

## A Rights-Based Solution to the Non-identity Problem

KEXIN FENG

In the realm of ethical inquiry, few questions are as perplexing and provocative as those concerning the treatment of future generations. At the heart of this discourse lies a dilemma known as the non-identity problem. This philosophical puzzle challenges conventional notions of moral responsibility and ethical decision-making by questioning whether it is possible to wrong a person by bringing them into existence under adverse conditions. In this paper, I will first present the non-identity problem as formulated by Derek Parfit as well as his inadequate attempt at solving it. I will then critically engage with a solution to the non-identity problem proposed by Elizabeth Harman and ultimately reject it for two reasons. Lastly, I will put forth a right-based solution to the problem and then defend it against some potential objections.

Before delving into the various responses to the non-identity problem, we should first establish what the non-identity problem is and how it arises from factual claims about individual existence. It seems uncontroversial to say that a given person *A* owes her existence to the combination of a particular ovum and a particular spermatozoon at a particular time *t*. Had *A*'s parents instead waited a few months and conceived a child at  $t_1$ , the

*Kexin Feng graduated from Duke University in May 2024 with a BA in Philosophy and a BA in Political Science. His philosophical interests include practical ethics and jurisprudence. He will work as a legal analyst for Kobre & Kim's Hong Kong office next year before eventually attending law school.*

child consequently born would have been a different individual *B* and *A* would in fact never have existed (Parfit 1986, 352). The non-identity problem concerns our moral obligation (or lack thereof) towards those whom we cause to exist precariously. Therefore, the problem can perhaps be most intuitively understood in the context of procreation:

*Wrongful Life*: Amy has always wanted a child. As she is finally getting ready for her pregnancy, she is diagnosed with a temporary condition that will cause any baby she conceives now to be born with Huntington's disease. She decides to get pregnant now anyway. Had she instead put a halt to her pregnancy plan and received treatment, the condition would have cleared up in two months and she could then conceive a baby free of Huntington's disease.

As pointed out by Parfit, the scope of non-identity cases encompasses not only procreation decisions but also policy choices with widespread impact and rippling effect over time that ultimately changes the configuration of the future generation (378). Consider the following case:

*Nuclear Waste Policy*: Government *X* has decided to adopt a cheap but risky nuclear waste disposal policy that involves the burial of large container boxes filled with nuclear waste deep underground. The policy will impact the way people live their everyday lives, which in turn affects those who will exist in the future. Since the waste will remain radioactive for thousands of years, it will eventually erode the containers and contaminate underground water, causing serious illness and suffering to millions of people. However, the erosion and contamination will not happen for at least another three hundred years. In the meantime, Government *X* can use the saved waste management funds to provide its citizens with better education and health care.

Both cases involve actions that bring people into flawed existence when there are alternatives that can avoid such flaws. Our intuitions tell us that what Amy does to her child and what Government *X* does to the future generation seems to be clearly wrong. Their actions seem to harm those whom they cause to exist, thus warranting moral blame. However, upon further reflection, such an intuition we have appears unfounded. Given the common understanding that an action harms an individual only if the individual is made *worse off* by the action, Amy and Government *X*'s acts certainly do not harm the *particular* persons that they bring into existence. Those affected in the future (supposing that they will have lives that are

flawed yet still generally worth living) are not made worse off by these actions for they would not have existed at all had Amy chosen to conceive the child later and had Government X chosen not to adopt the risky policy. The actions of Amy and Government X then seem permissible. Such a paradox thus captures the non-identity problem. It concerns the question of how we can hold an agent morally accountable for an act that brings people into flawed existence when such an act does not make the people she causes to exist worse off than they otherwise would be.

Having unleashed the beast, Parfit then tries to rein in its detrimental implications by introducing *The Same Number Quality Claim*, or Q. Q claims that “if in either of two possible outcomes the same number of people would ever live, it would be worse if those who live are worse off, or have a lower quality of life, than those who would have lived” (360). This principle thus allows for the possibility of comparing different lives. While Q does not mount to the status of a moral imperative and therefore does not impose upon us an obligation to bring into existence the best life that we can possibly bestow, it plausibly gives us a moral reason to not choose an act that causes a flawed existence when a more ideal alternative is readily available. However, what has been established so far is simply that Q has reason-giving weight when everything other than the well-being of the future generation stays constant. That is not the case for both *Wrongful Life* and *Nuclear Waste Policy*, as people in the present can benefit from the very acts that cause flawed existence in the future. The interests of people in the present also have reason-giving weight and should be taken into consideration when deciding between two courses of action. Therefore, it is still not clear whether Amy and Government X have strong moral reasons to not do what they did.

In response, Parfit cleverly argues for the moral equivalence of the interests of possible people (i.e., those who are brought into existence by our actions) and that of existing people. He does so by first establishing the *No-Difference View* regarding the interests of possible people and future people (i.e., those who will come to existence in the future independent of our actions). Consider the following case (revised for clarity and consistency):

*Medical Programs:* E and F are two rare conditions that would cause women with the conditions to give birth to children with Huntington’s disease if left untreated. E can only be contracted by non-pregnant women while F can only be contracted by pregnant women. Both E and F can only be detected via special tests, but fortunately, both can be cured quite easily once detected. A preconception testing program and a pregnancy testing

program were consequently developed to detect *E* and *F* respectively. Now suppose one of the two programs has to be canceled. The cancellation will go into effect one year after the decision, therefore affecting none of the present fetuses. If the preconception testing is canceled, each year 1,000 children will be born with Huntington's disease, as opposed to 1,000 different healthy children. If the pregnancy testing is canceled, each year 1,000 children will be born with Huntington's disease that could have been prevented through prenatal treatment (Parfit 1986, 367-8).

Parfit believes that our intuition would view the cancellation of either program indifferently since either way there will exist 1,000 children with Huntington's disease in the future when there could have been none (368). He goes on to argue that the interest of future people should equate to the interest of existing people given the reasonable belief that remoteness in time, in itself, has no moral relevance (357). Now given that the interest of possible people weighs the same as the interest of future people and that the interest of future people weighs the same as the interest of existing people, it follows that the interest of possible people weighs the same as the interest of existing people (McMahan 2013, 13).

While logical, such a theoretical maneuver is hard to swallow, nevertheless. Suppose we modify the case of *Medical Programs* to involve a choice between the preconception testing program and a treatment program for children under the age of five that can cure them of Huntington's disease, I believe few people would intuitively prefer the former to the latter. McMahan correctly identifies the moral asymmetry between comparative and non-comparative benefits and harms as the explanation for such an intuition. McMahan argues that in addition to comparative harms and benefits (or harms and benefits as used in the ordinary sense) that make an individual better or worse off, there are also non comparative kinds, namely existential harms and benefits (8). By existential harms and benefits, McMahan means all the good and bad constituents of one's life (9). While one's action cannot bestow comparative harms and benefits on the person whom she causes to exist, it can nevertheless confer a net existential (non-comparative) benefit if that person will have a life worth living. Our intuition seems to discount the value of non-comparative harms and benefits in relation to the value of equivalent comparative harms and benefits (18). Therefore, actions that bestow comparative harms and benefits matter more morally than actions that bestow only non-comparative ones. Returning to Parfit's argument, the interests of existing and future people intuitively matter more because

they concern the bestowment of comparative benefits, whereas the interests of possible people only concern non-comparative benefits. With the rejection of the *No-Difference View*, Parfit's solution to the non-identity problem ceases to be adequate.

Elizabeth Harman provides a more promising, though still not entirely satisfactory, solution to the non-identity problem. Her account relies heavily on the concept of non-comparative harm. Like McMahan, Harman believes that making a person worse off than she otherwise would have been is not the *only* way an act can harm a person. She points out that there exist cases in which an act can harm a person even if it makes the person better off than she would have been in the absence of the act (99). Consider the following case:

*Wrongful Conviction*: James was once a deadbeat alcoholic with a gambling addiction. He was misidentified by a racially biased eyewitness and wrongfully convicted for an alleged murder. He was put on death row and tormented physically and psychologically before finally being exonerated by newly discovered DNA evidence a decade later. James's experience on death row deepened his understanding of life and ignited a passion within him for social justice. After his exoneration, he went on to become a successful writer and influential activist. Had he not gone through this misfortune, James would likely have wasted his life and not accomplished much.

In this case, even though James was technically made better off by the unfortunate experience, few would say that the initial wrongful conviction does not constitute harm to James. Applying the same rationale to non-identity cases, Harman argues that "an action harms a person if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed if the action had not been performed" (93). Furthermore, Harman believes that the accompanying benefits of having a worthwhile life do not necessarily render the harm in question permissible because our reasons against causing harm have a much stronger force than our reasons to bestow benefits (98).

Harman's solution to the non-identity problem faces two difficulties. First off, a strict subscription to Harman's account of non-comparative harm would, in a sense, prove too much. Suppose that a healthy couple decided to have a child together. They passed all the preconception tests and did not find anything concerning during all the antenatal check-ups. Unfortunately, their baby was somehow born with a disease that causes inexplicable pain. They loved their child anyway and did their best to provide her with a life well worth living. By Harman's account, the parents'

act of conception harms the child regardless. While Harman never formally engages with such an objection in her paper, her arguments would commit her to the position that such harming is *prima facie* impermissible notwithstanding the benefits the parents bestow on their child (108). Such a claim does not quite square with our intuition. We tend to think the parents in question do not do anything wrong.

The second objection concerns Harman's inability to clarify the relationship between her account of comparative harm and McMahan's formula of existential harm. It seems plausible to view Harman's strict non-comparative harm and McMahan's existential harm as essentially the same sort of *intrinsic harm* that "causes a person to be in an objectively deprived or intrinsically bad state" (McMahan 2013, 8). However, if this is indeed the case, it is not obvious why the mere existence of such intrinsic harm in the life that we cause to exist renders our action impermissible. After all, even a healthy child would inevitably undergo much pain and suffering over the course of her lifetime. If intrinsic harm cannot be offset or compensated by the intrinsic benefit that accompanies a worthwhile life, as argued by Harman, then no form of procreation can ever be permissible.

Then Harman's non-comparative harm must somehow be distinguished from existential harm. Given Harman's list of conditions sufficient to constitute harm, namely "pain, early death, bodily damage, or deformity" she must argue that these particular bad states pass a threshold of seriousness to deserve special moral significance, such that it cannot be compensated the same way lesser-degree badness can be (97). However, this explanation faces further difficulties. It is not clear how "pain" makes the list alongside "deformity" and "early death" when it is such a common feature of human existence. The list is also rather arbitrary and idiosyncratic. Harman seems unable to offer a systematic treatment of this threshold separating regular intrinsic harms from more serious intrinsic harms that deserve elevated moral consideration. Harman's inability to work out the key concept in her solution to the non-identity problem thus renders her solution unsatisfactory.

Lastly, I shall put forth a rights-based solution to the non-identity problem that can dodge the messy discussion around harm. The wrong-making feature of an act that brings a person into a flawed existence is the violation of this person's *right to have a reasonable shot at a life of normal quality*. Here by a life of *normal quality*, I do not mean that people are entitled to an average level of quality of life for that would permit too little. Normality here instead refers to the minimum standards for an acceptable quality of life below which the life in question is commonly deemed undesirable. This rights-based account explains our intuition in *Wrongful Life* and *Nuclear Waste Policy*. Amy's decision to conceive a

child now subjects her child to a debilitating illness and a shortened life expectancy, thus violating the child's right to have a reasonable shot at a healthy life of normal quality. Similarly, Government X's decision to adopt the risky waste disposal policy violates the future generation's right to have a reasonable shot at a life of normal quality by subjecting them to detrimental effects of radiation exposure, such as deformity at birth and early death from cancer. Their existence inducing actions therefore rightly deserve moral blame.

Unlike Harman's strict non-comparative harm account, the rights-based account is compatible with our intuition to not blame those parents who give birth to disabled children as a result of unpredictable misfortune. Since the parents did everything possible to ensure that their child is protected from any preventable congenital diseases or physical abnormalities, they gave their child a *reasonable shot* at a life of normal quality. Whereas those parents with severe hereditary illnesses or those who learn about the presence of serious congenital disease in the fetus but decide to have the child anyway expose their children to unreasonable risk of having a life below normal quality and therefore harm their children. Here, it is worth noting that the permissibility of a parent with a severe hereditary illness deciding to have a child is more nuanced, since the parent's right to procreate is also at play. I will address this difficulty later in the paper when responding to the last objection.

I will next consider four potential objections to my rights-based solution to the non-identity problem. The first objection comes from Parfit. Parfit argues that even in the *Wrongful Life* case, the child in question, having lived a worthwhile life so far, may very likely be glad that her mother decided to conceive her against all odds. Parfit suggests that if the person whom we caused into existence is glad that we acted as we did, her lack of regret can thus count as her waiving of her right or her implicit consent to the right violation (364). However, such a claim seems deeply flawed. That one is glad to be born in retrospect does not mean that the person has waived her natural right. Consider again the case of *Wrongful Conviction*. There is no doubt that the decade-long imprisonment seriously violated James' rights to free movement and bodily autonomy. Suppose that James is genuinely glad that such a misfortune befell him and gave him a purpose in life. His later appreciation of the event does not count as a waiver that justifies the initial violation. The child's approval of her mother's act can at most serve as an excuse that diminishes the mother's responsibility for the violation in question. The act of bringing a person into a flawed existence is wrong regardless, given its violation of the child's right to have a reasonable shot at a life of normal quality.

The second line of objection accuses my rights-based account of being *ad hoc* and questions whether there indeed exists a universal right to have a reasonable shot at a life of normal quality. My response to the objection is two-fold. Firstly, the plausibility of such a right is evident in its compatibility with our intuition about the mistreatment of existing people, future people, and possible people (as illustrated in *Wrongful Life* and *Nuclear Waste Policy*). Secondly, the right to have a reasonable shot at a life of normal quality coincides with many well established basic human rights (as captured in the Universal Declaration of Human Rights and the UN Convention on the Rights of the Child), such as the right to the security of person, the right to not be subjected to torture, the right to not be held in slavery or servitude, and the right to enough food, clothing, housing, and healthcare for oneself and one's family. All of the rights aforementioned share the common goal of guaranteeing a fair shot at a healthy and normal life free of severe suffering, unreasonable limitations, and premature mortality. Of course, the mere public agreement on these rights does not automatically guarantee their legitimacy as rights. I will not launch into a defense of human rights in this paper. An elaborate philosophical explication of human rights can be found in James Nicke's *Making Sense of Human Rights* and Alan Gewirth's *Human Rights: Essays on Justification and Applications*. For my purposes, the fact that these basic human rights are widely accepted and vigorously defended lend them *prima facie* legitimacy.

The third objection finds issues with my proposed right's built in relativist feature. Given that what is commonly considered "healthy" and "normal" can change over time, the rights-based account cannot provide a consistent standard for judging the permissibility of actions. However, the insistence on a fixed, time proof formulation of rights seems unnecessarily dogmatic. Take the right to life in the healthcare setting as an example. It does not entail an unconditional obligation to save and sustain one's life at any cost, but is rather a function of the best available technology of the time and the reasonableness of the rescue effort when weighed against other moral and practical considerations. Rights with a fluid component can still be consistently applied to judge the permissibility of certain actions.

People may further argue that in non-identity cases, an existence inducing act that is deemed a violation of rights in today's society may not be seen as a violation at all in the future society in which the flawed person will exist. I will respond by considering a variation of the *Wrongful Life* case:



*Wrongful Life II*: During her preconception checkup, Betty is diagnosed with a temporary condition that will cause any baby she conceives now to suffer from a painful illness and die at the age of 40. If she puts a halt to her pregnancy plan and receives treatment now, the condition will clear up in two months. Betty conceives a baby now anyway but makes arrangements to extract the zygote and cryopreserve it so that the baby will be born instead in the year 2300. Also suppose that in the year 2200 a highly radioactive meteorite will unexpectedly impact the Earth, wiping out over half of the human population and subjecting the remaining half to serious illness and suffering. By the year 2300, almost everyone on earth will be born with painful radiation induced illnesses and have an average life expectancy of 40 years.

Putting the controversy of cryopreservation and surrogacy aside, I believe that most people would still think that what Betty does is morally objectionable. The question is how our intuition in *Wrongful Life II* can fit into my rights-based solution. By taking up the rights-based account, one necessarily adopts a non-consequentialist approach to judging the permissibility of actions. As demonstrated by the *Wrongful Conviction* case, a violation of rights can be wrong even when the violation brings about positive consequences and is appreciated retrospectively by the person whose rights were violated. When determining whether an act violates a right, one should take into consideration circumstances at the time the action was performed rather than circumstances in the future. In non-identity cases, one would violate the future-existing person's right to have a reasonable shot at a life of normal quality by giving her an existence abnormally flawed by today's standards.

The last objection asks whether my rights-based account proves too much. It would suggest that, for example, it would be wrong for people in a war-torn country *A* to produce children when there is no prospect of peace. Many may deem such an evaluation implausible. I agree that such an evaluation is entailed by my rights-based account but will try to defend its plausibility. By conceiving and giving birth to a child in country *A*, the couple will subject their child to possible starvation, dehydration, inhumane conditions of living, and other common injustices that occur in war. Life in country *A* under siege will certainly deprive the child of her right to have a reasonable shot at a life of normal quality. Given the inhumane circumstances in country *A* are arguably worse than the circumstances faced by the future generation in *Wrongful Life* and *Nuclear Waste Policy*, a couple's decision to bring a child into the world now is no less wrong than the action of Amy and Government  $\mathcal{X}$ .

Someone may follow up and argue that my response fails to consider the parents' right to procreate. Suppose that the war cannot possibly end in this couple's lifetime and that there is no realistic means of escaping the horrendous situation. Then for a couple living in the war zone to refrain from depriving any potential child of her right to have a reasonable shot at a life of normal quality, they would not be permitted to conceive at all. Such a burden on the couple is unreasonable and violates their right to procreate. The case for those with severe hereditary illnesses is similar—to not conceive a child vulnerable to hereditary illnesses is to not conceive at all. However, what the critics miss is the fact that the commission of a wrongdoing does not necessitate the assignment of moral blame. Just because the parents, under the particular circumstances mentioned above, wrong their children by bringing them into a flawed existence, it does not automatically imply that they are not permitted to conceive the child. In other words, parents stuck in an inescapable war zone and parents with incurable inheritable illness are not to be blamed for conceiving children whose existence is inevitably flawed.

I will clarify the distinction between wrongfulness and blameworthiness by appealing to the concept of justification and excuse in criminal law. According to the Model Penal Code Commentaries published by the American Law Institute, "to say someone's conduct is 'justified' ordinarily connotes that the conduct is thought to be right, or at least not undesirable" (Dubber 2015, 180). A justification-based defense accepts an agent's responsibility for the act in question but denies the wrongfulness of the act (Ferzan 2011, 239). By contrast, "to say that someone's conduct is 'excused' ordinarily connotes that the conduct is thought to be undesirable but for some reason the actor is not to be blamed for it" (Dubber 2015, 180). An excuse-based defense admits the wrongfulness of the act but denies the agent's blameworthiness (Ferzan 2011, 239). The principle of excuse can be applied to the case of procreation by war zone parents and hereditarily ill parents. Their act of conception constitutes wrongdoing because (a) in doing so, they deprive their child of her right to have a reasonable shot at a life of normal quality, and because (b) to deprive someone of what she has a right to is to wrong her. The wrongfulness of the act notwithstanding, the parents may be excused for conceiving the child given the lack of real choices they have and the morally significant weight of their procreative liberty.

Withstanding the various challenges presented above, the rights-based account emerges as a plausible solution to the non-identity problem. An act that brings a person into an unavoidably flawed existence is wrong because it would violate that person's right to have a reasonable shot at a healthy life of normal quality.

## Works Cited

- Dubber, Markus Dirk. *An Introduction to the Model Penal Code*. Oxford University Press, 2015.
- Ferzan, Kimberly Kessler. "Justification and Excuse." *The Oxford Handbook of Philosophy of Criminal Law*, edited by John Deigh and David Dolinko. Oxford Academic, 2011, pp. 239-68.
- Harman, Elizabeth. "Can We Harm and Benefit in Creating?" *Philosophical Perspectives*, vol. 18, 2004, pp. 89-113.
- McMahan, Jeff. "Causing People to Exist and Saving People's Lives." *The Journal of Ethics*, vol. 17, no. 1/2, 2013, pp. 5-35.
- Parfit, Derek. *Reasons and Persons*. Clarendon Press, 1986.

