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Response

A Response to Professor I. Glenn Cohen's Regulating Reproduction: The Problem with Best Interests

Helen M. Alvaré[†]

[I]f the kids are still alive when my husband gets home from work,
then hey, I've done my job.

-Roseanne Barr¹

Professor Glenn Cohen makes a tight logical case against employing a simple “best interests of the resulting child” (BIRC) argument to justify a variety of laws designed to affect whether, when and with whom a person procreates.² He shows that—given how such laws could result in a particular child not being conceived at all, or in the creation of a *different* child at another time—it is not possible to support such laws on literal BIRC grounds separate from the claim that it is better for a particular child never to be born at all.³ This is the “non-identity problem.”⁴ Professor Cohen further claims that the law in a “cognate area,”⁵ has essentially rejected the notion that it would be better for a particular child never to have been born; this is the set of cases usually denominated “wrongful life” suits, in which courts most often refuse to recognize a cause of action for the “wrong” of simply having life. He points out that at least one court has highlighted additionally the practical im-

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1. *Roseanne Barr Quotes*, BRAINY QUOTE, http://www.brainyquote.com/quotes/authors/r/roseanne_barr.html (last visited May 20, 2012).

2. I. Glenn Cohen, *Regulating Reproduction: The Problem with Best Interests*, 96 MINN. L. REV. 423 (2011).

3. *Id.* at 457.

4. *Id.* at 437.

5. *Id.* at 443.

possibility of determining whether the plaintiff (the child claiming that but for a doctor's error he or she would never have been born, and seeking damages for the harm of being alive) has been damaged at all.⁶

At the very least, Professor Cohen's article suggests that lawmakers would be inconsistent simultaneously to support courts' refusals to recognize the "wrongful life claim" and to endorse a literal BIRC rationale for one or more laws likely leading to the nonexistence of a particular child. Given that few, if any, persons would like to be associated with the declaration that a particular child's life is "not worth living," the practical result of Professor Cohen's argument is that laws and policies embodying even widely popular opinions about favorable conditions for childbearing, lose a powerful rhetorical device: BIRC.

Professor Cohen is correct about the widespread and explicit use of BIRC in order to justify laws and private policies ranging from incest prohibitions, to constraints upon access to assisted reproductive technologies (ARTs), to abstinence education (and he might well have added to the list those sex education programs receiving the vast majority of federal support, "comprehensive sex education" programs).⁷ He is also accurate in concluding that the non-identity problem essentially logically forecloses employing the usual BIRC justification in the legal and policy contexts he raises. His paper also, if only indirectly, suggests a proposition that is welcome from a human rights perspective: that it is best to conclude that human beings have lives worth living, no matter their origin. Undoubtedly there remains a connection in the mind of the average citizen, between exhortations from the state to avoid childbearing in "X" situation, and the perception that children nevertheless born in "X" situation have less dignity or merit less care. This is an affront to equality and ought to be fought explicitly. Of course, attempts to solve this equality problem can go too far, to the point of deeming all sexual or technological transactions resulting in the conception of children beyond comment or regulation—no matter the harms suffered by the adults involved, or the implications for long-held standards regarding adults' responsibilities to children generally. These latter standards would include

6. *Id.* at 445.

7. See Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034 (2009); see also News Release, Dep't of Health & Human Servs., HHS Awards Evidence-Based Teen Pregnancy Prevention Grants (Sept. 30 2010) available at <http://www.hhs.gov/news/press/2010pres/09/20100930a.html>.

at least the family law norm holding that parents' rights respecting their children are a function of parents' prior duties, along with its further specification: parents' continuing legal rights respecting their children depend upon maintaining parental "fitness," *i.e.*, certain minimum levels of behavior affecting children.

It is more than a little likely, in fact, that lawmakers' nearly constant invocations of BIRC in connection with regulations affecting procreation are intended to point to these norms, and not meant as a mechanical rule. In other words, one possible, even likely "read" of the practice of using BIRC to justify laws and policies which would almost certainly preclude the birth of a particular child, is as the state's way of communicating to those who *could* be parents, always to put children's interests before adults' in situations wherein adults are so empowered. Obviously, the moment of conception is a situation in which would-be parents are almost always so empowered. It is a moment in time where there either are or are not in place many of the basic conditions understood historically (and increasingly affirmed by current empirical research) as linked to children's well-being. Some of these basic conditions can be deduced from the laws and policies Professor Cohen highlights, for example, abstinence education, incest bans, and limits or regulations concerning assisted reproductive technologies (ARTs).⁸ They include, generally speaking, marriage, and age and economic factors which often go hand in hand. Likely rationales for these conditions include the research findings that when natural parents are not married to one another, there is more instability in children's lives.⁹ Furthermore, with unmarried biological parents, whether conception occurred naturally or via ARTs, children are more likely to be deprived of a relationship with one or both biological parent(s) for some part or all of their lives. When prospective parents are quite young, there are well-founded concerns about their ability to obtain adequate employment or education for purposes of supporting a child. When they are relatively old (in the case of some seeking access to ARTs), there arise questions about how long they can fulfill parental duties. If would-be parents are close kin, the law worries

8. Cohen, *supra* note 2, at 446–457.

9. See, *e.g.*, W. BRADFORD WILCOX, ET AL., WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES (3d ed. 2011); Cynthia Osborne et al., *Married and Cohabiting Parents' Relationship Stability: A Focus on Race and Ethnicity*, 69 J. MARRIAGE & FAM. 1345 (2007).

not only about their children's health, but also the problem of stable family life in a family of now confounded kin relations. All of these concerns are part of an increasingly visible legal and popular discourse about procreation; all can inform would-be parents' reflections at the moment of conception. Again, pre-conception, it is the potential parents, as compared with any child, who have the power to affect the circumstances into which a child is born, which circumstances can affect the child's flourishing permanently or for shorter or longer periods of time.

The BIRC rationale for laws affecting procreation makes sense if understood as an exhortation to parents, pre-conception, to "step up" to a level of "fitness" whereby children's best interests come first, and parents' rights follow only if they embrace this duty. Furthermore, such an understanding of BIRC would harmonize family law's pre-conception and post-birth treatment of parents, insofar as this is possible considering that children do not yet exist in the former case, but do in the latter. Post-birth, the law will not step in to remove a particular child (temporarily or permanently) from a particular parent—in other words, it will not step in to mold parenting—unless the parent's behavior falls below a floor demarcated by "neglect," "abuse," "abandonment" or other "unfitness."¹⁰ Pre-conception, the law will not speak to potential parents in a discouraging or definitive way, will not instruct them in the details of adequate parenting, unless their "parenting behavior"—*by which I mean their conceiving their child in particular circumstances*—falls below a floor constituted by the presence, at the time of conception, of a situation deemed minimally supportive of the child's best interests. At conception, there is no "track record" of parents' interactions with a child by which to judge their conduct or fitness respecting a particular child; he or she does not exist yet. Observers can only judge persons' suitability by the care they have taken at least to avoid depriving a child of some of the basic goods of family life. If none of these basic goods are lacking, the law remains silent. When basic goods may well be absent at the moment of conception, the law speaks. Of course, it cannot speak in the same way as it would when a child is actually born lacking basic goods. In this latter case, the law removes the child from the parents, some-

10. These are commonly used statutory standards. *See, e.g.*, National District Attorneys Association, Child Neglect and Abandonment Statutes 1 (2007), available at http://www.ndaa.org/pdf/ncpca_statute_child_neglect_abandonment_3_07.pdf.

times temporarily, sometimes permanently. At conception, all the law can do is exhort (*e.g.*, abstinence programs) or threaten with penalties (*e.g.*, incest bans), or interpose practical hurdles (*e.g.*, frighten off would-be sperm donors by requiring disclosure) in order to begin to mold would-be parents into the kind of parents it will assume them to be after the child's birth: "fit" parents who act in the child's best interests." This is the work presently performed or at least accompanied by the BIRC justification. How is it performed? In the case of persons who go forward to procreate a child in circumstances where it appears the child will be born deprived of one of the basic goods indicated by policies constraining procreation, the existence of the policy itself could help induce the parent(s) to later ameliorate the child's experience by moving toward the ideal the policy advocates. In the case of those who do not procreate at a particular time because of the existence of a policy constraining procreation, they might bring the law's ideals to bear on their future procreating, or they might decide that they do not wish to meet the standards for "parental fitness" suggested or required by one or more parenting laws and policies, and choose not to procreate.

This way of thinking about why the state imposes limits on whether, when and with whom a citizen can parent is, oddly enough, an answer to an age-old question asked by every parent of a newborn on his or her way home from the hospital: "You mean I don't need a license to have this baby? How can this be?" In other words, private and public policies affecting whether, when and with whom persons may procreate might be seen as a kind of licensing scheme. Immediately, however, it should be remarked that as far as licensing schemes go, this one is quite minimal. It operates more by exhortation than by penalty, and leaves more than a few decisions in the hands of private persons (*e.g.*, ART providers) who are themselves sorely tempted to assist conception for a fee in a great variety of situations. Furthermore, often (not always, *e.g.*, in the case of surrogacy contracts), this "licensing scheme" doesn't actually deprive the person who can't meet licensing conditions of the very thing the license was intended to gatekeep: a legal right to care and custody of a child. Still, it is important that society—whether the state or private parties—is not entirely silent about some of the minimal conditions for children's flourishing pertaining to the moment of conception. Parenting is, with few exceptions (*e.g.*, the care of a sick or disabled person over a long period of

time) the most dramatic experience a person might have of turning their life over to the needs of another person. While it is uniquely satisfying, it is also very difficult and demanding. I would argue that this is particularly true in a cultural environment like ours which valorizes individualism and material success. Furthermore, the United States is witnessing a growing divide between the marriage and parenting experiences of more privileged versus less-privileged citizens.¹¹ Better-off citizens who act at conception in ways that deprive their children of some of the basic goods of family life can at least sometimes ameliorate outcomes for their children, in part, with money.¹² Poor or otherwise marginalized citizens do not have that option. For the benefit particularly of less-privileged citizens, then, it is good for both public and private actors to speak about conditions for “fit” parenting in order to provide less privileged, would-be parents standards to guide their striving, and to avoid intergenerational decline within marginalized groups.

Understandably, a state purpose to help citizens consider what constitutes minimally fit parenting at the moment of procreation will strike many as not only a surprising, but as an impermissible justification for law affecting whether, when and with whom a person procreates. Sex is today increasingly dissociated both practically and conceptually from procreation. The widespread availability of birth control and abortion technologies partially explains this situation, as does the use of “privacy” language in connection with the legal right to access both. Perhaps most important, however, is the rise of the notion that sexual decision making and decisions about procreation are, first and foremost, about identity formation, self-expression, and personal happiness. While the rise of this idea in the law merits its own article,¹³ it suffices for now to remark that the latter notion was endorsed explicitly in the Supreme Court’s *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁴ (abortion) and *Lawrence v. Texas*¹⁵ (homosexual sexual inter-

11. KAY S. HYMOWITZ, *MARRIAGE AND CASTE IN AMERICA: SEPARATE AND UNEQUAL FAMILIES IN A POST-MARITAL AGE* (2006); CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA 1960–2010* (2012) ; W. Bradford Wilcox, *The Evolution of Divorce*, NAT’L AFF., Fall 2009, at 81.

12. SARA MCLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS* (1994).

13. I am currently drafting an article on this subject.

14. 505 U.S. 833, 851 (1992).

15. 539 U.S. 558, 574 (2003).

course) decisions. In both opinions, the Court stated that matters involving sex and procreation:

involve . . . the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] . . . are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.¹⁶

Any attempt by the state to intervene in the course of a person's sexual expression or procreation will appear invalid *ab initio* within such a framework of ideas. Yet all the same, sex continues to be the cause of conception, both when women and men intend it to be, and when they do not. Numbers of unintended pregnancies and nonmarital births remain quite high today.¹⁷ Furthermore, foundational aspects of children's lives are determined by the parents' situations at the moment of conception. Consequently, it is important for some authoritative voice to point to the fact that conception is still the effective beginning of parenthood.

I should note here that my suggestion that the state and some private actors (*e.g.*, ART providers) have proposed minimal standards for parental "fitness" at conception does not mean that these standards have been adopted or applied uniformly. There are many inconsistencies. For example, both state sponsored sex education programs and marriage programs speak about the advantages that married parents can offer to their children, but the law does nothing to discourage let alone forbid ART conceptions among singles or unmarried couples. Some jurisdictions or private providers will forbid assisted reproduction by men who wish to remain permanently anonymous to their children, but most jurisdictions and providers impose no such condition. Furthermore, fathers who conceive children naturally are often unknown to their children. Some jurisdictions may forbid surrogacy agreements which

16. *Casey*, 505 U.S. at 851. In another relevant passage, the opinion commends the legal availability of birth control and abortion in order to allow women to "define their view of themselves and their places in society." *Id.* at 856.

17. Lawrence B. Finer, *Unintended Pregnancy in the United States: Incidence and Disparities*, 84 *CONTRACEPTION* 478 (2011); Brady E. Hamilton et al., *Births: Preliminary Data for 2009*, NAT'L VITAL STAT. REP., Dec. 21, 2010, at 1, 4, available at http://www.cdc.gov/nchs/data/nvsr/nvsr59/nvsr59_03.pdf; see also STEPHANIE J. VENTURA, *CHANGING PATTERNS OF NONMARITAL CHILDBEARING IN THE UNITED STATES* 2, 6 (2009), available at <http://www.cdc.gov/nchs/data/databriefs/db18.pdf>.

could separate a child from his or her genetic mother, but these same jurisdictions may allow the use of donor, eggs, sperm or embryos, which often produce the same result. Many factors undoubtedly account for the lack of consistency—profit motives and politics, to mention just two. Yet there are some more or less consistent themes around marriage, age, health and economic circumstances which merit attention of the kind Professor Cohen and others have paid them.

In sum, the BIRC rationale makes sense as a public and private effort—albeit neither a consistent nor a particularly robust effort—to remind parents, before the moment parenting begins (conception) to be what the law later (after-birth) needs them to be and assumes that they are: fit parents who act in their children’s best interests. It is not clear why policymakers use BIRC language when, because of the non-identity problem, it could not logically apply. But the historical reason is not terribly important. What matters is that the state find some way of expressing to adults that important aspects of a potential child’s future are established at the moment of conception. The child’s genetic makeup, the presence or absence of a stable relationship between his or her biological parents, the family’s economic situation for at least some portion of the child’s minority, and other matters are discernible at the moment of conception.

But what about the concern that BIRC-justified constraints might lead to disparaging children born into less than ideal situations? One of the helpful consequences of Professor Cohen’s analysis is that it requires us to face the possibility that when the state expresses a preference for one or another family form or formation process, there arises the risk that children created in the teeth of the state’s preferences will be stigmatized. One solution is for the state to stop speaking entirely about conditions and environments better supporting children’s flourishing, but this is ridiculous on its face, for the reasons suggested *supra* and for additional reasons. The state’s *parens patriae* role is longstanding and necessary. On matters of education and nutrition, for example, the state has and will continue to speak about what serves children and what hurts them. Certainly, matters concerning the circumstances of the child’s conception are at least as important. It might be argued in response that, historically, the circumstances of a child’s birth “go deeper” and are far more easily interpreted as a comment upon the child’s “quality” or future prospects, to the point where some might speak of children born in less-than-ideal circum-

stances as having “lives not worth living.” This is true, but such a result is not inevitable. The currently reduced stigma concerning nonmarital birth, for example, combined with the line of Supreme Court cases eradicating legal differences in the treatment of “legitimate” versus “illegitimate” children,¹⁸ demonstrates the real possibility for maintaining a system where nonmarital births are still discouraged, but persons born outside of a marriage are recognized as fellow and equal citizens. Even, however, if the announcement of standards for fit parenting is misused to disparage innocent children, the alternative state of affairs—silence about parental fitness—is unacceptable. Conception is a crucial moment for children’s life courses, and those who would be parents may well benefit from this information. Furthermore, untried solutions await. Perhaps the state could frame its BIRC arguments not in terms of “building better children,” but as exhortations to parents to begin molding themselves *qua* parents before undertaking the conception of children. This proposal is undoubtedly not in tune with the modern *zeitgeist* about sex, as noted above, but has the nice qualities of avoiding a colloquial BIRC justification when it is technically illogical, while at the same time forwarding the cause of children generally.

A final note about this proposal in connection with Professor Cohen’s use of courts’ disposition of “wrongful life” cases; it is not undercut by family law’s admirable refusal to recognize a cause of action for “wrongful life.” It is a great good that, when confronted with a child who is already born, and is, for example, severely disabled, the law refuses to declare his or her life “not worth living.” But this should not be confused with messages from the lips of public or private policymakers to the effect that, when it comes to children, parents should hold themselves to particular responsibilities not only after the child is born, but at any time when the parents can significantly impact the child’s best interests in the areas of physical health, family stability, future connections with genetic parents, etc. There is even some precedent for this thinking in those cases evaluating unmarried fathers’ interests in retaining parental status respecting their children. Courts require them to come forward to demonstrate that they assumed their responsibilities in a timely manner.¹⁹ A father might even be required to have come for-

18. See, e.g., *Levy v. Louisiana*, 391 U.S. 68 (1968).

19. See *Lehr v. Robertson*, 463 U.S. 248 (1983).

ward at the time he “knows or reasonably should have known about the pregnancy.”²⁰

CONCLUSION

Professor Cohen does not conclude that because a literal application of BIRC cannot logically do the work of justifying laws and policies banning, delaying or conditioning procreation, there is no rationale available to the state for regulating the circumstances of conception. This is salutary given that the latter conclusion would be tantamount to a suggestion that adults have something like a “right to a child.” This would be the practical result of affirming that there is no room even for exhortation from the state which might interfere with adults’ undertaking procreative sex or ARTs whenever these would create a child with a life “worth living.” Yet it is well established in the law governing adoption, and in the area of surrogacy contracts, and even in parentage cases denying custody rights to genetic²¹ or gestational²² progenitors, that family law has a tradition of putting children’s interests before adults’ in a wide variety of situations.

Furthermore, to conclude that there is no rationale available to the state for regulating the circumstances of conception would appear to contradict the notion that “fit parents can be presumed to act in their child’s best interests,” and to set up in its place a new principle we might call the “Roseanne Barr” rule: parents need attend only to their children’s bare existence.

20. *In re Adoption of Michael H.*, 10 Cal. 4th 1043, 1054 (1995).

21. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

22. *Johnson v. Calvert*, 5 Cal. 4th 84 (1993).