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Whose Problem Is Non-Identity?

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Abstract

Teleological theories of reason and value, which take reasons to be reasons to realize “best” states of affairs, cannot account for the intuition that victims in non-identity cases have been wronged. Deontological accounts, however, recognize second-personal reasons, reflective of the moral significance of each person regardless of outcomes. We argue that such deontological accounts are better positioned to identify the wrong to victims in non-identity cases because a person wrongs another on such accounts if she violates his second-personal claims. Parfit argues that non-identity victims would consent to the acts in question, thereby waiving any such second-personal claims. But his arguments misrepresent the role of consent by articulating it through appeal to the very teleological theory of reasons that deontologists reject. We argue that Parfit’s conception of consent as retroactive endorsement only determines whether, given that the non-identity victim is second-personally wronged, he is nonetheless better off existing. It becomes clear that non-identity poses a problem for teleology – it cannot account for the intuition that non-identity victims have been wronged – but deontology can.

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Keywords

non-identity – future people – consent – second-personal – wrongdoing – harming

For those who adopt traditional teleological theories of reason and value, upon which all reasons are fundamentally reasons to realize states of affairs that are either better or worse overall or better or worse for some particular person,¹ the infamous non-identity problem² presents a serious challenge. They can account in many³ cases for the intuition that non-identity perpetrators – those who seemingly wrong future people in non-identity cases – have acted wrongly, because the resulting states of affairs in such cases are often worse overall. But they are hard pressed to account for the intuition that the apparent victims in such cases have been wronged by the perpetrators of non-identity actions, because the resulting states of affairs are not worse for such victims; indeed, they often appear to be better off than they would have been had the perpetrators not acted. Many philosophers, however, reject such a traditional teleological theory of value in favor of alternatives that recognize reasons and claims which we will characterize, following Stephen Darwall, as second-personal reasons and claims.⁴ Such second-personal reasons reflect a moral significance

1 For characterizations of such teleological theories of reason and value, see Scanlon, *What We Owe to Each Other* (Boston: Harvard University Press, 2000), pp. 79–87, and Stephen Darwall, *The Second-Person Standpoint* (Boston: Harvard University Press, 2009), pp. 6 and 127–129. Non-identity is an equally intractable problem for those who recognize only traditional teleological reasons as relevant in non-identity cases, whether or not they endorse theories of reasons upon which all reasons are fundamentally teleological. Note that many theories that have traditionally been characterized as teleological, e.g. theories of virtue ethics, need not be teleological in this sense – they need not recognize as fundamental only reasons to realize or promote outcomes/states of affairs.

2 Derek Parfit, *Reasons and Persons* (New York: Oxford University Press, 1984), pp. 351–374.

3 Though not in all cases. As Parfit notes, in cases where the same number of people will be born, a teleologist can say that it is better to create people who will lead better lives. But in many non-identity cases the act will create not only different people but also a different number of people, and that can change the overall assessment of the state of affairs such that it may be beneficial, overall, to perform the non-identity action. Examples of different number cases which cannot be addressed at all by third-personal reasons include creating a substantially larger but substantially less well off future population (so long as future people's lives remain worth living) or creating a slave child who will live under conditions that will not render her life not worth living and may even result in a modest benefit to others. (We may stipulate that the benefit the slave child renders to others is not great enough to justify enslaving an already existing child).

4 *The Second-Person Standpoint*, pp. 6 ff.

that each person has for each other person, a significance that is not grounded in traditional appeals to better and worse outcomes. Theories that recognize a fundamental role for such reasons suggest a distinctive account of what it is for one person to wrong another upon which a person wrongs another if his actions violate her second-personal moral claims, thereby treating her disrespectfully, as a thing rather than a person – a “mere means.”⁵ On such accounts a person can wrong another if the person wronged is not made worse off (in the teleologist’s sense), is unforeseeably benefitted, and even if the person is foreseeably benefitted. These accounts would appear to be in a far better position to identify the apparent wrong committed against victims in non-identity cases, since the fact that the victim is not made ‘worse off’ in the teleologist’s sense presents no obstacle to their determination that the perpetrator has wronged the non-identity victim.

Such accounts of moral wrong parallel in many relevant respects the negligence account of tort liability in Anglo-American legal systems. Consider, for example, the characterization of tort liability offered by Arthur Ripstein.⁶ Each person is recognized as having certain legal claims on each other person, certain legally protected interests. When I act negligently, failing to take appropriate care, I act “as though the legally protected interests of others are mere things.” In doing so, I make “the risk to them part of my agency.” My responsibility for my negligence, of course, “extends only to the negligent aspects of my conduct,”⁷ and when injuries result from the negligent aspects of my conduct I am liable for them “because responsibility flows back to me through the effects of my deed.”⁸

What if the others whose interests I treat as ‘mere things’ do not exist at the time of my action? This is of limited relevance to the determination of legal wrongdoing. If I fail to take appropriate care, thereby creating risks to the legally protected interests of people, whether past or future, treating them as mere things, I am liable for injuries that result from these negligent aspects of

5 Note that such wrongful treatment need not be part of the wrongdoer’s purposes - of the means to his ends - in order for him to treat his victim in this sense as a “mere means.” Whether the violation of your claims is part of his purposes, or merely an unintended but predictable side-effect of his pursuit of such purposes, he discounts your claims and the moral reasons that they provide him not to perform such an action. In so doing he violates your claims, treating you as a mere thing, and in this sense as a mere means. Our thanks to an anonymous reviewer for pointing out the need for greater clarity on this point.

6 Arthur Ripstein, *Equality, Responsibility, and the Law* (Cambridge: Cambridge University Press, 1999).

7 *Ibid.*, p. 48.

8 *Ibid.*, p. 48.

my conduct. If you are injured by my negligent polluting of your drinking water, it is irrelevant whether or not you existed at the time my polluting activities took place. I failed to take appropriate care, creating reasonably foreseeable risks to the legitimate interests of people. These risks resulted in injury; I am liable for the injury.

What if my actions result in benefit to you on balance? Whether you are benefitted overall as a result of my actions, I have violated your legally protected interest, and am responsible for any injuries that result from the negligent aspects of my conduct. If I discriminate against you, refusing you passage on an airplane that subsequently crashes, killing all aboard, I am liable for the injuries, the humiliation, psychological anguish, resulting insecurity, etc., that result from the negligent aspects of my conduct.⁹ That you also avoided death as a result of my actions is irrelevant to the question of whether I am liable for the injuries that resulted from the negligent aspects of my conduct.¹⁰

The irrelevance of non-identity considerations to determinations of liability in tort law, we suggest, reflects the fact that tort law in the Anglo-American legal system has a fundamentally second-personal structure. Of course, one can reject a second-personal structure for liability in tort law, or grant that such a second-personal structure is appropriate for torts but deny that morality itself has such a second-personal structure. But many ethicists do endorse such an account of second-personal reasons and second-personal determinations of moral wrongdoing. For such accounts of moral wrongdoing non-identity would appear to pose no more of a threat to our intuition that the non-identity perpetrator has morally wronged her victim than it does to our intuition in the legal case that the non-identity perpetrator is liable for the reasonably foreseeable injuries that fall within the scope of the negligent aspect of her conduct.

9 An example first introduced by Woodward, "The Non-Identity Problem," *Ethics* 96 (1986): 809–810.

10 Thus, Ripstein points out that in tort law "if one person exposes another to risk, and that risk ripens into injury, the injurer is responsible for the injury, even if the injured party turns out on balance to gain some other benefit as a result" (*Ibid.*, p. 57). In general, those who wrong others by violating their second-personal claims seem intuitively to be held accountable for the harms that foreseeably result from such wrongful action. Ripstein makes this point explicitly about Kant's Doctrine of Right, arguing that on Kant's account "harm is significant...when it wrongfully diminished a person's powers" (*Force and Freedom* (Cambridge: Harvard University Press, 2009), p. 22). Wrongful benefit does not somehow negate or cancel out wrongful harm, nor does it appear to provide grounds for not holding the perpetrator accountable for such wrongful harm.

What counts as negligence, in either the moral or the legal case, depends on what we deem to be the appropriate standard of care. By showing that the non-identity problem does not pose a problem for second-personal deontological theories, we implicitly reject the disturbingly low and counter-intuitive “life worth living standard” that many accept as following from acceptance of the non-identity problem. Solving the non-identity problem does not, by itself, set a standard of procreative care. Instead, it opens a space for setting an appropriate standard of procreative care. We suggest a second-personal deontological account of procreative ethics that, we argue, is not challenged by the non-identity problem. We thus open a space to set a second-personal deontological standard of procreative care. While we do not ourselves, in this paper, set that standard, our argument will suggest and imply some parameters to that kind of standard because second-personal ethical theories set standards. For example, by focusing on second-personal claims and interpersonal respect, a second-personal deontological standard of procreative care will require the motivation and alternatives available to the agent to play a role in the setting of a standard of procreative care such that whether one could easily do better for future persons or whether one is respectfully considering the claims of future persons will, in part, determine whether one has been procreatively negligent or not. This is both intuitive and consistent with the standards set by second-personal deontological theories for other cases of interpersonal interaction. It is a step forward in procreative ethics, and away from procreative standards of care that are set low enough to accommodate non-identity's alleged intractability.¹¹

11 If we reject or solve the non-identity problem, we have not, as argued, thereby answered any further questions regarding the appropriate standard of procreative care. Different arguments support different standards but many standards are set low to accommodate the non-identity problem: Both Joel Feinberg and Bonnie Steinbock propose a “minimal decency” standard. One may wonder: why only minimal decency, especially if one could easily do better? See Feinberg, “Wrongful Life and the Counterfactual Element in Harming,” *Social Philosophy and Policy* 4 (1986): 145–179 and Steinbock, “The Logical Case for Wrongful Life,” *The Hastings Center Report* 16 (1986): 15–20. Seana Shiffrin sets a strict liability standard. See “Wrongful Life, Procreative Responsibility, and the Significance of Harm,” *Legal Theory* 5(1999): 117–148. Elsewhere, one of us has argued for a Rawlsian contractualist standard (see Rivka Weinberg, “Procreative Justice: A Contractualist Account,” *Public Affairs Quarterly*, 16 (2002): 405–425), a standard much higher than many others have set because it is a second-personal deontological standard (a standard that rejects the non-identity problem). While one might think that “do the best you can for future people” is a common-sense standard, it does not take the interests of current people into account and will therefore be rejected by many as unreasonably demanding.

Derek Parfit, both in his initial presentation of the problem and in his subsequent debate with James Woodward,¹² makes the case that the inability to identify wrongdoing in non-identity cases is an intractable problem for such “person-affecting” deontological theories that recognize fundamentally second-personal claims and rights. We will demonstrate in what follows first, that his argument for the intractability of non-identity on such deontological accounts fails, and second, that because a person can be wronged on such accounts without being made worse off in the teleologists’ sense, just as he can be legally wronged in negligence law without thus being made worse off overall, the source of the intractability of the problem for traditional teleologists does not plague those who recognize fundamentally second-personal claims and reasons. On such accounts non-identity perpetrators do appear to wrong their victims; moreover, they do so whether or not such persons currently exist, and whether or not the wrongful action is itself a “but for” cause¹³ of the existence of the person whose claims it violates.

In section II, we will demonstrate that theories recognizing fundamentally second-personal moral reasons appear to avoid the non-identity problem by providing an account of what it is to wrong another that does not depend upon establishing that the result of one’s actions is, in the teleologist’s sense, worse for the other. In Sections III and IV, we will lay out Parfit’s arguments that such theories do fall prey to the non-identity problem and demonstrate why these arguments fail. We will argue that Parfit’s arguments misrepresent the role of consent in such theories by articulating it through appeal to the very teleological reasons that their advocates dismiss as inadequate. In Section V, we will apply the second-personal account of wrongdoing to non-identity cases, and demonstrate that it provides the resources to avoid the non-identity problem. We will make the case that that one such approach in particular, T. M. Scanlon’s contractualist approach, can plausibly be understood as deploying such a second-personal account of wrongdoing that does not depend upon showing that the result of a wrongful action is, in the teleologist’s sense, worse for the victim. The final section, VI, will demonstrate that once the non-identity debate is properly framed, non-identity presents itself as a particular problem for traditional teleological theories of reason and value rather than for their deontological counterparts: the former cannot – while the latter can – account for the intuition that victims in non-identity cases have been wronged by the perpetrators.

12 Parfit, *Ibid.*, pp. 364–366 and “Comments on the Non-Identity Problem,” *Ethics* 96 (1986): 854–862.

13 A “but for cause” is a necessary (though it need not be sufficient) cause of a subsequent event. “But for,” as in, “but for *x*, *y* would not have occurred.”

II

Most people care about their own children as well as the children of others and the world's future people. Traditional consequentialists, and advocates of teleological theories of value more generally, care because they think that a state of affairs consisting of well off people is inherently better than a state of affairs consisting of miserable people (or, on some accounts, no people at all). Deontologists care because they believe that we have duties to all people, and that these duties usually include valuing persons for their own sakes and treating all persons, including future persons, with appropriate dignity and mutual respect. We might therefore expect it to be easy to explain what is wrong with procreative policies, decisions, or acts that deliberately, negligently, or maliciously make life difficult for future people. The problem, as Parfit has famously put it, is that the very same policies, decisions, or acts that make life difficult for future people are often causally necessary for the existence of these very same people.^{14,15} He suggests that so long as future people's lives are worth living, we will have a very hard time supporting any claim by the victim to have been wronged by the perpetrator. *The non-identity problem*¹⁶ can thus be understood as the problem of identifying how such apparent victims can possibly be wronged by the decisions or actions of others given that their existence is worthwhile and dependent upon these very same decisions or actions.

Parfit's examples serve to illustrate the problem: A 14 year old girl wants to have a baby. We may want to tell her that, for her child's sake, she should postpone procreation. However, the child she would have at 14 cannot be born at a later time so it cannot be for *that* child's sake that the 14 year old should postpone procreation. A country wants to store nuclear waste in a risky manner that will likely result in a nuclear catastrophe in a thousand years ("pollution"). The catastrophe will cut short the worthwhile lives of many people. But because these people would not have existed at all had the risky policy not been enacted (policies affect whom people meet and when they procreate, so they affect future identities), and the people have worthwhile lives, we seem unable to say that the victims of the nuclear catastrophe were made worse off

14 Derek Parfit, *Reasons and Persons*, Ibid., pp. 351–374.

15 Melinda Roberts argues that sometimes the causal chain is not necessary such that the same child could exist even if different procreative actions or policies are in place but it is very unlikely. See Roberts, *Child Versus Childmaker*, (Lanham, Maryland: Rowman & Littlefield, 1998): pp. 89–108.

16 Ibid.

by the risky policy. After all, it did not set their interests back – if anything, it seems to have furthered them.¹⁷

A way around this problem is suggested by the realization that, as typically presented, the problem recognizes only what Tim Scanlon and Stephen Darwall refer to as teleological¹⁸ and state-of-the-world-regarding¹⁹ reasons, respectively. On approaches that recognize only such teleological or state-of-the-world-regarding reasons, all reasons are fundamentally reasons “to act so as to realize those states of affairs that are best – that is, have the greatest value.”²⁰ In particular, the framing of the non-identity problem appears to recognize teleological reasons that reflect two different standpoints for the evaluation of states of affairs. Some of these are reasons that reflect the evaluation of states of affairs as better or worse for a particular person; others are reasons to promote states of affairs evaluated as better or worse overall, from an impersonal or agent-neutral point of view. It will be useful in what follows to refer to reasons of the first sort as first-personal reasons, and to refer to reasons of the second sort as third-personal reasons. All subsequent references to first-personal reasons and third-personal reasons should thus be understood as appeals to first-person teleological reasons, reasons concerning better and worse outcomes for some particular person, and third-person teleological reasons, reasons concerning better or worse outcomes overall. In non-identity cases neither set of reasons can account for our intuition that the victim has been wronged. Third-personal reasons can sometimes account for why the teenage birth leads to a worse overall state of affairs, and hence for why it was wrong for the teenage mother not to wait and for the country to pollute, but not for particular claims by the child or the pollution sufferers that they have been wronged by the mother and the polluters.

First-personal reasons, in contrast, are often called upon in accounts of particular claims that one person has wronged another. Parfit, for example, points to “one of our familiar moral principles,” that “it is an objection to someone’s choice that his choice will be worse for, or be against the interest of, any other

17 Ibid.

18 Scanlon, *Ibid.*, p. 80.

19 Darwall, *Ibid.*, p. 6.

20 Scanlon, *Ibid.*, p. 80. Douglas Portmore wields the label “teleological theory” such that it encompasses more than just such first-personal and third-personal state-regarding reasons. See, for example, his *Commonsense Consequentialism*, Ch. 3. We are in what follows invoking the more traditional and more restrictive distinction between teleological (state-of-the-world regarding) and non-teleological reasons found in Scanlon and Darwall.

particular person.”²¹ Clearly the principle thus formulated is overly broad,²² and Parfit himself is careful not to endorse such a principle. But he invokes it to introduce a familiar account of what it is for another to have a distinctive “objection” to one’s choice – for such a choice not just to be wrong but to wrong another. This account takes being made first-personally worse off as a result of the actions of another to be a condition of being wronged by that other. On such an account, one must be harmed rather than benefitted as a result of the actions of another – made first-personally worse off – in order to have been wronged by another. But this condition is not satisfied in non-identity cases: from the child’s own personal standpoint she is not worse off all things considered as a result of the actions of the non-identity perpetrator. The same is true of the pollution case. There simply are not the available resources within an account that recognizes as relevant only first and third-personal state-regarding reasons, and that takes being made worse off by another to be a condition for being wronged by that other, to capture the intuition that the mother and the polluters have wronged the child and the poisoned – non-identity becomes an intractable problem.

But this *modus ponens* suggests a straightforward *modus tollens*. If a framing of the problem that appeals only to teleological reasons leads to a non-identity problem, then a solution to the problem may well require the recognition that more than such traditional first and third-person teleological reasons are involved. This may seem to lead those in search of a solution to the non-identity problem to accounts upon which persons have both a rational significance and a moral significance that is independent of whatever moral or rational significance they have from either a first or third-person state-regarding standpoint. Such independent moral and rational significance is what Kant and many contemporary ethicists invoke with the claim that each person must be treated with respect, as an end-in-itself, and must be recognized as having certain rights that constrain what agents can do in the promotion of outcomes.²³ Such respect is manifested as moral claims that each person has upon each other person not to be treated simply as a means to the promotion of first

21 *Reasons and Persons*, p. 359.

22 Indeed, it seems plausible to understand Parfit as making the point that even on such an overly broad understanding of the first-personal grounds for objecting on behalf of one person to the choice of another, they provide no basis for such an objection in non-identity cases.

23 See, for example, Immanuel Kant, *Groundwork of the Metaphysics of Morals and Critique of Practical Reason*, in *Practical Philosophy*, trans. and ed. Mary Gregor, (Cambridge: Cambridge University Press, 1996), 4:428 and 5:87, respectively.

or third-personally best outcomes, claims that, when they are of sufficient strength, generate both moral prohibitions against such treatment and decisive reasons not to treat the person in question in this way. In contrast with first-personal reasons grounded in the appeal to better and worse outcomes for some particular person, these are paradigmatically impartial claims and impartial reasons articulated from a standpoint of equal concern and mutual respect. In contrast with third-personal reasons to promote the best overall outcome, these are not reasons to promote outcomes ranked agent-neutrally, but reasons that, when decisive, often constrain agents from performing precisely such overall outcome optimizing acts. On such accounts to respect each person is to recognize, e.g., each person's moral claim upon you not to lie to her. Such a moral claim is reflected in a moral reason not to lie to her, on such accounts, even if telling such a lie will be first-personally better for her (or you), and even if violating her moral claim upon you will somehow prevent two other people from committing equally egregious violations of the moral claims that others have upon them, an outcome that is third-personally worse (i.e., worse, overall, from an impartial or impersonal standpoint).²⁴

It is these claims, duties, and reasons, moral claims reflecting the equal moral significance that each person has independent of whatever third-personal moral significance she might have, that we will follow Darwall in characterizing as second-personal moral claims and second-personal moral reasons,²⁵

24 See Darwall's claim that such expressions of second-personal authority as "Don't tread on me" and "Don't tread on other persons" do not reduce to "Bring it about that people are not tread upon" (Ibid., p. 7). Scanlon makes a similar point with his claim that accepting "the principle that one may not kill one person in order to save several others...involves accepting a certain view of the reasons one has: that the positive value of saving these others does not justify killing a person...this good is not sufficient to justify the action in question" (Ibid., p. 84). Similarly, although Nagel is unclear about whether he endorses the fundamental status of second-personal reasons, he recognizes that in cases in which such reasons are decisive although "things will be better, what happens will be better...I will have done something worse." *The View From Nowhere* (New York: Oxford University Press, 1986), p. 180. They are fundamentally claims that provide each person with reasons not to act in certain ways.

25 Thomas Nagel characterizes such reasons as deontological reasons, "considerations of what I may do, and the correlative claims of my victim against me," considerations that can "outweigh the substantial impersonal value of what will happen." (*The View From Nowhere*, p. 180) We choose to deploy Darwall's label because it highlights the contrast between such reasons and first and third personal teleological reasons. Not all reasons that Darwall identifies as second-personal are second-personal moral reasons of this sort. Rather, such distinctly moral second-personal claims and reasons reflect "an impartially disciplined version of the second-personal standpoint in which, as anyone..., one addresses someone...also as anyone" (Ibid., p. 102).

reasons that are articulated from an impartial standpoint of mutual respect. On such accounts, the second-personal claims of another person are typically taken to provide each agent with decisive reasons to avoid their violation. To act contrary to such a reason is to disrespect the person in question – to fail to acknowledge that the person has second-personal moral significance that is independent of whatever first and third-personal moral significance she might have.²⁶ Such fundamentally second-personal reasons, and the claims that they reflect, presuppose the recognition of each other as “your equal, and as sharing in...the authority of a fellow member of the moral community.”²⁷ In Darwall’s case of one person stepping on another’s foot, for example, such a reason would differ fundamentally from a third-personal teleological reason “to alter the regrettable state of someone’s pain or of someone’s causing another pain.”²⁸ Instead, it is a reason that “would be addressed to him, rather, as the person causing...pain to another person, something we normally assume we have the authority to demand that persons not do to one another.”²⁹

It is such second-personal moral reasons that are taken to be invoked on such accounts by many typical appeals to rights, respect, autonomy, and the requirement not to treat persons as though they were mere things, and in this sense as mere means. The 14 year old mother and the polluting country, it seems, violate the second-personal claims of her children and those sickened by their pollution, respectively, because, rather than respecting her child or future generations as separate persons with moral standing and moral claims, they subordinate the claims of such future persons to considerations of their own or overall benefit. In violating such second-personal claims, these actors wrong the victims in question, just as the polluting country legally wrongs its victims from the standpoint of negligence law. Thus, the moral of the story may seem to be that it is reasons available to Kantians and advocates of other deontological theories that are necessary to avoid a problem with non-identity, second-personal moral reasons that are not available to advocates of traditional teleological theories of value and reasons.

Such second-personal reasons and claims pave the way for an account upon which one person wrongs another if he violates her second-personal claims,

26 See, for example, Darwall, *Ibid.*, p. 60, and Scanlon’s claim that failure to be moved by what we owe to each other person is “a failure to see why the justifiability of his or her actions to us should be of any importance” (*Ibid.*, p. 159). Being appropriately moved by such duties to each other person, he argues, just is “respecting the value of human (rational) life” (*Ibid.*, p. 106).

27 Christine Korsgaard, “Autonomy and the Second Person Within,” *Ethics* 118 (2007): 8–23.

28 Darwall, *Ibid.*, p. 7.

29 *Ibid.*

irrespective of whether she has been made first-personally worse off overall, just as, in negligence law, one person legally wrongs another if he violates her second-personal claims, irrespective of whether she has been made first-personally worse off overall. It does not challenge the standard account of first-personal harm and benefit;³⁰ it argues instead for an account of what it is to wrong another that is not grounded in any such determination of first-personal harm or benefit, of whether the victim has been made in this sense better or worse off. If a person touches another person in certain ways in her sleep, even though she does not wake up and has no knowledge of the incident, he has nonetheless wronged her. She has not been made first-personally worse off, but she has been second-personally wronged.³¹ A person can wrong another even if, in violating her second-personal claims, he seeks her first personal benefit. If an accomplished plastic surgeon anaesthetizes another person in her sleep and without her consent, and performs plastic surgery that significantly enhances her appearance, she may be first personally better off overall, even by her own accounting, and such benefit may have been the surgeon's goal, but he nonetheless wrongs her.³² Although non-identity is a problem for traditional teleological theories, particularly those that accept some form of the 'familiar moral principle' according to which causing another to be first-personally worse off is a condition for any objection on their behalf that they have been wronged, it does not appear to pose any particular problem for such deontological theories. Whether or not the victims in non-identity cases are first-personally worse off overall as a result of their interactions with the

30 First-personal harm and benefit can be understood as a gain or loss to the interests of the individual. This can be contrasted with third-personal harm and benefit, which can be understood as a gain or loss to the overall state of affairs, impersonally considered.

31 This example and the one to follow are taken from Arthur Ripstein. See *Force and Freedom* (Boston: Harvard University Press, 2009), p. 125, for the more nuanced example that gave rise to this simplified version.

32 Indeed, those who wrong others by violating their second-personal claims seem intuitively to be held accountable for the harms that foreseeably result from such wrongful action. If the victim in the involuntary nose job case is traumatized by the violation of her bodily integrity that has taken place, the benefit that results from such wrongful action to her appearance does not seem to alter the doctor's responsibility for this wrongfully produced harm. Arthur Ripstein makes this point explicitly about Kant's Doctrine of Right, arguing that on his account "harm is significant...when it wrongfully diminished a person's powers" (Ibid., p. 22). Wrongful benefit does not somehow negate or cancel out wrongful harm, nor does it appear to provide grounds for not holding the perpetrator accountable for such wrongful harm.

non-identity perpetrators, such perpetrators would appear to violate the claims of such victims, and hence to wrong them.³³

III

Soon after Parfit originally presented the problem, James Woodward offered the outlines of just such a deontological response.³⁴ People, argues Woodward, have specific rights that cannot simply be aggregated into the one interest in being as well off as possible.³⁵ Rights can be violated whether the actions that violate them leave things first or third-personally worse off, better off, or the same as they were before. Thus, Woodward explains, when an airline refuses to sell an African American a plane ticket because they are racist, and the plane then crashes, killing all on board, the fact remains that the airline violated the African American's rights even though, in violating her rights, they saved her life. This response seems to capture what the non-identity problem gets intuitively wrong. But Parfit anticipates this response in his original work, and addresses it subsequently both in a direct reply to Woodward and in *On What Matters*. In *Reasons and Persons* Parfit considers whether an appeal to rights can solve the problem and decides that it cannot, because it is reasonable to assume that people would *wave* their rights in non-identity cases.³⁶ In his reply to Woodward, Parfit presses for an explanation of what constitutes a rights violation. When a surgeon amputates an unconscious person's arm to save her life, he says, the surgeon is not taken to have violated her patient's rights even though the surgeon hacks off her arm without her consent. Parfit takes this to show that when we can be reasonably certain that the person affected by our actions would consent to them (if their actual consent cannot

33 Parfit argues that he does not assume that existence is a benefit; the claim is that all that need be assumed in order for the non-identity problem to get going is that the future person is no worse off than had they never existed (no harm) (Ibid.).

34 Even before the non-identity problem was known as such, Gregory Kavka considered solving what he called 'the paradox of future individuals' by adopting a modified Kantian approach. He suggested that we refrain from "treating rational beings *or their creation* (italics his) as a means only, rather than as ends in themselves." See Kavka, "The Paradox of Future Individuals," *Philosophy and Public Affairs* 11 (1982): 93–112. For a reply to Kavka, see Parfit, "Future Generations: Further Problems," *Philosophy and Public Affairs* 11 (1982): 113–172.

35 James Woodward, "The Non-Identity Problem," *Ethics* 96 (1986): 809–810; and "Reply to Parfit's 'Comments on the Non-Identity Problem'," *Ethics* 97 (1987): 802.

36 Parfit, Ibid., pp. 364–366.

be obtained due to unconsciousness or nonexistence), we have not violated that person's rights.³⁷ Woodward replies that unlike the airline, the surgeon never violates the patient's rights in the first place,³⁸ but his reply can seem incomplete because he does not explain *why* the airline's actions constitute a rights violation but the surgeon's do not.

Parfit argues in favor of consent, be it actual or hypothetical, as a general test for rights violations, and of well-being as the reason to grant or withhold consent. He asks:

Can it be wrong to harm others, when we know that our act will not be worse for the people harmed? This might be wrong if we could have asked these people for their consent, but have failed to do so. By failing to ask these people for their consent, we infringe on their autonomy.³⁹

Because we cannot obtain the actual consent of future people to their own procreation, Parfit suggests using a "rational regret" test instead. Can the procreated rationally regret the actions that led to their procreation? Not, says Parfit, if they have a life worth living. In reference to those killed as a result of a deliberately enacted risky policy that risks their dying young, Parfit says: "These people will regret the fact that they will die young. But, since their lives are worth living, they would not regret the fact that they were ever born."⁴⁰

Won't such cases of consent violate a person's rights? Here Parfit makes his thought process clear: one's rights have not been violated if one would have consented to the act in question, and one has sufficient reasons to consent to any act that benefits one overall. No reasons are taken to be relevant to consent other than first and third-personal state-regarding reasons, and considerations of first-personal benefit are taken to be sufficient to establish rational consent. In short, Parfit suggests that a deontological response is properly cashed out in terms of first and third-person teleological reasons. Indeed, the right he considers, the "child's right to a good start in life,"⁴¹ is itself put in teleological terms. Appeals to rights will not solve the non-identity problem, Parfit argues, because the child of the teen mother does not think it would be better if he

37 Parfit, "Comments on 'The Non-Identity Problem,'" *Ibid.*, 832–863.

38 Woodward, "Reply to Parfit," *Ibid.*, 800–816.

39 Parfit, *Reasons and Persons*, *Ibid.*, p. 373.

40 *Ibid.*, p. 373.

41 *Ibid.*, p. 364.

were never born. This establishes, he claims, that if the child had a right to a good start in life, he would have waived this right.⁴²

In *On What Matters*, Parfit transposes this account of consent into a distinctively Kantian key. Because he takes a Kantian account of rights to be grounded in Kant's formula of humanity, he focuses upon developing what he takes to be the most plausible interpretation of Kant's claim that we must treat all rational beings never as means only, but as ends in themselves. It might seem that standard non-identity cases provide paradigmatic examples of treating someone as a mere means. Parfit's teenage mother subordinates her child to her own purposes, thereby wronging him. But Parfit argues that at the core of the formula of humanity is what he characterizes as the Consent Principle: "It is wrong to treat anyone in any way to which this person could not rationally consent."⁴³ Crucially, the focus of the principle is upon not just consent, but rational consent. In his articulation of the reasons relevant to the implementation of the Principle of Consent, the particular facts that he draws upon as providing us with reasons are of two different sorts. The first are facts about what "would make things go in a way that would be impartially better." Such facts provide agents with third-personal teleological reasons. The second are facts about what "would make things go better....for ourselves."⁴⁴ Such facts provide agents with first-personal teleological reasons. Parfit maintains, in addition, that when one choice would make things go impartially better, and hence is supported by third-personal reasons, and another would make things go better for ourselves, and hence is supported by first-personal reasons, "we often have sufficient reasons to make either choice."⁴⁵ The relevant reasons, Parfit argues, are thus supplied by facts that are relevant from the first-personal standpoint of the agent's own well-being and the third-personal standpoint of overall well-being, and such facts that are relevant from first and third-personal standpoints provide agents with what we have characterized as first and third-personal reasons.

As in his earlier work, Parfit's general approach here to cases in which people cannot actually consent is "to try to treat these people only in those...ways to which, *if* they had the opportunity, they *would* consent."⁴⁶ A stronger test

42 Ibid.

43 Parfit, *On What Matters, Vol. One* (Oxford: Oxford University Press, 2011), p. 181.

44 Ibid., p. 186.

45 Ibid., p. 186.

46 Ibid., p. 195. Parfit also articulates his account of rights within the context of the Principle of Consent. In particular, he articulates the Rights Principle, which holds that "Everyone has rights not to be treated in certain ways without their actual consent" (Ibid., p. 194).

suggested by Parfit, applicable in cases in which “people cannot give valid consent at the time,” is that “we ought to try to treat these people only in ways that they would later *retroactively endorse*, since they would later be glad that we acted as we did.”⁴⁷

Has the child of the teenage mother been wronged by being born to a child parent who is not competent to care for him? Although the answer, intuitively, appears to be yes, on Parfit’s interpretation of Kantian respect the answer is no. The question of whether the mother has failed to respect her child as an end-in-itself, treating him as a mere means to her own ends, becomes, on Parfit’s account, the seemingly very different question of whether the child would retroactively endorse the mother’s actions. The test for such retroactive endorsement, in turn, is whether he regrets that she acted as she did, and is glad that she gave birth to him. Since the child takes his life with hardships to be better for him than no life at all, he is glad, on such first-personal grounds, that his mother acted as she did. But this just is, on such an account, to endorse retroactively his mother’s actions. Whatever third-personal reasons there might be, moreover, are not reasons that will justify any claim that he has been wronged by his mother.

We saw that appeal only to first and third-personal teleological reasons cannot provide a solution to the non-identity problem. Appeals to rights and respect for persons as ends-in-themselves appear to invoke non-teleological reasons of the sort that can provide such a solution. But Parfit, we have seen, takes the most plausible interpretation of rights and prohibitions upon treatment of persons as mere means to appeal to his Principle of Consent, takes such a principle to draw upon an account of rational consent that invokes first and third-personal teleological reasons, and interprets consent of the unborn as retroactive consent through appeal to the first-personal teleological assessment of the outcome of the action as better for him. If Kant’s formula of humanity is articulated through an account of rational consent, and the reasons recognized as relevant to non-identity cases are only first and third-person teleological reasons concerning what is better for the agent and better overall, then the rights and respect for persons as ends-in-themselves invoked upon such a formula will provide no resources for addressing the non-identity problem.

It seems clear, however, that Kant himself is not proposing that we understand what it is to treat persons as ends-in-themselves through appeal to such an account of reasons. Rather, he, along with contemporary Kantians, takes such a formula to invoke a theory of value and reasons that is not limited to

47 Ibid., p. 195–96.

first and third-personal teleological reasons. For such deontologists the rights to be treated as an end in oneself are second-personal rights, and first-personal benefit does not provide grounds for waiving such second-personal rights. Even if the child born to teen parents is not, ultimately, made first-personally worse off by the disregard to which his very procreation subjected him, he may still have been *wronged*. Woodward is keenly aware of this. He tries to demonstrate this point, but his argument is frustrated when Parfit puts Kantian respect in terms of consent and calibrates consent to first and third-personal teleological assessments of well-being. When Woodward argues, for example, that Victor Frankl's rights were violated by the Nazis even if Frankl considered himself to have benefitted from insights gained from his experiences in a Nazi concentration camp during the Holocaust,⁴⁸ Parfit replies that a person's rights are, at least partly, determined by her interests. Thus, we don't consider a surgeon who amputates an unconscious person's arm to save her life to have violated the patient's rights because, given that the patient's alternative is death, we can safely assume that she would have consented to the amputation.⁴⁹ We don't allow the patient to claim that the fact that the amputation is no worse for her than any possible alternative is irrelevant to our determination regarding whether her rights have been violated by the surgeon who performed the amputation without her consent.⁵⁰ Similarly, Parfit argues, since the children resulting from non-identity procreative cases have lives worth living, we can safely assume that they too would have consented to their procreation – a life worth living is no worse than nonexistence. The discussion of a Kantian right to be treated with respect has been subtly translated into a right that is tested by a consent standard, upon which an agent would consent to an act that positively impacts her well-being overall, and such consent constitutes a waiver of his right. The transition from a deontological to a teleological standard has occurred, seemingly without anyone realizing it.⁵¹ An effective response on

48 Ibid., 109.

49 Parfit, "Comments on 'The Non-Identity Problem,'" Ibid., 855–856.

50 Parfit, Ibid., 856.

51 Rahul Kumar is a notable exception. Following Woodward, he argues that a good deal of non-identity problem worries can be done away with when we remember that being *wronged* is not about outcomes. He argues that, according to Scanlonian contractualism, being wronged is about what we are entitled to expect from others, based on our status as autonomous persons deserving of respect ("Who Can Be Wronged?" *Philosophy and Public Affairs* 31 (2003): 99–118). Parents who fail to guard against genetic diseases for which screening is available, he argues, "have wronged their child by exposing the child to avoidable risk, whether or not the risk ends up materializing as harm. Exposing the child to such risks involved an exercise of authority with respect to the child's interests to which

Woodward's behalf will demonstrate that there is a plausible alternative account of rights upon which they can provide the solution he proposes. Our suggestion is that deontological theories invoking fundamentally second-personal reasons provide just such an account.

David Wasserman is another critic of Parfit who is not lured into a teleological reasons framework. He appeals to second-personal reasons for avoiding non-identity-type excuses for parental procreative negligence, arguing that parents have non-consequentialist, "role-specific duties"⁵² toward their children that require procreators to be motivated by a concern for their children's good. His view regarding prospective parents and the non-identity problem is that "parents' reasons for having children hardly need to be selfless, but they should concern the child's own good and the prospect of intimate relationships that are respectful and not exploitative."⁵³ It can therefore seem somewhat mystifying that he concludes his discussion by explicitly distancing himself from the broadly Kantian approach that he seems to invoke. In particular, he suggests that his approach will help us answer questions about the permissibility of having a child to serve as a savior sibling for an ailing child one already has or to serve as a unifying factor in a failing marriage, "questions that cannot be resolved by a pious invocation of Kantian principles."⁵⁴

Wasserman is talking about a role that a party to a special kind of *relationship* (i.e. a parent to a child) demands. He calls reasons that reflect these

the parents were not entitled" (Ibid., 116). Such a formulation, however, does not yet appear to avoid the non-identity trap, since the parents, in cases such as these, have not exposed their child to avoidable risk - the risk was *unavoidable* for *that particular child*. Similarly, when he proposes principle M to protect children against non-identity-type behavior, his principle falls prey to non-identity reasoning. Principle M states that those responsible for a dependent "are morally required not to let her suffer a serious harm or disability or a serious loss of happiness or good, that they could have prevented" without undue cost to themselves or others (Ibid., 112). But the child in question does not suffer anything that the parents could have prevented *her* from suffering; preventing the suffering would prevent her (worthwhile) existence. Principle M seems to also put the wrong, if it occurs as a violation of M, in terms of the child's well-being, once again sliding from deontological to teleological evaluations. Kumar is right to claim that contractualist principles can avoid the non-identity problem by formulating general principles that apply to people in general, regardless of particular identities. However, he is neither the first nor the last to do so. See Weinberg, *op. cit.* and, for a more recent account, see Jeffrey Reiman, "Being Fair to Future People: The Non-Identity Problem in the Original Position," *Philosophy and Public Affairs* 35 (2007): 69–92.

52 David Wasserman, "Nonidentity, Disability, and Prospective Parents," *Ethics* 116 (2005): 141.

53 Ibid., 151.

54 Ibid.

demands non-consequentialist but not Kantian. Yet his approach appears to share with Kant's both the rejection of the adequacy of any appeal to traditional first and third-personal teleological reasons, and acceptance of fundamentally second-personal moral claims and reasons. Our approach, then, can be understood as locating Wasserman's appeal to distinctive second-personal reasons that arise within the parent-child relationship within an account of second-personal reasons generally. Such an augmented account can more effectively resist teleological reinterpretation, and can generalize to cover the vast array of non-identity cases that arise outside the context of parent-child relationships. Resisting reinterpretation within a traditional teleological framework requires an examination of the proper role of consent in deontological considerations of rights. It is to such an examination that we now turn.

IV

We will now address the role consent properly plays in deontological accounts of right action, and distinguish the role of consent from that of hypothetical consent. We will argue that the consent as hypothetical retroactive endorsement account to which Parfit appeals in his attempt to demonstrate that an "appeal to rights"⁵⁵ cannot solve the non-identity problem fails within the context of any account that understands such rights as fundamentally second-personal claims.

The Kantian requirement to treat all persons as ends in themselves, like other deontological requirements to recognize the second-personal claims of each person, is taken to reflect the distinctive value of rational agents, a value independent of whatever value they have either first or third-personally. Kant argues that rational agents have intrinsic value that manifests itself in claims to second-personal respect, and must be treated accordingly. Rational agents are capable of setting their own rational ends and this capacity confers upon them dignity and entitles them to our respect. Consequently, it makes sense to think that when a rational, autonomous agent has consented to an act, the act does not treat the agent as a mere means. After all, the agent has *agreed*; she has consented to the act, so the act cannot be reasonably said to violate her status as a rational agent. The appeal to consent as a test for Kantian respect is thus completely understandable.

We agree that consent plays a central role in the understanding of agents as sources of second-personal claims, but we argue that it is an eminently

55 Parfit, *Reasons and Persons*, *Ibid.*, p. 364.

defeasible test, a test which is unreliable and inappropriate under many common conditions.⁵⁶ The role for consent on Kant's and other relevantly similar accounts can all too easily be misunderstood. As Arthur Ripstein has cautioned:

It is easy to be seduced by the idea of consent, and to suppose that it is a self-standing source of moral significance...But consent does not work that way at all. We don't worry about lack of consent except when we are concerned with an action that would be wrongful but for the presence of consent. So if you want to know what is wrong with exploitative relationships, say, it is not that they are non-consensual. It is that they are exploitative.⁵⁷

Ripstein's point can be generalized across not only Kant and contemporary Kantian positions, but across other deontological accounts that share with Kant the incorporation of fundamentally second-personal claims and reasons. The central question on all such accounts is whether a person's second-personal claims have been violated by the actions of another. If so, the deontologist takes that action to be a disrespectful affront to the person's dignity, and takes the perpetrator in such cases to violate a second-personal duty that she owes to that person. Consent is significant on such accounts, as Ripstein points out, because it sometimes renders what would otherwise be wrongful action, rightful. If someone crosses your property without your consent, he violates your second-personal claims, thereby wronging you, and this is true irrespective of whether he improves your property in some way while trespassing. The wrongfulness of his action is due to the fact that he is violating your second-personal claims, not due to the fact that he does not have your consent. If he is invited, he is not committing what would otherwise be a wrong, and his crossing is rightful. Consent thus can sometimes transform what would otherwise be a wrongful action into a rightful one, but the otherwise wrongful nature of the action is determined from a self-standing source, independent of consent.

Hypothetical consent is more complicated. It is doubtful that it alone can render what would otherwise be wrongful conduct rightful; though it may sometimes be a necessary part of an act's justification, it alone seems unlikely to be sufficient. It is easy to think of cases in which hypothetical consent alone would not justify an otherwise wrongful act. For example, if you are unreachable

56 See Onora O'Neill, "Between Consenting Adults," *Philosophy and Public Affairs* 14 (1985): 252–277.

57 Ibid., p. 71.

while mountain climbing in the Himalayas, I violate your rights if I redecorate your living room (to your taste) even though you would have agreed had you been asked. Cases that are sometimes taken to prove the contrary include my breaking into your cabin in the woods to save my life during a blizzard. But the many cases in which hypothetical consent alone clearly does not justify an act suggest that even in such cases it is not hypothetical consent alone that justifies my breaking into your cabin. Indeed, even if you hung a sign on the cabin door expressly prohibiting trespassing to save one's life, breaking into the cabin to save my life would still be permissible.⁵⁸

Even when actual consent is present, deontological approaches recognize two basic and often overlapping kinds of conditions that can undermine the legitimacy of the consent offered to the point that it does not render otherwise wrongful action rightful. The first condition constitutes compromised authority due to incompetent or imperfect rational agency; the second constitutes compromised ability to exercise autonomy due to serious vulnerability, usually due to harsh circumstances. We are familiar with these conditions, as they occur frequently and are commonly cited as reasons for ignoring the presence of consent as a legitimizing factor.

From the standpoint of accounts that recognize fundamentally second-personal reasons, Parfit's appeal to retroactive hypothetical consent fails. On such deontological accounts, non-identity cases are cases in which a perpetrator brings a victim into an interaction which violates the victim's second-personal claims, treating him as a mere means whose claims can be discounted in the satisfaction of her own ends. This wrongful interaction with the victim is also a "but for" cause of the victim's existence.⁵⁹ There are two ways of understanding an appeal to consent as retroactive endorsement within the context of such an account, but on neither interpretation does the endorsement in question render such wrongful action rightful. On one interpretation,⁶⁰ retroactive endorsement confronts the hypothetical chooser, retroactively, with the choice between impaired existence and non-existence. To choose her impaired existence over non-existence, on this interpretation, is to consent to the action

58 We thank Michael Green and Charles Young for thoughtful contributions to this point.

59 This is the point at which such cases differ from standard cases of procreation, in which, although the mother brings her child into an interaction with her without his consent, the interaction does not violate the child's second-personal claims. Accounts of which acts of procreation do and don't violate the second-personal claims of children will vary with the different deontological theories of reason and value that underwrite such claims.

60 We take Parfit's own understanding of consent as retroactive endorsement to align more closely with our second interpretation, which we take up after arguing for the inadequacy of this first interpretation.

that brings it about, thereby waiving one's claim, and transforming what would otherwise be a wrongful action into a rightful one. But on this interpretation of hypothetical retroactive endorsement, the legitimacy of any such "consent" to impaired existence and the action that brings it about is clearly undermined for the deontologist by the dire nature of the choice situation with which our hypothetical chooser is confronted, and the wrongfulness of the action that puts him in this situation. "Your life with a serious disability or your life!" may elicit some sort of retroactive consent from the person thus hypothetically threatened with extinction, but such consent hardly renders the perpetrator's violation of the victim's second-personal claims respectful, nor does it in any way mitigate the wrongfulness of his action. Consider once again the parallel with negligence law: faced with the choice between discrimination and life and non-discrimination and death, the victim of discrimination in Woodward's airline example may well choose discrimination, but this merely demonstrates the irrelevance of such a test to the question of whether he has been legally wronged. As Kavka noted, the fact that this procreative agreement would have been agreed to under coercive circumstances does not indicate that the agreement is fair or that no wrong has been done.⁶¹ Recall Ripstein's example of the surgeon who benefits a patient by giving her a nose job to which she has refused consent.⁶² The victim is benefitted by the plastic surgery, even by her own lights, but the surgeon nonetheless wrongs his patient – relative advantage/disadvantage is irrelevant to the question of whether one person has wronged another.

There is a second, more straightforward interpretation of Parfit's consent as retroactive endorsement, however, that appears to avoid many of the serious shortcomings of the first. On this interpretation, retroactive endorsement does not appeal to a hypothetical choice situation, but is instead an appeal to the fact that the child does not rationally regret being born; indeed, that he is glad that his mother acted as she did. That he is in the relevant sense glad is taken to be established, in turn, by his first-personal judgment that he is better off existing than not. The suggestion is that one cannot be wronged by an act that one is glad (in this sense) occurred. The claim is that being glad that such an act occurred in such circumstances is tantamount to waiving one's claim against the performance of such an action, thereby transforming what would otherwise be wrongful action into rightful action.⁶³

61 Ibid.

62 Ibid., p. 125–26.

63 See, in particular, his argument in *Reasons and Persons*, Ibid., p. 364.

Thus understood, rational regret is a straightforward appeal to first-person teleological reasons, and the claim is that an agent cannot be wronged by an action that in this sense benefits him. Claiming that an agent cannot be wronged by an action that she does not regret does not seem like a clearly teleological claim. However, when the claim involves a conception of rational regret that gives one no reason to regret anything that furthers one's first-personal interests (without harming anyone else), it becomes a straightforwardly teleological claim, a claim that a deontologist will reject. For the deontologist, the judgment that a victim has been first-personally benefitted as a result of your action simply has no bearing on the second-personal wrongfulness of the action. The surgeon benefits his victim by wrongfully making her more attractive (without her consent); we can grant for the sake of argument that the mother benefits her child by wrongfully bringing him into existence in violation of his second-personal claims.⁶⁴ In each case the victim can agree that the wrongful action results in his or her being better off first-personally, but in each case, for our deontologists, this is not of central relevance to the question of whether or not the victim has been wronged by the perpetrator, nor does it provide grounds for waiving someone's second-personal claims, nor does it in any other way transform what would otherwise be wrongful action into rightful action.

Indeed, the reason such a judgment of first-personal benefit cannot make a second-personally wrongful action rightful, for the deontologist, is precisely the reason that such a judgment of first-personal benefit cannot, on Parfit's own view, make a third-personally wrong action right. Parfit argues that on third-personal teleological grounds we can judge that "it would have been better if this girl had waited, and had a child later." Moreover, he maintains, plausibly, that such a third-personal judgment by the child that his mother's act was wrong (but did not wrong him) does not at all imply that the child "ought rationally to regret that my mother had me."⁶⁵ The child is glad his mother acted as she did, but absence of first-personal reasons to regret, Parfit argues, in no way alters his judgment that his mother should have waited, and hence that she was in this sense wrong to have acted as she did. The reason is clear: the child's judgment that his mother should have waited is made on third-person teleological grounds, and his judgment that he is glad he is alive, and does not regret being born, is made on first-personal teleological grounds. The first-personal grounds for the latter judgment in no way undermine the

64 We grant that the mother benefits her child by his wrongful procreation for the sake of the present argument only. Rivka Weinberg has argued against this claim. See "Identifying and Dissolving the Non-Identity Problem," *Philosophical Studies* 137 (2008): 3–18.

65 *Ibid.*, p. 360.

third-personal grounds for the former, and in no way constitute a waiver of the judgment that the mother should have waited, and in this sense acted wrongly. Likewise, for the deontologist, the first-personal grounds for being glad one was born in no way undermine the second-personal grounds for the judgment by the child that his mother wronged him, and in no way constitute either consent to the mother's action or a waiver of his second-personal claim. Being glad that one was born does not make a third-personally wrong act right on Parfit's account, and it does not make an action that second-personally wrongs another rightful on the deontologist's account.⁶⁶

Because Parfit's account of rational consent does not recognize fundamentally second-personal reasons and claims, rational consent and rational regret can only be understood, on his account, in terms of first-person and third-person teleological reasons. Third-person teleological reasons can be relevant to the determination that an action is wrong, but not, as we have seen, to the determination that someone has been wronged by the action of another. The only reasons that can be relevant on Parfit's account to such a question of whether one has wronged another – whether she has violated his rights – are first-person teleological reasons. If the actions of the mother do not result in a first-personally worse state of affairs for the child, then the child, on such an account, can have no reason not to waive whatever right he has. Within the context of a deontological approach, by contrast, which recognizes in addition fundamentally second-personal reasons, Parfit's appeal to retroactive endorsement only answers the question of whether, given that the mother has wrongfully violated the second-personal claims of the child in bringing him into existence, it would be better for the child if he did not exist. The answer to this could clearly be no – that he is better off existing. But such first-personal endorsement by the victim of his continuing existence isn't a waiving of his second-personal claims, nor does it in any way address the second-personal grounds for the judgment that he has been wronged. It is instead merely recognition of what seems intuitively to be true in such cases, that he is better off living despite being wronged in the way he was brought into the world.

66 Some are suspicious of hypothetical consent generally and argue that only actual consent matters, but hypothetical consent is often relied upon in procreative cases wherein actual consent is impossible and, on most views, not required. Seana Shiffrin is a notable exception to the view that actual consent to having been born is not required. See "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999): 117–148.

V

We have suggested that Parfit frames the non-identity problem within the context of traditional teleological reasons and values, and that the seeming intractability of the problem is a function of this teleological framing. We have suggested, moreover, that Kant and many others who Parfit purports to draw into the non-identity problem reject such a limitation to first and third-personal reasons. Instead, they recognize certain fundamentally second-personal claims that give rise to fundamentally second-personal reasons for acting and refraining from acting. Appeals to consent play a very different role within the context of such theories, and Parfit's claim that victims in non-identity cases would waive their claims or rights becomes implausible once the second-personal nature of such claims and rights is kept clearly in view. In this section we will sketch some of the general features of accounts that recognize second-personal reasons and wrongdoing, and provide an example that highlights the resources available on such approaches to account for the wrong suffered by victims in non-identity cases. We will then look at a particular instantiation of such a deontological approach, that offered by Scanlon, and demonstrate that his account of second-personal wrong can readily account for the intuitive wrongdoing in other traditional non-identity cases.

We have seen in the previous section that the question of whether or not someone is better off existing, and will retroactively endorse this claim, is distinct from the question of whether or not his second-personal claims have been violated, even by those whose actions have resulted in his existence. We have already pointed out that this distinction is a central feature of negligence law. In Parfit's pollution case, neither the fact that some agent's polluting activities are a "but for" cause of my existence nor the fact that I would rather exist than not in any way preempts the question of whether or not the legal agent in question has violated my legal claims, and hence owes me compensation for the harm that he has wrongfully caused me. Tort law, in virtue of its second-personal structure, is not troubled by non-identity concerns in such cases. So too, we suggest, moral theories that recognize fundamentally second-personal reasons appear to yield what Parfit himself recognizes is the intuitive result in such non-identity cases. Such reasons, we have seen, are taken by these accounts to reflect the dignity of persons, dignity reflected in claims that each person has not to be treated disrespectfully by each other person. Darwall's example is "not stepping on one another's feet,"⁶⁷ but in general appropriate second-personal recognition of such dignity is taken to generate standard,

67 *The Second-Person Standpoint*, p. 13.

intuitively appealing deontic constraints not to lie to, steal from, unfairly exploit, or violate the bodily integrity of another person.

Moreover, Scanlon points out that as in the legal case, the scope of such second-personal moral claims appears to range over not only those who do exist, but also over those who “will, or have existed.”⁶⁸ Thus, in Parfit’s pollution case, the company or country that engages in actions that it recognizes will likely violate the second-personal moral claims of others, wrongs those others whose claims it violates. This is the case regardless of whether or not such persons exist at the time of such wrongful actions, and regardless of whether or not such actions are a “but for” cause of the existence of those who are wronged. Such victims are second-personally wronged by those who caused them to exist, whether or not they are better off existing.

Darwall argues that experiences of reactive attitudes such as resentment, guilt, and indignation are appropriate responses to second-personal wrongdoing. The appropriateness of experiencing such reactive attitudes in non-identity cases suggests that they are no more problematic for an account of second-personal moral wrongdoing than they appear to be for legal wrongdoing. It is reactive attitudes such as indignation, resentment, guilt, and blame, Darwall argues, that are concerned with the “form of respect that we realize when we relate to someone second-personally.”⁶⁹ Do the victims in non-identity cases appropriately experience indignation and resentment towards non-identity actors? The answer would appear to be yes. The radiation victims in Parfit’s pollution case appropriately resent the actions of the polluting country as disrespecting them and violating their second-personal claims, much as would victims of radiation poisoning who exist at the time of the polluting act. In each case the act of polluting will predictably result in the violation of the second-personal claims of other persons. Foreseeable first-personal benefit, we have seen, does not address the second-personal grounds for holding such actions to be wrongful, nor does it alter the grounds for holding such actors accountable for the harms that are the reasonably foreseeable results of such wrongful actions.⁷⁰ The actors in non-identity cases fail to treat the persons for whom their actions are “but for” causes of existence with appropriate respect, violating their second-personal claims. They appropriately experience guilt for

68 *What We Owe to Each Other*, p. 180. See also his subsequent claim that on such second-personal approaches we appear to “have reason to value the justifiability of our actions... to those who are...not yet born, as well as to our contemporaries.” (p. 186)

69 *Ibid.*, p. 80.

70 Indeed, Darwall argues that such first and third-personal considerations are the wrong kinds of reasons to bring to bear in such cases, *Ibid.*, pp. 15–17.

performing such actions on such an account, and their victims appropriately feel indignation and resentment towards them.

This deontological account of wronging another as violating her second-personal claims, and its applicability to non-identity cases, can be further clarified through the following example. Smith knows that he has a serious disease, and knows, moreover, that if he engages in sexual intercourse now he runs a high risk of transmitting this disease to other persons. As in other procreative cases, nearly every act and decision affects the timing of conception and is therefore identity determining, because timing affects which sperm fertilizes which egg. Smith's carelessness with regard to disease transmission affects the conception timeline and therefore partly determines the identity of his future progeny. For example, had Smith bought or even simply removed from his pocket, unwrapped, and put on a condom before the sexual encounter during which he risks transmitting his disease, he would not transmit the disease, but he would also father a different child than if he refrained from taking the time to obtain and put on a condom. Even the few minutes it takes to put on a condom or not will result in different sperm fertilizing the available egg and is therefore identity determining in the usual non-identity problem way. If Smith abstains temporarily, the danger to others will pass, and there are no other morally relevant considerations.

Each other person, present and future, has second-personal claims that provide Smith with moral reasons not to violate such claims in the pursuit of his own ends. If Smith engages in sexual intercourse with another person, Jones, during this time, thereby infecting Jones, and does so without disclosing his circumstances, then whatever actual consent he has obtained is fraudulent, not genuine, and Smith has violated Jones' second-personal claims, treating her not with dignity, as the bearer of moral claims, but as a thing, a mere means. If Smith's sexual encounter with Jones results in Jones conceiving and subsequently giving birth to an infected child, Little Smith-Jones, then because there can be no actual consent, Smith's action is warranted only if, within the context of the parent-child relationship, he is acting in a way that respects his future child's second-personal claims. But Smith is clearly pursuing his own purposes, and subordinating to his purposes the relevant moral claims of a future child of his who may be produced. He knows that his wrongful interaction with Jones may well result in the conception of his child, and that any child Jones conceives is likely to suffer the serious hardships posed by having the disease. Little Smith-Jones is just such a child of his who is the result of his acting in a way that subordinates his future child to his purposes, thereby violating the child's second-personal claims. The wrong, then, is the same in both cases: Smith knowingly risks giving a serious disease to present Jones and to

future Little Smith-Jones, and puts each of them at risk because he is unwilling to delay the gratification of his interests as respect for the claims of each requires. Smith violates their second-personal claims in the pursuit of his own purposes, thereby wronging them. Just as Little Smith-Jones would be legally wronged if he was harmed by the pollution in Parfit's polluting country case, he is morally wronged by Smith in this case. Parfit recognizes that in such cases, intuitively, both Jones and Little Smith-Jones have been wronged by Smith. Deontological alternatives that recognize fundamentally second-personal claims and reasons would appear to provide a supporting rationale for such an intuition.

Such an account of the wrong done in non-identity cases appears to be available to a wide array of moral theories we have identified as deontological theories, theories which maintain that in addition to whatever first and third-personal reasons persons might have, they have fundamental second-personal reasons that reflect the moral significance – the value – that each person has independent of whatever first or third-personal moral significance they might have.⁷¹ We have been working up to this point within the broad framework provided by Darwall's general account of second-personal claims and reasons. But Darwall himself recognizes that such an account must be more fully articulated to clarify the nature of its application to particular cases; indeed, he favors a contractualist approach to articulating such an approach. We will close by drawing upon Scanlon's contractualist articulation of such a second-personal approach to address Parfit's case of the 14 year old girl.

Scanlon's account holds that "appreciating the value of human life is primarily a matter of seeing human lives as something to be respected,"⁷² where "respecting the value of human (rational) life requires us to treat rational creatures only in ways that would be allowed by principles that they could not reasonably reject insofar as they, too, were seeking principles of mutual governance."⁷³ A person is wronged, on this account, when someone has failed to treat him as one to whom justification is owed, and in so doing has violated the terms of their second-personal relationship of mutual respect.

In the case of the 14 year old prospective mother, Scanlon directs us to consider whether there is a reason that no one can reasonably reject for a principle

71 For helpful discussions of Kant's theory of value and reason, see Barbara Herman, "Leaving Deontology Behind," in *The Practice of Moral Judgment* (Boston: Harvard University Press, 1996) and "Bootstrapping," in *Moral Literacy* (Boston: Harvard University Press, 2008), pp. 164–75.

72 Ibid., p. 104.

73 Ibid., p. 106.

that prohibits children from having and raising children in societies such as ours. It seems plausible that no one involved has good reasons to reject such a principle. Such a prohibitory principle cannot be reasonably rejected on behalf of the 14 year old child, who is not competent to take on the responsibility of parenting, and who will be compromised in her own efforts to develop into a fully functioning rational agent. Nor should it be difficult to justify such a prohibition on behalf of the children of such children. As Parfit has pointed out, such children can often readily agree (retroactively) on third-personal grounds that what their mothers did was wrong, even though they are glad to have been born. Similarly, they can readily agree that there are reasons no one could reasonably reject for rejecting the principle upon which their mothers acted, even though they are glad to have been born. This becomes most clear when the question of overall first-personal benefits that result from an action is disentangled from the question of whether it is wrongful to permit such actions, and such disentanglement is in part what is accomplished by the reasonable rejection test as it is articulated by Scanlon.

There are also, Scanlon is clear, principles that no one can reasonably reject precluding racial discrimination,⁷⁴ principles that account for why, regardless of whether or not the victim of such discrimination unforeseeably benefits from its taking place (as in the Woodward airline case), the discriminatory act itself is wrongful, and the excluded passenger is wronged by it. Moreover, there seem to be plausible grounds for holding there to be reasons that no one can reasonably reject in support of the principle upon which Parfit's surgeon acts. Ripstein points out that in such cases in which a surgeon must decide whether to treat an unconscious patient, "the law treats each person as having the purpose of maintaining his or her continued purposiveness."⁷⁵ It seems plausible that such a legal principle is supported by a moral principle that no one can reasonably reject. Unlike the airline, or the 14 year old mother, or Smith in our case, the surgeon is not acting only for herself, to further her own purposes, but is instead acting on behalf of her patient, out of respect for him as an end in himself. Like the airline, or the 14 year old mother, or Smith, the surgeon's actions result in a first-personal benefit to another, but unlike these other cases the surgeon violates no second-personal claim, hence she wrongs no one. In a case in which the surgeon is, in fact, acting only to further her own purposes and is opportunistically using unconscious patients merely as a means to enhance her surgical skills for profit, she may well be wronging her patients

74 *Moral Dimensions* (Boston: Harvard University Press, 2008), pp. 69–74.

75 *Ibid.*, p. 143.

even when her actions result in their first-personal benefit. However, by hypothesis, that is not the case in Parfit's example⁷⁶

Lastly, on Scanlon's account some non-identity wrongs can be captured by "the meaning of the action – the significance of this action for the agent and others."⁷⁷ He argues that what an act means can depend on the reasons for which the agent acts and that sometimes the meaning of an action can affect its permissibility:⁷⁸

If someone acts with no regard whatsoever for the interests of another person, then this has a certain meaning – it indicates something significant about his attitude toward that person and about their relationship with each other.⁷⁹

Thus, Scanlon could argue that the selfish, wanton, or discriminatory reasons for which the airline in Woodward's case, Smith in our case, and the parents or policy makers in non-identity cases (but not Parfit's surgeon) act affect the meaning of the act in ways that affect its permissibility as well. Hence, for a deontologist such as Scanlon, there appear to be resources for demonstrating that victims are wronged by non-identity actions, and that wrongful actions that result in first-personal benefit to those who are wronged are not thereby made rightful. Moreover, there appears to be a principled basis for distinguishing the surgeon from the non-identity perpetrator.

The general second-personal account of when one person has wronged another provided by Darwall, and the particular contractualist articulation developed by Scanlon, both extend readily to account for the wrong suffered by victims in traditional non-identity cases. On such theories the person who acts in a way that can reasonably be expected to violate another person's second-personal claim wrongs that person, and this is true regardless of whether the person wronged receives some form of first-personal benefit as a result of the wrongful action, and regardless of whether the person wronged is caused to exist by the wrongful action. Although non-identity is an intractable problem for advocates of traditional teleological theories of reason and value, it

76 Similarly, if a mother chooses to conceive while on medication that causes certain birth defects because she believes all life to be equally sacred and worthwhile, then while she may be acting wrongly on various grounds, she is not relying on non-identity reasoning and this sort of case is not a non-identity case.

77 *Ibid.*, p. 52.

78 *Ibid.*, p. 87.

79 *Ibid.*, p. 53.

does not appear to pose any such distinctive problem for these deontological counterparts.

VI

Whose problem, then, is non-identity? Parfit's original suggestion appears to be that non-identity poses a particular problem for the deontologist, who maintains that the mother's decision is "worse for her child,"⁸⁰ and violates his "right to a good start in life."⁸¹ He suggests that if a perpetrator caused her child to be first-personally worse off, a 'familiar principle' grounds a presumption that the victim may be wronged by such a perpetrator.⁸² But because the non-identity victim is not in Parfit's sense made worse off, the familiar principle will provide no grounds for a claim of wrongdoing. Nor, he argues, will the appeal to rights, since a 'victim' who is not made worse off in this way, and whose life is worth living, will waive any right against the perpetrator. Hence, he suggests, these deontological claims that the non-identity victim has been wronged cannot be vindicated by appeals either to rights or to familiar moral principles, however intuitive they may appear. What can be vindicated, he argues, is Principle Q, which supports the third-person, agent-neutral judgment (even the child's own) that it would have been better overall "if my mother had waited, and had a child later."⁸³ Deontologists, of course, are not precluded from endorsing any such third-personal judgment, or seeing it as invoking a legitimate reason for action. But it is a paradigmatically consequentialist judgment, and the paradigmatically deontological judgments that non-identity victims are wronged cannot in Parfit's view be vindicated. Non-identity, as Parfit presents it, raises distinctive problems for deontology, and in so doing highlights a comparative disadvantage for deontology relative to traditional teleological alternatives.

We have demonstrated that the problem must be radically reframed in order to engage with real deontological alternatives. This reframing of the problem, we suggest, also relocates it. For the deontologist the fact that the child is not made first-personally worse off by his 14 year old mother, like the fact that he judges his life to be worth living, is simply beside the point in identifying the wrong that she does to him. The child is wronged because his

80 Ibid., p. 359.

81 Ibid., p. 364.

82 Ibid., p. 359.

83 Ibid., p. 360.

second-personal claims are violated by his mother, who selfishly discounts his second-personal moral claims in the pursuit of her own ends. The child can certainly be glad that he was born, but properly understood this provides no grounds for waiving his second-personal rights and claims, nor does it alter the fact that his mother wronged him by bringing him into the world in a way that violated his second-personal rights and her second-personal duties.

Nor does it make any sense on such an account, we have shown, to claim that the child in Parfit's case retroactively consents to the mother's actions, and hence that she does not wrong him. Consent, we have shown, is not on such accounts the marker of whether or not someone has been treated with disrespect – disrespect is. Consent, rather, is what can sometimes make what would otherwise be disrespectful treatment respectful. Such actual consent cannot be given by children or future persons. It may be possible to model respectful treatment of children and future persons properly through some form of hypothetical consent, but we have argued that Parfit's own appeals to consent as retroactive hypothetical endorsement fail to do so.

Non-identity, then, simply does not appear to pose a distinctive problem for those who recognize fundamentally second-personal reasons, rights, and claims. On such accounts I wrong you when I violate your second-personal claims, whether or not such wrongful action on my part results in your being first-personally worse off. Such deontological theories may themselves be rejected, of course, and Parfit does challenge certain of the fundamental claims of such theories at other points.⁸⁴ But this is a disagreement over fundamental theories of value and reasons – between deontologists who can account for our intuition that the mother has wronged her child, and those who recognize as relevant only traditional teleological reasons, who cannot. Each camp can endorse the third-personal judgment that it would (*ceterus paribus*) have been better had the mother waited, but only deontological theories, theories that recognize fundamentally second-personal claims and reasons, can account for the judgment that the mother has wronged her child. Non-identity, then, appears to pose a distinctive problem for traditional teleological theories, a problem that it does not pose for various deontological counterparts: deontologists have an account of the wrong suffered by the victim in such cases; the traditional consequentialist and others who frame the problem within a traditional teleological approach do not.⁸⁵

84 See his argument for and deployment of a deontic beliefs restriction in *On What Matters*, Vol. One, secs. 54, 57–62, and 64.

85 We would like to thank Jonathan Adler, Michael Cholbi, Arthur Ripstein, Dion Scott-Kakures, Julie Tannenbaum, David Wasserman, Charles Young, and the members of the Claremont Colleges' Philosophers Works-in-Progress group for helpful comments and discussions.

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