

SCHRÖDINGER'S CHILD: NON-IDENTITY AND PROBABILITIES IN REPRODUCTIVE DECISION-MAKING

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ABSTRACT

Derek Parfit's non-identity problem calls into question the claims of both the state and individuals when they purport to act for the benefit of future children. This paper discusses how adoption of the non-identity argument as a legal argument could affect reproductive and family policy, demonstrating that it undermines the child-centric approach to assigning legal parentage. The paper concludes, however, that these non-identity problems can be solved by the expected value approach, which demonstrates that efforts to benefit future people can be logically coherent even if those efforts also affect the genetic identities of the future people.

Keywords: Non-identity; reproductive technology; parental rights; sperm donation; future children; best interests of the child

In a legal regime that recognizes fundamental rights in the parent–child relationship, the state must answer the initial question “who is a parent?” That is, when a child is born, which adults have special rights and duties relative to that child? Until the 1970s, U.S. law typically answered the question “who is a parent?” by assigning legal parentage to the woman who gave birth to the child, along with her husband if any; or to the married couple who adopted the child. In the 1970s, in the name of sex equality, this answer was supplemented by giving parental rights to the unmarried, genetic father under certain circumstances.

These answers to the question “who is a parent?” were developed with remarkably little attention to the interests of the child,¹ a point which is usually taken as a criticism. More recent theorizing about parental rights responds to this criticism, emphasizing the parent’s natural solicitude for the child as the best reason for giving the parent, rather than the state, authority over the child (Buss, 2002; Byrn & Ives, 2010). It follows that the rules for assigning parentage should be designed primarily to protect the best interests of children rather than to resolve competing entitlements among adults. This commitment to prioritizing the child’s interests has carried over to debates about how to regulate reproductive technology, including how to assign parents to the resulting children.

Legal scholars with a philosophical bent, most notably Glenn Cohen, have mounted a formidable challenge to this ordering of priorities in the context of reproductive technology (Cohen, 2011a, 2011b; Robertson, 2004). They apply Derek Parfit’s “non-identity” argument and conclude that the state cannot justify a regulation by appealing to the best interests of future children when the regulation itself will affect which future children come into existence (Parfit, 1984). In such cases, they argue, it is logically incoherent to speak of protecting the interests of the children. The state’s policy does not affect the future children; rather, it selects which of many possible future children will in fact be conceived and born. Our belief that our choice of policy can make any particular child better off is at best a misguided distraction. At worst, claims about the interests of future children provide rhetorical cover for eugenic or otherwise objectionable policies about what kind of future children we want and who should be allowed to be their parents.

This paper examines some of the implications of importing this philosopher’s debate into legal argument. It does so first by exploring some of the implications of the non-identity argument for legal controversies, with a focus on the implications for women’s reproductive and parenting interests. My practical concern is that the non-identity argument is at least as likely

to cut against women's interest in reproductive autonomy as it is to constrain the state. In addition, at the individual level, women frequently make decisions about the best interests of future children. If our accounting for those interests is incoherent, then our theorizing about those decisions should change.

Second, starting with regulations of reproductive technology, this paper shows that the claims of the non-identity argument could sweep broadly through family law. The most contentious issues in reproductive technology are, at their hearts, concerned with how we define the parent-child relationship and how we answer the question "who is a parent?" The non-identity argument thus has the potential to undermine the priority given to future children's interests in all attempts to answer that question, not just in the context of reproductive technology. In the absence of a solution to the non-identity problem, the new, child-focused rationale for parental rights may be a false foundation for family law.

Finally, the last part of this paper describes a solution to the non-identity problem based on the work of Melinda Roberts. This solution shows that the morally relevant aspects of a future child's life are those that are within our control in the present; incidental effects on the complex probabilities that determine other aspects of a child's experience do not mean it is illogical to try to improve what we can. This solution explains why law can logically take into account and be justified by the interests of future children, even as it regulates in ways that affect which of those future children will exist.

THE NON-IDENTITY PROBLEM

The Interests of (Future) Children

Concern for children's interests is the purported guiding principle for a range of state actions that determine children's fates. The "best interests of the child" standard ordinarily applies in uncontested proceedings (like most adoptions) or in disputes between two adults, each of whom has equal claim to act on behalf of the child (such as custody disputes between parents). A stronger constraint applies when the government is perceived to intervene in a family; how much stronger remains unclear, but some notion of children's interests underlies a range of government policies, from compulsory education to termination of parental rights for abuse or neglect.

This interest in children's welfare extends to government efforts to regulate or channel reproduction. Reproductive policies are often justified by what Cohen calls "the best interests of the resulting child," or BIRC (Cohen, 2011a, 2011b). For example, BIRC reasoning is used to justify:

- encouraging women to delay childbearing until they are a certain age (but not too old),
- encouraging women to take folic acid supplements before becoming pregnant,
- barring same-sex or unmarried couples from using reproductive technology,
- banning surrogacy contracts, and
- requiring disclosure of the identities of sperm and egg donors.

Like the regular best interests standard, "the best interests of the resulting child" can mask other agendas. Often, the "best interests of the child" serves as a vessel, filled with moral judgments about how children should be reared and what values they should be taught. In the reproductive context, "best interests of the resulting child" can similarly serve as the vehicle for eugenic or other questionable agendas. For example, policies that restrict reproductive technology to heterosexual, married couples reflect ideological disapproval of other kinds of families more than genuine concern for children's welfare. As Cohen argues, we should strive to unmask those other agendas.

The non-identity argument, however, goes farther: it is that, as a matter of logic, concern for the welfare of the resulting children can never justify a policy that affects "whether, when, or with whom" a person reproduces (Cohen, 2011a, p. 425). This conclusion is true, the argument goes, even when government does not intend to affect whether, when, or with whom anyone reproduces, so long as its actions have that effect in fact but are also simultaneously justified by the purported best interests of the resulting children. This argument calls into question not only the BIRC justification for regulating reproduction but also a much wider swath of policies that are justified by their benefits to future people.

The Non-Identity Argument

The reason for the alleged logical failure of BIRC arguments is that if a policy changes whether, when, or with whom a person reproduces, then the "resulting child" is actually a different person, so no particular person is

benefitted by the policy. This seeming paradox is known to philosophers as the non-identity problem. It was most famously posed by Derek Parfit in his 1984 book *Reasons and Persons*. It remains a lively topic of debate among philosophers, who have proposed numerous responses to the problem, none of which appears to have won widespread acclaim.

To illustrate the non-identity problem, consider the example of folic acid. In the United States, the Centers for Disease Control urge women to take folic acid supplements for at least a month before becoming pregnant in order to reduce the chance of neural tube defects in the resulting child.² Suppose a woman named Ruth decides she wants to become pregnant in January. She checks her temperature every morning, identifies the perfect day of the month, and is ready to go. But just before making the attempt, she learns about folic acid. She says to herself, "I want to do what's best for my baby, which surely means decreasing the risk of birth defects. So I will put off conception until February so I can take folic acid supplements."

According to the non-identity argument, Ruth's decision is illogical – or at least the justification for it is illogical. If she conceived in January, she would have a particular baby, defined for purposes of this discussion as the baby who results from a particular egg–sperm combination. That baby, born in October, would have a certain risk of birth defects. Even if birth defects occurred, however, assume that the October baby's suffering would not be so great that her life was not worth having. By deciding to postpone pregnancy, Ruth decides not to bring the October baby into existence at all, which can hardly be said to benefit that particular baby. By delaying conception, Ruth has not benefitted a particular future child; she has chosen a different one.

The decision to postpone pregnancy for the sake of folic acid may nonetheless be warranted, for reasons other than the best interests of the particular child. Ruth might prefer a baby with a lower chance of birth defects for her own sake or for the sake of imposing less of a burden on society. She may believe that the world as a whole is better off, in a utilitarian sense, if fewer babies have neural tube defects. These reasons sound less loving, so she prefers to think she is acting for the sake of her baby. But she is wrong.

The same is true for a government-sponsored campaign to encourage women to take folic acid before becoming pregnant. The government may claim that it is trying to help the potential children, but that is illogical. It is not protecting actual individuals; it is just trying to promote the production of "better" babies.³

Similarly, if Ruth skips the folic acid and conceives in January, her October baby, if born with neural tube defects, cannot complain that she was harmed by Ruth's failure to take folic acid soon enough. Because Ruth only learned about folic acid just before the conception, she had no opportunity to protect that particular egg from harm. Neural tube defects are a condition of the October baby's existence.

Many readers will object that the non-identity argument appears to rely on a purely genetic definition of identity. Perhaps we should instead think of the person exposed to a higher or lower risk of birth defects as "Ruth's next child" – a sort of placeholder child,⁴ or in Parfit's phrase, a general person rather than a specific one (Parfit, 2011, p. 219). In some ways, this objection is "fighting the hypo," since the non-identity argument assumes that genes are at least an important aspect of identity.⁵ Several philosophers have responded to the non-identity argument by positing alternate theories of identity; those approaches, however, are beyond the scope of this paper (Holtug, 2009; Wolf, 2009; Wrigley, 2012). Because, in today's society, genetics are widely emphasized and even equated with identity, this paper accepts, for purposes of discussion, the importance of eggs and sperm to identity. As it turns out, the solution I advocate in the final section of this paper – the expected value solution – is reminiscent of the placeholder-child intuition but provides additional rigor so that it does not necessarily conflict with contrary intuitions about the relationship between genes and identity.

The Dilemma for Law and Policy

The non-identity argument has the potential to help justify a lot of seemingly bad decisions, both forward-looking and backward-looking. If Ruth is fooling herself to think she benefits her child by delaying pregnancy in order to take folic acid, then she needn't bother (except to the extent she has other reasons for doing it). The non-identity argument washes her hands of responsibility for harming her child.

The non-identity argument can also be used to relieve society as a whole from responsibility for the suffering of future people. For example, Parfit imagines a society trying to decide whether to adopt a Risky Environmental Policy or a Safer one (Parfit, 1984, pp. 371–372). The Risky Policy will produce more immediate benefits but at catastrophic long-term costs. At the same time, the choice of which policy to pursue will have pervasive effects on society: what jobs people have, where they live,

which people they encounter. Over time, different eggs and sperm will combine to become future people. If we imagine the timelines of the two possible futures stretching out from the point when the policy choice occurs, then the two future populations initially consist of the same genetic people but gradually diverge. If the catastrophe is sufficiently far in the future, the two populations will be entirely different. Thus, no one who suffers in the catastrophe can claim to have been harmed by the Risky Policy, because the choice of that policy was a condition of that person's existence.

We can employ this reasoning not only to justify our selfish choice of the Risky Policy today but also to reject claims for remedying historic injustices. For example, most, if not all, descendants of American slaves would probably not exist as the particular egg-sperm combinations that they are had it not been for slavery. According to the non-identity argument, they cannot logically claim to be worse off than they would have been in some other version of history, because in the other version of history they would not have been at all. Again, there are other reasons for making reparations for slavery, but one of the most compelling reasons – real and unjust suffering of individual people alive today – is called into question by the non-identity argument.

Despite the non-identity argument, Parfit himself embraced the common intuition that policy-makers today should take into account the welfare of future people, even if those decisions change who the future people will be. After expounding on the non-identity problem, Parfit wrote that it would be best if the problem were kept secret from policy makers. He believed they would make better decisions if they believed they had a moral obligation to the future people who would be affected by those decisions, even if that belief is incorrect:

[The non-identity argument] undermine[s] our beliefs about our obligations to future generations. ... There must be a moral objection to our choice of the Risky Policy. ... Since I failed to find the principle to which we should appeal, I cannot explain the objection to our choice of such policies. I believe that, though I have so far failed, I or others could find the principle we need. ... In the meanwhile, we should conceal this problem from those who will decide whether we increase our use of nuclear energy. These people know that the Risky Policy might cause catastrophes in the further future. It will be better if these people believe, falsely, that the choice of the Risky Policy would be against the interests of the people killed by such a catastrophe. If they have this false belief, they will be more likely to reach the right decision. (Parfit, 1984, pp. 451–452)

For better or worse, that cat is out of the bag. Several legal scholars have advanced the non-identity argument as a bar to BIRC reasoning in the law, and courts may have already implicitly accepted the non-identity argument

by rejecting tort claims for “wrongful life” (Cohen, 2011a).⁶ The opponents of BIRC argue that rather than ignore the non-identity argument, reproductive policy should bow to it, abandoning the claim that policies that affect whether, when, or with whom a person reproduces can be justified by reference to the interests of the resulting child (Cohen, 2011a, 2011b; Robertson, 2004). If they are correct, we should admit that the child’s interests are simply not relevant to policies that affect which child will be born, and thus only the rights and interests of the adults need to be reconciled by law.

Many laws that shape the future can be justified without invoking the interests of future people whose existence depends on the choices we make now. Many environmental laws, for example, operate in the shorter term: they benefit people who are already alive and can be justified on that basis. Moreover, many laws can also be justified on “non-person-affecting” grounds, meaning that they are desirable even if they do not benefit any particular person. Environmental laws again provide an example: we could reasonably conclude that we prefer to create a future world with, say, less mercury in the water, because it would be better from an impersonal, consequentialist perspective. Thus, the non-identity argument may mean only that, if we set the stage for environmental catastrophe now, its future victims cannot necessarily blame us for their personal suffering, even if they condemn us on other grounds for making the wrong choice.

In the reproductive context, however, fewer alternative arguments are available to justify state policies. The non-identity argument could thus place substantial limits on state power. Cohen has canvassed other, non-BIRC justifications for laws that restrict the use of reproductive technology, and they face serious difficulties (Cohen, 2011b). A state interest in “better babies” is illegitimate for most purposes, and non-person-affecting concerns are weak reeds for justifying restrictions on procreative and parental autonomy. Moreover, restrictions on reproductive technology may be disproportionate and under-inclusive as compared to the sparse restrictions on sexual reproduction currently in place. Thus, accepting the non-identity argument might well require concluding that many regulations of reproductive technology are unconstitutional, since the state could no longer invoke the interests of the resulting children.

A Further Concern: The Maternal Justification for Women’s Rights

Even from a libertarian perspective, however, depriving the state of the “children’s interests” argument could have undesirable effects. The non-identity

argument undermines individuals' claims to act on behalf of future children at least as much as it undermines the state's, potentially depriving individuals of powerful arguments against state interference in reproductive decisions. Women, in particular, would lose some of the moral high ground they are sometimes able to claim as the protectors of the interests of future children.

A standard doctrinal use of the non-identity argument would go something like this: reproductive and parenting choices fall into the protected zone of "fundamental rights," which means that the state may interfere only if its actions are narrowly tailored to serve a compelling state interest. When regulating reproduction or parenthood, the state asserts, as its compelling interest, the best interests of future children. The non-identity argument alleges that this claim is incoherent. Therefore, in the absence of another compelling state interest, the regulation fails strict scrutiny. The non-identity argument thus serves a libertarian end by cutting out one justification for state intrusion into the protected zone.

This traditional argument, however, takes the existence and scope of the protected zone for granted. It thus fails to anticipate the potential effects of the non-identity argument in light of two doctrinal realities: (1) the Supreme Court has effectively abandoned the doctrinal structure summarized above, in favor of a more middling balancing test; and (2) one of the most powerful arguments for keeping parental rights and women's reproductive rights in the relatively protected zone is that women are better suited than the state to protect the interests of their children, including potential and future children.

Regarding the strict scrutiny framework, the reproductive autonomy of prospective parents falls under the broad umbrella of the "right to privacy," which also shields the right to abortion and the rights of parents to direct their children's upbringing. Of this range of rights, the one that has been most litigated and most frequently addressed by the Supreme Court is the right to abortion. Notably, the Court explicitly abandoned strict scrutiny for abortion regulations in 1992 – replacing it with the undue burden standard in *Planned Parenthood v. Casey* (1992). The Court has not looked back. Although it has not explicitly imported "undue burden" to non-abortion cases, it has refused in several cases to endorse the strict scrutiny standard, even in the face of repeated complaints by dissenting justices demanding to know what standard is being applied.⁷ It therefore seems reasonable to assume that regulations that restrict other kinds of reproductive decision-making will receive similarly weak protection.

One example of how the weakened approach has spread is *Troxel v. Granville* (2000), the Supreme Court's most recent significant non-abortion

case dealing with family privacy. The *Troxel* decision is extraordinary for its tepid response to a sweeping incursion on parental rights. The case arose because the mother and grandparents disagreed over how frequently the children should visit the grandparents. State law allowed anyone in the world to sue for visitation rights over the objection of a fit parent. Reversing a trial court order that the mother allow more frequent visits with the grandparents, the Supreme Court plurality explained, “The problem here is not that the Washington Superior Court intervened, but that when it did so, it gave no special weight at all to [the mother’s] determination of her daughters’ best interests.”⁸ Telling a judge to give “some special weight”⁹ to the parent’s views is a far cry from demanding a compelling state interest to justify restriction of a fundamental right.

From a libertarian perspective, the weakening of strict scrutiny might appear to be all the more reason we should undermine the state’s claim to have an interest in protecting potential children. The problem, however, is that whatever level of protection fundamental rights formally receive, the real scope of protection will depend in part on the arguments in favor of individual control of the specific question at issue. That is, questions of fundamental rights are really questions of separation of powers: the question is whether to give the power to the state or to the individual. Courts answer that question by evaluating the capacities and claims of both potential decision-makers, not just one.

We can see this dynamic at play in discussions of both parental rights and reproductive rights. Consider, for example, the proposal to require that children be told they were conceived with purchased sperm, along with the identity of the man from whom it came. Prospective parents complain that this regulation would interfere with their parental rights. The state responds that it is looking out for the best interests of their future child. The non-identity argument intervenes to say that the state’s claimed interest is incoherent and that parental rights should therefore prevail. But recall that in modern times, parental rights are based largely on our belief that parents will do what is best for their children. If the non-identity argument deprives the state of the argument that the child will be better off knowing her genetic father, it simultaneously deprives the parents of the contrary argument that, in their judgment, she will be better off not knowing. Each side must resort to its alternative arguments. If the non-identity argument is correct, then that is good: both sides will have to assert their real interests and concerns without the rhetorical cover of “the children.” The state will assert a general, utilitarian interest in overall welfare, and the parents will invoke their interests in personal autonomy. But there is no particular

reason to expect that this shift in the terrain of argument will lead to more libertarian outcomes.

A similar standoff over who speaks for the interests of future children takes place in abortion debates. In *Roe v. Wade* (1973), the Supreme Court did not merely take note that the abortion decision was within a private realm and proceed to the strict scrutiny analysis. Instead, it made an affirmative case for entrusting the decision to a non-state actor (mostly the doctor, but in later cases the pregnant woman). Later, in *Casey*, the Court acknowledged that some people reasonably view an unwanted birth as “a cruelty to the child.”¹⁰ Similarly, Reva Siegel has powerfully argued that the state’s claimed interest in fetal life is implausible because the state has “unclean hands” when it comes to fetal and child welfare – in stark contrast to pregnant women, who, as a group, exhibit extraordinary levels of solicitude for their future children (Siegel, 1992, p. 379). As Joan Williams has pointed out, women’s best shot for control of their bodies is often to claim the maternal prerogative to decide what is best for children, rather than relying on respect for their own autonomy (Williams, 1991). Troxel indicates that parental autonomy for its own sake – unconnected to the best interests of the child – is already rather weak. The best interests of children are powerful rhetorical tools to lose, and not just for the state.

It may be possible to differentiate between non-identity problems with government policies and non-identity problems in individual decision-making, in a way that deprives the state but not the parents of the “best interests” argument.¹¹ Most legal scholars who discuss the non-identity problem focus on government policies (Cohen, 2011a; Philips, 2009; Robertson, 2004). Philips argues in favor of some government regulations, while Cohen and Robertson would use the non-identity argument primarily to limit government power. Accordingly, they cabin off individual decisions, seeking only to apply the non-identity argument to government claims to protect future children. While my focus, too, is on questions of policy, I have three reservations about setting individual decisions entirely to the side.

First, this strategy appears protective of individual liberty only because we have been focusing on *ex ante* regulations of reproductive decisions. One could easily imagine a world in which Ruth is prosecuted for child neglect for having failed to take folic acid before becoming pregnant. In those circumstances, the individualized non-identity argument could be Ruth’s defense. Thus, the distinction between governmental and individual decisions will not necessarily produce the libertarian outcome.

Second, although legal scholars focus on policy decisions, the philosophical literature on the non-identity problem is largely focused on individual decisions. The non-identity problem can play out factually in different ways depending on context, but the differences do not map neatly onto a distinction between “government regulations” and “individual decisions.” There is not a clear logical distinction between the government saying, “Future children would be better off knowing who their genetic fathers are, and we will regulate sperm donation accordingly,” and an individual saying, “My future child will be better off knowing who her genetic father is, and I will choose a sperm donor accordingly.” Both claims are subject to the non-identity critique. Judges and legislators who are asked to limit governmental authority based on the non-identity argument will know, after a glance at the philosophical literature, that they can apply it to individuals too.

Third, that philosophical literature is replete with hypotheticals that are gendered in problematic ways. For example, a recurring character is the fecund woman who frivolously refuses to take a magic pill that is guaranteed to prevent an otherwise inevitable and severe disability to be suffered by her child. It is as though someone read the “convenience, whim, or caprice” language from the *Roe v. Wade* dissent and thought it would be a good premise on which to construct a theory of reproductive ethics.¹² This literature reinforces stereotypes about women as irrational. Trying to draw a line that protects individual women’s decisions from the rigor of the non-identity argument is likely to backfire by implicitly suggesting that women’s decisions are all the less to be trusted because they are not subject to reason. If society may not hide its agenda behind the fig leaf of protecting future children, then neither should individuals.

If the non-identity argument is unavoidably correct, then all sides must abandon their claims to be acting on behalf of future children when their proposed policies would affect which egg–sperm combinations become actual people. We must fight out questions about how children may be created on other grounds.

THE NON-IDENTITY PROBLEM AND ASSIGNING PARENTAGE

The remainder of this paper focuses on the example mentioned above: bans on anonymous sperm. I focus on this example in part because I do not

have a strong opinion about whether anonymous sperm should be banned; if anything, I am mildly opposed to a ban.¹³ The proposal thus serves as convenient, fairly neutral terrain on which to explore the non-identity problem. More importantly, as I argue below, rules about the status of sperm donors are rules about parentage. Conclusions about sperm disclosure will thus help answer the question set out at the beginning of this paper: whether parentage laws should be designed around the interests of children or, instead, the interests of society and reproducing adults.

The Non-Identity Argument Against Mandatory Disclosure

In most circumstances, genetic fatherhood of a child is sufficient to trigger the legal obligations of parenthood; it is also usually sufficient for gaining parental rights. An important exception is that a man can sell his sperm and thereby both waive the rights of parenthood and be exempt from its obligations.¹⁴

As the children who result from this process have grown up, some of them have expressed strong desires to know the identities of their genetic fathers. Some of the children have argued that they have a right to this information, prompting calls to establish such a right by statute (Cahn, 2009). Proponents of this right argue that the interests of future children weigh heavily in favor of disclosure, so heavily that they outweigh any interests the adults may have in anonymity.

The non-identity argument claims that the interests of future children are irrelevant to this debate because resolution of the anonymity question will itself determine which future children come into existence. A ban on anonymity would change who sells sperm and who buys it. Different (and possibly fewer) men would be willing to sell their sperm. Some prospective parents who were put off by anonymity might be willing to buy sperm from a knowable seller, while others who preferred anonymity might be deterred from reproducing in this fashion. Even if some of the participants in the market remain the same, their transactions will change in subtle ways. Buyers might choose different sperm if they know that the seller and the child may one day meet. Sellers might take a few extra days, weeks, or years to think about whether they want to provide sperm at all. These changes would pervasively alter the ultimate genetic identities of the resulting children. Different genetic people, in different numbers, and at different times would come into existence. Although these people, who would know their genetic progenitors, might be happier than the other people would

have been, they would not be the same people. We therefore cannot pretend, when we ban anonymity, that we are acting for the sake of any particular future people. When a child of reproductive technology claims that she is harmed by not knowing the identity of her genetic father, we can respond that were it not for the rule of anonymity, she never would have existed. Therefore, she is not in fact harmed.

By pure chance, we might end up with a few of the “same” children who would have existed in an alternate world that continued to allow anonymity. We could point to those children as the beneficiaries of our policy: because they would have existed in either version of the world, they do not trigger non-identity problems, and they are better off (we claim) than they would have been under the other policy. However, Cohen convincingly argues that this defense against the non-identity problem is unpersuasive (Cohen, 2011a). It requires us to use the (debatable) benefit to a small to vanishing number of “same” children as a justification for state control of the reproductive and parenting choices of a much larger number of prospective parents. The conclusion of the non-identity argument is thus that bans on anonymous sperm must be justified, if at all, by reference to state interests other than the best interests of future children.

Any prospective parents who objected to the ban would be similarly constrained, unable to invoke their presumptive ability to determine their children’s best interests. The ban on anonymity would then stand or fall on alternative arguments, and it is not at all clear that the parents would have the better case. Compelled disclosure of genetic parenthood is common: states routinely require women to identify their children’s genetic fathers – even genetic fathers with no other connection to the child – as a condition of receiving welfare assistance or placing the child for adoption.¹⁵ If the state reframed its reason for banning anonymous sperm – say, to reduce health care costs in an era of genetic medicine and a society in which ignorance of genetic heritage leads to mental anguish – then the parents’ autonomy interest might well give way. The effect of the non-identity argument is not only to weaken the state’s interest in regulation but also to weaken the individual privacy claim.

Mandatory Disclosure as an Assignment of Parentage

The parents’ argument is further weakened by the fact that there is a reasonable basis on which the sperm donor “is” the father – more precisely, there is a reasonable basis for deeming him a legal parent. Until now,

I have used “parents” to mean the people who plan to rear the child, not the supplier of sperm.¹⁶ The meaning of “parents,” however, is contested and in flux, and the status of unmarried genetic fathers is particularly unsettled. Sperm disclosure laws are an iteration of a debate about what makes a man a parent. For purposes of discussing the non-identity problem, sperm disclosure thus serves as a representative example of a parentage law.

In most cases, the law of parentage operates invisibly: a child is born, parents’ names are placed on the birth certificate, and neither the state nor any interested adult objects. In all cases, however, parental status is affirmatively established by law. Constitutional law imposes some constraints on how the state may define “parent,” but there is no question that the definition constitutes state action. Thus, laws governing the parentage of children born through reproductive technology do not uniquely invade a private realm of family formation. If the state, for example, refuses to enforce surrogacy contracts, that is because it is applying a definition of “parent” based on gestation and birth. This definition is not, *a priori*, a greater invasion of privacy in a surrogacy case than in any other case in which the state declares a woman who gives birth to be a parent. The private relationship between parent and child cannot be invaded until that relationship legally exists.

Bans on anonymous sperm declare that some sort of parental relationship exists between child and sperm donor, a relationship that cannot be eliminated by contract. After all, states have only recently begun to allow the sale of sperm to cut off the legal effects of a genetic tie. Previously, genetic fatherhood implied legal fatherhood. A ban on anonymous sperm suggests that the state (partially) regrets its move away from that genetic definition of fatherhood. Perhaps we do not think, after all, that genetic relationships can be completely contracted away (Weinberg, 2008a). Society, through law, may conclude that even a sperm donor is still a father in some sense, and thus that he owes a duty to be identified to the child.

In this light, a ban on anonymity is a step toward unbundling parental rights. When a child is born, the state acts to identify the parent or parents of that child. Traditionally, communities could informally recognize a variety of other relationships. As individual lives have become increasingly governed by formal law, we have found ourselves trapped by laws that have only two categories for adults: parent and stranger. After a few decades of trying to navigate that boundary with improvisations like *de facto* parent, psychological parent, and the like, we are just beginning to carve out space for recognizing the people in between: step-parents, birth mothers,

grandparents, foster parents – and, perhaps, gamete providers. The state may be willing to sever some rights and duties of parenthood – by, for example, relieving the man who provides the sperm from child support obligations – but still insist that genetic parents and children belong at least partly in a realm of status rather than contract. The sperm donor may owe some parental duty to the child – even an extremely minimal one, like having his identity disclosed – that cannot be signed away by the people who plan to rear the child.

Having classified sperm disclosure laws as part of the regime for assigning legal parentage, we can ask what this classification means for the non-identity problem. It suggests that all assignments of legal parentage may implicate the problem. Consider this list of state policies that assign parental rights and responsibilities:

- parental rights for the birth mother
- parental rights for her husband or the genetic father
- enforcement or non-enforcement of surrogacy contracts¹⁷
- availability of child support from the father
- availability of public support
- availability of open adoption
- use of the best interests standard for adoption
- the mother's ability to place child for adoption (with or without the father's consent)

Changing any of these policies would likely influence reproductive decisions and thus influence which potential people come into existence. How they would do so depends on the particular policy in question, and the policies fall roughly into four categories: foundational rules, reproductive technology rules, support rules, and adoption rules.

Foundational rules are the rules we usually take for granted as the core of legal parentage: parental rights for the birth mother and, under the right circumstances, her husband or the genetic father. Abandoning that system would be a radical change of the sort envisioned by Plato or by dystopian novelists like Margaret Atwood and Lois Lowery. The system originated in notions about ownership of children by parents, especially fathers, but modern scholars increasingly justify the system in terms of the best interests of children. As noted above, however, that shift is questionable in light of the non-identity problem. The choice between our current system and Plato's ideal is certain to have immediate, dramatic effects on which egg-sperm combinations become children, thus rendering suspect the attempt to justify the choice in terms of those children's welfare.

Rules about reproductive technology also clearly affect reproductive decision-making, as with the anonymous sperm rule already discussed. Other rules in this area, such as enforcement or non-enforcement of surrogacy contracts, have comparable effects on the genetic makeup of the resulting children.

Rules about the availability of child support, from either the father or the state, are more difficult to assess in terms of their likely effects on reproductive decision-making. There is evidence at least that some people believe these considerations affect women's reproductive activity: legislators hope that capping welfare benefits will deter poor women from having more children, and so-called "crisis pregnancy centers" hope that the promise of child support will deter them from having abortions. However well or poorly founded these hopes may be, a substantial change in the rules about financial responsibility for children seems likely to influence at least some behavior and thus the genetic identities of at least some of the children who are meant to be benefitted. There is thus a non-identity problem with justifying financial policies in terms of the best interests of future children, although it may be only partial and thus easier to resolve¹⁸ (Cohen, 2011a, pp. 474–80).

Last are rules related to adoption and how much control the birth mother has over that process: whether she can insist on or refuse to have an open adoption; whether the state controls the choice of adoptive parents; whether it allows the birth mother to have input subject to a best interests analysis, gives the genetic father "first dibs," or allows her to sell the baby to the highest bidder. These rules are not likely to influence people's actions related to conception (surrogacy contracts aside), but they probably influence some women's decisions about abortion. Many women who have abortions reject the possibility of adoption because they conclude it is wrong to have a child and give it away (Finer, Frohwirth, Dauphinee, Singh, & Moore, 2005). The continued contact allowed by open adoption could change that calculation. In addition, women are not generally able to place a child for adoption without the consent of the genetic father. After the birth, if he withholds consent, her choice is to rear the child herself or allow the father to do so; either way she will likely remain the legal mother. Any changes to the woman's ability to control what happens after birth would affect the relative attractiveness of abortion and adoption to women in various situations. Policy choices about this system are therefore vulnerable to the non-identity argument, although, again, it may be only partial.¹⁹

The non-identity argument implies that, however we come up with rules for assigning parentage, concern for the best interests of the children in question cannot logically be one of the considerations, if the rule itself will affect which genetic children come into existence. If that is correct, we need not consider any but adult or societal interests. The non-identity argument thus undermines the best interests of the future child as a justification not only for regulating reproductive technology but also for a wider swath of rules defining the parent–child relationship.

SOLUTIONS

This part discusses two possible solutions to the non-identity problem that are helpful in assigning parentage. First, different assumptions about the factual consequences of a policy – specifically, how many “same” and “different” people we expect to have under two versions of the future – affect the severity of the non-identity problem. Depending on the level of scrutiny applied to the state’s action, it may be entitled to choose its assumptions. This approach, however, is less satisfying than a more complete solution based on the work of Melinda Roberts. Roberts has demonstrated a solution to a certain kind of non-identity problem. From that solution, we can see that a decision can benefit all the potential people in question even as it affects which of them come into existence in ways we cannot predict. Parentage rules fall into the category of non-identity problems that are solved by this approach.

Probability and Complex Systems

One response to the non-identity argument is to question the prediction that a particular policy choice will change the identities of all or nearly all future people who are meant to be benefitted by the policy. Disagreements about this sort of prediction appear to travel hand-in-hand with disagreement over the intuitive appeal of the argument itself, so it is important to be clear about what factual assumptions are being made in the context of reproductive technology.

First, recall why factual predictions about future children matter to the non-identity argument. If mandatory sperm disclosure would not change any reproductive behavior at all, then the non-identity problem would

disappear. The children born under the new law would be the same children (in the egg–sperm sense) who would have existed if prior law had remained in effect. There would be nothing incoherent about legislating to protect their interests.

To the contrary, however, Cohen argues that nearly all decisions to reproduce with purchased sperm would be affected by slight alterations in behavior, which would be sufficient to alter which eggs and sperm join together and become people. Because the two possible futures entail different children being born, the non-identity problem arises. Even if there were a few “sames,” their interests would be outweighed by the interests of the prospective parents (both the parents of the “sames” and the parents of the “differents”). As long as the “differents” have lives worth living, comparison between the two worlds can be based only on the interests of the “sames.”

Although not necessary to create a non-identity problem, it is worth noting that the reproductive effects of a policy change would spread far beyond the children of reproductive technology. All future people’s identities (in the egg–sperm sense of identity) would likely be affected by sperm disclosure laws. In the first generation, the changes would be due mainly to the changed behavior of the prospective parents and sellers of sperm. Other changes, however, would already have started: the receptionist at the fertility clinic will or will not have a busy week, depending on how enthusiastic people are about disclosure laws; because she is more or less tired, she may or may not go to a party at which she might or might not meet someone with whom she might one day have a child. The changes would increase exponentially as the different children went on to have different lives. Eventually the entire population could be different than it would have been under a different law.

This outcome appears likely because of what Gregory Kavka has called “the precariousness of existence”: the very small likelihood of any particular egg–sperm combination occurring in the first place (Kavka, 1982). Because of the large number of potential egg–sperm combinations that could occur over the course of human history, the genetic makeup of the future population intuitively appears to be sensitively dependent on current conditions. That is, our genetic future is subject to the “butterfly effect,” in which a small change in initial conditions (a butterfly flapping its wing in China) can cause a large change in the overall system (a hurricane in Florida the next week or the next century).²⁰

An alternative possibility, however, is that reproductive patterns are more stable than any of the foregoing has assumed. For example, it is

conceivable that people would adjust relatively easily to a rule against anonymous sperm, so that the rule change would have only a temporary and/or localized effect on which children were born through the use of reproductive technology.²¹ The effects of the new rule could eventually disperse or be contained. If easy adaptation to the new rule limits the effects on the relevant population – that is, if the system is fairly stable – then the non-identity problem disappears. Over time, the number of “different” children born using donated sperm would be much smaller than the number of “same” children. We could therefore coherently strive to protect the interests of the “sames.”

Unfortunately, we do not have the ability to discern these sorts of outcomes in alternative realities, and intuitions seem to vary. In particular, one’s intuition may vary in proportion to one’s inclination to accept the non-identity argument. While I find the hypothesis that population patterns exhibit sensitive dependence far more likely in most contexts, I do not see a clear method for resolving any clash of intuition about an essentially empirical (but not testable) claim.

Perhaps a court would defer to a legislature’s determination that there will be a lot of the “same” people in the two versions of the future, thereby justifying the choice of one future over the other for the sake of the “sames.” But that just pushes the whole problem back to the legislature, which, we shall assume, prefers to act rationally. Cherry-picking assumptions about the numbers of “sames” and “differents” in order to justify a preferred path is not a satisfactory solution. It would be more satisfying to explain the choice between two futures in a way that did not depend on unprovable empirical assumptions. That is what Melinda Roberts’s “expected value” approach to the non-identity problem accomplishes.

Expected Value

The expected value solution proceeds from an error in how the non-identity argument assesses probability and harm. The solution relies on the precariousness of existence to show that efforts to benefit future people can be coherent even if those efforts also affect the genetic identities of the future people.

Suppose that we expect a particular woman, Mollie, to use purchased sperm to create a child, whom she will name Alice. The state is considering a sperm disclosure law, which the state claims will be in children’s best interests, including Alice’s. The non-identity argument says that this law

will alter the transaction such that Alice will not even be born. Instead, her mother will end up with a different child, named Betty; hence the non-identity problem.

The flaw in this non-identity argument is that it assumes Alice. That is, we imagined ourselves to have already lived through a timeline in which Alice existed. But the choice about sperm disclosure laws must be made earlier, before either Alice or Betty exists. At the time that choice is made, the probability of either of them ever existing is extraordinarily small. From the state's perspective at that time, future-Alice and future-Betty are just two among many, many potential people who could one day be born using purchased sperm. The state has no way of knowing or controlling which of those potential people will exist under various possible rules of parentage. But it does believe that each and every one of them, if they do happen to come into existence, will be better off if the rules of parentage are designed, to the best of our ability, to promote the best interests of the child. If we believe that children are better off with access to the identities of their genetic fathers, then choosing disclosure over anonymity confers a benefit on each potential child.²²

Here is Roberts's own explanation, adapted to apply to the sperm disclosure example:

[P]robabilities—at least conceived in a way that will make them useful in guiding the choices we make; that is, as determined by what agents grasp or are in a position to grasp at the critical time just prior to choice—are themselves in flux, changing in dramatic ways as the future unfolds. ...

The phenomenon of the precariousness of existence thus cuts both ways: existence, for any given ... baby, is highly precarious, independent of whether the agents opt for [anonymity] or [non-anonymity]. But the outcome, if the baby does make it into existence, would have been much better for the baby had the [law required disclosure]. Expected wellbeing for each ... baby is thus, after all, greater if [anonymity is banned]. The upshot is that the argument that [anonymity] is somehow better for each of the babies in fact born, and thus cannot harm them, evaporates. Roberts, 2006, p. 789)²³

Roberts's point about the timing of a probability calculation – that the calculation must reflect the information available “just prior to choice” – is critical. It may seem at first that this argument merely shifts the non-identity problem to a more abstract level: even if Alice and Betty are merely possibilities, each of them represents a set of possible future children. That is, if the state allows anonymity, then there is a set of Mollie's possible future children, each with her own probability of coming into existence; in our simpler version of the problem that set was represented by Alice. If the state bans anonymity, it creates a different set of probabilities for Mollie's

possible children, represented by Betty. Even if the state has not chosen between Alice and Betty, it has chosen between Alice's cohort and Betty's cohort. The non-identity problem thus continues to bar the state from justifying its choice by claiming to have benefitted Mollie's child, even in the probabilistic way I have described.

Roberts's points about timing and information answer this objection, as she has extensively discussed (Roberts, 2006, 2007). In brief, the situation described above creates a non-identity problem only if the Alice cohort and the Betty cohort are distinct. If the cohorts substantially overlap – if, for example, Alice is in Betty's cohort and vice versa – then there is no non-identity problem because we are dealing with (mostly) the same set of possible future people.

It may seem that we have wound ourselves back into another factual problem: whether we have a non-identity problem depends on whether we think the cohorts will substantially overlap. This factual question, however, is more easily resolved than our earlier question about Alice's chances of existing if we ban anonymous sperm. As Roberts argues at length, here we only need to know that she still has a chance – that she is in the Betty cohort.²⁴ It is not likely that the change in policy will reduce her chances of existing to zero. It follows that the Alice cohort and the Betty cohort are largely the same.

Note, also, that even though the Alice–Betty cohort of possible people is very large, it is a great deal smaller than the total number of possible people who may ever exist. The benefit or harm done to the cohort by virtue of having anonymous or non-anonymous sperm is specific to the cohort. The expected value solution therefore retains a person-affecting approach to harm.

At this point, however, the non-identity problem may play out differently at the policy level than it does at the individual level. At the time a government chooses among policies, it is not choosing between Alice and Betty; it is changing – in ways it cannot predict – the probability paths that could lead to the existence of various members of the Alice–Betty cohort. In Ruth's case, however, her decision to postpone pregnancy (in order to take folic acid) has an important feature that distinguishes it from the government's choice of policy: her decision involves passing over the particular egg that is available for fertilization in January. There are thus two distinct cohorts: those genetic individuals who might result from the January egg and those who might result from a later one.²⁵

Because of this timing issue, whether the expected value solution can apply to Ruth's case depends on a number of additional details. Is Ruth

making her decision before or after ovulation?²⁶ How precisely does she know when ovulation occurs? How far in advance of ovulation does the body “choose” the egg for that month?²⁷ What if Ruth, like the state, had adopted, in her own mind, a policy about her approach to pregnancy, and making time for folic acid was merely an implementation of that policy?²⁸

Application of the expected value solution to Ruth’s case is thus unclear.

Two things, however, strike me as both reasonably clear and desirable: First, the timing issues would likely prevent the expected value approach from resolving the non-identity problem if the state were to prosecute Ruth for failure to take folic acid. Such a prosecution would necessarily turn on Ruth’s isolated failure to take folic acid, not on Ruth’s general policies for pregnancy. She could thus assert the non-identity argument as a defense.

Second, the complications about whether the expected value solution could apply to Ruth’s overall policy are probably sufficient to address my concern that the non-identity argument could be used to deprive women of the moral high ground when it comes to decisions about the welfare of future children. That is, if the state can logically promote folic acid for the sake of future children, Ruth can logically consider future children’s interests when timing her pregnancy. Accordingly, she can resist state regulation of her decision not only on the basis of her own autonomy interests but also on the grounds that she is better able than the state to choose policies in the interests of her family, including the interests of her future children.

The expected value solution corrects an error in how the non-identity argument assesses probability from the standpoint of a decision-maker with limited information. When choosing between anonymous and non-anonymous sperm, that decision-maker is not, in a meaningful way, choosing between Alice and Betty. Rather, she is altering, in ways she can neither control nor predict, the event paths and probabilities that could lead to Alice, Betty, or someone else in their cohort. At the same time, she is benefitting the cohort by considering whether the one who happens to be born will be better off knowing or not knowing her genetic father. The solution thus demonstrates that it makes logical sense to choose either anonymous or non-anonymous sperm for the sake of the potential individuals in the cohort.

Expectation Without the Math

Another way of understanding this *ex ante* perspective – without having to think of it in terms of probability calculations – is to imagine the choices we would make “behind the veil.” The key question here is who are

the “we” who converse behind the veil. Specifically, do the conversants correspond to all possible egg–sperm combinations, or do they include only those who will in fact exist? Cohen argues that, if it is the former, the group will decide to reject BIRC arguments that would restrain their choices, should they eventually exist (Cohen, 2011a, p. 511). In the sperm disclosure context, he argues that is the case because each individual faces the following three possibilities for existence:

- (1) I might be the child who exists because sperm anonymity is allowed;
- (2) I might be the child who exists because sperm anonymity is banned;
and
- (3) I might be the prospective parent whose choices will be limited if there is a ban on anonymity.

Because I am neutral about whether I exist, I do not care whether anonymity is banned if I am person (1) or person (2). But if I am person (3), I prefer that anonymity not be banned. Because that is the only instance in which I care, I should oppose the ban (Cohen, 2011a, pp. 510–512).

But it is not clear why the conversants behind the veil should correspond to particular egg–sperm combinations, even if we have conceded, for the sake of discussion, to treat existing individuals that way. We could, instead, imagine that every “one” behind the veil is guaranteed an existence.²⁹ (Indeed, if the entities behind the veil corresponded to all possible egg–sperm combinations, each one’s chance of existing would be so small that I’m not sure why they would bother with working out rules for existence. They would probably talk about something else.³⁰) Guaranteeing existence would be more faithful to the veil metaphor because it would give everyone a stake in the fairness of the rules agreed upon. If the rules formulated behind the veil were taken to determine who, among the discussants, would exist, then existence itself would become a stake, contrary to the premise that there is no harm to anyone in the non-existence of a particular egg– sperm combination. Each person behind the veil should therefore be guaranteed an existence, and the conversation should address questions like whether or not sperm disclosure laws would be a benefit to that existence.

Guaranteeing existence also allows us to acknowledge the importance of genetic identity without taking genes to be definitive of the self. One could, for example, think of the conversants in the original position as souls awaiting genetic identity in order to be born. Mary Anne Case points out that in traditional Catholic theology, “there is ... no male or female ... in Christ,” suggesting that souls do not have gender (Case, 2009, p. 5, quoting

Galatians 3:28). If our essential selves are not sexed, it seems unlikely that they carry, say, genes for eye color or height.

This perspective brings us back to the placeholder-child intuition. When Ruth was deciding whether to delay pregnancy in order to take folic acid, she wanted to do what would be best for her baby. The baby for whom she wanted to do well was “Ruth’s child,” who could have been either the October baby or the November one – or, more accurately, an October baby or a November one, since the child who is eventually born will represent the sum over a very large number of very small probabilities.³¹ While the non-identity argument claims that Ruth has merely chosen a different baby, the expected value solution shows that she can benefit her future child by conferring a probabilistic benefit on each of her potential future children, even though her actions will affect how the probabilities change as events unfold. At the time she makes her decision, Ruth has no information about the details of her possible genetic children, other than her ability to improve their chances in life – if they have a life – by taking folic acid. Whichever soul becomes her child, and whichever genes that child receives, that child will receive the benefit of her decision.

The non-identity argument implicitly sets potential future children in competition with each other, competing to exist in the same way that we typically envision sperm competing to reach an egg. The expected value solution redirects our attention to the child who will exist. Existence, for that child, is not a prize but a fact, perhaps a dilemma. Her existence will be shaped by her genes but also by her gestation, the month of her birth, and many other happenstances. Most of those happenstances, and their effects on her life, will be unpredictable. A few, however, can be predicted, and some of them can be influenced by people who already exist. The moral implications of that influence depend on what the decision-makers know when they act. When Mollie chooses between anonymous and non-anonymous sperm, she may change which genes her child inherits from her father, but the only meaningful choice she is making is the one about anonymity. She still has no information about and thus no control over the other probabilistic consequences her decision will have. Given that it remains, from Mollie’s perspective, a matter of chance whether she will end up with Alice, Betty, or someone else, it makes sense for her to take the folic acid for the sake of whichever one it turns out to be.

* * *

Which sperm Mollie should choose and whether Ruth ought to delay conception to take folic acid are separate questions. They belong in

a separate category, along with questions about whether parents ought or ought not to use any number of available strategies and technologies to make their children healthier, smarter, happier, or prettier. The non-identity argument, if accepted, might make these questions easier. The same is true of parentage laws: if future children's interests were, as a matter of logic, irrelevant to the rules we adopt about buying sperm and eggs, enforcing surrogacy contracts, or other rules of parentage, then the policy debates might be less fraught and more forthright, with only adult and societal interests to take into account. The expected value solution, however, shows how we can logically take future children's interests into account when choosing policies that will affect their genetic identities. Given that we can, the case remains strong that we should.

NOTES

1. For example, in *Michael H. v. Gerald G.* (1989), the plurality opinion dismissed the notion that the child, Victoria, could have any claims or interests in the matter of her parentage beyond the claims asserted by the adults.

2. It is not clear from the Centers for Disease Control's recommendations whether taking folic acid before pregnancy actually has any beneficial effects or if the goal of recommending pre-pregnancy doses is simply to ensure that the folic acid is available as soon as pregnancy begins. The CDC recommends that all women of child-bearing age consume folic acid daily "because half of U.S. pregnancies are unplanned and because these birth defects occur very early in pregnancy (3–4 weeks after conception) before most women know they are pregnant." The recommendation is thus based on treating all women of child-bearing age as mothers-to-be (Burkstrand-Reid, 2013). The CDC also recommends that women who have previously had a child with neural tube defects start taking an increased dose of folic acid one month before their next pregnancy. This recommendation appears to be the likely source of statements in the popular press that women should start taking folic acid one month before pregnancy. <http://www.cdc.gov/ncbddd/folicacid/recommendations.html>

To the extent that my use of this hypothetical depends on the necessity of taking folic acid before conception, and that may not be the case, we could instead assume that Ruth learns about folic acid on the day she ovulates in January but that she lives in a remote area and would not be able to obtain the pills promptly. Or suppose that rather than wanting to start taking folic acid, Ruth is already taking a prescription medicine that might harm a fetus, and she must decide whether to delay conception until the drug has cleared from her body.

3. Whether those babies are in some sense "better" raises questions about the line between promoting health and promoting enhancements that we might consider undesirable biological engineering. Neither the non-identity argument nor its possible solutions help to identify that line. Because my concern is only with the logical coherence of Ruth's thought process, I do not address whether she is morally

required to take any particular course of action or whether the law should coerce or otherwise try to influence her decision. In other words, I do not delve into distinctions between harming, wronging, and failing to benefit another person.

4. “Placeholder child” is Jill Hasday’s phrase.

5. Cohen argues that one only need accept that genes are an important aspect of identity in order to conclude that changing the genes of future people affects their identities. If other things (like gestation) also matter, then there are more non-identity problems rather than fewer (Cohen, 2011, pp. 439–440). Heyd (2009) extends this point to argue that the non-identity argument applies to what he calls biographical identity, referring to how the child is reared. Taken to its extreme, this argument could render incoherent almost any attempt to benefit a person’s future, since anyone with a different lived experience could be deemed a different person. In addition, the child is not only a product of other people’s choices but also an actor whose own choices will shape her life (Korsgaard, 1989; Woodward, 1986).

6. Philips (2009), on the other hand, argues that courts have implicitly rejected the non-identity argument in constitutional contexts by using “BIRC” reasoning to uphold incest bans, and he distinguishes that context from the tort context of wrongful life claims.

7. The exception is *Washington v. Glucksberg* (1997), in which the Court used a rigid, formalist version of fundamental rights doctrine to reject a claimed right to assisted suicide.

8. *Troxel v. Granville*, 530 U.S. 57, 69 (2000).

9. *Id.* at 70.

10. *Planned Parenthood v. Casey*, 505 U.S. 833, 853 (1992).

11. Although the reservations discussed below would remain, the distinction between external and internal perspectives proposed by Herssione-Kelly (2009) is a promising basis for distinguishing individual decisions from state policy.

12. *Roe v. Wade*, 410 U.S. 113, 221 (1973) (White, J., dissenting) (claiming that the majority opinion “values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus”).

13. One of my reasons for opposing mandatory disclosure is that it interferes with the parents’ decision about what will be best for their child, a reason that triggers its own non-identity problem. My other reason is that sperm disclosure, like some other trends in family law, puts too much emphasis on genetics as definitive of family relationships.

14. Most states in the United States make some statutory provision for gamete donation free of the rights and duties of parenthood, but a genetic father’s status may depend on whether the donation occurs through a medical facility, whether the recipient is married, and whether the genetic father develops a post-birth relationship with the child.

15. For these reasons, my view is that a ban on anonymous sperm would be constitutional under current law. As a policy matter, however, my tentative position is to oppose the ban because I believe reproductive law already puts too much emphasis on genetics and out of deference to the parents.

16. Although the autonomy interests of the supplier are also at stake, his interest is generally to avoid being classified as a parent.

17. I am unaware that any of the concerns about anonymous sperm (or anonymous eggs) have been extended to the anonymity of surrogate mothers, whether traditional or gestational. My own concerns about surrogacy (Hendricks, 2007) would be mitigated in a regime of unbundled parental rights that accorded some status to the gestational mother.

18. As discussed below, however, my inclination is to believe that any substantial change will eventually lead to complete divergence between the two possible futures and thus to a complete non-identity problem. Because of the pervasive impact of any policy change on the genetic makeup of the future population, the number of “sames” will eventually become trivially small.

19. My reference to abortion in the last two paragraphs creates complications for some analyses of the non-identity problem. By focusing on the egg and sperm as the important factors in individual identity, discussions of the non-identity problem can implicitly suggest that the individual life begins at conception. This possibility, in turn, suggests the point of conception as a critical turning point for non-identity problems: for example, genetic manipulations before conception could create non-identity problems, while genetic manipulation after conception (or after birth) would not. For scholars who focus on pre-conception activity and who do not want to take a firm position on when life begins, the simplest strategy for dealing with these complications is to collapse conception and birth, bracketing questions about what happens during pregnancy.

While this strategy makes sense when the focus is on other matters, my analysis of parentage laws rejects it for two reasons. First, my interest is primarily in women’s reproductive experience. The process of pregnancy is too important to that experience to be collapsed for purposes of analysis, nor can I casually adopt an approach that implies, even rhetorically, that a distinct individual life exists at conception. Second, the exclusive focus on the choice of egg and sperm is too reminiscent of the ideology of genetic preformation – the belief that the fertilized egg is a complete, self-contained individual whose further development is merely an unfolding of itself - which I have extensively criticized elsewhere (Hendricks, 2012). In brief, the process of gestation has an important role to play in the genetic expression of the new individual, regulating epigenetic changes that both shape the organism and are heritable by future generations. In other words, gestation has the same features that we point to in eggs and sperm as reasons to consider them important to identity. While I have assumed the importance of eggs and sperm for purposes of this paper, I am not willing to set aside the similar importance of gestation. I therefore treat a woman’s decision to have an abortion, rather than gestate a particular fertilized egg, as analytically comparable to Ruth’s decision not to fertilize her January egg. Melinda Roberts similarly treats abortion as a decision not to bring a particular child into existence (Roberts, 2006, p. 780).

20. The butterfly example, which is frequently invoked in math and physics, appears to derive from Ray Bradbury’s short story, “A Sound of Thunder,” in which a human time traveller accidentally steps on a butterfly in the time of the dinosaurs and thereby alters the course of history.

21. Cohen’s research suggests that sperm donors would need to be paid an extra \$31 per donation to give up their anonymity (Cohen & Coan, 2013). Although \$31 is a substantial increase over the going rate for sperm donation (about \$75), it is

insignificant compared to the overall cost of using reproductive technology and could easily be absorbed by buyers. This suggests that the impact of a ban on anonymity could be small. On the other hand, Cohen and Coan also compile data from other countries suggesting that a ban on anonymity could lead to a shortage of supply.

22. That benefit is equal to (the benefit of knowing your genetic father's identity) \times (the probability of existence).

23. In Roberts's actual text, she is discussing the choice between hormone-assisted in vivo conception, which is more likely to result in multiple pregnancy, and in vitro fertilization, which reduces the risk of multiples.

24. Roberts expands on this point using Parfit's environmental scenario. She shows not only that the future person has a chance of existing but that the chance is as good under either policy choice, mostly because under either policy the chance is extremely small.

25. Because of this timing problem, the children of the January egg become analytically comparable to the children with genetic anomalies in Roberts's analysis: their existence as genetic individuals is inherently dependent upon the very anomaly or disadvantage that decision-makers might seek to prevent.

26. If she has already ovulated, then Ruth's situation shares some features with the two-envelope problem, which Roberts (2009) analyzes in conjunction with the non-identity problem.

27. Interestingly, it is very difficult to find information about how an egg is chosen each month. There seems to be much less interest in this process – uniformly depicted in sex education materials as entirely passive – than in the purportedly competitive “race” of the sperm to reach the egg.

28. Roberts (2007) discusses the complications of an individual decision that is part of a larger plan or program at greater length.

29. Jeffrey Reiman argues that “the parties in the original position, in effect, represent all and only those people who ... will ever exist ...” (Reiman, 2007, p. 79). As Rivka Weinberg explains, the contrary assumption incorrectly assigns value to the mere fact of existence (Weinberg, 2002, 2008b).

30. This is supposed to be funny. It is also supposed to acknowledge the artificiality, and thus manipulability, of the veil metaphor.

31. Whether a particular egg–sperm child comes into existence is thus analogous to whether Schrodinger's cat lives or dies, but with more contingencies and more possible outcomes.

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