making it a crime to engage in brother-sister incest or to purchase surrogacy services. Less intrusively, the State may make *certain status determinations immutable* (particularly as to parentage) and/or make *contracts surrounding reproduction unenforceable*; for example, California treats gestational surrogacy contracts (where the surrogate carries the fetus to term but does not contribute the egg for fertilization) as enforceable but not traditional surrogacy contracts (where the surrogate is both the genetic mother and carries the fetus to term).[12] More weakly, the State may also create *default status determinations and set the altering rules*, for example, the older

problem would largely persist. Thus, while I offer my analysis here in the more common frame, those who are attracted to the other frame can reverse engineer what I say.

11. For other purposes, the "how" dimension—for example, whether to permit cloning as a form of reproduction—may also matter, but not for the examples I discuss.

12. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776, 784 (Cal. 1993); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900–01 (Ct. App. 1994).

version of the Uniform Parentage Act still in place in many jurisdictions absolves a sperm donor of parental responsibilities only if the recipient was married and the procedure was done through a licensed physician, thereby setting conditions to overcome a default parentage rule.[13] Still less intrusively, the State may *selectively fund* certain types of reproductive assistance—in the United States a number of states use state-level insurance mandates to force insurers to cover IVF (an extremely expensive procedure), but use them selectively to fund only particular types of reproduction through language limiting it to married individuals, thus excluding single individuals and gays and lesbians.[14] An even less intrusive intervention is *informational*, for example, the State's funding of abstinence education or public health campaigns encouraging carrier testing for Tay-Sachs and other heritable genetic disorders.

The third dimension goes to the justification or, more often, justification*s* that are, or could be, offered in favor of these interventions ("justification" for short). At a high and somewhat crude level, it is useful to distinguish four different families of justifications: (1) the Harm Principle, tracing back to John Stuart Mill, suggesting that prevention of harm to others is a justification for state action; (2) Paternalism, the argument that the prevention of harm to the actor herself—usually calling on some conception of false consciousness or bounded rationality—is a justification for state action; (3) Wronging Without Harming, the argument that preventing the wronging (usually in a deontological sense) of another, even if one does not harm him, is a justification for state action; finally, (4) Moralism and Virtue, suggesting that though a particular action causes neither harm to the actor nor to third parties, its negative effects on public morality generally or the virtue/character of individual actors is a justification for state action.[15]

13. UNIF. PARENTAGE ACT § 5(b), 9B U.L.A. 377, 408 (1973).

14. *See, e.g.*, I. Glenn Cohen & Daniel Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should It Matter?*, 95 MINN. L. REV. 485, 536–40 (2010).

15. *Cf.* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 26–27 (1984) (developing a much-fuller taxonomy of justifications for criminal law interventions). The non-person-affecting principle approach I discuss in Part III may actually fall between boxes of this taxonomy. As always, taxonomies are useful rough approximations of the world, but like maps, they necessarily lose some of the details.

For our purposes, it is useful to further subdivide the Harm Principle form of justification to distinguish between claims of harm to the children (the BIRC justification) and claims of harm to other third-parties (a reproductive externalities justification I discuss toward the end of this Article).

The three dimensions and their elements are summarized in Table 1 and can be used to describe many regulations of reproduction.

For example, abstinence education is aimed at influencing *when* individuals reproduce (target), does so through information provision (means), and is typically justified based on a Harm Principle rationale targeting the interests of the children who will result from teenage pregnancy as well as legal moralism aimed at discouraging premarital sex (justification), though other forms of justification are possible. Prohibitions on sperm donor anonymity influence *with whom* individuals reproduce (target) through criminal prohibition (means) and are typically justified through a Harm Principle rationale targeting the interests of the children who will result (justification).

As is often the case in the fractal world of legal analysis, things can thus get much more complex, but for present purposes these three dimensions are a useful starting point and I will only add additional layers of complexity as needed.[16] While I have designed this taxonomy for this project and its aims, I also think the taxonomy is very useful on its own.

16. To wit, I will add a fourth dimension relating to perfect and imperfect Non-Identity Problems and I briefly discuss distinctions as to the severity of the reproductive interests that are being stymied—for example, a governmental intervention that prevented you from having an eighth genetically related child when you already had seven might be viewed quite differently than an intervention that prevented you from having any genetically related children, and short delays in the timing of reproduction might be thought of as less severe than longer ones. *See, e.g.*, Dan W. Brock, *Shaping Future Children: Parental Rights and Societal Interests*, 13 J. POL. PHIL. 377, 380 (2005); Cohen, *Genetic Parent*, *supra* note 5, at 1194; Daniel Statman, *The Right to Parenthood: An Argument for a Narrow Interpretation*, 10 ETHICAL PERSP. 224, 227–228 (2003). One could also draw an additional prior distinction between State attempts to influence the reproduction of others (the focus of this Article) versus attempts by other individuals (for example, charities offering voluntary sterilization programs for poor women).

Table 1: 3 Dimensions of Regulating Reproduction

1. Target Reproductive Decision
    a. When One Reproduces
    b. Whether One Reproduces
    c. With Whom One Reproduces
2. Means By Which the State Influences Reproduction (ordered from most to least intrusive)
    a. Physical Alteration
    b. Criminal Prohibition
    c. Immutable Status Determination
    d. Unenforceability of Contract
    e. Default Status Determination
    f. Selective Funding
    g. Information Provision
3. Justification Offered for Intervention
    a. Harm Principle
        i. Harm to Child ("Best Interests of Resulting Child")
        ii. Harm to Third Parties ("Reproductive Externalities")
    b. Paternalism
    c. Moralism and Virtue (Especially Legal Moralism)
    d. Wronging Without Harming

B. THE PROMINENCE OF BEST INTERESTS REASONING IN FAMILY LAW AND ITS ATTRACTION AS A JUSTIFICATORY MOVE

As the mapping in the prior Section suggests, the BIRC form of justification for regulation of reproduction focuses on a Millian Harm Principle[17] and applies it to a particularly vulnerable group—children who result from reproduction. From a political theory perspective, this idiom is a very attractive way to justify state interference with reproductive decision making because it justifies that interference for the sake of preventing harm to society's most vulnerable, children.[18] Harm Principle

17. *See generally* JOHN STUART MILL, ON LIBERTY (Albury Castell ed., F.S. Crofts & Co. 1947) (1859) (establishing the Millian Harm Principle).

18. To be precise, on at least some usages, what is called best interests actually *exceeds* that which is prohibited by the Harm Principle. Richard F. Storrow has captured a similar point nicely: "although exposing children to serious harm is of necessity inconsistent with their best interests, what is not best for a child does not necessarily harm the child." Richard F. Storrow, *The Bioethics of Prospective Parenthood: In Pursuit of the Proper Standard for Gatekeeping in Infertility Clinics*, 28 CARDOZO L. REV. 2283, 2300–01 (2007). Are the types of cases I discuss in this Article harm prevention or benefit conferral? To ask the question demonstrates the baseline problem we face, a point I return to in discussing enhancement below. Nevertheless, because my goal is

arguments are typically accepted even by libertarians as a proper justification for liberty-limiting government regulation, including criminal sanctions. Further, with harm to children arguments there are no issues of consent or contributory fault, and as a matter of human psychology, the suffering of children is a particularly potent call for action. Thus, BIRC is an attractive justificatory idiom because it relies on relatively uncontroversial premises that permit an overlapping consensus between otherwise divergent comprehensive moral theories, such as welfarism, libertarianism, etc.[19]

BIRC is also an attractive justificatory idiom because it can draw on a parallel idiom in family law as to the importance of Best Interests of *Existing* Children, one of the central organizing principles of family law. Although it is sometimes called child welfare or harm prevention, I will just use best interests from here on out. This idiom has origins in the United States going back to at least the 1830s.[20] For example, in determining child custody in a divorce proceeding, many states suggest that the best interests of the child is to be considered, with thirty-five states listing the welfare of the child as the sole consideration.[21] Many state statutes have a presumption that the legal

to defeat the application of best interests reasoning in this context, I want to be as generous as possible to my interlocutor. Therefore, for present purposes I will grant that all interventions justified on BIRC reasoning that I discuss can benefit from the political theoretical cover of the Harm Principle, even though I think the point is arguable. As a terminological matter it might be more precise to describe the Harm Principle as a commitment to the view that harm to others is the *only* basis for justifying the State's ability to limit liberty, but in what follows I will speak more loosely about going "beyond" the Harm Principle versus sticking to it.

19. *E.g.,* JOHN RAWLS, POLITICAL LIBERALISM 144 (rev. ed. 2005). Of course, even the command "protect children from harm" may not forge a complete overlapping consensus in that it may require subscription to particular concepts of what constitutes "harm," for example, whether being born deaf harms children or instead enables them to be a participant in deaf culture. *See*, *e.g.*, I. Glenn Cohen, *Intentional Diminishment*, *the Non-Identity Problem*, *and Legal Liability*, 60 HASTINGS L.J. 347, 349–50 (2008). But the BIRC approach, if it was valid, would certainly be able to forge much *more* of an overlapping consensus than many of the views I canvass below.

20. *See*, *e.g.*, DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 653 (2006) (citing MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 241 (1985)); Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 340–50 (2008).

21. *See* James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 907–11 (2003) (collecting statutes).

parent will have visitation rights with the child even when they are the noncustodial parent but that the court may terminate those rights on a showing that the child's welfare would be seriously endangered.[22] In adoption, the state investigates potential adopters, qualifying some and disqualifying others, to ensure that allowing the adoptive parents to become the parents of the child is in the child's best interests.[23] Despite constitutional law protecting parents' right to raise their child in their faith, religiously motivated refusal of needed treatment for the child will be overruled when the activity endangers a child's life and in some jurisdictions if it endangers the child's health as well.[24]

In these and other family law settings the central model is the same: "[t]he state appropriately steps in, as *parens patriae* protector of the welfare of these nonautonomous persons, to act in their behalf, choosing for them" when their welfare is threatened by parental action.[25] From a political-theory perspective, the best interests justification is a very powerful one, overruling what would otherwise be a forbidden state intrusion into the private realm of family decision making.

One way of understanding the prominence of BIRC justifications for the regulation of reproduction, then, is as transposition of reasoning from *family law* into *the law of reproduction*. The analogy goes: protecting the best interests of existing children is to the constitutional protections against interference in child rearing and legal parenthood (family autonomy) *as* protecting the best interests of resulting children is to the constitutional protections against interference in reproductive decisions (reproductive autonomy). Both are constitutionally protected spheres where the state is usually restrained from in-

22. *See id.* at 933–34 (collecting statutes).

23. *See*, *e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 9-308(b) (2002) (mandating court consideration of potential adoptive parents); Dwyer, *supra* note 21, at 882–904 (surveying existing adoption law by state).

24. *See*, *e.g.*, Kei Robert Hirasawa, Note, *Are Parents Acting in the Best Interests of Their Children When They Make Medical Decisions Based on Their Religious Beliefs?*, 44 FAM. CT. REV. 316, 317–24 (2006) (collecting cases and histories); Laura M. Plastine, Comment, *"In God We Trust": When Parents Refuse Medical Treatment for Their Children Based Upon Their Sincere Religious Beliefs*, 3 SETON HALL CONST. L.J. 123, 142 & n.79 (1993).

25. James G. Dwyer, *The Child Protection Pretense: States' Continued Consignment of Newborn Babies to Unfit Parents*, 93 MINN. L. REV. 407, 411 (2008).

terfering but where such interference is nevertheless justified in order to protect child welfare.

To be a little more precise, on the *existing* child side, U.S. Supreme Court decisions like *Meyer v. Nebraska*,[26] *Pierce v. Society of Sisters*,[27] *Prince v. Massachusetts*,[28] and *Wisconsin v. Yoder*[29] all recognize a broad family autonomy principle protecting parental-rearing decisions but also the need to subordinate family privacy when there are serious threats to child welfare. As is relevant for our purposes, the reason *why* the State can permissibly interfere in parental decision making in order to protect child welfare appears somewhat over-determined in these family privacy cases. The predominant strand ties it to child vulnerability: children are at the mercy of the parents, walled off from the assistance of any other agents of protection and socialization but for state intervention.[30] This strand connects the protection of children to the protection of other vulnerable populations such as mentally incompetent adults, with the State stepping in as *parens patriae*.[31] There is, however, a second strand present in these opinions in which protecting child welfare is merely an instrumental good in ensuring future citizens capable of participating in a democratic society. We can call these two the "vulnerability" and "social planning" strands, respectively. As to existing children, the two strands operate to some extent in tandem in that the State intervenes to protect children from, for example, an abusive home environment because the child is vulnerable *and* because failure to do so will result in a child who cannot appropriately carry the mantle of citizen. In the realm of regulating reproduction, however, the two strands pull apart conceptually. I will argue that there is a pervasive tendency to substitute the language of children's interest for what can really be justified only on the basis of societal interest.

26. 262 U.S. 390, 401 (1923).

27. 268 U.S. 510, 534–35 (1925).

28. 321 U.S. 158, 165–66 (1944).

29. 406 U.S. 205, 221–22, 230–34 (1972).

30. *See*, *e.g.*, Helen M. Alvaré, Gonzales v. Carhart: *Bringing Abortion Law Back into the Family Law Fold*, 69 MONT. L. REV. 409, 415–16 (2008) (arguing that this jurisprudence reflects the Lockean premise that "children are self-evidently vulnerable, particularly relative to adults, and require special solicitude and protection" and that "[p]arents have the first duty and first right to shield their vulnerable children; if they fail, the state may intervene on the children's behalf").

31. Dwyer, *supra* note 25.

C. THE PROBLEM WITH BEST INTERESTS

As I have said, there is a logical problem with attempts to have best interests reasoning play a limiting role in reproductive autonomy analogous to its role limiting family autonomy. The problem is that in the latter context there is an appeal to the best interests of the *existing* child while in the reproductive context the appeal is actually to best interests of the *resulting* child. Whenever the proposed intervention will itself determine whether or not a *particular* child will come into existence, best interests arguments premised on *that* child's welfare are problematic.

This point is at the core of the "Non-Identity Problem" developed by Derek Parfit, a problem that has been the subject of a great deal of philosophical attention since the publication of Parfit's *Reasons and Persons* in 1984.[32] The punch line of the problem is that we cannot be said to harm children by creating them as long as we do not give them a life not worth living.[33] I will have more to say about the boundaries of the concept of a "life not worth living" in Part III, but the basic idea is that it is a life so full of pain and suffering and so devoid of anything good that the individual would prefer never to have come into existence.

The easiest version of the problem to see involves regulation of *whether* individuals reproduce, for example, the denials of access to reproductive technology to gay, aged, or single parents. Imagine that sixty-year-old Ethel wants to have a baby through reproductive technology and assume *arguendo* that this child, Maxwell, will be worse off (physiologically, psycho-

32. DEREK PARFIT, REASONS AND PERSONS 358–59 (rev. ed. 1987); *see, e.g.*, ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 224 (2000); Dan W. Brock, *The Non-Identity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 BIOETHICS 269 (1995); Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 27 HASTINGS CENTER REP. 7, 12–13 (1997); James Woodward, *The Non-Identity Problem*, 96 ETHICS 804 (1986). For an in-depth treatment in the context of access to reproductive technologies, see John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7 (2004). For my own discussion of the problem in the context of tort liability for intentionally creating children with disabilities, see generally Cohen & Chen, *supra* note 14.

33. This is sometimes also referred to as a "life *not* worth living." *E.g.,* BUCHANAN ET AL., *supra* note 32, at 233; FEINBERG, *supra* note 15, at 98–104; Seana V. Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 118 (1999).

logically, etc.) than would the average child born to a woman in her twenties. We cannot say that a state law preventing Ethel's access to reproductive technology at her age furthers the welfare of Maxwell, because if the State blocks that access Maxwell will never exist and, so long as he has a life worth living, coming into existence does not harm him. Thus, any state intervention influencing *whether* individuals reproduce (absent lives not worth living)[34] cannot be justified by BIRC reasoning.

A similar problem extends to attempts to influence when and with whom individuals reproduce. Parfit's primary discussion of this problem in *Reasons and Persons* is that of a fourteen-year-old girl who has a child and gives it a bad start in life by not waiting to have a child until she is older.[35] Parfit states that we tried and failed to persuade her on the grounds that it is worse for her and for her resulting child, that the child would have a bad start in life, and asks:

> Were we right to claim that her decision was worse for her child? If she had waited, this particular child would never have existed. And, despite its bad start, his life is worth living. Suppose first that we do *not* believe that causing to exist can benefit. We should ask, 'If someone lives a life that is worth living, is this worse for this person than if he had never existed?' Our answer must be No. Suppose next that we believe that causing to exist *can* benefit. On this view, this girl's decision benefits her child.
>
> On both views, this girl's decision was not worse for her child. When we see this, do we change our mind about this decision? Do we cease to believe that it would have been better if this girl had waited, so that she could give to her first child a better start in life? I continue to have this belief, as do most of those who consider this case. But we cannot defend this belief in the natural way that I suggested. We cannot claim that this girl's decision was worse for her child. What is the objection to her decision? This question arises because, in the different outcomes, different people would be born. I shall therefore call this the *Non-Identity Problem*.[36]

Thus, here too the usual (what Parfit calls "person-affecting")[37] conception of harm of the BIRC argument cannot be the basis for justifying attempts to alter *when* individuals reproduce—such as state funding of teenage abstinence programs or implanting of Norplant or other temporary forms of birth control in women convicted of multiple counts of drug

34. From here on in I stop repeating the proviso "absent lives not worth living" but intend it to be implied throughout.

35. PARFIT, *supra* note 32, at 358.

36. *Id.* at 358–59.

37. *Id.* at 393–95.

possession.[38] A similar logic applies to interventions regulating *with whom* individuals reproduce, for example the criminalization of adult brother-sister incest in the United States and many foreign countries.

At this juncture it is worth clarifying that none of this depends on any assumption that children are harmed if they are not brought into existence. Instead, I share with others the view that "no one is harmed in not being created, because there is no one to be harmed if we do not create someone . . . ."[39] Thus, accepting this insight in no way implies a conclusion that parents do wrong by failing to have the largest number of children they can or that they harm a particular child by failing to create the child.[40] All it entails is that no one is harmed by being created if he or she is given a life worth living. I emphasize this point, because it is common source of confusion.

In one respect, the "whether" case is an easier one for ruling out BIRC justifications than the "with whom," and especially the "when" case. In these latter cases the claim depends on the assumption that changing which sperm meets which egg, that is changing which child *genetically* speaking is conceived, is *sufficient* to produce a Non-Identity Problem that rules out BIRC justifications. This is a relatively weak assumption. It does not require subscription to a strong form of genetic essentialism—the view that your genes determine who you are—but

38. To be clear, in the cases discussed in this Article, the delay has to be one as to when sperm and egg meet. Compare that to a different delay: a husband and wife fertilize pre-embryos as part of IVF at Time 1, but choose to implant the pre-embryo either at Time 1 + 1 year, or after cryopreservation at Time 1 + 5 years. In many of Part II's examples, the regulation that influences when and with whom we reproduce will also change other facets of an individual's life—like the date on which he or she is born or who his or her rearing parents are—that might *also* be thought to alter identity in the relevant sense. While I do not think these additional facts are *necessary* to produce a Non-Identity Problem (i.e., it is *enough* for a different sperm-egg combination to occur), I leave open the question of whether they might nonetheless be *sufficient* to do so in some cases even if the same sperm meets the same egg. If they were sufficient, a still-wider swath of the regulation of reproduction might be subject to the Non-Identity Problem; for example, rules regarding the enforcement of pre-embryo disposition agreements that may alter when pre-embryos are implanted. *See generally* Cohen, *Genetic Parent*, *supra* note 5.

39. F. M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 72 (2000).

40. It is at least possible that this conclusion *may* be entailed by one of the competitor views to BIRC as a justification for regulating reproduction, the non-person-affecting principle approach, a matter I discuss below. *See infra* Part III.C.

is instead entirely compatible with the view that given a certain complement of genes you could become any number of different kinds of people from the point of view of what philosophers sometimes call "narrative identity."[41] Genetic identity does not ensure narrative identity—identical twins share the same genes but are different people. Thus, it is also not a claim about identity and lack thereof in all senses of the word. It is the weak claim that if we want to know whether the person that results from the particular sperm and egg combination would be harmed, we cannot say that it would further the welfare of that person if we instead substituted a different sperm and egg combination. Philosophers often refer to this as "numerical identity," two entities are not the same because there are two of them.[42]

To put it tangibly: my mother was married once, without children, before she had me with her second husband. Imagine we concluded (counterfactually I hope!) that on the day of my conception she had instead conceived with her first husband the resulting child—call him Gabriel—who would have been healthier or in other ways had a better life than I did. All the Non-Identity Problem requires accepting is that if we want to know whether my life harms me (i.e., is Glenn harmed) it would be wrong to compare Glenn's life to the life Gabriel would have had. That comparison might be relevant for some other purposes—indeed the non-person-affecting principle approach I discuss in Part III focuses on it—but is not relevant to the question of whether *Glenn* has been *harmed* by being born. For that question the correct comparison is Glenn's life versus Glenn's nonexistence, not Glenn's life versus Gabriel's. I believe Parfit is right on this issue of alterations of "when" or "with

41. David Shoemaker, *Personal Identity and Ethics*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2008), http://plato.stanford.edu/entries/identity-ethics/.

42. Harold Noonan, *Identity*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta, ed., rev. ed. 2009), http://plato.stanford.edu/archives/entries/identity/ ("To say that things are identical is to say that they are the same. 'Identity' and 'sameness' mean the same; their meanings are identical. However, they have more than one meaning. A distinction is customarily drawn between *qualitative* and *numerical* identity or sameness. Things with qualitative identity share properties, so things can be more or less qualitatively identical. Poodles and Great Danes are qualitatively identical because they share the property of being a dog, and such properties as go along with that, but two poodles will (very likely) have greater qualitative identity. Numerical identity requires absolute, or total, qualitative identity, and can only hold between a thing and itself.").

whom" we reproduce, and in what follows I will examine the consequences for the law.[43]

I have also purposefully restricted my canvas in this Article to cases where the State seeks to influence who will be *conceived* not who will be *born* to bracket (for present purposes) three additional more controversial questions. The first question concerns whether Non-Identity Problems can result from genetic manipulations of early embryos, and which kinds of manipulations—an issue I have discussed in other work concerning tort liability for parents who use reproductive technologies to purposefully create children with disabilities; these cases raise the further question of whether genetic manipulations rather than changing conception can give rise to Non-Identity Problems.[44] The second question concerns the interplay between Non-Identity Problems and the abortion right, a case I believe requires a quite different analysis: On the one hand, while no one is harmed if not *conceived*, on some views of fetal personhood the fetus may be harmed if *aborted*, creating a divergence from my cases. On the other hand, for some writers that defend the abortion right as a right not to be a gestational parent that is tied to bodily integrity, that right exists irrespective of fetal person such that this divergence may be irrelevant.[45] Thus, my analysis here does not necessarily cut in any direction on the abortion debate, except to render more problematic a small strand of reasoning occasionally presented that parallels BIRC by defending the abortion right on the basis of harm to children of growing up unwanted or out-of-wedlock.[46]

43. For those who are not unpersuaded, the analysis of regulations that cover many of the interventions in Part II on "whether" individuals reproduce should still be relevant, since it does not rely on this tie between genes and identity. How the Non-Identity Problem interfaces with religious views of ensoulment I leave to religious scholars and self-consciously do not address here.

44. In a symposium issue in which we both participated, Kirsten Smolensky argued that such manipulations can never create Non-Identity Problems, Kristen Smolensky, *Creating Children With Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 331–36 (2008), while I argued against that conclusion, Cohen, *supra* note 19, at 350–59.

45. *See*, *e.g.*, Cohen, *Genetic Parent*, *supra* note 5, at 1132; Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48–49 (1971) (grounding a defense of abortion in the thought experiment of waking up one morning to find a world-famous violinist connected to your vital organs without your permission).

46. That strand is one way to read the passage in *Roe v. Wade* noting that "[t]here is also the distress, for all concerned, associated with the unwanted

The third question relates to regulation of multiple gestation, made (in)famous by the "octomom" news coverage.[47] Whether Non-Identity Problems occur here might depend on how multiple gestation came about (e.g., multiple implantation versus fertility drug use) and whether Non-Identity Problems occur with harms to already-existing pre-embryos. There are many complications here—indeed one might conclude that some of the multiple gestating pre-embryos are harmed while others are not[48]—but for this Article I stick to simpler cases which, as we will see, are not nearly as simple as they might appear.

D. AN ANALOGY TO WRONGFUL LIFE CASES

At this juncture some readers might react: "That is philosophically interesting, but it seems like an intriguing puzzle that would never motivate judges or other legal actors." To the contrary, there is an area of law where courts and legislatures

child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." 410 U.S. 113, 153 (1973).

47. Randall C. Archibold, *Octuplets, 6 Siblings, and Many Questions*, N.Y. TIMES, Feb. 3, 2009, http://www.nytimes.com/2009/02/04/us/04octuplets.html?ref=nadyasuleman.

48. To hum only the first few bars of a very complex set of questions: first imagine a woman is deciding how many of six pre-embryos to implant at once. If we knew that the prevailing legal rule would cause her to implant all six at once or each of the six seriatim, one might not think there is a Non-Identity Problem since the same six (genetically speaking) children will come into existence, the only question is whether they will suffer the deficits of womb sharing or not. Even this conclusion will depend on the issue alluded to above, *supra* note 38, of whether changes in sperm-egg combination are only sufficient or actually necessary to produce a Non-Identity Problem. Contrast this with a case where which of two legal rules was adopted to regulate multiple gestation will cause the prospective mother to either implant all six at once, or only implant two pre-embryos seriatim (due to cost or some other reason). Now there is no Non-Identity Problem as to the two, because the two would have been implanted either way, but there may be a Non-Identity Problem as to the four whose implantation depends on the prevailing legal rule. Actually, on some views about whether fertilized pre-embryos are the kinds of things that are harmed by not being implanted, the answer here might depend on whether the prevailing legal rule alters how many pre-embryos are *implanted* versus how many are f*ertilized* to begin with. Finally, contrast these two cases with still another case where multiple gestation occurs due to the use of a fertility drug, and but-for the use of the fertility drug all the fetuses that come into being would be the result of different sperm-egg combinations—here it seems as though the Non-Identity Problem affects all of the fetuses and thus the claim that the fertility drug should be banned due to harm to these children. This is merely a taste of the complexities involved in reasoning about the Non-Identity Problem in the multiple gestation context, one of the reasons I put it to the side in this Article since it deserves its own separate analysis elsewhere.

have implicitly paid attention to insights akin to those of the Non-Identity Problem: wrongful life tort suits. Thus, even a judge or scholar uninterested in the philosophical soundness of the BIRC justification should be troubled by the doctrinal rejection of the equivalent argument in a cognate area of law.

Although the nomenclature is somewhat fluid, "wrongful birth" suits are typically brought by parents of an unhealthy (but planned for) child against the medical professional who performed a genetic test on them or the fetus, or the one who interpreted the test or informed them of the results. The claim is that the professional behaved negligently, and but-for that negligence (i.e., had the parents received the proper results) the parents would have avoided conception or terminated the pregnancy.[49] By contrast, in a "wrongful life" suit *the child* that results brings action as him or herself under similar circumstances, with the claim being that "the operable injury is the child's life itself, with nonexistence identified as the preferred alternative."[50]

Only tort liability in wrongful life cases would run afoul of the Non-Identity Problem because (assuming they are given a life worth living) the children born cannot be said to be harmed by their conception, for had their parents been properly informed of the risk of their health difficulties and delayed conception or chosen a different reproductive partner, they would not have come into existence; instead a different child would have. In a wrongful birth case the parents claim that *they* have been harmed, *not* that the child has been, so no Non-Identity Problem arises. While they seldom speak in philosophical terms, this key insight of the Non-Identity Problem has been implicitly accepted by the federal courts and the vast majority of state courts when they reject wrongful life torts.[51]

49. *See*, *e.g.*, Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691 (Ill. 1987) (Hemophilia B); Viccaro v. Milunsky, 551 N.E.2d 8 (Mass. 1990) (anhidrotic ectodermal dysplasia). For a listing of leading cases by jurisdiction, see Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 114, 160 n.141 (2005).

50. *E.g.,* Hensel, *supra* note 49, at 143. Both can be contrasted with "wrongful pregnancy" or "wrongful conception" cases, in which parents sue for the birth of a healthy but unplanned for child, often the result of a negligently performed tubal ligation or other procedure aimed at blocking reproduction. *E.g.,* Simmerer v. Dabbas, 733 N.E.2d 1169, 1172 (Ohio 2000); Hensel, *supra* note 49, at 151 n.53, 152–53 & 153 n.61.

51. Hensel, *supra* note 49, at 161 (noting only three U.S. states permit wrongful life suits with the rest rejecting them).

Siemieniec v. Lutheran General Hospital, for example, involved a Mother who sought genetic counseling regarding her first trimester fetus due to the existence of other children in the family with Hemophilia.[52] She told the doctor she would seek an abortion if the child was likely to be a hemophiliac, but due to a misdiagnosis ended up giving birth to a child with Hemophilia B and brought actions for wrongful life and wrongful birth.[53] While the Illinois Supreme Court permitted the wrongful *birth* cause of action to go forward it rejected the wrongful *life* action, sharing with other courts "the belief that human life, no matter how burdened, is, as a matter of law, always preferable to nonlife," and thus it was "reluctant to find that the infant ha[d] suffered a legally cognizable injury by being born with a congenital or genetic impairment as opposed to not being born at all."[54] In chiding the lower court for analogizing to an ordinary prenatal injury claim, the court noted that in those cases "if the defendant had not been negligent, then the child would have been born healthy."[55] By contrast,

> [r]ecognition of a cause of action for wrongful life in this case would . . . require this court to find [the child] had an interest in avoiding his own birth, i.e., that there is a fundamental legal right not to be born when birth would necessarily entail a life of hardship,[56]

and the court reasoned that "[s]uch a finding, however, would essentially require us to possess the divine ability to determine what defects should prevent an embryo from being allowed life so that denial of the opportunity to terminate the existence of such a defective child in embryo supports a cause of action."[57] This last line amounts to a recognition both that the Non-Identity Problem poses no obstacle for a case involving a child on whom there has been conferred a life not worth living, along with a judicial reluctance to identify what lives fall into that category (where liability would be appropriate).

Similarly in *Nelson v. Krusen*, the Texas Supreme Court rejected wrongful life liability in a claim involving a negligent

52. 512 N.E.2d at 693–95.

53. *Id.*

54. *Id.* at 697 (citations omitted); *see id.* at 703–07 (allowing the parents' wrongful birth action to move forward).

55. *Id.* at 698.

56. *Id.*

57. *Id.*

failure to diagnose the genetic mother as a carrier of Duchenne muscular dystrophy.[58] The court held:

> In this, as in all wrongful life cases, however, there is no allegation that but for the defendant's negligence the child would have had a healthy, unimpaired life. Instead, the claim is that without the doctor's negligence the plaintiff never would have been born. Thus, the cause of action unavoidably involves the relative benefits of an impaired life as opposed to no life at all. All courts, even the ones recognizing a cause of action for wrongful life, have admitted that this calculation is impossible. . . . [T]his is not just a case in which the damages evade precise measurement. Here, it is impossible to rationally decide whether the plaintiff has been damaged at all.[59]

Thus the key insight of the Non-Identity Problem has already been recognized by courts and the problem is not merely of philosophical interest, but one that is already part of our jurisprudence.

II. THE PERSISTENCE OF BEST INTERESTS: SOME EXAMPLES FROM LEGISLATURES, COURTS, AND SCHOLARS

Given the logic of the Non-Identity Problem and the acceptance of the implications of the problem by courts in the wrongful life context, one might expect legal scholars, judges, and legislators to avoid making BIRC arguments for attempts to influence, when, whether, and with whom we reproduce. Indeed, the idea I have presented hopefully now seems so clearly correct that you might find it hard to believe that this error is widespread. Strikingly, as I show in this Part, this reasoning *appears* to persist in a wide swath of cases. On some occasions it is the primary justification for the policy offered, while in others it is one justification among others (for example, alongside Paternalism and Commodification concerns in the regulation of surrogacy agreements). I say "appears" quite deliberately because all texts are somewhat ambiguous. While the most natural reading of these sources seems to me the invocation of the BIRC argument, it is at least possible that in some instances the argument is instead shorthand for one of the three arguments I discuss in Part III (particularly the non-person-affecting principle approach). It is also possible that this ambiguity represents the dressing up of controversial premises in a palatable idiom.

58. 678 S.W.2d 918, 919 (Tex. 1984).

59. *Id.* at 925.

My ambition here is not psychoanalytic. I do not purport to delve into the minds of these players and show what they "really" were thinking, or suggest that they are trying to obfuscate. Instead, I will merely suggest that if these sources are really making BIRC arguments (my own view of the matter) then what I say in this and the preceding Part shows why it is unworkable. If instead they unintentionally or deliberately are using BIRC-like language as shorthand for one of the reformulated justifications discussed in Part III, then my analysis of those justifications will show why that too is problematic.

In this Part, I discuss six examples of cases where courts, legislatures, and legal scholars employ BIRC rhetoric to defend policies that influence when, whether, and with whom we reproduce.[60] In reviewing the use of BIRC-reasoning in my six illustrations, I divide them into two categories for which the Non-Identity Problem has subtly different implications that I call "perfect" and "imperfect" Non-Identity Problems. I further develop the possible significance of this distinction in the next Part.

A. PERFECT NON-IDENTITY PROBLEMS

For "perfect" Non-Identity Problems—for example, prohibitions on incest or access to reproductive technologies—state action restricting reproduction can never be justified by recourse to BIRC-reasoning because doing so is self-contradictory: the policy, if effective, will *necessarily* alter when, whether, and with whom one reproduces, thereby creating a Non-Identity Problem. Classification as a "perfect Non-Identity Problem" is not dependent on the policy's aim to alter when, whether, and with whom we reproduce but instead what will happen if the policy is successful. Thus, a policy could have an *aim* entirely divorced from the purpose of altering individuals' reproductive choices, and yet, to the extent its success will have that *effect*, BIRC justifications for the intervention are problematic.

60. These examples are not exhaustive, but nicely cover both natural and artificial reproduction as well as different means of regulation. Other good examples might include the denial of reproductive technology access to the disabled, *see*, Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, 50 UCLA L. REV. 17 (2002), and restrictions on procreation by incarcerated felons, *see* Carter Dillard, *Child Welfare and Future Persons*, 43 GA. L. REV. 367, 391 (2009).

1. Criminal Prohibition of Adult Brother-Sister and First Cousin-First Cousin Incest

Brother-sister incest between adults remains illegal in many states in the United States.[61] Sex between first cousins is illegal in eight states, while marriage between them is illegal in twenty-five.[62] The "most commonly cited rationale for prohibiting consensual relations is that incestuous relationships have the potential to create children with genetic problems if the parties reproduce,"[63] potentially a perfect illustration of BIRC justification.[64] Courts in the United States have upheld these statutes on this basis, as has a recent case in England upholding a similar prohibition, even in cases where siblings adopted into different families subsequently married each other.[65]

Sophisticated scholars have assumed the validity of BIRC arguments against incest. In a recent article examining the risk of "incest" with sperm and egg donation in the U.S., Naomi Cahn argues that "[t]he higher rate of genetic abnormalities in consanguineous relationships" provides "a partial justification for the incest prohibition."[66] In incestuous couplings there is an increased likelihood that both partners will carry the same re-

61. *See*, *e.g.*, LA. REV. STAT. ANN. § 14:78 (2011); MD. CODE ANN., CRIM. LAW, § 3-323 (LexisNexis 2002). Interestingly, brother-sister incest is not a crime in Rhode Island, Ohio, and New Jersey. Jennifer Collins et al., *Punishing Family Status*, 88 B.U. L. REV. 1327, 1343 & n.83 (2008).

62. Collins et al., *supra* note 61, at 1344. While BIRC arguments as to parent-child incest also run afoul of the Non-Identity Problem, it seems to me that in these cases the justification for regulation is much more obviously concerns about coercion in this relationship rather than BIRC.

63. *Id.* at 1391.

64. Of course, as I emphasize below, it is possible to recast these concerns not as BIRC but as non-person-affecting principle or externality justifications, although in context I read them more clearly as BIRC ones.

65. Israel v. Allen, 577 P.2d 762, 764–65 (Colo. 1978) (upholding a prohibition on the marriage of adopted siblings while striking down a prohibition on marriage between adopted siblings reasoning that only as between genetically related siblings is "[t]he physical detriment to the offspring of persons related by blood . . . totally absent") (quoting 1 VERNIER, AMERICAN FAMILY LAWS 183 (1931)); State v. Kaiser, 663 P.2d 839, 843 (Wash. Ct. App. 1983) (relying on the prevention of the "genetic mutation" of children born from incest as one of the reasons to uphold criminal prohibitions against constitutional challenge); State v. Allen M. (*In re* Tiffany Nicole M.), 571 N.W.2d 872, 878 (Wis. Ct. App. 1997) (similar); Naomi Cahn, *Accidental Incest: Drawing the Line—or the Curtain?—for Reproductive Technology*, 32 HARV. J.L. & GENDER 59, 61, 85–87 (2009) (noting an English case and presenting genetic justifications for prohibition).

66. Cahn, *supra* note 65, at 86.

cessive gene, thus increasing the likelihood of genetic abnormalities from a two to three percent risk rate of severe abnormalities in non-consanguineous relationships to between thirty-one and forty-four percent for siblings, with the most common abnormalities being congenital malformation, learning difficulties, blindness, hearing impairment, metabolic disorders, cystic fibrosis, and hemoglobin disorders.[67] Given that the "risk of harm *to future offspring* is palpable and certain (although most such offspring will not experience these abnormalities)," Cahn concludes, "we might decide it is appropriate, based on potential harm, to police certain relationships," and she recommends "allow[ing] incestuous relationships [only] between relatives who are incapable of procreating, or . . . requir[ing] genetic testing in the case of pregnancy."[68] Many other scholars make similar arguments supporting the incest prohibitions.[69]

To be sure, like Cahn, many of these authors critique existing laws as overinclusive in the scope of their prohibitions to be justified on the basis of the genetic harm argument. However, even if the prohibition was restricted to cases where there is a very substantial chance of genetic abnormalities, unless those abnormalities were severe enough to give the child a life not worth living, BIRC-type arguments in favor of the incest prohibition are irrational: if the parents of a child born of incest had complied with the law and instead had other reproductive partners, a different child would come into existence.

67. *See*, *e.g.*, *id.* at 85–87; Bernadette Modell & Aamra Darr, *Genetic Counselling and Customary Consanguineous Marriage*, 3 NATURE REVIEWS GENETICS 225 (2002).

68. Cahn, *supra* note 65, at 86–87 (emphasis added).

69. *See*, *e.g.*, Courtney Megan Cahill, *Same-Sex Marriage*, *Slippery Slope Rhetoric*, *and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1570 (2005) (noting that, while "what could very well be deemed offensive, and thus legally prohibited, [about incest] is the fact that parents might put their future progeny in harm's way by increasing the risk that they will be born with such [recessive genetic] traits," such a rationale is problematically underinclusive because we fail to criminalize other parents who do the same); Clare Chambers, *Inclusivity and the Constitution of the Family*, 22 CANADIAN. J.L. & JURISPRUDENCE. 135, 144 (2009) ("[I]ncest is wrong to the extent that it harms non-consenting others and undermines the maintenance of society over time, in both cases by producing children with vulnerable genetic compositions."); Jeffrey M. Shaman, *The Right of Privacy in State Constitutional Law*, 37 RUTGERS L.J. 971, 998 (2006) ("As for consensual incest, even under [John Stuart] Mill's [Harm] principle it can justifiably be prohibited because it poses a significant risk of causing serious genetic harm to the children conceived thereby.").

2. Abstinence Education/Funding

Since 1982, the U.S. government has spent over $1.5 billion to promote abstinence-only education programs through the Adolescent Family Life Act (AFLA), the Maternal and Child Health Services Block Grant (Title V of the Social Security Act), and the Special Programs of Regional and National Significance Community-Based Abstinence Education Program (CBAE).[70] To qualify for funding under either Title V or the CBAE block grants, programs must meet a number of content requirements, including that the program mandates that the curriculum *inter alia* "teaches that bearing children out-of-wedlock is likely to have harmful consequences for the child,"[71] a BIRC claim. In passing the CBAE statute, Congress relied in part on BIRC-type reasoning noting in its findings that the children of teenage mothers had "a higher incidence of low birth weight babies" and higher infant morbidity.[72]

BIRC justifications focused on social detriments experienced by the resulting children also feature prominently in conservative commentators' support for these kinds of programs, as reports issued by the Heritage Foundation demonstrate. One such report authored by Patrick F. Fagan titled *How Broken Families Rob Children of Their Chances for Future Prosperity* proclaims that the children of "teenage mothers who give birth outside of marriage . . . spend more time in poverty than do the children of any other family structure."[73] The report then catalogues a series of alleged harms to these children including that these children

70. 42 U.S.C. §§ 300z to z-10 (2006); Social Security Act, Title V, 42 U.S.C. § 710 (1935), *amended by* Personal Responsibility and Work Opportunity Reconciliation Act of 1996 Pub. L. No. 104-193, § 912 110 Stat. 2354 (1996); DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, COMMUNITY-BASED ABSTINENCE EDUCATION PROGRAM FUNDING OPPORTUNITY 2008, *available at* http://www.acf.hhs.gov/grants/pdf/HHS-2008-ACF-ACYF-AE-0099.pdf; *see* Bonnie Scott Jones & Michelle Movahad, *Lesson One: Your Gender is Your Destiny—The Constitutionality of Teaching Sex Stereotypes in Abstinence-Only Programs*, AM. CONST. SOC'Y FOR L. & POL'Y, Sept. 2008, at 1, 3, *available at* http://www.acslaw.org/sites/default/files/Jones_-_Movahed_Issue_Brief.pdf.

71. 42 U.S.C. § 710(b)(2); Jones & Movahad, *supra* note 70, at 4.

72. 42 U.S.C. § 300z (a)(5).

73. Patrick F. Fagan, *How Broken Families Rob Children of Their Chances for Future Prosperity*, HERITAGE FOUND. BACKGROUNDER (The Heritage Found., D.C.), June 11, 1999, at 10–11, *available at* http://www.heritage.org/Research/Reports/1999/06/Broken-Families-Rob-Children-of-Their-Chances-for-Future-Prosperity.

> miss more days of school, have lower educational aspirations, receive lower grades, and eventually divorce more often as adults . . . . [a]re almost twice as likely to exhibit antisocial behavior as adults; twenty-five percent to fifty percent more likely to manifest such behavioral problems as anxiety, depression, hyperactivity, or dependence; two to three times more likely to need psychiatric care; and much more likely to commit suicide as teenagers.[74]

Because these programs explicitly attempt to alter *when* teenagers reproduce (after marriage or, after adolescence), such programs cannot be justified out of concern for the children who will result if teenagers do not wait; waiting means that those children never come into existence, instead other children do.

3. Reproductive Technology Access Restrictions, Parental Fitness Screening, and the Adoption Analogy

A number of countries restrict access to reproductive technologies on the basis of age, marital status, or sexual orientation and justify it through BIRC reasoning. Such arguments are incoherent based on a perfect Non-Identity Problem.

Italy's Law 40 confines use of reproductive technologies to infertile women of "potentially fertile age" who are married or part of a "stable" heterosexual couple, and indirectly burdens LGBT Assistive Reproductive Technology (ART) users by prohibiting the use of donated sperm or eggs.[75] The BIRC-roots of the legislation are evident in the Italian Parliamentary Commission for Social Affairs' review of the then-proposed legislation expressing concern with "avoiding psycho-social damage to the child, which can result from parenting models which are not socially consolidated."[76] a view also espoused by more recent Italian governments.[77] The Australian states of Western

74. *Id.* at 11; *see also*, *e.g.*, Robert E. Rector et al., *Marriage: Still the Safest Place For Women and Children*, HERITAGE FOUND. BACKGROUNDER (The Heritage Found., D.C.) Mar. 9, 2004 (claiming that children of divorce or never-married mothers are far more "likely to suffer from child abuse than are children raised by both biological parents in marriage"), *available at* http://www.heritage.org/research/reports/2004/03/marriage-still-the-safest-place-for-women-and-children.

75. *See* Rachel Anne Fenton, *Catholic Doctrine Versus Women's Rights: The New Italian Law On Assisted Reproduction*, 14 MED. L. REV. 73, 73, (2006).

76. *Id.* at 88. Article I of the law itself provides the act's guiding principle: "recourse to medically assisted reproduction is permitted only in conformity with this statute and the rights of all those involved, including those of the *concepito*, or unborn child, are said to be ensured." *Id.* at 83.

77. *Id.* at 83, 88, 89 (citing recent Department of Health Consultation Paper proclaiming that "[a]s a general rule the Government believes that it is

Australia, South Australia and Victoria have all enacted similar legislation forbidding access to ART by LGBT and single individuals and permitting use only where the reason for infertility is not age; the statutes explicitly adopt BIRC language.[78] The Western Australian version requires "that the prospective welfare of any child to be born consequent upon a procedure to which this Act relates is properly taken into consideration."[79]

In the United Kingdom, the Human Fertilisation and Embryology Act (HFEA) of 1990 specifies that "a woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of the treatment (including the need of that child for a father)."[80] The HFEA Act of 2008 recently liberalized that policy by substituting "supportive parenting" for "a father" in the parenthetical after legislators decided that the requirement discriminated against single mothers and lesbians;[81] however, the "duty . . . to consider the welfare of any child who may be born as a result of the treatment . . . , and of any other child who may be affected" has been retained.[82] France's 1994 law regulating reproductive technologies confines ART access to "heterosexual couples who . . . are married or have lived together for at least two years prior to the reproductive procedure" and are of child bearing age; the BIRC justification for this law has become still more prominent in recent debates as to whether to include a right to use ART for couples entering into a *Pacte Civile de Stabilité* or PaCS (roughly "Pact of Civil Solidarity"),

better for a child to have both a father and a mother"); *see* ROSARIO M. ISASI & BARTHA M. KNOPPERS, NATIONAL REGULATORY FRAMEWORKS REGARDING HUMAN REPRODUCTIVE GENETIC TESTING 7 (2006), *available at* http://www.dnapolicy.org/pdf/geneticTesting.pdf.

78. *See Infertility Treatment Act 1995*, (Vict.) s 8 (Austl.), available at http://www.austlii.edu.au/au/legis/vic/hist_act/ita1995264.pdf; *Human Reproductive Technology Act 1991*, (W. Austl.) ss 4, 23(c), *available at* http://www.austlii.edu.au/au/legis/wa/consol_act/hrta1991331/s4.html (section 4), http://www.austlii.edu.au/au/legis/wa/consol_act/hrta1991331/s23.html (section 23); *Reproductive Technology Act 1988*, (S. Austl.) ss 10(b), 13(3)(b), *available at* http://www.legislation.sa.gov.au/LZ/C/A/ASSISTED%20REPRODUCTIVE%20TREATMENT%20ACT%201988/2000.07.05_%281996.08.01%29/1988.10.PDF.

79. *Human Reproductive Technology Act 1991*, (W. Austl.) ss 4, 23(c).

80. Human Fertilisation & Embryology Act, 1990, c. 37, § 13(5) (Eng.).

81. *See* Aidan Jones, *Rules Eased for Second Parent in IVF Births*, THE GUARDIAN, (Mar. 1, 2009), http://www.guardian.co.uk/uk/2009/mar/02/law-family.

82. *Compare* Human Fertilisation & Embryology Act, 2008, c. 22, § 14(2) (Eng.) *with* Human Fertilisation & Embryology Act, 1990, c. 37, § 13(5) (Eng.).

open to heterosexual or homosexual couples.[83] Iceland's Act no. 55/1996 provides that "Artificial fertilisation may only be carried out if . . . the child to be conceived by the procedure may be deemed to be ensured good conditions in which to grow up."[84] Other countries, such as Greece and Japan, also restrict access to ARTs to women fifty-years-old or younger.[85]

In the United States, no state currently bans ART use by aged, single, or LGBT individuals, but several bills have been introduced in state legislatures to do so.[86] Instead, access de-

83. Radhika Rao, *Equal Liberty: Assisted Reproductive Technology And Reproductive Equality*, 76 GEO. WASH. L. REV. 1457, 1474 (2008); Patrick Roger, *Blocage Sur L'adoption Par Les Couples Homosexuels* [Ban on Adoption by Homosexual Couples], LE MONDE (Fr.), Jan. 27, 2006, at 21, *available at* http://www.apgl.fr/presse/lemonde20060126-2.pdf; *see* M. JEAN LEONETTI, LA COMMISSION DES LOIS CONSTITUTIONNELLES, DE LA LÉGISLATION ET DE L'ADMINISTRATION GÉNÉRALE DE LA RÉPUBLIQUE SUR LA PROPOSITION DE LOI [COMMISSION ON CONSTITUTIONAL LAW, LEGISLATION, AND GENERAL ADMINISTRATION OF THE REPUBLIC], RAPPORT (N° 2211), RELATIVE À L'ORGANISATION DU DEBAT PUBLIC SUR LES PROBLEMES ÉTHIQUES ET LES QUESTIONS DE SOCIETE [REPORT ON ORGANIZATION OF PUBLIC DEBATE OVER ETHICAL PROBLEMS AND SOCIETAL QUESTIONS], Feb. 3, 2010, *available at* http://www.assemblee-nationale.fr/13/rapports/r2276.asp#P122_15516; *Loi Bioéthique: Les Principales Propositions du Rapport Leonetti* [*Bioethics Law: The Main Proposals of Leonetti's Report*], TFI NEWS, Jan. 19, 2010, http://lci.tf1.fr/science/sante/2010-01/loi-bioethique-les-principales-propositions-du-rapport-leonetti-5644995.html.

84. ACT NO. 55/1996 ON ARTIFICIAL IMPREGNATION AND THE USE OF HUMAN SEX CELLS AND EMBRYOS FOR STEM CELL RESEARCH (ICELAND 1996), *available at* http://www.althingi.is/dba-bin/unds.pl?txti=/wwwtext/html/lagasofn/138b/1996055.html&leito=t%E6knifrj%F3vgun#word1 (translation courtesy of Sigridur Rut Juliusdottir).

85. Nomos (2002:3089) [Medically Assisted Human Reproduction], Official Gazette of the Helenic Republic 2002, 1:1455 (Greece); Fenton, *supra* note 75, at 84 (reviewing Italy's law 40); Rachel Brehm King, *Redefining Motherhood: Discrimination in Legal Parenthood in Japan*, 18 PAC. RIM L. & POL'Y J. 189, 215 (2009) (explaining that Japan's Assisted Reproductive Technology Committee recommends ART be limited to women under 50); Rao, *supra* note 83 (discussing Italy's Law 40 limiting use of ART to women "of childbearing age").

86. At the present moment, these bills do not seem to be moving forward. *See*, *e.g.*, Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers*, *Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 44–46 (2008) (citing H.B. 187, 2006 Reg. Sess. of the Va. Gen. Ass.; Mary Beth Schneider, *Assisted Reproduction Bill Dropped*, IND. STAR, Oct. 6, 2005, at 2B). Various U.S. states achieve similar ends through more subtle means such as limiting the enforceability of surrogacy agreements to cases where the commissioning couple is legally married, limiting insurance mandates covering IVF to cases of married heterosexual individuals, and absolving sperm donors of legal parenthood responsibilities only when the recipient is married. *E.g.,* FLA. STAT. ANN. § 742.15(1) (West 2010); TEX. FAM. CODE ANN. § 160.754(b) (West 2008); JESSICA ARONS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND

nials stem from policies adopted by industry groups and attitudes of individual physicians often premised on BIRC justifications. For example, the American Society for Reproductive Medicine (ASRM) put forth a 1997 statement on access to ART for older women suggesting that "postmenopausal pregnancy should be discouraged," and that physicians should carefully consider not only threats to the woman's health or that of the child, but also "the provision for child-rearing."[87] It explained that "[b]ecause parenting is both an emotionally stressful and physically demanding experience, older women and their partners may be unable to meet the needs of a growing child and maintain a long parental relationship," and "children could resent having mothers old enough to be grandmothers and be adversely affected psychologically and socially."[88] Similarly, the American College of Pediatricians' 2004 position statement advises that "[g]iven the current body of research . . . it is inappropriate, potentially hazardous to children, and dangerously irresponsible to change the age-old prohibition on homosexual parenting, whether by adoption, foster care, or by reproductive manipulation."[89] In most states such service denials by providers remain lawful.[90]

These and other BIRC concerns have been internalized by U.S. physicians: A recent study found that one-fifth of U.S. ART treatment providers would refuse to provide services to a woman without a partner, 48% were "[v]ery or extremely likely to turn away" a gay couple using surrogates with one man as sperm donor, and 17% were likely to turn away a lesbian couple seeking to achieve pregnancy with donor insemination.[91] Many of these practitioners acknowledged a BIRC motivation for their gate-keeping with 62% and 64% agreeing with the state-

THE LAW 8 (2007); Cohen & Chen, *supra* note 14, at 539; Daar, *supra*, at 46; John A. Robertson, *Gay and Lesbian Access to Assisted Reproductive Technology*, 55 CASE W. RES. L. REV. 323, 356 (2004).

87. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Oocyte Donation to Postmenopausal Women*, 82 FERTILITY & STERILITY S254, S255 (2004).

88. *Id.* at S254–55 (2004).

89. Press Release, Am. Coll. of Pediatricians, Homosexual Parenting: Is it Time For Change? (Mar. 22, 2009), *available at* http://www.acpeds.org/Homosexual-Parenting-Is-it-Time-for-Change-Press-Release.html.

90. *But see* N. Coast Women's Care Med. Grp., Inc. v. San Diego Superior Court, 189 P.3d 959, 970 (Cal. 2008) (holding that a service denial based on sexual orientation violated California's Unruh Civil Rights Act and was not protected on First Amendment Free Exercise grounds).

91. Gurmankin et al., *supra* note 3, at 61–65.

ments "[i]t is wrong for me to help bring a child into the world to be cared for by a parent who would be unfit in some way" and "I have the responsibility to consider a parent's fitness before helping them conceive a child," respectively.[92]

Scholars, while taking opposite positions on the underlying data, have treated BIRC as the appropriate idiom in which to debate these questions. In asking whether age-based restrictions on IVF pass constitutional muster, Radhika Rao suggests that "[a]ge limits should be considered constitutional as long as they . . . promote a valid objective, such as ensuring that the children born of such technologies will have parents who are alive and able to care for them."[93] More generally, Rao posits that "prohibition upon the use of ARTs is [constitutionally] permissible as long as it is based upon a legitimate interest that goes beyond mere prejudice," and that "[t]he government could limit the use of ARTs in order to prevent physical, psychological, or social harms to the participants *or the resulting children*" as it does in adoption and that deficits to a child in being raised in a single or LGBT household could constitute such harm (although she doubts the claim's empirical support).[94] In a similar vein, Naomi Cahn treats BIRC as the appropriate subject of inquiry, but nevertheless notes the lack of strong empirical evidence that children of heterosexual couples do better than those of gays or lesbians.[95] While opposing sperm donor anonymity and unmarried and LGBT use of ARTs, Lynn Wardle also explicitly ties the issue to best interests arguments employed in family law as to *already existing* children by claiming that "[d]epriving a child of contact with one of his or her parents is very harmful to children" and pointing *inter alia* to laws "designed to encourage, protect, and facilitate visitation, even if the parents do not get along with each other"[96] He concludes that U.S. laws are problematically "schizophrenic" in that while "we go to great lengths to protect the child's right to a filial relationship with both parents in all other con-

92. *Id*. at 64.

93. Rao, *supra* note 83, at 1477.

94. *Id*. at 1476–77, 1479 (emphasis added).

95. NAOMI R. CAHN, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS LEGAL REGULATION 167–70 (2009).

96. Lynn Wardle, *Global Perspective on Procreation and Parentage by Assisted Reproduction*, 35 CAP. U. L. REV. 413, 444, 446 (2006).

ceivable circumstances, we simply ignore that right and that need of children in the ART context."[97]

The same theme appears in calls by leading scholars to require parental fitness screening for reproductive technology access patterned on adoption. Debora Spar, now Dean of Columbia University's Barnard College, emblemizes this approach to the problem arguing that

> [i]n the field of adoption, the interests and rights of the child are always taken as paramount: no would-be parent in the United States can legally adopt a child without some outside authority (a child welfare office, licensed adoption agency, or court) deeming that the parent is fit and that the proposed adoption is in the best interests of the child.[98]

She continues by noting that this "underlying principle . . . could easily be extended into the realm of assisted reproduction, even if only to scrutinize procedures that are known to carry extensive risks to the child . . . ."[99] Similarly, Marsha Garrison has argued that "[l]ogically, if regulation of adoption is constitutionally permissible to safeguard the interests of the adoptive child, her biological parents, and would-be adoptive parents, so is regulation of reproductive technology aimed at protecting the various actors involved and any children that might be produced."[100] Furthermore, she argues that "[t]o the extent that ART—or obstetrical practice—imposes risks on future children equivalent to those that state and federal law disallow for actual children, there is a sound basis for regulation aimed at providing protection against such hazards" that is justified by "child-protection aims."[101] Others make similar claims.[102]

97. *Id.* at 451*; see also* Camille S. Williams, *Planned Parent-Deprivation: Not in the Best Interests of the Child*, 4 WHITTIER J. CHILD & FAM. ADVOC. 375, 376, 389 (2005) (lamenting that "given the importance of shared familial history and kinship to individual identity, and the importance of both maternal and paternal involvement in the development of children, intentionally depriving a child of one parent will surely wound the child in a multitude of ways" and that current reproductive technology research and policy are "about the individual or couple and not necessarily about the best interests of the child.").

98. Debora L. Spar, *As You Like It: Exploring The Limits of Parental Choice in Assisted Reproduction*, 27 LAW & INEQ. 481, 491 (2009).

99. *Id.*

100. Marsha Garrison, *Regulating Reproduction*, 76 GEO. WASH. L. REV. 1623, 1627 (2008).

101. *Id.* at 1642; *see also* Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 858 (2000) ("Our tradition of deference to individual decisions about coital procreation and parenting undeniably supports equivalent def-

Several countries have adopted this exact model and tried to make their reproductive technology access rules more like their regulation of adoption.[103] Victoria, Australia requires criminal background checks as precondition for IVF usage.[104] The Dutch Society for Obstetrics and Gynecology advises screening out those who exhibit psychopathologies.[105] The ASRM recommends developing written policies regarding screening out those with uncontrolled psychiatric illness, a history of child or spousal abuse, or drug abuse.[106] At the level of clinical practice, a 2001 survey of 324 ART clinics in the United States found that the majority of respondents would deny access to services to parents who engaged in "excessive" alcohol consumption, marijuana use, or were convicted of child abuse; some clinics suggested they would deny access based on paren-

erence to individual choice in the use of technological conception. But deference does not imply abdication of any regulatory role. Indeed, parents who want to adopt, the 'traditional' method of achieving parenthood non-coitally, face a maze of state regulations, including rules imposing waiting periods before an adoption is finalized, voiding parental consents obtained prenatally, permitting rescission of parental consent within stated time limits, and requiring adopting through an intermediary agency." (citation omitted)).

102. *See*, *e.g.*, ELIZABETH BARTHOLET, FAMILY BONDS 33 (1993); Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 83–84 (2008–09) (proposing that U.S. patients seeking to use surrogates living abroad could be regulated in a way similar to international adoption, including "requiring a home study of the commissioning parties, including criminal background checks"; however, concluding that international surrogacy should be abolished rather than regulated); Judy E. Stern et al., *Access to Services at Assisted Reproductive Technology Clinics: A Survey of Policies and Practices*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591, 596 (2001) (observing that "[i]t should not be surprising that ART clinics feel responsibility to limit access in certain cases" because "concern for the well-being of children has long been a defining factor of the adoption process").

103. *See* Stern, *supra* note 102; Storrow, *supra* note 18, at 2290–91; *see also* Daar, *supra* note 86, at 67 ("Basing a physician's ability to deny ART services on his or her prediction about the child-rearing abilities of a prospective parent is speculative and leaves too much opportunity for masking pure discrimination with concern for offspring.").

104. *Mixed Response to Victoria's IVF Law Changes*, ABC NEWS (Dec. 5, 2008, 5:44 PM), http://www.abc.net.au/news/2008-12-05/mixed-response-to-victorias-ivf-law-changes/230976.

105. M. Hunfeld et al., *Protect the Child from Being Born: Arguments Against IVF from Heads of the 13 Licensed Dutch Fertility Centres, Ethical and Legal Perspectives*, 22 J. REPROD. & INFANT PSYCHOL. 279, 280 (2004).

106. Ethics Comm. of the Am. Soc'y for Reprod. Med., *Child-Rearing Ability and the Provision of Fertility Services*, 82 FERTILITY & STERILITY 564, 565 (2004).

tal schizophrenia, mental impairment, or *suspected* child abuse.[107]

The Non-Identity problem renders the empirical evidence about child outcomes irrelevant in BIRC arguments towards justifying the age, marital status, sexuality, or other parental fitness restrictions explored by John Robertson and Judith Daar.[108] There is a key problem with the analogy between parental fitness screening for adoption versus reproduction: a particular child waiting to be adopted *can* be harmed if the child is placed with unfit parents instead of other parents or continuing in foster care, etc., although that depends on what life in foster care would look like. By contrast, if potential genetic parents are unfit, a particular child that would result *cannot* be harmed if gate keeping rules them out because that particular child would not otherwise come into existence.[109]

Because policies that alter *when* individuals reproduce also create perfect Non-Identity Problems, home study visits and background checks may be problematic even if the parents *pass*, since to the extent they delay the moment sperm meets egg they are not in the best interests of a *particular* resulting child because the delay has caused a different child to result.

B. IMPERFECT NON-IDENTITY PROBLEMS

While perfect Non-Identity Problems are the easiest to see, a second category of "imperfect Non-Identity Problems," for example interventions aimed at prohibiting sperm donor anonymity, arise where state action will not *necessarily* alter when, whether, and with whom the *whole* population affected by the intervention reproduces. As will become clearer as I work through examples of these below, while *perfect* Non-Identity

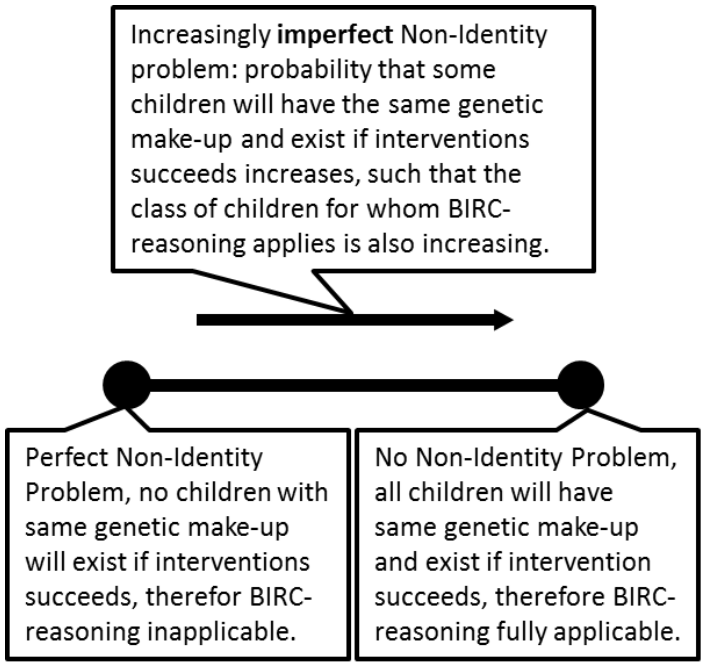
107. Gurmankin et al., *supra* note 3, at 61–65.

108. *See* Daar, *supra* note 86, at 69–71; Robertson, *supra* note 86, at 341, 343, 347; Robertson, *supra* note 32, at 29–31.

109. On its face, there is no Non-Identity Problem with removing the child, *once born*, from the custody of his rearing parents in favor of his being *reared* by another set of parents, and justifying it on the basis of Best Interests of the *Existing* Child-type reasoning. But suppose there is a rule to this effect upfront, for example that women over age 50 who successfully reproduce will have their resulting children removed from their custody and legal parentage and given to other parents. It is likely that few (if any) parents would choose to conceive in this circumstance, thereby manufacturing an imperfect Non-Identity problem without regulating reproduction per se. It seems that this move, too, could not be justified based on best interests grounds for that reason. *See infra* text accompanying notes 167–70.

Problems make BIRC-type justifications for policies *nonsensical*; *imperfect* Non-Identity Problems will sharply *reduce* the probability/number of children for whom the BIRC-type reasoning can be invoked in favor of a given intervention.[110] To use an example I will discuss in greater depth, for sperm donation it is theoretically possible that in a world where donor anonymity was prohibited there may exist at least one child who will come into existence with the same genetic code (i.e., when, whether, and with whom its genetic parents reproduce will be unaltered), but the probability/number of children for whom that will be true is likely very small (since all three conditions must go unaltered).

Diagram 1



The idea is illustrated by Diagram 1: The perfect Non-Identity Problem is a fixed point at the end of the continuum where no member of the class of resulting children on whose

110. To be more precise, it will alter the probability that a set number of individuals, on whose behalf the intervention is urged, will be harmed.

behalf the intervention is urged can be said to be harmed, for if the intervention succeeds none of those children would come into existence, rather other children (or *no other* children) would exist. By contrast, we can think of imperfect Non-Identity Problems as a sliding scale filling up the middle of the continuum, where the larger the number of children who will come into existence with the same genetic code (i.e., whose parents' decision whether, when, and with whom to reproduce will be the same) whether or not the intervention is in place, the more imperfect the Non-Identity Problem will be, and thus the larger the number of children for whom BIRC arguments will actually be valid. At the other end of the continuum are cases where no Non-Identity Problem will result because the intervention will not alter whether, when, and with whom anyone reproduces.

Diagram 2

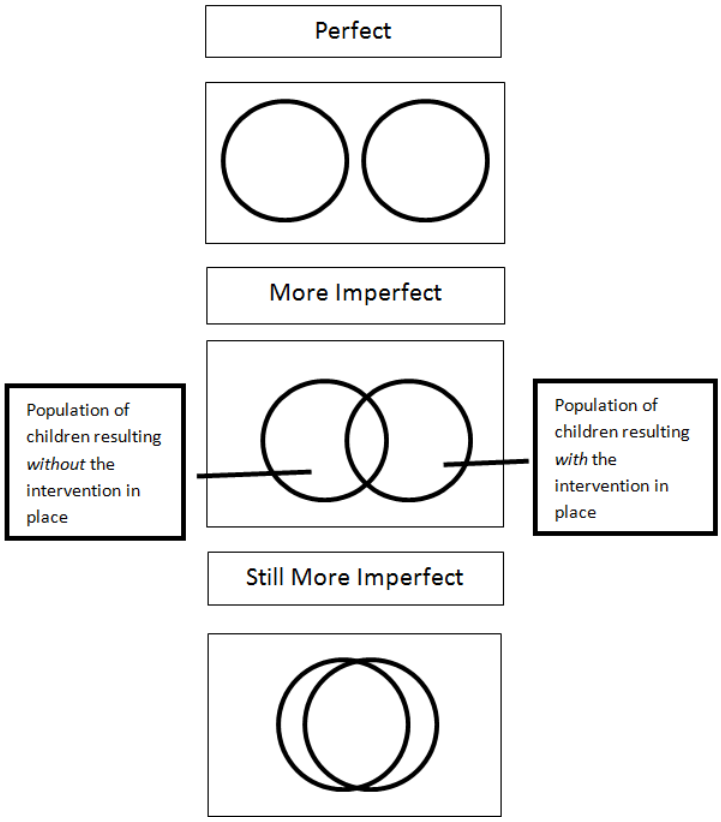


Diagram 2 illustrates this point a second way, by showing the "imperfect" nature of a Non-Identity Problem as a question of the degree of overlap between *two populations*—the population of children who will come into existence if the intervention is *not* in place (on the left) and the population of children who will come into existence if the intervention *is* in place (on the right). The zone where the two circles overlap represents the sub-population of children who will come into existence with the same genetic code (i.e., when, whether, and with whom reproduction occurs is the same) *whether or not* the intervention is in place. As the BIRC-type argument becomes more imperfect, the zone of intersection between the two circles increases, meaning that the probability/number of children who will come into existence with the same genetic code whether or not the intervention is in place increases. There is no Non-Identity Problem regarding the population of children falling into this

zone of intersection. We can actually say they are harmed since their counterfactual is not nonexistence but existence with versus without the intervention in place, assuming *arguendo* the intervention prevents harm to them.[111]

This description helps clarify that the examples that interest me share two features. First, the governmental intervention is urged *on the basis of* BIRC-type reasoning. While many governmental interventions may have the alteration of when, whether, and with whom we reproduce as a side effect, it is only those that are *justified* by BIRC reasoning that the Non-Identity Problem renders problematic. For example, a state's decision to shut down a public university or even increase its tuition may alter when, whether, and with whom individuals reproduce if many people meet their future husband or wife in university. There is no Non-Identity Problem with that intervention, though, because closure or tuition hikes are *not* being justified *on the basis of* the interests of the children who will result.[112] Second, for all my examples, even if not giving rise to a perfect Non-Identity Problem, the Non-Identity Problem is fairly close to the perfect end of the continuum and closer to that end than the no Non-Identity Problem end. I explore the implications of this latter point in more depth in Part III. Here I set out three examples of imperfect Non-Identity Problems.

1. Sperm Donor Anonymity

In 1985, Sweden became the first country to prohibit anonymous sperm 'donation'[113] by requiring that donor-conceived

111. This diagram is slightly misleading in that the circles stay the same size throughout, when in fact the size of the circles representing the number of children born will likely change given most of these interventions. This is clearest to see in interventions that affect *whether* given individuals will reproduce, where the intervention, if it succeeds, reduces the number of children. This idea has important implications for non-person-affecting principles discussed in Part III, but for the purposes of a diagram I favored simplicity.

112. There are some related (but more complex) problems with legislation to try and "save" the environment that may change who makes up the future generation whose interests we are trying to serve. *See* PARFIT, *supra* note 32, at 371–77 (describing the impact of choices on future events in the environmental context). I put environmental cases to one side in this Article except for one tentative suggestion at *supra* note 38.

113. The term "donor" is actually a misnomer since most provision of sperm is for compensation; still, I will rely on the more familiar terms "donor" and "donation" rather than "provider" and "provision" but ask the reader to keep this caveat in mind. Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous*

children be able to receive identifying information about their sperm donor when "sufficiently mature."[114] The law stemmed from studies of the welfare of adopted children, which the Swedes extrapolated to donor-conceived children.[115] A number of jurisdictions followed suit including Austria, Germany, Switzerland, the Australian States of Victoria and Western Australia, the Netherlands, and Norway.[116] Most recently the United Kingdom and New Zealand adopted similar policies in 2004, in both cases justifying that approach on BIRC grounds.[117]

Leading scholars have also treated the potential harm to resulting children from donor anonymity as the right lens to consider whether the United States should adopt similar prohibitions. For example, Naomi Cahn writes that "[a] law that required parents to tell their children of their donor origins and that permitted children to contact their donors could be justified on a showing that, without this information, children experience grave psychological, social, mental, and emotional difficulties." But she claims that "[t]hese data do not, however, exist" and that "[c]hildren born through the new technologies appear to be as well adjusted as other children."[118] Similarly,

Donation in Human Sperm and Eggs, 36 LAW & SOC'Y REV. 257, 258–59 (2002).

114. Claes Gottlieb et al., *Disclosure of Donor Insemination to the Child: The Impact of Swedish Legislation on Couples' Attitudes*, 15 HUM. REPROD. 2052, 2052 (2000).

115. Michelle Dennison, *Revealing Your Sources: The Case for Non-Anonymous Gamete Donation*, 21 J.L. & HEALTH 1, 8 (2008) (citing Gottlieb, *supra* note 114).

116. Dennison, *supra* note 115, at 8–9; Ilke Turkmendag et al., *The Removal of Donor Anonymity in the UK: The Silencing of Claims by Would-Be Parents*, 22 INT'L J.L. POL'Y & FAM. 283, 283–84 (2008).

117. Human Assisted Reproductive Technology Act 2004, § 4 (a), (e) (N.Z.) ("[T]he health and well-being of children born as a result of the performance of an assisted reproductive procedure . . . should be an important consideration in all decisions about that procedure," and more specifically, that "donor offspring should be made aware of their genetic origins and be able to access information about those origins"); Ken Daniels & Alison Douglass, *Access to Genetic Information by Donor Offspring and Donors: Medicine, Policy and Law In New Zealand*, 27 MED. & L. 131, 137 (2008) (noting how the New Zealand law reflects a principle that "knowledge by donor-offspring of their genetic origins is central to the health and well-being of children born as a result of assisted reproductive procedure"); *see also* Christopher De Jonge & Christopher L. R. Barratt, *Gamete Donation: A Question of Anonymity*, 85 FERTILITY & STERILITY 500 (2006); Dennison, *supra* note 115115, at 9–10; *Can You Be Anonymous as a Sperm, Egg or Embryo Donor?* HUM. FERTILISATION & EMBRYOLOGY AUTHORITY, (Nov. 10, 2009), http://www.hfea.gov.uk/1973.html.

118. CAHN, *supra* note 95, at 126.

Ellen Waldman treats the issues of openness in adoption and sperm donation as equivalent, both hinging on a best interests analysis, but while she finds the empirical evidence of harm to children from closed adoption compelling, she concludes that "[t]he data pushes for openness, but only modestly"[119] regarding reproductive technologies.[120] Other scholars have made similar BIRC-type evaluations.[121]

Explaining the problem with the BIRC justification here is a bit more complex. Prohibitions on sperm donor anonymity tend to alter whether and with whom individuals reproduce. Such regulation may cause some would-be donors not to donate, altering whether and with whom they reproduce. Further, regimes that prohibit anonymity usually *ceteris paribus* reduce the number of sperm donors, as has been the experience in Sweden, the Australian state of Victoria, England, New Zealand, and the Netherlands when they eliminated donor anonymity.[122] If donor anonymity were to actually produce a true gamete shortage, then, as to some portion of the population seeking donors, we would end up with a de facto restriction on *whether* they reproduce, creating a Non-Identity Problem in a

119. Ellen Waldman, *What Do We Tell the Children*, 35 CAP. U. L. REV. 517, 544 (2006).

120. *Id.* at 524, 532, 536, 544 (2006).

121. *See*, *e.g.*, Katharine K. Baker, *Bionormativity and The Construction of Parenthood*, 42 GA. L. REV. 649, 682–88 (2008) (arguing that "most people agree that we must consider children's interests in any question about parenthood," while conceding that data bears on whether donor anonymity for gamete donation should be permitted "is far from definitive"); Dennison, *supra* note 115, at 17 (concluding that "a number of studies that have been conducted have reached the same conclusion as those that have studied adoptees: namely, that for their own well-being, donor-conceived children need to know about their background"); Julie L. Sauer, *Competing Interests and Gamete Donation: The Case for Anonymity*, 39 SETON HALL L. REV. 919, 939–43 (2009); Mary Lyndon Shanley, *Collaboration and Commodification In Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 LAW & SOC'Y REV. 257, 268 (2002) ("From the perspective of the child, and the person that child will become, knowledge of how and from whom one came to be is now being seen as part of the right to an identity."); Wardle, *supra* note 96, at 444–51.

122. *See*, *e.g.*, June Carbone & Paige Gottheim, *Markets*, *Subsidies*, *Regulation*, *and Trust: Building Ethical Understandings Into the Market for Fertility Services*, 9 J. GENDER RACE & JUST. 509, 540 (2006); Waldman, *supra* note 119, at 549–57 (discussing and collecting studies). For a comprehensive discussion of the disastrous effects of anonymity prohibitions on the sperm supply in Sweden, the U.K., and the Australian state of Victoria, see Gaia Bernstein, *Regulating Reproductive Technologies: Timing*, *Uncertainty*, *and Donor Anonymity*, 90 B.U. L. REV. 1189, 1207–18 (2010).

way similar to access restrictions. Even if this regulation results only in waiting lists (as has been the case in many countries),[123] that may also de facto limit whether individuals reproduce, because some women seeking sperm donation will be at the end of their fertility cycle and often multiple attempts are required to successfully inseminate.[124]

To deal with such shortages many countries adopt mechanisms aimed at recruiting new sperm donors, thereby altering *with whom* individuals reproduce. "In Sweden, recruitment efforts have focused increasingly on the older, more altruistically motivated donor as a way of rebounding from the initial dampening effects of the" prohibition on donor anonymity.[125] The Australian state of Victoria has also tried to deal with low donor supply by targeting this population,[126] and one clinic in New South Wales, Australia even flew Canadian students to Australia for complimentary 'vacations' that required sperm donations every second day.[127]

Furthermore, even if the same donors are involved under the new and old regime, when they donate, and thus *when* reproduction takes place, may change dramatically. For example, I may choose to donate at age 40 rather than age 20 because I am concerned about donor anonymity before I am married and have children,[128] or it could change slightly if I choose to donate tomorrow rather than today because of the public relations campaign used to get me to donate in the anonymity-prohibited world. Both would be sufficient to produce a Non-Identity Problem. It is also conceivable that anonymity prohibitions will

123. *See* Bernstein, *supra* note 122.

124. The American Society for Reproductive Medicine estimates that with artificial insemination "the monthly chance of pregnancy ranges from 8% to 15%." AM. SOC'Y FOR REPROD. MED., THIRD PARTY REPRODUCTION: A GUIDE FOR PATIENTS 12 (2006), *available at* http://www.asrm.org/uploadedFiles/ASRM_Content/Resources/Patient_Resources/Fact_Sheets_and_Info_Booklets/thirdparty.pdf.

125. Waldman, *supra* note 119, at 552 (citing A. Lalos et al., *Recruitment and Motivation of Semen Providers in Sweden*, 18 HUM. REPROD. 212 (2003)).

126. *Id.* at 553 (explaining clinics in Victoria, Australia, targeted older, altruistically motived donors by using public relations campaigns).

127. *Id.*

128. *Cf.* Ken R. Daniels et al., *Information Sharing in Semen Donation: The Views of Donors*, 44 SOC. SCI. MED. 673, 680 (1997) (suggesting that while young students who donate for financial gain—a typical pool of sperm donors—often become unwilling to donate when anonymity is removed, older and married men who already have children are less phased by prohibitions on anonymity and could be tapped as a potential new donor pool).

change the timing of insemination on the *recipient* side, for example, if shortages produce wait-lists or other forms of queuing for access.

In any event, so long as a different sperm meets a different egg due to the anonymity prohibition rule, it cannot be better for the child who would have existed in the anonymity regime, as *that* child will never exist. All of this readily distinguishes the situation here from the adoption context, where the enactment of openness laws (it is argued) improves *the welfare of existing* children[129] but does not affect whether those children *come into existence*.

To be sure, there *may exist at least* one child who would have come into existence in both the anonymity-permitted and anonymity-prohibited regimes—one child conceived when the same donated sperm meets the same egg and for whom the rule has no effect on whether, when, and with whom reproduction takes place. As to *that particular potential child* (or children) a BIRC justification *will be valid*, which is why the Non-Identity Problem is imperfect. But the sheer number of children for whom this will be true is much smaller than the universe of all donor-conceived children to which the arguments debated by Cahn,[130] Waldman,[131] and others are meant to apply. I further discuss this question of whether the probability and numbers affected matter in the next Part.

What if individuals circumvent the law, for example if a firm offers a black market in anonymous sperm donation? The pool of donors and recipients, or the occasion in which donation takes places, is still likely to change—once again creating a Non-Identity Problem. But even if for a sub-set of the population use of a black market would not alter when, whether, or with whom they reproduced, such that as to them the Non-Identity Problem is avoided, that can hardly be an argument for adopting this legal intervention. If the only justified instances of a law are when the law is broken, the law should not be one we should enact. The same is true for cases where the law merely fails to have its desired effect, for example, abstinence education programs that do not produce much abstinence.

129. *See*, *e.g.*, Waldman, *supra* note 119, at 520–28 (discussing several studies and arguments debating the benefits of open adoption).

130. *See* Cahn, *supra* note 65.

131. *See* Waldman, *supra* note 119.

2. Sperm and Egg 'Donor' and Surrogate Compensation

Surrogacy, egg donation, and sperm donation are sometimes attacked on the claim that the resulting children are harmed because of donor or surrogate compensation. Many countries have restricted surrogacy. Britain, Canada and the Australian states of Victoria and New South Wales have banned or limited compensation for egg and sperm donation beyond expenses incurred.[132] Canada, the Australian states of Victoria, New South Wales and Western Australia have also made commercial surrogacy a crime,[133] as have the U.S. states of New York, Michigan, and Washington, and the District of Columbia.[134] Great Britain de facto prohibits commercial surrogacy by forbidding the transfer of parentage rights from the surrogate to the intended parents absent "a showing before the court that the surrogate received no financial or other beneficial consideration in exchange for her services as a surrogate."[135] The U.S. states of Louisiana, Maryland, Nebraska, New Mexico and Oregon render *commercial* surrogacy contracts unenforceable.[136]

The rationales behind these laws tend to be somewhat opaque from the legislative histories, but the judicial and scholarly literature is a bit clearer. Although much of the literature

132. *See Prohibition of Human Cloning Act 2002*, No. 144, s 23 (Austl.); Assisted Human Reproduction Act, S.C. 2004, c .2, S7(1) (Can.); Press Release, Human Fertilization & Embryology Auth., HFEA Confirms UK Position on Payment for Egg Donors (Feb. 25, 2004), *available at* http://www.hfea.gov.uk/784.html; Human Fertilization & Embryology Auth., *Sperm, Egg and Embryo Donation (SEED) Report*, 14 (2005), http://www.hfea.gov.uk/docs/SEEDReport05.pdf; *see also* Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics, and Responsible Regulation of Egg Donation to Protect Women's Rights*, 29 WOMEN'S RTS. L. REP. 193, 204–06 (2008).

133. *Surrogacy Bill 2010* (N.S.W.), pt 2 div 2 s 8 (Austl.); *Surrogacy Act 2008* (W. Austl.), pt 2 div 2 ss 8–9 (Austl.); *Infertility Treatment Act 1995* (Vict.), pt 6 s 59 (Austl.); Assisted Human Reproduction Act, S.C. 2004, c. 2, § 6(1) (Can.); *see* Ailis L. Burpee, Note, *Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy*, 37 GA. J. INT'L & COMP. L. 305, 310–20 (2009).

134. D.C. CODE ANN. §§ 16-401 to 16-402 (LexisNexis 2001) (punishing both commercial and altruistic surrogacy); MICH. COMP. LAWS ANN. § 722.859 (West 2002); N.Y. DOM. REL. LAW § 123(1) (McKinney 2010); WASH. REV. CODE ANN. §§ 26.26.210–.260 (West 2005).

135. Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN'S L.J. 275, 286 (2009).

136. *See generally* Darra L. Hofman, *"Mama's Baby, Daddy's Maybe:" A State-by-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449 (2009) (50 state survey).

on prohibiting (or limiting) compensation for egg (and much less frequently sperm) "donation" focuses on what I have elsewhere termed "coercion" concerns about the voluntariness of the decision to participate due to monetary inducement, a form of Legal Paternalism justification in Part I's taxonomy—and anticommodificationist corruption,[137] compensation has also been challenged due to its harmful effects on the children who result.

Kenneth Baum, for example, considers whether "a market in oocytes could have adverse psychological effects on the resultant offspring."[138] While he rejects the empirical bona fides of the claim, he accepts the question's validity.[139] In a famous article, the philosopher Elizabeth Anderson argues that commercial surrogacy is unethical because it poses harms to both the surrogate and the resulting child, suggesting that "no one represents the child's interests in the surrogate industry" and that commercial surrogacy's "substitutions of market norms for parental norms represent ways of treating children as commodities which are degrading to them."[140] She asks rhetorically: "[w]ould it be any wonder if a child born of a surrogacy agreement feared resale by parents who have such an attitude" and if "a child who knew how anxious her parents were that she have the 'right' genetic makeup might fear that her parent's love was contingent upon her expression of these characteristics[?]"[141] Martha Ertman similarly wonders whether "purchasing gametes to conceive a child could cause the child to feel that he or she has been purchased like a new car" and notes Peggy Radin's claim that "conceiving of any child in market rhetoric harms personhood."[142]

137. I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 689–90 (2003).

138. Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, BYU L. REV. 107, 156 (2001).

139. *See id.* at 157.

140. Elizabeth S. Anderson, *Is Women's Labor a Commodity*, 19 PHIL. & PUB. AFF. 71, 75–77 (1990).

141. *Id.* at 77.

142. Martha M. Ertman, *What's Wrong With a Parenthood Market?: A New and Improved Theory of Commodification*, 82 N.C. L. REV. 1, 33–34 (2003) (quoting MARGARET J. RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS, AND OTHER THINGS 139 (1996)). While, unlike Anderson, Ertman is ultimately unconvinced of the claim's empirical support, she nonetheless concludes that potential negative effects on children from gamete sale are a relevant consideration in making policy. *Id.*

This argument runs into an imperfect Non-Identity Problem. Absent the inducement of compensation, it is unlikely that the intending parents would be able to find a surrogate or egg donors, as evidenced by the shortages experienced by Canada and Britain after banning donor compensation for eggs.[143] These compensation bans will thus frequently result in a de facto restriction on *whether* individuals can reproduce at all. Even if a State succeeded in recruiting a large population of altruistic donors, the Non-Identity Problem persists: so long as that population of altruistic egg/sperm donors and surrogates is different from the population of compensated ones (*with whom*) or conception occurs at a different time (*when*), the ban on compensation cannot be said to be in the best interests of *this* child—the one who would exist in a commercialized regime but does not in one that makes compensation unlawful.[144] The problem is imperfect because there may exist at least one child who will come into existence with the same genetic code whether or not such compensation is permitted.

3. The Enforcement of Surrogacy Contracts

BIRC justifications have been offered (alongside Paternalism) for the nonenforceability of surrogacy agreements that allocate parenting rights, a position explicitly adopted by statute in some U.S. states.[145]

Leading court decisions have pointed to BIRC grounds in holding surrogacy agreements unenforceable. In *Matter of Baby M*, the New Jersey Supreme Court famously held unenforcea-

143. *See*, *e.g.*, DEBORA L. SPAR, THE BABY BUSINESS 201 (2006). As to surrogacy, The *Baby M* court explicitly noted this problem in its opinion, writing "all parties concede that it is unlikely that surrogacy will survive without money. Despite the alleged selfless motivation of surrogate mothers, if there is no payment, there will be no surrogates, or very few." *Matter of Baby M*, 537 A.2d 1227, 1248 (N.J. 1988).

144. Unlike some of the other examples I have canvassed above, in this context it is not particularly the intent of the regulator to alter with whom individuals reproduce. That is, they would be just as happy if all donors and all recipients and the time of donation stayed exactly the same, just with anonymity removed. Is that a relevant distinction? I think not; the question is whether the BIRC justification can be used to justify prohibitions on sperm donor anonymity, and any time we know that when, whether, or with whom we reproduce will be altered by an intervention (whether the regulator independently desires that this occur or not) that makes the BIRC justification unavailing.

145. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 47/1 to 47/75 (West 2009); Hofman, *supra* note 136.

ble a traditional surrogacy agreement between William and Elizabeth Stern and Mary-Beth Whitehead, relying on analogies to laws prohibiting baby-selling and requiring a best interests of the child judgment before authorizing adoption.[146] The court's decision problematically suggests that surrogacy harms the interests of resulting children by decrying:

> [w]orst of all, however, is the contract's total disregard of the best interests of the child There is not the slightest suggestion that any inquiry will be made at any time to determine the fitness of the Sterns as custodial parents, of Mrs. Stern as an adoptive parent, their superiority to Mrs. Whitehead, or the effect on the child of not living with her natural mother.[147]

California court decisions on the enforcement of traditional and gestational surrogacy contracts have also considered whether enforcement of these contracts is in the best interests of the resulting children, without realizing the imperfect Non-Identity Problem with that inquiry.[148]

Similarly, in *J.R. M.R. & W.K.J. v. Utah*, a Utah federal court declared unconstitutional a Utah statute declaring that the gestational mother would always be granted legal parentage.[149] The court accepted the State's premise that protection of the best interests of the child could constitute a compelling interest sufficient to overcome a fundamental constitutional right, but found the statute infirm in that it failed to consider best interests on a case-by-case basis.[150]

In other states, a BIRC-analysis has been built into the surrogacy process directly by statute. New Hampshire, for example, statutorily requires judicial pre-clearance for a surrogacy agreement to be enforced and demands that the intended parents must be examined and a licensed child placement

146. 537 A.2d at 1227.

147. *Id.* at 1248.

148. *See* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993) ("[A]s Professor S[c]hultz recognizes, the interests of children, particularly at the outset of their lives, are '[un]likely to run contrary to those of adults who choose to bring them into being.' Thus, '[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike.'") (quoting Marjorie Maguire Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 397)); *id.* at 799–800 (Kennard, J., dissenting) (arguing that prior contractual agreements as to surrogacy should be ignored and parentage determined purely by inquiry as to which potential parent would serve the best interests of the children).

149. 261 F. Supp. 2d 1268 (D. Utah 2002).

150. *Id.*

agency or the Department of Health and Human Services must perform a home study to verify that the intended couple can provide the child with food, clothing, shelter, medical care, and other basic necessities.[151] The Uniform Parentage Act adopts a similar approach.[152]

This focus on BIRC considerations is also evident in scholarly work. Richard Epstein, no fan of the non-enforcement of surrogacy agreements, considers seriously the possibility that intended parents will abuse or neglect their child but presses "is there any reason to think that parents by surrogacy would not love the children whom they obtain by this arrangement? Of course the risks here are not zero . . . . But by the same token . . . children conceived by normal means often run a far greater risk of abuse."[153] Other commentators make similar moves.[154]

Once again this logic is problematic in that but-for the anticipation that their surrogacy contract would be enforced, commissioning couples might have not used a surrogate at all, might have employed a different surrogate (e.g., a surrogate in another state or country that does enforce these contracts), or might have altered the timing of the insemination (for example by prolonging their search for an experienced surrogate). Perhaps the Non-Identity problem is more imperfect here, but in any event it weakens the force of BIRC arguments.

Intriguingly, the BIRC justification seems to have *more* force as to gestational surrogates, for in this case patients are

151. N.H. REV. STAT. ANN. § 168-B:16 to 18 (LexisNexis 2010).

152. UNIF. PARENTAGE ACT § 803(3), 9B U.L.A. 377 (2001) ((requiring *inter alia*, "unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of fitness applicable to adoptive parents.") (alteration in original)).

153. Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305, 2320–21 (1995).

154. *See*, *e.g.*, Vanessa S. Browne-Barbour, *Bartering for Babies: Are Preconception Agreements in the Best Interests of Children*?, 26 WHITTIER L. REV. 429, 485 (2004) ("Are preconception agreements in the best interests of the children produced through such arrangements? No . . . . Absent a determination of the individual needs of a particular child, these agreements, even if pre-approved by a court, cannot be based upon a true best interest analysis."); Amanda M. Holliday, *Who's Your Daddy (And Mommy)? Creating Certainty for Texas Couples Entering into Surrogacy Contracts*, 34 TEX. TECH L. REV. 1101 (2003) (refuting BIRC type concerns by arguing that "the most common users of surrogacy—infertile couples—are . . . more stable parents than people conceiving normally, and thus, the resulting child is more likely to have a stable and safe home") (quoting another source)).

usually seeking out a surrogate in which to implant an already (or soon-to-be) fertilized pre-embryo, such that the *with whom* dimension remains unchanged, suggesting the problem is more imperfect and the BIRC justification concomitantly stronger. This would suggest the opposite result from the case law, which is more likely to enforce gestational rather than traditional surrogacy agreements, for example the California Supreme Court's decision in *Johnson v. Calvert*.[155] Of course, as discussed above, it is unsurprising that these courts are not attuned to this particular difference given their general failure to consider the problems with BIRC reasoning.

* * *

In this Part I have shown that a large number of state interventions that influence when, whether, and with whom we reproduce are justified on BIRC grounds. However, as commonly presented—as a Millian Harm Principle concerned with the interests of vulnerable children, that is as an analogue to similar reasoning in family law governing child abuse or adoption—what I have said demonstrates why the BIRC justificatory idiom is unpersuasive; indeed I would go so far as to say it is logically incoherent.

III. REBOOTING BEST INTERESTS? REFORMULATED BIRC JUSTIFICATIONS AND THEIR PROBLEMS

I have shown that courts, legislatures, and commentators frequently invoke BIRC justifications to ground a large number of interventions aimed at influencing when, whether, and with whom we reproduce, and why this is flawed in Perfect Non-Identity Problem cases. In this Part I want to examine whether BIRC justifications could be saved or, perhaps more accurately, reformulated, and I examine three possible ways of doing so.[156] Throughout I consider whether these three approaches might justify some modes of intervention (e.g., informational, funding) but not others (e.g., bodily integrity infringements, criminal

155. *See*, *e.g.*, 851 P.2d at 782 (Cal. 1993). Of course if things like timing of birth or the identity of the gestational parent were found sufficient to create Non-Identity Problems, gestational surrogacy agreements would pose the same problems. *See supra* note 38.

156. The non-person-affecting principle is arguably more of a break with BIRC, but each of the three are much closer to BIRC than the three substitute approaches I describe at the end of this Article and take up in Cohen, *supra* note 9.

prohibition, etc.).

Because BIRC reasoning is only problematic for cases that produce children with lives worth living, I first consider whether we might still be able to use BIRC reasoning to justify the interventions discussed in Part II by arguing that if left unchecked these reproductive activities would indeed create a life not worth living.

Second, I examine whether the novel distinction I have introduced between perfect and imperfect Non-Identity Problems may allow us to draw a distinction that would concede the unworkability of BIRC justifications for the perfect cases but claim that it is a valid justification for intervening in the imperfect cases.

Third, I adapt a proposal by philosophers (most prominently Parfit himself and Dan Brock) who suggest that the wrongfulness of these reproductive acts stems not from harming the children that result, but from the failure to produce children who suffered less or had more opportunity, what they call non-person-affecting principles.[157]

I show that each of these reformulations faces problems and none can ultimately save BIRC reasoning. At the end of this Part, I offer some brief tentative thoughts on the implication of what I have said for the constitutionality of the interventions discussed above.

A. LIVES NOT WORTH LIVING

The BIRC-justification is *not* problematic for cases where the resulting child will have a life not worth living because here one might argue that an individual *has* been harmed by being brought into existence. Is it at all plausible that courts, commentators, and legislators could conclude that each of Part II's interventions prevents the existence of children who have exactly that kind of life?

It seems very unlikely. This kind of life has to be "so burdensome and without compensating benefits to the individual with the disease that it is worse than never existing at all," the kind where we might even say that abortion of the fetus was desirable *for the child that would have resulted*.[158] While there is controversy as to whether "lives not worth living" is an inco-

157. *See* PARFIT, *supra* note 32; Brock, *supra* note 32.

158. BUCHANAN ET AL., *supra* note 32, at 233.

herent concept or a null set, even defenders of the concept think of the set as exceedingly small and usually mention two particularly awful diseases as possible members, Lesch-Nyhan and Tay-Sachs, and even these cases have proven controversial.[159] Infants with the incurable Lesch-Nyhan syndrome begin (at approximately 6 months of age) a process of neurological and physiological deterioration involving athetosis (involuntary writhing movements), severe mental deficiencies, and a tendency towards compulsive self-mutilation often requiring placing the child's elbows in splints, wrapping her hands in gauze, and sometimes extracting all her teeth.[160] Tay-Sachs has its onset in infancy and leads to "hypotonia [deficiencies in muscle tone], progressive loss of vision, loss of interest in surroundings, and loss of attained milestones, with death occurring at about the age of 4."[161]

Even assuming (*arguendo*) that growing up with a single or gay parent, a parent who is 50 at one's birth, without knowing one's genetic parent's identity, or with the knowledge that one was the result of market transactions produce a less-good-than-average life, it seems very hard to conclude that any of these cases would produce a life not worth living. Of the cases discussed in Part II, only the severe genetic abnormalities stemming from incest pose even an arguable case of a life not worth living. If one adopts a narrow conception of that category (as I do) containing Lesch-Nyhan syndrome and Tay-Sachs but not much else, even the conclusion that incest produces a life not worth living seems suspect. Further, in the wrongful life cases, the courts have routinely rejected the classification of comparably serious genetic abnormalities as giving rise to a life not worth living.[162]

159. *See*, *e.g.*, *id.*; Alexander M. Capron, *Punishing Reproductive Choices in the Name of Liberal Genetics*, 39 SAN DIEGO L. REV. 683, 689 (2002) ("While the self-mutilation involved in Lesch-Nyhan disease seems Jobian in its horror, the lack of awareness of self-suffering that seems to characterize the neurological collapse of infants affected by Tay-Sachs disease would lead many people to say that the latter is a condition that is nearly unbearable for the child's parents rather than for the child.").

160. *E.g.*, Robert F. Weir, *Selective Nontreatment of Handicapped Newborn*, *in* ETHICAL ISSUES IN MODERN MEDICINE 416 (John D. Arido & Bonnie Steinbock eds., 4th ed. 1995).

161. *See* 5 ATTORNEYS' TEXTBOOK OF MEDICINE § 17.21(3) (Roscoe N. Gray & Louise J. Gordy eds., 3d. ed. 2000).

162. *See*, *e.g.*, Siemieniec v. Lutheran Gen. Hosp., 512 N.E.2d 691, 696–703 (Ill. 1987) (Hemophilia B); Nelson v. Krusen, 678 S.W.2d 918, 924–25 (Tex.

Thus, it seems implausible that any of the interventions discussed in Part II can be justified as preventing of lives not worth living, with the possible exception of the criminal prohibition of adult brother-sister incest, but even that seems dubious.

B. HOLDING THE LINE AT IMPERFECT NON-IDENTITY PROBLEMS

In Part II I showed why BIRC justifications are a nonstarter for perfect Non-Identity Problem cases. One possible response is to concede that point only as to the *perfect* Non-Identity Problems but not the *imperfect* ones (e.g., sperm donor-anonymity, bans on selling gametes, the nonenforcement of surrogacy contracts).

Recall that, in imperfect Non-Identity Problem cases, there *may* exist *at least one* child who will come into existence (in the sense that the child will have the same genetic code) whether or not the intervention is implemented because when, whether, *and* with whom an individual reproduces *may* remain unchanged even if the intervention succeeds. If that result obtains, one can say that the resulting child *is* harmed if the intervention is not put in place since his or her counterfactual is not nonexistence but existence in a less well-off state without the protection of the intervention. For example, existing with knowledge of your genetic parentage is better than existence without that knowledge because of sperm donor anonymity, or at least so it is argued. As the number of individuals we predict to come into existence with the same genetic code whether or not the intervention is put in place increases, the Non-Identity Problem becomes increasingly imperfect.

It is therefore useful to understand the imperfect Non-Identity Problem as posing a problem of over-inclusivity as illustrated in Diagram 3. The closer we are to a perfect Non-Identity Problem, the more over-inclusive the intervention in that the intervention seeks to prevent a large number of reproductive acts, but for only a small number of them is the BIRC-justification appropriate.

1984) (Duchenne muscular dystrophy).

Diagram 3

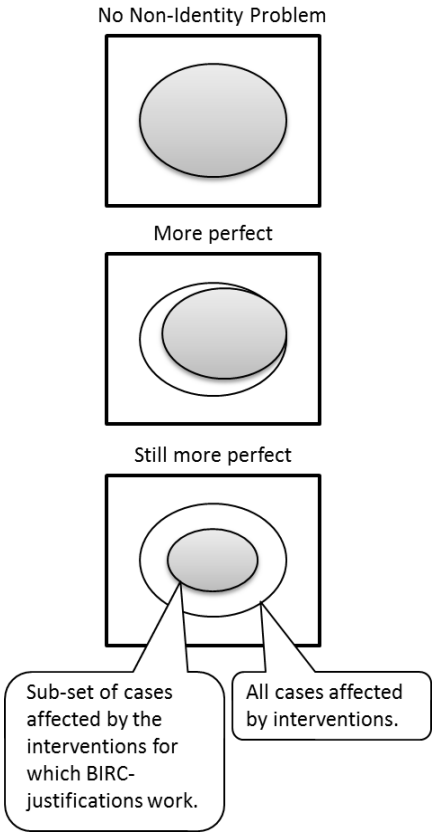


Diagram 3 maps this by showing the number of cases where the intervention will have effect and the sub-set of those cases that can be justified on BIRC grounds. The rule is that with increasing perfection of the Non-Identity Problem there is increasing over-inclusivity.

On the normative side, whether the perfect/imperfect distinction should make a difference as to whether BIRC adequately justifies state intervention depends on high-level moral/political theory commitments and what underlies the best interests of *existing* children type argument.

On one extreme, the best interests argument could be thought of as a strong deontological side constraint on maximizing good states of the world, a sort of categorical rule that says "state intervention should be set up in such a way that, to

the extent possible, no child is harmed." At this extreme, the distinction between perfect and imperfect Non-Identity Problem cases will carry a lot of weight; for as long as *one* child will be harmed if sperm donor anonymity is permitted (for example), that is a sufficient justification for state intervention notwithstanding parental interests in using anonymous sperm donor. In fact, though, the imperfect cases pose not just a question of the *number* of children harmed[163] and the severity of harm, but also a problem of probability—like determining an electron's position at the atomic level—in any given case we do not know whether the same genetic child will in fact result and can also only make a probabilistic determination of harm, such that the side constraint distinguishing perfect and imperfect cases would have to be not "do not harm even a single child" but instead "do not entertain any probability of harm to even a single child."

It is beyond cavil that such a strong side constraint for the BIRC-type justification would go far beyond what we currently tolerate for state interventions to protect the best interests of *existing* children. The current rules pertaining to the detection and prosecution of child abuse, re-assignment of parentage, and other similar rules, have as their goal a reduction in the incidence of harm to children. However, if instead we had a strong and single-minded side constraint of preventing the possibility of harm to a small number of children, we would entertain much more intrusive forms of state monitoring, such as closed-circuit televisions in every room of every house with government employees constantly watching. If one finds such a proposal quite repulsive, as I do, that suggests that, as important as the welfare of existing children is, we are not comfortable with a very strong side constraint. We are implicitly adopting a framework that treats the probability and number of children who will be harmed as one consideration to be balanced against what a stronger intervention would mean for countervailing interests in family privacy and child-rearing autonomy.[164]

163. And therefore the recurring moral theory problem of should the numbers matter. *Cf.* F. M. Kamm, *Aggregation and Two Moral Methods*, 17 UTILITAS 1 (2005) (discussing the question whether in trade-off situations we should consider the relative numbers of people); John Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977) (similar).

164. Thus, we are implicitly endorsing an approach that trades off invasions of privacy autonomy against the probability of harm, the number of children harmed, and the severity of harm to children.

If this more consequentialist analysis dominates as to best interests of *existing* children, it also seems appropriate as to best interests of *resulting* children. Harm to resulting children is bad, but the mere fact that children might be harmed does not itself tell us that an intervention to prevent that harm is justified. Rather we need to consider all costs and benefits, including the effect on the welfare of the parents whose choices are barred by the intervention. In the sperm donor anonymity case, for example, these countervailing interests would include concerns about the privacy interests of donors, the autonomy of rearing parents to decide whether to reveal that the child was donor-conceived, shortages in sperm donations, and the cost and administrability of such a system.[165] As the Non-Identity Problem becomes increasingly perfect and the intervention increasingly over inclusive as to the harm it prevents, it becomes harder to justify on this analysis, even if we value parental rights and procreative autonomy very little indeed.

If one believes in a broad and important conception of procreative liberty,[166] or otherwise finds important the parental interests impinged on by the interventions discussed above, the appropriate tradeoff between parental interests and children's welfare in these imperfect cases should clearly and conclusively tilt against intervention. One would already demand a quite significant showing of detriment to child welfare to justify restrictions here absent the Non-Identity Problem, and whatever showing is made will have to be discounted by the much smaller number and probability of children who will be harmed.

But even if one thinks the importance of these parental interests is frequently overstated, as long as those interests deserve some weight—which seems highly plausible—on this more consequentialist analysis, the trade-off will likely favor

165. *See*, *e.g.*, CAHN, *supra* note 95, at 117–29; Dennison, *supra* note 115, at 18–24; Pasquale Patrizio et al., *Disclosure to Children Conceived with Donor Gametes Should Be Optional*, 16 HUM. REPROD. 2036, 2036–38 (2001) (discussing the various reasons parents would choose not to disclose and arguing that disclosure should be optional); Waldman, *supra* note 119, at 549–57 (describing the interests of adults in the disclosure debate). For my own take on these issues, see I. Glenn Cohen, *Rethinking Sperm-Donor Anonymity: Of Changed Selves, Nonidentity, and One-Night Stands*, GEO. L.J. (forthcoming 2011).

166. *See*, *e.g.*, JOHN ROBERTSON, CHILDREN OF CHOICE 24 (1994) ("Procreative liberty should enjoy presumptive primacy when conflicts about its exercise arise because control over whether one reproduces or not is central to personal identity, to dignity, and to the meaning of one's life.").

parental interests in the imperfect cases from Part II. All of these cases are fairly close to the perfect end of the continuum such that the intervention is very over inclusive and the liberty of a large number of individuals will be limited in order to achieve a small probability of harm prevention for a small subset of resulting children. If the parental interests set back by these restrictions deserve some weight, even if not treated as a super-value, when aggregated across a large number of individuals whose liberty will be restricted, the harm from diminution of those interests should outweigh the small probabilistic chance of harm as to a small number of children.[167] Therefore, for these examples, holding the line at perfect Non-Identity cases seems difficult.

It is important, though, to emphasize that this conclusion is dependent on the closeness of these cases to the perfect Non-Identity Problem pole of the continuum. To see why, consider the following possible objection. There currently exists a set of child welfare rules protecting existing children by specifying that certain forms of child abuse will result in removing the child from parental custody and/or sanction of the parents. Those laws are avowedly premised on Best Interests of *Existing* Children reasoning, and at least initially seem immune from the Non-Identity Problem. But suppose a pair of parents, Mr. and Mrs. Hannigan, who plan on conceiving naturally, forthrightly admit (in song) to anyone who will listen that they intend to give the daughter they have always hoped for (whom they will name Annie) a hard-knock life full of child abuse (though not abuse so bad as to make poor little Annie's life not worth living). Suppose further they specify that only if they can abuse their daughter will they go ahead and have one, and if instead the law prevents it or terminates their parental rights for abuse they will refrain from conceiving. Does my argument imply that the child abuse laws cannot be justified by best interests reasoning because if they are in place Annie will never

167. Of course, if one attached a *very* small value to countervailing parental interests here, one might still reach the opposite conclusion that small probabilities of harm to small numbers of children did dominate. In this Article I have not tried to convince the reader how to value those interests. Indeed, I am not sure I could if I tried, and I think the valuation of the interests differ across cases. Instead, I have tried to make it clear that one's valuation of these interests has to be much smaller than one might originally have thought, in order to justify the regulation.

be born, and even if being abused is bad it cannot be said to be worse than nonexistence?

This is a very troubling and, as far as I know, novel argument. One way to avoid it might be to rely on one of the other strategies discussed below for determining that parental action is wrongful, notwithstanding the Non-Identity Problem, or to argue that there are constraints on what we can do to people *once* they are born, even if those constraints will discourage their being born.[168] Allowing the perfect/imperfect line to do

168. In a brief exploration of whether the State should prohibit mistreating animals, Robert Nozick considered a similar claim he thought should be rejected: that we can eat animals because but-for our consumption they would not be born and "[t]o exist for a while is better than never to exist at all." ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 38 (1974). To try to defeat this argument by a *reductio ad absurdum*, Nozick applied the same argument to parents and suggested that "once a person exists, not everything compatible with his overall existence being a net plus can be done to him, even by those who created him" and then suggested the same should hold true for animals. *Id.* at 38–39; *cf.* Susan M. Wolf et al., *Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues*, *Guidelines & Limits*, 31 J.L. MED. & ETHICS 327, 330–35 (2003) (making a similar point in explaining the ethical limitations that should restrain the ability of parents to genetically engineer donor children to help existing children, so called savior siblings).

Even if Nozick is right about this claim, all of the examples from Part II, with one possible exception, differ from Nozick's hypothetical. In Nozick's hypothetical, the harm to resulting children is separable and after the fact of their existence, whereas the harm in the examples from Part II is inherent in the resulting children and cannot be avoided if they are to exist as the particular people that they are. Sperm donor anonymity is a possible exception because it is possible to conceive of such anonymity as a continual kind of child abuse where the information is continually not released to the child and thereby harming it. Is this a good argument for distinguishing the sperm donor anonymity case? In the environmental context, Axel Gosseries has proposed a reason to think so that he calls the "'Last Judgment'" approach. Axel Gosseries, *On Future Generations' Future Rights*, 16 J. POL. PHIL. 446, 460–61 (2008). Gosseries imagines a man trying to decide whether to bicycle or drive his car home from work every day. He chooses to drive his car. Gosseries then imagines that, many years later, the man's 17-year-old daughter, who is an environmental activist, lambasts him for not bicycling and making the environment worse as a result. The man responds by stating: "'had I done so, *you* would not be here.'" *Id.* at 460. Had he used his bicycle, the man would have come home at a different time each day and thus slept with his wife at a different time and produced a different child. The father continues: "'Since your life in a polluted environment is still worth living, why blame me? I certainly did not harm you.'" *Id.*

Gosseries disagrees with the father. *Id.* at 461. He suggests that when there is overlap between generations (at least to some degree), there may be an asymmetry in the way the Non-Identity Problem immunizes pre- and post-conception harms. "As long as the father's pro-car choice was a necessary condition for his daughter's existence, it remains unobjectionable" such that "his

some work might offer us another way out. We might say that the portion of children who will exist, irrespective of whether child-abuse laws are put into place, is far greater than the portion whose existence is dependent on whether or not child-abuse laws are put into place (i.e. the ones for whom there *is* a Non-Identity Problem). Only a small number of parents like the Hannigans might *really* not reproduce, or alter the timing or partner for reproduction, unless allowed to abuse their child with impunity. Therefore, in this hypothetical, the Non-Identity Problem is still imperfect, but much closer to the *no* Non-Identity Problem pole of the continuum, and one could conclude that the Hannigans are defensible casualties of an

preconception actions are immune to moral criticism when it comes to alleged harms to his daughter." *Id.* at 461. However, "as soon as the daughter is conceived, all the father's subsequent actions no longer fall within the scope of the non-identity context" such that "we should expect the father to *catch up* as soon as his daughter has been conceived in order to be able, at the end of his life, to eventually meet" the obligations to her regarding the environment. *Id.* Even if the harm to the environment the father has already done is irreversible, says Gosseries, "he should act in such a way as to compensate for such negative impacts through substitution measures (e.g., replacing an extinguished species with new energy-saving technology)." *Id.*

Similarly, can we make the claim that the parents who have sought to use anonymous sperm donations should "catch up" by revealing the child's identity later on and that this justifies the legal prohibition on sperm donor anonymity? I think not. The existence of a legal obligation of the sperm donor to place his name in a registry available to the child at age eighteen is what, as discussed above, is likely to alter donor and recipient behavior relating to when, whether, or with whom they reproduce. Thus, a legally enforceable "catch up" obligation "feeds back" into the conception decision and thus is not immunized from the Non-Identity Problem. Therefore, even in terms of sperm donor anonymity, the Non-Identity Problem blocks harm to the resulting child as serving as a justification for the sperm donor identification law.

Is Gosseries right as a *moral* matter at least? Can we at least say that parents, who do not make available to their donor-conceived children the donors' identities, have acted immorally even if a legally enforceable obligation would not be justified? The matter is less clear, but so long as a parent can truthfully say "if I knew I faced this moral obligation I would have not reproduced or I would have altered when or with whom I had reproduced, thereby producing a different child"—that is that he or she would make different reproductive decisions and thereby create a different child, then the same feedback problem seems to exist, even though what alters the behavior is a moral and not legal obligation. For further discussion of this anticipation argument, see Cohen, *supra* note 165.

To some extent, Gosseries' proposal parallels a different line of responses to the Non-Identity Problem that I call "Wronging While Overall Benefitting." This response is exemplified by Seana Shiffrin's approach. Shiffrin, *supra* note 33. I discuss this approach in greater detail in a companion piece. Cohen, *supra* note 9.

over-inclusive but justifiable rule.[169] This is quite different than the other cases we have discussed. Furthermore, one might suggest that in this case the claimed parental interest—abusing one's child—is due much less, if any, weight as compared to the procreative interests at issue in the cases discussed in Part II.[170]

C. NON-PERSON-AFFECTING PRINCIPLES

The Non-Identity Problem is an obstacle for any argument that a restriction on whether, when, and with whom we reproduce is justified because it harms *the child that is produced*—that is, for any argument premised on the idea that "the individuals who experience suffering and limited opportunity in

169. This discussion may also provide a distinction between my cases and the environmental context. While changes to the environment may cause *some* variation in which individuals come into existence, the Non-Identity Problems posed will be much further from the perfect pole than in the cases I have been discussing, so more like the abuse hypothetical with the Hannigans. That is, so long as there exists a significant population of individuals who would exist whether or not the environmental intervention is put in place, harm to those individuals would be a good reason to prevent the environmental degradation. It is hard to imagine an environmental event that would completely (or nearly completely) change when, whether, or with whom individuals reproduced. As to such a hypothetical case where almost all future individuals will be different, it may be that there is no BIRC-type justification for acting to prevent it. I intend my comments on the environmental case to be very tentative, in part because there may be several important distinguishing characteristics. These include the possibility that *a*moral value considerations like aesthetics may be relevant, that the discontinuation of our entire species deserves special attention, or that most preventable environmental degradations are likely to negatively affect *already-existing* populations too such that BIRC may not be needed as a justification and we can rely on a pure externalities argument.

170. That response takes us into the complicated question of whether consequentialist theories can endorse some form of preference-laundering, like determining whether a sadist's preference to see others suffer ought to count in determining welfare effects. *See*, *e.g.*, L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 199–200 (1996) ("Does welfarism assign positive ethical value to . . . the enjoyment of others' misfortune? Worse, what about the sadistic pleasures of rapists or torturers?"); Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness*, *Utility*, *and the Pareto Principle*, 110 YALE L.J. 173, 183–94 (2000) (considering how to disregard certain preferences and how to "justify this 'laundering of preferences'"). If we could, in advance, perfectly sort who *is* serious about procreating only if they are allowed to commit child abuse, should we have a rule exempting *those* people from the usual consequences? Such a regime might still be objectionable in that it produces an inequality that unjustly favors those whose reproduction is conditioned on being able to abuse or out of moral hazard concerns that it might encourage parents to form these preferences to avoid inculpation. In any event, such sorting seems purely hypothetical.

one alternative exist without those effects in the other alternative."[171] However, there is a separate family of what are called "non-person-affecting principles" which may be used to condemn the action.[172] One such view suggests the world would be better off if, instead of person *A* who will experience serious suffering or limited opportunity coming into existence, person *B*, who will not experience such limited opportunities or suffering, would come into existence—that is, "[a]lthough the person born with the condition in question would not have been harmed by birth, the world is better off if a person without that harm had been substituted in his place."[173] Thus, on the non-person-affecting principle "[i]t is morally good to act in a way that results in less suffering and less limited opportunity in the world"[174] and therefore morally bad to act in a way that results in more of those things. The parent who produces a child who will experience serious suffering or limited opportunity has done something morally wrong when that parent could have produced a child who would not have experienced those things.[175]

To illustrate, suppose that Desdemona engages in adult brother-sister incest that produces Cal, a child who, due to genetic abnormality, psychological harm, or stigma, experiences serious suffering and diminished opportunity. The Non-Identity Problem tells us that the BIRC justification—that *Cal* is *harmed*—cannot do the work of justifying restrictions that would have prevented his birth. The non-person-affecting principle suggests that the wrongfulness of the act stems from Desdemona having given birth to Cal when she could have instead had a different child in Cal's place with a non-incestual partner, a child who would not experience the suffering Cal does. She could have done better, or perhaps more accurately, she

171. Brock, *supra* note 32, at 273.

172. *See*, *e.g.*, *id.* at 272–73 (explaining and giving an example of the non-person-affecting principle). Parfit himself introduces non-person-affecting principles of the same variety immediately after presenting the Non-Identity Problem. PARFIT, *supra* note 32, at 359–61, 364–71. The term is a slight misnomer in that the suffering that is diminishing welfare will be experienced by some person—it is not disembodied, it is just that the principle does not require the same person to suffer or not suffer based on the counterfactual; the relevant distinction is between same-number and same-person cases. Brock, *supra* note 32, at 273.

173. Robertson, *supra* note 32, at 16.

174. Brock, *supra* note 32, at 273.

175. Robertson, *supra* note 32, at 16.

could have avoided doing so badly. In a sense, this approach replaces Best Interests of the Resulting *Child* with Best Interests of the Resulting *Population*—BIRP (a term I would use if it did not sound like indigestion).

The type of impersonal harm this argument invokes is very unusual as a justification for criminal law intervention. Ordinarily, society intervenes with criminal sanctions because there will be an identifiable "victim" who is harmed or wronged, or, at least, a statistical but not yet identified victim.[176] Non-person-affecting principles posit that there can be wrongs that are 'victimless,' not in the colloquial sense of having very attenuated and indirect harms to people, as in the war on drugs, but where truly *no one* is harmed. For under a non-person-affecting principle there is no one to lodge a first-person complaint against the actor or feel indignation or resentment; instead the claim is at the level of populations evaluated from an impersonal standpoint: the world would be better if its population looked like *this* rather than *that*.[177]

To forestall confusion, let me emphasize that the non-person-affecting approach is *not* a claim that the intervention is desirable for the sake of that other child. He will not be harmed if he is not brought into existence. It is also not a claim that the restriction on reproduction is justified because *others in society* benefit or are harmed by the child's existence. That is a separate argument I discuss in a companion paper relating to reproductive externalities; the non-person-affecting principle by contrasts says the action is wrongful even if those externalities are zero.[178] What *is* the non-person-affecting argument then? It

176. *See*, *e.g.*, FEINBERG, *supra* note 15, at 34–36 (discussing harming and wronging). There are some tricky terminological nuances I self-consciously gloss over here in that there can be acts that wrong a person without harming him, or at least without harming him on balance. For more precision on these terms, see *id.*

177. *See* Johann Frick, Future Persons and Victimless Wrongs (2002) (unpublished manuscript at 4), *available at* https://webspace.utexas.edu/jtb538/Frick.pdf.

178. To clarify the distinction: There could be cases where reproduction will produce a population that is better off from the non-person-affecting point of view but which imposes externalities on already-existing individuals that would not occur without the intervention. It is also possible to create a population that would produce fewer externalized costs on others, yet be worse off from the non-person-affecting principle perspective. For example, creating a population that was more likely to die at the age when they had paid into Social Security but before they needed to rely on social support might be better

is a claim that the world is better off even though no person is made better off; the world is better in an *impersonal* sense.[179]

To make it clear exactly what it would mean to reject the non-person-affecting principle approach as a justification for criminalizing certain reproductive conduct, I should emphasize what doing so would *not* imply. It does not imply that the State is prohibited from imposing criminal sanction to protect the interests of future persons who we know will exist and whose existence is independent of our sanction. Joel Feinberg gives an imaginative example of a criminal who plants a time bomb in the closet of a kindergarten and sets a timing device to go off six years hence.[180] Eventually, the bomb goes off, "killing or mutilating dozens of five-year-old children."[181] As Feinberg rightly concludes, even though the criminal might deny he caused the harm to the children because they did not exist when he performed the act of placing the bomb, that should be no excuse because his act "set in train a causal sequence that led directly to the harm."[182] Nothing I say in this Article is to the contrary. What is important for the kindergarten case is that there is no reason to think that whether or not we punish the criminal will determine whether these children come into existence. That is, it will *not* alter when, whether, or with whom their parents conceive. Thus, there is no Non-Identity Problem. *These* children will come into existence and *these* children will be harmed if the act is not deterred through criminal liability. Our cases are different, though, for the reasons we have been discussing throughout this Article—whether or not we put in place criminal liability will determine whether these particular children come into existence, thus we cannot say that criminalizing the conduct prevents harm to these children, as we can in the time bomb case. For the same reason, rejecting criminal liability for the cases this Article discusses does not require rejecting criminal liability for environmental

in terms of externalized costs, but would be worse on non-person-affecting grounds because these individuals would face more limited opportunity.

179. PARFIT, *supra* note 32, at 369 ("If in either of two possible outcomes the same number of people would ever live, it will be worse if those who live are worse off, or have a lower quality of life, than those who would have lived.").

180. JOEL FEINBERG, FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 12 (1992).

181. *Id.*

182. *Id.*

damage or crimes against fetuses that will harm the children those fetuses will become.[183]

With those clarifications in mind, we can now discuss the non-person-affecting principle approach on its own terms. The approach gives us a way to condemn reproductive practices like those discussed in Part II that do not run afoul of the Non-Identity Problem. There are, however, a number of serious challenges to using this approach as a justification for state interventions seeking to influence when, whether, and with whom we reproduce. Here, I examine four kinds of critiques: (1) does the limitation of the approach to same-number cases (if justified) make it an inadequate substitute for BIRC; (2) is the approach problematically underinclusive; (3) is the approach sensible even as a criterion of moral wrongfulness, or does it carry with it problematic implications; and (4) can the approach even justify criminal sanctions? Each of these is a separate concern regarding this approach that collectively suggest it to be a poor substitute for BIRC in justifying these interventions.

1. The Limitation to Same-Number Cases

The most serious concern with the non-person-affecting principle approach is that, on its face, it can only justify a much smaller subset of the interventions from Part II than BIRC aims to justify. According to Brock and Parfit, non-person-affecting principles have built in to them the limitation that they apply only to "same-number" cases—where the *same number* of persons exist in either counterfactual and we merely substitute the person who would experience more opportunity or less suffering (i.e. the higher welfare person) for the one who would experience less opportunity or more suffering (i.e. the lower welfare person).[184] This is to be contrasted with "differ-

183. What to think about harm-to-fetus cases would depend on a separate question of one's criterion for the continuity of personal identity between fetuses and the children they become, and whether or not changes in personal identity of this sort are sufficient to create a Non-Identity Problem. *See* Cohen, *supra* note 19, at 354–59. There are similar, but even more difficult, questions about whether Non-Identity Problems occur from genetic manipulations of pre-embryos, as I have also discussed elsewhere. *Id.* at 357. In other words, one can support criminal liability as to the fetal or pre-embryonic cases but reject it as to the cases I discuss here.

184. PARFIT, *supra* note 32, at 360–61; Brock, *supra* note 32, at 273.

ent-number cases" where, if the intervention is put in place, a different number of children will come into existence.[185]

It is only in same-number cases that the non-person affecting principle approach can declare that the world is better off from an impersonal standpoint if the substitution takes place. The reason offered by Brock and his colleagues is that while the "intuitive point underlying [the non-person-affecting principle] is that it is good to prevent suffering and promote happiness even if doing so reduces no person's suffering and increases no person's happiness," when that principle is applied to "different-number cases, that implies Parfit's Repugnant Conclusion."[186] The Repugnant Conclusion is that "[f]or any possible population of at least ten billion people, all with very high quality of life, there must be some much larger imaginable population whose existence, if other things are equal, would be better, even though its members have lives that are barely worth living."[187] That is, if we extend the principle we have been discussing to "cases with different numbers of persons," that would "imply we should increase total happiness slightly by vastly increasing the population, even though we thereby make every existing person much worse off," and it is only "person-affecting principles [that] seem likely to avoid unacceptable implications like the Repugnant conclusion, since only they require that a reduction in suffering or an increase in happiness be to a distinct individual."[188]

Let me unpack that a bit. As part of a consequentialist theory—I will use utilitarianism here instead of other variants of consequentialism for explanatory simplicity[189]—one could have two quite different views about how to aggregate utility between persons. Total utilitarians would sum up the utility of every individual in the set such that (to use fictional numbers) a population of 100,000 people with utility of five each would be more desirable than a population of 50,000 people with utility five each; by contrast average utilitarians would divide all utili-

185. PARFIT, *supra* note 32, at 360–61 (contrasting "Same Number Choices" with "Different Number Choices").

186. BUCHANAN ET AL., *supra* note 32, at 254.

187. PARFIT, *supra* note 32, at 388.

188. BUCHANAN ET AL., *supra* note 32, at 254–55.

189. Deontologists face a similar problem as well, since they often begin with a commitment to pursuing the Good, but merely add constraints and options.

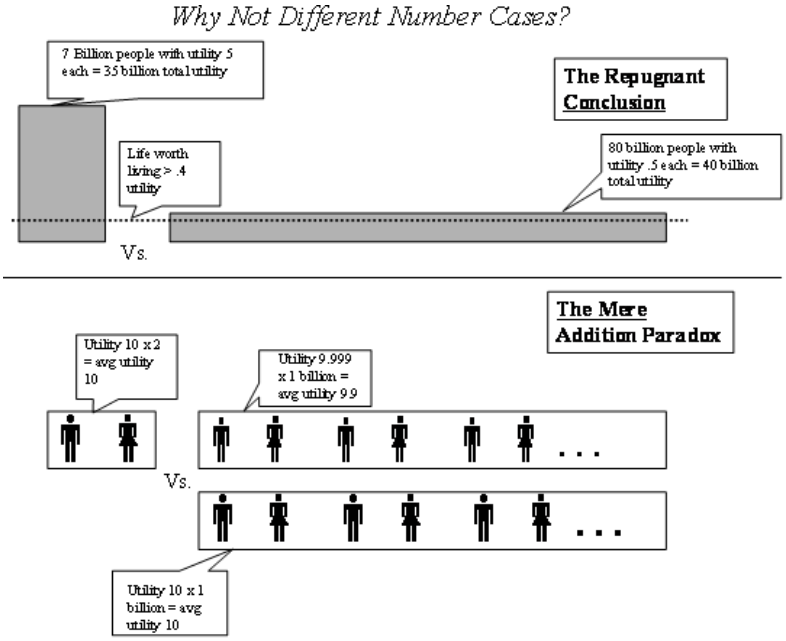
ty by the number of individuals in the population such that both of those hypothetical populations are equally desirable.[190]

Different numbers cases might be thought of as coming in two variants, those that will produce *fewer* children (including zero) and those that will produce *more* children. Those policies that will produce fewer children—all the regulations affecting *whether* individuals reproduce directly have this effect, and many of the regulations of *when*, and *with whom* individuals reproduce may *de facto* have this effect as discussed above—should be disfavored by a total utilitarian as long as the resulting children will have lives worth living. So long as the child's life will have positive utility (i.e. a life worth living), it is always better for there to come into existence one additional child for they add to the total utility. Thus, on the total utilitarian view, a non-person-affecting principle cannot ordinarily support regulating reproduction when it produces *fewer* children,[191] as most of the interventions from Part II actually do, and these interventions should thus be *disfavored*.

190. *See*, *e.g.*, Richard A. Posner, *Utilitarianism*, *Economics*, *and Legal Theory*, 8 J. LEGAL STUD. 103, 113 (1979) (discussing the difference between average and total utilitarianism and the debate between scholars on which type to use).

191. I say "ordinarily" because this conclusion is only completely assured in cases where the intervention reduces the existing set of children to zero or where the welfare of the children born is independent. One could at least conceive of an intervention that, instead of producing three children who each have a utility of seven, produced two children who have utilities of six and twenty respectively. In such a case the total utilitarian would favor the intervention because it produces a greater utility. While there is no reason to think any of the interventions I am discussing would have this structure, it is important to be precise.

Diagram 4



However, it is exactly the total utilitarian reasoning that threatens to lead to the Repugnant Conclusion which is illustrated in the top half of Diagram 4: we could vastly expand our population from the bar on the left (seven billion people with utility five each = thirty-five billion total utility) to the bar on the right (eighty billion people with utility .5 each = forty billion total utility). This would result in a much larger number of people with lives just barely worth living, thus increasing total utility but producing people with much worse lives than we currently have. Thus, these forms of regulation cannot be justified in different-number cases on non-person-affecting principles if one is a total utilitarian; *but* being a total utilitarian also seems to lead to an unacceptable conclusion.[192]

192. I say "seems" because one option would be to *accept* the Repugnant Conclusion as not so repugnant after all. *See*, *e.g.*, Torbjörn Tännsjö, *Why We Ought to Accept the Repugnant Conclusion*, 14 UTILITAS 339 (2002). I will not examine this possibility here, except to suggest that some of the intuitive repugnance of the conclusion may stem from improperly thinking of our population actually becoming the other one in which case our own lives would actually be made less good rather than a scenario in which we imagine choosing

One might argue that this conclusion can be evaded by accepting average rather than total utility as a measure of what makes a state of the world better: a non-person-affecting principle approach premised on average utilitarianism can support these kinds of regulations in different-number cases because the additional children whose existence the regulation seeks to prevent, while adding to the *total* utility in the world will, if "below-average," lower the *average* utility in the world.[193] Thus, on the average utilitarian version of the non-person-affecting principle, reproducing in such circumstances is wrong because it lowers average utility. However, average utilitarianism *also* appears to lead us to a different kind of repugnant conclusion, which Parfit calls the "Mere Addition Paradox" (represented in the lower half of Diagram 4), that the world would be better if Adam and Eve, both with a very high utility, existed alone than if in addition to Adam and Eve there also existed fifty billion other people with very good lives but utilities just below Adam and Eve (say 9.99999999 repeating).[194] That is, the latter world is a worse one, since the addition of these people has diminished the average from what it was with just Adam and Eve existing. This conclusion seems wrong. Indeed, perhaps still more strangely the average utilitarian should be *indifferent* as to Adam and Eve, each with utility ten, existing versus Adam and Eve plus fifty billion other people, all with utility ten, existing, for in each case the average utility is exactly the same.

Both Brock and Parfit candidly admit that the only way to avoid both of these paradoxes is to provide a comprehensive theory that mixes person-affecting and non-person-affecting principles—they call it "Theory X"—but that no such comprehensive theory has yet been formulated.[195] Therefore, Brock and his co-authors limit the scope of the application of non-person-affecting principles to same-number cases.[196] The impli-

between creating one population or the other *ab initio*. Accepting the Repugnant Conclusion and total utilitarianism would appear to stack the deck further *against* the interventions in Part II, for it would favor producing *more* children and not fewer. I will discuss these matters further in a *Beyond Best Interests*, when discussing reproductive externality approaches. *See* Cohen, *supra* note 9.

193. *See* Robertson, *supra* note 32, at 17 (providing reasons to use average utilitarianism when the numbers differ).

194. *See* PARFIT, *supra* note 32, at 419–21.

195. BUCHANAN ET AL., *supra* note 32, at 254–55; PARFIT, *supra* note 32, at 390.

196. BUCHANAN ET AL., *supra* note 32, at 254–55.

cation for our purposes is that only in same-number, but *not* different-number cases, can we say that the world is impersonally better without leading to conclusions about other cases we find intuitively unacceptable. The same/different-number distinction usefully maps on to one dimension of the taxonomy I developed in Part I. Attempts to target *whether* individuals reproduce are by definition *not* same-numbers cases and therefore unjustifiable by this framework. The limitation runs deeper, however, because interventions targeting *with whom* or *when* we reproduce may *de facto* lead to no reproduction at all. For example bans on commercialized surrogacy, refusal to contractually enforce surrogacy agreements, and prohibitions of donor anonymity, may result in shortages of sperm or eggs or surrogates or reluctance of prospective parent to reproduce on these terms.

As to this *de facto* point, let me dwell on one way in which my account differs subtly from that of Parfit and Brock. They are concerned with the *morality* of certain reproductive decisions that may produce children who are less well-off than they could have been. From the point of view of whether a parent acted morally wrong, they propose as a test of whether we are in a same-numbers case whether the parents *could* have substituted a better-off child for the worse-off one, with the idea being that if they *could* they failed by not doing so. Even at the level of what is meant by *could* I think there are some hard questions,[197] but the larger point here is that, when we are asking

197. Brock and his co-authors use an example of two parents who are "virtually certain to genetically transmit the disability to any child they conceive" such that "[i]f they choose not to have a child with a disability and can have no other child instead, the result is one fewer children—a different-number case." BUCHANAN ET AL., *supra* note 32, at 255. Suppose, however, that it is only the combination of *both* parents' genetic material that produces the disabled child; could they not avoid that result by using one of their gametes along with sperm or egg donated from a third-party? Even if they each had genetic material certain to produce the disability, could they not still produce a healthy child with the mother serving as gestational parent and using both donated sperm and egg? John Robertson has suggested that even in cases like these where we *could* make same-number substitutions, we may want to make an exception and not treat the failure to substitute as wrongful if it "unreasonably burden[s] parents," and has suggested as examples cases where it would "require that the parents give up having a genetically related child and accept childlessness, adoption, or use of a gamete donor." Robertson, *supra* note 32, at 16–17. Whether we ought to make an exception for such cases on the "could" view should depend, in part, on prior normative judgments about the value of having genetically related children. *See generally* Cohen, *Genetic Parent*, *supra* note 5, at 1189–90 (discussing parental adoption preferences); Cohen, *su-*

what interventions a *state* motivated by non-person-affecting principles *ought to adopt*, the question should subtly shift from one of whether these parents *could* have made a same-number substitution to whether they *will* make such substitutions if the intervention is put in place. If the intervention has the *actual* effect of reducing the number of children born rather than inducing same-number substitutions, the State cannot pursue it in the name of non-person-affecting principles since we cannot say the world has been made better off in an impersonal sense with the intervention in place.[198]

For these reasons, until we develop Theory X, the non-person-affecting principle approach is at most only a limited substitute for BIRC reasoning because it extends only to same-number cases and thus excludes many of the examples in Part II.

This is such a significant limitation to a non-person-affecting approach that it would be desirable to be able to relax it and show that non-person-affecting principles could apply even in some different-number cases. Adopting a proposal put forth by Thomas Hurka in the adjacent field of population ethics, Philip Peters has recently proposed a theory that combines average and total utility as a way to avoid both the Repugnant Conclusion and the Mere Addition Paradox and thus allow the use of this framework in some different-number cases.[199] On

pra note 19 (discussing tort liability for parents who intentionally have a disabled child).

198. While I think this is right, the point is not self-evident and may depend on whether one views the intervention through a more retributivistic lens or as a more consequentialist attempt at influencing social policy. If one adopts the more retributivistic perspective, it is possible to conclude that person has acted immorally by failing to substitute for another child, *and* that even if the intervention is put in place they will not actually substitute, *and* that they should be punished because they have acted wrongfully. On this view, punishment is warranted for a wrongful action, even though it is a wrongful action the possibility of punishment would not have prevented. I am not attracted to this position, in which individuals are punished in the name of non-person-affecting principles even though the intervention does *not* make the world better from an impersonal standpoint, but others may be. In any event, this perspective may be much better suited for defending criminal law interventions where retributivist impulses have a larger role to play. Yet, as I explain below, criminal law interventions may be the hardest to defend on the non-person-affecting principle approach for separate reasons.

199. Philip G. Peters, *Implications of the Nonidentity Problem for State Regulation of Reproductive Liberty*, *in* 35 HARMING FUTURE PERSONS: ETHICS, GENETICS, AND THE NONIDENTITY PROBLEM 317, 326 (MELINDA A. Roberts &

this theory "total utility declines in importance relative to average utility as populations increase" such that "the value that an additional individual contributes to the world is not constant, but varies with the number of other humans alive" so that after a crisis that decimated our population the value of an additional person's existence would be huge while as the population reaches its current size the value of an additional person would greatly diminish.[200] Peters writes that this approach attractively avoids the Repugnant Conclusion "by giving more weight to average utility when population levels are high."[201] Although he does not make this point, so long as total utility always retains some weight in the calculus the view also avoids one version of the Mere Addition Paradox in that adding an individual with identical utility to all other individuals (leaving the average unchanged) remains preferable because total utility acts at the very least as a "tie breaker." How this solution does with another version of the Mere Addition Paradox, say a population that looks like ours with average utility of ten versus a population that is twice as large but with just slightly less average utility (9.99999), is less clear and would depend on precisely how much total gives way to average utility and at what point.

Peters is to be congratulated for making such a clever and subtle addition to this literature, but how good of a solution is this to the different-number cases, really? Determining the right mix of total and average utility to precisely avoid these paradoxes seems to construct a bit of a "just-so story." Perhaps it is only by reflecting on such intuitions that one can determine the proper shape of a utilitarian theory, but while the intuitions behind Total and Average Utilitarian approaches are quite clear, the intuitions behind this theory are less than pellucid. In any event, it seems to me that the bigger deficit with the theory is that it errs in identifying what it is we think is wrong in reproduction when we think it wrong. Because the theory calls on us to heavily weight average utility when the population is the size of ours, it means that the wrongfulness of a reproductive act depends on whether the child created is above or below the average utility of all other existing individ-

David T. Wasserman eds. 2009) (citing Thomas Hurka, *Value and Population Size*, 93 ETHICS 496 (1983)).

200. *Id.*

201. *Id.*

uals—but that seems deeply counterintuitive. Why should the wrongfulness of my reproductive activity be measured relative to that of other reproducers in my society? Because we are in a *different*-number case it is not an argument that *I* could have done better by substitution but instead an acknowledgment that, although I could not have done better, because others *did* do better, my act is wrong.[202] Why treat the average as the morally significant baseline? The average utility of the world is quite different today than in 1850, which means that producing the same child could be morally permissible in 1850 but morally impermissible today.

Consider your own life. Most of us think that our parents did not act wrongly by producing us. And yet this approach would suggest that to know if that is right we would have to compare our utility with that of all other persons in society at the moment of our birth, and if we fall below the mean our existence could validly (indeed should) have been prohibited. Indeed, if tomorrow, other parents begin having children with much higher utility than our own utility, then our reproduction which was permissible today would suddenly become wrongful tomorrow, notwithstanding that no fact about our own lives has changed. This seems deeply troubling and so out of sorts with our conceptions of what makes particular acts of reproduction wrongful as to be a serious mark against Peters's otherwise elegant solution, or any approach with a high weighting of average utility.

Thus, I conclude that the limitation of non-person-affecting principles to same-number cases (and the concomitant narrowing of regulations on reproduction the non-person-affecting principle can support) persists. This represents a serious mark against the non-person-affecting approach to the extent it is offered as an adequate BIRC substitute, ruling it out for many (the whether interventions), if not all (many of the when and with whom interventions), in Part II.[203]

202. This distinguishes and sharpens the critique from one I make regarding enhancement. *See* discussion *infra* Part III.C.3.a. There, the problematic implication is that we do wrong by failing to enhance, to substitute for enhanced children in same-number cases, when we *can* do so. Here the claim is that we act wrongly by failing to have average or above-average children even when we *cannot* do so, and thus the State can validly prevent us from having any children at all.

203. To be clear, neither Brock nor Parfit argues that non-person-affecting principles are a total substitute for person-affecting ones and intends them to compliment not supplement person-affecting approaches. What I have shown,

2. Underinclusivity

Even if non-person-affecting principles are limited to justifying purely same-number substitution interventions, or if this limitation is overcome, there are several other reasons why this framework seems inadequate, to which I now turn.

Deploying the non-person-affecting principle argument to defend the interventions of Part II shows them to be problematically underinclusive. There are many forms of reproduction producing comparable (or worse) non-person-affecting principle deficits where no such intervention has been imposed. If many of us would reject intervention in those cases, and those cases cannot meaningfully be distinguished, that casts doubt about how good this reformulation is as a BIRC substitute.

To wit, the genetic abnormalities resulting from brother-sister incest are less likely to result and also less serious in terms of their effects on the population of resulting children than those that result from the mating of carriers of Tay-Sachs or a number of other genetic disorders. And yet our government has not required mandatory screening for these disorders—an intervention which is less liberty-intrusive as to particular individuals than the criminalization of brother-sister incest since it would merely force individuals to have the information, not control their sexual relationships—and it certainly has not made it illegal for Tay-Sachs carriers to reproduce. If you think that brother-sister incest may be unique on legal moralistic grounds, the same point could be made as to many of the other interventions I have discussed. Another example comes from the alleged effects on child welfare of single parenthood: the harms that it is claimed will occur from single parenthood will be the same whether it arises coitally or through reproductive technology, such that someone who defends a restriction on reproductive technology use by single individuals ought also apply the same limit on coital reproduction intended to give rise to single parenthood.

Underinclusivity might not be normatively problematic if there were meaningful distinctions between what is regulated and left unregulated, perhaps drawing on the difficulty and intrusiveness of attempts to regulate natural reproductive (as opposed to assisted reproductive) behavior. That response, however, fails to perfectly capture the current line of regulation

though, is that I do not think they can replace BIRC (which will not work for reasons discussed) in justifying these interventions.

in that we have in fact directly regulated adult sexual activity by criminalizing brother-sister incest while leaving alone procreative activities that portend much more certain and significant non-person-affecting harms, so we ought to be cautious before fully buying into this possible distinction.[204]

One might argue that the interests that would be set back in the natural reproduction context are weightier than those in the artificial reproduction context; state interference with sexual intimacy is more noxious than preventing an individual from receiving a particular type of medical assistance necessary to reproduce. Is that right? As a number of authors have suggested, the natural/artificial line ought to carry no weight.[205] I suspect that views to the contrary are the product of misfires of intuitions on positive versus negative liberty; they are misfires because *both* preventing access to reproductive technology and preventing coital reproduction are *negative liberty* violations. If governments restricted themselves to selective funding of assisted reproduction it would not be underinclusive because that *is* a positive liberty intervention, but my point holds for most of the other means.

One might try to more defensibly distinguish subcategories of assisted reproductive technology use, for example by hiving-off assisted reproduction involving the gametes of partners in an intimate relationship from that using the gametes of strangers to that relationship. Whether that move is persuasive depends on one's valuation of different forms of procreative and parental autonomy. This is a big question, and one that deserves its own article, so I will just confine myself to a couple of brief remarks. The philosopher Daniel Statman has described the interest in reproduction as:

> the desire to achieve a kind of immortality by continuing to live through descendants, the desire to live vicariously through one's children, getting a second chance, as it were, the desire for the deep and enduring intimate relations that one hopes to achieve with one's offspring, the longing for a home, a nest, a secure place with a close

204. That said, one might avoid this problem by decriminalizing brother-sister adult incest but retaining the other interventions discussed or by arguing that the brother-sister incest case is special and criminalization is justified by a quite different and independent reason, such as the Legal Moralism I sketch below. *See infra* notes 221–23.

205. Robertson, *supra* note 32, at 31–36; Statman, *supra* note 16, at 228 ("There seems to be no relevant difference between natural and artificial procreation that could explain why the former should enjoy a stronger protection than the other.").

> network of relationships in which one belongs, and, in addition, the interest of couples to found a family.[206]

On one reading of that list, only reproduction by those without *any* genetic tie to the offspring (none of the cases in Part II) is distinguished. On a different reading, reproduction that involves even one non-intimate partner (single, lesbian or gay parents, commercialized surrogacy) is justified because of the lower status of the interests represented by that kind of procreation. Would we be right in thinking that for the interest to be worth protecting, there must be a perfect overlap between the genetic partners, romantic partners, and rearing partners? Certainly some religious conceptions of procreation that condemn it outside of marriage view reproduction as worthy because it unifies an already existing romantic relationship, but that is a conception against which many of us would chaff. Even if this kind of move succeeds (and I am not at all sure it does) it still would not defend drawing the line between coital and assisted reproduction as such; instead it would counsel making a division between reproduction by single parents, *however it is achieved*, and reproduction by intimate partners. Thus, the underinclusivity seems to persist and demands that we either reject some of the interventions in Part II or add prohibitions on their coital equivalents. If we are unwilling to do so, that is some reason to doubt the non-person-affecting principle approach as a sufficient justification.

3. The Soundness of the Non-Person-Affecting Principle Approach as a Moral Criterion

Putting aside underinclusivity, and even as to cases involving genuine same-number substitutions, there is a further question as to whether the non-person-affecting approach is problematic on its own terms. I will only briefly touch on two objections that relate to enhancement and eugenics.

a. Enhancement

The first objection is that the non-person-affecting principle proves too much in that it ought to justify not only the moral wrongfulness of reproductive decisions to avoid what I have elsewhere called diminishment[207]—producing a child who is on balance significantly worse-off as compared to the 'normal'

206. Statman, *supra* note 16, at 226.
207. Cohen, *supra* note 19.

child (scare quotes to emphasize the normative baggage behind such labeling), a child who will "experience serious suffering or limited opportunity"[208]—but also a *duty to engage in enhancement*—to produce a child who is, on balance, significantly better-off as compared to the normal child. This point is suggested by the Oxford philosopher Julian Savulescu (although he does not treat it as a problem) who argues for a "moral obligation to have the best children" that he calls the principle of "Procreative Beneficence": "couples (or single reproducers) should select the child, of the possible children they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant, available information."[209] If the world would be *worse*, in an impersonal sense, if there comes into existence a child who experiences more serious suffering and loss of opportunity, than if there comes into existence a child who experiences the normal amount of these things, why would it not be *even better* with children who experience s*till less* of these things than the normal child? This too can be thought of as an underinclusivity problem, with the State's actions being problematic in taking steps to prevent parents diminishing their children but not pushing parents to enhance, when under non-person-affecting principles the two are equivalent. Otherwise put, this is a baseline problem familiar to legal academics that asks why the level of serious suffering, happiness, or opportunity of the normal child today is normatively significant.

Notice, though, what adopting a duty to enhance would mean: it is not enough to avoid an incestuous reproductive partner, one would have failed in one's duty if one did not choose as good a reproductive partner for one's child as possible. It is not enough to abstain from reproductive sex during one's adolescent years, instead a woman might fail in her duty

208. Brock, *supra* note 32, at 273. It is worth noting that if we take seriously the qualifier "serious" that may in and of itself rule out the use of this argument for a large number of the interventions discussed in Part II since whatever possible setbacks could be avoided in an impersonal sense by substitution do not rise to the level of being "serious" ones.

209. Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 BIOETHICS 413, 415 (2001). While Savulescu seems to equivocate between choosing a child with the "the best life" and one with "at least as good a life as the others," the logic of the non-person-affecting principle and his argument suggests it should be the former. *Id. But see* Rosamund Scott, *Why Parents Have No Duty to Select 'the Best' Children*, 2 CLINICAL ETHICS 149, 151 (2007) (noting this implication of Savulescu's approach).

to her child unless she waits until her career, wealth, etc., are in the ideal position for child-rearing. And, if genetic enhancements improving the lives of the children who result are possible, one who fails to use them would have failed in this duty. Unlike Savulescu, who views this implication as commonsensical, I believe that if endorsing non-person-affecting principles required this conclusion that would be a reason *not* to endorse them.

Still more troubling is what this means for *legal* regulation of reproduction. If, in spite of my objections in this Part, one takes the non-person-affecting principle approach to justify *legal* regulation of reproduction for cases involving diminishment, and the non-person-affecting principle approach does not distinguish diminishment and enhancement, then *legal* regulation (including criminal sanction) of reproduction to force enhancement is equally justified.[210]

Can the non-person-affecting principle approach avoid that implication? It is not clear. One response is that some amount of suffering or diminished opportunity is *good* for children. That is a contestable empirical claim, but even granting it would merely lop off the extreme end of the continuum: insofar as there are enhancements which improve children's lives but not past this threshold of a too-protected population we have a duty to enhance, and the state would be justified in enforcing it. This would still generate a robust duty to enhance unless by some "just-so story" we think that children currently get just the right amount of suffering and lack of opportunity, which seems implausible.

A different set of responses suggests that the diminishment-enhancement distinction maps on to act-omission distinctions in American law, or that the relevant distinction is between those committed to a maximization thesis and those who adopt a sufficientarian approach. I take up both of these claims as to the Reproductive Externalities argument in a companion paper,[211] and will not repeat my objections here but instead direct the interested reader to that discussion.

210. Interestingly, while Savulescu endorses the idea that doctors should "attempt[] to persuade [parents] to have the best child they can," he actually dismisses off-hand the possibility of state intervention because of "the presumption in favour of liberty in liberal democracies." Savulescu, *supra* note 209, at 425. This may just mean he implicitly accepts my claim that non-person affecting principles cannot justify restrictions on liberty.

211. Cohen, *supra* note 9.

A different response is that enhancements are distinguishable in practice because there are safety or theological concerns with genetic manipulation,[212] because some enhancements are not good for the child (to the extent they allow parents to hegemonically foreclose certain avenues for the child instead of securing a "right to an open future"),[213] because we lack sufficient foresight to pick good traits,[214] or because the availability of enhancements problematically exacerbates inequalities between those who have access to enhancing technologies and those who do not.[215] Even assuming *arguendo* that these points were true as to all *genetic* enhancements, the arguments seem less apposite as to the duties towards nongenetic forms of "enhancement" that parallel our cases (delaying reproduction, choosing particular reproductive partners, etc).

The most plausible way I can imagine to distinguish diminishment and enhancement in this context would instead point to the comparative burdensomeness of the two principles as restrictions on our autonomy to pursue important life projects: that Savulescu's principle of procreative beneficence will impose much greater constraints relative to Brock's more limited non-person-affecting principle. However, the assumption that the enhancement/diminishment line maps neatly on to the more-burdensome/less-burdensome one is problematic. There are some forms of enhancement that would require a fairly small restriction on liberty (for example, taking a particular dietary supplement once a week while pregnant that is shown to improve the intelligence of resulting children beyond the normal range) while there are some actions one would need to take to avoid diminishment that will involve significant limitations on one's life choices (for example, being unable to reproduce as a single or same-sex individual, or being subject to criminal sanction unless one chooses a reproductive partner other than one's genetic sibling with whom one is in love).[216] If what matters to us is the level of restriction in relation to how much better the world would be in an impersonal sense, it might be better to draw the line on that criterion directly rather than using

212. *See*, *e.g.*, Leon R. Kass, *The Wisdom of Repugnance*, *in* THE ETHICS OF HUMAN CLONING 3, 17–24 (Leon R. Kass & James Q. Wilson eds., 1998).

213. BUCHANAN ET AL., *supra* note 32, at 170–72.

214. *Id.* at 179–82.

215. *See id.* at 187–91.

216. *Cf.* FEINBERG, *supra* note 15, at 91–94 (discussing a similar point in criminal law).

the enhancement-distinction as a muddled heuristic. That would, however, still allow the state to legally require some enhancements.

It is still open to us to take the other horn of the dilemma and accept a symmetrical duty to enhance such that the State can justifiably use the same legal interventions as in Part II, not only to induce substitutions of 'normal' for diminished children but also to induce the substitution of enhanced children for 'normal' ones. For some, this implication of the non-person-affecting principle approach may be unsettling enough to justify rejecting it. For others, the intuitive discomfort of supporting legally enforceable duties to enhance can be mitigated by introducing limiting principles such as requiring extremely large non-person-affecting benefits and the least intrusive of the means of influencing the target reproductive decision (see Table 1 above). However, whatever cabining we must do on the enhancement side to make the non-person-affecting principle approach plausible ought to apply equally on the diminishment side. I believe many of the interventions justified by BIRC will not be supportable on the non-person-affecting principle, when appropriately cabined.

b. The Specter of the New Eugenics

A different kind of concern with the non-person-affecting principle approach as a substitute for BIRC is that it relies on objectionable eugenic premises. Expressively it threatens to suggest to a member of the set of individuals it targets (or at least to the children who sneak past its gates and come into existence): "we are expending state resources to prevent people like you from coming into existence because we think the world is better off if people like you (physically disabled, mentally retarded, raised by gay or single parents, etc.) were replaced by other people." This is a far cry from the goal of preventing harm to vulnerable populations that underlies much of the appeal of BIRC reasoning. This is not to say that such reasoning is necessarily invalid, but it does require a direct confrontation with the eugenics movements of old and the question of what made the "old" eugenics wrong?

Eugenics was the term coined by Darwin's cousin Francis Galton for the "science of improving stock—not only by judicious mating, but whatever tends to give the more suitable rac-

es or strains of blood a better chance of prevailing over the less suitable than they otherwise would have had."[217] In the first half of the 1900s, Galton's ideas spread as both a research program and a social movement to Germany, the United Kingdom, France, Brazil, Denmark, and even the United States[218]—where the Race Better Foundation headed by John Kellogg attracted ten thousand visitors at the Panama-Pacific exposition of 1915[219] and the American Museum of Natural History hosted large exhibits in 1915 and 1932[220]—and it was popular in the inter-war era not only among conservatives, but also Progressives and Scandinavian Social Democrats who sought to use eugenic reasoning as the basis for the social welfare state.[221] In U.S. law it is most famously associated with Justice Holmes's claim in *Buck v. Bell* that "[t]hree generations of imbeciles are enough" as a reason to uphold a Virginia policy of involuntarily sterilizing an allegedly "feeble-minded" who had already produced one "feeble-minded" child.[222] Eugenics was notorious as a central part of the Nazi movement that seized on the notion of blood and called for the purification of the nation's gene pool in order to "regain the nobility and greatness of their genetically pure forebears," and gave rise to prohibitions on sexual relations between Jews and Aryans, "Genetic Courts passing judgment on [] genetic fitness," marriage advice clinics, and ultimately mass sterilization and euthanasia programs targeting "Jews and other minorities."[223]

While the rationale of the non-person-affecting principle sounds a lot like that of the old eugenics movement, as Buchanan and his co-authors caution, "the central theses of a social movement, including its moral premises, ought not be dismissed because of the intellectual and ethical failings of its adherents."[224] Yes, "[e]ugenics is recalled as the Nazis' racial doctrine, which it was, but to be a eugenicist, then or now, is not

217. *See* BUCHANAN, ET AL., *supra* note 32, at 30. For an excellent comprehensive history of eugenics, see generally DIANE PAUL, CONTROLLING HUMAN HEREDITY: 1865 TO THE PRESENT (1998).

218. PAUL, *supra* note 217, at 31.

219. *Id.*

220. *Id.*

221. BUCHANAN ET AL., *supra* note 32, at 32–37.

222. Buck v. Bell, 274 U.S. 200, 205, 207 (1927).

223. BUCHANAN ET AL., *supra* note 32, at 38–40.

224. *Id.* at 45.

tantamount to being a Nazi," or at least not necessarily.[225] In more colloquial terms, we ought to be wary of trying to score points by comparing our opponents to Nazis.

Tracing what was and was not wrong with the eugenics movement is a book-length project. Here, I limit myself to briefly examining two possible ways in which what we might call the "new" eugenics—the means of state intervention in reproductive decision-making discussed in Part II—might be justified and distinguished from the old eugenics of the Nazis.

The first distinction would focus on the means used to regulate reproduction rather than the reasons for that use. The Nazi eugenics movement used murder and sterilization as some of its primary means of controlling reproduction.[226] One could argue that the old eugenics' badness departs from the evils of those means not used by the new eugenics.

I do not find this distinction persuasive. To be sure, involuntary sterilization involves an invasion of bodily integrity, a kind of interest that is often accorded particular normative and constitutional protection.[227] But it seems to be a fetishization of bodily integrity to say the imposition of criminal sanction to achieve the same ends is not equally objectionable. To use an extreme example, can we really conclude that an attempt to criminalize all reproductive activity by Jews or Gypsies would be appreciably less abhorrent than achieving that same result through sterilization? The Nazis did both after all, and on some accounts one might even conclude that sterilization is the less-bad alternative.

That said, while distinctions between sterilization and criminalization seem insufficient to do the work of avoiding the badness of the old eugenics, things are less clear as to some of the other less intrusive means. Imagine the State decided not to enforce surrogacy contracts only as to a category of parents who were likely to produce significant non-person-affecting harms—some states already refuse judicial pre-clearance (and thus enforcement) of surrogacy agreements when the intending parents are not a married heterosexual couple.[228] Or suppose that instead the State sought to fund abstinence education programs that target only particular subgroups likely to produce

225. *Id.*
226. *See id.* at 37.
227. *See*, *e.g.*, Cohen, *Genetic Parent*, *supra* note 5, at 1156.
228. *See* Daar, *supra* note 86, at 43.

these non-person-affecting harms, for example those with heritable disabilities such as deafness. This would certainly be less bad than involuntarily sterilization, but even the funding of informational interventions to dissuade reproduction carries with it a worrisome message. And while one might distinguish the message "your existence is so unworthy that it should be prevented" from "your existence reduces welfare from an impersonal standpoint compared to the children who might have been born in your place," that distinction is one that is likely to be lost on most listeners. Still, at least for the less intrusive means, this may offer some room between the new and old eugenics.

A second distinction would suggest that the badness of the old eugenics movement stemmed from its targeting of genetic unfitness and the transmission of genes as the source of harm. If one accepts even a moderate form of genetic essentialism in which one's genes are at least partially constitutive of who one is, this constituted a deep rejection of the person—"we want to prevent the existence of future people like *you*." By contrast, at least some of the examples discussed in Part II focus on preventing children from coming into being whose *rearing conditions* (single parent, unaware of parent's identity, etc.) are bad on non-person-affecting grounds. Even the criminalization of brother-sister adult incest where the harm results (at least in part) from genetic abnormalities might be rationalized not as a rejection of the person and their genetic make-up but merely as a condemnation of their reproduction with a particular other person—though here the move may be too clever by half since the worry is that *each* of the two people may carry a "bad" recessive gene. If a necessary condition of the wrongfulness of the old eugenics was the condemnation of the reproducing person this too may distinguish the new eugenics.

Although tempting, such a distinction is slippery in that while these examples may not require condemning a person *as a repository of genes*, in some instances they do nonetheless condemn the person. Individuals are condemned for reproducing when gay, single, of a certain age, etc., because of the welfare of populations that will result. Why is that less troubling than the condemnation of the individual because of their genetic make-up leading to the same effect? Holding this line might require a very strong form of genetic essentialism or perhaps some form of luck egalitarianism—the idea that individuals should not be held responsible for brute luck things they could

not help (such as genetic traits) but should be held responsible for option luck choices they do make.[229] The old eugenics problematically limited the reproductive liberty of individuals because their reproduction had consequences they could not help, the argument goes, but the new eugenics penalizes them only for decisions that fall within option luck. Such a defense would require overcoming many of the stock objections to luck egalitarianism,[230] as well as maintaining the brute-option luck distinction as to these cases, which seems quite difficult. Some (not conclusive) research suggests that at least one case—that of restrictions on LGBT access to reproductive technologies—might involve at least partially genetically determined 'choices' moving it to the brute luck and therefore bad eugenics side.[231] Many of the other cases—one's propensity to become a teenage mother, one's attraction to a sibling, whether one is single—might be thought to have many brute luck elements to them even though not *genetic* brute luck. To the extent we are restricting individuals from reproducing due to criteria that are not their fault, the gap between the "new" and "old" eugenics thus narrows.

For all these reasons, I find the difficulty in distinguishing the practices discussed in Part II from the old eugenics to constitute an additional problem faced by the non-person-affecting principle view as BIRC substitute, but perhaps not as serious a problem as the others I have outlined above.

4. Can Criminal Law Restrictions on Reproduction be Justified by Non-Person-Affecting Principles?

A more fundamental, but admittedly more contestable objection, is that even if we concede that non-person-affecting principles make one of the actions discussed in Part II *wrongful* in a moral sense, it is not the kind of wrong the law may justifiably target through criminal sanction on reproductive activities.

One might think that to justify the serious restriction on liberty posed by criminal sanctions on reproduction requires a

229. *See*, *e.g.*, Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 291 (1999); Nir Eyal, *Egalitarian Justice and Innocent Choice*, J. ETHICS & SOC. PHIL., Jan. 2007, at 1–2; Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 272–73 (2008).

230. *See*, *e.g.*, Markovits, *supra* note 229, at 274.

231. *See*, *e.g.*, David France, *The Science of Gaydar*, N.Y. MAG., June 17, 2007, *available at* http://nymag.com/news/features/33520/.

victim, someone to be harmed or wronged who has standing to complain about the act by the perpetrator, even if prosecution is done by "the People." Even in inchoate crimes, the State criminalizes an act that had a probability of harming *someone*, even if that harm was not actually realized.[232] By contrast, the non-person-affecting principle approach would target actions that harm *no one*; instead the evil is the failure to produce a potential population with less suffering or more opportunity, and the argument is that these should not be the kinds of actions for which I can be locked up or subject to bodily invasion, such as forced sterilization. On this view criminal law is special in that it expresses the approbation of the community and imposes a particular kind of sanction, all the more so when it targets as private and personal an activity as reproduction.

Eric Rakowski captures the idea in part when he observes that "[t]he person-affecting restriction encapsulates an apparently attractive moral thesis: the only morally cognizable harms or benefits are those to existing people."[233] My thesis in this Section is actually weaker: Even if these claims are *morally* cognizable they may not justify *legal* interventions that seek to use criminal penalties or bodily integrity infringement to limit reproduction. This is a kind of separate spheres view that suggests that, while non-person-affecting goods may be worth pursuing all things being equal, as legal matter they should not be traded off against serious person-affecting harms that flow from the criminalization of reproductive acts. Jan Narveson quipped that, "[W]e are in favor of making people happy, but neutral about making happy people."[234] Here the claim is that a state may be more justified in adopting criminal law interventions to prevent *harming* people (who do exist or will certainly exist) than to cause the production of people who have a welfare of X rather than a different set of people who would have a higher welfare of Y.

232. *See* Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 152 (2011) (explaining the practice of, and theory behind, preventative criminalization).

233. Eric Rakowski, *Who Should Pay for Bad Genes*, 90 CALIF. L. REV. 1345, 1387 (2002). In fact, to be more precise we should probably amend Rakowski's last words from "to existing people" to "to existing people, and those who will come into existence irrespective of our policy choice."

234. Jan Narveson, *Moral Problems of Population*, 57 MONIST 80 (1973).

Why do I want to suggest that such regulation may be beyond the moral limits of the criminal law? My argument begins with the view that interventions that seek to criminalize conduct (or invade bodily integrity, but from here on I will just speak of criminalization) require particularly persuasive justifications, and thus not every reason a state may have for achieving an end will pass muster if this is the form of the intervention. This is a theme that has pervaded this Article, beginning with the taxonomy I introduced in Part I, and on its own it does not seem terribly controversial. This might be thought of as a limitation on the *strength* of the reason or as a limitation on the *type* of the reason—not every type of reason for acting counts as sufficient to justify the criminalization of conduct.

The next step is to suggest that the non-person-affecting principle approach—which argues for the creation of one potential population over another—is not as persuasive a reason for criminalizing conduct as person-affecting arguments such as the prevention of harm to already existing individuals (or to those like Feinberg's kindergarteners who will exist irrespective of our policy choice). To be precise, we can identify at least five possible positions as to the relationship between person-affecting and non-person-affecting harms/benefits, at least in their ability to justify criminalizing reproductive acts: The first is "on par." The two count equally such that we ought to be indifferent between an equally sized prevention of harm to existing individuals (the person-affecting harm) versus creating a population that has the same size welfare differential over the other possible population (I will call this the "the non-person-affecting 'harm'" with 'scare quotes' around 'harm' to indicate that it is not really harm in the usual sense but instead the difference in welfare between two potential populations). The second possibility is "non-person-affecting discounted," in which the prevention of non-person-affecting 'harm' counts but not as much (or in the same way) as the prevention of the same size person-affecting harm. The third possibility is "non-person affecting does not count," in which we ignore non-person-affecting 'harms' altogether, but count the prevention of person-affecting harms. The last two possibilities, which I think can be rejected fairly easily, flip the last two—"person-affecting discount" and "person-affecting does not count" would discount or not count the person-affecting harms, respectively.

If "on par" is correct then my claims in this subsection should fail and non-person-affecting principles should count as perfectly good reasons for criminalizing reproductive behavior, though they still face the other challenges I have laid out in this part. If by contrast "non-person-affecting does not count" is true, then my argument in this subsection fully succeeds. If "non-person-affecting discounted" is true, the justifiability of these interventions would depend on the size of the aggregated person-affecting harms of this type (the set back of the interests of would-be reproducers whose liberty is curtailed) and the size of the aggregated non-person-affecting 'harm' prevention accomplished by the intervention, and how much one discounts the non-person-affecting 'harm' in the calculus.

Why doubt "on par"? Begin with a thought experiment: Imagine you saw that your seven year-old-son was about to be hit by a car and would become a paraplegic. How much of your own body would you risk if you knew you could get him out of the way? Would you risk the same amount to produce a child who had healthy use of his limbs rather than born a paraplegic, or would you risk less? If the answer is that you would risk less, on par seems to get it wrong just as a matter of how we choose for *ourselves*, which is not even getting to the question of what the State may permissibly *force* us to do through threat of criminal sanction. This would suggest that preventing harm to already-existing people of size 5 (to use an arbitrary number) gets priority over creating future person X instead of Y where the difference in their welfare is also 5.

Of course, as with all intuition pumps, we have to be cautious; it is possible what is really motivating this response is concern for the *additional* trauma to *ourselves* of our child's losing something good like walking, rather than if the child never had that ability to begin with, or the psychological bonding we have to an existing child. It is unclear whether any amount of introspection can help us sort this out, so let me try a less emotionally fraught thought experiment by adapting one Rakowski has himself adapted from Parfit (although Rakowski uses it differently than I do):

> There are two rare genetic conditions, A and B, which can be detected only by special tests and which, by different routes, produce the same serious disability in children. If a woman has condition A, she must undergo medical treatment for at least one month prior to conception to bear a non-disabled baby. Condition B afflicts children. If a child is born with condition B, doctors can cure it during the second month of an infant's life; after the window closes, no cure is possible.

> Suppose that the government has funds for only one of two medical programs. Program A would test millions of women who wished to become pregnant. Those found to have condition A would be warned to undergo treatment and to delay conception for at least one month, until their treatment was complete. Program B would test millions of infants. Those found to have condition B would be treated so that they would develop normally.[235]

Suppose that the costs of running the two programs are such that one program is just slightly cheaper and therefore that implementing Program A would lead parents to substitute 1,003 children without disabilities for 1,003 children with disabilities—different children would come into existence—while Program B would only cure the disability of 1,000 existing children. On the "on par" view we ought to always prefer Program A, for as Rakowski puts it "how could we be morally compelled to choose a medical program that leads to more disabled children?"[236] I, however, think that this is exactly the opposite of what our intuitions would tell us—that many would favor Program B because we should choose to *prevent harm* to *existing* individuals instead of pursuing the impersonal good by bringing into existence new individuals with higher welfare, individuals who will not be *harmed* if born with a disability for the reasons identified by the Non-Identity Problem.

Perhaps you are not sure if you would choose Program A or Program B. In that case, let me add an additional fact that may help clarify your own views. Imagine I now tell you that while Program B will cure 1,000 children already existing of the disability, that the screening offered by Program A, if put into practice now, will insure that 1,003 children will come into existence without the disability (as opposed to 1003 who would have the disability) not now but *ten generations from now*. If this makes you more likely to favor Program B, then that is an additional reason to doubt the view that person and non-person-affecting harms should be treated "on par," for the generational distance should be irrelevant for the non-person-affecting approach.[237]

235. Rakowski, *supra* note 233, at 1379.

236. *Id.* at 1381.

237. Again we must be wary of intuition pumps smuggling in other assumptions. If, for example, the reason why generational distance mattered to you is that you are imagining that ten generations from now we will have developed other cures for disability or that our society would be more disability-accommodating, that might give you a reason to favor Program B independent of whether "on par" is true. I could tell you to assume away these facts and ask

Indeed, to put the point most forcefully, "on par" seems to carry with it the counter-intuitive implication that if offered the choice of devoting resources to curing or preventing a harm to an already existing person versus devoting resources to produce a future person with an equivalent welfare differential, we ought to be indifferent between harm-prevention and replacement.

Suppose these thought experiments have convinced you that "on par" is problematic. There are, nonetheless, two separate types of responses one might make to my claim that the non-person-affecting principle approach may justify criminal sanction on reproductive activities. The first response is that my argument has only rejected "on par" in a forced choice rationing setting. It does not necessarily follow that "on par" ought to be rejected as a valid basis for the *criminalization of conduct* in the reproductive setting. Here the person-affecting harm we are allowing to occur is the setting back of the interests of the would-be parents in making the reproductive decisions the law tries to prevent (i.e., the regulation discussed in Part II). The second response is that even if I have successfully given an argument for rejecting "on par" in the criminalization of conduct, I have not rejected "non-person-affecting discounted," which would hold that that non-person affecting 'harms' do not count the same as person-affecting ones, but they do still count.

The first response might actually be helpful to my argument. While the State may face moral limits in rationing, they are not nearly as strict as the moral limits of the criminal law. Thus, if "on par" is not convincing as a justification for rationing decisions, one might think it should *a fortiori* not be con-

whether your intuition remained, but one might wonder whether you really banished those facts or merely thought you did. I accept this as a more general problem with the intuition pump methodology—another reason why I offer this critique of non-person-affecting principles more tentatively than the others—but I know of no other method to get at what we think the right answer on this issue should be.

Some might instead appeal to future discounting, that illness is less bad simply by virtue of the fact that they occur in the future even if we are not any better equipped to deal with them. Whether to discount, and what to discount is the subject to pervasive and complex disagreements among philosophers and economists that I will not try to resolve here. For a good introduction for legal academics, see generally Lewis Kaplow, *Discounting Dollars*, *Discounting Lives: Intergenerational Distributive Justice and Efficiency*, 74 U. CHI. L. REV. 79 (2007).

vincing as a justification for imposing criminal law sanctions on reproduction. In any event, in discussing the second response, I shift to a thought experiment that actually uses criminal law sanction rather than rationing.

The second response may or may not hurt my argument. If non-person-affecting 'harms' are discounted to a sufficient extent, then, in the cases discussed in Part II, whatever difference obtains between the welfare of the populations that would come into existence with versus without the intervention *once discounted* are unlikely to be significant enough to justify criminal restrictions on reproduction or bodily integrity violations. In a way similar to my earlier discussion of imperfect Non-Identity Problems in Part III.B, how much of a discount factor is required to reach that conclusion will vary with the weight one gives to reproductive liberty; the more weight one gives reproductive liberty, the less discounting of non-person-affecting 'harms' is needed to reach that conclusion. How much of a discount factor would be required also varies intervention-by-intervention based on the size of the welfare difference between the welfare of the populations that would come into existence. While this is of course one of the most important aspects of any critique of the viability of the non-person-affecting principle as an alternative to BIRC type justifications, as with the discussion of lives not worth living in Part III.A, I think the welfare difference due to the genetic abnormalities from incest is the most plausible case where such a calculus might in the end permit the criminal sanction, but the others seem far-off given even very minimal discounting.

Now we could sidestep this need to determine the discount factor and the other variables in the calculus altogether if we could go further and actually rule out "non-person-affecting discounted" in favor of the stronger position that "non-person affecting does not count," at least in the limited domain of justifying criminal sanction. Can one persuasively do so? One possible way is to employ a veil of ignorance device and ask whether behind such a veil one would endorse a principle that allowed the State to pursue non-person-affecting goods at the expense of limitations on your reproductive liberty, of either the criminalization or bodily integrity type. Not knowing who you will be in society, I ask you whether you would be willing to risk the chance that it would be *your* reproductive desires the State will stymie through criminalization (e.g., you are the single individual, the gay one, the individual over 50, etc.) *not* in order to

prevent *harm* to existing people or people who will necessarily exist in the future, but instead to ensure that population X where children have less suffering and more opportunity comes into existence sometime in the future, instead of population Y who does not have these things.[238] Once again, to really test this intuition we should ask you whether you would agree to this rule even if it meant criminalizing your reproductive conduct *today* to create a difference in population welfare that would only manifest itself *ten generations thereafter*, since temporal distance should be irrelevant on the non-person-affecting view. My own intuition in such a case is that I would not authorize the government to act in this way, whatever the size of the non-person-affecting gain to be had, for the selfish reason that there is nothing in it for me, only risk.

One might counter that this is not entirely true. It may be the case that *I* am the person who comes into existence with the higher rather than the lower welfare—but that seems to actually recapitulate the problematic reasoning of BIRC: the choice is not higher-welfare *me* versus lower-welfare *me*, but the welfare of person A versus the welfare of person B. And remember, no one is harmed if not brought into existence, so it is not clear why I should care. If that is right, then non-person-affecting principles cannot justify criminal or bodily integrity violative interventions on reproduction *at all*.

Of course, like all veil of ignorance type arguments, this one is subject to variances in intuitions and critiques about whether the veil is thick or thin enough in terms of the description of what the chooser knows.[239] This is one reason why I am

238. One concern one might raise with this hypothetical is "I would not support the intervention even if it prevented the anticipated harm to an *existing* child." For such a person I have made the case against these interventions so forcefully that we need not get into this level of complexity, and I can take a breather. Even this person, though, may encounter a harm-intervention pairing that they find justifies intervening if harm to existing children was prevented. As long as she can construct for herself one such case where she supports intervening to prevent harm to *existing* children but *not* to ensure an equivalent welfare differential between bringing population Y rather than X into existence, she has rejected on par and can continue reading this discussion using that example in her head.

239. Indeed, Parfit has suggested that these veil methods are not useful when they require imagining not coming into existence as one of the possibilities, that while "we can imagine a different possible history, in which we never existed . . . we cannot assume that, in the actual history of the world, it might be true that we never exist and thus we cannot ask what, on this assumption, it would be rational to choose." PARFIT, *supra* note 32, at 392. Of course, Par-

more tentative about this critique of the non-person-affecting principle approach than the others discussed. While I think I have clearly made the case for at least discounting non-person-affecting principles as reasons for criminalizing reproductive conduct of the type discussed in Part II, the case for ruling these reasons out altogether is less certain.

To be clear, the discussion in this subsection has been directed towards a particular *means* of regulating reproduction that require exceedingly compelling justifications: Those that criminalize reproductive conduct or invade bodily integrity. Excluding (or at least discounting) non-person-affecting principles as justifications for these interventions need not mean one has to do the same as to all the possible interventions in the taxonomy developed in Part I. This is just to re-iterate the prior point that there are moral limits to the criminal law or the invasion of bodily integrity that are not present as to other forms of state action.[240]

Thus, it seems to me that for informational interventions the State might more justifiably adopt a non-person-affecting principle as support. Although it would not be a pithy billboard, it does not seem particularly problematic for the State to urge people as part of abstinence education that "waiting until you are older results in less suffering and less limited opportunity in the world and is thus good (in an impersonal sense)." Selective funding of assisted reproduction is somewhat closer but may also be potentially justifiable on non-person-affecting principles since if the State has no obligation to fund X (and especially if it is rationing funding), it does not seem objectionable for it to choose to fund only instances of X that do not involve creating individuals who experience more suffering or limited opportunity, at least when the reproducers could have done otherwise.[241] Selectively invalidating contracts or assigning pa-

fit's own thought experiments require imagining all sorts of odd things (like having half one's brain put in one person and half in another), so one might beg to differ with him on how far imagination can stretch.

240. This concession parallels one Feinberg makes as to his rejection of Legal Moralism, that harmless immoralities might properly be targeted through subsidies or educational programs promoting a particular vision of the good life, just not criminal prohibition. *See* JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 312–13 (1984) (harmless immoralities might properly be targeted through subsidies or educational programs promoting a particular vision of the good life, just not criminal prohibition).

241. *See* Cohen & Chen, *supra* note 14, at 500–09 (discussing whether the State has an obligation to fund reproductive technologies).

rental status in order to serve non-person-affecting goals seems to fall somewhere in between, although my own sense is that they should fall closer to the impermissible use of criminal sanction because of their serious negative liberty consequences, but that is an argument to be fleshed out for another day.

To be sure, I think this claim about the relationship of non-person-affecting principles and the moral limits of the criminal law is more controversial. Although I find it convincing on its own terms, even without it, I believe the other arguments I have offered above sufficiently favor rejecting the non-person-affecting principle approach as an adequate reformulation of BIRC that can justify the interventions discussed in Part II.

D. SOME IMPLICATIONS FOR CONSTITUTIONAL LAW

Whether the interventions discussed Part II are *normatively* justified by BIRC or its reformulations is a distinct question from whether those justifications are *constitutionally* sufficient as a doctrinal matter under U.S. law. My analysis has focused on the former, but I want to make a few brief and tentative suggestions regarding implications for the constitutional question.

As I and others have elsewhere suggested, the level of scrutiny (rational basis, strict scrutiny, or something intermediate like the "undue burden" standard from *Planned Parenthood of Southeastern Pennsylvania v. Casey*)[242] under which the kinds of regulations of reproduction I have been discussing would be judged (especially those involving reproductive technologies) is underdetermined by the existing case law. The only U.S. Supreme Court decision to consider whether there is a fundamental right to become a genetic parent, *Skinner v. Oklahoma*—finding a fundamental right that was violated by physical sterilization of individuals convicted three or more times of crimes of moral turpitude but not for embezzlement—is subject to a myriad of possible interpretations, especially as applied to reproductive technologies.[243] That uncertainty is

242. 505 U.S. 833, 873–74 (1992).

243. 316 U.S. 535, 536–39 (1942); *see*, *e.g.*, VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR-TRIUMPH OF AMERICAN EUGENICS 165 (2008) (concluding that "both liberals and conservatives have made a mistake" in their reading of *Skinner* because the case was "neither argued nor decided as a case about rights in the sense that we use the term 'fundamental right' today"); CARL WELLMAN, MEDICAL LAW AND MORAL RIGHTS 145–46 (2005) (reading *Skinner* as limited to marriage); Cohen, *Genetic Par-*

compounded by other unresolved substantive Due Process debates: the debate between those adopting an "intimacy" versus "Due Process traditionalist" approach to substantive due process;[244] the debate over the level of generality with which we characterize the right at issue[245] —it is easier to find a fundamental "right to procreate" writ large grounded in *Skinner* and historical analogues than a "right to use an anonymous sperm donor"; and uncertainty whether new fundamental rights claims that build off existing decisions (*Skinne*r in this case) will be 'grandfathered' in or instead revisited under the more traditionalist approach. Further complicating the question is that while cases of the denial of services based on age, marital status, and sexuality ordinarily only merit rational basis review when discrimination against these categories of persons is alleged, it is also possible that, when combined with the increased substantive due process protection of procreative activities, heightened scrutiny (of the intermediate or strict variety) may be warranted in these cases as a matter of equal protection (one reading of what happened in *Skinner* itself).[246]

A full analysis would have to consider BIRC and each of its reformulations under each possible tier of scrutiny. I hope to undertake that fuller analysis on another occasion, but here I examine the matter only through the prism of rational basis, and focus on BIRC itself. Interventions that fail rational basis will *a fortiori* fail heightened scrutiny. Moreover, if strict scrutiny was the appropriate review, many of these interventions would also have problems more directly related to the underinclusivity problem I sketched above. That is, because there are many cases where under BIRC or its reformulations there are comparable probabilities and severity of deficits to children

ent, *supra* note 5, at 1148–67; Carter J. Dillard, *Rethinking the Procreative Right*, 10 YALE HUM. RTS. DEV. L.J. 1, 44 (2007) (reading *Skinner* as protecting only a right to "self-replace" and thus a fundamental right to only one or two children per couple).

244. *See*, *e.g.*, Cohen, *Constitution*, *supra* note 5, at 1159–60; Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008). *Compare Casey*, 505 U.S. at 851 (intimacy) *and* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (intimacy), *with* Washington v. Glucksberg, 521 U.S. 702, 720–21, 727 (1997) (due process traditionalism).

245. *Compare Glucksberg*, 521 U.S. at 720–22, *and* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (narrow), *with Michael H.* 491 U.S. at 139 (Brennan, J., dissenting) (expansive).

246. See Rao, *supra* note 83, at 1474–88 (discussing Equal Protection challenges for denials of access to reproductive technology).

where the State has not acted in similar ways (including those involving coital reproduction), a court is unlikely to find these interventions as "narrowly tailored to achieve a compelling governmental interest" under strict scrutiny, just as the *Skinner* Court found that Oklahoma's distinction between sterilization of "those who [had] thrice committed grand larceny" and those who had thrice embezzled was constitutionally problematic.[247] While the State might argue that the difficulties it would face in its ability to enforce the rule on the natural reproduction side is sufficient to distinguish the two cases, it is far from clear that this is a winning argument.

Even under rational basis review's very deferential standard requiring only that the statute bear "a reasonable relation to a legitimate state interest,"[248] BIRC justifications should fail for *perfect* Non-Identity Problem cases because no one is harmed such that this justification is *irrational*. BIRC justifications for perfect Non-Identity problems will therefore, *a fortiori*, fail intermediate and strict scrutiny. By contrast, in the *imperfect* cases the statutes are likely to survive rational basis review because so long as "any state of facts reasonably may be conceived to justify" a legislative enactment, it satisfies that scrutiny.[249] A small enough probability of harm to a small enough population of resulting children (especially if the harm itself is small) might make the intervention *actually* irrational given the burden it places on a much larger population. But the question under this review is whether a legislature *could conceivably* have estimated the probability, population size affected, and harm severity in such a way that the intervention was rational. Given the usual deference, I think the answer is yes, and thus there is an important divergence from the normative analysis that I have argued should treat perfect and imperfect cases more alike.

247. By contrast, if rational basis review applies the failure of the State to go after all similar is unproblematic, in that the Court has permitted legislation to conclude that "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies . . . [o]r the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . [or t]he legislature may select one phase of one field and apply a remedy there, neglecting the others". Williamson v. Lee Optical, 348 U.S. 483, 489 (1955).

248. *E.g., Glucksberg*, 521 U.S. at 722; *see also* Robertson, *supra* note 86, at 347 (making a similar point for denials of access to reproductive technologies for LGBT populations).

249. McGowan v. Maryland, 366 U.S. 420, 426 (1960).

A similar logic might apply to a justification that these interventions prevent lives not worth living, but first there is a threshold question of whether preventing lives not worth living is a legitimate state interest. While I have suggested that it is implausible that any of the interventions discussed in Part II *actually* prevent lives not worth living, on rational basis review all a court must determine to sustain the intervention is that the *legislature could rationally* have reached that conclusion. Thus, the kinds of uncertainty evinced by courts in wrongful life cases as to whether a particular condition produces a life not worth living is not an obstacle; here, the courts would be deferring to a hypothetical legislative judgment on the matter and their own uncertainty might cut in favor of that deference. Except perhaps for the incest case, I think in the rest of these cases a claim by the State that "children born to single parents will have lives not worth living" seems likely to exceed even the extreme deference given to legislatures under rational basis review. In any event, for political reasons, I think it unlikely that governments would defend statutes on this theory in most of the examples I have discussed.

It is unclear whether the pursuit of non-person-affecting principles approach constitutes a legitimate (or for that matter compelling) state interest. Preventing significant externalized costs from reproduction might be such an interest, but this approach represents the State's interest in the nature of the population that comes into existence in the future that is *unconnected to* the externalities different possible populations of future persons might impose on already-existing individuals or the state. As Phillip Peters has put the matter there is an "unanswered question [of] whether the courts will be skeptical of state laws prohibiting conduct that does not make any specific individual worse off."[250] His most specific argument in favor of the constitutionality of this approach (to be fair, delivered in a very short paragraph in a twelve-page book chapter) is to rely on the presumed constitutionality of incest laws,[251] but it is this very example that my work seeks to question, and as I have shown in Part II most of the courts that have passed on its constitutionality have relied on the (I hope) now-discredited BIRC justification. There are also further questions of whether the limitation to same-number cases is a *constitutional* limitation.

250. Peters, *supra* note 199, at 323.
251. *Id.* at 329.

Again I emphasize the tentative and brief nature of this analysis: it does not consider intermediate standards of review, nor have I pressed on how differences between the kinds of means used to regulate reproduction might interface with the justifications in a constitutional sense.[252] My goal here has been to start a conversation about the way in which the normative and constitutional analyses are in some places symmetrical and in others divergent. There is much more to be said, and I hope to say it in further work. At the very least, though, my account renders problematic the claims of Radhika Rao, Marsha Garrison, and others on the presumed constitutionally of BIRC-justified regulations of reproduction and the suggestion it flows ineluctably from the constitutionality of similar regulation of adoption.[253]

CONCLUSION—BEYOND BEST INTERESTS

In this Article I have shown a deep tendency for courts, legislatures, and scholars to appeal to a particular kind of justification for interventions that influence when, whether, and with whom we reproduce: Best Interests of the Resulting Child (BIRC). I have shown that the Non-Identity Problem makes this form of justification problematic, and that this parallels the existing rejection of wrongful life tort liability. Nevertheless, I have suggested that appeals to BIRC reasoning remain pervasive, reflecting the transposition of settled family law and the political theory advantages of adopting a Millian Harm Principle justification for protecting vulnerable populations.

I have also considered three attempts to save the BIRC view by reformulating it. The first would expand the category of lives not worth living; the second would accept BIRC reasoning but limit it to the imperfect Non-Identity Problem cases discussed in Part II; the third would replace it with a non-person-affecting principle justification which claims that the wrongfulness of the parental action stems from the failure to substitute a child who would experience less suffering or more opportuni-

252. *Cf.* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1234–40 (1996) (suggesting that in its free speech, free exercise, and abortion jurisprudence that for incidental infringements of would-be fundamental rights, the Court has at times applied a substantiality threshold).

253. *See*, *e.g.*, Garrison, *supra* note 100, at 1626, 1642; Rao, *supra* note 83, at 1477.

ty. I have provided reasons why I think each faces problems that make it unworkable.

Where do we go from here? We have two options: the first is to accept that these interventions are unjustified. The second is to drop the fig leaf of BIRC and delve into the "secret ambition" of best interests arguments pertaining to regulating reproduction. I believe there are three families of potential frameworks that might still sustain the interventions described in Part II, but accepting any of them requires a move away from the comfortable, overlapping consensus between comprehensive moral theories that BIRC arguments pretend to offer, and instead requires adopting more controversial premises. I develop these approaches and offer critiques in a companion article.[254] Here I merely want to sketch the three possibilities:

Reproductive Externalities: The Non-Identity Problem is an obstacle for any attempt to justify state intervention by claiming *that the child who would be produced* absent the intervention is harmed. What I call the "reproductive externalities" approach sidesteps the Non-Identity Problem by specifying a different victim of the harm: third-parties may be harmed *by this child's existence*. These externalities may be *intra*familial or more domain-general ideas about costs to the State through disability accommodation, diminished earnings, etc. These costs are most tangible as to cases involving the creation of children with disabilities, for example the genetic abnormalities stemming from brother-sister incest.

Wronging While Overall Benefiting: This possibility can be understood as shifting the criteria for moral wrongfulness from harm to a conception of wrong absent harm or as offering a conception of harm where the fact that an individual is overall benefited is insufficient to save the act from being wrongful.

In the wrongful life context, Seanna Shiffrin has developed the most fully fleshed out version tied to *legal* application,[255] but other versions of this approach also exist.[256] On Shiffrin's account, with its non-comparative conception of harm and ben-

254. Cohen, *supra* note 9.

255. Shiffrin, *supra* note 33, at 119–20.

256. *See*, *e.g.*, Davis, *supra* note 32, at 12; Dillard, *supra* note 60, at 1131 n.48; Elizabeth Harman, *Can We Harm and Benefit in Creating?*, 18 PHIL. PERSP. 89, 93 (2004); F.M. Kamm, *Baselines and Compensation*, 40 SAN DIEGO L. REV. 1367, 1385 (2003); Woodward, *supra* note 32, at 810.

efit, in creating a child we both harm and benefit the child at once, and it is wrongful to impose upon a child an unconsented-to harm merely to confer upon him a "pure benefit" like existence rather than to remove or prevent a greater harm.[257]

Legal Moralism and Virtue Ethics: A third alternative is what Joel Feinberg called legal moralism in the narrow sense—the use of criminal law to deter acts which neither harm nor offend but undermine public morality.[258] A related approach draws on virtue ethics conceptions, which suggest that the character of the agent doing the action is what is central in determining its wrongfulness.[259] Michael Sandel's work on an opposite issue, the morality of enhancement, might be thought of as one model of where a virtue ethics argument might go.[260] Both of these approaches side-step the Non-Identity Problem because they do not depend on a claim that *the child* is harmed by the reproductive act, rather that society or the agent reproducing is, in a way that should motivate state action.

As I suggest in a companion article coming out in another Issue of this Journal, each of these options faces some serious normative and constitutional difficulties as justifications for the interventions I have discussed in Part II. Would it be better to adopt one (or more) of these alternative possibilities or instead to simply reject these interventions? A full evaluation of that question is (in this case quite literally) a matter I leave for another paper. Here my goal has been instead to show that the way courts, legislatures, and scholars discuss the regulation of reproduction is deeply flawed, and cannot be saved.

257. Shiffrin, *supra* note 33, at 120–27.

258. *See* FEINBERG, *supra* note 15, at 24; FEINBERG, *supra* note 240, at 3–4.

259. Lawrence B. Solum, *Natural Justice*, 51 AM. J. JURIS. 65, 65–76 (2006); Rosalind Hursthouse, *Virtue Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds.) (rev. ed. 2007), *available at* http:// plato .stanford.edu/entries/ethics-virtue/.

260. MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING, *passim* (2007).