

Reply

Burying Best Interests of the Resulting Child: A Response to Professors Crawford, Alvaré, and Mutcherson

I. Glenn Cohen[†]

I am gratified by the very kind remarks of Professors Crawford,¹ Alvaré,² and Mutcherson³ in their separate responses to *Regulating Reproduction*⁴ and *Beyond Best Interests*,⁵ especially since each of them writes work that I greatly admire and often rely on. Because I view responses like this as a means of crystallizing and helping to resolve disagreements, I focus here on those points where our views diverge rather than the issues on which we agree. However, I do not want to give the misleading impression that our points of disagreement are more significant than our points of agreement. If anything, I think the opposite is true.

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1. Bridget J. Crawford, *Authentic Reproductive Regulation*, 96 MINN. L. REV. HEADNOTES 31 (2012), <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/CrawfordFinal.pdf>.

2. Helen M. Alvaré, *A Response to Professor I. Glenn Cohen's Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. HEADNOTES 8 (2012), <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/AlvareFinal.pdf>.

3. Kimberly M. Mutcherson, *In Defense of Future Children: A Response to Cohen's Beyond Best Interests*, 96 MINN. L. REV. HEADNOTES 46 (2012), <http://www.minnesotalawreview.org/wp-content/uploads/2012/05/MutchersonFinal.pdf>.

4. I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011) [hereinafter Cohen, *Regulating Reproduction*].

5. I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187 (2012) [hereinafter Cohen, *Beyond Best Interests*].

I. PROFESSOR CRAWFORD

I am very grateful to Professor Crawford for her kind words about the descriptive and normative contributions of my Articles, as well as her attempts to simplify and clarify some parts of my argument that are somewhat weighed down by the philosophical language I use.

In reflecting on one of the three alternatives to Best Interests of the Resulting Child (“BIRC”) I examine in *Regulating Reproduction*,⁶ the distinction between what I call perfect and imperfect Non-Identity Problems, Professor Crawford notes it is “somewhat difficult to understand,” stating:

It might take shape as follows: an intervention is justified if the likely number of children who may or may not come into existence if the intervention *is* in place is *less* than the likely number of children who may or may not come into existence if the intervention is *not* in place. In other words, the likely population-wide aggregate of actual harm to actual children is lower with the intervention in place. If this reading of Professor Cohen’s analysis is correct, then perhaps he could be (mis)interpreted to justify reproductive interventions that cause overall fertility rates to decline. It is not entirely clear that this is his view, however, and this aspect of the argument might be developed or clarified in future work.⁷

Again, this is quite complex terrain, so I am grateful to Professor Crawford for highlighting an area of relative obscurity in my writing. Let me try to clarify: in cases of what I call “perfect” Non-Identity Problems, such as prohibiting brother-sister incest or reproduction by women over age 50, if the regulatory intervention succeeds it will *necessarily* alter when, whether, or with whom individuals reproduce, thereby creating a Non-Identity Problem in that the same child will not come into existence with and without the intervention in place. By contrast, in the category of what I call “imperfect” Non-Identity Problem, such as prohibitions on sperm-donor anonymity or egg sale, *in theory* the population of children who come into existence with and without the intervention in place may share at least some members. Imagine, for example, that Jason and Tony are both seeking to use eggs provided by another individual. Imagine that in one state of the world (i.e. in one possible world) egg sale is permitted and in another egg sale is prohibited. Jason’s egg provider is willing to provide the egg even if not paid, while Tony’s egg provider is only willing to sell. If it is the case that Jason’s egg provider will provide the exact same egg

6. I consider an additional four in *Beyond Best Interests*. See generally *id.*

7. Crawford, *supra* note 1, at 36 (citations omitted).

at the exact same time to Jason such that it is fertilized with exactly the same sperm whether or not egg sale is permitted, then we can say there is *no* Non-Identity Problem, and thus no problem as to using BIRC arguments to argue for a prohibition on egg sale as beneficial to Jason's offspring. There remains a Non-Identity Problem as to Tony's offspring, preventing us from relying on BIRC justifications, though, because, as to Tony, the prohibition on egg sale will alter when, whether, or with whom he reproduces. One possible BIRC alternative I consider is to restrict the use of BIRC arguments to cases like sperm-donor anonymity and egg sale where there may be some children who come into existence whether or not the regulation is put in place. Nevertheless, I do not find this approach particularly persuasive, at least as to the set of examples I canvass, *because* while the regulation burdens *all* parents, it is only justifiable on BIRC grounds for a small and hypothetical subset of children who will come into existence as the same children whether or not the intervention is put in place. If the world were full of Jasons and not Tonys, things might be different, but if most of those who will be regulated are like Tony, the regulation is much harder to justify. For more on why I think this, I refer readers back to the relevant section of *Regulating Reproduction*.⁸

Professor Crawford points to my writing that “the natural/artificial line [as to types of reproduction] ought to carry no weight. 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.”⁹ She worries that “[t]he reader, however, likely persists with a misfiring intuition, as it is not immediately obvious that the state's failure to fund assisted reproduction is a negative liberty violation” and that “[s]uch a result *appears* to obtain only to the extent that there is a constitutional right to become a genetic parent *by any means necessary*, not merely a generalized right to become a genetic parent.”¹⁰ This is a helpful issue for her to raise, in that it shows I have not put my point as clearly as I might have. Let me try to do better:

When we are talking about decisions of the state to *fund*

8. Cohen, *Regulating Reproduction*, *supra* note 4, at 474–81.

9. Crawford, *supra* note 1, at 40 (quoting Cohen, *Regulating Reproduction*, *supra* note 4, at 495).

10. *Id.*

reproductive technology, we are indeed discussing positive-liberty rights to become genetic parents. Professor Crawford correctly observes that, in prior Articles, I have carefully distinguished such positive-liberty rights from negative-liberty rights to become genetic parents.¹¹ In the passage in question, by “preventing access to reproductive technology,” I meant regulations such as those preventing unmarried individuals, LGBT individuals, or those over age fifty, for example, from purchasing reproductive technology services out of pocket. I did not mean a rights claim on the state to pay or otherwise provide those services, which I agree are positive-liberty interventions. Thus, to restate my point more clearly, those who hew to a line distinguishing natural and artificial reproduction are mistakenly confusing the natural/artificial line with the line between positive- and negative-liberty claims to become a genetic parent. Preventing those who are unmarried, LGBT, or older from buying reproductive technology services is as much of a negative-liberty infringement as is preventing the coital reproduction of the same groups. Of course, whether we ought to believe that those individuals *should*, as a normative or constitutional matter, have a negative-liberty right to become a genetic parent through assisted reproduction, and whether that right is a fundamental or more garden-variety one, is something I did not dwell on in these Articles.¹² Instead, in this work, I merely want to suggest that even if one believes negative-liberty rights as to assisted reproduction deserve *less* protection than their coital equivalent, the state still needs a real and defensible justification to impinge on such rights.

Professor Crawford’s suggestion that I “might elaborate beneficially on the difference between interventions that make access to reproductive technology *difficult*, on the one hand, and interventions that *prevent* access to reproductive technology, on the other” is well-taken.¹³ I try to get at this somewhat as to my ordering of the means of regulating reproduction from the most to the least intrusive and my suggestion that stronger justifications are needed for the more intrusive ones. But she is certainly right that it would be profitable to develop this fur-

11. I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1140–41 (2008) [hereinafter Cohen, *Rights Not to Procreate*].

12. For some discussion elsewhere in my work, see generally *id.* and I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115 (2008).

13. Crawford, *supra* note 1, at 40–41.

ther. For now I will make the tentative suggestion that one way to do this would be to borrow from the Supreme Court's abortion jurisprudence since *Planned Parenthood of Southeastern Pennsylvania v. Casey*, and frame the question of whether the state has put in place (in negative-liberty terms) a "substantial obstacle" to reproduction.¹⁴ That said, I am well aware of the dissatisfaction that test has engendered in abortion litigation, so I would want to think (and hope others will as well) more carefully about this issue before offering anything more concrete.

I am also extremely grateful for Professor Crawford's suggestions of how my work in these Articles bears on the question of whether surrogacy payments should be taxable, an area she has enlighteningly discussed in her earlier writings.¹⁵ In these Articles I have suggested a few reproductive-rights debates for which my approach would reframe the debate, but, as Professor Crawford shows with her tax example, the implications extend much farther than I have mapped.

II. PROFESSOR ALVARÉ

Professor Alvaré's response to my two Articles, like all of her work, is elegant in both its writing and underlying ideas. As she recognizes, I am careful to suggest that rejecting BIRC arguments for the reasons I set out (primarily in *Regulating Reproduction*) does not imply that "there is no rationale available to the state for regulating the circumstances of conception."¹⁶ In *Regulating Reproduction* and *Beyond Best Interests* I consider seven substitute justifications, each of which I examine thoroughly.¹⁷ Professor Alvaré's paper adds what potentially might be an eighth justification. She suggests that the regulations I canvass might be "understood as an exhortation to parents, pre-conception, to 'step up' to a level of 'fitness' whereby children's best interests come first, and parents' rights follow only if they embrace this duty."¹⁸ That is,

At conception, all the law can do is exhort (*e.g.*, abstinence programs) or threaten with penalties (*e.g.*, incest bans), or interpose practical hurdles (*e.g.*, frighten off would-be sperm donors by requiring disclo-

14. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992).

15. Crawford, *supra* note 1, at 41–45.

16. Alvaré, *supra* note 2, at 17.

17. See generally Cohen, *Regulating Reproduction*, *supra* note 4; Cohen, *Beyond Best Interests*, *supra* note 5.

18. Alvaré, *supra* note 2, at 11.

sure) in order to begin to mold would-be parents into the kind of parents it will assume them to be after the child's birth: 'fit' parents who act in the child's best interests.¹⁹

She suggests that this reformulation of the argument would "harmonize family law's pre-conception and post-birth treatment of parents," an intriguing idea.²⁰

The notion of shaping parents through a level of minimal fitness is a very alluring one. I think one might spin it in a series of possible directions, which might map onto one or more of my BIRC alternatives.

The simplest interpretation would be to say that in the pre-conception setting, "unfit parents are those who would produce children with lives not worth living." As I have said in my Articles, that approach would not be problematic under BIRC since preventing the coming into existence of children who would be given a life not worth living *is* arguably in the interests of those children.²¹ However, as she recognizes, given that "few, if any, persons would like to be associated with the declaration that a particular child's life is 'not worth living,'" this argument will not be usable to justify most forms of reproductive regulation.²²

What else might Professor Alvaré's fitness approach mean? At some points, her argument sounds very much like a virtue-ethics one. In virtue-ethics approaches, an action is right if the action is one that a virtuous moral agent would characteristically perform under the circumstances.²³ Thus, one way to understand the idea that Professor Alvaré is pushing is that the regulations of reproduction I canvass are aimed at enforcing a vision of parental virtue. She writes that "the BIRC rationale makes sense as a public and private effort . . . to remind parents, before the moment parenting begins (conception) to be what the law later (after-birth) needs them to be and assumes that they are: fit parents who act in their children's best interests."²⁴ In this regard she sounds very much like a proponent of Rosalind McDougall's virtue-ethics take on parenting. McDougall argues that "the primary purpose of a parent is the flour-

19. *Id.* at 12.

20. *Id.* at 11.

21. See Cohen, *Regulating Reproduction*, *supra* note 4, at 472–74.

22. Alvaré, *supra* note 2, at 9.

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

24. Alvaré, *supra* note 2, at 15.

ishing of his or her child,” and thus there “seems to be something unparental about an agent who creates a child with no chance of flourishing, purely to satisfy his or her own desire to have a child.”²⁵ But, as I suggest in *Beyond Best Interests*,²⁶ this kind of approach merely pushes the question back one level, causing us to ask *why* the state is pressing *this* concept of parental virtue and whether the state is justified in using the means of regulating reproduction that it does in order to achieve this end. Or, to use Professor Alvaré’s nice phrasing, *why* does the law need the parents to “be fit parents who act in their children’s best interests”?²⁷

The answer cannot be “because those children will be *better off*,” at least as to pre-conception decisions, because this would just reincorporate BIRC arguments that, as Professor Alvaré recognizes, I have shown are problematic due to the Non-Identity Problem. Why else might we want to emphasize pre-conception fitness then? One reason hinted at by Professor Alvaré (I am not sure intentionally or otherwise, so I will emphasize this is *my* reading of some things she says) is that, because the state has a justified *parens patriae* interest in the parental fitness of parents *post*-conception, it is entitled to impose those same requirements *pre*-conception to achieve desired post-conception behavior. This idea might, in turn, be taken in one of two directions, each having different implications.

First, one might move away from a focus on society-level mores and instead focus on the individual resulting children. Thus, by screening for parental fitness in family form, age, or the like, we are preventing harm to the child *once* he exists, given those (by hypothesis) more pathogenic parenting environments. As I explain in *Regulating Reproduction*, this kind of interpretation is one that fails to completely wrap its head around the Non-Identity Problem. If the only way of protecting the child who would have come into existence from negative post-conception parental activities is to cause him not to exist (either because no child comes into existence or another child comes into existence in his place), we have “protected” him out of existence in a way that cannot be justified by harm- or benefit-based rationales.²⁸

25. R. McDougal, *Acting Parentally: An Argument Against Sex Selection*, 31 J. MED. ETHICS 601, 603 (2005).

26. Cohen, *Beyond Best Interests*, *supra* note 5, at 1271–72.

27. Alvaré, *supra* note 2, at 15.

28. I deal with this most explicitly in *Regulating Reproduction* in my dis-

The second interpretation is that while law professors and philosophers can nicely separate out pre- and post-conception behavior and the very different effects of this kind of harm, the average person will not do so, such that, in order to maintain a strong norm of parental attention to the best interests of *existing* children, we must be overbroad and sweep in parental attitudes about pre-conception activities as well. The pre-conception attitudes are not themselves problematic, but they are inexorably linked to the post-conception ones, and therefore we cannot (if you will pardon the pun) Solomonicly split the baby. To justify the regulation on this ground would therefore depend on an empirical claim that we cannot optimally enforce the post-conception regime Professor Alvaré has in mind without also enforcing the pre-conception regime. It is possible this empirical claim can be cashed out, but the very inconsistency in the extent of both pre- and post-conception regulation Professor Alvaré identifies makes me somewhat skeptical that the two are so closely linked. Even if they were linked, one would need to defend a further normative claim that the benefit gained in better inculcation of the post-conception parental virtues justifies the incursion on pre-conception procreative liberty that is being reigned in, not for its own sake, but for the sake of the post-conception regime. Is it possible that one might defend both the empirical and normative claim? Perhaps, though I have my doubts. Even if one could defend both claims, my guess is that the imperative this argument would generate would be a fairly weak one. It might justify only the least intrusive means of regulating reproduction, such as informational interventions or refusals to affirmatively subsidize certain reproductive decisions, but not something like the criminalization of brother-sister incest or prohibition of anonymous sperm donation.

There are still other ways to understand Professor Alvaré's parental fitness approach, which might fall under what I call the Non-Person-Affecting Principle approach or the Reproductive Externalities approach. In *Regulating Reproduction* and *Beyond Best Interests*, I deal with both approaches in some detail,²⁹ but I will refrain from repeating that analysis here and just refer readers to that discussion, especially because my own

cussion of Axel Gosseries's "Last Judgment" proposal. Cohen, *Regulating Reproduction*, *supra* note 4, at 479 n.168.

29. *Id.* at 481–513; Cohen, *Beyond Best Interests*, *supra* note 5, at 1217–44.

sense of Professor Alvaré's response paper and her larger body of work is that neither would be an approach she would find attractive.

III. PROFESSOR MUTCHERSON

Like much of her writing, Professor Mutcherson's response shows a passionate, empathetic, and deep focus on the experience of the disadvantaged. As with all the commentators, I think that Professor Mutcherson and I agree about more than we disagree. I am grateful that her response focuses on where she perceives we diverge, since it greatly enriches the discourse. I will take the same course, highlighting three main areas of disagreement. I will then press Mutcherson on what theory of reproductive regulation she endorses. Before I do so, though, let me start by identifying some broad areas of agreements.

First, I think we agree that the reasoning of most of the courts that have rejected wrongful life liability—that children have not been harmed by being brought into existence if given a life worth living—is directly in tension with BIRC reasoning.³⁰

30. That said, Professor Mutcherson notes a single case from 1984, *Procanik v. Cillo*, which she cites to claim “where there is no companion wrongful birth claim, at least one court has determined that a wrongful life claim could stand, thus suggesting that the calculus being done by these courts is a bit more complex than Cohen admits.” Mutcherson, *supra* note 3, at 58 (citing *Procanik v. Cillo*, 478 A.2d 755 (N.J. 1984)). However, the actual holding of the court is that “an infant plaintiff may recover as special damages the extraordinary medical expenses attributable to his affliction, but . . . he may not recover general damages for emotional distress or for an impaired childhood.” *Procanik*, 478 A.2d at 757. Thus, the case seems to be rejecting the claim that the child was harmed in denying the infant general damages, but gives him the damages the parents would have had through a wrongful birth lawsuit, which are different both conceptually and in monetary amount from what he would be entitled to in a wrongful life lawsuit. It is the harm from being born that tracks the BIRC problem, not the extraordinary medical expenses of raising the child. In any event, even if there really were cases giving children true wrongful life compensation when there was no one to assert a wrongful birth lawsuit, it would not count as strong evidence against my claim for two reasons. First, while it is understandable that courts want to help children with impairments by bending the law this way, the logic is problematic, and it is also underinclusive in that there are many children with comparable impairments who cannot claim negligence on the part of their doctor. Therefore, it seems more sensible to me, and I suspect congenial to Mutcherson, to provide better social support for all children with impairments rather than engage in a legal fiction that benefits only those who can find some negligent act of genetic diagnosis of their parents. Second, as I have argued elsewhere, if one is willing to uncouple the compensatory and deterrent functions of tort (as

A second point of agreement is that while my project has been to expose the intellectual problems with BIRC, I think Professor Mutcherson is correct that doing so is not sufficient to topple this discourse, and that I need to be more attuned to the political landscape, which admittedly was not the focus of my Articles. Moreover, I think she is right to be sensitive to the political use of anti-BIRC language and the fear that my arguments will be misused by her political opponents. Sometimes we must press forward in an intellectually honest way even if our arguments will be co-opted by those we disagree with, but I think Professor Mutcherson is right that there are dangers here.

Third, even while my greater ambition is to vanquish BIRC, whether or not I succeed, I completely agree with Professor Mutcherson that in the meantime it is worthwhile to pursue taming best-interests discourse and co-opting it away from being used to support regulation we find repugnant. I also very much agree that the best-interests standard is abused even as to its deployment in analyzing the interests of *existing* children, though I think the problems are different and persist whether or not one accepts my critique of BIRC.

Finally, I agree with many of the reproductive-justice arguments that Professor Mutcherson makes for more social support and empathy for drug-using pregnant women. I merely think that those types of goals are worth pursuing for reasons disconnected from BIRC and the Non-Identity Problem.

Now let me turn to our disagreements.

IV. DISAGREEMENTS

A. THREE DISAGREEMENTS: POTENTIAL CHILDREN, POSITIVE LIBERTY, AND POLITICAL THEORY

If I understand her Article correctly, I think Professor Mutcherson and I have three primary disagreements, although “disagreements” may be too strong a word since in each of these

some theories of tort but not others are willing to do), it may be possible to justify providing monetary compensation to children in wrongful life cases, not because they have been harmed and deserve to be compensated, but because failing to do so will under-deter doctors operating in genetic-diagnosis practices. See I. Glenn Cohen, *Intentional Diminishment, the Non-Identity Problem, and Legal Liability*, 60 HASTINGS L.J. 347, 365–66 (2008) [hereinafter Cohen, *Intentional Diminishment*]. In other words, the children are transformed into a kind of private attorney general. See *id.*

places I think Professor Mutcherson may be talking past my Articles.

1. Future Children vs. Potential Children, or Wanting the Best for the Children We Have vs. Wanting to Have the Best Children.

Professor Mutcherson titles her Article “In Defense of Future Children,” unintentionally, I believe, suggesting the pregnant negative (if you will pardon the pun) that my Articles are “in attack” or at least “in indifference” to future children. To understand why this is wrong, it is useful to distinguish *future* children from *potential* children. Future children are the children we *will* have if our reproductive act takes place,³¹ whereas potential children are the universe of all children we possibly could have. At several points in her Article, Professor Mutcherson seems to suggest that I think parents or the state

31. I am very explicit about this distinction in *Regulating Reproduction*, noting in a long passage:

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. Eventually, the bomb goes off, “killing or mutilating dozens of five-year-old children.” 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.” 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 damage or crimes against fetuses that will harm the children those fetuses will become.

Cohen, *Regulating Reproduction*, *supra* note 4, at 484–85 (citations omitted) (quoting JOEL FEINBERG, FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 12 (1992)).

should be indifferent as to how the children people have will fare. For example, she observes that, “from the perspective of many laypeople, one comes to owe something to a child to a significant degree well before a child or even a pregnancy comes to pass,” but that “[t]his reality is substantially missing from Cohen’s work.”³² Quite the contrary, I think parents should do everything possible to care for, love, and help make flourish the children they *do* have.

What Professor Mutcherson appears not to grapple with is the distinction between *wanting the best for the children we have* versus *wanting to have the best children*. Rejecting BIRC and all of its alternatives does not at all imperil wanting the best for the children we have. Rejecting BIRC does, however, mean that the state cannot justify interventions aimed at producing the best children of all the potential children we could have by claiming that doing so prevents harm or confers benefits on those children. Instead, the state needs to have a different non-BIRC theory to justify using tools like prohibition to press us to have the best children, such as non-person-affecting principles, reproductive externalities, etc. As I show in these two Articles, such theories run into many problems; they seemingly justify mandatory enhancement and appear to be based on principles similar to the Nazi eugenics movement, among other problems. Professor Mutcherson lumps together future children and potential children and fails to distinguish between wanting the best for the children we have and wanting to have the best children. In so doing, she fails to confront these implications and in some ways recapitulates the same error with BIRC that my Article is meant to correct.³³

2. Reproductive Rights or Reproductive Justice? Why Choose?!

Professor Mutcherson suggests that “[u]ndergirding all of Cohen’s discussion in *Beyond Best Interests* is an understanding of procreation as a fundamental right as articulated by the U.S. Supreme Court in *Skinner v. Oklahoma*.”³⁴ It is a minor point, but I think she is wrong about this. I mention *Skinner*

32. Mutcherson, *supra* note 3, at 61.

33. Curiously, in a footnote Professor Mutcherson labels as “disturbing” Julian Savulescu’s argument about a duty to enhance, but fails to explain how her own views avoid that implication, a point I explicitly raise in my articles. *Id.* at 62 n.56 (citing Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 *BIOETHICS* 413 (2001)).

34. *Id.* at 50–51.

only very briefly at the end of *Regulating Reproduction*, and I explicitly avoid trying to resolve whether there is a fundamental right to become a genetic parent implicated by regulation of assisted reproduction. Moreover, I undertake the brief constitutional analysis explicitly under the assumption that reproduction is not a fundamental right, and is thus reviewed only under rational-basis review.³⁵

Professor Mutcherson's more general point, though, is that taking a "reproductive justice" lens (which she contrasts with more rights-talk oriented approaches) might take my project in a quite different direction.³⁶ She nicely captures the emphasis of this approach in suggesting that its goal is to ensure that all people have "the economic, social, and political power and resources to make healthy decisions about [their] bodies, sexuality and reproduction for [them]selves and [their] communities."³⁷ In *Regulating Reproduction* and *Beyond Best Interests*, I do consider some regulations of reproduction that might be thought of as particularly salient to those offering reproductive-justice critiques, such as restrictions on single-parent reproduction, on state insurance coverage, and on enforcement of surrogacy agreements. Indeed, in both papers I make much of the fact that several of the BIRC alternatives would make current patterns of reproductive regulation underinclusive, or in other words, discriminatory. But Professor Mutcherson is surely correct that there are more examples of state reproductive policies

35. Cohen, *Regulating Reproduction*, *supra* note 4, at 514–19. The one place where more normative conceptions of rights to procreate take on increased prominence is in my analysis of "Imperfect Non-Identity Problems," where I noted, referencing John Robertson's work,

If one believes in a broad and important conception of pro-creative liberty, 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.

Id. at 477 (citations omitted). I then, however, go on to address the implications for those who hold quite different views. *Id.*

36. I will note that as a matter of nomenclature I would not divide rights from justice in this way. One way in which individuals will face injustice is if the state limits a right they have without good reason.

37. Mutcherson, *supra* note 3, at 52 (quoting *A New Vision for Advancing Our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice*, FORWARD TOGETHER, at 1, <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf> (last visited July 12, 2012)).

that have disparate effects on women of color, among others.

Why focus on what I do, rather than on the examples of children born at low birthweights, without health insurance, or abused or neglected, as Professor Mutcherson suggests? It is not because I think these categories of regulation are unimportant; quite the contrary. Rather, it is because the philosophical problems I identify with BIRC reasoning are not particularly salient to these issues. As Professor Mutcherson (and also Professor Alvaré) notes, even as applied to *existing* children, best interests is a problematic concept that is often wielded in ways that disproportionately target poor women of color. These problems, however, are not my focus in these two Articles. My critique in the pre-conception area is a logically prior problem. The problem I identify is one that even the best-articulated and applied best-interests analysis would not evade. In this sense, I really do think Professor Mutcherson and I are more “yes and” not “yes but.”

Professor Mutcherson also observes that “BIRC is not just about the who, what, and when of procreation. It is profoundly and disturbingly about staking out claims of worthiness, about who deserves to be a full and complete member of the polity, and the meanings of citizenship and human dignity.”³⁸ I do not disagree at all. And, indeed, at several points in my two Articles, I discuss the ways in which the potential BIRC alternatives I canvass have very disturbing implications as to the worth and dignity of those with disabilities, those who choose to remain unmarried, and LGBT populations, among others. When Professor Mutcherson observes that “the community element of the justice narrative suggests that discussions about procreation are not simply about a contest of clashing rights and radical autonomy involving atomistic individuals, but also involve questions of interdependence, obligation, and relationship,”³⁹ I again do not disagree. My discussion of Wronging While Overall Benefitting and Reproductive Externalities is explicitly aimed at arguments for regulating reproduction tied to obligations and interdependence.⁴⁰

For similar reasons I have not focused on Professor Mutcherson’s worry about “what remains to obligate the state in positive ways to provide services to those who procreate.”⁴¹ I

38. *Id.* at 53–54.

39. *Id.* at 54.

40. Cohen, *Beyond Best Interests*, *supra* note 5, at 1217–64.

41. Mutcherson, *supra* note 3, at 57.

understand this concern to map more onto to positive- rather than negative-liberty claims,⁴² though I recognize the dichotomy simplifies much. Otherwise said, assuming one agrees with me that BIRC is not a viable way of justifying negative-liberty restrictions on reproductive decision making, one could, consistent with that conclusion, endorse a large number of possible approaches to the state's obligation to provide support; anything from no support to maximal support for children who do come into existence would be possible.⁴³ In other words, if *this* is what holds Professor Mutcherson back from rejecting BIRC, she need not fear, in that the rejection of BIRC does not hold a clear implication for this question.

3. Parental Choices vs. State Regulation

Professor Mutcherson writes, "Also largely missing from Cohen's work is clear acknowledgement that having children is a choice fairly subject to an ethical analysis that has policy-making implications."⁴⁴ I disagree, in that the two Articles consider eight (including BIRC) possible ethical/public policy justifications for regulating reproduction and spend close to 200 pages examining them. But I think this disagreement is better captured when Professor Mutcherson suggests that what I have missed is a point from an essay by Laura Purdy that she

42. The locus classicus is ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY 170 (2004).

43. Cf. Cohen, *Rights Not to Procreate*, *supra* note 11, at 1139–48 (explaining why recognizing a right to be a genetic, legal, or gestational parent does not necessarily require recognizing a right not to be a genetic, legal, or gestational parent). This point is nicely captured in an exchange between Michael Sandel and Frances Kamm on the morality of human enhancement. Sandel expresses the worry that if enhancement is permitted, individuals who fail to enhance themselves, and therefore have larger needs for public assistance, will not receive that help because social solidarity will be eroded. Michael Sandel, *The Case Against Perfection*, THE ATLANTIC MONTHLY, Apr. 2004, available at <http://www.theatlantic.com/past/docs/issues/2004/04/sandel.htm>. Kamm responds that it does not follow that our entitlement to social support will be diminished in the case of our (or our parent's) choice not to enhance, because our entitlement to support may be independent of choices we make. As she writes, "These are conceptually two separate issues. For example, suppose someone is at fault for acting carelessly in using his hairdryer. If he suffers severe damage and will die without medical treatment, his being at fault in a minor way does not mean that he forfeits a claim on others he otherwise had to free medical care." Frances M. Kamm, *Is There a Problem with Enhancement?*, 5 AM. J. BIOETHICS 5, 12 (2005). This follows even more clearly if it was a choice the child is not responsible for, as in the cases of procreative decisions by her parents that are the focus of my articles.

44. Mutcherson, *supra* note 3, at 54.

quotes: “If we are consistent in our concern about human happiness, it seems clear that we must attend to the welfare of future people,’ which in Purdy’s case, means rejecting the implications of Parfit’s Non-Identity Problem.”⁴⁵

In the same vein she points to a new book published by Christine Overall (published after *Regulating Reproduction*) that “ponders why it is that people are often called on to justify why they are childless, but are much less frequently asked why they have opted to have children.”⁴⁶ She explains Overall’s position as being that “[i]n other words, what matters from the perspective of a parent is whether the child is the first child, second child, etc. and this identity category is not determined by what sperm and egg combination comes together at any point in time. If Overall is right, then the non-identity problem is not really a problem at all, but I suspect that Cohen does not believe that Overall is right.”⁴⁷ Finally, Mutcherson questions “if we jettison BIRC, as Cohen suggests, what remains to anchor any public concerns about procreation other than the slim tether of reproductive externalities?”⁴⁸

Let me make a few points in response to all of this. First, one should be careful to distinguish the *personal ethical* question of whether a person has done something wrong by engaging in a particular act of reproduction from the *legal/political theoretical* question of whether *the state* may use some of the means of regulating reproduction that I identify to influence or prevent those same reproductive choices. The answer to one question might track the answer to the other, but it need not, and my two Articles are pretty squarely focused on the latter issue. Indeed, I note in several spots (such as in my discussion of non-person-affecting principles or virtue ethics or wronging while overall benefitting) that various theories of the domain of law and the state may render unjustifiable some means of regulation, even if individuals think, as a matter of personal ethics, that there are bona fide reasons for condemning certain behaviors.⁴⁹ Overall, whose new book Mutcherson relies on, is also very explicit in making the same point, noting that “in speak-

45. *Id.* at 55 (quoting Laura M. Purdy, *Loving Future People*, in REPRODUCTION, ETHICS, AND THE LAW 301 (Joan C. Callahan ed., 1995)).

46. *Id.* at 56 (citing CHRISTINE OVERALL, WHY HAVE CHILDREN?: THE ETHICAL DEBATE (2012)).

47. *Id.* (citations omitted).

48. *Id.* at 57.

49. See Cohen, *Regulating Reproduction*, *supra* note 4, at 504–13, 518–19; Cohen, *Beyond Best Interests*, *supra* note 5, at 1260–64, 1272.

ing of a possible obligation not to have children, I am saying *nothing* about what the state should or should not do to curtail protection. That is a matter of social policy, which I am setting aside in this book.⁵⁰

To put the point a different way, many people hold beliefs, often as a moral matter, that would not meet the demands of public reason. Indeed, some might label these beliefs irrational (for some, certain religious beliefs would be an example). Take, for example, certain religious mandates against eating pork. A conclusion that the state should not *ban* the consumption of pork would resolve the political theoretical/legal question. But this does not inexorably lead to the conclusion that individuals would be wrong to choose on their own to refrain from eating pork. Thus, the resolution of the personal ethical question does not necessarily track the resolution of the theoretical/legal question. In the reproductive area, the better way to think of this is as a two-step process. First, we determine which forms of reproductive regulation the state can justifiably forbid or discourage, and only then, in the space that remains, do personal moral choices about reproduction come to the fore. Thus, there is a large space between a conclusion “X is immoral” and “the state should make X illegal or otherwise discourage it.” Lying is a good example of an immoral action that is still far from state regulation. Therefore, even if one thought the parents Mutcherson identifies were acting immorally, it would not follow (absent significant additional argumentation) that the state would be justified in prohibiting or otherwise discouraging these reproductive practices. Relatedly, nothing I have said in my Articles has suggested that individuals should seek to have children or that the state should encourage them to do so. Instead, my focus has been on when the state can justifiably interfere with those who want to have children.

Finally, to the extent Professor Mutcherson’s fear is that if we reject BIRC she does not know “what remains to anchor any public concerns about procreation other than the slim tether of reproductive externalities,”⁵¹ I have two responses. First, she might find satisfying one of the six other justifications for reproductive regulation, besides BIRC or Reproductive Externalities, that I have identified and analyzed. While I would be overjoyed to think I have been so convincing in my criticisms of these approaches that Professor Mutcherson finds them un-

50. OVERALL, *supra* note 46, at 118 (emphasis added).

51. Mutcherson, *supra* note 3, at 57.

thinkable, in my own mind what I have done is to show some of their difficult and disturbing implications, rather than offer a thoroughgoing and undeniable rejection. It may be that Professor Mutcherson would rather accept some of these theories' implications as to eugenics or enhancement, for example, if it means she would have a BIRC alternative that would satisfy her.

Second, I would like to urge Professor Mutcherson to reverse her polarity. She seems to want to start with a regulation of reproduction, assume it must be justified, and for that reason reject any analysis that would leave the regulation unjustified even if one cannot find the soft point in my analysis (for *it must* be there!). Given the huge variance in the forms of reproduction that have been regulated over history and around the world, and insofar as Professor Mutcherson and the other commentators recognize that BIRC or other theories can be a coded justification for the oppression of minorities or other unacceptable *leitmotifs*, I want to suggest that it may be worthwhile to take a different approach. We should start by finding out which (if any) theories for regulating reproduction we can endorse in what circumstances, and let *that* guide what regulations to enact, not vice versa. That has been my ambition in this work.

B. WHAT EXACTLY IS PROFESSOR MUTCHERSON'S VIEW?

Professor Mutcherson's twenty-one pages of response are quite coy on her own views about when the state is justified in regulating reproduction. I am fairly explicit that I reject BIRC, and explain why I find the other theories I describe or invent also problematic, though I think that the Reproductive Externalities justification is the best of a bad lot and may justify regulation in a few cases. As the professorial adage goes, it takes a theory to beat a theory, so I question just what theory Professor Mutcherson is endorsing. Given that she is writing a response to my own Articles, it might be a bit unfair to press too hard on her failure to cast her die with one of the eight theories I articulate, and I am hopeful she will write more on this issue in her future work. For now, let me instead identify and discuss three very different theories that appear at various points in her response.

Early on, Professor Mutcherson appears to actually want to save/retain a version of the BIRC view. While she does not explicitly champion it, she does seem sympathetic to a position pertaining to birth order that she associates with Professor

Overall's book. As Mutcherson describes the approach, that "what matters from the perspective of a parent is whether the child is the first child, second child, etc. and this identity category is not determined by what sperm and egg combination comes together at any point in time."⁵² While this response essay is not an appropriate place to fully respond to Overall's excellent new book, let me say a few words about why this particular response to the Non-Identity Problem will not work as a defense of a BIRC-based justification for the state's regulation of reproduction, especially since this birth-order view is one that others have informally offered in reaction to my Articles during workshops. Here, it is again useful to disentangle the grounds justifying when the state may interfere with private reproductive choices from the way that some parents sometimes think about their children.

Why this birth-order approach will not work as a justification for state regulation of reproduction is easiest to see as to regulation aimed at altering *whether* individuals reproduce, such as limitations on same-sex or older-parental use of reproductive technologies. It is hard to adopt a relational view, because the state is blocking the formation of *any* relation, by blocking the conception of any child, whether first, second, or third in birth order. It would seem as though the birth-order approach is just beside the point. Therefore a reformulation of BIRC on the birth-order view will not save most of the regulations of reproduction I have discussed, since they restrict whether individuals can reproduce at all.

Next, consider attempts to alter *with whom* individuals reproduce. Let me tell you about my family, not out of exhibitionistic desire, but to illustrate the problem with the birth-order view: I am the second born in my family. I have a brother, Jon, and my mother (Ethel, although she now calls herself Ginger) was married (to Jeffrey) once before she married my father (Bert), but without any children. Imagine that after having produced my older brother Jon, my mother went back to her first husband and had a son with him instead. That boy, call him Gabriel, who would have resulted from reproduction between Ethel and Jeffrey, would be Ethel's second child, just as in the real world I, Glenn (or I. Glenn according to my official documents!) am her second child. According to the birth-order view, to determine if I (Glenn) have been harmed by my exist-

52. *Id.* at 56 (citing OVERALL, *supra* note 46, at 153).

ence in a way that justifies state intervention, we should compare my life to the one that Gabriel would have had, because the real question is whether my mother harmed her “second child” by conceiving him with one man versus the other. This seems like a very strange view in that it treats the children from two different fathers as possible substitutes for one another, but only if they both happen to be the second child in the birth order, rather than one being second and one being third, for example. Why should birth order be given such prominence? As further proof of the implausibility of the view, consider this: in the example I gave, Gabriel and Glenn would each be my mother’s “second child,” but Glenn would be Bert’s “second child” while Gabriel would be Jeffrey’s “first child.” According to this view, does that mean that we are allowed to compare those two lives in determining if Glenn is harmed or not, because the birth order is only the same for one genetic parent? For these reasons, focusing on birth order does not seem a plausible way of saving BIRC for cases in which the state aims at altering with whom we reproduce.

Finally, there are the cases of state attempts to alter *when* individuals reproduce. I only have one primary example of this in my Articles, abstinence education, so even if the birth-order view made a difference here, most of my claims in those Articles would remain unscathed. In any event, the birth-order view seems no more persuasive here than elsewhere, because it is unclear why the sperm-and-egg combination would matter for *with whom* we reproduce but not *when* we reproduce. The point can also be made with a thought experiment, albeit one that is a bit more complex than for the other two types of regulations of reproduction. Suppose a husband and wife use In Vitro Fertilization (IVF) to fertilize two preembryos (each of which is a different sperm-and-egg combination, but from the same genetic parents). They are choosing which preembryo to implant, which we can think of as analogous to deciding *when* to reproduce, in that what changes is the sperm-and-egg combination from the same genetic parents. Suppose one preembryo will produce a boy with deafness, while the other will produce a girl without that impairment. If the parents choose to implant the first preembryo to produce the boy, can they be said to have harmed him, to have acted against his best interests? His complaint would have to be “you have harmed me by having me; instead I should have been a hearing girl.” But I think we would respond, “No, if we had had a girl without

deafness we would not have had you,” which is analogous to what courts actually say in wrongful life cases, as my Articles note. But a proponent of the birth-order view might retort: “you are ignoring the birth order, the relevant category is ‘first child’ not ‘this child.’” As a purely descriptive matter, I suspect many parents actually think of “first son” and “first daughter” quite differently, so I am not sure that is right. In any event, the problem runs deeper, for suppose the parents implant the female preembryo first, making her their “first child.” If they *then also later* implant the second preembryo, it becomes their “second child,” and the relation identified by the birth-order view seems to disappear. It seems strange to think the child is harmed in a world where the preembryo chosen is the only one implanted but not in a world where it is implanted after a prior preembryo. I apologize in advance if this last bit of the discussion is confusing, but I think the confusion stems from trying to fit a square peg (the birth-order view) into a round hole (the grounds for which a state can justifiably prohibit reproductive acts).

So much for saving BIRC through the birth-order view. Perhaps anticipating these types of criticisms, Professor Mutcherson seems to shift to a virtue-ethics approach later in her Article. As she recognizes, in *Beyond Best Interests* I note that “virtue ethics has the benefit that it can, if wielded correctly, circumvent the non-identity problem because it does not rely on any reference to the well-being of a future child, but only the moral character of the parent or potential parent,” but that “where a reference to the moral virtue of a parent measures that virtue in part by reference to the flourishing of a future child, non-identity once again rears its head.”⁵³ Still, she thinks that I “may be too quick to reject the insights of virtue ethics or the extent to which this branch of inquiry closely tracks the root of much policymaking” because “[t]itle notwithstanding, BIRC is not solely about a child and it certainly need not be reduced to any given child and any given set of parental decision makers.”⁵⁴ Instead, Professor Mutcherson states that BIRC “is a stand in for a larger conversation about the nature of reproductive responsibility, a concept certainly as slippery and malleable as the concept of the best interests of a (real or imagined) child.”⁵⁵

53. *Id.* at 59.

54. *Id.*

55. *Id.*

In *Beyond Best Interests*, I suggest three difficulties with virtue-ethics approaches to justify the reproductive regulations I discuss: (1) any view tying the wrongfulness of reproductive action to the flourishing of the resulting child depends on some notion of harm and benefit to that child, which is rendered problematic by the Non-Identity Problem; (2) there are clashing conceptions of parental virtue at work here, and one might just as plausibly defend these parents as the virtuous ones for (to borrow from Michael Sandel's work) being humble, open to the unbidden, and resisting the pull of mastery, as opposed to pursuing eugenic or at least perfectionist aims for their children; and (3) it is unclear whether conceptions of virtue divorced from harm and benefit can form the justificatory basis for legal regulation rather than merely serve as a marker for moral wrongfulness, especially as to criminal law.⁵⁶ Professor Mutcherson seems to concede my first critique, seems supportive of the second, and says nothing about the third. Despite her labeling, it is hard to understand this as a full-throated endorsement by her of virtue ethics views, and in any event she has not responded to my critiques.

A few paragraphs later we have what reads like it may be the articulation of Professor Mutcherson's *actual* position, namely that "[r]eproductive responsibility and BIRC as some faction of evaluating that responsibility is ubiquitous and it speaks to the fact that BIRC is not strictly about logic or reason, but it resonates instinctively with people precisely because it takes seriously, as a normative matter, the idea that one can act wrongly by procreating."⁵⁷ This seems very close to the BIRC alternative I call "Wronging While Overall Benefitting," which claims that, even though the individual who is brought into existence has been made (all things considered) better off by the act of reproduction, one can still claim he has been *wronged* (in a deontological sense) by the act of reproduction, especially if his parents refuse to take responsibility. I spend roughly twenty pages of *Beyond Best Interests* explaining this view, using the elegant version of this approach put forth by Seana Shiffrin as my main interlocutor, and then explaining why I think it will not work.⁵⁸ What holds me back from thinking this is the view that Professor Mutcherson actually subscribes to is the fact that she does not cite Shiffrin's Article,

56. Cohen, *Beyond Best Interests*, *supra* note 5, at 1269–73.

57. Mutcherson, *supra* note 3, at 60.

58. Cohen, *Beyond Best Interests*, *supra* note 5, at 1244–64.

reference this discussion, or attempt to respond to my criticisms of it, which makes me think this cannot be where she wants to hang her hat.

While it would probably be unfair to expect Professor Mutcherson to articulate a fully fleshed-out theory of when the state can regulate reproduction in a twenty-one-page response paper, at the end of the day, I am not sure where she stands at all, nor do I think she has struck any significant blows to the argumentation I have offered against BIRC and many of its alternatives.

C. SO WHAT?

Finally, Professor Mutcherson pushes the question of whether anything I say in these Articles really matters. She suggests that “[I do] not successfully capture the extent to which BIRC is an expression of a larger and intuitively persuasive view of the basic requirements of human goodness and a prerequisite to many accounts of human flourishing and human obligation.”⁵⁹ As evidence she points out:

It is because of BIRC that women begin to take pre-natal vitamins while trying to become pregnant. It is BIRC that drives families to move to bigger homes in good school districts in anticipation of having a child. BIRC drives future fathers to begin smoking cessation programs so that they can become non-smokers before their future child is conceived.⁶⁰

Let me put to one side the fact that I doubt that all things that are “intuitively persuasive” are true, that I am a much bigger believer in reflective equilibrium, and that it is precisely because it is “intuitively persuasive” but also (in my view) wrong that I want to dethrone BIRC. In any event, it is not entirely clear to me why Professor Mutcherson thinks that my argument renders BIRC problematic in any of these contexts. Remember that I argue in these Articles only that BIRC is problematic as a justification for altering when, whether, or with whom individuals reproduce in the sense of *conception*. It is not clear to me that any of these cases alters when, whether, or with whom individuals conceived. Instead, most of the cases that seem to concern her are about harms to *already conceived* fetuses being carried by their mothers. In my Articles I am explicit that accepting my claims regarding state regulation of *conception* does not necessarily mean that the state cannot jus-

59. Mutcherson, *supra* note 3, at 58.

60. *Id.* at 60.

tifiably regulate maternal behavior while carrying a fetus,⁶¹ such that it is strange that most of the examples Professor Mutcherson chooses are about harms to fetuses.

Further, I am very purposefully *not* claiming that “whatever acts one commits during the process of creating new life are not wholly morally repugnant so long as the life being brought into being is not without worth.”⁶² This is both because the Non-Identity Problem does not render problematic BIRC arguments for condemning every “act[] one commits during the process of creating new life”⁶³ that produce lives worth living, and because BIRC is not the final possible word on the matter, and because, again, we should distinguish government regulation from personal choices.

Moreover, it is also possible that even if parents accept my denunciation of BIRC, many will continue to want to do a myriad of *pre*-conception activities that will ensure their offspring are of higher welfare than the offspring they would have had if they had engaged in other behavior. What my analysis does is force them to reckon with the possibility that they want these higher-welfare children not for the sake of the child’s best interest, but because it furthers *their own best interests*. It is not clear to me that there is anything inherently wrong with that. It only looks wrong as against a fairy tale (albeit one often based on assumptions about motherly altruism that might make some cringe) where we portray the decision to conceive as an entirely selfless enterprise. If people want to ignore what I have said and continue to adopt views they cannot defend through reasoned argument, again, I have no serious beef with them; we as a society tolerate a wide range of un-reasoned beliefs in personal decisions. I become uncomfortable when the state uses logic that it cannot defend to prevent individuals from making certain reproductive decisions they would like to make.

Again, I want to emphasize that with Professor Mutcherson, as with the other commentators, we agree on much more than we disagree. With Professor Mutcherson, in particular, I share a large number of prior political commit-

61. Cohen, *Regulating Reproduction*, *supra* note 4, at 441–42, 484–85. On the applicability of the Non-Identity Problem to post-conception but pre-birth decisions and harms, see also Cohen, *Intentional Diminishment*, *supra* note 30, at 349–59.

62. Mutcherson, *supra* note 3, at 61.

63. *Id.*

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ments about reproduction, such that mapping where we diverge from quite-common starting points is particularly revealing.

CONCLUSION

I am extremely grateful to all of these commentators. Each writes work I hungrily consume and learn from, and I am gratified by the careful attention they have paid to my own work. I am also happy that, perhaps for different reasons, they agree with me that the Best Interests of the Resulting Child rhetoric—which has dominated much of the discourse and has been my target in this work—is deeply problematic. It would be better to move beyond best interests and to face the more difficult questions about the state’s justification for regulating reproduction that this construct hides. Thus, the title of this reply refers not only to my goal (to bury best-interests discourse in terms of regulating reproduction), but also to the psychoanalytic sense of “bury”: that which we repress with our conscious mind nonetheless can maintain a strong pull on us, it may be forgotten but not gone, and my goal is to bring it into the light.