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Response

In Defense of Future Children: A Response to Cohen's *Beyond Best Interests*

Kimberly M. Mutcherson[†]

Reproduction is a private affair and parenthood is its intense reward. The reproductive drive needs to be tempered by the collective virtue of human solidarity so the aspirations and rewards of having fine children can be shared by everyone.¹

INTRODUCTION

I. Glenn Cohen's articles, *Regulating Reproduction: The Problem with Best Interests*² and *Beyond Best Interests*,³ are well-argued pieces of legal scholarship written with the ambitious goal of "fundamentally re-writ[ing] the way we talk and think about regulating reproduction."⁴ It is a goal that Cohen has pursued in a range of different pieces concerned with the problems of reproduction in our complicated post-coital world. In *Beyond Best Interests*, and its companion piece, he points to the multiple examples of the use of an appeal to the best interests of the resulting child, or BIRC as he calls it, as a sufficient basis for a range of intrusive interferences with and denials of reproductive choice.⁵ He makes his case using examples ranging from criminal bans on brother-sister incest to similar bans on the sale of sperm purchased from an anonymous source to

[†] For Max and Beanie, whom I loved before they were born. Copyright © 2012 by Kimberly M. Mutcherson.

1. ROGER GOSDEN, DESIGNING BABIES 241 (1999).

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

3. I. Glenn Cohen, *Beyond Best Interests*, 96 MINN. L. REV. 1187 (2012) [hereinafter *Beyond Best Interests*].

4. *Id.* at 1274.

5. While much of the commentary in this response addresses the text in *Beyond Best Interests*, the points made here are generally applicable to *Regulating Reproduction* as well.

make a baby.⁶ He rejects BIRC as unsound largely because it falls prey to Derek Parfit's non-identity problem, which as Cohen succinctly describes it, holds that "we cannot be said to harm children by creating them as long as we do not give them a life not worth living."⁷ Further, when we the law to intervene in reproduction we also alter who gets made. In other words, when we keep a woman from becoming pregnant at point A, which would have resulted in the birth of child B, the child who she bears at some later point will be child C. Therefore, it is impossible in most cases for us to say that we have regulated reproductive choice to change the future of one child except to the extent that we have prevented that child from ever being born.

Not only does Cohen reject BIRC because of its non-identity implications, he further rejects a range of ways that people might attempt to avoid the implications of BIRC. Rejected reformulations include those focusing on imperfect non-identity problems meaning problems that will not necessarily impact a whole population of future people who will never come to be but some smaller slice of that population,⁸ or by focusing on non-person affecting principles, which shift our analysis from an individual child to broader conceptions of creating more or less good in the world by reducing or replacing the number of people who will experience more suffering or limited opportunities.⁹ He then turns to dismantling other justificatory regimes for reproductive regulation including concerns about reproductive externalities, 3rd parties who will be harmed by the births of particular children, and an argument based on the idea that an act can be wrongful where there is harm even if there is an overall benefit, such as a life worth living.¹⁰ He ends by problematizing regulatory rationales based on legal moralist concerns steeped in the idea that it is good to deter acts that "undermine public morality" or virtue ethics concerns for the

6. As Cohen notes in *Regulating Reproduction*, the general convention is to refer to men who sell their sperm in a booming commercial market as donors. See *Regulating Reproduction*, *supra* note 2. Bowing to this convention perpetuates myths of altruism that ultimately mask commodification and therefore make it more difficult for us to seriously consider the realities of a market in making babies. Such a market clearly warrants serious and ongoing consideration, therefore this response will dispense with using the word donor.

7. *Regulating Reproduction*, *supra* note 2, at 437.

8. *Regulating Reproduction*, *supra* note 2, at 457.

9. *Id.* at 481–482.

10. *Beyond Best Interests*, *supra* note 3, at 1244.

virtue of the parents or future parents who are making procreative of decisions.¹¹ Here he points out that these rationales may be masked by BIRC and that it is a good thing to get them out into the open.¹² He also argues that the virtue ethics approach may fall prey to the non-identity problem, therefore making it illegitimate.¹³

The ultimate implication of Cohen's work is that if the BIRC rationale is bankrupt and actually masks a string of problematic rationales for denying access to reproductive choice, then the larger scholarly and policymaking conversation about the regulation of reproduction needs to experience profound changes. He gives some concession to the idea that reproductive externality issues might warrant reproductive regulation, but only in a small number of cases.¹⁴ Further, he asserts that if forced to argue based on true motivations, including in some cases a preference for heterosexist notions of family life, those making such strong arguments for reproductive regulation might find themselves waging a much more uphill battle.¹⁵

Cohen's work fits into a long and ongoing collection of scholarly work about "whether, when, and with whom individuals reproduce."¹⁶ These scholars of reproduction include many people who share some of the scholarly commitments that appear to flow through Cohen's work including grave concerns about state attempts to regulate reproduction and the bioethical and legal scholarship that champions such a move.¹⁷ These scholars have written extensively about ways in which the best interests of the child rationale can and often has been used as subterfuge for pernicious types of bias¹⁸ and, their writing on

11. *Id.* at 1265.

12. *Id.*

13. *Id.* at 1269.

14. *Id.* at 1243.

15. *Id.* at 1266.

16. *Id.* at 1192.

17. See, e.g., Khiara M. Bridges, *Quasi-Colonial Bodies: An Analysis of the Reproductive Lives of Poor Black and Racially Subjugated Women*, 18 COLUM. J. GENDER & L. 609 (2009); Linda C. Fentiman, *Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse Is Not the Answer—A Comparative Legal Analysis*, 15 MICH. J. GENDER & L. 389 (2009).

18. Though Cohen's narrative does not focus on the best interest of the existing child, it is worth noting that many scholars and activists have challenged the use of the best interest paradigm in the context of live children, as juxtaposed against Cohen's resulting children, because the test is subjective on a level that can make it feel almost meaningless. See, e.g., Andrea Charlow,

the myriad ways in which reproduction is a unique site for considering notions of human rights, dignity, and autonomy is illustrative of the core issues that are relevant when one writes about the practice and regulation of having babies. When the state regulates access to reproduction, and it does so in a range of ways with disparate impacts on various populations, it strips individuals of agency; it denies privileges of citizenship; and it deprives people of dignity and human rights. When practiced on a large scale, state sponsored reproductive control can have profound impacts across a population. But even when practiced on a small scale, the individual consequences for a person left to ponder why the state is so appalled by the specter of her procreating that it would legislate against it has the potential to be devastating. While not specifically articulated in this way in Cohen's writing, it is vital to ground this discussion in the seriousness of its ramifications and the often discriminatory ways in which the power to regulate reproduction is wielded.

While there is much to appreciate in Cohen's work, as a whole it fails to attain his goal of fundamentally shifting the terrain upon which discussions about exercising control over reproduction takes place. This response offers four interrelated observations about why Cohen's work is ultimately unconvincing or less persuasive than it might otherwise be. First, his work is rooted in the notion of procreation as substantially, and perhaps strictly, a matter of rights and autonomy. That conversation ignores the ways in which such a narrow lens continuously fails to capture the complexities of the enterprise of creating new lives. An enterprise that necessarily involves some consideration of consequences for those who already exist and those who will exist. Second, Cohen's work takes little account of the fact that actively choosing to have children is a moral choice and, as such, it is subject to condemnation, critique and public scrutiny. Third, and this is the most important critique and it is closely related to the first two, if we take Cohen at his

Awarding Custody: The Best Interest of the Child and Other Fictions, 5 YALE L. & POL'Y REV. 267, 272-273 (1987) ("Use of the indeterminate best interests standard permits individual judges to ignore the results of scientific research and to substitute their prejudices and values for those of legislatures [T]he current best interests standard provides too much latitude in which judges can obscure the rationales for their decisions and allows them to base custody awards on their personal values."). See also, David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984).

word that his piece is about shifting the conversation in the policy realm, his work substantially misses the proverbial boat. There is no way that broad conversations about reproductive regulation, and broad in this sense refers to conversations outside the confines of the insular world of academia, can or will be conducted without some notion of the consequences that the exercise of reproductive choice has on the lives of those children who issue as a result of such choices. Fourth, and finally, the real task of those of who find BIRC untenable is not to convince others that it is unsound—philosophically or otherwise—but to convince them that their notions of best interest are flawed. This task is no doubt daunting, but the probability of success on this account is substantially stronger than the probability of convincing a range of decision makers that their resort to the best interests of future children to rationalize action is and forever will be completely inadequate.¹⁹

I. JUSTICE AND RIGHTS OR JUSTICE, NOT RIGHTS

Crucial to this critique of Cohen is a broader framing of the problem that he seeks to solve. In Cohen's work, it is never quite clear who exactly he is fighting for or why. To be sure, he gives several specific examples of people who are subject to regulation of their procreative choices, siblings in love among them, but he never quite lays out why all of this matters in a practical sense, though the answer to that is likely quite obvious to most readers. The primacy of the discussion about how to regulate procreative choices, if at all, rests on very specific ideas about procreation that merit ongoing exploration as they are contested in academia and beyond. Cohen's vision of why this conversation matters appears to rest on his "modestly libertarian view" that "the State has to offer some justification for limiting individuals' reproductive choices . . ." ²⁰ Specifically, Cohen's articles seem to take as unchallenged the premise that the appropriate regime for worrying about issues of reproductive regulation is one that is rooted in the stand-alone notion of reproduction as a right. Undergirding all of Cohen's discussion in *Beyond Best Interests* is an understanding of procreation as a

19. Throughout this response, I focus in particular on Cohen's discussions related to assisted reproductive technology (ART), as this is the area in which I have been primarily focused for some years. I also believe that the ART arena sets up some interesting conflicts related to how reproduction may be perceived differently depending upon its context.

20. *Regulating Reproduction*, *supra* note 2, at 429.

fundamental right as articulated by the U.S. Supreme Court in *Skinner v. Oklahoma*.²¹ While it is uncertain whether that fundamental right extends to the use of ART, and this question is disputed in the literature, there are certainly those who vigorously make this argument.²² Similarly, within the realm of ethics, there are those for whom procreation is a right, not a privilege, that is worthy of respect and protection, but that is also subject to limits.²³ The organizing framework of rights, however, is not uncontested territory. As a general matter, the debate about rights as an organizing framework is not necessary to repeat here as it has been raging for far too long to be dismissed as inconsequential.²⁴ The field of advocacy related to reproduction has not been immune to this debate and its consequence is that many of those who formerly considered themselves advocates for reproductive rights now proudly proclaim that they are advocates for reproductive justice.²⁵

The shift from rights to justice is an important one as notions of justice, especially as articulated by the reproductive justice (“RJ”) movement, have long taken careful note of difference and offered multi-layered critiques of the relationship between reproduction and oppression in our divided and unequal world. Cohen’s work takes no real account of the concept of re-

21. *Beyond Best Interests*, *supra* note 3, at 1188 (citing *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

22. See, e.g., John A. Robertson, *Reproductive Rights and Reproductive Technology in 2030*, THE FUTURE OF THE CONSTITUTION 1–18 (Jeffrey Rosen & Benjamin Wittes eds.).

23. Laura Purdy explains, “Although there is no explicit constitutional right to procreate, it is generally assumed that such a right is implied by other fundamental constitutional rights. It is also assumed that it is, in any case, morally justifiable to assert such a right, and that this right should be protected by law.” Laura M. Purdy, *Loving Future People*, in REPRODUCTION, ETHICS, AND THE LAW: FEMINIST PERSPECTIVES, 301 (Joan C. Callahan ed.) (1995). See also, Bonnie Steinbock, *Reproductive Rights and Responsibilities*, 24 HASTING’S CENTER REPORT 15 (2004) (discussing the contours of a right to procreative liberty and concluding that those without capacity to parent do not have a right to reproduce).

24. See, e.g., Mark Tushnet, *The Critique of Rights*, 47 SMU L. REV. 23 (1993) (describing the critical legal studies critique of the rights framework).

25. See, e.g., Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L. J. 1394 (2009); Zenaida Mendez, *Reproductive Justice Is Every Woman’s Right*, NATIONAL ORGANIZATION FOR WOMEN, http://www.now.org/nnt/fall-2006/reproductive_justice.html (describing the National Organization for Women’s adoption of a resolution “calling for a collaborative reproductive justice campaign that would ‘connect the relevance of reproductive rights, health care and justice to the race and ethnicity of all women, including women with disabilities.’”).

productive oppression as an active and vital part of any conversation about the regulation of reproduction. To ignore both the discriminatory nature of much of reproductive regulation, in that it hits most deeply at traditionally disenfranchised groups, and to not discuss the consequences that flow from treating access to reproduction in a cavalier or discriminatory fashion leaves a big hole in this analysis.

To talk of justice rather than rights does not dismiss the relevance of rights in the context of reproduction. Rather, the reproductive justice narrative takes rights as necessary but not sufficient for the purpose of freeing women and others from the shackles of reproductive oppression.²⁶ The goal of this movement is to ensure that all people have “the economic, social, and political power and resources to make healthy decisions about [their]bodies, sexuality and reproduction for [them]selves . . . and [their] communities”²⁷ Reproductive justice advocates and scholars have long pondered the dangerous, pernicious, and oftentimes discriminatory ways in which a professed concern for future children justifies a range of abuses against the poor, people of color, those with developmental disabilities and other disenfranchised populations. Cohen makes brief reference to forced sterilization of those with disabilities and other types of reproductive wrongs,²⁸ but reproductive justice scholars like Dorothy Roberts have long documented and decried the reality of reproduction as a site for intersectional oppression, especially for women of color, poor women, immigrants and others.²⁹ They have also noted that in the case of

26. Reproductive oppression here refers to the multiplicity of ways in which the ability to reproduce has served as a site of public control over the lives of individuals, especially women. This oppression comes in the form of reduced access to the tools of avoiding pregnancy, as well as sterilization abuse, criminalization of actions taken while pregnant, reduction in access to abortion services, and discrimination in employment based on pregnancy or reproductive capacity.

27. *A New Vision for Advancing our Movement for Reproductive Health, Reproductive Rights and Reproductive Justice*, FORWARD TOGETHER, <http://forwardtogether.org/assets/docs/ACRJ-A-New-Vision.pdf>.

28. *Beyond Best Interests*, *supra* note 3, at 1192.

29. See, e.g., Dorothy Roberts, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997); Betsy Hartmann, *REPRODUCTIVE RIGHTS AND WRONGS: THE GLOBAL POLITICS OF POPULATION CONTROL* (1995); Sarah Smith Kuehnel, *Abstinence-Only Education Fails African American Youth*, 86 WASH. U. L. REV. 1241 (2009); Alexandria Walden, *Abortion Rights for ICE Detainees: Evaluating Constitutional Challenges to Restrictions on the Right to Abortion for Women in ICE Detention*, 43 U.S.F. L. REV. 979 (2009).

children of color and poor children, professed concern for the best interests of future children so often seems to end soon after those children leave their mother's wombs.³⁰ This last point, which starkly ties together the two strands of best interest of the child, has strong political resonance—a resonance that would get lost if one simply jettisoned the best interests discussion from all interactions related to reproduction.

This information about reproductive justice is relevant for a few reasons. First, it highlights that the population for whom Cohen's arguments are salient goes beyond brothers and sisters interested in pursuing sexual relationships with each other or post-menopausal women who desire to have children or even same-sex couples who want to create families with children. In fact, those individuals are probably a tiny fraction of the people for whom reproductive oppression is of primary concern. The collection of individuals, especially women, for whom a critical understanding of the role played by the BIRC trope in policy-making and legal analysis is broad, diverse, and often times politically weak.

Second, a justice lens, in contrast to a rights lens, tells complicated stories about identity and imagines a diverse range of interests related to reproduction that are both individual and community oriented. For instance, the justice lens is firmly rooted in the concept of intersectionality, which takes as its starting point the understanding that overlapping identities have profound implications for how one moves through the world.³¹ A justice lens does the critical work of highlighting the reality that procreation has been and well into the future will continue to be a place where deep fears about race, gender, sexual orientation, and class privilege play themselves out on bodies that are largely female. As such, BIRC is not just about the who, what, and when of procreation. It is profoundly and disturbingly about staking out claims of worthiness, about who deserves to be a full and complete member of the polity, and the

30. According to the Children's Defense Fund, each day in America: 2 mothers die in childbirth; 5 children are killed by abuse or neglect; 5 children or teens commit suicide; 8 children or teens are killed by firearms; 80 babies die before their first birthdays; 949 babies are born at low birthweight; 2,058 children are confirmed as abused or neglected; 2,163 babies are born without health insurance; and 2,573 babies are born into poverty. *Each Day in America*, CHILDREN'S DEFENSE FUND (July 2011), <http://www.childrensdefense.org/child-research-data-publications/each-day-in-america.html>.

31. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

meanings of citizenship and human dignity. What is at stake when one contemplates the role of BIRC in discussing reproduction is very much the stuff of life. Even more though, the community element of the justice narrative suggests that discussions about procreation are not simply about a contest of clashing rights and radical autonomy involving atomistic individuals, but also involve questions of interdependence, obligation, and relationship.³² For those who believe that these ideas of connection and obligation are central to talk about reproduction, even if the conclusions that we draw from this insight are different than those drawn by others, there is an obligation to talk frankly about how and why those potential connections or possible obligations do not dictate a single answer to how people should or should not pursue procreation.

II. HAVING CHILDREN IS A MORAL CHOICE

Also largely missing from Cohen's work is clear acknowledgement that having children is a choice fairly subject to an ethical analysis that has policymaking implications. This seems like an especially relevant point in an article that substantially concerns itself with philosophy and ethics so that if it is a philosophical argument that lays the foundation for rejecting a particular regulatory regime, other philosophical arguments may be relevant to the discussion as well. As described above, Cohen ascribes to himself a modestly libertarian view about human reproduction. It is not incompatible with such a view to have deep respect for private choices related to reproduction, while being cognizant of the fact that procreation is in the public interest and there are public interests in procreation such that the choice to procreate can raise serious public concerns that justify the existence of public discussion though not necessarily public control. This means that any veil of privacy surrounding procreative choice can be pierced. Individuals and those who govern them have obligations to generations that follow and opting to create life is not an ethically neutral transaction. As the philosopher Laura Purdy contends, the fact that one has serious misgiving about and finds unjustifiable most limits on individual reproductive behavior does not mean that "there are

32. The concept of relational autonomy does some of the work of describing how one can subscribe to notions of autonomy that do not depend on the concept of disconnect. *See, e.g.*, RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (Catriona MacKenzie & Natalie Stoljar eds., 2000).

no *moral* limits on reproduction.”³³ Put another way, “exercising your legal rights can sometimes be morally wrong.”³⁴ No doubt, the space between public concern and public control is frequently bridged and describing ways of maintaining that space without denying the legitimacy of public concern is a consistent theme in the scholarship of reproduction.

While Cohen’s philosophical leanings lead him to the conclusion that the non-identity problem makes it impossible to justify reproductive regulation based on the interests of future children, one can legitimately conclude that reproduction without serious thought toward future children is morally suspect. Again from Laura Purdy: “If we are consistent in our concern about human happiness, it seems clear that we must attend to the welfare of future people,”³⁵ which, in Purdy’s case, means rejecting the implications of Parfit’s non-identity problem. In part she does so by casting some doubt on the idea of what it means for a different person to exist from each new meeting of sperm and egg.³⁶ Further, she argues that the highly abstract examples offered by Parfit³⁷ coupled with a narrow focus on harming individuals, “as opposed to states of harm[] . . . implicitly promotes an unattractive ethic of moral minimalism that could hardly be distinguished from libertarianism.”³⁸ She concludes:

The underlying moral principle here seems to be that it is morally permissible to bring you to life as long as you can be expected to find your life worth living, because you are not thereby harmed (even if you have been born in a harmed state) and it is permissible to do anything that does not harm you. What we owe others is thus reduced to not harming them, and the standard for not having harmed them is set very low. Generalizing these principles to other cases would lead to a great deal of misery.³⁹

Purdy’s rejection of the implications of Parfit is important because it shows us one way out of the non-identity problem

33. Purdy, *supra* note 23, at 301.

34. *Id.* at 302.

35. *Id.*

36. *Id.* at 314.

37. Christine Overall also critiques Parfit’s and others’ chosen hypotheticals, noting “examples of women who happily or at least indifferently contemplate giving birth to suffering children are scarcely believable.” CHRISTINE OVERALL, *WHY HAVE CHILDREN?: THE ETHICAL DEBATE* 151 (Arthur Kaplan ed., 2012).

38. *Id.* at 316.

39. *Id.* at 316–317.

and exposes the moral limits of non-identity as a baseline for considering procreative choice.

In a similar vein, in her book, *WHY HAVE CHILDREN?*, Christine Overall ponders why it is that people are often called on to justify why they are childless, but are much less frequently asked why they have opted to have children.⁴⁰ In part it might be because having children is considered part of fulfilling a biological destiny, an inadequate argument in Overall's estimation,⁴¹ but she argues that questions about having children are both prudential and ethical as:

[T]hey are about whether to bring a person . . . into existence—and that person cannot, by the very nature of the situation, give consent to being brought into existence. Such questions therefore profoundly affect the well-being both of existing persons (the potential parents, siblings, grandparent, and all the other people with whom the future child may interact) and potential persons.⁴²

She goes on to note that procreative decisions have profound impacts on children, no doubt, and significant implications for communities. Overall also rejects Parfit's framing of identity in a way that inexorably and conveniently leads to his non-identity problem. She believes that the relevant identity category is not that of the child produced by the joining of a particular egg and a particular sperm. Rather, citing to Sim Vehmas, Overall argues that the relevant data point is the identity of the child vis a vis that child's "social place" in the family.⁴³ In other words, what matters from the perspective of a parent is whether the child is the first child, second child, etc. and this identity category is not determined by what sperm and egg combination comes together at any point in time.⁴⁴ If Overall is right, then the non-identity problem is not really a problem at all, but I suspect that Cohen does not believe that Overall is right.

Cohen's response to all of this is probably that Overall and Purdy are falling into the same philosophical fallacy that so many have entered before them, but after making that claim one needs to be prepared to offer some alternative account of

40. This freedom from being asked to justify one's choice to parent tends to be reserved for those deemed to be good parents worthy of procreation. So it is the case that procreation pursued by single women, same-sex couples, low-income people and other categories of reproductive outsiders is often met with derision instead of delight. OVERALL, *supra* note 34.

41. *Id.* at 3.

42. *Id.* at 6.

43. *Id.* at 152.

44. *Id.* at 153.

why procreation and procreative choice are matters worth ethical inquiry. It is not clear if Cohen would take the unequivocal position that the interests of future children are unknown, unknowable, and unworthy of reflection unless the life to be lived would not be worth living. If he did, such a position dismisses a critical conversation that goes to the heart of the procreative discussion. One need not be pro-life in the political sense in order to believe that matters of life merit both public and private care and concern. Assuming that Cohen believes that this is true, how he would articulate and justify such care and concern without reference to future children or to reproductive externalities that offer no account of anything substantive being owed to future people, but that focus instead on the interests of the already living? In other words, if we jettison BIRC, as Cohen suggests, what remains to anchor any public concerns about procreation other than the slim tether of reproductive externalities? More important, what remains to obligate the state in positive ways to provide services to those who procreate?

III. BIRC IS HERE TO STAY

Despite Cohen's quest to ensure that "never again will policymakers, courts, and legislatures defend the regulation of reproduction on grounds of children's best interest or child welfare,"⁴⁵ it is certain that BIRC will remain a cornerstone of policymaking regarding reproduction for decades to come. If Cohen's goal was simply to engage in debate with other scholars, he can claim to have successfully continued the quest to chip away at or at least expose the difficulties inherent in presuming to consider the interests of a person not yet conceived. However, as Purdy and others have indicated, Parfit's non-identity problem is not without its holes that make it a less than optimum theory of the morality of procreation.⁴⁶ Even Cohen's claim that courts have already taken up some elements of non-identity through jurisprudence on wrongful life claims, in which a child with a disability claims his existence as an injury worth compensation because of a negligent failure to give his parents information that would have led them to abort him,

45. *Beyond Best Interests*, *supra* note 3, at 1274.

46. See, e.g., James Woodward, *The Non-Identity Problem*, 96 ETHICS 804 (1986); Christine M. Korsgaard, *Personal Identity and the Unity of Agency: A Kantian Response to Parfit*, 18 PHIL. & PUB. AFF. 101 (1989); Jeffrey Reiman, *Being Fair to Future People: The Non-Identity Problem in the Original Position*, 35 PHIL. & PUB. AFF. 69 (2007).

has some holes.⁴⁷ After all, wrongful life claims seem to go hand-in-hand with wrongful birth claims so that a court has the easy exit of allowing parents to recover for the negligent denial of making a choice to abort without explicitly ruling on whether the child's life is worth living.⁴⁸ But where there is no companion wrongful birth claim, at least one court has determined that a wrongful life claim could stand, thus suggesting that the calculus being done by these courts is a bit more complex than Cohen admits.⁴⁹ This further intimates that the story about wrongful life claims and non-identity that Cohen offers is more complicated and will resonate in the BIRC debate far into the future.

This persistence of the debate about BIRC in the literature (after all, Parfit threw down the gauntlet of non-identity in 1984) speaks to the larger point here, which is about the rhetorical staying power of BIRC and Cohen's ambition, which goes beyond the community of scholars. Whatever their strengths, these articles will not put a nail in the coffin of the use of BIRC. This has nothing to do with the power of the argument. Instead, it is because Cohen does not successfully capture the extent to which BIRC is an expression of a larger and intuitively persuasive view of the basic requirements of human goodness and a prerequisite to many accounts of human flourishing and human obligation. This goes to the points that Cohen makes at the end of *Beyond Best Interests* in which he discounts the contribution of virtue ethics to the discussion of the

47. *Beyond Best Interests*, *supra* note 3, at 1213.

48. See, e.g., *Smith v. Cote*, 513 A.2d 341 (1986) (rejecting wrongful life claim but embracing wrongful birth claim).

49. *Procanik v. Cillo*, 478 A.2d 755 (1984). Furthermore, when courts embrace wrongful birth while rejecting wrongful life, they convince themselves that in so doing they have avoided embracing the idea of a life not worth living. In fact, though, those wrongful birth claims, while given a different conceptual cloak, rest on the premise that potential parents would have deemed their now living disabled child to have a future not worth living and would have terminated that fetus in utero had they been presented with accurate and timely information. In some very real sense, vindicating the right of the parent to make reproductive decisions with full information premised on circumstances that lead to the birth of a child with disabilities whose presence is a harm to her parents who would have avoided her birth is tantamount to saying that the child's life was one not worth pursuing and not worth living. This in substance is the crux of a wrongful life claim. Plus, one wonders whether there is much difference between being told that one's life is not worth living versus being told that one is not worth parenting. All of this is to say that the message that courts send when they embrace wrongful birth and sanctimoniously reject wrongful life is fuzzy.

regulation of reproduction. Virtue ethics refers to branch of ethical thought that concerns itself with the virtue or moral character of an actor rather than the consequences of an act or the duties or rules that inspire a particular action. Within Cohen's account, virtue ethics has the benefit that it can, if wielded correctly, circumvent the non-identity problem because it does not rely on any reference to the well-being of a future child, but only the moral character of the parent or potential parent.⁵⁰ In other instances, though, where a reference to the moral virtue of a parent measures that virtue in part by reference to the flourishing of a future child, non-identity once again rears its head.⁵¹

But, Cohen may be too quick to reject the insights of virtue ethics or the extent to which this branch of inquiry closely tracks the root of much policymaking. Title notwithstanding, BIRC is not solely about a child and it certainly need not be reduced to any given child and any given set of parental decision makers. Instead, it is a stand in for a larger conversation about the nature of reproductive responsibility, a concept certainly as slippery and malleable as the concept of the best interests of a (real or imagined) child. The logical fallacy of BIRC is not wholly relevant to the bigger conversation which BIRC raises which is under what conditions is it responsible for a person to procreate? No doubt there are many who would say that there is no objective answer to this question, and Cohen notes that part of the problem of virtue ethics is that people will and do propose dueling ideas about what it means to act virtuously as a future parent. Within the policy arena smart people consistently engage in this inquiry and make policies based on the conclusions that they draw. For some policymakers, it is not responsible to have a child while one is receiving public assistance and the right policy move is to cap benefits for families receiving such assistance so that the aid flowing to the family will not increase if a child is born while that family is receiving government aid.⁵² The interests of children, present and future, is central to the debate surrounding such caps as is a baseline concern about how policy can and should be used to

50. *Beyond Best Interests*, *supra* note 3, at 1270.

51. *Id.* at 1271.

52. See, e.g., Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.F GENDER & L. 151, 152 (2006) (noting that as of her writing, 22 states had family cap or child exclusion policies in place).

trigger certain types of decisions by would-be parents on behalf of would-be children.⁵³ While people draw differing conclusions about those interests, the idea that those interests are irrelevant to the conversation is not even entertained. Similar policy examples abound, but they all boil down to the idea that a critical and foundational component of actively engaging in a decision to procreate is an assessment of the life that is being offered to a future person, as an individual, and to future people in aggregate.

Reproductive responsibility and BIRC as some faction of evaluating that responsibility is ubiquitous and it speaks to the fact that BIRC is not strictly about logic or reason, but it resonates instinctively with people precisely because it takes seriously, as a normative matter, the idea that one can act wrongly by procreating. Concomitant with this belief for many people is one that holds that the state has obligations to provide services to better the conditions in which procreation happens. By this I mean that people believe in the idea of BIRC because it fits with an account that future people are owed some measure of respect and that one who seeks to bring new life into the world has obligations to that new life that begin at least at pregnancy if not well before. It is because of BIRC that women begin to take pre-natal vitamins while trying to become pregnant. It is BIRC that drives families to move to bigger homes in good school districts in anticipation of having a child. BIRC drives future fathers to begin smoking cessation programs so that they can become non-smokers before their future child is conceived. BIRC is the incentive for a woman living with diabetes to get her disease under control before she attempts to become pregnant.

The list of ways in which individuals and couples organize their lives around the potential for potential life is staggering, if not surprising. Similarly, as Cohen notes, there is law and public policy aimed at future generations in explicit and implicit ways. Much of our governmental policy related to protecting the environment hinges on a belief that we have obligations to be good stewards of the earth for those who will inherit it long after those of us alive today have shuffled off this mortal coil. Cohen might argue that these efforts are for the benefit of many and not one specific future person. Plus, our actions in protecting the environment have real, tangible benefit for those

53. *Id.*

alive today. But the point here is that choosing to create life is an act with consequences. Some of those consequences are the reproductive externalities that Cohen describes in his piece, with a focus on so-called “cost-type externalities to third-parties within a State,”⁵⁴ but the most basic consequence of engaging in a procreative act is that, when successful, such an act ends in the arrival of a new human being. It is precisely because of this simultaneously simple and complicated truth that BIRC is here to stay. It is an intuitive, powerful and intractable political tool and one cannot jettison that tool without providing an adequate account of what will replace it. Cohen offers no such account here and no clear way forward to creating such an account.

Many people, policymakers among them, find it abhorrent to argue that whatever acts one commits during the process of creating new life are not wholly morally repugnant so long as the life being brought into being is not without worth. It may be that I am taking Cohen’s argument in a direction which he does not intend, but it is not an illogical direction. In fact, from the perspective of many laypeople, one comes to owe something to a child to a significant degree well before a child or even a pregnancy comes to pass. This reality is substantially missing from Cohen’s work and makes it seriously unlikely that it will resonate strongly in the policymaking arena. This lack of resonance might be irrelevant, but based on Cohen’s stated goals, I think it is not. Cohen argues that BIRC is a “non-starter,” “empty,” and “misleading” and that it is used to “avoid [] confrontation with justificatory idioms that are disturbing, controversial, and illiberal,”⁵⁵ but none of these things are necessarily true in an objective sense. The BIRC idiom is in fact the most basic of starting points for conversations about reproduction. Cohen’s point is that it should not be, but that is a normative claim whereas the claim in this response is descriptive. BIRC can have serious content even if the content that it reveals is underneath its surface rather than on its face. That subsurface content is not misleading to the extent that what it concerns itself with is seeking to get people and policymakers to take as seriously the decisions that precede procreation as those that follow. The idioms that justify these moves may be disturbing, controversial and illiberal, but in many cases those disturbing, controversial and illiberal arguments are being made in con-

54. *Beyond Best Interests*, *supra* note 3, at 1218.

55. *Id.* at 1189.

junction with BIRC so it is inaccurate to say that BIRC is always a mask for something dark.⁵⁶

As Cohen notes in his own piece, this belief in BIRC has consequences in the law and policy arena. The power of the state is brought to bear on women who pursue pregnancy in spite of active use of illegal drugs.⁵⁷ People seek to appoint a guardian for a fetus when its mother is developmentally disabled and incapable of making her own decisions related to reproduction.⁵⁸ The irony in the ART context is that the non-identity problem protects the reproductive freedom of people who may be more inclined than anyone to consider themselves parents with parental obligations before a pregnancy is even begun. Imagine the married couple, same-sex or opposite sex, that begins discussing decorations for a nursery before even hiring the surrogate that they will need to carry their future child in her womb. In the end, many people, perhaps most, consider it anathema not to consider a child's welfare in the process of preparing for that child's conception and birth. Imagine Cohen or Parfit in a room of "donor-conceived"⁵⁹ children who want answers about their genetic origins. Those young people or adults would not be satisfied with a claim that reducing access to anonymity in the sale of sperm would have led to their non-existence. By the same token, as people and policymakers consider what changes technology has wrought on traditional notions of family, there is a desire to cling to the preciousness of genetic tie as a last bastion of normalcy. In that case, the idea of severing that connection by allowing people to move through the world without knowledge of their genetic origins will strike many as a denial of a basic human right and a wholly preventable harm inflicted on future people.

56. For instance, Savulescu makes his disturbing argument about a duty to enhance without subterfuge. Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 *BIOETHICS* 413 (2001).

57. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (describing and finding unconstitutional a program at Medical University of South Carolina that involved arresting women who gave birth while using illegal drugs).

58. *Wixtrom v. Department of Children and Family Services (In re J.D.S.)*, 864 So.2d 534 (2004) (court refused to appoint a guardian for the fetus of a severely developmentally disabled woman).

59. Many of those who are the product of alternative insemination involving purchased sperm, some of whom also actively work against the practice of anonymous sales of sperm within the fertility industry, use the term donor-conceived to describe their provenance. See, e.g., <http://donorconceived.blogspot.com/>.

None of the preceding paragraphs should be read to reject Cohen's important contribution to the scholarly conversation about the regulation of reproduction. In fact, in the ART context, academics would do quite well to heed his call to find other ways to describe and support efforts to push policymakers toward more restrictive regulation of access to the tools of babymaking because anything that makes people substantially more conscious of the serious consequences of their advocacy in this arena is a good thing. Many of those writing in this arena, several of whom are cited in Cohen's work, would argue that there is no hidden agenda in their work that uses the idea of best interests of the future child. For those authors, Cohen's work is a clear challenge and seeing how they respond to his claims will be fruitful for this ongoing conversation.

It may be the case that none of the foregoing discussion changes anything about what Cohen has written depending upon how narrow his claim is. His claim might simply be that policy and law cannot and should not be based on BIRC, or even more narrowly, that criminal prohibitions should not be premised on BIRC. More broadly, his claim could be that no decision-making can or should be based on the best interests of a being not yet in existence. If his claim is the latter one, then it is far too broad. By contrast, if it is the former then we are left to ponder the justification for not extending the same claim to individual decision-making. If it is wrong for the state or other public bodies to act in the interest of that which does not yet exist because in so acting they change who will exist, that outcome would seem to be the same for an individual as well.

Once we extend the claim to individual decision making things get really scary. While few people would endorse arresting pregnant women who smoke cigarettes, most people would likely offer approval for public health officials advising pregnant women not to smoke. Further, most people would advise close friends and family members not to smoke while pregnant. A fair number of people would probably offer unsolicited advice to a pregnant stranger encountered on the street about her smoking habit. That advice would not be simply about reproductive externalities such as premature births or low birth weight associated with children born to cigarette smokers. Instead, in advising a friend to kick her cigarette habit while pregnant, one would do so in part to urge that friend to act in a way that reflects some concern about the life in being that she is choosing to carry to term.

One might take the position that BIRC is always wrong or should be abandoned, but one might also take the position that wrong or not, BIRC is here to stay and that the fight, therefore, is not about eliminating BIRC, but molding it so as to limit its potential for harm. The challenge to Cohen, therefore, is to ask him to consider whether in fact the proper route to change policy is to get people to abandon notions of BIRC or to reconfigure their sense of what is in the best interest of a child not yet conceived or not yet born. This is a proposal about practicality and feasibility rather than a proposal about supportable or insupportable philosophical claims because, again, even if his claims are well-supported, though not universally embraced in the scholarly literature,⁶⁰ a good philosophical argument does not always (or often) hold great sway in the legislature.

As any good politician would tell us, you do not win political battles by ceding all of the good rhetoric to the other side and Cohen's arguments allow for a wealth of rhetorical concessions. In a fight on the floor of a state legislature, on Cohen's side are those who do not care about the lives of future babies and children. On the other side are those who do. On Cohen's side are those who would defend the rights of adults to have babies over the rights of those babies to be cared for and cared about prior to their birth and perhaps prior to conception. On the other side are those who declare that procreation is a right that brings with it enormous responsibilities that can and should be enforced by the government. When the rhetorical battle becomes between those who care about defenseless children and those who do not, it is hard to feel that one is on the side of the angels if one does not side with the children. It is not clear from Cohen's paper how he would extricate himself from this dilemma. None of this is meant to suggest that anyone who believes in the non-identity problem must necessarily believe that reproduction carries with it no responsibilities. But, to that extent that they do stake a claim for reproductive responsibility they are obliged to offer a supportable basis for such a claim that makes no reference to the actual people created from reproductive acts.

IV. MAKING BIRC WORK

It may indeed be the case that BIRC is as bankrupt as Cohen argues, but it can simultaneously be the case that attempt-

60. See, e.g., Purdy, *supra* note 23.

ing to break its hold is a quest that is doomed to failure or one that at least will take inordinate amounts of time to successfully pursue. In the meantime, as Cohen points out in his piece, there are multiple scholars supporting an agenda of enhanced regulation in the ART arena that could have potential negative impacts on those who use ART to build families with children. Rather than put forth a freestanding proposal about how to respond to these calls for regulatory action premised on BIRC, this response simply make a few points about a possible way forward.

A way of reconfiguring BIRC comes from the realm of existing pregnancy regulation. Consider a pregnant woman or a woman eager to conceive who has some dangerous habits. Most individuals would agree that a fetus is very poorly- served by a pregnant woman or a soon to be pregnant woman who is an alcoholic who consistently drinks alcohol to excess or who has an expensive heroin habit or who pops prescription pills like candy while pregnant. Such women draw substantial ire from the masses. Even women who have no illegal habits may find themselves judged for their wish to procreate if they are living with a profound disability or are living with a transmissible disease like HIV or if they are simply low-income. For these women, an extreme response to the idea of acting within the best interest of a child could be to sterilize women without their consent if there are serious concerns about their future parenting skills; or arrest pregnant drug-using women; or deny access to fertility treatments for women living with disabilities. But, one could also turn the conversation away from punitive measures and instead imagine the ways in which the world could be re-configured to provide better services so as to avoid the need to punish. More treatment beds and less prison spaces for people with substance abuse problems. Broad access to supportive services at a reasonable cost for people living with disabilities. Higher minimum wage, greater job training, better public education. It is here that one has more than ample opportunity to expose the type of hypocrisy that Cohen fears lurks in so many discussions about BIRC. There is always much hue and cry about reproductive irresponsibility and such enormous reluctance to take steps that create much more supportive circumstances in which people can make choices for themselves and their families. In the act of highlighting that hypocrisy, we might do more for changing the perception of what is appropriate regulation of procreative choice than we would by urging

people to ignore or unlearn everything they have come to value about what it means to procreate responsibly. Further, while Cohen is most concerned with criminal sanctions, the implications of his position might include arguments against positive attempts to influence reproductive decisions and create better conditions in which people opt to procreate. To the extent that his work would lead to conclusion in this vein that would be an unfortunate and, I imagine, unintended consequence of his work.

CONCLUSION

The push back articulated in this response has the potential to reinforce uses of state power that many, myself included, find abhorrent. The goal here is not to buttress any foundation for discriminatory and dignity reducing public intrusions into private acts of procreation. But, to reject BIRC in a way that has resonance, requires two things. First, it requires acknowledging the laudable goal that many individuals are pursuing when they make reference to BIRC—namely asking those who have children to be ever mindful that procreation has power and therefore brings with it serious responsibility. In conjunction with this sense of private responsibility, BIRC asks the state to act in positive ways to create conditions under which children and families can both survive and thrive. Both of these goals can be used to justify extreme and discriminatory legislation, but they can also be used to justify goods like better enforcement of environmental standards, increased access to job training, and more availability of contraceptives. Any or all of these policy moves accrue to the benefit of existing and future people. Second, it requires offering some alternative formulation to BIRC that allows policymakers to continue to consider that which makes the procreative act unique and what makes ART unique is that it is the only thing that we do that creates new human beings. And while it may seem quaint in an era of 16 and Pregnant to imagine that there is something special about making a baby—a world in which we no longer believe that procreation matters, to those who procreate and those who are made, is truly bankrupt.