

Genetic Engineering and The Non-Identity Problem

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Let's imagine a situation which can occur in the very close future: doctors detect that a woman who is not yet pregnant, but who would like to have a child, has a severe genetic disorder. Although the problem does not affect her directly, it can affect her future child. She is told that unless she undergoes genetic alteration on her germline she will pass on a debilitating condition to her, as yet unconceived, child. The child born after the alteration would surely be a genetically different child from the one which would exist if the treatment were not performed – genetic alteration of germline (in contrast to genetic alteration of somatic cells) is passed on to offspring.

The future mother, who is a Parfit-style philosopher,¹ claims that the treatment is completely useless, because there is nobody who might benefit from this very complicated and expensive cure. She argues as follows: firstly, the child who would exist if the alteration were not performed cannot benefit. On the contrary – if the alteration were performed, the child would not exist at all. If we assume that its disability were not very serious and the child could enjoy its life which would still be worth living, the alteration could only prevent this enjoyment since the child conceived after it is an entirely different child. Secondly, the child who would exist if the alteration were performed, also cannot benefit from this procedure because – analogically to the previous case – if the alteration were not performed it would not exist.

Moreover, the philosophizing mother maintains that by not performing this treatment we do not harm anyone. It is difficult to imagine that a person whose life is still worth living, though not perfect (like the life of the child who would be born if genetic alteration were not performed), could feel harmed by being brought into existence. Probably it could say something like this: “Ok. I'd prefer to be healthy, but I do not regret that my mother had not done otherwise, because I would not have been born. So, I do not feel harmed by my mother.”² In the case of

¹ See: Parfit [1987] part IV.

² Parfit [1987] gives a similar example of a man who wrote a letter to *The Times* after some British politicians publicly welcomed the fact that there had been fewer teenager pregnancies in the previous year. The man, whose mother was 14 when he was born, found this declaration outrageous: he understood that they mean that it would be better if he had never been born (p. 364).

the child who would exist if the mother underwent the treatment, we also do not harm anyone, because we cannot harm anyone solely by not bringing him into existence.

Consequently, the philosophizing mother claims that her decision to have or not to have genetic treatment is morally neutral and she is not morally obliged to undertake the genetic alteration before conceiving a child. Finally, the child who is born a few months later is handicapped indeed.

In this essay I want to discuss some possible arguments against the decision of the philosophizing mother and similar decisions in which genetic treatment affects the identity of future people. I begin with some comments and clarifications of problems which arise from the introductory example. Then, I analyze two general lines in which philosophers try to solve this problem: consequentialist and non-consequentialist. I conclude that, although there are many strong arguments against the decision of the philosophizing mother and from the preanalytical perspective there is no doubt that she is morally obliged to have genetic treatment, the problem is more complicated than it seems at first sight. I do not find in recent philosophical literature one theory which coherently elucidates our preanalytical indignation over the philosophizing mother's decision and embraces all possible problems triggered by genetic engineering.

Preliminary remarks

Before we discuss arguments against the decision of the philosophizing mother it is necessary to make a few comments. The first concerns the problem of personal identity. Demonstrating a possible example of genetic treatment in the introduction, I tacitly accepted Parfit's definition of identity, which he calls *The Origin View*. It claims that "each person has this distinctive necessary property: that of having grown from the particular pair of cells from which this person in fact grew."³ It is an important reservation, since if we accepted a different conception, for example, *The Descriptive View*, according to which each person is defined by some set of distinctive necessary properties and his biological origin (understood in terms of the genetic material from semen and ovum) is not important for his identity, our introductory example would not be convincing. In this case it could turn out (even though it could be very unusual) that regardless of genetic alteration of the mother's germline, the conceived child could be in both cases *the same child*. Nevertheless it seems that there are strong arguments in favour of the

³ Ibid., p. 352.

previous view, which will not be discussed here.⁴ Accepting *The Origin View* means that if someone had not been conceived from the same genetic material that in fact he/she was conceived (that is, among other things: a germline of his mother had been changed before he was conceived or he was conceived a month earlier/later), it means that he/she would never have existed.

The next problem concerns the phrase “a life worth living”. I am not going to discuss here cases in which a mother’s decision could result in bringing into existence a child so disabled as to lack a life worth living (e.g. a child with spina bifida). It seems that if someone’s life is not worth living, it might be rational for him to prefer the situation in which he/she would not exist at all. It is the reason why the case of a child whose life is not worth living is fundamentally different from the much more complicated example from the introduction. Of course, there are some influential moral standpoints (e.g. Catholic) which maintain that all human life – regardless of its quality – is always, or almost always,⁵ worth living. Fortunately, even those who claim that every human life is worth living can agree with the arguments presented in this paper – the only difference is that they will include cases which I exclude.

The final preliminary comment concerns the problem of obligation towards future generations. The premise that we have this kind of obligation is not obvious because we have to assume that we can benefit and harm people who as yet do not exist. It will be easier to accept this premise if we treat remoteness in time as similar to remoteness in space. We can clarify it with an example taken from Parfit:⁶ if I intentionally take a shot at a distant wood knowing that there could be some people, but do not knowing who they are (that is not knowing their identity), I can be guilty of murder. The fact that I cannot identify the people to whom I shoot is not an excuse. The analogical argument can be used in case of time-relations: it is possible to harm or wrong people who, as yet, do not exist. But it seems that obligation towards future generations means something more. In this essay I premise that so-called doctrine of actualism,⁷ which says that the moral status of an action is determined by its effects on the interests of only actual past, present and future people, is false. The best clarification of meaning and conse-

⁴ See: Kripke [1980].

⁵ Strictly speaking even Catholic theologians allow to stop the sustaining therapy when there is no chance for the patient’s survival.

⁶ Parfit [1987] p. 357.

⁷ The exponent of this view is Roberts [2002] who writes (expounding her “person-based consequentialism”): “For each person who ever will exist, agent must maximize well-being for that person”, p. 316.

quences of this doctrine is to tell a story.⁸ On the Day of Final Judgment God prepares two lists: the first with all the people who ever lived, and the second with all the deeds they ever did. When God evaluates whether peoples' actions were morally right or wrong He takes into consideration only these deeds which made the people from the first list better or worse off. He does not care about actions leading to alternative worlds which could be populated by different people (also in different number) who could be better or worse off than people in other possible worlds. Contrary to the view expressed by this story I assume that doctrine of actualism is false and we can be guilty of moral negligence if we care about only actual past, present and future people. In other words: God could send me to hell even if there existed no one in the whole history of our world who could complain that my action or negligence made him worse off.⁹

The consequentialist approaches to the non-identity problem

The case which was described in the introduction is in many ways similar to Parfit's example of the fourteen-year-old girl who chooses to have a child, although she is too young to give it a good start in life.¹⁰ Nevertheless the life of her future child will be still worth living. The paradox, which Parfit calls the non-identity problem, arises when we look at this situation from the perspective of prospective children. The future mothers who claim that there is nobody who might benefit from putting conception or genetic alteration off are right, but only if we assume that we can evaluate harms and benefits from the personal perspective of future children.¹¹

There are a few ways in which we can try to approach to this problem from the consequentialist position. In Parfit's explanation we have to assume that the perspective of future child is the wrong perspective and we have a kind of impersonal responsibility – that is responsibility to avoid bringing about states of affairs that are in one particular way worse than another. Adopting this view we cannot

⁸ It is adapted from Hare [2007] pp. 498-99.

⁹ Of course if God from the above example happens to be Christian God, He also would not take into consideration only deeds which concern other humans or other sentient beings. Instead, He would consider also actions or thoughts which concern no one, but are sins nevertheless (e.g. not observing the Sabbath). Therefore Christians can also expect that they will be punished by God, even if they did not make worse off any sentient being, but from different reasons than in my example.

¹⁰ Parfit [1987] p. 358.

¹¹ One could argue against this point that the mothers can benefit, because it is always better to have a healthy child. That is why we have to assume that a disability is not this kind that will be troublesome for parents.

claim that the woman's choice (whatever it might be) goes against the interests of any particular person. In this kind of approach we are reasoning only in one dimension: how well off, overall, will future persons be (whatever identity they will have). If some action affects a person negatively, but on the other hand it has also other effects that make the net result an overall gain in well-being, we should choose this action. Parfit describes this consequentialist intuition as The Same Number Quality Claim:

If in either of two possible outcomes the same number of people would ever live, it would be worse if those who live are worse off, or have a lower quality of life, than those who would have lived.¹²

Therefore Parfit would judge the future mothers' decisions in terms of the goodness or badness that her act produced for whoever existed. He would compare one possible situation with other evaluating the possible states of affairs from an impersonal perspective without holding that the future mother has wronged any particular person. Parfit defends the idea that the choice can be morally wrong because it produced lower quality of life than could have been brought about by different choices. The woman from the introductory example would act morally wrong, even if she would not wrong anyone in particular. She only violated a general utilitarian-style duty to avoid causing more suffering than necessary.

Slightly different consequentialist approach to the problem is introducing the idea of "de dicto good for"¹³. What does this mean? If we wanted to persuade the future mother that she should agree to genetic treatment (or in Parfit's example, that a fourteen-year-old girl should put having a baby off until she will be able to give it a better start in life), we would have to convince her that her decision would be wrong for *her child*. But we would have to use the phrase *her child* in a very specific sense in which it does not refer to one or another particular child she will have, but to *any* child she might have. In other words we would have to abandon *The Origin View* and switch to *The Descriptive View*. Therefore the philosophizing mother could not maintain – as in our introductory example – that by not performing this treatment she does not harm *anyone*. In Hare's approach she harms *her* child (in *de dicto* meaning of this word). In more technical formulation proposed by Hare "de dicto better" goes as follows: "Where S1 and S2 are states of affairs, S1 is de dicto better for the health of -- than S2, when the thing that is -- in

¹² Parfit [1987] p. 360.

¹³ See: Hare [2007].

S1 is healthier in S1 than the thing that is -- in S2 is in S2"¹⁴ (where "--" is a descriptive referring term). It seems that Hare's conception have a clear advantage over Parfit's in the persuasive and explanatory power. It is easier to persuade to a future mother that she will harm *her* (in that sense of *her* which does not imply any specific identity) future child if she will not undergo genetic treatment, than to persuade her that she has a general impersonal responsibility not to bring about state of affairs which is worse than other possible. Hare's conception also seems to be closer to our preanalytical judgments – we does not tend to see our moral duties in terms o impersonal obligation towards one or another impersonal state of the world.¹⁵

The limits of consequentialism

Leaving aside the problem if "de dicto" approach is better than The Same Number Quality Claim, there are some serious problems with both of these consequentialist solutions – especially in the prospect of genetic engineering. The most obvious question arises when the number of people affected by two possible actions is different and, for example, there are many people who clearly benefit and some people who does not seem to be harmed. Probably everyone agreed that it would be morally repugnant to produce human clones solely to use their organs for transplantation and cut out of them needed "spare parts", as it was described by British writer Kazuo Ishiguro in his last novel *Never Let Me Go*¹⁶. Our moral evaluation would not be undermined even if all sides involved – both clones and recipients of organs – seemed to benefit from this situation in the standard consequentialist understanding: the first because they get needed "parts", the second because they exist and their life is worth living (even though their lives would be significantly shorter than the average life span and after reaching a certain age would be forced to donate organs to their prototypes). Ishiguro's example, although fictional, can serve as a model for all branches of real cases (or possible in the nearest future) in which our actions affect the identity and the number of people who are brought into existence. The standard consequentialist approaches which take into consideration the best outcome produced by our actions (taken

¹⁴ Ibid., p 514.

¹⁵ Nevertheless, it is worth to notice that Parfit considers this approach, but finally rejects it. Hare's main example (or as he calls it "a lame joke") is a version of an example given by Parfit. Hare quotes Hollywood celebrity Zsa Zsa answer how he found to keep his husband young and healthy: "I get a new one every five years". Parfit gives a similar example of a general who won every battle he fought because he changed sides when his actual army was going to lose (Parfit [1987] p. 360).

¹⁶ Ishiguro [2005].

from an impersonal perspective) does not explain why we object to cloning people for “spare parts”.

Unfortunately, it is not the only failure of standard consequentialist approach to the problems triggered by genetic engineering. The next goes as follows: it seems that we can be guilty of moral negligence if we produce lower quality of life than we could doing otherwise. Therefore every couple is morally obliged “to produce” as good offspring as possible. This duty seems problematic especially in the light of the prospect of genetically enhanced children. Is it really true that every couple is morally obliged to use all possible means (including genetic engineering) to create the most talented, the healthiest, the most good-looking etc. child? This view is rarely accepted, although it has some hard-headed supporters like Savulescu, who proposes a principle called Procreative Beneficence:

couples (or single reproducers) should select the child, of the possible children they could have, who is expected to have the best life, or at least good life as the others, based on the relevant, available information.¹⁷

Savulescu argues that this obligation has a moral character. He underlines that the couple should employ every possible mean (we can assume that also genetic enhancement if it were possible) to create the best possible child. According to Savulescu, the only possible principle which could compete with this above is Procreative Autonomy, which says that anyone is free to decide when and how to procreate. Consequently, it seems that we are caught between a rock and a hard place: on the one hand (if we accepted Procreative Beneficence) we have to agree that we have not only moral permission but strong moral obligation to create genetically enhanced children, on the other (by adopting Procreative Autonomy) we cannot object to the decision of the philosophizing mother from the introductory example.

Why the first perspective – i.e. the perspective of being morally obliged to create genetically enhanced children – seems to be morally outrageous? The answer is not simple. Probably we assume that the life of “normal” person (normal in terms of brightness, health, appearance etc.) is valued as much as the life of a person whose abilities were genetically improved. On the other hand we are tend to think that the life of a person whose life is in some important aspect significantly lower than average (as the life of a child from our introductory example) is not valued the same – as the life of clones in Ishiguro novel. Therefore there is a

¹⁷ Savulescu [2001] p. 415.

kind of asymmetry in thinking about creating enhanced and impaired children which reflects general asymmetry in ethics between benefiting and harming. Every moral theory which would try to solve the non-identity problem has to take that asymmetry into consideration.

Is it possible to improve consequentialism?

According to Hanser [1990] the problem with Parfit's solution lies in the fact that he uses two equivalent notions to evaluate our actions in consequentialists terms¹⁸. The first is 'worse off' and the second is 'harm'. Hanser claims that in all discussed by Parfit examples (e.g. 14-years old mother and Risk Policy, but it also applies to our case of the philosophizing mothers) people end up being *harmed* more than they would have been if we had chosen differently, but in the same time they are not *worse off* in morally relevant way. How is it possible? Hanser compares situation in which people from Parfit's examples (e.g. a child of 14-years old mother) would not exist at all. Therefore he assumes that they cannot be worse off, because every life worth living is better than non-existence. But in the same time he assumes that they are harmed more because if they had not been created, they would not have suffered. It is a reason for him to reject Parfit's principle The Same Number Quality Claim because it is enough to adopt simpler and wider principle: "if agent is morally accountable for someone's suffering a harm, his action is morally objectionable"¹⁹. According to this principle not undergoing genetic treatment would create harm and it would be a reason not to choose this option. Refraining from harming is morally by far more important than making people better off (especially if it only means bringing them into existence).

This asymmetry (i.e. a disparity between harming and benefiting) in the context of obligations towards future people was introduced also by Shiffrin [1999] and Harman [2004].²⁰ Shiffrin uses this asymmetry to argue that so called wrongful life suits (civil suits brought by the disabled children who seek damages for suffering that result from their creation) could be in theory brought by children whose life is worth living (even though they are disabled) and their creation was

¹⁸ Especially if in addition to part IV of Parfit [1987] we take into consideration pp. 67-69.

¹⁹ Hanser [1990] p. 59. His position is similar to Harman [2004], but it seems that he can be pulled up to the label of non-consequentialist (or deontologist), whereas Harman is consequentialist.

²⁰ The other consequentialist solution to The Non-Identity Problem, which could avoid Savulescu's conclusion is "person-based consequentialism" proposed by Roberts [2002]. It says that we are morally obliged to maximize not general, aggregative well-being, but well-being of people who will exist. Roberts juxtapose this solution with Parfit's "aggregative consequentialism". Unfortunately, as it was noticed above, this solution premises "actualism" what disqualifies it.

not caused by any moral fault: negligence, recklessness or maliciousness (recently in USA courts examine only those cases in which a plaintiff has a life which is not worth living). She claims that it is impossible to treat benefit as a advancement and harm as a setback of someone's interests on the same one scale. The well-known fact of morality is that failing to being benefited is morally less serious than both being harmed or not being saved from harm. In the case of the disabled child from the introductory example benefits of being created would not invalidate harms which was done.

Harman goes further and, similarly to Hanser, tries to build a consequentialist moral theory on the prohibition of harming. Her conception is a version of negative utilitarianism, which says that minimizing bad effects that our actions have on people is more important than maximizing good effect. She writes that "reasons against harm are so morally serious that the mere presence of greater benefits to those harmed is not in itself sufficient to render the harms permissible."²¹ Admittedly, in her theory the benefits can sometimes outweigh the harms in that sense that total package of benefits and harms leaves person better off than he/she would be otherwise. But even in this case benefits do not outweigh harms in that they do not make it permissible to cause them. Consequently, according to Harman we have strong moral reasons to create "not *the most happy, most benefited, or most perfect* child we can create, but *the least seriously harmed* child we can create."²²

Her theory has another nice feature which helps to solve some troubles with the non-identity problem. She proposes to change our ordinary use of the word "harm" so that we can harm someone causing him to existence even if we know two things. First, that this person will have no regrets about his/her existence. Therefore harming cannot be based on the grievance of the victim. A mother can harm her child by causing it to come into existence in a handicapped condition, even though the child cannot establish a grievance against her as long as it concedes that his handicapped existence is far preferable to nonexistence at all. And second, that our act can harm a person even if we know that it is clearly better off for this person in this sense in which existence is better than nonexistence.²³

Unfortunately, there is some very serious argument against these improved consequentialist positions. Is it really true – one could ask – that being brought into existence is a kind of benefit (all improved consequentialist solutions seem to

²¹ Harman [2004] p. 93.

²² Ibid., p. 105 (italics by Harman).

²³ Ibid., p. 99.

premise it)? This assumption requires quite a tortuous explanation. Everyone would agree that saving someone's life benefits this person, what means that a saved person is better off than he would have been if he ceased to exist. From the above example supporters of the view that existence is better than nonexistence come to conclusion that making moral calculations we sometimes compare a situation in which some persons exist with a situation in which these persons do not exist. Therefore, even if it seems bizarre – they argue – we have to accept that sometimes we compare one state of affairs with nothing. There is one surprising consequence of this view (let's call it the second asymmetry): normally, if some act was good for someone, the lack of this act would leave him worse off. But this is not the case of "coming-to-be" an actual person. In this case, even though occurrence (e.g. bringing someone into existence) can benefit him, the opposite act (namely, not bringing him into existence) cannot leave him worse off, because anyone who does not exist cannot have any claim to be created. Parfit accurately sums up this argument: "If a certain kind of life is good, it is better than nothing. If it is bad, it is worse than nothing."²⁴ But is this assumption really convincing? Especially if we keep in mind both mentioned above asymmetries: between benefiting and harming, and between being created and not being created.

Benatar [1997] claims that if we accept these two asymmetries and if we adopt the impersonal consequentialist perspective, we must come to conclusion that being brought into existence is not a benefit but always a harm. He premises – what is a matter of empirical facts – that bad as well as good things happens to all humans. Especially the first are undeniable – since we all face death. Therefore even in the most happy life there is always a kind of balance between good and bad things. Taking into consideration asymmetries discussed above the situation looks radically different if we did not exist. Firstly, the absence of suffering and pain which is intrinsic part of our life would be undeniable good. Secondly, the absence of pleasures of life surely would not be bad. Consequently, this second case (if we were not-existent) has a clear advantage over the first: in the first there is (at best) a balance between good and bad, in the second we have the clear good and lack of bad. In other words, if we had only two options: the first in which we can create quite happy and "normal" child which life – as almost every life – will be full of pains and pleasures, and the second in which we can refrain from creating anyone, we should choose from moral reasons the second option. This proposition surely solves our introductory example but in a quite unexpected way: although Benatar finally claims that having children in some cases can be morally

²⁴ Parfit [1987] p. 487.

justified because of pleasures which it makes for parents, refraining from having offspring – even if we can expect that they will be quite happy – would always be morally desirable. It would be a supererogatory or a heroic deed. Moreover, it means that from the moral point of view it would be preferable for mankind (or even for all sentient beings) to completely die out.²⁵

Maybe if we want to move further we have to abandon consequentialist standpoint. Even Parfit who at first sight seems to be hard-headed consequentialist admits that sometimes (when the number of future people affected by our actions is not the same) appeal to rights is more legitimate than appeal to impersonal consequentialism. He gives an example of future generations whose existence depends on the energy policy we choose, e.g. we can either choose a “Depletion” policy which significantly improves the well-being of people in the next 200 years, but then leads to sudden deterioration (e.g. because of a global nuclear catastrophe after 300 years) or we can choose a “Conservation” policy which guarantees a slower, but stable increase of well-being without any predictable catastrophe. As a chosen policy influences distribution of people, it influences also the identity of future people. In such cases Parfit admits that the best possible explanation can be given with reference to rights of future people which would be violated if we chose the first policy.²⁶ So maybe non-consequentialist approaches better manage the non-identity problem? Let’s try.

The non-consequentialist approach

Woodward [1986] goes further than Parfit and argues that in the many non-identity cases we violate not impersonal consequentialist rules, but rights possessed by, or duties owed to people. According to this theory rights are the indispensable part of the explanation as to why some choices which affect the identity and number of future people are morally wrong. Woodward claims that the general structure of explanation of our moral attitude should be given in terms of rights, that is, in our examples, in terms of wrongs done to a child or – as in the Ishiguro case – to clones. Harm is not a harm which happens to anyone or to impersonal state of affairs, it is the loss which some people can complain about – he argues.

²⁵ This conclusion is opposite to Parfit’s views: he directly claims that disappearing of people (e.g. as a result of nuclear catastrophe) would be by far the greatest of all possible crimes (Parfit [1987] pp. 453-454).

²⁶ Ibid., p. 372.

Woodward demonstrates his argument on the example of Smith who is refused to buy a flight ticket because of racial discrimination.²⁷ The plane he expected to fly crashes shortly after the take-off and nobody survives. A diehard consequentialist would say that Smith is better off than he otherwise would be, and if selling or not selling Smith the ticket is the only relevant action which the airline could perform, not selling him a ticket leaves him better off than any other possible action the airline might have performed. Therefore, no wrong was done to him. Nevertheless, it seems obvious that the airline office which had refused to sell a ticket solely because of racial prejudice did something morally wrong. And what is morally wrong in this case is not captured by invoking the consequence of action: it is, rather, the violation of Smith's right to be treated equally.

Nevertheless, Woodward does not claim that his person-affecting approach includes every possible case. There are some parts of morality (as well as some instances of the non-identity problem) in which moral wrong cannot be explained by appeal to rights or any other person-affecting view. Again, the best way to see the limits of Woodward's non-consequentialism is to give an example: let's imagine that in our introductory example what is required for a woman to have a healthy child is not a genetic treatment before conception, but a standard therapy during pregnancy which does not affect the identity of a child. The stubborn, although philosophizing mother again does not agree to the treatment and as a result the child who is born is disabled.²⁸ Is this case morally more reprehensible than the introductory one? Probably some people would say "yes". But is this conviction based solely on prejudices against genetic engineering or does it have stronger moral ground? Parfit's consequentialist approach says that the moral objections to both of these cases should be the same because the non-identity problem does not make a moral difference. It raises only theoretical questions and never affects what we ought or ought not to do.²⁹

²⁷ Woodward [1986] p. 810-811.

²⁸ This case is adapted from Parfit's example of Jane and Ruth – Parfit [1987] p. 375

²⁹ Parfit [1986] p. 859. For Hare this example is an argument in favour of his „de dicto” approach. Although Parfit claims that the non-identity problem does not make any moral difference, Hare maintains otherwise: in the introductory case nobody has a special complaint against philosophizing mother. “Everybody can complain – Hare writes – ‘you have made things worse’. Nobody can complain ‘you have made things worse for me.’” (Hare [2007] p. 523). Whereas in the last case of the mother who fails to undertake a standard therapy during pregnancy there is always someone who can complain that was harmed. “De dicto” concern eliminates this difference, since even in the first case a child can say to its mother: “you failed to show appropriate de dicto concern for your child, and *I am your child.*”

Accepting the rights-based approach we would be forced to say otherwise: that the second example (i.e. refraining from the standard treatment during pregnancy) is morally worse than the first one (i.e. refraining from genetic treatment before conception) which affects the child's identity and it is not because of the prejudice toward genetic engineering. Why? Because the mother in the second situation does something worse to her specific child. What we compare here is the state of a child conceived without having treatment and the same child conceived after it. The situation looks different in the first case in which we have to compare the situation of a child with the unattainable baseline situation in which *this* child existed and its rights weren't violated. The fact that a child from the first example cannot exist without having its rights violated is for non-consequentialist a reason for treating this case in a more morally lenient way than the second case. Of course, according to the rights-based approach the first case is also morally reprehensible, but not as reprehensible as the second. The fact that consequentialist and rights-based approaches make a difference in moral evaluation of actions is a reason for Woodward to admit finally³⁰ that in such cases the consequentialist approach is more appropriate. Therefore, neither consequentialist approach, nor non-consequentialist cannot be treated as a global solution to the non-identity problem.

The other problems with the non-consequentialist approach

The first problem with Woodward's is that we have to assume that we can wrong the person even though the overall impact on our action toward someone is to make him finally better off (but not more benefited) than any other possible action we might have taken towards him. The fact that someone is better off does not cancel the wrongfulness of some acts because he still can regret this act. In contrast to the consequentialist approach, the moral wrong is based on the grievance of the victim and not on comparing impersonal states of affairs. Woodward writes:

one can coherently think of one's life as fairly rich in whatever it is that makes life worth living (as a life at a very high level of welfare and one which most people would envy) and yet still think that it has fallen so far short of some ideal (e.g. winning a Nobel prize) that one would prefer not having been conceived to this failure.³¹

³⁰ See: Woodward [1987].

³¹ Woodward [1986] p. 823.

The above position can probably explain Smith's case, but is more problematic in cases of genetic engineering. For example we have to accept that from the fact that the clones in Ishiguro's novel lead lives that are worth living, it does not obviously follow that they do not regret that they exist. Therefore – according to Woodward – it is possible that someone whose life is worth living might still have a preference for not having been brought into existence. But in the same time this person (like the clones in Ishiguro novel) are not going to finish her miserable life by committing suicide. It is quite mysterious how is it possible to connect these two preferences: not having been conceived and conducting life which is worth living.

It seems that cases which concern violations of rights during the life of the person (like Woodward's example of Smith) are qualitatively different from the cases in which the violation takes place before their conception. In the second cases the violation of rights is inseparable from bringing someone into existence. Therefore, there is a qualitative difference between thinking that "It's good that my rights were violated, because of that I am still alive" and "It's good that my rights were violated, because as a result I was brought into existence". What distinguishes the second case in Woodward's argumentation is an element of regret towards our own existence, which the Smith's case lacks. Unfortunately, it leads to the weird psychological state in which one combines two incompatible preferences: someone regrets that his rights were violated, but at the same time he knows that if his right had not been violated he would not have been born. Woodward's solution – if it were to be treated seriously – would need a new "phenomenology of regret and grievance" which goes beyond the normal experiencing of these feelings.

The second main defect of Woodward's rights-based approach is that we have to compare some situations to conditional modes. Woodward explains the moral wrongfulness of the Risk Policy by focusing on the difference between the actual situation of people with the "unattainable baseline situation" in which they would exist and violations of their rights would not occur.³² Even if we take into consideration that the notion of an unattainable baseline situations is only "a device" for representing the extend of the wrongness of certain choices, it is difficult to imagine how can we use it in specific cases. In Parfit's example of the energy policy we have to compare the situation of the people under Depletion Policy with the situation of *the same* people if their rights weren't violated. Examples which concern genetic engineering are ever more peculiar and it is not clear if Woodward

³² Woodward [1986] p. 817.

would try to solve them by non-consequentialist approach. Accepting his theory in the case of the philosophizing mother we had to compare the situation of a child which would be born if she did not undergo genetic treatment with the situation of *the same* child if its mother decided to undergo genetic treatment – even if we are sure that after genetic treatment a child would not be the same. In Ishiguro case we had to compare the situation of clones under the conditions described in *Never Let Me Go* with the situation if their rights were not violated, i.e. they existed, but they were not clones.

Kumar's [2003] solution tries to avoid this problem. Similarly to Hanser he underlines the difference between being harmed and wronged off but denies that avoiding harm has a primary importance in moral assessment of a deed. Moreover Kumar does not characterize a claim of having been morally wronged as requiring an appeal to how one has been made worse off than one otherwise would have been – as consequentialists and Woodward do. Rather he appeals to the notion of “legitimate expectations” and writes: “a claim to have been wronged requires that certain *legitimate expectations*, to which one is entitled in virtue of a valid moral principle, have been violated.”³³ This ban on violating certain legitimate expectations – at least without adequate excuse or justification – comes from the sheer treating one as a person. Therefore, this approach – contrary to the Parfit solution – premise that the moral evaluations is made from the point of view of the aggrieved. The most obvious problem with this approach appears when we try to elucidate the concept of “legitimate expectations”, especially if we wanted to establish what is “legitimate” and what is not. For example does this concept licence people to complain about some more or less trivial problems, e.g. “why am I slightly lower than average?” or “why am I not as bright as I would expect?” Or in our introductory case: can I legitimate expect to have life without any disabilities, and therefore may I legitimately expect from my mother to undergo genetic treatment even if it means that I would not exist?

One of the best non-consequentialist answers to the problem of delineation of “legitimate expectations” comes from Reiman [2007]. He uses Rawls' concept of original position to elucidate what are the morally relevant interests of future people (that is what they can legitimately expect). The concept of original position was primarily used to illustrate how to create rational principles of justice which can be accepted by everyone after proper consideration (it requires the veil of ignorance, that is a mode of making decision as if we did not know who we are – what character we have, if we are healthy or ill etc.). According to Reiman we can

³³ Kumar [2003] p. 106 (italics by Kumar).

use this concept also to establish obligations towards people who as yet do not exist. It seems reasonable for parties in the original position to agree to a general duty of living people to provide for future generations “normal” functioning because all of the parties want to safeguard their ability to pursue their goals whatever they turn out to be (and whoever they turn out to be). Therefore normal life expectancies and morbidity or mortality rates, prevention of serious defects and disabilities would provide such a safeguard (what would solve the case of philosophizing mother and Ishiguro clones).

Conclusion

Although intuitively we strongly oppose the decision of the philosophizing mother who refuses to undergo the genetic therapy I do not find one consistent moral theory which could explain our pre-analytical assessment of this case. The consequentialist approaches (Parfit and Hare) to the non-identity problems caused by genetic engineering leads to serious counter-intuitive consequences (the cases of Ishiguro’s clones or Savulescu’s Procreative Beneficence principle). We can avoid them if we accept improved versions of consequentialism and the asymmetry between benefiting and harming (Hanser, Shiffrin and Harman). But these positions built on prohibition of harming lead to even more outrageous consequence demonstrated by Benatar – that the best way to avoid harming is to refrain from procreating and to allow mankind to die out. The rights-based approach (Woodward) aspires to explain the wider scope of cases (although not all), but it leads to serious difficulties. The most promising seems to be two improved versions of non-consequentialist approach (Kumar, Reiman), but we still have to keep in mind that these solutions are not global – in some cases of the non-identity problem it is inevitable to appeal to consequentialist reasoning. The non-identity problem – especially in the cases where genetic engineering is involved – shows how difficult is to build one coherent and global moral theory which could embrace all possible problems triggered by our actions which affect the number and the identity of future people.

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