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Author(s): Nicholas Vrousalis

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Smuggled into Existence: Nonconsequentialism, Procreation, and Wrongful Disability

Nicholas Vrousalis

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Abstract The wrongful disability problem arises whenever a disability-causing, and therefore (presumptively) wrongful, procreative act is a necessary condition for the existence of a person whose life is otherwise worth living. It is a problem because it seems to involve no harm, and therefore no wrongful treatment, *vis-à-vis* that person. This essay defends the nonconsequentialist, rights-based, account of the wrong-making features of wrongful disability. It distinguishes between the person-affecting restriction, roughly the idea that wrongdoing is always the wronging of some person, and the harm principle, the idea that all wrongings are harmings. It argues, first, that the harm principle should be rejected, in light of offending intuitions in salient examples. Rejection of the harm principle is not only independently plausible, but also paves the way for a nonconsequentialist diagnosis of wrongful disability. This diagnosis conceives of wrongdoing as a failure to express adequate respect for the humanity or personhood inherent in the person created. The paper defends a theory of humanity-respecting rights that accommodates plausible intuitions about satisfying and fairness, without resorting to consequentialist premises that lead to well-known impossibility results and paradoxes.

Keywords Non-identity problem · Nonconsequentialism · Procreation · Preconception Rights · Derek Parfit · Melinda Roberts

This essay puts forward a rights-based solution to a class of moral puzzles subsumed under the non-identity problem. More specifically, it is concerned with cases of so-called ‘wrongful disability’, instances of procreation where a parent’s or a medical provider’s actions cause some defect to a child which is a necessary condition for that child’s existence. These cases are puzzling, because they seem to involve wrongdoing in the absence of harm. The puzzlement issues from an individualistic commitment to explanations of wrongdoing (wrong-makers) that are both person-affecting *and* harm-based. The corollary is that either we can’t discern the harm that actually exists in wrongful disability cases, or that the individualistic commitment is itself somehow flawed.

N. Vrousalis (✉)
Institute of Philosophy, KU Leuven, 3000 Leuven, Belgium
e-mail: nicholas.vrousalis@hiw.kuleuven.be

The argument that follows opts for the second disjunct. It is a plea for a fresh start, an attempt to understand wrongful disability through a nonconsequentialist account of rights. I first distinguish between two features of our traditional way of dealing with the non-identity problem, namely the person-affecting restriction and the harm principle (Section 1). I present a preliminary case, recently made by Melinda Roberts, in defence of harm-based wrong-makers in these cases, which asserts these two principles (Section 2). With the help of examples, I argue that her view cannot possibly account for salient intuitions in wrongful disability cases (Section 3). This is, in part, symptomatic of her commitment to consequentialism, which is caught in a perennial dilemma between offering plausible responses to the non-identity problem and eschewing a bias towards 'repugnant conclusions' of all sorts (Section 4). I thereby reject the harm principle and proceed to endorse a view of wrongdoing as the wronging of persons through lack of sufficient concern or respect for the humanity in them (Section 5). I refine that view by considering how a form of humanity-respecting rights generates procreative obligations and argue that it encompasses compelling intuitions in wrongful disability cases (Sections 6 and 7). I then defend this theory of rights against a series of relevant objections (Section 8).

1

There are two types of cases relevant to the present study, both difficult and controversial: those involving wrongful *life*, and those involving wrongful *disability*. Wrongful life cases arise when a child is presumptively entitled to complaint against parents, or medical providers, for acts or omissions that have caused that child to suffer to an extent that his life is not worth living.¹ Wrongful disability cases, on the other hand, involve acts or omissions of parents, or medical providers, which result in disabilities that do not render the child's life not worth living. The latter category can be broken down further, by distinguishing between wrongful disability to 'identical', and 'non-identical' children. To see the distinction, consider:

Two minute break — A mother knows that, if she takes a pill now, her child will be born with a serious disability. If she takes the pill in 2 min, the same child will be born without the disability. She does not take the break, and takes the pill now.²

The mother's behaviour in this example is wrongful, as it involves disregard for the child's life prospects, and significant harm to him. Since the example keeps the child's identity constant across salient states of the world, it involves wrongful disability to an identical child. Now consider:

Winter Child — A mother can give birth any time in the year. If she gives birth in the winter, she will, because of her rare disease, give birth to a child with a significant disability. If she gives birth outside the winter months, her child will suffer no such

¹ I shall assume that certain lives may not be worth living, in virtue of the pain, suffering, and low duration they involve. For discussion, see Feinberg (1992). During a seminar at Oxford in 2007, Derek Parfit proposed a distinction between a life not worth living and a life worth not living, where the quality of the latter life is lower than that of the former. I shall take 'wrongful life' to refer to the latter class of cases.

² She knows because there is only one sperm, one egg, and conception within 2 min is certain. A more realistic example would involve parents preselecting the genes of their child but failing to prevent disability, say, on a whim.

disability. Both the winter child, and the non-winter child, will lead lives worth living (or decent, or good lives). The mother knowingly gives birth in the winter.³

By stipulation, the disability of the winter child is physically necessary for the child's existence. Now, the mother's behaviour in *Winter Child* seems wrongful.⁴ But the nature of the wrong and its wrong-making features are significantly distinct from those in *Two minute break*. The wrongful disability suffered in *Winter Child* is disability to a non-identical child. It is on cases of 'non-identical' wrongful disability that this paper focuses.

Where precisely is the wrongdoing in *Winter Child* located? The child itself seems not to have been harmed by his creator's act, after all, since that act is necessary for his coming into existence (and therefore for living a life worth living). The example elicits -what has come to be called- the 'non-identity problem', independently discovered by Derek Parfit, Gregory Kavka (1982) and Robert Adams (1972). This paper argues that treating the winter child right, respecting the humanity in *him*, requires not bringing him into existence, even if such existence would be rich and rewarding for him. But first I must present, and refute, an argument commonly brought to bear on this, and associated problems, in moral philosophy.

1) Wrongdoing is the wronging of someone, or a violation of someone's rights.⁵ (Premise)

Premise (1), the *person-affecting restriction*, claims that there can be no impersonal wrongdoing (or, contrapositively: no victims, no wrongdoing).⁶

2) Wronging entails (wrongful) harming. (Premise)

Premise (2), the *harm principle*, embodies a claim that virtually all consequentialists will be attached to. It says that whenever A wrongs B, A *eo ipso* harms B, or somehow renders B worse off.⁷ Consequentialists will be attached to the harm principle to the extent that they want to minimise the bad, or maximise the good (I have no quarrel here with exotic, non-maximizing forms of consequentialism). A moral theory is consequentialist if and only if its definition of moral rightness or moral reason(s) follows from a commitment to maximizing

³ This is a variation on Parfit's famous 14-year-old girl example from Parfit (1984, p. 358). The metaphysical assumption here is that the identity of the child can only be preserved by a particular combination of gamete-tokens. This combination fails to obtain after a sufficient amount of time has passed.

⁴ At least as long as not having birth in the winter is not very difficult or costly, which is what I assume for the rest of this essay.

⁵ Note that (1) is not true by definition: some consequentialists reject it, for they believe there can be impersonal (i.e. victimless) wrongdoing. I accept that (1) is not true by definition, and therefore that wrongdoing and wronging are conceptually distinct. But I believe that (1) can be defended as a substantive thesis (see section 4 for discussion).

⁶ All normative definitions are put forward in terms of wrong, rather than right, because 'right' may be confused with 'rights' and because 'wrong', unlike 'right', has a verb form. Note that the person-affecting restriction asserted here imposes a necessary condition on *wrongness*. There can be other forms of person-affecting restriction, for instance imposing a necessary condition on goodness or betterness. Accordingly, one can deny the restriction with respect to betterness and assert it with respect to wrongness. Note, further, the distinction between *person-affecting* and *person-directed* wrongdoing: instances of the former merely affect A, regardless of whether they are also directed towards A (e.g. through the wrongdoer's intentions). I shall, hereafter, utilise the broader notion of person-affectingness as encompassing both forms of wrongdoing.

⁷ I assume away the possibility of self-harm: A harms B only when, for any A and B, A ≠ B.

the goodness of a state of affairs brought about by a person's action –where a state of affairs may include that action.⁸

It follows that:

3) Wrongdoing entails harming.

(From (1) and (2))

And since:

4) *Winter Child* involves wrongdoing.

(Premise)

Then:

5) *Winter Child* involves harming.

(From (3) and (4))

Different authors affirm, or deny, different versions of (1) and (2). Like most of these authors, I believe that *Winter Child* involves wrongdoing (that is, I assert (4)). If all wrongdoing involves harming ((3) is true), then the only way to make sense of our intuitions in *Winter Child* is to show (in accordance with (5)) that this example involves harm.⁹

The next section sketches a broadly consequentialist account of the wrong-making features of *Winter Child* consistent with the conclusion of the preceding paragraph. The consequentialist account bites the bullet on the non-identity problem, in the sense that it locates no wrongdoing in cases of no harm. I shall argue that this view does not succeed, and suggest examples which cast doubt on any attachment to (5) as a moral compass in wrongful disability cases.¹⁰ A better solution, based on an explicitly nonconsequentialist theory of rights, will reject the harm principle, and therefore not need to bite the bullet on non-identity. I will sketch such a theory, in a way that furnishes an answer to salient intuitions.

2

In an innovative and thought-provoking essay, Melinda Roberts defends the view that the winter child is comparatively harmed. She claims that comparative harms can capture our intuitions in connection with the wrong-making features in that example. She also holds that her view, which asserts both the person-affecting restriction and the harm principle, can be better integrated into a comprehensive legal framework for the protection of future people in wrongful disability cases.¹¹

⁸ The said consequentialist may object that he need not affirm (2). For assume A can benefit B moderately by giving him an apple or benefit C significantly by giving him the same apple. Both B and C are well-off. A gives the apple to B. Consequentialists are inclined to regard this act as wrongful, although it harms neither B nor C. And it also fails to *wrong* B or C: the relevant wrong-maker consists in the failure to produce the best outcome. Consequentialist moral censure of this non-beneficent action presupposes rejection of the person-affecting restriction, not the harm principle. See Section 4 for discussion.

⁹ This is, roughly, the general argumentative strategy pursued in Roberts (2007).

¹⁰ The argument above is valid. Falshood of (5) and truth of (4) implies falshood of (3). And if (3) is false then either the person-affecting restriction, or the harm principle must be false.

¹¹ I will assume, like Roberts, that population is fixed, and hence that the choices of present people can only affect the identity of future people, and not their number.

As her point of departure, Roberts takes issue with some of the central claims in Buchanan et al. (2000). She assumes, as a matter of course, that the mother's action in *Winter Child* and cognate examples is a necessary condition for the winter child's existence, and that the child's life is worth living.¹² She then asserts, with Buchanan et al., a duty-grounding variation on the harm principle, which 'charges the agent with the duty to avoid letting a child or other person [for whom she can reasonably be deemed responsible] to suffer any serious harm or disability.' (Roberts 2009, p. 9)¹³ Roberts parts company with Buchanan et al., when the latter assert a supplementary principle, one intended to make sense of wrongful disability in non-identity cases. For they deny that the mother's choice in *Winter Child* renders her child worse off (i.e. they reject (5)), and hence need to reject either the person-affecting restriction or the harm principle. They reject the former by embracing 'principle N' for instances of harmless wrongdoing.¹⁴ Roberts dissents¹⁵ because she believes we *can* make good sense of wrongful disability in non-identity cases by concentrating on how people, like the winter child, are rendered worse off by salient acts.

In order to buttress this claim, Roberts draws a distinction between the *procreative* and the *distributive* effects of a person's conception and birth. The latter class of effects, unlike the former, extends far beyond the life of the affected child, for instance through the impact of its conception or birth on siblings, grandparents, etc. Roberts claims that, in wrongful life cases, *both* the procreative effects of a creator's choice —the bringing into existence of a severely disabled child— *and* the distributive effects —the costs of supplying this child with the means necessary for a decent life— can properly be construed as harms. She thus contrasts wrongful-life with wrongful-disability cases, since the latter, unlike the former, cannot be said to involve harms by way of *procreative* effect: the winter child enjoys a good life, and the very act of procreating cannot reasonably be said to harm him.

True to her programmatic commitment to harm-based wrong-makers (premise (3)), Roberts then suggests that wrongful disability is harmful in a 'vast majority of cases' because it involves, in all these cases, harmful *distributive* effects to siblings, grandparents, and other people for whom the parents of the winter child may be deemed responsible. The crux of Roberts' distributive argument is that *someone* will, in most cases, be harmed by the winter child's coming into existence: either his siblings will suffer relative to the state of affairs in which he is non-existent, or the winter child will suffer relative to his sibling(s) in the state of affairs in which he exists. This she calls the 'moral bind' of wrongful disability.

¹² The fact that A's ϕ -ing is necessary for B's doing, having, or being, something worthwhile does not imply that ϕ -ing is not harmful, wrongful, malicious, or whatever. Furthermore, the fact that ϕ -ing produces a desirable effect E does not imply that A ϕ -ed with the intention or desire to bring about E. An exclusive focus on effects/consequences/harms necessarily misses these distinctions. See section 3 for discussion.

¹³ This principle, which Buchanan et al (2000) label 'Principle M' seems very well-suited to handle cases like *Two minute break*, where a child's identity is not at stake as a result of the action(s) of parent, or medical provider.

¹⁴ Neither Buchanan et al. (2000), nor Roberts (2009), draw a distinction between the person-affecting restriction and the harm principle. Indeed, much of the literature on the non-identity problem seems, illicitly, to run these fundamental, but distinct, principles together. This has led many to think that there are only two ways out of the non-identity problem: rejecting the person-affecting restriction, or biting the bullet on offending examples. By running the two principles together, consequentialists and nonconsequentialists have managed to obscure a major point of contention between their theories, a point central to sorting out this and related problems in moral philosophy.

¹⁵ '...our reason for accepting principle N should evaporate should it turn out that we can explain the wrong of wrongful disability in terms that are purely person-affecting.' (Roberts 2009, p. 18f)

According to Roberts, an act of procreation will therefore *not* be wrongful if, and only if, it involves:

- (i) No unjustifiable harm to persons other than the impaired child: The procreative choice fully takes into account the wants, needs and interests of existing and future persons (other than the impaired child) for whom those agents are morally responsible; i.e., the choice confers on each such person either (α) a maximally high level of wellbeing, thus negating the claim that that act harms that person, or (β) an appropriately high level of wellbeing, that is, a level of wellbeing that reflects an appropriate distribution of wellbeing between that person and each other existing and future person for whom the agents are morally responsible, thus negating the claim that that act imposes an unjustifiable harm on that person.

And

- (ii) No unjustifiable harm to the impaired child: The procreative choice fully takes into account the wants, needs and interests of the impaired child; i.e., the choice confers on that child either (α) a maximally high level of wellbeing, thus negating the claim that that choice harms that child, or (β) an appropriately high level of wellbeing (a level of wellbeing that reflects an appropriate distribution of wellbeing between that child and each other existing or future person for whom the agents are morally responsible), thus negating the claim that that choice imposes an unjustifiable harm on that child.

Roberts has clearly drawn attention to something important. She claims, perhaps rightly, that her account is more congenial to integration into legal proceedings and precedent. But is the underlying moral argument compelling?

3

In this section I discuss the conjunction of i) and ii) as a condition for locating wrongdoing in relevant non-identity cases. I assume, with Feinberg (1984, 1986), that the relevant notion of harm consists in a) having one's interests set back b) through another's wrongful behaviour.¹⁶

Consider:

Careless Shooter — A man climbs to the top of a building with the intention of killing A, who is sitting alone in the park. In preparing to fire his gun, he inadvertently drops a stone that causes a minor, but lifetime, injury to another person, B. He then squeezes the trigger with A in sight, only to realise his gun was not loaded.

The behaviour of the shooter does not harm A (by stipulation, A will never know, or think, that he was aimed at). B is harmed, and in this respect the shooter has wronged him. But is the harming of B the *only feature* of the situation that makes the shooter's behaviour wrongful? Intuitively his behaviour wrongs A, perhaps to a greater

¹⁶ It might here be objected that harm carries wrongdoing on its back, as it were, so that harming logically entails wrongdoing. Conjunct b) is therefore superfluous. The argument proffered here is consistent with this thesis. It is consistent, that is, with the view put forward by R. A. Duff, to the effect that some harms are individuated by their (wrongdoing-infused) causes. (see Duff 2001, p. 22) This would suffice to establish that (some) harming is constituted by, and therefore implies, wrongdoing. Note that the latter thesis is *not* the harm principle but its converse.

extent than it wrongs B. Indeed, B seems to be mere collateral moral damage. The presence of harm to the winter child's siblings could not, *mutatis mutandis*, conclusively tell us what was wrong with the mother's behaviour in *Winter Child*. Harming suffices for wrongdoing, but not vice versa.¹⁷

Now consider a simpler variation on that example:

Forgetful Shooter — The shooter aims at A. He squeezes the trigger, only to find that the gun was not loaded. He never tries again, but not out of regret.

The shooter's behaviour seems *pro tanto* wrongful, in part because it wrongs A. But A has not been, nor will he ever be, harmed by this behaviour.¹⁸ Thus the emphasis on harm as a wrong-maker seems to simply mislocate (in *Careless Shooter*) or, indeed, not to locate at all (in *Forgetful Shooter*) obvious instances of wrongdoing.¹⁹

Assuming that present actions can both wrong and harm future people (when they come into existence), the 'shooter' problem also extends to them. Here's an example that transposes this section's concerns to wrongful disability:

Welfare Child — A relatively well-off working woman is told that she can (costlessly) have a very generous pension and a big house if, but only if, she has a mildly disabled child. The woman aims at creating a disabled child, and succeeds, through a combination of bad nutrition and bad medication. Had she not undertaken such action, she would have had another, non-disabled, child.

This apparently artificial scenario²⁰ involves sufficiently high living standards for everyone, in comparison with *Winter Child*. Both the child, and his creator, live well, in a way that ensures both '(α) a maximally high level of wellbeing for the [welfare child], thus negating the claim that the mother's choice harms that child,' and '(β) an appropriately high level of wellbeing (a level of wellbeing that reflects an appropriate distribution of wellbeing between that child and each other existing or future person for whom the agents are morally responsible).'²¹ But it is still very difficult to argue that the mother's behaviour is not wrongful. I conclude that Roberts' recent attempt to defend the harm-based account (conclusion (5)) fails.

¹⁷ I am not claiming that the shooter's behaviour is wrongful *merely* because of his intentions: even if his intentions were not intentions to kill, his belligerent and vicious attitude would, in and of itself, suffice to constitute (harmless) wrongdoing.

¹⁸ Note that A does not even suffer a *risk* of harm in this example.

¹⁹ It may be objected that these examples presuppose an unjustifiably narrow notion of harm: a broader notion would capture the idea that A is harmed in both examples. The harm principle is therefore unscathed. This objection is misguided, however, since the stated presupposition is false. That is, for any notion of (wrongful) harm, one can always come up with compelling examples that involve wronging of A without (wrongful) harming of A. Say, for example, we were to adopt a broad notion, according to which people are harmed when their (informed) preferences go unfulfilled. It would still be wrong for B to (intend to) hit A in the street, even if A himself — unknown to B — had an (informed) preference for unexpected street-fighting: A would not be harmed, but would still be wronged by B's behaviour.

²⁰ Though perhaps not as artificial as it seems: poor teenagers sometimes give birth to children, which might, in turn, end up disadvantaged and/or disabled, in order to secure public housing. I hasten to add that ascribing wrongdoing is not tantamount to holding the wrongdoer *blameworthy* for his actions independently of his circumstances.

²¹ Roberts might insist that distributive harms will still surface *somewhere* on the distributive grid (e.g. in high health expenses for the welfare child, depriving others of scarce resources). All these possibilities can easily be stipulated away, however: the welfare child may possess a unique capacity for self-healing, or for generating resources that automatically cover his (increased) educational needs, such that children conceived differently would necessarily lack such abilities. Mundane examples show that 'no harm done' is more common than Roberts seems to think.

This section suggests a diagnosis of the general problem that seems to be plaguing consequentialist accounts of the non-identity problem, including Roberts'.

Consequentialist moralities tend to assert the harm principle: *if* an individual is wronged, then something bad must have happened *to* him. They then have two options: they can assert the person-affecting restriction, or reject it. Rejecting it allows them to insist that no-harm cases like *Welfare Child* are wrongful. For there exist impersonal forms of wrongdoing.²² Accepting the person-affecting restriction, on the other hand, means the consequentialist must bite the bullet on cases like *Welfare Child*. For such cases involve no harm, and therefore no wrongdoing (from (1) and (2)). So why assert, with Roberts, the person-affecting restriction? After all, the impersonalist strategy seems to yield an intuitively correct answer to *Welfare Child* at zero theoretical cost.

The zero cost presumption is, unfortunately, false. It is false because of a rather general problem that plagues consequentialist moralities, largely endemic to their maximising structure. Insofar as the relevant maximand is *total* value, consequentialists will tend to fall prey to (variations on) what Parfit has called the 'repugnant conclusion': maximising 'impersonal' value raises the spectre of massive populations with very low per capita standards of living.²³ This is one reason why many consequentialists, like Roberts, are wont to insist on person-affecting moralities: these restrictions purport to limit the repugnancy bias, as it were, of their moral theory. So there are, *pace* Parfit, strong reasons for consequentialists to assert some form of the person-affecting restriction. The problem, however, is that this restriction fails to take the non-identity problem seriously. Hence those who assert the restriction (*contra* repugnancy) and the harm principle (*qua* consequentialists),²⁴ have no option but to bite the bullet on no-harm examples. Consequentialists are thus ineluctably drawn into a dilemma: they can take the non-identity problem seriously, and reject the person-affecting restriction —à la Parfit— or they can assert the person-affecting restriction and bite the bullet on the non-identity problem —à la Roberts. If they do the former they are subject to a repugnancy bias. If they do the latter they embrace strongly counterintuitive conclusions in *Welfare Child*.²⁵

There may be no (consequentialist) way out of this circle. If so, there would be sufficient reason to attempt a fresh start. A nonconsequentialist morality could furnish plausible answers to non-identity problem cases without requiring significant revisions in our commonsense intuitions about wrongdoing. I am not here claiming that consequentialism cannot solve the non-identity problem, or that nonconsequentialism can unproblematically solve it. I am only claiming that there is at least some reason to pursue nonconsequentialist accounts, in light of persistent difficulties with alternatives. The reason, or one reason, for the comparative conceptual leeway enjoyed by nonconsequentialists consists in the fact that

²² The most prominent advocate of such a view is Derek Parfit (although he presents his own theory in axiological, rather than normative terms). See chapter 16 of Parfit (1984).

²³ The literature on the repugnant conclusion is massive. See Parfit (1984, pp. 381–390) for the original contribution, and Ryberg and Tännsjö (2004) for a collection of essays.

²⁴ Consequentialism entails the harm principle, or something like it, by definition (see section 1). That principle forms an indispensable —for consequentialists— normative bridge between wrongdoing and the good.

²⁵ This form of dilemma is developed by Parfit at greater length in his 'mere addition paradox'. See Parfit (1984, pp. 419–441). For a series of impossibility results along similar lines, see the work of Gustaf Arrhenius, particularly Arrhenius (2000a) and Arrhenius (2000b). Holtug (2004) has argued that the dilemma works the other way around: any axiology embracing a defensible form of the person-affecting restriction will be subject to the repugnant conclusion —and not the non-identity problem.

they are much better positioned to reject the harm principle and variants thereof. This is, as evinced by the examples of the previous section, a theoretically sound move.

In the next section I piece together rudiments towards a nonconsequentialist theory from rights-based premises. The argument that follows retains a commitment to the person-affecting restriction while rejecting the harm principle.

5

We are off to a fresh start: we want to make sense of the non-identity problem unencumbered by counterintuitive conclusions and paradoxes. We must try to do this through a rich, nonconsequentialist, investigation of the problem. How would such an investigation approach the wrong-making features in *Welfare Child*? Promising nonconsequentialist accounts have recently been put forward by Velleman (2008), Kumar (2003), and Smolkin (1999), following excellent suggestions in Woodward's original commentary on Parfit. These accounts can, I think, make better sense of *Forgetful Shooter* and *Welfare Child*, by promulgating the idea of wrongdoing as wronging, rather than as harming, of persons. Such wronging consists in failure to treat another's humanity with sufficient respect, in light of virtually costless alternatives.²⁶

The rejection of the harm principle can therefore be couched along these lines:

The nonconsequentialist conviction, broadly stated, is that what one does has an intrinsic significance in moral reasoning that is independent of what happens as a result of what one does. It is to the moral significance of what the wrongdoer has done, or more precisely, how the wrongdoer has related to the wronged (quite apart from the consequences for the victim), that the nonconsequentialist turns in order to account for the distinctive character of a claim to have been wronged. (Kumar 2003, p. 105)

This paves the way for a harm-independent diagnosis of the non-identity problem. Thus in *Winter Child*:

[T]he particular psycho-physical identity of the person in question, at the point in time at which compliance with the duty is required, may still be an indeterminate matter, turns out to be of no consequence, as the other retains her standing as a certain type to whom certain duties are owed regardless of what her token identity turns out to be. (Kumar 2003, p. 113)

It follows that 'what will have been slighted from [the winter child's] perspective is not his interest, but rather his importance as a human being —more precisely, the importance of humanity in him, as it turns out to be.' The nonconsequentialist view of wrongdoing turns 'on an understanding of rights as including more than morally protected interests.' (Velleman 2008, p. 276) *Humanity-respecting rights*, therefore, do not merely protect the interests or (hypothetical) choices of the child: they are also meant to attach respect to his status, or to the sort of being that he is.²⁷ This remains true, moreover, even if he does not have concrete singular

²⁶ It does not follow that people have a right to a disability-free existence. All that follows is that, when one faces a costless choice between, say, child A and child B, where A has a limp and B has Huntington's disease, one has to choose A, partly *out of respect to B* (strictly: the disrespect to B actualised if and only if B comes into existence). I thank an anonymous referee for raising this question.

²⁷ By 'humanity' I mean here a predisposition to setting 'ends through reason'. Kant discusses the 'predisposition to humanity' in Kant (1992, p. 437). Since the said predisposition is not coextensive only with the species *homo sapiens*, the account offered here is not speciest.

referents at the time of the right's encroachment: the right is 'held' by a person-to-be and is *actualised* when he comes into existence: the parent's failure to fulfil her duties —by causing the winter child to exist— means he will come into the world with his rights violated. Thus the wrong-making feature common to my examples is this: they all involve bringing a human being into the world without sufficient regard for him as an object of value. People have a right not to be smuggled into existence in this way, even if their lives would be rich and rewarding as a result of such treatment. The next two sections elaborate on this claim.

6

In his influential 1981 paper, Gregory Kavka discusses the following example:

Slave Child — In a society in which slavery is legal, a couple that is planning to have no children is offered \$50,000 by a slaveholder to produce a child to be a slave to him. They want the money to buy a yacht... On the assumption that life as a slave is better than never existing, their doing so would not harm the child. Thus, all involved — themselves, the slaveholder, and the slave child they would produce— would benefit from the arrangement. They proceed to have the child.

Kavka locates wrongdoing in this example neither in the harm suffered by the child (Kavka rejects (2)), nor in some victimless wrong (he affirms (1)). Instead, he argues, one reason the procreator's actions 'strike us as wrong' is that 'he extorts an excessive (and unearned) price from those to whom he provides the benefit of existence or from their representative.' (Kavka 1982, p. 108) To buttress this claim, Kavka sketches an analogy:

a member of a drought stricken tribe who, purely by luck, discovers a substantial underground source of water. Keeping its location a secret, he trades buckets of water at a very high price to those and only those who can afford to pay with useful goods. He grows enormously rich, while many die who would have lived had he disclosed the water source or sold his water at a reasonable price. Though his selling water at monopolistic prices renders no one worse off than they would have been had he left them alone, we would condemn his use of the natural danger to his fellows' lives to extract riches from them as a form of extortion.

According to Kavka, it is extortion that makes *Slave Child* and cognate cases wrongful. Although the analogy is illuminating, it fails, I believe, to account for the wrongmaking features common to wrongful disability cases. Here's why. Extortion is a culpable act that renders someone exploitable (\neq exploited) by adversely affecting his (set of) options. Both the water finder, and the proverbial man who pushes another into a pit, render their victims exploitable by depriving them of reasonable options: the water-finder by creating an artificial scarcity of water, the pit-pusher of ways out. Extortion thus causally enables exploitation. No extortion is, or need be, present in wrongful disability cases, however. Of course potential people are exploitable in the sense that procreators can (i) benefit at their expense, (ii) in virtue of the status vulnerability of the former (namely, the possibility of never coming into existence). Like the water finder, procreators are endowed with a monopoly of sorts (a monopoly over access to actuality), which permits *Slave Child*-like *exploitations*. It does not follow that they *extort*. For *Slave Child* is unlike Kavka's water-finder case in that it is not earlier generations who caused the zillions of merely potential people to be in a state of mere possibility, any more than they caused the mere possibility of unicorns or the

Gods of Valhalla. Since earlier generations do not have the requisite form of control over the conditions that antecedently render future people exploitable, they cannot properly be said to extort them (whether or not they can be said to exploit them).²⁸

What about exploitation? Surely what makes *Slave Child* so 'outrageous' (Kavka 1982, p. 101) is that procreators can and *do* benefit at the child's expense. This is important, but I doubt it describes a necessary feature of wrongful disability. For consider:

New Slave Child — A couple lives in a society in which procreators must pass through genetic screening prior to conception (and this is widely known). Screening always changes the identity of a couple's next child. If no screening takes place, the child that comes into existence becomes a slave. The couple negligently fails to take the test (while, say, observing \$50,000 yachts at the local harbour) and later conceives a child that becomes a slave.

In *New Slave Child* the couple draws no benefit from the enslavement of their child. But a necessary condition for exploitation is that the exploiter extracts a benefit from the exploitee (by taking advantage of his vulnerability). It follows that there is no exploitation here.²⁹ But the couple's actions still wrong the child, I believe, and are thus still wrongful.

If neither extortion, nor exploitation are necessarily wrongmaking features of relevant disability cases, what about unfair appropriation? Matthew Rendall has recently argued that the offensive non-identity examples involve some sort of unfair advantage-taking, i.e. either an 'unfair distribution of inherited goods' or an unfair 'division of social surplus' at the expense of future generations.³⁰ Rendall may well be right that unfairness is part of what's wrong in cases not involving procreation.³¹ My principal concern here is with procreative acts, however. *New Slave Child* involves such an act. Crucially, the example can be amended so that, through some bizarre causal chain that need not detain us here, the couple's child avoids enslavement. Against all odds, he ends up free, enjoying a good life and, indeed, a fair share of resources. I believe there is no reason to think that the child's enjoyment of a fair share absolves the couple of all wrongdoing. What matters is not (just) how the child fares, or what he would consent to, but rather how he is *treated*, or what sort of dialogue is implicit in his (preconception) relationship with his creators (I elaborate on this in the next section). The couple's (in)action in *New Slave Child* wrongs that child, even if, in the end, he avoids slavery.³²

Kavka's more general diagnosis of wrongful disability is as follows:

The spirit of this analysis may be expressed in the form of a small, but significant, proposed modification of the second form of Kant's Categorical Imperative. The

²⁸ Charging an exorbitant price for a basic necessity is sometimes called extortion in ordinary language. In my special sense, charging such a price may well suffice for exploitation, but not for extortion. The distinction between exploitation and extortion is not as sharply drawn in Kavka, but given the ambiguity in his account of *Slave Child*, I believe it is necessary.

²⁹ Someone might object that this misunderstands Kavka, since he allows that the couple could pass on the proceeds of \$50,000 to charity. The couple is therefore not exploiting the *child*, but rather its position of power over that child. It scarcely follows that what the couple does is wrongful, however, for one can justifiably exploit an (undeserved or unjustified) position of power. Exploiting or extorting *other people*, on the other hand, is necessarily wrongful, but not necessarily present in wrongful disability cases. I thank an anonymous referee for raising the objection motivating this footnote.

³⁰ Rendall (2011) assumes that unfair-advantage taking is a sufficient condition for exploitation, a claim I do not wish to dispute here.

³¹ Such as Parfit's *Risky Policy*, in Parfit (1984, p. 371), which is Rendall's principal aim.

³² It is no coincidence that Rendall's view fails to capture such nuances, for it limits itself to evaluating person-independent states of the world.

modified imperative would forbid treating rational beings or their creation (that is, their being brought into existence) as a means only, rather than as ends in themselves. This principle directly condemns the couple's actions in the case of the slave child, for they use the creation of the slave child solely as a means to their ends.

But the parents in *New Slave Child* are not treating their child, or his creation, as a mere 'means to *their* ends' (Kavka 1982, p. 110, emphasis mine): perhaps they have no procreation-related ends, or simply do not care. And, if we assume that failing to treat another as a mere means is sufficient for respecting him, then the parents wrong no one in that example. I disagree with this conclusion and therefore reject the major premise that generates it: failing to treat another as a mere means does not suffice for treating him *at the same time as an end*.³³

My more general contention is therefore that the winter child of Section 1, the welfare child of Section 3, and the slave child are wrongfully treated (in increasing order of severity) in at least one sense: in none of these cases do they figure appropriately in the procreator's attitudes and behaviour. That is, another's humanity fails to intrude into the space of the procreator's deliberations as an authoritative (and therefore exclusionary) claim.³⁴ This is not tantamount to asserting that the wrong kind of motivation suffices to establish wrongdoing—whether because it accords no status to another's humanity, or, worse, negative status to that humanity—but rather that the wrong kind of motivation, *expressed as such in action*, so suffices. All wrongful disability cases, I maintain, share a failure to adequately *express* respect. The next section elaborates.

7

When does someone's behaviour fail to adequately express respect for others? I suggest that A's φ -ing respects B only if A's φ -ing expresses a rational (*nonpropositional*) attitude R vis-à-vis B,³⁵ and R is dialogically endorsable. Call the content of this italicized passage the *expressionist* condition. The question then becomes: which putative attitudes count as dialogically endorsable? Moral philosophers have proposed a number of plausible answers, so I shall simply state the one I believe to be most promising in this context: R is dialogically endorsable if and only if the considerations giving rise to R can be advanced as putative justifications for action in the context of embarrassment-free dialogue among interested parties in conditions of equality (see Cohen 2008, Habermas 2001). 'Embarrassment-freeness' obtains when people have no reason to feel shame, or guilt, for putting, or allowing, a particular form of justification for some putative act on the table of discourse. An implication of this expressionist condition is that the extent to which a particular (set of) interaction(s)

³³ Kant's second formulation of the categorical imperative is as follows: 'Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.' Kavka only emphasises the latter half of Kant's formula, on treating 'simply as a means', which is why he needs extortion or exploitation to reinforce his view that the child is so treated. If, on the other hand, one thinks that wrongful disability *need not* involve treating someone 'simply as a means', as opposed to (merely) failing to treat him 'at the same time as an end', then no such reinforcement is required.

³⁴ Here 'claim' is not meant to be coextensive with interests: the winter child has an *interest-independent* claim that the humanity in him be adequately respected. A claim is *exclusionary* if it excludes, or pre-empts, other claims, such as certain desires or whims, from the justificatory calculus pertaining to candidate courses of action. One's flourishing furnishes such a reason.

³⁵ On rational attitudes, see Anderson (1993).

between persons is respectful comes to depend crucially on the *implicit dialogical relationship* between them.

A common way to spell out the requirement of dialogical endorsability is to claim that respect for persons presupposes forms of second-personal address, or second-personal *reasons*: 'Unlike non-second-personal reasons... a second-personal reason depends for its very existence upon an authority to address the reason second-personally and on the reason's conceptual connection to (second-personal) practices of responsibility or accountability, that is, to holding people responsible.' (Darwall 2006, p. 263) This approach has the intuitive advantage that it imputes to relationships of respect a dimension of authority: when in 'conversation mode', individuals have the power to address reasons that are *pro tanto* binding on others, by creating (content-independent and) pre-emptive reasons that those others act in particular ways. The second-personal account judges A's treatment of B as respectful just when A acts for the right sorts of (second-personal) reasons.³⁶

In previous sections I argued that the procreator's attitude in *Winter and Welfare Child* does not adequately express respect for the child. Here's an imagined dialogue between that child (W) and its creator (C):

C: Do you regret existing?

W: No, I don't.

C: Then why are you complaining?

W: Because my existence is a result of a disrespectful attitude towards me.

C: Whose?

W: Yours.

C: Why?

W: You could easily have had a non-disabled child, or no child at all. You chose to have a child with significantly reduced life prospects instead.

C: But I needed the money!

C's putative justification of his actions to W fails to pass muster in direct dialogue: it expresses an attitude vis-à-vis W that C ought to be ashamed to have. C therefore disrespects W.³⁷

On the view defended here, then, personhood-respecting rights require that procreative acts be expressive of respect. If it is granted that these rights are violated in the case of, say, the winter child, what remedies are available to rights-violating procreators? Care for, and active commitment to, the well-being of others constitute, I submit, apt remedies for disrespect. If I am right, then caring for the winter child after birth may constitute remedy for the violation of his

³⁶ Note, however, that the expressionist condition italicized two paragraphs back is in way weaker and in a way stronger in its implications than Darwall's 'intentionalist' reading of respect. It is weaker in that it allows, in principle, that A can treat B respectfully even if A is not motivated by the right sorts of reasons in interaction with B, and perhaps even if A's prior intentions are *disrespectful* to B. This is why, on the expressionist view, one can inadvertently treat another respectfully, just as one can inadvertently treat another disrespectfully. It is, strictly speaking, individual attitudes *as expressed in action* that matter, not the prior intentions that generate them (except, that is, insofar as such intentions are necessary for generating (or constituting?) the right sort of attitudes). The expressionist condition is stronger in its implications than intentionalism, in that A's acting for the right (set of) consideration(s), call it C*, does not suffice to establish absence of disrespect (see Anderson 1996). Rather, A's φ -ing should adequately *express* C*. On the expressionist view respect is a sort of success term. I cannot do justice to these nuances here, however.

³⁷ It is not, it bears repeating, necessary that W and C ever *do* have such a dialogue, or *can* have any dialogue whatsoever: what matters is the nature of the dialogical relationship implicit in their particular form of interaction.

rights. If A violates B's rights in creating B, for example, then A ought to parent B by way of remedy for that violation. On this view, *parental* obligations can arise in virtue of *procreative* wrongdoing.³⁸

8

Humanity-respecting rights are about how individuals are approached and treated, rather than (just) about how they fare. By extending the conceptual space between harming and wrongdoing, this nonconsequentialist account of rights meets at least two important desiderata. First, it allows us to track down wrongdoing in cases of harmless aggression, viciousness, torture, deceit and—even mutually beneficial—exploitation.³⁹ Moreover, by rejecting only the harm principle, advocates of humanity-respecting rights can avoid the charge of 'impersonalism' which is often leveled against deniers of the person-affecting restriction. Two important objections to humanity-respecting rights survive, however, in connection with wrongful disability. I discuss them presently.

The first objection says that humanity-respecting rights attach respect not to the predisposition to humanity, *à la* Kant, but rather to *merely possible* humanity. After all, the winter child is only conceived after the mother commits her presumptively wrongful act of procreation. How are we, in other words, to ascribe rights to the winter child, given that *any* non-rights-violating act (by the procreator) would cause the putative rights-holder (the winter child) never to exist? James Woodward cuts through this knot by arguing:

I agree that it is a necessary condition for a right or an obligation to be violated that someone holding that right or obligation actually exist. But it is consistent with this claim to hold that the reason a certain course of action would be wrong is that it would involve the creation of rights and obligations that would probably or inevitably be violated... My account does not rely on rights or obligations owed to merely possible people. (Woodward 1986, p. 821)

Consider an analogy with the wrongdoing involved in knowingly making an unfulfillable promise. There exist strong moral reasons for A not to undertake a promise to B that A knows he will not be able to fulfill, *even if* undertaking that promise will benefit B (fulfillment-independently). These reasons may be fleshed out in terms of rights: B's rights not to be given such a promise, or not to have his dues encroached upon, are violated by A's actions. In wrongful disability cases, this encroachment implies that the child will come to the world with his rights violated.

The second objection says that the account of rights sketched here is irrelevant. It is true that on this account the winter child's rights are encroached upon. But so what? Surely the child would waive these rights, or be inclined to do so retrospectively. It follows that there is nothing objectionable about the contingent and presumptively wrongful act necessary for his existence. This irrelevance objection is flawed. For even if one could, as it were, waive oneself into existence, the terms of such a waiver

³⁸ I discuss procreative obligations at greater length in 'Do Procreators have Special Obligations?', available from me upon request.

³⁹ Indeed, the most abject forms of exploitation can be instances both of 'no harm done' and/or of free consent by all parties involved (for discussion see my 'Why Marxists Should be Interested in Exploitation', which is available from me upon request).

are necessarily inadmissible. Indeed, the child's waiver of his right of complaint against his creator—once he has come into existence—is effectively forced upon him: 'the child may still waive his birthright because his only alternative is to complain that it cannot be fulfilled. Such a waiver is granted less voluntarily... Its validity is therefore questionable.' (Kavka 1982, pp. 98–104, Velleman p. 277) The fact that nearly everyone would waive themselves into existence is only indicative that the said waiver cannot be free. And, in any case, there is no reason why a theory of humanity-respecting rights should grant that all duties are waivable through (actual or hypothetical) consent.

On the view defended here, then, wrongful disability cases always involve a choice between different lives, one of which is smuggled into existence through insufficient respect for the humanity inherent in it. A useful rule of thumb for ascertaining whether the obligation to respect humanity has been met is to ask whether the child actually 'chosen' (by delaying conception, by genetic screening and selective abortion, or by gene selection) has been given reasonable prospects of a sufficiently decent life, whatever *that* means.⁴⁰ It bears repeating, however, that the child's enjoyment of a decent life (i.e. *faring* well) would not suffice to establish absence of wrongdoing, as the case of the child narrowly escaping slavery shows: procreators must have taken active steps to ensure that it is so, by aptly expressing respect for him through their actions.

A final caveat: it does not follow from the account defended here that 'In creating human lives... we must take care that they afford the *best* opportunity for personhood to flourish... We are obligated to give our children the *best* start we can give to children, whichever children we have.' (Velleman 2008, p. 276) Such maximalism is too demanding.⁴¹ For say a mother can increase her future child's IQ from 150 to 160 by not taking a pill necessary to cure a strong headache. It is too strong to insist on the impermissibility of taking the pill.⁴² To ascribe maximal content to humanity-respecting rights is to overburden them needlessly.

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⁴⁰ It is consistent with this view that it may be wrongful to bring a child into existence if the anticipated level of dignity, or respect, to be enjoyed by him is below a certain level, even if this is not due to harmful 'defects' in the child, but simply due to the fact that this particular society does not allow for decent lives. I do not know exactly what counts as a sufficiently decent life, but it most certainly rules out a lifetime of torture, disgrace, humiliation, etc.

⁴¹ I thank an anonymous referee for pointing this out.

⁴² It may, of course, be impermissible that she does so on a whim, as in *Two Minute Break*. All this is consistent with the view put forward by Francis Kamm (2002), who argues for the permissibility of the creator taking the pill before conception, or giving it to the fetus, and against the permissibility of giving him the pill after birth.

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