

Smuggled into Existence:  
The Wrongful Disability Problem and its  
Nonconsequentialist Solution

Nicholas Vrousalis\*

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

The argument that follows opts for the second disjunct. It is a plea for a fresh start, an attempt to solve the non-identity problem through a nonconsequentialist account of rights. I first distinguish between two features of our traditional way of dealing with the non-identity problem, namely the person-affecting restriction and the harm principle (section 1). I present a preliminary case, recently made by Melinda Roberts, in defence of harm-based wrong-makers in wrongful disability cases, which asserts these two principles (section 2). With the help of examples, I argue that her view cannot possibly account for salient intuitions in wrongful disability cases (section 3). This is, in part, symptomatic of her commitment to consequentialism, which is caught in a perennial dilemma between offering plausible responses to the non-identity problem –by rejecting the person-affecting restriction- and eschewing a bias towards ‘repugnant conclusions’ of all sorts –by asserting that restriction (section 4). I thus reject the harm principle and proceed to endorse

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\*Chaire Hoover, Université catholique de Louvain. Email: [nicholas.vrousalis@lmh.oxon.org](mailto:nicholas.vrousalis@lmh.oxon.org)

a view of wrongdoing as wronging of persons, through lack of sufficient concern or respect for the humanity in them (section 5). I refine that view by considering how a form of humanity-respecting rights generates procreative obligations and argue that it encompasses compelling intuitions in wrongful disability cases (section 6). I then defend this theory of rights against a series of important objections (section 7).

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

*Two minute break* – A mother knows that, if she conceives now, her child will be born with a serious disability. If she waits for two minutes, the same person will be born without the disability. She does not take the break, and conceives now.<sup>2</sup>

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

*Winter Child* – A mother can give birth any time in the year. If she gives birth in the winter, she will, because of her rare disease, give birth to a child with a significant disability. If she gives birth outside the winter months, her child will suffer no such disability. Both the winter child, and the non-winter child, will lead lives worth living (or decent, or good lives). The mother knowingly gives birth in the winter.<sup>3</sup>

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<sup>1</sup> I shall assume that certain lives may not be worth living, in virtue of the pain, suffering, and low duration they involve. For discussion, see Joel Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992). During a seminar at Oxford in 2007, Derek Parfit proposed a distinction between a life not worth living and a life worth not living, where the quality of the latter life is much lower than that of the former. I shall take 'wrongful life' to refer to the latter class of cases.

<sup>2</sup> She knows because there is only one sperm, one egg, and conception within two minutes is certain. A more realistic example would involve parents preselecting the genes of their child, while failing to choose one without the disability, intentionally or through negligence.

<sup>3</sup> This is a variation on Parfit's famous 14-year-old girl example from *Reasons and Persons* (Oxford: Oxford University Press, 1984), p. 358. The metaphysical assumption here is that the identity of the child can only be preserved by a particular combination of gamete-tokens, which fails to obtain after a sufficient amount of time.

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

Where precisely is the wrongdoing in *Winter Child* to be located? After all, the winter child itself seems not to have been harmed by the mother's act, since that act is necessary for his coming into existence (and therefore for living a life worth living). The example elicits -what has come to be called- the 'non-identity problem', independently developed by Derek Parfit and Gregory Kavka.<sup>4</sup> I now present an argument commonly brought to bear on this, and associated problems, in moral philosophy.

1. Wrongdoing is the wronging of someone, or a violation of someone's rights.<sup>5</sup>

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

2. Wronging entails (wrongful) harming.

Premise (2), the *harm principle*, embodies a claim that virtually all consequentialists will be attached to. It says that whenever A wrongs B, A *eo ipso* harms B, or somehow renders B worse off.<sup>7</sup> Consequentialists will be attached to the harm principle to the extent that they want to minimise the bad, or maximise the good. A moral theory is consequentialist if and only if its definition of moral rightness or moral reason(s) follows from a commitment to maximizing the goodness of a state of affairs brought about by a person's action -where a state of affairs may include that action.<sup>8</sup>

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<sup>4</sup> For Kavka's contribution, see 'The Paradox of Future Individuals', *Philosophy and Public Affairs* 11 (1982), pp. 93-112.

<sup>5</sup> In what follows, 'wronging' and 'harming' denote the doing of wrong or harm to someone.

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

<sup>7</sup> I assume that this excludes the possibility of self-harm: A harms B only when, for any A and B, A ≠ B.

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

It follows that:

3. Wrongdoing entails harming (from (1) and (2)).

But:

4. *Winter Child* involves wrongdoing.

Therefore:

5. *Winter Child* involves harming (from (3) and (4)).

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

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

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

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<sup>9</sup> This is, roughly, the general argumentative strategy pursued by Melinda Roberts in her 'The Non-identity Fallacy', *Utilitas* 19 (2007), pp. 267-311.

<sup>10</sup> The argument above is valid. Falseness of (5) and truth of (4) therefore implies falseness of (3). And if (3) is false then either the person-affecting restriction, or the harm principle must be false.

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

As her point of departure, Roberts takes issue with some of the central claims in Buchanan, Brock, Daniels, and Wikler's *From Chance to Choice*.<sup>12</sup> She assumes, as a matter of course, that the mother's action in *Winter Child* and cognate examples is a necessary condition for the winter child's existence, and that its life is worth living.<sup>13</sup> She then asserts, with Buchanan et al., a duty-grounding variation on the harm principle, which 'charges the agent with the duty to avoid letting a child or other person [for whom she can reasonably be deemed responsible] to suffer any serious harm or disability.'<sup>14</sup> Roberts parts company with Buchanan et al., when the latter assert a supplementary principle, one intended to make sense of wrongful disability in cases where the identity of the child is at stake. For they deny that the mother's choice in *Winter Child* renders her child worse off (i.e. reject (5)), and hence need to reject either the person-affecting restriction or the harm principle. They reject the former by embracing 'principle N' for cases of harmless wrongdoing.<sup>15</sup> Roberts dissents<sup>16</sup> because she believes we *can* make good sense of wrongful disability in non-identity cases by concentrating on how people, like the winter child, are rendered worse off by salient acts.

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

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<sup>12</sup> Allen Buchanan, Dan W. Brock, Norman Daniels, Daniel Wikler, *From Chance to Choice: Genetics and Justice* (Cambridge: Cambridge University Press, 2000).

<sup>13</sup> The fact that A's  $\varphi$ -ing is necessary for B's doing, having, or being, something worthwhile does not imply that  $\varphi$ -ing is not harmful, wrongful, malicious, or whatever. Furthermore, the fact that  $\varphi$ -ing produces a desirable effect E does not imply that A  $\varphi$ -ed with the intention or desire to bring about E. An exclusive focus on effects/consequences/harms necessarily misses these distinctions. See section 3 for elaboration on this claim.

<sup>14</sup> Melinda Roberts, 'What is Wrong with Wrongful Disability? From Chance to Choice to Harms to Persons', *Law and Philosophy* 28 (2009), p. 9. This principle, which Buchanan et al. label 'Principle M' seems very well-suited to handle cases like *Two minute break*, where a child's identity is not at stake as a consequence of the action(s) of parent, or medical provider.

<sup>15</sup> Neither Buchanan et al., nor Roberts, draw a distinction between the person-affecting restriction and the harm principle. Indeed, much of the literature on the non-identity problem seems, illicitly, to run these fundamental, but distinct, principles together. This has led many to think that there are only two ways out of the non-identity problem: rejecting the person-affecting restriction, or biting the bullet on offending examples. By running the two principles together, consequentialists and nonconsequentialists have managed to obscure a major point of contention between their theories, a point central to sorting out this and related problems in moral philosophy.

<sup>16</sup> '... our reason for accepting principle N should evaporate should it turn out that we can explain the wrong of wrongful disability in terms that are purely person-affecting.' (Roberts, p. 18f)

said to harm him.

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

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

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

And

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

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

3. In this section I discuss the conjunction of i) and ii) as a necessary condition for locating wrongdoing in relevant non-identity cases. I will assume, with Joel Feinberg,<sup>17</sup> that the relevant notion of harm consists in a) having one's interests set back b) through another's wrongful behaviour.<sup>18</sup>

Consider:

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

The behaviour of the shooter does not harm A (by stipulation, A will never know, or believe, that he was aimed at). B is harmed, and in this respect the shooter has wronged him. But is the harming of B the *only feature* of the situation that makes the shooter's behaviour wrongful? Intuitively his behaviour wrongs A, perhaps to a greater extent than it wrongs B, for it has a personified direction, namely A. Indeed, B seems to be just collateral moral damage. The presence of harm to the winter child's siblings could not, *mutatis mutandis*, conclusively tell us what was wrong with the mother's behaviour in *Winter Child*. Harming suffices for wronging, but not vice versa.<sup>19</sup>

Now consider a simpler variation on that example:

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

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<sup>17</sup> See Joel Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984) and *Harmless Wrongdoing* (Oxford: Oxford University Press, 1986).

<sup>18</sup> It might here be objected that harm carries wrongdoing on its back, as it were, so that harming logically entails wronging. Conjunct b) is therefore superfluous. The argument proffered here is consistent with this thesis. It is consistent, that is, with an anti-'consequentialist' view, put forward by R. A. Duff, that some harms are (partly) individuated by their causes. My sofa can be damaged in exactly the same way by an earthquake and by a burglar. But the *nature* of the harm suffered in these two cases is different, since in the second case 'my sofa has not just been damaged, it has been *vandalized*.' (R.A. Duff, 'Harms and Wrongs', *Buffalo Criminal Law Review* 5 (2001), p. 22) This would suffice to establish that (some) harming is constituted by, and therefore implies, wrongdoing. Note that the latter thesis is *not* the harm principle but its converse.

<sup>19</sup> I am not here claiming that the shooter's behaviour is wrongful *merely* because of his intentions: even if his intentions were not intentions to kill, his belligerent and vicious attitude would, in and of itself, suffice to constitute (harmless) wrongdoing. For relevant examples from a different angle see Parfit's discussion of the harmless torturers in *Reasons and Persons*, pp. 80-81.

The shooter's behaviour seems *pro tanto* wrongful, in part because it wrongs A. But A has not been, nor will he ever be, harmed by this behaviour.<sup>20</sup> Thus the emphasis on harm as a wrong-maker seems to simply mislocate (in *Careless Shooter*) or, indeed, not to locate at all (in *Forgetful Shooter*) obvious instances of wrongdoing.<sup>21</sup>

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

*Welfare Child* – A relatively well-off working woman is told that she can have a very generous pension and a big house if, but only if, she has a mildly disabled child. The woman aims at creating a disabled child, and succeeds, through a combination of bad nutrition and bad medication. Had she not undertaken such action, she would have had another, non-disabled, child, whose lifetime wellbeing would have been more or less equal with that of the disabled child.

This apparently artificial scenario<sup>22</sup> involves equivalent living standards for everyone, in comparison with *Winter Child*. Both the child, and his mother, live well, in a way that ensures both '(α) a maximally high level of wellbeing for the [welfare child], thus negating the claim that the mother's choice harms that child,' and '(β) an appropriately high level of wellbeing (a level of wellbeing that reflects an appropriate distribution of wellbeing between that child and each other existing or future person for whom the agents are morally responsible).' But it is still very difficult to argue that the mother's behaviour is not wrongful. I conclude that Roberts' recent attempt to defend the harm-based account (conclusion (5)) fails.

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

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<sup>20</sup> Notice that, due to the shooter's forgetfulness, A does not even suffer a *risk* of harm.

<sup>21</sup> It may be objected that these examples presuppose an unjustifiably narrow notion of harm: a broader notion could, and would, capture the idea that A is harmed in both examples. The harm principle is therefore unscathed. This objection is misguided, however, since the stated presupposition is false. Rather, the claim is that, for any notion of (wrongful) harm, one can always come up with compelling examples that involve wronging of A without (wrongful) harming of A. Say, for example, we were to adopt a broad notion of harm, according to which people are harmed when their (informed) preferences go unfulfilled. It would still be wrong for B to intend to hit A in the street, even if A himself – unbeknown to B – had an (informed) preference for unexpected street-fighting: A would not be harmed, but would still be wronged by B's behaviour.

<sup>22</sup> Though perhaps not as artificial as it seems: poor underage parents sometimes give birth to children, which might, in turn, end up disadvantaged and/or disabled, in order to secure council housing. It bears noting here that ascribing wrongdoing is not tantamount to *blaming* the wrongdoer for his actions independently of his circumstances.

Consequentialist moralities tend to assert the harm principle (2): *if* an individual is wronged, then something bad must have happened *to* him. They then have two options: they can assert the person-affecting restriction (1), or reject it. Rejecting it allows them to insist that no-harm cases like *Welfare Child* are wrongful. For there exist impersonal forms of wrongdoing.<sup>23</sup> Accepting the person-affecting restriction, on the other hand, means the consequentialist must bite the bullet on cases like *Welfare Child*. For such cases involve no harm, and therefore no wrongdoing (from (1) and (2)). So why assert, with Roberts, the person-affecting restriction? After all, the impersonalist strategy seems to yield an intuitively correct answer to *Welfare Child* at zero theoretical cost.

The zero cost presumption is, unfortunately, false. It is false because of a rather general problem that plagues consequentialist moralities, largely endemic to their maximising structure. Insofar as the relevant maximand is *total* value, consequentialists will tend to fall prey to (variations on) what Parfit has called the ‘repugnant conclusion’: maximising ‘impersonal’ value raises the spectre of massive populations with very low per capita standards of living.<sup>24</sup> This is one reason why many consequentialists, like Roberts, are wont to insist on person-affecting moralities: these restrictions purport to limit the repugnancy bias, as it were, of their moral theory. So there are, *pace* Parfit, strong reasons for consequentialists to assert some form of the person-affecting restriction. The problem, however, is that this restriction fails to take the non-identity problem seriously. Hence those who assert the restriction (*contra* repugnancy) and the harm principle (*qua* consequentialists),<sup>25</sup> have no option but to bite the bullet on no-harm examples. Consequentialists are thus ineluctably drawn into a dilemma: they can take the non-identity problem seriously, and reject the person-affecting restriction – la Parfit- or they can assert the person-affecting restriction and bite the bullet on the non-identity problem - la Roberts. If they do the former they are subject to a repugnancy bias. If they do the latter they embrace strongly counterintuitive conclusions in *Welfare Child*.<sup>26</sup>

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<sup>23</sup> The most prominent advocate of such a view is Derek Parfit (although he presents his own theory in axiological, rather than normative terms). See, apart from chapter 16 of *Reasons and Persons*, his ‘Acts and Outcomes: A Reply to Boonin-Vail’, in *Philosophy and Public Affairs* 25 (1996), p. 314.

<sup>24</sup> The literature on the ‘repugnant conclusion’ is massive. For Parfit’s original contribution, see *Reasons and Persons*, pp. 381-390. For a collection of essays on the repugnant conclusion, see Ryberg, J. and T. Tansj, (eds.), *The Repugnant Conclusion. Essays on Population Ethics* (Dordrecht: Kluwer Publishers, 2004).

<sup>25</sup> Consequentialism entails the harm principle, or something like it, by definition (see section 1). For the harm principle forms an indispensable -for consequentialists- normative bridge between wrongdoing and the good.

<sup>26</sup> This form of dilemma is developed by Parfit at greater length in his ‘mere addition paradox’. See *Reasons and Persons*, pp. 419-441. For a series of impossibility results along similar lines, see the work of Gustaf Arrhenius, particularly his ‘An Impossibility Theorem for Welfarist Axiology’, *Economics and Philosophy*, 16 (2000), pp. 247-266, and *Future Generations: A Challenge for Moral Theory*, FD-Diss., Uppsala University, Dept. of Philosophy, (Uppsala: University Printers, 2000). In a recent paper, Nils Holtug has argued that the dilemma works the other way around: any axiology embracing a defensible form of the person-affecting restriction will be subject to the repugnant conclusion –and not the non-identity problem. See N. Holtug, ‘Person-Affecting Moralities’, in *The Repugnant Conclusion*, pp. 129-161.

There may be no (consequentialist) way out of this circle. If so, there would be sufficient reason to attempt a fresh start. A nonconsequentialist morality could furnish plausible answers to non-identity problem cases without requiring significant revisions in our commonsense intuitions about wrongdoing. I am not here claiming that consequentialism cannot solve the non-identity problem, or that nonconsequentialism can unproblematically solve it. I am only claiming that there is at least some reason to pursue nonconsequentialist attempts, in light of persistent difficulties with alternatives. The reason, or one reason, for this comparative conceptual leeway that nonconsequentialists enjoy consists in the fact that they are much better positioned to reject the harm principle and variants thereof. This is, as evinced by the examples of the previous section, a theoretically sound move.

In section 6 I piece together rudiments towards a nonconsequentialist theory from rights-based premises. The argument that follows retains a commitment to the person-affecting restriction while rejecting the harm principle. But I must first discuss a recent nonconsequentialist attempt to deal with wrongful disability on the basis of the latter principle.

5. The foregoing critique of consequentialism relies on a widely accepted conception of harm: Joel Feinberg's. Here is the conclusion of his study of the non-identity problem:

Did the mother wrong the child by causing him to come into existence in a harmful (handicapped) condition? I do not think that the child can *establish a grievance against her* so long as he concedes that his handicapped existence is far preferable to no existence at all. . . . To hold her liable anyway, would be (at least with respect to the harm element) something like holding a rescuer liable for injuries he caused an endangered person that was necessary to his saving that person's life. . . . the broken-armed plaintiff suffered a harmful condition with respect to his arm, but the rescuer-defendant did not cause a condition that was harmful on balance, offset as it was by the overriding benefit of the rescue, and he cannot be said, therefore, to have *harmed* the plaintiff...<sup>27</sup>

On Feinberg's view, what matters for ascribing harmfulness to an action is harm-on-balance. Rescue cases, like the one above, demonstrate intuitively that harms can properly be 'netted' against benefits in a way that entails no overall harm. And no harm, in conjunction with the harm principle, entails no wrongdoing. This seems to accord well with related core intuitions.

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<sup>27</sup> Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', p. 27 (emphasis added).

But the ‘netting’ conception of harm is not uncontroversial. An important objection appeals to the difference between harming to prevent greater harm and harming to bestow a benefit.<sup>28</sup> To see the distinction, consider :

*Rescue* – A man is standing in a forest. He has not noticed a massive object heading toward his head, which will kill him instantly. A hunter nearby knows that the only way to save the man is to shoot him in the leg. The hunter takes the shot.

The hunter in *Rescue* imposes a (non-consensual) harm in order to prevent greater (non-consensual) harm. Now contrast:

*Enrichment* –The hunter is a generous, but eccentric millionaire. His gun is loaded with bullets worth \$50 million each. A poor man is passing by in an old vehicle. The only way the hunter can help him out of poverty is by shooting him in the leg. The poor man can then more than cover the cost of surgery by selling the bullet, and live a good life from then on. The hunter takes the shot.

The hunter’s behaviour in *Rescue* differs in relevant respect from that in *Enrichment*. For in the latter case the hunter imposes a (non-consensual) harm in order to bestow a (non-consensual) benefit. I believe that the hunter does not overall harm the man in *Rescue*, but does overall harm him in *Enrichment*. If this *asymmetry* is true, then certain harms cannot always be ‘compensated for’, or ‘netted by’, any amount of benefit.

Now, instances of procreation that involve disabilities to the child are more like *Enrichment* than like *Rescue*. For these instances *harm*, not in order to prevent greater harm –nonexistence does not harm, but in order to bestow the benefits of living. It follows that it is wrongful, *because* harmful, to give birth to the winter child.<sup>29</sup>

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<sup>28</sup> The possibility of non-comparative *benefit* is not taken up here, although very little of substance would change for the argument that follows if such benefits were possible. For discussion, see Krister Bykvist, ‘The Benefits of Bringing into Existence’, *Philosophical Studies* 135 (2007), pp. 335-362 and Elizabeth Harman, ‘Can we Harm and Benefit in Creating?’, *Philosophical Perspectives* 18 (2004), pp. 89–113. What follows with respect to non-comparative *harms* takes its cue from Seana Shiffrin’s ‘Wrongful Life, Procreative Responsibility, and the Significance of Harm’, *Legal Theory* 5 (1999), 117-48.

<sup>29</sup> For further discussion of the asymmetry in the context of procreation, see Gosseries and Vrousalis, ‘Does Causing to Exist Make a Difference?’, available from me upon request.

While I am inclined to assert the asymmetry, many philosophers are not. Consequentialists, for one, will encounter great difficulty granting it, since the asymmetry implies a discontinuity in the value function: some (types of) harms cannot be outweighed by any amount of benefit. This is again inapposite to the maximizing tendencies of consequentialism.<sup>30</sup> But note that, even if the asymmetry is true, it still fails to capture the wrong-making features of *Forgetful Shooter*, or indeed *Welfare Child*. For harm scarcely supervenes in either of these cases, even if construed in an asymmetry-friendly way. My account captures those wrong-making features surplus to the asymmetry view. Moreover, in doing so it provides a rear-guard defence against consequentialist responses to wrongful disability that presupposes no controversial view of harm. The battle need not be fought in the frontlines of the harm principle.

6. We are off to a fresh start: we want to make sense of the non-identity problem unencumbered by counterintuitive conclusions and paradoxes. We must try to do this through a rich, nonconsequentialist, investigation of the problem. How would such an investigation approach the wrong-making features in *Welfare Child*? Promising nonconsequentialist accounts have recently been put forward by David Velleman and Rahul Kumar,<sup>31</sup> following groundbreaking suggestions in Woodward's original commentary on Parfit.<sup>32</sup> These accounts can, I think, make better sense of *Forgetful Shooter* and *Welfare Child*, by promulgating the idea of wrongdoing as wronging, rather than as harming, of persons.

Rahul Kumar, for instance, couches his rejection of the harm principle along these lines:

The nonconsequentialist conviction, broadly stated, is that what one does has an intrinsic significance in moral reasoning that is independent of what happens as a result of what one does. It is to the moral significance of what the wrongdoer has done, or more precisely, how the wrongdoer has related to the wronged (quite apart from the consequences for the victim), that the nonconsequentialist turns in order to account for the distinctive character of a claim to have been wronged.<sup>33</sup>

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<sup>30</sup> See chapter 2 of John Broome's *Weighing Lives* (Oxford: Oxford University Press, 2004) for discussion of the consequentialist value function and its incongruence with such discontinuities.

<sup>31</sup> See J David Velleman, 'Persons in Prospect', *Philosophy and Public Affairs* 36 (2008), pp. 221-288 and Rahul Kumar, 'Who Can be Wronged?', *Philosophy and Public Affairs* 31 (2003), pp. 99-118. Doran Smolkin has also proposed a rights-based solution in 'Toward a Rights-Based Solution to the Non-Identity Problem', *Journal of Social Philosophy* 30 (1999), pp. 194-208.

<sup>32</sup> James Woodward, 'The Non-Identity Problem', *Ethics* 96 (1986), pp. 804-831, my emphasis.

<sup>33</sup> *Ibid.*, p. 105.

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

[T]he particular psycho-physical identity of the person in question, at the point in time at which compliance with the duty is required, may still be an indeterminate matter turns out to be of no consequence, as the other retains her standing as a certain type to whom certain duties are owed regardless of what her token identity turns out to be.<sup>34</sup>

It follows that ‘what will have been slighted from [the winter child’s] perspective is not his interest, but rather his importance as a human being –more precisely, the importance of humanity in him, as it turns out to be.’<sup>35</sup> The nonconsequentialist view of wrongdoing turns ‘on an understanding of rights as including more than morally protected interests.’<sup>36</sup> Call these rights *humanity-respecting*. Humanity-respecting rights do not merely protect the interests or choices of the child: they are also meant to attach respect to his status, or to the sort of being that he is.<sup>37</sup> This remains true even if he does not have concrete singular referents at the time of the right’s encroachment: the right is ‘held’ by a person-to-be and is actualised when he comes into existence. In other words, the mother’s failure to fulfil her duties (by causing the existence of the winter child) means the child will come into the world with his rights violated.

7. Humanity-respecting rights are about how individuals are approached and treated, rather than just about how they fare. By extending the conceptual space between harming and wrongdoing these rights meet two desiderata. First, they allow us to track down wrongdoing in cases of harmless viciousness or torture and in cases of mutually beneficial exploitation.<sup>38</sup> Moreover, by rejecting only the harm principle, advocates of humanity-respecting rights can avoid the charge of ‘impersonalism’ which is often leveled against deniers of the person-affecting restriction. Four important objections to humanity-respecting rights survive, however: three in connection with wrongful disability and one in connection with the *nature* of these rights. I discuss them presently.

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<sup>34</sup> Ibid., p. 113.

<sup>35</sup> Velleman, p. 276.

<sup>36</sup> Ibid.

<sup>37</sup> By ‘humanity’ I mean here a predisposition to setting ‘ends through reason’. Kant discusses the ‘predisposition to humanity’ in his *Groundwork for the Metaphysics of Morals* (see the *Cambridge Edition of the Writings of Immanuel Kant* (New York: Cambridge University Press, 1992), vol. 4, p. 437). Since the said predisposition is not coextensive only with the species *homo sapiens*, the account offered here is not ‘specieist’.

<sup>38</sup> Indeed, the most abject forms of exploitation can be instances both of ‘no harm done’ and/or of free consent by all parties involved. Respecting another’s humanity (in my technical sense of the term) generates stronger requirements than merely treating him in ways to which he would (ideally) consent.

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

I agree that it is a necessary condition for a right or an obligation to be violated that someone holding that right or obligation actually exist. But it is consistent with this claim to hold that the reason a certain course of action would be wrong is that it would involve the creation of rights and obligations that would probably or inevitably be violated. . . . My account does not rely on rights or obligations owed to merely possible people.<sup>39</sup>

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

The second objection says that the account of rights sketched here is irrelevant. It is, of course, true that on this account the winter child's rights are encroached upon. But so what? Surely the child would be inclined to waive these rights. It would follow that there is nothing objectionable about the contingent, only presumptively wrongful, act necessary for his existence. The irrelevance objection is flawed. For even if one could, as it were, waive oneself into existence, the terms of such a waiver are necessarily tantamount to extortion. Indeed, the child's waiver of his right(s) of complaint against the mother -once he has come into existence- is effectively forced upon him: 'the child may still waive his birthright because his only alternative is to complain that it cannot be fulfilled. Such a waiver is granted less voluntarily. . . . Its validity is therefore questionable.'<sup>40</sup> The fact that nearly everyone would waive themselves into existence -except perhaps for advocates of the asymmetry view!- is only indicative that the said waiver cannot be free.

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<sup>39</sup> Woodward, p. 821.

<sup>40</sup> Velleman, p. 277.

The third objection against humanity-respecting rights says that the theory in fact implies disrespect for those it purports to protect. For wishing away the mother's wrongdoing seems to imply wishing away the object of her wrong, the child. This does not, however, follow. Consider:

*Kidnap* – Owing to lifetime obsession with romantic literature, Mary cannot love men who fail to resemble the medieval knights of her daydreams. George kidnaps Mary, without knowing about her unorthodox visions of love. They develop a good relationship, and join into happy marriage. Had George not abducted Mary, he would have met Charlotte, with whom he would have had an even happier marriage.

What is regrettable about *Kidnap* is, I think, George's initial behaviour vis-à-vis Mary, namely his act of coerced abduction. The happy marriage that results from George's actions is not, in itself regrettable. Indeed, Mary can justifiably blame George for, or even regret, his behaviour and *simultaneously* love him, or cherish the outcome of his actions, their marriage.<sup>41</sup> Similar things apply, *mutatis mutandis*, to the winter child's relationship with his mother. He can blame her for disregard for his humanity, and still love, and accept love, wholeheartedly.

On the view defended here, then, wrongful disability cases always involve a choice between different lives, one of which is smuggled into existence through insufficient respect for the humanity inherent in it. A useful rule of thumb for ascertaining whether the obligation to respect humanity has been met is to ask whether the child actually 'chosen' (by delaying conception, by genetic screening and selective abortion, or by gene selection) has been given prospects or opportunities for a life at least as good as the average enjoyed by other members of society.<sup>42</sup> In discussion of this view, David Velleman argues for ascribing 'maximal' content to humanity-respecting rights: 'In creating human lives. . . we must take care that they afford the *best* opportunity for personhood to flourish. . . We are obligated to give our children the *best* start we can give to children, whichever children we have.'<sup>43</sup> But maximalism is too demanding.<sup>44</sup> For say a parent can, at moderate or low cost, increase her future child's IQ from 140 to 160 –for example by taking a pill necessary to

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<sup>41</sup> Moreover, the natural/psychological fact that kidnapping is necessary for happy marriage –Mary would not marry, and not be happy, without kidnapping- may itself be regrettable, just as it may be regrettable that the winter child's existence can only result from similar moral transgression. It does not follow, and it is false, that it would not be better if George had abstained from the kidnapping or, analogously, if the mother had abstained from winter birth.

<sup>42</sup> It is consistent with this view that it may be wrongful to bring a child into existence if the anticipated level of dignity, or respect, to be enjoyed by him is below a certain level, even if it is not due to harmful 'defects' in him, but simply because this particular society does not allow for decent lives.

<sup>43</sup> Velleman, p. 276.

<sup>44</sup> I thank an anonymous referee for pointing this out.

cure a strong headache. It is too strong to insist on the impermissibility of taking the pill.<sup>45</sup> To ascribe ‘maximal’ content to humanity-respecting rights is to overburden them needlessly.

The fourth objection to humanity-respecting rights is not concentrated on wrongful disability cases. Rather, it questions the idea that moral demands of the sort raised in this article can have any title to being formulated in terms of *rights*. For humanity-respecting rights fit neither into the category of *interest theory* rights nor into the category of *will theory* rights. And since there can be no other forms of right, there can be no humanity-respecting rights. Let me explain. Interest theorists assert that X’s right is grounded on some sort of interest that X has (an aspect of X’s wellbeing), where that interest is strong enough to hold others under a duty.<sup>46</sup> Will theorists, on the other hand, assert that X’s right consists in X’s power to demand or waive compliance with some duty of Y to X.<sup>47</sup> Humanity-respecting rights fit into neither category. Take, first, the interest theory. If, as I have argued, wrongful disability cases are best conceived as instances of wrongdoing without harming, i.e. wrongdoing without setback to interests, then the victims of wrongdoing cannot raise any rights-based claims against the wrongdoer. Thus humanity-respecting rights cannot be interest-theory rights. Now take the will theory. If humanity-respecting rights are best viewed as grounded on X’s (predisposition to) humanity, then there will be instances of X meeting the antecedent predisposition, but lacking the capacity to control duties, in the way required by the will theory. The latter is, after all, notoriously incapable of ascribing rights to babies, the demented, or future people, i.e. beings in whom the predisposition to humanity fails to be actualised. Thus humanity-respecting rights cannot be will-theory rights. And because rights can be nothing other than will-theory or interest-theory rights, humanity-respecting rights are not rights.

The view that the will-interest disjunction is exhaustive is questionable, however.<sup>48</sup> This is hardly the place to discuss what an alternative account of rights might look like.<sup>49</sup> But, in light

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<sup>45</sup> It may, of course, be impermissible that she does so just on a whim, as in *Two Minute Break*. All this is, moreover, consistent with the view put forward by Francis Kamm, who argues for the permissibility of the mother taking the pill before conception, or giving it to the fetus, and against the permissibility of giving the pill to him after birth. See F.M. Kamm, ‘Genes, Justice and Obligations to Future People’, *Social Philosophy and Policy* 19, pp. 360-388.

<sup>46</sup> See Joseph Raz, ‘On the Nature of Rights’, *Mind* XCIII (1984), pp. 194-214. The most comprehensive recent defence of the interest theory can be found in Matthew Kramer’s ‘Rights without Trimmings’ in M. Kramer, N.E. Simmonds, H. Steiner (eds), *The Debate over Rights* (Oxford: Oxford University Press, 1998).

<sup>47</sup> The most rigorous recent defence of the will theory has been put forward by Hillel Steiner. See his ‘Working Rights’ in Kramer, Simmonds, and Steiner.

<sup>48</sup> Leif Wenar argues that the disjunction is not exhaustive, but just needs to be *supplemented* by sets of rights entailed by neither the will nor the interest theory (see his ‘The Nature of Rights’, *Philosophy and Public Affairs* 33 (2005), pp. 223-252). The upshot of Wenar’s argument is that his view retains the implausible features of both the will and the interest theory (see next footnote).

<sup>49</sup> The minority consensus among legal philosophers seems to be that, on the one hand, the interest theory fails

of the theory of humanity-respecting rights put forward in this paper, I must say something, however tentative, about the nature of such rights. A definition in the right direction would, I think, go as follows: X has a right to  $\varphi$  if and only if X has a claim that can be advanced as an *exclusionary reason* sufficient to hold other persons under a duty towards X in respect of X's  $\varphi$ -ing.<sup>50</sup> A definition like this would put reason-advancing claims at the theory's conceptual core, while emphasising the 'direction' of claims, as residing in a subject from whom issue definite sets of duties. It would thereby account both for the reason-giving *content* of rights-talk and for its duty-grounding *structure*. Furthermore, a theory of the sort might well break through the stale and Manichean preoccupation of legal philosophers with univocal theories of rights. That would, I think, be a very welcome step forward for the debate and for our understanding of rights in general.

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on grounds of parsimony: it generates an inflation of rights claims, as too many interests seem to be crying out for too many duties. The will theory, on the other hand, fails to ascribe duties where it, arguably, should. A better account of rights would need to incorporate insights from the traditional debate and offer a richer picture of, first, a right's individuation conditions and, second, its diverse functions.

<sup>50</sup> 'Claims' is here not coextensive with interests, as in the winter child's (interest-independent) *claim* that the humanity in him be adequately respected. A reason is *exclusionary* if it excludes, or pre-empts, other reasons, such as the general utility, from the justificatory calculus related to X's  $\varphi$ -ing. Respect for X's (predisposition to) humanity offers one such a reason. This definition draws inspiration, but is different from Ronald Dworkin's. See his 'Rights as Trumps', in J. Waldron (ed) *Theories of Rights* (Oxford: Oxford University Press, 1984).