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Moral and Legal Constraints on Human Reproductive Cloning

Melinda Roberts

Goals of this paper

Does moral law limit the families we may permissibly choose to construct? Should human law do the same? Or do both morality and the law instead permit the family to proliferate, whether by rhyme or reason or not, in whatever direction potential procreators might happen to have in mind? Is, in other words, the rule that governs procreative choice just the very simple ‘anything goes’?

One argument in favour of the ‘anything goes’ rule has seemed particularly compelling. According to that argument, which borrows its logic from what is called the *nonidentity problem* (Parfit 1987: 363), the choice that brings a person into existence cannot *harm* that person provided that person’s existence itself is worth having. In this paper, I find fault with that argument as it arises in the context of human reproductive cloning. But both the argument itself and the objection I shall suggest apply to many other reproductive technologies as well – and indeed to procreative choice generally, whether technologized or not.

The logic of the nonidentity problem may seem highly exculpatory from a legal point of view and – arguably – from a moral point of view as well. But any close inspection will reveal that things are not quite so simple. In this paper, I explore the difficult issues raised by nonidentity logic. I argue that that logic fails in any case in which we can trace an *alternate, and better, route* into existence for a particular child available to agents just prior to choice. In such cases, the argument that concludes ‘no harm done’ loses all force. On the basis of the harm that we can then easily discern, we find ourselves nicely positioned to argue both that the child has suffered a moral wrong and that the state is entirely justified in regulating the choices we make for the purpose of rescuing offspring from that particular harm going forward.

The analysis I propose may seem at odds with a certain idea that has a great deal of force among moral philosophers and is at least taken seriously within the law as well. That is the basic *consequentialist* idea that agents cannot have done anything wrong if they have maximized wellbeing for people. I will argue, however, that we can avoid any tension by simply giving to that necessary

condition on wrongdoing a *person-affecting*, or *person-based*, construction instead of a more traditional *aggregative* construction.

Human reproductive cloning is the focus of the next part of my paper. My conclusion is not that all applications of human reproductive cloning are morally and legally problematic. It is rather that some are and some aren't – with everything turning on whether or not the special logic of the nonidentity problem in fact *succeeds* in showing 'no harm done'.

Finally, I consider a particularly trenchant objection against my claim that human cloning, in at least some cases, impermissibly harms the very offspring it helps to produce. According to that objection, if it is permissible to impose what is arguably the *deeper* harm on a given person – the harm of never existing at all – then it should be permissible as well to impose the *shallower* harm on that same person – the harm of existing as a genetic multiple. I conclude with a response to that puzzle.

Does the logic of the nonidentity problem undo claims of harm whenever the existence is worth having?

Does 'anything go' when it comes to procreative choice? We understand, of course, that that's not the rule when the issue is how we are to conduct ourselves in respect of the children we already have. While we think parents surely must be accorded some discretion regarding how they deal with their own children, we understand that that discretion is far from absolute. Some parents on at least some occasions treat their children in ways that no plausible moral theory can deem permissible. And any credible legal system will give the community license on some occasions to protect children against some of the serious harms their parents would otherwise be likely to inflict.

But the *construction* of the family – the *procreative* choices, that is, that determine the size and constituency of a particular family going forward – may be thought to be different. Choices to bring a child into existence may seem to be governed – categorically, across the board – by the special, and highly exculpatory, logic of the nonidentity problem¹. The idea is this. Whether a given choice damages the very child it causes to exist is surely, at least from the child's own point of view, moot. After all, the child's interests ordinarily weigh *in favour* of existence – or at least not *against* existence². Stripping the agents of their right to procreate will only bring it about that the child *will never exist at all*. Perhaps an alternate, seemingly better (that is, less damaging) choice would have produced a *distinct* child, one *nonidentical* to the original, in place of the original. And perhaps that child would have been better off than the original. But that *alternate* choice (at least very probably) would have done nothing to improve things for the *original* child. We are thus left with no basis on which to conclude

that the original child has been harmed by the choice agents in fact made. No better-for-the-child alternate choice *entails* ‘no harm done’ to that child.

We see the same logic at play in far more ordinary cases. Thus, even the well-executed surgical procedure may leave you with a limp. But if you would otherwise have necessarily been left paralyzed for life, we don’t think the surgeon who has performed the procedure has *harmed* you. Similarly, the well-executed reproductive technology may leave the child it brings into existence *disadvantaged* in some way. It may cause the child, not just to exist, but also to bear a certain burden. But if that same child could never otherwise have existed at all, then the use of that technology cannot plausibly be said to have *harmed* the child³.

The logic of the nonidentity problem has been widely understood to support the use of many innovative reproductive technologies – including, for example, intracytoplasmic sperm injection (ICSI), in vitro fertilisation (IVF), aggressive drug therapies (high doses of, for example, clomiphene) and human reproductive cloning – against their critics⁴. Unable to identify any clear victim, critics have instead fashioned speculative arguments against whatever technology it is that offends them. But such arguments should always be greeted with suspicion. If we truly are blocked from establishing harm-to-offspring, it is difficult to see how we are not blocked as well from establishing any serious objection against any of those technologies.

Nonidentity logic may seem unassailable. In fact, however, it cannot be relied on to defend each and every procreative choice. Rather, it supports the ‘no harm done’ result when it is limited to the case in which agents *could have done no more for the child than they have*. But it fails miserably in any case in which what agents have done is simply part of the causal sequence of acts and events that leads to the existence of a particular child and an *alternate, less burdensome route into existence* for that same child was available to the agents just prior to choice. In both scenarios, it is perfectly correct to say that the act under scrutiny ‘brings the child into existence’. But under the former, perfectly reasonable principle, the burden that comes with the act is one that agents (practically, that is, physically) *cannot avoid* if the child is to exist at all; the burden is (we can say) *critical* to the child’s coming into existence at all (or at least to the *probability* of the child’s coming into existence being higher than it is under any alternative choice). And under the latter, fallacious principle, the burden that comes with the act could have been avoided had agents opted for some other stepping stone into existence on behalf of the particular child rather than the one that creates the burden. When the latter principle rather than the former has been deployed for the purpose of showing ‘no harm done’, critics of any particular technology have far more than mere speculation to draw on. For in those cases we can easily sidestep the inference to ‘no harm done’.

Moreover, we can, in such cases, establish that harm has been done not in some exotic (and arguably morally and legally irrelevant) sense of the term ‘harm’

but rather in an *ordinary* and *intuitive* – that is, *comparative* – sense. In my view, then, we can – and I believe should – concede (contra Benatar 2006) that in many cases existence is, from the child's own point of view, a good thing. We should concede, that is, that in many cases existence is better, and certainly not worse, than never having existed at all. And we can – and again I think should – concede (contra Harman 2009, and Steinbock 2009) that no harm is done to the child *unless* agents have made that child worse off when they could have made that same child better off. We can – and should – accept, that is, an intuitive, ordinary, comparative account (as opposed to an 'objective list' account, or a 'minimal decent threshold' account) of *harm*, or *loss*. We can – and should – instead say that a person is harmed by a given act performed in a given possible scenario (or 'future' or 'world') *only if* that act makes that person *worse off* than that person is in some alternate scenario – *only if*, that is, the agents could have performed some *alternate* act that would have made things *better for that same person*.

But we can concede all these points but still insist that the act that brings the child into an existence worth having may well *harm* the child. What is important is whether the act – and any injuries or adverse effects it might produce – was *critical* to that child's coming into existence. Could the agents have acted otherwise and still brought that very same child into a better existence?

We would certainly say that the surgery that leaves you with a limp *harms* you had it so happened that an alternate and better procedure – say, an Ace bandage rather than a bone graft – was available to your surgeon. And so should we say that the procreative choice that leaves the child damaged *harms* that child if an alternative, better means of bringing that same child into existence is available.

What applications of nonidentity logic, then, often overlook is that a particular procreative choice is not always the *only* path into existence for a given child. If multiple paths into existence are available, and if some of those paths are better for that child than others, and if agents could have chosen a path that was better for the child and instead have chosen a path that was worse, then what they have done *harms* the child. And if that harm cannot be justified – if, for example, there is no showing that the only way to avoid harming the one child is to impose a more serious harm on still another person or that same harm on *many* other children – then agents have not only *harmed* but have also *wronged* the child. And they have wronged the child both morally – they have done less for the child when they could have done more at no cost to anyone else – and legally – tort law remedies should be understood to be available and laws regulating the agents' conduct recognized as valid constitutional measures necessary to protect children from the harm that they would otherwise incur⁵.

But this is very general. We can't just *say* that other, better routes into existence are sometimes available to agents in the context of – for example – human reproductive cloning. We must instead *prove* that point. I will turn to

that argument later in this paper. But first a discussion of certain underlying connections between morality and the law is in order.

Morality and the law

It seems that any plausible moral theory will share with any credible legal system one important goal – that of promoting the ‘general welfare’ or, alternately, the ‘public welfare’ or the ‘common welfare’. These are expressions O.W. Holmes used in describing the goals and function of law (Holmes 1881). Relatedly, he exhorts judges to read the law ‘recogniz[ing] their duty of weighing considerations of social advantage’ (Holmes 1897: 467).

Restated in purely moral terms, the idea here could be read this way: an act is morally permissible *if and only if* nothing agents could have done in place of that act would have created still more wellbeing for people – would have, that is, done still more to promote the common good. The resulting moral principle is inherently *consequentialist* and inherently *maximizing*. But as far as I can see there is no reason to think that it is also *aggregative*. We thus have the option of instead endorsing a *person-affecting*, or *person-based*, form of maximizing consequentialism.

Reference to the *common* good need not, in other words, be construed as a reference to the *aggregate* good. It can instead be taken as a reference to the good that is done for each person *as an individual* – more for one person, perhaps, than for another, but with the goal being not the maximization of the *aggregate*, or *summation*, of individual wellbeing levels but rather *for each person* the maximization of wellbeing *for that person* (with the necessary caveats in place to address cases in which agents cannot create more wellbeing for one person without creating less for another).

Similarly, when Holmes invokes the common good in his discussions of how the law is to be read, there is no indication that the good he is referring to is measured by summing up the wellbeing levels of all the individuals who belong to a given population. Far more plausibly, the common good consists not in *aggregate* wellbeing but rather in the varying amounts of the good enjoyed by varying numbers of people⁶. At least in many cases, the fact that we can *count* means we need not *aggregate* (Roberts 2002: 326–333, 347–348). We needn’t say that one choice produces more wellbeing *in the aggregate* than another. We can instead in many cases simply note that one choice produces more wellbeing for *at least some people* and less for none – or assigns *fewer people* to a lower wellbeing level, or etc. – than another does. Tricky, perhaps, to detail, person-based principles in the end yield a far more plausible picture of what morality requires.

These two ways of understanding the common good – the aggregative reading and the person-based reading – will yield very different results when applied to procreative choice. That that is so can be seen in the context of

human reproductive cloning. The argument against human reproductive cloning is in many cases going to be effectively blocked if our starting point is aggregative consequentialism. Specifically, if the technology of cloning is applied in a way that adds to the population and if adding to the population maximizes wellbeing in the aggregate, then aggregative consequentialism is going to favour cloning. And that is so, even in the case in which *not* adding to the population and not cloning happens to be the choice that maximizes wellbeing *for each and every person who does or ever will exist*.

Suppose, as the following table suggests, that agents have the options of cloning a single, consenting adult source to produce between one and four new people – children – genetically identical to that source. And suppose that they also have the option of not cloning at all.

Table 14.1 Human Reproductive Cloning

	a1 = produce via cloning from an adult clone source p1 as a singleton	a2 = produce via same procedure p1 and p2 as two genetically identical individuals	a3 = produce via same procedure p1, p2 and p3 as three genetically identical individuals	a4 = produce via same procedure p1, p2, p3 and p4 as four genetically identical individuals	a5 = avoid cloning altogether and produce no additional individuals at all
p1	+10	+9	+8	+7	*
p2	*	+9	+8	+7	*
p3	*	*	+8	+7	*
p4	*	*	*	+7	*

The asterisk (*) signifies that the indicated person never exists under the indicated choice; numbers indicate relative overall, lifetime wellbeing levels.

As long as p1–p4 are additional people and agents had no way of producing genetically distinct additional people at higher wellbeing levels, aggregative consequentialism is going to imply that a4 is obligatory and that a1, a2, a3 and a5 are wrong.

In contrast, person-based consequentialism – depending, of course, on its details – can easily find a4 wrong. As I understand it, a main tenet of a person-based approach is the so-called *person-affecting*, or *person-based*, intuition. According to that intuition, an act can be ‘bad’ *only if* it is ‘bad for’ some person or another. In other words: an act performed in a given scenario, or possible future or world w, is wrong *only if it harms* – that is, makes things,

relative to some alternate world w' , *worse for* – a person who does or will exist at w (Parfit 1987: 363). Still another basic tenet will surely be the following. If a person is harmed *without any justification at all* at a world w at which that person does or will exist, then the act that harms that person is *wrong*. So, if the harm is justified, then the harm won't ground a finding of wrongdoing. But if it isn't, it will.

Applying these basic tenets to Table 14.1, and understanding that harm is imposed in any case in which agents could have created more wellbeing for a person and have instead created less, we can infer that $a1$ is perfectly permissible. In contrast, $a4$ harms a person who does or will exist at a world where that act is performed – namely, $p1$. And that harm itself remains unjustified: agents can avoid that harm to $p1$ by performing $a1$ instead, where $a1$ (i) makes things better for $p1$ than $a4$ does but (ii) doesn't impose any harm – at least, doesn't impose any *morally significant* harm – anyone at all.⁷ $a4$, we can thus conclude, is wrong.

Nonidentity logic and human reproductive cloning

My analysis, when coupled with the facts displayed in Table 14.1, shows that $a4$ *harms* and indeed *wrongs* $p1$. But why should we think that 'the facts' displayed by Table 14.1 have anything to do with 'real life'? Why should we think Table 14.1 represents the alternatives that would be available to agents in any actual cloning scenario?

To establish the relevance of the table for 'real life', we must argue two points. First, we must argue that there are grounds for thinking that $p1$ is indeed worse off as one of – say – four genetically identical individuals than $p1$ is as a genetic singleton. And, second, we must show that agents had the ability to make $p1$ better off – that an option like $a1$ would be genuinely available to agents in normal cloning scenarios and that $a4$ and its effects are not themselves *critical* to $p1$'s coming into existence. We must, in other words, show that the special logic of the nonidentity problem in fact fails.

Macintosh (in this volume) describes a number of grounds for prohibiting human reproductive cloning and then points out just how weak those grounds in fact are. Consider, for example, the claim that the families cloning may help to create may be dysfunctional in certain ways or the claim that parentage of any cloned offspring will be difficult to establish for legal purposes. Macintosh's argument that these claims are speculative seems exactly right. There is no reason to think that the family created via cloning is at any particular risk of becoming dysfunctional. And many societies are by now adept at addressing issues of parental rights in the context of adoption, including in the case where the adopted child is genetically related to one of the two parents but not the other. Distinctions will need to be drawn. But surely we will be able to use that

expertise to address issues that will arise in the case where the child is not just genetically related to, but rather shares the full genome of, one parent but not the other.

Macintosh also properly dispenses with the various arguments against cloning that derive from religious dogma. Faith may help an agent decide whether to produce a child by way of cloning. But the faith that some people have should not play any role in deciding how *everyone* in society should conduct their lives.

At the same time, the international groundswell of legislation prohibiting human reproductive cloning shows that the prospect of human cloning is highly controversial – more troubling to many than is, say, the right of early abortion. Why are all of these people so worried? Do the objections against cloning truly fail across the board?

We begin with the point that a person's being brought into existence as one of four genetically identical multiples rather than as a genetic singleton really does constitute a burden or a disadvantage – something it would 'ideally' have been better for a given person to have lived without, something that *harms* that person. We begin with the point that a4 can indeed be expected to be *worse for* p1 than a1 is. Here we – just for the moment – put aside whether the special logic of procreative choice in the end forces us to say that what *looks* to be harm is really *not* harm at all.

We can, I believe, easily articulate a basis for the claim that existing as one of four rather than just one of one is indeed worrisome. Neither you nor I would want to look out into the world and discover that our genetic identity – our genome – had been shared without our consent for the reproductive purposes of other people. Whether we have a moral or constitutional *right* of genetic control is not anything we need to decide in order to be very confident that we *want to exercise* a certain level of genetic control – and that taking that control out of our hands imposes a genuine harm, or loss, against us. Thus, I don't want my gametes shared (courtesy of, for example, the technician in charge of the cryopreservation of my ova) without my consent. Still less do I want my entire genome shared without my consent.

But we can't reasonably take that position – and insist that we do indeed have an interest in exercising a certain level of genetic control and that stripping us of that control *harms* us – and also take the position that the offspring we produce, whether for our personal childrearing purposes or in order to help our patients or our clients or still others achieve their own childrearing ends, have no parallel interest. We can't reasonably take the position that *our* wellbeing has legal and moral significance, and that we can be harmed by a certain sort of choice, but that *their* wellbeing does not have the same sort of moral significance and that they can't be harmed by a very similar sort of choice.

Similarly, I can't reasonably take the position that I have an interest in keeping – say – my left kidney and at the same time take the position that you have no parallel interest in keeping yours. If your taking my kidney constitutes

a harm to me – represents, that is, a case in which you as moral agent have created less wellbeing for me when you could have created more – then so does my taking your kidney constitute a harm to you. Now, on occasion such harms may permissibly be imposed. But we cannot expect that latter debate to reach any correct conclusion unless we begin the debate with the recognition of *all* the harms that our many alternative choices may impose – including the harm that is imposed on you when I take your kidney.

The same analysis holds in the case of human reproductive cloning. The thought here is not at all that our genes make us who we are or determine our ‘destiny’ – or that the process of human reproductive cloning will produce people who are the *exact duplicates* of each other. Much goes into who we are beyond our genes. Nor does our left kidney make us who we are. But we still don’t want to lose it without our consent.

Now, it might be argued that losing our left kidney *makes a difference* to us in a way that losing our genetic uniqueness – that is, being made to share our genome with others – cannot. But innovations in genetic technology give rise to worries – or at least fantasies – that quickly reveal just how naïve this argument in fact is. Do we think it makes a *difference to us* if, after we have produced our own child, our frozen embryos are handed off to other infertile couples so that they may produce their own child without our consent? Yes. We want to be the ones to make the call; we want to exercise that level of genetic control.

It might be objected that the fact that we *want* to retain genetic control does not on its own prove either harm or risk of harm. Perhaps our desire instead does no more than reveal a certain squeamishness on our part when it comes to our bodily parts – or a fetishism about our genetic identity. Perhaps our desire is itself arbitrary or irrational. We thus need to be able to give at least a rough account of *why* the duplication of our own genome in another constitutes a loss. We need to be able to say just how the case is one in which agents could have created more wellbeing for a person and have instead created less.

I believe that our genetic identity, while it does not determine who we are or our destiny in life, is part of what we offer the world. If our genomes can be obtained from many different sources, then the value of what we have to offer the world is diminished. My children’s hearts and minds may not be as wonderful as I think they are. But if you want what you perceive to be the riches that can be mined from the genomic stream that makes up my little clan, you shall have to convince one or the other of them to have a child with you. If you can obtain those riches elsewhere, my children will not have as much to offer you. And it makes things *better for them* that they have a lot to offer; it’s an *advantage to them* that in your eyes they have something you cannot get elsewhere. That their value is increased in your eyes is of value to them. You should not be permitted to cheat them out of their due by taking their genomes without their consent from the saliva they leave behind when they go to the dentist.

But now, of course, we must address the second point. We must show just why the special logic of procreative choice fails in the context of human reproductive cloning. Yes, existing as a genetic multiple as opposed to a genetic singleton *looks* to be a disadvantage. If, however, the act under scrutiny and the disadvantage it seems to inflict are *critical* to the coming into existence of the apparent victim, then we shall have no choice but to infer ‘no harm done’.

It is useful to return to Table 14.1 at this point. To reach the result that a4 does not harm p1, it is not enough to establish that a4 brings p1 into existence. One would need to establish as well that there exists *no alternate means* of bringing p1 into existence that *makes things better* for p1 – that p1 cannot be *both* brought into existence *and* accorded a desirable level of genetic control.

But surely there *is* an alternate and better route into existence for p1. Surely, that is, there is a way of bringing p1 into existence *and* according to p1 the same level of genetic control we want for ourselves.

The choice of a1 is, in other words, an alternative that we can anticipate would actually be available to agents in any ‘real life’ case. Perhaps the particular *mechanics* of the cloning procedure mean that all four genetically identical embryos must be created if p1 is ever to exist at all⁸. But that does not mean that all four genetically identical embryos need to be allowed to develop into four genetically identical (‘full-fledged’) persons. After all, the agents could allow the one embryo to develop into p1 while destroying any remaining embryos⁹. p1 would then exist, not as one of *many*, but as one of *one*¹⁰.

We must, accordingly, recognize that the logic of the nonidentity problem simply does not fit at least some cases involving human reproductive cloning. Because alternative, better routes into existence are clearly available to agents prior to choice, we cannot infer ‘no harm done’ on the basis of that logic.

My conclusion here is *not* that *every* cloning choice harms the person it brings into existence. On some occasions, the sound application of nonidentity logic will indeed allow us to construct a compelling argument for the ‘no harm done’ result. Consider, for example, the choice of a1. Let’s suppose that a1 brings p1 into existence by way of cloning DNA derived from an adult clone source and that p1, accordingly, is genetically identical to that adult clone source. In this case, it seems that p1 has no other, better route into existence. Being brought into existence without the desirable level of genetic control, in this case, is indeed *critical* to p1’s coming into existence to begin with. And we should conclude ‘no harm done’.

Macintosh’s opening scenario involves similar facts. There, a woman gives birth to a son, the genetic clone of the woman’s infertile husband. It’s true that the son has been deprived of a certain level of genetic control. Because the man and the child are genetically identical, the man would remain perfectly able to clone *both* himself *and the child* again and again. But it’s also true that that particular child would not have been any better off had his mother achieved her pregnancy through donor sperm. For then that *particular* child

would never have existed at all. Nor would that child have been better off had his mother arranged for the cryopreservation of the embryo and then waited until her spouse died before having that embryo transferred to her uterus. For then the child would have been deprived of the parenting that the man himself was (presumably) willing to provide. Thus, while the child certainly *lacks* a certain level of genetic control, it is not at all clear that he has been on balance *harmed* in a morally or legally relevant sense.

More generally, the determination of harm in a given case involves an assessment of *all* the alternatives available to the agents just prior to choice. If *any* alternative exists that make things better for the child than does the procreative choice under scrutiny – if *any* alternative both avoids the disadvantage and still manages to bring that very same child into existence – then the child is *harmed*. But if on the other hand the choice reflects the *best agents can do for that particular child*, then, we should agree, ‘no harm done’.

**If it is permissible not to bring a child into
existence at all, how can it be wrong to bring
a child into existence as a genetic multiple?**

The foregoing discussion establishes, I believe, that human reproductive cloning in some cases can be expected to harm the very offspring it brings into existence, depending on the facts of the particular case. I believe that that harm can easily serve as a basis for a finding of moral *and* legal wrongdoing.

But there is an argument – a puzzle, really – that would seem to undermine my conclusion. As we have seen, if the agents’ choice not to perform a4 is replaced by a1, then what they do will make things *better* for p1 than a4 does. But, of course, their choice not to perform a4 could instead be replaced by a5. Rather than make things *better* for p1 than a4 does, agents could, in other words, make things *worse*. After all, it is surely better for p1 to exist under a4 than it is for p1 never to exist at all under a5. Or so I will concede for purposes here.

But with this recognition the problem arises. If the *lesser* harm that a4 imposes on p1 counts against a4, then surely the *greater* harm of never existing at all counts still more heavily against a5. Yet we do *not* think that a5 is wrong. We think, rather, that it is perfectly permissible not to bring p1 into existence at all. But if it really is permissible for agents to impose the *greater* harm on p1, then how can it not also be permissible for them to impose the *lesser* harm on p1 – to perform, that is, a4 in place of a5 or a1¹¹?

It might seem discouraging that this particular puzzle – this objection – isn’t the least bit susceptible to a seemingly obvious solution. Thus, one *wants* to say that it is just obvious – a matter of common sense – that *existing* and *future* people matter morally in a way that *merely possible* people do not. One could

then concede that leaving a child out of existence altogether can harm that child but insist that that harm itself is devoid of moral significance.

The principle would be this: the child's *modal* status determines the child's *moral* status, and the *child's* moral status determines the moral status of the *harm*¹². Because the merely possible do not, in other words, matter morally, the harms they incur cannot *count against* the choices that impose those harms.

But the seemingly commonsensical notion that people can be divided between those who matter morally and those who don't – that *modal* status determines *moral* status – cannot be made to work. A number of cases compel us to recognize that the merely possible *do* matter morally – and in just the way that we ourselves matter morally.

One case that makes this point clearly is *Addition Plus*¹³. Suppose that we can make *existing* people better off only by bringing into existence still other people whom we *avoidably* treat very badly. And suppose that we in fact choose not to bring those other people into existence at all. Our choice seems clearly permissible. The difficulty is that that result seems unavailable to us if we think that modal status determines moral status. After all, if the *merely possible* do not matter morally and if that, in turn, means that the harms they incur have no moral significance whatsoever, then the choice to harm *existing* people – by failing to provide them with, for example, slaves or organ donors – will presumably turn out to be *wrong*. For that choice makes existing people worse off when we could have made those same people better off at no cost *to anyone who matters morally*.

This shows that the merely possible do, after all, matter morally. At least in some cases, the harms they incur can indeed make the otherwise wrong choice to impose still other harms on existing people perfectly permissible (Roberts 2010; Roberts 2011).

Fortunately, however, we can defend the result that it is perfectly permissible to leave a child out of existence altogether and yet still wrong to bring that child into existence as a genetic multiple on other grounds. The new strategy is this. We concede, as before, that leaving a child out of an existence worth having harms that child, and that that harm is deeper than the harm of existing as a genetic multiple. We can also recognize that the merely possible have the same moral status as existing and future people. But we now insist that to say a given person has moral status is just to say, not that the harms that person may incur matter in a categorical or across-the-board way, but rather that they matter *variably*. More specifically, we can say that a harm to a person matters morally if and only if it is imposed on that person at a world where that person does or will exist¹⁴. And we can then analyse the problem case as follows. Yes, it indeed harms p1 to leave p1 out of an existence worth having, and that harm is indeed deeper than the harm of bringing p1 into existence as a genetic multiple. But that deeper harm, we can now assert, has no moral significance at all. It *does not* count against a5 or in any roundabout way in favour of any alternate

choice. It cannot, in other words, make the otherwise permissible a5 wrong. In contrast, the harm of existing as a genetic multiple, though shallower, has full moral significance. It *counts against* a4 and in a roundabout way in favour of the alternate choice a1 that avoid it.

Our puzzle is then solved. We have explained just how it can be perfectly permissible to leave a given child out of existence altogether but still wrong to bring that same child into existence as a genetic multiple. a5 may well, in other words, be perfectly permissible, even as a4 is clearly wrong. In the world of contemporary moral theory, this strategy for solving our puzzle and others like it is highly controversial¹⁵. I hope, though, that the law at least – or at least Holmes! – would find it plausible.

Notes

- 1 See Parfit 1987: 363. David Heyd calls the special rules he believes applicable to procreative choice ‘genethics’ (Heyd 1992, 2009). John Robertson has also appealed to this special logic (see Robertson 2004a: 344, and generally Robertson 1994) but does recognize that it is limited in some ways (Robertson 2004b: 15). See also Macintosh, this collection.
- 2 The only exception would seem to be the case of the genuinely *wrongful life* – the case, that is, where the child would inevitably and unavoidably be so diseased that his or her life would be *less* than worth living. But that is hardly the ordinary case.
- 3 At least it seems not do so in any ‘morally relevant sense’ (Parfit 1987: 374) – in any sense, that is, that *counts against* the particular application of the technology itself or make that otherwise *permissible* application into a moral *wrong*. One might, of course, challenge my analogy. One might argue that it makes no sense to say that the scenario in which one exists and suffers in a certain way is better than or at least no worse than the scenario in which one never exists at all. On this view, there would be a disanalogy between arguing ‘no harm done’ in the surgical case and arguing ‘no harm done’ in the reproductive case. It is not clear, however, that the highly technical argument against the cogency of comparisons involving scenarios in which the subject never exists can in fact successfully be made. For a summary of the current debate on that issue, see Roberts 2011. In any case, if it so happens that such comparisons are not cogent, it is simply going to make it more difficult to establish that the particular technology harms its apparent victim. We still, in other words, would seem forced to conclude, in both the surgical case and the reproductive case, ‘no harm done’.
- 4 One risk associated with many reproductive technologies involves multiple pregnancy, which can occur in any case in which the number of embryos transferred to the uterus is not strictly limited or (in the case of drug therapies) fetal reduction is not applied (Robertson 2004b: 10; 2007). The risk associated with ICSI is of a different sort. There, the concern has been that ICSI itself is associated with certain birth defects which in nature occur very rarely (Robertson 2004b: 9–10). Human reproductive cloning, even in the case in which agents take steps to avoid multiple pregnancy, is associated with still another sort of risk. That risk is a main subject of this paper.

- 5 Of course, as just noted, the imposition of harm can be morally, and indeed legally, justified by the fact that the choice to do anything else would have led to a more serious harm being imposed on another person or the same harm being imposed on many other persons. But that just means that the logic that governs at least some of the new reproductive technologies is perfectly routine and not special at all. That is, for purposes of resolving the particular issue, we should do what we usually do when a conflict scenario arises: we should balance the parties' interests and particularly balance the harm we think will be imposed on the particular child by one choice against the harm we think will be imposed on others by another choice. We can predict, however, that it will often be the child's interests that prevail. The cheaper technology – which is itself often the technology that will produce more offspring per procedure – may benefit the child's *parents*, or their *fertility specialist*, in some way. Human reproductive cloning may – for example – insure that one's children are genetically related to oneself. But if doing things in that way is what is worse *for the child*, then my suspicion is that things ought not be done in that way. I will not, however, fully develop that argument here.
- 6 I believe this point holds whether we are talking about Holmes or John Stuart Mill.
- 7 For an account that explains why the harm to p1 that a4 imposes can't be justified by the fact that a1 arguably *does* impose an arguably still *deeper* harm than a4 does on each of p2, p3 and p4 when it leaves those people out of existence altogether – that explains, that is, just why the harm that a4 arguably imposes on p2, p3 and p4 is devoid of moral significance – see the concluding part of this paper.
- 8 This is so whether the cloning procedure uses genetic materials derived from an adult (and presumably consenting) clone source, as in Table 14.1, or instead involves the cloning of a human embryo, itself created using in vitro fertilisation.
- 9 Perhaps the agents would not have been interested in the production of p1 as a singleton. Perhaps they want four – or a hundred, or a thousand – genetically identical individuals or none at all. No matter. Regardless of what they *want*, if the alternative of producing p1 as a singleton is available to the agents just prior to choice, then the agents *harm* p1 when they produce p1 as one of (perhaps many) genetically identical individuals.
- 10 I presented earlier versions of this argument in Roberts 1996, 1998 and 1999. As in the case of human reproductive cloning, the logic of the nonidentity problem also fails in the case of multiple fetal pregnancy. Not *all* of the people developing from the fetuses involved in a multiple fetal pregnancy can exist and not suffer the impairments that are by now clearly associated with pregnancies involving three or more fetuses developing within the same uterus. But *some* of them could. That better-for-some outcome could be achieved in either of two ways: reducing the number of ova fertilized and transferred to begin with or selectively reducing the number of fetuses once the pregnancy is established. Harm is thus easily established (Roberts 2007).
- 11 A similar but not identical puzzle is suggested by McMahan 2006.
- 12 While there is some controversy as to whether such comparisons can cogently be made, it is far from conclusive that they can't. Accordingly, it would be a mistake to try to ground the view that bringing a person into existence as one of (perhaps) many genetically identical individuals is wrong while leaving that same person out of existence altogether may be perfectly permissible on the controversial, and

- highly technical, position that the claim that it is worse for a person never to exist at all is not fully cogent (Roberts 2011).
- 13 Roberts 2011; Roberts 2010.
 - 14 I have elsewhere called this principle *Variabilism* (Roberts 2011; Roberts 2010).
 - 15 Specifically, contemporary moral philosophers are divided regarding what we should say about ‘the Asymmetry’, according to which it would be wrong to bring the miserable child into existence even as it is perfectly permissible to leave the happy child out of existence. See generally Roberts 2011; Roberts 2010.

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