

The Nonidentity Problem and Bioethics: A Natural Law Perspective

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Technology has significantly improved our ability to predict the traits of our offspring. This technology and the knowledge it affords us have enormous implications for bioethics. When we make a decision to bring (or not to bring) a person into existence, and we are concerned with the welfare of the child herself, we are left in the awkward position of comparing existence with nonexistence. This is the basis of the nonidentity problem, a topic that has generated a large amount of philosophical literature. To my knowledge, however, no one has attempted a comprehensive analysis of this literature from a natural law perspective. This paper attempts to begin such an analysis. If what I say is right, we can see how natural law theory helps explain some of our most basic moral thinking in this very perplexing area of normative ethics. This, I hope, will demonstrate just one of the values of natural law theory for bioethics.

Keywords: *natural law, nonidentity problem, procreative beneficence, reproductive ethics*

I. INTRODUCTION

Technology has significantly improved our ability to predict the traits of our offspring. For example, genetic screening can show that a given person is at risk of passing a disease to a child she may conceive in the future. This technology and the knowledge it affords us have enormous implications for bioethics. Questions about procreative decision-making that used to be hypothetical are becoming increasingly more practical. Here are just a few. Would it be wrong to conceive a child knowing that he or she will likely suffer from a disease? What amount of suffering would be so severe that it would be wrong to bring a person in such a condition into existence? Do we have some moral obligation to conceive the “best” possible children?¹

There are many important ethical considerations we must take into account in addressing such questions. My goal in this paper is to survey just one set of these questions and to do so from a natural law perspective.

When we make a decision to bring (or not to bring) a person into existence, and we are concerned with the welfare of the child herself, we are left in the awkward position of comparing existence with nonexistence. This is the heart of the nonidentity problem, which has generated an enormous amount of philosophical literature in ethics and in bioethics specifically. To my knowledge, however, no one has attempted a comprehensive analysis of this literature from a natural law perspective. This paper attempts to begin such an analysis.

I will proceed as follows. First, I will introduce the nonidentity problem, explain how it challenges some of our basic moral intuitions, and discuss two broad views of understanding welfare: the person-affecting and the impersonalist. In section III, I will give a brief outline of what I take to be the fundamental tenets of natural law theory. In section IV, I will apply this natural law perspective to the nonidentity problem and show how they can supplement a person-affecting view to make it more in line with our moral intuitions. And finally, in section V, I will take a similar approach, showing how natural law theory can help impersonalists respond to criticisms of their view. If what I say is right, we can see how natural law theory helps explain some of our most basic moral thinking in this very perplexing area of normative ethics. This, I hope, will demonstrate just one of the values of natural law theory for bioethics.

II. PROCREATIVE DECISION-MAKING AND THE NONIDENTITY PROBLEM

From an ethical perspective, decisions to bring persons into existence are of a peculiar sort. Derek Parfit (1984) famously brings this to light.² Parfit explains that our choices can affect both the identity of the people that will exist in the future, as well as the number of people who will exist in the future. A *same person choice* affects neither the identity nor the number of people that exist in the future. That is, regardless of the choice we make, the same person/people will exist (such people are sometimes referred to as “nonuniquely realizable”). *Different person choices* affect the identity of future people (or, “uniquely realizable people”). So the choice we make will determine whether one person comes into existence instead of another. If our choice will result in the same number of people existing (e.g., one person instead of one other person, or two people instead of two other people), it is a *different people same number choice*. And finally, if the choice will affect both the identity and the number of people who come into existence (e.g., one person instead of two other people), it is a *different people different number choice*. Parfit shows that the distinctions between these types of

choices have important implications in a number of different cases. For the purposes of this essay, I am most concerned with cases of procreative decision-making because such cases are importantly connected with bioethics.³

Each of us, according to Parfit, has the following distinctive necessary property, what he calls the “Origin View: that of having grown from the particular pair of cells from which we in fact grew” (Parfit, 1984, 352). He takes the truth of this claim to be uncontroversial, which seems to me a very plausible claim.⁴ So I too will assume that if a choice results in one combination of gametes instead of two other different gametes, it is a different people choice. Once we take note of this, our common sense moral intuitions in certain cases of procreative decision-making appear problematic. Consider Parfit’s now famous case of the fourteen-year-old girl:

This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child’s life, his life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life. (Parfit, 1984, 358)

Parfit’s intuition, and that of many others as well, is that we ought to try to persuade this girl to wait and have the child later in life. I should mention that many of those sympathetic to natural law theory would think she ought to wait for reasons involving the necessity of procreation taking place within marriage. I think there are good arguments for such a view. But even if we grant this, most of these people will nevertheless concede that in marriage there can be grave enough circumstances that it is morally permissible to postpone having a child until a later time.

If one has the intuition that the girl should wait, there are several reasons she might give. It could make life harder for the girl herself because she may ultimately regret the decision. Perhaps the girl’s family is forced to help care for her child in a way that makes them unhappy. Someone might even claim that, given the girl’s unpreparedness, societal resources might be drained to support the child. All of these reasons might be relevant, but they overlook what is perhaps the most important reason underlying the intuition that the girl should wait: concern for the child himself. If the girl waits and has the child later, the child will have a better start in life and will presumably be happier. Though this line of reasoning is tempting, it raises a difficulty, which Parfit coins “The Nonidentity Problem.” If the girl waits and has a child later in life, the child she has will come from a different pair of gametes, and thus (given the Origin View) will be a person different from the child whom she would have conceived when she was fourteen.

The nonidentity problem rests on a particular understanding of the nature of welfare, and the principle of beneficence, which we can state generally as follows: “All other things being equal, it is generally right to benefit people and wrong to harm them.” This principle is part of most plausible ethical

theories, although of course those theories will sometimes differ in their understanding of how it relates to other moral principles, and thus how it applies to certain cases.⁵ Intuitively, many people are attracted to a version of a principle of beneficence that is *person-affecting*, with benefits and harms understood in a counterfactual sense. That is, all other things being equal, actions or states of affairs in which a certain individual is better off than she otherwise would have been are good; conversely, actions or states of affairs in which a certain individual is worse off than she otherwise would have been are bad. The important thing to note here is that, in its person-affecting form, the principle applies to some distinct individual. Sometimes the person-affecting view is articulated this way: What is better (or worse) must be better (or worse) *for someone*. One can see how nonidentity cases such as Parfit's fourteen-year-old girl raise problems for such a person-affecting view. If she chooses to conceive now, the choice will be "worse for no one." Call the child she would conceive now "Abe;" though his life is more difficult in important ways than the child she would conceive later, call this later child "Ben," we cannot say that Abe is worse off than he otherwise would have been. For Abe *wouldn't* otherwise have been. Nevertheless, even when we realize that the choice to conceive would not make Abe worse off, many of us nevertheless have the same intuition that the girl should wait. This is the nonidentity problem.

There is a wealth of literature responding to the nonidentity problem, and it would be beyond the scope of this paper to survey all of it here. However, in broad strokes, we can outline some of the general strategies to "solve" it. One strategy is to abandon the person-affecting version of the beneficence principle. Recall that this principle states that in order for an action to be wrong, it must make some distinct individual worse off than he otherwise would have been. However, we can revise the beneficence principle from a person-affecting form to an impersonal form. An impersonal form takes welfare to be a quality of the world that can be evaluated apart from any particular person being better or worse off. Thus, in the case of the fourteen-year-old girl, we can say that if we have good reason to think that Ben's life will be better (in whatever axiology we have in mind), then the world has a higher overall amount of welfare if she chooses to have him later rather than Abe now. It need not matter that Abe and Ben are different people. So impersonalism denies that the nonidentity problem is a problem after all. By abandoning the person-affecting view, we are able find principled ground on which to defend the intuition that the fourteen-year-old girl should wait to conceive.

Parfit suggests that most of us allow impersonal considerations to carry moral weight. He offers the following example, *The Medical Programmes*:

There are two rare conditions, J and K, which cannot be detected without special tests. If a pregnant woman has Condition J, this will cause the child she is

carrying to have a certain handicap. A simple treatment would prevent this effect. If a woman has Condition K when she conceives a child, this will cause this child to have the same particular handicap. Condition K cannot be treated, but always disappears within two months. Suppose next that we have planned two medical programmes, but there are funds for only one; so one must be cancelled. In the first programme millions of women would be tested during pregnancy. Those found to have Condition J would be treated. In the second programme, millions of women would be tested when they intend to try to become pregnant. Those found to have Condition K would be warned to postpone conception for at least two months, after which this incurable condition will have disappeared. Suppose finally that we can predict that these two programmes would achieve results in as many cases. If there is Pregnancy Testing, 1,000 children a year will be born normal rather than handicapped. If there is Preconception Testing, there will each year be born 1,000 normal children rather than 1,000, different, handicapped children. (Parfit, 1984, 367)

Parfit's intuition in this case, and the intuition of most people at least on first inspection, is that both of these programs would be equally good. However, this intuition is at odds with a strict person-affecting view (I will call this the "SPAV" for the remainder of the paper). If the Pregnancy Testing program is instituted, then we can say that the 1,000 children that are born healthy rather than handicapped are all (presumably) made better off than they otherwise would have been; the program meets the person-affecting requirement of being *better for some individual/s*.⁶ By contrast, the Preconception Testing program fails to meet the person-affecting requirement. Since the handicapped children are not the same as the healthy children who are born in their place, the handicapped children cannot be said to be better off than they otherwise would have been. Like Abe in the earlier example, their alternative is nonexistence. Thus, the Pregnancy Testing program is better for 1,000 people; it makes each of them better off. The Preconception Testing program is better for no one; it makes no one better off. The SPAV therefore entails that the Pregnancy Testing policy is significantly better than the Preconception Testing program. But if, like Parfit, we think that either policy will be equally good (the "No Difference View"), then we must reject the SPAV. Alternatively, an impersonal view is consistent with the intuition that the programs are equally good. It need not matter whether or not the children who are healthy instead of handicapped are the same children. If being healthy makes a life go better, then to whatever degree this is good, choosing either policy makes the world better in terms of increased welfare. Similarly, an impersonal view can explain why the fourteen-year-old girl should wait to conceive, assuming that we have good reason to think that the child she has later will have a better life than the child she would conceive now. So impersonalism seems to solve the nonidentity problem. It can explain in a nonarbitrary way why decisions to bring less happy people into the world instead of more happy people are wrong.

Impersonalism gives a plausible solution to these nonidentity cases and others. However, it does so at a cost. It is in accord with our intuitions in nonidentity cases, but it generates very counterintuitive claims in other kinds of cases. The most famous of these, introduced by Parfit himself, is the Repugnant Conclusion. I will discuss this problem and another with impersonalism in section V. Some authors believe that the cost we pay for solving the nonidentity problem with impersonalism is too high. It is easier, they argue, to give up our intuitions in nonidentity cases (i.e., that the fourteen-year-old girl should wait to conceive and that the two medical programs are equally good), than it is to accept all of the other implications of impersonalism. Thus, they remain committed to a SPAV. That is, they are willing to accept that the actions in nonidentity cases are not wrong. David Heyd takes such a view:

Advocates of the strict person-affecting view, like myself, must face some consequences that are definitely counter-intuitive. They may nevertheless have reasons to “bite the bullet” so to speak. . . . For anyone who is not a stringent impersonalist and who is convinced by the arguments against a diluted or compromised version of the person-affecting view, the strict or narrow person-affecting analysis seems to be the lesser theoretical evil in being both consistent and doing justice to some of our fundamental intuitions. (Heyd, 2009, 17)

Of course, strict impersonalism and the SPAV represent just two of many approaches to the nonidentity problem; the literature includes many others. A survey of just a few of these includes: trying to widen the scope of the person-affecting view, combining impersonalist and person-affecting views, using noncomparative accounts of harm, and arguing that those involved in nonidentity cases are wronged even though they are not harmed (i.e., made worse off). None of these theories is immune from criticism. But to my knowledge, no one has examined the nonidentity problem through the lens of natural law theory. To discuss all of the various approaches to the nonidentity problem from the natural law perspective would be well beyond the scope of this paper. My goal, therefore, is a more modest one. I will restrict myself to the two broad views of welfare that I have outlined above, namely, the SPAV and impersonalism. I will examine each of these views from the perspective of natural law theory. Before doing this, however, I will turn to the task of outlining what I take to be the fundamental theses of this perspective.

III. NATURAL LAW THEORY

It would be difficult to give a definition of natural law theory that could be agreed on by everyone. Even among those who consider themselves natural law theorists, there are disagreements about some key issues. So my hope is that I can sketch a broad outline of the theory here, one that most natural

law theorists will accept. Roughly I have in mind the theory with its roots in the thought of Thomas Aquinas. Using Aquinas primarily, but referencing contemporary authors as well, my goal in this section will be two-fold. First, albeit briefly, I will discuss some of what I take to be the foundational points of natural law, especially as they relate to the nonidentity cases outlined above. Second, I will anticipate a possible natural law-based objection to my general project in this paper; namely, that the nonidentity problem is unlikely to arise because relevant cases will inevitably involve practices that natural law theory rejects on other grounds. I will argue that this objection is too hasty.

Natural law theory is a theory of practical rationality; it provides an account of what we have most reason to do. Aquinas distinguishes between two types of reason, speculative and practical. Speculative reason has *Being* as its first subject, and is concerned with everything that we understand without qualification. Practical reason's first subject is *Good*. Law, as Aquinas defines it, governs the subjects of both types of reason. A law is "an ordinance of reason for the common good, made by him who has care of the community, and promulgated" (Aquinas, 2008; ST Part I-II Q. 90 Art. 4).⁷ Aquinas lists four different types of law: eternal, natural, divine, and human. The eternal law governs all of creation. Speculative reason can investigate this law, beginning from its primary precept, the law of noncontradiction. Through demonstration, one can arrive at secondary precepts that are more specific. Nonrational beings are simply directed by the eternal law, and obviously do not share in the eternal law in virtue of their understanding of it. Human beings, however, are able to understand this order, and are thus subject to the eternal law in a special way. The natural law is part of the eternal law, but is specific to human beings in virtue of their rational agency. Thus, precepts of natural law will take on the form of actions that one can perform. Aquinas states:

Now as "being" is the first thing that falls under the apprehension simply, so "good" is the first thing that falls under the apprehension of the practical reason, which is directed to action: since every agent acts for an end under the aspect of good. Consequently the first principle of practical reason is one founded on the notion of good, viz. that "good is that which all things seek after." Hence this is the first precept of law, that "good is to be done and pursued, and good is to be avoided." (Aquinas, 2008; ST I-II Q. 94 Art. 2)

Since *Good* is the first subject of practical reason, natural law theory is *welfarist*. The primary precept of practical reason, to do good and avoid evil, grounds the more specific secondary precepts that we derive from it. This parallels the relationship between the primary and secondary precepts of speculative reason.

Secondary precepts of practical reason relate to goods in an appropriate sort of way. Furthermore, what is good according to natural law theory will

be determined by the nature of the thing in question.⁸ Thus, we must speak of the good *for humans*. The picture is Aristotelian in this respect, and the precepts of natural law will be grounded in a notion of human flourishing. Aquinas states:

Since, however, good has the nature of an end, and evil, the nature of a contrary, hence it is that all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently as objects of pursuit, and their contraries as evil, and objects of avoidance. Wherefore according to the order of natural inclinations, is the order of the precepts of the natural law. Because in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances: inasmuch as every substance seeks the preservation of its own being, according to its nature: and by reason of this inclination, whatever is a means of preserving human life, and of warding off its obstacles, belongs to the natural law. Secondly, there is in man an inclination to things that pertain to him more specially, according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, "which nature has taught to all animals" [Pandect. Just. I, tit. i], such as sexual intercourse, education of offspring and so forth. Thirdly, there is in man an inclination to good, according to the nature of his reason, which nature is proper to him: thus man has a natural inclination to know the truth about God, and to live in society: and in this respect, whatever pertains to this inclination belongs to the natural law; for instance, to shun ignorance, to avoid offending those among whom one has to live, and other such things regarding the above inclination. (Aquinas, 2008; ST I-II Q. 94 Art. 2)

It is important to note that while human beings have one nature, the various goods to which we are by nature directed are distinct and incommensurable. This distinguishes natural law theory from other welfarist theories, for example, classical utilitarianism, which states that there is only one good (pleasure). Basic human goods cannot be reduced to a single more general good, nor can one good be directly compared against another good so that it can be ignored for the sake of another. As we see in the passage above, Aquinas claims that all those things that human beings have a natural inclination toward are goods. He then articulates a list that includes (among other things) life, sociability, and knowledge. Most contemporary natural law theorists make similar lists. As might be expected, however, there is not universal agreement on what items ought to be included, though most of these lists have items in common. Consider some examples. In his earlier work John Finnis lists: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion (Finnis, 1980). Mark Murphy lists: life (in which he includes proper functioning and health), knowledge, aesthetic experience, excellence in work and play, excellence in agency, inner peace, friendship and community, religion, and happiness (Murphy, 2001). Much of the debate over which items to include on a list of basic goods has to do with whether or not a given item is properly basic; some

proposed items might be better understood as particular instantiations of other goods rather than as basic human goods in themselves. Despite this controversy, natural law theorists generally agree that human goods are distinct and incommensurable, and that they are rooted in an account of natural human flourishing.

Natural law theory is a theory of practical reason, and the reasons for human action are the pursuit of basic human goods. What remains to be said is how natural law theory sees the relationship between human actions and the goods to which they are related. Actions are practically reasonable to the extent that they are intelligible in terms of pursuing some good. However, the natural law theory denies that the proper relation between an action and a good is the maximization of that good. This is perhaps the most crucial difference between natural law theory and consequentialism. For example, an agent could perform an action that promoted some good (perhaps knowledge), at the expense of another (perhaps life). Suppose one could kill an innocent person so as to learn a great deal about human anatomy, which in turn might even save many lives from disease (the killing might serve to further two goods in such a case—knowledge and life in the future).⁹ Even if the gain in knowledge were very substantial, the action would not be permitted because the action is defectively related to the good of life. We might be able to judge, however imprecisely, which of two states of affairs was better all things considered; however, this will not settle the question of right action for the natural law theorist.¹⁰ Some actions, as the means we use to bring about states of affairs, will be ruled out. Hence, we must stress the importance of *agency* for the natural law theorist. Actions must be evaluated on the basis of how they relate to various human goods, and the end result that the agent hopes to achieve is not the only basis on which the action is evaluated. From the preceding discussion, I hope I have given a basic framework, one that can serve as the lens through which we can examine various issues involved in the nonidentity problem. In terms more familiar in contemporary analytic philosophy, Mark Murphy sums the theory up very well: “a particular naturalist, objectivist, cognitivist, welfarist, anti-particularist, anti-consequentialist view” (Murphy, 2001, 5).

Before returning to the person-affecting and impersonal approaches to the nonidentity problem, I wish to address one possible objection that at least some of those sympathetic to natural law theory could make. Especially in cases of procreative decision-making, many nonidentity cases will involve practices that natural law theorists would simply rule out in principle. For example, literature on the nonidentity problem often poses procreative choices in the context of IVF procedures, and choosing which of several embryos to implant. For many natural law theorists these cases are problematic for other reasons. Embryos are viewed not as possible persons, but as very young *actual* persons. So these cases do not involve choices about bringing persons into existence; rather, they involve choices about how to

treat persons already in existence. Furthermore, even if all the embryos were implanted, such a case would be problematic because procreation would take place outside the conjugal act between husband and wife. Many natural law theorists insist that the only morally licit conditions under which procreation can take place is within the conjugal act between a husband and a wife open to life (which would rule out artificial contraception as a means of postponing conception and thus having one child instead of another).¹¹ And so, it might be argued, many of the problematic cases involving the nonidentity problem would be ruled out on other grounds, and thus the problem can be rather neatly sidestepped by certain versions of natural law theory.

I am somewhat sympathetic to this objection. Nevertheless, I think it would be premature to say that natural law theorists of this type will *never* be faced with nonidentity puzzles. For we can imagine technology that would raise them in cases in which no existing embryos are discarded, and in which procreation takes place through the conjugal act. Of course, such technology is not presently available. There might also be additional problems, particularly from a natural law perspective, about whether or not one could develop such technology in a morally licit way. But again, it would be premature to suggest that prospective parents could never be faced with the decision of which of two possible children to bring into existence. For example, imagine that it were possible to do a kind of “gamete selection” before prospective parents conceived. Perhaps a drug could be used to kill off certain sperm or ova that contained some undesirable gene that would lead to serious disease, thus leaving only the more desirable gametes left as possible candidates for fertilization. Furthermore, leaving aside hypothetical examples of future technologies, cases of a couple simply waiting to conceive for some grave reason would raise the kinds of nonidentity puzzles I have discussed above. Conversely, a couple might try to conceive when they are younger so as to reduce the chances of their children having birth defects, chances that increase as they age. So I believe that the natural law theorist cannot ignore the nonidentity problem. My aim, however, is to show that natural law theory can provide help in resolving some of the more famous problems associated with solutions to the problem. Natural law theory can do this in either a person-affecting or an impersonal version.

IV. A PERSON-AFFECTING NATURAL LAW PERSPECTIVE

Recall that the person-affecting view takes it to be the case that what is worse must be worse for someone. There must be some nonuniquely realizable person that we can say is worse off than he otherwise would have been in some alternative state of affairs. As we saw in section II, those who adhere to the SPAV are left with the uncomfortable implications of the nonidentity problem. They are forced to say that (with respect to the child) the fourteen-year-old girl has no reason to wait to conceive. They would be similarly

committed to the counterintuitive notion that prospective parents had no reason to conceive a healthy child instead of a child with a very painful and debilitating impairment (provided that the child's life was worth living).¹² And finally, they would also be forced to reject the "No Difference View" in comparing cases such as Parfit's two medical programs. Therefore, SPAV theorists have been motivated to find other grounds to criticize such choices, or at least to make their counterintuitive conclusions more palatable. In this section, I hope to show how a natural law perspective can improve on some of these person-affecting approaches in a meaningful way.

One SPAV answer to nonidentity cases such as the fourteen-year-old girl and the choice between conceiving a healthy child versus a child with a serious impairment rests on an appeal to the virtues of parenthood. These virtues are put in terms of the prospective parents' intentions. David Wasserman offers such arguments (Wasserman, 2005, 2009).¹³ However, I think Heyd (2009) expresses the purest person-affecting interpretation of them and so will outline his argument here. Heyd asks us to compare the following cases involving two couples: "the first can *only* conceive a seriously ill child due to a permanent genetic condition from which they suffer; the second can conceive *now* a child who will be equally seriously ill, but if they postpone conception for a year, they will have a healthy child" (Heyd, 2009, 16). Suppose that the first couple conceives a child and the second couple conceives a child now rather than waiting for a year; both couples have children that are seriously ill just as they had predicted. The SPAV cannot say that these children are worse off than they otherwise would have been. They also cannot distinguish the two cases by saying that the first couple makes the world better because the choice was between a seriously ill child (whose life was nevertheless worth living) and no child at all, whereas the second couple makes the world worse because they could have produced a healthy child instead of a seriously ill child. Making such a distinction would rely on precisely the kind of impersonal view the SPAV rejects. However, the SPAV *can* draw a distinction based on the intentions of the parents in the two cases. The first couple might, out of hope to become parents despite their genetic disposition or because of attitudes toward procreation and the goods of marriage, conceive the child. They might genuinely foresee but not intend the illness.¹⁴ By contrast, suppose the second couple decided to conceive now for some superficial or selfish reason. Perhaps they wish to have a child born in the same year that their favorite baseball team won the World Series; or one of them is running for political office and it is thought that having a newborn baby (especially one with a serious illness) will make him a more likable candidate.¹⁵ Now the alternative for the children in both cases is non-existence. Nevertheless we can ask, what kinds of parents are these people? We are likely to sympathize with the first couple or perhaps even find them noble. The second couple strikes us as despicable.¹⁶

Those favoring the SPAV can point to this difference in character to explain how we judge the two couples differently despite the fact that no one is made worse off. Heyd puts it this way:

What counts in our moral judgment is the parents' moral profile, the kind of people they are, rather than the objective condition of the child (or the world). And it is of course also true that if parents are completely indifferent to the welfare of their planned future child, they are liable to become bad parents and to violate their parental duties *to* the child once she is born. (Heyd, 2009, 16)

The argument is plausible, and it is consistent with the central tenets of the SPAV. However, there is an important sense in which it lacks force. According to Heyd, the second couple's decision in and of itself is not problematic. Their intentions are a clue that they are likely to harm their child later. This is unsatisfying. We would like the SPAV to be able to say more than this. For if we stipulate that the parents' characters would not translate into other harmful actions toward their child, we are left with no grounds to criticize the initial decision. I believe that by supplementing the SPAV with a natural law theory, we can form the basis for such grounds.

Recall that natural law theory is welfarist. In evaluating actions, the natural law theorist must examine what the agent intends to do with respect to the basic human goods that are affected. Since the theory is non-consequentialist, the issue cannot be settled by simply evaluating which of two states of affairs is better. If it were, then the SPAV would have to say that an action on the part of the second couple in our earlier example is not wrong because the state of affairs in which that child is born is worse for no one. But natural law theory denies that this is the only way that an action can be defectively related to a basic human good. Most natural law theories involve some version of the claim that an action could be defectively related to a good if an action has, as its object, the intentional destruction of an instance of that good. Killing an innocent person to acquire knowledge is a good example. Though most natural law theorists would accept this, it would be a mistake to think that this is the *only* way that an action can be defective. And indeed, in the example of the second couple's choice to have an impaired child, it is unclear exactly what instance of a basic good they have "intentionally destroyed." I believe, however, that natural law theory is subtler. So I think it is appropriate to explore some other ways (besides intentional destruction) in which an action can be defectively related to a basic human good. At the very least, I think we can identify circumstances in which we ought to be suspicious of an action because it is very *likely* to be defective.

Returning to the version of the second couple in which they are motivated by political aspirations, we can ask what basic goods are relevant to the decision to conceive now, and about the adoption of the proposal to bring about this state of affairs. The decision (or at least the willingness) to conceive a child involves a plan to bring a new person into existence. So life is

a relevant good, as is the good of family (assuming that it is included on the list). Increasing the political career of one of the parents is also part of the object of the action, so the good of excellence in work and play is part of the proposed plan of action. One could argue that other goods are relevant as well, but for simplicity's sake I wish to focus on the good of life (including health). When we have the intuition that the couple is doing something wrong, I think this has to do with the fact that they knowingly and intentionally conceive a child in less than optimal health. How, we might ask, is the good of health being regarded in this decision?

In addition to the plans of action that involve the intentional destruction of instances of basic goods, Mark Murphy offers the following requirement of practical reasonableness: "Any plan of action that dismisses an aspect of well-being by treating it as of less value than some other aspect of well-being presupposes the falsity of the incommensurability thesis as applied to categories of basic good" (Murphy, 2001, 198). As Murphy notes, this requirement of practical reason is difficult to apply. In the case of many actions, it is sufficient that they aim at one good. His example is that of spending seven dollars to enter a museum in pursuit of aesthetic experience. This act presumably does not dismiss or devalue other goods (that could have been pursued with the seven dollars) in such a way that it is practically unreasonable. However, this difficulty of application does not mean that the requirement is contentless or that we can never have a fair idea of when an act is in compliance with it. Murphy argues that one of the most obvious ways that we can see when this requirement is violated is in evaluating an agent's life plan rather than just one plan of action. We might rightly be suspicious about a life plan that completely omitted one or more basic human goods.¹⁷

Now I believe that it is precisely this requirement of practical reason that makes us suspicious about the second couple in our example. The health of the child that will come into existence is being dismissed and devalued. In the version in which the couple acts for political aspirations, the good of life (insofar as this involves health) is severely devalued because it is treated as less important than a second good, excellence in work. In the version in which the couple wants to conceive in the same year their favorite team won the World Series, I think the good of life is simply dismissed as not being important at all.¹⁸ While the requirement is difficult to apply, it can still guide action. And in this case, I think it provides the correct ground for a moral evaluation that we otherwise have a hard time trying to explain, given the *sui generis* nature of the nonidentity problem.

The natural law framework has what I take to be a plausible response to the *Two Medical Programmes* as well. Recall that in this case one must evaluate one program that eliminates an impairment by delaying conception (which is identity affecting) versus a second that eliminates the same impairment by treating the already existing fetus (which is identity preserving). Parfit believes there is no difference between these two programs and concludes

that such procreative decisions must include some impersonal element. The SPAV denies this, and must presumably reject the *No Difference View*; the treatment program is significantly better than the preconception program. If the natural approach I have presented is right, we may be able to temper this response. Such an approach would indeed reject the *No Difference View* in a strict sense; for one program is better for individuals while the other is not. Nevertheless, the fact that no one is made better off by the preconception program is not the only morally relevant factor one must evaluate. Once again, the natural law theorist can ask about how the agent's plan relates to the good of life and health. So perhaps the treatment program is clearly the morally better choice on strict person-affecting grounds, all other things being equal. But at the very least, a natural law theorist sympathetic to the SPAV could find room to criticize identity-affecting policies. Instead of comparing treatment to preconception, imagine that one were simply faced with the decision to fund the preconception program or fund some other very superficial program that would make already existing adults marginally happier. Even though the superficial program makes people better off and the preconception program does not, I believe that a SPAV natural law theorist could claim that funding the superficial program displays a defective attitude toward the good of health in our children. And this might be enough to prefer the preconception program.

Natural law theory's emphasis on agency and how plans of action relate to basic goods provides a more compelling basis on which to criticize certain procreative decisions on the SPAV. It can tell us something about the agent's plan itself that is defective, and not merely say that the agent's willingness to act on that plan is evidence that he is likely to make people worse off in *other* plans of action later. Thus, I believe that if one is committed to SPAV, a natural law theory is closer to our genuine moral intuitions in these cases.¹⁹

V. AN IMPERSONAL NATURAL LAW PERSPECTIVE

Many are unconvinced by the SPAV. It should be noted that there are other difficulties with the view in addition to the nonidentity problem and the rejection of the *No Difference View*.²⁰ These difficulties lead some to endorse the impersonalist approach. The natural law theory I have relied on in this paper is not obviously at odds with impersonalism. So my strategy in this section will parallel that of the previous one. I will briefly survey two of the most serious problems associated with impersonalism and show how a natural law approach provides a framework that addresses them or at least limits their scope.

Perhaps the most famous criticism of impersonalism is the *Repugnant Conclusion*, which was introduced by Parfit himself. Recall that an impersonalist approach allows us to compare states of affairs with uniquely realizable people. We can make these comparisons to evaluate both same and different number choices. The repugnant conclusion follows from the observation

that for any population of people with very happy lives, we can imagine a much larger population with barely positive lives that we would be forced to say is better. See the diagram below in which the height indicates the number of people and the width indicates the level of welfare. The people in world B have lives barely worth living, but since the population is so much greater than world A, it must be the better of the two.



Now the first thing to be said about the repugnant conclusion is that it seems to rely on a totalist utilitarian theory; but as I noted earlier, the repugnant conclusion arises for any theory that takes welfare seriously.²¹ That is, whatever deontological constraints we may place on our actions, we are still faced with it if we think we have some moral reason to try to make the world better.

One way that a natural law theorist committed to impersonalism could approach the repugnant conclusion is to focus on the importance of human flourishing.²² As we saw above, human flourishing consists in a life with an appropriate balance of basic human goods. The basis of these goods (i.e., what *makes them good* for humans) is human nature. For the natural law theorist, the nature of a thing will determine what constitutes what is good for it. For example, nutrition and growth are goods for plants, but knowledge is not. So there is nothing regrettable about a plant, or for that matter a nonhuman animal, being unable to partake in the good of knowledge. However, a human being with a severe brain injury who is unable to partake in knowledge is in a privative state despite being capable of nutrition and growth. If welfare (including the welfare of things like plants) is a quality of the world as impersonalists claim, then natural law theorists can take such privative states into account when evaluating states of affairs. Consider the following (very simple) two worlds: world X, which has one healthy plant, and world Y, which has one human being in a persistent vegetative state. There is a sense in which there is an equal level of welfare in both of these worlds, yet they are importantly different for a natural law theorist.²³ I make no claim here about which of the two worlds is better (though I think natural law theorists should conclude that world Y is better).²⁴ The point I wish to make is a slightly different one. Regardless of which world is better, there is an importance sense in which world Y is regrettable in a way that world X

is not. World Y contains a substance that is failing to flourish in accordance with its nature. There is no such failure in world X. Let us refer to the kind of failure of a substance to flourish in accordance with its nature a “privative feature” of its world.

I believe that privative features can provide principled grounds for a natural law theorist to reject the repugnant conclusion (i.e., that world B is better than world A) while maintaining an impersonalist view. The lives in world B are supposedly miserable, but still worth living. So each has a minimal positive value; the impersonalist believes that we can understand the cumulative welfare in the world a feature of that world. The repugnant conclusion rests on a view that this feature is additive. Even if this is right (i.e., the more lives worth living there are, the more welfare there is), the natural law theorist can explain why this additive feature is not the whole story. For in addition to the cumulative welfare, we can ask about the privative features of the world. In world A, we assume that the lives of the people are flourishing with respect to their nature. We would probably not say that everyone is perfectly flourishing; it is difficult to know what such a life would look like. So even if the lives of people in world A are very good, there will presumably be some minimal privative feature of the world. By contrast, world B is one in which lives are barely worth living. No one in this world is flourishing, thus the privative feature of the world is enormous. It is so large that it outweighs the additive feature of welfare. On these grounds, the natural law theorists can explain why world A is better than world B. In a sense, the question for the natural law theorist is, “Which is better: a world where all the people are flourishing, or a world where there are many people, none of whom is flourishing?” Based on the privative features, we can say the former is better.

Now one might rightly ask, if both the additive features and the privative features are relevant, how can we decide when one outweighs the other if the two conflict? Obviously, in the cases of world A and world B, we would want the privative feature to be the determining factor. Other cases might not be as clear. Consider worlds A and C.



The lives in world A are more flourishing than they are in world C, but there are more people in world C. Like world B, world C is more preferable

in terms of total welfare, but has a greater privative feature. Nevertheless, it is not obvious that world A is better than world C.²⁵ I confess that I do not have a formal principle to make this determination. So while I think that two worlds of uniquely realizable people are comparable, it might be that they are not always *precisely* comparable, given that both additive welfare features and privative features are at play.²⁶ Worlds A and C are difficult to compare for this reason. This will be unsatisfying to some, but I believe this simply might be the nature of such impersonalist judgments.²⁷

Before concluding this section, I wish to consider a second general criticism of impersonalism. Many are attracted to the SPAV because the non-identity problem seems to them to be more palatable than problems that come with impersonalism, such as the repugnant conclusion.²⁸ But aside from biting bullets in various cases, some advocates of the SPAV also challenge the basic impersonalist denial of the person-affecting nature of value. Impersonalism claims that “goodness” (justice, rights, flourishing, etc.) is a value to the world. But impersonalists owe an explanation of what exactly it is that makes a world with humans in it better than a humanless world. Heyd puts the challenge this way:

these are views which are difficult to defend, and philosophers often appeal to non-moral (aesthetic or religious) notions of shame or loss (“it would be a pity if . . .”) as substitute for the moral grounding of such duties and values. The impersonalist must identify what makes the world better (impersonally). (Heyd, 2009, 7)

I believe that natural law theorists sympathetic to impersonalism will not be troubled by this criticism. For it is not the case that they are motivated by intuitions generated by nonidentity cases, and must *then* find a way to justify the idea of value as a quality of the world that is not ad hoc. Rather, the natural law theorist (apart from any peculiar cases involving possible people) takes such a view of nature as fundamental. The claim that nature is not “value free” is the basis on which the theory builds its notion of flourishing and basic goods. Thus, the natural law theorist has no difficulty in making room for value in this impersonalist sense; it is a basic tenet of the theory to begin with.²⁹

VI. CONCLUSION

This paper has touched on a great many topics. Of course, any one of them could be expanded. So I do not mean to give the impression that I have decisively solved all the problems I have discussed. Rather, my goal has been a more modest one. I hope that I have been able to give a sketch of what a natural law perspective might look like when applied to ethical questions about bringing people into existence. Though I have spoken to both person-affecting and impersonalist views, I have not made a claim about which a natural law theorist ought to endorse. My own view is that the basic tenets of

natural law theory lend it more toward impersonalism, but I believe that it is an open question. I hope that natural law theorists will take it up in the future; I also hope they will engage in more formal discussion about the nonidentity problem, the repugnant conclusion, and population ethics more generally. The reason that these problems are so challenging is because it seems that the only way to do justice to our moral intuitions in one case is to endorse principles that are completely at odds with equally strong intuitions in other cases. Natural law, I have argued, is an appealing theory precisely because it can go a long way in explaining and accommodating our moral thinking. If I am right, this should count as evidence for its truth as a theory and for its relevance in bioethics.

NOTES

1. For an argument that there is such an obligation, see [Savulescu \(2001\)](#).
2. Though Parfit is often credited for bringing the full force of these problems to light, they were recognized earlier. It could be argued that the earliest discussion of these issues goes back at least as far as Henry [Sidgwick \(1907\)](#).
3. In addition to bioethics, Parfit's arguments are hugely influential in issues of population ethics and environmental ethics. His famous case of "Conservation and Depletion" exemplifies many of these issues.
4. I think that most natural law theorists of the stripe I am considering in this paper will be sympathetic to the Origin View as well. These natural law theorists are often committed to an Aristotelian/Thomistic view of persons. On such a view the human form is something that all human persons share, and particular human persons are individuated by the matter that composes them. So different pairs of gametes would result in numerically different persons. While this metaphysical understanding of persons advocates the existence of souls as substantial forms, it is not a dualistic Cartesian understanding of persons being identical to immaterial souls. On such a dualistic view, the Origin View could be challenged because the matter would be accidental; there would seem to be no principled ground on which to deny that a given soul could come to be instantiated in any pair of gametes.
5. Sometimes (and wrongly in my view), it is claimed that the nonidentity problem, and especially related issues like the repugnant conclusion that I will discuss later in the paper, only arises for consequentialist theories. However, it is generally accepted that the nonidentity problem arises for *any* moral theory that includes welfare. The best interpretations of natural law theory are welfarist in my view, so the nonidentity problem cannot be ignored.
6. It is of course a bit presumptuous to say that, necessarily, the life of a person with a certain handicap will inevitably make his life "go worse" than it otherwise would have gone. Some might say that we are never in a position to make such judgments. I think we should be sensitive to this, but in general we do make these kinds of assumptions. We try to keep ourselves (and our children) free of disease and injury. Of course, this is not to say that those who do suffer from such things are unable to lead very good and fulfilling lives.
7. All quotes to the *Summa Theologica* list Part, Question, and Article numbers.
8. There is debate between those who think knowledge of human goods is derived from speculative judgments and those who think that it is immediate and underived. The former, sometimes called *derivationists*, include (among others) Ralph McInerney, Anthony Lisska, David Oderberg, Henry Veatch, and Joseph Rautenberg. The latter group, sometimes referred to *inclinationists* or as the "new natural law theory" includes John Finnis, Germain Grisez, Robert George, Patrick Lee, Joseph Boyle, and Christopher Tollefsen. Despite their differences, these authors share the basic commitments that I characterize as natural law theory generally and that form the basis of the natural law arguments I will give in response to the nonidentity problem.

9. I do not mean to suggest that consequentialists will not be able to reject such an action, only that they will reject it on different grounds.

10. The incommensurability of the goods could be called into question here. What I say here and in my later arguments will depend on the notion that distinct goods can be imprecisely compared. So I must deny a strict incommensurability. The key point I wish to claim about incommensurability, however, is that a complete absence of one good cannot be compensated by a large amount of another good.

11. Joseph Spoerl (2000) has even argued that married couples would be wrong to engage in sex if their express purpose was to conceive, because it would treat the not yet existing child as a means to an end. Procreation, he argues, should “just happen” in the context of the relationship between the husband and wife.

12. I will not wade into the debate about defining the point at which a life is not worth living. Even if we assume that there are such lives, many lives that include diseases and impairments are certainly well worth living. Natural law theorists and I believe any plausible axiology will concede this.

13. I have offered arguments of this sort as well. See Delaney (2012a, 2012b).

14. Such double-effect reasoning might be particularly appealing to a natural law theorist, or in general those who accept a plurality of incommensurable human goods.

15. Of course, the second couple could conceive now for more noble reasons. If so, we might judge them more like the first couple, and we might not judge their decision (or willingness) to conceive as wrong. Additionally, one could argue that the second couple might also be said to merely foresee and not intend the illness. This might be the case in the World Series version of the case, but if the couple with the political ambitions wanted the child with the illness to gain sympathy, the illness was intended. So the cases in which the illness is actually intended might be relatively rare. Even so, that would not make all foreseeable illnesses morally on par. Some foreseeable illnesses like the first couple could be more appropriately related to basic goods than others.

16. One might argue that there are two differences in this case: (1) the very high probability of having a child with the disability and (2) the motives of the parents and that (2) is really doing all the work. I think that parents' motives are indeed the crucial way of evaluating how their actions relate to the relevant goods. But I bring in the disability aspect for two reasons. First, I think that this makes the bad motives even worse. To have a child for a selfish or superficial reason is perhaps bad enough, but when that child is likely to be unhealthy I think it adds a dimension that makes it even worse. So I think this helps make the point clearer. Second, I think setting up the cases this way helps them to parallel much of the existing literature on the nonidentity problem, which often uses cases involving children with disabilities. I thank an anonymous reviewer for bringing this point to my attention.

17. Murphy is quick to point out that there are many epistemic challenges in determining when this has actually happened (2001, 199–200).

18. It is interesting to consider how this argument would apply in a case in which the second couple took the position of Spoerl (2000) and thought children should “just happen” in the context of married life without too much planning one way or the other. I think that one could (and I believe should) make room on such a view for exceptional circumstances in which one should postpone conception. This would be the “grave reason” cases I mentioned above that I think many natural law theorists accept.

19. It may be argued that relating plans of action to goods in this way is to smuggle impersonal considerations into our evaluation by having a plan of action related to the abstract “good of health” rather than the health of a nonuniquely realizable person. But I do not think this objection holds; I believe that, to be a genuinely impersonal approach, the decision must rest on making a judgment about which of two worlds is better when different people exist with different levels of well-being. Nothing I have said here with respect to applying natural law theory to the SPAV has made any such claim.

20. One problem is that the SPAV is unable to maintain transitivity. Suppose that world A has two people in it, *x* and *y*; world B has *y* (better off than he is in A) and *z*; world C has *z* (better off than he is in B) and *x* (worse off than he is in A). We are then left with the odd result that world B is better than world A, world C is better than world B, but world C is not better than world A. Another problem with the SPAV is that it can generate strongly counterintuitive conclusions when comparing worlds with some uniquely realizable people and some nonuniquely realizable people. Suppose world A contains 1,000 very happy people plus person *x*; world B contains 1,000 very miserable *other* people plus person *x* very slightly better off than he is in world A. It seems the SPAV must bite the bullet and say that world B is better than world A. For a more thorough discussion of these and other problems with the SPAV, see Arrhenius (2003, 2009).

21. Other types of utilitarianism such as averagism and a variable value (which combines totalism and averagism) have been used to address the repugnant conclusion, but they lead to other conclusions that are equally problematic or even worse.

22. Larry Temkin's work has been interpreted by some as a human flourishing account (Temkin, 1993). Temkin's view of flourishing is quite different from that of natural law theory.

23. I do not mean to suggest that only natural law theorists will say there is a difference between these two worlds. I think most ethical theories are compatible with this kind of claim, at least in a qualified sense.

24. I am inclined to say that world Y is the better of the two worlds according to natural law theory. It contains a being with a higher nature, one which, although it is not functioning properly, nevertheless has an intrinsic worth simply in virtue of the kind of thing that it is.

25. The most serious challenge would be to ask what would happen if we made the population of C *much* bigger. If one thinks that eventually the population will be big enough so as to make it better than A, then conditions will be set up to generate the repugnant conclusion. This is because one could then compare C with a greater population in the same way C was compared to A, and then continually compare the resulting better world to another even larger population until arriving at B. One might have to simply deny the claim that at some point C will become better than A if the population increases enough. The worlds might just remain imprecisely comparable because the privative feature of C increases as well.

26. The notion of two things being comparable, though not precisely comparable, can be seen in other contexts as well. For example, in the case of evaluating what one has most reason to do, we might consider what would be best impartially or best for ourselves. Against what he calls Sidgwick's Dualism, Parfit argues that these reasons are comparable, so that very strong reasons of one sort could outweigh very weak reasons of the other. If the reasons were of relatively the same strength, however, we could rationally act in either way. See Parfit (2011). I have something like this in mind when comparing total welfare and privative features.

27. It should also be noted that the examples I've considered have been simple in the sense that I have stipulated that everyone has the same level of flourishing. Things get more complicated when we compare worlds in which different people have different levels of welfare, and we must also evaluate how/if equality in a given world makes it better than a world with the same total level of flourishing that contains inequality. Temkin (1993) has discussed these issues at length. For the sake of brevity, I have not explored such cases in this paper.

28. There are other problems with impersonalism as well that, for the sake of space, I have not addressed here. One of these is the charge that impersonalism implies a duty to procreate, since adding worthwhile lives to the world makes the world better. It would be interesting to address this criticism from a natural law perspective. Since natural law theory emphasizes goods of family and the connection of procreation to the conjugal act in marriage, it could make this duty much more plausible.

29. Not all natural law theorists will grant this. Murphy, for example, denies that there is "agent-neutral value." However, he accepts agent-neutral reasons, so from the standpoint of moral agency, we might still be able to generate the impersonal preferences of which Heyd is skeptical. So even if there is not "goodness" per se as a quality of the world, but only "goodness for," we can take something like an impersonal approach. A world with something that has welfare could be better than a world without it.

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