

## PROCREATIVE JUSTICE: A CONTRACTUALIST ACCOUNT

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### I. PROCREATIVE JUSTICE: A DISTRIBUTIVE JUSTICE PROBLEM

Procreative justice is usually approached in a lopsided manner: we tend to focus on either parent's rights or children's rights when we really ought to adjudicate between conflicting parent-child interests. Paternalistic principles, a natural place to seek guidance regarding procreative matters, direct prospective parents to always act in the best interests of their (future) child. This neglects parental interests. Procreative liberty principles, on the other hand, seek to protect parental procreative interests and give only minimal protection to children, usually ruling that parents may procreate so long as they don't impose a risk of unjustified harm on their future children. This neglects children's interests because, although it gives cursory protection to children's interests, parental *promotion* of children's interests is not required, in contradiction with the widespread intuitive belief that parents have paternalistic obligations toward their children.

Surely children have an interest in being born in optimal health, to parents who will provide optimal care for them. Does this mean that parents in sub-optimal situations ought not procreate? This seems unfair to parents who are often stuck in sub-optimal situations due to circumstances beyond their control. Prospective parents may be interested in procreating when they are adolescents, elderly, mentally incompetent, hopelessly impoverished, or share many gravely defective genes. The Taliban regime in Afghanistan made being female a grave disadvantage. Given that children have about a 50% chance of being female, should those people ruled by the Taliban have refrained from procreation? If parents don't bear the procreative burden, their children will.

Our failure to look this parent-child conflict squarely in the eye is probably due to the fact that parents and their children are often natural

allies with many interests in common. Parental sacrifice for children's good is viewed as the norm. Resistance to viewing procreative justice as a distributive conflict of interests between prospective parents and future children is therefore understandable. Understandable, but wrong, because procreative justice is about the morality of *creating* a child, it's not about *raising* a child; therefore, parental sacrifice for existing children is irrelevant. Parental procreative activity that affects their future children is what is at issue. And even many of the parents who are willing to make huge sacrifices for the sake of their desperately ill children may never consider that the most important sacrifice they ought to make is not to create these desperately ill children in the first place.

The procreative conflict demands a principle that will justly allocate procreative benefits and burdens, adjudicate between the conflicting interests, and fairly promote and protect the interests of both parties<sup>1</sup> to the conflict. Rawlsian Contractualism is a principle ideally suited to this task because it's a method specifically formulated to resolve questions of distributive justice.<sup>2</sup> The Rawlsian method of conflict resolution operates on the assumption that if the interested parties to the conflict, motivated by self-interest, and given only the information relevant to the just resolution of their conflict, would agree to resolution *x*, then *x* has "justice as fairness"<sup>3</sup> to recommend it. (Rawls's justice as fairness can be interpreted as justice in the sense of an especially compelling impartiality: if we can show that our principles would have been hypothetically chosen by the parties in the original position, we have reason to believe that these principles are just).

This account of procreative justice is intended to deliberate toward principles of procreative justice that will be action-guiding for individuals seeking to make just procreative decisions.

Let us now turn to some of the more salient objections to attempting a Rawlsian Contractualist account of procreative justice. In part 2, the procreative original position will be constructed; in part 3, some implications of this original position will be discussed; and in part 4, the principles to which deliberation from this original position will lead will be briefly sketched.

*The Non-Identity Problem (NIP)*: Parfit's famous NIP<sup>4</sup> arises from the fact that sperm lead very short lives. Because sperm lead very short lives, our identities depend, in fact, on when we were conceived. Consequently, virtually anything that we do or fail to do will affect the identity of whomever is conceived just by taking time (or not taking time) and thereby affecting which sperm fertilizes the (month's) egg. Therefore, so long as whoever will exist will likely have a life worth living—even by the narrowest of margins—we need not maximize the

quality of life of future persons because they owe their existences to the choices we made, including the very choices that cause them to have a low quality of life.<sup>5</sup> According to the NIP, even parents who go out of their way to deliberately and maliciously conceive a disabled child have not harmed their child since, so long as their child's life is worth living, the child has not been harmed by her parents' procreative activity. The NIP may be taken to indicate that a Contractualist account of procreative justice is on shaky ground because, if the NIP cannot be solved, perhaps we cannot say that anyone with a life worth living is harmed by any procreative act whatsoever.

*Reply:* The NIP poses a problem for any theory of right action that deems an action wrong only if it would make things worse for a determinate person, i.e., any *narrow* person-affecting principle. But, Contractualism is not person-affecting in the narrow sense of "whatever is best for particular person *p*" but, rather, it is person-affecting in the *wide* sense of "whatever is best for people, regardless of particular identities." Wide person-affecting principles are not subject to the NIP. Unlike narrow person-affecting principles, Contractualism doesn't seek the *best* outcome for *particular* individuals; it seeks the set of principles that would result in a *society* that is *justifiable* to each of its members. In order to determine that set of principles, those in the original position consider how people in society with rule *X* fare [how rule *X* affects the "*X* people"] as compared with how people in society with rule *Y* fare [how rule *Y* affects the "*Y* people"]. Contractualists need not claim that negligently conceived children have been *harmed* by their parents' procreative activity. Rather, the claim that negligently conceived children have is that their parents *wronged* them by not abiding by just procreative principles. On this Contractualist view, parents are required to abide by just procreative principles: they "owe" this to their children and children have a right to have been justly procreated; they are entitled to "demand" this from their parents. Because Contractualism is a wide person-affecting principle, it easily avoids making claims of procreative harm to identified individuals who have a life worth living and thus easily avoids the NIP.

*Parfit's Objection:* Parfit considers Rawlsian Contractualism as an alternative account of procreative justice, but he rejects it because, he argues, Rawlsian impartiality cannot be applied to procreative matters since we cannot assume that it might be true, in the actual history of this actual world, that we never exist.<sup>6</sup> He concludes that the Rawlsian method is not impartial when applied to procreative justice unless we imagine something that is impossible to imagine.

*Reply:* The Contractualist need not imagine her own nonexistence in order to impartially apply Contractualism to procreation because the issues of justice in procreation are restricted to birth conditions and procreative liberty,<sup>7</sup> not to issues of justice in existence *per se*, as Parfit seems to think when he says

[t]he principle we choose affects how many people exist. If we assume that we shall certainly exist whatever principle we choose, this is like assuming, when choosing a principle that would disadvantage women, that we shall certainly be men.<sup>8</sup>

Evidently, Parfit is mistaken here, as analysis of his analogy demonstrates: Whereas there are issues of distributive justice between men and women and, therefore, assuming a male perspective will render a Contractualist construct wrongly partial, there are no issues of distributive justice between merely possible people that will exist and merely possible people that won't. Therefore, assuming an existent perspective will not render a Contractualist construct wrongly partial. The reason for this disanalogy is that existence is not a distributable benefit: everyone must have it and no one can lack it. Although there are justice issues involved in being procreated under certain conditions, there are no justice issues involved in not being procreated at all, i.e., in nonexistence, since there are no subjects for such injustices (in either the narrow or wide sense). Neither people in general nor individuals in particular will be disadvantaged by the assumption of an existent perspective. In contrast, women may be disadvantaged by the assumption of a male perspective. Merely possible people are hypothetical entities whose interests are only real if they will become real, i.e., exist, too. Since merely possible people possess neither rights nor interests independent of their existence (if an entity will never exist then there is no subject for any interests of any sort), there is no issue of justice and hence no impartiality requirement, between merely possible people regarding existence *per se*. Existence itself is not the benefit that a Rawlsian procreative justice contract must justly distribute. Paradoxical as it might sound, when it comes to procreative justice, existence *per se* is a red herring. Since all interests are contingent upon existence at some point in time, when seeking to allocate procreative benefits and burdens justly, existence must be assumed; otherwise, there are no subjects for the allocation.

Parfit further argues that even if we assume that we shall certainly exist, we are forced to make counterintuitive choices. For on the assumption that we will exist, we must opt for a hell that contains many more people but forty nine days and twenty three hours of suffering (Hell I) over a hell that has fewer people but fifty days of suffering

(Hell II).<sup>9</sup> But here too, Parfit is not applying the Rawlsian method correctly. Contractualism is directed toward principles, not outcomes. Consequently, it has nothing to say about Hells I and II without information regarding the principles which result in hellish situations. We are selecting procreative principles, not population outcomes. Furthermore, according to wide person-affecting principles, population policy should consider the interests of those who will, in fact, exist under the policies in question. If the fate of children conceived at time  $t$  is to live in Parfit's hell (i.e., a life much worse than nonexistence), be it Hell I, Hell II, or any other Parfitian hell, Contractualism will presumably deem it impermissible to procreate. Alternatively, if we assume that the number of existing people is fixed, and look to Contractualism to choose Hell I or Hell II, obviously we will choose Hell I, the choice that limits the suffering of those in existence.

## II. THE PROCREATIVE ORIGINAL POSITION

The original position is the fair situation from which the parties to the hypothetical contract deliberate and choose principles of procreative justice (PPJ). The construction of the original position includes four basic elements: the nature of the parties, the veil of ignorance, the conception of the good, and the decision principle. Each element will have to be changed significantly from Rawls's original position in order to justly and aptly reflect the procreative situation.

*The Nature of the Parties:* As argued, merely possible people do not have interests independent of their existence, so we need concern ourselves only with future actual people.<sup>10</sup> Thus, the people whose interests must be considered are those who would exist, were the PPJ in force. Therefore, the parties in the original position assume the perspective of Hypothetical Future Participants (HFP), defined as: Members of the set of people who would exist, on the hypothesis that the PPJ being evaluated were in force, and members of the set of people who would be subject, as prospective parents, to such policies. This may seem circular at first glance—how can we assume the class of future people in order to determine who the class of future people will include? But, we are not determining *who* will exist; we are formulating *principles* which will dictate the *conditions* under which procreation is permissible. The HFP are not those who will exist in the future; they are hypothetical parties who assume the hypothetical perspective of those who would exist in the society governed by the PPJ under consideration. The HFP assume, hypothetically, that they will be procreated in accordance with PPJ and that they will have to procreate in accordance with the same

PPJ. Then, from behind a veil of ignorance which conceals identifying information, they select the PPJ that will best serve their interests, i.e., the PPJ under which the hypothetical society that would exist under those principles is best off, as compared with the people that would exist in societies governed by alternative PPJ. The veil of ignorance in the procreative contract results in indeterminate identity, not indeterminate existential status; the job of the HFP is to imaginatively project what life would be like under different PPJ, not to predict or determine future population. Existence is not *determined* by this process; it is (correctly, as argued) *assumed* by this process.

Interpersonal vs. intrapersonal conflict: The simplest way to represent the conflicting interests of the HFP is to posit prospective parents and future children in the original position and place them behind a veil of ignorance concealing which party is a prospective parent, which a future child. This is consistent with a Rawlsian framework: we posit conflicting interests as parties in the original position, veil knowledge of which party will end up living with which interests, and thereby ensure impartial deliberation. But, this construction distorts procreative deliberation: First, it biases deliberation against children because, whereas children usually become prospective parents, prospective parents do not become children. If there's a conflict of interests between *X* and *Y*, and *X* will usually become a member of *Y*, then either the conflict will be resolved in favor of *Y* or there seems to be no ultimate conflict of interests at all. But each prospective parent does indeed have interests that conflict with her own future children and vice-versa. Thus, we see that a straightforward construction of the original position biases deliberation. Second, if we attempt to correct our first difficulty by veiling the fact that children normally grow into prospective parents, the HFP will be motivated to set PPJ that are unjustifiably restrictive to parents and to neglect children's interests as well, due to this ignorance: PPJ unjustifiably restrictive to parents will be chosen because the gravity of correctable or outgrowable childhood harms (e.g., night terrors, fused fingers) will be exaggerated by a perspective arbitrarily cut off in early childhood; children's interests will be neglected because unpleasant childhood experiences that are necessary to development (e.g., teething, weaning) will be deemed undesirable unless one is aware of the natural course of human growth.

It is simpler and more fair to employ an *intrapersonal* conflict construction in which the HFP assume the perspective of future people who know that they will begin life as children and grow, in the normal course, into prospective parents. The HFP will thus represent their own individual interests over a lifetime and they will adjudicate between their

own interests at different stages of life, allocating procreative benefits and burdens in the most prudentially advantageous way for themselves throughout their lives (by deciding under which procreative principles they would choose both to be born and to procreate). Rawls's *interpersonal* conflict construction of the original position is intended to reflect the separateness of persons, a fact which grounds the view that it is wrong to justify burdens to some by benefits to others. In a Rawlsian contract, one will occupy only one social position and, as such, the claims of the sharecropper are not fully addressed by the benefits that her burdens accord the landowner. Procreation differs from social institutions in that we will each occupy each position to the conflict (children grow into prospective parents) and this justifies the move from the interpersonal to the intrapersonal. Because the parties to the procreative contract will occupy both positions to the contract (at different stages of life), trade-offs between the parties are permitted since everyone will be equally affected.<sup>11</sup>

*The Veil of Ignorance:* The veil of ignorance is the metaphorical blinders placed on those in the original position to conceal information that may bias deliberation. For example, Rawls veils probability information, i.e., information regarding the likelihood of various outcomes. But, for the procreative contract, knowledge of probabilities is crucial. When making procreative decisions, the chance procreative act *P* has of resulting in harms *q*, *r*, *s*, *t*, etc., is most relevant. The PPJ must accord with the fact that justice in matters of risk depends, at least to some degree, on the probabilities constitutive of particular risks. After all, *all* procreative acts risk grave harm, it's the *probability* of the risk that varies. Furthermore, without knowledge of probabilities, it becomes difficult to ascertain the nature and severity of some disadvantages because sometimes the incidence of a feature determines its impact, e.g., if half the human population were confined to wheelchairs, being wheelchair bound would be less problematic than it is now because it's likely that most buildings would be wheelchair accessible. For the procreative contract, veiling probabilities will render the HFP not impartial but blind. The HFP must deliberate with all available procreative probability information (e.g., the probability of being born deaf or of a deaf person conceiving a deaf child, the percentage of people who are genetically predisposed to depression, cancer, etc.). Not only is this the only way to meaningfully represent procreation in the original position, it is also a theoretical advantage because veiling probabilities is widely suspected of illegitimately building an anti-Utilitarian bias into Rawls's theory of justice. By keeping probability information in full view, the procreative contract is less susceptible to charges of question begging.

With probabilities in full view, we may consider individual, societal, and species information. Obviously, individual information must be veiled to ensure unbiased deliberation, e.g., if an HFP knows that she'll be infertile, she'll be motivated to set an extremely high standard of procreative care since she won't be restricted by that standard herself. Just as no HFP may know who she will be, she cannot know into which society she will be born. However, the HFP must know the nature and degree of the variation of societal norms, customs, and attitudes. Knowledge of societal parameters is necessary in order to ensure that the HFP select principles that are applicable across cultures and sensitive to cultural difference, e.g., dyslexia is a lesser disadvantage in an agrarian society than it is in a literate one. Societal information also serves to focus deliberation on the facts as they are, not as they might be in a more perfect world where societies did everything possible to mitigate their members' disadvantages. Since the PPJ are intended to apply to the real world, that is the world, warts and all, that the HFP must consider. Species information, i.e., knowledge of what is normal, optimal, advantageous, and disadvantageous for members of the human species, must be known as well. Thus, the HFP will know that it is normal (for humans) to see, optimal to have acute vision, disadvantageous to be myopic, and far more disadvantageous to be blind. The HFP need to know about the normal human physical, mental, and emotional capacities and needs so that they can appreciate and assess the nature and extent of the disadvantages posed by conditions like mental retardation, blindness, paralysis, Down Syndrome, failure to thrive, etc.; in order to understand human developmental needs like adequate nutrition, attention, etc.; and in order to confine deliberation to conditions of just human procreation rather than to comparisons between human life and some other kind of existence (we are trying to address claims in the "I'd rather have been born to an adult mother" category, not claims in the "I'd rather be a hammer than a nail" category<sup>12</sup>).

*The Conception of the Good:* In order to make comparative assessments of PPJ, the HFP need to refer to a conception of the good that's pluralistic enough to account for their ignorance of individual identity information, yet specific enough to structure a (rough) ranking of goods so that trade-offs can be evaluated. The parties in Rawls's original position are concerned with only "primary goods,"<sup>13</sup> i.e., those goods which are necessary for the satisfaction of *all* rational life plans,<sup>14</sup> which makes sense for parties ignorant of their own personal life plan. But, in the procreative contract, part of what is being distributed is the capacity to have more goods be useful to one's rational life plan, thereby providing one a greater choice set of rational life plans from which to choose.



Food, for example, is necessary for all rational life plans but access to sports equipment isn't, since many rational life plans can proceed unimpeded in its absence. Yet sports equipment is required for the rational life plan of a sports player, so a person with access to sports equipment (or a piano, a garden, etc.) has a greater choice set of rational life plans than a person without these non-primary goods. Rawls's theory of the good is too narrow to allow for this central aspect of procreative good and not robust enough to provide the HFP with a way to rank goods.

A Utilitarian preference-satisfaction conception of the good is pluralistic but, in the absence of individual identity information, the HFP will not know what will satisfy their preferences. A preference-satisfaction conception of the good is problematic in any case because preferences are shaped by culture, experience, expectation, and personality to the point where they are often unreliable indicators of the good,<sup>15</sup> e.g., the preference for second-class status that is not uncommonly espoused by women in sexist societies. An Ideal Utilitarian conception of the good defines the good as the satisfaction of rational preferences but, as with Rawls's theory of the good, since the HFP are ignorant of individual identity information and have an interest in having a large choice set of rational life plans, they must look to what is rationally *preferable* (as opposed to rationally *required*) for *all*. We need an objective conception of the good which delineates the class of goods that are rationally *preferable for all humans*, no matter which human one may be.

A capability conception of the good, which defines the good in terms of opportunity to achieve a human functioning,<sup>16</sup> will meet our criteria—it will provide the HFP with a specific, objective, and comprehensive conception of the good while preserving pluralism. The capability conception is grounded in Aristotelian virtue ethics, wherein the question one asks about the good is not, "How much does one have?" but, "What is one able to do and be?"<sup>17</sup> E.g., it is good for humans to have the capability to feel pleasure or to have rich, rewarding social interactions (i.e., to be capable of functioning in these human ways). This conception of the good is most appropriate for procreative justice because parental obligation is to their children's capabilities, not to their children's autonomous choices. Nussbaum delineates human capabilities, divided into two levels: Level 1 includes that which is basic to living a recognizably human life, i.e., subsistence living; level 2 includes capabilities which enable human flourishing.<sup>18</sup> <sup>19</sup> Special prominence is given to the capabilities for agency<sup>20</sup> and social affiliation since these functionings organize and arrange the others.<sup>21</sup> This is consistent with Rawls's emphasis on autonomy and the social basis of self-respect.<sup>22</sup> The two levels and the prominence given to the agency

and social affiliation capabilities enable us to roughly rank goods for trade-off purposes.

Some might take issue with the priority that Nussbaum, along with Rawls and most liberal theorists of the good, gives to agency, individualism, separateness, and self-determination, as opposed to communalism or some views regarding the "greater good." A Contractualist argument in favor of individualism is that it is the less restrictive alternative, always the more prudent choice if one could be anybody. Individualism in no way precludes affiliation, strong social and communal bonds, even martyrdom, so long as these associations are freely chosen or would be reflectively endorsed. The difference between choosing communal values and having them chosen for you is as big and important as the difference between voluntarily joining a kibbutz and being forced into one of Lenin's collective farms or the difference between being a martyr and a sacrifice. If people can choose to be martyrs or to form very strong communal bonds then there seems no reason to force them to unless they would not make this choice on their own. But, if they wouldn't make the communal choice on their own then the communal choice does not serve individuals well. And we are all individuals, even though we are social ones. Since individualism does not preclude joining a commune but communalism precludes individualism, individualism is the more inclusive choice. If one is ignorant about which type of person one will be, it is only prudent to choose the more inclusive option.

Because the capability conception of the good, especially as specified by Nussbaum, delineates procreative goods, is applicable to all regardless of identity, and enables a rough ranking of procreative goods, it is the conception of the good that the HFP should have.

*The Decision Principle:* Charged with deciding upon the allocation of procreative benefits and burdens over the course of their lifetimes, the HFP will be guided by a principle of self-interested prudential reasoning, a principle directing them to choose PPJ that will make their lives go better rather than worse.

Rawls assigns those in his original position the Maxi-Min decision principle which directs them to maximize minimum returns (the best-worst option). This is an appropriate principle for deliberators in the dark about their chances; the parties in Rawls's original position don't know the percentage of people in the worst-off class and are therefore motivated toward this risk-averse principle. But, because the deliberators in the procreative original position have all available probability information, they won't be motivated toward Maxi-Min since they know that the worst-case scenario is rare. Procreative deliberation guided by Maxi-Min would lead to a procreative ban since no procreation is better

than being born with an incurable disease that makes life not worth living, and any conception proceeds under that risk. But a procreative ban is unlikely to serve the HFP's interests (again, because worst-case cases are rare).

Given knowledge of probabilities, many argue that Maximizing Average Utility (MaxAvU), wherein utility is usually equated with preference satisfaction, is the most rational decision principle.<sup>23</sup> However, because the good ought not be equated with preference satisfaction (see above), we cannot use MaxAvU as our decision principle.

Another reason to reject MaxAvU is that it fails to protect self-respect. MaxAvU would direct the HFP toward decisions inconsistent with self-respect by allowing trade-offs that treat some persons purely instrumentally, as mere means for the good of others rather than as separate selves in their own right, so long as gains elsewhere in the collective outweigh the individual loss. MaxAvU might allow for (or even require) the procreation of organ donors, persons procreated for the sole purpose of organ harvesting.<sup>24</sup> It is imprudent to risk being one of these "sacrifice children" because, even though one is more likely to be "benefited" than burdened by this procreative principle, it puts one's self-respect at grave risk. Any principle that allows the treatment of persons as sacrifices treats persons as *expendable parts* of a collective rather than as *selves*—as *whole beings* deserving respect in their own right. Being treated as a "self" is vital to self-respect because, as the term "self-respect" implies, in order to have self-respect, one must first have a sense of self to respect. It will be difficult to develop and maintain a sense of self secure enough to serve as a basis for self-respect if one is not treated as a separate self.<sup>25</sup> The HFP will not be motivated to risk self-respect at any stage of life in exchange for some other good because self-respect is a special, pervasive, fundamental, and incompensable human good since it is the basis for valuing one's well-being. We value our well-being because we value our personhood—we have self-respect—and not vice-versa,<sup>26</sup> if you don't value yourself, your own good is also of no value to you. Therefore, losing self-respect is tantamount to total loss; never worthwhile. Because it is irrational to barter self-respect, self-respect places restrictions on how persons may be treated; restrictions violated by MaxAvU. Hence, MaxAvU cannot be our decision principle.

Utilitarians might argue that being treated as a mere means is a threat to self-respect only if one has, in the first place, the moral view that persons have intrinsic and separate worth which bars their treatment as mere means.<sup>27</sup> They could argue that it is the highly individualistic moral conception of a person which informs the anti-Utilitarian conception of

self-respect. And it's true that moral notions of how others ought to treat you inform your conception of self-respect. However, there is nothing particularly moral about recognizing that self-respect can occur only where there is a self to respect. Yet, if you can be treated as a sacrifice then you are not regarded as a "self" at all; you are regarded as an expendable part of some other whole. Therefore, being treated as a mere means is a critical threat to self-respect regardless of your specific moral view about how others ought to treat you. And, because self-respect is fundamental to one's value of oneself and one's own well-being, it is utterly incompensable. Therefore, it is imprudent to risk self-respect. Thus, the way in which self-respect prohibits treatment of persons as mere means is grounded prudentially.

We may instead opt for Maximizing Capability (MaxC) as the procreative decision principle. This differs from a Utilitarian decision principle in that special status is granted to self-respect. Protection for self-respect is built into our conception of the good via the prominence Nussbaum's list accords agency (because basic self-respect is required for agency since one must value oneself in order to be an effective agent) and the value it places on "strong separateness."<sup>28</sup> MaxC thus imposes a special constraint against bartering basic self-respect.<sup>29</sup>

In keeping with classic prudential reasoning theory, the HFP will give equal consideration to all times of life.<sup>30</sup> In order to sacrifice good in one time period for good in another, there must be some reasonable reason for doing so, like the effect one time period has on others, the enjoyment of anticipation, the value of hope, or trading a lesser good in one time period for a greater good in another.

### III. REASONING FROM THE ORIGINAL POSITION

Whichever specific PPJ the HFP arrive at, deliberation from the procreative original position outlined above will involve thinking about procreative matters in interesting and sometimes unusual ways.

*Are All Children Equally Valuable?* We have long been conditioned to think that all children are equally valuable to their parents. That's how parents try to view their children and how they encourage their children to view themselves. Of course, parents should love each of their children wholly, unconditionally, and value each child for who she is. Yet, the first-born enhances parental capability in a way that no subsequent child can; in fact, with each child, parental procreative interest decreases. Analysis of HFP deliberation shows this to be true: In attempting to maximize their capability level, the HFP will be deciding upon trade-offs between their interests, as children, in optimal capability

levels and their interests, as adults, in procreation. In order to assess these trade-offs, they will have to analyze how different degrees of procreative restriction affect their lives so that they can decide what sort of procreative restrictions are worth accepting as adults in exchange for protection, as children, from certain types or degrees of procreative risks (i.e., risks to capability level entailed by many birth conditions).

When analyzing the cost of various degrees of procreative restriction, it becomes clear that one's first child affects one's capability level in a way that no subsequent child can because, whereas total procreative restriction can steeply affect an adult's capability level in many deep and pervasive ways, restrictions regarding the number of *additional* children one may have don't have nearly the same impact. Not procreating at all inflicts the biological loss of the procreative experience; requires restraining the biological instinct toward perpetuation of one's genes via reproduction; exacts the emotional loss of one of life's deepest, most joyous, and most fulfilling kinds of nurturing roles and social affiliation; often leads to a feeling of alienation from one's social set—especially if others have exercised their procreative capabilities—that lasts a lifetime (you can't be a soccer Mom or Dad, you have no place in parental associations, you're left out of discussions about parenting, you may feel left out at social functions involving parents and children, you don't have a picture of your child on your desk, you have no grandchildren . . .); may cause a real or perceived loss of social status; may remove an avenue of spiritual expression; and may deprive one of a means of combating existential angst or attaining a feeling of immortality. Not procreating at all takes a sharp, deep bite out of one's capability to achieve a life of human flourishing; it has pervasive, serious level 2 impact. Refraining from procreating a second child has a qualitatively smaller impact on parental capability. Sure, many people have good reasons for wanting to procreate more than once<sup>31</sup>: some enjoy the procreative experience so much that they want more of that experience; some think of a "family" as parents and a few children. But the experience and life structuring feature of parenthood is acquired with one child; therefore, parental interest in procreation decreases dramatically and *qualitatively* after the birth of one child and grows progressively weaker with each additional child.

*The Adoption Option:* When adoption is a viable option, the HFP will increase parental procreative restriction because the cost of not procreating biologically dramatically decreases if one can adopt. Those who must adopt rather than procreate biologically may lead lives identical to those who are biological parents, except that they have sustained a significant biological (and possibly an existential or spiritual) loss.

This is most relevant to prospective parents whose prospective future children risk biological rather than social disadvantages; if they can adopt rather than procreate biologically, their procreative restriction will increase accordingly (depending on the nature, degree, and probability of the procreative biological disadvantage posed to their prospective future children).

*Playing the Numbers Game:* It may seem like knowledge of probabilities might skew deliberation by allowing the HFP to bet against rare conditions.<sup>32</sup> They might reason, say, that because it's unlikely that they will be slaves, if they bar procreation among slaves, they will guarantee that they won't be born into slavery in exchange for a tiny risk of being prohibited from procreating if they, as prospective parents, are slaves. But, while it's unlikely that they will be slaves, it is correspondingly unlikely that they will risk being born into slavery, so that set of probabilities cancels each other out, leaving the HFP with a difficult and realistic trade-off to adjudicate: is it prudent to restrict procreation among prospective parents whose children will be born into slavery, given that one has a roughly equal chance of being either the prospective parent whose future child is at such risk or the prospective future child at such risk? This probability issue might seem to arise as well in cases of autosomal recessive genetic diseases, e.g., Tay-Sachs, where the risk of being a carrier is far greater than the risk of being born with the disease. However, in these cases, since having the disease is a more serious burden than is refraining from procreating (if one is a carrier partnered with another carrier), the fact that one is less likely to suffer than to carry the genes for the disease does not prejudice deliberation. In cases where the disease is no worse than procreative restriction, procreation will presumably be permitted but, here too, knowledge of procreative probabilities informs rather than distorts deliberation.

*Darwinian "Cures":* Because the HFP know that they will be born in accordance with PPJ that they select, what is to prevent them from reasoning that they might as well bar carriers of, say, Huntington's disease from procreating? This will guarantee that *they* will neither carry nor suffer from Huntington's disease. Win-win, and Huntington's will be eradicated in the bargain (a Darwinian cure). But, what about people who *are* carriers of Huntington's? They seem to lack representation in the original position. It looks like the assumption that the HFP will be born into PPJ that they select may prejudice deliberation against all prospective parents whose prospective future children risk disadvantages that could be eradicated via selective procreation. Let us call these disadvantages Darwinian disadvantages.

It looks like we have a malfunction of the original position because those who will actually suffer the consequences of barring procreation among carriers of Darwinian disadvantages seem not to be represented in the original position. But, the seeming malfunction can be repaired in a Contractualist manner by noting that since new methods of diagnosis, detection, and prediction of Darwinian disadvantages are likely to surface during the HFP's lifetimes, it is prudent for them to guard against Darwinian PPJ by assuming probabilities that correspond to the actual generation during which the hypothetical deliberation ensues and ignoring the possibility of Darwinian cures. Darwinian cures may also have societal implications that the HFP will not want to endure. Because new Darwinian cures may arise during the HFP's lifetimes and may have negative effects on their societies, carriers of Darwinian disadvantages are represented in this way in the original position. This doesn't necessarily mean that the HFP won't bar procreation by Huntington's carriers, it just means that they will not be able to do so at no cost to themselves (via Darwinian cure reasoning).

*Abortion versus Procreation:* The ethics of procreating a child are distinct from ethical questions regarding abortion. Once a child has been conceived, the procreative issue is moot and a different perspective is required. This can be illustrated by conditions which limit capability level but do so to the point where the affected person is not capable of experiencing her limitation or deprivation. Say a conception puts a future child at high risk of mental retardation so severe that the child will be incapable of perceiving her disadvantage and may actually enjoy her limited life, blissfully ignorant of how limited she is. From the *ex ante* procreative perspective (before conception), being disadvantaged in this way would likely be a strong reason to require the prospective parents to refrain from procreating (since not procreating diminishes parental capability far less than severe mental retardation diminishes child capability). The HFP would be motivated to protect themselves, as future children, from a high risk of such a gravely limited life, a life far more limited than the childless life they might thereby risk as prospective parents facing this procreative situation. From the *ex ante* procreative perspective, being deprived to the point where you cannot even experience your deprivation does not diminish the deprivation. But, the *ex post* (after conception) perspective, the perspective from which we consider abortion, differs; the degree to which an existing fetus will experience her disadvantages may well impact our view regarding whether we ought to or can permissibly abort. E.g., when deciding whether to abort a Down's fetus, we may take into account the fact that most people with Down's don't seem to experience their

deprivation. While the *ex ante* perspective directs us to avoid disadvantage, the *ex post* perspective directs us to make the best of what we have; hence, we ought to avoid procreating a gravely disabled child but do our best to enable disabled people to lead rich and rewarding lives. The Contractualist approach to procreative justice gives us an account of why these two perspectives differ: *Ex ante*, all future children are (by definition) guaranteed existence but have indeterminate identities; therefore, each future person has an interest in an identity that is fully capable of flourishing in all possible human ways. *Ex post*, all actual children have determinate identities and therefore each actual child has an interest in exercising the capabilities she actually has. This doesn't shed light on the abortion dilemma or on whether or when fetuses attain personhood, but it does explain some differences regarding our perspectives on procreation and abortion.

#### IV. THE PRINCIPLES OF PROCREATIVE JUSTICE

The PPJ that the HFP would likely select, when they deliberate from the procreative original position outlined above, will now be briefly outlined.

*The Obvious Principle:* The Obvious Principle prohibits procreation that undermines the interests of both prospective parents and prospective children, e.g., adolescent procreation. It also prohibits procreation that obviously risks or sustains a major burden for the sake of a minor benefit, e.g., procreating while on temporary medication that will put any child conceived during that time at high risk of severe brain damage. The HFP would be motivated to choose the Obvious Principle because it protects them from obviously imprudent trade-offs.

*The Balance Principle:* The Balance Principle permits procreation only when it would not be irrational<sup>33</sup> for the prospective parent to accept for herself the very same risk her procreation imposes on her prospective children, in exchange for permission to procreate under these conditions. Prospective parents' interests in procreation are balanced against prospective children's interests in a life as fully capable as possible of human flourishing. In order to apply the Balance Principle, the HFP will assess the impact of varying degrees of procreative restriction—e.g., no procreation at all, no biological procreation, timing restrictions, restrictions regarding the number of children—and then deliberate regarding which type and degree of capability risk to future children would justify which sort of procreative restriction to prospective parents. In each case they will ask themselves, "Would it be rational for me to accept procreative risk  $x$ <sup>34</sup> as a future child in exchange for



the liberty to procreate as a prospective parent whose prospective future child faces procreative risk  $x$ ?" The Balance Principle dictates that, as parental procreative interest decreases, procreative restriction increases because children's interests exert a greater pull on a lesser parental interest. Thus, the PPJ will likely, barring special circumstances, never permit procreating one's tenth child since parental interest in having ten rather than nine children is hardly significant and therefore too weak to offset the significant risk of significant disadvantages that even the lowest risk prospective child inevitably faces as a part of the human condition.

*The Motivation Restriction:* The Motivation Restriction requires that procreation be at least partially, yet still prominently, motivated by a desire to raise, nurture, love, and care for one's child once it is born. Procreation that is wholly otherwise motivated—e.g., procreating for the sole purpose of generating help on the farm—threatens the future child's self-respect because it fails to treat the child as a separate self, entitled to love and consideration in her own right. To treat one's child as a separate person in her own right is to love, care for, and nurture the child intrinsically, for herself, and not merely derivatively, through love or care for oneself. Parents who fail to view their child as a separate self make it very difficult for their child to develop a healthy, robust sense of self, without which one cannot have self-respect because there is insufficient "self" to respect. The HFP will be motivated to adopt this restriction because it protects them from wholesale disregard for their self-respect, a special good which is not worth trading for some other good. The Motivation Restriction provides an important protection for a special good without exacting much in return, therefore the HFP have much reason to favor it and virtually no reason to oppose it.

## V. CONCLUSION

Once we recognize that the requirements of procreative justice can best be ascertained by acknowledging the parent-child conflict present in virtually all procreative cases, we are able to adjudicate this conflict via the principle of intergenerational reciprocity, as expressed by the Contractualist framework. We are then able to derive principles that equitably address the interests of both prospective parents and future children, which is what a theory of procreative justice ought to do.<sup>35</sup>

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## ENDNOTES

1. Procreative justice affects third-party interests as well, i.e., people who are neither the prospective parents nor the future children but who will nevertheless be affected by the procreative decision or act. Discussion here is confined to issues of procreative justice between the direct parties, i.e., the prospective parents and their prospective future child.

2. There are other methods of resolving distributive conflicts of interest, e.g., Utilitarianism (this point was raised by Stephen Darwall). However, Rawlsian Contractualism allows its impartial deliberators to choose Utilitarian principles or any other principles, so long as the principles are the outcome of unbiased rational deliberation. Thus, the Rawlsian method of resolving distributive conflicts of interest is intended to account for competing theories of justice.

3. Rawls, John, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), p. 11.

4. Parfit, Derek, *Reasons and Persons* (New York: Oxford University Press, 1984), pp. 351–363.

5. *Ibid.*, p. 363.

6. *Ibid.*, pp. 392–393.

7. The liberty referred to here is moral, not political, and positive (i.e., the freedom to engage in procreation).

8. Parfit, *Reasons and Persons*, p. 392.

9. *Ibid.*, p. 393.

10. If we mistakenly do treat merely possible people as if they have interests to be impartially considered, as a matter of justice, we become hopelessly ensnared in a bizarre dilemma: If we posit possible people in the original position and give them no interest in existence *per se*, then it will make sense for them to set a standard of procreative care well out of any parent's reach. After all, if they have no interest in existence, then why exist unless a Utopian existence is guaranteed? But, if we posit possible people in the original position and give them an interest in existence *per se*, then nonexistence may become an injustice (at least in some cases), even though there is no subject for such an injustice and/or possible people may accept much harm in order to obtain the benefit of existence, so long as their existence provides them with a life worth living (the NIP rises again).

11. Prudential allocation between age groups may be viewed as prudential allocation through the stages of *one person's* life and not as trade-offs *between persons*. Norman Daniels, *Am I My Parents' Keeper? An Essay on Justice Between the Young and the Old* (New York: Oxford University Press, 1998), p. 53.

12. However, the HFP are free to decide that human species conditions are bad enough to render all human procreation unjust. This judgment requires an exception to the direct representation of the HFP in the original position because, if the HFP choose PPJ which ban all procreation, then they won't exist,

so how will they be able to make this judgment? In order to assess whether procreation is always impermissible, the HFP must be represented by agents who choose for them. If the human condition is such that it is always irrational to prefer to exist, even at the risk of living under a procreative ban should one exist, then the HFP's agents will choose PPJ that ban procreation entirely.

13. Rawls, *A Theory of Justice*, p. 95.

14. *Ibid.*

15. Hare, R. M., "Rawls's Theory of Justice," in *Reading Rawls*, ed. Norman Daniels (Stanford, Calif.: Stanford University Press, 1989), p. 147. Sen, Amartya, *Commodities and Capabilities* (New York: Oxford University Press, 1985), p. 21. Nussbaum, Martha, "Human Capabilities, Female Human Beings," in *Women, Culture, and Development*, ed. Jonathan Glover and Martha Nussbaum (New York: Oxford University Press, 1995), pp. 91–92. Sunstein, Cass, "Preferences and Politics," *Philosophy and Public Affairs*, vol. 20 (1991), p. 21.

16. Nussbaum, Martha, "Human Capabilities, Female Human Beings," in *Women, Culture, and Development*, ed. Glover and Nussbaum (New York: Oxford University Press, 1995), pp. 76–85.

17. Nussbaum, Martha, "Aristotelian Social Democracy," in *Liberalism and the Good*, ed. R. Bruce Douglass, Gerald M. Mara, and Henry S. Richardson (New York: Routledge, 1990), p. 211.

18. The objective capability conception of the good, as delineated by Nussbaum, leaves some people astounded to find an actual *list* of what is good for *all* people. Yet, this sort of reaction betrays a misplaced relativistic reluctance to recognize that, for all their differences, people still have much in common, particularly at the *capability* level. Nussbaum's list is based on what people have in common, what is good for people as such, yet it leaves much room for personal variation, hence Nussbaum's description of her list as a "thick-vague" ("Aristotelian Social Democracy," in *Liberalism and the Good*, ed. Douglass, Mara, and Richardson, p. 218) conception of the good. Her account is reasonably pluralistic, allowing for cultural and personal difference within the limits of reality and reason. Cultural and personal difference, and the requisite respect for pluralism they demand, may mean that being sufficiently educated entails very different things in different societies but it doesn't mean that ignorance contributes to human flourishing. Being educated can mean a college degree in an industrialized Western society or it can mean being well versed in the oral traditions and agricultural skills of a culture isolated deep in the Amazon rain forest. But, in either case, being educated contributes to human flourishing.

19. Nussbaum, Martha, "Human Capabilities, Female Human Beings," in *Women, Culture, and Development*, ed. Glover and Nussbaum, pp. 81–83.

20. Nussbaum's "practical reasoning" ("Aristotelian Social Democracy," in *Liberalism and the Good*, ed. Douglass, Mara, and Richardson, p. 226) capability is her articulation of agency.

21. Nussbaum, Martha, "Aristotelian Social Democracy," in *Liberalism and the Good*, ed. Douglass, Mara, and Richardson, p. 226.

22. Rawls, *A Theory of Justice*, p. 440.

23. For arguments against this view, see Rawls, *A Theory of Justice*, pp. 165–182.

24. The reference here is to uncontroversial persons: to babies, children, or adults, not to embryos or fetuses.

25. Self-respect based on one's role in one's community is consistent with self-respect only if this role has been freely chosen or would be reflectively endorsed. Otherwise, one is left with too weak a "self" to have true self-respect.

26. Anderson, Elizabeth, *Value in Ethics and Economics* (Cambridge, Mass.: Harvard University Press, 1993), pp. 59–60.

27. This objection was raised by Elizabeth Anderson.

28. Nussbaum, Martha, "Human Capabilities, Female Human Beings," in *Women, Culture, and Development*, ed. Glover and Nussbaum, p. 81.

29. Whether self-respect is a matter of degree or an all-or-nothing affair is not addressed here. What is argued, however, is that without a reasonably robust sense of self, one will lack a sufficient basis for any meaningful sense of self-respect at all. It is this capacity for self-respect that MaxC protects. Protecting basic self-respect entails enabling persons to develop and retain a robust sense of self which, in turn, requires the treatment of persons as separate selves, worthy in and of themselves, apart from their worth to collectives.

30. Parfit challenges the equal time consideration aspect of classic prudential reasoning, claiming that it may not be irrational to care more about the present than the future (*Reasons and Persons*, New York: Oxford University Press, 1984; p. 145) and that it cannot be irrational to care most about the present:

The requirement of temporal neutrality may seem least plausible when applied to the bias toward the present. How can it be irrational to mind my agony more while I am suffering the agony? (Parfit, Derek, *Reasons and Persons*, p. 179.)

It seems that Parfit's challenge turns on his equivocation between two kinds of concern. We can be concerned about something in an emotional sense of caring, in the sense of feeling care or interest and we can care about something in a value sense, in the sense of deeming it a value to be rationally considered. Thus, while we will of course care more about our agony, in an emotional sense, while we are suffering it (after all, that is part of what agony entails, it entails psychological engagement), we will not care about it more, in the value sense, while we are suffering it. We will not *value* our pain more while we are suffering it, even though we will *care* about it more *emotionally* while we are suffering it. Therefore, if we will suffer the exact amount of pain today and tomorrow (adjusting for the pain of anticipation), we will *value* both pains equally—we will deem both pains equally worthy of our equal rational consideration—even though we are likely to *care emotionally*—about each one most while we are suffering it. While at the dentist, we will *care* more, emotionally, about the

greater short-term pain of the dentist than we do about the lesser, but much longer-term, pain of the toothache. However, because we *value* all times of life equally, we will *value* the greater short term pain of the dentist less than the lesser but much longer term pain of the toothache. That's why you may find us in dentists' chairs, bristling with emotional *care* about our present pain but remaining seated, voluntarily opening our mouths as wide as we can, because we don't grant the present pain any more *value* in our rational decision making merely because it is in the present. Thus, while it's not irrational to *mind*—to emotionally care—about one's agony more while one is suffering the agony, it is irrational to *value*—to grant greater consideration and worth—to one's agony merely because one is suffering it now.

31. Having a second child to provide a companion for the first child is a third-party reason, excluded here, and not a strictly parental interest.

32. This objection was raised by David Velleman.

33. The term "not irrational" is used rather than "rational" so that the Balance Principle includes the many rational approaches to risk, excluding only those choices that are irrational.

34. Procreative risks involve some degree of probability of lacking some capability, i.e., a risk with probability  $p$  of not being capable of capability  $q$ .

35. I am indebted to Elizabeth Anderson, Stephen Darwall, David Hills, Derek Parfit, and David Velleman for their generous and insightful comments.

