Procreative Justice

The Ethics of Creating and Raising Children

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Abstract:

Despite its immense personal significance, procreation is an inherently other-regarding endeavor. By its very nature, the decision to procreate is the decision to bring into existence another morally considerable being, one who will be exposed to the full range of harms, benefits, and risks that accompany a typical human life, and one who cannot by its nature ever consent to being born. Moreover, when this decision is undertaken in a community of persons, it is also a decision to affect the lives of others in a host of profound (if often underappreciated) ways, from its effects on population size and environmental sustainability, to its consequences for a community's distribution of resources. In many cases, of course, these interests coincide: adults need children for their parenting projects, societies need citizens for the maintenance of their institutions, and children themselves are often happy to have been brought into existence. However, as a burgeoning literature is beginning to demonstrate, the various interests that are implicated by procreative decision-making can also come into conflict as well, and in ways that raise basic questions of justice.

This thesis explores five of these questions, and in so doing, seeks to contribute to our understanding of the normative significance of procreation. Chapter One considers the relationship between procreation and child welfare, asking what role (if any) prospective children's interests play in limiting the scope of the right to procreate. Chapters Two and Three consider the relationship between procreation and parenthood, asking whether the act of creating a child generates special rights and/or obligations to parent that child. Chapter Four considers how the significant costs of procreation and parenting ought to be distributed through society, asking whether parents are responsible for paying the full cost of their childrearing projects, or whether childrearing costs should be shared in some way among parents and non-parents alike. Finally, Chapter Five considers our moral obligations to orphaned children, asking whether it is permissible to create new children in conditions where there are already existing children in need of parental care. While numerous positions are defended on each of these interrelated questions, one general conclusion runs through all of them: rather than being viewed as something that is immune from moral scrutiny, or as something that individuals have an unqualified right to do, procreation ought to be viewed as the site of potentially conflicting interests that must be carefully balanced against one another.

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Introduction

> The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life.
>
> - John Stuart Mill[1]

Procreation and the parenthood that normally accompanies it are immensely important human projects. When performed in conjunction with one another, they not only result in the creation of a biologically related human being, but also in the establishment of a deep and potentially lifelong relationship, one that is arguably unmatched in the brand of intimacy, affection, and unconditional love that it makes possible. People who choose to have children often describe it as a transformative experience, one that results in irrevocable shifts in their priorities and values, and one that both colors and reverberates through virtually every other experience they encounter within their lifetime. People who cannot have children often respond in sorrow, and with painful ruminations on what their lives might otherwise have been.

Decisions to have children are in part prudential: prospective procreators must consider whether creating a child is something that is in their interest to do, and in societies where children are normally reared by their biological progenitors, they must also consider whether they are prepared to undertake the longer and far more demanding task of raising that child into an independent adult. However, decisions to have children also involve an important ethical dimension as well, and one that has been left surprisingly under-examined by moral and political philosophers. Despite its immense personal significance, procreation is an inherently *other-regarding* endeavor. By its very nature, the decision to procreate is the decision to bring into existence another morally considerable being, one who will be exposed to

[1] John Stuart Mill. *On Liberty and Other Essays*. (Ed.) John Gray (Oxford: Oxford University Press, 1991), 120.

the full range of harms, benefits, and risks that accompany a typical human life, and one who cannot by its nature ever consent to being born. Moreover, when this decision is undertaken in a community of persons, it is also a decision to affect the lives of others in a host of profound (if often underappreciated) ways, from its effects on population size and environmental sustainability, to its consequences for a community's distribution of resources. In many ways, of course, these interests coincide: adults need children for their parenting projects, societies need citizens for the maintenance of their institutions, and children themselves are often happy to have been brought into existence. However, the various interests that implicated by procreative decision-making can also come into conflict as well, and in ways that raise basic questions of justice.

This thesis explores what justice requires in the area of procreative decision-making. The *question* of procreative justice is the question of how to fairly balance the competing interests that are stake in the creation of new people. An *account* of procreative justice is an answer to this question: it offers a specification of the rights and obligations of individuals *qua* procreators, and a prescription for how the benefits and burdens of procreation ought to be distributed throughout society. While there are numerous issues that might be addressed under this broad heading, a full account of procreative justice will provide responses to at least six core questions:

1. Is there a moral right to procreate? If so, what are its grounds, and how should we think about its limits?
2. Can procreation ever be wrongful in light of its effects on the resultant child? What role (if any) do prospective children's interests play in limiting the scope of the right to procreate?
3. What is the relationship between procreation and parenthood? Does the act of creating a child generate rights and/or obligations to parent that child?

4. How should the significant costs of procreation and parenting be distributed throughout society? Are parents responsible for paying the full cost of their childrearing projects, or should childrearing costs be shared in some way among parents and non-parents alike?
5. How do the claims of orphaned children impact on the morality of procreation? Is it permissible to create new children when there are already existing children in need of parental care?
6. How do the claims of future generations impact on the morality of procreation? Is there an obligation to limit or reduce the world's population to a level that is sustainable over time?

These questions are diverse in their focus: some have to do with the interests of procreators; some have to do with the interests of the children they bring into existence; and some have to do with the interests of the wide range of third parties who are affected by procreative decision-making, including taxpayers, potential adoptees, and present and future human beings at large. Since no thesis of reasonable length could hope to provide a satisfactory treatment of all of these questions, I have limited my focus to questions (2) through (5), which I take to be both the most interesting and the least explored in the contemporary literature. In this sense, my thesis provides a *partial* account of procreative justice: it offers a specification of the rights and obligations of procreators with respect to the children they bring into existence, and a partial prescription for how the benefits and burdens of procreation ought to be distributed throughout society.

I will say more about each of these questions in the Chapter Overview below; but first, it is worth saying a few words about the important questions that I do not address in significant detail, namely, questions (1) and (6). In some ways, these questions might appear to be the least contentious on the list outlined above, as the right to procreate is almost univer-

sally affirmed as a fundamental human right[2], and its near-universal affirmation is largely a response to various states' attempts to control the size and eugenic character of their populations, as in the case of Nazi Germany, Indira Gandhi's India, Nicolae Ceauşescu's Romania, and present-day China (whose notorious 'One Child Policy' has only recently been relaxed). However, both of these questions are far more contentious than they initially appear, and each raises a host of difficult normative and conceptual questions that have yet to be fully addressed. Take question (1) for example. Despite its near-universal affirmation, the right to procreate remains a structurally anomalous right that does not fit neatly into existing theories of what rights are.[3] For instance, we do not in general recognize rights to make choices or pursue personal interests that involve the nonconsensual imposition of burdens on other people, though as Seana Shiffrin has noted, this appears to be precisely what we are doing when we nonconsensually impose the burdens of existence on prospective children.[4] Similarly, we do not in general think it is permissible to put someone in a dependent state just so that we can help them out of it, though as Sarah Hannan and RJ Leland have recently argued, this seems to be what procreators are doing when they create children for the purpose of parenting them.[5] In this sense, far from being self-evident or unproblematic, the right to procreate actually faces a unique set of justificatory hurdles that do not apply to other rights-claims.

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[2] For example, Article 16 of the Universal Declaration of Human Rights (1948) states that "Men of women of full age, without any limitations due to race nationality and religion, have a fundamental right to found a family," continuing that "The family is the fundamental group unit of society and is entitled to protection by society and the State." See UN General Assembly. *Universal Declaration of Human Rights.* 10 December 1948, 217A(III), Article 16(1) and (3).

[3] For similar observations about the *sui generis* nature of the right to procreate, see Daniela Cutas. "Sex is Overrated: On the Right to Reproduce," *Human Fertility*, 12(1) (2009), pp. 45-52; Onora O'Neill. *Autonomy and Trust in Bioethics*. (Cambridge: Cambridge University Press, 2002), chapter 3; Yvette Pearson. "Storks, Cabbage Patches, and the Right to Procreate," *Bioethical Inquiry*, 4 (2007), pp. 105-115; Muireann Quigley. "A Right to Reproduce?" *Bioethics*, 24(8) (2010), pp. 403-411; and Laura Shanner. "The Right to Procreate: Where Rights Claims Have Gone Wrong," *McGill Law Journal,* 40 (1995), pp. 823-874.

[4] Seana Valentine Shiffrin. "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory*, 5 (1999), pp. 117-148.

[5] Sarah Hannan and RJ Leland. "Childhood Bads, Parenting Goods, and the Right to Procreate," forthcoming in *Critical Review of International Social and Political Philosophy*.

Question (6) is no less contentious. While population control continues to be a taboo subject among law- and policy-makers, the environmental challenges presented by climate change have moved a number of philosophers to consider sustainability-based obligations to have fewer children.[6] Some have argued that having multiple children is a form of overconsumption, and that the two should therefore be treated equivalently from a moral point of view. In this sense, if we think it is morally irresponsible to drive an oversized Hummer that gets only six miles per gallon, we should also think it is morally irresponsible to create another human being, given that the environmental consequences of the latter decision will normally dwarf those of the former (particularly for procreators in affluent societies with high levels of average lifetime consumption).[7] Others have moved beyond moral argumentation to endorse more practical proposals for managing population size. While most of these theorists have focused on what Elizabeth Cripps calls 'choice-providing' policies, such as the social enfranchisement of women and the wide provision of contraception[8], some have recently considered 'incentive-changing' policies as well, including tax breaks for smaller families and even income-proportionate fines levied against prolific procreators.[9]

These are both interesting questions that merit further scholarly attention, though for reasons of space and prioritization, I will not consider them further in this thesis. With respect

[6] See, for example, Philip Cafaro. "Climate Ethics and Population Policy," *Wiley Interdisciplinary Reviews: Climate Change*, 3 (2012), pp. 45-61; Sarah Conly. *One Child: Do we have a Right to More?* (Oxford: Oxford University Press, 2015); Elizabeth Cripps. "Climate Change, Population, and Justice: Hard Choices to Avoid Tragic Choices," *Global Justice: Theory Practice Rhetoric*, 8(2) (2015), pp. 1-22, and "Population and Environment: The Impossible, the Impermissible, and the Imperative" in Stephen M. Gardiner and Allen Thompson (eds.) *The Oxford Handbook of Environmental Ethics*. (Oxford: Oxford University Press, 2016); Carol A. Kates. "Reproductive Liberty and Overpopulation," *Environmental Values*, 13(1) (2004), pp. 51-79; Corey MacIver. "Procreation or Appropriation?" in Sarah Hannan, Samantha Brennan, and Richard Vernon (eds.) *Permissibly Progeny? The Morality of Procreation and Parenting*. (New York: Oxford University Press, 2015); and Thomas Young. "Procreation and Overconsumption: Are they Morally Equivalent?" *Journal of Applied Philosophy*, 18(2) (2001), pp. 183-192.

[7] Cafaro, 2012, 55. See also Young's analogy of the 'Greens and the Grays' in 2001, 184-186.

[8] See, for example, Amartya Sen. "Fertility and Coercion," *University of Chicago Law Review*, 63(3) (1996), pp. 1035-1061.

[9] See, for example, Conly, 2015, esp. chapter 4. The distinction between 'choice-providing' and 'incentive-changing' policies is presented in Cripps, 2016.

to question (1), I will simply assume that adults have a presumptive right to procreate that is grounded in the strong interest they have in developing intimate parental relationships with children. This assumption is of course contestable for the reasons outlined above, though I am mainly interested in questions that arise once this right is taken for granted. With respect to question (6), I remain mostly silent. While I consider briefly in Chapter Four the role that population growth plays in tempering arguments for socializing childrearing costs[10], I do not consider in detail our sustainability-based obligations to future generations, nor do I consider the permissibility of the various population policies that have been discussed in the recent literature. These questions are bound to increase in importance as we continue to face the effects of climate change, though they are ultimately outside the scope of the present inquiry.

Chapter Overview

My arguments are developed over the course of five chapters. I begin in Chapter One by considering the role that children's interests play in limiting the scope of the moral right to procreate. Given the enormous impact of procreation on the welfare and life prospects of the children who result from it, it is reasonable to think that the right to procreate ought to be constrained in light of their interests, perhaps only permitting the creation of children who can reasonably be expected to live (at the very least) minimally decent lives. This is in keeping with ordinary understandings of the scope and limits of other parenthood-related rights, for example, whose acquisition and maintenance is normally conditional on promoting the child's interests to some minimal degree. However, there is a philosophical problem in the case of procreation that complicates this reasoning, and that threatens to limit the extent to which children's interests can be incorporated into a theory of procreative justice.[11] When a

[10] See Chapter 4, section 4.5
[11] For the most comprehensive statement of this problem, see Derek Parfit. *Reasons and Persons*. (Oxford: Clarendon Press, 1984), chapter 16.

set of parents fail to promote their existing child's interests, there is an identifiable person who is made worse off by that failure: the child's life goes worse than it otherwise would have gone had they fulfilled their responsibilities and promoted her interests, and their conduct can be objected to on that basis. However, the same is not true in the case of procreation. When a set of procreators bring their child into less-than-minimally decent conditions, the child has not been made any worse off than she otherwise would have been, as her very existence depended on their procreative act taking place. Indeed, had her parents delayed conception until a more favorable time, this would not have improved her condition, but would rather have resulted in a different child altogether, one composed out of a unique set of reproductive gametes. This, in turn, raises an important and notoriously complicated question: how can an act be contrary to a person's interests when it is also a necessary condition of their existence?

Chapter One addresses this question by examining the nonidentity problem and considering its implications for the morality of procreation. I argue against the terms of that problem that it is not necessary to be made worse off in order to wronged, and that even if a child cannot be made comparatively worse off by being brought into existence, they still may be wronged by being born into conditions that fall below a minimally decent welfare threshold to which all children are putatively entitled. After defending this rights-based view against a number of prominent objections, I then introduce its central normative implication, which I term the *Decent Start* (DS) Principle:

> DS: of all of the children that a set of procreators might create, they may only permissibly create those children who stand a reasonable chance of having a decent start in life.

I conclude the chapter by elaborating the implications of this principle and clarifying its role within a broader account of procreative justice.

Following my discussion of the nonidentity problem in Chapter One, I turn in Chapter Two to consider the relationship between procreation and parental rights, asking whether the act of creating a child generates a special right to parent that child. It is normally taken for granted that individuals have a presumptive right to parent their biological children, and the undisputed nature of this right might be seen as evidence of a special moral relationship between procreation and parental rights. However, as Anca Gheaus has recently noted, the philosophical justification of this right is far from clear, for while contemporary accounts of parental rights explain why adults have a fundamental right to parent in general, they do not explain how adults come to acquire those rights over particular children.[12] Chapter Two addresses this problem by considering the philosophical basis of the right to parent one's biological baby. After considering and rejecting the Lockean proposal that such a right is grounded in a labor-based theory of property, I outline what has emerged as the most promising alternative to that view, namely, that the right to parent one's biological baby is grounded in the intimate relationship that develops between procreators and their progeny during the process of gestation.[13] Noting the advantages of this view over the Lockean alternative, I argue that it faces a serious dilemma regarding its inclusivity: either the description of the gestational relationship is such that it excludes men from acquiring the right to parent their biological children, or it is calibrated to include men, but in so doing also includes a host of additional parties that a gestational account is wont to exclude, such as commissioning parents in surrogacy contracts. I propose in its place an alternative account of the right to parent one's biological baby that is grounded in a principle of genetic self-ownership, which I term the *First Dibs* principle. According to this principle, individuals have a presumptive right to par-

[12] Anca Gheaus. "The Right to Parent One's Biological Baby," *Journal of Political Philosophy*, 20(4) (2012), pp. 432-455.
[13] Ibid.

ent the children who develop from their reproductive gametes, provided (a) that they have not forfeited that right antecedently (e.g. through anonymous gamete donation), and (b) that assuming a parental role with respect to the child is not contrary to that child's interests. I conclude the chapter by considering a number of possible objections to this view, including those that claim it is explanatorily weak, those that claim it is objectionably proprietarian, and those that claim it has unattractive normative implications when applied in custody disputes.

Chapter Three shifts the focus from parental rights to parental obligations and asks whether the act of creating a child also generates a special obligation to parent that child. The nature of this question is importantly distinct from the one posed in the previous chapter. Whereas a theory of parental rights is needed to resolve cases in which there are multiple conflicting claims over who is entitled to parent a newborn child (e.g. surrogacy disputes), a theory of parental obligation is needed to resolve cases in which there is disagreement between different parties about who is liable to parent a newborn child (e.g. cases of unwanted progeny). The existing literature on the morality of parenthood offers three main accounts of the origins of parental obligations: the genetic account, according to which one acquires on obligation to parent a particular child by contributing the genetic material from which that child developed[14]; the voluntarist account, according to which one acquires an obligation to parent a particular child by consenting to do so[15]; and the causal account, according to which one acquires an obligation to parent a particular child in virtue of one's causal relationship to that child's need for parental care.[16] In Chapter Three, I defend what I refer to as a weak, in-

[14] David Benatar. "The Unbearable Lightness of Bringing into Being," *Journal of Applied Philosophy*, 16(2) (1999), pp. 173-180.
[15] Elizabeth Brake. "Fatherhood and Child Support: Do Men Have a Right to Choose?" *Journal of Applied Philosophy*, 22(1) (2005), pp. 55-73, and "Willing Parents: A Voluntarist Account of Parental Role Obligations" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010); Onora O'Neill. "Begetting, Bearing, and Rearing" in Onora O'Neill and William Ruddick (eds.) *Having Children: Philosophical and Legal Reflections on Parenthood*. (New York: Oxford University Press, 1979); and Judith Jarvis Thomson. "A Defense of Abortion," *Philosophy and Public Affairs*, 1(1) (1971), pp. 47-66.
[16] David Archard. "The Obligations and Responsibilities of Parenthood" in Archard and Benatar, 2010; Michael W. Austin. *Conceptions of Parenthood: Ethics and the Family*. (Burlington: Ashgate, 2007),

direct version of the causal account, according to which causing a child to exist through procreation is sufficient to generate an obligation to ensure *that* the child is adequately parented. While this obligation may be (and usually is) discharged by taking on the parental role oneself, I argue that it may also be discharged by ensuring that someone else takes on that role as well, as in standard cases of adoption. After noting the advantages of this account over the existing alternatives, I then defend it against four possible objections: (i) that it overdetermines who counts as parentally obligated; (ii) that it imposes excessive demands on unwilling procreators; (iii) that it has objectionably unequal implications for men and women; and (iv) that it fails to appreciate the moral significance of biological connectedness. I conclude the chapter by offering some general conclusions about the relationship between procreation and parenthood, and its potential implications for law and public policy.

Having identified the conditions under which it is permissible to bring a child into existence, as well as the considerations that determine who is morally entitled and obligated to parent a child once it is born, I turn in Chapter Four to consider how the significant costs of procreation and parenthood ought to be distributed throughout society. I begin by considering the view, prominent among responsibility-sensitive egalitarians, that the cost of creating and raising children should be borne primarily, if not entirely, by the individuals who choose to bring them into existence.[17] I then consider the most prominent pro-sharing response to this view, according to which non-parents are obligated to share in the cost of childrearing in virtue of their status as the future beneficiaries of parents' childrearing labor, mainly (but not

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chapter 3; Jeffrey Blustein. "Procreation and Parental Responsibility," *Journal of Social Philosophy*, 28(2) (1997), pp. 79-86; Giuliana Fuscaldo. "Genetic Ties: Are They Morally Binding?" *Bioethics*, 20(2) (2006), pp. 64-76; and Lindsey Porter. "Adoption is Not Abortion-Lite," *Journal of Applied Philosophy*, 29(1) (2012), pp. 63-76, and "Why and How to Prefer a Causal Account of Parenthood," *Journal of Social Philosophy*, 45(2) (2014), pp. 182-202.

[17] Paula Casal. "Environmentalism, Procreation, and the Principle of Fairness," *Public Affairs Quarterly*, 13(4) (1999), pp. 363-376; Paula Casal and Andrew Williams. "Equality of Resources and Procreative Justice" in Justine Burley (ed.) *Dworkin and His Critics*. (Malden, Mass.: Blackwell, 2004); Matthew Clayton. *Justice and Legitimacy in Upbringing*. (Oxford: Oxford University Press, 2006), esp. 67-70; Eric Rakowski. *Equal Justice*. (Oxford: Oxford University Press, 1991), esp. 150-154; and Peter Vallentyne. "Equality and the Duties of Procreators" in David Archard and Colin. M. Macleod (eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002).

exclusively) through their enjoyment of social security benefits funded by the next generation of citizens.[18] After outlining an attractive iteration of this latter view—namely, Serena Olsaretti's recent socialized goods account[19]—I then explain how it is conditional on two further considerations. First, it is conditional on the success of independent arguments for redistributive social welfare institutions that translate childrearing labor into benefits for others, and second, it is also conditional on others actually benefiting from those institutions, an empirical consideration that may vary significantly according to both the rate of procreation as well as how we conceive of our broader demands of justice. I provide a Rawlsian contractualist argument that might work to satisfy the first condition, and attempt to specify the conditions under which the second condition might be satisfied by elaborating the various domestic and global considerations that work to influence whether childrearing creates net positive externalities.

Finally, after discussing the social distribution of childrearing costs in Chapter Four, I turn in Chapter Five to consider how the interests of orphaned children impact on the morality of procreation, asking whether it is permissible to create new children when there are already millions of existing children in need of parental care. I begin by considering the claim, recently proposed by a number of philosophers, that a strong *pro tanto* duty to adopt follows from a more general duty to rescue or assist those in need.[20] I then consider two prominent objections to that claim: one that appeals to individual preferences for biological children, and another that appeals to the significant financial, emotional, and logistical costs of adoption. While I dismiss the first as unsuccessful, I argue that the second often succeeds in overriding the presumptive duty to adopt. However, recognizing that these costs are themselves

[18] Nancy Folbre. *The Invisible Heart.* (New York: New Press, 2001); Rolf George. "Who Should Bear the Costs of Children?" *Public Affairs Quarterly*, 1(1) (1987), pp. 1-42; and Serena Olsaretti. "Children as Public Goods?" *Philosophy and Public Affairs*, 41(3) (2013), pp. 226-258.
[19] Olsaretti, 2013.
[20] Daniel Friedrich. "A Duty to Adopt?" *Journal of Applied Philosophy*, 30(1) (2013), pp. 25-39; and Tina Rulli. "The Duty to Adopt" (PhD Diss., Yale University, 2012), and "Preferring a Genetically-Related Child," *Journal of Moral Philosophy*, (2014), pp. 1-30.

the product of socially contingent barriers to adoption, I also argue in favor of collective obligations to facilitate adoption, including state obligations to subsidize adoption over fertility services, and broader societal obligations to promote adoption as a valuable childrearing option. I conclude that our obligations to orphaned children are twofold: we have individual duties to adopt them into our families, as well as collective duties to actively facilitate adoption, both of which impose moral constraints on our procreative activity.

Following my discussion of the duty to adopt in Chapter Five, I offer some brief concluding remarks, summarizing the main conclusions and implications of my arguments, and identifying some unanswered questions that might provide avenues for future research.

Contribution to Existing Literature

This thesis aims to make two major contributions to the existing literature on procreative ethics. The first is to provide a cohesive and integrated approach toward the core question areas in procreative ethics. With a few recent exceptions[21], much of the literature on procreation has been relatively fragmented: not only have the six core questions been addressed in relative isolation from one another, but they have often been addressed only peripherally in relation to the other issues or philosophical problems for which they are relevant. For example, question (2) has been addressed mainly in conjunction with the literature surrounding intergenerational justice and the nonidentity problem; question (3) has been addressed mainly in conjunction with the literature surrounding the ethics of third-party reproduction (including surrogacy, gamete donation, and technologically-assisted reproduction), particularly in relation to cases where there are conflicting claims over who is entitled or obligation to parent a particular child; question (4) has been addressed mainly as a test case for

[21] Recent exceptions include Overall, 2012; David DeGrazia. *Creation Ethics: Reproduction, Genetics, and Quality of Life*. (Oxford: Oxford University Press, 2012); Norvin Richards. *The Ethics of Parentood*. (Oxford: Oxford University Press, 2010); and Rivka Weinberg. *The Risk of a Lifetime: How, When, and Why Procreation May Be Permissible*. (Oxford: Oxford University Press, 2015).

theories of distributive justice, particularly responsibility-sensitive theories that require individuals to internalize the costs of their freely chosen projects and interests; and question (5) has been addressed mainly in connection with the emerging literature surrounding the ethics of adoption.

The fragmentation of the existing literature is problematic for at least two reasons. First, as will become more evident as the thesis progresses, the high level of interdependence between the six core question areas means that dealing with them in isolation from one another will only yield partial answers to each—insofar as the answers that we provide to one set of questions will depend on (or influence, as the case may be) the answers we provide to another, they are most meaningfully and productively addressed in conjunction with one another. Second, and perhaps more troublingly, our thinking is also at risk of becoming muddled when we attempt to extract general principles about procreative rights and obligations on the basis of particular cases or areas of practical concern, as the principles that we glean from one set of cases may not cohere with the principles that we glean from another. By addressing the core question areas in conjunction with one another, this seeks to avoid this pitfall, and achieve a level of consistency in the particular responses that are provided to them.

The particular responses that are provided to these questions constitute the second major contribution of this thesis. In addition to the methodological innovation of addressing the core questions in conjunction with one another, I also defend a novel positions and arguments with respect to each of them, which together amount to a unique account of the ethics of procreation. Among the major claims that I advance in this thesis are the following:

(1) that all children have a right to a decent start in life that imposes constraints on their (would-be) parents' right to procreate;
(2) that procreators have a presumptive though defeasible right to enter into parental relationships with the children that result from their reproductive gametes;

(3) that procreators are not necessarily obligated to parent the children they have caused to exist, so long as they can transfer custody of the child to a willing and competent adoptive parent;

(4) that the non-parents in just societies have a conditional fairness-based obligation to share in the cost of parents' childbearing and childrearing projects; and

(5) that prospective parents have a presumptive though defeasible duty to adopt rather than procreate if they are financially and emotionally capable of doing so.

Methodology

Before proceeding to the main arguments, I would like to make a brief note about my general methodological approach. The method that I employ throughout this thesis is a version of Rawlsian reflective equilibrium.[22] Reflective equilibrium can be understood as a form of coherence justification in which we justify a set of proposed moral principles by seeking their coherence with our considered judgments in particular cases. Two versions are generally distinguished in the literature.[23] In *narrow* reflective equilibrium, we work back and forth between our considered judgments and a set of proposed moral principles until we achieve coherence between them, either by modifying our judgments to accord with the principles, or by adjusting the principles to yield particular judgments. Achieving this kind of coherence provides an explanation for why we might hold a particular judgment (i.e. because it is an inference from a certain principle), or a particular principle (i.e. because it systematizes a set of judgments we take to be correct).

However, while reflective equilibrium in the narrow sense may supply an explanation for why we hold certain judgments or principles, it cannot by itself provide justification

[22] John Rawls. *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971), 46-53.
[23] See Norman Daniels. *Justice and Justification: Reflective Equilibrium in Theory and Practice*. (Cambridge: Cambridge University Press, 1996), chapters 1 and 2.

for those judgments or principles, or explain why we *ought* to hold them. This is due to two major problems stemming from the emphasis it places on our considered judgments. First, if the validity of a moral principle is defined at least in part by its coherence with a particular judgment, then this will simply lead to subjectivism in ethics: since considered judgments will differ between individuals and across societies, the validity of a principle will also differ according to whose judgments it is being tested against.[24] Second, considered judgments by themselves carry little justificatory weight, as they are often the products of enculturation, bias, or historical accident.[25] Given the sheer contingency of such judgments, it would seem misguided to make the validity of our moral principles dependent on them.

Thus, in order to provide justification for our proposed moral principles, we must "widen the circle of justificatory beliefs,"[26] and provide argumentation for those principles that is independent of their coherence with our considered judgments in particular cases. We do so by drawing inferences from a number of more general background theories that are relevant to the principles or judgments at hand.[27] By advancing these arguments, we place our moral principles on more stable ground, for they must not only cohere with a set of considered judgments that we subscribe to upon reflection, but they must also be supported by a set of relevant background theories that we also have good reason to accept. This *wide* version of reflective equilibrium thus has a three-tiered structure, comprising (a) a set of considered judgments, (b) a set of proposed moral principles, and (c) a set of relevant background theories.[28] We provide justification for the various elements in this structure by achieving a mutually supporting coherence among them.

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[24] See Peter Singer. "Sidgwick and Reflective Equilibrium," *Monist*, 58(3) (1974), pp. 494-5; and R.M. Hare. "Rawls' Theory of Justice—I," *Philosophical Quarterly,* 23(91) (1973), pp. 145-47.
[25] Daniels, 1996, 27; and Singer, 1974, 516.
[26] Daniels, 1996, 1.
[27] Ibid., 22.
[28] Ibid., 22.

A good starting point for the process of reflective equilibrium is thus the recognition of disequilibrium among the various moral principles and considered judgments that we appear to subscribe to pre-reflectively. This is the starting point for this thesis. Within political theory and practice, there exist a number of deep discrepancies between our moral principles and our considered judgments with respect to human procreation. For example, the common judgment that the right to procreate is absolute or unconditional appears to be inconsistent with the widely accepted principle that the exercise of our rights, and the pursuit of our personal projects, must be bounded by the rights and interests of the non-consenting third parties whom it affects. Similarly, in cases where prospective children are at risk of being born into disadvantaged conditions, an absolutist interpretation of the right to procreate also appears to be inconsistent with the strong commitment to children's rights that has been expressed in recent years among philosophers and lawmakers alike. We cannot resolve these discrepancies by achieving a simple coherence between our principles and judgments, for coherence in itself provides justification for neither judgment nor principle. Rather, we must advance philosophical arguments for our moral principles by drawing on a number of relevant background theories, including the nature and value of rights, the limits of individual liberty, and the requirements of distributive justice, among others. If the arguments we advance persuasively support those principles, then we may be lead to adjust our judgments to cohere with them; alternatively, if the arguments advanced are unpersuasive, we may be forced to maintain those judgments and revise our judgments accordingly. In this thesis, I undertake the process of reflective equilibrium in each individual chapter, advancing philosophical arguments for my proposed moral principles (e.g. the Decent Start, Principle, the First Dibs Account, the Indirect Causal Account, the conditional Pro-Sharing view, and the presumptive Duty to Adopt), and demonstrating how prevailing judgments about procreation ought to be adjusted accordingly. If successful, these arguments will contribute to a more coherent and integrated account of procreative justice.

Chapter One
Procreation and the Nonidentity Problem

1.1 Introduction

In a brief passage toward the end of *On Liberty*, John Stuart Mill considers the application of his liberty principle to the issue of procreation, claiming,

> It is not in the matter of education only, that misplaced notions of liberty prevent moral obligations on the part of parents from being recognized, and legal obligations from being imposed, where there are the strongest grounds for the former always, and in many cases for the latter also. The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility—to bestow a life which may be either a curse or a blessing—unless the being on whom it is to be bestowed will have at least the ordinary chances of a desirable existence, is a crime against that being.[1]

Mill's views on procreative responsibility have a strong intuitive pull. Even if individuals have a presumptive right to procreative liberty, it still seems wrong to create a child who will face serious restrictions on the quality of her life, and the putative wrongness of that action seems explainable in terms of *that* child's interests—it looks, in Mill's terms, like 'a crime against that being'. However, the precise nature of this crime has proven notoriously difficult to make sense of. Initially, it is tempting to claim that the crime consists in harming the child in the standard comparative sense of setting back her interests. On this interpretation, bringing a child into disadvantaged conditions is wrong because it makes that child worse off than she otherwise would have been had her parents brought her into decent conditions instead. However, as Derek Parfit and others have noted, this interpretation overlooks the fact that a child's identity is dependent on the particular act of procreation that brought her about.[2] Had

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[1] John Stuart Mill. *On Liberty and Other Essays*. (Ed.) John Gray. (Oxford: Oxford University Press, 1991), 120.

[2] Derek Parfit. *Reasons and Persons*. (Oxford: Clarendon Press, 1984), chapter 16. For similar expressions of the same phenomenon, see also Gregory S. Kavka. "The Paradox of Future Individuals," *Philosophy and Public Affairs*, 11(2) (1982), pp. 93-112; and Thomas Schwartz. "Obligations to Posteri-

her parents delayed conception until a more favorable time, this would not have improved her condition, but would rather have resulted in a different child altogether, one composed of a unique set of reproductive gametes. The supposed 'crime' to which Mill makes reference therefore appears to be a victimless one, as there is no identifiable individual who is made any worse off than they otherwise would have been.

In the existing literature surrounding procreative ethics, this type of reasoning has often been used to exclude children's interest from the set of consideration that may be appealed to when evaluating the morality of procreation: either it is not wrong to bring a child into disadvantaged conditions because that child will not be made worse off, or it *may* be wrong to bring a child into disadvantaged conditions, but its wrongness must be explained in terms of abstract 'impersonal' values, such as a failure to maximize aggregate utility. In this chapter, I argue that this reasoning is flawed, and that it is in fact possible to make sense of the idea that bringing a child into sufficiently disadvantaged conditions is a crime against that child. Even if a child cannot be made comparatively worse off by being born into disadvantaged conditions, I argue that they may nevertheless be *wronged* by being born into conditions that fall below a minimally decent threshold to which all children are putatively entitled. The crime in question, then, consists in violating the child's 'right to a decent start', a right that functions to limit the scope of their would-be parents' right to procreate.

The chapter proceeds in five parts. In 1.2, I outline the nonidentity problem and the central challenge that it poses in the context of procreative ethics, namely, that a child cannot be harmed by a procreative act insofar as their existence depended on that act taking place. In 1.3, I outline and reject two unsuccessful solutions to the nonidentity problem: those that concede its implications, and those that attempt to solve it by appeal to impersonal values. In 1.4, I explain how an appeal to rights gets around the nonidentity problem by accounting for

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ty" in Brian Barry and R.I. Sikora (eds.) *Obligations to Future Generations*. (Philadelphia: Temple University Press, 1978).

the moral wrong in nonidentity cases without insisting that the child has been made comparatively worse off. In 1.5, I outline and respond to four prominent challenges that have been raised against rights-based solutions in the contemporary literature. Finally, in 1.6, I introduce the central normative implication of my argument—the child's right to a decent start—and clarify its role within a broader account of procreative justice.

1.2 The Nonidentity Problem

The nonidentity problem is a problem that arises in cases where an act that apparently harms a person is also a necessary condition for their existence. It is generated from the mundane fact that a person's numerical identity is tied to the timing of conception, such that if your parents had not conceived when they in fact did, the resultant child would not have been you, but a numerically distinct 'nonidentical' child composed of a unique set of reproductive gametes. Parfit expresses this fact as the Time-Dependence Claim, which holds that "If any particular person had not been conceived when he was in fact conceived, it is *in fact* true that he would never have existed."[3] According to Parfit and others, the Time-Dependence Claim forces us to concede that so long as a person has a life worth living, he cannot be harmed by a set of actions or choices that lead to his conception, for his very existence depended on that conception taking place when it did.

The full force of the nonidentity problem is felt in cases where our actions or choices cause a person to be born into harmful conditions. While our gut reaction may be to claim that such actions or choices are wrong—and wrong in light of the adverse effects on the person who results—the nonidentity problem complicates this inference. Because a person's numerical identity is tied to the timing of conception, they often owe their existence to the very act that appears to harm them; for had that act not been performed, they may never have

[3] Ibid., 351.

been conceived, and in this sense are not made any worse off than they otherwise would have been. The logic of the nonidentity problem is best illustrated through a series of hypothetical cases designed to show that an apparently harmful act is not in fact 'bad' for anyone. As a paradigm nonidentity case, consider Dan Brock's *Impatient Woman*:

> *Impatient Woman:* A woman is told by her physician that she should not attempt to become pregnant now because she has a condition that would be highly likely to result in a welfare-limiting disability in her child. Her condition is easily and fully treatable by taking a quite safe medication for one month. If she takes the medication and delays becoming pregnant for two months there is every reason to expect that she will have a healthy child. However, because she is impatient to begin a family she refuses to wait, gets pregnant now, and gives birth to a child who is disabled.[4]

What is puzzling about *Impatient Woman* and other nonidentity cases is that there seems to be a clear moral wrong that has taken place, yet no identifiable person who has been made any worse off than they otherwise would have been. Due to Time-Dependence, the circumstances that the disabled child was born into were the best the *he* could have hoped for. Had his mother delayed conception for two months, the resultant child would not have been him, but rather a different child altogether, one composed of a unique set of reproductive gametes. Assuming that life with his particular disability is better than no life at all—even marginally—the disabled child has not been made any worse off than he otherwise would have been. The challenge, then, is in articulating what, if anything, was wrong with his mother's decision.

It is important to recognize just how *enormous* the reach of the nonidentity problem really is: not only does it bear upon our individual procreative decisions, but it also bears upon our non-procreative decisions as well, as such decisions tend to have domino effects that

[4] Dan W. Brock. "Genetic Harms and the Nonidentity Problem," *Bioethics*, 9(3/4) (1995), pp. 269-275, 270. This passage has been paraphrased for style.

influence who conceives when, and thus the identities of future people.[5] It is also important to recognize just how *problematic* the nonidentity problem is, as it directly challenges an intuitively plausible and practically significant moral judgment: that certain actions we take now can have harmful effects on people who do not yet exist, and that such actions are wrong in light of their harmful effects. If this judgment is false, it may have significant and potentially disturbing implications for our treatment toward future people. In the present context, the worry is that it gives carte blanche to individual procreators, who may bring children into whatever conditions they choose under the guise that those children will not be made any worse off than they otherwise would have been.

However, while the nonidentity problem is sometimes presented as a fact that poses an insurmountable challenge to claims of harm to future persons, it actually relies on three contestable assumptions, the combination of which generates a paradox:

(1) the act in question is morally objectionable;

(2) for an act to be morally objectionable, it must be bad for someone;

(3) for an act to be bad for someone, it must make them worse off.

The puzzle of nonidentity cases arises from the fact that, while each of these assumptions is intuitively appealing, they cannot all be held at once. Thus, responses to the nonidentity problem have mostly centered along three lines, with each challenging or dispensing with a particular assumption.

[5] For instance, a decision between large-scale social or economic policies will not only affect the number of people living in the future, but will also affect their identities by creating minor but cumulative differences that influence the timing and manner of conceptions. See Parfit's discussion of Depletion and Conservation in Parfit, 1984, 361-364.

First, some theorists have dispensed with (1), and simply conceded that the act in question is not in fact morally objectionable.[6] This set of views retains assumptions (2) and (3), and holds that a morally objectionable act must make a particular person worse off than they otherwise would have been. On the basis of these assumptions, it deduces that because a particular person did not exist at the time of the act in question, and would not have existed had the act not been performed, they cannot be made worse off by the act, and so the act must therefore be morally permissible. In its strongest guise, this set of views yields the blunt conclusion that future persons who depend on our choices for their existence have "no moral status of any kind, not even a weak one."[7]

Second, some theorists have dispensed with (2) and insisted that an act can be morally objectionable without being bad for any particular person.[8] According to this set of views, the moral failing in nonidentity cases does not consist in violating a duty to any particular person, but rather in violating a duty to promote certain impersonal values, such as aggregate utility. In this sense, the moral wrong in cases like *Impatient Woman* does not consist in causing harm to the particular child who results, but rather in failing to create a better off child in his place, or in "wantonly introducing a certain evil into the world."[9]

Finally, some theorists have dispensed with (3), and have argued that an act can be bad for a particular person without making them worse off. There are several variations on this line of response. First, some theorists have denied that a person must be made worse off in order to be harmed—that is, they have rejected a comparative conception of harm in favor

[6] David Boonin. "How to Solve the Non-Identity Problem," *Public Affairs Quarterly*, 22(2) (2008), pp. 127-157; David Heyd. *Genethics: Moral Issues in the Creation of People*. (Berkeley: University of California Press, 1992); John A. Robertson. *Children of Choice: Freedom and the New Reproductive Technologies*. (Princeton: Princeton University Press, 1994), esp. chapter 4; and Schwartz, 1978.
[7] Heyd, 1992, 99.
[8] Parfit, 1984; Brock, 1995; Joel Feinberg. "Wrongful Life and the Counterfactual Element in Harming" in *Freedom and Fulfillment*. (Princeton: Princeton University Press, 1992).
[9] Feinberg, 1992, 27.

of a noncomparative conception.[10] On this understanding, harm does not consist in being made worse off than one otherwise would have been, but rather in being subjected to noncomparatively harmful states, such as "pain, early death, bodily damage, or deformity,"[11] among others. Adopting a noncomparative conception of harm allows theorists to claim that the moral wrong in nonidentity cases *does* in fact consist in causing harm to the particular person who results, even if that person is not made worse off than they otherwise would have been.

Alternatively, other theorists have shifted the focus from harming to wronging, and have argued that while a person may not be harmed in the sense of being made comparatively worse off in nonidentity cases, they may nevertheless be *wronged*. One set of views locates the moral wrong purely in the actions or attitudes of the agents in nonidentity cases, i.e. through their lack of concern or respect for the person brought into disadvantaged conditions.[12] Another set of views locates the moral wrong in the not-worse-off consequences for the apparent victim in nonidentity cases, i.e. in their being born into conditions that fall below a minimally decent threshold to which all persons are putatively entitled.[13]

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[10] Elizabeth Harman. "Can We Harm and Benefit in Creating?" *Philosophical Perspectives*, 18 (2004), pp. 89–113; Lukas H. Meyer. Past and Future: The Case for a Threshold Notion of Harm" in Lukas H. Meyer, Stanley L. Paulson, and Thomas W. Pogge (eds.) *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz*. (Oxford: Oxford University Press, 2003); and Seana V. Shiffrin. "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory*, 5 (1999), pp. 117–148. For a more general discussion and defense of noncomparative harm, see Shiffrin's "Harm and its Moral Significance," *Legal Theory*, 18 (2012), pp. 1-42.

[11] Harman, 2004, 93.

[12] See Kavka, 1982; Rahul Kumar. "Who Can Be Wronged?" *Philosophy and Public Affairs,* 31(2) (2003), pp. 99-118; J. David Velleman. "Persons in Prospect," *Philosophy and Public Affairs*, 36(3) (2008), 221-288; and David Wasserman. "The Nonidentity Problem, Disability, and the Role Morality of Prospective Parents," *Ethics*, 116(1) (2005), pp. 132-152.

[13] See David Archard. "Wrongful Life," *Philosophy*, 79(309) (2004), pp. 403-420; F.M. Kamm. "Genes, Justice, and Obligations to Future People," *Social Philosophy and Policy*, 19(2) (2002), pp. 360-388; "Doran Smolkin. "Toward a Rights-Based Solution to the Non-Identity Problem," *Journal of Social Philosophy,* 30(1) (1999), pp. 194-208; Bonnie Steinbock. "Wrongful Life and Procreative Decisions" in Melinda A. Roberts and David T. Wasserman (eds.) *Harming Future Persons*. (Dordrecht: Springer, 2009); and James Woodward. "The Non-Identity Problem," *Ethics*, 96(4) (1986), pp. 804-831.

In this chapter, I defend a particular variation of this third line of response, namely, that the moral wrong in nonidentity cases consists in violating the child's 'right to a decent start'. From this defense, I derive an action-guiding principle that requires procreators to only create children in ways, and amid circumstances, in which that right is likely to be satisfied, a principle that is meant to specify the role that children's interests play in limiting the scope of the right to procreate. However, in order to motivate support for this line of response, it will be helpful to show how alternative lines of response are unsatisfactory. To do this, I will briefly explain the pitfalls of the first two lines of response before outlining and defending my preferred rights-based solution.

1.3 Unsatisfactory Solutions

The nonidentity problem is a problem because it exposes a discrepancy between our intuitive judgments about certain cases and the principles that we commonly appeal to in order to evaluate those cases. Whenever we encounter such a discrepancy in our moral reasoning, we generally have two options: one is to revise our principles so as to generate the intuitive judgments; the other is to revise our judgments so as to cohere with our existing principles.[14] The option that is more attractive in a given case will typically depend on how strong our attachment is to an existing principle (usually defined by its importance in terms of explaining other moral phenomena), and how counterintuitive the conclusion is that it generates in the case at hand. Thus, when confronted with the nonidentity problem, it seems like the decision that we must make is whether to dispense with our existing principles and replace them with new ones, or simply stomach their implications when applied to nonidentity cases.

[14] See John Rawls's discussion of reflective equilibrium in *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971), 46-53.

Proponents of the first line of response claim that we should take the latter option and simply revise our judgments about nonidentity cases. Their preference for this option derives from a stalwart commitment to what is described in the literature as the Person-Affecting Restriction (PAR) on morality, or the notion (reflected in the conjunction of assumptions (2) and (3)) that for an act to be morally wrong, it must make a particular person worse off than they otherwise would have been.[15] Endorsing this principle may generate surprising conclusions in nonidentity cases, though its proponents insist that accepting these conclusions is a fair price to pay for maintaining it in other contexts.

However, just how fair a price this is will depend on how strong our attachment is to the PAR, and how counterintuitive its implications are when applied to nonidentity cases. While making particular persons worse off certainly seems to be a common feature of morally wrong acts, it is hard to overstate the counterintuitive implications that follow if we take this criterion to be a necessary condition of such acts. It implies, for example, that it is permissible to deliberately create children with significant welfare- or opportunity-limiting impairments, and it permits us to all but disregard the interests of future persons in our procreative and non-procreative decision-making. For many people, accepting these conclusions is not a fair price to pay for maintaining the PAR, but is rather a reason to reject that principle in favor of a new one that better fits with our intuitive judgments.

Some proponents have tried to respond to these worries by showing how the PAR can accommodate many of our intuitions surrounding future-regarding action, even if it does not generally permit us to take account of the interests of future persons whose existence depends on those actions. For instance, some have pointed out that if we take nonexistence to be comparable with existence, then the PAR will not permit procreative acts that result in children whose lives are 'not worth living', as those children can plausibly be said to have

[15] For statements of the Person-Affecting Restriction, see Parfit, 1984, 363, 394; and Heyd, 1992, 13-15.

been made worse off than they otherwise would have been by being brought into existence.[16] In this sense, the PAR might be consistent with a very limited set of child-centered restrictions on the right to procreate. Others have argued that the PAR may be able to support more extensive procreative obligations that are grounded in the interests of existing third parties.[17] For example, even though the disabled child has not been made worse off by being born with a disability, his mother's decision may still be wrong by imposing an unnecessary burden on the healthcare system, and thereby diminishing the medical resources that are available for others. In this sense, while the PAR provides a narrower framework for assessing the morality of future-regarding action, some commentators believe that it can generate many of the same normative implications as frameworks that ascribe moral status to future persons.

These qualifications might soften the blow to our intuitions in nonidentity cases, though there are a few reasons to remain skeptical of them. First, framing the moral wrong in cases like *Impatient Woman* in terms of third party interests not only seems like a clear misdiagnosis of the case (insofar as the act appears wrong primarily in light of its effects on the resultant child), but also one that is unattractively based on contingency, rather than principle. If it just so happens that certain future-regarding actions *also* have adverse effects on existing people, then the PAR might have the resources to deal with them, though in cases where the adverse effects are borne solely by future persons, the PAR will continue to generate unpalatable conclusions. Suppose, for example, that the impatient woman is independently wealthy, and is therefore able to subsidize her child's healthcare costs without diminishing the resources available to others. In this case, there are no existing persons who have been made

[16] Feinberg, for example, holds that a child can be 'better off unborn' if nonexistence is deemed rationally preferable to the child's flawed existence from the perspective of a proxy chooser. However, critics like David Heyd reject this idea, insisting that "no logical comparison between life and nonlife can be justified." For a defense of comparability see Feinberg, 1992, and Appendix G of Parfit, 1984, 487-490. For a defense of incomparability, see Heyd, 1992, esp. chapter 1.

[17] This is one of the main theses in Heyd, 1992, and is also suggested in Schwartz, 1978.

worse off by her decision, forcing the PAR to designate it as morally permissible. Despite the claims of its proponents, then, the PAR gives only cursory protection to the interests of future persons, as the extent to which those interests are protected will depend on contingent facts about the effects of our future-regarding actions on existing persons.[18]

The second reason for skepticism follows from the first. If we cannot reliably appeal to third party interests to support more extensive procreative obligations, then the only child-centered restrictions on the right to procreate that the PAR is capable of supporting are restrictions on the creation of children with lives 'not worth living'. The obvious problem with this set of constraints is that it seems far too weak, permitting the deliberate creation of children with lives that are only barely preferable to nonexistence.[19] Some may be happy to accept this conclusion as a sensible (if surprising) implication of the PAR, though others have taken it as evidence that the PAR must be false.

Rejecting the PAR is the starting point for the second line of response to the nonidentity problem. Suppose we agree that the disabled child has not been made worse off than he otherwise would have been by being born with a disability, and that his mother has not therefore acted wrongly on a person-affecting account of wrongdoing. It does not necessarily follow that she has not acted wrongly *tout court*, for if we reject the PAR, then we open up the possibility that her decision may be wrong independently of its effects on the resultant child. One possible alternative is that her decision is wrong because it failed to produce the best

[18] This point is more evident in examples involving members of distant generations, given the strong psychological tendency to discount their interests. Suppose that we adopt a risky nuclear energy policy with short-term benefits, but a significant risk of causing a massive catastrophe in three centuries. Because this is an identity-affecting choice that will not have any negative effects on existing persons *or* the near descendants whose welfare they care about, the PAR will—counterinutitively—designate it as morally permissible. See Parfit's discussion of Risky Policy in Parfit, 1984, 371-377.

[19] Of course, just how weak this set of constraints is will depend on how many lives are 'not worth living'. While most commentators believe that such lives are exceedingly rare, David Benatar has notoriously argued that *all* human lives fit this description, as a fundamental asymmetry between harms and benefits implies that nonexistence is always preferable to existence. Since addressing this argument here would take us too far afield, I have provided an independent response to it in the Appendix. For the fullest presentation of this argument, see David Benatar. *Better Never to Have Been: The Harm of Coming into Existence*. (Oxford: Oxford University Press, 2006), chapter 2.

consequences in an impersonal sense, as measured by (say) aggregate utility. Parfit prefers this type of approach for a certain subset of nonidentity cases, proposing the following impersonal comparative principle:

> *The Same-Number Quality Claim,* or *Q*: If in either of two possible outcomes the same number of people would ever live, it would be worse if those who live are worse off, or have a lower quality of life, than those who would have lived.[20]

Unlike the PAR, Q is capable of generating the intuitive judgment in cases like *Impatient Woman*. Given that the woman could have produced a better off child by delaying conception for two months, Q implies that her decision is morally wrong—not because it made the disabled child any worse off than he otherwise would have been, but rather because the world in which the disabled child exists is impersonally worse (i.e. by containing less total utility) than the different possible world in which an alternative non-disabled child existed instead.

Some theorists have appealed to impersonal comparative principles like Q to generate moral constraints on procreative behavior, most notably Julian Savulescu, whose Principle of Procreative Beneficence (PB) holds that "couples (or single reproducers) should select the child, out of the possible children who they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant, available information."[21] However, despite their recent popularity, impersonal comparative principles run into at least three major problems when invoked as moral constraints on the permissibility of procreation. The first set of problems stems from their lack of substantive content, and subsequent indeterminacy. Because impersonal comparative principles only require procreators to take the better of the available procreative options, they are prone to being both excessively and insufficiently demanding depending on what the available options are. For instance, most people

[20] Parfit, 1984, 360.
[21] Julian Savulescu. "Procreative Beneficence: Why We Should Select the Best Children," *Bioethics*, 15(5/6) (2001), pp. 413-126, 415.

who have created children likely had the possibility of creating a different child who would have had a better life according to the relevant measure, though it would seem odd to claim that their procreative choices were morally impermissible for that reason, particularly if the children they created were born into decent conditions in absolute terms. Similarly, in cases where the only available procreative options are very poor ones, it also seems odd to concede that a particular procreative choice is morally permissible just because it happens to be the best of the (bad) available options. Imagine, for example, that the choice faced by the Impatient Woman is between creating a severely impaired child now or creating a marginally less impaired child in two months' time. The woman would be acting in accordance with Q or PB by delaying conception and creating the marginally less impaired child, though her decision still seems problematic insofar as the child will face serious restrictions on its welfare and opportunities.

A second and more difficult set of problems arises when we consider how impersonal comparative principles apply to 'different-number', rather than 'same-number', choices. Same-number choices are choices in which the same number of persons will exist regardless of the choice that is made (i.e. choosing to create one child rather than another), while different-number choice are choices in which a different number of persons will exist depending on the choice that is made (i.e. choosing whether or not to have a child).[22] Indeterminacy aside, it is relatively easy to see how impersonal comparative principles apply to same-number choices: we simply compare the different possible lives that we might create as a result of different possible procreative options, and then select the life that ranks highest along whatever index we take to be important. However, things become significantly more complicated when impersonal values are appealed to in order to govern the different-number choice of whether or not to have children. For example, if what matters from the perspective of im-

[22] See Parfit's typology of 'same-person', 'same-number', and 'different-number' choices in Parfit, 1984, 355-356.

personal approaches is pursuing the option that produces the most value, then those approaches may imply an active *duty* to create children, as the creation of additional children may increase the total amount of utility in the world. Yet this implication runs counter to an intuitive asymmetry that we tend to assume in procreative decision-making, whereby the fact that a person's life would not be worth living constitutes a strong moral reason not to bring them into existence, while the fact that a person's life would be worth living does *not* provide a reason to bring them into existence.[23] Moreover, if increasing *total* value is what matters from the perspective of impersonal approaches, then they may lead to what Parfit has termed the 'Repugnant Conclusion', whereby the creation of immense numbers of children with barely tolerable lives is preferable to the creation of a smaller number of children with decent lives, so long as the former state of affairs contains more total utility.[24] To the extent that we reject such a conclusion, we may be lead to reject the underlying principles that generate it.

Both of these problems present significant difficulties for solutions to the nonidentity problem premised on impersonal values. Even if they could be dealt with, however, there is a third and final problem with impersonal approaches that gives us an additional reason to reject them: by focusing solely on impersonal values, they fail to account for the strong intuition that the acts in nonidentity cases are wrong primarily in light of their effects on the resultant child. Even if impersonal comparative principles could somehow be calibrated to generate palatable normative conclusions in nonidentity cases, they still seem to provide the wrong explanation of why the acts in nonidentity cases are objectionable. As Bonnie Steinbock and Ron McClamrock put it, "Such an explanation leaves out our sense that the children whose lives fall below a decent minimum are the *victims* of their parents' decision to procreate. It leaves out the plausible and intuitive idea that bringing children into existence under

[23] For classic statements of the Asymmetry problem, see Jeff McMahan. "Problems of Population Theory," *Ethics*, 92(1) (1981), pp. 96-127, esp. 99-104; and Jan Narveson. "Utilitarianism and New Generations," *Mind*, 76(301) (1967), 62-72.
[24] Parfit, 1984, chapter 17.

very adverse conditions is unfair to the children themselves."[25] Combined with the previous problems facing impersonal approaches, this departure from intuition should be sufficient to send us in search of a more attractive alternative.

1.4 Rights-Based Solutions

What I want to argue now is that, appropriately formulated, a solution to the nonidentity problem premised on a conception of rights can provide such an alternative, one that offers a person-affecting explanation of wrongdoing in nonidentity cases while avoiding the counterintuitive normative implications that plague the previous two solutions. It begins with the recognition that, as formulated above, the PAR actually contains two separable premises, namely,

(2) for an act to be morally objectionable, it must be bad for someone;

(3) for an act to be bad for someone, it must make them worse off.

While it is clear that a person-affecting account of wrongdoing needs to retain (2), it is less clear that it needs to retain (3). In fact, there are several instances in which (3) appears to be false, including basic instances of rights-violations. Consider, for example, James Woodward's case of Smith:

> Suppose that Smith, who is black, attempts to buy a ticket on a certain airline flight, and that airline refuses to sell it to him because it discriminates racially. Shortly after, that very flight crashes, killing all aboard.[26]

[25] Bonnie Steinbock and Ron McClamrock. "When is Birth Unfair to the Child?" *Hastings Center Report,* 24(6) (1994), pp. 15-21, 19.
[26] Woodward, 1986, 811.

Clearly the airline's refusal has left Smith, on balance, better off than he otherwise would have been, for had he boarded the aircraft, he would have died along with the other passengers. However, even though Smith has not been made comparatively worse off by the airline's refusal, he has nevertheless been *wronged* by being stigmatized and treated unequally on the basis of his race. His right to non-discrimination has been violated, and he retains a legitimate complaint against the airline *even if* its refusal left him better off than he otherwise would have been.

Less ad hoc examples arrive at the same point. Factories operating in developing countries often exploit impoverished locals by employing them in low-paying jobs amid dangerous working conditions. In many of these cases, the workers will have been made better off than they otherwise would have been, as there may have been no more lucrative opportunities for work. However, even if the workers have been made better off on balance, it is entirely consistent to say that they have nevertheless been *wronged* by having their situation exploited for the profit of the factory. This points to the more general fact that an act can wrong a person independently of its effects on their overall welfare. It can also wrong them for nonconsequentialist reasons as well, e.g. for violating their rights.

Rights-based solutions appeal to this fact in order to account for the moral wrong in nonidentity cases. Even if a procreative act cannot make a child comparatively worse off, it may still be wrong by violating one or more of that child's rights, such as a putative right against being born into a certain kind of existence. On this view, what is potentially wrong with a case like *Impatient Woman* is not that the child is made any worse off than he otherwise would have been, but rather that he is made worse off than he is *entitled to be* according to a particular conception of children's entitlements. A rights-based solution thus has the advantage of accounting for the moral wrong in nonidentity cases while preserving the intuition that it is the *resultant child* who has been wronged. In other words, it is able to account for the moral wrong in person-affecting terms.

As specified so far, however, a rights-based solution offers only a formal response to nonidentity cases, and the extent to which it impugns certain procreative acts will depend on the substantive content of a child's rights. Within the literature, this content differs from theorist to theorist, and is articulated with varying degrees of specificity. For instance, Bonnie Steinbock claims that a child has a right to a life that "holds a reasonable promise of containing the things that make human lives good," such as "an ability to experience pleasure, to learn, [and] to have relationships with others."[27] Alternatively, David Archard claims that a child has a right to a life in which they can enjoy a "good number" of the rights articulated within the United Nations Convention on the Rights of the Child (CRC) (1989)[28], which include but extend far beyond the minimal criteria mentioned by Steinbock. In this sense, while all rights-based solutions include what Archard calls a 'birthright claim', or the notion that any child has a right to a standard of living above a certain threshold, exactly *where* that threshold is set is a matter of dispute.

The reliance of rights-based solutions on substantive content rather than comparative judgment can be seen as both a strength and a potential weakness. It is a strength because, in contrast to the alternative approaches, it allows us to provide a consistent and determinate account of when an act of procreation is wrongful in light of its effects on the resultant child. However, it is also a potential weakness because the selection of content might seem arbitrary, or simply geared toward generating our preferred conclusions in nonidentity cases, particularly when there is widespread disagreement about what the content should be. How, then, do we provide the requisite account of children's rights while avoiding the charge of positing an ad hoc solution? I will offer my own account of children's rights in just a moment, though before doing so, I would like to call attention to two general considerations that we should keep in mind when evaluating the tenability of different accounts. First, the higher

[27] Steinbock, 2009, 163.
[28] Archard, 2004, 406.

the threshold is set for what constitutes a minimally decent life, the more cases of procreation will be designated as wrongful, and hence the more restrictive a rights-based account will be in terms of its normative implications. For example, David Wasserman has criticized rights-based solutions on the grounds that they rest "on two questionable propositions: (1) that children are entitled to a life that is more than just worth living, even if they can have no better life; [and] (2) that genetic impairment precludes a life good enough to meet that high standard."[29] He rejects proposition (1) on the grounds that it carries 'disturbing implications', for it will sometimes imply that persons of limited means or in hostile social environments should not have children, while he rejects proposition (2) on the grounds that it overlooks both the extent to which persons with genetic impairments can live flourishing lives, and the extent to which the disadvantages they currently face are socially constructed. I will explain in section 1.5 why (1) is not as disturbing as it initially appears, though I think that (2) expresses something important that a rights-based account should be sensitive to. Given that people with genetic impairments routinely live objectively decent and subjectively enjoyable lives, disability should not be equated with disadvantage, and the total absence of genetic impairment should not be built into our account of what kinds of existences children are entitled to be born into. This is not to say that all genetic impairments are compatible with a minimally decent life—there are stock examples, such as Tay-Sachs or Lesch-Nyhan syndrome, which are clearly not. Rather, it is simply to say that rights-based approaches should not be calibrated so as to proscribe genetic impairments altogether, as in many cases there is no direct correlation between genetic impairment and quality of life.[30]

[29] Wasserman, 2005, 137.

[30] The relationship between disability and quality of life is itself the subject of a sophisticated and burgeoning literature. For two useful collections, see *Disability and Disadvantage*. (Eds.) Kimberley Brownlee and Adam Cureton. (Oxford: Oxford University Press, 2009), and *Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability*. (Eds.) David Wasserman, Jerome Bickenbach, and Robert Wachbroit. (Cambridge: Cambridge University Press, 2005).

One might seek a lower rights threshold in order to accommodate these considerations, though here one runs into a second difficulty: the lower the threshold is set, the fewer cases of procreation will be designated as wrongful, and hence the more permissive that a rights-based account will be in terms of its normative implications. Joel Feinberg, for example, defends a weak rights-based view according to which all children have a right to a 'life worth living' in the sense of being preferable to nonexistence from the perspective of a rational proxy chooser.[31] This is presented as a rights-based view, though it is normatively identical to the PAR in terms of the kinds of existences it permits and proscribes, and is therefore inadequate for the same reasons that the PAR is inadequate: it permits the deliberate creation of lives that are only barely preferable to nonexistence, and thus gives insufficient protection to children's interests.

What we want, then, is an account of children's rights that is sufficiently demanding so as to distinguish a rights-based approach from the PAR, but not too demanding so as to preclude the creation of lives that are clearly minimally decent, including those with mild to moderate genetic impairments. What could this account be? My own proposal is to think in terms of a child's 'right to a decent start'. As the phrase suggests, the right to a decent start includes two main elements: one is a specification of the relevant rights threshold ('decent'), while the other is a specification of the temporal period to which it applies ('start'). The 'decent' in the phrase 'decent start' is meant to reflect a sufficientarian understanding of the kinds existences that children are entitled to be born into. This understanding carves a middle path between more demanding conceptions, such as the view that children have a right to "best start" their progenitors are capable of providing them with[32], and less demanding con-

[31] Feinberg, 1992.
[32] Velleman, 2008, 276. Note that this type of view is not only unsatisfactory insofar as it potentially too demanding, but also in the sense that it is indeterminate, as the 'best' start that a set of progenitors is capable of providing for children will be relative to their capabilities and circumstances. It therefore faces the same problems that plague other maximizing principles, such as Parfit's Q or Savulescu's PB.

ceptions, such as the view that children only have a right to a life that is merely 'worth living'. Of course, what exactly counts as minimally decent is a subject about which people reasonably disagree, though I think we can arrive at a plausible conception by thinking in terms of what Feinberg has described elsewhere as a person's *basic welfare interests*.[33] Basic welfare interests are interests whose satisfaction is normally a necessary precondition of pursuing a life containing valuable projects and pursuits. According to Feinberg, they include

> interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability, the absence of groundless anxieties and resentments, the capacity to engage normally in social intercourse and to enjoy and maintain friendships, at least minimal income and financial security, a tolerable social and physical environment, and a certain amount of freedom from interference and coercion.[34]

Feinberg's list is illustrative rather than definitive—there are certain interests that we might like to omit, such as the interest in the 'normal functioning' of one's body, and others that we might like to add, such as childhood-specific interests in things like access to adequate parental care. However, the important point for now is that the satisfaction of each of these interests is typically necessary for a minimally decent life regardless of one's broader aims or projects. In this sense, they are structurally if not substantively similar to what others have described as 'primary goods'[35] or 'basic capabilities'.[36]

The 'start' in the phrase 'decent start' is meant to reflect a particular understanding of the temporally limited nature of child-centered procreative obligations. Unlike some alternative accounts, which hold procreators responsible for their progeny's welfare throughout the

[33] Joel Feinberg. *Harm to Others, Vol. 1 of the Moral Limits of the Criminal Law*. (New York: Oxford University Press, 1984).
[34] Feinberg, 1984, 37.
[35] Rawls, 1971, 90-95.
[36] Martha Nussbaum. *Women and Human Development: The Capabilities Approach*. (Cambridge: Cambridge University Press, 2000), 78-80.

duration of their lives[37], procreators on the account under consideration are only obligated to provide their progeny with a decent start in life, where 'start' is perhaps best interpreted as 'childhood'. This limitation is rooted in general considerations of personal responsibility, and the assumption that responsibility for personal well-being transfers from procreator to child after a certain period of time. Thus, what all children have a right to on this account is to be born into conditions in which their basic welfare interests can be consistently and reliably satisfied for the duration of their childhood. Accordingly, intentionally conceiving a child amid conditions in which these interests cannot be satisfied violates that child right, and constitutes a wrong to that child.

There are a number of advantages to this account. First, it appears to meet the criteria of demandingness set out above. Given that it focuses on a child's access to a range of positive goods, it is sufficiently demanding to distinguish it from the standard PAR approach, which only focus on whether a child's life is 'rationally preferable' to nonexistence. However, because the goods in question are quite basic, indicating what is necessary for a minimally decent life whatever one's aims or projects, it need not proscribe the creation of lives marked by genetic impairments. Having even a significant genetic impairment does not necessarily entail a less-than-minimally decent life, particularly when one has access to social supports and accommodations.

A second advantage of this account is that it is largely consistent with the principles and norms that govern other parenthood-related rights, and therefore avoids the charge of being posited as an ad hoc solution. The acquisition and maintenance of the right to parent, for example, is usually thought to be conditional on promoting a child's interests above some minimal threshold, and this threshold is typically conceived in sufficientarian terms, focusing

[37] See, for example, Peter Vallentyne. "Equality and the Duties of Procreators" in David Archard and Colin. M. Macleod (eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002). Smolkin also might be read as endorsing this type of view, insofar as he focuses on the goods that persons are entitled to at different 'stages' of their lives. See Smolkin, 1999, 204-207.

on children's basic welfare interests. The notion of a child's right to a decent start simply applies the same reasoning to the right to procreate, and therefore fits neatly with principles we already accept.

Before defending this approach against potential objections, it is worth making one final point regarding my rationalization for adopting it. One might wonder why, given that there are other variations of the third line of response, I have chosen specifically to adopt a rights-based solution to the nonidentity problem. Why not, for example, simply posit a noncomparative conception of harm, and conclude that the acts in nonidentity cases are wrong in light of exposing the child to noncomparatively harmful states? Not only is this strategy capable of offering a person-affecting explanation of wrongdoing, but it also seems to avoid the additional task of articulating and defending a particular account of the content of children's rights.

Now, in one sense, the difference between rights-based and noncomparative harm accounts is more semantic than normative, for if many of children's rights are rights not to be exposed to noncomparatively harmful states, then there will often be significant overlap between the two accounts in terms of their normative implications.[38] Nevertheless, there is still a good reason to prefer the language of rights over the language of harm, and this has to do with the analytic distinction between harming and wronging. Consider first how this distinction maps onto a *comparative* conception of harm. While it is often wrong to make a person comparatively worse off, there are also cases in which these concepts come apart—cases in which a person can be wronged without being made comparatively worse off (e.g. certain

[38] However, rights-based accounts may be more flexible in the kinds of procreative activity they can designate as wrongful. For example, a rights-based account is capable of designating as wrongful procreative acts that result in children who lack access to certain positive goods or opportunities, whereas a noncomparative harm account seems limited to designating as wrongful procreative acts that result in children in noncomparatively harmful states, such as pain, deformity, morbidity, etc. Proponents of noncomparative harm accounts may of course respond by claiming that a state in which a child lacks access to particular good or opportunity is noncomparatively harmful; however, the more that is included under the heading of noncomparative harm, the more that conception drifts away from our ordinary understandings, and the less plausible it ultimately becomes.

instances of exploitation or harmless trespass), and cases in which a person can be made comparatively worse off without being wronged (e.g. losing out in a fair competition). If we were to equate wronging with harming, we would not be able to account for these classes of harmless wrongdoing and non-wrongful harming, leading us to incorrectly designate certain permissible acts as impermissible, and vice versa.

The same point applies with respect to a *noncomparative* conception of harm as well. While it is often wrong to subject persons to noncomparatively harmful states, there are also cases in which these concepts come apart—cases in which a person can be wronged without being put in a noncomparatively harmful state (e.g. again, certain instances of exploitation or harmless trespass), and cases in which a person can be put in a noncomparatively harmful state without being wronged (e.g. having their arm amputated in a life-saving surgery). Once we take note of the distinction between harming and wronging, we realize that what is really doing the work in noncomparative harm accounts is a background notion of wronging. It is not sufficient for proponents of noncomparative harm accounts to simply show that the child in nonidentity cases has been subjected to a noncomparatively harmful state; in addition, they must also explain how those particular instances of noncomparative harming are also wrongful, given that not all such instances are wrongful. Thus, as a response to nonidentity cases, positing a noncomparative conception of harm is a philosophical spare tire. Any noncomparative harm account will have to rely on a prior conception of what constitutes wrongful and non-wrongful instances of noncomparative harming, and insofar as this is the case, we would do better to dispense with such an account and focus directly on the antecedent conception of wronging. A rights-based account does this by stipulating the kinds of minimally decent conditions that children are entitled to be born into, and designating as wrongful procreative acts that result in children whose conditions fall beneath that threshold. Depending on what one takes to be the content of a child's rights, these may be the same procreative acts that a noncomparative harm account would designate as wrongful; however, whereas the latter ac-

count focuses on an extraneous notion of harming, the former account focuses on what *really* makes those acts wrongful, i.e. the violation of the child's rights.

1.5 Objections

Even if we drop assumption (3), and insist that a child may be wronged by a procreative act without being made comparatively worse off by it, vestiges of the nonidentity problem remain insofar as that child's numerical identity is tied to the timing of conception. Parfit points this out by claiming that a child who has his rights violated through a procreative act could not have had *his* rights fulfilled, for his parents could not have had *him* by conceiving under more favorable conditions, but only a better off, different child.[39] If 'ought implies can', the fact of nonidentity might appear to get his parents off the moral hook. After all, if his rights could not possibly have been fulfilled, in what sense could his parents have violated them?

One way of responding to this point is simply to claim that the moral wrong in nonidentity cases consists in creating a child whose rights cannot be fulfilled, something Michael Tooley likens to making a promise you know you cannot keep.[40] However, even this qualified view is open to a number of possible objections, each of which challenges the ascription of rights to prospective children in procreative contexts.

Identifiability

The first objection insists that prospective children do not satisfy a necessary condition of rights-ascription, and therefore cannot be said to have their rights violated through a

[39] Parfit, 1984, 364.
[40] Tooley takes making a promise you cannot keep to be just as wrong as breaking a promise that you have already made, suggesting that creating a child whose rights cannot be fulfilled is just as wrong as violating the rights of a child who already exists. See *Abortion and Infanticide*. (Oxford: Clarendon Press, 1982), 270-273. See also Woodward, 1986, 815.

procreative act. David Heyd notes that in our usual understanding, rights seem to be linked to metaphysically identifiable people who are the subjects of those rights, and the recipients of their correlative duties.[41] For instance, in the case of Smith, we are able to pick out a particular person who is the subject of a right not to be discriminated against, and thus a particular person to whom a duty of non-discrimination is owed. It then makes sense to say that *Smith's* rights were violated, because the airline failed to perform a duty owed specifically to Smith as a fully identifiable person.

Prospective children, however, are not identifiable in this way. As Michael Bayles points out, there are deep epistemic limitations to identifying the prospective children who we might produce, as the designator 'prospective child' may refer to *any* of the possible children we might produce depending on which sperm fertilizes which egg.[42] In this sense, it is not clear *to whom*, exactly, our procreative duties are owed. But as Heyd makes clear, the problem of identifiability runs even deeper than this. It is not only that the identities of prospective children are beyond human knowledge; they are also wholly dependent on human choice.[43] Prospective children are not concrete individuals 'waiting in the wings', so to speak, but depend for their identity on the human choices that bring about their conception. Ascribing rights to prospective children might then seem paradoxical, for if the identity of a prospective child depends on our choices, how can those same choices be constrained by a consideration for *its* rights? Heyd concludes that they cannot be, and that to apply rights to procreative choices is to ignore their *sui generis* nature.[44]

Is the identifiability objection sound? Perhaps partly. It is true that among the prospective children implicated by our procreative choices, there is no numerically identifiable

[41] David Heyd. "The Intractability of the Nonidentity Problem" in Roberts and Wasserman (eds.), 13.
[42] Michael Bayles. "Harm to the Unconceived," *Philosophy and Public Affairs*, 5(3) (1976), pp. 292-304, 300. On this point, see also Nils Holtug. "On the Value of Coming into Existence," *Journal of Ethics*, 5(4) (2001), pp.361-384, 367.
[43] Heyd, 1992, 36.
[44] Heyd, 2009, 13.

person to whom we can ascribe a right, and thus no *particular* person to whom we can owe a correlative duty. But this fact is only normatively significant if we accept Heyd's point that rights must be linked to metaphysically identifiable people. This point seems false, however, and oddly out of touch with common understandings of how rights function. On one plausible understanding, rights do not attach to people's numerical identities, but rather to the *kinds* of creatures they are, and the positions they occupy in relation to others. What is relevant to the ascription of rights, then, is not a person's identity, but rather their relevant type-description, or the "normatively significant [set] of characteristics"[45] that indicates what kind of creature they are, and what kinds of interests they have. To see this point more clearly, consider once again the case of Smith. It is true that the individual Smith had a right not to be discriminated against, and that by refusing to sell him a ticket, the airline violated *Smith's* right. But Smith did not hold this right by virtue of being *Smith*, i.e. Smith, born June 17, 1952, on the basis of a prior conception that brought together a particular combination of Mr. and Mrs. Smith's reproductive gametes. Rather, Smith held this right on the basis of particular characteristics indicative of his *type*, i.e. a citizen who stands in a particular relation of equality to others. This right is also held by Jones, Brown, Wilson, and all the other citizens who share those particular characteristics, and the airline would have violated their rights in the same way by refusing to sell them tickets.

The unidentifiability of prospective children should not prevent us from thinking about them as rights-holders to whom particular duties are owed, for we still know the *kinds* of creatures they will become, and thus the kinds of interests they are likely to have. Regardless of their numerical identities, all children have certain interests *qua* children, the satisfaction of which is necessary for them to lead minimally decent lives. Thus, our procreative du-

[45] Kumar, 2003, 111. For a similar point, see also Jeffrey Reiman's distinction between 'properties' and 'particulars', in "Being Fair to Future People: The Nonidentity Problem in the Original Position," *Philosophy and Public Affairs,* 35(1) (2007), pp.69-92, 83.

ties are owed to *all* the prospective children who we may produce, *whoever* they turn out to be. To this end, their numerical identities are not morally important.

Nonexistence

Even if we pursue this line of reasoning and regard prospective children as a *class* of persons with antecedently identifiable interests, their eligibility as rights-holders may be attacked from a different angle. In the literature surrounding intergenerational justice, some commentators have denied that rights can be ascribed *now* to members of future generations who do not currently exist.[46] The thought behind this claim is that the possession of rights necessarily presupposes the existence of the being who possesses them, such that "The ascription of rights is properly to be made [only] to actual persons—not possible persons."[47] On this view, members of future generations will come to have rights if and when they exist, but they do not *currently* possess rights that impose correlative obligations on members of the present.

A similar point might be made in the smaller-scale context of procreation. While prospective children will certainly come to have rights if and when they exist, their present nonexistence might be thought to imply that they cannot *currently* possess rights that impose constraints on our procreative behavior. At the very least, any claim to the contrary would seem to rely on the controversial metaphysical assumption that nonexistent entities can possess real properties, and to the extent that we reject such an assumption, we may be lead to reject the notion that prospective children have rights.

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[46] See Wilfred Beckerman and Joanna Pasek. *Justice, Posterity, and the Environment: Environmental Ethics for a New Millennium.* (Oxford: Oxford University Press, 2001), esp. chapter 2; Richard De George. "The Environment, Rights, and Future Generations" in Kenneth Goodpaster and K.M. Sayre (eds.) *Ethics and Problems of the 21st Century*. (Notre Dame: Notre Dame University Press, 1979); and Ruth Macklin. "Can Future Generations Correctly be said to Have Rights?" in Ernest Partridge (ed.) *Responsibilities to Future Generations*. (Buffalo: Prometheus Books, 1981).

[47] Macklin, 1981, 151-152.

One possible result of accepting the nonexistence objection is that we are lead back to the first line of response to the nonidentity problem: because prospective children cannot possess rights, it might follow that we therefore have no obligations toward them. However, not all theorists draw this conclusion. Wilfred Beckerman and Joanna Pasek deny that members of future generations can possess rights, though simultaneously insist that "…we have a moral obligation to take account of the *interests* of future generations in our policies."[48] There are two important features of this type of view. The first is that it rejects definitional correlativity between rights and obligations—that is, it assumes that that we can have obligations toward particular persons even if they do not possess corresponding rights against us.[49] The second is that it holds that the *eventual* possession of interests by members of future generations is sufficient to generate obligations in members of the present. In other words, since we can be reasonably certain about the kinds of interests future persons will have if and when they come to exist, we have an obligation to act in ways *now* that will promote or at least not impede their enjoyment of those interests in the future.

There is nothing mysterious in Beckerman and Pasek's claim that the eventual possession of interests by members of future generations can generate obligations in members of the present. Because the enjoyment of those interests can be thwarted in advance by actions we take now (i.e. resource depletion, the emission of greenhouse gases, etc.), it is reasonable to think that we can have present obligations that are grounded in the interests of people who will exist in the future. However, the exact same line of reasoning could also be deployed to support the notion that future people—including future children—have rights.[50] As noted previously, one interpretation of the claim that prospective children have rights is that they

[48] Beckerman and Pasek, 2001, 28. Emphasis added.
[49] Onora O'Neill is a prominent defender of this view. For an explication of this view in relation to children's rights, see "Children's Rights and Children's Lives," *Ethics*, 98(3) (1988), pp. 445-463.
[50] Simon Caney takes this approach toward the nonexistence objection in "Human Rights, Responsibilities, and Climate Change" in Charles R. Beitz and Robert E. Goodin (eds.) *Global Basic Rights*. (Oxford: Oxford University Press, 2009), 234-236.

possess rights *now*. This interpretation relies on the metaphysical premise that rights can be ascribed to nonexistent persons, and is thus susceptible to the nonexistence objection leveled by Beckerman and Pasek. However, another interpretation of the claim that prospective children have rights is simply that they *will* possess rights in the future.[51] This interpretation does not assume that nonexistent persons can possess rights, nor does it assume that rights can somehow float free of rights-holders. Rather, it simply holds that future persons will have rights in the future, and because their enjoyment of those rights can be thwarted in advance by actions we take now, we are under a correlative obligation to respect those rights by acting in ways that will not jeopardize their enjoyment if and when their bearers come to exist.

The present nonexistence of prospective children does not threaten this latter interpretation of their rights. All prospective children that become actual will have rights to the satisfaction of certain interests, and those interests may be thwarted in advance by conditions that are either intrinsic or extrinsic to their creation. Thus, to claim that prospective children have rights is simply to claim that we are under a correlative obligation to pursue our procreative projects in ways, and amid circumstances, that are conducive to their enjoyment of those rights. Contrary to the charges of the nonexistence objection, this claim does not rely on contentious metaphysical assumptions, nor does it stretch or unduly tax our ordinary understandings of the nature and function of rights.

[51] Robert Elliot refers to these two interpretations as the Non-Concessional View and the Concessional View respectively, according to stance they take on the metaphysical premise that "there cannot be rights whose bearers do not yet exist." See "The Rights of Future People," *Journal of Applied Philosophy*, 6(2) (1989), 159-169, 160. A view similar to the Concessional View was defended earlier by Joel Feinberg, who uses the alternative label of 'contingent rights'. See "The Rights of Animals and Unborn Generations" in *Rights, Justice, and the Bounds of Liberty*. (Princeton: Princeton University Press, 1980).

Waiving of Rights

Suppose then that it makes sense to think of prospective children as (prospective) rights-holders, and that their rights may be violated when they are born into conditions in which their basic welfare interests cannot be satisfied. A further problem arises from the fact that such children may not regret the rights violation insofar as their existence depended on it occurring. Parfit makes this point by citing a letter from *The Times*, written in response to a British politician who welcomed the fact that there had been fewer teenage pregnancies than the previous year. The man who wrote the letter had been born to a fourteen-year-old mother, and while he *did* have a difficult upbringing, he now had a life well worth living, and balked at the suggestion that it would have been better had he never existed. According to Parfit, this man's reaction undermines rights-based objections to his mother's procreative conduct. Even if we claim that his mother violated his rights by bringing him into certain adverse conditions, he might then decide to *waive* those rights to the extent that he is happy to be alive.[52] The possibility of waiving rights might seem to diminish the overall significance of rights-violations in procreative contexts. After all, in what sense is a rights violation objectionable if it is not regretted, and is even celebrated, by the supposed victim?

There are two different ways that we might go about responding to the waiving of rights objection. The first is to challenge the significance of a child's lack of regret by pointing to an intuitive asymmetry between the benchmarks associated with starting and continuing lives. According to some theorists, we tend to assign a higher benchmark to starting lives than we do to continuing them, such that we may judge our lives worth continuing with certain impairments, but also think that it is better not to start a life with the same impairments.[53] For example, David Benatar notes that, "while most people think that living life without a limb does not make life so bad that it is worth ending, most (of the same) people also think

[52] Parfit, 1984, 364.
[53] See Benatar, 2006, 22-28; Velleman, 2008, 273-274; Steinbock, 2009, 165-166.

that it is better not to bring into existence somebody who will lack a limb."[54] This asymmetry might be thought to undermine the significance of a child's lack of regret, for the fact that a child (or child-as-adult) judges their life to be worth continuing does not necessarily tell us anything about whether it was permissible to initiate in the first place. David Velleman appears to draw this conclusion, claiming that "we can hardly justify initiating a life on the mere grounds that there would not immediately be reason to terminate it."[55]

Of course, this response depends on an intuitive judgment that is not universally shared, and thus may be open to an easy counter-response: perhaps the fact that life would still be worth continuing after losing a limb simply indicates that starting a life without a limb would not be so bad.[56] And if we take the benchmarks associated with starting and continuing lives to be symmetrical in this way, we might then consider a child's lack of regret to be centrally important, as the fact that a child judges his life to be worth continuing might suggest that it was permissible to initiate in the first place, despite the fact that his rights have been violated.

A second and much stronger response to the waiving of rights objection is to challenge its underlying notion of consent. Notice that the waiving of rights objection turns crucially on the notion of consent, or the idea that right-violating conduct can be rendered permissible by receiving the free consent and participation of the person(s) whom it affects. This notion is more or less straightforward when applied in a *prospective* manner, to acts that are going to happen in the future. For instance, while my right to bodily integrity prevents you from permissibly cutting me with a knife, I might choose to waive that right with respect to you by commissioning you to perform cosmetic surgery on my nose. Assuming that I was not

[54] Benatar, 2006, 23.
[55] Velleman, 2008, 274.
[56] Tim Bayne holds this view, arguing for parity between the benchmarks associated with starting and continuing lives. See "In Defense of Genethical Parity", in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010).

coerced, deceived, and had adequate knowledge of the relevant facts and risks, I have meaningfully consented to the surgery, and you do no wrong by cutting. However, applied *retrospectively*, the notion of consent seems to carry significantly less, if any, normative weight. Suppose that you find me unconscious one day and perform a rhinoplasty without any prior agreement to the surgery. It is true that I may 'waive' my right by consenting retrospectively to the surgery; perhaps I am happy with my new nose and decide not to press charges against you.[57] But it is dubious to claim that this somehow legitimates your action. At the time of the act, you knew that I had a right that would be violated by the surgery, and you could not have known that I would later consent to having that right violated. In this sense, you are lucky to have evaded culpability for your act, but that does not make it morally permissible.[58]

To the extent that the waiving of rights objection turns on a notion of retrospective consent, it faces similar problems. First, it is not clear that a child's retrospective consent carries the same normative weight as prospective consent, and we can certainly imagine non-procreative cases in which it appears not to. For instance, a child may suffer a neglectful and abusive childhood, but later be happy to give his consent to it insofar as it 'made him who he is today'—yet it would seem dubious to claim that this somehow legitimates the original wrongs of neglect and abuse. Moreover, even if retrospective consent *could* legitimate an otherwise wrongful act, it is not then necessarily permissible to wrong a child on the assumption that he will later consent to having been wronged. Taken together, these points significantly undermine the waiving of rights objection, and suggest that the possibility of a child

[57] This is not to suggest that refraining from pressing charges for a crime necessarily indicates retrospective consent. People may refrain from pressing charges for a variety of reasons, including inconvenience, embarrassment, fear of retaliation, or fear of reliving the experience, none of which indicate the retrospective consent of the victim.

[58] The same point undermines Parfit's own analogy about marriage: "Suppose that I have a right to privacy. I ask you to marry me. If you accept, you are not acting wrongly, by violating my right to privacy. Since I am glad that you act as you do, with respect to you I *waive* this right." (1984, 364) In Parfit's example, the infringement on privacy is permissible because it was *prospectively* consented to. It would be a much different story if you moved into Parfit's flat without prior discussion, assuming that he might ask you to marry him in the future.

retrospectively waiving their birthrights is not a decisive factor in determining the permissibility of the rights violation.

Lack of Legitimate Complaint

A related but much deeper worry is that even if a child did not retrospectively waive their birthrights, and were to protest their violation, they would nevertheless lack a legitimate complaint against their progenitors insofar as the only alternative to having their rights violated was nonexistence. This has often been the verdict in so-called 'wrongful life' torts, in which a child (or their representative) claims damages against their parents or others for bringing them into a miserable, disadvantaged, or unwanted life.[59] Courts have typically rejected such claims on the grounds that they depend on an impossible comparison between the value of nonexistence relative to existence, which does not allow for the establishment of injury on the part of the child. As one judge wrote in response to a case in which a doctor was sued for permitting the birth of a severely disabled child,

> [S]ympathy for a handicapped child and his parents should not lead us to ignore the notions of responsibility, causation, and damage that underlie the entire philosophy of our system of justice. It would be unwise—and, what is more, unjust—to permit the plaintiff to recover damages from persons who caused him no injury.[60]

Now in one sense, this common objection to wrongful life torts simply begs the question against rights-based solutions, as it relies on the tendentious 'no worse off' argument that such solutions reject. Conceiving of injury as the comparative worsening of one's condition, it deduces that the child has not been injured in wrongful life cases because it cannot be shown to have been made worse off than it otherwise would have been (as such a judgment

[59] For a useful philosophical overview of wrongful life torts, see Bonnie Steinbock. "The Logical Case for 'Wrongful Life'," *Hastings Center Report*, 16(2) (1986), pp. 15-20.
[60] Excerpt from New Jersey Supreme Court Justice Schreiber's dissenting opinion in *Procanik v. Cillo* (1984), quoted in Steinbock, 1986, 18.

would entail an allegedly impossible comparison between the value of a defective life and no life at all). But this is the very premise that rights-based solutions seek to discredit. Even if a child cannot be made comparatively *worse off* by a procreative act, they may nevertheless be *wronged* by being brought into conditions in which their rights-based interests are doomed to non-satisfaction. Viewed in this way, such a child *does* appear to have a legitimate moral complaint against those responsible for their birth: that their rights have been violated, or that they have been born into conditions in which their rights cannot be fulfilled.

In another sense, however, this common objection to wrongful life torts might indicate a much more problematic notion for rights-based solutions—namely, that there are cases in which a person lacks a legitimate complaint for having their rights violated. As an example of a case that might fit this description, consider the following scenario, based on one originally introduced by Parfit.[61] Suppose that you are unconscious after a car accident. Your arm, currently lodged under one of the vehicles, must be amputated imminently in order to save your life. Fortunately, a surgeon happens to be on scene to perform the operation. Knowing what he must do, he successfully amputates your arm, thereby saving your life.

The accident case appears to be one in which the violation of a person's rights does not affect the permissibility of the act in question. It is true that by amputating your arm without your consent, the surgeon violates a number of your rights, including your right to bodily integrity. However, given the available alternatives, the violation of that right does not provide a strong reason against amputating your arm. If the surgeon does *not* amputate your arm, your rights will be respected, but only at the much higher cost of your life. In this sense, we might say that even though the surgeon has violated your right to bodily integrity, you lack a legitimate complaint against him insofar as you would have died otherwise.[62]

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[61] See Derek Parfit. "Comments," *Ethics*, 96(4) (1986), pp. 832-872, 855.

[62] This claim may be disputed in certain cases. For instance, there have been a number of cases in which Jehovah's Witnesses have refused medically necessary blood transfusions on religious grounds. Performing a blood transfusion on an unconscious Jehovah's Witness might then leave them with a

An analogy with the accident case might undermine the significance of rights violations in procreative contexts. Just as your rights were violated by the surgeon amputating your arm without your consent, so too is a child's rights violated when he is born into conditions in which his basic welfare interests cannot be satisfied; and just as you lack a legitimate complaint against the surgeon insofar as your life depended on him violating your rights, so too does a child lack a legitimate complaint against his parents insofar as *his* life depended on them violating *his* rights. If sound, this analogy serves as a compelling *reductio ad absurdum*, for if we want to claim that a child *does* in fact have a legitimate complaint against his parents, we seem forced to take on board the more counterintuitive claim that you also have a legitimate complaint against the surgeon, and that his act was therefore impermissible.

However, there are two important differences between the procreative context and the accident case that preclude such an analogy, and which by extension undermine the lack of legitimate complaint objection as a whole. The first difference involves the consequences of not acting, or of refraining from engaging in the right-violating conduct. By not acting in the accident case, the surgeon allows you to die, which results in an even greater harm than the rights violation, and which may also violate a general duty of easy rescue. However, by not acting in the procreative context, there is no comparable loss: the parents would not be allowing a greater harm to occur, and, assuming that there is no duty to procreate (at least not one owed to the child who would result)[63], they would not be violating any duties owed to particular people. Thus, while there are strong reasons in favor of acting in the accident case

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legitimate moral complaint even if they would have died otherwise (perhaps, from their perspective, death would have been preferable to violating their religious doctrine).

[63] Some theorists have argued on consequentialist grounds that there *is* in fact a duty to procreate: that if there are impersonal reasons *against* creating miserable people, then there are also impersonal reasons *in favor* of creating happy people. For a recent defense of this view, see Ingmar Persson. "Rights and the Asymmetry Between Creating Good and Bad Lives" in Roberts and Wasserman (eds.). Alternatively, others have argued that there may be a limited duty to procreate owed to third parties who may benefit from the creation of additional people. For an exploration of this view, see Anca Gheaus. "Could There Ever Be a Duty to Have Children?" in Sarah Hannan, Richard Vernon, and Samantha Brennan (eds.) *Permissible Progeny? The Morality of Procreation and Parenting.* (New York: Oxford University Press, 2015).

(in light of the consequences of *not* acting), there are only reasons *against* acting in the procreative case, suggesting that the violation of a child's birthrights is not equivalent to the violation of your right to bodily integrity.

However, a second and arguably more important difference between the two cases involves the causal relationship between the right violator(s) and the circumstances of the rights violation. In the accident case, you were by chance put in a position where the only available options were to have your arm amputated or to die, a circumstance that apparently leaves you with no legitimate complaint against the surgeon for violating your rights. However, in the procreative context, the parents are responsible for *creating* the comparable circumstance. By conceiving amid conditions in which their child's rights could not be satisfied, they electively *put* him in a position where he lacks a legitimate complaint against them, insofar as the only alternative to having his rights violated was to never exist. A truly analogous accident case would then be one in which the surgeon was responsible for putting you in a position where the only available options were to have your arm amputated or to die—perhaps he was in the other vehicle and deliberately crashed into you to perform a surgery. However, in this revised accident case, it would seem odd to attach significance to the fact that you lack a legitimate complaint against the surgeon, for he is responsible for *putting* you in that compromised position. Had he acted with due consideration for your interests, you would not have been in a circumstance where the best available option was to have your arm amputated.

In a similar vein, it seems misguided to attach moral significance to a child's apparent lack of complaint against his parents. Had his parents acted with due consideration for his interests (or, more accurately, the interests of whatever child they might have created) he would not have been put in a position where having his rights violated was the best available option for him. The fact that he would not have existed otherwise should not get his parents off the moral hook, for they still appear to have done wrong—not only for creating a child

whose rights could not be fulfilled, but also for putting him in a position where the cost of protesting that injustice is decrying his own existence.

1.6 The Child's Right to a Decent Start

I hope to have demonstrated that the fact of nonidentity does not vindicate, nor insulate from moral criticism, procreative acts that result in children whose basic welfare interests cannot be satisfied: the fact that such children would not have existed otherwise does not affect their status as rights-holders, nor does it affect the impermissibility of the rights violation, and arguments to the contrary have so far been unpersuasive. However, while an appeal to rights allows us to account for the moral wrong in nonidentity cases, the fact remains that *preventing* the moral wrong requires preventing the very existence of the child who would have been wronged. As an action-guiding principle, this implies the following rights-based directive for prospective procreators:

> *Decent Start (DS):* of all the possible children that a set of procreators might create, they may only permissibly create those children who stand a reasonable chance of having a decent start in life.

DS is meant to specify the role that children's interests play in limiting the scope of the moral right to procreate. I want to conclude this chapter by offering a few general remarks about DS, particularly concerning the position it occupies within a broader account of procreative justice.

First, we should note that DS indicates a necessary rather than sufficient condition of morally permissible procreation. All procreative acts that do not satisfy DS are presumptively impermissible, though it does not then follow that all procreative acts that satisfy DS are pre-

sumptively permissible, as such acts may still be impermissible for other reasons, including the effects they have on third parties. For instance, a set of procreators may satisfy DS by bringing a child into conditions in which her basic welfare interests are satisfied, though in order to determine the permissibility of their procreative act, we also have to take into account a broader range of potentially competing interests, including the interests of persons affected by the introduction of new members into the community, and the interests of children currently in need of adoption. In this sense, DS indicates just *one* type of moral constraint on the right to procreate; there may be others that further limit its scope.

Second, we should also clarify the role of DS and its relationship to the other principles that are commonly discussed in the literature surrounding procreative ethics. DS is a principle that is meant to govern the different-number choice of whether or not to have a child. Since it imposes a set of restrictions on the kinds of conditions under which it is permissible to do so, we might refer to it as a *principle of restriction*. Principles of restriction can be contrasted with *principles of selection*, or principles that are meant to govern same-number choices between different possible procreative options. For example, Parfit's Q and Savulescu's PB are both principles of selection, as their role is to tell us *which* child to create out of the multiple possible children that we could create—they do not on their own impose restrictions on procreation or forbid us from procreating if the available options are sufficiently bad. DS can in theory be supplemented by a principle of selection, though as a principle of restriction, it always takes priority over selection principles. For instance, one might consistently endorse DS *and* PB, holding that one has a moral obligation to create the child who has the best chance of the best possible life *out of the possible children whose basic welfare interests are likely to be satisfied.* In this case, DS serves the function of specifying the eligible procreative options to which PB applies, though if there are no available options that satisfy the conditions of DS, then PB will not come into effect.

Third, we should take note of a built-in limitation of DS. As formulated above, DS only impels procreators to limit their procreative activity to instances in which the resultant child will stand a *reasonable chance* of having their basic welfare interests satisfied. The inclusion of the phrase 'reasonable chance' is meant to account for the fact that procreators are usually in an epistemically compromised position: they cannot always know at the time of conception how a particular procreative act will turn out, or how the environment the child is born into might change between the time of conception and birth. Given this limited knowledge, all that can be expected of procreators prior to conception is to conduct an honest assessment of the likely outcome of their possible procreative act, and to only proceed in cases where the resultant child can reasonably be expected to have a decent start in life.[64] The operative notion of 'reasonable' here is admittedly vague and open to interpretation, though attempts to specify it with a greater degree of precision risk rendering it arbitrary (e.g. attempting to determine 'reasonable' probabilities). It is perhaps better, then, to leave this notion somewhat indeterminate, even if it means there will sometimes be disagreement about whether a particular procreative act is consistent with the dictates of DS.

Finally, we should take note of some possible qualifications to DS, and some hard cases in which it is not immediately clear what DS requires. In its most plausible iteration, DS is a strong *pro tanto* principle, or a principle that carries significant moral weight, but is not immune to being overridden in light of competing considerations. There are at least three types of cases in which competing considerations may weigh against the observance of DS, or, to put it in slightly different terms, three types of cases in which the non-observance of DS may be considered excusable or justifiable. The first type of case involves instances in which

[64] A corollary of this requirement might be the imposition of a duty to actively seek out information about the likely outcomes of a procreative act. For example, DS might place procreators under a moral obligation to undergo pre-conception genetic testing to learn about their risk of passing on certain life-limiting congenital disorders. This is in contrast to the claims of commentators like Simo Vehmas, who insists that "Parents have a prima facie right to remain in ignorance concerning their genetic make-up." See Simo Vehmas. "Is it wrong to Deliberately Conceive or Give Birth to a Child with Mental Retardation?" *Journal of Medicine and Philosophy*, 27(1) (2002), pp. 47-63, 59.

the creation of additional children serves an important public good, or averts a significant public harm.[65] Imagine, for example, a case of massive depopulation in which the creation of additional children is necessary for the preservation of the species, even though the children who are created will likely be born into sub-threshold conditions. In this type of case, it is plausible to argue that the violation of DS is justified in light of the immense value that preserving the species has for existing persons.[66] Notice, however, that the plausibility of the argument in this case stems in large part from the enormously high stakes involved. As the stakes become lower, and the public goods/harms in question less salient, it will be less plausible to argue that the promotion of public goods or aversion of public harms justifies the non-observance of DS.

The second type of case that might give us pause are cases of non-deliberate conception that can reasonably be expected to yield a child whose basic welfare interests will go unsatisfied. A strict interpretation of DS may require the woman to terminate the pregnancy in such cases, as this is the only way to avoid wronging the child who would otherwise result. However, there are good reasons to resist this implication, at least on the basis of the arguments provided here. The first reason is because any moral requirement to terminate a pregnancy depends on the moral permissibility of abortion, and there has not been sufficient space to argue for that claim here—it would therefore be premature to infer a duty to abort from the specifications of DS alone. However, even if abortion *were* shown to be morally permissible under the circumstances, a moral *requirement* to abort an existing fetus may still be excessively harsh or unreasonably demanding. This is because abortions are not costless procedures, but often involve non-negligible physical and psychological costs for the women who undergo them, many of whom develop strong emotional attachments to their fetuses *in*

[65] See Archard, 2004, 18-20.
[66] Samuel Scheffler's recent writing on the importance of the 'collective afterlife' may provide the resources for such an argument. See *Death and the Afterlife*. (Ed.) Niko Kolodny. (Oxford: Oxford University Press, 2013).

utero.[67] Positing a moral requirement to terminate a pregnancy may be insufficiently attentive to these costs, and the more complicated moral picture that emerges once conception has already occurred. However, one conclusion that *can* be drawn on the basis of DS is that procreation is a morally significant endeavor, and that great care should be taken to ensure that conception *is* achieved deliberately and in a way that is sensitive to the interests of the child who may eventually emerge. In this sense, an accidental conception resulting from contraceptive failure should be viewed and treated much differently (and more leniently) from a moral point of view than an accidental conception resulting from reckless indifference to the possible consequences of heterosexual intercourse.

The third and final type of case that might give us pause is also the hardest, and involves cases in which the inability to meet the conditions of DS stems from factors that are largely beyond the control of the procreators. As a component of procreative justice, DS impels prospective procreators to only procreate in ways, and amid circumstances, that are conducive to the resultant child's enjoyment of her basic welfare interests. This principle offers a reasonable level of protection to children's interests, and is motivated by the view that it is unfair for individuals to pursue their own procreative interest at the expense of the basic interests of child who results. However, there will often be cases in which the inability to satisfy a child's interests is not due to the prior actions or choices of the procreators themselves, but rather to factors that are beyond their control, such as unjust social arrangements that have resulted in poverty and limited life chances. Requiring individuals to forgo procreation in such cases might seem like adding insult to injury, for not only are they disadvantaged due to factors beyond their control, but they would also then be precluded from pursuing an important and potentially life-altering project.[68]

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[67] Note that this point is not restricted to women: men may also develop emotional attachment to a fetus *in utero*, and may also suffer significant psychological costs as a result of an abortion.
[68] For an expression of this worry, see Wasserman, 2005, 137-138.

While it is clear that we should condemn and work to rectify whatever social injustices put persons at such a disadvantage, it is far less clear what morality requires of persons in those situations. On the one hand, they are not (by stipulation) responsible for their inability to satisfy DS, so it might seem reasonable to conclude that they should not be held responsible for the violation of DS—perhaps responsibility transfers to the persons or collective bodies that are initially responsible for their poor condition. On the other hand, however, procreation is still a choice, and it is not unfathomable that individuals would retain responsibility for that choice when it is made consciously and in full view of the consequences. After all, the scope of morally permissible action often widens and contracts according to the actions of others, including others' unjust actions.[69] While this sometimes affects our ability to permissibly pursue our interests or projects, it does not necessarily give us a free pass to renege on our moral responsibilities.

A full elucidation of DS would have to sort out these worries, and sorting them out would almost certainly require delving deeper into more general debates concerning the nature and limits of moral responsibility—a task that cannot be undertaken here. Suffice it to say, then, that DS can be calibrated to permit *or* forbid procreation in circumstances of unchosen disadvantage. Those who ascribe significant weight to the interest in procreating may be more inclined to view the realization of that interest as sufficiently important to justify the infringement of DS in those circumstances, while those who ascribe less weight to that interest may be more inclined to view them as instances of bad moral luck.

[69] To take a rather simple example: imagine that the most convenient route to your child's school winds through a dangerous neighborhood frequented by gangs and drug dealers, who routinely intimidate and assault passers-by. Your inability to safely send your child to school via this route is due entirely to the unjust actions of others, though this does not relieve you of responsibility for the consequences if you decide to send your child down that route anyway. In this instance, others' actions have regrettably made an otherwise permissible action impermissible, and morality requires that you adjust your behavior to ensure your child's safe passage (i.e. showing him a safer route or driving him to school), even if this means sacrificing convenience.

1.7 Conclusion

In this chapter I have attempted to identify the role that children's interests play in limiting the scope of the right to procreate. This task was initially complicated by the nonidentity problem, which holds that an act cannot harm a person if that person has a life worth living and would not have existed had that act not taken place. This problem has been taken by many to imply that procreation cannot be wrongful in light of its effects on the resultant child, and, *ipso facto*, that children's interests cannot support moral limits on the right to procreate. However, I argued that an appeal to rights gets around this problem by accounting for the moral wrong in nonidentity cases without insisting that the child has been made comparatively worse off. Even if a child cannot be made worse off by being brought into existence, they still may be *wronged* by being born into conditions that fall below a minimally decent threshold to which all children are putatively entitled. The fact that the child (i) cannot be identified, (ii) did not exist prior to the procreative act, (iii) may not regret the rights violation, and (iv) would not have existed otherwise, does not affect their status as a rights-holder, nor does it affect the impermissibility of the rights violation. The procreators have still done wrong by bringing their child into sufficiently adverse conditions, and what is more, they have done wrong *to* that child. Thus, a rights-based solution is able to account for the moral wrong in nonidentity cases while preserving the intuition that it is the resultant child who has been wronged.

The normative upshot of a rights-based solution is an action-guiding principle that impels procreators to only procreate in ways, and amid circumstances, in which the resultant can be reasonably expected to have their basic welfare interests satisfied. I have labeled this principle the *Decent Start (DS)* principle and have clarified its role within a broader account of procreative justice—in particular, I specified that it is meant to govern the 'different number' choice of whether to have a child, that it only proscribes procreative acts that can be rea-

sonably expected to result in children whose basic welfare interests will go unsatisfied, and that it is best interpreted as a strong *pro tanto* principle that may be overridden in certain cases by competing considerations. However, DS indicates only *one* moral constraint on the right to procreate, and a full theory of procreative justice will have to determine how the right to procreate ought to be balanced against the broader range of third party interests that are implicated by people's procreative behavior. This task will be undertaken primarily in Chapters Four and Five. In the following two chapters, I continue the focus on procreators and their progeny by exploring the relationship between procreation and parenthood, particularly, whether the act of creating a child generates rights and/or obligations to parent that child.

Chapter Two
Procreation and Parental Rights

2.1 Introduction

Once a child is born it requires, in virtue of its dependent and vulnerable nature, to be parented by at least one competent adult. Should the persons who brought the child into existence also be the persons who act as that child's parents? In the present and following chapter, I explore the moral relationship between procreation and parenthood by addressing the following two questions:

(1) Does causing a child to exist through procreation generate a special *right* to parent that child?

(2) Does causing a child to exist through procreation generate a special *obligation* to parent that child?

In the existing literature surrounding the morality of parenthood, many theorists have treated these questions as two sides of the same coin, assuming that the kinds of considerations that serve to ground parental rights are the same kinds of considerations that serve to ground parental obligations.[1] On this view, if causing a child to exist through procreation is sufficient to generate a special right to parent that child, then it is also sufficient to generate a special obligation to parent that child as well. However, as I will demonstrate over the course of the next two chapters, this 'parental package'[2] view is in fact false. While procreation plays an im-

[1] This view is typified by Tim Bayne and Avery Kolers, for example, who assume that "insofar as parenthood brings rights and responsibilities, it brings them *together*—that is, one does not get all the rights and none of the responsibilities, and vice versa." See Tim Bayne and Avery Kolers. "Towards a Pluralist Account of Parenthood," *Bioethics*, 17(3) (2003), pp. 221-242, 223.

[2] The term 'parental package' was coined by David Archard to refer to the view (which he rejects) that "both parental obligations and rights with respect to any particular child somehow come together as a whole 'package'." See David Archard. "The Obligations and Responsibilities of Parenthood" in David

portant role in the generation of both parental rights and obligations, the precise feature of procreation that gives rise to parental rights is not the same feature that gives rise to parental obligations. This means that, in certain cases of procreation, parental rights and obligations come apart: one can have a presumptive right, but no obligation, to parent a child one has played a role in creating, and one can have an obligation, but no presumptive right, to parent a child one has played a role in creating. As I will go on to demonstrate, clearly distinguishing the sources of parental rights and obligations is indispensible to resolving a wide range of procreative conflicts, including cases in which there is disagreement between different parties about who is entitled to parent a child (e.g. surrogacy disputes), as well as cases in which there is disagreement between different parties about who is responsible for parenting a child (e.g. cases of unwanted progeny).

I begin in the present chapter by considering whether causing a child to exist through procreation generates a special right to act as that child's parent. In Western societies, it is widely taken for granted that, so long as they meet a minimal threshold of parental adequacy, individuals are entitled to parent their biological children. This entitlement was also more or less assumed in the account of the right to procreate stipulated in the introduction, according to which the right to procreate is grounded in the strong interest that adults have in developing intimate parental relationships with children. However, as Anca Gheaus has recently argued, the philosophical justification of this right is far from clear, for while existing theories of parental rights explain why it is legitimate for adults to exercise certain rights over children in general, they do not on their own explain how adults come to acquire those rights over specific children.[3] What is needed, then, is a supplementary explanation of why individ-

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Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010), 106.

[3] Anca Gheaus. "The Right to Parent One's Biological Baby," *Journal of Political Philosophy*, 20(4) (2012), pp. 432-455.

uals who have a right to parent in general can also be thought to have a special right to enter into parental relationships with their biological children.

In this chapter, I argue that such an explanation is provided by a principle of genetic self-ownership, or the idea that individuals have ownership rights, or at least something resembling ownership rights, over their reproductive gametes. This principle does not imply the proprietarian thesis that procreators own their biological children (or so I will argue), but rather that they have a presumptive though defeasible right to enter into parental relationships with the children that have resulted from their reproductive gametes. I argue that this account not only provides a plausible explanation of why individuals who have a right to parent in general can also be thought to have a right to parent their biological children, but also that it avoids the conceptual and normative problems associated with alternative explanations, particularly those that appeal to the significance of gestation.

The chapter proceeds in five parts. After making some brief terminological clarifications in 2.2, I begin the argument in 2.3 by outlining the two dominant theories of the right to parent and showing how neither has the resources to explain why adults who have a right to parent in general can also be thought to have a special right to parent their biological children. In 2.4, I outline and critique Gheaus's gestational account of the right to parent one's biological child, arguing that it faces two serious problems that ultimately discredit it as a plausible account. In 2.5, I introduce my alternative genetic account of the right to parent one's biological baby, which I term the 'First Dibs' account. Finally, in 2.6, I defend the First Dibs account against a number potential objections, including those that claim it is conceptually incoherent, and those that claim it has unacceptable normative implications when applied in concrete cases.

2.2 Parental Rights and Parental Obligations

Before proceeding to the argument, it is first necessary to clarify some of the terminology that I will be using over the course of the next two chapters. Unless otherwise noted, I use the term 'parent' to refer to a moral role involving special role-based rights and obligations, rather than to a biological relation between procreators and their progeny. On this interpretation, a parent is someone who has special childrearing rights and obligations with respect to a particular child. This may be (and often is) a person who is also biologically related to the child, though it may be a non-biologically related person as well, such as an adoptive parent.

When evaluating the moral role of parent, it is important to disambiguate three distinct senses in which we might speak of parental rights and obligations.[4] First, we might speak of the rights and obligations *of* parents, or the various rights and obligations that attach to that particular role. These include, for example, the rights of parents to make certain important decisions on behalf of their children, as well as the obligations of parents to provide their children with certain goods and opportunities. In accordance with (one variation of) the parental package thesis, the rights and obligations *of* parents normally do go together as a package, with the acquisition and maintenance of parental rights usually being conditional on the adequate fulfillment of parental obligations. There are, however, certain exceptions to this rule. An abusive parent, for example, may forfeit their right to make important decisions on behalf of their child but retain an obligation to provide their child with financial support. Notice, however, that while it is possible for someone to lose parental rights, but retain certain

[4] The following typology draws on similar typologies that have been recently advanced in the literature. See, for example, David Archard. *The Family: A Liberal Defense*. (New York: Palgrave MacMillan, 2010), chapter 2, esp. at 28-29; Harry Brighouse and Adam Swift. *Family Values: The Ethics of Parent-Child Relationships*. (Princeton: Princeton University Press, 2014), esp. 54-55; and Sarah Hannan. "Introduction" in Sarah Hannan, Samantha Brennan, and Richard Vernon (eds.) *Permissible Progeny? The Morality of Procreation and Parenting*. (New York: Oxford University Press, 2015), esp. 12-16.

parental obligations, there are no parallel cases in which someone can lose parental obligations, but retain parental rights. In this sense, the rights *of* parents always come packaged with the obligations *of* parents, even if the latter can sometimes be held independently.

In addition to the rights and obligations *of* parents, we might also speak of the right and obligation *to* parent, or the prior right and obligation that an individual might have to enter into the role of a child's parent. By way of illustration, a man who has agreed to be the godfather of his best friend's child will have both right and the obligation *to* parent that child in the event of his friend's death, at which point he will then acquire the rights and obligations *of* that child's parent. In this sense, the right and obligation *to* parent can be understood as preceding the rights and obligations *of* parents by one step: they are the right and obligation to enter into a role to which certain childrearing rights and obligations attach. As I indicated in the introduction, one of the conclusions that I will be arguing for over the next two chapters is that, contrary to the rights and obligations *of* parents, the right and obligation *to* parent do not necessarily come together as a package, and are in fact grounded in different types of considerations.

Finally, when we are speaking of the right and obligation *to* parent, we might distinguish further between the right and obligation to parent in *general*, and the right and obligation to parent a *particular* child (though in the context of this thesis I am mainly concerned with how this distinction applies to rights). The right to parent in general is, as Sarah Hannan puts it, "the entitlement to vie for, and in some cases, occupy the role of parent,"[5] whereas the right to parent a particular child is the entitlement to occupy that role with respect to a specific child. As Hannan notes, "Establishing that someone has a right to parent [in general] leaves open which specific children they have a claim to parent, and how they come to have claims to parent these children, rather than others."[6] In the next section, I will explain how this lack

[5] Hannan, 2015, 13.
[6] Ibid., 14.

of entailment between a right to parent in general and a right to parent a particular child presents a problem for the apparent right of procreators to parent their biological children, though before doing so, it is necessary to make two brief remarks. First, because I am concerned with rights and obligations to parent particular children—and specifically with whether those rights and obligations are generated via procreation—I will not be concerned with elaborating the content of the rights and obligations *of* parents, apart from what is required for expository purposes. I do not see this as a significant omission, for it is reasonable to think that questions about the content of role-based rights and obligations can be separated from questions about their acquisition. Second, because I do not discuss the rights and obligations *of* parents in any significant detail, I will from now on reserve the terms 'parental rights' and 'parental obligations' to refer the right and obligation *to* parent, respectively, unless otherwise noted. With these clarifications in mind, let us now proceed to the argument.

2.3 Parental Rights and the Baby Redistribution Problem

The common assumption that individuals have a presumptive right to parent their biological children rests on two premises:

(i) adults are entitled to stand in authoritative relationships with respect to children; and

(ii) procreators are uniquely entitled to enter into those relationships with their biological children.

Following a line of argument recently developed by Gheaus, I will demonstrate in this section that while contemporary accounts of parental rights are able to substantiate premise (i), they are ill-equipped to substantiate premise (ii). This will highlight the need for a supplementary

justification for the right to parent one's biological baby, which I will spend the remainder of the chapter developing.

The existing literature on the morality of parenthood offers two main accounts of the justification of parental rights generally: *child-centered* accounts, which justify parental rights solely with reference to the interests of children[7]; and *dual-interest* accounts, which justify parental rights with reference to both the interests of children as well as the adults who are intent on raising them.[8] Child-centered accounts begin with the basic observation that children, as not yet fully formed persons, tend to be poor guardians of their own interests. Left to their own devises, children will often make decisions emotionally and impulsively, and they will often forgo their long-term interests in favor of more immediate desires. In order to develop into healthy adults, then, children need the help of paternalistic caretakers, who can make important decisions on their behalf to ensure that their immediate and long-term interests are being served. However, because adults require a certain degree of authority over children in order to perform this role effectively, serving as a child's caretaker is also thought to ground a number of limited and conditional rights over that child. Samantha Brennan and Robert Noggle describe this view in the following way:

> Children are immature in a number of ways. Their limited cognitive powers and experience make them prone to mistakes in judging their own interests and how to further them. The healthy mental, physical, and emotional development of children seems to require that someone have the responsibility to nurture and protect the child, and the authority to exercise her

[7] For child-centered approaches toward the justification of parental rights, see Archard, 2010, esp. chapter 2; Jeffrey Blustein. *Parents and Children: The Ethics of the Family*. (New York: Oxford University Press, 1982); Samantha Brennan and Robert Noggle. "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice," *Social Theory and Practice*, 23(1) (1997), pp. 1-26; Robert Noggle. "Special Agents: Children's Autonomy and Parental Authority" in David Archard and Colin Macleod (eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002); and Sarah Hannan and Richard Vernon. "Parental Rights: A Role-Based Approach," *Theory and Research in Education,* 6(2) (2008), pp. 173-189.

[8] For dual-interest approaches toward the justification of parental rights, see Harry Brighouse and Adam Swift. "Parents' Rights and the Value of the Family," *Ethics,* 117(1) (2006), pp. 80-108, as well as Brighouse and Swift, 2014, esp. chapter 4; Matthew Clayton. *Justice and Legitimacy in Upbringing*. (Oxford: Oxford University Press, 2006), chapter 2; and Ferdinand Schoeman. "Rights of Children, Rights of Parents, and the Moral Basis of the Family," *Ethics*, 91(1) (1980), pp.6-19.

> own judgment in doing so on a day-to-day basis. Given that someone must do these things, and that children are often too immature to do so, it seems natural to assign parents the right to do so.[9]

One of the attractive features about the child-centered account is that it fits with common understandings about the conditionality of parental rights. If parental rights are justified indirectly, as it were, as necessary conditions of fulfilling antecedent parental duties, then this explains why parents lose the right to parent children when those duties go unfulfilled, e.g. through neglect or abuse. However, while child-centered accounts seem well-suited to explain the conditionality of parental rights, their sole focus on children's interests also makes them vulnerable to a particular kind of objection, which I will refer to here as the 'baby redistribution problem'. As Harry Brighouse and Adam Swift describe it,

> [I]f all that matters is ensuring that children's interests are met as well as possible, then children should be distributed to those people judged most likely to raise them best. If parents' interests play no justificatory role [in an account of parental rights], what would there be to impugn a well-intentioned and efficient government agency that distributed the children, who under a laissez-faire system would be reasonably well-raised, to adults who would be better parents, thus leaving some adequately good parents childless?[10]

The baby redistribution problem suggests that child-centered accounts of parental rights are not really accounts of parental rights at all. To invoke the terminology outlined above, while child-centered accounts seem to provide a coherent justification of the rights *of* parents, or the rights of caretakers to exercise a certain degree of judgment over how they discharge their parental responsibilities, they do not provide a justification of the right *to* parent, or the right of adults to stand in authoritative relationships with respect to children. And because they do not appeal at all to adults' interest in grounding parental rights, child-centered accounts are consistent with redistributing children to adults who are most likely to serve their interests,

[9] Brennan and Noggle, 1997, 4.
[10] Brighouse and Swift, 2006, 86.

including redistributing babies away from their procreators to more competent adoptive parents.

Of course, proponents are likely to respond here that the child-centered account *does* in fact have the resources to solve the baby redistribution problem. For example, if the babies are old enough to have formed emotional attachments to their biological parents, then redistributing them to more competent adoptive parents is likely to harm them by undermining their interest in what Anne Alstott calls 'continuity of care', or the "intensive, intimate care that human beings need to develop their intellectual, emotional, and moral capabilities."[11] Even if the proposal was to redistribute babies at or shortly after birth, there may nevertheless be child-centered reasons against doing so. For example, theorists like David Velleman and Bernard Prusak have argued that children have a special interest in being parented by their biological progenitors that is derived from their interest in having access to their 'family history' or the unique brand of parental love that is made possible in the context of the 'given relationship' between procreator and progeny.[12] If these arguments are correct, they seem to supply us with reasons against baby redistribution.

Notice, however, that even if these arguments *are* correct—and I am doubtful that they are[13]—they do not account for the more fundamental intuition that the baby redistribution problem seeks to pump, which is that redistributing babies away from their biological parents is unfair *to the parents themselves* (in addition to being potentially unfair to the children). According to Brighouse and Swift, a more plausible theory of parental rights that is able to account for this intuition is one that appeals to both the interests of children as well as adults. While children have an important interest in having a paternalistic caretaker, adults

[11] Anne L. Alstott. *No Exit*: *What Parents Owe Their Children and What Society Owes Parents*. (Oxford: Oxford University Press, 2004), 4-5.
[12] J. David Velleman. "Family History," *Philosophical Papers*, 34(3) (2005), pp. 357-378, and Bernard Prusak. *Parental Obligations and Bioethics*: *The Duties of a Creator*. (New York: Routledge, 2013), esp. chapter 1.
[13] I discuss and ultimately reject both of these arguments in Chapter Three (section 3.3), in connection with my discussion of the relationship between procreation and parental obligation.

also have an important interest in the type of paternalistic caretaking that is performed in the context of parent-child relationships. Brighouse and Swift identify four features of this kind of relationship that combine to make it non-substitutable, and hence distinctively valuable for adults.[14] First, unlike relationships between adults, the relationship between parents and children is structurally unequal, with children being especially vulnerable to and dependent on the guidance of their parents. Second, the relationship between parents and children is also unlike relationships between adults in that it is always characterized by a type of legitimate paternalism, wherein parents are required to govern children in ways that will promote their immediate and long-term interests. Third, the parent-child relationship is also unique in the sense that children, unlike participants to other types of relationships, are not capable of exiting the relationship without significant cost to themselves. Finally, parent-child relationships are also distinct in the unique brand of intimacy they make possible, wherein the "love that one receives from one's children…especially in the early years, is spontaneous and unconditional and, in particular, outside the rational control of the child."[15] According to Brighouse and Swift, adults have a strong self-regarding interest in being able to occupy relationships characterized by these four features. As they write,

> The [parental] role enables [parents] to exercise and develop capacities the development and exercise of which are, for many (though not, certainly, for all), crucial to their living fully flourishing lives. Through exercising these capacities in the specific context of the intimately loving parent-child relationship, a parent comes to learn more about herself, she comes to develop as a person, and she derives satisfaction that otherwise would be unavailable.[16]

Once we take stock of the strong interest that adults have in parenting, we can start to see why baby redistribution might be an injustice to parents as well as to children. So long as adults meet a minimal threshold of parental competency, their strong interest in developing

[14] Brighouse and Swift, 2006, 91-96. See also Brighouse and Swift, 2014, 87-93.
[15] Brighouse and Swift, 2006, 93.
[16] Ibid., 95.

intimate parent-child relationships weighs in favor of entitlement to maintain those relationships uninterrupted, even if there are other adults available who might do a better job of serving the child's interests. Importantly, this entitlement is *fundamental*, in the sense that is grounded directly in the parent's, rather than the child's, interests.

However, while the Brighouse-Swift account explains why adults have a fundamental right to parent in general, and why it would therefore be unjust for the state to redistribute children from what it deems less suitable to what it deems more suitable parents, it does not on its own explain how adults acquire rights to parent *particular* children, and may still be vulnerable to other kinds of baby redistribution. Gheaus makes this point by imagining a scenario of 'baby scarcity' in which the number of adults who wish to be parents exceeds the number of children who are available to be parented.[17] In this type of scenario, how should we determine who gets to parent which child? An intuitive response is to claim that, so long as they meet the threshold of parental adequacy, adults should have a presumptive right to parent their biological children. Notice, however, that the Brighouse-Swift account does not in fact support such a right. Because their account of the value of parenting does not depend on any biological connection between parent and child, adults who do not have biological children have the same moral interest in parenting as adults who do have biological children, and hence the same fundamental right to parent. Thus, Gheaus imagines two possibilities for redistributing the babies, both of which are consistent with Brighouse and Swift's account.

First, the babies may be redistributed on the basis of parental competence without actually violating anybody's right to parent. If there are more prospective parents than there are children available to be parented, then the situation is simply one in which it is impossible to satisfy everybody's right to parent; and if all adults have an equal right to parent in general, then moral considerations other than the right to parent must be used to determine who gets to parent which child. Gheaus suggests that parental competence may be one such con-

[17] Gheaus, 2012, 438-440.

sideration, given that children have a morally relevant interest in having "better rather than less good parents."[18]

However, if redistributing babies on the basis of parental competence seems unfair (perhaps the personality dispositions associated with excellent parenting are in part a matter of brute luck), a second possibility for redistribution is to set up a baby-allocating lottery in which each adult who would make at least an adequate parent has an equal chance of being allocated a baby. In this case, it is possible that babies would in fact be transferred from less good to better parents, though the basis for reallocation would not be grounded in considerations of parental competence, but rather in considerations of fairness.

Both the competence-based and fairness-based redistribution schemes are consistent with Brighouse and Swift's account of parental rights, yet both leave open the possibility that some adults would be denied the opportunity to parent their biological children. According to Gheaus, this highlights an important limitation of their account: while it has the resources to explain why adults have a right to maintain existing parental relationships with the children in their care, it cannot explain why adults are entitled to enter into those relationships with their biological children in the first place.

In the following section, I will outline and evaluate Gheaus's own strategy for addressing this limitation, though before doing so, it is worth sidelining a potential objection. One might argue that the specter of baby redistribution is only problematic if there are positive reasons in favor of redistributing babies—otherwise, the mere desire of adults to parent their biological children might provide a sufficient reason against redistribution. This type of argument might seem tempting in the context of laws and social norms that give adults a strong presumptive claim to parent their biological children, though there are at least two problems with it upon reflection. First, even if there were no positive reasons in favor of redistributing babies, it is still problematic that an account of parental rights permits it in theo-

[18] Ibid., 438.

ry, for it suggests that one of the most widely accepted parenthood-related rights—the right to parent one's biological baby—is rooted only in social or legal convention, and has no principled basis. However, a second and arguably more significant problem for this type of argument is that there *may* in fact be good reasons for redistributing babies under certain circumstances. For example, Gheaus has suggested that in societies with entrenched histories of racism or sexism, redistributing babies randomly at birth might have the effect of improving equality of opportunity by mitigating the influence of race or gender on one's life prospects.[19] Moreover, if we take the opportunity to parent as itself a distribuendum of justice (as theorists like Brighouse and Swift do), then redistributing babies randomly between all adequate prospective parents might also be a fairer way of allocating parenting opportunities, particularly for those who might be at a disadvantage for pursuing parenthood under a laissez-faire system, including same-sex couples and single or infertile individuals. This, of course, is not to say that pursuing either of these ends justifies baby redistribution, but only that such a conclusion is tenable in the absence of a fundamental right to parent one's biological baby.

2.4 Anca Gheaus's Gestational Account

If the arguments in the previous section are correct, then neither the child-centered nor the dual-interest account of parental rights necessarily supports a right to parent one's biological baby. A child-centered account may be able to explain why it would be unfair to children to redistribute babies away from their biological parents, though this does not establish a *right* to parent one's biological baby—at most, it simply establishes an *obligation* to do so, and only if we accept that children have a morally relevant interest in being parented by their biological progenitors. A dual-interest account can explain why it would be unfair to parents to disrupt *already existing* parent-child relationships, though to the extent that their

[19] Ibid., 445-446.

interest in those relationships is conceived independently of any biological connection to the child, it cannot on its own explain how adults acquire rights to parent their biological children in the first place. This, it seems, leaves us with one of two options: we can either (1) bite the bullet and accept that there is no fundamental right to parent one's biological baby; or (2) explain how such a right can be incorporated into the dual-interest framework.

Given the undisputed nature of the right in question, option (1) is not very attractive. Even if it were in a child's best interest to be handed over to a set of excellent adoptive parents upon its birth, forcibly redistributing babies away from their adequate biological parents still seems like an injustice to those parents, and this is a difficult intuition for many people to abandon.[20] However, option (2) is not without its difficulties either, for attempts to ground a rights-claim in the fact of biological connectedness have often run the risk of collapsing into the kind of proprietarian account that many theorists now consider outdated. To take one commonly cited example, some have argued in accordance with a Lockean theory of acquisition that, insofar as individuals acquire rights over the fruits of their self-owned labor, so too do procreators acquire rights over the fruits of their procreative labor.[21] This type of argument might be able to explain why individuals have a right to parent their biological children, though it does so at a cost, for it seems to imply that children, like Locke's acorns and apples, are simply things to be owned.

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[20] Note, however, that not all theorists have shied away from this option. For example, Peter Vallentyne has notably argued the right to parent a newborn baby may be "legitimately claimed by anyone for whom possession is suitably in the child's best interests." See Peter Vallentyne. "The Rights and Duties of Childrearing," *William and Mary Bill of Rights Journal,* 11(3) (2003), pp. 991-1009, 991.

[21] According to the Lockean theory of acquisition, "every man has a *property* in his own *person*: this no body has a right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*." While Locke did not endorse the idea that procreators own their children, many theorists have suggested that this is an unavoidable implication of his theory of property acquisition. For Locke's theory of acquisition, see John Locke. *Second Treatise of Government.* (Ed.) C.B. Macpherson. (Indianapolis: Hackett, 1980), chapter 5. For discussion of its application to procreation, see David Archard. *Children: Rights and Childhood.* (New York: Routledge, 2004), 141-145; Robert Nozick. *Anarchy, State, and Utopia*. (New York: Basic Books, 1974), 287-289; Susan Moller Okin. *Justice, Gender, and the Family*. (New York: Basic Books, 1989), 74-88; and Hillel Steiner. *An Essay on Rights*. (Oxford: Blackwell, 1994), 237-248.

Recognizing this difficulty, Gheaus has sought to provide an alternative account of the right to parent one's biological baby that does not appeal to a proprietarian claim over one's offspring, but rather to the significance of the relationship that is established between procreators and their progeny during the process of gestation. This gestational account has emerged as the most promising account of the right to parent one's biological baby currently on offer, so it is worth exploring in some depth.

Gheaus's account begins with the observation that pregnancies always impose a variety of burdens (or 'costs') on pregnant women and their supporting partners. For instance, throughout the duration of their pregnancies, women endure numerous *physical* burdens, from the aches, pains, nausea, and fatigue that are experienced during gestation, to the intense pain and physical trauma that often accompanies childbirth. These burdens are not only intrinsically costly in terms of being physically unpleasant, but they are also instrumentally costly in terms of curtailing women's autonomy, making them increasingly reliant on others for the performance of everyday tasks. Moreover, women also endure a number of *social* and *behavioral* costs as a result of carrying out a pregnancy. They face limitations on the food they can eat, the amount of alcohol they can consume, and the physical activities they can safely engage in, and they must cope with the patronizing and sometimes intrusive behavior of friends, family, co-workers, and strangers. Finally, pregnant women also endure a wide range of *psychological* and *emotional* costs prior to giving birth. They must deal with the constant fear of miscarriage or of something else going wrong with the pregnancy, and they must sometimes confront the daunting decision of whether to continue a pregnancy in the face of significant health risks.

One might think that the mere incursion of these costs is sufficient to ground a compensation-based claim to parent the resultant child. Similar to the Lockean argument canvassed above, one might reason that because pregnant women and their supporting partners pay a variety of costs in bringing a child into existence, they have a special entitlement to act

as that child's parents.[22] However, Gheaus does not believe that this argument can perform its intended function, for while the incursion of costs may entitle procreators to parent *a* baby, it does not necessarily entitle them to parent their biological baby in particular. Indeed, appealing to costs alone would not preclude a different type of redistributive scheme in which newborn babies were shuffled randomly between all eligible procreative couples.

However, while a strictly compensation-based argument ultimately fails, Gheaus believes that the costs of pregnancy are significant for a second reason, namely, because their incursion "facilitates the creation of an intimate relationship between the bearing parents and the future baby."[23] As she writes,

> Because children come into existence through gestation, pregnant women and their supporting partners have to invest a significant amount of resources into having birth children. This is often a conscious, intentional process, akin to other projects in which people engage: it contains much anticipation and planning, thinking and hoping, imagination and projection. Through their bodily connection with the baby and their various psychological investments, expecting parents normally build a relationship with their future baby, which is something highly emotional and already quite developed at birth.[24]

According to Gheaus, the relationship that develops between procreators and their progeny during gestation provides the 'missing step' in the justification for a fundamental right to parent one's biological baby. While existing dual-interest theories explain why it is impermissible to disrupt already existing parent-child relationships, they do not on their own explain why adults are entitled to enter into those relationships with their biological children in the

[22] Joseph Millum has argued along similar lines that parental rights are generated by parental 'investment', or by the performance of parental work. However, this type of account cannot be correct as a general account of how parental rights are acquired, as being in the appropriate rights position with respect to a child is usually a necessary precondition of performing parental work. For example, one cannot gain parental rights over someone else's child simply by performing parental work with respect to that child—the rights of that child's parent, which typically include rights to a certain degree of exclusivity, prevent one from doing so. In this sense, the crucial question that needs answering—how one becomes entitled to perform parental work with respect to a particular child—is left unanswered by Millum's account. See Joseph Millum. "How Do We Acquire Parental Rights?" *Social Theory and Practice*, 36(1) (2010), pp. 112-132.
[23] Gheaus, 2012, 449.
[24] Ibid., 449.

first place. Yet if the process that brings children into existence also results in the development of an intimate relationship between the baby and its birth parents, then birth parents do not need a special justification for initiating a relationship with their baby, as such a relationship has already been initiated at the time the baby is born. As Gheaus writes,

> If, at the moment of birth, adequate bearing parents have already paid significant costs for becoming parents, and in the process have developed an incipient intimate relationship with the baby, then they are more entitled than other prospective parents to parent the baby they have borne. This difference between adequate bearing parents and other adequate prospective parents can provide the necessary justification for translating the fundamental right to parent in general into a right that birth parents have to parent their birth baby.[25]

Gheaus's gestational account has a number of attractive features. First, it seems to provide a coherent justification for the right to parent one's biological baby without collapsing into a form of proprietarianism: procreators are not entitled to parent their biological babies because they have general ownership rights over their offspring, but rather because they tend to develop morally significant relationships with their babies during the process of gestation. Moreover, this justification also fits neatly into the dual-interest framework, as it appeals to the same kinds of considerations that dual-interest theorists appeal to in order to justify the right to parent in general. The reason why it would be unjust to redistribute babies away from their adequate biological parents is the same reason that Brighouse and Swift provide as to why it would be unjust to redistribute children away from their adequate custodial parents: it disrupts an already existing relationship that the parents (and perhaps also the children) have a morally relevant interest in continuing. Finally, Gheaus's account might also be considered advantageous insofar as it provides a philosophical justification for existing legal judgments. In parental custody disputes involving gestational surrogacy and donated gametes, courts and legislators in Europe and North America have consistently assigned legal motherhood to the woman who has gestated the embryo, rather than the woman who donated

[25] Ibid., 451.

the ovum or commissioned the surrogacy arrangement.[26] Gheaus's account has the resources to explain why these judgments are correct.

However, while Gheaus's account presents a number of advantages over competing accounts of the right to parent one's biological baby, it also runs into a number of difficulties as well. The first difficulty, or rather set of difficulties, stems from the reliance of Gheaus's account on the realization of certain qualitative features in a pregnancy, particularly the development of an intimate maternal-fetal bond. This is problematic for a number of reasons. First, it seems to carry the odd implication that in cases where such a bond is *not* established, gestating women do not have fundamental rights to parent their biological babies. Imagine, for example, a woman who suffers from antenatal depression throughout her pregnancy, a condition characterized by (among other things) a feeling of physical and emotional detachment from one's fetus. This woman may not have developed an intimate bond with her fetus, though given that she has incurred all of the typical costs associated with carrying out a pregnancy (in addition to the ancillary cost of coping with her depression), it would still seem unjust to deny her the opportunity to parent her biological baby. Indeed, the only difference between this woman's pregnancy and a non-depressed woman's pregnancy is a particular attitude felt toward the fetus, and one that is itself the product of an unchosen psychological affliction.

Gheaus's response to this difficulty is more or less to bite the bullet: she concedes that such a woman would not have a fundamental right to parent her biological child, though denies that this is a significant problem for her account, as "the existence of an intimate rela-

[26] In the United States, precedent for assigning legal motherhood to the gestational mother was set in the famous 'Baby M' case, *In re Baby M*, 537 A.2d 1227, 109 N.J. 396 (N.J. 1988). In the United Kingdom, giving legal priority to gestational mothers is legislated through s. 33(1) of the *Human Fertilization and Embryology Act* (2008), which states that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of a child."

tionship between birth parents and newborns is the rule rather than the exception."[27] However, even if we bite the bullet about atypical pregnancies, there is still a second and more serious problem with the reliance of Gheaus's account on maternal-fetal bonding, which is that there is scant evidence that such a bond *ever* materializes, at least not in the rights-grounding sense that Gheaus describes. As Lindsey Porter has recently argued, empirical evidence from nursing and psychology suggests that the apparent 'relationship' that Gheaus describes between mothers and their fetuses is really better characterized as a one-directional attitude.[28] While it is common for pregnant women to self-report feelings of attachment to their fetuses, these feelings are best explained as responses to social or cultural cues, rather than as evidence of a two-way maternal-fetal bond: there is in fact no biological evidence to suggest that fetuses have any causal effect on their mother's feelings of attachment, nor is there any evidence to suggest that maternal feelings of attachment have any effect on developing fetuses. Thus, "Given that the woman's feelings aren't affecting the fetus, and the fetus's feelings aren't affecting the woman," Porter concludes that "it is implausible to suppose that the right way to characterize MFA [maternal fetal attachment] (or 'bonding') is as a relationship. It's not a relationship; it's an attitude."[29]

If Porter is right that maternal-fetal bonding is better characterized as an attitude rather than a relationship, then Gheaus's account is in serious trouble. The key selling point of Gheaus's account is that it purports to offer a distinctively relationship-based account of the right to parent one's biological baby, one that explains why redistributing babies away from their adequate biological parents is just as wrong—and wrong for the same reasons—as redistributing children away from their adequate custodial parents. However, if the crucial maternal-fetal 'bond' that drives Gheaus's account is really just a one-directional attitude, then the

[27] Gheaus, 2012, 452.
[28] See Lindsey Porter. "Gestation and Parental Rights: Why is Good Enough Good Enough?" *Feminist Philosophical Quarterly*, 1(1) (2015), pp. 1-27, esp. 17-23.
[29] Ibid., 22.

case of gestation is not really analogous to existing parent-child relationships in which *both* parent and child are interpersonally engaged. Rather, it is more analogous to a case in which a person simply *feels* attached to something that is not capable of reciprocation.

There are two possible ways that Gheaus could respond to this difficulty, though neither is particularly helpful for her account. First, she might claim that a one-way feeling of attachment is in fact sufficient to ground a right to parent one's biological baby. This would defuse the worry that mothers do not develop relationships with their fetuses *per se*, though if merely feeling attached to something is sufficient to ground a right to that thing, then this strategy also invites a slippery slope toward some rather dubious rights-claims. Alternatively, she might concede that a one-way feeling of attachment is insufficient to ground a right to parent one's biological baby, but insist that there are still good child-centered reasons against separating babies from their gestational mothers (to the extent that such reasons are available).[30] This would provide a solution to the baby redistribution problem, but only on child-centered terms—it would not explain why redistributing babies away from their biological parents is an injustice to the parents, and so would not constitute an argument for a fundamental right to parent one's biological baby.

These are both serious difficulties that may on their own be sufficient to undermine Gheaus's account.[31] However, in what follows, I would like to set them aside and focus on a second set of difficulties facing her account, one that might be described as a dilemma regarding its inclusivity. Even if gestation has the significance that Gheaus ascribes to it, one glaring problem with appealing to gestation as a basis for the right to parent one's biological baby is that it seems to exclude men from the constituency of persons who can claim that right. If the labor and bonding that occurs during gestation is what grounds parental rights, then it seems like only women can have fundamental rights to parent their biological children

[30] Gheaus in fact hints at this strategy in Gheaus, 2012, 452, n. 46.
[31] This is the conclusion of Porter, 2015.

(as long as only women are capable of gestation).[32] This, in turn, suggests a significant limitation of Gheaus's account: while it might have the resources to explain why it would be unjust to redistribute babies away from their adequate biological mothers, it seems ill equipped to explain why it would be unjust to redistribute babies away from their adequate biological fathers.

One could of course bite the bullet on this issue and simply accept the implication that men do not have fundamental rights to parent their biological children. This is the route taken by Barbara Katz Rothman, for example, who insists that "If men want to have children, they will either have to develop the technology that enables them to become pregnant…or have children through their relationships with women."[33] However, while biting the bullet is a viable option, it is not one that many people would want to take. Not only does it seem intuitively unfair that only women should have fundamental rights to parent their biological children, but it also violates what some parental rights theorists call the 'Parity Principle', which holds that "any fact by virtue of which a woman laid claim to be a parent could also be a fact in virtue of which a man with equal merit could claim to be a parent, and vice versa."[34] If we believe that an account of parental rights ought to respect the Parity Principle, then it seems like we have a *prima facie* reason to reject an account that grounds parental rights in gestation.

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[32] For an interesting discussion of the possibility of male pregnancy and its potential ethical implications, see Robert Sparrow. "Is it 'Every Man's Right to Have Children If he Wants Them?' Male Pregnancy and the Limits of Reproductive Liberty," *Kennedy Institute of Ethics Journal*, 18(3) (2008), pp. 275-299.

[33] Barbara Katz Rothman. Reconceiving Motherhood: Ideology and Technology in a Patriarchal Society. (New York: W.W. Norton, 1989), 257.

[34] David Archard and David Benatar. "Introduction" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010), 26. The term 'Parity Principle' was originally coined by Tim Bayne and Avery Kolers in "'Are you My Mommy?' On the Genetic Basis of Parenthood," *Journal of Applied Philosophy*, 18(3) (2001), pp. 273-285, 280. For further discussion of the Parity Principle and its role within a theory of parental rights, see also Bayne and Kolers, 2003.

Gheaus acknowledges this worry, though rather than rejecting the Parity Principle, she attempts to accommodate it by showing how men (and non-gestational partners in general) can also share in the labor and bonding that generates parental rights. As she writes,

> Like in the case of paying the costs of pregnancy, pregnant women's supporting partners are capable of being direct participants in the process of creating a relationship with the baby during pregnancy. With the help of medical technology they can see the fetus and hear its heartbeat as early as the bearing mother; during the last stages of pregnancy they can feel the baby, talk to it and be heard by it. Just like the mother, they can experience the fears, hopes, and fantasies triggered by the growing fetus.[35]

In this sense, even though men are not capable of gestating babies themselves, they are still capable of participating in many of the relationship-building activities that women typically engage in over the course of their pregnancies, which may be sufficient to generate a relationship-based right to parent the resultant child. However, while this type of approach might allow Gheaus to account for the rights of biological fathers[36], it ends up introducing a new set of problems, for if male partners can acquire parental rights in virtue of participating in the various relationship-building activities that occur during a pregnancy, then it seems as though a laundry list of other persons can as well. For example, in addition to their male partners, many pregnant women also receive support from their sisters, mothers, aunts, and friends, each of whom participate in the various relationship-building activities that occur during a pregnancy, and sometimes to an even greater extent than the baby's biological father.[37] If we want to argue that men can acquire parental rights in virtue of their proximity to their gestating partner, then we risk opening the door to a host of other potential rights-claimants as well.

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[35] Gheaus, 2012, 450.

[36] While I will not press the point here, it is worth noting that the extent to which Gheaus's approach successfully accounts for the rights of biological fathers is debatable. Brighouse and Swift, for example, have pointed out that Gheaus's attempts to include men in the category of bearing parents seem "a bit of a stretch," and are also potentially inconsistent with the other aspects of her argument that emphasize the bodily connection between fetus and gestating mother. See Brighouse and Swift, 2014, 109.

[37] Porter also makes this observation in Porter, 2015, 14-17.

Gheaus could once again bite the bullet on this point and concede that, along with male partners, sisters, mothers, aunts, and friends can also acquire rights to parent children with whom they have bonded during gestation. However, this is not an attractive option. Not only does it seem intuitively implausible that so many people should have legitimate claims to parent a particular child, but acknowledging any parental rights-claims on the basis of mere proximity to the gestator also prevents Gheaus's account from serving a crucial *adjudicatory* function in cases where there are multiple conflicting claims over who gets to parent a particular child. To understand why, consider a relatively standard case in which this type of conflict arises:

> *Gestational Surrogate*: Alice and Bill desperately want to have a biological child, though Alice suffers from a form of infertility that makes her unable to safely gestate an embryo. Eager to fulfill their procreative aspirations, Alice and Bill create an embryo using *in-vitro* fertilization and arrange for a gestational surrogate, Claire, to bring the embryo to term. However, after nine months of pregnancy, Claire cannot bear the thought of relinquishing the child, and now wants to keep the child against her prior agreement with Alice and Bill. Who is entitled to parent the child?

Initially, it might seem like Gheaus's account has the resources to settle this type of dispute—indeed, if parental rights are grounded in gestation, then Gheaus's account seems to provide a fairly straightforward explanation for why the surrogate, rather than the gamete providers, should be entitled to act as the child's parent. Notice, however, that if Gheaus wants to maintain her initial response to the worry about parental parity, then this resolution to the surrogacy dispute does not necessarily follow. In the same way as male partners can participate in the various relationship-building activities that occur during a pregnancy, so too can commissioning parents in surrogacy contracts: they can accompany the surrogate to doctor's ap-

pointments, they can view ultrasound scans of the developing fetus, they can feel its kicks and rumblings inside the surrogate's abdomen, they can talk to and be heard by it, and they can share in the various fears, hopes, and fantasies triggered by the growing fetus. If male partners can acquire parental rights in virtue of their participation in these relationship-building activities, then it is difficult to see how Gheaus's account could consistently exclude commissioning parents.

The inclusivity dilemma facing Gheaus's account can now be stated as follows: either parental rights are acquired via gestation, in which case men do not have rights to parent their biological children; or men can acquire rights through their proximity to a gestational mother, in which case so can a host of other potential rights-claimants that a gestational account is wont to exclude. Both horns of this dilemma are unattractive, the first because it is woefully under-inclusive, the second because it is woefully over-inclusive. However, as I will argue in the following section, we do not in the end need to accept either of them, as there is a better non-gestational account of the right to parent one's biological baby available—one that is capable of both solving the baby redistribution problem *and* resolving cases in which there are multiple conflicting claims over who gets to parent a particular child.

2.5 The First Dibs Account

The account in question is based on a principle of genetic self-ownership, or the idea that we have ownership rights, or something closely resembling ownership rights, over our reproductive gametes. Genetic self-ownership is not in itself a new idea—philosophers have previously defended the claim that we own our genetic material, and some have even explored the implications of this claim for the acquisition of parental rights.[38] However, my par-

[38] See, for example, Barbara Hall. "The Origin of Parental Rights," *Public Affairs Quarterly*, 13(1) (1999), pp. 73-82.

ticular take on this idea is new, and I believe devised in such a way that makes it immune to some of the standard objections that have been raised against genetic accounts of parental rights.

I will provide the general contours of this account momentarily. However, in order to motivate support for an account of the right to parent one's biological baby based on genetic connectedness, rather than gestation, it is worth calling attention to another questionable feature of Gheaus's account. At the most basic level, Gheaus's account relies on the Interest Theory's supposition that having a strong interest in a thing is sometimes sufficient to generate a right to that thing.[39] This supposition is often true: there are many cases in which we acquire rights to certain things or states of being in virtue of the contribution those things or states of being make to various aspects of our well being. However, a common limitation or exception to this rule involves cases in which someone else already has a legitimate claim to the thing in question, evinced most clearly in cases of property ownership. To take a somewhat trivial example, imagine that I hire you to look after my ficus while I am off vacationing in Europe. In the following months, you become surprisingly attached to it: you enjoy the ritual of watering and fertilizing it, you take pleasure in watching it grow, and it also looks great in your apartment, tying together your previously disagreeable décor. While you may have a strong interest in keeping the ficus upon my return, most people would deny that you have a legitimate claim to do so, even if you stand benefit from it more than I do. Your strong attachment to the ficus might supply me with a *reason* to let you keep it, but it is not in itself sufficient to hold me under a *duty* to do so.

Now, there are obviously many ways in which a fetus is unlike a ficus, and I will be careful to elaborate these differences in further detail below. However, at a very general lev-

[39] In Joseph Raz's widely cited version, "X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." See Joseph Raz. *The Morality of Freedom*. (Oxford: Clarendon Press, 1986), 166.

el, it seems like the same types of considerations that undermine your claim to keep the ficus against my wishes can also be invoked to undermine the gestational surrogate's claim to keep the baby against the wishes of the gamete providers. Presumably, the reason why your interest in the ficus does not justify a right to keep it is because I already have a pre-existing claim to it: assuming that it was acquired legitimately, it is *my* ficus, and I ultimately have the final say over who gets to keep it. By parity of reasoning, if individuals can be thought to have ownership-like rights over their reproductive gametes, then the reason why the surrogate's interest in the baby does not generate a right to parent it is because the gamete providers already have a legitimate claim to do so themselves. It is *their* embryo, so they should have the initial say over who gets to parent the child it grows into.

Admittedly, the conditional statement in the previous paragraph contains a pretty big 'if'. The idea that individuals own their reproductive gametes seems to rely on the more general concept of self-ownership, and this concept is by no means unproblematic or immune to criticism.[40] My aim in this section is not to provide a comprehensive defense of the concept of self-ownership, but rather to substantiate the more modest claim that we have ownership rights, or at least something resembling ownership rights, over our reproductive gametes. I believe that this is a claim that most people already endorse, and one that is consistent with widely accepted principles concerning bodily integrity, particularly principles concerning personal jurisdiction over one's organs and body tissue. To illustrate the plausibility of this claim (and the implausibility of rejecting it) consider the following case:

> *Gamete Thief*: Dana breaks into the freezer of a gamete storage facility and steals an embryo that Ernest and Fran had frozen after a cycle of *in-vitro* fertilization. She then

[40] Many of the central problems facing the concept of self-ownership, including the notion that it is self-contradictory or too indeterminate to serve any useful normative purpose, are discussed by G.A. Cohen in *Self-Ownership, Freedom, and Equality*. (Cambridge: Cambridge University Press, 1995), chapter 9.

> has it implanted in her uterus and gestates it for the following nine months. When Ernest and Fran discover what Dana has done, they confront her at the hospital on the day the baby is born and demand that she hand it over to them to parent. Who is entitled to parent the baby?

According to Gheaus's gestational account, Dana is in the strongest rights position with the respect to the baby in virtue of the fact that she has gestated it for nine months and participated in the various relationship-building activities that give rise to parental rights. However, this seems entirely backwards. Rather than acting in a way that makes her eligible for the acquisition of parental rights, Dana appears to have engaged in a fairly egregious form of wrongdoing: she has gestated an embryo that, in some very basic sense, was not hers to gestate. Notice, however, that we can only account for this intuition if we accept the claim that Ernest and Fran have some kind of control rights over what happens to their reproductive gametes—otherwise, there is no principled basis on which to challenge Dana's parental rights-claim to the baby that grew out of them.

With a few negligible differences[41], the case of *Gamete Thief* is structurally similar to the case of *Gestational Surrogate,* such that the reasoning we use to resolve one case ought to be applied *ceteris paribus* to the other. If we think that Claire has a gestationally-based right to parent the baby in *Gestational Surrogate*, then we are forced to extend the same reasoning to Dana in *Gamete Thief*. If, however, we think that Dana's parental rights-claim is illegitimate in virtue of her relationship to the embryo, then we ought to think the same of Claire, who differs from Dana only in terms of the point in the gestational process at which she de-

[41] For example, while Dana intentionally steals an embryo from the outset, Claire initially engages in a legitimate agreement and only 'steals' the fetus once she changes her mind about relinquishing it to Alice and Bill. Moreover, whereas Dana only steals the embryo, Claire steals the embryo *and* breaks a contractual agreement, giving Alice and Bill an additional basis on which to condemn her actions. However, neither of these differences detracts from the relevant fact that, in both cases, a person is claiming parental rights over an embryo that was created out of others' genetic material for the purposes of serving *their* parenting interest.

cided to 'steal' the embryo. My suggestion is that both women lack a legitimate parental rights-claim to the child they gestated, and that this is best explained by appeal to a principle of genetic self-ownership.

However, lest the notion of genetic self-ownership be disregarded as an ad hoc explanation of the right to parent one's biological baby, notice that it is consistent with more general principles of bodily integrity. We do not under usual circumstances believe that other people have legitimate claims to our body parts or services simply in virtue of the contribution that those body parts or services might make to their well being. For example, it would not be permissible for someone to non-consensually use blood or stem cells that one has autologously stored for future use, nor is it generally thought permissible to harvest a deceased person's organs without their prior consent (particularly if consent has been explicitly withheld).[42] Or, to borrow a pair of more fanciful examples from Judith Jarvis Thomson's famous defense of abortion, one is not obligated to serve as a dialysis machine for a famous violinist who is suffering from kidney failure, nor is one entitled to the touch of Henry Fonda's cool hand on one's fevered brow.[43] The explanation in each case is that individuals have rights to bodily integrity that entitle them to determine what happens to and with their own bodies, and that also set limits on what others can justifiably demand of them. If these claims apply to one's bodily services, organs, and tissue, then it would seem consistent to extend the same jurisdiction to one's reproductive gametes as well.

However, while a strong presumption in favor of bodily integrity is widely accepted, it is worth noting here that it might be disputed in certain circumstances. Cécile Fabre has provocatively argued that insofar as poorly off citizens have legitimate claims on others' material resources when access to those resources is necessary for them to live minimally decent

[42] For a discussion of the rights to the bodily integrity and personal sovereignty involved in organ donation and transplantation, see T.M. Wilkinson. *Ethics and the Acquisition of Organs*. (Oxford: Clarendon Press, 2011), chapter 2.
[43] Judith Jarvis Thomson. "A Defense of Abortion," *Philosophy and Public Affairs*, 1(1) (1971), pp. 47-66.

lives, so too do unhealthy citizens have legitimate claims on others' bodily resources (including expendable organs and body tissue) when those resources are also necessary for them to live minimally decent lives—even if the donors of those resources are still living.[44] In this sense, even if one accepts the claim that individuals have a strong presumptive right to determine what happens to and with their own bodies, there may be cases in which that right is overridden by the just claims of other people. In the present context, this line of argument might be thought to carry the implication that while individuals have a strong presumptive right to control what happens to their reproductive gametes, there may be circumstances in which that right can be overridden by the just claims of other people. This might be the case, for example, if parenting was considered a necessary condition of a minimally decent life *and* there was a shortage of viable reproductive gametes, such that access to others' gametes was necessary to pursue one's parenting projects.[45]

While I mention this type of argument for the sake of completeness, I do not think that we should ultimately accept it, nor do I think that it significantly impacts on the idea that, under normal circumstances, individuals have a right to control what happens with their reproductive gametes. I do not think that we should ultimately accept it because I do not think that parenthood is in general a necessary condition of a minimally decent life—at most, it is a necessary condition of a particular conception of the good life, and one that is not universally shared among all persons. Moreover, even if parenthood *were* a necessary condition of a minimally decent life, it could only support a claim to others' reproductive gametes in circumstances where gametes were not available on a voluntary basis, and where there were not already children in need of adoption. Because neither of these conditions obtain (or are likely

[44] Cécile Fabre. Whose Body is it Anyway? Justice and the Integrity of the Person. (Oxford: Clarendon Press, 2006).

[45] Fabre considers this potential implication of her argument, though ultimately rejects it on the grounds that parenting is not a necessary condition of a minimally decent life, and that forcing men or women to donate reproductive gametes would impose on them unreasonably high emotional costs (though it is hard to see how the latter condition would not also impugn forced organ or tissue donation). See Fabre, 2006, 122-123.

to obtain) in our existing world, I think that we can dispense with this type of argument and rest easy with the idea that individuals generally have a strong presumptive right to determine what happens to their reproductive gametes. This is an idea that is supported both by general principles of bodily integrity *as well as* intuitions about specific cases.

Assuming, then, that we do have something like ownership rights over our reproductive gametes, what follows from this fact? My suggestion is that our ownership-like rights over our reproductive gametes support a presumptive, though defeasible, right to enter into parental relationships with any children that grow out of them, a claim that be summarized in the following principle:

> *First Dibs Principle*: individuals have a presumptive right to parent the children who have resulted from their reproductive gametes provided that (a) they have not forfeited that right antecedently, and (b) that assuming the role of the child's parent would not be contrary to that child's interest.

The First Dibs Principle offers a specific explanation of why individuals have a presumptive right to enter into parental relationships with their biological (read: genetic) children. It does not offer, nor does it purport to offer, an explanation of why individuals have a right to parent in general, or of the various alternative ways in which those rights might be acquired. In this sense, the First Dibs Principle is meant to serve the same purpose as Gheaus's gestational account: it is meant to augment a standard dual-interest theory of parental rights by explaining why individuals who have a right to parent in general can also be thought to have a special right to enter into parental relationships with their biological children.[46]

[46] It is also worth noting here that, insofar as it is meant to augment a standard dual-interest theory, the First Dibs Principle will likely only be acceptable to proponents of that theory. Proponents of child-centered approaches to parental rights will not ascribe the same significance to genetic self-ownership.

I will respond to potential objections to this account shortly. Before doing so, however, I would like to make a few brief comments about conditions (a) and (b) in the proviso outlined above, as well as the advantages of the First Dibs account over Gheaus's gestational account.

The non-forfeiture condition specified in (a) follows from a more general principle that applies to standard cases of property ownership. Returning the ficus example illustrated above, while I may have a pre-existing claim to the ficus that prevents you from keeping it against my wishes, this claim can be nullified by transferring ownership of the ficus to you through a gift. In this instance, I have forfeited my claim to the ficus—I no longer have a right to determine what happens to it, and I cannot legitimately demand that you give it back to me in the future. Similarly, individuals who have presumptive rights to parent the children who develop from their reproductive gametes can also be thought to forfeit those rights when they transfer ownership of their gametes through a process of voluntary donation. In this sense, a person who has voluntarily donated sperm or ova does not stand in any special rights position with respect to a child that grows out of them, as those rights have been forfeited along with the more basic right of gamete ownership that gives rise to them.

Moreover, the child welfare condition specified in (b) simply follows from the conditionality of parental rights. Recall that both the child-centered and dual-interest accounts of parental rights hold that the acquisition and maintenance of parental rights is conditional on fulfilling a number of fiduciary parental duties. Thus, if a genetic progenitor is unable to fulfill those duties, or if their assumption of a parental role with respect to their genetic child would otherwise be contrary to that child's interests, then they do not have presumptive claim to parent their genetic child as they are generally ineligible for the acquisition of parental rights.

With these conditions in tow, the First Dibs account presents two major advantages over Gheaus's gestational account of the right to parent one's biological baby. First, the First

Dibs account has a clear explanatory mechanism. While Gheaus's account relies on controversial claims about the apparent relationship that is developed between mothers and their fetuses during gestation, the First Dibs account relies on widely accepted norms surrounding property ownership and bodily integrity. This is not to say that the First Dibs account does not invite its own sources of controversy—as I will demonstrate in the following section, the explanation that the First Dibs account provides is also vulnerable to a number of objections to which Gheaus's account is not. Rather, it is simply to say that the explanation itself is relatively straightforward. Insofar as we have rights to control what happens to and with our reproductive gametes, it is reasonable to think that we also have a presumptive right to enter into parental relationships with any children who grow out of them.

Second, the First Dibs account also escapes the inclusivity dilemma. Unlike Gheaus's account, the First Dibs account is able to account for the rights of biological fathers without opening the door to a host of other potential rights-claimants as well. This is not only attractive insofar as it restricts parental rights to a more plausible constituency of persons, but also because it means that the First Dibs account can effectively adjudicate cases where there are multiple conflicting claims over who gets to parent a particular child. In the case of *Gestational Surrogate*, for example, the First Dibs account clearly and unambiguously assigns parental rights to the gamete providers (Alice and Bill), whereas Gheaus's account is ambiguous between assigning parental rights to the gestator (Claire) and the gamete providers, assuming the gamete providers have also participated in the various relationship-building activities that give rise to parental rights on that account. In this sense, the First Dibs account is capable of solving the baby redistribution problem *and* resolving cases in which there are multiple conflicting claims over who gets to parent a particular baby.

Before moving on to objections, it is worth making one final point about the relationship between genetic and gestational accounts of the right to parent one's biological baby. While Gheaus concedes that her account "has nothing to say about individuals who claim

biological parenthood rights on the sole basis that they contributed sperm or ova,"[47] one might think that the First Dibs principle could nevertheless be accommodated within her argument. It might be the case, for example, that parental rights are generated by the relationship building that occurs during gestation, but only with respect to gametes that have been legitimately acquired. In this sense, gestation would give rise to parental rights in standard instances of procreation, but would not give rise to parental rights in cases such as *Gestational Surrogate* or *Gamete Thief*, as Claire and Dana both lack First Dibs over the embryos they have gestated. Notice, however, that the gestational component in this type of hybrid approach is really just a spare tire. If the parental rights-claims of Claire and Dana are both illegitimate in virtue of their relationship to the embryo they gestated, then we need not go further than legitimate gamete entitlement when thinking about parental rights in standard cases of procreation. This suggests that a genetic account of the right to parent one's biological baby is more foundational than a gestational account, for while one can acquire rights to parent a genetically-related child who one has *not* gestated (as in the case of *Gestational Surrogate*), one cannot acquire rights to parent a child that one has gestated but to whom one lacks a genetic entitlement.

2.6 Objections

Despite its advantages, the First Dibs account is vulnerable to four important objections that must be responded to before it can be considered a tenable account of the right to parent one's biological baby: one that claims it is explanatorily weak; one that claims that it is objectionably proprietarian; and two that claim it has unattractive normative implications when applied in concrete cases, particularly cases involving estranged parents and sexual as-

[47] Gheaus, 2012, 436.

sault. In this final section, I will review each of these objections in turn, ultimately concluding that none of them succeed in undermining the First Dibs account.

Explanatory Power

One of the standard objections to genetically-based accounts of parental rights is that genetic connectedness does not by itself have any moral significance and cannot therefore serve as the basis for a rights-claim.[48] For example, in her own treatment of the right to parent one's biological baby, Porter rejects what she refers to as 'straight genetic' accounts of parental rights on the grounds that "Chemical sequences are not the sorts of things, on their own, that can be morally weighty enough to drive a rights claim."[49] Michael Austin has cast similar aspersion on genetic accounts of parenthood in general, arguing that "a mere genetic connection between individuals is neither necessary nor sufficient for [moral] parenthood. That Jeff has the same level of genetic connection with his twin brother's child as his own does not entail that he has parental rights over or parental responsibilities to his twin's child."[50]

Do these criticisms undermine the claim under consideration, i.e. that individuals have a presumptive right to parent the children that have resulted from their reproductive gametes? Not necessarily. The mistake in each case seems to be in the assumption that it is genetic *similarity* that is meant to do the work in genetic accounts, rather than the origins of the genetic material from which the child develops. For instance, Austin is correct that Jeff does not have any parental rights with respect to his twin brother's biological child, though this implication only follows if we think that genetic similarity is what grounds parental rights. However, the First Dibs account does not assume this. The presumptive right to parent a child that has resulted from one's genetic material is not explained by the child's genetic

[48] See for example, Porter, 2015, 5-9; Bayne and Kolers, 2001; and Michael W. Austin. *Conceptions of Parenthood: Ethics and the Family*. (Burlington: Ashgate, 2007), 20-21.
[49] Porter, 2015, 5.
[50] Austin, 2007, 20.

similarity to oneself, but rather from the fact that the child developed from genetic material that one originally had a right to control. In this sense, the First Dibs account actually affirms Austin's reservations: Jeff does not have parental rights to his brother's child because that child developed from reproductive gametes over which his brother (and his brother's procreative partner) had an initial entitlement.[51]

Proprietarianism

However, while appealing to genetic derivation avoids the problem about explanatory power, it also seems to invite a different kind of problem, for if parental rights are rooted in an initial ownership claim over one's reproductive gametes, then this might be thought to entail that parents also have ownership rights over the children who result from them. This proprietarian objection has recently been raised by Porter, who claims,

> [I]n order to ground parental rights in genes, one must argue not just that parent and child share genetic material, but that the genetic material belongs to the parent, and thus, so do the products of it (i.e. the offspring produced with it)… But this belongingness will need to be of a sort that can generate rights over the object of the belonging. It is difficult to see what sort of belonging could do so, other than ownership. Indeed, when I claim rights over my own body, I do so via the claim that I own it: I own my body, and that is why I have rights over it. Same will go then, for my genetic children. A straight genetic account of parental rights, then, collapses immediately into a proprietary account.[52]

[51] Austin anticipates the response that it is genetic derivation, rather than similarity, that generates parental rights, though swiftly disregards it on the grounds that "Genetic derivation amounts to a causal account of parental rights and obligations. On this account, causation, and not mere genetic connection, does the work." However, as I will make clear by the end of the following chapter (see section 3.4), this claim is patently false. Insofar as one can cause a child to exist using someone else's reproductive gametes, genetic derivation is not the same thing as causation, and each factor plays a different role in the generation of parental rights and obligations, with genetic derivation giving rise to presumptive parental rights, and causation of existence (and hence, parental need) giving rise to presumptive parental obligation. Causing a child to exist using someone else's reproductive gametes would generate an obligation to ensure *that* the child is adequately parented, but it would not establish a presumptive right to parent that child. The owners of the reproductive gametes would maintain First Dibs over the resultant child, but would not be obligated to take on a parental role with respect to it in virtue of that fact that they are not morally responsible for its existence. See Austin, 2007, 21.

[52] Porter, 2015, 6.

Now, the First Dibs account unabashedly subscribes to the idea that the presumptive right to parent one's genetic children derives from a kind of ownership claim over one's reproductive gametes. The real question, however, is whether an ownership claim over one's reproductive gametes necessarily translates into an ownership claim over the children that grow out of them, such that the First Dibs account immediately collapses into a form of proprietarianism. I will challenge this connection in a moment; but first, it is worth clarifying precisely *why* proprietarianism is thought to be objectionable in the first place.

In addition to a vague discomfort with thinking about children in the same way that we think about ficus plants, the claim that parents own their children is usually thought to run into two kinds of problems, one of which is normative, the other conceptual. On the normative side, there is the worry that if we accept the claim that parents own their children, then we are accepting the idea that parents have the same package of ownership rights over their children as they do over their other property, including the right to sell, neglect, or dispose of it at will. To the extent that ownership rights entail absolute or near-absolute decision-making power over what is owned, conceiving of children as property seems inconsistent with recognizing their independent moral status.[53] On the conceptual side, there is the worry that conceiving of children as property conflicts with the very principle of self-ownership that gives rise to the parental rights-claim in the first place. If I have an ownership claim over the product of my reproductive gametes, then this must be because I own my reproductive gametes; and if I own my reproductive gametes, then this must be because I own the body that produces them. However, if human beings are self-owning creatures, then having an ownership claim over one's offspring seems paradoxical—either because children are human beings,

[53] See, for example, Brennan and Noggle, 1997, 11.

and so are themselves self-owning, or because procreators are someone's children, and so are themselves owned.[54]

It is not my intention here to argue for the claim that parents own their children, though it is worth noting that simply using property as a model for thinking about parental rights does not necessarily lead to either of these problems, at least not as directly as critics seem to suggest. For instance, in response to the normative problem, one might point out that it is not always the case that ownership rights entail absolute or near-absolute decision-making power over what is owned. Rather, there are certain instances in which one's ownership rights can be limited by the moral standing of the thing that is owned, as in the case of animals or (more controversially) historically significant artifacts or intrinsically valuable works of art.[55] Moreover, in response to the conceptual problem, one might posit a gradualist account of self-ownership wherein children gradually *become* self-owning as they develop the capacities for autonomy and rationality that are constitutive of moral personhood. This type of account might avoid the paradox of self-ownership, as it is consistent with the view that parents initially own their children, but gradually relinquish that ownership as their children approach the moral age of majority.

However, whether or not proprietarianism necessarily leads to these problems, the First Dibs account is not vulnerable to either of them, as it does not assume or imply the claim that parents own their children. As I indicated previously, the First Dibs account is meant to augment a standard dual-interest theory of parental rights by explaining why individuals who have a right to parent in general can also be thought to have a special right to enter into parental relationships with their biological children. All that it establishes is *who* gets the first shot at parenting a newborn child—it does not by itself explain why adults have

[54] The 'paradox of universal self-ownership' is discussed in Steiner, 1994, 237-248. For further discussion, see also David Archard. "What's Blood Got to Do With It? The Significance of Natural Parenthood," *Res Publica*, 1(1) (1995), pp. 91-106, 95-96.
[55] Similar points are made by Austin, 2007, 14-15, and Edgar Page. "Parental Rights," *Journal of Applied Philosophy*, 1(2) (1984), pp. 187-203, esp. 192-193.

a right to parent in general, nor does it offer any prescription about the principles or norms that ought to govern parent-child relationships. In this sense, the First Dibs account is *compatible* with the view that parents own their children, though this substantive view about the content of the rights *of* parents is not logically entailed by a principle that presumptively assigns the right *to* parent to genetic progenitors in the first instance. On the contrary, that principle is also compatible with the view that the rights of parents are limited and conditional, and subject to forfeiture upon the failure to fulfill a range of fiduciary parental duties.

There is a more general point underlying this response to the proprietarian objection, which is that questions about the content of role-based rights and obligations can be separated from questions about their acquisition. For instance, my right to occupy an elected office might be derived from the fact that I have received the support of the majority, though the particular means by which I have acquired the right to hold office does not necessarily influence the content of the rights and obligations that are attached to that office—the decisions that I make in my official capacity are not necessarily conditional on receiving the support of the majority through a vote. In a similar vein, the fact that the right to parent can be acquired through a claim of ownership over one's gametes does not necessarily imply any particular view about the content of the rights or obligations of parents.

Estranged Parents

However, even if the First Dibs account does not imply the proprietarian claim that genetic progenitors own their offspring, some may worry that it still has unpalatable normative implications when applied in concrete cases. One type of case that is of particular concern involves the parental rights claims of estranged biological parents. In the United States, for example, there have been numerous court cases in which men, previously unknown to their biological children, have claimed the legal right to parent those children on the basis of

genetic connectedness.[56] In a notable case from Iowa, *In the Interests of B.G.C.* [Baby Girl Clausen] (1992)[57], a young woman, Cara Clausen, gave her irrevocable consent to her baby's adoption two days after its birth, as did the man who was falsely listed on the birth certificate as the baby's father. Several weeks later, Clausen began to regret her decision and informed a second man, Daniel Schmidt, that he was the baby's real biological father. Schmidt responded by filing a petition to establish paternity and initiating a legal action to block the adoption, which was by then already underway. After winding its way through the courts for two years, the case eventually reached the Supreme Court of Iowa, which ruled in favor of Schmidt on the grounds that his parental rights were never legitimately terminated. The baby—now a toddler—was then transferred away from her adoptive parents and into the custody of Schmidt.

Initially, it seems like the First Dibs account affirms the Court's ruling: if individuals have a presumptive right to parent the children who result from their reproductive gametes, then it seems to follow that Schmidt also has a legitimate claim to parent his biological child. Yet many will find this to be a counterintuitive implication, and one that invites a slippery slope to even more questionable rights-claims. If Schmidt has a legitimate claim to parent his biological child after two years of absence, what is preventing an estranged parent from claiming the right to parent their biological after five, or even ten, years of absence?

In responding to this worry, it is important to distinguish between two types of cases in which estranged biological parents might claim parental rights. First, there are cases in which an individual refuses an initial opportunity to parent their biological child, but later demands custody of that child on the basis of genetic connectedness. The paradigm example of this type of case is the case of absentee fathers, who abandon their children in infancy and

[56] For a useful overview of these types of cases, see Mary L. Shanley. "Fathers' Rights and Mothers' Wrongs? Reflections on Unwed Fathers' Rights and Sex Equality," *Hypatia*, 10(1) (1995), pp. 74-108.
[57] *In the Interests of B.G.C.,* Supreme Court of Iowa, No. 207/91-476, 92-49, September 23, 1992. For discussion, see Shanley, 1995, 74-75.

then later claim a paternity-based right to parent those children later in life. These types of cases are easy to resolve within the framework provided by the First Dibs account, for the act of abandoning one's child at birth is tantamount to forfeiting the right to parent that child. Just as sperm or ova donors forfeit their presumptive right to parent the children who result from their donated gametes, so too do absentee fathers who choose to forgo that right at the time of the child's birth.

However, things are more complicated in a second type of case, wherein biological fathers are kept in the dark about their paternity.[58] In the case of Baby Girl Clausen, for instance, Schmidt was not given an initial opportunity to parent his biological child, but only became aware of his paternity after the child had already been put up for adoption. According to the First Dibs account, Schmidt *does* have a legitimate moral complaint, as his presumptive right to parent his biological child has not been respected, and he cannot be said to have forfeited that right through his actions or any prior agreement.

However, while the First Dibs account identifies an instance of wrongdoing in this case, it does not necessarily imply the particular resolution favored by the Supreme Court of Iowa, i.e. transferring custody of the child back to the biological father. In cases where men have been denied the opportunity to parent their biological children, the importance of rectifying that injustice has to be weighed against the potential costs of that rectification to the child in question. Depending on a number of factors, such as a child's age and the duration of their relationship with their adoptive parents, transferring custody to the biological father is likely to impose significant costs on a child, including the immediate costs of being separated from the only family they have ever known, as well as the longer-term costs associated with a disruption in continuity of care. Moreover, these costs tend to increase over time: generally speaking, the longer that a child has been in a relationship with his or her adoptive parents,

[58] Since it is unlikely that biological mothers could remain in the dark about their maternity, these types of cases are generally unique to biological fathers.

the more detrimental that disrupting that relationship will be for the child's present and long-term well being.[59] Now, it is possible to argue that the case of Schmidt is a borderline case in which the appropriate resolution is not exactly clear. Given that the child was only two years of age when she was transferred away from her adoptive parents, it might be the case that the separation costs are not so severe as to outweigh Schmidt's presumptive right to parent his biological child (though this is a determination that is perhaps best left to child psychologists, rather than political theorists). However, things become clearer with the passage of time. The older that a child gets, and the more attached they become to their adoptive parents, the harder it is to argue that enforcing a father's right to parent his biological child justifies the disruption of an existing parent-child relationship.

Luckily, support for this type of reasoning can be found in condition (b) of the First Dibs principle, which holds that individuals have a presumptive right to parent the children who result from their reproductive gametes *provided* that assuming the role of the child's parent would not be contrary to that child's interest. Thus, whether or not estranged parents have legitimate claims to parent their biological children will depend on whether or not assuming that role is contrary to that child's interest, which will usually be a function of how much time has passed between the child's birth and the point at which the parental rights-claim is made. In this sense, Ernest and Fran from *Gamete Thief* have a stronger claim to parent their biological child than Schmidt in the Baby Girl Clausen case, who in turn has a stronger claim than someone who claims the right to parent their biological child several years into that child's life.

[59] I say 'generally speaking' here because there are exceptional cases in which this is not true. For example, in cases where a child's parents are failing to fulfill their fiduciary duties, the cost of transferring that child to adequate adoptive parents might be outweighed by the harm that child is likely to suffer by remaining with its current parents. Notice, however, that this assumes the existence of viable alternatives. As Brighouse and Swift have noted, "Depending on what alternative arrangements for raising the child are available—and state institutions have generally been very bad at providing children with a decent start in life—it may yet be that a parent who is not 'good enough' is nonetheless a child's best hope." See Brighouse and Swift, 2014, 96.

One might object at this point that, even if it is successful, the reasoning that is used to resolve cases of estranged parents has embarrassing implications elsewhere. For example, if the passage of time can weaken the presumptive rights of biological parents, then this seems to imply an odd statute of limitations in cases like *Gamete Thief*: so long as Dana can keep Ernest and Fran in the dark for a few years about the fact that she has stolen and gestated their embryo, they will eventually lose their right to parent the resultant child due to the ever-increasing costs of separating that child from Dana (assuming Dana is an adequate parent). I believe that this is indeed a consequence of the reasoning that is used to resolve cases of estranged parents, though I do not believe that it is an embarrassment for the First Dibs account, for even if there are child-centered limitations on how a case like *Gamete Thief* can be resolved, the First Dibs account still provides a coherent explanation of why that case reflects an instance of wrongdoing. The presumptive rights of Ernest and Fran have *still* been violated, though it just so happens that the child's interest in continuity of care trumps the importance of rectifying that violation via a transfer of custody.

Sexual Assault

However, even if the First Dibs account does not legitimize the parental rights-claims of *all* estranged parents, it might be thought to have an even more troubling implication in cases of sexual assault. According to the National Conference of State Legislatures (NCSL), there are normally between 17,000 and 32,000 rape-related pregnancies in the United States each year.[60] States themselves are split in terms of how they assign parental rights in cases where pregnancies are carried to term, with roughly half of states allowing for the outright termination of perpetrators' rights, and half allowing for significant restrictions on custody

[60] National Conference of State Legislatures. "Parental Rights and Sexual Assault", last modified January 28th, 2016. Accessed April 13th, 2016 from http://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx

and visitation—all of which is usually conditional on a successful conviction.[61] One potential worry about the First Dibs account is that it does not obviously supply an argument against assigning parental rights to perpetrators. If individuals have a presumptive right to parent the children who result from their reproductive gametes, how does this not carry the perverse implication that perpetrators of sexual assault should also be granted a presumptive right to parent a child that their victim has brought to term?[62]

One possible reason is suggested by the type of justification that state legislatures provide for existing legislation aimed at terminating or limiting the parental rights of sexual assailants, which typically focuses on the best interests of the child. On this view, sexual assailants do not have a presumptive right to parent their victim's child because their history of sexual violence renders them unfit to parent children generally, in contravention of condition (b) of the First Dibs principle. However, while this is a valid argument, and perhaps sufficient to support the forfeiture of parental rights in most (if not all) cases of sexual assault, there is also an additional and arguably more fundamental argument against assigning parental rights to sexual assailants, which can be gleaned from consideration of structurally analogous cases. Consider, for example, one such case:

> *Embryo Creator:* Back at the gamete storage facility, George steals an ovum that Heidi (a stranger) had frozen for a future possible procreative project. He then combines it with his own sperm *in-vitro*, and has his partner gestate the resulting embryo for nine months, leading to the birth of a healthy baby.

[61] The fact that the termination or restriction of parental rights is usually conditional on a successful conviction suggests a disturbingly low incidence of enforcement. According to data gathered from the United States Department of Justice, more than 68% of sexual assaults go unreported, and of the remaining 32% that are reported, less than 2% result in successful convictions. For a summary overview, see the Rape, Abuse, and Incest National Network (RAINN). "Reporting Rates". Accessed April 13th, 2016 from https://rainn.org/get-information/statistics/reporting-rates

[62] I am assuming in this scenario that the perpetrator is a man and the victim is a woman, though everything I say here applies *mutatis mutandis* to situations in which these roles are reversed.

In this instance, even though George has contributed some of the genetic material from which the child developed, his parental rights claim to the child seems illegitimate for the same reasons that Dana's parental rights claim is illegitimate in *Gamete Thief*, namely, because the child was created from the use gametes to which he did not have legitimate access. In this sense, just as presumptive parental rights can be nullified by the illegitimate acquisition of an existing embryo (as in *Gamete Thief*), it seems as though parental rights can also be nullified by the illegitimate *creation* of an embryo. This not only seems intuitively correct, but it also seems consistent with more general principles of property ownership and access: just as one does not come to own a boat that is 50% constructed out of lumber stolen from one's neighbor, one does not acquire the right to parent a child that is created of out illegitimately acquired gametes.

If not decisive, this point at least serves as a supplementary consideration weighing against the assignment of parental rights to sexual assailants. By impregnating a victim as a result of a sexual assault, the sexual assailant engages in the same type of wrongdoing as George in *Embryo Creator* (in addition to the wrongdoing associated with the assault itself): he forces the creation of an embryo with reproductive gametes to which he does not have legitimate access. In this sense, we should not think of a sexual assailant as someone who has presumptive parental rights that are subject to being overridden by considerations of child welfare; rather, we should think of him as someone who does not have any presumptive parental rights to begin with, due to the manner in which his genetically related child was conceived. There are, however, further questions about the assignment of parental *obligations* in these types of cases. For example, even if a sexual assailant does not have a presumptive right to parent a child that resulted from his reproductive gametes, does he nevertheless have an obligation to parent that child, or perhaps an obligation to secure that child's parentage, in the event that the mother does not wish to do so? I will consider these types of questions in

the following chapter, when I evaluate the moral relationship between procreation and parental obligation.

2.7 Conclusion

In this chapter, I have sought to evaluate the relationship between procreation and parental rights by asking whether causing a child to exist through procreation generates a right to act as that child's parent. While it is routinely taken for granted that individuals have a presumptive right to parent their biological children, this assumption was shown to be problematic: while existing theories of parental rights can explain why adults have a right to parent in general, they cannot explain how adults acquire those rights over specific children, highlighting the need for a supplementary explanation of why adults who have a right to parent in general can also be thought to have a special right to parent their biological children. I have argued that such an explanation is provided by a principle of genetic self-ownership: because individuals have a right to determine what happens to and with their reproductive gametes, they also have a presumptive right to enter into parental relationships with the children who result from those gametes, provided (a) that they have not forfeited that right antecedently, and (b) that assuming the role of the child's parent would not be contrary to that child's interest. I have argued that this account not only avoids the conceptual and normative implications that plague existing accounts of the right to parent one's biological baby—particularly those that focus on the significance of gestation—but also that it is immune to a number of potential objections, including those that claim it is conceptually incoherent, and those that insist that it has unpalatable normative implications when applied in concrete cases. However, while individuals have a presumptive right to parent the children that result from their procreative activity, it remains to be seen whether they also have an obligation to do so as well. I take up this separate question in the following chapter.

Chapter Three
Procreation and Parental Obligation

3.1 Introduction

In the previous chapter, I argued that individuals have a presumptive right to parent the children that have resulted from their reproductive gametes, provided (a) that they have not forfeited that right antecedently, and (b) that assuming the role of the child's parent would not be contrary to that child's interests. In this chapter, I shift my focus from parental rights to parental obligations, and ask whether individuals also have a presumptive obligation to parent the children that result from their procreative activity. One way to get clearer about the distinction between these two types of questions is to consider the different contexts in which they typically arise. Questions about the origins of parental rights typically arise in cases where there are multiple conflicting claims over who gets to parent a particular child, such as the surrogacy dispute cases discussed in the previous chapter. Questions about the origins of parental obligations, by contrast, typically arise in cases where there is disagreement between different parties about who is responsible for parenting a particular child. Consider, for example, one such case:

> *Unwilling Father*: Alan and Brenda meet for a casual sexual encounter, and both make it clear that they have no interest in establishing a long-term relationship, and certainly no interest in having children together. However, despite taking every reasonable precaution to avoid conception, Brenda falls pregnant, and, having changed her mind about becoming a parent, decides to give birth to the child against her prior agreement with Alan. Is Alan now obligated to parent or otherwise support the child?

In order to adjudicate this type of case, we need a theory of parental obligation, or a theory about *how*, or in light of which facts, one acquires an obligation to parent a particular child. The existing literature on the morality of parenthood offers three such theories: the *genetic* account, which holds that one acquires an obligation to parent a child by contributing the genetic material from which that child developed[1]; the *voluntarist* account, which holds that one acquires an obligation to parent a child by volunteering to do so[2]; and the *causal* account, which holds that one acquires an obligation to parent a child by causing that child to be in need of parental care.[3] In this chapter, I defend what I refer to as a weak, indirect version of the causal account, according to which causing a child to exist through procreation is sufficient to generate an obligation to ensure *that* the child is adequately parented. While this obligation may be (and usually is) discharged by taking on the parental role oneself, I argue that it may also be discharged by ensuring that someone else takes on that role as well, as in standard cases of adoption. My ultimate conclusion, then, is that procreation and parental obligation are indirectly related: causing a child to exist through procreation always generates an obligation to ensure *that* the child is adequately parented, which sometimes but not always requires parenting the child oneself. On this account, whether or not Alan is obligated to par-

[1] David Benatar. "The Unbearable Lightness of Bringing into Being," *Journal of Applied Philosophy*, 16(2) (1999), pp. 173-180.

[2] Elizabeth Brake. "Fatherhood and Child Support: Do Men Have a Right to Choose?" *Journal of Applied Philosophy*, 22(1) (2005), pp. 55-73, and "Willing Parents: A Voluntarist Account of Parental Role Obligations" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010); Onora O'Neill. "Begetting, Bearing, and Rearing" in Onora O'Neill and William Ruddick (eds.) *Having Children: Philosophical and Legal Reflections on Parenthood*. (New York: Oxford University Press, 1979); and Judith Jarvis Thomson. "A Defense of Abortion," *Philosophy and Public Affairs*, 1(1) (1971), pp. 47-66.

[3] See David Archard. "The Obligations and Responsibilities of Parenthood" in Archard and Benatar, 2010; Michael W. Austin. *Conceptions of Parenthood: Ethics and the Family*. (Burlington: Ashgate, 2007), chapter 3; Jeffrey Blustein. "Procreation and Parental Responsibility," *Journal of Social Philosophy*, 28(2) (1997), pp. 79-86; Daniel Callahan. "Bioethics and Fatherhood," *Utah Law Review*, 3 (1992), pp. 735-746; Giuliana Fuscaldo. "Genetic Ties: Are They Morally Binding?" *Bioethics*, 20(2) (2006), pp. 64-76; James Lindemann Nelson. "Parental Obligations and Surrogacy Contracts: A Causal Perspective," *Public Affairs Quarterly*, 5(1) (1991), pp. 49-61; Lindsey Porter. "Adoption is Not Abortion-Lite," *Journal of Applied Philosophy*, 29(1) (2012), pp. 63-76, and "Why and How to Prefer a Causal Account of Parenthood," *Journal of Social Philosophy*, 45(2) (2014), pp. 182-202; Bernard Prusak. *Parental Obligations and Bioethics: The Duties of a Creator*. (New York: Routledge, 2013); and J. David Velleman. "Persons in Prospect," *Philosophy and Public Affairs* 36(3) (2006), pp. 221-288, esp. 245-266.

ent the child created out of his sexual encounter with Brenda will depend on whether or not doing so is necessary to ensure *that* the child is adequately parented, a factor I will argue is importantly context-dependent.

The chapter proceeds in three parts. In 3.2, I outline the three dominant theories of parental obligation, and argue that only the causal account is capable of establishing a plausible moral relationship between procreation and parental obligation. In 3.3, I defend a particular version of the causal account by outlining and responding to four key challenges. Finally, in 3.4, I offer some general conclusions about the moral relationship between procreation and parenthood, and its potential implications for law and public policy.

3.2 Theories of Parental Obligation

Consider the following case:

> *Willing Procreators*: Charles and Diane are in a stable long-term relationship, and have long dreamed of parenting a child together. Deciding that the time is now right, Diane stops taking her birth control pills and has unprotected sex with Charles at the times of the month when she is most likely to conceive. Shortly thereafter, Diane becomes pregnant, and nine months later gives birth to a healthy child. She and Charles then take the baby home from the hospital and eagerly begin their new lives together as parents.

Most people would agree that Charles and Diane are now morally obligated to parent their biological child. But what is the basis of this obligation? Existing theories of parental obligation give three different answers, which in turn have different implications for other cases of procreation. The genetic account locates the obligation in the fact that the child resulted from

Charles and Diane's reproductive gametes; the voluntarist account locates the obligation in the fact that Charles and Diane appear to have tacitly consented to parent their child; and the causal account locates the obligation in the fact that Charles and Diane are causally responsible for their child's existence, and hence for that child's need to be parented. Each of these theories may be posited in a *weak* or a *strong* sense, or as indicating a sufficient or necessary condition for the acquisition of parental obligations. Positing a strong version of any account commits one to *monism* about parental obligation, or the view that obligations to parent children can only be acquired in one way, whereas positing a weak version of any account is consistent with *pluralism* about parental obligation, or the view that obligations to parent children can be acquired in a number of different ways.[4] The weak causal view that I defend in this chapter is consistent with (and in fact assumes) a pluralistic approach toward parental obligation in which causation and voluntary acceptance are both sufficient for the acquisition of parental obligations. However, before outlining and defending this particular view, it is first necessary to introduce the existing views with which it competes.

The Genetic Account

According to the genetic account, one acquires an obligation to parent a particular child by contributing the genetic material from which that child developed.[5] The material in question has historically been conceived in terms of reproductive gametes—sperm and ova—though with the recent advent of three-parent IVF, it may be extended to include the mitochondrial DNA contributed by nuclei donors as well.[6] On the genetic account, Charles and Diane are obligated to parent their biological child because they have contributed the genetic

[4] This typology belongs to Bayne and Kolers. See Bayne and Kolers, 2003, 221-222.
[5] The genetic account is more commonly defended in the law than it is in philosophy, though one philosophical defense of the genetic account is provided by Benatar, 1999.
[6] In three-parent IVF, the nucleus of a donor egg is inserted into the cytoplasm of a recipient egg from which the nucleus has been removed due to mitochondrial abnormalities. The hybrid egg is then fertilized with a man's sperm, thereby giving the resultant child three genetic parents.

material from which that child developed. Importantly, this obligation is shared between them, as both contributed genetic components that were necessary to that child's existence.

If posited as a strong or monistic theory of parental obligation, the genetic account is clearly implausible, as it cannot account for the obligations of non-genetically-related adoptive parents. However, even if genetic connectedness is not necessary for the acquisition of parental obligations, one might be tempted to think that it is at least sufficient in most cases. One reason for this is that it appears to be consistent with the way that parental obligations are typically assigned in the law. In the United Kingdom, for example, the establishment of genetic paternity normally provides legal grounds for securing child support payments from men who have contributed genetic material to a child their sexual partner has brought to term, regardless of the nature of their relationship with that partner or their intentions in having sex. Conversely, common law in Australia has also *relieved* men of the obligation to financially support a child when it has been shown, contrary to what was previously thought, that they are not in fact the child's genetic father.[7] To the extent that we agree with these types of judgments, we may be lead to the view that the obligation to parent children is in part genetically grounded.

However, despite its popular appeal and apparent instantiation in law, the genetic account faces at least two major problems that ultimately discredit it as a plausible account of the origins of parental obligations. The first problem has to do with its lack of explanatory power, or its inability to account for the relationship between genetic connectedness and the acquisition of moral obligations. A satisfactory account of the origins of parental obligations should be able to explain how a certain set of facts gives rise to a certain set of moral obligations, though, as Joseph Millum puts it, "it is inexplicable what justificatory role stretches of

[7] See Fuscaldo's discussion of *Magill v. Magill*, in Fuscaldo, 2006, 65.

DNA could play."[8] This lack of explanatory power is helpfully illustrated by considering how genetic connectedness functions in non-procreative contexts. Suppose that I have an identical twin brother with whom I share all of my DNA, and to whom I have special obligations. While there are numerous explanations that could be given for the origins of these obligations—our shared history, my past promises to him, his vulnerability to my actions—our genetic connectedness does not seem to be one of them. In fact, if genetic connectedness were sufficient for the acquisition of special obligations, it would imply that I would still have special obligations to my brother even if we were separated at birth and grew up in isolation from one another on opposite sides of the planet. However, this implication is clearly false, suggesting that genetic connectedness alone is not sufficient for the acquisition of moral obligations.

A second problem with the genetic account is that it leads to counterintuitive or unacceptable implications when generalized to other types of cases. Consider, for example, one such case:

> *Gamete Thief II*: Emma breaks into the freezer of a gamete storage facility and steals a sample of sperm that Fred (a stranger) had frozen before his vasectomy. She then uses it to inseminate herself, and nine months later gives birth to a healthy child.

On a simple genetic account, Fred would now be obligated to parent the child in light of contributing part of the genetic material from which the child developed; yet holding Fred liable for this obligation seems egregiously unfair, given that he did not consent to, and was not even aware of, his contribution. Proponents of the genetic account might seek to avoid this implication by adding the condition that the genetic material must be contributed willingly

[8] Joseph Millum. "How Do We Acquire Parental Responsibilities?" *Social Theory and Practice*, 34(1) (2008), pp. 71-93, 72.

and in full view of the potential consequences; however, even this qualified view would still imply that voluntary gamete donors are equally liable to support the children who develop from their reproductive gametes. Some theorists are happy to accept this implication as a defensible feature of an account of parental obligation[9], though we should be hesitant to accept it if there are alternative theories that are capable of avoiding it.

The Voluntarist Account

A more promising alternative to the genetic account is an account of parental obligation premised on the notion of consent, or what is normally referred to in the literature as 'voluntary acceptance'. The voluntarist account follows from a more basic principle concerning the acquisition of role obligations generally, namely, the 'volunteer principle', which holds that "the only way in which we can acquire role obligations—or in any case, role obligations with genuine moral force—is by signing on for the roles to which they are attached."[10] Many critics have objected to the volunteer principle on the grounds that it is not universally applicable, as it cannot account for presumptively involuntary role obligations like filial obligations or obligations of citizenship.[11] However, even if the volunteer principle cannot account for all of the role obligations that we take to be important, it nevertheless specifies at least one common way in which role obligations are incurred. The role-based obligations of spouses, friends, and employees, for example, can all be explained in voluntarist terms: in each case, the obligations are incurred as a result of individuals having signed on for the roles to which they are attached.

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[9] See e.g. Benatar, 1999.
[10] Michael Hardimon. "Role Obligations," *Journal of Philosophy*, 91(7) (1994), pp. 333-363, 343. Note that Hardimon is merely reporting this principle, and does not himself endorse it. For a qualified defense of the volunteer principle with respect to special obligations generally, see Diane Jeske. "Families, Friends, and Special Obligations," *Canadian Journal of Philosophy*, 28(4) (1998), pp. 527-556.
[11] See e.g. Hardimon, 1994; and Christina Hoff Sommers. "Filial Morality," *The Journal of Philosophy*, 83(8) (1986), pp. 439-456.

In the context of parenthood, the volunteer principle implies that parental obligations are also incurred as a result of signing on for the role of parent. 'Signing on' here may take an explicit form, as when one formally adopts a child through an institutionalized procedure, though it may take an implicit for as well, as when one performs a set of actions that one knows, or ought to know, signals the assumption of the parental role (e.g. deliberately creating a child and taking it home from the hospital upon its birth). It is important to note, however, that while some form of voluntary acceptance is usually necessary for incurring parental obligations on a voluntarist account, it is not in itself sufficient, as candidate parents must normally meet two additional conditions of eligibility.[12] First, they must stand in the appropriate rights position with respect to a child in order to assume the role of that child's parent. If that role is already filled, or if someone else has a better claim to fill it (e.g. genetic progenitors with First Dibs), then simply volunteering to be a child's parent is not sufficient for acquiring parental obligations. Second, a candidate parent must also be capable of discharging the relevant obligations. If a person is demonstrably unfit to parent a child, then they may not undertake the role of a child's parent, *even if* no one else has a better claim to do so.

As an account of parental obligation, the voluntarist account has two main advantages over the genetic account. First, it is explanatorily strong: it offers a clear and plausible explanation of how parental obligations are acquired, and one that is consistent with generally accepted principles concerning the acquisition of role obligations. Second, it is also more inclusive about who can count as a parent. Whereas the genetic account can only account for the parental obligations of those who contributed the genetic material from which a child developed, the voluntarist account can account for the parental obligations of both genetically-related and non-genetically-related volunteers.

Despite these advantages, however, the voluntarist account also runs into a number of difficulties when invoked in concrete cases of procreation. First, while it has no trouble

[12] Brake, 2010, 172-173.

assigning parental obligations in standard cases of deliberate procreation, it encounters a potential difficulty in cases where there is disagreement between procreators about who is responsible for parenting the resultant child. In the case of *Unwilling Father*, for example, the voluntarist account implies that Alan has no obligations to the child created out of his sexual encounter with Brenda, for not only did he take every reasonable precaution to avoid conception, but he also explicitly expressed his desire *not* to become a parent. Some proponents of voluntarism have seen this as a defensible feature of their account, for if women have the choice of 'opting out' of their parental obligations through abortion or adoption, then it might seem fair that men should have a similar choice as well.[13] Others, however, have seen this implication as a key inadequacy, and a potential *reductio ad absurdum* for voluntarism in general.[14]

Of course, whether or not we take this implication to be problematic will depend on our pre-reflective intuitions about cases like *Unwilling Father*, and not everyone shares the intuition that unwilling fathers are necessarily obliged to their unwanted progeny. However, a second and less controversial problem for the voluntarist account is that it appears vulnerable to what Elizabeth Brake has termed the 'deadbeat dads' problem (which I will call the 'child abandonment' problem, given that it applies equally to biological fathers and mothers), wherein procreators may permissibly abandon their offspring by not volunteering to serve as their offspring's parents. Judith Jarvis Thomson recognizes (and endorses) this implication of voluntarism, claiming,

> Surely we do not have any such 'special responsibility' for a person unless we have assumed it, explicitly or implicitly. If a set of parents do not try to prevent a pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support from it at the cost of its life because they now find it difficult to go on providing for it. But if they have taken all reasonable precautions against

[13] See Brake, 2005.
[14] See Austin, 2007, 55, and Porter, 2012, 66.

> having a child, they do not simply by virtue of their biological relationship to the child who comes into existence have a special responsibility for it. They may wish to assume responsibility for it, or they may wish not to. And I am suggesting that if assuming responsibility for it would require large sacrifices, they may refuse.[15]

Brake has argued that the child abandonment problem is in fact illusory, for even if voluntary acceptance is necessary for acquiring parental obligations, general moral duties will normally block the conclusion that procreators may permissibly abandon their offspring: "if such abandonment endangers the child, the claim that a voluntarist account would permit it is false: it would be wrong for anyone to abandon a child to death, because it violates a general duty of easy rescue."[16] However, while appeal to general moral duties may indeed block the conclusion that procreators may abandon their offspring, it is at best a partial response to the child abandonment problem. Indeed, what is troubling about this implication of voluntarism is not only the prospect of permissible infanticide, but also the prospect that there may be children born whom no one is obligated to parent. It would be consistent with Brake's view, for example, for procreators to sustain their progeny at a subsistence level, but to deny them the more extensive goods of care, nurturing, and intimacy that are associated with parental relationships. If we view such a scenario as an injustice to children, then the child abandonment problem remains, and the voluntarist account appears inadequate as a monistic account of parental obligation.

The Causal Account

The main alternative to the genetic and voluntarist accounts seeks to avoid the child abandonment problem by assigning parental obligations to persons on the basis of their causal relationship to that child's existence. An early version of the causal account was stated (but not elaborated) by Immanuel Kant, who claimed,

[15] Thomson, 1971, 65.
[16] Brake, 2010, 174.

> …there follows from procreation in this community [i.e. marriage] a duty to preserve and care for its offspring; that is, children, as persons, have by their procreation an original innate (not acquired) right to the care of parents until they are able to look after themselves… So from a practical view, it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition as far as they can.[17]

On Kant's view, the obligation to parent a child one has created is not grounded in one's genetic connection to the child, nor in one's voluntary acceptance of the parental role, but rather in the fact that one has caused them to exist in a dependent and vulnerable state where they require—and also have a right to—the provisions associated with parenthood. Procreation, on this view, involves a kind of natural liability: every child is born into a dependent and vulnerable state, and the procreator, being the cause of that dependence and vulnerability, thereby incurs an obligation to parent the child.[18]

Whereas the voluntarist account follows from a more basic principle concerning the acquisition of role obligations, the causal account follows from a more basic principle of morality in general, namely, the principle that we ought to bear responsibility for the outcomes of our actions. The plausibility of this principle, as well as its appropriateness in the context of procreation, can be helpfully illustrated by considering how it operates in analogous cases. As a stock example of such a case, consider David Velleman's analogy of a child who is drowning in a swimming pool:

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[17] Immanuel Kant. *The Metaphysics of Morals*. (Trans.) Mary Gregor. (Cambridge: Cambridge University Press, 1991), 98-99.

[18] There is a possible objection here that being the cause of a person's existence is distinct from being the cause of their vulnerability, and that while a procreator may be responsible for the existence of a child, they are not responsible for that child's being vulnerable. This may be true in a strict sense; however, given the fact that a child's existence and vulnerability always go together (one cannot create a *non*-vulnerable child) this seems to be a distinction without a difference. For a defense of this type of argument, see Brake, 2005, 60, and Millum, 2008, 76-77. For a comprehensive critique, see Jeff McMahan. *The Ethics of Killing: Problems at the Margins of Life*. (Oxford: Oxford University Press, 2002), 364-372.

> Consider the hackneyed example of a child who is drowning at the deep end of a swimming pool. People lounging around the pool obviously have an obligation to rescue the child. But the obligation to fish the child out doesn't fall on the bystanders equally if one of them pushed the child in. The one responsible for the child's predicament is not just a bystander like the others, and he bears the principal obligation… Likewise with procreation and parenting. In my view, parents who throw a child into the predicament of human life have an obligation to lend the assistance it needs to cope with that predicament, by helping it to acquire the capacities whose exercise will enable it to flourish and whose lack would cause it to suffer. By choosing to create a child, perhaps even by choosing to have sex, adults take the chance of incurring this obligation.[19]

It is important to take note of two features of the relationship between causing existence and acquiring parental obligations. First, it is not the causation of existence *per se* that generates an obligation to parent the child, but rather the causation of a child's *need* to be parented. This has two important implications. The first is that the causal account is not necessarily limited to cases of procreation. If, through some form of culpable negligence, I cause the death of a child's parents, then I have caused that child to be in need of parental care, and accordingly incur an obligation to secure that child's parentage.[20] The second implication is that whether or not causing a child to exist amounts to causing that child to be in need of parental care will largely be a function of a society's childrearing conventions.[21] In Western societies, where children are primarily raised in the context of nuclear, biologically-related families, causing a child to exist is normally tantamount to causing that child to be in need of parental care. However, this is not necessarily the case. In Israeli *kibbutzim*, for example, children are raised collectively by all of the adults in the community, and in this context, causing a child to exist may not necessarily amount to causing that child to be in need of parental care. While I mention these points for the sake of completeness, my evaluation in the remainder of the chapter will assume a Western context, where causing a child's existence typically means causing that child to be in need of parental care.

[19] Velleman, 2008, 251.
[20] For a similar observation, see Archard, 2010, 112.
[21] Blustein, 1997, 80.

Second, it is also important to distinguish two possible interpretations of the relationship between causing existence and acquiring parental obligations. On the first, standard interpretation, causing a child to exist *directly* obliges one to undertake the role of that child's parent. This is the interpretation reflected in Velleman's analogy, where, much like the person who pushed the child into the pool, the persons responsible for a child's existence are directly responsible for lending the assistance it requires to cope with its newfound predicament. However, there is also a second interpretation in which causing existence and acquiring parental obligations are *indirectly* related. On this interpretation, the obligation that is incurred as a result of causing a child to exist is not the obligation *to* parent the child, but rather the distinct and prior obligation to ensure *that* the child is adequately parented. This obligation may be (and usually is) discharged by parenting the child oneself, though it may also be discharged by ensuring that someone else parents the child, as in standard cases of adoption. In this sense, the relationship between causing existence and acquiring parental obligations is mediated by the separate obligation to ensure *that* the child is adequately parented, which sometimes but not always requires parenting the child oneself.[22]

If we assume that adoptive parents are just as capable as biological parents at providing their children with a supportive upbringing, then this second interpretation actually fits better with the analogy that Velleman uses to support the first. Presumably, pushing a child

[22] Versions of the indirect interpretation have been defended in recent years by David Archard and Lindsey Porter, though there is a subtle difference between their accounts that is worth taking note of. On Archard's account, causing a child to exist generates an obligation to ensure *that* the child is adequately parented, which can either be discharged by parenting the child oneself or by ensuring that someone else does so. Crucially, when one takes the latter option, one does not have any further obligations to the child—caretaking responsibilities are transferred to the adoptive parent 'wholesale', as it were, and it is from that point forward the adoptive parent's responsibility to ensure that the child is adequately cared for. Alternatively, on Porter's account, causing a child to exist puts one in the role of a child's 'maker', which involves an inalienable obligation to ensure that the child is adequately cared for throughout the duration of its childhood. Caretaking responsibilities may be temporarily transferred to adoptive parents, though if the adoptive parents fail in that task, then the child still has a moral claim against its maker to ensure that it is adequately cared for. The view that I defend in this chapter is closer to Archard's account, as I assume that the package of caretaking responsibilities that are transferred from biological to adoptive parents includes the obligation to make alternative arrangements for the child in the event that one is no longer capable of caring for it. For expressions of each account, see Archard, 2010, esp. 105 and 116-118, Porter, 2012, esp. 70-73, and Porter, 2014, esp. 191-196.

into a pool generates an obligation to ensure *that* the child is pulled out of it, though discharging this obligation does not necessitate pulling the child out oneself: if there are other persons available who are willing to pull the child out and who would do just as good of a job as oneself, then one may satisfy their obligation to the child by ensuring that someone else comes to his assistance. In what follows, I assume in line with this second interpretation that the obligation that is incurred as a result of causing a child to exist is not the obligation *to* parent the child, but rather the obligation to ensure *that* the child is adequately parented. As I will demonstrate below, keeping this distinction in mind is key to responding to many of the standard objections that are raised against the causal account.

However, whether we adopt a direct or an indirect interpretation, the causal account presents a number of advantages as a theory of parental obligation. First, like the voluntarist account, the causal account is also explanatorily strong: it offers a clear and plausible explanation of why parental obligations are incurred, and one that is consistent with generally accepted principles concerning moral responsibility. Second, unlike the voluntarist account, the causal account is also capable of assigning parental obligations in cases where one or both procreators do not wish to parent a child they have caused to exist. In the case of *Unwilling Father*, for example, the causal account is consistent with (though, as I will explain in the following section, does not necessarily imply) the view that Alan *is* obliged to the child created out of his sexual encounter with Brenda, for even though he expressed his intention not to become a parent, he nevertheless acted in a way that had as its foreseeable consequence the creation of a child in need of parenting. The same reasoning generalizes to cases in which both procreators do not wish to parent their child, thereby providing a solution to the child abandonment problem.

Despite these advantages, however, the causal account has also been the subject of a series of probing critiques in recent years. In addition to the obvious critique that it cannot account for the obligations of parents who do not cause their children to exist (which only

applies to strong or monistic versions), critics have also raised four more troubling objections: (1) that the causal account over-determines who counts as parentally obliged; (2) that it is inconsistent with a standard fault-based view of liability; (3) that it is unfair by assigning equal parental obligations to parties who normally have unequal decision-making power over whether or not a child is brought into existence; and, regarding the indirect version particularly, (4) that it fails to appreciate the moral significance of biological connectedness. I will now address each of these objections in turn, ultimately arguing that none of them succeed in undermining the indirect causal account.

3.3 Defending the Causal Account

Causal Over-Determination

The first challenge for the causal account consists in providing a non-arbitrary conception of causation that does not over-determine the constituency of causally responsible agents. Causation is often conceived in counterfactual or 'but-for' terms, whereby an action counts as a cause for an event if that event would not have occurred but-for that action being performed.[23] However, as several critics have noted, this conception of causation risks being far too inclusive, as it would seem to assign parental obligations to virtually any person who has participated in a causal chain that has resulted in a child's birth.[24] For example, in an IVF pregnancy, there are multiple persons who causally contributed to the resultant child's existence, including the man and woman who supply the reproductive gametes, the embryologist who inseminates the egg, the clinician who performs the embryo transfer, the woman who gestates the embryo, and the obstetrician who administers the pregnancy—not to mention the multitude of persons (including matchmakers, grandparents, pro-natalist friends, etc.) who

[23] David Lewis. "Causation," *Journal of Philosophy*, 70(17) (1973), pp. 556-567.
[24] See Archard, 2010, 112; Austin, 2007, 39; Brake, 2010, 158; Blustein, 1997, 82-83; Fuscaldo, 2006, 67; and Nelson, 1992, 53-54.

contributed to the conditions under which the decision to procreate was initially made. A standard but-for conception of causation would seem to imply that each of these persons bears partial responsibility for the child they causally contributed to bringing into existence, leading to "a tremendous proliferation in the number of persons who could be considered [a] child's 'parents'."[25]

Some causal theorists have tried to address this worry by separating the 'primary and proximate' cause of a child's existence from the infinite chain of necessary conditions that preceded it. For example, Michael Austin has suggested that we can posit a "commonsense notion of causation which takes genetic (and perhaps gestational) parents to be the primary and proximate causes of the existence of their children and rules out those individuals who make important causal contributions to a child's existence, including healthcare professionals."[26] However, while this type of approach might succeed in narrowing down the range of causally responsible agents, it seems to do so at the cost of circularity, for it simply defines as 'primary and proximate' the causal contributions of the persons who we pre-reflectively consider to be obligated to the child, without actually explaining how *their* causal contribution is more relevant to the assignment of parental obligations than the causal contributions of possible others, e.g. the IVF clinician who also played a necessary causal role in the child's existence. This is clearly unsatisfactory. The very purpose of the causal account is to explain *who* bears responsibility for parenting a particular child, so we cannot very well appeal to those persons when constructing our conception of causation.

A better approach toward responding to this worry begins by distinguishing causal from moral responsibility.[27] Notice that the worry about causal over-determination is premised on the assumption that there is a direct and perhaps proportional correlation between

[25] Blustein, 1997, 82.
[26] Austin, 2007, 39.
[27] For a useful discussion of the distinction between causal and moral responsibility, see David Miller. "Distributing Responsibilities," *Journal of Political Philosophy*, 9(4) (2001), pp. 453-471, esp. 455-460.

causal influence and moral responsibility, such that causally contributing to a particular event is sufficient for bearing moral responsibility for it. This assumption seems false in at least two respects. First, we do not normally hold people to be morally responsible for *all* of the remote consequences of their actions, even when those actions serve as necessary conditions for the consequences in question. For example, by pioneering the field of nuclear physics, Ernest Rutherford played a necessary causal role in the atomic explosions at Hiroshima and Nagasaki, though it would be a mistake to hold him morally responsible for those explosions in light of that role—after all, he did not participate in the construction or delivery of the bombs, nor was the creation of atomic bombs a foreseeable consequence of his research at the time it was being conducted. In this sense, causally contributing to a particular event may be necessary for bearing moral responsibility, but it does not seem to be sufficient.[28]

Of course, critics like Austin might claim that the reason Rutherford is not morally responsible for the atomic explosions is because he is too far removed—while he played a necessary causal role in the explosions, he was not their primary and proximate cause. Notice, however, that this explanation is also incomplete, as we do not necessarily hold people to be responsible for every event for which they are the primary and proximate cause, at least not in the absence of additional conditions. If I light a match in a hallway where there happens to be a gas leak, I am the primary and proximate cause of the subsequent explosion, but it does not necessarily follow that I am also morally responsible for the destruction that ensues. For me to bear moral responsibility for the explosion, it seems like additional conditions have to be in place: that I acted with intention, that the lighting of the match was uncoerced, that I was aware of the risk of a gas leak (or was culpably ignorant of such a risk), and so on. Again, while causally contributing to an event appears necessary for bearing moral responsi-

[28] Note, however, that not all theorists agree that causation is even necessary for moral responsibility. For an argument against this view, see Carolina Sartorio. "How to Be Responsible for Something Without Causing It," *Philosophical Perspectives*, 18 (2004), pp. 315-336.

bility, it does not appear to be sufficient, even in cases where the causal contribution in question is the most primary and proximate.

What both of these examples illustrate is that the relationship between causation and moral responsibility is not direct or straightforward, but is rather mediated by an additional set of considerations that serve to link the two concepts. The question we should be asking, then, is not the empirical or metaphysical one of who played a necessary causal role in a child's existence (a group that undeniably includes grandparents, matchmakers, fertility clinicians, etc.), but rather the normative one of what conditions have to obtain for a person's causal contribution to translate into moral responsibility.[29] According to what Giuliana Fuscaldo calls the 'standard account of moral responsibility', there are at least two conditions that must obtain for an agent to bear moral responsibility for an event they have causally contributed to bringing about.[30] First, the causal contribution in question must have taken place under conditions of *freedom*, where freedom can be understood as both the absence of external constraints and the internal capacity to govern oneself on the basis of higher-order reasons. According to this condition, one cannot be held morally responsible for an event they have causally contributed to under conditions of duress, or in circumstances where they were involuntarily not of sound mind. Second, the event for which the person is being held morally responsible must also be a *reasonably foreseeable* consequence of one's free actions. According to this condition, one cannot be held morally responsible for events that occur via random and unpredictable causal sequences that spring from one's actions, but only those events that can be reasonably foreseen in the normal course of events.

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[29] Archard, 2010, 112-113. Once we acknowledge the distinction between causal and moral responsibility, we can also see why some of the existing strategies for addressing the problem of causal over-determination are inadequate. For example, Michael Austin and Lindsey Porter both attempt to address the problem of causal over-determination by positing modified conceptions of causation that count a narrower range of persons as causes. However, this strategy can only succeed if we assume—falsely—that causally contributing to a particular event is sufficient for bearing moral responsibility for it. See Austin, 2007, 39, and Porter, 2012, 68-69.

[30] Fuscaldo, 2006, 70-71.

To be sure, these two conditions provide only a partial picture of the complex relationship between causation and moral responsibility, and the conditions themselves could be subject to further interrogation—we could go into significantly more detail, for example, about what freedom entails, or about what counts as 'reasonably' foreseeable. Even stated broadly, however, these conditions go a long way toward narrowing the range of morally responsible causers to a much more plausible set. If we take freedom to be a necessary condition of moral responsibility, then parental obligations can only be incurred as a result of causal sequences that one has voluntarily[31] participated in. This will rule out the assignment of parental obligations to victims of involuntary sex, as well as victims of gamete theft or deceptive sexual practices (e.g. lying about birth control or fertility, poking holes in condoms, etc.). Moreover, if we take reasonable foreseeability to be a necessary condition of moral responsibility, then parental obligations can only be incurred if, in the normal course of events, the creation of a child is a reasonably foreseeable consequence of one's actions. This will arguably rule out the assignment of parental obligations to persons like grandparents, matchmakers, and pro-natalist friends, for even though they may have causally contributed to the conditions under which a decision to procreate was initially made, the creation of a child is not usually a foreseeable consequence of their particular causal contributions. Indeed, setting up a date or professing the joys of parenthood does not typically result in the birth of a child, at least not in a way proximate enough to confer moral responsibility for the child's existence.[32]

[31] It might be objected here that if voluntary participation in the relevant causal sequence is necessary for incurring parental obligations, then the causal account simply collapses into a form of voluntarism. However, this objection is based on a conceptual confusion. What is being volunteered for in the present context is not the role of acting as a child's parent, but rather an act that can foreseeably result in the creation of a child who needs to be parented. One can involuntarily incur obligations as a result of voluntarily engaging in an act that leaves one liable to incur them (think, for example, of the obligation to compensate for damages as a result of causing a car accident).

[32] An interesting class of causers that may *not* be absolved of responsibility on the reasonable foreseeability condition is pro-natalist social institutions that encourage people to have children and stigmatize those who do not. For example, the Catholic Church encourages procreation among its followers by forbidding the various means that are often used to avoid it, including contraception and abortion. Because the creation of more children is a reasonably foreseeable consequence of these policies, it

The constituency of morally responsible causers, then, is limited to only those persons whose free actions can be reasonably foreseen to result in the creation of a child. This will include persons who freely engage in heterosexual intercourse (regardless of whether they intend to create a child), though it will also include persons like fertility clinicians and gamete donors, as they too act freely in ways that can be reasonably foreseen to result in the creation of children. The inclusion of these latter groups will likely strike many as counterintuitive, though it becomes much more plausible when we adopt the indirect rather than the direct version of the causal account. Recall that, on the indirect version, the obligation that is incurred as a result of causing a child to exist is not the obligation *to* parent the child, but rather the distinct and prior obligation to ensure *that* the child is adequately parented. Once we adopt this view, we can see that the parental obligations of gamete donors and fertility clinicians are usually discharged antecedently within the institutional context in which their causal contributions normally take place. In most jurisdictions, fertility services like IVF and artificial insemination by donor (AID) are only provided on the condition that the receiving patient is capable of parenting the child that may result from those services. This condition is legislated in the United Kingdom, for example, through section 14(5) of the *Human Fertilization and Embryology Act* (2008), which states that "A woman shall not be provided with treatment services unless account has been taken of the welfare of the child who may be born as a result of treatment (including the need of that child for supportive parenting), and any other child that may be affected by the birth."[33] Thus, while it might initially seem odd to claim that persons like gamete donors or fertility clinicians are liable to incur parental obligations, this is because those obligations are normally discharged beforehand by ensuring that the recipient of gametes or fertility services is capable of parenting the children they help bring into existence. In cases where these safeguards are not in place—in cases, for example,

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could be argued on a causal view that the Catholic Church bears some of the responsibility for meeting those children's needs, particularly in cases where their progenitors are unable to do so.

[33] United Kingdom. Human Fertilization and Embryology Act 2008, s. 14(5).

where gametes or fertility services are provided recklessly to persons who are clearly incapable of parenting a child—it is not unreasonable to charge the gamete donor or fertility clinician with the responsibility of ensuring that the child is adequately parented, even if discharging that responsibility requires parenting the child themselves.

Over-Demandingness

Even if we can identify a sufficiently narrow constituency of morally responsible causers, a second challenge for the causal account relates to the apparent stringency of the causally incurred obligations. As Lindsey Porter has recently emphasized, the causal account 'has teeth' in its strict assignment of parental obligations: one does not have to be a willing parent to incur parental obligations to a child, but simply has to stand in a particular causal relation to that child's existence.[34] I suggested earlier that this is in fact an advantage of the causal account, as it allows us to hold 'deadbeat' procreators to account, though some may worry that it is excessively demanding by imposing a set of obligations that is disproportionate to the amount of risk taken by engaging in the relevant causal activity—most notably, having sex.[35] The nature of this worry can be helpfully illustrated via an analogy. Like sexual intercourse, driving a motor vehicle is a desirable and beneficial activity that always presents a risk of an unintended and costly consequence, namely, getting into an accident. However, we normally think that the costs that are incurred as a result of an accident should be proportional to the extent to which the driver is at fault. A driver who injures a pedestrian while driving recklessly or inattentively has acted negligently in a way that leaves them liable to incur the full costs of their actions, whether this takes the form of compensation to the victim or time served in jail. However, a prudent driver who injures a pedestrian in a freak accident is not liable to incur the same costs, despite the fact that the outcome is the same. The fact

[34] Porter, 2014, 183.
[35] For expressions of this worry, see Brake, 2005, 60; and Millum, 2008, 72-73.

that they have acted prudently at least partially absolves them of responsibility for the injury, and this factors into their liability for costs.

The causal account, however, is insensitive to whether or not the relevant causal activities were prudently or recklessly engaged in. While it assigns full parental obligations to persons who have created a child out of risky sexual behavior, it also assigns full parental obligations to persons like Alan from *Unwilling Father*—persons who took every reasonable precaution to avoid conception, but whose actions nevertheless resulted in the creation of a child. To the extent that we accept a fault-based view of liability, this insensitivity might seem problematic, for if we are not fully responsible for the outcomes of our actions if we have taken sufficiently rigorous precautions to prevent those outcomes, we might think that we should not be bear full responsibility for the children we create if we have taken sufficiently rigorous precautions to avoid creating them (e.g. by using multiple reliable forms of birth control).

How should a causal theorist respond to this charge? Two responses are available. The first is to point out that, in practice, the worry about over-demandingness is largely defused by the various options that persons typically have for permissibly circumventing their parental obligations. For example, a couple who has conceived accidentally might decide to abort the fetus, or, if this is not an acceptable option, they may decide instead to bring the child to term and then transfer custody of that child to a competent and willing adoptive parent. These points go a long way toward alleviating concerns that participation in even cautious sexual activity leaves one liable for the involuntary acquisition of long-term parental obligations, as there are often viable exit options for those who do not want to undertake them.

However, a second and more direct response is simply to deny the premise that the causal account *is* in fact over-demanding. It is true that there are certain cases in which taking reasonable precautions to prevent a particular outcome relieves one of moral responsibility

for that outcome in the unlikely event that it comes to pass. However, there are also cases in which we impose strict liability on the outcomes of one's actions, particularly in cases where the actions in question involve significant and inherent risks.[36] For example, if a tiger in my animal sanctuary escapes from his cage one day and mauls a local resident, I am liable to compensate the victim *even* if I took every necessary precaution to prevent an injury, e.g. by using the strongest and most tamper-proof tiger cages, installing a well-constructed electric fence around the compound, and hiring sufficient staff to patrol the animals and alert local residents in the event of an escape. The reason why I am liable in this case is because keeping wild animals is an inherently dangerous activity with a foreseeable (if unlikely) chance of resulting in a serious and costly accident. Thus, a condition of permissibly engaging in this activity is the obligation to assume those costs in the unlikely but possible event that they arise.

If strict liability is imposed in virtue of the magnitude of the risk associated with a particular activity, then heterosexual intercourse seems like a prime candidate: even when undertaken cautiously, it always presents the risk of resulting in the creation of a dependent and vulnerable child whose life may either wither or thrive depending on whether or not they are adequately parented. Thus, it is reasonable to think that a condition of engaging in that activity should be the obligation to ensure the adequate parentage of any child that may result from it, even if every reasonable precaution was taken to avoid that outcome.[37]

However, even if it is consistent with analogous cases, some may think that a strict liability interpretation of the causal account still seems unfair by assigning the same obligations to cautious procreators as it does to reckless ones—after all, a cautious procreator like Alan has acted morally differently than a reckless procreator who is indifferent to the outcomes of their actions, and we might think that a theory of parental obligation should be able

[36] Tony Honoré. *Responsibility and Fault*. (Oxford: Hart Publishing, 1999), 23-31.
[37] Strict liability interpretations of the causal account have been explored by Archard, 2010, 115-116, and Blustein, 1997, 84-85.

to account for that difference. I agree that that there is an important moral difference between the conduct of reckless procreators and the conduct of cautious procreators like Alan, though I think that this difference can be accounted for in a way that does not impact on their responsibilities. The relevant difference, it seems, involves the extent to which each person is to blame for the outcomes of their actions. Returning to Velleman's analogy, if I accidentally nudge a child into the deep end of a swimming pool, I am less blameworthy than someone who deliberately shoves him in, but our obligations with respect to the child are exactly the same—we are both obligated to jump into the water to fish him out. By the same token, when a person engages cautiously in sexual activity, they may not be blameworthy for the fact that there now exists a vulnerable child in need of parenting, though their obligation to that child is the same as it would be had they acted recklessly—they are still obliged to ensure that the child is adequately parented. In this sense, a person's level of recklessness or prudence in their procreative activity may affect how we appraise them from moral point of view, but it need not affect the content of the obligations that activity generates.

Causal Asymmetry

The third challenge for the causal account relates to an apparent asymmetry in the amount of decision-making power that different parties have over a child's existence. When reflecting on the case of *Unwilling Father*, one reason why it might seem unfair to hold Alan equally liable is because he had an unequal amount of causal influence over the child's existence: while Alan and Brenda contributed equally to the child's conception, it was ultimately Brenda who got to decide whether or not the conceived embryo would be gestated and brought to term. This asymmetry, it seems, is a built-in feature of the causal account. Given the different biological capacities of men and women, and making certain assumptions about women's rights to abortion and bodily integrity, it appears as though women will always have a disproportionate amount of decision-making power over whether or not a child is brought into existence.

How should a causal theorist respond to this asymmetry? This depends on whether we take the inequality in decision-making power to be *prima facie* objectionable. If we think that it is unfair that men and women have unequal causal influence over a child's existence, yet equal responsibility to parent the child once it exists, then the causal theorist can respond in one of two ways. First, they can address the inequality directly by arguing either (a) that men should be granted equal decision-making power over whether or not a fetus is brought to term, or (b) that they should be given an option to 'opt out' of their parental obligations that is equivalent to women's option to choose abortion or adoption.[38] Alternatively, the causal theorist can also address the implications of the inequality by arguing that the difference in decision-making power should be reflected in the distribution of child-rearing responsibilities. In other words, if women play a greater causal role in the existence of a child, then perhaps they should also incur a greater share of the parental responsibilities.

[38] Versions of the latter view are defended by Brake, 2005, 63-68, and Stephen D. Hales. "Abortion and Father's Rights" in James M Humber and Robert F. Almeder (eds.) *Reproduction, Technology, and Rights*. (Totowa: Humana Press, 1996).

Neither of these options is particularly attractive. Even setting aside their troubling implications for the social position of women in relation to men, there are good philosophical reasons to reject them. First, the basic idea motivating the first line of response—that the option of men to opt out of their parental responsibilities is equivalent to the option of women to choose abortion or adoption—is based on a conceptual confusion. When a woman chooses to abort a fetus or put a child up for adoption, neither the man nor woman incurs any child-rearing responsibilities with respect to that child. This is either because the pregnancy is terminated, in which cases there are no responsibilities, or because the child is adopted out, in which case the responsibilities are incurred by a willing recipient. However, when a man chooses to opt out of his parental responsibilities, the same is not necessarily true: in cases where the man opts out, but where his partner continues the pregnancy, the woman is saddled with the full responsibility of parenting the child, a scenario that the man is not generally at risk of facing. One might of course respond at this point that if the woman is not prepared to undertake this responsibility, then she should opt out of parenthood as well by terminating her pregnancy or putting the child up for adoption. However, this type of response only serves to underscore the different realities faced by men and women in procreative decision-making. Whereas men can quite literally walk away from an accidental conception with relative detachment, women are faced with either nine months of pregnancy followed by the relinquishment of their child, or the difficult and often long-lasting decision to terminate the pregnancy. To suggest that these are equivalent options—that they constitute a form of 'opting out' for women—is to ignore their most important differences.

The second line of response does not fare much better than the first. In addition to the obvious child-welfare and gender-equality-based reasons against saddling women with a greater share of parental responsibilities, there is also a philosophical reason against doing so: it assumes, as was rejected above, that one's level of moral responsibility for a particular event should be proportional to one's level of causal influence in bringing that event about.

To the extent that we reject this view, we should also reject its apparent implication that women ought to bear greater parental responsibilities in virtue of their greater (and ultimately unchosen) biological role in bringing a child into existence.

However, while both of these responses to the causal asymmetry objection ultimately fail, the causal theorist does not in the end need to embrace them, for there is no reason to think that the unequal decision-making power of men and women is objectionable in the first place. Unequal treatment of men and women is not objectionable if the inequality is a response to morally relevant differences, and procreation is a case in which sexual differences do seem to make a moral difference. The situation might be described as one in which women have an extra right, or perhaps an extra opportunity to exercise a right, in virtue of certain physiological differences.[39] Both men and women have a basic right to bodily integrity that protects their ability to control what happens to and with their bodies, though only women's bodies are capable of conceiving and gestating children. In the context of procreation, the effect of this difference is that women have an option that men lack: whereas women and men will be equally obliged to any child they jointly cause to exist, women have a bodily-integrity-based right to abort fetuses from their bodies.[40] Moreover, in jurisdictions where this right is legally recognized and publically known, it is also a factor that men should include in their risk assessment before engaging in heterosexual intercourse. That a woman might choose to continue rather than terminate an accidental pregnancy is a reasonably foreseeable consequence of having sex.

However, even if there is nothing objectionable about the asymmetrical decision-making power of men and women in this context, we still might be sensitive to certain claims of unfairness on the part of unwilling fathers, particularly those who have taken every reasonable precaution to avoid conception. To understand why, consider for a moment that the

[39] Millum, 2008, 90-93.
[40] I assume that women's right to abortion is grounded in a more general right to bodily integrity. For a defense of this view, see Thomson, 1971.

case of *Unwilling Father* was reversed, and that Brenda was adamant on terminating the pregnancy despite the fact that Alan desperately wanted to her to continue it. Few would likely defend the view that Alan's interest in becoming a parent justifies compelling Brenda to gestate and give birth to a child against her will, though if this is the way that we feel about the case of unwilling mothers, it is not clear why we should treat unwilling fathers so differently. Presumably, the reason why it is unjust to compel a woman to gestate and give birth to a child for the sake of her partner is because the burdens associated with doing so are unreasonably demanding: in addition to the unique challenges and risks associated with giving birth to a child, it also requires nine months of physically demanding pregnancy, during which time the woman will likely face serious limitations in her autonomy and independence. However, as critics like Brake have argued, the burdens imposed on unwilling fathers are not dissimilar.[41] In many jurisdictions, unwilling fathers are often required to pay child support for a minimum of eighteen years, which, depending on their occupations and earnings, can have serious and long-term consequences for their physical, financial, and emotional well-being. And while these burdens are different for men than they are for women—they do not, for example, interfere directly with a man's bodily integrity—they are not so different as to merit being discounted entirely, even if we ascribe to them different relative weight.

Luckily, the indirect version of the causal account also has the resources to accommodate concerns about unfairness. If the obligation that is incurred as a result of causing a child to exist is the obligation to ensure *that* the child is adequately parented, then presumably this obligation can be discharged by unwilling fathers by ensuring that their female partners are adequately equipped to support the child, up to whatever level is required by that child's entitlements. On this view, the level of support that is owed by unwilling fathers will be context-dependent: in some cases, it will require bearing an equal share of child-rearing responsibilities, though in other cases—e.g. cases in which a woman is capable of inde-

[41] Brake, 2005.

pendently supporting the child without great sacrifice—it will require bearing much less.[42] This will certainly be an unpopular view in some circles, though it seems to be one that is required by fairness. Indeed, if it is unfair to compel women to make demanding sacrifices in order to accommodate their partner's parenting interests, then it should not automatically be considered fair to compel men to do the same.

Biological Connectedness

A fourth and final challenge applies not to the causal account *per se* but rather to the indirect version that I have defended in this chapter. The notion that procreators can adequately discharge their parental obligations by transferring custody of a child to competent and willing recipients assumes that children can be adequately parented by persons to whom they are not biologically related, and that procreators are not violating any additional moral requirements by alienating themselves from their biological offspring. Initially, both of these seem like relatively safe assumptions. In the first instance, there does not seem to be any reason for thinking that adoptive parents are any less capable than biological parents at providing their children with a supportive upbringing—on the contrary, given the extraordinary lengths that adoptive parents often go to in order to parent children, there may in fact be reason for thinking that they are on average *more* likely than biological parents to provide such an upbringing, given that the latter sometimes find themselves in the parental role unintentionally, and hence with less deliberate preparation. In the second instance, there also does not seem to be any reason for thinking that biological parents are necessarily violating any additional moral requirements by alienating themselves from their offspring before or shortly after birth. Provided that children are put up for adoption before developing strong emotional

[42] Another contextual factor that will influence the amount of support owed by unwilling fathers is how childrearing costs are distributed throughout society. I consider this issue in further detail in the following chapter.

attachments to their biological parents, there does not seem to be any special harm associated with 'abandoning' them to the care of competent and willing others.[43] In cases were the biological parents are themselves incapable of providing a supportive upbringing, this type of abandonment may in fact be morally required.

However, some theorists have suggested the biological connectedness matters more than I have acknowledged here, and in a way that impacts on how parental obligations may be appropriately discharged. For example, Bernard Prusak has recently argued that the 'given' relationship between procreators and their progeny is "of tremendous value and importance to [the] child,"[44] as it provides a unique context for the development of deep and unconditional love. On this view, there is something special about the way that procreators identify with their biological children that leads them to view their task as unconditional, which in turn benefits children by promoting their sense of security and belonging. Prusak concludes on the basis of these claims that "the child's need for emotional support is answered most adequately—and so we could say answered most *responsibly*—by a relationship with his or her biological procreators," and that procreators therefore have a "prima facie obligation to develop loving parent-relationships with the children who they presume to bring into being."[45]

Prusak is undoubtedly correct to note that children require access to secure and loving parental relationships in order to flourish; the real question, however, is whether these types of relationships are more likely to obtain between parents and their biological children as opposed to parents and their adoptive children. Remarkably, Prusak does not actually provide any support for this claim, though, to his credit, it is potentially consistent with select

[43] As the proviso in this sentence suggests, things are different if a child is put up for adoption *after* developing strong emotional attachments to their biological parents, as this kind of detachment is likely to harm the child emotionally and compromise their interest in continuity of care—though doing so may still be justifiable under certain circumstances, e.g. if the biological parents become unable to care for the child.
[44] Prusak, 2013, 19.
[45] Ibid., 36.

evidence from evolutionary psychology. For instance, some evolutionary psychologists have noted a higher incidence of child maltreatment among stepchildren as compared to biological children, which they believe can be explained by a parent's evolutionary tendency to invest more heavily in their genetic offspring (a phenomenon known as the 'Cinderella Effect').[46] If this explanation is in fact valid and reliably consistent, it might provide a limited basis of support for the *prima facie* obligation to parent one's biological children.

However, it is unclear how much emphasis we should place on these types of explanations, and how much influence we should allow them to have on our theory of parental obligation. For one thing, child maltreatment is a complex phenomenon that is unlikely to be reducible to a single explanation—indeed, other sources of empirical evidence suggest that a far more significant predictor of child maltreatment is a parent's own history of childhood abuse, a factor that may be distributed evenly among biological and adoptive parents alike.[47] More to the point, however, even if secure and loving relationships *were* more likely to obtain between parents and their biological children, it is not clear how this constitutes an argument against the indirect causal account that I have defended in this chapter. The supposedly greater tendency of biological parents to love and support their children would not imply that transferring parental obligations is impermissible *tout court*, but only that it is impermissible to transfer them to adoptive parents who fail to meet a competency threshold that includes the ability to love and support the child. Prusak's real point, then, is not so much about biology as it is about a child's need to be loved—a need that can be satisfied (or unsatisfied) in the context of biological *and* adoptive parent-child relationships.

However, while Prusak's argument fails to support the notion that parental obligations should be discharged by a child's procreators, it is not the only available account of the

[46] Martin Daly and Margo Wilson. *The Truth about Cinderella: A Darwinian View of Parental Love*. (New Haven, CT: Yale University Press, 1999).
[47] See, for example, Angela Moreland Begle, Jean E. Dumas, and Rochelle F. Hanson. "Predicting Child Abuse Potential: An Empirical Investigation of Two Theoretical Frameworks," *Journal of Clinical Child & Adolescent Psychology*, 39(2) (2010), pp. 208-19.

value of biological connectedness. An alternative account proposed by Velleman focuses on the special value that is associated with having knowledge of one's biological ancestry, or what he calls one's 'family history'.[48] According to Velleman, "knowing one's [biological] relatives and especially one's [biological] parents provides a kind of self-knowledge that is of irreplaceable value in the life-task of identify formation."[49] On this view, having a relationship with our biological progenitors is important not because they are more likely to love us, but rather because they can provide us with the connection to our ancestral past that we require to form our identities and situate ourselves within a broader narrative. It follows on this account that adoptive parent-child relationships are in an important sense second best, and that it is accordingly "immoral to create children with the intention that they be alienated from their biological relatives."[50]

If biological connectedness matters in the ways that Velleman claims it does, then transferring parental obligations to non-biological adoptive parents may well be problematic. Even if biological parents are not naturally better suited to meet their child's needs than adoptive parents, they may nevertheless be denying their children an important good by alienating them from their family history and the deep self-knowledge that it affords. This might again be thought to support a stronger, direct version of the causal view, whereby a child's procreators are not only obligated to ensure *that* the child is adequately parented, but are also obligated to parent the child themselves.

Should we accept this stronger view? Not necessarily. Even if biological connectedness matters in the way that Velleman claims it does, it does not necessarily follow that children must be *parented* by their biological progenitors. Rather, all that follows is that adopted children must have sufficient access to the knowledge about their biological ancestry that is required for their identity formation and self-conception. For example, it would be consistent

[48] See J. David Velleman. "Family History," *Philosophical Papers,* 34(3) (2005), pp. 357-378.
[49] Ibid., 357.
[50] Ibid., 357.

with Velleman's account of the value of biological connectedness to permit the transfer of parental obligations on the condition that procreators provide the relevant information to an accessible database (as is now legally required in many jurisdictions for gamete donors)[51] or, if this is insufficient, agree to make themselves available for future contact from their offspring (as in the case of open adoptions). It is also worth noting here that being parented by one's biological progenitors is no guarantee of acquiring the kind of ancestral knowledge that Velleman thinks is so crucial. Just as one can gain knowledge of one's biological roots in the context of an adoptive parent-child relationship, one can lack knowledge of one's biological roots in the context of a biological parent-child relationship, as in cases where one's biological parent is secretive or ignorant about the branches of the family tree.

However, even if biological self-knowledge can be realized in the context of adoptive parent-child relationships, we should also be cognizant of the extent to which the value of that knowledge is socially constructed. Both Prusak and Velleman cite the tendency of adopted children to seek out their birth parents as evidence of the deep significance of the biological connection between procreator and progeny, though it is not clear that this is the right conclusion to draw.[52] Rather than underscoring the intrinsic value of biological connectedness, the phenomenon of the 'search movement' may be more indicative of the higher value that our culture attaches to biological over adoptive relationships, and our tendency to conceive of family history in genetic rather than relational terms. One can imagine that in a world where adoption was more routine, and where adoptive relationships were accorded higher value, there would be less of a desire for adopted children to seek out their biological parents, and perhaps more of a tendency for them to see themselves as part of their adoptive

[51] For example, Austria, Finland, New Zealand, Norway, Sweden, Switzerland, and the United Kingdom all legally require gamete donors to be identifiable to their genetic offspring. For a discussion of this requirement and the possible ethical considerations that underlie it, see Inmaculada de Melo Martin. "The Ethics of Anonymous Gamete Donation: Is There a Right to Know One's Genetic Origins?" *Hasting Center Report*, 44(2) (2014), pp. 28-35.
[52] See Prusak, 2013, 15; and Velleman, 2005, 359-60.

family's lineage. Even in our existing world, where biology happens to take precedence, it is still unclear whether biological self-knowledge is of 'irreplaceable value' in the process of identity formation. If this were true, it would imply that children of closed adoptions lead necessarily diminished lives in virtue of being severed from their biological ancestry, though there is no reason to think that this is the case. While some may regret never knowing their biological parents, many develop healthy and robust identities on the basis of non-biological factors, including their own personal history and the new web of relationships they have been adopted into.[53] This should give us pause about the supposed value of biological connectedness, as well as its role within a theory of parental obligation.

Even if these arguments are sound, however, we still might think that there is something morally impoverished about transferring parental obligations to non-biological adoptive parents in certain types of cases. For example, while many would likely agree that transferring parental obligations is permissible or even obligatory in cases where the procreators are unable to adequately care for the child, some may be uncomfortable with the idea that parental obligations may be permissibly transferred in cases where the procreators are able to care for the child, but simply choose not to. I agree that there is a morally relevant distinction between these types of cases, but not one that impacts on the latter's permissibility. The elective transfer of parental obligations should only be viewed as impermissible if it involves an instance of wrongdoing, though on the account that I have provided in this chapter, no rights are violated, and no duties are shirked, when a set of procreators decide to transfer custody of their child to a competent and willing recipient. On the indirect causal account, the obligation that is incurred as a result of causing a child to exist is not the obligation *to* parent the child, but rather the distinct and prior obligation to ensure *that* the child is adequately parented. I have argued that adoptive parents are just as capable as biological parents at parenting chil-

[53] For a more extended critique of Velleman's arguments along similar lines, see Sally Haslanger. "Family, Ancestry and Self: What is the Moral Significance of Biological Ties?" in *Resisting Reality: Social Construction and Social Critique*. (Oxford: Oxford University Press, 2012).

dren, suggesting that there is no right to be parented by one's procreators, but only a right that one's procreators secure one's parentage. Of course, in line with Velleman's arguments, there may also be a right to know one's genetic origins, but note that this is a different kind of right that imposes different kinds of correlative duties. As I mentioned earlier, one can discharge one's duty to provide information about a child's genetic origins without actually parenting the child.

However, even if the elective transfer of parental obligations is not impermissible, considerations of permissibility do not exhaust the domain of morality, and there may be other bases on which that type of decision can be criticized. For example, while procreators may not be acting unjustly by electively alienating themselves from their biological offspring, they may nevertheless be acting dishonorably by approaching procreation with the wrong motives[54], or by failing to appreciate its seriousness and deep moral significance. I do not necessarily agree or disagree with these types of criticisms, but only point out that claiming that an act is morally impoverished is not the same thing as claiming that it is morally impermissible. If there is a general 'right to do wrong', then we are often permitted to do things that we might have good moral reason not to do.[55] The elective transfer of parental obligations might just be an instance of this more general phenomenon: a decision that possibly reflects poorly on one's character, but does not in fact violate anybody's rights.

3.4 Parenthood Unpackaged

Having provided an account of the relationship between procreation and parental rights, as well as an account of the relationship between procreation and parental obligation, we are now in a position to draw some general conclusions. At the beginning of Chapter

[54] For an exploration of the role that motives play in procreative decision-making, see Steven Lecce and Erik Magnusson. "Do Motives Matter? On the Political Relevance of Procreative Reasons" in Hannan, Brennan, and Vernon (eds.), 2015.
[55] Jeremy Waldron. "A Right to Do Wrong," *Ethics*, 92(1) (1981), pp. 21-39.

Two, I introduced what David Archard calls the 'parental package' thesis, which holds that the kinds of considerations that serve to ground parental rights are the same kinds of considerations that serve to ground parental obligations.[56] On this view, if causing a child to exist through procreation generates a special right to parent that child, then it also generates a special obligation to parent that child as well. We can now see that this common view is in fact false, and that parental rights and obligations have different moral grounds. While the presumptive right to parent one's biological baby is rooted in general ownership rights over one's reproductive gametes, the presumptive obligation to parent one's child is rooted in one's causal responsibility for that child's existence and subsequent need to be parented. To see how these two features come apart, it is useful to reconsider one of our previous cases. Recall, then, the case of *Embryo Creator* from the previous chapter, which was presented as a structural analogue for cases of sexual assault:

> *Embryo Creator:* Back at the gamete storage facility, George steals an ovum that Heidi (a stranger) had frozen for a future possible procreative project. He then combines it with his own sperm *in-vitro*, and has his partner gestate the resulting embryo for nine months, leading to the birth of a healthy baby.

George, like a sexual assailant, has no presumptive right to parent the child, as the child was created using reproductive gametes to which he did not have legitimate access—in this instance, only Heidi has First Dibs. However, insofar as he is causally responsible for the existence of the child, he still retains an obligation to ensure *that* the child is adequately parented in the event that Heidi chooses not to. Heidi, of course, may justifiably refuse to parent the child, for even though she has First Dibs, she is not causally responsibility for the child's existence and therefore does not have a presumptive obligation to parent it.

[56] Archard, 2010, 106.

Recognizing the distinction between the basis of parental rights and obligations allows us to draw two general conclusions. First, in cases where there are multiple conflicting claims over who gets to parent a child, parental rights should be assigned primarily on the basis of genetic derivation. This suggests that the status quo on surrogacy resolution is backwards, as priority is currently given to the woman who gestated the baby, regardless of whether that baby is genetically related to her.[57] Second, in cases where there is disagreement between different parties about who is responsible for parenting a particular child, parental obligations should be assigned in the first instance to whoever is causally responsible for a child's existence and hence need to be parented. This suggests that the legal assignment of parental obligations is normally correct, but that the explanation supporting it is wrong. Parental obligations do not derive from the contribution of the genetic material from which a child developed, but rather from one's moral responsibility for that child's need to be parented. While these factors often overlap, failing to distinguish between them will lead one to unjust and counterintuitive conclusions, such as the assignment of parental obligations to victims of sexual assault, gamete theft, or deceptive sexual practices, and the assignment of parental rights to gamete thieves and rogue gestational surrogates.

3.5 Conclusion

In this chapter I have argued that causing a child to exist through procreation always generates an obligation to ensure *that* the child is adequately parented, but that discharging this obligation does not always require parenting the child oneself: while one may discharge this obligation by taking on the role of the child's parent, one may also discharge it by ensuring that someone else takes on that role as well, assuming that there are persons available

[57] See, for example, s. 33(1) of the *Human Fertilization and Embryology Act* (2008), which states that "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of a child."

who are both capable and willing to do so. This weak, indirect version of the causal account is consistent with, and in fact assumes, a pluralistic approach toward parental obligation in which causation and voluntary acceptance are both sufficient for acquiring parental obligations in certain cases. The crucial point, however, is that in cases where a set of procreators do not wish to parent a child, their lack of voluntary acceptance does not absolve them of their parental obligations. In virtue of their causal responsibility for the child's existence, and subsequent need to be parented, they are still obliged to ensure the child is adequately parented, and, unless they can transfer custody of that child to a competent and willing recipient, discharging this obligation will require parenting the child themselves. However, even when a person is responsible for parenting a child they have caused to exist, this does not necessarily imply that they are liable for the entire cost of raising it. On the contrary, the extent of their individual liability will depend in large part on how childrearing costs are distributed throughout the society they live in. I address this issue in the following chapter.

Chapter Four
Distributing the Cost of Procreation

4.1 Introduction

Anyone who has undertaken the project of creating and raising a child will be all too familiar with the fact that kids are expensive. A recent report in the United Kingdom has found that the average cost of raising a child in that country from birth until the age of twenty-one is now in excess of £229,251, which averages out to approximately £10,917 per year, £910 per month, and £30.00 per day.[1] For the typical two-parent family, this expenditure accounts for around 29% of annual household income; for single-parent families, it exceeds 54%.[2] And these, of course, are only the financial costs. In addition to a significant financial investment, prospective parents can also expect to invest an enormous amount of time and energy in the raising of their children, and to incur innumerable opportunity costs along the way. They can expect to routinely forgo their own interests in favor of the interests of their children, and to live their lives with less substantive freedom than non-parents in their society who are in similar financial circumstances.

From the perspective of justice, an important question concerns how the significant costs of procreation and parenthood should be distributed throughout society. Should parents[3] be responsible for paying the full cost of their childrearing projects, or should childrearing costs be shared in some way among parents and non-parents alike? To the extent that political theorists have considered this question, two sets of views have emerged, which, following Serena Olsaretti, we can label *anti-cost-sharing* and *pro-cost-sharing* views, respectively (or

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[1] Liverpool Victoria (LV=). *The Cost of Raising a Child*. 2015. Accessed December 16, 2015 from https://www.lv.com/assets/life/pdfs/life-insurance/coac-2015-infographic-compressed.pdf. Note that these figures are merely illustrative of the significant amount of resources that are typically devoted to childrearing—they do not by themselves tell us how much *ought* to be spent on childrearing.

[2] Ibid.

[3] Unless otherwise noted, I use the term 'parent' in this chapter to refer to procreative parents, or persons who are responsible for creating *and* raising other human beings.

anti-sharing and pro-sharing views, for short).[4] According to anti-sharing views, the cost of creating and raising children should be borne primarily, if not entirely, by parents themselves. This set of views counts among its defenders responsibility-sensitive theorists of justice, who see childrearing as a choice for which individuals ought to be held responsible.[5] Assuming an initially just distribution of resources, these theorists reason that it would be unfair to diminish the resource share of non-parents for the sake of financing the expensive choices of parents—after all, it is parents who brought it about that there are children with costly needs to be met, so the responsibility for meeting those needs ought to fall primarily on them.

Proponents of pro-sharing views see things differently. While it is true that the costs of childrearing arise out of the voluntary[6] choices of parents, focusing too narrowly on the origins of those costs distracts attention from the various ways in which non-parents benefit from others' childrearing labor. In societies with social security systems, for example, non-parents benefit from the existence of a younger generation that can maintain the economic institutions they will depend on in old age.[7] They may also be considered the past beneficiaries of the childrearing labor of their *own* parents, to the extent that being brought into existence and raised into an adult can be considered a benefit.[8] Proponents of pro-sharing views insist that because non-parents stand to benefit from others' childrearing labor in either or both of these ways, they have a justice-based obligation to share in the cost of that labor by contributing to some form of cost sharing scheme.

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[4] Serena Olsaretti. "Children as Public Goods?" *Philosophy and Public Affairs*, 41(3) (2013), pp. 226-258, 229.

[5] See Paula Casal. "Environmentalism, Procreation, and the Principle of Fairness," *Public Affairs Quarterly*, 13(4) (1999), pp. 363-376; Paula Casal and Andrew Williams. "Equality of Resources and Procreative Justice" in Justine Burley (ed.) *Dworkin and His Critics*. (Malden, Mass.: Blackwell, 2004); Matthew Clayton. *Justice and Legitimacy in Upbringing*. (Oxford: Oxford University Press, 2006), esp. 67-70; Eric Rakowski. *Equal Justice*. (Oxford: Oxford University Press, 1991), esp. 150-154; and Peter Vallentyne. "Equality and the Duties of Procreators" in David Archard and Colin. M. Macleod (eds.) *The Moral and Political Status of Children*. (Oxford: Oxford University Press, 2002).

[6] In this chapter, I assume for the sake of argument that childbearing and childrearing are decisions undertaken voluntarily.

[7] Nancy Folbre. *The Invisible Heart.* (New York: New Press, 2001); Rolf George. "Who Should Bear the Costs of Children?" *Public Affairs Quarterly*, 1(1) (1987), pp. 1-42; and Olsaretti, 2013.

[8] Patrick Tomlin. "Should Kids Pay Their Own Way?" *Political Studies*, 63(3) (2015), pp. 663-678.

The position we take on the question of how to distribute the costs of procreation and parenthood will have important ripple effects throughout a broader theory of procreative justice. I argued in previous chapters that the right to procreate is constrained by a prior obligation to ensure that any child created as a result of its exercise will have a decent start in life, and that causing a child to exist—whether intentioned or not—always generates an obligation to ensure *that* the child is adequately parented. The extent to which prospective procreators are capable of discharging these obligations will depend in a significant way on how the society they live in distributes their associated costs. For example, in societies that externalize costs through the provision of benefits like child subsidies, paid parental leave, or universal childcare, morally permissible procreation will be available to more people, whereas in societies that internalize costs by holding parents primarily liable, it will be available to far less. This highlights the important if sometimes underappreciated fact that the moral permissibility of procreation turns not only on personal features of the procreators themselves, but also on features of the broader social context in which they make their procreative decisions.

In this chapter, I address one feature of this social-contextual question by considering how the costs of procreation and parenthood ought to be distributed throughout society. I ultimately defend a forward-looking version of the pro-sharing view, according to which non-parents are obligated to share in the costs of childrearing in virtue of their status as the future beneficiaries of parents' childrearing labor. However, I also argue that the tenability of this view is conditional on two further considerations. First, it is conditional on the success of independent arguments for redistributive social welfare institutions that translate childrearing labor into benefits for others, and second, it is also conditional on others actually benefitting from those institutions, an empirical consideration that may vary significantly according to both the rate of procreation as well as how we conceive of our broader demands of justice. After demonstrating why a forward-looking pro-sharing view is preferable to the alternatives,

I attempt to show how both of these conditions can be met, and how non-parents are therefore obligated to share (to a certain extent) the cost of parents' childrearing projects.

The chapter proceeds in four parts. In 4.2, I consider the most prominent version of the anti-sharing view, namely, the view that childrearing is choice whose costs ought to be internalized by the individuals who decide to pursue it. In 4.3, I consider the most prominent pro-sharing response to this view, namely, the view that children are public goods whose costs ought to be externalized among the third parties who stand to benefit from them. In 4.4 and 4.5, I defend a particular variant of this pro-sharing view—Olsaretti's 'socialized goods account'—by showing how it can meet the two aforementioned conditions.

4.2 The Responsibility Argument

In the context of current, nonideal conditions, there seem to be numerous considerations that weigh in favor of providing public support to families who are raising children.[9] In societies where mothers perform a disproportionate share of childrearing responsibilities in relation to fathers, the provision of benefits like public daycare or paid parental leave may be necessary to ensure that women are not unfairly disadvantaged relative to men in the pursuit of their careers and ambitions. Moreover, in societies marked by poverty and other forms of distributive injustice, the provision of benefits like child subsidies may also be necessary to ensure that poorly off citizens are able to provide for the children in their care. These are both good reasons to assist parents who are raising children, and both are commonly invoked in favor of laws and public policies that offer parental assistance. However, the question I am concerned with in this chapter is whether parents have any claims to assistance *qua* parents, that is, in their capacity as persons who create and raise the next generation of citizens. In a

[9] See, e.g. Oslaretti, 2013, 226, and Tomlin, 2015, 664.

society where men and women had equal opportunities, and where resources were distributed fairly, would non-parents still have an obligation to share in the cost of childrearing?

To focus attention on this question more directly, it is helpful to begin with a hypothetical example that abstracts from the other possible grounds on which we might offer parental assistance. Consider, then, the following case:

> *Desert Island:* A small group of shipwreck survivors have washed up on the shore of a desert island and are forced to establish a new society together. Recognizing that no one has any special entitlement to the island's resources over anyone else, they collectively decide to distribute the resources equally, so that each islander has an equal bundle that they can use in ways consistent with their own tastes and ambitions. Since each islander has different tastes and ambitions, each uses their resources for different purposes, which in turn has different effects on the overall distribution: entrepreneurial islanders invest their resources in risky commercial ventures, in the hopes of earning significant returns; prudent islanders use their resources sparingly, saving rations that can sustain them in the future; and leisure-prone islanders live off their resources freely, as they spend their days swimming and basking in the sun. Because each islander starts with an equal bundle of resources, and only loses or gains resources as a result of voluntary exchanges, it is assumed that the resulting distribution is just.[10]

Now suppose that one pair of islanders decide to create a child in order to fulfill their personal ambition of starting a family. What effect should this decision have on the overall distribu-

[10] This type of example—a favorite in the literature surrounding parental justice—is based on one originally developed by Ronald Dworkin to illustrate his theory of distributive justice, 'equality of resources'. For the original example, see Ronald Dworkin. *Sovereign Virtue: The Theory and Practice of Equality*. (Cambridge, MA: Harvard University Press, 2000), 65-71. For the most comprehensive discussion regarding its application to parental justice, see Casal and Williams, 2004, esp. 152-156.

tion of resources? On the one hand, given that the child is a person, we might think of her as a late-coming islander who is also entitled to an equal share of the island's resources. On this view, the resource share of each islander ought to be diminished to accommodate the new arrival, much as it would be if there was one additional shipwreck survivor at the time of the initial allocation. On the other hand, given that the child was created deliberately to service her parent's ambition of starting a family, we might think of her as the kind of voluntary decision for which individuals ought to be held responsible. On this view, the cost of caring for her should not be distributed equally among the other islanders, but should rather be internalized by the particular individuals who are responsible for her existence. Eric Rakowski defends a version of this latter view, claiming,

> …babies are not brought by storks whose whims are beyond our control. Specific individuals are responsible for their existence. It is therefore unjust to declare…that because two people decide to have a child, or through carelessness find themselves with one, *everyone* is required to share their resources with the new arrival, and to the same extent as its parents. With what right can two people force all the rest, through deliberate behavior rather than bad brute luck, to settle for less than their fair shares after resources have been divided justly? If the cultivation of expensive tastes, or silly gambles, or any other intentional action cannot give rise to redistributive claims, how can procreation?[11]

Rakowski's view is rooted in a particular brand of responsibility-sensitive (or 'luck') egalitarianism, one that holds individuals responsible for their choices when made against a fair background distribution. On this type of view, individuals have legitimate claims to compensation for inequalities arising from bad 'brute' luck (or luck that befalls them regardless of their choices), but they do not have legitimate claims to compensation for inequalities arising from bad 'option' luck (or luck in the way their calculated gambles turn out), nor for those arising from the satisfaction of expensive tastes.[12] In this sense, just as it would be unfair to force the community of islanders to share the cost of a failed commercial venture, or to sub-

[11] Rakowski, 1994, 153. See also Clayton, 2006, 69, and Vallentyne, 2002, 207.
[12] For a full elaboration of this brand of responsibility-sensitive egalitarianism, see Dworkin, 2000, esp. chapters 1 and 2.

sidize a lazy neighbor's beach-going lifestyle, so too would it be unfair to force them to share the cost of others' procreative decisions.

It is important to note here that endorsing the general idea that parents should be responsible for paying the cost of their procreative decisions does not necessarily commit one to a specific idea about *which* costs they are responsible for paying. As Olsaretti has pointed out, any theory of responsibility must include two separable elements: an 'attribution principle', which explains *who* is responsible for the consequences of a particular action or choice; and a 'principle of stakes', which explains *which* particular consequences they are responsible for.[13] Proponents of the responsibility argument may agree on the principle of attribution, or the idea that responsibility falls on the persons who choose to bring a child into existence, but disagree on the principle of stakes, or the particular childrearing costs those persons should be responsible for paying.[14] In what follows, I assume that if parents are responsible for paying the costs of their childrearing projects, they are only responsible for the costs associated with providing their children with what they are justly due. These will include the 'costs of care', or the time, money, and energy that is required to adequately care for children during their childhood, as well as the 'costs of added adult members', or the costs associated with providing children with what they are justly due as adults.[15]

With this caveat in mind, is the responsibility argument sound? On the one hand, it seems to capture a strong intuition that many people will share about choice and personal responsibility. If we do not think that individuals have legitimate claims to compensation for

[13] For a general discussion of the principle of stakes, see Serena Olsaretti. "Responsibility and the Consequences of Choice," *Proceedings of the Aristotelian Society*, 109 (2009), pp. 165-188. For a discussion of its significance for the question of parental justice, see "Choice, Circumstance, and the Cost of Children" in Steven de Wijze, Matthew H. Kramer, and Ian Carter (eds.) *Hillel Steiner and the Anatomy of Justice: Themes and Challenges*. (New York: Routledge, 2009).

[14] For example, while Rakowski argues that procreators are responsible for paying the costs associated with providing their children with what they are justly due (interpreted as an equal bundle of resources), Peter Vallentyne has put forth a far more demanding view, according to which procreators are also liable for paying the costs of children's bad brute luck and any injustices they may inflict on others throughout their lifetime. See Vallentyne, 2002.

[15] For further discussion of the distinction between 'costs of care' and 'costs of added adult members', see Olsaretti, 2013, 229-232.

the other expensive choices—say, the choice to climb Mount Everest—then it is not clear why they should have legitimate claims to compensation for their procreative choices. After all, the cost of each choice is known (or at least knowable) beforehand, and individuals are free to forgo that choice if they consider its costs to be prohibitive. On the other hand, however, the responsibility argument might seem counterintuitive, for it appears to entail a radical revision in the types of costs that parents are liable for paying. As Patrick Tomlin notes, "Is it really true that schools and children's hospitals should ideally be entirely parentally funded? Or the state funded parental leave (against a just background distribution) is an affront to justice?"[16]

While many people will likely share Tomlin's skepticism, it is important to note that the bare fact that the responsibility argument has radical implications does not necessarily constitute an objection to that argument. A proponent could easily respond that the responsibility argument is most plausibly pitched at the level of ideal theory: it purports to explain what our childrearing responsibilities would be if, contrary to fact, resources were distributed justly, and in such a society it is not clear that the implications of the responsibility argument would be unacceptable.[17] However, while Tomlin's objection misses the mark, there are other possible objections that take the responsibility argument on its own terms. For example, G.A. Cohen has notably argued that while responsibility-sensitive egalitarianism prohibits compensation for expensive tastes that have been deliberately cultivated, it does not necessarily prohibit compensation for expensive tastes that a person cannot be held responsible for developing.[18] If Cohen is right, then one way to resist the implications of the responsibility argument is to claim that the desire to have children falls into the second category, either be-

[16] Tomlin, 2015, 665.
[17] Of course, this response might invite the criticism that the responsibility argument is therefore useless in the non-ideal conditions in which we find ourselves. While I am somewhat sympathetic to this line of criticism, I will not pursue it here, preferring instead to consider the responsibility argument on its own terms.
[18] G.A. Cohen. "On the Currency of Egalitarian Justice," *Ethics*, 99(4) (1989), pp. 906-944, esp. 921-924.

cause the desire to procreate is a biologically-driven instinct, or because it is the product of social norms and pressures for which individuals cannot be held responsible.[19]Alternatively, one might also distinguish between childrearing and other expensive projects on ethical grounds, or in virtue of the value that is created or involved in their pursuit. If we distinguish between different types of projects in terms of their relative value, it is not clear that creating and raising children should be treated on par with drinking champagne or eating plover's eggs.

Both of these objections are tenable, though neither is problem-free. While one might be able to argue that there is a range of external factors that contribute toward the desire to have children, the significance of these factors is undermined by the fact that the vast majority of persons who choose to have children identify with, and reflexively endorse, their choice. Moreover, while there seems to be an obvious difference between the choice to have children and the choice to pursue a luxury lifestyle, it is harder to distinguish between childrearing and some of the other expensive projects that a responsibility principle is wont to cover, particularly for those who are committed to a stance of neutrality between competing conceptions of the good life.[20] Just as childrearing is costly, time-consuming, and central to the identity and self-conception of prospective parents, so too is the choice to climb Mount Everest for many prospective mountaineers. One *might* be able to draw a principled distinction between these two types of projects, but not without taking a controversial ethical stand.

[19] Justine Burley considers but ultimately rejects this type of argument in "The Price of Eggs: Who Should Bear the Costs of Fertility Treatment?" in John Harris and Soren Holm (eds.) *The Future of Human Reproduction*. (Oxford: Oxford University Press, 1998), 137-141.

[20] For a discussion of the implications of liberal neutrality for the issue of parental subsidies, see Robert S. Taylor. "Children as Projects and Persons: A Liberal Antinomy," *Social Theory and Practice*, 35(4) (2009), pp. 555-576. For a similar argument in the context of state-funded fertility treatment, see Emily McTernan. "Should Fertility Treatment Be State Funded?" *Journal of Applied Philosophy*, 32(3) (2015), pp. 227-240.

There is, however, a more promising way of distinguishing between childrearing and other expensive projects that appeals to the benefits they will create for others. This is the starting point for the most prominent version of the pro-sharing view.

4.3 The Public Goods Argument

In framing his initial argument against cost sharing, Rakowski is adopting a single-generation perspective, assuming that the non-parents of a particular generation will be made unjustifiably worse off by having to share in the cost of childrearing due to a diminution in their current overall resources. This may be true in the short term; yet it underplays the fact that, in the longer term, many those children will grow to become productive members of society, and the fruits of their labor may be used to support members of the previous generation in old age.[21] Once we adopt this multi-generational perspective, we see that childrearing is importantly distinct from the other expensive projects that individuals might pursue. Few, if any, people stand to benefit from another person's project to climb Mount Everest. Yet most, if not all, people stand to benefit from the existence of a younger generation that can maintain the economic institutions they will depend on in old age.

A simpler way of putting the point is to say that decisions to bear and rear children tend to produce positive externalities that benefit parents *and* non-parents alike. Nancy Folbre describes this effect in the following way:

> Parents who raise happy, healthy, and successful children create an especially important public good. Children themselves are not the only beneficiaries. Employers profit from access to productive workers. The elderly benefit from Social Security taxes paid by the younger generation… Fellow citizens gain by having productive and law-abiding neighbors. These are all

[21] Rakowski briefly acknowledges this potential objection to his view, but swiftly disregards it on the grounds that "externalities of this sort rarely seem significant," and that "It is highly questionable, furthermore, that one may compel another to pay for a benefit the latter did not request." As will be made evident in this section, both of these objections are far too quick. See Rakowski, 1994, 153-154.

> examples of positive spillovers and side effects that economists often call 'positive externalities', because they are external to the actual decision to provide care.[22]

The positive externalities that are produced as a result of childrearing labor form the basis of a particular kind of pro-sharing argument, known as the *public goods argument*. Put briefly, the idea is that "Parents, by having and rearing children, produce positive externalities for everyone, and non-parents would be unfairly free riding on parents if they accepted the benefits but did not share the costs."[23]

It is important at this point to clarify the distinction between incentive-based and fairness-based versions of the public goods argument.[24] One possible reason for sharing the cost of childrearing is because the public good that it produces—productive citizens—is in relatively short supply, and people need to be incentivized to produce more of it. Cost sharing is meant to achieve this end by making childrearing a more attractive, because less costly, option. For example, in countries with declining birth rates, governments have sometimes adopted cost sharing policies as a means of encouraging population growth, instituting schemes like paid parental leave, universal subsidized daycare, and increased child benefits in the hopes that it will encourage people to have more children. Importantly, these policies are not justified on grounds of fairness, but rather because they are deemed necessary[25] to achieve an optimal population size, e.g. one that is capable of maintaining but not overburdening existing social welfare systems.

By contrast, another possible reason for sharing the costs of childrearing is because some form of cost sharing is required by considerations of fairness. Even when there is no threat of under-supply, non-parents still benefit greatly from the goods created by other people's childrearing labor, and may on that basis have an obligation to share in part of its costs.

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[22] Folbre, 2001, 50.
[23] Olsaretti, 2013, 228-229.
[24] Casal, 1999, 366; Olsaretti, 2013, 237-238.
[25] Perhaps falsely so: states can also achieve an optimal population size by augmenting low fertility rates with an increase in the number of immigrants they accept into the country.

This fairness-based version of the public goods argument follows from a more general principle of fairness, or 'fair play', which states that we should not enjoy the benefits of social cooperation unless we are prepared to do our fair share in creating them. As John Rawls (following H.L.A. Hart) writes,

> …when a number of persons engage in a mutually advantageous cooperative venture according to rules, and thus restrict their liberty in ways necessary to yield advantages for all, those who have submitted to these restrictions have a right to a similar acquiescence on the part of those who have benefited from their submission. We are not to gain from the cooperative labors of others without doing our fair share.[26]

As a principle governing social cooperation, the principle of fair play has considerable initial appeal, particularly when it is applied to the production of non-excludable[27] public goods like fresh air or a clean environment, as these types of goods are especially susceptible to free rider problems. Imagine, for example, that a group of environmentalists decide to pick up litter on a commonly owned beach, thereby creating a public good.[28] As a result of their service, more people come to use the beach, and it quickly becomes littered with garbage. When it comes time to clean the beach again, it does not seem unreasonable to think that the environmentalists could legitimately demand help from the beachgoers who have enjoyed using it—after all, the beachgoers have benefitted from the good created by the environmentalists' labor, so it seems fair that they should contribute toward maintaining it.

According to the public goods argument, the same reasoning also applies to the goods that are produced as a result of parents' childrearing labor. As proponents like Folbre emphasize, non-parents benefit in myriad ways from other people's childrearing projects: when all goes well, those children grow to become productive workers, law abiding citizens,

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[26] John Rawls. *A Theory of Justice*. (Cambridge, MA: Harvard University Press, 1971), 112. For H.L.A. Hart's original formulation, see H.L.A Hart. "Are There Any Natural Rights?" in Jeremy Waldron (ed.) *Theories of Rights*. (Oxford: Oxford University Press, 1984), 85.

[27] A non-excludable good is a good that is impossible or too costly to prevent others from enjoying. I return to this feature in further detail below.

[28] Casal, 1999, 365.

and perhaps most importantly for the public goods argument, a future tax base to maintain the social security programs that will support parents *and* non-parents in old age. Given that non-parents stand to benefit from these goods, considerations of fair play seem to tell in favor of an obligation to share in the cost of producing them, usually through tax contributions that can be redistributed to parents in the form of child subsidies, paid parental leave, and state-sponsored childcare programs.[29]

Is the public goods argument sound? Assuming that childrearing *does* in fact create positive externalities (an empirical assumption I will discuss in further detail below), its plausibility ultimately relies on the truth of two premises, namely:

(i) the principle of fair play is a defensible principle; and

(ii) the goods created as a result of parents' childrearing labor are the kinds of goods that are appropriately governed by the principle of fair play.

Premise (i) has been the subject of considerable debate since the principle of fair play was originally formulated by Hart, with perhaps the most prominent critique being advanced by Robert Nozick.[30] According to Nozick, the principle of fair play is implausible because it falsely assumes we can foist benefits on people without their consent and then demand that they contribute toward the cost of those benefits. To illustrate his point, Nozick imagines a neighborhood broadcasting system in which each neighbor takes a turn operating a loud-speaker for a day, playing records, reading news bulletins, and telling amusing stories for the

[29] It is worth noting here that redistributive taxation is not the only way that childrearing costs can be shared among parents and non-parents. For example, one alternative way to share the cost of childrearing might be to require non-parents to perform a certain proportion of childrearing labor (as in Israeli *kibbutzim*), which may be attractive for advocates of the non-parental care of children. While I acknowledge that there are alternative cost-sharing arrangements to redistributive taxation, I do not consider these in any detail here on the grounds that we can separate the question of *whether* non-parents are obligated to share in the costs of childrearing from the question of *how* those costs should be shared.

[30] Robert Nozick. *Anarchy, State, and Utopia*. (New York: Basic Books, 1974), 90-95.

enjoyment of anyone who cares to listen. According to Nozick, even if you have occasionally enjoyed listening to the broadcasts of your neighbors, you are not thereby obligated to sacrifice a whole day at the loudspeaker when it comes your turn to operate it—for you, the chore of operating the loudspeaker for a day might dramatically outweigh whatever benefit you received from listening to the broadcasts, casting doubt on the notion that simply receiving a benefit generates a duty to share in its costs.

However, while Nozick's critique is persuasive in the instance he describes, it is perhaps best interpreted as an argument against a broad interpretation of the fair play principle, rather than against the very idea of fair play obligations.[31] It might seem implausible to claim that passively enjoying a few broadcasts generates a duty to participate in a broadcasting program, though these are not the types of benefits that Hart and Rawls likely had in mind when formulating their principles. In the Rawlsian formulation quoted above, for example, acquiescence on the part of beneficiaries is required only with respect to benefits that have been produced by "mutually advantageous cooperative venture[s]" in which participants have "restrict[ed] their liberty in ways necessary to yield advantages for all." Moreover, it only applies if one "has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."[32] Some theorists, such as George Klosko, have narrowed the scope of the principle even further, limiting it to the production of goods that all members of the community can be presumed to want or require.[33] On this view, the principle of fair play only applies to the production of goods that are "necessary for an acceptable life for all members of the community,"[34] not to merely discretionary goods that members can easily do without.

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[31] For an argument to this effect, see Richard J. Arneson. "The Principle of Fairness and Free-Rider Problems," *Ethics*, 92(4) (1982), pp. 616-633.
[32] Rawls, 1971, 112.
[33] George Klosko. "Presumptive Benefit, Fairness, and Political Obligation," *Philosophy and Public Affairs*, 16(3) (1987), pp. 241-259.
[34] Ibid., 246.

Given these qualifications, a proponent of the fair play principle might respond that while there is no fair play obligation to participate in a public broadcast system, this is because the goods that it produces are not properly governed by the principle of a fair play—either because the broadcast system cannot plausibly be characterized as a mutually advantageous cooperative venture whose benefits have been voluntarily accepted, or because the goods that it produces are merely discretionary. However, while the benefits of broadcasting do not seem to fit the bill, there are other cooperatively produced goods that do. National security, for example, is a good that is produced by a mutually advantageous cooperative venture (i.e. a political association), and one that also seems necessary for an acceptable life for all members of the community.[35] It seems fair, then, that persons who benefit from that good should also contribute toward its costs.

However, most critics of the public goods argument do not question the tenability of (some version of) the principle of fair play, but rather question whether the goods that are produced as a result of parents' childrearing labor are in fact the kinds of goods whose production is governed by that principle—that is, they have denied premise (ii). In fact, three distinct objections have been raised against that premise: one that denies children are positive externalities; one that concedes they are positive externalities, but denies they are like the other public goods that are plausibly governed by the principle of fair play; and one that denies they are public goods at all. I will now review each of these objections in turn.

[35] This example, while commonly invoked in favor of the fair play principle, is not uncontroversial. Some theorists, most notably A. John Simmons, have argued that fair play obligations apply only to goods that one enjoys but is able to refuse, indicating a distinction between the active acceptance and passive receipt of benefits. See A. John Simmons. "The Principle of Fair Play," *Philosophy and Public Affairs*, 8(4) (1979) pp. 307-337.

The Negative Externalities Objection

One possible way of challenging the public goods argument is to claim that the empirical premise on which it rests—that childrearing creates positive externalities—is false. There are in fact two variations of this objection. The first, weaker variation calls attention to the fact that childrearing does not *always* produce positive externalities; rather, it sometimes produces negative externalities in the form of unjust or unproductive citizens who serve primarily as a drain on social resources. On this view, parents might have a fairness-based claim that non-parents share in the cost of their child-rearing labor, but only to the extent that their labor actually produces a good that non-parents will benefit from.[36]

If sound, this weak variation of the negative externalities objection does not serve as an objection to the public goods argument *per se*, but rather as a consideration limiting its scope: it implies that only *some* parents will have fairness-based claims to the cost-sharing contributions of non-parents.

Should we accept this narrower view? On the one hand, it might seem attractive from the perspective of responsibility-sensitive egalitarians, who may see the future productivity of one's child as a matter of good or bad option luck. On this view, having a child is on par with taking a calculated gamble, as parents know beforehand that there is a risk their child will not be socially productive, and that they will be not be eligible for the cost-sharing contributions of non-parents if that turns out to be the case (though, given that this knowledge is not always available before the child reaches adulthood, this 'ineligibility' might take the form of an obligation to pay back the value of past parental subsidies to the cost-sharing scheme). On the other hand, however, there seem to be good reasons against discriminating between parents on a case-by-case basis. First, and most importantly, there are many cases in which parents cannot meaningfully be held responsible for their children's lack of social productivity. For

[36] Vallentyne, 2002.

example, some children will not be socially productive because they are born with, or acquire during their childhood, cognitive or physical impairments that prevent them from economic participation, though this outcome is not traceable to any choice on the part of the parents; rather, it seems like the kind of bad brute luck that merits compensation. Even differences in parenting ability, which may contribute toward variously socially productive children, are not necessarily traceable to the choices of parents, but may be the product of different types of upbringings and other factors that are beyond the parents' control.

Second, there may also be epistemic and pragmatic reasons against discriminating between parents on a case-by-case basis. Perhaps with the exception of children with significant physical or cognitive impairments, it is often difficult to tell which children will be, or have been, net social contributors, and hence which parents are eligible for the cost-sharing contributions of nonparents. These epistemic limitations might be overcome by setting up a system to track and calculate the social productivity of each child, though such a system is not without its costs. In addition to its significant financial costs, making the requisite calculation of each child's social productivity would inevitably require intrusive interferences in the private lives of parents and children, which may prove to be more trouble than they are worth.

In light of these considerations, most proponents of the public goods argument have preferred to think of parents as collectively producing the good that non-parents will benefit from.[37] On this view, we do not distinguish between parents individually, but rather treat them as a group of people who have all made the same choice, i.e. to create and raise the next generation of citizens. However, even if we assume that the goods of childrearing are produced by parents collectively, the public goods argument still faces a stronger version of the negative externalities objection, which is that, in an already overpopulated world, the production of *any* children produces negative environmental externalities in virtue of its contribution

[37] Olsaretti, 2013, 235-237; Folbre, 2001.

to environmental degradation and anthropogenic climate change.[38] I think that this is a serious objection that ultimately limits the applicability of a pro-sharing argument, though I will set it aside until section 4.5. For now, I will assume for the sake of argument that children *do* in fact represent positive externalities in the societies in which they are created, and that these are benefits that parents produce collectively.

The Cost/Intentionality Objection

A second possible way of challenging the public goods argument is to show that childrearing is unlike the other public goods that are governed by the principle of fair play. According to Paula Casal and Andrew Williams, a plausibly construed principle of fair play applies to "a very specific class of positive externalities," namely, to "nonexcludable goods that are produced by *cooperative activity* in which individuals *bear some cost*, which they would not otherwise bear, *in order to produce the good*."[39] In the beach cleaning example illustrated above, we can see that each of these criteria are satisfied: the clean beach is produced as a result of the *cooperative activity* of the environmentalists; it is produced with the *intention* of creating a good for others to enjoy; and its production involves *costs* (in the form of time, effort, and supplies) that the environmentalists would not otherwise have incurred if not for the production of the good. It seems fair, then, that these costs should be shared in some way by the other individuals who have benefitted from using the beach.

However, Casal and Williams argue that the goods produced as a result of parents' childrearing labor are importantly distinct from the other goods governed by the principle of fair play, as parents do not typically have children with the intention of producing benefits for

[38] Casal, 1999, 370-373.
[39] Casal and Williams, 2004, 158-159. Emphasis in original.

others, nor do they typically view having children as an all-things-considered cost.[40] In this sense, childrearing is less like the beach cleaning example described above, and more like a modified beach cleaning example in which a farmer gathers seaweed from a beach for the purpose of fertilizing his fields.[41] In this instance, the farmer's labor happens to create a benefit for others, though given that this is merely a by-product of his self-serving actions, it does not seem like beachgoers would be unfairly free riding on the farmer by enjoying the beach without helping him gather seaweed. In a similar vein, Casal and Williams argue that "merely enjoying the beneficial consequences of others' procreative activity need not violate the principle [of fair play],"[42] as those benefits are not normally produced intentionally, nor does their production involve net costs (to the extent that parents themselves benefit from having children).

Does the cost/intentionality objection succeed in undermining the public goods argument? This depends on (a) whether the incursion of costs and the intentional creation of benefits are in fact necessary for the generation of fair play obligations, and (b) whether parents really do not incur costs and do not intentionally create benefits when pursuing their childrearing projects. With respect to (a), there may be possible counterexamples that tell against the idea that fair play obligations are *only* generated in cases where individuals incur costs for the sake of intentionally creating benefits. For example, Olsaretti imagines a case in which a group of gardening enthusiasts plant trees as a means of practicing their hobby, which happens to have the beneficial side-effect of offsetting carbon emissions from transport and industry.[43] According to Olsaretti, even if the gardeners did not view tree planting as a burden, and were not motivated by a desire to offset emissions, it still might seem fair that others who stand to benefit from that activity share in its costs. After all, tree plant-

[40] Ibid., 159. There is a further concern that childrearing cannot plausibly be construed as a cooperative activity. I address this concern in the following subsection.
[41] Casal, 1999, 368.
[42] Casal and Williams, 2004, 159.
[43] Olsaretti, 2013, 243.

ing still involves time, effort, and supplies, and if such an activity was deemed necessary to produce a particular type of good (e.g. clean air), then fairness might demand that the beneficiaries of that good contribute toward its production, *even if* the gardeners would have produced it anyway. Of course, one might still resist this conclusion on cost/intentionality grounds, though it is worth noting that this type of resistance might end up committing one to some rather unattractive implications. For example, if the gardening enthusiasts do not have a legitimate claim to compensation on cost/intentionality grounds, then a teacher who loves her job, and who is motivated primarily by the joyful feeling she gets from teaching students, might also not have a legitimate claim to compensation for her labor.

However, irrespective of whether this type of counterexample holds, one might also claim in response to (b) that childrearing *does* in fact exhibit the features of cost and intentionality that Casal and Williams claim are necessary for the generation of fair play obligations, albeit on a less demanding interpretation of what those features require. Regarding the feature of cost, while it is true that parents do not typically view childrearing as an all-things-considered cost, it is not clear that the *perception* of costs is what is relevant to the generation of fair play obligations; rather, what seems relevant to the generation of those obligations is the actual *incursion* of costs, and parents undeniably satisfy this condition in virtue of the significant amount of resources they invest in the raising of their children.[44] One might object at this point that parents also stand to benefit from these costs in the same way as a normal investment, though this should not affect their claim that costs be shared by other beneficiaries, as it is often the case that the producers of public goods also benefit from their production. For instance, the producers of a system of national security are presumably better off

[44] For similar arguments, see Olsaretti, 2013, 242-245; and Tomlin, 2015, 670.

than they otherwise would be in the absence of such a system, though it still seems like they have a legitimate claim that others not free ride on their cooperative efforts.[45]

Regarding the feature of intentionality, it has been noted by Olsaretti that Casal and Williams may be conflating intention with parental motivation when formulating their critique.[46] According to this line of response, while it is true that the creation of benefits for others is not typically what *motivates* parents to have children, it is not true that parents do not *intend* to create the benefit, as much parental labor is explicitly directed toward ensuring that children grow to become productive members of society who are positioned to contribute to redistributive schemes through taxation. One might object that there is a difference between intentionally creating something that is beneficial and intending to benefit others, though it is unclear what effect this difference should have on our obligations of fairness. By Casal and Williams' own estimation, fair play obligations are generated when persons incur costs as a result of intentionally participating in a benefits-producing scheme, so to the extent that parents incur costs to intentionally create productive citizens, then, irrespective of their motivation for doing so, it appears that their labor fits the relevant criteria.

The Socialized Goods Objection

However, while the cost/intentionality objection is not entirely persuasive, the public goods argument faces an even stronger objection, which is that the goods produced as a result of parents' childrearing labor are not in fact public goods at all. Standard examples of public goods like national security or a clean environment tend to exhibit three important features that distinguish them as public goods. First, they are *non-excludable*, in the sense that it is either impossible or too costly to prevent non-contributors from enjoying them. Second, they

[45] In fact, the idea of producers benefitting seems to be assumed in the very idea of something's being a public good, for if the cost of producing the good outweighed its benefits—such that its production was viewed as a net cost—then it would not be a 'good' at all, but rather a public 'bad'.
[46] Olsaretti, 2013, 245-248.

are usually *unavoidable*, in the sense that they are either impossible or too costly to refuse. Finally, they are also typically *non-rivalrous*, in the sense that one person's enjoyment of the good in question does not diminish or compromise another's.[47] Clean air is a stock example of a good that exhibits all three of these features: it is impossible to exclude non-contributors (e.g. polluters) from breathing it in, people cannot avoid breathing it in, and one person's enjoyment of clean air does not diminish or compromise another's.

However, as Olsaretti has recently argued, the goods produced as a result of parents' childrearing labor do not in fact exhibit *any* of these features, despite initial appearances to the contrary.[48] They are not unavoidable, as non-parents could choose to forgo social security benefits funded by the next generation's taxes; they are not non-rivalrous, as the enjoyment of benefits by one person *does* in fact diminish the amount that is available for others; and perhaps most problematically, they are not non-excludable, as it is conceivable that we could set up a two-tiered social security system in which the benefits funded by the next generation's taxes are only accessible to parents. According to Olsaretti, these observations reveal that the benefits of childrearing are not in fact public goods, but rather deliberately socialized goods that are transferred artificially to non-parents via the social and economic institutions of the welfare state. As she writes,

> …the central benefits created by parents' having and rearing children are not public goods. Rather, children are *socialized* goods: our social and economic institutions *are intentionally so structured as to ensure that* the product of parents' labors is socially beneficial for everyone, including nonparents. These institutions ensure that children are beneficial for everyone, including non-parents, by forcibly directing some benefits, from the next generation, to today's nonparents and parents alike.[49]

According to Olsaretti, the observation that children are not public goods, but rather deliberately socialized goods, could carry one of two implications for the pro-sharing view. First, it

[47] See, for example, Arneson, 1982, 618, and Olsaretti, 2012, 248.
[48] Olsaretti, 2013, 248-253.
[49] Ibid., 252. Emphasis in original.

might be thought to undermine that view by weakening the initial case for cost sharing. If the benefits of childrearing are in principle excludable, then proponents of the anti-sharing view might simply insist that we ought to exclude non-parents from benefits, rather than share the cost of childrearing. After all, if it is unjust to diminish the resource share of non-parents to finance the childrearing projects of parents, then it would seem similarly unjust to transfer the benefits of those projects to persons who played no role in supporting them. The socialized goods objection might therefore be thought to lend support to the kind of two-tiered social security system noted above, in which non-parents are excluded from the benefits funded by the next generation's tax contributions.

Alternatively, given that a two-tiered system is not in place, and that the benefits of childrearing are typically distributed equally between parents and non-parents alike, the socialized goods objection might actually be thought to lend support to the pro-sharing view by filling an important gap in the public goods argument—namely, the understanding of childrearing as a 'mutually advantageous cooperative venture' capable of giving rise to fair play obligations. Recall that the public goods argument relies on the idea that childrearing is the kind of cooperative benefits-producing scheme upon which it would be unfair to free ride. While this characterization might have initially seemed plausible, there seem to be at least two problems with it upon reflection. First, childrearing is not really 'cooperative' in the same way as other benefits-producing schemes: decisions to create and raise children are not made collectively in anticipation of the social benefits they will bring, but are usually undertaken privately, producing social benefits only as a happy side-effect, and only then against the backdrop of certain institutional conditions. This in turn reveals a second problem, which is that childrearing is not *necessarily* benefits-producing (at least not in the material sense being discussed here)[50:] rather, it is benefits-producing only because, and to the extent that,

[50] While childrearing is not necessarily benefits-producing in a material sense outside of redistributive social welfare institutions, there may be non-material benefits associated with childrearing that are

social welfare institutions *make* it benefits-producing by forcibly distributing benefits funded by the next generation to parents and non-parents alike. Taken together, these two problems suggest that the standard version of the public goods argument begs the question, as it must assume the very institutional scheme that it argues for.

However, if we simply posit the existence of social welfare institutions as a premise in a pro-sharing argument, then both of these problems disappear, as the institutions themselves *become* the cooperative benefits-producing scheme. When parents create and raise children in a society with a unified social welfare system, they are contributing to a scheme that deliberately creates benefits for others in the form of pensions, social security, and the like.[51] Given that non-parents in such a society stand to benefit from that scheme, the principle of fair play seems to require that they contribute toward its costs, including the cost of raising the next generation of citizens who will maintain it in the future.

Olsaretti believes that this type of pro-sharing argument—the *socialized goods argument*—provides a more robust case for sharing the costs of childrearing, particularly in the context of liberal egalitarian societies where unified social welfare systems are already in place. I agree that the socialized goods argument provides a stronger alternative to the standard public goods argument, though it still faces a significant hurdle that has yet to be addressed. As Olsaretti herself acknowledges, the socialized goods argument is *conditional*: it does not support cost sharing obligations in cases where the benefits of childrearing are not already socialized, nor does it establish that they ought to be socialized.[52] Olsaretti does not see this as an especially pressing problem, as her goal is specifically to determine whether

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produced independent of those institutions. Samuel Scheffler, for example, has argued that the value of many life projects is predicated on the assumption of a 'collective afterlife', or the idea that future generations will live on after us. If sound, this argument might show how creating and raising children produces benefits for non-parents even if they are not benefitted materially through social security. See Samuel Scheffler. *Death and the Afterlife.* (Ed.) Niko Kolodny. (Oxford: Oxford University Press, 2013).

[51] There is an important caveat to this claim having to do with the rate of procreation, which I will discuss in further detail in section 5.5.

[52] Oslaretti, 2013, 254.

liberal egalitarian societies ought to offer support to families raising children (and she assumes that liberal egalitarians are already committed to the kind of social welfare institutions that can give rise to cost sharing obligations). However, if we do not take these institutions as a starting point, the conditionality of the argument becomes problematic, as critics of the pro-sharing view could still reject the legitimacy of the institutions themselves. Thus, in order to successfully defend a forward-looking pro-sharing argument, it is necessary to explain why we ought to endorse the kind of unified social welfare system on which that type of argument is premised. I undertake this task in the following section.

4.4 Why Socialize the Benefits of Childrearing?

Before doing so, however, it is worth pausing for a moment to take stock of the argument so far. One important insight that can be gleaned from the previous two sections is that the answer we provide to the question of parental justice cannot be divorced from the answers we provide to more general questions of distributive justice. *What fairness requires vis-à-vis sharing the cost of childrearing will ultimately depend on what justice requires vis-à-vis a society's distribution of resources.* For example, we saw in the previous section that the principle of fair play can support cost-sharing obligations, but only when there is a unified social welfare system in place that translates childrearing labor into benefits for non-parents. In this sense, the success of the pro-sharing view is conditional on the justice of a particular background distribution: *if* justice requires a unified social welfare system in which the benefits funded by the next generation are distributed to parents and non-parents alike, *then* non-parents have a fair play obligation to share in the cost of childrearing. The same point applies to the anti-sharing view as well. Just as the pro-sharing view must assume an institutional scheme that translates childrearing labor into benefits for non-parents, the anti-sharing view must assume the absence of such a scheme, for in order for cost-sharing to rep-

resent a net burden to non-parents, it must be the case that they do not materially benefit from childrearing over the course of their lives—a condition that is unlikely to obtain if they are the recipients of social security benefits in old age. The lesson to be taken away, then, is that different distributive schemes generate different kinds of cost-sharing obligations, so the conclusion we reach about how the costs of childrearing should be distributed throughout society will ultimately depend on what we think about how resources should be distributed more generally.

For some commentators, this is all to the credit of the pro-sharing view, for the fact that the anti-sharing view conflicts with existing social welfare institutions might be read as a *reductio ad absurdum* for that view. This is the perspective taken by Olsaretti, for example, who maintains that "defenders of the anti-sharing view cannot occupy a comfortable middle ground, one in which there is familiar welfare state in place that serves egalitarian justice, but in which nonparents are not obliged to share the costs of children."[53] Olsaretti is correct about the dilemma facing the anti-sharing view, though simply pointing it out does not necessarily constitute an argument against that view, as proponents could still reject the social welfare institutions that give rise to cost-sharing obligations (as some have been inclined to do).[54] Thus, in order to adequately defend the pro-sharing view, we need to provide an independent argument for why we should endorse the kind of unified social welfare system on which that view is premised.

Following Rawls, one way to provide support for such a system is to show that it would be chosen by rational and suitably motivated individuals in a position of initial equality.[55] To get a sense of the shape this argument might take, let us return to the *Desert Island* scenario with which we began. We now know that the real choice faced by the islanders is

[53] Olsaretti, 2013, 255.
[54] Hillel Steiner and Peter Vallentyne might be read as endorsing this conclusion. See Hillel Steiner and Peter Vallentyne. "Libertarian Theories of Intergenerational Justice" in Axel Gosseries and Lukas H. Meyer (eds.) *Intergenerational Justice*. (Oxford: Oxford University Press, 2009), esp. 66-68.
[55] Rawls, 1971.

not the choice between sharing or not sharing the costs of childrearing within the context of fixed institutions, but rather the choice between different institutional schemes that will generate different kinds of cost-sharing obligations. While there are numerous arrangements from which the islanders might choose, ranging from those that completely internalize the costs of childrearing to those that completely externalize them, it will be useful for expository purposes to imagine that their choice is between the two extremes at either end of the spectrum. Thus, upon arriving on the island, let us assume that the islanders face a choice between two institutional schemes for distributing the cost of childrearing:

(1) a unified social welfare system, in which the costs *and* the benefits of childrearing are socialized among parents and non-parents alike; or
(2) a two-tiered social welfare system, in which both the costs *and* the benefits of childrearing are internalized by parents alone.

According to Rawlsian contractualism, the best way to determine which scheme has justice to recommend it is to imagine which would be chosen in a hypothetical choice scenario characterized by fairness and equality. To do this, we imagine that the islanders are making their choice from behind a veil of ignorance that shields them from potentially biasing information. Behind the veil of ignorance, islanders have access to general information about how resources and opportunities would be distributed under either scheme, but they do not have access to personal information that would shed light on their place within that distribution. In particular, they do not know whether they are adults or children, whether their conception of the good includes parenting or remaining childless, and whether they are relatively fortunate or unfortunate in the distribution of natural talents and abilities.

The immediate effect of the veil of ignorance is to prevent the islanders from tailoring the choice of institutions to their own personal circumstances. Equipped with full infor-

mation about their talents and preferences, islanders might be tempted to select the institutional scheme that works best for them individually, regardless of the effects that it might have on others. However, the veil of ignorance prevents them from doing so. Rather than viewing the choice of institutions from their own individual perspective, each islander is forced to view it from the perspective of every social position that is possible under either scheme, as each of them could end up occupying *any* of these positions. The resulting decision is then thought to be fair, as it is the product of an impartial process in which each possible social position is given equal and non-biased consideration.

Supposing that the islanders are mutually disinterested, concerned primarily with maximizing their own resources and opportunities over the course of their lifetime, Rawls believes that the veil of ignorance would lead them to employ a 'maximin' decision-making principle in their deliberations, or to select the scheme that has the best worst outcome.[56] There are two main reasons for this. The first is because the veil of ignorance shields them from probability estimates that might otherwise inform calculated gambles. For example, suppose that scheme A had a worse worst position than scheme B, but a much better best position. If the parties to the decision knew that there was only a slight chance of ending up in the worst position under scheme A, they might accept that risk in exchange for the higher payoff of ending up in scheme A's best position. However, because they do not have this information, parties are forced to assign an equal probability to each outcome, which introduces a level of risk aversion into their decision-making. For all they know, there is an equal chance of ending up in the best and worst position under either scheme, so the rational choice is to select the scheme that maximizes the minimum possible return.

The second reason why maximin is an appropriate decision-making principle in this context has to do with the high stakes involved with the decision in question. Rawls concedes that maximin is not a rational decision-making principle for every decision, particularly for

[56] Rawls, 1971, 152-157.

those in which potential losses can be recouped in the future, though the choice between different social institutions is not this kind of decision. In choosing between a unified or two-tiered social welfare system, the islanders are making a choice between different background conditions for all of their future choices, one that will have far-reaching and irreversible effects on their future life prospects. Given the unique importance of this decision, Rawls believes that it is rational for parties to approach it conservatively and try to maximize the worst possible outcome.

If Rawls is correct that the islanders would be motivated to select the scheme with the best worst outcome (as measured by one's level of resources and opportunities over the course of a lifetime), which scheme would they choose? Given that the decision is between institutions that will determine the distribution of childrearing costs, it seems like they would want to evaluate it from at least three different perspectives, corresponding to the three main positions they might find themselves in once the veil has been lifted: an adult with a childrearing preference ('parent'), an adult with no childrearing preference ('non-parent'), and a child. Each position can be subdivided further according to whether the individual occupying it is relatively fortunate or unfortunate in terms of the various factors that will influence their resources and opportunities over time. For adults, this includes their level of marketable talent during their working years, their ability to save for retirement, and their option luck in matters regarding childbearing (e.g. whether their child is relatively inexpensive or expensive to raise, whether their contraception succeeds or fails, etc.), whereas for children, this mainly includes who their parents are and how expensive they are to raise. The various possibilities are illustrated below in Figure 4.1:

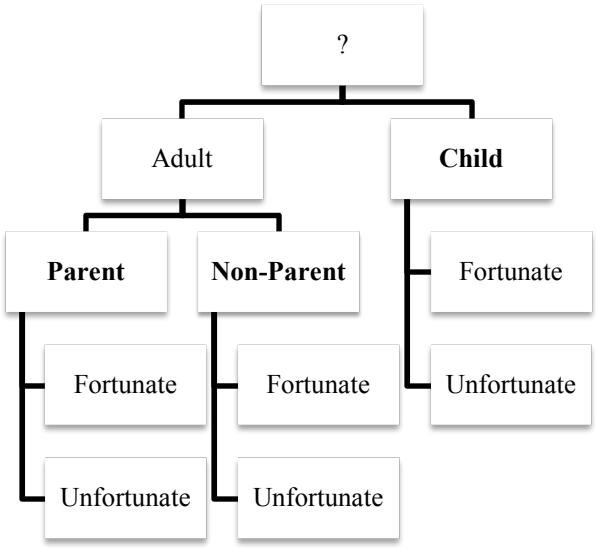

Figure 4.1 Possible Social Positions on *Desert Island*

If the islanders were guided by maximin reasoning, they would focus on comparing the effects of each institutional scheme on the resources and opportunities of individuals occupying the bottom position on each branch, i.e. unfortunate parents, unfortunate non-parents, and unfortunate children. It seems clear that individuals in *all* of these positions would have a significant reason to prefer scheme (1) over scheme (2), or a society with a unified social welfare system in which the costs *and* benefits of childrearing were shared among parents and non-parents alike. To explain:

Unfortunate Parents: Unfortunate parents would reach this conclusion by comparing their level of resources and opportunities during their working years under schemes (1) and (2). Under scheme (2), unfortunate parents are vulnerable to two outcomes they would want to avoid. The first is the inability to fulfill their childrearing preference because they cannot afford to provide a child with what they are justly due. This may be because they have insufficient income to support themselves along with another person, or because their child has (or is likely to have) special needs that make them too expensive to raise independently. The se-

cond is the ability to fulfill their childrearing preference, but only at the expense of other opportunities. This is because unfortunate parents will be forced to spend a larger portion of their limited resources on meeting the totality of their child's needs, leaving less available for the pursuit of other projects and ambitions.

Whether or not it is ideal, scheme (1) is at least comparatively better for unfortunate parents on both of these counts. If the costs of childrearing are shared among parents and non-parents alike, it is *more* likely that unfortunate parents will be able to satisfy their childrearing preferences, and those who are able to will be *more* financially secure and will have *more* resources to dedicate toward their other projects and ambitions (even if they are still struggling in absolute terms). Notice, moreover, that the fact that unfortunate parents will fare better under scheme (1) during their working years is sufficient to establish their preference for it. Because they will have access to social security benefits under both schemes, consideration of their resources and opportunities in retirement will not play a significant role in their decision.

Unfortunate Non-Parents: The preference of unfortunate non-parents for scheme (1) is less obvious, and follows from a slightly more complicated line of reasoning. Initially, it seems like unfortunate non-parents face a simple trade-off in their choice of institutions. Under scheme (1), they will be worse off during their working years by having to share in the cost of childrearing, but more secure in their retirement, as they will then be entitled to social security benefits funded by the next generation. Under scheme (2), they will be better off during their working years by avoiding cost-sharing contributions, but less secure in their retirement, as they will not be entitled to publically funded social security benefits and will therefore have to rely on whatever they have managed to save during their working years. One might infer from this tradeoff that there is no clear institutional preference for unfortunate non-parents, though a preference for scheme (1) begins to emerge once we take into account

other kinds of considerations. For instance, even though they do not have a preference for childrearing, it is important to remember that non-parents of all stripes may still be at risk of incurring childrearing obligations involuntarily as a result of bad option luck, e.g. if their decision to have sex results in an accidental conception, and abortion and adoption are not available options. If they are guided by maximin reasoning, it will be rational for unfortunate non-parents to select the scheme that minimizes the effect of bad option luck on their resources and opportunities. Because childrearing is less burdensome under scheme (1) than under scheme (2), scheme (1) will be the preferable option.

Moreover, there are also considerations having to do with maximizing opportunity that might lead unfortunate non-parents to prefer scheme (1) over scheme (2). As Paul Bou-Habib has recently argued, preferences for and against having children are typically complex and subject to variation, relying as they do on "different inclinations within us that can change in light of experiences that lie ahead."[57] If parties behind the veil of ignorance know that their initial parenting preference could change over time, they might be inclined to protect themselves against the eventuality of changing their mind about parenting, but being unable to fulfill their newfound parenting preference due to an inability to provide a child with what they are justly due. Scheme (1) provides them with better protection against this eventuality than scheme (2).

Unfortunate Children: The preference of unfortunate children for scheme (1) follows fairly straightforwardly from the preferences of unfortunate parents and unfortunate non-parents. The worst outcome for children under either scheme is being born with special needs that make them expensive to raise to unfortunate adults who have a limited capacity to meet the necessary expenses, whether this is a pair of adults who have voluntarily brought them into

[57] Paul Bou-Habib. "Parental Subsidies: The Argument from Insurance," *Politics, Philosophy, and Economics*, 12(2), pp. 197-216, 209.

existence, or a pair of adults who have involuntarily incurred parental obligations due to bad option luck stemming from the decision to have sex. Because both unfortunate parents and unfortunate non-parents fare better financially under scheme (1) than scheme (2), unfortunate children will have a clear preference for scheme (1).

This, of course, is just a sketch of one type of argument that might be made to show why we have reason to prefer a society in which the costs and benefits of childrearing are socialized among parents and non-parents alike—there may be different arguments available that lead to the same conclusion, and the argument here could be developed in greater detail.[58] However, if successful, this type of argument serves to buttress the pro-sharing view by showing that there are independent reasons to prefer the kind of institutional scheme that gives rise to fairness-based cost-sharing obligations. Some theorists may believe that this is an unnecessary step in an argument for cost-sharing, given that such a scheme is already in place in most Western democracies. However, whether or not it is in fact necessary will depend on the general aims of the argument, and whether it is being pitched at the level of ideal or non-ideal theory. If one's aim is simply to show that, amid our existing social welfare institutions, non-parents have a fairness-based obligation to share in the cost of childrearing, then it may not be necessary to provide additional argumentation for the legitimacy or preferability of those institutions, as the principle of fair play might kick in regardless of whether we take those institutions to be desirable. However, if one's aim is to show that justice requires that non-parents share in the cost of childrearing, then it is necessary to explain why we ought to endorse the kind of background conditions that give rise to cost sharing obligations in the first place. Either way, however, the contractualist argument presented here advances the pro-

[58] One possible alternative recently proposed by Bou-Habib appeals to a Dworkinian hypothetical insurance scheme in which we ask what types of outcomes people would rationally insure against. It should be noted, however, that Bou-Habib does not deploy this scheme as a supplementary argument in a socialized goods account, but rather as a separate account that supports similar pro-sharing conclusions. See Bou-Habib, 2013.

sharing view, either as a necessary step in a pro-sharing argument pitched at the level of ideal theory, or as a supplementary consideration in a pro-sharing argument that takes existing institutions as its starting point.

Of course, once it is established *that* the costs of childrearing ought to be shared among parents and non-parents alike, two further questions need to be addressed: (1) what is a fair distribution of childrearing costs between parents and non-parents; and (2) what form should cost-sharing take? I will not attempt to provide definitive answers to these questions here, though it is worth addressing each of them in brief. In response to (1), it is clear that nonparents are only required to share in the cost of providing children with what they are justly due—they are not on the hook for the various extraneous goods the parents typically provide for the children, including birthday parties, piano lessons, or trips to summer camp. Moreover, even with respect to the goods that children are justly due, such as education or medical care, there will be logical limits on how much nonparents are obligated to contribute—they cannot, for example, be expected to contribute more than they expect to get in return, as their obligation to contribute is premised on the assumption that they will later benefit. As a general rule of thumb, then, it seems like a plausible distribution will be characterized by a kind of proportionality, whereby the amount the nonparents are expected to contribute will be proportional to the amount they can expect to get in return. What this amount is may vary according to context, though it is reasonable to think it will be markedly less than what parents are obligated to contribute.

In response to (2), I noted earlier that cost-sharing will most plausibly take the form of tax contributions that can be redistributed to parents in the form of child subsidies, paid parental leave, and state-sponsored childcare programs, though it is worth acknowledging here that this is not the only possible form they can take. In addition to sharing costs via redistributive taxation, nonparents could also share in the cost of childrearing by sharing directly in childrearing labor, as in the case of Israeli *kibbutzim*. This might be preferable for advo-

cates of the non-parental care of children[59], though considerations of personal autonomy may weigh against imposing that kind of obligation on persons who have deliberately chosen not to have children.

4.5 Internal and External Limitations on the Pro-Sharing View

Before concluding, I would like to qualify my argument for sharing the cost of childrearing by briefly taking note of two important limitations on a forward-looking pro-sharing view. The first type, which I will refer to as *internal* limitations, derive from within the society to which a pro-sharing argument is meant to apply, whereas the second type, which I will refer to as *external* limitations, derive from the global community of societies in which that society is situated. Both impose limits on the conditions under which the pro-sharing argument applies and, particularly in the case of external limitations, whether that argument even applies at all.

Internal Limitations

Suppose that the preceding arguments are sound, and that non-parents have a fairness-based obligation to share in the cost of childrearing when there is a unified social welfare system in place that distributes the benefits funded by the next generation to parents and non-parents alike. It does not follow from this argument that non-parents have an obligation to share the costs of *any and all* children that parents might produce. Rather, if non-parents are obligated to share in the cost of childrearing in virtue of their status as the future beneficiaries of parents' childrearing labor, then they are only obligated to share the cost of producing whatever number of children is necessary to secure those benefits in the future. Calculat-

[59] See, for example, Anca Gheaus. "Arguments for Nonparental Care for Children," *Social Theory and Practice*, 37(3) (2011), pp. 483-509.

ing this number in real-world contexts is bound to be extraordinarily complicated, as one would have to take into account a society's level of productivity, its cost of living, and its rate of inflation, among other factors, though its general significance can be illustrated with a simplified example. Imagine that a society contains an initial cohort of 100 adults (G1), and the economics are such that G1 will be required to produce the same number of children (G2) in order to maintain the social security system on which it will depend in old age at a reasonable level of taxation. The non-parents of G1 will have a fairness-based obligation to share the cost of producing 100 children, though it is not clear that they have fairness-based obligation to share the cost of any children exceeding the required 100, nor is it clear that they have a fairness-based obligation to share the cost of producing *any* children should the number of children comprising G2 fall significantly below 100. Let me explain both of these points in further detail.

The reason why the non-parents of G1 do not have a fairness-based obligation to share the cost of any children exceeding the required 100 is because the production of additional children is not necessary to secure the benefits that give rise to their cost-sharing obligations. Suppose that G1 is comprised of 50 non-parent individuals and 25 parent couples, each of which produces five children. Assuming that social security benefits are fixed, rather than proportional to the size of G2, the non-parents of G1 will have an obligation to share the cost of the first four children of each couple, though they will not have an obligation to share the cost of the fifth. The point becomes clearer the larger that G2 expands beyond the size that is required to sustain G1 in old age. While five versus four children per couple may not seem like a significant difference, it is harder to argue that non-parents have an obligation to share the cost of eight children per couple if only four are required to produce the future benefits that give rise to their cost-sharing obligations in the first place.

One might claim that we can address this worry by making the social security benefits distributed to members of G1 proportional to the size of G2, such that non-parents would

be entitled to a larger package of social security benefits in virtue of sharing the cost of a larger number of children during their working years. This type of strategy might succeed within a limited range (e.g. 4-*x* children per couple) though there will certainly be limits on how far it can be taken. First, there will be a clear upper limit the number of children that the members of G1 can sustain at a reasonable level of taxation. Because non-parents will be required to contribute a larger share of resources with every additional child, the proportionality strategy becomes less plausible as a greater value is assigned to *x*. Moreover, if continued indefinitely, the proportionality strategy also faces the risk of a demographic disaster in the distant future. If G2 is significantly larger than G1, then G3 will likely have to be at least as large as G2 to support it in old age; and if G3 is significantly larger than G2, then G4 will likely have to be at least as large as G3 to support it in old age; and so on. In this sense, even if we make social security benefits for members of G1 proportional to the size of G2, there will still limits on the number of children that a cost-sharing scheme can accommodate deriving from both the current cost-sharing capability of G1, as well as a society's general carrying capacity in the distant future.

At the other end of the spectrum, the reason why non-parents of G1 do not have a fairness-based obligation to share the cost of *any* children should the number of G2 fall significantly below 100 is simply because they do not stand to materially benefit from those children in the future (supposing that G2 must contain at least 100 children to maintain the social security system on which G1 will depend). In this sense, the rate of procreation in a given society must fall within a happy medium in order to generate cost-sharing obligations: there must be enough children created to generate positive externalities, but not so many to generate negative externalities.

There are also a few additional considerations that must be taken into account when thinking about internal limitations, which I will mention only briefly here for the sake of completeness. First, in addition to determining the population range of G2 that is capable of

giving rise to cost-sharing obligations, one must also determine how 'procreative credits' (for lack of a better term) ought to be distributed among the adults in G1 who have a parenting preference. For example, suppose that in our society of 100 adults, there are 20 non-parent individuals, and 40 couples with a parenting preference. One now has to decide how the 100 procreative credits ought to be distributed between the 40 couples. One strategy would be to claim that the parents of the first 100 children born are entitled to have the costs of those children subsidized by contributions from non-parents, though if we take the opportunity to procreate to itself be a distribuendum of justice, then a fairer strategy might be to assign two procreative credits to each couple, and then distribute the remaining 20 credits fairly among any remaining couples who desire more than two children (perhaps by lottery). Couples would be permitted to create a number of children that exceeds their number of credits, but they would not be entitled to cost-sharing contributions for their extra children.

Moreover, one also has to take into account considerations of intergenerational justice when determining how a cost-sharing scheme will work over time. For example, in our society with 100 adults, intergenerational justice problems begin to emerge the further that the size of the following generation departs from replacement-level procreation. If G2 is significantly smaller than G1, then this might place an unfair burden on members of G2, who will be tasked with supporting a much larger G1 in old age. Alternatively, if G2 is significantly larger than G1, then the burden is shifted to G1 (which must share the cost of raising a much larger G2), and potentially G3 (which, depending on its size, might also have to support a much larger G2 in old age). Depending on one's conception of intergenerational justice (e.g. egalitarianism, sufficientarianism, etc.), there may be limits on the rate of procreation that derive from the just claims of members of future generations.

External Limitations

In addition to these internal limitations, a pro-sharing view is also subject to external limitations that derive from the global community in which a particular society is situated. As I mentioned a moment ago, the rate of procreation in a particular society must fall within a happy medium in order to generate cost-sharing obligations, with enough children created to generate positive externalities, but not so many children created to generate negative externalities. When we take a society as a self-contained entity, this means that the number of children in G2 cannot be so large as to place an unfair burden on members of G1, or to lead to an ever-ballooning population in which each generation needs to produce greater and greater numbers of children to sustain itself in old age. However, if we take a society as a member in a global community of societies, then the rate of procreation may also be bounded further by the demands of global justice. For example, in a Western industrialized society with a high level of average lifetime consumption, creating even a sufficient number of children to generate cost-sharing obligations may be violating global duties of justice by contributing disproportionality to climate change and environmental degradation. In other words, given a particular level of consumption, the childrearing labor of parents in affluent societies may create global public bads at the same time as it creates domestic public goods.[60]

Depending on how we conceive of the demands of global and environmental justice, this may have one of two implications for the success of a forward-looking pro-sharing argument. First, it might imply that that type of argument simply does not work in societies with a level of average lifetime consumption above a certain threshold, as creating a sufficient number of children to generate cost-sharing obligations would violate global duties of justice, and fulfilling global duties of justice would not permit the creation of a sufficient number of children to generate cost-sharing obligations. Alternatively, it might imply that, for the affluent societies at which it is typically directed, the success of the pro-sharing argument

[60] Interestingly, the existing literature on sharing the costs of childrearing contains very little discussion about how the demands of global or environmental justice may serve to temper pro-sharing arguments. For a notable exception, see Casal, 1999, esp. 370-373.

will be contingent on reducing the level of average lifetime consumption to a level that is consistent with the demands of global justice when the rate of procreation is at a level sufficient to generate cost-sharing obligations. This is the more attractive implication, though it would certainly require a radical change in the lifestyle to which Westerners are currently accustomed, or radical technological innovation that would enable them to maintain their current lifestyle with a smaller environmental footprint.

While I cannot resolve these difficulties here, their significance should not be understated. Participants to the debate on sharing the cost of childrearing—especially proponents of the pro-sharing view—have tended to ignore how the demands of global justice might impose limits on the tenability of their arguments. Olsaretti, who is perhaps the most prominent defender of the pro-sharing view, all but brushes these considerations aside, claiming that substantiating the crucial premise that children are net positive externalities "would require venturing into complex factual territory."[61] This is certainly true, but the facts cannot be ignored or taken for granted, for when we think about procreation in a global context, it might well be the case that one person's benefit is another person's burden. This should be especially concerning to proponents of the pro-sharing argument who rely on a Rawlsian principle of fairness to make their case, for as Rawls himself emphasizes, the principle of fairness applies principally to *just* schemes of social cooperation.[62] If our duties of justice include duties of global or environmental justice, then it is not obviously clear that a cost-sharing scheme meets this criterion if it creates domestic public goods but global public bads.

[61] Oslaretti, 2013, 239.
[62] Particularly, Rawls states that "[The principle of fairness] holds that a person is required to do his part as defined by the rules of an institution when two conditions are met: first, the institution is just (or fair), that is it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests." See Rawls, 1971, 111-112.

4.6 Conclusion

In this chapter, I have offered a qualified defense of the view that the significant cost of creating and raising children should be shared to some extent between parents and non-parents. In societies with a unified social welfare system, in which the benefits funded by the next generation are distributed to parents and non-parents alike, non-parents are the future beneficiaries of their contemporaries' childrearing labor and can therefore be thought to have a fairness-based obligation to contribute to some of its costs. This type of view has proven immune to many of the standard criticisms, though I have argued that its success is ultimately conditional on two further considerations. First, insofar as fair play obligations only kick in against the backdrop of certain institutional conditions, the pro-sharing view is conditional on independent arguments for those conditions, namely, the existence of redistributive social welfare institutions that translate childrearing labor into benefits for non-parents. Second, the pro-sharing argument is also conditional on others benefitting from those institutions, which may vary significantly according to both the rate of procreation as well as how we conceive of our broader demands of global justice. I provided a Rawlsian contractualist argument that might work to satisfy the first condition, and attempted to specify the conditions under which the second condition might be satisfied by elaborating the various internal and external considerations that work to influence whether childrearing creates net positive externalities, though establishing whether childrearing does or does not create positive externalities in the context of existing societies would take further empirical research and argumentation.

While I have provided a qualified argument for the view *that* non-parents are obligated to share in the cost of childrearing, I have not attempted to specify the precise extent of this obligation (or how much they are obligated to contribute), nor have I attempted to elaborate the various alternative ways in which this obligation might be discharged (e.g. labor-sharing rather than redistributive taxation). These are important topics, though giving them

full consideration is outside the scope of this thesis. In the following chapter, I move on from these distributive questions to consider how the morality of procreation is influenced by the claims of an often neglected group of existing third parties: children in need of parental care.

Chapter Five
Procreation and Adoption

5.1 Introduction

While a precise number is notoriously difficult to calculate, UNICEF estimates that there are currently over 13 million orphans worldwide, where an 'orphan' is defined as a child who does not have access to stable and long-term parental care.[1] Of this 13 million, somewhere between 2 and 8 million are in the care of institutions, while the remainder float precariously between alternative childrearing arrangements, including group homes, foster homes, and temporary care arrangements with relatives or members of their communities.[2] Notably excluded from these estimates are potentially millions more children for whom there is no reliable documentation, such as those in unregistered institutions, those living on the street, and those who are at risk of becoming parentless in the near future due to famine, disease, or political violence. Once we factor in these children, the total number of children currently or soon to be in need of parental care is potentially in the tens of millions.[3]

According to Tina Rulli, these numbers are indicative of a global *orphan crisis*.[4] This crisis is not only one of great magnitude, in the sense that there are millions of children currently in need of parental care, but also one of great severity, in the sense that the cost to chil-

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[1]UNICEF. "Orphans". 2015. Accessed June 15, 2016 from http://www.unicef.org/media/media_45279.html. The precise number of orphans is notoriously difficult to calculate not only due to factors like chronic underreporting and the hidden nature of child abandonment, but also to the fact that the definition of 'orphan' varies according to context. The magnitude of the global orphan crisis is sometimes grossly exaggerated by commentators who appeal to statistics based on a more expansive definition of an 'orphan', e.g. as a child who has lost one or more parents, of which there are currently over 132 million. For a commonly cited study employing this more expansive definition (because it is concerned specifically with children who have lost one or more parents due to the AIDS epidemic), see UNAIDS, UNICEF, and USAID. *Children on the Brink 2004: A Joint Report of New Orphan Estimates and a Framework for Action*.

[2] UNICEF, 2015.

[3] Elizabeth Bartholet. "International Adoption: The Human Rights Position," *Global Policy*, 1(1) (2010), pp. 91-100, 95.

[4] Tina Rulli. "Preferring a Genetically-Related Child," *Journal of Moral Philosophy*, (2014), pp. 1-30.

dren of going without parental care is often devastating.[5] Children who are living on the street or in institutions often lack access to basic nutrition and medical care, and they normally face a far higher risk of neglect, abuse, and exploitation than children who are living in families. Even children who are raised in seemingly preferable arrangements, such as group homes or foster homes, often suffer a wide range of developmental problems due to a lack of continuous care and attention, including attachment disorders, impaired intelligence, and long-term problems with executive function and social interaction.[6] Not surprisingly, the future life prospects for many orphaned children are accordingly grim, with many succumbing to homelessness and unemployment by the time they reach the age of majority.

Prospective parents could help to avert this fate by adopting orphans into their families and providing them with long-term parental care, yet most choose to bring new children into the world instead. Is this morally justifiable? Several philosophers have recently considered the claim that it is wrong to create new children when there are so many existing children in need of parental care.[7] According to this view, we have a significant moral reason to meet the needs of existing children before creating additional needs to be met, and this reason is not easily defeated by competing considerations, including individual preferences for biological children or the substantial costs associated with adopting a child. If sound, this argument has significant implications for the morality of procreation, for it suggests that as long

[5] Ibid., 6.
[6] For an overview of the empirical literature on the developmental consequences of institutional and foster care, see Elizabeth Bartholet. *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative*. (Boston: Beacon Press, 1999), chapters 3 and 4.
[7] Daniel Friedrich. "A Duty to Adopt?" *Journal of Applied Philosophy*, 30(1) (2013), pp. 25-39; Jurgen de Wispeleare and Daniel Weinstock. "State Regulation and Assisted Reproduction: Balancing the Interests of Parents and Children" in François Baylis and Carolyn McLeod (eds.) *Family-Making: Contemporary Ethical Challenges*. (Oxford: Oxford University Press, 2014), and "Privileging Adoption Over Sexual Reproduction? A State-Centered Perspective" in Sarah Hannan, Samantha Brennan, and Richard Vernon (eds.) *Permissible Progeny? The Morality of Procreation and Parenting*. (New York: Oxford University Press, 2015); Thomas Søbirk Petersen. "The Claim from Adoption," *Bioethics*, 16(4) (2002), pp. 353-374; and Rulli, 2014 and "The Duty to Adopt" (PhD Diss., Yale University, 2012).

as there are existing children in need of parental care, it is often wrong to bring additional children into existence.

In this chapter, I evaluate these arguments further by considering our moral obligations to orphaned children. I argue in accordance with Rulli and others that there is a strong case to be made for a *pro tanto* duty to adopt rather than procreate, but that this duty may be legitimately overridden in light of the significant financial, legal, and logistical costs of adoption. However, recognizing that these costs are themselves the product of socially contingent barriers to adoption, I also argue in favor of collective obligations to facilitate adoption, including state obligations to subsidize adoption over fertility services, and broader societal obligations to promote adoption as a valuable childrearing option. In this sense, our moral obligations to orphaned children are twofold: we have a *pro tanto* obligation to adopt them into our families, and we also have secondary obligations to actively facilitate others' adoptive efforts.

The chapter proceeds in four parts. In 5.2, I outline the central argument for the individual duty to adopt, which is based on an analogy with the more general duty to rescue or assist those in need. In 5.3 and 5.4, I consider two prominent objections to that duty: one that appeals to individual preferences for biological children, and one that appeals to the significant financial, legal, and logistical costs of adoption. While I dismiss the first as unsuccessful, I argue that the second ought to be taken seriously as a consideration limiting the scope of the duty to adopt. Finally, in 5.5, I consider collective duties to facilitate adoption by addressing its contingent costs. I argue that these duties weigh in favor of a significant shift in the way that societies treat adoption as compared to procreation, and that, in many respects, our priorities are currently backwards.

5.2 The Duty to Adopt

In this section, I will outline the central argument for the presumptive duty to adopt, though before doing so, it is worth clarifying the nature of the claim under consideration. The phrase 'duty to adopt' is sometimes used ambiguously in reference to two rather distinct duties: (a) the duty of individuals to adopt orphaned children; and (b) the duty of individuals to adopt orphaned children *rather than create biological children*. The first duty implies a moral obligation to become a parent, whereas the second duty implies a moral restriction on how one may go about fulfilling an already existing parenting interest. In this chapter, I am primarily concerned with the duty to adopt in the second sense, or the presumptive duty that *prospective parents* might have to adopt rather than create children as a means of fulfilling their interest in parenting. The main reason for this focus is specific to the aims of this thesis—I am primarily interested in the duty to adopt as a moral constraint on procreation—though it is worth noting that there are also good general reasons for focusing on (b) rather than (a). First, if the duty to adopt is defensible at all, it is most likely to be defensible as a duty incumbent on persons who already have an interest in parenting. This is because it faces one less justificatory hurdle when applied to prospective parents than it does when applied to persons generally. When applied to prospective *non*-parents, the duty to adopt involves two types of costs: the costs associated with becoming a parent (including the opportunity costs associated with forgoing other valuable projects) and the costs associated with becoming a parent via adoption rather than procreation. When applied to prospective parents, however, the duty to adopt only involves the latter type of cost, and therefore faces a lesser justificatory burden.

Second, showing (b) to be successful *or* unsuccessful will normally make consideration of (a) unnecessary. If (b) is shown to be unsuccessful, then we can assume that (a) is unsuccessful by extension, for not only does it involve the same duty to adopt rather than pro-

create, but it also involves the far more demanding duty to parent rather than remain childless. If (b) is shown to be successful, however, then consideration of (a) is likely unnecessary, for the pool of prospective parents at any given time is normally significantly larger than the pool of prospective adoptees. As long as this is the case, adoption duties can in principle be discharged entirely by prospective parents before considering the potential obligations of prospective non-parents (though, as I will argue below, prospective non-parents may still be bound by collective duties to facilitate adoption). Thus, in what follows, I will reserve the phrase 'duty to adopt' to refer to the presumptive duty of prospective parents to adopt rather than create children as a means of fulfilling their interest in parenting.

What, then, is the basis of the duty to adopt in this more restricted sense? In the existing literature surrounding the ethics of adoption, the duty to adopt has typically been inferred from a more general duty to rescue or assist those in need, famously illustrated in cases like Peter Singer's *Shallow Pond*:

> *Shallow Pond*: The path from the library at your university to the humanities lecture hall passes a shallow ornamental pond. On your way to give a lecture, you notice that a small child has fallen in and is in danger of drowning. If you wade in and pull the child out, it will mean getting your clothes muddy and either cancelling your lecture or delaying it until you can find something clean and dry to wear. If you pass by the child, then, while you'll give your lecture on time, the child will die straightaway. You pass by and, as expected, the child dies.[8]

Most people agree that it is wrong for you to proceed on to a lecture while a child helplessly drowns in a nearby pond, and the reasoning for this is straightforward: there is a child in danger of losing his life, and this loss can be easily prevented at comparatively little cost to your-

[8] This is particular iteration of Singer's *Shallow Pond* case is presented by Peter Unger in *Living High and Letting Die: Our Illusion of Innocence.* (Oxford: Oxford University Press, 1996), 9. For Singer's original case, see his "Famine, Affluence, and Morality," *Philosophy and Public Affairs*, 1(3) (1972), pp. 229-243, 231; for a more recent iteration, see his *Practical Ethics* (third edition). (Cambridge: Cambridge University Press, 2011), 199.

self. Singer translates this type of reasoning into a generalized moral principle, which I will refer to here as the 'duty to rescue':

> *Duty to Rescue:* if it is in our power to prevent something bad from happening, without thereby sacrificing anything of comparable moral importance, we ought, morally, to do it.[9]

Daniel Friedrich and Tina Rulli have independently argued that accepting a duty to rescue commits us to a strong *pro tanto* duty to adopt, as the features that generate a duty to rescue in cases like *Shallow Pond* are also present in the case of orphaned children.[10] First, like the child in the pond, orphaned children are also at risk of losing what Rulli calls 'critical life goods', or goods that are "necessary for a person to avoid being in a state of critical, absolute harm."[11] Not all orphaned children face an imminent risk of death, though as I indicated in the introduction, many face the risk of significant physical and psychological harm as a result of long-term institutional care. Common physical harms include malnutrition, stunted growth, and greater susceptibility to neglect, abuse, and exploitation, while common psychological harms include impaired cognitive and emotional development due to a lack of continuous and attentive care.[12] Given its detrimental effects on a child's present well-being and future life prospects, Rulli argues that a childhood bereft of stable and attentive parental care is plausibly characterized as "a severe life-disadvantage and impairment."[13]

Second, the orphan crisis also features numerous potential rescuers—prospective parents—who are able to prevent this harm at comparatively little cost to themselves by

[9] Singer, 1972, 231. Importantly, Singer argues that the duty to rescue can be affirmed by consequentialists and non-consequentialists alike. As he stresses in a later statement of his view, "Most non-consequentialists hold that we ought to prevent what is bad and promote what is good. Their dispute with consequentialists lies in their insistence that this is not the sole ultimate ethical principle: that it is *an* ethical principle is not denied by any plausible ethical theory."
See Singer, 2011, 200.
[10] Friedrich, 2013, 25-26; Rulli, 2012, chapter 2, and 2014, 4-10.
[11] Rulli, 2012, 71.
[12] Ibid., 55-63.
[13] Ibid., 62.

adopting orphans into their families and providing them with long-term parental care. This is not to suggest that adopting children is costless, for as I will discuss in further detail below, adoptions typically involve a range of financial, legal, and logistical costs that place considerable burdens on adoptive parents. However, the important point for now is that the orphan crisis exhibits similar *cost-thresholds* as standard rescue cases. Whether or not we think it is too costly in absolute terms, the cost to a prospective parent of rescuing an orphan via adoption does not compare to the cost to the orphan of *not* being rescued, much like the cost to a passerby of pulling a child out of a pond does not compare to the cost to the child of *not* being pulled out. Given these similarities, both Rulli and Friedrich conclude that insofar as we acknowledge a duty to rescue in cases like *Shallow Pond*, we should also acknowledge a duty to adopt in the structurally similar case of orphaned children.

Is the argument for the duty to adopt sound? Because it is generated via an analogy with rescue cases, its soundness ultimately depends on the truth of two premises, namely:

(1) we have a duty to rescue in cases that exhibit certain criteria; and

(2) the orphan crisis exhibits the criteria that generate a duty to rescue.

Premise (1) has been the subject of considerable debate since the duty to rescue was originally formulated by Singer, with many critics focusing on its apparent demandingness.[14] In its strongest version, the duty to rescue requires that we prevent avoidable suffering so long as we can do so without sacrificing anything of *comparable moral importance*. According to Singer, this duty implies that we are obligated to assist the needy "until we reach the level of marginal utility—that is, the level at which, by giving more, I would cause more suffering to

[14] For a useful survey of different versions of the demandingness objection, see Brad Hooker. "The Demandingness Objection" in Tim Chappell (ed.) *The Moral Problem of Demandingness*. (New York: Palgrave Macmillan, 2009).

myself or my dependents than I would relieve by my gift."[15] Not surprisingly, many critics have taken issue with the stringency of this requirement, arguing that it is both counter to intuition and incompatible with living an autonomous life characterized by valuable projects and relationships. For example, most people would not consider reading philosophy or buying a new pair of shoes to be morally impermissible, though both activities run afoul of Singer's duty to rescue if one's time and resources could have been used to provide critical benefits to those in need. To the extent that we take this conclusion to be implausible, we may be lead to reject premise (1).

The demandingness objection constitutes an important objection to the duty to rescue, and as I will argue in sections 5.3 and 5.4, case-specific versions of the demandingness objection constitute the most plausible objections to the presumptive duty to adopt. However, it is best understood as an objection limiting the scope of the duty to rescue, rather than one that defeats it entirely. If we recognize a duty to pull the child out of the pond, then we recognize a duty to make *some* personal sacrifice in order to prevent avoidable suffering, and the question then becomes, how much? I will not attempt to provide a definitive answer here, but will only point out that the duty to rescue seems to apply in a fairly wide range of cases, including those that exhibit much higher cost thresholds than *Shallow Pond*. As a popular example of a more demanding case, consider Peter Unger's *Vintage Sedan*:

> *Vintage Sedan*: Not truly rich, your one luxury in life is a vintage Mercedes sedan that, with much time, attention, and money, you've restored to mint condition. In particular, you're pleased by the auto's fine leather seating. One day, you stop at the intersection of two small country roads, both lightly travelled. Hearing a voice screaming for help, you get out and see a man who's wounded and covered with a lot of his blood… Now, if you aid the [man], you must lay him across your fine back seat. But, then, your fine upholstery will be soaked through with blood, and restoring the car will cost over five thousand dollars. So, you drive away. Picked up the next day by another driver, he survives but loses the wounded leg.[16]

[15] Singer, 1972, 241.
[16] Unger, 1996, 24-25.

In *Vintage Sedan*, the cost to the rescuer is comparatively higher than it is in *Shallow Pond* ($5000 versus a trip to the dry cleaner), while the cost to the victim is comparatively lower (the loss of a leg versus the loss of a life). However, it still seems wrong for you to prioritize your prized leather upholstery over the leg of the victim, suggesting that the duty to rescue applies even in cases where the costs of rescuing are quite high.

In the following two sections, I will consider different versions of the claim that the costs of adoption are in fact *too* high to justify a duty to adopt, though before doing so, it is worth dispensing with a number of alternative objections. Even if one accepts that there is a duty to rescue in cases that exhibit certain criteria, one might still deny the claim in premise (2) that the orphan crisis exhibits the relevant criteria. In fact, there are at least four disanalogies between the orphan crisis and standard rescue cases that might be thought to undermine that premise.[17]

Proximity

First, one might argue that the orphan crisis is disanalogous to rescue cases insofar as there is not necessarily close physical proximity between the rescuer and victim. In cases like *Shallow Pond* and *Vintage Sedan*, the rescuer is immediately presented with physically proximate victim, though the same is not necessarily true in the case of prospective parents. Rather than being presented with a baby in a basket, as it were, prospective parents are often many miles (or even continents) away from orphaned children, and may therefore have a weaker duty to come to their assistance.

Physical proximity certainly indicates one possible difference between the orphan crisis and standard rescue cases, though it is not clear that it is an important one—as Unger stresses, "unlike many physical forces, the strength of a moral force doesn't diminish with

[17] These disanalogies are drawn from Unger's discussion of the duty to assist in Unger, 1996, chapter 2.

distance."[18] If distance is relevant to our duty to rescue, it is only because of its impact on our knowledge of a victim or our capacity to render assistance, but it is not morally significant in and of itself. To illustrate this point, Unger imagines a modified version of *Vintage Sedan* in which your knowledge of the man with the wounded leg does not come from confronting him directly, but rather by hearing about his predicament over the sedan's CB radio.[19] Even if the man happens to be many miles away, Unger insists that the strength of the duty to assist him is the same as it would be had you come across him directly. Similarly, while prospective parents may not be physically proximate to orphaned children, the distance between them should only impact on their duty to adopt to the extent that it impacts on their ability to discharge that duty (e.g. by contributing to its costs). Otherwise, most prospective parents are aware that there are children in need of assistance, and are capable of assisting them by adopting them into their families and providing them with long-term parental care.

Multitude of Victims

While physical proximity may not directly bear on the duty to adopt, a second possible distinction between the orphan crisis and standard rescue cases appeals to the multitude of potential victims. In *Shallow Pond* and *Vintage Sedan*, there is only one victim who needs to be rescued, though in the case of the orphan crisis, there are literally millions. This difference might be thought to invite another type of demandingness objection, for rather than being required to perform a single act of assistance, it might seem as though prospective parents are required to repeatedly adopt children until there are no more orphans in need of parental care.

I will consider in a moment a potential response to this worry deriving from an account of fair shares, though it is worth noting that the type of assistance that orphaned children require will generally set limits on the number of times it can be rendered by one indi-

[18] Unger, 1996, 33.
[19] Ibid., 34-35.

vidual. The reason why orphaned children need to be adopted is because they currently lack access to the continuous and attentive parental care that is necessary for their healthy physical, cognitive, and emotional development. A duty to adopt a limitless number of orphans would therefore be self-defeating, as individuals cannot provide a limitless number of children with continuous and attentive parental care (this, in part, is what makes group homes and orphanages inadequate childrearing institutions). In this sense, while it is true that there are millions more victims in the orphan crisis than in standard rescue cases, this is not necessarily a consideration weighing against a duty to adopt, as the type of assistance those children require will generally weigh against repeated adoptions.

Multitude of Rescuers

In addition to a multitude of potential victims, the orphan crisis is also distinct from standard rescue cases in that there is a multitude of potential rescuers. In *Shallow Pond* and *Vintage Sedan*, there is one individual who is uniquely positioned to render assistance to the victim, whereas in the orphan crisis there are numerous prospective parents who are capable of adopting children. Might this impact on whether the orphan crisis generates a rescue-based duty to adopt? On the one hand, there may be certain cases in which the existence of multiple rescuers diminishes or even negates one's presumptive duty to rescue. Imagine that in the case of *Shallow Pond* there are several other bystanders who you know will come to the child's assistance regardless of what you do. In this case, you might be morally permitted to continue on to your lecture on the grounds that someone else is certain to come to the child's assistance.

On the other hand, however, it is difficult to see how the orphan crisis fits this criterion. For one thing, there are deep epistemic limitations that preclude you from knowing what other prospective parents will do—you cannot possibly know the intentions or capabilities of

the world's prospective parents, and would not therefore be warranted in thinking that orphan crisis will be solved regardless of what you do. More to the point, however, any reasonable person will realize that the probability of others solving the orphan crisis by adopting *all* of the world's orphans is miniscule, and that it is very likely there will still be children in need of parental care even if millions of prospective parents act on their duty to adopt. In this sense, the orphan crisis is less like *Shallow Pond* and more akin to a scenario in which thousands of children are drowning in a lake where there are only a limited number of lifeguards available who are able and willing to save them. In this scenario, there are multiple potential rescuers available, but there is also a large number of potential victims, casting doubt on the notion that the presence of multiple rescuers excuses one from one's duty to rescue.

One might argue, however, that the multitude of rescuers is significant for a different reason. Liam Murphy has notably argued that in cases where there are multiple persons who are able to assist those in need, one is not morally obligated to do more than their fair share in rendering the relevant form of assistance.[20] Suppose, for example, that in order to house the homeless in one's community, each community member was required to contribute $100 to a local shelter. According to Murphy, even if partial non-compliance resulted in insufficient funds to run the shelter, one would not be morally required to contribute more than one's fair share of $100. Applied to the orphan crisis, Murphy's argument might be thought to undermine the duty to adopt by exposing it as supererogatory. If, as is plausible, the number of prospective parents far exceeds the number of prospective adoptees, then discharging one's fair share of assistance amounts to something less than adopting a child.[21]

Is Murphy's argument sound? If it has merit at all, it is only with respect to cases where the relevant form of assistance is divisible between different parties, though the case of adoption is not one of these cases. Presumably, dividing the duty to adopt between all pro-

[20] Liam B. Murphy. "The Demands of Beneficence," *Philosophy and Public Affairs*, 22(4) (1993), pp. 267-292.
[21] On this point, see Rulli, 2012, 87-91.

spective parents would entail something like an obligation to care for a child for a limited period of time before shuffling him or her off to another duty-bearer. However, this would be self-defeating insofar as the child's lack of continuous and attentive care is what gives rise to the duty in the first place. In this sense, the type of assistance that orphaned children require generally precludes us from dividing the duty to adopt evenly among all prospective parents.

However, while the requisite form of assistance precludes a division of duties, an account of fair shares may still impact on the number of children that each prospective parent is duty-bound to adopt. It might be the case, for example, that each prospective parent has a presumptive duty to adopt one or two orphaned children, but is thereafter permitted to create additional children if they so choose. This seems plausible, though whatever an account of fair shares says about how many times each prospective parent is required to discharge their duty to adopt, it does not undermine the very idea of such a duty, and so does not constitute an objection to premise (2).

Responsibility for Predicament

A fourth and final difference between the orphan crisis and standard rescue cases has to do with moral responsibility for the victim's predicament. The predicaments in *Shallow Pond* and *Vintage Sedan* are perhaps best characterized as freak accidents: the child in the pond and the man on the road are endangered as a result of brute bad luck, so it is reasonable to think that the duty to rescue them falls upon whoever is capable of doing so (e.g. a passerby capable of rendering the appropriate form of assistance).[22] However, the same is not necessarily true of the orphan crisis. While it may be exacerbated by unforeseen events like

[22] Unger actually builds an element of personal responsibility into *Vintage Sedan*. In the original unabridged version, the man cuts his leg after trespassing into an area with a barbed fence, suggesting that he is partly to blame for his injury. However, because this detail does not bear on the arguments presented in this chapter (my interest in the example is due to its high cost thresholds), I have left it out for the sake of brevity, and simply assume that the man is not responsible for his predicament.

wars, famines, or natural disasters, the orphan crisis is less the result of a freak accident and more the product of a pervasive and large-scale social problem for which there are likely identifiable causes.[23] We might then think that the duty to render assistance should not fall on prospective parents generally, but rather the various persons and institutions that are responsible for there being orphans in the first place, including religious institutions that forbid the use of contraception, governments that fail to address poverty, substance abuse, and other root cause of child abandonment, or the various national and international agencies that maintain bureaucratic barriers to adoption, to name just a few.[24]

It is true that the orphan crisis has many root causes, and that some of these causes are traceable to failures on the part of a wide range of persons and institutions. However, the fact that others may bear responsibility for the predicament of orphans does not necessarily weaken the case for an individual duty to adopt. Imagine, by way of analogy, that the child in *Shallow Pond* is not in danger by brute bad luck alone, but rather because his inattentive parent has failed to keep a close eye on him, and/or because the campus maintenance department failed to install an adequate safety railing around the pond. It might be the case that the parent or university ought to bear responsibility for pulling the child out of the pond in virtue of being responsible for the child's predicament, though this does not seem to weaken your presumptive duty to rescue the child. Indeed, if you are in position to rescue the child, and you know that the child may die if you fail to act, it seems like your duty to rescue is just as strong as it would be if no one was responsible for the child's predicament.[25] In this sense, while recognizing the root causes of the orphan crisis is an important step toward addressing

[23] Rulli, 2014, 7.
[24] This view would seem to be implied by the causal account of parental obligation defended in Chapter Three.
[25] One difference, however, is that you may have a legitimate claim to compensation in the event that the child's parent was responsible for his predicament (e.g. the parent may be morally obliged to pay your dry cleaning bill).

it, it does not necessarily weigh against an individual duty to adopt when there are currently children in need of parental care.

It seems, then, that the various objections to premise (2) are unpersuasive: while there are numerous differences between the orphan crisis and standard rescue cases, none of these differences serve to defeat the idea of a rescue-based duty to adopt. However, rather than pointing to a disanalogy between the orphan crisis and standard rescue cases, it seems like the most plausible objection to the duty to adopt appeals to general considerations of demandingness. There are in fact two versions of this type of objection that merit further consideration.[26] The first claims that the duty to adopt is excessively demanding by requiring prospective parents to forgo their preference for a biological child, whereas the second claims that it is excessively demanding by forcing prospective parents to incur the significant financial, legal, and logistical costs of adoption. I will consider each of these objections in turn, arguing that the first fails, but that the second often succeeds. I will then argue that this does not necessarily weigh against the duty to adopt, but rather in favor of collective duties to facilitate adoption.

5.3 Moral Options and the Preference for a Biological Child

To focus attention on the first type of objection, consider a thought experiment designed by Rulli to abstract from the socially contingent costs of adoption:

> *Safe Haven*: Imagine that you have just decided to become a parent. You learn that the local fire station, a safe haven, has received a newborn baby in need of a family. You are aware of the research showing that early infant adoptions pose little risk regarding the infant's psychological health and potential for emotional attachment. The urgent need for placement and the lack of administrative costs allow for the baby's adoption with few additional hurdles or fi-

[26] A third possible version of the demandingness objection appeals to the long-term nature of the commitment to parent a child; however, given that prospective parents are already willing to undertake this commitment, I think that this only constitutes an objection when the duty to adopt is applied to prospective *non*-parents.

> nancial burdens. You can adopt this child, who will otherwise face a life of uncertainty in various institutions or foster homes. Or you can decline and bring a new child into the world instead.[27]

If the arguments in the previous section are sound, then you have a significant moral reason to adopt the baby from the fire station instead of bringing a new child into existence, for in doing so you will be satisfying your own desire to become a parent *as well as* the baby's need to be parented. Moreover, the socially contingent costs that might have dissuaded you in other circumstances are not present: there are no costly adoption fees, no lengthy wait times, and the baby does not present any behavioral or health-related challenges that would make parenting it especially onerous. Despite these considerations weighing in favor of adoption, however, many people still believe that you are morally permitted to create a new child if that is something that is sufficiently important to you. On this view, adopting the baby from the fire station would be morally praiseworthy, but it is not something that it is morally required given your strong preference for a biologically related child.

This type of objection assumes that you have what Shelly Kagan calls *moral options*, or prerogatives to prioritize your own interests and projects over the interests of others.[28] The existence of moral options is a central tenet of commonsense morality, and constitutes an important objection to moral theories (particularly forms of consequentialism) that place significant demands on moral agents.[29] I noted earlier, for example, that one of the standard objections to Singer's strong duty to rescue is that consistently acting on that duty would eventually preclude the duty-bearer from investing in the various projects and interests that give *her* life value. In this sense, while it is reasonable to think that we are obligated to make *some*

[27] Rulli, 2014, 1-2.
[28] Shelly Kagan. *The Limits of Morality*. (Oxford: Clarendon Press, 1989), 3.
[29] See, for example, Samuel Scheffler. *The Rejection of Consequentialism* (revised edition). (Oxford: Clarendon Press, 1994); Bernard Williams. "A Critique of Utilitarianism" in J.J.C. Smart and Bernard Williams. *Utilitarianism: For and Against*. (Cambridge: Cambridge University Press, 1973); and Susan Wolf. "Moral Saints," *Journal of Philosophy*, 79(8) (1982), pp. 419-439.

sacrifices in order to prevent avoidable suffering, it also seems like there are limits on what morality can legitimately demand of us.

Few[30] philosophers are prepared to deny the existence of moral options altogether, though disagreement persists about their scope in different circumstances. How, then, do we determine whether a person's preference for a biological child can excuse them from their *pro tanto* duty to adopt? Providing a comprehensive account of moral options is beyond the scope of this chapter, though we can identify at least two general considerations that ought to guide us in our deliberations. The first is the strength of the *pro tanto* duty. In general, the more that is at stake in performing or not performing a particular duty, the higher that the bar will be set for what constitutes a legitimate overriding preference. In this sense, your preference for maintaining your expensive leather upholstery might override a presumptive duty to give your exhausted friend a ride home from his coal mining job, though it will not likely override the presumptive duty to drive a man to the hospital whose wounded leg is in serious jeopardy.

The second consideration is the strength of the conflicting interest or project. In general, the more central that a particular interest is to one's deepest projects and commitments, the more likely it will be to ground a moral option in cases where it conflicts with a presumptive moral duty. In this sense, your sincere religious beliefs are more likely to excuse you from a presumptive duty to donate blood in an emergency than your mild discomfort with needles. Taken together, these two considerations suggest a balancing process whereby we weigh the strength of the *pro tanto* duty against the strength of a conflicting interest or project to see if the latter can ground a moral option. If the strength of the former is low, while the strength of the latter is high, then there is a good case to be made for recognizing a moral

[30] Notable exceptions include Singer, 1972, Kagan, 1989, and Unger, 1996.

option; however, if the strength of the former is high, while the strength of the latter is low, then there is good case to be made for discharging the presumptive moral duty.[31]

Initially, this balancing process might seem to work against the presumptive duty to adopt, for the vast majority of prospective parents express a deep and sincere preference for a biologically related child. Indeed, the preference for a biological child is so strong among some prospective parents that adoption does not even register in their ranking of childrearing preferences. In other words, the preference ranking for many prospective parents is not (1) create a child, (2) adopt a child, or (3) have no children, but rather (1) create a child or (2) have no children. Given the strength with which it is held by many prospective parents, can this type of preference ground a moral option to create rather than adopt a child?

I think that the answer is 'no', and the reasoning for this partly appeals to another general consideration that I believe restricts the scope of moral options, which is the coherence or reasonableness of the conflicting interest. In general, interests that are based on false assumptions or specious reasoning should not carry significant weight in excusing people from their *pro tanto* moral duties, *even if* those interests are deeply valued or subscribed to from a subjective point of view. Consider a non-adoption-related example that illustrates the plausibility of this restriction. Given its significant benefits for individual and herd immunity, there is a strong case to be made for a *pro-tanto* duty to provide one's child with the measles, mumps, and rubella (MMR) vaccine, especially in developed countries where it is easily and readily available. The sincere and deeply held conviction that the MMR vaccine causes autism in children should not be given overriding weight, as it is based on demonstrably false beliefs. There is no credible evidence linking the MMR vaccine to the development of autism in children, so we should not accept the belief in such a link as a legitimate excuse for not vaccinating one's child.

[31] For a useful and much more thorough discussion of moral options in the context of the adoption debate, see Rulli, 2012, 133-143. The account presented here is an abbreviated version of Rulli's approach.

I believe that something similar applies in the case of the duty to adopt. While many prospective parents express a sincere preference for a biologically related child, this is not the type of preference that should ground a moral option, as it is often based on false beliefs about the significance of biological or genetic connectedness and/or is too trivial to justify the non-performance of a strong *pro-tanto* duty.[32] To illustrate this point, I will briefly review four of the most common reasons advanced in favor of the preference for a biological child and show how each of them fails to provide a plausible explanation for why we should ascribe that preference overriding weight. These arguments will not show that prospective parents have a duty to adopt in all circumstances, though they will show that objections to that duty based on the preference for biological children are often unpersuasive.

Creating a Life

When confronted with the option of adopting the baby from the fire station, what reasons might you advance in favor of creating a new child instead? We can broadly distinguish between two categories of reasons: those that have to do with the *process* of procreation, and those that have to do with its *product*. One type of reason that falls into the former category appeals to the experience of creating a new human life. There are a number of reasons why creating a new human life might be considered valuable. Matthew Liao, for example, has recently likened the creation of a new human life to the creation of a beautiful work of art, as in both cases individuals are exercising their agency and autonomy to produce something with inherent value.[33] Carson Strong, by contrast, has argued that creating a new human life is instrumentally valuable because "intentionally having children can be an affirmation of a cou-

[32] Friedrich makes a similar point in his own account of the duty to adopt, arguing that "the non-satisfaction of central desires can reduce an agent's wellbeing and thus be costly for the agent as long as these desires are informed desires, that is, as long as they aren't based on a false conception of the desired state of affairs. Importantly, though, most people harbor false beliefs about adoption." See Friedrich, 2013, 28.

[33] S. Matthew Liao. *The Right To Be Loved.* (Oxford: Oxford University Press, 2015), 155.

ple's mutual love and acceptance of one another," and can further provide "an anticipation that the bond between the couple will grow stronger because of common children to whom each has a biological relationship."[34] To the extent that these goods are both valuable and unique to procreation, they might provide a basis for preferring procreation over adoption.

However, it is not difficult to see that even if these goods are valuable, neither of them is unique to, or even necessarily involved in, procreation. First, if the value of creativity consists in exercising one's agency and autonomy, then procreation actually seems like a poor candidate for an act that is creative in a valuable sense. While a set of individuals may autonomously engage in reproductive sex, what happens afterwards is almost entirely determined by biological processes that are beyond their control, and is therefore a poor analogue for a deliberately creative act like artistic expression. There may of course be creative value in shaping a child's identity by parenting it once it is born[35], though this form of creativity fails to mark a distinction between procreation and adoption, as it is available to biological *and* adoptive parents in equal measure.

Second, while raising a child in the context of a shared family life may well serve affirm a couple's mutual love and respect for one another, it is less plausible to think that this type of affirmation is brought about by procreation alone. If this were the case, it would imply that a couple who procreates on the basis of a one night stand and subsequently puts their child up for adoption can expect their bond to grow stronger in light of the fact that their happens to be a child in the world to whom they are both biologically related. This implication is clearly false, however, suggesting that if having a child serves to affirm a couple's mutual love and affection for one another, it is only to the extent that they actually share in the task

[34] Carson Strong. "Cloning and Infertility," *Cambridge Quarterly of Healthcare Ethics*, 7 (1998), pp. 279-293, 282.

[35] Colin Macleod in fact uses the term 'creative self-extension' to describe this morally valuable feature of parenting. See "Parental Responsibilities in an Unjust World" in David Archard and David Benatar (eds.) *Procreation and Parenthood: The Ethics of Bearing and Rearing Children*. (Oxford: Oxford University Press, 2010), esp. at 142.

of raising that child—a task that can be performed with respect to biological *and* adopted children.[36]

Experiencing Pregnancy

A second process-based reason for preferring procreation to adoption appeals to the experience of pregnancy: only by procreating is a woman able to have the unique experience of gestating and giving birth to another human being. The desire to experience pregnancy is often strong among many prospective mothers, and the experience itself is often thought to have both instrumental and intrinsic value. For instance, some commentators have argued that pregnancy is instrumentally valuable insofar as it prepares women for motherhood and contributes to the development of an intimate maternal-infant bond[37], while others have argued that it is intrinsically valuable insofar as the experience itself contributes in some way to the identity and self-conception of the women who pursue it.[38] Given that adoption does not involve experiencing pregnancy, a desire to have that experience might be thought to undergird a moral option to create a biological child.

According to Rulli, the desire to experience pregnancy is the *only* legitimate reason that prospective parents can advance in favor of their preference to have a biological child, for unlike the other reasons that are typically advanced in favor of that preference, "the interest in pregnancy may arise to the level of a project."[39] I agree that the desire to experience pregnancy might provide a stronger reason than the desire to create a life in terms of grounding a moral option, though in contrast to Rulli, I think there are still good reasons against

[36] Also worth noting here is the fact that Carson's argument really only applies to heterosexual couples—it does not apply, for instance, to single individuals who procreate independently, or homosexual couples who do not share a biological connection with their child.
[37] Anca Gheaus. "The Right to Parent One's Biological Baby," *Journal of Political Philosophy*, 20(4) (2012), pp. 432-455, esp. 446-451, and 453.
[38] Rulli, 2014, 25-28. See also Amy Mullin. *Reconceiving Pregnancy and Childcare: Ethics, Experience, and Reproductive Labor*. (New York: Cambridge University Press, 2005), esp. 27-34.
[39] Rulli, 2014, 28.

granting it an exceptional status. First, the apparent instrumental value of pregnancy seems overstated. While it is commonly assumed that mothers have closer emotional connections to their biological as opposed to adoptive children, numerous empirical studies have shown that mother-child attachment is usually as strong in the case of adoption as it is in the case of biological procreation, particularly when children are adopted early in their infancy.[40] Moreover, it is also unclear whether pregnancy necessarily gives biological mothers a competitive edge in the preparation for parenthood. While pregnancy may help to prepare mothers for many of changes brought about by parenthood, so may the rigorous process that adoptive parents often undergo before adopting a child, which typically involves prolonged waiting periods, home visits, and parenting classes. Finally, there are also certain respects in which adoption may have instrumental advantages over pregnancy. While adoptive mothers do not experience the benefits of pregnancy, they also do not incur its associated risks, including the risk of miscarriage, pre-eclampsia, or pre-natal and post-partum depression.[41]

Second, even if pregnancy has intrinsic value insofar as it is a profound and non-substitutable experience, it is difficult to see how the desire to have that experience can arise to the level of an option-grounding project. In the *Safe Haven* scenario outlined above, citing the desire to experience pregnancy as the basis for a moral option seems to imply that the cost associated with forgoing that experience is morally on par with the cost to the child of not being adopted. However, given the severe cost to children of going without parental care, this comparison seem implausible, suggesting that the mere desire to experience pregnancy cannot excuse women from their *pro tanto* duty to adopt.

[40] See, for example, Leslie M. Singer, David M. Brodzinsky, Douglas Ramsay, Mary Steir, and Everett Waters. "Mother-Infant Attachment in Adoptive Families," *Child Development*, 56(6) (1985), pp. 1543-1551; and J.E. Koepke, S. Anglin, J. Austin, and J. Delesalle. "Becoming Parents: Feelings of Adoptive Mothers," *Pediatric Nursing*, 17(4) (1991), pp. 333-336.
[41] Rulli, 2014, 27.

Family Resemblance

In addition to reasons pertaining to the process of procreation, a second category of reasons for preferring procreation to adoption appeals to its product, namely, a child who is biologically related to oneself. One set of reasons that falls into this second category appeals to the apparent value of physical or psychological resemblance. It is common for parents to react in joy or amusement when various physical traits are reproduced in their offspring—discovering that a baby has its father's eyes or its mother's hair is usually cause for laughter and celebration, and is an experience that is largely unique to biological parenthood. Similarly, there may also be value in seeing one's offspring share in what Brenda Almond has termed one's *Weltanschauung*, or the various "attitudes, appraisals, interests, tendencies, [and] common qualities of character," that make up one's "characteristic way of looking at the world."[42] To extent that these resemblances are both valuable and genetically determined, they might provide an additional basis on which to prefer procreation to adoption.

However, there is good reason to be skeptical of both the value of these resemblances, as well as the extent to which they are genetically determined. Consider first the value of physical resemblance. Even if procreation is more likely to result in a child that physically resembles its parents, it is difficult to see why the desire to achieve that kind of resemblance should be ascribed any normative weight. At best, it reflects a trivial curiosity that is not weighty enough to justify the non-performance of a duty; at worst, it reflects an objectionable form of narcissism that ought to be discouraged rather than legitimized. It is also worth noting here that a desire for physical similarity might lead one to counterintuitive conclusions when generalized to other cases. For example, if there is genuine value in creating a child who is physically similar to oneself, then this would imply that cloning a child is preferable to creating one through procreation.

[42] Brenda Almond. "Family Relationships and Reproductive Technology" in U. Narayan & J.J. Bartkowiak (eds.) *Having and Raising Children*: *Unconventional Families, Hard Choices, and the Social Good*. (University Park, PA: Pennsylvania University Press, 1999), 104.

The desire to achieve psychological similarity might carry greater normative weight insofar as it contributes to the quality of the parent-child relationship, though the problem here is that the relevant psychological features are not genetically determined, but are rather the product of complex interactions between a range of genetic and environmental factors.[43] As Neil Levy and Mianna Lotz have argued, to assume that one's progeny will share one's *Weltanschauun* simply in virtue of sharing one's genes is to engage in a crude form of genetic determinism, and to underplay the significant role of environmental factors in shaping personality.[44]

Immortality

A final reason that prospective parents might advance in favor of their preference for a biological child is the desire to achieve a form of immortality by having their genetic material live on into the future. The desire the achieve immortality is sometimes cited as an unconscious desire motivating the decision to procreate[45], though recent cases of posthumous reproduction have given it a more concrete expression. For example, it is not uncommon for terminally ill men to make their sperm available for their female partners' use following their deaths, and there have even been cases of postmortem sperm retrieval in cases where men have died accidentally before being able to act on an expressed desire to procreate. While less common, there have also been cases in which terminally ill women have made their ova available to their male partners for fertilization and gestation by surrogate following their

[43] Neil Levy and Mianna Lotz. "Reproductive Cloning and a (kind of) Genetic Fallacy", *Bioethics*, 19(3) (2005), pp. 232-250, esp. 237-238.
[44] Ibid., 237-238.
[45] For instance, in speculating on the significance of procreation, John Robertson suggests that "in connecting us with nature and future generations, reproduction gives solace in the face of death." See John A. Robertson. *Children of Choice: Freedom and the New Reproductive Technologies*. (Princeton: Princeton University Press, 1994), 24.

deaths, attesting to the fact that the desire to pass on one's genetic material can be very strong among many prospective parents.[46]

Can the desire to achieve immortality ground a moral option to procreate rather than adopt? There are a number of reasons to be skeptical that it can. First, procreation is no guarantee of genetic immortality. In order for one's genetic material to live on into the future, it must be the case that one's children procreate as well, though there is never any certainty that they will choose or be able to do so—in this sense, procreation only guarantees that one's genetic material will live on for *one* generation. Moreover, even in cases where one's genetic material *does* survive into the future, it diminishes in significance with each subsequent generation. While one's progeny will share 50% of one's genetic material, one's grandchildren will only share 25%, one's great-grandchildren 12.5%, and so on, until the proportion of one's genetic material in each descendant is inconsequential.[47]

Second, and more to the point, it is also unclear that genetic self-extension is the most meaningful way to achieve the relevant form of immortality. Imagine that one's choice was between (a) creating a genetically related child who grew to eschew one's culture, values, and traditions, or (b) an adopted child who grew to embrace them. If one's decision to become a parent was in part motivated by a desire to achieve a lasting form of immorality in the sense of influencing future generations, it seems like one would be more successful choosing (b) over (a).[48]

If the preceding arguments are sound, then many of the reasons commonly advanced in favor of preferring biological over adoptive children are not weighty enough to provide the basis for a moral option to procreate rather than adopt: some are based on false assumptions

[46] For discussion of these and other cases of posthumous reproduction, see Carson Strong, Jeffrey R. Gingrich, and William H. Kutteh. "Ethics of Postmortem Sperm Retrieval," *Human Reproduction*, 15(4) (2000), pp. 739-745.
[47] Levy and Lotz, 242.
[48] Rulli, 2012, 149.

about the value of biological connectedness, others are too trivial to justify the non-performance of the duty, and others fail to mark a meaningful distinction between procreation and adoption given that the purportedly valuable features of procreation often have close analogues in cases of adoption. Notice, however, that even if one rejects these arguments and insists that reasons for preferring biological children *are* morally significant, they cannot ground a moral option to pursue procreation in all cases. Given that each of the aforementioned interests can be satisfied by the creation of *one* biological child, appealing to any of them can at best ground a moral option to procreate *once*. The duty to adopt would still apply with respect to any subsequent children that one wanted to parent, as one's preference for a biological child would then have been satisfied.

5.4 Socially Contingent Costs of Adoption

In the real world, of course, the preference for biological children is not the only consideration dissuading prospective parents from adoption. In justifying their decision to procreate rather than adopt, many prospective parents are just as likely to appeal to the significant financial, legal, and logistical costs of adoption. It is no secret that, in many Western societies, adopting a child remains extremely expensive. In the United States, for example, the average cost of adopting a child is between $10,000 and $15,000, though it is not uncommon for costs to exceed $40,000 depending on the type of adoption (e.g. domestic or international), the type of agency that is facilitating it (e.g. public or private), as well as the age and physical health of the prospective adoptee.[49] Some jurisdictions offer income-proportionate tax credits or adoption subsidies to defray some of these costs, though signifi-

[49] Child Welfare Information Gateway. *Costs of Adopting: A Factsheet for Families*. (Washington, D.C.: U.S. Department of Health and Human Services, 2011). Available from https://www.childwelfare.gov/pubpdfs/s_costs.pdf

cant credits are typically reserved for adoptions involving children with special needs, who also tend to be more expensive to raise.[50]

The process of adopting a child also involves a number of legal and logistical hurdles that procreative parents do not typically have to overcome. For example, adoptive parents must typically undergo an invasive parental licensing process, which usually involves a comprehensive home study, a requirement to attend parenting classes, and strict scrutiny of their personal and family background.[51] Moreover, many adoptive parents must also endure longer wait times than procreative parents before gaining custody of their child. While a successful pregnancy can be achieved in nine months, a finalized adoption can sometimes take years to complete, during which time adoptive parents can be left in a state of uncertainty about whether their adoption will in fact succeed. These hurdles combine to make the process of adoption a frustrating and emotionally taxing experience, or as Carolyn McLeod and Andrew Botterell have recently put it, one that is "not for the faint of heart."[52]

Finally, adoptive parents may also face a unique set of challenges in raising the children they successfully adopt into their families. In contrast to Rulli's *Safe Haven* scenario, the majority of children available for adoption are not healthy newborns, but are rather children over the age of five who have spent significant time in institutional care.[53] They are therefore more likely to present a range of developmental and behavioral problems that make them more difficult to raise. While some prospective parents may be willing to undertake these additional burdens, others may find them too overwhelming, and prefer to forgo parenthood altogether.

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[50] Ibid., 6-7.
[51] Andrew Botterell and Carolyn MacLeod. "'Not for the Faint of Heart': Assessing the Status Quo on Parental Licensing" in Carolyn McLeod and Françoise Baylis (eds.) *Family Making: Contemporary Ethical Challenges*. (Oxford: Oxford University Press, 2014), 153.
[52] Ibid.
[53] E.J. Graff. "The Lie We Love," *Foreign Policy*, 169 (2008), pp. 58-66.

The significant financial, legal, and logistical costs of adopting a child form the basis of a second type of demandingness objection to the presumptive duty to adopt. Even if we do not ascribe any weight to individual preferences for biological children, it still might be the case that the costs associated with adoption are too high to expect prospective parents to pay. On this view, prospective parents may have a duty to adopt in idealized cases like *Safe Haven*, but not necessarily in real world cases in which the costs of adoption are typically substantial.

Is this second type of demandingness objection sound? Some theorists have expressed their doubts.[54] Friedrich, for example, has argued that objections to the duty to adopt based on costs are often overstated, as they tend to ignore the costs that are associated with procreation (and which are avoided through adoption). For instance, he notes that the "medical costs of pregnancy, childbirth, and infant care are often significant and the costs of raising a child through its first year or two of life (including opportunity costs of missed wage income) are also substantial."[55] He notes further that these costs can expand considerably in cases where prospective parents require access to assisted reproductive technologies (ARTs) like *in vitro* fertilization (IVF). In the United States, for example, where IVF treatment is rarely subsidized, the cost per live birth (which includes the cost of unsuccessful cycles) can easily exceed $45,000, particularly for woman over the age of 40 who may be required to undergo multiple cycles.[56] The case of IVF is particularly significant in this context, for it not only reveals that procreation can involve financial costs that are comparable to those associated with adoption, but also that there are many prospective parents who are willing to incur them.

[54] See, for example, Friedrich, 2013, esp. 31-32, and Travis N. Rieder. "Procreation, Adoption, and the Contours of Obligation," *Journal of Applied Philosophy*, 32(3) (2015), pp. 293-309, esp. 300-301.
[55] Friedrich, 2013, 32.
[56] Ibid., 32.

We might add to Friedrich's point about financial costs that procreation can also involve a host of additional burdens and frustrations that are not dissimilar to those faced by adoptive parents. For example, while the process of adoption can involve false starts and excessive wait times, so too can the process of procreation: it can sometimes take couples months or even years to conceive a child, and many must endure the pain and worry associated with miscarriage and other pregnancy-related complications. Moreover, while adoptive children may pose a higher risk of developmental problems due to post-institutional trauma, procreation may also result in children with congenital disabilities or health-related problems that present significant challenges for their biological parents. When we take into account the burdens associated with procreation, we begin to see that it is parenthood in general that is a demanding enterprise, and that the differences between procreation and adoption are largely differences of degree, rather than type.

However, while these considerations might temper the strength of the demandingness objection, they do not defeat it entirely. To the extent that 'ought implies can', it seems like the duty to adopt will most plausibly be restricted to those who have both the financial and psychological ability to adopt orphans into their families and provide them with adequate parental care. Following Travis Rieder, we can restate the duty to adopt as follows:

> *Restricted Duty to Adopt*: all prospective parents who have the means and ability to do so are morally obligated to adopt rather than create children as a means of fulfilling their interest in parenting.[57]

The restricted duty to adopt does not apply to *all* prospective parents, but only to those who have the financial and psychological ability to do so. What implications does this have for our obligations toward orphaned children? On the one hand, it might simply imply a narrow-

[57] This is a paraphrased version of a similar principle proposed in Rieder, 2015, 302.

ing of the constituency to whom the duty to adopt applies. On this view, there are simply fewer persons who are bound by the duty to adopt, and potentially fewer orphaned children who are morally required to be adopted (depending on the size of the constituency of prospective adopters relative to the size of the constituency of prospective adoptees).[58] On the other hand, however, a restricted duty to adopt might also weigh in favor of secondary duties to lower the costs of adoption. As Rulli and others have noted, many of the cost associated with adoption are not essential to the adoption process, but are rather "the result of socially-contingent barriers to adoption,"[59] and in principle can be changed. For example, governments might offer greater subsidies or tax incentives to prospective parents who are considering adoption, or they may work to expedite the adoption process so that children are adopted at earlier ages, making adoption more attractive to prospective parents and more responsive to the needs of children.[60] Both of these strategies might help to lower the costs of adoption and hence expand the constituency of prospective adopters, though I will not consider either of them in significant detail here. Rather, in the remainder of the chapter, I will briefly outline just one possible strategy that governments might pursue to lower the cost of adoption: shifting resources currently used to subsidize fertility treatments to subsidize the costs of adoption.

[58] One's duty to adopt could also in principle be discharged by subsidizing someone else's adoption costs—that is, if one had the financial means to adopt a child, but lacked the emotional capacity to adequately raise a child with post-institutional developmental problems, one may be able to satisfy their duty by subsidizing the adoption costs of another person who was willing and able to do so. An obvious concern with this type of approach, however, is that it may create an objectionable form of inequality between the rich and the poor, wherein the rich are able to buy their way out of their adoption obligations while the poor have little choice but to discharge them.
[59] Rulli, 2014, 30.
[60] Ibid., 30.

5.5 Collective Duties to Facilitate Adoption: The Case of ART

I noted earlier that in countries like the United States, where IVF treatment is rarely state-funded, the cost of achieving a live birth can often be substantial, particularly for older women who may be required to undergo multiple cycles. However, this is not the case in all countries. In the United Kingdom, for example, the National Health Service (NHS) funds up to three cycles of IVF for women under the age of 40, and one cycle for women aged 40-42, while in Israel IVF is entirely state-funded up until the birth of two children for women under the age of 45, regardless of the number of cycles it takes to achieve that outcome. Many other countries offer at least partial subsidization of IVF treatment, including Austria, Spain, Sweden, the Netherlands, Finland, and Canada, to name just a few.[61]

Is it justifiable for states to invest significant public resources funding expensive fertility treatments when there are millions of children—some of whom reside *within* their own borders—in desperate need of parental care? Jurgen De Wispelaere and Daniel Weinstock have recently suggested otherwise.[62] Noting an asymmetry in need fulfillment between the case of adoption and the case of ART, De Wispelaere and Weinstock have argued that states have a significant reason to subsidize adoption over ART, for while subsidizing ART allows them to satisfy the needs of only infertile prospective parents, subsidizing adoption allows them to satisfy the needs of infertile prospective parents *and* the needs of orphaned children, reflecting a more just and efficient use of public resources. As they explain,

> Adoptive children have an interest in restricting the availability of competing reproductive technologies as this affects their chances of finding an adoptive family. Children who owe their existence to ART, on the other hand, have no such interest, for if ART were not made available to prospective parents, these children would simply not exist. In other words, where 'adoptive children' can be harmed by promoting ART, 'ART children' cannot be similarly harmed by promoting adoption. This asymmetrical dimension of ART versus adoption gives

[61] For an overview with a focus on the Canadian context, see S. Ndegwa and S. Kelly. "Status of Public Funding for In Vitro Fertilization in Canada and Internationally," *Environmental Scan*, 14 (2010), pp. 1-12.
[62] De Wispelaere and Weinstock, 2014. For an earlier, similar argument, see Petersen, 2002.

> the state a legitimate reason to promote adoption over ART, a reason that is furthermore proportional to the extent that ART directly affects adoptive children's interests. At the same time, prospective parents have no valid reason for complaint, for their fundamental right to parent is satisfied through adoption even when they are denied access to parent their own biological child through ART.[63]

Crucial to De Wispelaere and Weinstock's argument is the assumption that the valuable aspects of parenting can be achieved just as well in adoptive parent-child relationships as they can in biological parent-child relationships. If there was something distinctively valuable about the quality of the relationship that was achievable between parents and their biological children, then infertile prospective parents *may*[64] have a legitimate complaint against a funding scheme that promoted adoption over ART, as parenthood via adoption would be in a relevant sense second-best. If, however, the valuable aspects of parenting can be achieved just as well by parenting adopted children as they can by parenting biological children, then infertile prospective parents have no such complaint, as their fundamental right to parent can be still be satisfied through adoption. Any remaining preference for biological children amounts to something like an 'expensive taste' that states are under no obligation to accommodate.

Having rejected the notion that parenthood via procreation is valuable in a way that parenthood via adoption is not, I am inclined to find De Wispelaere and Weinstock's argument persuasive. However, before endorsing the view that states ought redirect resources away from ART and toward adoption, there a number of possible objections to take into consideration. First, one might object that a number of empirical realities ultimately undermine the extent to which ART can be substituted by adoption. The argument for funding adoption over ART seems to assume that the two are more or less interchangeable, though for reasons outlined in the previous section, this is not necessarily the case. For instance, while ART provides prospective parents the possibility of parenting a healthy newborn child, adoption may

[63] De Wispelaere and Weinstock, 2014, 139.
[64] I say 'may' here because it is not clear that the interest that prospective parents have in the distinctive value of biological parent-child relationships would necessarily outweigh the interest that orphans have in being adopted into families.

only provide prospective parents the opportunity to parent a child who is over the age of five, and who may or may not exhibit a range of development problems as a result of long-term institutional care. Similarly, while prospective parents can often utilize ART with minimal scrutiny of their personal and family background, adopting a child in most jurisdictions still involves an onerous and invasive parental licensing process. In this sense, even if we agree that there are no significant differences between parenthood via procreation and parenthood via adoption in principle, it may still be the case that there are significant differences between them in practice.

De Wispelaere and Weinstock are sensitive to this type of objection and temper their view accordingly, concluding that "access to adoption by and large remains too complex and burdensome for the time being to be able to justify significant restrictions on the availability of ART for those prospective parents who cannot conceive naturally."[65] It may be true that adoption is currently too burdensome to constitute a perfect substitute for procreation, though it is not clear that this should necessarily weigh against the proposal to subsidize adoption over ART. When evaluating these types of proposals, it is important not to lose sight of the fact that the plight of orphaned children is often a function of the various laws, policies, and social norms that govern adoption. One of the reasons that orphaned children remain so long in institutional care, and subsequently develop the range of developmental and behavioral problems that make them more difficult to raise, is because there are laws and policies in place that make adoption excessively costly—thus, citing the difficulty of raising adopted children as a reason against amending those laws and policies seems like a potentially question-begging response. If we took measures to make adoption a less costly and hence more attractive option—e.g. by redirecting public resources from ART to adoption—then orphaned children may ultimately spend less time in institutional care, and thereby avoid developing

[65] De Wispelaere and Weinstock, 2014, 142.

the kind of cognitive and behavioral problems that dissuade prospective parents from adopting them in the first place.

Similarly, while it is true that adoptive parents currently face a range of legal and bureaucratic hurdles that ART parents do not, these hurdles are again the product of existing laws and policies, and should not therefore count as a consideration against the proposal to subsidize adoption over ART. As De Wispelaere and Weinstock point out, rather than maintaining the status quo on parental screening in adoption versus ART, "the state could equalize the current disparity between very strict adoptive screening and comparatively lax screening for ART,"[66] either by relaxing the strict screening standards that currently apply to adoptive parents, introducing more stringent screening standards for accessing ART, or both.

However, a second and arguably more troubling objection to the proposal to promote adoption over ART is that it is discriminatory, for it seems to place a disproportionate burden on infertile individuals to meet the needs of orphaned children (or, perhaps more accurately, infertile individuals who cannot afford to pay the cost of their own fertility treatment). As Eduardo Rivera-López has notably argued, this type of singling-out seems arbitrary: to the extent that infertility is an unchosen physical attribute, singling out infertile individuals as special duty bearers toward orphaned children makes just as much sense as singling out individuals with a height of over 1.70 meters, or individuals with blue eyes.[67]

Is this objection sound? Does privileging adoption over ART place an unfair burden on infertile individuals to meet the needs of orphaned children? As a first response to this objection, it is important to note that the argument for subsidizing adoption over ART does not assume that we should *only* promote adoption among infertile individuals. On the contra-

[66] Ibid., 142. Many other theorists have argued that the current disparity between 'natural' and adoptive parents in terms of parental screening is unjustified. See, for example, Botterell and MacLeod, 2014, and Elizabeth Bartholet. *Family Bonds: Adoption, Infertility, and the New World of Child Production*. (Boston: Beacon Press, 1999).
[67] Eduardo Rivera-López. "The Claim from Adoption Revisited," *Bioethics*, 20(6) (2006), pp. 319-325, 321.

ry, it may be pursued alongside other policies designed to promote adoption as a valuable childrearing option. For instance, in addition to promoting adoption over ART, states might work to challenge bionormativity through public education (much in the way that heteronormativity in currently being challenged in many public school curriculums); reduce bureaucratic barriers to adoption that currently work to disincentivize prospective adoptive parents; socialize the costs of adoption through taxation, similar to the way that they fund other important social programs[68]; and work to reinforce the idea that adoptive parent-child relationships can have a unique type of value that biological parent-child relationships lack—namely, the value associated with helping an existing child in need.[69]

However, even if, despite these measures, subsidizing adoption over ART *did* create a form of disparity between fertile and infertile individuals, this might be an acceptable outcome given the available alternatives. Consider, for instance, the two obvious ways in which the state might achieve the relevant form of parity between fertile and infertile individuals. First, the state might achieve parity by attaching costs to natural procreation that are equivalent to the costs associated with unfunded ART, e.g. by implementing a tax on natural procreation when there are already existing children in need of parental care. This way, fertile prospective parents would have the same economic incentive to adopt rather than procreate that infertile prospective parents have under a scheme of unfunded ART. Alternatively, the state could fully subsidize ART so that infertile individuals have the same opportunity to procreate as fertile individuals. This way, both fertile and infertile individuals would be free to procreate if they so choose, or adopt children on a fully voluntary basis.

Both of these options have their own disadvantages. While the second option works to ameliorate the disadvantage faced by infertile individuals, and may therefore be attractive

[68] These three strategies are drawn from De Wispelaere and Weinstock, 2015, 215-222.
[69] For an account of this type of value, see Tina Rulli. "The Unique Value of Adoption" in Carolyn McLeod and Françoise Baylis (eds.) *Family Making: Contemporary Ethical Challenges*. (Oxford: Oxford University Press, 2014).

to those who see infertility as a disability or form of brute bad luck, it is worse than the status quo from the perspective of orphaned children, who may be even less likely to be adopted into families. Similarly, while the first option may be better from the perspective of orphaned children, it also carries a potentially negative side-effect, for by heavily taxing those who procreate naturally when there are existing children in need of parental care, the state may be indirectly disadvantaging their biological children.[70] Given the available alternatives, and taking into account the needs of orphaned children, subsidizing adoption over ART does not seem morally objectionable even if it does create a form of disparity between infertile and fertile individuals. While it would be impermissible for the state to prohibit ART outright, or actively preclude infertile individuals from accessing it, there does not seem to be anything particularly objectionable about the state biasing its funding decisions in favor of orphaned children.

5.6 Conclusion

In this chapter, I have sought to determine how the claims of orphaned children impose moral limits on the permissibility of procreation. I argued in accordance with theorists like Rulli and Friedrich that there is a strong case to be made for a *pro tanto* duty to adopt rather than procreate that is grounded in a more general duty to rescue or assist those in need. Contrary to popular belief, this duty is not overridden by individual preferences for biological children, though it may be overridden by the significant financial, legal, and logistical costs of adoption. However, recognizing that these costs are themselves the product of socially contingent barriers to adoption, I also argued in favor of collective duties to facilitate adoption, including state obligations to subsidize adoption over fertility services, and broader societal obligations to promote adoption as a valuable childrearing option. There may, of

[70] De Wispelaere and Weinstock, 2015, 212.

course, be additional duties even further upstream: to the extent that the orphan crisis is the product of large-scale social problems for which there are likely identifiable causes, there may also be collective obligations to prevent orphanhood in the first place by addressing those causes. These preventative obligations are likely an important part of addressing the orphan crisis, though giving them due consideration is outside the scope of this thesis.

Conclusion

In this thesis, I have advanced a partial account of procreative justice by addressing a series of core debates in procreative ethics. I began in Chapter One by considering the relationship between procreation and child welfare, asking what role (if any) prospective children's interests play in limiting the scope of the right to procreate. This task involved addressing Derek Parfit's nonidentity problem, which holds that an act cannot harm a person if that person has a life worth living and would not have existed had that act not taken place. I argued that an appeal to rights gets around this problem by accounting for the moral wrong in nonidentity cases without insisting that the resultant child has been made comparatively worse off. Even if a child cannot be made worse off by being brought into existence, they still may be wronged in a person-affecting sense by being born into conditions that fall below a minimally decent threshold to which all children are putatively entitled. The fact that the child (i) cannot be identified, (ii) did not exist prior to the procreative act, (iii) may not regret the rights violation, and (iv) would not have existed otherwise, does not affect their status as a right-holder, nor does it affect the impermissibility of the rights-violation. The procreators have still done wrong by bringing their child into sufficiently disadvantaged conditions, and what is more, they have done wrong *to* that child.

The normative upshot of a rights-based solution is an action-guiding principle that impels procreators to only procreate in ways, and amid circumstances, in which the resultant child can reasonably be expected to have a decent start in life, which I defined as one in which their basic welfare interests are satisfied for the duration of their childhood. I have labeled this principle the *Decent Start* principle and have clarified its role within a broader account of procreative ethics—in particular I specified that it is meant to govern the 'different number' choice of whether to have a child, that it only proscribes procreative acts that can reasonably be expected to result in children whose basic interests will go unsatisfied, and that

it is best interpreted as a strong *pro tanto* principle that may be overridden in certain cases in light of competing moral considerations.

Following my discussion of prospective children's interests in Chapter One, I turned in Chapter Two to consider the relationship between procreation and parental rights, asking whether the act of creating a child generates a special right to parent a child. While it is routinely taken for granted that individuals have a presumptive right to parent their biological children, this assumption was shown to be problematic: while existing theories of parental rights explain why adults have right to parent in general, they do not explain how adults come to acquire those rights over *particular* children, highlighting the need for a supplementary explanation of how individuals who have a right to parent in general can also be thought to have a special right to enter into parental relationships with their biological children. I argued that such an explanation is provided by a principle of genetic self-ownership, which I termed the *First Dibs* principle. Insofar as individuals have a right to determine what happens to and with their own reproductive gametes, they can also be thought to have a presumptive right to enter into parental relationships with the children who grow out of them, provided (a) that they have not forfeited that right antecedently (e.g. through voluntary gamete donation), and (b) that assuming the role of the child's parent would not be contrary to that child's interests. I argued that this account not only avoids the conceptual and normative implications that plague gestational accounts of the right to parent one's biological baby, but also that is immune to a number of potential objections, including those that claim it is explanatorily weak, those that claim it is objectionably proprietarian, and those that claim it has unpalatable normative implications when applied in concrete cases, particularly those involving estranged biological parents and sexual assault.

In Chapter Three, I shifted the focus from parental rights to parental obligations, and asked whether the act of creating a child generates a special obligation to parent that child. Whereas a theory of parental rights is required to adjudicate cases in which there are multiple

conflicting claims over who gets to parent a child (e.g. surrogacy disputes), an account of parental obligation is required to settle cases in which there is disagreement between different parties about who is responsible for parenting a child (e.g. cases of unwanted progeny). In Chapter Three, I defended what I refer to as a weak, indirect version of the causal account, according to which causing a child to exist is sufficient to generate an obligation to ensure *that* the child is adequately parented. While this obligation may be (and usually is) discharged by taking on the parental role oneself, I argued that it may also be discharged by ensuring that someone else take on that role as well, as in standard cases of adoption. After outlining the advantages of the causal account over the existing alternatives—namely, the genetic and voluntarist accounts—I then defended it against four prominent objections that have been raised against it in the contemporary literature: (i) that it overdetermines who counts as parentally obligated; (ii) that it imposes excessive demands on unwilling procreators; (iii) that it is unfair by assigning equal parental liability to parties who have unequal decision-making power over whether or not a child is brought into existence (i.e. men and women); and, regarding the indirect version specifically, (iv) that it fails to appreciate the moral significance of biological connectedness.

In Chapter Four, I moved beyond the relationship between procreators and their progeny to consider how the significant costs of procreation and parenthood ought to be distributed throughout society. This question is not only important in its own right, insofar as any theory of justice needs to explain who is responsible for paying the cost of creating and raising the next generation of citizens, but also because it impacts on some of the previous issues discussed in this thesis. For example, whether or not a prospective parent is able to provide their future child with a decent start in life, or whether they are able to ensure *that* their child is adequately parented, will largely depend on how the society they live in distributes the costs of procreation and parenting. After considering existing arguments for both the anti-sharing and the pro-sharing view, I ultimately defended a forward-looking version of the

pro-sharing view, according to which non-parents are obligated to share in the cost of childrearing in virtue of their status as the future beneficiaries of parents' childrearing labor. However, I also argued that the success of this argument is conditional on two further considerations: first, it is conditional on the success of independent arguments for redistributive social welfare institutions that translate childrearing labor into benefits for others, and second, it is also conditional on others actually benefitting from those institutions, a consideration that may vary considerably according to both the rate of procreation, as well as how we conceive of our broader demands of justice. I provided the outlines of a Rawlsian contractualist argument that might work to satisfy the first condition, and attempted to specify the conditions under which the second condition might be satisfied by taking stock of the various considerations that work to influence whether or not childrearing creates net positive externalities.

Finally, in Chapter Five, I considered how the interests of existing children in need of parental care impose limits on the permissibility of procreation. I began with the claim, recently defended by Rulli and Friedrich, that a strong *pro tanto* duty to adopt rather than procreate follows from a more general duty to rescue or assist those in need. I then considered two possible objections to this claim: one that appeals to individual preferences for biological children, and another that appeals to the significant financial, legal, and logistical costs of adoption. While I dismissed the first as unsuccessful, I argued that the second often succeeds in limiting the scope of the duty to adopt. However, acknowledging that these costs are themselves often the product of socially contingent barriers to adoption, I also argued in favor of collective obligations to facilitate adoption, including state obligations to fund adoption over fertility services, and broader societal obligations to promote adoption as a valuable childrearing option.

Appendix
On David Benatar's Asymmetry Argument

In Chapter One, one of the main objections I raised against the first line of response to the nonidentity problem was that it is normatively weak: if morally wrong acts must make particular persons worse off than they otherwise would have been, then procreation can only be wrongful if the resultant child would have a life 'not worth living'.[1] This constraint is too weak, I argued, because there are few (if any) lives that fit this description, meaning that it will rarely impose limits on our procreative behavior. However, in a series of papers and a widely discussed monograph, David Benatar has argued that *all* human lives fit this description, as a fundamental asymmetry between harms and benefits implies that it is always preferable never to exist.[2] If sound, Benatar's argument supports a different type of conclusion than the one I drew in Chapter One: rather than condemning only rare or aberrant cases, the first line of response to the nonidentity problem implies that *all* procreation is wrongful, and that we should accordingly refrain from bringing additional children into existence.

I do not think this argument succeeds, so I chose to set it aside in Chapter One in favor of different arguments that I take to be more plausible. However, given its prevalence in the contemporary literature, it is hard to ignore it entirely in a thesis about procreative ethics, so I will outline it here and explain in detail why it fails.

Benatar's argument is based on the idea that there is a fundamental asymmetry between harms and benefits in terms of their presence and absence, which entails that coming into existence is always comparatively worse than never existing. As Benatar puts it,

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[1] See Chapter One, section 1.3.
[2] David Benatar. "Why it is Better Never to Come into Existence," *American Philosophical Quarterly,* 34(3) (1997), pp. 345-355; "The Wrong of Wrongful Life," *American Philosophical Quarterly*, 37(2) (2000), pp. 175-183; *Better Never to Have Been: The Harm of Coming into Existence*. (Oxford: Oxford University Press, 2006); and "Part I: Anti-Natalism" in David Benatar and David Wasserman. *Debating Procreation: Is it Wrong to Reproduce?* (Oxford: Oxford University Press, 2015).

Whereas:

1. The presence of harm is bad; and
2. the presence of benefit is good,

an asymmetrical evaluation applies to the *absence* of harm and benefit:

3. The absence of harm is good, even if that good is not enjoyed by anyone; but
4. the absence of benefit is not bad unless there is someone for whom this absence is a deprivation.[3]

A visual representation of this asymmetry can be seen below:

Scenario A (X exists)	**Scenario B (X never exists)**
(1) Presence of harm (Bad)	(3) Absence of harm (Good)
(2) Presence of benefit (Good)	(4) Absence of benefit (Not Bad)

Figure 1: Benatar's Asymmetry[4]

According to Benatar, we can assess the relative value of existence and nonexistence by comparing the value of quadrants (1) and (3) with the value of quadrants (2) and (4). When we make the first comparison, we find that nonexistence has a distinct advantage over existence, as non-existence involves an absence of harm (which is good) whereas existence involves the presence of harm (which is bad). However, when we make the second comparison, we find that existence has no symmetrical advantage over nonexistence, for while the pres-

[3] Benatar, 2015, 23.
[4] Ibid., 23.

ence of benefit is good for the person who exists, the absence of benefit can only be bad if there is someone for that absence to be bad *for*. Thus, Benatar concludes that "coming into existence is always a net harm,"[5] and that this constitutes a strong moral reason against having children.

As stated above, Benatar's asymmetry argument relies on the truth of three premises:

(i) There is a fundamental asymmetry between harms and benefits in terms of their presence and absence;
(ii) This asymmetry entails that coming into existence is always a net harm; and
(iii) That coming into existence is always a net harm entails that it is always wrong to procreate.

I will demonstrate in this appendix that while each of these premises is in certain respects intuitively appealing, all of them are in fact false: there is no asymmetry between harms and benefits in terms of their presence and absence; even if there *were* such an asymmetry, it would not entail that coming into existence is always a net harm; and even if such an asymmetry *did* imply that coming into existence is always a net harm, this would not by itself entail that it is always wrong to procreate.

Rejecting Premise (i)

Let us begin by evaluating premise (i). Irrespective of its implications for the morality of procreation, many may wonder whether Benatar's asymmetry is itself coherent. If the absence of benefit is not bad unless there is someone for whom it is a deprivation, how can the absence of harm be good if there is nobody to enjoy it? Alternatively, if the absence of

[5] Ibid., 24.

harm can be good if there is nobody to enjoy it, why can't the absence of benefit be bad in the same way? Benatar admits that "it is difficult to *prove* definitively that we must accept the axiological asymmetry,"[6] but notes that it has considerable explanatory power with respect to a number of other judgments that we tend to subscribe to upon reflection. For example, it seems to make sense of the commonsense moral judgment that there is a strong duty to avoid bringing into existence people who will lead miserable lives, but no corresponding duty to bring into existence people who will lead happy lives. As Benatar explains,

> the reason why we think that there is a duty not to bring suffering people into existence is that the presence of this suffering would be bad (for the sufferers) and the absence of the suffering is good (even though there is nobody to enjoy the absence of suffering). In contrast to this, we think that there is no duty to bring happy people into existence because while their pleasure would be good for them, its absence would not be bad for them (given that there would be nobody who would be deprived of it).[7]

Benatar goes on to make parallel arguments with respect to three related judgments, including the judgment that it is odd to cite as a reason for procreation the fact that the child will benefit, but not odd to cite as a reason for procreation the fact that the child will suffer; that we can regret having brought a suffering child into existence for that existent child's sake, but cannot regret having failed to bring a happy child into existence for that merely possible child's sake; and that we are rightly sad for the presence of suffering in distant inhabited lands, but do not regret the absence of happiness in distant uninhabited lands.[8] To the extent that we accept these "quite plausible views,"[9] Benatar contends that we should also accept his explanation for them.

It is important to note, however, that the bare fact the asymmetry is consistent with these judgments does not provide a definitive reason for accepting it—if the asymmetry is

[6] Benatar, 2015, 24.
[7] Benatar, 2006, 32.
[8] Ibid., 34-46. See also Benatar, 2015, 25-27.
[9] Ibid.,32.

itself incoherent, then we should either reject the judgments that follow from it, or provide an alternative explanation for why we ought to accept them. Thus, in order to assess the validity of Benatar's asymmetry argument, we need to assess the asymmetry on its own terms, independently of the intuitive judgments that it allegedly supports.

I will evaluate the coherence of Benatar's asymmetry in a moment, though before doing so, it is worth making one clarificatory point about its content. While the terms 'good' and 'bad' in Benatar's asymmetry admit of both impersonal and person-affecting interpretations, it is clear that Benatar intends for them to be interpreted in the latter sense: his claim is not merely that the absence of harm in the absence of a person to experience it is good for the world generally, but rather that it is good *for the potential person* who would have experienced it had they existed.[10] Thus, a statement of Benatar's asymmetry that is truer to the aims of his argument might be read as follows:

> Whereas:
>
> 1. The presence of harm is bad for the person who experiences it; and
> 2. the presence of benefit is good for the person who experiences it,
>
> an asymmetrical evaluation applies to the *absence* of harm and benefit:
>
> 3. The absence of harm is good for the person who does not experience it, even if this absence is achieved by that person never existing; but
> 4. the absence of benefit is only bad for the person who does not experience it if that person exists and is thereby deprived by the absence.

This more explicit statement of Benatar's asymmetry allows us to better see where its problems lie. Claims (1) and (2) are uncontroversial: the presence of harm is indeed bad for the person who experiences it, and the presence of pleasure is indeed good for the person who experiences it. Claim (4), while potentially controversial, is at least intelligible on a person-

[10] See, for example, Benatar, 2015, 22: "we are seeking to determine whether it is coming into existence or never coming into existence that is best *for* X."

affecting understanding of harm and benefit: if there is no person for whom the absence of benefit is a deprivation, then such an absence cannot be bad *for* that person (even if it can still be bad in an impersonal sense). Claim (3), however, is harder to make sense of as a person-affecting claim. How can the absence of harm be good *for* a person who never exists, and in a way that does not imply the parallel claim that the absence of benefit is also bad for them?

Many critics have argued that it cannot be, and that claim (3) can *only* make sense as a claim about impersonal value.[11] Jeff McMahan, for example, has argued that "there seems to be no way to understand this claim except as a claim about impersonal value. If it is good that suffering or miserable people do not exist, even though it is not good or better for anyone, how else can we understand the status of this good except as a good that is not *good for*—that is, except as an impersonal good?"[12] If McMahan and others are correct that claim (3) only makes sense as a claim about impersonal value, then Benatar's asymmetry is explained (and presumably debunked) by his deployment of two separate accounts of value in claims (3) and (4). In other words, the reason why the absence of harm in nonexistence is 'good', while the absence of benefit is merely 'not bad', does not trace to a fundamental asymmetry between harm and benefit, but rather to an equivocation between impersonal and person-affecting views. Benatar could of course address this equivocation by recasting claim (3) as a claim about impersonal value, though as several critics have noted, doing so would not be friendly to his argument.[13] Not only would an impersonal reading of claim (3) preclude him from claiming what he wants to claim—i.e. that never existing is better *for* the potential person who may have otherwise existed—but it would also collapse the asymmetry between

[11] See Elizabeth Harman. "Critical Study: David Benatar. *Better Never to Have Been: The Harm of Coming into Existence*. (Oxford: Oxford University Press: 2006)," *Noûs*, 43(4) (2009), pp. 776-785, esp. 779-780; Jeff McMahan. "Asymmetries in the Morality of Causing People to Exist" in Melinda A. Roberts and David T. Wasserman (eds.) *Harming Future Persons: Ethics, Genetics, and the Nonidentity Problem*. (Dordrecht: Springer, 2009), esp. 61-64; David DeGrazia. *Creation Ethics: Reproduction, Genetics, and Quality of Life*. (Oxford: Oxford University Press, 2012), esp. 145-150; and Christine Overall. *Why Have Children? The Ethical Debate*. (Cambridge, MA: MIT Press, 2012), esp. 97-106.

[12] McMahan, 2009, 62.

[13] See, for example, DeGrazia, 2012, 147, and Harman, 2009, 781.

claims (3) and (4), for if the absence of harm in the absence of a person to experience that harm can be good in an impersonal sense (e.g. by contributing to a world with greater overall utility than would otherwise be the case), then surely the absence of benefit in the absence of a person to experience that benefit can also be bad in the same way (e.g. by contributing to a world with less overall utility than would otherwise be the case).

However, Benatar denies that he is relying on an impersonal view of goodness, and insists that claim (3) is being misinterpreted by those who attribute one to him.[14] According to Benatar, claim (3) does not entail the 'absurd literal claim' that there is a nonexistent person for whom the absence of harm is good, but rather that in a counterfactual scenario in which such a person *did* exist, nonexistence would have been judged to be preferable. As he explains,

> Claim (3) says that this absence [of pain] is good when judged in terms of the interests of the person who would otherwise have existed. We may not know who that person would have been, but we can still say that whoever that person would have been, the avoidance of his or her pains is good when judged in terms of his or her potential interests. If there is any (obviously loose) sense in which the absent pain is good *for* the person who could have existed but does not exist, this is it.[15]

In support of this counterfactual reading, Benatar follows Joel Feinberg in likening the claim 'better never to have been' to the claim 'better off dead.'[16] When we claim that a person is better off dead, we do not usually mean that there is a state after death in which that person would be better off, but rather that ceasing to exist would be preferable to existing given the low quality of their current existence. By parity of reasoning, when we claim that it is better never to have been, we need not be claiming that there is a state prior to existence in which

[14] See, for example, Benatar's response to this objection in "Still Better Never to Have Been: A Reply to (More of) My Critics," *Journal of Ethics*, 17(1) (2013), pp. 121-151, 125-126.
[15] Benatar, 2006, 31.
[16] Ibid., 21-22. For Feinberg's original comparison, see "Wrongful Life and the Counterfactual Element in Harming" in *Freedom and Fulfillment: Philosophical Essays*. (Princeton: Princeton University Press, 1992), 16-17.

potential people are better off, but rather that never existing would be preferable to existing given the non-negligible harm associated with existence. Contrary to the claims of critics, this interpretation does not rely on an impersonal view of goodness, and still leaves room for the possibility that a person may be harmed in a person-affecting sense by being brought into existence.

This counterfactual interpretation might allow Benatar to avoid the charge of relying on an impersonal view of goodness, though it also exposes him to a different type of problem, for if there is nothing incoherent about claiming that the absence of harm is good when judged in terms of the interests of a person who would have experienced it had they existed, then there seems to be nothing incoherent about saying that the absence of benefit is bad when judged from the same perspective. Just as we can imagine a possible person whose life would be so replete with harm as to make nonexistence preferable, so too can we imagine a possible person whose life would be so replete with benefit as to make existence preferable. In this sense, interpreting claim (3) as a counterfactual claim appears to lead to a more symmetrical view of harms and benefits, thereby undermining premise (i) of the asymmetry argument. This symmetrical view still allows for the possibility that a person may be harmed by being brought into existence (in the sense that nonexistence would be judged to be preferable), though whether or not this is the case would seem to depend on the projected balance of harms over benefits over the course of that person's lifetime, or the difference between quadrants (1) and (2) in Figure 1.

Benatar would likely respond here that there are costs to viewing harms and benefits symmetrically in this way, as it may conflict with our intuitive judgments or commit us to views that we would otherwise reject.[17] For instance, if we posit a symmetrical account of harms and benefits along the lines just described, we might be committing to the view that just as we have a strong duty to avoid bringing into existence children who will lead misera-

[17] Benatar, 2006, 202-208, and Benatar, 2015, 28-30.

ble lives, we also have an equally strong duty to bring into existence children who will lead happy lives. However, there are at least two major problems with this line of response. First, it is far from clear that an appeal to intuition works in Benatar's favor. If the choice that we face is between (a) rejecting the four beliefs supported by Benatar's asymmetry, and (b) rejecting Benatar's asymmetry and its anti-natalist implications, it seems as though (b) would be the far easier choice to make. While (b) might commit us to the (admittedly odd) view that we sometimes have a positive duty to procreate, (a) commits us to the deeply counterintuitive view that it is *always* wrong to procreate and that humanity should accordingly be eased into extinction. In this sense, as Rivka Weinberg puts it, "the implications of Benatar's views may be more counterintuitive than the four beliefs are intuitive."[18]

Second, and more to the point, it is not clear that accepting a symmetrical account of harms and benefits forces the choice just described, as there are plausible alternative explanations for the four judgments that Benatar appeals to in support of his asymmetry. Numerous candidate explanations have been proposed in the secondary literature[19], though the most plausible explanation appeals to the simple metaphysical principle that "all interests are contingent upon existence at some point since in the absence of an existent entity, we have no real subject for interests at all."[20] If we accept the plausible idea that only existent beings have interests, then we have reasonable explanations for Benatar's four supporting judgments. For example, the reason (or at least one reason) why we have a strong duty not to bring into existence people who will live miserable lives, but no corresponding duty to bring into existence people who will live happy lives is because failing in the former duty would

[18] Rivka Weinberg. "Is it Always Wrong to Have Children?" *South African Journal of Philosophy*, 31(1) (2012), pp. 26-37, 28.
[19] For instance, some theorists have argued that Benatar's judgments can be explained by a distinction between negative and positive duties, or the notion that our duties not to harm are weightier than our duties to benefit. For an example of this strategy, see Ingmar Persson. "Rights and the Asymmetry Between Creating Good and Bad Lives" in Melinda A. Roberts and David T. Wasserman (eds.) *Harming Future Persons: Ethics, Genetics, and the Nonidentity Problem*. (Dordrecht: Springer, 2009).
[20] Weinberg, 2012, 28. For a similar explanations, see DeGrazia, 2012, 147-150, and David Boonin. "Better to Be," *South African Journal of Philosophy*, 31(1) (2012), pp. 10-25.

cause a person to exist with set-back interests, though failing in the latter duty would not result in anyone's interests being set back. This line of reasoning can be extended to explain the three other judgments as well, thus undermining the support base for Benatar's asymmetry.[21]

It should be noted, however, that this explanation of Benatar's supporting judgments suggests a different kind of symmetry between harms and benefits in terms of their presence and absence. While the presence of harm is bad for the person who experiences it, and presence of benefit is good for the person who experiences it, the absence of harm or benefit in the absence of a person to experience it is neither good or bad in a person-affecting sense, as there is no person in that scenario with interests that can be affected. Thus, a corrected version of Benatar's asymmetry can be expressed as follows:

> Whereas:
>
> 1. The presence of harm is bad for the person who experiences it; and
> 2. the presence of benefit is good for the person who experiences it,
>
> the *absence* of harm and benefit can only have person-affecting value if there are existent persons to be affected by that absence. Thus,
>
> 3. The absence of harm in the absence of a person to experience harm is neither good nor bad for that merely possible person; and
> 4. the absence of benefit in the absence of a person to experience benefits is neither good nor bad for that merely possible person.

Rejecting Premise (ii)

Rejecting premise (i) is sufficient to show that the asymmetry argument fails, for if premise (i) is false, then premises (ii) and (iii) do not follow. However, in the interest of providing a comprehensive response to the asymmetry argument, it is also worth showing how premises (ii) and (iii) fail as well—this way, any remaining controversy about my rejection of premise (i) will be answered by my rejection of the later premises in the argument.

[21] For further explanation, see Weinberg, 2012, 28-30.

Suppose for the sake of argument that I have been mistaken so far, and that there *is* a fundamental asymmetry between harms and benefits in terms of their presence and absence. Does this asymmetry generate the conclusion that Benatar draws from it, i.e. that coming into existence is always a *net* harm? Not necessarily. Even if we grant premise (i) and assume that there is always an advantage associated with never existing (i.e. avoiding the harms of existence), coming into existence would only constitute a net harm if existence proved to be more disadvantageous than nonexistence is advantageous—that is, if the value of quadrant (3) in Benatar's asymmetry is greater than the combined value of quadrants (1) and (2).[22] This is a possibility in certain rare instances (e.g. paradigm wrongful life cases), though it is certainly not the case in what I will assume for now are average human lives, in which the harms of existence are typically outweighed by the benefits.[23] To illustrate the plausibility of this view, it is helpful to assign numerical values to the quadrants of Benatar's asymmetry in a way that better reflects the distribution of benefits and harms within a typical human life. Consider, then, another modification:

[22] Similar arguments have been advanced by Skott Brill. "Sick and Healthy: Benatar on the Logic of Value," *South African Journal of Philosophy*, 30(1) (2012), pp. 38-54, and Aaron Smuts. "To Be or Never To Have Been: Anti-Natalism and a Life Worth Living," *Ethical Theory and Moral Practice*, 17(4) (2014), pp. 711-729.

[23] In his quality of life argument, Benatar rejects this type of assumption as overly optimistic, arguing that even the best human lives are net harms. However, this argument is highly controversial: not only does it seem to rely on a strictly objectivist conception of well-being (one which does not take people at their word regarding how well their lives are going), but it also assigns the average human life an exceedingly low score on that conception, one which few people are likely to feel the pull of.

Scenario A (X exists)	**Scenario B (X never exists)**
(1) Presence of harm -1	(3) Absence of harm +1
(2) Presence of benefit +10	(4) Absence of benefit 0

Figure 2: A Typical Human Life

If we restrict our comparison to quadrants (1) and (3), we will find that nonexistence is preferable to existence, as nonexistence involves avoiding 1 unit of harm, whereas existence involves suffering it.[24] However, in order to make a true comparison between the two scenarios, we also have to take into account the benefits that are associated with existence. Even if we assume that the absence of these benefits is 'not bad' in the case of nonexistence, and thereby assign a neutral value to quadrant (4), we will still find that existence is preferable to nonexistence so long as the value of quadrant (2) is more than twice the value of quadrant (1).[25] In this case, existence is clearly preferable to nonexistence given its high projected benefit: whereas existence has a net value of +9, nonexistence only has a net value of +1. In this sense, while nonexistence always presents the advantage of avoiding the harms of existence, whether this constitutes an advantage *over* existence will depend how the harms of existence stack up against its benefits.

[24] Note that the value of quadrants (1) and (3) must necessarily mirror each other, for if the advantage of nonexistence consists in avoiding the harms of existence, then quadrants (1) and (3) must be equal negative and positive values.

[25] The reason why quadrant (2) has to be *more* than twice the value of quadrant (1) is because anything less than that would render Scenario A either equivalent or inferior to Scenario B.

Benatar anticipates this type of objection to his argument, and responds with an analogy designed to undermine it. According to Benatar, claiming that existence is preferable to nonexistence in the case just described is like claiming that a person S (Sick), who is prone to regular bouts of illness but who has the capacity to recover quickly, is in a preferable position to person H (Healthy), who lacks the capacity to recover quickly but who never gets sick:

Person S (Sick)	**Person H (Healthy)**
(1) Presence of sickness (Bad) -	(3) Absence of sickness (Good) +
(2) Presence of capacity for quick recovery (Good) +	(4) Absence of capacity for quick recovery (Not Bad) 0

Figure 3: Sick and Healthy[26]

In this analogy, never existing is compared to never getting sick, while a net beneficial existence is compared to getting sick regularly with a capacity for quick recovery. Benatar suggests that the type of reasoning that is used to support the conclusion that it is better to exist in the previous example implies that it is better to be S than it is to be H. "But," he argues,

> this cannot be right, for surely it is *always* better to be H (a person who never gets sick and is thus not disadvantaged by lacking the capacity for quick recovery). The whole point is that (2) is *good for S* but does not constitute an advantage over H. By assigning a positive charge to (2) and a '0' to (4), [Figure 3] suggests that (2) is an advantage over (4), but it quite clearly

[26] Benatar, 2006, 47.

> is not. The assignment of values in [Figure 3], and hence also in [Figure 2], must be mistaken.[27]

Benatar is correct that it is always better to be H than it is to be S in the case he describes, though as a response to the above objection, his analogy fails for at least two reasons. First, the case of S and H involves a different type of comparison than the case of existence and non-existence. This is not only because it involves a comparison of two existent persons (or two possible states of existence), but also because it involves a comparison of instrumental rather than intrinsic goods.[28] Unlike the benefits of existence, which are intrinsically valuable for the person who exists, the capacity for quick recovery is only instrumentally valuable to the extent that it allows a person to regain their health. Thus, the goods in quadrant (2) of Figure 3 are not analogous to the goods in quadrant (2) of Figure 2, for as Aaron Smuts puts it, "there is nothing in quadrant (2) worth having that makes up for the bads in quadrant (1)."[29]

However, a second and more significant reason why Benatar's analogy fails is that, unlike the benefits of existence, which can in principle outweigh the harms of existence, the capacity to quickly recover from sickness can at best serve a canceling function for the harm associated with getting sick. In other words, the value of quadrant (2) of Benatar's analogy can only serve to negate the disvalue of quadrant (1), meaning that the column under Person S in Figure 3 can at best have a neutral value (as compared to the positive value of the column under Person H). However, this is not analogous to the situation described in Figure 2. In that scenario, the benefits of existence significantly outweigh the harms of existence, allowing Scenario A to have a positive value that far exceeds the positive value of Scenario B. In this sense, even if it is better to be H than it is to be S, this does not shed any light on the

[27] Ibid., 47.
[28] See Brill, 2012, 43-45, and Smuts, 2014, 716-717.
[29] Smuts, 2014, 716.

comparison between existence and nonexistence, as the two cases are not analogous in the relevant way.

This second response to Benatar's analogy reveals a fundamental mistake he makes when comparing existence with nonexistence in his original asymmetry. By using the terms 'bad' and 'good' to refer to the presence of harm and the presence of benefit in existence, Benatar gives the impression that quadrants (1) and (2) necessarily cancel each other out. This, in turn, makes it seem as though nonexistence always has an advantage over existence, for on the terms of Benatar's asymmetry, the absence of harm is 'good' in nonexistence while the absence of benefit is merely 'not bad'. However, in order to make a true comparison between existence and nonexistence, we need to know more precisely how the harms of existence stack up against its benefits. If the disvalue of quadrant (1) exceeds the value of quadrant (2), then Scenario A will have a negative value, and will therefore be inferior to Scenario B (which always has a positive value that is equivalent to the negative value of quadrant (1)). If, however, the value of quadrant (2) exceeds the disvalue of quadrant (1) by more than two times, then Scenario A will have a higher positive value than Scenario B, and will therefore be the preferable scenario from the perspective of X. Since it is reasonable to think that the value of quadrant (2) can exceed the value of quadrant (1) by more than two times, Benatar's asymmetry does not generate the conclusion that coming into existence is *always* a net harm, even if the terms of that asymmetry are granted.

Rejecting Premise (iii)

Suppose, however, that I am mistaken once again, and that Benatar's asymmetry *does* entail that coming into existence is always comparatively worse than never existing. Would this fact on its own entail that procreation is always wrong? It might if we assume that it is always wrong to make another person comparatively worse off, though there is no good

reason to make that assumption. While the concepts of harming and wronging often go together—there are many cases in which it is wrong to make a person comparatively worse off—it is widely accepted that they also come apart, such that we can make a person comparatively worse off without wronging them, and wrong a person without making them comparatively worse off.[30] Thus, the bare fact that a person is made comparatively worse off by being brought into existence is not sufficient to establish that it is always wrong to procreate. In order to establish *that* claim, additional argumentation is required to show that a moral entitlement of theirs has also been violated, though it is difficult to see how Benatar could supply that type of argument without saying something substantive about how bad a typical human life is, and how good a life people are entitled to live.[31]

Benatar might respond here that the fact that existence is inferior to nonexistence *is* sufficient to show that procreation is wrongful, for it implies that prospective parents fail to act in their children's best interests by bringing them into existence. This is an intelligible response to the objection raised against premise (iii), though it depends on the controversial claim that parents are *always* obligated to act in their children's best interests. This claim seems false, however, and out of accordance with more plausible interpretations of parental role morality. Parents often—perhaps usually—fail to optimize their children's interests, though as long as they promote their children's interests above some minimal threshold of adequacy, we do not normally think that the children have a legitimate moral complaint against them just because they could have been made better off than they currently are.[32] Thus, in order to establish that it is always wrong to procreate, Benatar has to do more than

[30] For a classic discussion of the distinction between harming and wronging, see Joel Feinberg. *Harm to Others, Vol. 1 of the Moral Limits of the Criminal Law*. (New York: Oxford University Press, 1984), esp. chapter 3.
[31] Benatar says a lot about how bad a typical human life is in his distinct quality of life argument, though if it is the noncomparative badness of life that explains why creating lives is wrongful, rather than the comparative inferiority of existence relative to nonexistence, then it is not clear what role the asymmetry argument plays in his overall case for anti-natalism. For more on this point, see David Wasserman. "Part II: Pro-Natalism" in David Benatar and David Wasserman. *Debating Procreation: Is It Wrong to Reproduce?* (Oxford: Oxford University Press, 2015), 151-152.
[32] Ibid., 150-154.

show that existence is comparatively worse than nonexistence; he also needs to show—implausibly—that existence is a worse state than people are entitled to be in.

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