*Contractualism, person-affecting wrongness and the non-identity problem*

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The “non-identity problem” can arise in “selection” cases where an agent’s decision or action is a necessary condition both for another person suffering a serious bad like incurable blindness and for the existence of that very person. Let’s say that the person suffering the bad still has a life worth living. In that case, a tension arises between the claim that the agent has harmed or wronged the person and the fact that, had the agent acted differently, that very person would have never existed to have a life worth living. In response to this tension, some have appealed to impersonal moral theories or principles that make no reference to outcomes for particular people.

Recently, a number of philosophers have argued that Scanlon’s contractualist metaethical theory both “gets around” and “solves” the non-identity problem. Scanlon grounds his moral theory in second-personal relationships of mutual justifiability. Theorists argue that it “gets around” the problem because contractualist moral principles state how it is permissible for agents to act not in terms of what is justifiable to particular people but to “types” of people, like children, students or strangers. It therefore excludes from deliberation on what is morally permissible or impermissible any reference to the fact that different people will exist depending on how the agent acts. Yet they further argue Scanlon’s contractualism “solves” the non-identity problem because violating a contractualist moral principle in one’s treatment of another wrongs that particular other, thereby grounding a person-affecting moral claim.

In this paper, I agree with the first claim but dispute the second. I argue that, on the contractualist view, one wrongs a particular other if one treats the other in a way that is unjustifiable *to that other* on reasons she could not reasonably reject. In that case, we should think of justifiability and wronging in terms of the reasons had by the actual agent and the actual person who results from the agent’s action. This is shaped both by the reason to reject the treatment provided by the bad suffered and the reason to affirm the treatment provided by the goods had as a result of existing. I argue that it would be reasonable for the actual person to find the treatment justifiable, and so I conclude that Scanlon’s contractualist metaethics does not provide a narrow person-affecting solution to the non-identity problem on its own terms.

I further argue that the two claims represent a tension within Scanlon’s contractualist theory itself. Is it a theory of what is morally wrong or impermissible to do even if doing so does not wrong another person? Or is it, at its core, a theory that aims to explain what it means to wrong another person? On the former reading, if an agent’s action in selection cases is unjustifiable from the perspective of abstract types of people, contractualism can still morally condemn the agent’s action, even if not in person-affecting way. On the latter reading, however, since it is not clear that the agent treats the person who results from her action in a way that is unjustifiable to, and therefore wrong to, that particular person, contractualism may not be able to morally condemn that action.

The paper proceeds as follows. In Section 1, I show the way the non-identity problem seems to undermine narrow person-affecting moral claims in selection cases. I also review the theoretical costs of giving up such claims that have led theorists to look to Scanlon’s contractualism for a response. In Section 2, I show Scanlon’s contractualism is open to an “impersonal, moral wrong” reading and a “narrow person-affecting, moral wronging” reading. In Section 3, I examine the former reading and show how the contractualist understanding of hypothetical deliberation on moral principles does get around the non-identity problem. In Section 4, I examine the latter reading and show how the contractualist understanding of interpersonal wronging cannot itself solve the non-identity problem in a narrow person-affecting way.

**1. Narrow person-affecting wrongness and the non-identity problem**

Wilma is planning on having a baby. Wilma’s doctor tells her that she suffers from a medical condition that causes there to be a greater risk of her conceiving a child with incurable blindness. The doctor also tells her that this result is avoidable. If she takes an inexpensive pill every day for two months, there will be only an average risk of her conceiving a child with incurable blindness. Wilma decides that waiting and taking the pills is an inconvenience. She does not intend to have a child with incurable blindness, but she conceives and then gives birth to an incurably blind baby girl whom she names “Pebbles.” If she had waited to conceive and taken the pills, she would have later given birth to a perfectly sighted baby boy whom she would have named “Rocks” (Boonin, 2014, pp. 2–5). Pebbles faces some difficult hardships in her life and wishes she could see, but she is happy to be alive, has a loving mother and other valuable relationships and is a huge Mozart fan.

It seems as if Wilma has done something harmful and morally wrong to Pebbles by failing to take the pills and thereby causing her to be born with incurable blindness. Yet, it is difficult to articulate a moral objection to Wilma’s act from Pebbles’s point of view (Wallace, 2013, p. 80). This is because had Wilma prevented incurable blindness to Pebbles by waiting to conceive and taking the pills, Pebbles would have never existed. Instead, the perfectly sighted Rocks would exist. As long as Pebbles has a life worth living, Wilma’s act does not appear “worse for” Pebbles, at least if existing with a (blind) life worth living is better than never existing. Wilma’s act, it seems, has not harmed Pebbles, at least on a widely accepted counterfactual notion of harm.[[1]](#footnote-1) In “selection cases” such as this one, the seemingly wrong act is also a necessary condition for the existence of an actual particular person. The tension between our moral intuitions and the facts in selection cases has been called the “non-identity problem” (Parfit, 1986b; Schwartz, 1978).[[2]](#footnote-2)

More specifically, the non-identity problem arises from the tension between “narrow person-affecting” moral principles or theories and the facts in selection cases. Narrow person-affecting principles or theories judge the moral permissibility of an action by looking at the way that action harmed or wronged an identifiable individual (Parfit, 2011, p. 219). That person becomes a “moral claimant” with a personal complaint against the one who harmed or wronged her. Narrow person-affecting principles represent “directed duties” that are owed *to* other persons.[[3]](#footnote-3) Therefore, their violation is not just morally wrong, but are wrong *to* a particular other.

Let’s say I am driving erratically and I hit you with my car, seriously injuring you. I have harmed you unjustifiably, thereby wronging you. You thereby have special standing to resent me, demand an apology, sue for compensation, etc., a standing that the onlookers lack. While it is the case that Wilma was similarly negligent, thereby causing Pebbles to be born with incurable blindness, it is not clear whether Wilma’s act harmed or wronged Pebbles in the same way. This is because her act was also a necessary condition for Pebbles ever existing with a life worth living.

Some philosophers have taken the non-identity problem to show that morality must have an important “impersonal” dimension. Impersonal moral principles or theories judge the moral permissibility of an action based on the value of the general state-of-affairs that act produced (Parfit, 1986b, p. 386). These theorists argue that if we do want to morally object to Wilma’s act, it must be because her action produced a state of affairs that was somehow suboptimal with regard to impersonal value. For example, one might argue that if she had waited, she would have produced more human well-being and less suffering in the world because she would have had a child with both sight and a life worth living (Parfit, 1986b, p. 360). Wilma’s action is morally wrong because each agent morally ought to act in ways that promote greater overall human well-being.

This move has been unsatisfying for some theorists because of its seeming theoretical costs. First, a moral theory centered on the promotion of impersonal goods may be in tension with practices of holding each other morally responsible. While an agent’s action might be morally wrong because it fails to promote the (total or average) overall good, this has a different moral valence than if her act has harmed or wronged a particular subject (Davidson, 2008, p. 479). That is, even if Wilma has failed to promote the overall good by conceiving now, if Wilma has not harmed or wronged anyone in particular by failing to do so, then no one may be positioned to justifiably blame her, the least not the very child she caused to exist and to suffer from incurable blindness.[[4]](#footnote-4)

Second, because an impersonal response may be in tension with moral responsibility it may also be in tension with legal liability. For example, medical professionals have faced legal claims of “wrongful life” from children who have been born with a serious genetic disorder as a result of their negligence (Feinberg, 1994; McMahan, 1998; Shiffrin, 1999). But can medical professionals (or Wilma) be held liable *to the impaired child* under a claim of negligence when the child would have never existed had they not been negligent?[[5]](#footnote-5)

Hoping to maintain these theoretical benefits, a number of theorists have argued that Scanlon’s contractualist metaethical theory can both “get around” and “solve” the non-identity problem.[[6]](#footnote-6) They argue that it “gets around” the problem because, as on other deontological theories, moral principles in Scanlon’s contractualism are not narrowly person-affecting. They tell agents how they morally ought to act in a way that is insensitive to the question of whether others are affected or who such people turn out to be. At the same time, however, these theorists argue that contractualism “solves” the non-identity problem because it can still identify Pebbles as the victim of Wilma’s wrongdoing. They argue it can do so because it differentiates between harming a person and wronging her. For example, it can wrong another to impose a risk on her, even if that risk does not eventuate in harm (Hurley & Weinberg, 2015, p. 701; Kumar, 2003b, p. 102). Whether one person wrongs another is not determined by the consequences of the person’s actions for the other, but by “the way the people involved treat each other, regardless of the consequences” (Weinberg 2015, p. 83). That is, contractualism ties the normative force of moral principles to second-personal relations between persons and not to first-personal, good or bad outcomes (Hurley & Weinberg, 2015, p. 704; Kumar, 2009, p. 254). On this view, Wilma’s violation of a moral principle barring reproductive negligence has “degraded” her second-personal relationship with her future child, who, it turns out, is Pebbles. She has therefore degraded her second-personal relationship with Pebbles herself, thereby wronging her. Finally, since specifically personal reactive attitudes like resentment are tied to second-personal relationships, and Wilma’s act has degraded her relationship with Pebbles herself, Pebbles is personally justified in holding Wilma responsible for what she did to her via reaction of resentment. Thus, these theorists argue, Scanlon’s contractualism allows us to maintain the theoretical benefits of a narrow person-affecting approach even as it appeals to principles that are sufficiently impersonal to get around the non-identity problem.

We can see that if all of the steps of this argument hold, Scanlon’s contractualist metaethical theory provides a comprehensive response to the non-identity problem. It is a response, moreover, that would make selection cases like that of Wilma and Pebbles unproblematically analogous to non-selection cases (Kumar, 2009, pp. 270–271). These claims regarding Scanlonian contractualism therefore deserves serious consideration.[[7]](#footnote-7) To do so, we need to gain a deeper understanding the theory. In the next section, I will argue that when we do so, we see that Scanlon’s contractualism is open to at least two readings that have different implications regarding the non-identity problem.

**2. Two readings of Scanlon’s contractualism**

In this section, I argue that Scanlon’s contractualism is open to at least two readings, and, as I will proceed to show in further sections, each reading has implications for recent claims about the theory’s ability to respond to the non-identity problem. On one reading, contractualism is an account of impersonal principles that articulate what it is wrong or unjustifiable for moral agents to do in general. Insofar as an agent violates such a principle, what she does is wrong, even if her doing so does not wrong any particular person. On another reading, contractualism is an account of narrow person-affecting principles because it articulates moral principles in terms of what any person owes to any other actual person with whom she is in an actual interpersonal relationship. When an agent violates such a principle, what she does wrongs a particular other in virtue of the fact that her action treats the other person in a way that is unjustifiable *to* *her in particular*. Since doing so fails to treat that other person in the way that she is owed—disrespecting her capacity for reasoning as a moral person—that particular person is justified in having personal reactive attitudes like resentment to that treatment (Scanlon, 1998, p. 271).

To understand the source of these two readings, we first need to differentiate Scanlon’s contractualism from theories built around “third-personal” value. On certain “act consequentialist” views, the proximate goal of moral action is the promotion of an impersonal value. An act is morally wrong if and only if, of the available actions, there was another action that would have created more of that value. Since that value is aggregated across persons, it does not matter to whom that value accrues. On this theory, therefore, moral principles are third-personal.

As a nonconsequentialist moral theory, Scanlon’s contractualism does not hold the promotion of third-personal value as the proximate goal of moral action. Rather, both morality and its normative force arise from the actual second-personal relationships between moral agents. Like Stephen Darwall (2009), Scanlon argues that moral principles arise from the interpersonal authority of each moral person to hold other moral persons accountable via second-personal claims.

On his contractualist theory, Scanlon specifies the nature of this second-personal relationship in terms of “mutual justifiability.”[[8]](#footnote-8) For Scanlon, my recognition of the authority of another person to make second-personal claims on me is linked to my recognition of that person’s ability to reflect on and act for reasons. Second-personal claims on my treatment of another person, therefore, are just claims to treat her in ways I could justify to her on reasons she could not reasonably reject. If my treatment is not justifiable to her in this way, then my treatment disrespects her capacity as a moral person, thereby wronging her.

For example, take the following case:

*Breaking In*: Clara needs a medicine to save her wife Dana’s life and she knows Esau keeps enough of that medicine in the bathroom of his house. Esau is away on safari and is unreachable. Clara harmlessly picks the lock to the door of Esau’s house and takes the medicine out of his bathroom without his consent. She thereby saves Dana’s life.[[9]](#footnote-9)

In other circumstances, the action of breaking into Esau’s house and stealing his property is one that would morally wrong him. Scanlon’s theory would explain this by stating that this is because Clara’s act would disrespect Esau by treating him and his property in a way that he could reasonably reject. In *Breaking In*, however, we might judge that Clara’s action did not wrong Esau. This is because the reason she did the action was to save someone’s life. Scanlon’s theory would explain this judgment by pointing to the fact that, if Esau was being reasonable, he should see that there was a weightier moral reason to which Clara could appeal to justify treating him and his property the way she did. In that case, Clara’s action did not morally wrong him because it did not disrespect him by treating him and his property in a way that he could reasonably reject.

Scanlon thinks that this way of thinking about mutual justifiability can be used to flesh out a set of more general moral principles that he calls “what we owe to each other” (1998, pp. 6–7). Are these contractualist moral principles impersonal or narrow person-affecting ones? There are indications for both readings in Scanlon’s work.

What counts in favor of thinking that contractualism is a theory of what is morally wrong in general? First, when Scanlon develops particular moral principles using his conception of mutual justifiability he expresses these in terms of general permissions and requirements. Take his discussion of principles regulating promising. His Principle M states, “In the absence of special justification, it is not permissible for person A in order to get another person B to do some act X…” and his Principle D states, “One must exercise due care not to lead others to form false expectations…” (1998, pp. 298–300). Scanlon does not formulate these principles in a way that expressly states that violating them wrongs a particular other, namely the promisee (Gilbert, 2004, p. 91ff; Wenar, 2013, pp. 384–385). Second, Scanlon does not formulate his general statement of the moral domain of “what we owe to each other” in terms of wronging: “An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behavior that no one could reasonably reject as a basis for informed, unforced, general agreement” (Scanlon, 1998, p. 153).

On the other hand, there are a number of indications that Scanlon’s contractualism is a theory of narrow person-affecting wrongness that aims to ground specifically directed duties. First, to return to promising, even while Scanlon does not formulate his principles as directed duties that are owed to a particular other, he criticizes Rawls’s view of promising because it does not capture the way the obligation to keep a promise is owed to a specific other (Scanlon, 1998, p. 316; Wenar, 2013, p. 386). Second, when Scanlon distinguishes the realm of “what we owe to each other” from morality in general he speaks specifically about duties *to* others. He explains that his contractualist theory is “most plausibly seen as an account not of morality in [the] broad sense in which most people understand it, but rather a narrower domain of morality having to do with our duties to other people” (1998, pp. 6–7). Third, given the connection I outlined above between contractualism and second-personal relationships of mutual recognition and respect, this makes sense. Second-personal relations hold between actual people. Regulating our behavior according to contractualist principles ensures that our *actual* relationships are ones that express recognition and respect for those *actual* others by ensuring we treat those others in a way that we could justify to them on reasons they could not reasonably reject.[[10]](#footnote-10) Finally, in his more recent work, Scanlon emphasizes the connection between morality and the actual interpersonal relationships between people when he speaks expressly about the value of living in a “moral relationship” with others (2008, p. 139.).[[11]](#footnote-11)

In the end, however, it is a question of interpretation. On the one hand, one might hold that not all contractualist moral principles outline duties owed *to* other people and so the interpersonal “wronging relation” does not attach to all such principles. There would be room, therefore, to argue that Wilma’s reproductive negligence is wrong, and to do so even if her act does not wrong Pebbles herself.

*Contractualist “moral wrong” in selection cases*

(1) X’s act is wrong if it is unjustifiable on reasons no one could reasonably reject.

(2) Wilma’s act is unjustifiable on reasons no one could reasonably reject.

Therefore, Wilma’s act is wrong.

On the other hand, as we have seen, Scanlon’s contractualism has a particular view of when one agent wrongs another; namely, when the agent treats the subject in a way that is not justifiable to the subject on reasons the subject herself could not reasonably reject. In that case, for Wilma’s act to wrong Pebbles herself, her act would have to be unjustifiable to Pebbles herself.

*Contractualist “moral wronging” in selection cases*

(3) X’s act wrongs Y iff (i) X treats Y in a way that is (ii) unjustifiable to Y on reasons Y could not reasonably reject.

(4) Wilma’s act (i) treats Pebbles in a way that is (ii) unjustifiable to Pebbles on reasons Pebbles could not reasonably reject.

Therefore, Wilma’s act wrongs Pebbles.

There are therefore two claims to examine in order to better understand what sort of response Scanlon’s contractualism can give to the non-identity problem. First, is premise (2) true? Is Wilma’s act unjustifiable on reasons “no one” could reasonably reject? Second, is premise (4) true? Does Wilma’s act treat Pebbles in a particular way and could Wilma justify her treatment of Pebbles to Pebbles on reasons she could not reasonably reject? In the next section, I show that premise (2) appears to be met, especially given the nature of contractualist hypothetical deliberation on general principles. But I will further argue that it is an open question whether premise (4) is met.

**3. Contractualist “moral wrong” in selection cases**

One reason that theorists have argued that contractualism “gets around” the non-identity problem is because of the nature of hypothetical deliberation on the content of moral principles. As we have seen, Scanlon’s metaethics ties moral principles to second-personal relationships of mutual justifiability. This then opens the question of which moral principles are mutually justifiable. Scanlon explains that one way to develop such principles is to use a form of hypothetical deliberation whereby we weigh the benefits and burdens to all affected of a principle prohibiting or permitting a certain action in a certain circumstance. This has become known as the Complaint Model of contractualism.

How does the Complaint Model work? Imagine a principle prohibiting a certain action in a certain circumstance. That prohibition will have burdens on those who desire to perform that action, but it will prevent burdens to those whose interests would be protected by the prohibition. The fact that a candidate principle will have burdens to some, however, is not sufficient complaint to *reasonably* reject it, since that will depend on how the burdens it causes and the burdens it prevents are weighed against each other. Let’s say the burdens of prohibition are outweighed by the burdens prevented. If those burdened by the prohibition are being reasonable and are motivated to find and live according to principles no one could reasonably reject, then they should give up their complaint about the burdens of prohibition.

For example, take a moral principle that might regulate cases this:

*Drunk Driving*: Abraham drives to the bar, proceeds to get quite drunk and decides he will drive home. It is late and he lives in a small town. The road from the bar to his apartment does not have any houses along it and there is usually no one on the road that late. But it turns out that Bill is driving on the road. Abraham gets his swerving under control and passes Bill without incident.

We can imagine a principle prohibiting what Abraham did in this case. That principle would place burdens on drivers because it would require them to take relatively inconvenient precautions not to drive when they know they will be drinking. The principle would, however, prevent the burden on others of having a risk of serious injury or death imposed on them by others. Since burdens that threaten people’s fundamental interests outweigh the burdens of relative inconvenience, a principle prohibiting drunk driving is one “no one” could reasonably reject. In this case, therefore, Abraham’s drunk driving is morally wrong. Moreover, since it imposed the risk on Bill, it seems that it also wronged Bill himself.[[12]](#footnote-12)

This way of thinking through which principle should regulate the case makes no reference to the actual people involved (at least until the moral judgment is made regarding Abraham’s act specifically). What this shows is that the benefits and burdens appealed to in the hypothetical justification of principles must be what Scanlon calls “generic reasons.”[[13]](#footnote-13) Because contractualism presents a method of hypothetical deliberation and reasoning toward principles that are justifiable to all, the method does not have us imagine *actual* individuals in all their specificity. Rather, we imagine persons and their interests in terms of “types,” or what Scanlon calls “standpoints.” A standpoint represents a bundle of interests that any person occupying that standpoint would have in general (Scanlon, 1998, p. 204). In *Drunk Driving*, the relevant standpoints are “driver” and “other people along the road,” and the burden of inconvenience to the generic interests of “drivers” is outweighed by the risks imposed on the generic interests of “other people along the road.”[[14]](#footnote-14) In that case, “no one,” i.e. no member of the moral community of drivers, could reasonably reject a principle prohibiting drunk driving.

Theorists argue that this “hypothetical deliberation” understanding of mutual justifiability gets around the non-identity problem. They argue that we should think of what principle should regulate situations like Wilma’s in terms of the burdens to the type “parents” and to the type “future children.”[[15]](#footnote-15) As in *Drunk Driving*, they argue that the inconvenience to parents of taking reasonable precautions to minimize reproductive risks is outweighed by the burden to their future children of having a risk of a serious illness or disability imposed on them. Moreover, because these types make no reference to the existence or non-existence of particular individuals (e.g. Abraham or Bill), when we come to a selection case like that of Wilma and Pebbles, we should similarly not make reference to the existence or non-existence of particular individuals. While it is the case that Wilma’s act of conceiving now is a necessary condition for Pebbles’s existence, that fact is excluded by hypothetical deliberation on moral principles that no one could reasonably reject. Wilma’s act is morally wrong despite the fact that, had Wilma acted morally rightly Rocks would have existed instead (Finneron-Burns, 2016, pp. 5–8; Hurley & Weinberg, 2015, pp. 726–727; Kumar, 2003b, pp. 113–114, 2009, p. 261; Suikkanen, 2014, p. 123; Weinberg, 2015, pp. 109–110).

While there could be number of objections made to this claim, for my purposes I want to emphasize the nature of the moral principles that result from thinking about mutual justifiability on this hypothetical Complaint Model. Since the model develops principles that make no reference to any actual individual, those principles are “wide person-affecting” ones (Weinberg, 2015, pp. 82–84). They are not fully impersonal, since they do not judge the permissibility of an act based on its impact on some value in general. Nor are they narrow person-affecting principles, because they do not judge the permissibility of an act based on its effects on an actual, identifiable person. Rather, they judge the permissibility of an act based on its impacts to different types of people in general, regardless of their identities (Parfit, 1986b, p. 396). Following on my discussion of the ambiguity in contractualism above, however, there are at least two interpretations we might give to such wide person-affecting principles.

On the one hand, we might take such principles to represent those actions it is wrong and unjustifiable to do apart from the question of whether any actual person is wronged or treated unjustifiably by them. On this view, our moral criticism of Wilma’s act is that it is wrong because it violates a principle that no one could reasonably reject from the perspective of the generic types had by members of the moral community.[[16]](#footnote-16) On the other hand, we might take the violation of a wide person-affecting principle as identical with the performance of an act that is unjustifiable and therefore wrong *to* an actual other. A number of theorists want to understand things this way, since, as we have seen, they argue that not only can contractualism “get around” the non-identity problem, but that it can also show that Wilma’s violation of such a principle wrongs Pebbles. That is, they argue that contractualism can give a narrow person-affecting response to the non-identity problem even if hypothetical deliberation on principles results in wide person-affecting principles.

Their reasoning is as follows. Hypothetical deliberation can justify a wide person-affecting principle that shows that reproductive negligence is unjustifiable and so impermissible from the standpoint of “parents” and “future children.” Wilma violates this principle and, as a result, gives birth to Pebbles. Since Pebbles is an existing token of the type “future child,” Pebbles herself has been wronged by Wilma’s action. Moreover, since Wilma’s act is unjustifiable to the type “future child,” her act treats her actual child, Pebbles, in a way that is unjustifiable to her.

Non-selection cases like *Drunk Driving* appear to support this line of thought. There is a principle prohibiting drunk driving because the burden of taking due precautions to avoid driving after drinking are outweighed by the burden of the risk of serious injury or death to whomever might be on the road. In that case, drunk driving is impermissible and unjustifiable because of the risk it creates to “whomever might be on the road.” Therefore, any other driver on the road, whomever they turn out to be, could reasonably reject a risk-imposition that results from another’s failure to take due care. Moreover, in *Drunk Driving*, Abraham in particular has violated this principle and, as a result, subjected Bill to the risk of serious injury or death. It is fair to assume, moreover, that Abraham’s act of drunk driving is *also* unjustifiable to Bill himself on reasons Bill could not reasonably reject. This is what allows us to not only say that Abraham’s act was wrong, or impermissible, but that his act wronged Bill himself.

The question is whether this way of thinking can extend to selection cases; namely, cases where the act that violates a wide person-affecting principle in virtue of it being unjustifiable to a “type” is also a necessary condition for the very existence with a life worth living of the particular token of that type claimed to be treated unjustifiably and therefore wronged. Put another way, it may be the case the Wilma’s act is unjustifiable in terms of general types, and so wrong, but it may not be the case that Wilma’s act is unjustifiable to, and therefore wrong to, Pebbles herself (Heyd, 2009, pp. 11–12; Huseby, 2010, pp. 203–204). Moreover, if the value at the heart of contractualist metaethics is the value of living in actual second-personal relationships of mutual justifiability, what matters for an agent is that her action be justifiable to the actual people she is in relationship with on reasons those people could not reasonably reject.[[17]](#footnote-17)

I argue that the key question that needs to be answered if contractualism can provide a narrow person-affecting “solution” to the non-identity problem on its own terms is not whether premise (1) above is met, but whether premise (3) is. Does Wilma’s act (i) “treat” Pebbles in a way that is (ii) unjustifiable to Pebbles on reasons Pebbles could not reasonably reject?[[18]](#footnote-18) I will argue that the fact that Wilma’s action is a necessary condition for Pebbles’s existence with a life worth living returns as a reason in play when it comes to narrow person-affecting wronging. This makes selection cases ambiguous in a way that *Drunk Driving* is not. This is because it is not so clear that Wilma’s violation of a wide person-affecting principle *also* treated Pebbles herself in a way that is unjustifiable to Pebbles.

**4. Contractualist “moral wronging” in selection cases**

Our question is whether premise (4) is met. First, we need to ask whether condition (i) is met. Does Wilma’s act of negligently increasing the risk her future child will be blind “treat” Pebbles in a particular way? Is Pebbles affected by Wilma’s violation of a wide-person affecting principle? Being personally affected (in some way) appears to be a necessary condition on being personally wronged by another.

Take a revised drunk driving case, *Drunk Driving*\*: Abraham performs the same action but Bill, who lives in the neighboring town, considers driving along that road to visit his friend but decides to stay home instead. It would be odd to say that Abraham’s driving still personally wronged Bill while he sits in his living room because the risk Abraham created did not fall on him. While what Abraham did was wrong because it violated a wide person-affecting principle, it turns out that his doing so did not wrong anyone in particular.[[19]](#footnote-19)

Similarly, Wilma’s creation of a reproductive risk did not “affect” Pebbles but rather shaped the risk of a future person coming into being with the characteristic of being incurably blind. Moreover, at the time of Wilma’s action Pebbles both did not exist and might never have existed had Wilma acted otherwise. If being affected is a necessary condition for being personally wronged, then narrow person-affecting claims in selection cases will seem to need to work differently that in non-selection cases.[[20]](#footnote-20)

The question is whether this makes any moral difference. Wilma’s act violates a wide person-affecting principle barring reproductive negligence and this act ended up causing Pebbles to exist with incurable blindness. Hasn’t Wilma’s act therefore wronged Pebbles herself? But here the issue of the counterfactual dependence of Pebbles’s existence on Wilma’s action returns. Wilma’s action did not impose a risk on Pebbles herself but created the risk of a “future child” existing with a cluster of characteristics, so it is not clear whether her doing so personally wrongs Pebbles on contractualist terms. This is because the counterfactual dependence of Pebbles’s existence on Wilma’s act may not undermine Wilma and Pebbles’s actual interpersonal relationship of mutual justifiability *ex post*. Whether it does, I argue, hinges on whether the counterfactual dependence of Pebbles’s existence on Wilma’s act is a reason Wilma could appeal to in order to justify her action to Pebbles, and whether Pebbles could reasonably reject that reason.

This bring us to the key condition (ii) of premise (4). Does Wilma’s violation of a wide person-affecting principle wrong the child she actually has when that child would have never existed had Wilma not acted wrongly? Could Wilma justify her action to Pebbles herself on reasons Pebbles could not reasonably reject? More specifically, is the counterfactual dependence of Pebbles’s existence with a life worth living a justification that Pebbles could reasonably reject? This, however, just is the question raised by the non-identity problem, and, as I will argue, the contractualist idea of “reasonable rejection” does not provide a decisive answer.

There are at least two ways that the counterfactual dependence of Pebbles’s existence on Wilma’s act could serve as a reason at play that shapes mutual justifiability between Wilma and Pebbles herself. First, Pebbles could judge that her existence is a good or benefit since it is the necessary condition for her life worth living.[[21]](#footnote-21) Existence has made possible all the goods of life, like hearing music, eating chocolate and falling in love, despite that existence also being one where she faces the burdens of being incurably blind. Moreover, when Pebbles recognizes the counterfactual dependence of these goods on Wilma’s violation of a wide person-affecting principle barring reproductive negligence, she could reasonably judge that the good that Wilma’s act caused to her outweighs the burden that it also caused to her and therefore find Wilma’s act to be justifiable to her on reasons she could not reasonably reject.

One might argue that it is incoherent to claim that causing a person to exist with a life worth living benefits that very person. Even if it does not, a second way the counterfactual dependence of Pebbles’s existence on Wilma’s act could serve as a reason is in terms Pebbles’s rational affirmation of Wilma’s action. For example, R. Jay Wallace discusses the sorts of emotional responses and attitudes it is rational to have when we assess past events.[[22]](#footnote-22) He argues that it is rational to regret a past action when one judges that act to have been wrong or wishes that things had been otherwise. If, however, that past action is a necessary condition for something one presently has reason to affirm, then retroactive assessment will give rise to only ambivalent regret (2013, p. 78).

Wallace points to selection cases as an example. Wilma violates a wide person-affecting principle barring reproductive negligence but her doing so is a necessary condition for Pebbles’s existence. Now that Pebbles exists in a second-personal relationship with Wilma, the great value of Pebbles’s life and of their interpersonal relationship gives her a reason to affirm and celebrate Pebbles’s existence and therefore a reason to affirm the wrongful act that is a necessary condition for that relationship (2013, p. 95).[[23]](#footnote-23) If Pebbles has reason to affirm Wilma’s past action, why is that act not justifiable to her on reasons she could not reasonably reject?

Whether Pebbles’s existence is a benefit or she has reason to affirm her existence, Wilma’s violation of a wide person-affecting principle was a necessary condition of Pebbles (and Wilma) having something of great value that is worthy of recognition and affirmation. Even though Wilma’s act was also a necessary condition of Pebbles having incurable blindness, it appears reasonable for Pebbles to judge that this reason is outweighed by the great value to her of her existence and relationships. In that case, condition (ii) of premise (4) is not met, so the conclusion that Wilma’s act wrongs Pebbles herself does not follow. Those who defend the claim that Scanlonian contractualism solves the non-identity problem have responded in a number of ways, but I argue that none of them is sufficient to address this problem.

First, Kumar argues that it is the “individual reasons restriction” on moral principles that allows contractualism to maintain a narrow person-affecting solution. This is because it restricts the interests we can include when weighing principles in hypothetical deliberation to those that could be had by an individual member of a type. He argues this restriction shows that Wilma’s violation of the wide person-affecting principle barring reproductive negligence wrongs Pebbles in particular because Wilma’s act failed to appropriately recognize the value of her future child’s interests as an individual (2003b, p. 110). He notes that

[t]his is not quite the same as the idea of one person’s life having been damaged as a result of another’s conduct (the worse off view), but it occupies the same conceptual space, without requiring that anything have happened to a person in order for her to stand in a particular relation to the wrongdoer as the one who has been (metaphorically) attacked by wrongdoer’s conduct (2009, p. 260).

Emphasizing the individual reason restriction, however, does not show that the wide person-affecting principle that results from hypothetical deliberation can fill that conceptual space in selection cases. This is because those individual reasons are the generic reasons had by general standpoints or types, which, I have argued, are different than the reasons had by Wilma and Pebbles now that Pebbles exists and they are in an interpersonal relationship.

Second, one might argue that it is not reasonable for Pebbles to either take her existence as a benefit or to rationally affirm the necessary conditions for her existence because doing so is a metaphysical mistake. It is a mistake because never existing would not have been bad for her. Weinberg, for example, asks Pebbles to imagine her life as a scale with goods on one side and bads on the other (2015, pp. 88–90). Since Wilma’s act caused the bad of blindness to be on the scale, the bad of blindness can serve as a reason that Wilma’s act is unjustifiable to her. Yet she might also credit the goods of chocolate, love, the sound of music, etc. on her scale to Wilma’s act. Weinberg argues this would be a mistake because crediting Wilma for those goods means also crediting her for Pebbles’s existence, but existence is not something that can be credited as a good since never existing is not a bad.

When both benefits and harms are weighed against each other, chocolate may outweigh a learning disability, but one is still harmed by a learning disability unless existence is included in the equation, or placed on the scale. But since existence is not a benefit, is not needed, and cannot be lacked by any real person, it should not be used to outweigh or excuse any real person’s real life burdens (2015, pp. 91–92).

So, on Weinberg’s view there are good philosophical reasons for Pebbles to consider only Wilma’s role in her being blind as a reason at play and not any of the other facts about the non-identity problem.

One issue with this response is that it unclear why it is a mistake for Pebbles to credit Wilma for the goods on her scale but not a mistake for her to credit Wilma for the bads on her scale. It seems that crediting the bad of blindness to Wilma also requires crediting Wilma for causing Pebbles’s scale to exist in order for there to any bads on it at all. If it is reasonable for Pebbles to take the bads she has as a result of existence as reasons shaping the justifiability of Wilma’s act, it appears arbitrary to say that Pebbles is unreasonable to take the goods she has as a result of her existence also as reasons.

Another issue is that completely excluding existence from mutual justifiability returns us to the wide person-affecting perspective. In order for Pebbles to judge whether Wilma’s act is unjustifiable to her, Pebbles would compare the bads that exist as a result of Wilma’s wrongful act (making no reference to the fact they exist for her) and the goods that would have existed instead had Wilma acted rightly (making no reference to the fact that those goods would have existed for a completely different person, Rock). Given the metaphysical complexities here, I argue that it is reasonable for Pebbles to *both* recognize the bad of being blind as a reason she could reject Wilma’s action *and* all the goods of her existence as a reason she could affirm it.

This leaves open a third response. One could claim that it is not clear whether or not it would be reasonable for Pebbles to find Wilma’s act justifiable to her. For example, Finneron-Burns argues that even if we assume “that existence does improve a person’s well-being and is good for that person” this does not mean that “existence automatically outweighs any other burdens the person may bear” (2016, pp. 10–11). Given this, she argues that it would be reasonable for Pebbles to judge either way, and it is not for us to speculate how Pebbles would weigh the goods and bads that result from the counterfactual dependence of her existence on Wilma’s act.

While this seems right to me, I do not think Finneron-Burns recognizes its implications. If Pebbles reasonably could or could not find Wilma’s act justified to her on reasons she could not reasonably reject, then condition (ii) of premise (4) is or is not met. In that case, it is ambiguous whether Wilma has wronged Pebbles herself in a narrow person-affecting way, at least according to the theoretical resources of Scanlonian contractualism and its understanding of the nature of second-personal moral relationships.

In reply, one might argue that all we need to show that Wilma’s act wrongs Pebbles herself is that Pebbles *could* reasonably judge Wilma’s act to be unjustifiable even if, in this case, she *shouldn’t* because of the other reasons in play. For example, Finneron-Burns states, “for the purposes of providing a contractualist solution to the non-identity problem, it is not necessary to be able to explain every circumstance in which a future person was wronged in being created. Rather, it is enough simply to show that it is plausible that a person could reasonably reject a principle that led to their creation” (2016, p. 12). This reply, however, misunderstands Scanlon’s conception of reasonable rejection. If one could reject another’s act but shouldn’t for other reasons, then those reasons should enter into the weighing of whether the act is one that is justifiable on the whole.

Take a version of Parfit’s famous case (1986a, p. 855). I am unconscious and, without my consent, a doctor slices into my stomach and damages my intestines, but she does so to operate on my kidneys, thereby saving my life. Does the doctor’s act wrong me by treating me in a way that is unjustifiable to me? The doctor failed to get my consent and violated my bodily integrity causing harm. These are both weighty reasons to which I *could* appeal in order to explain why the doctor’s action is unjustifiable to me. But it does not seem as if the doctor wrongs me by performing this action because of the other weightierreason at play; namely, that the doctor did so to save my life. It is for that reason that most judge that the doctor does not wrong me.

Similarly, the fact that Pebbles could reasonably reject Wilma’s act because it caused her to be incurably blind is not sufficient to show that Wilma’s act wrongs her, at least on contractualist terms. This is because, as I have argued, one wrongs another when one treats the other in a way that is unjustifiable to her, but justifiability results from *all* the reasons for and against and how it is reasonable to weigh those against each other. Determining whether Wilma’s wrongful act wronged Pebbles herself requires determining whether Pebbles could reasonably find that act to be unjustifiable to her. This requires weighing both Wilma’s wrongful act and the bads of incurable blindness that resulted from it against the counterfactual dependence of her existence on that act. The question of a reasonable weighing of those reasons is one of the major philosophical questions raised by the non-identity problem. Scanlon’s contractualism, however, does not itself provide the answer. It does not clearly show, therefore, that Wilma’s act is unjustifiable to and therefore wrong to Pebbles herself.

**5. Conclusion**

The non-identity problem puts a narrow person-affecting view of moral wrongness into question. In this paper, I have explored a number of difficulties raised by the claim that Scanlonian contractualism can explain why the particular child who is born in a bad state as a result of reproductive negligence is wronged even if she is not counterfactually harmed. Contractualists are right when they argue that an agent can wrong a subject without harming her by treating her in a way that is unjustifiable to her on reasons she could not reasonably reject. It is not clear, however, whether this line of thought can extend from non-selection cases like *Drunk Driving* to selection cases like that of Wilma and Pebbles. In such cases, I have argued, the counterfactual dependence of Pebbles’s very existence with a life worth living on Wilma’s act is a reason that is in play and shapes the second-personal relationship of mutual justifiability between Wilma and Pebbles. As a result, it is not clear whether it is reasonable for Pebbles to Wilma’s act justifiable to her.

This leads to two possible conclusions depending on whether we take the “moral wrong” or the “moral wronging” interpretation of Scanlon’s contractualism. On the former, Wilma’s act is still morally wrong because it violates a wide person-affecting principle and so is unjustifiable on reasons that “no one” could reasonably reject from the abstract perspective of the types of members of the moral community. Scanlon’s contractualism therefore “gets around” the non-identity problem because it excludes those very reasons that lead to the problem in the first place. I have argued that when we come to ask whether Wilma’s violation of that wide-person affecting principle wrongs Pebbles herself in a narrow person-affecting way, however, we lose the reason to exclude those considerations. It is not clear, therefore, that Scanlon’s contractualism “solves” the non-identity problem by allowing us to point to the victim who has been treated unjustifiably and therefore wronged by Wilma’s act.

If that is the case, theorists should be wary of appealing to Scanlon’s contractualism to respond to concerns with other broadly impersonal responses to the non-identity problem. Since it is not clear that Pebbles herself has been treated unjustifiably, it is similarly not clear whether Pebbles is the moral “claimant” of Wilma’s wrongful act or that Pebbles has special standing to blame Wilma via interpersonal reactive attitudes of resentment.[[24]](#footnote-24) Moreover, insofar as theorists sometimes appeal to interpersonal relations of wronging to ground claims for legal liability or compensatory duties, they should recognize that Scanlon’s contractualist theory at best provides an unstable grounding for such claims. Finally, if it the case that contractualism gets around but not solve the non-identity problem, the best it can provide is a conclusion similar to Parfit’s (1986b, p. 360). Insofar as we take up the perspective of the abstract moral community, we can judge Wilma’s act to be wrong and so blame her in an “impersonal” way.[[25]](#footnote-25) Pebbles herself can take up this perspective on Wilma’s act even as she recognizes it is not clear whether Wilma’s act wronged her personally.

If we take the pure “moral wronging” reading of Scanlon’s contractualism, however, it is more difficult to say that it gets around the problem. On this view, Scanlon’s contractualism is solely focused on interpersonal relations of wronging. The principles that result from hypothetical deliberation in terms of types are guides that help ensure that our actions are justifiable to the actual people with whom we end up being in actual interpersonal relationships. Since Wilma has acted in a way that has put her in a relationship with Pebbles, and Pebbles does have reason to find that act justifiable to her despite the hardships she faces, it is not clear that Wilma did anything impermissible. That is, if anyone could reasonably foresee that any child she has will have a life worth living, she could reasonably foresee that her act of conceiving will not wrong any actual child she had. Since that act will not wrong any particular future child, on this reading of Scanlon’s contractualism, it is not impermissible to do (Gibb, 2016).

Finally, if I am right about the reasons at play when Pebbles comes to reflect on whether Wilma’s act is justifiable to her, then selection cases are ones where ambiguities about what counts as reasonable strain the theoretical machinery of Scanlon’s contractualism. It seems reasonable for Pebbles, like many philosophers, to take the fact that she would never have existed as a reason to see Wilma’s act as justifiable to her. But, it is also reasonable for Pebbles, like some other philosophers, to not. Both are reasonable because, as I argued above, there are complex metaphysical questions at stake.

Scanlon recognizes the limits of his theory when it comes to these difficult questions. He explains that one benefit of his account is that it can give a nonconsequentialist grounding to core cases of moral wrongs like “murder, rape, torture, and slavery” (1998, p. 357). Still, there are persistent disagreements about what we owe to each other and about the force of different reasons “because of the intellectual difficulty of the underlying issues” (1998, p. 359). Scanlon argues that contractualism does not take a highly structured or technical form that will resolve these difficulties. It does not provide a decision-procedure for determining the weights and grounds for reasonable rejection. Instead, promoting the value of second-personal relationships of mutual justifiability means engaging in “a continuing process of revising and refining our conception of the reasons that are relevant and those that are morally excluded in certain contexts” (1998, p. 157). The philosophical literature on the non-identity problem can contribute to this continuing process when it comes to moral duties in selection cases, but it is mistaken to claim that Scanlon’s contractualism provides a cut-and-dry, narrow person-affecting “solution” to the problem.

**References**

Ashford, E. (2003). The demandingness of Scanlon’s contractualism. *Ethics*, *113*(2), 273–302. https://doi.org/10.1086/342853

Benatar, D. (2000). The wrong of wrongful life. *American Philosophical Quarterly*, *37*(2), 175–183.

Boonin, D. (2014). *The non-identity problem and the ethics of future people*. Oxford: Oxford University Press.

Darwall, S. (2009). *The second-person standpoint: Morality, respect, and accountability*. Harvard: Harvard University Press.

Darwall, S. (2012). Bipolar obligation. In *Oxford Studies in Metaethics* (Vol. 7, pp. 333–358). Oxford: Oxford University Press.

Davidson, M. D. (2008). Wrongful harm to future generations: The case of climate change. *Environmental Values*, *17*(4), 471–488.

Eshleman, A. (2016). Moral responsibility. In E. N. Zalta (Ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2016). Metaphysics Research Lab, Stanford University. Retrieved from https://plato.stanford.edu/archives/win2016/entries/moral-responsibility/

Feinberg, J. (1994). Wrongful life and the counterfactual element in harming. In *Freedom and fulfillment: Philosophical essays* (pp. 3–37). Princeton, NJ: Princeton University Press.

Finneron-Burns, E. (2016). Contractualism and the non-identity problem. *Ethical Theory and Moral Practice*, 1–13. https://doi.org/10.1007/s10677-016-9723-8

Frick, J. (2015). Contractualism and Social Risk. *Philosophy & Public Affairs*, *43*(3), 175–223. https://doi.org/10.1111/papa.12058

Fried, B. H. (2011). Can contractualism save us from aggregation? *The Journal of Ethics*, *16*(1), 39–66. https://doi.org/10.1007/s10892-011-9113-3

Gibb, M. (2016). Relational contractualism and future persons. *Journal of Moral Philosophy*, *13*(2), 135–160. https://doi.org/10.1163/17455243-4681057

Gilbert, M. (2004). Scanlon on promissory obligation: The problem of promisees’ rights. *The Journal of Philosophy*, *101*(2), 83–109.

Hare, C. (2007). Voices from another world: Must we respect the interests of people who do not, and will never, exist? *Ethics*, *117*(3), 498–523. https://doi.org/10.1086/512172

Heyd, D. (2009). The intractability of the nonidentity problem. In M. A. Roberts & D. T. Wasserman (Eds.), *Harming future persons: Ethics, genetics and the nonidentity problem* (pp. 3–28). Dordrecht: Springer.

Hurley, P., & Weinberg, R. (2015). Whose problem is non-identity? *Journal of Moral Philosophy*, *12*(6), 699–730. https://doi.org/10.1163/17455243-4681044

Huseby, R. (2010). Person-affecting moral theory, non-identity and future people. *Environmental Values*, *19*(2), 193–210.

Kamm, F. M. (2002). Owing, justifying, and rejecting. *Mind*, *111*(442), 323–354.

Kumar, R. (2003a). Reasonable reasons in contractualist moral argument. *Ethics*, *113*, 6–37.

Kumar, R. (2003b). Who can be wronged? *Philosophy & Public Affairs*, *31*(2), 99–118.

Kumar, R. (2009). Wronging future people: A contractualist proposal. In A. Gosseries & L. H. Meyer (Eds.), *Intergenerational justice* (pp. 251–272). Oxford, UK: Oxford University Press.

Kumar, R. (2011). Contractualism on the shoal of aggregation. In R. J. Wallace, R. Kumar, & S. Freeman (Eds.), *Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon* (pp. 129–154). Oxford: Oxford University Press.

Kumar, R. (2015). Risking and wronging. *Philosophy & Public Affairs*, *43*(1), 27–51. https://doi.org/10.1111/papa.12042

Lenman, J. (2008). Contractualism and risk imposition. *Politics, Philosophy & Economics*, *7*(1), 99–122.

May, S. C. (2015). Directed duties. *Philosophy Compass*, *10*(8), 523–532. https://doi.org/10.1111/phc3.12239

McMahan, J. (1998). Wrongful life: Paradoxes in the morality of causing people to exist. In J. Coleman & C. Morris (Eds.), *Rational commitment and social justice: Essays for Gregory Kavka* (pp. 208–47).

McMahan, J. (2013). Causing people to exist and saving people’s lives. *The Journal of Ethics*, *17*(1/2), 5–35.

Meyer, L. (2003). Past and future: The case for a threshold notion of harm. In Lukas H. Meyer, Stanley L. Paulson, & Thomas W. Pogge (Eds.), *Rights, culture, and the law: Themes from the legal and political philosophy of Joseph Raz* (pp. 143–159). Oxford: Oxford University Press.

Meyer, L., & Roser, D. (2009). Enough for the future. In A. Gosseries & L. H. Meyer (Eds.), *Intergenerational Justice* (pp. 219–248). Oxford: Oxford University Press.

Munoz-Dardé, V. (2013). Global justice: Imposed and shared risks. In J.-C. Merle (Ed.), *Fair distribution - Global economic, social and intergenerational justice* (Vol. 2, pp. 539–554). Dordrecht: Springer.

Parfit, D. (1986a). Comments. *Ethics*, *96*(4), 832–872.

Parfit, D. (1986b). *Reasons and persons*. Oxford: Oxford University Press.

Parfit, D. (2011). *On what matters* (1st ed., Vol. 2). Oxford: Oxford University Press.

Raz, J. (2003). Numbers, with and without contractualism. *Ratio*, *16*(4), 346–367. https://doi.org/10.1046/j.1467-9329.2003.00228.x

Reibetanz, S. (1998). Contractualism and aggregation. *Ethics*, *108*(2), 296–311. https://doi.org/10.1086/233806

Scanlon, T. M. (1998). *What we owe to each other*. Cambridge, MA: The Belknap Press of Harvard University Press.

Scanlon, T. M. (2008). *Moral dimensions: Permissibility, meaning, blame*. Cambridge, MA: Belknap Press.

Schwartz, T. (1978). Obligations to posterity. In R. Sikora & B. Barry (Eds.), *Obligations to future generations* (pp. 3–13). Philadelphia: Temple University Press.

Shiffrin, S. V. (1999). Wrongful life, procreative responsibility, and the significance of harm. *Legal Theory*, *5*, 117–148.

Sreenivasan, G. (2010). Duties and their direction. *Ethics*, *120*(3), 465–494.

Strawson, P. F. (1974). *Freedom and resentment, and other essays*. London: Methuen.

Suikkanen, J. (2014). Contractualism and climate change. In M. D. Paola & G. Pellegrino (Eds.), *Canned heat: Ethics and politics of global climate change* (pp. 115–128). Oxon, UK: Routledge.

Thomson, J. J. (1981). Some ruminations on rights. In J. Paul (Ed.), *Reading Nozick: Essays on Anarchy, State, and Utopia* (pp. 130–147). Totowa, NJ: Rowman & Littlefield.

Wallace, R. J. (2013). *The view from here: On affirmation, attachment, and the limits of regret*. New York: Oxford University Press.

Weinberg, R. (2015). *The risk of a lifetime: How, when, and why procreation may be permissible*. Oxford: Oxford University Press.

Wenar, L. (2013). Rights and what we owe to each other. *Journal of Moral Philosophy*, *10*(4), 375–399. https://doi.org/10.1163/174552412X628968

1. For a discussion of other notions of harm and their relation to the non-identity problem seeMeyer, 2003; Meyer & Roser, 2009. [↑](#footnote-ref-1)
2. The non-identity problem may also undermine the applicability of narrow person-affecting moral principles to acts that affect people who live in the further future. In this paper, however, I focus on reproductive cases like that of Wilma and Pebbles. [↑](#footnote-ref-2)
3. For more on the idea of a directed duty see May, 2015; Sreenivasan, 2010. [↑](#footnote-ref-3)
4. A consequentialist about moral responsibility may not be moved by this concern. On that view, praise or blame would be an appropriate reaction to another if and only if a reaction of that sort would change the agent’s behavior in a way that would mean that she would better promote the overall good (Eshleman, 2016). Perhaps blaming Wilma and those who behave like her in similar contexts is warranted because doing so will mean less children will be born with incurable blindness and its attendant suffering. I cannot delve further into debates on moral responsibility here, but I am assuming that being able to say something about Wilma’s moral responsibility to her future child (and not in general) would better fit with the narrow person-affecting intuition both in general. [↑](#footnote-ref-4)
5. Legal negligence occurs when an agent fails to engage in a reasonable level of care and this failure is a proximate cause of harm to a subject. Because of the non-identity problem, however, the particular child who is born could never have existed except in that state. If this does undermine a person-affecting view of harm, then the impaired child also loses a claim in negligence. Moreover, the impersonal claim that the health professional has made more bad or suffering in the world might ground laws regulating health professionals but not tort claims. As David Benatar puts the point, “For criminal or civil charges to be justifiable, under liberal theory, there must be a victim—somebody who is harmed by the conduct that is made the subject of the legal proceedings” (2000, p. 175). [↑](#footnote-ref-5)
6. This way of formulating the contractualist response comes from (Weinberg, 2015, pp. 117–118). [↑](#footnote-ref-6)
7. Scanlon briefly discusses the non-identity problem. He argues that the non-identity problem is no bar for including actual future people as beings who it is possible to wrong. Rather, it presents “a substantive question about when we have wronged someone” (1998, p. 186). This paper explores the latter question. [↑](#footnote-ref-7)
8. As Darwall himself argues, Scanlon’s contractualist view fleshes out the nature of the second-personal standpoint: “When we attempt to hold anyone accountable by addressing second-personal reasons of any kind, we presuppose that the authority and principles we implicitly invoke are ones our addressee can be expected to accept, or not reasonably reject, as a free and rational agent who is apt for second-personal address” (2009, p. 301). [↑](#footnote-ref-8)
9. Case adapted from (Thomson, 1981, p. 135). [↑](#footnote-ref-9)
10. As Frances Kamm interprets Scanlon, wronging a particular other, as opposed to do something wrong, “is doing something to someone that is contrary to a principle that he could reasonably reject” (Kamm, 2002, p. 333ff.). [↑](#footnote-ref-10)
11. As Michael Gibb notes, on this interpretation “all wrongdoing of…[a] contractualist kind essentially involves wronging *someone* by failing to respect the value of your shared moral relationship” (2016, p. 140). Gibb goes on to argue that the metaethical core of Scanlon’s contractualism means that it is a narrow person-affecting view of morality (or at least of the realm of “what we owe to each other”). Interestingly, Darwall has himself recently recognized a need to distinguish the “wrong” and “wronging” aspect of his own second-personal metaethics (2012). [↑](#footnote-ref-11)
12. In the next section I will put into question our ability to make this step in selection cases. [↑](#footnote-ref-12)
13. Another important feature is the “individual reason restriction.” Principles can be reasonably rejected only by reference to interests and reasons that an individual might have (Scanlon, 1998, p. 229). This bars the interpersonal aggregation of complaints: a large collection of lesser complaints cannot outweigh a single person’s personal complaint. Contractualism thus aims to capture the separateness of persons by recognizing that persons should not be sacrificed to the group. There is, however, a debate on whether contractualism does in fact get the answers right about aggregation in difficult cases. See Ashford, 2003; Fried, 2011; Kumar, 2011; Raz, 2003; Reibetanz, 1998. [↑](#footnote-ref-13)
14. For debate on whether contractualist hypothetical deliberation gets the answer right in non-selection risk cases see for insteance (Frick, 2015; Fried, 2011; Kumar, 2015; Lenman, 2008; Munoz-Dardé, 2013) [↑](#footnote-ref-14)
15. Similarly, Caspar Hare (2007) has distinguished a *de dicto*, non-rigid reading of the definite description “her child” from the *de re*, rigid reading of the definite description of the child that Wilma actually has. He argues that Wilma can harm “her future child” *de dicto*, even if she does not *de re*. [↑](#footnote-ref-15)
16. Take the principle Kumar argues should regulate reproductive cases: “Those individuals who are responsible for a child’s…welfare are morally required not to let her suffer serious harm…” (p. 112). The principle does not state, however, that parents who do allow a child to suffer harm wrong that actual child. Moreover, in personal communication, Kumar has emphasized that the issue is the “permissibility” of Wilma’s action. But, as I have argued, the question of permissibility is different from the question of “whether one wrongs one’s child by not taking the steps needed to avert her child ending up blind.” [↑](#footnote-ref-16)
17. In that case, as Gibb (2016) has recently argued, hypothetical deliberation in terms of types is simply an epistemic heuristic. [↑](#footnote-ref-17)
18. Note how the two conditions for premise (2) track Kumar’s own gloss of the problem that selection cases pose: “how can one have wronged another when there was no ‘other’ who stood to be wronged by one’s conduct at the time of that conduct, and who is now the particular person she is because of the conduct in virtue of which she takes herself to have been wronged” (2003a, p. 110). Also see (Huseby, 2010, p. 203). [↑](#footnote-ref-18)
19. Take another case: Let’s say I fail to salt the walkway to my house out of laziness and it remains icy and slippery. No one else walks on it all winter. In the spring, the ice melts. Perhaps it was negligently wrong of me not to salt it, but since no actual person was ever put at direct risk by my negligence, then no actual person was wronged. Now let’s say that Bill randomly drives by my house during the winter. It would also be strange to say that simply in virtue of driving by my house where the dangerous walkway sits, my negligence has wronged Bill himself. [↑](#footnote-ref-19)
20. Hurley and Weinberg do not seem to recognize this issue when they state that “non-identity cases are cases in which a perpetrator *brings a victim into an interaction* which violates the victim’s second-personal claims” and does so despite the fact that this “*interaction with the victim* is also a ‘but for’ cause of the victim’s existence” (2015, p. 719, my emphasis). [↑](#footnote-ref-20)
21. As Jeff McMahan states, “It is coherent, and plausible, to claim that to cause a person to exist is *good* for that person when the intrinsically good elements of the person's life more than compensate for the intrinsically bad elements. Because the claim is only that this would be good for the person and not that it would be better for the person, there is no implication that it would be bad, or worse, for this person never to exist” (2013, p. 6).I thank a helpful review for pointing me to this source. [↑](#footnote-ref-21)
22. I thank Rahul Kumar for directing me to this source. [↑](#footnote-ref-22)
23. Moreover, as Wallace argues, after conception Wilma’s deliberative situation is also different than before because “there is now an individual human being, her daughter, who both exists and stands in a significant relationship of attachment to her. Actual human beings of this kind make claims on us, however, of a kind that merely possible people do not” (2013, p. 89). [↑](#footnote-ref-23)
24. But see (Wallace, 2013, pp. 112–114). [↑](#footnote-ref-24)
25. As Strawson (1974, pp. 72–74, 84–85), Darwall (2009, pp. 67–68) and Scanlon (1998, p. 271) point out, reactive attitudes come in two forms: “participant” and “impersonal.” Participant reactive attitudes are the attitudes of those in the “transaction” itself, for example gratitude, resentment, forgiveness, love, and hurt feelings. Impersonal reactive attitudes, on the other hand, are “impersonal or disinterested or generalized analogues” of these, for example moral indignation, disapprobation, and feelings of obligation, guilt, compunction and remorse. These reactive attitudes are felt when an individual takes the impartial standpoint of the moral community in regard to the transaction of others. [↑](#footnote-ref-25)