

ARTICLES

RIGHTS, INDIRECT HARMS AND THE NON-IDENTITY PROBLEM

JUSTIN PATRICK MCBRAYER

Keywords

*non-identity problem,
indirect harm,
cloning,
moral harm,
Markie*

ABSTRACT

The non-identity problem is the problem of grounding moral wrongdoing in cases in which an action affects who will exist in the future. Consider a woman who intentionally conceives while on medication that is harmful for a fetus. If the resulting child is disabled as a result of the medication, what makes the woman's action morally wrong? I argue that an explanation in terms of harmful rights violations fails, and I focus on Peter Markie's recent rights-based defense. Markie's analysis rests on the notion of an indirect harm, and I show that the calculation of an indirect harm relies on an improper baseline for the determination of whether or not an action adversely affects a patient's interests. I also defend an impersonal duty-based analysis of the wrongdoing in non-identity cases against an objection by Markie. I close by arguing that the rights-based analysis is insensitive to context and that context is morally relevant in the determination of the moral valence of actions in cases of non-identity. This failure provides a pro tanto reason to favor an impersonal duty-based analysis of the wrongdoing in non-identity cases.

Our decisions often affect who will exist in the future. The problem of taking this element into account in moral deliberation was dubbed by Derek Parfit the non-identity problem.¹ Determining the moral value of an act of conception is an instance of the more general non-identity problem. Conception obviously affects who will exist in the future. And – given the contingent facts of human reproduction – precisely *who* will exist is a matter of what month conception occurs. Had my mother conceived in April instead of March, I would not be writing this paper. The child born from an April conception would be non-identical to me.

It is difficult to account for the moral wrongness of actions in non-identity cases. Consider the case of a

woman whose act of conception results in the birth of a disabled child. Imagine, for example, that the woman purposefully conceives while taking a medication that she knows may result in birth defects. What makes the woman's action morally wrong? In normal cases in which a woman's actions negatively affect an already existing fetus, the grounding of the wrong is straightforward: the woman violates the child's rights in a way that is harmful to him. But in the non-identity case, even if the woman violates some right of the resultant child, it seems she has not harmed him. After all, granting that his life is better than non-existence, the child has not been made worse off by the mother's act of conception. The only way to avoid the disability is to forgo conception. So what makes her action wrong?

Bioethicists agree that the woman acts wrongly. What is at stake is the grounding of that wrong. There are two

¹ Derek Parfit. 1984. *Reasons and Persons*. Oxford: Clarendon Press: 351–379.

contesting views in the current literature. According to what I'll term the rights-based account, the action is wrong because it morally harms the child.² His rights are violated for no good reason, and he is harmed. This violation of a *personal* duty and the accompanying harm accounts for the moral wrongness of conception. A personal duty is a duty owed to someone and is associated with a correlative right. The rights-based account, however, is *prima facie* unsatisfying; after all, the only way to avoid the disability is to forgo conception – an outcome that is worse for the child than living with his disability. It is difficult to see how the mother has harmed her child.

A second account of the wrongness is a duty-based analysis which accedes that the child is *not* morally harmed, but the wrongness of the act is accounted for by appeal to an *impersonal* duty that requires would-be mothers to bring about (or avoid) certain consequences for their would-be children. An impersonal duty is a duty owed to no one in particular and has no associative right. A breach of an impersonal duty does not entail a violation of a right (hence, the *duty*-based analysis). On this analysis, the act is morally wrong because the woman violates a duty by willfully introducing an avoidable amount of suffering and evil into the world.³

Peter Markie argues that the rights-based analysis is sufficient to ground the wrong in non-identity cases.⁴ In this paper I recount Markie's solution and illustrate its shortcomings. Incorporating an insight from the compatibilism debate in free will, I shall argue that Markie's analysis fails to show that the woman's act adversely affects the child's interests, and so her action fails to count as a moral harm. I shall also defend the duty-based analysis against an objection raised by Markie. I close by arguing that the continued failure of rights-based analyses is the result of something endemic to the nature of the analysis itself. The problem is that rights are not sensitive to context whereas the moral value of actions in non-identity cases is contextual. While certainly not conclusive, this fact provides a *pro tanto* reason to accept the duty-based analysis of wrongdoing in non-identity cases.

² For examples of rights-based defences, see Peter Markie. Nonidentity, Wrongful Conception and Harmless Wrongs. *Ratio* 2005; 18: 290–305; and James Woodward. The Non-Identity Problem. *Ethics* 1986; 96: 804–831.

³ For examples of duty-based defences, see Dan Brock. (1995) The Non-Identity Problem and Genetic Harms – the Case of Wrongful Handicaps. *Bioethics* 1995; 9: 269–275; Joel Feinberg. Wrongful Life and the Counterfactual Element in Harming. *Social Philosophy and Policy* 1987; 4: 145–177; Gregory Kavka. The Paradox of Future Individuals. *Philosophy and Public Affairs* 1982; 11: 93–112; and Parfit, *op. cit.* note 2, pp. 351–379.

⁴ Markie, *op. cit.* note 2, pp. 290–305.

Who cares which analysis is correct as long as we agree that the woman's action is morally wrong? Note that the issue of what grounds the wrong is important because it has radical consequences for other bioethical issues such as genetic intervention, cloning, etc. For example, if the wrong in non-identity cases is grounded by an impersonal duty to bring about (or avoid) certain consequences for would-be children, this leaves open whether or not would-be parents are obligated to perform genetic screening, engage in genetic enhancements of their gamete cells, etc. If parents are genuinely bound by such a duty, it seems plausible that morality would require this sort of genetic intervention, etc. when the parents could do so with little risk to themselves, etc. If a rights-based analysis is sufficient to ground the wrong, however, the duty to engage in genetic intervention, etc. is not raised.⁵ And since many of the most interesting bioethical problems are raised at the beginning of life (e.g. abortion, sex-selection, genetic enhancements, etc.) and are thereby instances of the non-identity problem, an answer to the grounding question in non-identity cases is paramount for making progress in addressing these other pressing concerns.

I. MARKIE'S RIGHTS-BASED SOLUTION

Peter Markie contends that the rights-based analysis is sufficient to explain the moral wrongness of acts of conception that he labels 'wrongful disability' cases. A case of wrongful disability is a case in which the child is born with a disability but with a life worth living. This case is contrasted with a case of wrongful life in which the child is born with a disability and a life that is not worth living. Since it is widely agreed that cases of wrongful life can be handled by rights-based analyses, I shall not treat them further here.⁶ The question at hand is whether or not the rights-based analysis can ground the wrong in cases of wrongful disability. According to the rights-based account, the mother's action is morally wrong because it constitutes a moral harm. 'Moral harms', Markie writes, 'both wrong the victim by violating his rights and

⁵ Granting, of course, that children don't have claim rights on parents to secure genetic enhancements, etc.

⁶ After all, in a case of wrongful life, the resultant child's rights have been violated and he has been harmed even on the traditional accounts of harming. This is because – *ex hypothesi* – his life is not worth living, and so the act of conception makes him worse off than he would have been otherwise. Hence, the mother's action constitutes a moral harm: she violated the child's rights and harmed him. See Joel Feinberg 1984. *Harm to Others*. Oxford: Oxford University Press.

adversely [affecting] his interests'.⁷ So Markie must show that the woman's action wrongs the child and adversely affects his interests.⁸

First consider the charge of wronging. Markie adopts Joel Feinberg's analysis of wronging:

A wrongs B just when (A) A acts with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; (B) A's acting in that manner is neither morally excusable nor morally justifiable; and (C) A's action is the cause of a violation of B's rights.⁹

These three conditions are severally necessary and jointly sufficient to determine an act of wronging. Consider our paradigm case. The mother knew of the risks associated with conceiving while on the medication, and yet she did not take any special measures to avoid getting pregnant. So the action meets (A). Condition (B) requires that the mother's action is neither morally excusable nor justifiable.¹⁰ Examples of morally excusable actions include actions done by small children, the insane, etc. To be morally justifiable 'is to admit responsibility for an act, but to argue that it was 'a good thing, or the right or sensible thing, or a permissible thing to do, either in general or at least in the special circumstances of the occasion''.¹¹ Our paradigm case can be specified so that the woman's action is neither morally excusable nor justifiable. Finally, granting the immanently plausible suggestion that we have a claim right on others not to be made disabled, conception violates the child's rights, and so the action meets condition (C).¹² I hereby grant that the mother has wronged the child.¹³

⁷ Markie, *op. cit.* note 2, p. 290.

⁸ Feinberg, *op. cit.* note 6, p. 65.

⁹ Markie, *op. cit.* note 2, p. 296.

¹⁰ 'To plead an excuse is in effect to admit that one's action 'wasn't a good thing to have done, but to argue that it is not quite fair or correct to say baldly' or without qualification, that one did the thing at all, that it was one's action' Feinberg, *op. cit.* note 6, p. 108.

¹¹ Ibid: 108.

¹² Note that we need not assume that the child is a person while he is yet at fetus to get this result. Feinberg clarifies the situation as follows:

Before the fetus becomes a person, it is a potential person with the potential attributes, including the possession of rights, of a person . . . and if it is true that one of the rights he will have at birth (the presumed onset of personhood) is the right to be free of these total impediments to a development and fulfillment, that is, a right to some opportunity for a tolerable life, then the potential rights at the very moment they are actualized are violated. A grossly impaired infant [might] come into existence not simply with rights, but with rights already violated. (Feinberg, *op. cit.* note 3, p. 166)

¹³ It might be thought that rights violations are sufficient for an act of wronging, and that an act of wronging is sufficient for an act to be morally wrong. If this is correct, then the non-identity analysis ends

Consider next the claim that the mother harms the child. Markie must show that the action adversely affected the child's interests. Markie must argue that the child is worse-off as a result of the conception than he would have been otherwise.¹⁴ His solution is to differentiate between the following questions:

- (Q1) Does the mother's act of conception, which wrongs her son, also harm him?
- (Q2) Does the wrong, which results for the son from the mother's act of conception, harm him?¹⁵

In response to (Q1), Markie concedes that the mother's action does not harm the child (though it wrongs him). A baseline of non-existence is the appropriate measure of harm in this case. Since existence with a life worth living is better than non-existence, the child hasn't been harmed by the act of conception. In response to (Q2) however, Markie argues that the wrong that results from the act of conception does affect the child's interests adversely. In this case, the baseline for determining harm is different:

The difference between how things are for him with the disabilities and resulting lack of opportunity, on the one hand, and how things would have been for him without the disability and with the opportunities, on the other, is an appropriate measure of what his restricted life has cost him.¹⁶

The distinction is one between direct and indirect harms:

An act is *directly* harmful if it causes a violation of the victim's rights and makes him worse off than he would

here: the woman's action violated the child's right, and a rights violation is sufficient for an act to be morally wrong. This account has its own problems. For example, it has to make sense out of cases in which one agent clearly violates the rights of another and yet we think that his action is morally permissible (e.g. the surgeon who amputates the leg of an unconscious victim in order to save his life). Regardless, since Markie does not assume that a rights violation is sufficient for an act to be morally wrong, this move is off limits for him.

¹⁴ Technically, the counterfactual test is reformulated to include rational preferability as the standard. This is because non-existence is one of the baseline alternatives, and, in Feinberg's words 'it is necessary to be if one is to be better off' (Feinberg, *op. cit.* note 3, p. 158). When comparing existence to non-existence, Feinberg suggests the following counterfactual test: B is in a harmed state if, because of A's breach of duty, B comes into existence in a condition such that *it would be rational to prefer nonexistence to that condition*. (Feinberg, *op. cit.* note 3, p. 161). For simplicity's sake, I will just speak of the child being better or worse off while noting that this can be rephrased in light of the new conditional to avoid any logical inconsistencies concerning nonexistence actually *being* better.

¹⁵ Markie, *op. cit.* note 2, p. 301.

¹⁶ Ibid: 301.

have been but for the *act*. It is *indirectly* harmful if it causes a violation of the victim's rights and the substance of that wrong itself then makes him worse off than he would have been but for the *wrong*.¹⁷

So on Markie's proposal, the mother's act – though it does not *directly* harm the child – constitutes a moral harm because it both wrongs him and adversely affects his interests by indirectly harming him. The solution relies on the following principle:

(MH): an act Φ constitutes a moral harm to a subject S if and only if Φ constitutes an act of wronging S and *either* directly or indirectly harms S.

If (MH) is true, then the rights-based solution has accounted for the moral wrongness of conception in wrongful disability cases and this provides a *prima facie* reason for accepting a rights-based solution to the non-identity problem more generally.

II. A CRITIQUE OF MARKIE'S RIGHTS-BASED ANALYSIS

Markie's analysis fails because it does not establish that indirect harms adversely affect one's interests, and thus for our paradigm case, the woman's action fails the second necessary condition of a moral harm. (MH) is false. What does it mean for an action to affect one's interests adversely? Feinberg sketches at least 4 alternatives, and I reproduce them here in ascending order of severity.¹⁸ First, an interest can be *impeded*. When an interest is impeded, its advancement is neither stopped nor reversed but merely hampered. Blinding me will impede my interest in learning to play the piano. Second, an interest can be *thwarted*. An interest is thwarted when it is blocked from further advancement. Suspending a student from school thwarts her interest in graduating from that school. Third, an agent's interests can be *set back*. This occurs when an action reverses the progress towards the interest in question. My interest in buying a house is set back when someone steals my down-payment. Finally, an interest can be *defeated*. An interest is defeated when the necessary conditions for the advancement of that interest are blocked. Cutting off my fingers will defeat my interest in learning to use chopsticks.

Markie's innovation is to classify the foregoing types of harm into direct and indirect harms. Direct harms are

measured by the standard conception of harm in which an act counts as a harm only if it makes the subject worse off than he would have been otherwise. Applied to the mother's case, Markie concludes the following:

In particular, the claim that usually supports a determination of harm, 'He would have been much better off, if his mother had acted otherwise,' is either false or without a truth value, as it incorrectly assumes that her child would have existed if she had acted differently.¹⁹

But the analysis for an indirect harm is different. Instead of comparing the condition of the subject against the baseline in which the act has not occurred, Markie compares the condition of the subject against some other logically possible world in which the subject exists without his rights violated:

The difference between how things are for him [the child] with the disabilities and resulting lack of opportunity, on the one hand, and how things would have been for him without the disabilities and with the opportunities, on the other, is appropriate measure of what his restricted life has cost him. The difference is substantial. The claim, 'He would have been much better off, if he had not had the disabilities and lost opportunities,' is clearly true and sufficient to support a determination of harm.²⁰

And note that there is some logically possible world in which the child in our paradigm case exists without the disability. To deny this is to maintain that he is *essentially* disabled. Markie measures indirect harm by comparing the state of the subject after the rights violation with the nearest world in which the subject exists with the substance of the rights violation intact. Granting that there is such a world for the child, it follows that the woman's act has indirectly harmed him.

But while direct harms adversely affect one's interests, not all indirect harms adversely affect one's interests, and this is because not all of the baselines appealed to in the determination of indirect harms are *actually* possible states of affairs. Here I borrow a play from the literature on the compatibilism debate in free will. A compatibilist argues that free will is consistent with determinism (of some sort or another). An incompatibilist denies this claim. Both camps, however, want to make sense out of the claim that a free agent could have done otherwise than he actually does. Consider the analysis of 'could have done otherwise'. The

¹⁷ Ibid: 302, emphasis mine.

¹⁸ Feinberg, *op. cit.* note 6.

¹⁹ Markie, *op. cit.* note 2, p. 301.

²⁰ Ibid: 302.

compatibilist analysis of ‘could have done otherwise’ relies on a counterfactual reading: in the case of a free action, had the world been different (e.g. had the agent had different desires, motives, etc.), then the agent would have done something else. And so – in a sense – it is true that the agent could have done otherwise. Incompatibilists, not surprisingly, are unimpressed. ‘It doesn’t matter what the agent would do in these possible worlds with different histories’, they say, ‘what matters is whether or not an agent could do otherwise *even while maintaining a fixed past*’. John Martin Fischer elucidates the issue as follows:

I have suggested that a fair interpretation of the intuitive view of the fixed past implies that one can do *X* only if one’s doing *X* can be an extension of the actual past. Alternatively, one might say that an individual can actualize only those possible worlds which share the past of the actual world.²¹

Regardless of whether the incompatibilist gripe is legitimate, a similar complaint can be raised in response to Markie’s view of indirect harms. Let’s say that a world is *actually possible* just in case it is both physically possible and possible given the way that the actual world has turned out thus far. All actually possible worlds share the past of the actual world. For example, it is not actually possible that marbles float or that the first climber of Mt. Everest is Bill Clinton. The way the actual world has turned out limits the range of possible worlds to the set that is consistent with facts about the past, facts about the physical world, etc. This is the set of actually possible worlds.

Another way to think about the restriction of actually possible worlds is the medieval notion of *necessity per accidens*. Accidental necessity relates to the necessity of past events. It is now necessary that Atlanta held the Olympics in 1996. Nothing can be done to change that fact, and the proposition is necessary. The set of actually possible worlds is restricted in a similar way. Given the way the actual world has turned out, there is no actually possible world in which the Olympics were not held in Atlanta in 1996.

The crucial point is that *actually impossible* interests cannot be adversely affected (or perhaps they are not legitimate interests at all). If I have some interest Φ , but Φ is not achieved in any of the actually possible worlds, then there is nothing that anyone else can do to set back that

interest of mine. To appeal to possible worlds that are not actually possible in order to determine harm is illicit. In this way, my response mirrors the complaint that the compatibilist’s appeal to possible worlds that don’t share the past is illicit when determining whether or not an agent could have done otherwise.

What this means for our discussion of the non-identity problem is that *only actually possible worlds are eligible as baselines for determining harm*. Suppose I have adopted the goal of being the first to climb Mt. Everest. Given the way the actual world has gone, there is nothing that anyone can do *now* to adversely affect this interest of mine. This is because Hilary and Tenzing climbed Mt. Everest in 1953. In no actually possible world is this interest of mine actualized, and so, given the way the world has turned out, there is nothing that anyone can do *now* to affect this interest of mine adversely.

It might be objected that being the first to climb Everest is not a genuine interest of mine but merely a desire. The example is easily modified. Suppose that it is in the interest of an old farm couple to have numerous children in order to work the farm. They are both past the age of reproduction, however. Given the fact that they have waited until their bodies were incapable of reproduction, it is not physically possible that they have children. Despite the fact that they have children in some possible world (i.e. they are not *essentially* childless), there is no actually possible world in which they have children. And so there is nothing that anyone can do to set back their interest in having children.

Now compare these scenarios to our paradigm case. The woman is on medication. This is a past fact – it is accidentally necessary. The sperm and egg requisite for this particular child’s existence are available this month and this month only. If the woman conceives, then the child is born with a disability. If the woman does not conceive, then the child will not exist. Given the way the actual world has turned out, there is a limited space of physically possible worlds in which the child exists. This set is the set of actually possible worlds. In every *actually* possible world in which he exists, the child is disabled. Yet he is not essentially disabled (there are lots of *logically* possible worlds in which he exists without the disabilities), rather, his disability is an accidental necessity. Since there is no actually possible world in which he exists without the disability, there is no action that can set back his interest in this respect. And so the act of conception does not adversely affect the child’s interests (if anything, the mother promotes his interests, because without her action he would not exist at all). And so her act does not constitute a moral harm.

²¹ John Martin Fischer. 1994. *The Metaphysics of Free Will: An Essay on Control*. Oxford: Blackwell: 101.

III. DE-FUSING AN OBJECTION

In addition to providing a defence of the rights-based analysis, Markie offers a critique of the duty-based analysis of the non-identity problem. He proffers an argument by false implication showing that a duty-based analysis would have implausible implications in certain scenarios:

Consider another case, Abortion. A mother is in the early stages of pregnancy, so that the fetus is not yet a person, when she learns that, through no fault of her own, her child will be seriously disabled but have a life worth living. She considers abortion with the plan of conceiving a nondisabled child at a later date. . . . Note that the mother in Abortion will not harm or even wrong her child by terminating her pregnancy. The child can only be harmed or wronged through the violation of its rights, and, as Feinberg and Brock claim, the child only has rights once it becomes a person, which never happens if she has an abortion.²²

Markie's claim is that according to plausible candidates for a duty-based analysis, the mother in this scenario is morally *obligated* to have an abortion. This is putatively because she could easily bring it about that another child who lacks the disability could exist instead of the disabled child that will exist if she refuses to abort the current fetus. Markie points out (rightly, I think) that our intuitions on the matter are otherwise: while it may be permissible for the woman to abort, surely it isn't the case that she is obligated to abort. And since the rights-based analysis does not imply that the woman is morally obligated to abort (because maintaining the pregnancy does not constitute a moral harm), this is a case in which the rights-based analysis is explanatorily superior.

Pace Markie, the duty-based analysis does not imply that the woman has a moral obligation to abort. This is because the duty-based analysis is context sensitive. To illustrate this sensitivity, I shall examine Dan Brock's example of the type of impersonal duty appealed to by those defending the duty-based analysis:

Individuals are morally required not to let any child or other dependent person for whose welfare they are responsible experience serious suffering or limited opportunity or serious loss of happiness or good, if they can so act that, without affecting the number of persons who will exist and *without imposing substantial burdens or costs on themselves or others*, no child or other dependent person for whose welfare they are

responsible will experience serious suffering or limited opportunities or serious loss of happiness or good.²³

Notice that the duty includes a *ceteris paribus* clause. It specifies that the acting agent must be able to act in an alternative fashion, and he must be able to do so 'without imposing substantial burdens or costs on [himself] or others'. It is this *ceteris paribus* clause that blocks the implication in Markie's criticism. In Markie's case Abortion, the *ceteris paribus* clause has not been met. After all, abortion is an invasive surgical procedure that would involve physical pain, mental/emotional trauma, financial burden, social implications, etc. It is plausible that this cost to the woman is enough to make conception of a new child too distant an option, and thus the duty-based analysis does not imply that the woman is obligated to abort. Aborting and not-aborting are not choices that are otherwise equal.

Markie might object that the case can be specified so that the duty-based principle *does* imply that the woman in this scenario is morally obligated to have an abortion. Suppose that the abortion could be effected by merely taking a pill and that the pill is inexpensive and has no negative side effects. Assume also (as per Markie's suggestion), that the fetus is not a person. He actually needs something stronger here, to wit, the supposition that the fetus has no moral standing whatsoever.²⁴ Let's grant this. But now, once this is granted, if the woman discovers that the resulting child will be horribly disabled, the suggestion that she is obligated to abort loses its counterintuitive nature. In fact, it is very plausible (again, given these suppositions) that abortion is morally obligatory.

Our initial negative reaction to a moral obligation to abort stems from either a reluctance to strip the fetus of all moral standing or an assumption that abortion is a burdensome procedure with negative physical and social ramifications. Once these assumptions have been denied to meet the *ceteris paribus* clause, there is no reason left to explain why abortion in such a case would not be obligatory. Surprisingly, this sensitivity to context not only blocks this type of objection to the duty-based solution but it also illustrates the superior explanatory power of the duty-based analysis over the rights-based alternative.

²³ Brock, *op. cit.* note 3, p. 249, emphasis mine.

²⁴ If we don't grant this, then we have the situation in which the fetus is not yet a person but may have some lower moral standing. If this is the case, the *ceteris paribus* clause will not be met. This is because aborting the fetus will kill some being with moral standing while not aborting will not. So in order to get the conclusion that the impersonal duty entails an obligation to abort, we need to assume that the fetus has no moral standing whatsoever.

²² Markie, *op. cit.* note 2, pp. 299–300.

IV: THE NON-IDENTITY PROBLEM AND CONTEXT

In this closing section I shall argue that the failure of Markie's account is not an isolated and easily-solved problem. Instead, the inability to account for the wrong in the range of cases discussed here is endemic to rights-based accounts in general. The reason is straightforward: the rights-based solution is *not* sensitive to context and the moral valence of actions in cases of non-identity *is* sensitive to context. I shall illustrate the problem with two final thought experiments.

In the first case, a woman in the early stages of pregnancy finds out that her fetus is disabled. Her attending physician offers her a certain pill. If the woman takes the pill, a *different*, but healthy child will be born. If she does not take the pill, the disabled fetus will come to term and a disabled child will be born. Grant merely for the sake of argument that the fetus has no moral status whatsoever at this early stage of pregnancy (i.e. no moral patient is either wronged or harmed this early in the pregnancy) and that taking the pill has no harmful medical, social or financial ramifications. Taking the pill is like swallowing a vitamin. Should she take the pill? Yes. Intuitively, the woman in this scenario has a *prima facie* moral obligation to take the pill. If this result is counter-intuitive to some, I suggest that this is because either A) they are unwilling to strip the early-term fetus of all moral status or B) they are imagining some sort of abortion where the woman will be subjected to various emotional, physical and financial duress. But once we hold all these aside and make the case equivalent to merely swallowing a vitamin, it is plausible to suggest that the woman morally ought to take the pill. After all, it costs her nothing and results in the creation of a healthy child whereas her omission costs her nothing and results in the creation of a disabled child.

And here is where the context sensitivity of the duty-based analysis is helpful. If we grant that taking the pill is very easy for the woman (e.g. it places her under no emotional, physical, financial duress), then the duty-based analysis yields the intuitive result. The woman morally ought to take the pill. The rights-based case does not. To see why, just look at the resulting child in both cases. If the woman takes the pill, the resultant child is not wronged and not harmed. Similarly, if the woman does not take the pill, the resultant child is not wronged and not harmed. It might be objected that not taking the pill *does* harm the resultant child, albeit it is a harm that results from an omission on the woman's part. In other words, not taking the pill made the result-

ant child worse off than he would have been otherwise. This would be plausible if taking the pill merely alleviated the disability. In that kind of case, the mother would have harmed her child by an act of omission: not taking the pill resulted in her child being worse off than he would have been otherwise. But recall that taking the pill results in the birth of a *different* child. It is implausible to suggest that I harm someone standing in the interstate by not killing him before a truck hits and disables him. Similarly, it is implausible to suggest that the mother harms the child by not taking measures to ensure that he never exists with his disability. So in this case the rights-based analysis implies that not taking the pill is morally *permissible* while our intuitions are that taking the pill is morally *obligatory*. The big-picture lesson is that context that makes all of the difference and the duty-based analysis captures this fact.

Consider a second case. In this case a man and a woman – both of whom suffer from Down's Syndrome – are deliberating about whether or not to have a child. Knowing that there is a significant chance that their child will be born with a similar disability, they intentionally conceive and commit themselves to loving and raising a disabled child. Suppose that the child is born with a mild disability but with a life that is worth living. Note that there was nothing that the couple could have done to insure that the child was born without the disability. The only live options were remaining childless or giving birth to a child with a mild disability. Was the act of conception morally permissible? Yes. In this case, the intuitive response is that the couple did nothing morally wrong.

The duty-based analysis explains this result. Once again, context is crucial. Since there was no alternative action that was available without imposing substantial burdens or costs on themselves or others, the action was morally permissible. The rights-based analysis, however, implies that the act of conception is morally wrong even in this altered case. Why? Because the couple wrongs the child (i.e. their action meets all three conditions of wrongdoing), and the action either directly or indirectly harms the child because there is some logically possible world in which he is not disabled. In this second thought-experiment, the rights-based analysis implies that the act of conception is morally *wrong* when our intuitions are that it is morally *permissible*. Again, context makes all of the difference, and the duty-based analysis captures this.

A natural objection is to insist that in the altered case, the mother's action is not negligent with regard to the consequences of her actions for her child. This is an effort to show that the first condition of wrongdoing has not been met. While it's true that the woman's action is not negligent in this regard, this is irrelevant. Recall that the first

condition of the analysis of wrongdoing is an inclusive disjunction: '(A) A acts with the intention of producing the consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences'. The condition is met anytime an agent acts with the intention of producing the consequence under consideration *or* anytime an agent acts with negligence in respect to those consequences. Since the mother's act of conception and the resulting consequence (the birth of a disabled child) were – *ex hypothesi* – intentional, it follows that the action meets condition (A) of wrongdoing.

The gist is that whether or not the act in a case of non-identity is wrong depends crucially on what other options are available for the agent in question. When an agent willfully makes things worse than they could easily have been, the action is morally wrong. When there is

nothing that the agent can do to avoid the evils in question without sacrificing some great good, we think that the agent's actions are permissible. As long as the rights-based analysis remains insensitive to context, the duty-based analysis of wrongdoing in non-identity cases will better explain our intuitions about these tough cases. This, I suggest, is a *pro tanto* reason to favour duty-based analyses of wrongdoing in non-identity cases.

Acknowledgements

Thanks to Jon Kvanvig, Robert Johnson, Peter Markie, Eric Roark, and two anonymous reviewers for *Bioethics* for helpful comments on earlier drafts of this paper.

Justin McBrayer is a PhD candidate at the University of Missouri where he is writing a dissertation in defense of moral perception. His interests lie in epistemology, philosophy of religion and applied ethics.