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Assessing the Person-Affecting Approach to the Non-Identity Problem

Olan Thomas Harrington

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College of Arts

University of Glasgow

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Abstract

The non-identity problem is an intriguing and important problem in moral philosophy, which has considerable implications for our thinking about the morality of some seemingly immoral acts of conception. Suppose, for example, that a prospective parent – Mary – is given two options by her doctor after being told she has a serious illness. She can take medication every day for the next three months to clear her illness and then conceive a healthy child in three months' time or she can take no medication and conceive a child now – but that child will be born with significant health problems. Mary goes ahead and conceives a child now. The child that is born – Mariette – is born with significant health problems and yet, despite a widely held belief that such an act is morally wrong because of what that act has done to Mariette, the non-identity problem presumes to show that this belief is in error: such an act cannot be worse for Mariette, because the alternative for her is not better – she would simply not exist in that alternative; nor does such an act wrong her because her life, although impacted by serious health problems, is still a life worth living – and one does not wrong someone by bringing them into a life worth living. But this means that knowingly conceiving Mariette is not – after all – morally wrong, for we cannot do moral wrong to her without wronging her in the first place.

In response to the above case, some philosophers have argued that Mary's act of conception is still wrong because her act violates an impersonal moral principle – such as a utility-maximizing principle – and this would mean that the act of conception can still be wrong without wronging Mariette. However, establishing that Mary's act of conception wrongs Mariette is still desirable because most people's intuitive belief about this case is that Mary's act wrongs *her*. I argue that, actually, there are some promising person-affecting proposals which show that the act is wrong. I assess three recent proposals; the de-dicto proposal, wherein I develop novel cases to respond to its most challenging objections; as well as the harm and rights-based proposals, wherein I argue that the act of conception is ambiguous and this ambiguity prevents us from appealing to person-affecting proposals. I argue that an alternative understanding of the act is most relevant and this allows person-affecting proposals to overcome their most salient objections. Ultimately, while I do not aim to favour any one person-affecting proposal over another, I aim to have developed several novel arguments that, I argue, allow me to conclude that the prospects for these have not just been underestimated but that there are promising person-affecting proposals that allow us to conclude that Mariette is wronged by the act of conception.

1. Introduction

The non-identity problem was first discussed (independently) by Adams (1972), Schwartz (1978) and Parfit (1976).¹ It is more thoroughly presented by Derek Parfit (Parfit, 1982) and *Reasons and Persons* (Parfit, 1986) and is best explained by example. Let us consider a version of one of Parfit's paradigm non-identity cases² as presented by David Boonin (2014) (see Parfit (1986) for the original). This case has many iterations, but for our purposes let us call it *Not-Postponing Conception*³.

Imagine a woman named Mary who decides she wants to conceive a child. She goes to the doctor for a check-up prior to conceiving. The doctor says that they have both good news and bad news. The bad news is that if Mary conceives now, then this child will be born with significant health problems⁴

(Boonin, 2014, p. 2).

In this example, we are to assume two things; the first is that the child's life will be substantially and negatively impacted in one of many ways. This could be because of the intrinsic features of those health problems, or due to a failure of society to adapt to their health problems, or some combination of these reasons. Yet, second, we also assume that most lives are better than no life at all – including this one. Taking these two claims together, then we can assume that despite their significant health problems the child's life will still be

¹ For more modern summaries of this problem, there are two helpful overviews of non-identity literature in (Boonin, 2014) and (Roberts, 2019). Both of which describe the literature in some detail.

² Boonin's version of the case is derived from a case Parfit calls 'Handicapped Child' (1982, p.118). There are others like it – such as the '14-Year-Old-Girl' in which a 14-year-old-girl supposedly wrongs her child by bringing them into existence when they themselves are too young to fully exercise the obligations of parenthood when the child is born, or so the main thought of that problem goes.

³ Here, I take the lead from Boonin (2014) in how I present the problem – it is helpful, for example, that his presentation carves at the joints of the problem to highlight different ways of addressing it. In addition to Boonin's presentation of the problem, the adaptation of the same case by Caspar Hare in *The Limits of Kindness* (Hare, 2013) is also influential to how I present the problem – indeed, I borrowed the names given by Hare in *The Limits of Kindness* for the case in question. Ultimately, the focus case of this thesis is an adaptation of the 'Handicapped Child' case.

⁴ In Boonin (2014) he uses the example of blindness – he invites us to consider any disease that we would consider to be bad for us, but one that would still not be so bad as to make our lives not worth living. As I said above, I take his lead on explaining the problem but avoid naming such a disease/significant ailment. This is because I wish to avoid making any normative claims about the attributes of children that we should avoid bringing into existence. My claim is more general, and allows for whatever normative claim to insert itself into the discussion – my goal here is only to explain the non-identity problem in a convincing manner such that it is reasonable then to believe – as per the non-identity argument – that if you wanted to express your some normative claim of this kind then it is difficult to do so without running into the non-identity problem.

worthwhile and indeed their life is better than no life at all. If the child who is born were to be asked whether they are glad they have come into existence despite this significant difficulty, they would likely say yes, they are very glad. Furthermore, they would likely say that their life is better than having no life at all. Finally, as with many health problems that are deemed ‘significant’, we are to assume that their significant health problems are irreversible and that there is no way to eliminate their effects (Boonin, 2014, p. 2). However, there is good news offered by the doctor:

The good news is that if Mary takes a course of medication for two months and waits until then to conceive, then this child will be born without those significant health problems. Knowing all the facts Mary returns home and decides that taking these pills is too much of an inconvenience for her. She goes ahead and conceives at once. The child that is born – Mariette⁵ – is born with significant health problems

(Boonin, 2014, p. 2).

The question that comes to mind in this case is whether Mary has done something morally wrong. With respect to that question, most people believe that Mary has done something morally wrong. Surely, they might say, that Mary has wronged Mariette by conceiving now and causing Mariette to have significant health problems when she could have just waited and conceived a child without significant health problems? Surely, they might continue to say, the impact that this has had on Mariette - due to significant health problems - is reason to believe that Mary has done something morally wrong by that act of conception: and this makes the act of conception (now, rather than later) morally wrong. I will now show why – according to David Boonin (2014) who is one of the main contemporary proponents of the non-identity problem and its conclusion – Mary’s act of conception is not morally wrong. In what follows, I’ll show how Boonin reaches the conclusion that Mary’s act of conception is not morally wrong by motivating several other beliefs that, when taken together, allow him to conclude that Mary’s act is not morally wrong.

The non-identity argument that Boonin (2014) develops is based on taking common-sense accounts of moral concepts like harming or rights to generate five premises and what he calls an ‘implausible conclusion’.⁶ After doing this, Boonin (2014) then systematically assesses proposals that purport to show that Mary’s act is morally wrong. Ultimately Boonin concludes that none of these alternative proposals have been successful and that the non-

⁵ Again, note that I have adapted the case from Boonin (2014) to include changed names throughout.

⁶ Boonin uses this phrase because people refuse to accept the conclusion.

identity conclusion remains – Mary’s act of conception is not morally wrong. However, before I explain Boonin’s (2014) argument in detail I want to first highlight that, while I present each of Boonin’s premises and their underlying principles as plausible I do so initially only for the sake of generating the argument and its subsequent conclusion. In fact, some philosophers like Melinda Roberts (2018) have argued that Boonin’s presentation of the non-identity problem generates the ‘implausible conclusion’ only because it relies on premises which are unacceptably narrow – narrow in the sense that they exclude other plausible principles or views that could expand on the principles as they have been presented (at least this is what I take Roberts to mean). Roberts (2018), for example, argues that we could simply expand the scope of P1 to solve the non-identity problem.

I agree that once we recognise this narrowness then we can advocate for more expansive principles, and that this could allow us to draw the seemingly correct conclusion in cases like not-postponing conception. Once I explain Boonin’s argument – which consists of five premises and a conclusion - to show how he generates the implausible conclusion in not-postponing conception I intend to grant that, of his five premises, P3 and P5 are plausible. I then intend to assess the three remaining premises of his argument – P1, P2 and P4 – in the Chapters that follow. Ultimately, I’ll show that the prospects for some person-affecting proposals have been underestimated by Boonin and that they do in-fact offer a plausible means of denying one of his premises. I’ll now move on to explain Boonin’s argument where he concludes that Mary’s act of conception is not morally wrong.

1.1 The Non-Identity Problem

One potential way for us to reach the conclusion that Mary’s act of conception is morally wrong is to first claim that Mariette is *worse off* for having to suffer from some serious health condition.⁷ This might give us grounds to then claim that Mary’s act of conceiving Mariette is morally wrong⁸. This, in turn, would be in line with our original belief about this case. For our purposes, it will be helpful to sketch out what we might mean by *worse off* in this case and so it is to that task that I will now turn.

⁷ I say to ‘...first claim that Mariette is worse off’ here because whether making her worse off is morally wrong or not will depend on whether by making Mariette worse off she also wrongs her. Here I am only dealing with the worse off claim.

⁸ It is worth pointing out here that claims about moral worseness can sometimes contribute to arguments in favour of an act being morally wrong. However, sometimes there are cases where an act being worse for someone is not enough to explain why that act is also morally wrong. Due to this, I take the challenge the non-identity problem poses for our belief in cases like not-postponing conception to be one of explaining why – ultimately – Mary’s act is wrong and not just that it makes things worse for Mariette.

Ordinarily, when we claim that a person is *worse off* we mean this in a comparative sense. We can make sense of a comparison in several ways, but the most common comparative with respect to the non-identity problem is to understand the comparative worseness of the act of conception as a counterfactual comparative claim of worseness. Counterfactuals concern comparisons between states, and so compare a state S1 (my remaining seated) with S2 (standing on a piece of Lego upon standing – which is painful). Intuitively, by moving from S1 to S2 the act of standing makes me worse off than I would otherwise have been had I stayed in S1. What is interesting about this is that if we accept that making a person worse off involves making them being worse off in this comparative sense, then it is not clear that we can make the comparison needed to ground the claim that Mariette is worse off because of the act of conception⁹. Let me explain.

Presumably, what is seemingly worse for Mariette is the assumption that she is worse-off compared to some alternative. Yet, considering the fact that such a serious health condition is tied to Mariette's genes at conception she will either be conceived with serious health problems or she won't – that is to say, she cannot exist without that serious health condition. For that reason the act of conceiving Mariette does not make her worse off. To make her worse off we would need to compare our impaired Mariette to a state where she is not impaired by that serious health condition – but that is not possible in this case.

Parfit did not explicitly endorse this kind of origins essentialism but it is a key assumption for his non-identity argument. Consider a question that he posed in *Reasons and Persons* (1986) where he asks 'what would have made it true that some particular person would never have existed?' (Parfit, 1986, p. 351). To answer this question, Parfit then provides an explanation, he says that: 'If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed'¹⁰ (Parfit, 1986, p. 351). Parfit's claim relies on facts of biology – and while the following elucidation of those facts may seem superfluous – that is, superfluous to making

⁹ The challenge which follows would be the same even if the mode of comparison were not counterfactual but instead indexed to time by comparing T1 (the time at which I was sitting) to T2 (the time at which I was standing with a piece of Lego stuck painfully into my foot), for example. I discuss alternatives to the counterfactual baseline assumed in this Chapter in Chapter 2.

¹⁰ Stipulating that Mary can either conceive a child now or in two months highlights more clearly the point that Parfit is trying to make. While we might disagree about whether Mariette could exist if Mary conceived today or tomorrow, this is because it is at least possible – though extremely unlikely – that Mariette would come into existence if conception instead occurs tomorrow. Due to facts of biology it is in fact true that, by origins essentialism, Mariette would not have existed had conception occurred two months later. The general thrust of making this stipulation is that even if we disagree about who would exist if Mary conceived tomorrow instead of today then we can certainly agree about who would have/and have not in fact existed if there is a two month gap between either conceiving now or two months later.

the simple point that there is no better alternative for Mariette – those same facts will be important for our discussion later.

Considering that sperm have a lifespan of approx. three days, and only one ovule¹¹ is produced within any 28 day cycle, then it is possible (though not likely) that the same sperm could fuse with the same ovule within the same cycle that a person was in fact conceived. The odds of this happening are somewhere in the region of 100 million to one if you assume the same sperm cells are present at each time of the act and that there are 100 million sperm each time (but this is not the case either since some may be at the end of their three-day lifespan at day T1 but some might just be beginning their three day life at T2 – and so the odds of this happening are actually likely to be in the many hundreds of millions). Parfit could probably make a stronger claim here due to facts of biology – he could say that ‘if any particular person had not been conceived within +/-3 days of the time when he was in fact conceived, he would in fact never have existed’. While Mariette could have been conceived within the hours or days of when her conception did in fact occur (though very unlikely), it is *in fact true* – Parfit claims – that someone in Mariette’s position would not have existed had Mary waited a month to conceive a child¹². Remember too, that the gametes that Mariette is composed of are defective in such a way that results in a serious health condition. Marty, whose conception occurs two months later, would be directly derived from a different set of gametes (a different sperm, and a different egg), and would not be born with a serious health condition. The moral implication of this is that we cannot claim that the act of conception makes Mariette worse off than she otherwise would have been because for Mariette to be worse off due to some act it must be that the act makes her worse off compared to some alternative. But the alternative in this case is not one that she could be made ‘worse-off’ than. We can now form the first plausible belief of the non-identity argument. This is:

¹¹ Or ovules in some cases.

¹² The truth of Parfit’s claim is most clearly true of a view called *origins essentialism*. While origins essentialism is not explicitly endorsed by Parfit in *Reasons and Persons* it is an important underlying assumption for Parfit’s discussion on the non-identity problem. This is the view that my identity is necessarily linked to my origins – and this includes the timing of my conception because of the precarity of existence. Note that in the case of identical twins where origins are a distinctive necessary property then the implication is that our origins – including the timing of conception - cannot be a fully distinctive property. A particular set of gametes joining at a specific time is necessary for P but this means that P is not fully distinctive because of cases where twins form from an embryo splitting. However, had conception occurred two months later than it did in fact occur then it would still be the case that no child born then would have grown from the gametes from which you did in fact grow from when conception happens now – despite the fact that those gametes are not fully distinctive. This point is made in Parfit (1986).

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been

(Boonin, 2014, p. 3).

It ought to be clear why, in a comparative sense, Mariette is not worse off given what I have said above. If we cannot show that Mariette is worse off, then presumably we cannot use a claim about worseness to show that the act of conception is wrong, and thus morally wrong. In his non-identity argument Boonin appeals to a counterfactual and comparative account of harm where: 'if A's act harms B, then A's act makes B worse off than B would otherwise have been'¹³ (Boonin, 2014, pp. 3-4). If we accept that Mariette is not worse off than she otherwise would have been, then the act of conception does not harm her.¹⁴ By this account of harm, actions cause harm by making people (or persons) worse off than they would otherwise have been, and because she is not worse off she is not harmed. We can now take P1 and then introduce the counterfactual and comparative account of harm as P2 to generate the following sub-argument of the overall non-identity argument that Mary's act is not morally wrong and conclude C1:

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been.

P2: If A's act harms B, then A's act makes B worse off than B would otherwise have been.

C1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm Mariette

(Boonin, 2014, p. 4).

¹³ This is the comparative and counterfactual account of harm. I explain it in more substantial detail in Chapter 3. While I have asked you to imagine that the counterfactual and comparative account is the most intuitive account of harm, there are other comparative accounts whose merit I will consider in that Chapter. In addition to comparative accounts there are non-comparative accounts which avoid comparative baselines altogether, I also consider those in Chapter 3. Here, I only outline what I take to be the most intuitive account of harm for the sake of developing the argument.

¹⁴ One might wonder 'whether she is still harmed by that act even if she is not made to be worse off? If we can show that Mariette is harmed then we may be able to show that that act is wrong, and thus morally wrong.' Remember, I said that I would present Boonin's premises as being plausibly true so as to generate the implausible conclusion before developing proposals for alternatives.

We already know that P1 is plausibly true for reasons outlined. We also know that, given that P1 is true, then when we add P2 we cannot conclude that Mariette is harmed by that act – since she is not worse off in the counterfactual and comparative sense described by P2. The main take-away from this sub-argument is that if we accept that to harm is to make a person worse off than they would otherwise have been, then we cannot claim that Mariette has been harmed because she is not worse off for the act¹⁵.

Some philosophers accept the conclusion generated above, but claim that while Mariette is not harmed, Mary's action nonetheless harms those who already exist around her. Such proposals are found in Cooley (2007), Rakowski (2002), and Shapiro (1996). Cooley (2007), for example, argues that bringing a child with significant health problems into existence places a significant burden on the business community. Others claim that Mary's act harms those who may have to make sacrifices to care for her, it harms the community who will bear the costs of her care, it harms those who avail of schooling and health systems by putting additional pressure on their ability to deliver better services. It is this that makes the act of conceiving Mariette harmful without harming Mariette.

Even if such a claim were plausible, it would strike me as highly counter-intuitive for someone to believe that Mary's action was wrong for that reason without having any concern for Mariette. It seems to me that people's intuitive belief about this case involves the belief that Mary's act is morally wrong because of its effect on Mariette. It is highly counterintuitive, in my view, to think that our belief about the wrongness of Mary's action relates only to some solidarity with the taxpayer¹⁶. We are unlikely to think, for example, 'those poor taxpayers' on hearing about this case. Anyone who does so would, in my view, be morally misguided. Material reasons do not capture our intuition about this type of case. Thus while I have said already that I will assess the plausibility of P1 and P2 in this thesis, I am prepared to grant P3 from Boonin that:

P3: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm anyone other than Mariette

(Boonin, 2014, p. 4).

¹⁵ To some these counterfactual and comparative principles may seem like unnecessarily narrow versions of what it means to make a person worse off or to harm someone. Some, like Melinda Roberts (2018) argue that the principles outlined in this set-up are too narrow. I have already elaborated on Roberts' objection in a footnote above. What is important to note is that even if you suppose that an alternative account of harming that does not involve a comparative claim may be able to conclude that Mary's act of conceiving now harms Mariette in a morally relevant way then there is reason to believe that these alternatives cannot help us.

¹⁶ This point is also made by Boonin (2014).

The fact that I am willing to grant P3 moving forward reveals that, when it comes to assessing ‘person-affecting’ proposals – which is to say that the person-affecting proposals are the proposals I assess in this thesis, and these are proposals that will determine the moral status of an act of conception, ‘...not by whether its outcome is simply better or worse than the outcomes of alternative actions, but by whether its outcome is better or worse for you, for me, for Joe Smith, etc’ (Hare, 2007, p. 499) - I am really only interested in assessing a certain subset of those ‘person-affecting’ proposals moving forward. The person-affecting proposals that I am interested in are those that aim to conclude that Mary’s act of conception is morally wrong because it is worse-for or harms (and therefore wrongs) *Mariette*, and not some other person or people such as those who avail of services that are impacted by Mariette’s serious health problems.¹⁷

Moving forward we can assume that the moral wrong ought to be explainable in terms of how it wrongs Mariette to satisfy what I have said is an intuitive belief about this case – that the act is morally wrong because it wrongs Mariette. Thus, regardless of the truth of C1, I will grant that P3 is true as a general assumption in this thesis. Given that Mary’s act of conception does not harm anyone other than Mariette for reasons stated above, we can now introduce P3 and then add it to C1 to make the following claim.

C1: Mary’s act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm Mariette.

P3: Mary’s act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm anyone other than Mariette

C2: Mary’s act of conceiving Mariette does not harm anyone¹⁸

(Boonin, 2014, p. 4).

¹⁷ Note that this description of person-affecting proposals comes from Hare (2007), however he uses this to describe person-affecting ‘approach’ to ethics. However, I take the person-affecting ‘approach’ to mean the same thing as person-affecting ‘proposals’ – where by proposals I do not mean a single person-affecting principle. By ‘proposals’ I mean a sets of person-affecting ‘principles’ that have theme on how they intend to show on what person-affecting ‘principle’ is plausible. As well as this, that Hare’s person-affecting ‘approach’ rules out impersonal proposals – when he says that it is not that the moral status of the action is not determined by whether the outcome is better or worse simpliciter (Hare, 2007). I will also rule out impersonal proposals – but will discuss this below.

¹⁸ Even if Boonin’s principle here is false, and you think that it is possible for an action that does not harm and thus causes no wrong can in fact be wrong then I will show in Chapter 3 why such solutions fail on their own terms.

When Boonin explains the non-identity problem, he introduces the ‘no-harm, no-foul’ principle (Boonin, 2014, p. 4). He relies on this principle¹⁹ to claim that if an agent has no moral claim for a wrong, then the act is, as a matter of principle, not wrong. Boonin uses the principle to say that moral wrongs are only present when there is a moral claim made to justify that same wrong, he says that “...if an act is such that no particular person has a legitimate moral claim against its being done, then it is not wrong to do the act,”²⁰ (Boonin, 2014, p. 4). We already know from C2 that Mary’s act of conceiving Mariette does not harm anyone – thus we cannot use a *harm-based* claim as a moral claim to ground a wrong²¹. With this in mind we can generate an additional premise:

P4: If an act does not harm anyone, then the act is not wrong

(Boonin, 2014, p. 5).

Why accept Boonin’s premise here? One might argue that even if we cannot say that Mary’s action harms Mariette, then we may be still able to deny that harming is a necessary moral claim for wrongdoing. For Boonin’s ‘no harm, no foul’ claim to work, it would need to show that not only is there no harm to ground a moral wrong there is also no other moral claim that can ground a wrong either. An opponent could claim that Mary’s act of conceiving Mariette is wrong by showing that, although Mariette is not worse off, or harmed, she is still wronged. That is, they could say that the moral claim for a wrong is not limited to a claim about harm because wronging people does not always involve a harm. If this is true, then – pending a suitable explanation of that wrong – such a wrong could ground the belief that Mary’s act of conceiving is wrong even if that act does not harm anyone. It is intuitive, for example, to think that I can violate a person’s rights even if I make them better off by doing so. I could take a person off the streets to be a modern slave²² against their will, for example, and in turn give them a home, food to eat and relative comfort in comparison to the streets they lived on. But simultaneously I take away their autonomy and freedom by keeping them

¹⁹ Once again, this is a principle that some may consider too narrow, and because of its use in the explication of the non-identity problem in Boonin (2014) those opponents argue that they only serve to help Boonin reach his desired conclusion– which is that we ought to accept the conclusion of the non-identity problem. Of course, it is up to a proponent of an alternative solution to explain why we should reject this principle.

²⁰ Note that this is described in person-affecting terms, and seems to rule out impersonal solutions.

²¹ If your thoughts have jumped to considering whether a moral claim can be something other than a harm then I will discuss this in what follows and might ask you to hold that thought for now.

²² I use modern slave here to distinguish against, perhaps, intuitive ideas of what ‘slavery’ might entail. Modern slavery is used to describe more contemporary examples such as trafficking persons for work in return for some accommodation and (or) subsistence. Yet with little freedom and (or perhaps) being held there against their will or making changing their own circumstances difficult by design. Modern slavery in the modern sense then, is the illegal exploitation of people for personal or commercial gain which might include sexual or domestic exploitation and organ harvesting amongst other crimes against that person.

as a modern slave. Perhaps I pay them far below the minimum wage for the work they do – that is if I pay them at all!

But rights are held by those who exist. A modern slave has rights because they exist and are identifiable persons who can make a rights claim. To claim otherwise would be to say that non-existent things have rights – and that seems strange. It is not the case that Mariette, at conception, can make this kind of claim because she does not exist at her own conception. How can the right of a person be violated if they do not exist at the time of that act occurring? Only existent and identifiable beings have rights, and given that Mariette does not exist at her own conception then there is no right violated at conception, thus Mary's act is not wrong.

The lack of an existent entity at the time of the act is a crucial tenet of why person-affecting proposals (generally speaking, not just those which advocate for rights-based principles) cannot apply to Mariette at the time of the act. If, as I have said above, that person-affecting proposals apply to those who exist then we cannot show that Mariette is harmed or wronged at the time of the act because she does not exist at that time. This is what I think is a fairly modest claim about the applicability of moral concepts like harming and rights. It will become more important for our discussed as I move through the thesis – and so it is best to explicitly flag this view as early as possible.

I take up several responses to this line of argument in Chapter 4, but for now, let us assume that, for the sake of argument, that P4 is plausibly true and that as well as there being no harm, there is no right violated²³, and so no wrongdoing.

If, for now, we assume that P4 is plausible for the sake of argument – which is to say that we accept that there is no other moral explanation of the supposed wrongness of the act of conception – then we can affirm the plausibility of P4. This is because if it is plausible then there is no harm-based moral claim to ground that supposed wrong and, in the absence of an alternative, we cannot say that the act is wrong. So, when we talk about a 'no-harm, no-foul' principle, what we mean is not merely a claim about harm but a claim about the general lack of any moral claim that can ground a wrong. However, in this instance we mean that because there is no harm to anyone, accepting P4 given no-harm-no-foul means that the act does not wrong anyone.

²³ I have simplified this, for brevity. An act can also be wrong because it is unfair, because you did not afford that person due respect, but each of these are also susceptible to the same objections levelled at rights-based claims. I will discuss this in more detail in Chapter 4.

Furthermore, Boonin argues, it would be unusual to think that an act is *morally* wrong without the act wronging some person²⁴. Thus, Boonin argues that that act of conception cannot be morally wrong. This is because once we take P4 and add it to P5 below then we can make the following argument:

P4: If an act does not harm anyone, then the act does not wrong anyone

P5: If an act does not wrong anyone, then the act is not morally wrong

C3: Mary's act of conceiving Mariette is not morally wrong

(Boonin, 2014, p. 27)

Some philosophers reject P5. They do this by appealing to impersonal proposals to argue that the act of conception is morally wrong once you consider the impersonal rather than person-affecting outcome of that act. Mary's act is morally wrong on such proposals because Mariette's level of welfare makes a difference to the impersonal state of the universe. It is easy to explain that approach by appealing to some consequentialist or utilitarian²⁵ principles for example. Consider the following principle which considers the impersonal worseness of an act. Parfit's 'principle Q is an example of an impersonal principle that aims to show why it is worse – impersonally speaking – for Mary to conceive now. He says that, 'if in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life, than those who would have lived' (Parfit, 1986, p. 361). Assuming the same number of people are impacted then we can say that one act is either better or worse (that is, better or worse simpliciter) than some alternative act. Of course, such an act would still need to not only be worse but wrong. There are principles which aim to do just that. Imagine, for example, that in two available outcomes for the universe the same number of people exist. The only difference is that in universe 1 (U1) Mariette exists and in universe 2 (U2) Marty exists.

²⁴ Though obviously someone who believed that we can do impersonal wrongs – such as the kind endorsed by some versions of utilitarianism, would disagree. The problem presented here is one that requires a person-affecting proposal, rather than an impersonal proposal. I will come to discuss impersonal proposals below.

²⁵ Some of the most influential consequentialist arguments are found in Kagan (1989), DeGrazia (2009), Levy (2002), Persson (2009), Salvulescu (2001). For a rule consequentialist response to the non-identity problem see Mulgan (2009) and for a recent defence of his view against an objection to a rule-consequentialist solution raised by Boonin (2014, pp. 175-178) see Mulgan (2019) who argues that rule-consequentialism can, in fact, avoid the conclusion that Mary's act of conception is not morally wrong. Principle Q is an example of an act consequentialist principle. However, there are other views that argue Mary's action is wrong because of reasons that are impersonal but are not consequentialist. Valentina Urbanek (2010) proposes that Mary's action is morally wrong because that act reveals a flaw in her character. Other views that are impersonal come from proponents who argue that actions which affect groups or destroy cultural heritage are morally wrong – though it is difficult to then apply these views to not-postponing conception. See Page (1999; 2006).

Imagine that both U1 and U2 each contain 80 units of welfare. Yet while in U1 Mariette's existence contributes only 1 unit of welfare to the overall amount of welfare in U1, Marty is able to contribute 5 units of welfare to the overall amount of welfare in U2. If we compare the amount of total welfare in U1 (81) to the amount of welfare in U2 (85) then we can clearly see that U2 is impersonally better than U1 and, assuming a principle about it being wrong to create worse impersonal outcomes than an alternative outcome that is available to us then it would be wrong to choose U1 over U2.

Taking an impersonal approach to the moral wrong of the act of conception would mean that its proponents could grant that P1 – P4 are true and yet we still determine that the act is morally wrong, even if it is shown to not be morally wrong by any person-affecting proposal. With all of that in mind there are two of Boonin's premises that I will grant in this thesis, P3 and P5. However, my aim is to show that there are plausible person affecting proposals that allow us to reject P1, P2 and P4. Taking all of Boonin's sub-arguments together gives us the following non-identity argument – I have highlighted the premises that I intend to address in this thesis in bold for clarity.

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been.

P2: If A's act harms B, then A's act makes B worse off than B would otherwise have been.

P3: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm anyone other than Mariette

P4: If an act does not harm anyone, then the act does not wrong anyone

P5: If an act does not wrong anyone, then the act is not morally wrong

C3: Mary's act of conceiving Mariette is not morally wrong

(Boonin, 2014, p. 27).

I have now explained Boonin's non-identity argument and said that I would assess P1, P2 and P4 in this thesis. In doing so I will argue that person-affecting proposals which reject those premises have been underestimated. Broadly speaking, the focus of this thesis is on reproductive style cases and practical problems generated by the non-identity problem in bioethics. Given this focus, any additional cases that I consider will be within that same

theme. I do not consider cases like Depletion for example. Depletion is a paradigm non-identity case first presented by Derek Parfit (1987) and presented here by Boonin (2014):²⁶

A society must choose between two policy measures. A ‘conservation’ policy or a ‘depletion’ policy. The conservation policy maintains a steady extraction of resources from the planet and provides a steady increase in living standards over the next 300 years, all the while preserving the environment for future generations. After the 300-year mark living standards level off. In contrast to conservation, the depletion policy extracts significant resources from the planet now and provides a greater increase in the quality of life to those who exist now at the expense of the quality of life experienced by those who exist in the future. This is because the depletion policy results in future people having severe health problems (severe respiratory problems, for example) due to the negative effects of excessive resource extraction on the environment. Ultimately, while depletion delivers a greater increase in quality of life for those who exist now it makes the quality of life for those who exist in 300 years time much lower than the quality of life experienced by those future people who would exist later under the conservationist policy

(Boonin, 2014, p.6).

This case is called an ‘indirect’ non-identity case because actions we take now will only have an indirect impact on who will come into existence. The case leverages the idea from Gregory Kavka (1982) that our existence is precarious and that a change in one generation can have ripple effects that impact who will/and who will not come into existence later. The thought is that our existence is so precarious that any person who lives in the future under either policy will exist as an indirect consequence of that act. Let me explain. Imagine, for example, that under conservation a world government launches several ground-breaking green energy initiatives. These initiatives require significant international cooperation and this involves workers moving from one country to another for work. New technology and changing attitudes to the environment that emerge from the initiatives supported by the conservation policy have an impact on how people go about their lives, how they socialise, holiday and whether they choose to have children. Generations later, every future person

²⁶ Parfit (1987) also describes a case called ‘the risky policy’ where a society must choose between policies which will shorten the lives of those who live in the future. The structure of the depletion example is often seen in discussions on climate change. For a specific example of this see Parfit (2017).

could attribute their existence indirectly to the conservation policy. It is not a farfetched idea – just think of whether it is plausible to think that you would have existed in a world where the industrial revolution had not taken place. It's extremely unlikely. Today, the impact of the revolution has been so widespread that your existence cannot but be indirectly attributed to it. The same story can be told of the depletion policy. Yet if those future persons owe their existence to that act – since they only exist but for it – then it could not be worse for them because there is no alternative for them – they don't exist in that alternative. Nor do we harm them in a counterfactual-comparative sense of harm, because there is no comparison we can make for them. We do not wrong them either, we do not violate a right now at time T1 by choosing depletion for example. My view – as will become clear in Chapter 4 – is that rights are only attributable to persons who exist at the time of that act.

There is another reason that I do not consider cases like depletion. It is because I am sceptical about the salience of acts that happen in the distant past. It seems to me that given the precarity of existence it only needs to be true that one of your direct ancestors did not come into existence for it to be in fact true that you would not have come into existence but for it. This means that, in addition to policies like depletion there are many other decisions that are made today that impact who will come into existence in the future. What I mean to say is that it does not seem obvious to me that either policy is sufficient to bring anyone into existence and no more necessary than any of the trillions upon trillions of identity determining acts that occur every day. These kind of arguments are also found Roberts (1998; 2009) and Roberts and Wasserman (2017). The thought is that even in the moments prior to the sperm and egg fusing to form the entity who does in fact come into being in the terrible future caused by depletion then they owe their existence just as saliently to anything or anyone that brought about the conditions needed for that to happen at that particular time – and I do not see the importance of such an policy in that timeline of events given that just about anything could have prevented or caused those same people to come into existence.²⁷

With that in mind, to say that depletion is morally wrong at T1 because it violates a right that future generations have seems ad hoc to me – however I will discuss why this is the case in Chapter 4. For the act to be wrong at T1 it must violate a right now. Since it does not violate a right at T1 then depletion cannot be wrong at T1 because there are no entities who can claim that right. This is a small but very important modest position that I take with respect to who matters morally and to whom moral concepts like harming and wrongdoing

²⁷ See, Section 3.5 of Roberts (2019) for an illuminating yet brief discussion on the probabilities of alternative futures.

can apply to now if we wish to show that an act now is harmful or wrong. So, moving forward it is important to note that a modest view that I take when it comes to moral concepts is that there are many proposals that solve the non-identity problem by suggesting an act now can be worse for, harm or wrong a person who will exist in the future but I do not believe that it is plausible to claim that an act is worse for, harms or wrongs an entity if there is no entity to whom we can attribute that act to in a person-affecting matter. This means that should you see a solution that you believe applies to future generations that can be wrong now that I have not developed – it is likely that I have merely set that aside given what I have said above. Given that both those reasons take us far from the type of cases that I am interested in more generally, which are reproductive and bioethical style cases, I have chosen only to highlight the issues I have with an indirect case such as depletion here and set them aside.

On saying all of that, there are ways in which depletion may still be morally wrong. Perhaps impersonal principles could potentially generate the conclusion that depletion is morally wrong. However, I have said that I will only assess the prospects of person-affecting proposals in this thesis, and so I will leave an impersonal discussion of this case aside.

1.2 Thesis Outline

With all of that in mind there are two of Boonin's premises that I will grant in this thesis, P3 and P5, but while I will assess the ability of prospective person-affecting proposals to deny P1, P2 and P4 I am only interested in a certain subset of person-affecting proposals that apply to those premises – that is, those person-affecting proposals whose principles explain the moral wrong of Mary's act of conception in terms of Mariette. To ensure that the purpose of this thesis is clear in mind, you should understand it as an assessment of some recent person-affecting proposals as they apply to P1, P2 and P4 of the non-identity problem presented by David Boonin (2014). The proposals that I consider are the *de dicto* proposal, the harm-based-proposal and the rights-based proposal. I won't favour any of these, but I will argue that they offer plausible person-affecting explanations of the worseness, harmfulness and/or wrongness of a right violation in terms of Mariette and I believe this is so because – as I will argue – their prospects have been underestimated by Boonin (2014).

In Chapters that follow, I explain each proposal as they apply to P1, P2 and P4, and offer novel counterarguments against these proposals' most salient objections. In Chapter 2 I assess the *de dicto* proposal. This proposal is presented by Caspar Hare (2007) and he argues that if we interpret P1 in a *de dicto* sense – that is, we interpret P1 to include a description of those toward whom Mary has a legitimate obligation to make things better for ('her child') and that description just so happens to include 'Mariette' – rather than a *de re*

sense – where by picking out ‘Marianne’ we pick out a particular individual and not one who just so happens to occupy that relevant de dicto description – then it is possible for us to conclude that Mary’s act of conception is not just worse than the alternative but that that act is wrong. Some interlocutors have rejected Hare’s de dicto proposal because they claim it does not provide plausible reasons to believe that a de dicto interpretation of P1 is morally relevant and so while it may show a respect in which the act is worse it is not morally relevant for determining whether it is wrong. I respond by developing several new arguments which I believe do show that a de dicto interpretation of P1 is morally relevant. Ultimately I will show that the de dicto proposal allows us to conclude that not only is Mary’s action worse than an alternative, it is morally wrong.

In Chapter 3 I assess the harm-based proposal. I begin by pointing out that while the de dicto proposal provides a plausible person-affecting response to the non-identity problem that it is more desirable that this response is ‘narrowly’ person-affecting. This means that we grant that P1 is true as it is currently described by Boonin (2014) – that is, we understand that the act is not worse for ‘Marianne’ as opposed to “‘her child’ who just so happens to be ‘Marianne’”. I argue that a non-comparative account of harm can show that the act of conception come to harm Marianne. To do this I argue that our understanding of the act of conception is ambiguous in non-identity literature. I argue that we are mistaken about the intended understanding of that act. To defend this view I go on to set out three ways that act has come to be understood. I say that the act of conception can be described as:

- i) the act of choosing to bring an entity into being
- ii) the biological act
- iii) the act of bringing that entity into being

I argue that while there is reason to think that the intended understanding in the literature is *the biological act* I provide arguments which favour my view that we ought to instead view the act of bringing that entity into being as the most morally relevant. With this in mind, I go on to make the case that the most morally relevant understanding of the act of conception is the act of bringing an entity into being. I then show that when we understand the act of conception in this way then we can clearly see that the non-comparative account of harm is a plausible person-affecting proposal which shows that Marianne is harmed.

In Chapter 4, I assess the rights-based proposal. I argue that of two rights-based proposals – a direct and an indirect rights-based proposal – that the direct rights-based proposal offers a solution to the non-identity problem. This is a significant conclusion due to the fact that the prevailing view is that the indirect rights-based proposal is preferable to

the direct rights-based proposal. As with the previous Chapter, I take three clarified understandings of the act of conception which I developed and defended in Chapter 3 and show how these have a significant impact on the plausibility of the rights-based proposal. I argue that objectors to the direct rights-based proposal have mistakenly rejected it. The reason I believe it has been mistakenly rejected is that we cannot apply that proposal to not-postponing conception to explain that a right violation that occurs due to *the assumed* biological act of conception. If we try to explain the wrong done by the biological act of conception then we will not be able to. We would not be able to conclude that a right has been violated because there is no entity at the biological act of conception that can have their right violated at that time. However, if we instead understand the act of conception as the act of bringing that entity into being then I show that the direct right-based proposal allows us to conclude that the right-based proposal gives us the conclusion that Mary's act of conception is wrong in a person affecting sense.

In the final Chapter, I conclude that when it comes to bioethical cases that are impacted by the non-identity problem my proposal does the work of illuminating why we have many of the intuitions that we currently have about the worseness, harmfulness or wrongness of an act of conception in the context of challenges raised by assisted reproductive technology. I also give more context to the importance of keeping pace with rapid developments in assisted reproductive technology. I close the thesis by describing how we ought to engage with the non-identity problem into the future so as to avoid the kind of problems we have thus far encountered with evaluating the morality of the act of conception in person-affecting terms in the context of those new technologies.

2. The De Dicto Proposal

In Chapter 1, I said that David Boonin (2014) has underestimated several prospective person-affecting proposals that deny P1, P2 and P4 in his non-identity argument. I said that I would assess these person-affecting proposals in this thesis and I will defend one of these in this Chapter. The proposal that I assess in this Chapter is Caspar Hare's de dicto proposal (Hare, 2007). Hare argues that we ought to understand P1 in its de dicto rather than de re understanding. He argues that when we do this then it is clear to see that Mary's act is worse for 'her child' because 'her child' could, in a morally relevant sense, claim to have been made worse off than 'her child' would otherwise have been in the alternative. Its objectors deny that the de dicto understanding of P1 is morally relevant. To motivate my argument that this de dicto proposal is plausible and morally relevant I present several novel arguments that respond to objections from David Wassermann (2008), Valentina Urbanek (2010) and David Boonin (2014)²⁸ to ultimately conclude that Mary's act of conception does make things worse for 'her child' and that this is wrong in a morally relevant sense because in so doing Mary fails to meet her de dicto obligation to make things better for 'her child'.²⁹

2.1 How a De Dicto Proposal is Morally Relevant

In this section I will first explain the concept of *de re/de dicto*. I then explain the de dicto proposal and its relevance to not-postponing conception. Finally, I show how Hare applies these concepts to the non-identity problem. To begin, it will be helpful to consider the literal translation of *de re/de dicto* for clarity:

De Re: about the thing (object, or person)

De Dicto: about what is said

Examples will provide a way to support an explanation beyond mere translations, so let me introduce some. Consider this: when I listen to podcasts – or any talk show for that matter – the host will often introduce their guest as 'the *one and only* so and so...'. This

²⁸ There is also an important objection to Hare's approach from Rivka Weinberg (2008); (2013). Weinberg focuses on denying the metaphysical arguments that Hare makes in support of his de dicto proposal. Earlier drafts of this thesis included that metaphysical discussion in the main body. So as not to distract from the moral thread through the thesis I have not included this discussion.

²⁹ Although not necessarily a critic, Rahul Kumar argues for a fairness-based approach that he argues is similar to Hares.

statement has always struck me as a little funny because it is, in one sense true, but false in another. Imagine if someone were to introduce me on their podcast, for example. They would say something like ‘I’m joined now by *the one and only Olan Harrington*,’. In one sense that is true – a *de re* sense. In the *de re* sense, *Olan Harrington* is the one which picks me, the particular person with my particular features. In that respect I am *the one and only Olan Harrington*.

While there is one sense in which I am the one and only Olan Harrington there is another sense in which I am *not* the *one and only* Olan Harrington. I know this to be true because when I was in school, our receptionist would often call for Olan Harrington and be surprised when I turned up – this was because there was another person named ‘Olan Harrington’ in my school. As I explained, when the podcast host introduces me as ‘the one and only’ Olan Harrington, it’s the *de re* sense they are referring to because being called Olan Harrington picks *me*, the particular person with *my* particular features. When the receptionist calls for Olan Harrington, she is calling for a particular person with particular features, and *that* person that is not *me* – and so the receptionist surprised when I turn up. However, there is a sense in which I could have had a complaint if the receptionist told me to go back to class. I could say ‘you called for Olan Harrington, and I am Olan Harrington’. That is true because it is a truth about what is said – I satisfy the *description* of the person that she called out via the intercom. The disagreement that would ensue would be disagreement about in which sense that announcement was meant. Did the receptionist mean to call out ‘Olan Harrington’ *de re* – a sense which would capture a **particular person** with particular features? Or did they intend their announcement to be understood *de dicto* – a sense which would capture *any* individual who satisfies the description **about what is said**? What is meant is clearly the former in this circumstance.

The standard way to explain the *de re/de dicto* distinction goes something like this. The statement ‘the president of the United States’ could mean two things depending on whether we understand the statement in either its *de re* or *de dicto* sense. Talk of persons in the *de re* sense picks out a particular person because of their features. So, when I talk about the President of the United States in the *de re* sense, knowing that Joe Biden is the President of the United States then I intend to pick out President Joe Biden. The reason it picks out President Joe Biden is that I intended to pick him out specifically by that feature.

On the other hand, talk of people in the *de dicto* sense refers to whatever object or person has some property because it relates to what is said rather than any property of a particular thing. Understanding the President of The United States in the *de dicto* sense would mean whatever person fits that property or role. When I talk about the President of the United States in the *de dicto* sense, I refer to whoever has that feature even if I don’t

know who fulfils it, e.g. imagine that you believed that POTUS is a nice old man – not because you had met him or ever heard him – but because you have a firm belief that the American people would only ever elect a nice old man. This is because all that is relevant is that what I have said is satisfied no matter who occupies that role or has that feature. Understanding the sentence *de dicto* does not pick out some particular individual by that description. In this case, understanding ‘the President of the United States,’ *de dicto* applies to whatever person fits that description – but for now it just so happens also to be Joe Biden.

It is not that one understanding is right or wrong in these cases. The point of these examples is to show that often there are two modes of understanding certain claims. Furthermore, it’s important to clarify which understanding is most plausible or relevant in some circumstances. Consider this: when a secret service agent says, they have ‘an obligation to protect the President of the United States’ we can understand their obligation in two senses, they could mean this in a *de re* sense, where they are referring specifically to President Joe Biden, or in the *de dicto* sense, where the agent means their role generates ‘an obligation to protect the President of the United States’ whoever should occupy that role – whether that person is (or was) Barak Obama, Donald Trump, or Joe Biden for example. The most plausible understanding of their obligation is – arguably – in the *de dicto* sense given that their allegiances must remain with POTUS (whomever they should be) and not any one particular POTUS. In any case, to make this clearer, we can consider another example:

The claim that Mary wants to marry the tallest man in Bedrock for example, could mean two different things: that there is a particular man that Mary wants to marry who happens to be the tallest man in Bedrock (the *de re* reading) or that she wants to marry whatever man turns out to satisfy the description “the tallest man in Bedrock” (the *de dicto* reading)

(Boonin, 2014, p. 31).

Once again, there are two readings of this example available to us. Understanding Mary’s desire to marry the tallest man in bedrock in the *de re* sense refers to a particular person who has that feature (though, crucially, Mary need not have any thoughts about whether they have that feature, it just so happens that they have it). Understanding Mary’s desire in a *de re* sense points to a feature about the person to whom she is directing her desire – and it is that person who Mary wants to marry. Second, on the *de dicto* reading, it could also refer to anyone who occupies that role, or as Boonin says above, whoever ‘satisfies the description,’. These distinctions arise more often than we are aware of; conversationally, there can be confusion when we are not clear which reading we refer to in some cases. Sometimes there can be confusion about which understanding is most morally relevant or

which is more appropriate. Indeed, we can even use the distinction humorously. Consider the following example which is originally attributed to Jan Narveson (1967) but also found in Hare (2007):

Zsa Zsa. Ah! People misunderstand me! They think that I am just a creature of leisure that I do nothing useful, but they are wrong. I am constantly finding new ways to do good for people.

Interviewer. Like what?

Zsa Zsa. I have found a way of keeping my husband young and healthy, almost forever.

Interviewer. Eternal youth...that is quite a discovery! How do you do it?

Zsa Zsa. I get a new one every five years

(Hare, 2007, p. 514).

The punchline of the joke ought to be obvious I think, but the humour lays in the fact that it is funny that Zsa Zsa seems to care little for the welfare of ‘her husband’ *de re*, seeming to place more weight on the welfare of ‘her husband’ *de dicto*. In doing so, Zsa Zsa presents herself as a saintly creature who has managed to keep ‘her husband’ young for all these years. The joke is that while this is better for ‘her husband’ understood *de dicto* (since ‘her husband’ is the descriptor that refers to whoever will [or had] occupied that role) it is no doubt bad for ‘her husband’ *de re* (the particular person who is picked out by that property because presumably, they are about to be divorced!)

The case is interesting because, presumably, the most relevant response to this is that Zsa Zsa ought to be concerned for her husband's welfare (*de re*). However, her distinct lack of concern in this sense is what is so funny. The example also shows that it is possible to make things *de dicto* better in some ways without making things *de re* better in that way and vice-versa (Hare, 2007; 515). In the case of Zsa Zsa’s husband what is so funny is that it is evident that Zsa Zsa is mistaken or negligent to think that her primary concern ought to be for the *de dicto* health of ‘her husband’. Indeed we might believe that a spouses concern for the welfare of their husband ought to be expressed *de re* rather than *de dicto*. This confusion can occur in many cases, and it can have surprising moral implications for determining what we ought to do morally speaking. Consider the following example from Hare (2007) in which he intends to show how strange it can be to think of some concern for another as being more relevant in the *de dicto* sense rather than the *de re* sense (as with the peculiar mind-set of Zsa Zsa above):

When I befriend someone suffering from cancer, what I do is *de dicto* bad for the health of 'my newest friend' – if I had been unsociable my newest friend would have been thriving, but as things are my newest friend is sick. But it is not *de re* bad for my newest friend – my actual newest friend is no less healthy for my befriending him

(Hare, 2007, p. 516).

While it is possible to make a *de re/de dicto* distinction here between how we interpret the case, should we think that making my newest friend *de dicto* worse off is morally relevant? I would think not. When I befriend a cancer patient, what I do is worse for the health of 'my newest friend' because 'my newest friend' understood *de dicto* is sick – that much is true in the *de dicto* sense (Hare, 2007). However, if I care about making things *de dicto* better for 'my newest friend' I ought to be much more choosy about the kind of friendships I develop since 'my newest friend' understood *de dicto* is whoever occupies that role. But it would be strange to think that I should choose not to befriend a cancer patient because I believe it is morally relevant that it would make 'my newest friend' sick *de dicto*. Therefore, it looks like the *de dicto* reading is **not** morally relevant here as it does not appear to appeal to a familiar moral obligation. It also shows that making someone *de dicto* worse off could not ground the moral wrongness/rightness of that act – presumably because in this case, it does not seem to be grounded in a general moral principle about *de dicto* obligations to our friends. Consider this final example to reiterate this point.

Suppose I am facing my office door, and the person in the office to my left is healthier than the person in the office to my right. By choosing to face the door rather than the window behind me, I have made things *de dicto* worse for the nearest person to my right. Does that matter. Not at all

(Hare, 2007 p. 516)

There are many cases in which bringing about a worse state of affairs *de dicto* has no moral relevance; in the case of 'my newest friend' above, it seems odd that I could be held morally accountable for making things worse in this way. The same is true of making things *de dicto* worse of 'the nearest person to my right'. At this point, you might be thinking that there is no such case where failure to make things *de dicto* better is morally relevant. At least, with respect to the above cases, it doesn't seem like bringing about better states of affairs *de dicto* would have been morally relevant.

In not-postponing conception and cases like it, Parfit thought it is bad for that child in one sense (a *de dicto* sense) but that this is morally irrelevant. He rejects it so outright

because it ‘does not appeal to a familiar moral principle’ (Parfit in Hare, 2007, p. 515). As Parfit puts it, described by Hare, that ‘it does not reflect well on the skill of a general if he makes things de dicto better for his army by switching to the winning side in the heat of battle,’ (Hare, 2007, p.516). As we have seen above, there are many cases where we can understand our obligations de dicto. However, I have not yet presented any principle in which it would be plausible to think that those de dicto ‘obligations’ are genuine moral obligations.

Hare’s proposal turns on the difference between de re and de dicto conceptions of betterness. He argues that just because making things de dicto better or worse for others is irrelevant to the moral status of an action in some cases does not mean that it is never relevant (Hare, 2007, p. 515). This is in contrast to the view outlined by Parfit above. For the de dicto understanding to be relevant, there would need to be an underlying moral principle that makes it morally relevant. Hare argues that some moral principles support his view that our obligations understood de dicto matter morally in some cases. The kind of principle that Hare has in mind is that it is understandable that parents should make things ‘better’ for the health of their children and that this obligation is best understood de dicto. I will explain that de dicto obligation, and his argument in support of it in what follows, but first it will be helpful to think back to the premise of the non-identity problem that this solution aims to reject – P1. Remember that P1 says the following:

De Re Understanding of P1 (DRU): Mary’s act of conceiving now at T1 rather than taking a pill once a day for two months before conceiving at T2 does not make Mariette who she conceives at T1 worse off than she, i.e. Mariette, would otherwise have been had Mary conceived at T2.

Why is it that I have reframed this now as the de re understanding of P1? Remember that de re translates to ‘about the thing’; considering that, one might wonder what it is ‘about the thing’ that we are referring to in not-postponing conception? To establish this, I need to cast back to the discussion of not-postponing conception in Chapter 1. Remember that Mariette is not worse off. This is because Mariette does not exist at T1 in a comparative sense when Mary conceives later at T2. Given that Mariette does not exist if Mary chooses to conceive at T2 then we cannot make any comparative claims about worseness in this case. What we are interested in here, in the de re sense, is to what we are referring to when we pick out some feature of Mariette’s? Here, we are referring to Mariette, whose features include her origin – and this origin is an essential feature of her in particular, as I said, she would not exist otherwise but for her origin ‘story’ which includes being conceived at T1. So when we pick Mariette out by the timing of her conception (which is essential to her) we

pick out Mariette in particular. The feature about the thing that picks out that particular person is their origins. Remember too, that our origins are essential to us according to Parfit, so this is the feature that we refer to when we pick out Mariette – who is conceived at T1³⁰. In sum, Mariette is uniquely picked out by her origins which includes being conceived at T1, and so it is her origin at T1 that uniquely picks her out in the de re sense. Another version of P1 emerges when we understand it in its de dicto rather than its de re sense.

De Dicto Understanding of P1 (DDU): Mary's act of conceiving now at T1 rather than later at T2 does not make 'the child that Mary conceives' at T1 worse off than they otherwise would have been than 'the child that Mary conceives' at T2.

On the de dicto understanding, P1 is false. It is false because with respect to 'her child' Mary can truthfully claim that 'her child' is worse off at T1 than 'her child' who would otherwise be conceived at T2. Above, I introduced cases where there was some clarity about whether either the de re or de dicto understanding were most relevant. I have said that the DRU is the understanding of P1 that we have assumed to be most plausible. However, there is some disagreement about this. As I have said previously, Caspar Hare (2007) argues that the de dicto understanding of P1 is most morally relevant in cases like not-postponing conception. He does this by claiming '...it is appropriate to expect people to care about making things de dicto better in some ways (Hare, 2007, p. 516)' and in fact may be morally obliged to do so – conversely, in some situations, when people make things de dicto worse for others it can be morally wrong. Given this claim, a concept like 'de dicto betterness' can explain how a person can be morally accountable for making things de dicto worse for others. To counter the claim by those like Parfit that concepts like de dicto betterness/worseness do not appeal to familiar moral principles Hare must provide reason to accept that concepts like de dicto betterness/worseness are plausible. In fact, in some cases according to Hare, it is both morally relevant and plausible for a concept like de dicto betterness to guide the moral status of some of our actions. However, its relevance bears on the nature of our obligations. Hare introduces an analogy to further support the claim that de dicto betterness is a morally relevant guide to determine the moral status of some of our actions. Hare's claim for the moral relevance of de dicto betterness (and following that, the DDU) is that it is reasonable to have a special concern to make things 'better' for others and

³⁰ Our origins need not be essential to us. However, Parfit assumes origins essentialism in his canonical explanation of the problem. Some reject this, but I explained why I do not consider those arguments above.

furthermore that the nature of our role has a significant bearing on the nature of our responsibilities toward those specific others.

Hare appeals to an example to illustrate that de dicto obligations are morally relevant. He argues that it is reasonable to have a special concern to make things 'better' for others – and not just 'better' de dicto 'better' – and that the nature of our roles has a significant bearing on the nature, or moral relevance, of our responsibilities to those others. We can summarise the claim that a de dicto moral obligation is morally relevant when two conditions are met.

- 1) The case must show that we have a special responsibility to make things better for certain people that can be understood de dicto.
- 2) That obligation must have no de re expression.

Hare argues that cases can be generated to satisfy these two conditions. The case Hare presents to illustrate the conditions is called the Safety Officer.

The Safety Officer—Tess is a state safety officer, whose job it is to regulate those features of the automobile that protect its occupants in the event of a collision—airbags, crumple zones, and so forth. Noticing that people in her state are not wearing safety belts, she implements some tough new regulations and, a year later, is pleased to discover evidence that they have been effective, that the severity of injuries sustained in automobile accidents has been reduced as a result of people belting up. She gives herself a pat on the back

(Hare, 2007, p. 516).

In this case, Hare argues that the two aforementioned conditions are met and so Tess de dicto obligation to accident victims is morally relevant. With respect to 1) The case must show that we have a special responsibility to certain people and that this can be understood de dicto, Tess has reason to have special concern to make things better for certain groups of people – she must be concerned with making things better for 'accident victims'. The first condition is met by this case. As for the second condition, 2) the obligation in this case must have no de re expression, Tess cannot express her concern de re because she does not know who – in the de re sense – will be negatively impacted by an accident in the future. That is an obvious epistemic concern, but there is a more striking metaphysical concern: her policy decisions are identity determining and so not only does she not know who her policies will effect, her actions will determine who those accident victims are in a de re sense. If Tess chooses policy A, then X is an accident victim and is in an accident, if Tess chooses policy B, then Y is an accident victim and will be in an accident. But if we understand Tess's

obligation *de re* then she has made things much worse for X with policy A and worse for Y with policy B – both of whom would not have been in accidents but for the policy. We cannot even say that she has made things better for those accident victims who avoided accidents – because they are not whom Tess has responsibility toward if they are not in an accident. Understanding Tess’s obligation *de re* puts Tess in the terrible position of never being able to do a good job by making things worse for accident victims at the benefit of those whom she has no responsibility toward (those who would have been in accidents but are not due to the policy she chooses). Tess’s obligation cannot be a *de re* obligation because of the ‘identity determining’ nature of her policy choice.

With these two conditions met, Hare concludes that Tess has fulfilled her *de dicto* obligation to make things better for accident victims and has done a ‘good job’. From this Hare generates an analogy from this case to cases like not-postponing conception by applying the same two conditions. Tess has reason to have special concern to make things better for certain groups of people – she must be concerned with making things better for ‘accident victims’. Similarly a parent ought to be concerned with making things better for ‘their child’. We expect Mary to have a standing obligation to make things better for ‘the health of her children’ (Hare, 2007, p. 519). It would be strange to think of a parent supporting the claim that they do not have an obligation to make things better for their children. We would expect this concern for her children’s health to play a role in guiding her choices. Hare’s claim with respect to cases like not-postponing conception is that ‘it is a responsibility to avoid bringing about states of affairs that are in one particular way worse than other states of affairs – not worse simpliciter, but *de dicto* worse for the health of her child’ (Hare, 2007, p. 519). That means condition 1 is met in not-postponing conception. Furthermore, Tess’s obligation cannot plausibly be understood *de re* prior to the implementation of her policy because of the identity determining nature of her choice, and Hare claims that Mary’s choice is identity determining in the same way. Mary’s choice to conceive now or later will affect who, in particular, will come into existence – by the precarity of existence. Any decision she makes will be *de re* better for any child she brings into existence which, we are assuming, is based on the view that it is better to exist than not to exist. Neither Tess’s nor Mary’s choices are plausibly understood *de re* and so – in not-postponing conception as with the Safety Officer - it is appropriate to understand her obligation *de dicto*. That means that condition 2 is also met in not-postponing conception.

By analogy, Hare uses the Safety Officer to show that failing to make things *de dicto* better – or actively making things *de dicto* worse – for others is morally relevant not just in the Safety Officer but also in not-postponing conception. If we understand Mary’s *de dicto*

obligation as a *de dicto* obligation to make things better for ‘her child’ then the answer is clear – Mary’s action makes ‘her child’ worse off.

Someone might wonder why not-postponing conception even needs a case to be analogous to. Why can’t not-postponing conception simply represent a special type of case that satisfies the conditions that Hare sets out? It could, and if someone is happy to accept this then we need not go any further. At that point, the *de dicto* proposal gives us what we want – a solution to the non-identity problem in not-postponing conception. However, an opponent of this view might say that one reason to reject it is because there are no instances of this obligation anywhere else, and so without any additional justification for the *de dicto* obligation in not-postponing conception then that *de dicto* obligation is unacceptably *ad hoc*. What I mean, is that just because the *de dicto* objection gives us the seemingly correct answer in not-postponing conception does not mean there is any reason to accept it.

To sum up the argument, Mary’s act of conception makes things worse for ‘her child’. Returning to the original presentation of the non-identity argument, we can now run the argument again with the *de dicto* understanding of P1 substituting for the *de re* understanding of P1 to show that P1, understood *de dicto*, is false:

P1: Mary’s act of conceiving now rather than later does not make *‘the child that Mary conceives’* worse off than they otherwise would have been.
[emphasis added]

P2: If A’s act harms B, then A’s act makes B worse off than B would otherwise have been

P3: Mary’s act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm anyone other than the child that Mary conceives

P4: If an act does not harm anyone, then the act does not wrong anyone

P5: If an act does not wrong anyone, then the act is not morally wrong

C: Mary’s act of conceiving the child that Mary conceives is not morally wrong

(Boonin, 2014; 27)

What we can see here is that P1 is false. If P1 is false then we can legitimately reject that premise. This is a good result for our aim since what we wanted to do was to show that there are ways in which the premises in Boonin’s argument could be rejected. However,

there are several moral arguments against this solution to which the next section of this Chapter is dedicated. I will explain and evaluate these objections in the next section – Section 2.2. Once I have explained these objections I respond to each of them in Section 2.3 by providing novel counterarguments to their objections.

2.2 Objections

In the previous section, I established two claims. The first is that in some cases we can plausibly understand ourselves to have a *de dicto* obligation to make things better for some special set of others – such as our children, our partners, our friends and so on. Second, that sometimes this obligation can only plausibly be understood *de dicto* and so is the only morally relevant understanding of that obligation. This means that despite being presented with cases where a *de dicto* obligation is clearly implausible and not morally relevant, in some cases our *de dicto* obligation to make things better for some special set of others is morally relevant because not only is it a plausible way to understand our obligation to them it is the only way – and thus a morally relevant way – to understand that obligation.

I now consider two objections to Hare’s argument that Mary’s action is morally wrong because she makes ‘her child’ *de dicto* worse off. The first objection, that I call the *de re* objection, is from Valentina Urbanek (2010). Urbanek argues that condition 2 is not met in the Safety Officer and that Hare is wrong when he claims that Tess’s obligation does not have a *de re* expression³¹. If this is true then it undermines Hare’s argument by analogy.

The second objection is due to David Boonin (2014) – which I call the harm reduction objection – in which Boonin argues that the Safety Officer case is not analogous to not-postponing conception. This undermines Hare’s argument that the *de dicto* obligation is relevant in not-postponing conception because in the Safety Officer we can understand Tess’s *de dicto* obligation as an obligation to reduce the harm of that accident to accident victims – and this understanding of Tess’s *de dicto* obligation is not applicable to not-postponing conception.

³¹ Remember that one of the conditions stipulated by Hare to justify the moral relevance (and perhaps pre-eminence) of a *de dicto* obligation is that – in addition to the claim that we plausibly have special concern for a certain group of people and that this concern for their health guides our behaviour – the obligation in question must have no *de re* expression; and Hare argues that, when these conditions are met, then a *de dicto* obligation is the most plausible understanding of one’s obligation to that group. With respect to the Safety Officer, Hare argues that Tess’s obligation is towards a special group of people with whom her concern is for their health, and importantly this concern has no *de re* expression given the non-identity nature of her choice situation. It is on the basis of these two conditions that Hare justifies the pre-eminence of a *de dicto* obligation in this case, and he then uses the structure of this case to justify the *de dicto* obligation in not-postponing conception; Remember following Hare’s argument: Mary has a special concern for the health of ‘her child’ and due the non-identity nature of Mary’s choice situation she too cannot express this concern in a *de re* sense – therefore, her obligation must be understood *de dicto*.

I believe that both of these objections have a common solution. Assuming these challenges hold – and for the sake of argument I assume that it is the case in my explication of the objections – I then develop an alternative analogy that can justify the *de dicto* obligation in not-postponing conception in response to these two objections. Let us take these two objections in turn; for each case, I will explain the objection and in the final section offer an alternative to the Safety Officer before considering whether this leaves us any closer to a solution to the non-identity problem than the solutions I have already considered. I argue that it allows us to conclude that Mary’s act of conception does make the child that Mary conceives worse off in a morally relevant sense.

2.2.1 *The De Re Objection*

In the Safety Officer, we know that Tess is aware of the fact that she does not make ‘accident victims’ better than they would otherwise have been in a *de re* sense and so cannot be said to have done a good job on this understanding of her obligation.³² We also already know that “...absolutely whatever the safety regulator does in her role as a safety regulator will turn out to be *de re* worse for the accident victims upon whom she should focus...” (Hare, 2007, p. 519). Appealing to *de re* considerations cannot help Tess to guide her choice in this case (and we would expect a person with a special concern for some group of others to be guided by their concern to make things better for them); this is because Tess cannot appeal to *de re* considerations to help her to fulfil her obligation to make things better for accident victims, no matter what she does it will be worse for them *de re* (Hare, 2007).

Hare argued that Tess’s obligation cannot be understood *de re* for the identity determining reasons I discussed previously. Understanding her obligation to make things better for accident victims *de re* means that she cannot truthfully claim to have made things ‘better’ for accident victims with her seatbelt policy. This is because her seatbelt policy is identity affecting – they would not have been in an accident but for the policy – and those accident victims (understood *de re*) are in fact worse off than they would otherwise have been. They could complain that Tess’s policy was not good for them. We would expect a Safety Officer to be guided by their obligation to make things better for ‘accident victims’ but Tess’s obligation cannot have a *de re* understanding because no matter what Tess does

³² Hare suggests that Tess could respond to complaints that she has not done a good job by saying that: “We regulators always know, long before we decide what substantive measures to take, that the substantive measures we will actually take (whether they involve reducing speed limits a little, increasing them a lot, adding more traffic lights or spreading nails all over the roads of America) are going to be *de re* worse for accident victims. My job was not to make things *de re* better for last year’s accident victims, but to make it the case that last year’s accident victims were, collectively speaking, healthier than those people who would have been last year’s accident victims would have been if I had acted otherwise. In brief, my job was to make things *de dicto* better for the health of last year’s accident victims. And I did just that” (Hare, 2007; 518).

it will make those ‘accident victims’ worse off.³³ No matter what she does, Tess has not made things ‘better for’ accident victims *de re* because they are worse off than they would otherwise have been – which is contra our original intuition about whether Tess does a good job by implementing a seatbelt policy and so a puzzle is generated: given that we cannot appeal to a *de re* understanding of Tess’s obligation, how is it that does Tess does a good job; that is, how do we vindicate our original intuition that Tess does a good job?³⁴

While Hare argues that all of this means that Tess’s obligation to accident victims cannot be *de re* – and so satisfies condition 2) above – Valentina Urbanek (2010) objects to Hare’s claim that Tess’s obligation cannot be *de re*. If Tess’s obligation can be plausibly understood *de re*, then this would mean the moral relevance of Hare’s proposed *de dicto* obligation in this case is weakened. To that end, Urbanek argues that we can understand Tess’s obligation in a *de re* sense³⁵ and deny Hares second condition.

One reason that Tess’s obligation cannot be understood *de re* is because it is identity affecting. A way to reject Hare’s argument is to reassess whether Tess’s choice is actually identity affecting in the way that Hare says it is and to show that there is a plausible way to claim Tess has done a good job in a *de re* sense. Even if it we deny the claim that Tess’s choice is identity affecting then the *de re* obligation proposed needs to be *more* morally relevant than its *de dicto* counterpart. If there is room for doubt about this, then Hare might

³³ One might say that Tess’s obligation does have a *de re* expression and that it just means that no matter what she does she will not fulfil that obligation and so we are mistaken about her having done a good job – but the point is that surely we cannot expect Tess to be guided by such an obligation, and this is why Hare says we cannot represent the obligation in its *de re* form.

³⁴ Perhaps we ought to qualify this claim with the caveat that what we care about is that Tess does a good job ‘in most cases’. This is because there are some cases where, although Tess fulfils her obligation she might be seen to do a bad job – maybe she bans driving altogether to reduce the harm caused to accident victims? This would surely not be a plausible means by which Tess could do her job well – hence the caveat. Of course, all we care about here is her seatbelt policy and so I do not see the lack of a caveat causing any problems for what I say later.

³⁵ Note that what is at issue here is how should we understand Tess’s obligation. That is, what is the correct interpretation of her obligation? Is the correct interpretation of Tess’s obligation a *de re* obligation or is the correct interpretation of Tess’s obligation a *de dicto* obligation? I point this out because there are other questions that also arise that are peripheral to the discussion. These questions are: (1) what is Tess guided by when she makes her decision to impose a seatbelt policy? (2) How are we to understand her doing a good job? Finally, there is the question that is at issue here, described above. (3) What is the correct interpretation of her obligation? Presumably the answer to the last question will determine the answers to the first two questions – if Tess’s obligation is correctly interpreted in a *de dicto* sense, for example, then Tess should be guided by that *de dicto* obligation, similarly in response to (2) Tess does a good job. In most cases, failing her introducing policies such as banning driving altogether which presumably would not be an example of Tess doing a good job when she allows her actions to be guided by that same *de dicto* principle. However, with respect to these two questions it is not clear whether correct decision making procedures must necessarily track correct principles. Consequentialists think that the best consequentialist decision-making stems from people believing in common-sense morality. But the correct principles are not those of common-sense morality. A similar divergence may occur here – as is clear with respect to thinking about Tess banning cars, even though her banning cars would have her doing well because she follows the correct principle, surely she does not do well because this goes against common-sense morality. To that end – I focus on the third question, and it is that question that is at issue in what follows.

be able to claim that: even if there exists a *de re* explanation and it is plausible, the *de dicto* explanation is still the *most* relevant explanation of why Tess does well – and his argument would still be successful. This weakens the claim above – that the obligation must have no *de re* expression to show that a *de dicto* obligation is most morally relevant, but that condition is meant to show examples of cases where we have the strongest reasons to accept that the *de dicto* obligation is morally relevant. To sum up, Urbanek's *de re* explanation must do two things: a) reject the identity affecting claim, and b) provide more reason for the moral relevance of the *de re* obligation than its *de dicto* counterpart. If it cannot meet these two conditions then there is still reason to accept the *de dicto* obligation.

2.2.1.1 Reject the Identity Affecting Claim

Remember condition 1. from above:

1. The case must show that we have a special responsibility to make things better for certain people that can be understood *de dicto*.

There is an important difference between Hare and Urbanek about who Tess's responsibilities are directed toward. This has an impact on whether Tess's obligation can have a *de re* expression. This difference is that while Hare (2007) and others such as Boonin (2014) both describe the subject of Tess's obligation as 'accident victims' Urbanek says that Tess's obligation is an obligation to make things better for 'drivers' and that in doing so Tess's policy making decisions are no longer identity affecting.

Remember that Hare argues that Tess's choice is identity affecting; and all that means is that Tess's policy decision will determine who is, and is not, an 'accident victim'. Given that they would not have been in an accident had the policy not been in place, then Hare points out that any accident victim after Tess enforces her seatbelt policy can claim that this policy has made them worse off than they would otherwise have been;³⁶ and this is contra Tess's obligation to make things better for 'accident victims'. So, Hare concludes that the only plausible grounds to justify that Tess does a good job by implementing safety belts is that her obligation is plausibly understood *de dicto*. Tess's obligation is clearly identity affecting if we understand her obligation as an obligation to accident victims, and the result is that her supposed *de re* obligation is unacceptably implausible. However, when we

³⁶ Remember that in Hare's example he says that Tess enforcing a seatbelt policy is identity affecting. It is identity affecting in the sense that, whenever someone pauses for a few moments to put on a seatbelt it changes where they will be later, it affects the time they leave their driveway, the amount of time they spend in traffic lights and so on. Traffic collisions are split second occurrences and so any alterations to our journeys has an impact on where and when we will be as we make our journey. While seemingly insignificant this has an effect on who will be in accidents due to the split-second nature of traffic collisions. Its then easy to imagine that putting on a seatbelt can impact who will be in accidents such that had seatbelts not been in place one group of accident victims would have been in accidents, and had they been in place then a different group of accident victims would have been in accidents.

describe Tess's obligation as an obligation to 'drivers' her choice is no longer identity affecting. Urbanek says that: 'If we describe her obligation as an obligation to accident victims, then there's a puzzle about how she could do well if her policy affects the identity of who is in an accident,'³⁷ (Urbanek, 2010; 134). Here, Urbanek is only confirming what Hare has already told us. When we understand Tess's obligation as a *de re* obligation to 'accident victims' we cannot plausibly conclude that she has done a good job because instead of making things better for those accident victims her policy only makes things worse for them by making them worse off than they would otherwise have been had Tess not enforced her seatbelt policy.

Urbanek says that if we understand Tess's obligation as an obligation to make things better for 'drivers', then a *de re* reading of her obligation is in fact plausible. Following from what she has said immediately above, she goes on to say that: 'If we redescribe her obligation as an obligation to drivers, then there isn't a puzzle about how she does well, though her policy is identity affecting. It's an obligation to drivers to make it the case that if they are in an accident, their accident will not be that bad (Urbanek, 2010; 134).' Tess's choice is still identity affecting in an important respect, but not identity determining in the same way as when we understand her obligation as one toward 'accident victims'.

Urbanek needs to show that her *de re* explanation of Tess's good job is plausible. However, it is still true that no matter what she does, then some 'drivers' will be in accidents that would not otherwise have been in accidents but for her policy. Given that the policy is still identity affecting with respect to who will be in an accident, does this mean that those 'drivers' can complain that they would not have been in an accident but for the policy³⁸? They can, but this isn't a complaint that is legitimate or undermines Urbanek's claim that Tess's obligation can be understood *de re*. Tess's choice is still identity affecting in some sense, but not in a way that could ground a legitimate complaint by drivers. This is because Tess's obligation is not – according to Urbanek – to make things better for 'drivers' in an unqualified sense, or to make things better for them by making them better off than they would otherwise have been, but rather to make things better for drivers by reducing the risk of any accident they have being fatal for them. Reducing the risk posed to 'drivers' if they end up being in an accident is undoubtedly a good thing – especially when this is a serious risk of fatality. So, it is not that Tess has a *de re* obligation to make things 'better' for

³⁷ This is because those 'accident victims' can claim to be, in actual fact, worse off because of Tess's policy.

³⁸ Remember that when Hare says that the 'accident victim' in the Safety Officer can complain about being worse off because of Tess's policies what Hare means is that Tess has made them worse off than they would otherwise have been (because the alternative for them is that they are not in an accident). This is because Tess's obligation to 'accident victims' means that her action determines who becomes an 'accident victim'.

‘drivers’ who end up being in accidents by making sure they are not worse off,³⁹ but rather she makes things better for them – that is, any driver – by ensuring that if they are in an accident then their accident will not be that bad. That is to say, that she reduces the risk of being in a fatal accident for every ‘driver’.⁴⁰ However, one might still wonder how Tess can have a de re obligation to all drivers – is this not a de dicto obligation?

According to Urbanek we ought to now understand Tess’s obligation as a de re obligation to reduce the risk of a fatal accident for ‘drivers’. If we do this then Tess can claim that every driver – in the de re sense - is importantly better off because of her policy. She says that if a driver were to complain that they would not have been in an accident but for her policy then she could remind them, ‘...that she decreased their risk of being in a fatal car accident (Urbanek, 2010, p. 135)’ and remember that reducing their risk of being in a fatal car accident is one way to make someone better off.⁴¹

This is a substantial change to the obligation that Hare originally proposes. Urbanek’s argument seemingly captures what the obligation really is – a de re obligation to make things better for drivers by reducing their risk of a serious accident, and not a de dicto obligation to make things better for ‘accident victims’. But that means that Hare is wrong to claim that we cannot understand Tess’s obligation in a de re sense. On Urbanek’s argument there is a plausible de re understanding of Tess’s obligation. This is a problem for Hare, because the moral relevance of a de dicto obligation in not-postponing conception is grounded in cases like the Safety Officer where, he argues, obligation avoids a de re explanation. However, Urbanek has shown that there is a de re understanding of Tess’s obligation in this case. This establishes that there is a plausible understanding of Tess’s obligation that we can understand de re which shows that Tess has done a good job and is not identity affecting in a morally relevant way. However, it does not yet show us that the de re obligation described is more morally relevant than its de dicto alternative.

Hare might argue that a de dicto interpretation of Tess’s obligation to ‘drivers’ would also allow us to truthfully claim that by introducing seatbelts Tess has made things better for ‘drivers’ by reducing the severity of the harm caused by road traffic accidents by enforcing

³⁹ It is not to make things better whatever way Tess can, she would not do a good job to install new cupholders into cars for example, which although would make things better for drivers exactly how this is understood needs more detail.

⁴⁰ It’s worth noting that while Urbanek stipulates Tess’s obligation as an obligation to ‘drivers’ she surely also has an obligation to those who are passengers in a vehicle. One might then wonder whether her obligation is really an obligation toward ‘the occupants of a vehicle’.

⁴¹ Someone might wonder if it’s still going to be true that, for some drivers, Tess’s policy has actually increased their risk of being in an accident, e.g. because for that person being attentive to making sure seatbelts are on makes them a worse driver, etc. Those people could plausibly claim that Tess’s policy has actually made them worse off/increased their risk of being in a fatal accident. But Tess might claim that although they are more at risk of being in an accident, it is less likely that their accident would be fatal despite causing them to be in it.

seatbelts; a de dicto obligation that Hare proposes still gets us the result that we want from this case, and perhaps have no reason to accept Urbanek's de re obligation over Hare's de dicto obligation. Hare can point out that the de dicto understanding of Tess's obligation is still plausible here even when we change her obligation from an obligation to make things better for 'accident victims' to an obligation to make things better for 'drivers'. However, even if it mattered that Hare could point out that there is a de dicto version of Urbanek's obligation to 'drivers' then Urbanek could say that there is a reason to prefer her de re reading to Hare's de dicto reading. Let us now consider b) from above.

2.2.1.2 Provide More Reason for the Moral Relevance of the De Re Obligation than its De Dicto Counterpart

Urbanek says, '...whenever someone does well by making things de dicto better, perhaps they are actually doing well by making things de re better (Urbanek, 2010, p. 135).' Which is to say that the de dicto obligation in the Safety Officer collapses to a de re obligation on closer examination. Urbanek seems to make a weak claim here when she says that 'perhaps they are actually doing well by making things de re better (Urbanek, 2010, p. 135).'

The claim that whenever someone does well by making things de dicto better perhaps they are actually doing well by making things de re better is not obviously true. However, if this is true (and I do not think that it is) then this would give us a reason believe that, having established a de re obligation in the Safety Officer, Urbanek's de re obligation is more plausible than Hare's de dicto obligation in The Safety Officer because when Tess does well in a de dicto sense, she is actually doing well in a de re sense. Here's a case to illustrate the thought that de re obligations supersede de dicto obligations:

Adoption 1: a father of three has an obligation to make things better for their children. Understood *de re* we can clearly see that their obligation to make things better for their children by, for example, improving their diet would mean that they are fulfilling that obligation. Understood *de dicto* this father could meet their obligation to make things better for their children by simply adopting replacement children who already have a higher level of dietary related health benefits than 'their children' currently have – but surely this is not a plausible expression of the obligation to make things better for their children?

One explanation for why de dicto obligations are not relevant in Adoption 1 is that de re and de dicto obligations are not on par; that is, where there is a de re expression of one's obligation then that will override, and is more stringent than, the de dicto understanding of that same obligation. Urbanek suggests that the take-away from this type of case is that whenever there is a conflict between a de dicto and de re understanding of some obligation

then we ought to accept the de re obligation as the most morally relevant. This shows us that de re obligations override, and are more stringent than, de dicto obligations according to Urbanek.⁴²

While the above case is one in which there is an intuition about which understanding is more morally relevant, Hare would agree with Urbanek on this. However, it does not mean that de dicto obligations always collapse to de re obligations. Indeed, Hare's principled approach to determining the moral relevance of de dicto obligations generates the same conclusion. When he considers the Safety Officer Hare says that the reason that the de dicto obligation is a genuine moral obligation in this case is because first of all we have a special obligation to make things better for certain groups of people – and in Tess's case this is to accident victims and secondly, Tess's obligation eludes a de re explanation. Urbanek says that, with respect to Adoption 1, the reason why the de dicto obligation is not relevant in this case is because...

...if there's a de re way to make things better for your children, then that is supposed to trump any de dicto obligation

(Urbanek, 2010, p. 136).

The suggestion from Urbanek is clear: where there is a de re way to make things better for your children then you should do that. Hare argues that we have obligations to certain groups or persons, and that this can be understood de dicto – and where there is **no** plausible way to understand an obligation de re then the de dicto understanding of that obligation is morally relevant. Hare's principled approach to determining the moral relevance of de dicto obligations with his two conditions helps him to avoid implausible conclusions generated by a supposed deference to de dicto obligations proposed in cases like Adoption 1. But even if in the above case the de re obligation to make things better for your children is more relevant – it does not ground a general principle that de re obligations trump de dicto ones - at least it does not obviously ground such a principle. However, what it does do is weaken Hare's argument by analogy from the Safety Officer to not-postponing conception because, to counter a response to the objection that an obligation to 'drivers' can also be understood de

⁴² Someone might think that this is a clear case of question begging against the suggestion that Tess has a de dicto obligation towards accident victims despite not having a de re one. Or that there are no firm conclusions that we can draw on the basis of Adoption 1 where it is of course very implausible that we have a de dicto obligation. Instead, what is needed is some general principled reason for favouring de re obligation over de dicto ones, as opposed to simply cherry picking cases in which de dicto obligations look especially implausible. But we do have these reasons. Remember that Hare says that we have obligations to certain groups of persons, and that when there is no de re obligation to that group of people then a de dicto obligation is the most morally relevant. So, it is not simply a case of question begging, but rather that the conditions that Hare himself sets out are not met in this case to justify the moral relevance of a de dicto obligation and not simply that it is implausible.

dicto, Urbanek can claim that this is a case which shows the de re understanding of that objection follows the same type of claim as in Adoption 1 – though, as I have said, it is not obviously generalisable.

If Urbanek is right about a more general claim (and I do not think that she is), then Hare cannot claim that the de dicto reading is the most plausible understanding of Tess's obligation. This would mean that when Hare uses the Safety Officer to justify the de dicto obligation in not-postponing conception he makes a mistake because Tess's obligation is most plausibly understood de re and not de dicto – and only a case where we cannot understand that obligation de re can provide an acceptable reason to think we can analogize a de dicto obligation in the Safety Officer to a de dicto obligation in not-postponing conception. But if there is no general claim to be made about whether de re obligations always trump de dicto obligations then the presence of a de re obligation does not mean that Hare is wrong to say that the de dicto obligation is morally relevant.

In any case, given the doubt injected into the strength of the Safety Officer as an analogy to not-postponing conception the burden of proof is at the foot of those who want to endorse the moral relevance of a de dicto obligation in not-postponing conception. This is because it would be up to them to propose additional cases where one's obligation to make things better to some special set of others eludes a de re explanation and thus satisfies Hare's two conditions for the strongest possible claim. Without such cases, Hare cannot justify the claim that Mary does not do well to conceive now rather than later because of an analogous de dicto obligation to make things better for some special people (namely, for her child). This is because without the justification for such an obligation then proposing that Mary does not fulfil her de dicto obligation to make things better for 'her child' risks the charge of being 'as hoc'.

There are two ways that we can challenge Urbanek's argument. The first is to deny that because Tess's obligation has a de re expression it trumps the de dicto understanding of her obligation (and I already said while there is no general principle outlined which says this is the case it raises some doubt), the second way is to provide additional examples that show that there are de dicto obligations that are morally relevant and which elude a de re explanation – that is to say, they satisfy conditions 1 and 2 set out above. That example would provide reason to believe that Mary has an analogous de dicto obligation in not-postponing conception. I will take up the latter task in what follows. However, this latter example also provides a response to the next objection that I will consider, and so I will move on to consider that objection now before I return to consider my response to both.

2.2.2 Boonin's Harm Reduction Objection

Given that David Boonin discusses Tess's obligation in terms of 'accident victims' I will do the same in what follows. Boonin (2014) objects to the de dicto proposal. To do this he argues that there are two ways to understand Tess's de dicto obligation⁴³ and that only one is plausible in the Safety Officer – but this is not the same understanding that is plausible in not-postponing conception. Boonin's conclusion is that the Safety Officer cannot be analogous to not-postponing conception in the way that Hare needs it to be so as to justify the moral relevance of Mary's de dicto obligation in not-postponing conception. Without the analogy then Mary's de dicto obligation does not appeal to a familiar moral principle as per Parfit's objection (see Parfit in Hare, 2007, p. 515).

With that in mind I will now explain Boonin's argument that there are two ways to understand Tess's de dicto obligation to make things better for accident victims. It turns on the 'how' of how Tess aims to make things 'better' for them. Here are two ways to understand it:⁴⁴

- a) A de dicto obligation to make things better for accident victims by *maximising the health* of accident victims.

or

- b) A de dicto obligation to make things better for accident victims by *reducing the harm caused* to accident victims

Maximizing the health⁴⁵ of another person⁴⁶ or reducing harm caused to them are two intuitive ways that we could make things better for others. Boonin argues that only one of these ways to understand Tess's obligation is plausible in the Safety Officer. We know that Boonin believes that a), where Boonin argues that Tess's de dicto obligation is to make things better for accident victims by maximising the health of accident victims, is not plausible in the Safety Officer. Boonin uses a case to highlight the differences between a) and b) but it will serve not only as a way to explain what is meant by each understanding but also show why a) cannot apply in the Safety Officer. Boonin does not explicitly name the case that he appeals to, but I will call it *Jack and Jill*. In it, Tess must choose between two policy options so that she can fulfil her obligation to make things 'better' for them.

⁴³ The distinction between two ways that Tess can act on her de dicto obligation is also discussed in Urbanek (2010) – the distinction explained in Boonin roughly follows the distinctions that Urbanek (2010) introduces.

⁴⁴ Note that I am paraphrasing Boonin's claim here to capture the main thrust of each understanding.

⁴⁵ Urbanek (2010) also notes this.

⁴⁶ Boonin does not explicitly name this as 'health maximization' – this is my doing – but in doing so I hope to give more clarity to how Tess ought weigh each policy with respect to each principle she intends to follow.

Suppose that as things now stand neither Jack nor Jill has been involved in an accident and that Jack has a health level of 100 units and Jill has a health level of 80 units. Tess has to choose between Policy 1 and Policy 2. If she chooses Policy 1, Jack will be in an accident and suffer a loss of 10 units of health. If she chooses Policy 2, Jill will be in an accident and suffer a loss of 5 units of health

(Boonin, 2014, p. 35)

We can represent Tess’s choice between the two policies as follows:

	Policy 1	Policy 2
Jack	Has an accident; drops from 100 units to 90	Does not have an accident
Jill	Does not have an accident	Has an accident; drops from 80 units to 75

(Boonin, 2014, p. 35)

We already know that Tess’s “...job is to make things *de dicto* better for the accident victims”. However, as Boonin (2014) notes, we could understand Tess’s *de dicto* obligation to make things better for accident victims in two ways. Let us first understand Tess’s *de dicto* obligation as per a) above, and say that with respect to her policy choice she could pursue what we will call a ‘De Dicto Health Maximization Policy’. We can describe that policy as follows:

De Dicto Health Maximization (DDHM): Tess’s *de dicto* obligation is to make sure that the accident victims, whoever they should be, end up having a higher level of health than the people who would otherwise have been in the accident would have ended up having.

What policy ought Tess to choose if she is to be guided by the De Dicto Health Maximization Policy (DDHM hereafter)? To maximize the health of the victims she would have to select Policy 1. As Boonin says:

If Jack is in an accident, he will be reduced from 100 units of health to 90 units of health. If Jill is in an accident, she will be reduced from 80 units of health to 75 units of health. 90 units of health is greater than 75 units, and so Tess should choose policy 1, the policy in which Jack is in the accident

This cannot be how Tess is expected to realise her de dicto obligation as per her role. On DDHM (Policy 1) Tess should make sure that accident victims, whoever they should be, are as healthy as possible after their accident. We could understand that Tess's obligation is to ensure that accident victims have the highest level of health by choosing policies and safety features that ensure that accidents happen to already healthier people – which is what occurs in the case of Jack and Jill. However, this policy would surely require Tess to know who will be in an accident before that accident occurs – and this is not plausible given the identity affecting nature of her policy choice. But there are ways that she could ensure that already healthier people become accident victims. Urbanek (2010) suggests that one way Tess could do this is to ensure car dealers ensure that cars equipped with extra safety features are more expensive. The result of this is that those cars are more likely to be bought by older persons. This result, Urbanek suggests, would have the effect of keeping older people safe, but this would be at the expense of younger 'healthier' drivers – and it doesn't seem like we should pat Tess on the back for that.

If Tess is to fulfil her obligation to accident victims she must choose – as she must do in Jack and Jill – those who are already healthiest to direct accidents toward. The healthiest people would start with an already high level of health and so their chances of having a higher level of health after an accident compared to someone who has several serious health conditions is better. If it were possible for Tess to direct accidents toward already healthier people then accidents would not be as damaging to the already healthiest in terms of their overall health – as was the case in Jack and Jill. However, ensuring that accident victims have a high level of health to begin with seems like an implausible way for Tess to fulfil her de dicto obligation.

I will now introduce the second way that we can understand Tess's de dicto obligation. It relies on reducing harm to make things better for accident victims. For that reason, we can call it 'De Dicto Harm Reduction' – DDHR hereafter. This is the preferred way for Tess to understand her de dicto obligation by both Boonin and Hare. For clarity sake I have interpreted the understanding as follows:

De Dicto Harm Reduction (DDHR): Tess's obligation is to make sure that accident victims, whoever they should be, end up suffering less harm than the people who would otherwise have been in the accident would have suffered.

If Tess intends to use DDHR to weigh her policy options, what policy should she choose? Boonin argues that Tess should reason as follows:

If Jack is in an accident he will lose 10 units of health. If Jill is in an accident, she will lose 5 units of health. Losing 5 units of health is a smaller harm than losing 10 units of health, and so Tess should choose Policy 2, the policy on which Jill is in the accident

(Boonin, 2014, p. 35).

Endorsing this policy means that Tess ought to choose policies and safety features that would reduce the harm caused to accident victims. Tess could mandate the instillation of seatbelts. Hurtling through a windscreen is more harmful to a person than the bruising caused by a seatbelt. Given that, then it's obvious that accident victims would suffer less harm than accident victims would otherwise suffer in any given collision (not forgetting that we are understanding accident victims *de dicto*). Installing seatbelts would foreseeably ensure that Tess's actions reflect her *de dicto* obligation to make things 'better' for accident victims by reducing the harm that comes to them – whoever they should be.

Further to the plausibility of DDHR over the DDHM in the Safety Officer, we also know that Hare intends DDHR in the Safety Officer because Hare (2007) confirms this himself. He says that Tess, 'is pleased to discover evidence that [her new regulations] have been effective, that the severity of injuries sustained in automobile accidents has been reduced as a result (Hare, 2007, p. 516).' For that reason, the following discussion will assume that the DDHR is Tess's intended principle and that policy 2 is the policy of choice in this case.

With that, we have established an additional feature of Tess's obligation that Hare needs to consider when making an analogy to not-postponing conception to justify the moral relevance of that *de dicto* obligation. We now know that Tess ought to understand her *de dicto* obligation to make things better for accident victims as DDHR – and that this means Tess can choose policy 2 in Jack and Jill. Given that the Safety Officer and not-postponing conception are supposedly analogous then it is plausible to assume that Mary ought to also act in line with DDHR when choosing whether to conceive now or later. However, in what follows, we will see that while the DDHR is plausible in the Safety Officer Boonin argues that it is an implausible understanding of Mary's *de dicto* obligation in not-postponing conception.

The core of Boonin's objection, as I interpret it, is this: he argues that when Mary considers whether to conceive now or later, Mary ought to deliberate by asking herself the following questions:

If I conceive a child with significant health difficulties now, how much harm will my act of conceiving that child cause to that child? If I instead conceive

a child without significant health difficulties later, how much harm will my act of conceiving that child cause to that child? If the act of conceiving one child will cause less harm to that child than the act of conceiving the other would cause to the other, Mary should conclude, then I am morally required to conceive that child because I have a special obligation to protect my child from harm

(Boonin, 2014, p. 36).

The point of the objection is that, if Mary ought to reason in the way that Boonin suggests, then we cannot compare the harm done to particular agents. The DDHR requires that we can compare harm done to particular agents to assess whether we ought to choose one action over another. This is like in the Safety Officer where we needed to assess how some policy would affect those ‘accident victims’ who would be impacted by it before choosing which policy to choose. However, this kind of comparison is not available to use in not-postponing conception. In the Safety Officer then, we can compare the harm done to particular agents who fill the role of ‘accident victim’. But that is something that we cannot do in not-postponing conception. Because of that, Boonin then reminds us that: ‘the non-identity problem arises in the first place precisely because neither of Mary’s choices will cause any harm at all to the particular child that she conceives’ – by this, Boonin means that when we try to assess the harm that choosing to conceive now over conceiving later would cause to the child that is conceived now we cannot make a comparison by using the HR. Boonin, concludes that, for the reasons he has given, and for the reasons we are aware of from previous Chapters, that ‘...Mary’s act of conceiving Mariette does not make her child *de dicto* worse off (Boonin, 2014, p. 36).’

The surprising conclusion is that because we cannot appeal to the DDHR in not-postponing conception we ought to instead appeal to DDHM.⁴⁷ However, this would mean that the Safety Officer does not do the work that Hare has intended it to do. Namely, to justify the *de dicto* obligation in not-postponing conception by analogy. Boonin touches on

⁴⁷ Janet Malek discusses Boonin’s arguments against the *de dicto* proposal in Malek (2019). They argue that this argument is circular. She says that, ‘Boonin’s claim that Hare’s example does not apply to Wilma’s case under the harm reduction interpretation is based on circular reasoning. The statement that Wilma’s choice to conceive Pebbles will not result in harm to the child she brings into the world relies on a *de re*/ridged designation of that particular child. If, instead, a *de dicto*/non-ridged designation is used, Wilma’s child may be worse off as a result of her decision and may therefore be harmed. The argument therefore only goes through if its conclusion is assumed: that Pebbles and Rocks should be referred to as two different possible children.’ (Malek, 2019, pp. 23-24) Note that in this case Wilma is to Mary, Pebbles is to Mariette, and Rocks is to Marty. For what it is worth I believe that Malek is right about this – this is an intuition I had about Boonin’s objection also. However, for my purposes I chose not to expound it in detail. The main reason for this was that even assuming that it is true my own case (which I introduce later) can replace the Safety Officer.

one way to appeal to HM to justify Mary's obligation. That would be to develop an alternative analogy that instead appeals to a principle in line with DDHM that is best understood in its de dicto sense.

We now know that we know the DDHR cannot help Mary to fulfil her obligation to 'her child' in the de dicto sense. If a de dicto proposal is to be successful then we must appeal to DDHM. If we can do this then regardless of whether one believes my initial responses to Urbanek and Boonin work, it can show that there are alternative examples that we can use to make an analogy between it and not-postponing conception. It is to generate those analogous cases that I now turn my attention.

2.3 Responses

Suppose that both the de re and harm reduction objection are plausible and that, subsequently, Hare cannot use the Safety Officer case to justify the moral relevance of the de dicto obligation in not-postponing conception. As I have said previously, we cannot simply say that not-postponing conception is a special type of obligation that is understood de dicto without being susceptible to the kind of objections put forward by Parfit wherein he argued that it did not appeal to any familiar moral principle. This means that we need to come up with an alternative case which shows that de dicto obligations are morally relevant. Furthermore, that case must be analogous to not-postponing conception. If so, then we can use that case as an alternative to the Safety Officer and can use it to justify the moral relevance of Mary's de dicto obligation.

The alternative – and novel – case that I develop is called Swim Coach. I argue that it can a) independently justify an obligation to make things de dicto better for some special set of people⁴⁸ and b) show that a de dicto obligation is the most (and only) morally relevant understanding of the Swim Coach's obligation. If both these conditions are met in that case then we could use it to justify an analogous de dicto obligation in not-postponing conception in the absence of the Safety Officer. So, even if both Urbanek and Boonin's objections mean that we need to dispense with the Safety Officer then this case can take its place.

48 Of course, it does not just have to do this – the case must, in addition to showing that some groups of persons deserve special consideration, also show that a de dicto obligation to make things better for those people is the only plausible understanding of that obligation, it must also show that this obligation is best understood in line with a Health Maximization Principle to be truly analogous to not-postponing conception. I will discuss this in detail in what follows.

2.3.1 Swim Coach

One way to show that we ought to accept that the *de dicto* obligation in not-postponing conception is morally relevant is to show that there are similar cases which are structurally analogous in which the *de dicto* obligation is morally relevant – without which, an opponent would argue that accepting the *de dicto proposal* in not-postponing conception is unacceptably *ad hoc*. They would claim that we ought not to accept those arguments simply because they generate the seemingly correct conclusion. This is a charge worth avoiding if at all possible. To that end, if one thinks that additional supporting cases are needed to justify the *de dicto* obligation in not-postponing conception then we need to develop one – I do so in this section. Any case that is intended to replace the Safety Officer with a view to justifying an analogous *de dicto* obligation to make things better in not-postponing conception must satisfy three conditions. I will outline these conditions before introducing the case.

1. The case must show that we have a special responsibility to make things better for certain people that can be understood *de dicto*.

This is used to justify the claim that Mary has an obligation to make things better for her child when the analogy is transposed to not-postponing conception. To that end, it must be true that whatever example we want to use as our analogous case it must show that it is plausible to say that we have reason to be partial to certain groups or to make things better for certain people. This condition does not deviate from Hare's original conditions when he sets out the Safety Officer case, nor does our second condition, which is:

2. The obligation in the case must have no *de re* expression.

This condition deviates from Hare's own condition when he sets out the Safety Officer analogy. Its stronger than the claim that the *de dicto* expression must be *more* morally relevant than a *de re* expression on purpose. This means that without any *de re* expression there cannot be any doubt about the relevance of the *de dicto* objection.⁴⁹ However, I have added an additional condition in response to the objections we have considered in this Chapter:

3. This *de dicto* obligation to make things better for some person (or people) is most plausibly fulfilled by health maximization and not harm reduction.

This third condition emerged from our discussion of Boonin's objection. Remember that, while Hare confirmed that the obligation in the Safety Officer ought to be DDHR, we know from Boonin's objection that DDHR is not plausible in not-postponing conception.

⁴⁹ Someone might note that perhaps there being no *de re* obligation means that there is no obligation at all.

Here, I simply acknowledge that the DDHM is the most plausible way to understand Mary's de dicto obligation to make things better for her child, and aim to find a case that supports that. I have added this condition for that reason. As such, any case that we use to justify the de dicto obligation in not-postponing conception must be plausibly understood DDHM.

These three conditions must be met for any analogy to avoid the objections I have already considered. To that end, this modifies the conditions set out by Hare (2007) to take into account Boonin's harm reduction objection. In what follows I will outline the candidate case that I believe meets those three conditions. Consider, then, the Swim Coach:

Swim Coach: Suppose that Mitchel is a swim coach who is looking for a new swimmer to train through to Olympic trials and a chance at an Olympic gold medal. They have an obligation to make things better for their athlete – whomever they should be – and given that they do not know who that athlete will be this obligation to them can only be understood in its de dicto sense. To that end, they can fulfil their de dicto obligation to make things better for their athlete by choosing the fastest, and healthiest athlete.⁵⁰ To do this, Mitchel changes his selection criteria two years prior to when he usually takes on a new athlete – his last athlete has moved on from competitive swimming. However, Mitchel's new selection criteria means that the new performance bar is set so high that prospective athletes change their training plans so as to meet these new criteria two years later. Unfortunately, the selection criteria and performance bar is so high that some prospective athletes become injured who would not otherwise have become injured. Others change their days such that new opportunities arise and they abandon swimming altogether, still another group – who would not have risen to the task had they not been emboldened by the sheer weight of the challenge and so to meet the criteria they begin to train in earnest. The result is that because of the Mitchel's new selection criteria the athlete who does become his athlete is a different athlete from the one who would otherwise have become their athlete had the coaches criteria stayed the same.

⁵⁰ Someone might think there is something slightly odd about this being the way to discharge the obligation. It's not quite as weird as a doctor who makes things better for their patients by only taking in very healthy ones, but it's in a similar area of strangeness – they might claim. This, I think, is too quick. 'Betterness' here is ambiguous, and the swim coach in the case I describe is in the business of promoting excellence, and if their job is in the business of promoting excellence then choosing the best athletes is one way of fulfilling this obligation to them.

Some may initially think this case is a little strange. But I do not think that that it is. The idea that this case is strange comes from the thought that this case is just as odd as Tess choosing to ensure younger drivers are in accidents to make it the case that ‘accident victims’ are better off. Presumably we do not think that this would be an appropriate way for Tess to fulfil her obligation to ‘accident victims’. The charge is that this case is just as implausible. There is something odd, an opponent might say, about a coach having an obligation to make things better for ‘their athlete’ in a *de dicto* sense prior to being their coach – in a way that does not seem odd in not-postponing conception. But let me give some reasons to accept the case is plausible.

One reason that it is appropriate to make sure that whatever athlete you choose to join your training regime is as healthy as possible is that you have an obligation to make sure that your athlete, whomever they should be, are able to keep up with the training regime that you have set. To that end, you would do any athlete you could choose a disservice if you do not choose the most healthy athlete – and I think that this is quite analogous to our feelings about not-postponing conception. Bringing children into existence is a precarious and risky business, and as parents we should make sure that our children are equipped to deal with life – generally speaking. One of the intuitions behind the belief that Mary in not-postponing conception does wrong is that for her to choose a child that is not in some way ‘fully’ equipped to deal with life and so fail to recognise that life is more difficult when you place challenges in your child’s pathway – and as parents we ought to be minimizing these challenges as much as possible. In that sense, Mitchel’s obligation in *Swim Coach* is not too dissimilar from Mary’s obligation in not-postponing conception. So, while at first the case may seem strange, it is not implausible.

A similar type of case is found in David Wasserman (2008). However, the context in which Wasserman presents the case is to show that a coach of this kind does not have any obligation to the particular person they are choosing to be on their team. Here is what Wasserman says so as to differentiate it from my treatment of his similar case:

A college coach who aggressively recruits healthier players will have special duties to those players once he recruits them (as well as a duty not to recruit players whose health is not good enough to play safely). But any duty he has to select the healthiest possible players is owed to the institution, the fans, and the alumni, or perhaps to “the team” as a temporally extended entity—not to the players he selects

(Wasserman, 2008, p. 534).

As you can see, Wasserman takes this type of case to be problematic because if an obligation is owed – as he claims – not to the potential athlete but to the institution or to the team to choose the best player then Wasserman argues that this means Mary cannot have this type of obligation in not-postponing conception because it would go against our belief that the reason Mary ought to conceive later is because of her obligation to be partial to ‘her child’. The idea – I assume – is that the coach is discharging their obligation not to the athlete but to their institution or their team, and to that end it is not an obligation to the athlete they will choose – and this athlete is analogous to ‘her child’, and where there is no obligation to the athlete there cannot be an obligation to ‘her child’. However, I do not think this is the case.

Perhaps a coach needs to choose the best athlete because their training program is so rigorous, and they know that they will do ‘their athlete’ a disservice by making sure they are not as healthy as possible. It is at least plausible that a coach must choose the best athletes for the athletes own sake, and not merely because their obligations to their institution or team demand it. But this is not a concern for our case because – by stipulation – the coach does not owe their obligation to any institution or team, nor do they have any obligation to current athletes because, as a rule, they only take on one athlete at a time. I could simply alter this case to say that the coach is institution independent and only in it for the money they would receive from a percentage of future royalties – or some other means of maintaining independence from institutions.

I believe that these responses suffice to deal with the type of objections to my case found in Wasserman and so we can move to consider whether this case gives us what we need to justify an analogous obligation in not-postponing conception.

In what respect is Swim Coach the case we are looking for? Let us assess it against our three criteria set out above.

1. The case must show that we have a special responsibility to make things better for certain people that can be understood *de dicto*.

A coach in this case is partial to the health of his athletes. It is plausible that they are partial to only ‘their’ athletes in the same way that a parent is partial only to ‘their’ children. We can use this to justify the claim that Mary has an obligation to make things better for her child when the analogy is transposed to not-postponing conception.

2. The obligation in the case must have no *de re* expression.

Any analogous case must be a case where due to the non-identity nature of that case the obligation to make things better for some persons can have no *de re* expression. The coach cannot know who will become their athlete when they change their recruitment criteria. This is because their change in criteria will change the behaviours of those who may

wish to compete to be on their team. Their training schedules will change, their day to day lives will shift, some will become injured, others will do better while others will fare worse on their new training plans; so much so, that in two years-time those who would have been on the team are not. In that respect it is a non-identity case. The actions of the coach have an impact on who will be on their team as ‘their athlete’ in two years-time. In this respect, the coaches responsibilities to ‘their athlete’ cannot be understood *de re* – they need only make sure that their athlete – understood *de dicto* – is as healthy as possible.

3. This *de dicto* obligation to make things better for some person (or people) is most plausibly fulfilled by health maximization and not harm reduction.

As I have said, it is entirely appropriate for a coach to represent their obligation to make things better for their athlete in a *de dicto* sense. Remember that they can do this by choosing the healthiest possible athlete. Furthermore, the most appropriate way to do this is by health maximisation – and that means it satisfies the third criteria I set out above.

One final way to justify the claim that this is the most plausible way to understand the coach’s obligation is to consider what would happen if they did not follow this strategy. It’s easy to see how Mitchel in Swim Coach can choose their athlete by health maximisation. Mitchel is in the business of promoting excellence, but there are other coaches that are not. Imagine that, instead, a coaches obligation is to make things better for their athlete by making it the case that they increase an athletes ability levels – and so we measure their success not by their overall (or maximum) level of health, but by their improvements. In this alternative case, what we have is a coach who is trying to increase an athletes ability levels (no matter what their original levels are). It may be that a coach operating on this strategy would do a good job if they brought an athlete from 10 ability points to 50 ability points (+40). But an Olympic coach like Mitchel who is in the business of promoting excellence is unlikely to be impressed by this strategy if winners are required to have 80 ability points with the prospect of developing 20+ more to reach 100 – where, say, 90-100 ability points is enough to be considered a world class athlete.

This is not a strange idea. Marathon runners who want to enter the Olympic games must reach particular running times to qualify for entry to the competition. The Olympic games, and their rules, are interested in promoting excellence in the same way that Mitchel is. But Mitchel is unlikely to do a good job if he bases his decision on who can improve the most knowing they will never reach world class. To that end, let us accept that Mitchel has an obligation to make things better for their athletes and that this is best understood *de dicto*. Furthermore, this picks out the best possible athlete and awards them as such. Because of this, it is entirely appropriate for a coach to choose their athletes on the basis of their prior

condition, and when this is understood then we can easily see how such an obligation could be applied to not-postponing conception.

Remember that, by stipulation, Mitchel has no institutional ties and they have no fans to please in a *de re* sense. In this respect, Mitchel in Swim Coach is like the prospective parent who has no children of their own currently – and so has no *de re* obligations to them. Because of this they cannot understand their obligation *de re*. Remember that Swim Coach satisfies the conditions needed to justify an analogous *de dicto* obligation in not-postponing conception. The Swim Coach gives us what we need to justify the *de dicto* obligation in not-postponing conception and that is an important step forward.

2.3.2 *Is the De Dicto Proposal 'Unifying'?*

There is a class of non-identity cases that raise similar concerns to Wassermann's example above. The concern that Wassermann raised was with respect to the *de re* obligations that are owed to those who are already on a coach's team. This is a problem because as per condition 2 where there are *de re* obligations we cannot (by stipulation) create a strong analogy to not-postponing conception – that is, if there is a *de re* obligation then we cannot satisfy the conditions set out to justify the moral relevance of a *de dicto* obligation. This objection was not a problem for Swim Coach. However, this problem can arise in other paradigm procreative cases. One might wonder why it matters that this objection can cause problems for the *de dicto* proposal in other paradigm procreative cases? The reason that potential problem matters is because there is a belief that *some* paradigm cases ought to also be solved by a solution to the non-identity problem – not just simple procreation cases like not-postponing conception. For example, some might argue that a solution to the non-identity problem ought to be able to explain the moral wrong of a multitude of other cases for that solution itself to be plausible. One such case where there is a belief that it ought to also be explained by a proposed solution to the non-identity problem is called 'Two Prospective Parents'. I will introduce the case and then I will then consider the challenge it raises for the *de dicto* proposal.

Two Prospective Parents: Our Mary from not-postponing conception is joined in the doctor's office by another prospective parent. This prospective parent, Matilda, is five months pregnant. However, while Mary agonises over whether her child will be worse off by conceiving now or later, Matilda is meeting with her doctor to discuss her diet. She has been told that if she continues to enjoy a supposedly cleansing – but in fact dangerous – fad juice diet then then her child will be born with serious health difficulties. Knowing the risks, Matilda continues to diet, and Mary conceives her child

now. Both children are, coincidentally, born with the same serious health difficulties.⁵¹

The prevailing belief in this case is that both parents do something morally wrong – Mary does wrong by knowingly conceiving a child with serious health difficulties, and Matilda by continuing to knowingly diet to the detriment of her child's health and ensuring they will have serious health difficulties. The belief is that their actions make their children worse off in a morally relevant way, however it is not just that both these parents do wrong, but that they do wrong for the same reason. The challenge is that while we can easily explain why Matilda's action is wrong by appealing to plausible narrow person-affecting moral principles (such as a counterfactual and comparative account of how this child comes to be harmed by Matilda's action for example), we cannot easily explain why Mary's action is wrong by appealing to the same narrow person-affecting principles.

It is worth pointing out that it might seem controversial to assume that Matilda 'exists' while her parent is five months pregnant and that for this reason we can apply concepts like harm and wrong to the entity that exists at that time. One might argue that person-affecting approaches apply only to 'persons' and not entities or 'beings' that are not 'persons'. But I do not think that it is controversial to say that the entity that exists at that time can be harmed by their prospective parents' act. This is because we apply person-affecting concepts like harms and wrongs to beings or entities that are not 'persons' all the time – just think of harms to animals. One who argues this point may be confused between legal personhood and merely being considered an entity to which we can apply person-affecting concepts like harm and wrong. It is therefore not strange in my view to apply person-affecting harms and (or) wrongs to entities which are not considered persons. I believe that entities such as Matilda are those to which we can apply those concepts at that time and while they may not be 'persons' (depending on how this is explained) they are included in my ontology of who exists at that time. I present a more thorough argument for this position later in Chapter 3 Section 3.4.3.

So, there is a relevant difference between these two cases. The charge is that, if the *dicto* proposal cannot produce the seemingly correct answer in Two Prospective Parents then

⁵¹ This is a paradigm non-identity case that I have modified this case but the spirit of the example is the same – a unifying explanation for the wrong ought to be possible (it is believed) but there is not a unifying explanation because in Mary's case she does not do anything wrong on any person-affecting moral principle. This means that while we can explain Matilda's wrong with respect to known narrow person-affecting moral principles we cannot explain why Mary's action is wrong despite the belief that both parents do wrong for the same reason.

the de dicto proposal – which now relies on Swim Coach to justify the de dicto obligation in not-postponing conception – is not plausible.

In previous sections I said that in order to produce a strong reason to accept the de dicto proposal in not-postponing conception we needed to accept condition 2 where there is no de re explanation to the proposed moral obligation. However, in this case Matilda's obligation to make things better for her child has a de re expression and so we cannot appeal to a de dicto proposal in this case. Furthermore, if we are to assess the case in this way then it leaves Mary's morally wrong act of conception unexplained.

Condition 2, where there cannot be a de re understanding of that obligation, is helpful to Hare in some cases. For example, it helps Hare to explain why a parent cannot simply exchange their children for 'better' ones and claim to have done a good job⁵² and insulates it from the charge of being implausible. However, accepting 2) comes at the cost of losing the Safety Officer case as an analogy for the de dicto obligation in not-postponing conception. Earlier we strengthened Hare's criteria to only include analogies where there is no plausible de re expression of that obligation. We did this to strengthen the plausibility of the moral relevance of the de dicto obligation in not-postponing conception at the cost of the solution being less morally relevant in cases where a de re obligation was present. While this provided us with a way to navigate cases like ones that involve making things 'better' for your already existent children by exchanging them for 'better' ones, it does so only by creating problems for the de dicto proposal with cases like Two Prospective Parents. If we accept that the de dicto proposal ought to also solve cases such as this then we are forced to accept that in other paradigm cases the de dicto proposal is not morally relevant – and this is a significant challenge for the solution.

It looks like Hare's solution does not give us a unifying explanation of how that act could be worse for 'their child' in both cases. There is a response to this that I will now present that I believe allows us to avoid the charge that the de dicto proposal is implausible because it cannot be used in other paradigm cases and that we can easily modify not-postponing conception to make the de dicto obligation proposed less morally relevant. I do not believe that a solution that solves for the belief that Mary's act of conception is worse for 'the child that Mary conceives' in not-postponing conception is implausible because we accept 2. I believe that what is actually shown here by Two Prospective Parents is that these cases are relevantly different and that a unifying solution for these cases is not necessary.

⁵² Remember the reasoning is that while they have fulfilled a de dicto obligation to their 'children' they failed in their de re obligations to those 'children' and it is the latter that are morally relevant and not their de dicto obligation – and our discomfort arises out of this confusion.

Once we recognise that there is a morally relevant difference between the two parents choices then the Two Prospective Parents is not be problematic for Hare – indeed, Hare arrives at the same conclusion that I have with respect to comparing these two cases. He says that both prospective parents ‘fail to show appropriate concern for the health of their children’ (Hare, 2007, p. 522). While Hare says that a prospective parent in the example above should each be guided by their respective de re and de dicto obligations what I have provided is a clear rule of thumb for evaluating when a de dicto obligation is morally relevant in the case where we lose the Safety Officer and instead must only appeal to supporting cases where the obligation can only be de dicto.

But to get a sense of how Swim Coach can help us to arrive at this conclusion let’s compare this case to the obligations that could be expressed by two coaches who have different priorities. There is an analogy that can be made between comparing the de dicto obligations of a coach who chooses to only takes one athlete at a time and thus an obligation to choose the healthiest future Olympian with the de re obligations of a different coach who coaches a team, and for them their obligations will be toward those who are already on a team they coach. Remembering that a de dicto obligation is not morally relevant in cases where that same obligation has a de re expression by condition 2) then if he has a de re obligation to make things better for those teammates then the performance of any future teammate should feature in choosing a teammate. That is, any additional teammate should not disadvantage them. The team-coach has obligations to each individual team mate de re but each represents an individual obligation to that team member. By making things better for ‘her child’ in cases where Mary already has children, then she should understand her obligations de re. Where she does not have any children whose obligations toward them she cannot understand de re, then she ought to appeal to her de dicto obligation understood as harm maximisation as per 3).

Given that Swim Coach justifies the existence of a de dicto moral obligation to make things better for some people in a morally relevant way we can conclude that the act is not just worse, but wrong. The subtilty of this solution is that we get the right answer in Two Prospective Parents by acknowledging that both acts are not just worse, but wrong for different reasons – one being a failure in their de re obligation and another in their de dicto obligation. This can only be done if we deny that a de dicto proposal that rejects P1 in not-postponing conception needs to be a unifying solution across all other relevant non-identity cases. This means that by proposing Swim Coach as an alternative justification for the de dicto moral obligation in not-postponing conception we can capture the intuitive belief that we have about the wrongness of the parents’ acts in each case. To that end, the idea that the harm that affects each child in question is a unified version of harm, or wrong that must only

be explained in either *de dicto* or *de re* terms is overly simplistic. What I have shown is that a more nuanced solution gets us the right answer with respect to why each parent in Two Prospective Parents does wrong. It is wrong in both cases, but for different reasons. While Hare does come to the same conclusion I believe that my approach means that the proposed solution – that the two acts do not unify is stronger than it was when the Safety Officer was used to provide the justification of the moral relevance of Mary's *de dicto* obligation in not-postponing conception.

As I see it, this leaves the would-be proponent of the *de dicto* proposal in the following position. They would have to accept that while the solution has its limitations it can give us the correct answer in not-postponing conception. It would mean that where there is any *de re* obligation towards our 'children' we ought to respect it – but would this be such a bad thing? It would mean that when parents weigh up the cost/benefits of an additional sibling they take into account their obligations to those children they already have. It would give us the right account of the moral wrong in Two Prospective Parents though for two different reasons, and an explanation of the moral wrong in not-postponing conception. Would this be so bad? I don't think so.

To my mind this does not seem problematic – and I would be willing to accept this outcome if it meant the conclusion remained the same (even if that explanation is more complex than a unified solution where both parents make things worse their children for the same unifying person-affecting reason). I do not think there is anything but intransigence stopping us from accepting this conclusion simply because of the view that it does not 'work' in non-identity cases which force us to consider the welfare of those who already exist against those who do not. The question is the standard to which it needs to work in these cases – I think it does work, in fact, though it just does not provide a unifying person-affecting reason for the wrongness of the acts that the Two Prospective Parents engage in. But as I have said, this is only problematic if we are unwilling to revise our beliefs about the case – with the considerable upshot of providing a person-affecting proposal that allows us to conclude that Mary's act is worse than its alternative in not-postponing conception.

2.4 Conclusion

In this Chapter, I have explained a person-affecting approach to the non-identity problem and I have argued that this gives us a way to deny that P1 is true in not-postponing conception. When we interpret P1 as I have done below, then we can see clearly that Mary makes things worse for 'the child that Mary conceives' and given that she fails in her *de dicto* obligation to make things better for 'her child' she does wrongs 'her child' by failing to fulfil that obligation.

P1: Mary's act of conceiving now rather than later does not make *'the child that Mary conceives'* worse off than they otherwise would have been [emphasis added]

(Boonin, 2014, p. 27).

To reach this conclusion I assessed two of the most challenging objections to the view by bringing together objections from David Boonin (2014), Valentina Urbanek (2010) and David Wassermann (2008). Their arguments objected to the use of the Safety Officer to justify the moral relevance of the de dicto obligation in not-postponing conception. I argued that to overcome this problem we would need to strengthen Hare's criteria for the moral pre-eminence of de dicto obligations and with that in mind I developed a new case analogous to not-postponing conception that I then used to argue the case that de dicto moral obligations are morally relevant. I argued that even if the objections to Hare's use of the Safety Officer are successful then my alternative case – Swim Coach - can justify the moral relevance of the de dicto obligation in not-postponing conception. I concluded that Swim Coach meets the strengthened criteria that I proposed. Due to this it can justify the de dicto obligation in not-postponing conception in lieu of the Safety Officer case and without falling foul of the aforementioned objections.

Finally, I considered how cases like Two Prospective Parents may affect the plausibility of the de dicto proposal. I argued that this concern is only problematic for the de dicto proposal if we believe that a solution to the non-identity problem ought to provide a unifying solution between the reasons why both parents do wrong to their child. That is to say, that it can explain what is so wrong about both Mary and Matilda's actions for the same person-affecting reason. For the solution to be a unifying one, both of their obligations would need to be understood de dicto – and this does not seem right given that we can easily appeal to person-affecting moral principles to explain why Matilda's act is morally wrong for reasons that are to do with the child she is carrying in a de re sense. However, I argued that such a unifying solution is not necessary. I said that when we recognise the strength of the rule of thumb provided by modified criteria for an analogy to justify de dicto obligations in cases like not-postponing conception then we can see that the solutions in this case need not be a unifying one. We can see that the two parents in Two Prospective Parents both do something morally wrong – it is simply that one does wrong by not fulfilling a de dicto obligation and the other for not fulfilling a de re obligation. Perhaps in more complex cases those who believe that there must be a unifying account of the wrong in Two Prospective Parents are simply wrong. It's not implausible that Mary does wrong by failing in her de dicto obligation while Matilda fails in a de re obligation. This would be a satisfying

conclusion, and I believe that the strength of Swim Coach which justifies the claim that the de dicto obligation in not-postponing conception and in Two Prospective Parents is morally relevant, allows us to conclude just that. The de dicto proposal provides a satisfactory explanation for why they both do wrong, albeit it is for different reasons.

To sum up, I have provided a case that – in lieu of the Safety Officer – provides justification for the de dicto obligation in not-postponing conception and this allows us to say why Mary's act is worse for the child that she conceives and given that I have provided a strong new case based on strengthened criteria for a successful analogy I believe we can also say that that worseness is morally relevant due to the fact that failing to meet ones de dicto obligation to make things better for 'her child' has not just made things worse for that child it was wrong to do so.

It is up to an opponent to provide reasons to reject my proposal – though I have considered some challenges and made great efforts to clarify and justify the plausibility of the response to aforementioned objections. All in all, I believe that I have shown an understanding of the arguments against the use of the Safety Officer to justify the de dicto obligation in not-postponing conception and contributed to the literature by suggesting an alternative that has resulted in generating a person-affecting proposal which gives us a morally relevant reason to claim that Mary's act is worse than its alternative. Given those conclusions I believe that I have achieved what I set out to do at the beginning of this Chapter which was to show that Mary's act of conception is worse than its alternative for person-affecting reasons.

This means that we now have a person-affecting proposal that plausibly denies a premise of Boonin's non-identity argument. I have said that there are two other person-affecting proposals that I will assess and I will move on to evaluate harm-based proposals now. While this proposal has given us a way to deny P1 for reasons that are to do with wronging 'her child' the next two Chapters will focus on the original understanding of P1. Thus, each proposal will aim to show that if the act harms or does wrong then it does so in terms of Mariette. While the solution in this Chapter gives us what we need to deny P1, a solution that points specifically to Mariette would be closer to the kind of person-affecting proposal that most have in mind when they form an intuitive belief about who the act has wronged.

3. The Harm-Based Proposal

In this Chapter I aim to show that there is a harm-based proposal that allows us to conclude that Mary's act of conception harms Mariette. I have said that to do this I will grant that P1 is true. This means that when I claim that the act of conception is harmful, what I mean is that it is harmful to Mariette. While the proposal that I considered in the previous Chapter has provided a person-affecting response to the question of whether Mary's act is worse for 'her child' I believe that a narrow person-affecting solution which shows that the act harms or wrongs Mariette in particular may be preferable for those who hold a firm belief about the need for a 'narrow' person-affecting proposal as opposed to a wide person-affecting proposal (even if that proposal shows us that Mary's act makes things worse for 'her child' and that child just so happens to be Mariette). It is for that reason that I will hold that P1 is true in this Chapter and so I will assume that:

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been

(Boonin, 2014, p. 3).

In the previous Chapter I considered whether alternative cases could justify the argument that de dicto obligations are sometimes morally relevant and that not-postponing conception is a case where that obligation is morally relevant. In this Chapter I will argue that a harm-based proposal can tell us how Mariette is harmed by Mary's act of conception. To do this I will first explain and then assess both comparative and non-comparative harm-based proposals to the non-identity problem in not-postponing conception. While doing so I will highlight their most challenging objections and offer several counterarguments. However, what is novel about this Chapter – and indeed the next Chapter also – is that my approach to showing that the person-affecting proposals considered in this Chapter and the next involves developing novel arguments about our understanding of the act of conception. I will argue that there is a striking ambiguity in how we have come to understand an act of conception in non-identity literature. The impact of this is that many solutions to the non-identity

problem have been rejected due to the fact that there is – as I argue – an inconsistency in our moral claims about different types of non-identity cases based on which understanding of the act of conception is assumed. I will argue that there are three understandings of the act of conception that arise in non-identity literature. These are the act of choosing to bring an entity into being, the biological act and the act of bringing an entity into being. I devote quite a lot of space to defending my argument that these are acts which are worthy of independent moral assessment. Once I have done this I will argue that the understanding of that act that is most used – the biological act - is not the most morally relevant act in cases like not-postponing conception. Instead, I argue that for an alternative understanding of the act of conception that I claim is most plausible – the act of bringing an entity into being. I then use that understanding of the act of conception to show that comparative accounts are fundamentally flawed and cannot provide a solution to the non-identity problem even if we have clarified our understanding of the act of conception. However, I argue that a non-comparative harm-based account can show that Mariette is harmed by Mary's act of conception when we understand the act of conception as the bringing of that entity into being.

My contribution to non-identity literature in this Chapter is that, with a clarified understanding of the act of conception, I will show that we can see clearly that a non-comparative account of harm offers a solution to the non-identity problem in not-postponing conception, and it does so by avoiding its most salient objection – that without an existent entity moral principles cannot apply to it at the time of that act. I have said that a modest assumption in this thesis is that moral concepts like harm and wronging must only apply to those who exist now. However, this is only the case when we understand the act of conception as the bringing of that entity into being. With that, my goal for this Chapter is to show that Mary's act of conception harms Mariette in a person-affecting sense by appealing to a non-comparative account of harm. An additional goal of this Chapter is to make the case that bringing an entity into being is the most plausible understanding of the act of conception. I then use this understanding to show how a non-comparative account of harm is able to show that Mary's act harms Mariette.

At this point, one might wonder the following: why consider comparative harm-based accounts at all if they turn out to be fundamentally flawed? The answer is that it is helpful to see the non-comparative account in contrast to the comparative account to see how important the non-comparative element of the account is for determining harm in a case like not-postponing conception. Regardless of the negative conclusion with respect to comparative accounts, the ultimate conclusion that I generate in this Chapter shows us

something more profound: that it is true that if we disambiguate the act of conception and I am able to justify my claims that this ought to be understood as the act of bringing an entity into being then this understanding can be used to show that there are person-affecting proposals to the non-identity problem that can overcome their most salient objections.

One might also have some initial reservations about the idea that we have misunderstood the relevant understanding of the act of conception. An opponent might argue that merely changing the understanding of some concept 'x' such that it has an impact on whether some principle 'y' applies to it is not very profound, and without good reasons for doing so then that effort seems contrived to generate a means by which we can apply a person-affecting proposal to our cases. But clarifying our understanding of the act of conception is not the same as changing our understanding of the act of conception. As I have said, I devote quite a bit of space to clarifying our understanding of the act and justifying the reasons why we should accept my claims. I have also said that by clarifying the act that is under scrutiny it changes our conclusions about the morality of some acts of conception in some non-identity cases. In fact, as you will come to understand, we moralise about different understandings of the act of conception regularly – we question whether it is morally wrong to select embryos for implantation based on certain features for example, but that is a different question to whether it is morally right or wrong to bring such embryos into existence in the first place.

3.1 Three Comparative Accounts of Harming

Let us begin by introducing *comparative* harm-based principles. As I have said, a common belief about not-postponing conception is that Mariette is harmed by Mary's act of conception. We already know that this belief faces Derek Parfit's non-identity problem (Parfit, 1986). We also know that Mary's act, which ensures Mariette's significant health problems, does not make Mariette worse off. This is because, as per P1 of the non-identity argument outlined in Chapter 1, Mariette would not have existed had Mary waited to conceive two months later and so she cannot be worse off in a comparative sense. Remember that P1 says that:

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been

(Boonin, 2014, p. 3).

For our purposes, we have assumed - for now - that to harm is to make a person worse off. Given that assumption, Mariette cannot be harmed by the act of conception because she is not worse off for reasons already detailed in Chapter 1 and outlined in P1 above. This is an obvious challenge for those who believe that Mariette is harmed by that act of conception. Remember that we want to assess whether proponents of the non-identity problem such as David Boonin are correct to reject this account of harm as a solution to the non-identity problem on the basis that it cannot show that Mariette is worse off in a narrow person-affecting sense. To assess this, let me first explain the counterfactual-comparative account of harm in more detail and then examine the aforementioned argument that those like Boonin and others deploy to reject it as an explanation of why Mary's act of conception is morally wrong. Those proponents in favour of the conclusion generated by the non-identity argument claim that there is no comparative sense in which Mariette is worse off – as:

Counterfactual-Comparative Account of Harm: If A's act harms B, then A's act makes B worse off than B otherwise would have been

(Boonin, 2014, pp. 3-4).

The counterfactual-comparative account of harm is an often deployed account of harm⁵³. It is a state-based account of harm. That is, when these proponents evaluate the morality of an action they compare whether one state of affairs – S1 – is better or worse than some other state of affairs – S2. While the account is comparative in that it compares two states, the way it compares states is counterfactual: that is, by considering how two states compare with respect to how alternative – counterfactual – states of affairs would have affected them; they care about how some agent would otherwise have been had that act either not taken place, or had some other action occurred instead. This means that a proponent of the counterfactual-comparative account cares about whether some act makes an agent worse off than they would otherwise have been⁵⁴.

⁵³ It is important to note that what I am assessing in this section is *not* whether comparative harm-based principles are plausible generally speaking. Instead, I am assessing whether there is reason to reject the prevailing view that the above argument and its conclusion is correct

⁵⁴ It may be helpful to think about counterfactuals in the language of Lewisian possible worlds, so to make the counterfactual-comparative account clear I will explain it in that language. If the noted explanation has been enough for you to grasp the counterfactual-comparative account then feel free to return to where you left off before coming to this footnote. However, let us consider two possible worlds where W1 is the actual world while W2 is the nearest possible world. In W1 I have just been crushed by a falling tree (let us call the falling tree proposition X). In W2 the world is exactly the same as W1 in all respects except that in W2 the proposition 'X' does not occur i.e. in this world (W2) I am not crushed by a tree – that is to say that x is false in W2. Comparatively speaking I am worse off with respect to W2, this is because in the closest possible world W2

In Chapter 1, I said that the prevailing view is that the counterfactual-comparative account of harm cannot show that Mariette is harmed by Mary's act of conception. Indeed, the non-identity problem is a challenging case for those who claim that the counterfactual-comparative account of harm can explain how Mary's act comes to harm Mariette. Remember that Boonin (2014), in the sub-conclusion of his version of the non-identity argument described in Chapter 1, says that:

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been.

P2: If A's act harms B, then A's act makes B worse off than B would otherwise have been.

C1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm Mariette

(Boonin, 2014, pp. 3-4).

As you can see, the account of harm that Boonin appeals to in this case – as P2 – is a counterfactual-comparative account of harm. Some proponents of a counterfactual-comparative account of harm have tried to reject the conclusion that Mary's act of conception is not morally wrong (see Klockseim, 2012). Their hope has been to explain the moral wrong of Mary's act by appealing to impersonal principles like those I have described in Chapter 1 from Parfit⁵⁵ and others. However, these proponents are still unsuccessful⁵⁶ in narrow person-affecting terms. The fact that resistance to the conclusion generated by Boonin cannot explain why Mariette is harmed on this account in a narrow person-affecting sense matters because I have said the prevailing view is that a satisfactory explanation of the

(where X does not occur) I am better off. As I said above, the account is counterfactual and comparative; its comparative because it compares states, and counterfactual because how those states are compared is in respect to how propositions that obtain in the actual world affect me with respect to the nearest possible world in which that same proposition does not obtain (that is, some alternative act occurs) - and that is a long way of saying that to harm someone on the counterfactual-comparative account is to say that: A's act harms B, if A's act makes B worse off than they would otherwise have been.

⁵⁵ Remember principle Q, where: 'if in either of two outcomes the same number of people would ever live, it would be bad if those who live are worse off, or have a lower quality of life, than those who would have lived' (Parfit, 1986, p. 361).

⁵⁶ See Klockseim (2012) for a defence of the counterfactual-comparative account of harm as what he calls a 'partial' solution to the non-identity problem. In fact, his partial solution is only to say that an impersonal approach is enough to explain the wrongdoing of Mary's act in cases like not-postponing conception. However, given all that I have said thus far this move to an impersonal solution in cases like not-postponing conception is premature given the ambiguity I described with our understanding of the act of conception and its downstream effect on the plausibility of some narrow person-affecting solutions to the non-identity problem.

moral wrong of the act of conception is a narrow person-affecting one. Due to that belief, that is, the belief that a solution to the non-identity problem ought to be a person-affecting one, then proposed solutions (even a ‘partial solution’ as he describes it) like those suggested by Klockseim (2012) will be unsatisfactory. It remains that there is no comparison that we can make for Mariette when Mary postpones her conception, and this means that the act of conception cannot be better or worse for Mariette. If Mariette is not worse than she otherwise would have been then it cannot be a harm for her on the counterfactual and comparative account of harm.

As an alternative to the counterfactual-comparative account of harm we could attempt to substitute the counterfactual baseline for a temporal one. The thought is that this alternative could explain how a comparison between two states can be worse in a case like not-postponing conception. Appealing to a temporal comparison would mean that instead of explaining harm by appealing to whether A’s act makes B worse off in state S2 than B *otherwise would have been* in state S1 we instead explain harm by evaluating whether B is *worse off at time T2 than he was at time T1 before A’s act*. The account of harm is both temporal and comparative, and so the temporal-comparative account of harm (hereafter TCA) is as follows:

Temporal-Comparative Account of Harm: If A’s act harms B, then A’s act makes B worse off than B was before A’s act

(Boonin, 2014; p. 57).

Proponents of this explanation for the harm caused to Mariette by Mary’s act will argue that act of conception makes Mariette worse off at T2 than she would otherwise have been at T1 before Mary’s act. But the temporal-comparative account is not a viable alternative to the counterfactual-comparative account of harm. Remember that P1 is as follows:

P1: Mary’s act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette *worse off than she would otherwise have been* [emphasis added]

(Boonin, 2014, p. 3).

To see why the temporal-comparative account of harm cannot be a viable alternative to the counterfactual-comparative account I will revise Boonin’s P2 to reflect the temporal baseline we are now substituting for the counterfactual one. When we revise P2 as described we get the following argument:

P1^{TCA}: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette *worse off than she was before*.

P2^{TCA}: If A's act harms B, then A's act makes B worse off than B was before A's act.

C1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm Mariette.⁵⁷

As you can see, the conclusion of P1^{TCA} (where TCA denotes that the counterfactual baseline for that comparison has been substituted for a temporal one) combined with the P2^{TCA} still shows that Mariette has not been harmed. This is because Mariette does not exist before (or at) T1. Because of this, there is no Mariette to speak of before the act takes place, and so it cannot be the case that Mary's act harms Mariette by making her worse-off at T2 than she was before the act at T1 – we know that there was no Mariette before T1. This is a problem for the temporal-comparative account and so if we are seeking to explain the harm that comes to Mariette by appealing to some comparative harm principle we will have to try and explain it some other way by appeal to an alternative baseline that can be a morally relevant substitute for the counterfactual and temporal ones we have rejected as providing an explanation of the moral wrong in not-postponing conception by appeal to comparative harm.

The final comparative account determines harm on the basis of normative considerations.⁵⁸ That is, by comparing whether my condition 'R' at time T is worse with respect to how R should⁵⁹ have been at T. The intended 'should' is a distinctly moral one and relates to normative claims about what should be the case – children should be free from serious harm, for example. As is often the case, the best explanation of it is by way of example. Consider the following:

⁵⁷ This is an adapted version of the argument from Boonin (2014) already presented.

⁵⁸ Such an account is described in Morriem (1998) where "a person P is harmed at time T in respect R if his condition regarding R is worse than it should have been at time T", (Morriem, 1998; p.23). A similar take on this kind of account is also explored by Feinberg (1987, p.53), where Feinberg says that 'A [wrongfully] harms B only if his wrongful act leaves B worse off than [sic] he would be otherwise *in the normal course of events insofar as they were reasonably foreseeable in the circumstances*' (Feinberg, 1987; p53).

⁵⁹ It is not a should on the basis of something like pure statistics. To appeal to something like a statistic would be a deeply implausible way to ground a harm claim. Consider that it is a statistical fact that it rains quite a lot in Glasgow - it should have rained during my morning walk, in fact. But surely I am not harmed simply because I should have got wet but did not? Without specifying the nature of the 'should' in question then this is what the account seems to entail.

Angry Alastair: Alastair sees you walking across campus and becomes even angrier. He really wants to tear your arms off. If he doesn't do that, he will slap you in the face. Although the urge to tear your arms off is extremely strong, he manages to resist the temptation and instead merely slaps you in the face.

(Boonin, 2014, p. 62).

Proponents of what is called the moralised-comparative account tell us that Alastair has harmed you. This is because what Alastair should do, morally speaking, is to not slap you. Given that, we can say that the moralised comparative account says that:

[Moralised-Comparative Account of Harm:] If A's act harms B then A's act makes B worse off than B should have been.

(Boonin, 2014, p. 61).

Now that we have an alternative comparative harm-based principle we can revise P1 and P2 in line with the moralised-comparative account of harm by replacing the counterfactual/temporal comparative baseline with a moralised one. When we do this, we get the following argument with the substitution denoted by MCA:

P1^{MCA}: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette *worse-off than she should have been*.

P2^{MCA}: If A's act harms B, then A's act makes B worse-off than B should have been.

C1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm Mariette.⁶⁰

As you can see, when we substitute our comparative baseline for a moralised one then this moralised-comparative account of harming does not show that Mary's act harms Mariette. In Angry Alistair, what is so harmful about Alistair's act is that you had a reasonable expectation that you would cross campus unimpeded at T.⁶¹ Normatively

⁶⁰ This is an adapted version of the argument from Boonin (2014) already presented.

⁶¹ Someone might say 'I don't think this expectation is necessary for the case to be one involving harm. Suppose, for example, that I expect to be slapped because I'm used to being bullied. It's still a harm, surely.' We could say that everyone has a reasonable expectation that people will follow some moral code, and that involves necessarily not slapping others and so I have a standing expectation that I will not be slapped.

speaking you have come to expect some degree of non-interference. Unfortunately, with respect to how your welfare should have been at T your welfare was reduced at that time T due to Alistair's act. We can easily imagine that same journey without that act reducing your welfare, and if everyone were acting morally then you could expect your welfare to be unimpeded during that journey. Morally speaking, doing neither is what Alistair should do if they were acting morally even if taking that option is unavailable to him.⁶²

Here is another example to consider. Imagine, that on the day of your viva exam you have minimal anxiety about it – in fact, you're rather excited! After all, you have spent years writing your thesis, and having read it several times over the weekend you are certain you can answer any questions about it. However, just before you enter your exam your colleague plays a cruel practical joke. They tell you that your external examiner was in a very bad mood this morning. This substantially raises your anxiety levels. So much so, that your anxiety is much worse than it should have been. They say that either they were going to tell you that the external examiner was in a very bad mood this morning, or that your viva had been cancelled and you could go home. They argued that since they did not do the worse of those options then in fact it was better for you that they did what they did in fact do. But on the moralised-comparative account of harm what your colleague has done harms you because, morally speaking, they should not play practical jokes of this kind; and in doing so your colleague's act has made you worse off than you should have been during your viva exam.

The argument above, even with the substitution of comparative baseline, shows that the same thought does not transfer to not-postponing conception. If Mary postpones conception then that alternative is not better or worse for Mariette. In fact, by conceiving now, Mariette is exactly how she *should* have been⁶³. As such, proponents of such a view cannot conclude that Mary's act harms Mariette by appealing to a moralized comparative account of harm.

The challenge for the moralised-comparative account is that it cannot show that the harm is morally wrong in not-postponing conception. This is because, if ought implies can then – with respect to Mariette's welfare – Mary only ought to do what she can do. If Mary

⁶² This thought also means that there is room to deny the claim that this act is morally wrong – this is because if what we ought to do is only what we can do, then if Alistair could not have done otherwise, some might think that act is (although harmful) not morally wrong.

⁶³ Someone might say that, 'I'm not sure if that's right. We might think it regrettable that she is in that state, and so think that she shouldn't be in that state. But that's different from thinking that she's worse off than she should have been.' But then it would not be a comparative account based on how Mariette fares in one state over another. That account would be something like a non-comparative account of harm – I will discuss this type of account later in this Chapter.

ought to conceive later then Mariette does not exist. If Mary ought to conceive later then it cannot be for reasons to do with how Mariette should be because she does not exist in the alternative. If there is harm – which there is not on this version of the account but let us suppose that there is – then an argument against that harm being morally relevant is to say that it is only the harm of an unavoidable tragedy akin to the type of tragedy discussed by Klocksien (2012) without any person-affecting moral wrong.

There are some elements of this proposal that are absorbed by the non-comparative account that I assess later. Briefly, this non-comparative account takes harm to be when one is in a ‘bad state’ where bad states are ‘those that are worse in some way than the normal healthy state for a member of one’s species’ (Harman, 2009, p. 139). There is a sense in which this non-comparative account takes how one should be against some normal/average measure of human functioning to determine whether one is in a ‘bad state’ or not. I don’t want to suggest here that Harman means a ‘moral’ should but it shows that there may be some scope for adopting moral norms into the language of Harman’s non-comparative proposal in such a way that resolves the problems I have just outlined for the moralised-comparative account of harm. Such a proposed moralised-non-comparative account would evaluate whether an act is harmful or not on the basis of whether some moral norm is violated, and not by comparing states of affairs for the particular individual. This version of the proposal would not run into the problem that the comparative version of the account runs into because it does not seek out an alternative state for Mariette in which a moral norm is adhered to that is not adhered to in the state she finds herself in in this world. The result of this is that Mariette cannot locate such a state to compare to given that she does not exist in the alternative – but this problem does not occur if we only ask whether a norm that already exists in this world would be violated by bringing that entity into existence.

The more general point is that comparative harm-based solutions to the non-identity problem fail because there is no comparison that we can make for Mariette when conception is postponed. What is more important is that we cannot explain the harm of the act of conception in person-affecting terms by appeal to comparative accounts of harm – and I have said that any solution to the non-identity problem ought to be person-affecting.

There are those who believe there is a counterfactual and comparative claim of harm that can be made in non-identity cases where there is a mistake that is made about the relevant probability of a person’s being brought into the conditions of their existence that at first seems unavoidable but it is not. This proposal is found in Roberts (1998; 2009; 2019) and Roberts and Wasserman (2017).

The proposal that follows is one that I have adapted from Roberts (2019) where it is argued that there are cases where someone could have done otherwise and still produce that

same individual – and this would mean that we could evaluate how alternatives could be better or worse for that individual. I'll aim to capture the main thrust of the argument and connect it back to our not-postponing conception case shortly after. Consider the following case from Gregory Kavka which is used to illustrate the point:

In a society in which slavery is legal, a couple that is planning to have no children is offered \$50,000 by a slaveholder to produce a child to be a slave to him. They want the money to buy a yacht. Should they sign the agreement, accept the money, and produce the child?

(Kavka, 1982, p.100).

The couple in this case conclude that by conceiving this child now, then they would not harm that child, since that child would not exist but for the offer. Call this child 'S'. Let us call some alternative child who they could instead conceive later child 'T'. The claim is that, 'If S existed and T had not obtained, then S would be better off with respect to that condition' – that is, S would have been better off with respect to that condition in a counterfactual-comparative sense. But how can this be? The broader argument highlights the probability of that child S's coming into existence even if they do not accept the offer. The claim is that it is open to that couple to not accept that offer and conceive anyway – and in doing so it is possible that child S still comes into existence. Proponents of this type of argument conclude from this that there is a state for S that is better for them and because there is a state that is better for them then we can say that by conceiving now because they have agreed to hand the child over to the billionaire is worse for S than the alternative. Therefore S has been harmed. One might argue that the probability of this alternative obtaining is so low as to disregard it – Greene (2016) argues that while such accounts show that the act is worse they do not show that the act under scrutiny is not wrong because the probability of such an alternative obtaining for S is so low. However the probability of this alternative obtaining is just as low as the probability of S's existence at the moment prior to her actual conception given the precariousness of existence.

There is another more fundamental challenge to the relevance of the Slave Child case to the non-identity argument that Parfit presented. Parfit stipulates that it must be in fact true and not just necessarily true that there is no alternative in which that same person could come into existence. In the case of Mariette, even if her conception was postponed by a few hours then this would likely have had an impact on whether she would have come into existence. However, it is not in fact true that she would not have come into existence since the conditions for her origins still remain if the same sperm is still able to fertilize the same egg. This is why we have stipulated that in not-postponing conception there is a three month gap

between Mary conceiving now and conceiving later. But even if the choice was between Mary conceiving now and Mary conceiving in two days' time – it would still be the case that, probability permitting, if the same sperm fused with the same egg then Mariette would still have the same health problems that she has if Mary conceives now. There is no scenario for Mariette in which she does not have that serious health problem and so it is in fact true that she cannot exist without it no matter when she is conceived.

The same is not true in the Slave Child case. If we were to ask what would have in fact made it the case that the slave child did not come into existence then we could not say that this was the contract that the parents agreed to. If it is a necessary feature of their existence then it is no more necessary than any of the conditions that lead up to their eventual creation as a particular sperm fused with a particular egg. Irrespective of probability – this means that such accounts can appeal to counterfactual-comparative accounts of harm to ground the claim that the slave child is harmed in this case.

This type of account cannot apply to cases like not-postponing conception. The reason why is because while this account highlights that an option that was physically and metaphysically accessible to the couple was simply not taken, it is not the case in not-postponing conception that an alternative option is accessible to Mary that could result in Mariette being in a comparative counterfactual state where she does not have some serious health condition. It is in fact true that Mariette could not exist without that serious health problem. The couple can easily choose to conceive independently of the offer from the billionaire. That is to say that an alternative state for S is accessible to them in a way that an alternative state for Mariette is not – that is even if it is unlikely. But there are other cases that seem similar to not postponing conception that we can exclude from our discussion because they fall into this same category. Kavka notes that it would be 'enormously improbable' that the couple could try to replicate the conditions of the choice without agreeing to the slaveholders offer and still produce the same child. While it is 'enormously improbable' there is still a possibility of it occurring. However, as I have said above Kavka also notes that there are more plausible examples – he suggests that these more plausible examples might involve:

...couples producing (surrogate mothers carrying), for money, children for adoptive (genetic) parents that would seriously mistreat it, or would have to raise it in such poverty-stricken circumstances that its life would barely be worth living

(Kavka, 1982, p.100).

But these cases are no more puzzling than the slave child case in my view – which is to say not puzzling at all. It seems to me that there are alternate possibilities for children in these kinds of cases. Regardless of the decision that such a surrogate makes, the child that does in fact come into being has the fertility clinic diary manager to thank just as much as the surrogate's decision to agree to carry the child. However, as I have already said I believe that cases like the Slave Child can be solved by appealing to comparative accounts of harm because there is the possibility that that child could have come about in the alternative (even though that chance is slim). But note that, as will become clear in Section 3.3 I believe that Kavka is asking a very specific question, that is whether the act of choosing to bring an entity into being now is wrong and this is only relevant in my view if we are to understand the act of conception as *the act of choosing to bring an entity into being* – an act that I will explain in detail in Section 3.3.1

As will become clear, my view is that moral concepts such as harm only apply to entities that exist now at the time of the act. This would mean that, in the case of the Surrogate, there is a sense in which that entity is harmed by the act of conception but only if we are clear about what that act of conception is. Such an act can only come as a comparative harm to the entity that is brought into being only if the entity is already created.

This may sound a little strange, but when two prospective parents create an embryo for implantation there is a sense in which there is an 'entity' that exists. Many people believe there is nothing wrong with creating embryos for implantation later, but the fact that that embryo is implanted in this particular surrogate would come as a harm to it. There is reason to think that if that embryo were instead implanted in a kinder surrogate then that embryo would fare better into the future. I will explain this thought in more detail in Section 3.3.2 and Section 3.3.3 when the time comes to explore acts of conception and how our understanding of the act has an impact on the plausibility of person-affecting proposals.

To sum up this section, while initially I rejected comparative harm-based accounts because they could not ground the harm to Mariette I went on to suggest that there may be a way for some comparative accounts to explain the harm that comes to some entities in some non-identity cases. However, while this may be the case these are not the kind of non-identity cases that we care about in this thesis. The kind of cases that I care about in this thesis are those where it is in fact true that there is no other state or condition that that entity could be in if conception occurs at some other time and this ought to also be true even if they exist at that alternative time also. In any case, what matters for us is that we cannot ground a comparative claim of harm in not-postponing conception because Mariette does not exist in the alternative, and because of this there is no state on which we can make a comparison for her no matter what that comparison is. Let us now move on to evaluate an alternative harm-

based solution – a non-comparative harm-based solution - along with its most challenging objection.

3.2 Non-Comparative Harm-Based Solutions

The account of harm that I discuss in this section is the non-comparative account of harm that is presented by Elizabeth Harman (2004; 2009).⁶⁴ Harman presents a sufficient account of harm that she argues can explain why Mary's act of conception harms Mariette. As such, you can assume that when I discuss it I mean it only as a sufficient condition. The comparative accounts of harm that I discussed in the previous section are intended only to be necessary accounts of harm and so Harman's non-comparative account of harm is not incompatible with it. However, while there are others who have proposed similarly important non-comparative accounts, I do not consider them in detail in this thesis⁶⁵. I believe that Harman's non-comparative account is enough to show that Mariette is harmed and while the account has its objections, I believe that I provide a satisfactory response to its most salient one as well as providing responses to others.

Harman evaluates the morality of an act on the basis of whether that act leaves a person in some non-comparatively *bad state*. According to Harman, bad states are:

those where a person is left in pain, mental or physical discomfort, disease, deformity, disability or death

(Harman, 2004, p. 93).

When Harman talks of harm then, she means to say that one is harmed when they are caused to be, '... in-a certain sort of non-comparatively bad state. It is to come to be in (or is simply to be in) a state in which one fares, not worse than one fared, or would have fared, in some alternative state of affairs, but simply badly (Hanser, 2008, p. 422).'⁶⁶ One reading of the account assumes a comparative element. Hanser, along with Gardner (2015), note that

⁶⁴ Seana Shriffrin (1999) argues that a non-comparative account of harm can provide us with a 'complete' account of harm. Shriffrin's account provides a necessary and sufficient condition for harming based on the idea of 'preventative' and 'pure' benefits. On Shriffrin's account, the delivery of a pure benefit – such as existence - cannot negate the harm caused in delivering that benefit. So, the benefit of existence cannot, on Shriffrin's view, be used to negate the harm caused by that action – namely, the non-comparative state that results from one's conception. However, Boonin (2014) argues that if this were plausible then it would mean that all existence comes to us as a harm. This is because any harm could then count in favour of my conception coming to me as a harm – or so he argues.

⁶⁵ See also, Carter (2002), DeCamp (2012), Dillard (2007), Harstein (2009), and Meyer (2004).

⁶⁶ One reading of the account assumes a comparative element. Hanser (2008), along with Gardner (2015) note that causing someone to be in a bad state, or describing harm as one's coming to be in a non-comparative bad state assumes that there is a state for them from which they came. But this can be easily avoided by noting that when we talk about non-comparative harm what we mean to say is that a harm causes what is a bad state of affairs for the person.

causing someone to be in a bad state, or describing harm as ones *coming to be* in a non-comparative bad state assumes that there is a state for them from which they came. But this can be easily avoided by noting that when we talk about non-comparative harm what we mean to say is that a harm is simply *to be in a bad state*.

While it may seem like the account is strictly non-comparative, it is not. Hanser notes that the account is misnamed in this respect, and argues that a proponent of the account need not rule out making comparisons. He says that the account only intends to distance itself from counterfactual comparative and temporal comparative accounts of harm (Hanser, 2008; p. 426). Hanser uses a case of blindness to explain the thought. The example is intended to show that there is some sense in which there is a comparison being made – and that it is up to Harman to explain the nature of this comparison without collapsing back into a comparative account. He explains that what Harman intends is that the account is to be understood as non-comparative in the sense that a bad state is a state that we can be in which is not the ‘proper state for a human’.

It is arguable that when we judge states of impaired functioning to be bad, we are really comparing them unfavourably to states of proper functioning. For example, to say that blindness is bad for a human is really to say that being blind is worse for a human than being able to see, the latter being the state proper for a human

(Hanser, 2008; p. 426).

Following from Hanser above, Harman does explicitly offer an account of a bad state that aims to clarify in what sense the account is comparing bad states and yet doing so in a non-comparative way. She says that, ‘bad states are those that are worse in some way than the normal healthy state for a member of one’s species (Harman, 2009; p.139).’ However, such an explanation leaves Harman open to several objections. First of all, this explanation of a bad state will identify harm where we would not ordinarily identify it. Imagine, for example, that a doctor acts in such a way that leaves you in a bad state by doing significant damage to your body during an operation to save you. But in Harman’s explanation of a bad state the doctor has harmed you, and this might seem like a very strange thing to conclude about such an event. Harman’s response to such an objection is to say that yes it is true that the account will identify a non-comparative harm in this case, but while this account shows that the doctor harms you non-comparatively – that is, their act causes a bad state for you – they do so permissibly (Harman, 2009).

Returning again to not-postponing conception, one might wonder whether the aforementioned doctor case also provides reason to think that Mary’s act of conception is

permissible given the significant benefit of existence that is bestowed upon her in much the same way that the doctors action – although harmful – is permissible. The objection then, is that surely, one might think, that the benefit of existence outweighs the supposed harm of a bad state? Harman responds to such objections by claiming that,

If an action harms someone who does not independently exist, then the fact that the action also benefits the person harmed, and benefits him more than it harms him, is ineligible to justify the harm if failing to perform the action would similarly benefit someone

(Harman, 2009, p.139).

She goes on to say that,

The fact that an action harms someone provides a strong moral reason against acting: it is a reason that tells in favor [sic] of refraining as opposed to performing the action. If the action also benefits the harmed person, but performing the action is not the only way to provide such benefits – indeed, refraining from performing the action would provide similar benefits to someone – then considerations of benefit simply do not tell in favour of acting as opposed to refraining from acting. On my view, considerations of benefit are therefore “ineligible” to justify the harm in that they never justify the harm in such cases

(Harman, 2009, pp.139-140).

I am presuming that in this response when Harman says that ‘indeed, refraining from performing the action would provide similar benefit to someone,’ she means to say that a similar benefit could be given to someone else without the harm. Harman’s non-comparative account of harm is an improvement on comparative accounts when applied to cases like not-postponing conception because Mariette does not have to *have some alternative state in which she is not harmed* to ground the claim of harm. Mariette only needs to be in a non-comparatively bad state for it to be harmful. Since the act of conception leaves Mariette with serious health difficulties, and having to endure serious health difficulties is undoubtedly a bad state to be in, Harman claims that Mary’s act of conception harms Mariette.

While that seems to provide an answer for the question of whether the non-comparative account of harm can provide a satisfactory solution to the non-identity problem generated by not-postponing conception there are other objections to consider. Proponents of these objections aim to discredit the non-comparative account by painting it as

incomplete, insofar as it gets the wrong answers in the cases I am about to present. Consider the following case presented by Molly Gardner.

Loss of Fortune. Jeeves was once a world-renowned physicist with extraordinary intellectual abilities. He then had a stroke and suffered brain damage. The brain damage left him with average intellectual abilities

(Gardner, 2015, p. 431).

The objection is that the non-comparative account of harm will not give you the correct answer in this case because, while it is clearly bad to suffer brain damage, on Harman's average for the species account of what it means to be in a bad state it does not count as a harm after all. This is because, while Jeeves is comparatively worse-off, his intelligence is not below the average for his species. But this seems like an implausible conclusion. We cannot explain this kind of harm away by appealing to permissibility as we did in the previous example where – if you remember - a doctor must do serious damage to a person's body in order to save them. One obvious reason that we cannot make the appeal to something like permissibility is, of course, that a stroke is not the kind of thing that can be permissible or impermissible. Harman argues that, in response to cases such as this, she did not intend to say that other accounts of harm cannot explain the harm that has come to Jeeves in this case. Remember that comparative accounts are assumed to be necessary accounts of harm and so while we can explain this case by appealing to a counterfactual and comparative account of harm we need not also appeal to a non-comparative account since it is only intended to a sufficient condition for harming. This means that Harman's non-comparative account of harm can avoid the challenges associated with such cases. The positive upshot of avoiding such a challenging case is that we can continue to apply this non-comparative account of harm to not-postponing conception without worrying about generating implausible conclusions in other cases such as Loss of Fortune. We can still plausibly claim that Mariette has been harmed by Mary's act of conception while not applying it in cases like Loss of Fortune.

Even if we accept the account as a sufficient condition of harm then another objection arises. Proponents of alternative accounts argue that Harman's average health for the species account of what is a bad state will *still* identify harm in cases where we would not ordinarily think that there is any harm at all. They use a case to make this point, and iterations of it are found in, Gardner (2015); Thomson (2010); Hanser (2009); Harman (2009); and Boonin (2014). I will use the case as presented by Gardner (2015).

Dim Vision. Jones has been blind for many years as a result of retinal damage. Recently, Dr. Smith has developed a surgical operation that can repair some but not all of the damage. Dr. Smith operates on Jones and improves his vision from a state of blindness to a state in which Jones can see, but not very well: Jones now has what we will call dim vision

(Gardner, 2015, p.431).

The objection is that Dim Vision shows that when we apply Harman's list of harms – which includes disability and dim vision ought to count as a disability – then it looks like a proponent of the non-comparative account is forced to conclude that the doctor has harmed Jones in Dim Vision. While Jones is comparatively better off than they were previously the doctor has caused the state of dim vision for them and that, on Harman's account of harm, is a harm. However, while Harman does not explicitly respond to such a case I will offer a response.

Here, I will argue that the conclusion generated by proponents of Dim Vision is incorrect. Firstly, the case makes a category mistake. Let me explain. Jones is indeed blind prior to the actions of their doctor. It is also true that after the surgical operation Jones is in a state where he can see, but not very well – indeed, he is not blind (as per the case) but instead has dim vision. The doctor's act means that Jones is in this new state of dim vision – and that state, according to Harman's list of harms, is a harm. However, there is a category mistake that is made which assumes that blindness and dim vision are distinct disabilities. They are not. Blindness is a disability with a severity spectrum. Being blind does not always mean that one has no vision. Jones is not in any other state than the one he was already in. The case as presented suggests that Jones is in a new state because of that act, but he is not. There is no new state for Jones because he is still blind. The severity of that blindness is irrelevant. So, now that this category mistake has been rectified, we can say that the reason why Jones is not harmed on the non-comparative account is because with respect to the disability itself – which is blindness – Jones has not had any change in their state, they are still non-comparatively blind.

Even if we accept that Dim Vision does challenge the non-comparative account of harm as a solution to the non-identity problem in not-postponing conception then perhaps there is reason to set aside these kinds of cases and suggest that the non-comparative account simply does not apply in these cases for a legitimate reason. One reason why this might be the case is to suggest that – as I have done earlier with respect to considering the slave child case and the case of a surrogate carrying a child only to return them to their genetic parents whom will neglect the child – perhaps there is something about these cases which

legitimately removes them from the scope of the non-comparative account in a way that is not ad hoc? Perhaps we could say that bad events – such as being sold into slavery or handed over to genetic parents who will mistreat you – are not relevantly similar to being brought into a bad condition where that bad condition is not independent of one's existence. Which is to say that perhaps bad events come to us as harms that are not non-comparative. This would mean that the examples considered are excluded from our analysis and leaves us only with those that we are primarily concerned about – those acts in which it is in fact true that one could not have existed independently of the act that created an entity in a bad state. The fact that there exist alternate states for those persons suggests that there is something relevantly different to cases like not-postponing conception.

There is one final objection that I will consider. In my introduction, I said that the person-affecting approach I am applying in this thesis is one that demands that moral concepts only apply to those who exist currently at the time of the act. Due to this condition, Harman's non-comparative account of harm still needs to explain the harm that comes to Mariette in narrow person-affecting terms at the time of that act – and it cannot do so. In cases like the one in which a doctor permissibly harms you, you exist at that time. But Mariette does not exist just prior to her own conception. Because of this, the act of conception cannot be said to harm Mariette in the person-affecting terms that I have described previously. To whom is the harm attributable at the time of the act? No one. If the act is harmful to no one, then it cannot provide reasons to refrain from doing it, as Harman suggests that such an act ought to.⁶⁷ Even if that person exists in the future, then the entity that would exist if Mary conceived now does not exist now. We would not be able to apply this non-comparative solution to not-postponing conception because while it is true that an action that harms someone provides a strong moral reason against acting, that is, it is a reason that tells in favour of refraining as opposed to performing the action, it cannot do so on some understandings of the act of conception at that time. Alas, we run into the same challenge that has dogged us since the beginning of this thesis. For the solution to be satisfactory, then it must be a person-affecting one, and as such the solution must show that a person is affected by that act at the time of the act and not at some time later. Finally, I said that it would be better if that person-affecting reason was to do with Mariette and not a *de dicto* description of Mary's obligation which just so happens to capture Mariette as 'her child'. But this

⁶⁷ Remember Harman says that: 'the fact that an action harms someone provides a strong moral reason against acting: it is a reason that tells in favor of refraining as opposed to performing the action (Harman, pp.139-140).'

account cannot seem to do this in such a way that provides a reason to refrain from acting at the time of the act.

Having explained the challenges for both comparative and non-comparative accounts of harm,⁶⁸ we are left without a harm-based proposal that can show us that Mariette is harmed by Mary's act of conception in not-postponing conception. As such, we cannot use these accounts of harm to provide a person-affecting solution to the non-identity problem in not-postponing conception. But the strength of this challenge depends on an ambiguous understanding of the act of conception and the assumption that there is no entity that exists at the time of the act of conception to whom we can apply concepts like harm.

In what follows, I will show that there is a way to resolve this challenge so that Mariette can claim to be harmed by that act at that time – which allows us to avoid this challenge. I have presented three ways that we can understand the act of conception. When we apply harm-based principles to each act I will show that there is an understanding of the act of conception that allows us to explain the harm of that act. Ultimately, I show that the non-comparative account of harm provides a plausible sufficient condition for harm that shows us how Mariette is harmed in a person-affecting sense at the time of that act.

3.3 Understanding Acts of Conception

Proponents of the non-identity problem argue that there is no comparative account of harm that explains how Mariette is harmed by Mary's act of conception. That act is not comparatively worse for Mariette, she simply does not exist in the alternative; and given that the act of conception is not worse for Mariette then the condition for harm is not met in any version of P2 that we have considered (be it counterfactual, temporal or moralised versions of the comparative baseline). With respect to non-comparative accounts, like the one I presented from Elizabeth Harman, we cannot show that Mariette is harmed by that act

⁶⁸ The other main source of harm-based solutions to the non-identity problem is a hybrid of both the comparative and non-comparative solution. This is often called the event-based account of harming and it comes from Matthew Hanser (2008) (2009) (2011). The easiest way to explain the account is by comparing it to the counterfactual and comparative account of harm. The counterfactual and comparative account is state based, it is state based in the sense that there is something about the truth or falsity of a proposition that brings about a state that is bad comparatively speaking between two states of affairs where in one some proposition has obtained and in the other it has not. The event-based account is comparative in different sense, it considers a comparison between how some events are bad for you with respect to the acquisition or loss of some basic good. Basic goods are, according to Hanser, the kind of things that are good to have. The ability to see is good to have, to hear, to taste, to smell, for example are examples of basic goods. It is good to be able to walk, to talk, to think, to read. It is good too, to have thumbs, limbs, and depth perception. Basic goods are not states, so the comparison is not between having some 'good' in W1 in comparison to W2. Basic goods are simply good things to have – they are 'those the possession of which makes possible the achievement of a wide variety of the potential components of a reasonable happy life' (Hanser, 2009). But how we are harmed according to Hanser has to do with two ways in which these goods are affected by our actions and the actions of others.

because if it is a condition of harming that she exists at the time of that act (and we are assuming that it is) then given that she does not exist at the time of the act she cannot be harmed by that act. Subsequently, proponents of both comparative and non-comparative accounts of harm cannot explain the moral wrong of Mary's act of conception in terms of the supposed harm that comes to Mariette – that is, they cannot explain that supposed harm in person-affecting terms. Due to this, those proponents cannot claim Mary's act of conception is harmful in a way that is satisfactory (satisfactory, in the sense that I have said a solution ought to be person-affecting). Now that I have presented several ways that the harm based proposal could be developed I will now argue that of these proposals only the non-comparative harm-based proposal is plausible in not-postponing conception.

To argue for this claim, I will first show that in cases like not-postponing conception there is an ambiguity in how we understand an act of conception. In what follows I will argue that there are three ways to understand an act of conception. I will show that non-identity literature is not clear on which understanding of the act of conception is intended but I assume that the intended understanding is what I will call the biological act of conception. The result of this ambiguity is that when interlocutors engage with the non-identity problem there is an underlying understanding of the act of conception that is assumed in many cases and the result of this is that person-affecting proposals do not apply to some of these understandings. The challenge that this presents those who wish to argue for person-affecting proposals in this context is that without having clearly articulated which understanding of the act of conception is under scrutiny then there are many person-affecting proposals which are assumed to be implausible because many (but not all) understandings of the act of conception assume that there is no entity to whom we can apply person-affecting moral principles to at the time of the act. Indeed, the understanding that many moral philosophers assume is one that assumes there is no entity at the time of the act of conception to whom we can apply a person-affecting moral proposal. I believe that not only is it wrong to assume there is only one act that we can plausibly say is under scrutiny in a case like not-postponing conception, but also that they are wrong to assume that that assumed understanding is the most morally relevant act. When we understand that my proposed alternative act of conception – which I will use to assess person-affecting proposals to the non-identity problem in not-postponing conception non-identity cases - is the most morally relevant then we can apply person-affecting proposals in a way that solves the non-identity problem not only in not-postponing conception, but in many other challenging bioethical cases.

With respect to the harm-based views considered in this Chapter, the non-comparative account of harm is more plausible depending on which understanding of the act

of conception one intends to use. In Chapter 1, I said that I would develop three understandings of the act of conception. Remember that these were:

- (i) the act of choosing to bring an entity into being;
- (ii) the biological act, or;
- (iii) the act of 'bringing' an entity into being.

It is not just that these understandings of the act of conception can show us how a non-comparative account of harming can ground the harm of Mary's act in terms of Mariette, I will also show that – having argued that each of these acts are plausible ways that we can come to understand an act of conception – the intended understanding of the act of conception in non-identity literature, what I call the biological act, is not the most morally relevant.

Cases like not-postponing conception involve the timing of conception as an important feature of the act that determines the condition of those who will come into existence. Conception is an identity determining act, yet the intended understanding is not clear in many discussions on the non-identity problem. In what follows, I will explain three ways of understanding the act of conception and highlight the impact that each understanding has on prospective solutions to the non-identity problem. How can we understand an act of conception is a different question to how should we understand an act of conception. I'll consider the former first and then the latter. Some philosophers have come close to pointing out that our understanding of the act is ambiguous. However, none have done this explicitly. As a remedy to this ambiguity, I will now motivate three ways that we can understand an act of conception.

3.3.1 The Act of Choosing to Bring an Entity into Being

The closest reference to this ambiguity that I have found is in David Wasserman (2009). He argues that the morality of the act of conception may rely on whether such parents intend to create a certain kind of individual. His claim then, is that procreative *intentions* seem to have a bearing on the morality of the act of conception. He says that in garden variety cases of bringing children into the world, parents do not choose the qualities of those children. Due to this, Wasserman claims that those parents have some protection from moral scrutiny if their child is born with a serious health difficulty. How can those parents be responsible for bringing a child into existence with a serious health difficulty? Surely not, he argues and says that:

While the desire to create a person with such a trait or in such a condition may sometimes reflect a morally deformed conception of the good, those

who owe their worthwhile existence to that desire will have no special standing to complain.

(Wasserman, 2009, p. 281)

However, what Wasserman does not do, is consider whether choosing seemingly negative traits, or choosing seemingly ‘bad’ conditions in that child would be reason for that child to complain even if they owe their existence to that desire or intention. Doing so would be an important feature of grounding a claim of harm and/or wrongness about that act. Importantly though it would not be a person-affecting wrong.

In the person-affecting sense such an intention could not be bad for that child that comes into existence – this is due to the fact that that child did not exist at the time of the intention. However, at this point Wasserman has highlighted something that I aim to develop further – what we are now considering is not whether an ‘act of conception’ is morally wrong, but a more specific act: the act of choosing to bring a child into existence with certain seemingly negative traits. There are other examples where the act under scrutiny is ambiguous and I’ll explain those examples in what follows. I do this to support my argument that this is just one way that we describe the act of conception in non-identity literature. However, as will become clear, I do not believe that it is the most relevant understanding for determining whether Mariette is harmed or wronged (as will be discussed in Chapter 4). Consider the following for example from Doran Smolkin (1994) where he says that:

People have the power to affect who will come into being in the future.
Sometimes this power is exercised intentionally, but mostly it is done unintentionally

(Smolkin, 1994, p. 315).

Once again, it is highlighted that intentions play an important role in determining whether the act of conception is morally wrong. All Smolkin is saying here is that it is sometimes within our power to direct our actions toward some outcome, but in many cases (such as in cases of bringing people into existence without assisted reproductive technology such as in vitro fertilization for example) it is not something that we intentionally exercise power over. Without intending to create some outcome then it would not be wrong to produce such a child such as Mariette if Mary did not intend that she have serious health difficulties. However, while it may not be Mary’s intention to bring a child into being with serious health difficulties she can still foresee that if she chooses to bring a child into being now then that child will – foreseeably – have serious health difficulties. This matters for moralising about not-postponing conception because moralising about the act of choosing

to bring an entity into being does not have very much to do with the child that is in fact brought into existence later if we are to care about what prospective parents intend or can foresee occurring.

The reason I point out this understanding of what is under scrutiny is because first of all, there are cases where what we intend to do or choose to do in the context of some foreseeable circumstances or risk is morally assessable as an act in itself even if the intention or supposed foreseeable outcome does not come to fruition. This is to say that the act of choosing to bring that entity into being is one that we can moralise about that even if that act does not yet occur. I am noting an example of this here because I want to show that when we consider the morality of the act of choosing to bring an entity into being we can do so without referring to any actual person that comes about because of that act and to then show how some philosophers have tried to explain the morality of that act. Incest cases come to mind. Imagine the following:

Close relatives Johnny and Silvia choose to bring an entity into being despite knowing the risk associated with such a pregnancy and the potentially negative impact on the health of the child that is ultimately brought into being. Yet while their intention was never to bring a child into existence with serious health difficulty it is nonetheless a foreseeable possibility. Imagine then that they never bring such a child into existence – because Johnny was, unfortunately, involved in a very serious road traffic accident and died later in hospital.

The point that I am trying to make here, is that it is morally salient that despite foreseeable (and presumed negative) consequences to the child that would come about because of their intended act never actually coming to fruition their intentions say something about their character. In fact there are proposed ways to moralised about such cases. Arguing that this case says something negative about the virtuous nature of the characters is one way to respond to such a case. I make this point, because pointing to intentions or desires of prospective parents to choose the attributes of their future children cannot explain why holding that intention wrongs someone like Mariette or any other future child that a prospective parent who foresees that their act will have a seemingly negative impact on their future child is wrong.⁶⁹ Person-affecting moral principles cannot apply when the act of

⁶⁹ See Urbanek (2010) for a virtue-based proposal that responds to the non-identity problem in cases like not-postponing conception by arguing that our P5 is false. They argue that it is false because Mary acts in a way that is not virtuous even if the act itself does not make things worse for or wrong anyone.

conception – that is, the act under scrutiny in this case – is instead understood as the act of choosing to bring an entity into being. If moral principles only apply to those who exist, then we cannot reason that such an act is morally wrong because it is difficult to ground the harm or wrongness of an intention that a person holds in terms of someone else. Consider the following case:

Defective gametes: Imagine that a prospective parent intends to conceive a child and must choose between two gamete donors. They had intended to seek out partners that have defective gametes and are delighted to see that one of the donors' gametes are defective in such a way that choosing that donor would produce a child with serious health difficulties. Knowing that that donor has defective gametes that will result in producing a child with serious health difficulties they go ahead and conceive that child instead of conceiving an alternative child – Brian – with the non-defective gametes. The child that is ultimately brought into being – Ben – is born with serious health difficulties.⁷⁰

When we consider the non-identity problem it is difficult to determine whether the act is morally wrong on any person-affecting proposal. That is despite the belief it might have raised that it would be morally wrong to choose such a donor. It seems wrong because Ben, who exists now with a serious health difficulty, has been wronged in some way. Yet, once again, it seems like there is nothing wrong with doing this.

It seems like the act of choosing to bring an entity into being when certain negative traits are foreseeable (or that they intend to bring about those seemingly negative outcomes) plays a significant role in our determination of whether something morally wrong has occurred. It is a common belief that prospective parents who refuse genetic testing despite a belief that they could be at high risk of bringing a child with significant health problems into existence would do something morally wrong by refusing it.

There is a sense in which this act of choosing to bring an entity into being regardless of the outcome (as per the incest case) could be wrong not because of the welfare of the resulting child but that it suggests recklessness or disregard for foreseeable risk by the prospective parents. Yet this position would stimulate the same kind of moral wrong as previous cases even if they went on to have a perfectly healthy child. Such an act would not be morally wrong for any person-affecting reason. Thus, understanding an act of conception

⁷⁰ See, Glover (2007, p. 438) for intuitions about this type of case.

in this way positions the act under scrutiny as a denial of P5 of our non-identity problem in Chapter 1. This is reason to believe that intentions and/or our actions in the presence of foreseeable circumstances can play an important role in the morality of an act of conception – but only if the wrongness of that act of conception is explainable in terms of the person who chooses to bring an entity into being despite the foreseeable consequences and despite the actual outcome. But the question of whether a prospective parents' intentions are good or bad, virtuous or not, is an entirely separate question to the one that I believe we ought to be focusing on.

One might think that I have only considered intentions and actions that occur while some person who could exist in the future is just a twinkle in the eye of a prospective parent or just a thought. But the understanding of the act that is under scrutiny here as I have described it does not need to be located to a particular time. Whether there is a person-affecting reason to say that the act of conception harmed or wronged Mariette is independent of Mary's intentions or actions despite foreseeable consequences no matter when we evaluate that act of choosing to bring an entity into being. Yet, what we aim to do is to show that an act of choosing to bring an entity into being is harmful or wrong at the time of that act and so the point that I want to make here is that the non-identity problem is often discussed in the context of the time of the act when that resultant child is a twinkle in their prospective parents' eye. When that is the case then there is no entity to whom we can apply person-affecting proposals to. For that reason, we cannot explain the moral wrong of the act of choosing to bring an entity into being in terms of the child that is ultimately brought into being. Anyone who claims that the act of choosing to bring an entity into being is harmful or wrong for person-affecting reasons can simply say that there is no existent entity at that time for whom that act is harmful or wrong at that time and we cannot apply those concepts to the entity in question – in our case this is Mariette. However, while the non-identity problem is often explained in terms of an act of choosing to bring an entity into being I believe that there is a more relevant understanding of the act of conception.

Given all that I have said above, there is reason to believe that acts of conception are ambiguous in many presentations of the non-identity problem. What I have highlighted is that there is a way to understand the act of conception as one that is to do with the intentions of parents and whether their choosing to bring an entity into being now will have a negative impact on the child that is ultimately brought into being and whether that choice itself is the appropriate subject of moral scrutiny.

The discussions in Wassermann seem to suggest that without such an intention we cannot claim that such an act of conception is morally wrong. But this misses an important

consideration – that this only accounts for the act of choosing to bring an entity into being now, and furthermore, it only accounts for a moral wrong in terms of someone other than someone like Mariette – and we want to be able to explain the moral wrong in terms of Mariette.

This leads me to an important claim: if the non-identity problem is explained as the challenge of determining whether the act of choosing to bring an entity into being now is morally wrong then such an act would not be morally wrong on any person-affecting approach because there would be no entity at that time to apply those moral principles to so as to determine whether that act is morally wrong at that time. Understanding the act of conception in this way has a significant impact on how we come to a solution on the non-identity problem that is satisfactory for our original belief about the case. It is not just that if we can understand the act of conception in an alternative way then we could explain the moral wrong of the act of conception, it is that regardless of any solution, the act of intending to bring an entity into being now is not itself enough to ground a moral claim that Mariette herself could appeal to so as to ground the wrong done to ‘her’. Specifically – pre-existence intentions seem to exclude Mariette from being the claimant of that moral wrong at that time. It is up to a proponent of some solution to the non-identity problem to explain why that serious health difficulty poses a harm or wrong to Mariette now at the time of that intention. This may seem far-fetched. However, even a consequentialist who determines whether an action is right or wrong on the basis of that action’s outcome must admit that it is plausible to moralise about the actual planning that Mary takes because that act of planning brings about a person who is seriously defective when, for example, it is the actual act taken.⁷¹

The task here has been to show that there is reason to think that how we understand the act of conception in non-identity cases is ambiguous and to assert that intentions can play a role in our moralising about non-identity cases but it is not the kind of role that will help us to solve the non-identity problem in person-affecting terms. If the act refers to the act of bringing together sperm and egg, then that act can still be morally wrong regardless of the intended outcome and so there is divergence about what act of conception we understand as being under scrutiny.

⁷¹ One might argue that we still cannot moralise about such a case because at the time of planning that entity does not exist now even though we know they will in fact exist in the future. But this is a problem for thinking about what principles we can use to show that this act is morally wrong—perhaps there are some consequentialist principles that can show this, but impersonal consequentialist principles are not my concern as I have said in the previous section.

3.3.2 *The Biological Act of Conception*

What does it mean to understand the act of conception as *the biological act*? Here, I mean the biological process of bringing together sperm and egg, that is, the physical components necessary to bring an entity into being.⁷² Initially, I say ‘biological process’ instead of ‘biological act’ because to refer to a ‘biological act’ of conception makes it seem like what I am talking about is, in essence, sex. But that is not the case. I am not talking about sex and do not equate the biological act necessarily to sex. What I mean is *any* process that brings sperm and egg together.

The consequences of limiting our understanding of the act of conception only to sex is that it excludes many other means by which prospective parents come to bring a child into existence. As such, the biological act as I understand it here does not exclude appealing to assisted reproductive technology such as in vitro fertilization. Understanding the ambiguity of an act of conception requires a clear understanding of the biological processes involved. Once these processes are understood, then when I present cases later along with their proposed moral conclusions, it is easy to see that there are differences in moral conclusion between cases that are analogous. I then use this to argue that what we care about in bioethical cases like not-postponing conception and others is not conception broadly or ambiguously understood but when we consider each biological process as an act in itself (which I believe that we ought to) then it’s clear that what we care about is not the biological act of conception as I will describe it here. Morally speaking what is relevant in bioethical cases is the act of bringing that entity into being.

Locution is important in diagnosing the ambiguity I have described. Imagine a case where two prospective parents choose not to undergo genetic testing despite it being likely that they will produce a child that has significant health problems. The non-identity problem certainly applies in this case. If the child that is brought into existence has significant health problems – though still with life is worth living - that child could say that they owe their existence to their parents refusal to get those tests. It is hard to see how the parents action was worse for that child, since presumably had they taken the tests they might have opted to choose in vitro fertilization wherein they could screen embryos for significant health

⁷² Of course, sometimes entities reproduce asexually – such as some plants and bacteria – however, even if human beings could reproduce asexually (and there is no reason to think they could not) I would still presume that some components need to be brought together even if only one person is providing them. For example, it is possible to transform stem cells – cells which are not defined and can be transformed into many kinds of other cells – into sperm cells. One could imagine a scenario where a human being could reproduce asexually with future (and even some present) technology – though I limit the discussion to sexual reproduction rather than asexual reproduction.

difficulties prior to implantation. In any case, what is necessary for the point to be made is that it is necessary for that child's existence that their parents choose not to undergo testing.

In the previous description of what is the morally relevant act of conception, I said that intentions and certain actions may be morally wrong in spite of what actually occurs. However, this is not what is of concern here. In a discussion of this case Boonin (2014) runs the two thoughts together. He says that, 'Couples are often urged to undergo genetic screening before they attempt to conceive' (Boonin, 2014 p. 15) and if they do not, and then produce a child that has significant health problems but also have a life worth living then the non-identity problem thwarts a 'common belief that it would be wrong for them not to undergo such screening' (Boonin, 2014 p. 15). He goes on to say that 'If failing to undergo genetic screening leads the couple to conceive a child with such a defect, after all, their failure will not have made the child worse off because if they had instead undergone the screening and acted on it, that child would not have existed in the first place' (Boonin, 2014 p. 15). One thought running through this case is about whether the act of refusing to take a genetic screening test is morally wrong if one is intending to conceive a child foreseeing that any child that comes about will have significant health problems and a life worth living. But given what I have said previously, this is in my view different to assessing whether their 'attempt to conceive' that child is morally wrong. I am sceptical about any connections that are made from the refusal of a genetic screening to their child's later existence where the morality of refusing a genetic screening process determines whether that child is wronged because of it and yet must be thankful for it. Presumably they ought to be thankful for it because it is necessarily true that the child now exists but for their parents refusing to take such a screening. Accepting this would suggest that there is an obligation to undergo genetic testing either generally, or only if you intend to bring a child into being. It cannot be the case that refusing a genetic test is by itself morally wrong. It must be morally wrong only if one also intends to bring a child into existence where there is a foreseeable risk to that child. The challenge is that the risk to that child is not explainable in person affecting terms at the time they refuse the test. The correct way to evaluate the couples decision is by evaluating their pre-conception intentions as per the previous understanding of the act of conception. We cannot do this by appealing to the person-affecting impact on the child that ultimately comes about. It is difficult to see how we can explain the risk to that child by appealing to person-affecting proposals when we evaluate whether conceiving that child is morally wrong. We have already said that what is relevant for us to determine the supposed harm to the child is to assess whether a suitable person-affecting proposal explains how the act of conceiving that child harms them in the absence of a pre-conception genetic test. What we really ought

to care about is not whether the parents go ahead and take a genetic test or not, but whether their act of conception harms the child for person-affecting reasons.

How we understand an ‘attempt to conceive’ is ambiguous. This ambiguity makes it difficult to say whether that act of conception harms the person in question at that time because it is not clear whether they exist or not when the act takes place. I have said that an objection to many person-affecting proposals is that there is no entity at the time of that act and so there is no entity to whom we can apply person-affecting proposals.

Let’s assume for a moment that an attempt to conceive is pointing to sex. It may be the case that when people discuss non-identity cases such as not-postponing conception they believe that the harm comes to the entity when our couple have sex with the intention of creating a child foreseeably knowing that they will have serious health problems. But this cannot be the act that is under scrutiny for the same reason that refusing a genetic screen is. It is not sex at a particular time that determines who will come into existence, it is the fusion that takes place between a sperm cell and an egg cell – and this does not occur at the same time as when someone has sex. Sex only leads to that occurring. Genetic screening leads to that child’s conception in the same way that sex leads to their conception so understood – and the pathway from sex to fusion for that entity that ultimately comes about is precarious.

Irrespective of the connection between these acts there is no entity at the point of genetic screening from whom we can determine the act is morally wrong. Neither can we say that sex is wrong because of its impact on the entity that that act of conception understood as sex is supposedly harmful for. While this means that if we understand ‘conception’ as the fusion of sperm and egg then we are only indirectly responsible for one’s conception, it does not mean that there are cases of conception that we are not directly responsible for. What matters here is that even if sex and fusion are run together as the same act, then it seems like what we care about is the creation of an embryo and that it is this that is the harmful act.

I believe that when we discuss the non-identity problem that this is the intended understanding of the biological act that is relevant for describing what is meant by the act of conception. This is because when it comes to precarity of existence the question of one’s existence as an entity is settled at this point.

But there is a reason to believe that while we focus on this aspect of conception in non-identity cases there is broad consensus that seems to ignore the moral relevance of this act when it comes to arguments against human cloning and research on human embryos. In fact, arguments against human cloning create the same kind of ambiguity that I am describing in this section where however we come to understand the claim that it is ‘wrong to attempt to produce’ (Boonin, 2014, p.14) a clone could mean several things. One argument against human cloning runs as follows:

If a human clone is produced, this will cause significant negative consequences for the clone, and the causing of these significant negative consequences renders it morally wrong to attempt to produce the clone for whom the consequences would be negative

(Boonin, 2014, p.14).

Two features of the argument are relevant. The first is the ambiguity surrounding the locution in ‘if a human clone is produced’ and the second is the commitment to the ‘negative consequences’ being described as a commitment to a person-affecting reason why the act is negative. It says it would be morally wrong to ‘...attempt to produce the clone for whom the consequences would be negative’. If we imagine that the relevant meaning of ‘produced’ is that we should not create an embryo that is a clone then stem cell research will always be morally wrong because stem cell research involves creating clones whom are then discarded. However, while there is significant moral disagreement about whether this is morally wrong or not, there is significant orthodoxy that says we do nothing wrong by creating an embryo so long as it is not implanted and then allowed to develop into an adult. If human cloning is morally wrong because it would involve significant negative consequences for the clone then without a person-affecting proposal that effectively responds to the non-identity argument it is difficult for us to explain how such prospective negative consequences for that clone produce the conclusion that the act is morally wrong in person-affecting terms.

The point that I am trying to make here is that most people do not believe that there is anything morally wrong about using embryos for stem cell research where doing so requires the creation of clones. The contrast with cases like not-postponing conception and others is that, when those like Boonin engage with the non-identity problem, while they refer to conception as the act of conception it is not clear whether they are referring to the biological act as I have described it (such as bringing together sperm and egg and in the same way that we create embryo clones for stem cell research) or the act of ‘bringing that entity into being’ by implanting that embryo later which – by analogy to the clone case, is an entirely separate act that is worthy of its own moral scrutiny.

I believe that it is this act of implanting that embryo that we care about when we talk about non-identity cases. However, I also believe that our understanding of the act of conception is so broad that it has clouded our understanding of what act is under scrutiny. This has meant that if we assume the modest view that only entities that exist are morally relevant then when that act of conception assumes there is no entity at the time of the act then we cannot apply person-affecting proposals to that non-identity case. My claim is that we have been wrong to assume that many non-identity problems do not involve entities at

the time of the act of conception. Moving forward, when I assess person-affecting proposals I refer to the biological act as: any act that brings together sperm and egg, which are – notwithstanding any developments in assistive reproductive technology – necessary to bring the entity in question into being. This understanding is the closest that we get to what I take to be the intended understanding in non-identity literature. But I do not believe that it is the most morally relevant. In what follows I will explain a final understanding of the act of conception and why it is most morally relevant.

3.3.3 The Act of 'Bringing' an Entity Into Being

As with in vitro fertilization, some research that requires the use of embryos involves creating them⁷³ and this involves fertilizing those eggs in a petri dish⁷⁴. When an egg is fertilized outside of a host body it is called in-vitro fertilization as opposed to in vivo fertilization which denotes when an egg is fertilized in an organism. In the case of in vitro fertilization this embryo is then transferred to an organism to develop. The subsequent carrying of that entity into being occurs as an emergent process of that act should the embryo successfully implant in the uterine wall. This later act of moving the embryo is currently necessary to bring that entity into being but while it is currently necessary it is not sufficient for the ultimate development of a foetus since challenges with implantation can occur and result in miscarriage.⁷⁵

The previous section discussed how the morality of creating an embryo under certain conditions should be seen as an act that is morally assessable. This does not go against any strongly held intuitions about what it means ‘to conceive’ I should think. However, there are non-identity cases in which it is vague whether the biological act of conception is being evaluated and for reasons already explained I said that this means that person-affecting proposals fail to ground the moral wrong of that act in terms of the person that is ultimately brought into existence. In what follows I will present several cases that I believe generate an intuition that there is an act that is under scrutiny in these cases that is distinct from the biological act of conception. What I propose in this section is that the act of conception can plausibly be understood as the act of ‘bringing’ an entity into being and that this act

⁷³ I say some, as some embryos will be donated from a clinic while in other cases the type of embryo required needs to be created in the lab – such as in the case of stem cell research, which I will also explain in this section since it is relevant to our discussion.

⁷⁴ A petri dish is a small circular dish that is often seen showcasing bacteria or some other research project such as evaluating microbial resistance to antibiotics by dropping a small sample of antibiotic into a petri dish of bacteria and returning to evaluate the results later

⁷⁵ it is not clear whether this will always necessarily involve a biological host since it is possible to develop some animals to up to fourteen weeks in an artificial womb.

comprises of the act of enabling the implantation of an embryo. Not only will I argue that this act is a relevant act whose morality can be determined independent of the biological act, I will argue that it is more relevant for the non-identity problem than any other act. Furthermore, I'll argue that it is able to ground a person-affecting explanation of the harm or wrong to the entity that exists at that time. I'll begin by introducing several cases that I believe show us that it is plausible to assess the act of 'bringing' an entity into being as a morally assessable act that is distinct from the biological act of conception. I'll then show that these research cases match our intuitions in some bioethical cases. Finally, I will return to not-postponing conception and argue that the gives us reason to believe that what our intuition is picking up in this case is that if the act if harmful or wrong then it is harmful or wrong because of Marys act of bringing that entity into being.

While there may be some initial resistance to accepting that the act of choosing to being an entity into being is really a plausibly distinct moral act consider the following case, which I believe shows us that there are cases in non-identity literature that ask us to consider the morality of the act of choosing to bring an entity into being.

Goat. A team of biologists have created a continuum of genetically engineered embryos, such that human embryos are at one end and goat embryos are at the other. As one moves from the human end to the goat end of the continuum, the embryos contain less and less human DNA and more and more goat DNA. The biologists are wondering whether it would be morally permissible to cause the embryos in the middle of the continuum to develop into adults

(Gardner, 2015; 432).

In this case there is a clear distinction between considering whether the creation of those embryos is morally wrong and whether it would be permissible (and though it is not stated, this could also be substituted for whether it would be morally wrong) to implant them. This kind of distinction arises in many types of bioethical cases that supposedly generate the non-identity problem.

Many bioethical examples ask us to consider the morality of a conception choice given some set of conditions, and these cases are often set against the backdrop of increasing abilities that prospective parents have for selecting both the attributes of our prospective children and, sometimes as a consequence of choosing those attributes this may often alter who those children are. It is possible, for example, to test for Down syndrome, Huntington's disease and hereditary deafness through a variety of genetic testing routes and it is often the

case that prospective entities do not get implanted when results for these tests show markers of those conditions.

These tests are available at varying stages. For example, genetic testing of the parties involved can occur at any time – indeed, we already considered a case where a parent considering genetic testing turns it down only to produce a child that has serious health difficulties. Many clinics offer pre-implantation genetic diagnosis when undergoing in vitro fertilization. In those cases, a selection of fertilized embryos have a few cells taken away for analysis prior to being implanted during a ‘cycle’ of in vitro fertilization.⁷⁶ Given the possibilities open to prospective parents we can now imagine another case:

Choosing to Implant Embryos with Severe Health Problems: During their first cycle of in vitro fertilization a prospective parent, named Amy, is presented with the option of having her embryos screened before conceiving as a standard. However, the doctor suggests that Amy take up this offer because of her family history of a serious health problem. Having done so, she is told that all of their embryos have the genetic markers for a defect that produces some significant health difficulty. Their doctor offers Amy another appointment to undergo another cycle of in vitro fertilization in the hope that next time their embryos will be free of any serious health difficulty and ultimately they can go on to produce an alternative child with those difficulties that would be experienced by the child brought about by the embryos in this current cycle. However, their doctor is surprised to hear that Amy would like to go ahead with implantation despite the known outcome. The doctor, through initially uncomfortable, reasons that they cannot see any person-affecting reason not to proceed in line with the wishes of his patient. Amy goes on to bring Alison into being – and Alison has serious health difficulties.

Alison would not exist, but for the decision to implant her. She would not have the life worth living that she currently enjoys but for that act. She is not worse-off because of it. She has not been harmed in the counterfactual and comparative sense that Boonin sets out above and nor is it clear that she is wronged by the act at that time. Granting that the act does

⁷⁶ In addition what I have already said, there are many other diagnostic tests that prospective parents can avail of. Chorionic villus sampling may be offered at between 11 to 14 weeks gestation to those prospective parents deemed at high chance of their child having a genetic or chromosomal condition such as Down’s syndrome, Edwards’ syndrome or Patau’s syndrome. In later stages of gestation, after 15 weeks, amniocentesis is used to test amniotic fluid where a sample of amniotic fluid is taken from the amniotic sac which surrounds the foetus via a very thin needle guided by an ultrasound.

not harm anyone, and nor is it morally wrong in terms of a concern for Alison if it does not wrong anyone in particular. Advances in assisted reproductive technology and associated diagnostic tools mean that we do not have to wait until an implantation stage to have a sense of the outcomes of our conception decisions on those who we ultimately bring into being. Knowing Amy's family history and the foreseeable likelihood of producing embryos with serious health difficulties is not a barrier to producing them. In fact we might even think that someone who is in this situation does something virtuous by agreeing to have their embryos screened prior to implantation knowing their own family history. What is at odds with our moral intuitions in this case is that it seems morally wrong to implant one of these embryos. There is a similar story that is told when it comes to human cloning and stem cell research. Let me explain how stem cells are created for use in therapies and in research in what follows. I will then connect the stem cell example back to our discussion about Amy's act of choosing to bring an entity into being.

Stem cells are 'pluripotent' cells present in an embryo at the very early stages of embryonic development. To say they are 'pluripotent' means that they can become any kind of cell in the human body. They can be used in treatment of spinal injuries and can even be used to create lab-grown organs. But while there are many other potential usages for these cells, their use is controversial. This is because the main source of stem cells are donated embryos, but these embryos are destroyed⁷⁷ in the process of harvesting stem cells.⁷⁸ Creating stem cells for use in therapies involves taking that donated embryo and then removing its nucleus. A cell is taken from the therapies recipient, and this cell has its own nucleus removed. Then the patient's adult cell nucleus is transferred to the donated embryo. The donated embryo then begins to produce stem cells – like it would ordinarily do had it kept its original nucleus. The benefit of this is that we can use a donated embryo to create an embryo that is producing stem cells which match the patient's genetic information. This means that when those stem cells are used for therapy, or for building a new organ for example, the organ will not be rejected.

Perhaps you have noticed something peculiar about the process involved in creating stem cells for this purpose. In the previous section I pointed out that some argue that it is 'wrong to attempt to produce the clone'. But the stem cell process creates a clone of the patient that is receiving the therapy. If this embryo were instead implanted into a surrogate

⁷⁷ Some of the controversy surrounding stem cell research is that these embryos are destroyed.

⁷⁸ The embryos used in treatment and research are usually donated to a lab with the consent of the prospective parent(s) from the fertility clinic they would have attended at one time and no longer have a use for those embryos. Its standard practice to fertilize enough embryos for implantation later assuming that several rounds of in vitro fertilization will be needed.

then the resultant child would be a clone of that patient. Harvesting stem cells utilizes the same process that is used to create animal clones – and that is also the same process that created Dolly the sheep (the first successfully cloned animal). It suggests that while there ought to be a moratorium on attempts to produce a clone it is not wrong to create stem cells via the creation of an embryo clone so long as that embryo is not implanted to *produce* a human clone. Let me explain why this matters by connecting this back to many of our bioethical examples above that seemingly produce non-identity problems.

The word *produce* here does similar work to *conceive* in many of our other cases. The point I am trying to make here is that if we compare cases of creating stem cells (which involves creating human clones) with cases like Choosing to Implant Embryos with Severe Health Problems then there seems to be nothing at all morally wrong with creating embryos that are defective, and in the case of stem cell research those ‘clones’ created by the process are destroyed at the end of it. It is a good thing that these embryos are ultimately destroyed – given that it is seemingly wrong to attempt to produce the clone that would come about if that embryo were implanted.

Implanting an embryo is wrong because there is some entity that is wronged at that time. If we interpret the act of conception as the implantation of the embryo then this means that not only does it capture our intuitions about cases like human cloning and stem cell research, it also captures the potential target of a person-affecting proposal in cases like Choosing to Implant Embryos with Severe Health Difficulties and Defective Gametes. All in all, it captures the intuition that bringing an entity into being is morally wrong – and this surely matches our determination in the aforementioned cases and is the appropriate act of moral concern.

To those who object to creating stem cells for treatment and research using the method described above, that is those who would argue that it is morally wrong at that time T1 for person-affecting reasons to create an embryonic clone on the biological act of conception, we can simply point out that they are mistaken about the most morally relevant act and so long as that act does not occur then there will not be a clone to experience the presumed negative impact it would supposedly experience by its existence. Heller (1998) points out that the non-identity problem does undermine arguments where the concern is for the clone – and yet, as I will show, there are some person-affecting solutions which can accommodate the conclusion that such an act of conception (understood as the bringing of that entity into being) is harmful to them.

The previous discussion ought to give pause for thought as to whether this same distinction also applies to cases like not postponing conception. I believe that it does. We have seen how the distinction is most clearly seen in in-vitro fertilization (IVF) cases and in stem cell research. In IVF the biological act takes place in-vitro – and while this is a necessary act it is not sufficient for the ultimate creation of a person later, the act of bringing that entity into being must also occur. What is needed then, is implantation. In IVF cases this act of bringing an entity into being after the biological act is clearly an act that is morally assessable.

There is yet another example that shows how the biological act diverges from the act of bringing that entity into being morally speaking. Let us return to everyday garden variety sex. When it comes to bringing an entity into being (via sex) then that biological act of conception and the act of bringing of an entity into being run-into one another – imagine it as a kind of relay on a running track, there is a kind of ‘hand-off’ that occurs here that is unaccounted for in the ambiguous understanding of the act of conception. It’s a passive hand-off that requires no thought from its instigators. One is forgiven for thinking that because this process does not always require any causal input that the latter is undeserving of moral consideration on its own terms. However, this mistakes the type of action that the latter is. This is because there are cases where starting the process of bringing an entity into being is an act that is an omission. Such acts are morally wrong because while structured like an omission, this omission is an act of bringing the entity into being – which is the same as saying that they fail to stop a process that they ought to stop and in failing to do so they bring that entity into being. Anyone who believes that the act of bringing an entity into being is undeserving of unique moral consideration is simply mistaken for much the same reason that one is mistaken to believe that letting someone die is not an act (although it is an omission). In any case, even when that act required no further intervention then that entity comes into being only because of a continuation of that process. It is the decision to continue the process of bringing that entity into being that is deserving of its own moral consideration. This moral consideration is in isolation from the morality of the biological act. So, it is a mistake to think that just because the act of bringing an entity into being occurs after the biological act in the ‘normal course of events’ is not reason to ignore it as a separate act. Indeed, we can moralise about taking the morning after-pill to prevent the act of bringing that entity into being occurring independent of the morality of the biological act. My point is that there is good reason to believe that the act of bringing an entity into being is deserving of moral consideration whether it is deliberate or passive and to conflate the two acts is a mistake. My aim here has been to point out that it is easy to see why the non-identity problem

is firmly at the centre of advances in assistive (and diagnostic) reproductive technology. The non-identity problem challenges our beliefs about what counts as an immoral use of such technologies. Without a successful person-affecting proposal many of our person-affecting beliefs about the immoral use of assistive (and diagnostic) reproductive technology explained in terms of those it impacts are false. And yet, to come to a conclusion about the morality of these acts one must have a clear understanding of the act under scrutiny – the act of conception. I believe that focusing an assessment of prospective person-affecting proposals toward these cases helps to highlight a significant ambiguity in non-identity literature with respect understanding what is meant by the ‘act of conception’. I have argued that not only are there different understandings of the act of conception but that this produces an inconsistency about what act is under scrutiny across non-identity literature. This, I argue, has resulted in prospective person-affecting proposals being more or less plausible depending on which understanding of the act of conception is taken to be the most morally relevant understanding. Consider for example someone who believes that the act of conception ought to be understood as the act of choosing to bring an entity into being. They are unlikely to think that their acts are morally wrong at the time of choosing while their prospective child is merely a twinkle in their eye. This is because there is no one to whom moral principles can apply that can contribute to a person-affecting reason why that act of choosing to bring an entity into being under certain conditions is morally wrong due to consequences for the child that is ultimately brought into being. I have shown that while someone who believes that the biological act of conception is the most morally relevant understanding of the act of conception it is not – and anyone who believes that the act of conception ought to be understood this way will not be able to explain why that act is wrong on any person-affecting proposal. Given that I have shown that this is not the most relevant act in many bioethical cases and argued that it is not as relevant in not-postponing conception and that an alternative is more relevant the significance of the previous discussion is that it allows us to apply a person-affecting proposal in such a way that avoids the objection that there is no entity at the time of that act that we can point to say at that time that the act is wrong.

3.4 Harm and the Act of Conception

Given these distinctions and the reasons I have discussed, there is strong reason to believe that each act as I have described above is an independent morally appraisable act that non-identity literature seems to run together. I believe that person-affecting proposals have been rejected in part because the act of conception is assumed to be something like the biological

act – but I do not believe that this is the most relevant understanding of that act. I believe that the most morally relevant understanding of that act is the act of ‘bringing’ an entity into being. When we recognise that we can moralise about the act of bringing an entity into being without moralising about the biological act then we can apply person-affecting proposals to it and avoid the objection that for person-affecting principles to be morally relevant there must be some existent entity to whom they apply now at the time the act is supposedly morally wrong. This does not mean that we cannot moralise about the act of choosing to bring an entity into being, or moralise about the biological act of conception, it just means that I believe – as I have argued – that the act of bringing an entity into being is the most morally relevant in the kind of bioethical discussions that seemingly generate the non-identity problem and in cases like not-postponing conception. To set out what I intend to do in what follows, I’ll first summarise the claims I made above. I’ll then evaluate harm-based proposals against them to show why they either produce a negative result or – as in the case of the act of ‘bringing’ an entity into being, show us that an act of conception can cause harm to the entity in question and so is harmful. We can understand the act of conception in three ways:

- (i) the act of choosing to bring an entity into being;
- (ii) the act of conception as the biological act, or;
- (iii) the act of ‘bringing’ an entity into being.

One might then wonder what effect this ambiguity has on a solution to the non-identity problem? Let us assume that, for argument’s sake, a condition of having a moral claim against an action that is supposedly wrong because it is a ‘right violation’ is that the claimant needs to exist at the time the act is committed. This is a plausible claim that most would be willing to accept without much difficulty. However, accepting such a claim has given us reason to reject a Rights-based proposal to the non-identity problem. This is because the prevailing view is how can Mariette have any moral claim against that act of conception? She did not exist at the time of that act, and so cannot have a moral claim against it. This relates to our acts of conception because, as discussed previously while outlining the understandings of the acts, there is only one act on which there is an entity that exists and is identifiable and so can have moral principles apply to it given that I have stipulated there must be some existent entity for those principles to apply. Once we apply each of these understandings to previously rejected solutions to the non-identity problem then a solution to the non-identity problem could emerge. In this case, what I mean to say is that, when it comes to comparative and non-comparative harm-based solutions to the non-identity problem, evaluating the morality of the acts above explains how Mariette is harmed in a

person-affecting sense – and crucially, this conclusion depends on which understanding of the act of conception is under scrutiny. I will now examine this proposal with respect to our aforementioned comparative and non-comparative harm-based solutions.

3.4.1 *The Act of Choosing to Bring an Entity into Being*

In Chapter 1, I said that the act of choosing to bring an entity into being does not include the *biological act*. Let us first consider the comparative accounts I introduced above. On the counterfactual-comparative account of harm, proponents claim that the act of conception makes Mariette worse off than she would otherwise have been. However, even if we understand the act of conception as the act of choosing to bring an entity into being then it is still the case that no alternative state for Mariette exists that can explain how choosing to bring her into existence is better or worse for her. There is no Mariette at the time of choosing to bring an entity into being. For whom then is the act harmful? No one, it seems.

As before, we can appeal to an alternative comparative baseline – that is, a *temporal* rather than *counterfactual* one. Remember that proponents of the temporal comparative account say that: if A's act harms B, then A's act makes B worse off than B was before A's act. So, we could claim that the act of choosing to bring an entity into being harms Mariette because that act makes Mariette worse off than Mariette was before. However, as with the counterfactual-comparative account there is no Mariette at (or prior to) T1 when we substitute the counterfactual baseline for a temporal one, so we cannot make the sort of comparative claim needed to explain the harm of the act even with a temporal baseline. While Mariette does exist now at T2, there is no respect in which Mariette is worse off at T2 by a comparison to how she fared before the act at T1 – she simply did not exist before/at T1.

As you know, there is one last comparative account that we can test the act of conception understood as the act of choosing to bring an entity into being against: the moralized-comparative account. Remember that a proponent of this account would say that: if A's act harms B then A's act makes B worse off than B should have been. Subsequently, in not-postponing conception, someone might claim that the act of choosing to bring an entity into being harms Mariette because that act makes Mariette worse off than she should have been. However, there is still no person for whom this act is better or worse at the time of that act. There just simply isn't anyone to speak of in the alternative, and given that there is no entity in the alternative then there is no person for whom the alternative should have been. Therefore we cannot say that there is an alternative for Mariette wherein Mary should have acted differently. The moralised comparative account does as well as the two

alternatives when we understand the act of conception in this way - which is to say, not very well at all.

The overall point that I want to make here is that even if we understand the act of conception in this way – no matter how we measure our comparative baselines – then when comparative accounts of harm are purported to show that Mary’s act caused harm to Mariette then that claim is still false because of the standard objection.

What is to be said about non-comparative accounts of harm when applied to this understanding of the act of conception? Some, such as Molly Gardner, have claimed that the non-comparative account gets the right result in not-postponing conception - Mariette’s act causes what is a bad state of affairs for Mariette. That act necessarily causes what is a bad state of affairs for the person that comes into being later. At the time of the act of choosing to bring an entity into being there is no person ‘S’ for whom that act can be non-comparatively bad. This won’t be a challenge for those who believe that future people (that is, actual future people) ought to be included in our ontology of whom person-affecting principles can apply to⁷⁹. However, it is a problem for those who argue that harm-based principles are limited only to those who exist now. If that is plausible, then there is no person who can be the claimant of that harm at the time of that act of choosing to bring an entity into being⁸⁰. I have assumed that a harm and the suffering of a harm is linked to the claimant of that harm at that time - that to harm, is to suffer a harm *at that time*. Even in reflecting on whether Mary’s act of choosing to bring an entity into being harmed Mariette then we cannot say that it has, because to say the act has harmed is to say that there is a sufferer of that harm at that time – and since Mariette was yet to exist in a morally relevant sense (though she is actual) she cannot have been harmed by that act.

Given all that I have said above, we can conclude here that the non-comparative account of harm fares no better on this understanding of the act of conception than comparative accounts. What we end up with on this understanding is represented in the below table where an ‘No’ denotes where we cannot conclude that the account described allows us to explain the harm of the act of conception:

	CCA	TCA	MCA	NCA
The act of choosing to conceive now	No	No	No	No

⁷⁹ Gardner, whom this quote is attributed to, argues elsewhere that actual people are just as real and morally relevant as those who presently exist.

⁸⁰ For an argument to the contrary that denies this kind of presentism and instead argues that that actual future people are just as real as those who exist now then see Gardner (2016).

As you can see, appealing to this understanding of the act of conception does not allow a proponent appeal to any of the harm-based accounts described to explain the harm of the act of conception understood as the act of choosing to conceive now. This means that if we are looking for a way to explain the harm of Mary's act in narrow person-affecting terms then we will have to consider whether there is an alternative understanding of the act of conception that enables us to make that narrow person-affecting harm claim.

3.4.2 *The Biological Act of Conception*

Remember from Chapter 1 that I said there is a significant moral difference between the act of choosing to bring an entity into being now and the physical act of bringing the necessary components together (sperm and egg) to bring about an individual. Furthermore, I said that, if we were to define it, then we can call this physical act the 'biological act of conception' and that this refers to any physical process that brings together a sperm and egg – the components necessary to bring some entity into being (and that this does not necessarily mean sex, it can include in-vitro fertilisation). What I aim to do here is to address the question of whether, if we understand the act of conception as the biological act of conception, then could we then successfully appeal to either a comparative or non-comparative account of harm to explain the supposed harm that comes to Mariette by that act biological act of conception in such a way that allows us to answer the moral question posed at the beginning of this Chapter? It is this appeal that I will investigate in this section, beginning with comparative accounts.

Remember that the counterfactual-comparative account of harm aims to ground harm by assessing whether a person is *worse off than they would otherwise have been* – that is, comparative in the counterfactual sense. Unfortunately, the counterfactual-comparative account is not equipped to overcome the challenge posed by a lack of a comparative baseline for Mariette even if we narrow our understanding of the act of conception to the biological act of conception. As per the biological act of conception, the harmful act is supposedly the bringing together of two unique components at a particular time⁸¹. We cannot fail to bring

⁸¹ Note that in cases of in-vitro fertilization, it is possible to fertilize an egg with a particular sperm. For this reason, while the timing of the biological acts of conception matters quite a lot when sex brings about that fusion of sperm and egg, it is less important in some cases of in-vitro fertilisation where a particular sperm is used to fertilise a particular egg. This is because when it comes to sex there is no deliberate control over which sperm fertilises the egg in question, while in in-vitro fertilisation which sperm fertilises that egg can be calibrated with much more precision. One could point to biological facts such as that sperm have a three-day lifespan, and so the concerns that Parfit raises with respect to the lifespan of sperm and egg again matter here. Thus, the timing of conception does matter. However, that is not strictly the case anymore. Sperm and eggs can be frozen. However, of course practically speaking, they cannot be frozen indefinitely and so there is some

together these same components and expect the same entity without health difficulties later⁸². The entity that will result will have the same serious health difficulties no matter how they are brought together. There is no comparison to be made for this entity that can show they are counterfactually worse off because they do not exist in the alternative – that is, their necessary components do not come together. In sum, Mariette cannot be worse off than she would otherwise have been because she still does not exist in the alternative.

Remember that the temporal comparative account grounds harming in terms of whether a person is *worse off at T2 than they were at T1 before that act takes place*. As with the counterfactual-comparative account of harm, we cannot ground the claim that Mary's biological act of conception has harmed Mariette by appealing to the temporal comparative account of harm. We know from our previous analysis of this account that it was not possible for us to ground a temporal comparative claim of harm when we understood the act of conception as the act of choosing to bring an entity into being because Mariette did not exist at T1 before that act takes place – she was merely an intention at that time. The same is true of the biological act of conception. When the necessary components of Mariette are brought together it is not the case that she is better off before that act takes place with respect to how she fares later – she simply did not exist prior to that act.

The challenge that is posed by the lack of either a counterfactual comparative or temporal comparative baseline arises once again for the moralised account. Remember that the moralised comparative account determines harm on the basis of whether a person is *worse off than they should have been*. The question is then whether the biological act has made Mariette worse off than she should have been and we cannot say that it has. It is not the case that there was, in fact, a moral alternative for Mariette. Metaphysically speaking she is exactly as she should have been and morally speaking there is no moral alternative for her.

We can now move on to evaluate whether narrowing our understanding of the act of conception to the biological act of conception allows a proponent of a non-comparative account of harm to conclude that not-postponing conception is a harm to Mariette. When we

time related limit that we can place on cases where ones procreative choice is to say conceive now via sex and perhaps produce Molly (perhaps because the timing of their conception will be necessary for their origins) or conceive at some undefined time in the future beyond the viability of using an egg produced now and produce Polly (whose timing of conception is not necessarily linked to their origins in the same way as Molly's would be if she were in fact composed of the sperm that ultimately fertilises that egg). Presumably though that act of conception can only bring about one entity at fusion and that person cannot be comparatively harmed.

⁸² Of course, in cases of in-vitro fertilization this is not the case due to the fact that the physical components can be fused at any time. One might wonder, without this time-dependence condition, whether this is a non-identity case at all – but it is. This is because the time-dependence claim only shows us that the biological act now would produce a different child to the one that the biological act would produce later, and in an in-vitro fertilization case we can achieve the same non-identity style case simply by saying that one can choose between two individual sperm, one that we know will have some health difficulty and one that will not.

appeal to a non-comparative account of harm to determine whether Mariette has been harmed by the biological act of conception we still cannot say that Mariette is harmed at that time. One might assume that since the biological act of conception brings about the entity at the same time as the act then given that simultaneity we can say that that act would harm that entity at that time if that act is taken. But this makes an assumption about the biological act that is actually false. Let me explain.

Remember that, for our purposes, we have appealed to Harman's claim that such a state is to be: "... in a certain sort of non-comparatively bad state. It is to come to be in (or is simply to be in) a state in which one fares, not worse than one fared, or would have fared, in some alternative state of affairs, but simply badly." (Hanser, 2008, p. 422). Imagine that, for the sake of argument, that we are to understand both the biological act and Mariette's existence as an entity is simultaneous. In this case, I have said above that a proponent of this thought can argue that this is enough to ground the conclusion that Mariette is harmed by that act at that time. They claim that because she is an existent entity at that time then her condition – created by that act – is bad for her⁸³ at that time because she is in a bad state due to that act. However, this thought runs two separate acts together. One act is sex. When one argues that the biological act of conception is wrong they could mean that the biological act is the act of Mary having sex so as to bring about that child, and at the same time she does something wrong by creating an entity that is harmed by that act. But this is not what happens. The non-identity problem is concerned about existence and identity and sex does not determine either. At best, sex makes it more likely that whatever set of sperm exist at any given moment in time will have the opportunity to fuse with an egg – but while it determines the set of sperm that get this opportunity sex itself does not determine which will be successful. Sex then is not a sufficient act for bringing Mariette about, and neither is it necessary given that it is possible – though unlikely that – Mariette would also have come about if Mary had instead undergone in vitro fertilization. What is necessary is that Mariette is formed of a particular sperm and a particular egg. There is nothing sufficient about that act which means that Mariette would certainly have been conceived in the same way that the act of not choosing to engage in genetic screening is not sufficient for bringing about the child that did in fact come about. Although sex plays a role in bringing Mariette about it does not mean that Mariette could not have come about via some other means – though it would have been unlikely, as I have said. Even if sex was an act that lead to fusion of sperm and egg that form Mariette – it would still not be enough to ground the harm of that act at

⁸³ Where 'bad' is assumed to be however one defines what is bad for harm-related claims along the same lines of the conditions I set out from Elizabeth Harman in section 3.2.

the time of the sex, and furthermore, there would still have been significant aspects of Mariette's existence that would have been precarious along the way – the fact that they have sex at a particular time is not sufficient for producing Mariette as I have said.

If the act is understood as the act of bringing about the fusion of sperm and egg and that was the biological act then it would not be the kind of act that Mary can do. The only other reason we would have for determining that this act was harmful because at the same time as the act an entity is brought into a harmed existence would be to appeal to the kind of cases that I discussed in the previous sections. Ones in which fusion is a very deliberate act where sperm is taken from a petri dish and injected directly into an egg to create an embryo. But there are many cases that we have considered in which there doesn't seem to be any intuition that this act is harmful at all. In fact, in some cases it seems virtuous to create many embryos as part of an in vitro fertilisation cycle so as to test for abnormalities and serious health difficulties. Finally, I have said that sex could 'lead' to the fusion that is harmful to the entity that is created at that time. However, there would be no reason for prospective parents to refrain from doing so in person-affecting terms – because up until the point that the embryo is formed there would be no entity to whom they can point to say that this is the entity who is harmed.

The point that I want to make here is that if sex is assumed to be the biological act then it cannot create an entity at that time to locate the subject of the harm. If, in the alternative it is understood as the fusion of genetic material then there are many cases which support the claim that this is not the morally relevant aspect of the problem we ought to focus on. Instead what is morally relevant is whether defective embryos are implanted in a research or assisted reproductive context or whether that implantation is allowed to occur in cases like not-postponing conception.

I have argued that when we understand the act of conception as the biological act of conception that it does not allow us to conclude that Mary's biological act of conception is harmful. If you accept the claim that one's existence is a condition for moral concepts like harm to apply to Mariette, and also that that entity does not exist at the time that Mary acts and so is not morally relevant then we can conclude that it is not plausible to claim that the biological act of conception non-comparatively harms Mariette at the time of that act, This leaves us with the following additions to Fig1-3, which I have now expanded to create Fig2-3.

	CCA	TCA	MCA	NCA
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The act of choosing to conceive now	No	No	No	No
The biological act of conception	No	No	No	No

Fig2-3.

I have shown that understanding the act of conception as the biological act of conception does not challenge the prevailing view that a narrow person-affecting proposal to the non-identity problem cannot show that Mariette is harmed. When we cannot assume simultaneity of the act and the entity that it creates we cannot conclude that that act harms at that same time if we also hold the view that moral principles ought to only apply to entities that exist. But there is another understanding of the act: the act of ‘bringing’ an entity into being that does in fact show us Mariette is harmed by that act of conception at the time of that act.

3.4.3 *The Act of ‘Bringing’ an Entity into Being*

Proponents of comparative accounts of harm – whether they are counterfactually comparative, temporally comparative, or morally comparative – have not yet shown that the challenge posed to our belief that Mariette is harmed in this case is resolved by appeal to comparative accounts of harm on any understanding of the act of conception that we have thus far considered. Remember that the reason for this was that there was no comparative baseline from which we could determine whether Mariette was worse off in comparison to. The final act of conception that we will consider is the act of ‘bringing’ an entity into being. This refers to the process from implantation of that embryo (that embryo itself created by the separate, morally independent act – the biological act).

Here, I will briefly outline why comparative accounts of harm also fail to ground the claim that Mariette is harmed on this act of conception. As for the counterfactual-comparative account of harm, it is likely that you have already concluded, or have foreseen, that even if we understand the act of conception as the act of ‘bringing’ an entity into being there is no counterfactual alternative for Mariette that is better or worse for her if the alternative is to not come into being. The entity that will result will always have the same serious health difficulties. Taking a counterfactual comparative as our baseline then, Mariette cannot be worse off than she would otherwise have been because she still does not exist in the alternative.

The counterfactual-comparative account of harm cannot show that Mariette is worse off on this understanding of the act of conception. The temporal-comparative account does not fare any better. One might argue that there is a sense in which an entity exists prior to this act. Surely this then means that there is an entity prior to the act to whom we can compare the relative betterness and worseness of this act to them?

I do not deny that this is the case. Of course, there is a sense in which an entity *does* exist prior to this act; that is, when the necessary components of Mariette are brought together in the biological act of conception then an entity does come into existence, and this is prior to the process I describe as the act of ‘bringing’ an entity into being. But while it might seem like the temporal-comparative account may be a potential solution because of that, it is not. There is a reason why. Although the temporal-comparative account seems at first like it may be a potential solution, it is not. It is not the case that Mariette is worse off than she was before because she is still determined to have these serious health difficulties at that earlier time. Therefore, she is not worse off when we apply a temporal baseline. The same conclusion is reached when we consider the moralised comparative account of harm: there is no moral alternative for Mariette and so she is exactly as she should have been⁸⁴.

As for the non-comparative account of harm, we know that there is some entity that exists prior to the act of ‘bringing’ that entity into being. That is, the embryo that is implanted by either IVF or in the normal course of events. If we accept that an entity exists at that point, then we can say that there is a sense in which conception is non-comparatively bad for that entity and we know that that entity is Mariette. The act of conception understood in this way causes that entity (who we know to be Mariette) to be in a bad state in a way that choosing to bring an entity into being does not at that time. If that is plausible, then we end up with the following results to add to our table from the previous acts:

	CCA	TCA	MCA	NCA
The act of choosing to conceive now	No	No	No	No

⁸⁴ One might argue that the moralised account of harm may be saved by generating a non-comparative version of it. Those proponents could argue that the state that Mariette is brought into is, morally speaking, non-comparatively bad because violating some moral norm is bad. If this were plausible then we could appeal to this account of harm without needing to appeal to any comparative state for Mariette. But this is not a plausible alternative. The reason for this is that such an account would rely on comparison to some moral norm, which invariably involves imagining Mariette in a state where that norm does not come to fruition for her, and this is unacceptably close to sounding like a comparative account in my view. In addition to this, I cannot imagine a familiar moral norm that prohibits bringing someone into a life that is worse for them – in fact, it is a principle that can inform such a moral norm that is exactly what we are trying to determine.

The biological act of conception	No	No	No	No
The act of 'bringing' that entity into being	No	No	No	Yes

Fig3-3.

Knowing that Mariette is harmed when the act of bringing that entity into being occurs is key to determining harm in the narrow person-affecting sense that I have described. This gives us a way to explain the harm of the act of conception in narrow person-affecting terms at the time of that act. This is a boon to non-comparative accounts of harm, and provides a path to resolving the challenge that we cannot apply harm-based principles to Mariette in not-postponing conception because she does not exist at the time of her own conception.

3.5 Conclusion

I have argued that a non-comparative account of harm can straightforwardly show us that Mary's act of conception understood as the act of bringing an entity into being harms Mariette. To do this I explained three comparative accounts of harm alongside the non-comparative account. When it came to showing that Mariette is harmed by the act of conception, I argued that comparative accounts cannot show us that this act harms her. This was because accounts of harm that are comparative are unable to show how Mariette is counterfactually, temporally or morally worse off because there is no alternative state for her that is worse.

I also argued that there are three ways that we can plausibly understand an act of conception. I said that when we understand the act of conception as either the act of choosing to bring an entity into being or the biological act of conception then we cannot apply person-affecting proposals to non-identity cases. I argued that the fact that the biological act of conception is assumed in much of the literature means that many proposed person-affecting proposals have been rejected in part due to that assumption. I then argued that once it is clear that we ought to understand the act of conception as the act of bringing an entity into being then we can see that there is an entity at that time that can be harmed by the act of conception so understood.

This meant that when we assessed the comparative and non-comparative accounts against each understanding of the act of conception it meant that when we evaluated the act

of bringing an entity into being person-affecting proposals were able to show that Mariette is harmed.

Having offered responses to its objections, my novel conclusion in this Chapter is that the non-comparative account can show that an act of conception can be harmful to the actual entity at that time. Assuming that that the act of conception is understood as the act of bringing that entity into being then we can conclude that Mariette is non-comparatively harmed by that act – and this would give us a person-affecting solution to the non-identity problem. With that, I claim to have shown that Mary's act of conception harms Mariette and that act harms Mariette in the non-comparative sense of harm.

4. The Rights-Based Proposal

In this Chapter, I set out to show that a person-affecting rights-based proposal allows us to conclude that Mary's act of conception violates Mariette's rights in a person-affecting sense. However, as with the harm-based proposal in the previous Chapter the success of the rights-based proposal will depend on whether how we understand the 'act of conception' has an impact on its plausibility. Most philosophers argue that, given a choice between two versions of a rights-based proposal, only the 'indirect' version can show that Mary's act of conception violates Mariette's rights and that the 'direct' version proposed (most influentially) by Doran Smolkin (1994) cannot. In this Chapter, I show that the reverse is the case. Contrary to that prevailing view, it is the direct version of the rights-based proposal that shows Mary's act of conception violates Mariette's rights. However, the direct version of the rights-based proposal only applies when we clarify what is meant by an 'act of conception' and understand that act as 'the act of 'bringing' an entity into being'. I argue that while the indirect rights-based proposal is plausible on that same version of the act of conception, since the direct version of the rights-based proposal gives us what we need in this case then the indirect version is superfluous.

In Chapter 3, I argued that our understanding of Mary's act of conception is ambiguous. In that Chapter, I put forward the argument that there are three understandings of the act of conception. The motivating thought behind gaining clarity on this ambiguity is that, when we apply these understandings to *seemingly implausible* person-affecting proposals then there may be a way for us to conclude that Mary's act harms or wrongs Mariette in narrow person-affecting terms (as opposed to the wide person-affecting terms as we saw in Chapter 2). One of my goals for this Chapter (and the thesis more generally) is to show that proponents of the implausible conclusion in the not-postponing conception such as David Boonin have underestimated person-affecting proposals. Once we are clear about which understanding of the act of conception is most morally relevant then we can see that person-affecting proposals can show us how that act of conception wrongs Mariette. I have already shown that there is a person-affecting harm-based proposal that can show us that

Mariette is harmed on that alternative understanding of the act of conception. I did this by first explaining each proposed understanding of the act of conception and then evaluating whether several person-affecting harm-based proposals were able to show that the act harmed Mariette on any of those understandings. Of course, the fact that a proposal is able to show that the act harms on one or another understanding of the act of conception is not enough to say whether that person-affecting proposal is plausible. What is needed is justification that the act of conception is morally relevant – and in the previous Chapter I also argued that the act of conception ought to be understood as ‘the act of ‘bringing’ an entity into being.’ To evaluate the aforementioned rights-based proposals I intend to follow roughly the same evaluation process in this Chapter as I did in the previous.

Let me now explain how a rights-based proposal can resolve the challenge posed by not-postponing conception. The question for this Chapter is whether Mary’s act of conception violate Mariette’s rights? If so, then this could provide a means by which we can say that Mary’s act of conception is wrong. Proponents of the rights-based proposal argue that, although (or if) Mariette has no harm-based moral claim (as opposed to some other kind of moral claim, like unfairness or a lack of respect shown toward Mariette) against Mary’s act of conception then Mary’s act is still wrong – and that furthermore that wrong is explainable in person-affecting terms because that act violates *her* rights. Thus it is a rights-based moral claim that explains the moral wrong in lieu of a harm-based moral claim. The Rights-based proposal identifies Mary’s act as a right violation, that is broadly taken by its proponents to be the violation of Mariette’s right to a certain kind of life or existence⁸⁵. All in all, I believe that so long as my conclusion in the previous Chapter is plausible - that we ought to understand the act of conception as the ‘act of ‘bringing’ and entity into being’ - then we will be able to conclude that Mary’s act of ‘bringing’ an entity into being’ wrongs her.

The structure of Chapter 4 is as follows: in Section 4.1 I establish an important preliminary for the rights-based proposal. This is the view that we can wrong a person without harming them. In Section 4.1.1, I explain that while this wrong can be explained by a right violation I do not believe the content of that right is ultimately important for my arguments later. Following those important preliminaries, I then explain the rights-based proposal in Section 4.2 wherein I introduce two versions of that proposal – the direct and indirect version – and establish their most salient objections. In Section 4.3, I outline my

⁸⁵ This, as we will see, is often discussed in terms of something like the welfare a child can expect to have in life.

claim that whether a right has been violated in this case ultimately depends on how we come to understand an act of conception – and that when we clarify how we understand an act of conception (and show that it ought to be understood as the ‘bringing’ of an entity into being) then it is clear that a rights-based proposal is able to explain the wrong of Mary’s act of conception so understood. In Section 4.4, I consider three objections to the direct and indirect versions of the proposal. I offer several responses that I believe will show that ultimately Mary’s act of conception violates Mariette’s rights by the direct version. With that in mind, the goal of this Chapter is to show that a direct rights-based proposal allows us to conclude that Mary’s act of conception is wrong in a person-affecting sense, but only if we understand that act as the act of ‘bringing’ that entity into being.

4.1 Wrong-Without-Harm

I said above that to begin this Chapter I will establish some important preliminaries for the Rights-based proposal. I will establish these preliminaries now. The rights-based proposal relies on a ‘wrong-without-harm’ (hereafter WWH) approach to wronging. This approach, which is contra Boonin (2014), denies ‘no-harm-no-foul’⁸⁶ from Chapter 1 (hereafter NHNF); which is a view that says: where there is no moral claim of harm there cannot – by necessity – be any wrong.⁸⁷ By way of contrast, proponents of WWH state that we can wrong a person without harming⁸⁸ them. As we have seen in Chapter 1, NHNF is quite plausible;⁸⁹ indeed, many moral theories accept it – such as paradigm consequentialist moral theories.⁹⁰ Perhaps claims like ‘there was no harm done, don’t worry, you did nothing

⁸⁶ James Woodward calls something like NHNF the ‘no worse-off argument’ (1986, p. 805). The particulars of the claim are the same – an action that does not make you worse-off (or better-off) cannot be said to wrong you. Woodward (1986) does not endorse it, but others like David Heyd (2009), and Thomas Schwartz (1978) do.

⁸⁷ Although Brock (1995), and Parfit (1986) hold that they do not rule out an alternative non-consequentialist addition of some consequentialist principle—though it is not that they explicitly say this, it is merely undiscussed and so it would be unfair to attribute Boonin’s ‘necessity version’ of the NHNF to them—where by ‘necessity’ here I mean that by Boonin’s NHNF there cannot, by necessity, be any wrong where there is no harm. James Woodward confirms this with respect to Derek Parfit in a footnote in Woodward, (1986, p. 807). He says that in correspondence with Parfit his view is that non-consequentialist principles may play a role in the wrongness of acts like the act of conception in not-postponing conception though he does not say this explicitly in *Reasons and Persons* (1986)

⁸⁸ When I say harming here I also mean to say that the thought is also that we can wrong a person without making them worse off. The assumption here is that to harm someone is to make them worse off, and so harming here is inclusive of that claim.

⁸⁹ When I say plausible here, I mean it in the sense that it is at least intuitively plausible. There are, of course, many people who will deny it as I will go on to discuss.

⁹⁰ Note that I say *paradigm* as opposed to *all* consequentialist moral theory. This is because there are some versions of consequentialism that could prioritise virtue, or rights. If this were the case, such a consequentialist theory might accept that it is possible to wrong without harming – since it’s possible to do something that doesn’t maximise the chosen value. Such a consequentialist theory would still fail to provide the solution that we are after for the same reasons I reject a virtue-based solution in Chapter 1. Note also that, by consequentialist

wrong,' sound familiar. We make claims like this all the time and whenever we make statements like this we endorse some version of NHNF.

The work that NHNF does to generate Boonin's conclusion that Mary's act of conception is not morally wrong is crucial. This is because NHNF allows the proponent of the non-identity problem to generate P4. If we accept that Mary's act of conception does not harm Mariette (or anyone else – by stipulation), then when a proponent of the non-identity problem such as David Boonin (2014) adds NHNF to the argument they can generate the following sub-argument from Chapter 1:

P4: If an act does not harm anyone, then the act does not wrong anyone

P5: If an act does not wrong anyone, then the act is not morally wrong

C3: Mary's act of conceiving Mariette is not morally wrong

(Boonin, 2014, p. 27).

While I have said NHNF is plausible on paradigm consequentialist moral theories, for other kinds of popular moral theory – such as non-consequentialist approaches – it is uncontroversial to say that NHNF is false and that WWH is true. Harming is not a necessary condition for wrongdoing according to these non-consequentialist moral theories. For example, a virtue-based approach to ethical questions would not rely on harm to ground a wrong. They would claim that the wrong can be grounded in a failure to exude some virtue. Similarly, deontological approaches rely on an assessment of action rather than its consequences. Lying, on a Kantian approach for example, would be wrong independent of whether that act caused harm. Critics of NHNF include James Woodward (1986) and Doran Smolkin (1994). Smolkin, for example, argues that, 'there appears to be nothing necessarily implausible or even particularly unusual about saying that a person can have a legitimate complaint that some act violated her rights even though she may not have been better off had that act not been performed' (Smolkin, 1994, p. 319).⁹¹ The extent to which this claim is true needs some support,⁹² and so I will introduce several cases that aim to justify the type of claim made by Smolkin and others in favour of WWH. These cases will guide us toward, and then justify, the preliminary conclusion I aim to reach in this Chapter: that harming is

here, I mean consequentialist in line with Parfit's proposed solutions to the non-identity problem which are impersonal rather than person-affecting, and I have side-stepped those solutions for reasons for reasons that I have already outlined in Chapter 1.

⁹¹ Smolkin does not think that rights are the only explanation for wrongdoing and sees rights as complimentary of the view that harms are sufficient for wrongdoing.

⁹² See also, Smolkin (1999, p. 201)

not necessary for wrongdoing. Furthermore, this means that while harms may still be sufficient for wrongdoing, I only mean to discuss rights in this case as providing a similarly sufficient condition for wrongdoing. To that end, let us consider three paradigm examples used to justify this claim; *The Terminally Ill Patient*; *Smith*; and *Factory Workers*:

The Terminally Ill Patient: A doctor lies to their terminally ill patient about their prognosis to spare them the anguish of knowing they will die in a few months.⁹³

The doctor does not harm the patient or make their prognosis worse, yet there is cause to say the act is wrong. A widespread intuition generated by this case is that there are circumstances where although someone is not worse off or harmed by the act in question, the act is still wrong in a morally relevant sense because some right violation has occurred or a duty has not been fulfilled.⁹⁴ In cases like *The Terminally Ill Patient* – where a doctor withholds information about a patient’s terminal prognosis – Smolkin (1999) argues that there is a clear sense in which the doctor’s action is wrong even though it does not harm the patient. Cases like this which involve deception⁹⁵ are key motivating examples for WWH. In this case the act is wrong – Smolkin claims – because it violates the patient’s right to autonomy in their decision making, and also their right to be informed about matters which concern them when it comes to their health and future care (Smolkin, 1999).

There is something to be said about where these proposed rights come from to situate our discussion on rights in a wider context. I note this here to avoid confusion as we move through the Chapter. In rights theory there are two general approaches to the purpose of rights. These are the interest approach and the choice/will approach. I will limit my discussion to the interest approach. I do this because they are more prominent in the non-identity debate, and to cover all possible approaches in a single thesis is not possible. In any case, I will explain how these differ in what follows to avoid confusion on the matter.

In the Terminally Ill Patient, such a right could be explained equally by appeal to either of these views. The interest approach says that rights function ‘...to further the right-holder’s interests’ (Wenar, 2021, Web), so we can easily see how the advancement of an interest such as not being lied to, or autonomy in their own decision making when it comes

⁹³ This type of case is borrowed from Smolkin (1999; p. 201)

⁹⁴ As I have stated above, it is a separate issue of how one explains the content of such a wrongdoing. But the focus here is on rights rather than duties.

⁹⁵ Promise-breaking cases also generate similar intuitions. For an example of a promise-breaking case see Woodward (1986; pp. 810-811), example (b). In addition to this, consensual incest cases like those posed by Jonathan Haidt also generate similar intuitions about cases where no harm has occurred but there still seems to be something wrong with the act in a morally relevant sense.

to their healthcare, is violated by the doctor and why this is a good thing for the patient to have – that is to say, it is in their interest. The patient has an interest in their doctor being honest with them because it is good for them. Alternatively, the choice/will approach to rights singles out that ‘the function of a right is to give its holder control over another’s duty’(Wenar, 2021, Web). This explanation of rights confers power to the patient. The patient in this case can waive their rights, and relieve the doctor of their duty to inform them of their prognosis if the patient does not want to know their prognosis. The theoretical difference between these two approaches does not have much impact on what I will say in this Chapter but it is important to be aware of it. This is because much of the language used to describe rights – especially by people like Smolkin, Magnusson, Tooley, and Woodward – seems to suggest that the interest theory of rights is most important.⁹⁶ Indeed, the will theory of rights only seems important with respect to one class of objection wherein in the case of Mariette an opponent of the non-identity problem could claim that Mariette would – if given the choice – waive a right violation to experience the goods that come with a life well lived – but this would still depend on Mariette having a right to waive in the first place and so the same type of objections that apply to interest theories apply equally in this case to choice/will approaches. This is why it is not wholly important which approach one takes in my view – however, as I have said above, I discuss the rights-based proposal only in the context of the interest approach to rights.

With that wider context in mind I will now move on to present another case that gives us reason to conclude that we can wrong without necessarily harming someone. Consider the case of Smith from Woodward (1986).

Smith: Smith (who is black) is about to board his plane, and the security officer decides to not let the passenger onto that plane for no reason other than racial prejudice. Smith tries to explain that he has been wronged. However, as the plane takes off, it crashes in a nearby field. Smith, who is now better off than he would otherwise be is still the victim of wrongdoing⁹⁷

(Woodward, 1986, p. 811).

⁹⁶ A well-known objection to the will theory is that it cannot attribute rights to children and animals. By extension we might think that it can’t do so for fetuses, etc. But the interest theory may fare better if we think these entities have interests (as children and animals surely do). So it is a virtue of their approaches that it seems like they favour an interest theory of rights.

⁹⁷ This case is borrowed from Woodward (1986; 811), see example (c).

In this case, Smith is better off than he would otherwise have been, and because of this, we cannot say that the safety officer harms Smith.⁹⁸ However, despite this, our intuition is that the officer nonetheless wrongs Smith with their action.⁹⁹ The wrongdoing here is purportedly grounded in the fact that Smith has an interest in not being treated in a way that is discriminatory. Smith's right to be treated equally is violated in this case even though the officer's racist actions do not harm him. Indeed, while Smith is better-off for the officer's actions, it does not excuse the officer from violating the passenger's right to equal treatment (Woodward, 1986). The right violation, in this case, seems sufficient to justify the claim that the act wrongs Smith even in the absence of harm.

This case highlights a crucial takeaway for the critic of NHNF. It is crucial because it shows that concepts like harming – which are, generally speaking¹⁰⁰, based on a comparison between states of affairs – and wronging come apart. That is to say, wrongdoing can be explained by moral claims like those expressed by Smith when they say that the officer's action was wrong because it constituted a right violation. I will now introduce a final case to justify the claim that we can do wrong without harm by appeal to a right violation;

Factory Workers: Factories operating in developing countries often exploit impoverished locals by employing them in low-paying jobs amid dangerous working conditions. In some of these cases, the workers are made better off than they otherwise would have been, as there are no more lucrative opportunities for work in their area. However, even if the workers are made better off on balance, it is entirely consistent to say that they are nevertheless wronged by receiving less-than-fair compensation for their labour¹⁰¹

(Magnusson, 2019, p. 585).

⁹⁸ Here I am assuming the counterfactual and comparative sense of harming.

⁹⁹ One might disagree with the reading of this case, for example, one might claim that Smith may have been harmed, but that this harm is outweighed by the benefit; or Smith is harmed relative to the right violation at T1 but not relative to the plane crashing at T2; the question generally speaking is whether harm must be necessarily tied to making someone worse off all-things-considered. However, in Chapter 1 I proposed that the counterfactual and comparative account of harming is the most plausible account of harming, and in Chapter 3 I argued that even if we accepted these accounts of harming they result in implausible conclusions when it is applied to the non-identity problem. For that reason I stipulated that harming, in this thesis, is taken to be counterfactual and comparative – and on this view, Smith is not harmed by the actions of the racist officer.

¹⁰⁰ I say generally speaking here because, of course, there are non-comparative accounts of harming that do not strictly compare states of affairs and because most persons beliefs about what it means to harm is grounded in some comparative baseline.

¹⁰¹ The question of whether harm ought to be tied to considerations about all-things-considered worseness pops up again in this example. However, as I say above, I take the counterfactual and comparative account of harming to be the most plausible, and so the cases are read with this in mind.

In this case, there is a clear sense in which although the factory owners do not cause harm to the workers,¹⁰² they nonetheless wrong the workers.¹⁰³ These workers have certain interests that are violated by the owners' actions and these are independent of how they fare overall.¹⁰⁴ In *Factory Workers*, the wrongdoing is purportedly grounded in the fact that by paying wages that are far below the amount required to live a fruitful life the factory owners violate their workers' right to be paid fairly, or their right to be paid at such a level that reflects respect, is fair, or some other plausible right.

These cases motivate us to think that wrongdoing does not depend only on that act being harmful. In lieu of harm, other moral claims can explain why an act is wrong – such as a right violation. The aforementioned cases give us a *prima facie* reason to believe that we can wrong without harm by appeal to a right violation.

Given that we can wrong without harm, normative ethicists then argue that they can show that Mary's act of conception wrongs Mariette. The motivating thought behind this claim is that we can appeal to rights to ground the moral claim of wrongdoing in the absence of harm and, more specifically, that we can appeal to the rights of children to explain the wrongdoing of Mary's act.

4.1.1 *The Rights of Children*

Some proponents of wrong without harm argue that every child has a *moral* right¹⁰⁵ to be born into a life that is not defective in some way,¹⁰⁶ and despite not being worse off or harmed,¹⁰⁷ we wrong a child born into such a life in a morally relevant sense (Archard, 2004); (Elliot, 1989); (Smolkin, 1999); (Steinbock, 2009); (Tooley, 1983); (Tooley, 1998) and (Woodward, 1986). The rights of children – however they are described – are central to

¹⁰² See footnote for an explanation of why overall benefits do not outweigh the wrong in this case as with Smith.

¹⁰³ Perhaps, by giving them less-than-fair compensation for their work.

¹⁰⁴ Note that on the choice/will account of rights then a proponent may argue that the workers choose to waive these rights. This is true too of the other two cases I considered. However, as I have said I do not consider this rights waiver argument in this thesis and focus primarily on the interest-based account of rights.

¹⁰⁵ Note that I have stipulated the discussion around a *moral* right here – the reason for this is that while many people talk about rights without stipulating between legal and moral rights there are cases where these come apart. Given that what we care about is whether an the act of conception is morally wrong in not-postponing conception I limit the discussion to moral wrongs, as opposed to legal wrongs. In any case, the non-identity problem is primarily a moral, and not a legal, problem.

¹⁰⁶ Note that when I talk about there being a right to not being born into a life that is not defective in some way what I mean is that that defectiveness is not yet described, and so I do not mean 'some way' in the sense of being defective in any way that their lives can be defective. This claim would be much too strong.

¹⁰⁷ Remember, that I will not come to favour any of the accounts that I consider in this thesis but instead aim to evaluate each on its own merit. This is why, to develop the rights-based proposal I have assumed for the sake of argument here that Mariette is not worse-off or harmed (even though we of course know that in the previous Chapter I put forward arguments which show that Mariette is plausibly harmed and that Mary makes 'her child' worse off.

rights-based arguments against the non-identity problem in cases like not-postponing conception. The preliminary thought is that, with respect to not-postponing conception, every child has rights of this kind and it is then presumed that Mariette in not-postponing conception also has these rights and they are violated by the act of conception. The content of that right differs depending on which theorist you ask. Bonnie Steinbock (2009, p. 163), for example, claims that every child has a right to a life that, ‘holds a reasonable promise of containing the things that make human lives good’, such as ‘an ability to experience pleasure, to learn, [and] to have relationships with others’. Alternatively, David Archard (2004, p. 406) claims that a child has a right to a life in which they can enjoy a significant number of the rights articulated within the United Nations Convention on the Rights of the Child (1989),¹⁰⁸ which include but also extend far beyond the minimal criteria mentioned by Steinbock (2009). Michael Tooley (1983), argues that ‘every person has a right to an equal chance of enjoying those natural resources, both environmental and genetic, that a person living in society might enjoy, and that make it possible for one to lead a satisfying life’ (Tooley, 1983, p. 272). Despite the exact content of the right differing between theorists, what Archard (2004), Elliot (1989), Smolkin (1999), Steinbock (2009), Tooley (1983) (1998) and Woodward (1986), share is that they propose a right that, when violated by an act of conception, is reason to conclude that act is morally wrong and so when discussing a case like not-postponing conception Doran Smolkin (1994) argues that:

What is principally objectionable about them¹⁰⁹ is that future people in each of these cases were caused to have lives that were seriously defective. As a preliminary thesis, then, a future person has been wronged by some act A, if A was a necessary condition for her to come into being, and A resulted in her having a life that will in some serious sense be defective¹¹⁰

(Smolkin, 1994, p. 203).

On this stipulation, Mary’s act of conception violates Mariette’s right not to be born into a life that is ‘*seriously defective*’¹¹¹ (Smolkin, 1994, p. 203). Objections to this claim

¹⁰⁸ While these are legal rights they can be understood as moral rights also – though as I say above I only want to focus on the moral rather than the legal claims.

¹⁰⁹ Note that here ‘them’ refers to the decisions or actions we take, and not the thresholds themselves.

¹¹⁰ Note that this would seem to entail that, generally, acts of conception which produce children with lives that are seriously defective are *wrongful*. While having a clear enough application in the case of Mary, it seems pretty implausible when applied to more run of the mill cases commonly found in real life, i.e. where the parents are unaware of the condition.

¹¹¹ In addition to the argument above, on Smolkin’s stipulation in not-postponing conception, Mary’s act of conception is only wrong ‘if A was a necessary condition for her to come into being, and A resulted in her having a life that will in some serious sense be defective.’ But this only seems relevant to not-postponing conception, and no general principle underlies it.

take two forms. The first is to say such a right is implausible based on the content of the right. As I have said, this right differs from theorist to theorist. But an analysis of each right proposed by those like Archard (2004) or Steinbock (2009) is downstream from the question of whether Mariette can have any right at all – no matter the description of that right. It's this latter question that I intend to focus on in this Chapter. For that reason, I do not focus on the exact description of the right in question and only say that a child, generally speaking, has a right to a life that is not seriously defective. This is, as I have said, common ground amongst all aforementioned theorists.

The question is whether Mariette can be a 'holder' of the right to a life that is not 'seriously defective'. Broadly speaking there are two ways that theorists show that, when applied to not-postponing conception, Mariette is a right 'holder' whose right is violated by Mary's act. With that in mind, I will first focus on an account proposed by Doran Smolkin. I focus on Smolkin's account. This account explicitly applies to not-postponing conception, and so it provides a useful principle on which to evaluate the claim that Mariette is a right holder whose right is violated by the act of conception (Smolkin, 1994; Smolkin, 1999).

4.2 The Rights-Based Proposal

Proponents of the rights-based proposal like Doran Smolkin argue that we can easily transpose the relevant features of cases like *The Terminally Ill Patient*, *Smith*, and *Factory Workers* to cases like not-postponing conception. As with the right violations in the aforementioned cases, Smolkin says that Mary's act of conception violates a right, and he says that this right is Mariette's right to a life that is not in some sense 'seriously defective'.

There is an important feature of these cases that is relevant to when we transpose the thought to not-postponing conception. The three original cases involve rights violations at the time of the act – so, for example, when Smith is treated unequally by the officer at T1, his right is also violated directly at T1. It is direct in the sense that, with respect to time, the violation occurs at the same time of the act in question. Given that the right is violated at the same time as the act then we can call this the direct version of the rights-based proposal. To set this solution out in the clearest of terms, we can say that 'an act is wrong when that act at T1 violates a right that an agent has at T1'. While this can serve as a general principle for establishing a right violation we will now need to apply this to not-postponing conception.

Smolkin says that cases like Smith are similar to not-postponing conception. Given the proposed similarity, it suggests that he believes Mariette has a right that is violated at T1 – which is at the same time as the act of conception at T1. With all this in mind, when we

apply the aforementioned direct rights-based proposal to not-postponing conception, then can say that:

Direct Rights-Based Proposal: Mary's act of conception is wrong because that act at T1 violates a right that Mariette has at T1.

A significant challenge arises when we try to show that Mary's act of conception is wrong by applying this principle. Non-existent entities cannot have interests now at T1 that generate the supposed right that is violated at T1. The problem is described formally by Magnusson (2019):

P1 In order to possess rights, one must have interests;

P2 In order to have interests, one must exist;

P3 Future persons do not presently exist; therefore,

C Future persons cannot presently possess rights

(Magnusson, 2019, p. 590).

Smolkin has made an assumption that Mariette is the type of entity that – at the time of the act – can have interests, but this is not the case. For that reason, Smolkin cannot use cases like Smith to justify applying his rights-based proposal to not-postponing conception.

There is an alternative that aims to explain how an act now can violate a right in the future with the purpose of showing that it is possible to bring someone into existence and violate their right when you conceive them even though they will not exist until later or have their right violated now: the indirect rights-based proposal. I will first show how proponents explain, and then justify the existence of, an indirect right violation by appeal to a paradigm case. I will highlight the important features of that case¹¹² and then attempt to transpose these features to not-postponing conception as I have done with the above cases to Smolkin's proposed principle.

The case I focus on here was first presented in Woodward (1986). However, I have borrowed an iteration of it from Boonin (2014) which he calls the 'lying gardener':

¹¹² While I recognise that we often describe the features of a case that support some concept all the time I want to highlight that it is very important that we do this with precision in this specific instance. This is because proponents indirect right violations use these features to justify it in not-postponing conception. For that reason, we need to be clear whether these really are the most important features, and whether there are features that have been ignored that might prevent us transposing the indirect rights-based proposal to not-postponing conception.

Suppose, for example, that I can either promise to mow your lawn and promise to paint your house, in which case I know that I will keep the first promise but break the second promise, or that I can promise to do neither task, in which case I know that I will do neither

(Boonin, 2014, p. 115).

One way to explain the right violation in this case is to say that the lying gardener shows that we can create new rights in others by certain acts – like promises. The thought is that these new rights are specific to the content of the promise made – like when an interest in seeing that a promise is fulfilled generates a right to see it happen. The promisee does not have this right prior to making the promise, this new right is *specific* to the act and is grounded in the interest the promisee has that it be fulfilled. This is why Woodward calls this type of interest a ‘special interest’, and this is generated in the promisee by the promise made.¹¹³

It is important to highlight that Woodward’s claim is that the promisee gains something *new* by the promise. That is because this specific right claim to have their lawn mowed *and* their house painted is not a one that they had prior to the promise. Prior to the promise, the promiser has not made any promise on which the future promisee could base a right claim. I cannot, for example, claim to have a right against my neighbour that they fulfil a promise to mow my lawn if I have not yet met them and that promise was not made. As such, the new right is present only after the promise is made. This new right only exists *but for* the ‘lying-promise’ – a promise that is made knowing that it cannot be fulfilled. After all, it is the promise itself that creates the special interest that the promise be fulfilled.

Following this thought, Woodward argues that it would be wrong now, at T1, for me to promise to mow your lawn *and* paint your house. This is because I know that at the time of making the promise that I will only do one of those things when the time comes to do them at T2. That is to say, at T1, I will ‘indirectly’ violate your right to see that your interest is fulfilled – that is, the interest created by the promise.¹¹⁴ Importantly, at T1 we know that as

¹¹³ Remember that on the interest view of rights, rights are the things that we have an interest in, or what is ‘good’ for us. He says that this interest is specific to the content of that promise and is unlike general interests we might have to not be lied to for example. If you accept that interests can be more specific in the way that Woodward proposes, then the thought is that – by the interest view of rights – some actions generate a *special* interest in others that did not exist prior to the act. In light of this special interest Woodward says that when we make a promise of this kind – one that generates a specific interest – then a new right that did not exist prior to the act of promising comes into existence in the promisee – a right that is specific to their special interest in seeing that their interest generated by the promise in this case is fulfilled (Woodward, 1986).

¹¹⁴ Surely one might think that such an act cannot be wrong, they are clearly better off having you do one of these tasks over none of them? However, we cannot say that the act is not wrong simply because it leaves the

a necessary consequence of the act that it will not be fulfilled. So, entailed by my lying-promise at T1 is the necessary conclusion that the *new* right that some interest is upheld will be violated later at T2. That we would make a promise at T1 knowing that it would be violated later as a necessary consequence of that same act makes this lying-promise at T1 an indirect right violation according to Woodward. This means that the lying-promise is wrong at T1 because that act of promising at T1 indirectly violates that right that the promisee gains as a result of that promise at T2. If we accept Woodward's claims, then we can define a principle that I believe best describes the principle as follows, a modified version of the Indirect rights-based proposal presented by Boonin (2014):

Indirect Rights-Based Proposal: An act is wrong if that act at T1 creates a *new* right where, entailed in that act at T1, is the necessary failure to fulfil that *new* right at a later time T2.¹¹⁵

This means that the right violation does not occur now, but later, and so the wrongful act now is not a direct right violation, but instead an 'indirect right violation'. Of course, this does involve suspending a common understanding of how a right can be violated – that is, a violation occurs at the same time as the act.

The question then becomes whether this same thought can be transposed to not-postponing conception. Remember that in the above case the specific new right does not exist prior to the act – it is the act itself that generates the special interest and the right to the fulfilment of the promise later. Woodward argues that an act of conception is arguably the kind of act where special interests are created in a similar way. The act of conception brings about a new interest that did not exist previously, and Mariette has a right to see this interest is fulfilled.¹¹⁶ Given that it will not, by necessity, be fulfilled then it is like a lying-promise and so counts as an indirect right violation.

promisee better off than they otherwise would have been? But remember that states of affairs, and claims about how they contribute to overall wellbeing, do not count as reasons against the wrongs of failing to fulfil ones duties even if by partially fulfilling them the promisee is better off.

¹¹⁵ One might wonder whether it must be necessary failure and not just be very likely to fail – but non-identity cases involve bringing someone into an being where that serious health problem is a necessary feature of ones existence in the same way that making such a promise and then breaking in the future it is a necessary feature of making that promise in the first place.

¹¹⁶ What kind of interest does an act of conception bring about, one might wonder? Parents do have certain duties towards their children – to ensure that the child is clothed, educated, or has a certain threshold of welfare, for example – and an act of conception plausibly not only creates these duties in a parent that are not present prior to conceiving their child but also creates a being whom has a special interest in those conditions materialising. The act of conception is arguably analogous to a promise because it is the kind of act that, at T1, creates an interest and subsequent new right to that interests fulfilment at T2. The main take away is that Mary's act of conception broadly understood creates a new interest in someone who did not have that interest before that act – and that interest is something that they have a right to see fulfilled.

In not-postponing conception it is still not clear whether there is an entity that can claim the interest which generates the right that is broken later. The neighbour in the lying gardener has the special interest at T1 created by the act – or at the very least, at T1 they are the kind of entity that can have interests. The right will be broken later, necessarily, but there is an entity that exists which can have that interest. It is still not clear why these cases are analogous even on this principle because it is not clear why it can apply in not-postponing conception – the neighbour already exists in the lying gardener, but Mariette does not exist at the time of the act of conception and so cannot have an interest generated at T1 that is violated later.

While the indirect rights-based proposal explains the moral wrong in the lying gardener there is no reason to think that it can apply to not-postponing conception. This is because it differs in an important respect as described above. However, this objection may be grounded in an assumption about whether an entity does or does not exist at T1 when the act of conception occurs – or at least there is no entity that exists at T1 under *some understandings* of the act of conception. Of course, this has been my point all along and once we are clear about which understanding is most morally relevant then we can see that there is in fact an entity at that time. Prior to assuming that any one of these is the intended act while I argue that the most relevant is the act of ‘bringing’ an entity into being it is my view that the biological act is the understanding that is most prevalent in non-identity literature. We know that it is most prevalent because discussions about the fusion of sperm and egg in Parfit (1987) would explicitly suggest that this is the act that is assumed. However in other paradigm discussions it is not so clear. Consider that when Gregory Kavka discusses the Slave Child he says that they, ‘...want the money to buy a yacht. Should they sign the agreement, accept the money, and produce the child?’ (Kavka, 1982, p.100). But ‘produce’ the child could mean quite a few things – it is not clear what the intended meaning behind produce is. There is a way to address the question of which assumption is intended in these cases and in the previous chapter I said that there are three ways of understanding what is meant by the act of conception;

- (i) the act of choosing to bring an entity into being;
- (ii) the biological act, or;
- (iii) the act of 'bringing' an entity into being.

I will now address the aforementioned assumption by applying each understanding of the act of conception to not-postponing conception and then evaluating it with respect to the direct and indirect versions of the rights-based proposal. Ultimately this generates a very surprising conclusion. This is because it shows us that when we understand the act of

‘bringing’ an entity into being then the existence objection cannot be used to reject either proposal. This is an very important conclusion. This is because the prevailing view is that the indirect rights-based account represents an improvement on the direct version of that account. I conclude that the indirect version of the proposal is no better or worse than its alternative – which is contra the prevailing view. However, I ultimately determine that the direct version of the rights based objection is the preferred rights-based proposal for reasons that I will discuss later. In any case, regardless of which solution is preferred, when we apply clarified acts of conception to both proposals it will be clear that when we understand the act of conception as the act of ‘bringing’ an entity into being then the rights-based person-affecting solution to the non-identity problem overcomes a significant objection.

4.3 Rights and the Act of Conception

Remember that Smolkin says the direct version of the rights-based proposal shows us that Mary’s act of conception is wrong because that act at T1 violates a right that Mariette has at T1. I presented an objection to this view that relies on an assumption about whether Mariette does or does not exist at the time of the act (T1). I argued in Chapter 1 that our understanding of the act of conception is ambiguous. In the previous Chapter I applied three understandings of this act to harm-based solutions to determine whether it can help those solutions avoid their strongest objections. I do the same here, and show that there is one understanding of the act of conception that allows both the direct rights-based proposal and the indirect rights-based proposal to avoid the existence objection presented in 4.2.

When we apply the first understanding of the act of conception to not-postponing conception it does not help proponents of either account to avoid the existence objection. As for the direct rights-based proposal: even if we understand Mary’s act as the act of choosing to bring an entity into being we still cannot draw an analogy from the supposedly analogous cases that Smolkin and other proponents point to as justification for applying children’s rights to this case to not-postponing conception. We cannot point to an existent entity at T1 who can have an interest in the kind of right that Smolkin stipulates. When Mary chooses to bring an entity into being, it is still the case that Mariette does not exist T1. This is enough to prevent the kind of justification for the direct Rights-based proposal that Smolkin has in mind.¹¹⁷ As for the indirect rights-based proposal, it is also the case that the lying gardener

¹¹⁷ Smolkin – and others – might appeal to the thought that if Mariette is actual then there is a standpoint from which we know there *will* be a person that is born with serious defects and from a certain standpoint we know that that person is Mariette and that she will exist. Smolkin may argue that the act of conception understood as the act of choosing to bring a person into being at T1 is a right violation of that actual person at T1 – even if

- the case which is intended to provide justification for the indirect rights-based approach – is not analogous to not-postponing conception. There is an existent person in the lying gardener at the time of that act, while there is no existent person in not-postponing conception. In sum, Mariette needs to have a right *now* at T1 that is violated by the act of choosing to bring an entity into being at T1 in order for the proponent of the direct rights-based proposal to show that a right violation has occurred and there needs to be an existent entity for the case of the lying gardener to be fully analogous to not-postponing conception in the case of the indirect rights-based proposal.

Let us evaluate whether the second understanding of the act of conception helps to overcome the existence objection and so we can now evaluate whether *the biological act of conception* (directly or indirectly) violates a right that Mariette has at T1. Remember that the biological act refers to the biological processes involved in bringing together the necessary physical components of a sperm and egg; and so, to say that Mary's biological act is morally wrong refers to the wrong of the act of sperm and egg coming together – however that is achieved. I have discussed the reasons that we have to assume that this biological act is a plausible understanding of the act of conception in Section 3.3.2 and so I will not say more to justify the act itself here and will move directly onto applying it to our rights-based proposals. However, I will note that I have not said whether sex or fusion is the point at which the biological act occurs. In any case, on both versions of the biological account neither act are able to ground the claim that a right is violated at the time of that act.

If we understand the act as the biological act then that still does not mean we can overcome the existence objection that we have tried to avoid. It must be true that a right – that is, a right that Mariette has at T1 – is violated at that same time at T1. If you remember from the previous Chapter I said that the biological act can be understood as sex in cases like not-postponing conception, but the simultaneity between that act and the entity forming from sperm and egg is not possible in Mary's case because she does not directly bring those components together at the same time as the act itself. It is not possible to claim that Mariette has *that* right at T1 when Mary attempts to conceive because that right only comes about as a consequence of that act after T1. We know that the biological act creates *an* entity but it does not do this at the same time as Mary attempts to conceive. This is not enough to avoid the objection that there is no existent entity at T1. It is not the case that both the act and

they do not exist now. But this avoids the objection only by stipulation. This thought does not get us the conclusion we are after. This is because even if Mariette is the actual person who will exist and be identifiable later it is not the case that Mariette has an interest in a right at T1. This is because she does not exist – even if she is actual and thus exists later at some point T2. The promise of Mariette's actuality – and thus her existence at a later time T2 – is not the same as saying she exists now.

Mariette's existence occur at T1.¹¹⁸ The same is true of the indirect rights-based proposal. If there is not an entity which can have an interest at the time of the act then we cannot create an interest that generates a right even if that right is not violated now and is instead violated later. This understanding of the act of conception does not allow the indirect version of the rights-based proposal to avoid the existence objection because it still does not bring the proposal in line with the act of promising. In the act of promising there is an existent person to whom the promise is made, and without any particular reason to justify making that type of promise to someone who does not yet exist there is no reason – in my view – to accept that it can apply in not-postponing conception without such a justification.

When you apply the final understanding of the act of conception we can see the same outcome for both versions of the rights-based proposal. This means that the direct rights-based proposal is – despite the prevailing view in the literature – a promising solution to the challenge faced by our initial belief about cases like not-postponing conception; and it also means that the indirect rights-based proposal becomes more plausible because the lying gardener cases is now analogous to it in an important sense. All-in-all, when we ask, 'does modifying our understanding of the act of conception overcome the existence objection?' we end up with the following set of claims:

	Direct Rights-Based Proposal	Indirect Rights-Based Proposal
The Act of Choosing to Conceive Now	No	No
The Biological Act of Conception	No	No
The Act of 'Bringing' an Entity Into Being	Yes	Yes

Fig1-4

¹¹⁸ While it is reasonable to believe that there is some existent entity at this point. This only helps us to partially avoid the existence objection. This is because while we can point to *some* existent entity at this time we cannot say with certainty how *many* existent entities at this point. Embryos split after several days to form twins, triplets and so on in many cases - this occurs usually after 6-8 days even without implantation (implantation occurs later, that is, when an embryo attaches to the uterus wall) – equally, this stage can happen in a lab without any intention of implanting that embryo. At T1, it is not possible to say with certainty what or how many entities have – or will – come into existence. There is a response to this problem. We might say that what matters is that the entity at T1 exists, and we need not care about any entity that comes after – for example, if the embryo splits to form two entities later at some time T2. This ought not to matter for the morality of the act now at T1 for the entity that exists now regardless of whether it will split later to form two entities. All that is left then, it seems, is to identify that particular entity at T1 for our act to be morally wrong at T1.

When you apply the direct rights based proposal to the act of ‘bringing’ an entity into being it is clear that by acting against what one ought to do which is to prevent the implantation of such an entity to prevent the right violation occurring you thereby violate a right that they have at that time. This is true too of the indirect rights based solution. Understanding the act of conception in this way means that on both proposals we can show that a right is plausibly violated when Mariette in not-postponing conception fails to do what she ought to do and instead acts in such a way to ‘bring’ that entity into being.

My argument in this section has been that if we understand Mary’s act as the ‘bringing’ of an entity into being then there is an entity at T1 that exists, and that this means that the existence objection can be avoided in these cases. However, the existence objection is just one objection to a rights-based proposal and this solution is susceptible to many other objections even if the existence objection is resolved. My goal in this section was only to show that clarifying our understanding of the act of conception can help us to overcome that objection. I will move on to evaluate three other objections now.

4.4 Objections

4.4.1 Identifiability is a Necessary Feature for Ascribing Rights

Heyd (2009) argues that identifiability is a necessary condition for ascribing rights to those who exist. Identifiability is different to existence in an important way. The existence objection is a metaphysical concern while identifiability is an epistemic concern. Here, by *identifiability*, I mean that we are able to pick out a ‘particular person’ with an interest generated by our action. By ‘particular person’ what I mean is that we pick out that person in the narrow person-affecting sense, that is: the sense in which our action has an effect on some individual that is identifiable it picks out a particular person instead of picking out a person by some description that just so happens to also pick them out. Some examples will be helpful; in *Smith* for example, we point to him in particular as the person who is impacted by the officers act. When we ask whether Mariette is wronged by some act we refer to Mariette as the identifiable entity – and **not** simply an entity that exists that fits some description.

Understanding what is meant by identifiability in the sense that I describe above can be made clearer by contrasting it to what is meant by identifiability in a ‘wide’ person-affecting sense. A wide person-affecting sense of identifiability can be captured by pointing back to our de dicto proposal. With the de dicto proposal we picked out ‘her child’ as a relevant entity (and this just so happened to be Mariette). But we can pick out entities by

descriptions quite easily – if I was to say that I am going to ask ‘the delivery driver’ where my parcel is it does not matter who the driver is in the narrow sense, what matter is that that relevant description picks out that person who just so happens to be the delivery driver. A wide person-affecting approach can be useful when we do not know anything about those to whom we might have a responsibility in the narrow person-affecting sense. I could say that I am preparing a class for ‘next year’s students’ whomever they should be – it only matters that that descriptor picks out a group who identify themselves as my group of ‘next year’s students’. One might argue that surely an existent entity can have rights even if we do not ‘know’ who that entity is. Surely, they might claim, we can use this wide person-affecting sense of a right violation to identify those who exist in the future who will have their rights violated (ignoring for now the challenge that the existence objection poses). We talk about the rights of people in this wide person-affecting sense all the time - like by identifying groups that have rights, like the rights of ‘Tasmanians,’ for example. The rights of Tasmanians may be impacted by our continued greenhouse gas emissions and can be described in terms of a ‘group right’ to certain protections qua being people of the island of Tasmania. A wide person-affecting approach to rights describes the group which has particular rights qua being a member of that group. We talk of LGBT* rights, Women’s rights, and we even talk of crimes against humanity which consider the rights of humanity as a whole group. Similarly we might talk of the rights of people in terms of some relevant description, like the rights of ‘my students’ or ‘my children’ for example, without reference to the particular individuals in a narrow person-affecting sense. When I talk about identifiability in this Chapter, I do not talk about identifiability in this wide person-affecting sense, instead I understand identifiability in a narrow person-affecting sense. This is the sense that picks out one particular right-bearer. In Smith, the officer may have a duty to treat ‘all passengers’ equally and this description picks out all those who have that right. Given that Smith is a passenger then the officer fails in their duty to them as ‘a passenger’. But here, I care not about the officer’s duties to some description of persons *that just so happens* to include Smith, what I care about are the interests and subsequent rights that Smith – the person with a specific origin, experiences, and genetic identity – has in particular, and the corresponding duty that the officer has qua Smith and *Smith’s* interests, and not merely because he is picked out by the descriptive term of ‘passenger’. What I mean to say is that the relevant understanding of both rights-based proposals in this Chapter is a narrow (as

opposed to wide) person-affecting understanding.¹¹⁹ The reason that not-postponing conception is so puzzling is because we hold the belief that Mary's act is wrong because of its effect on Mariette in a narrow person-affecting sense, and so this is the sense I will appeal to.¹²⁰ It's for that reason that I focus on this understanding of identifiability in this Chapter, and why I do not consider whether taking a wide person-affecting approach would be satisfactory.

I have not yet said anything about why we ought to accept that identifiability ought to be a necessary condition for ascribing rights. All I will say on this matter is: how can we talk of something that exists without identifying something, anything, about that entity that identifies them as a right holder? In my view we cannot – imagine the following dialogue;

‘Their rights were violated,’ they say,

‘Whose rights?’ I might ask,

‘Theirs!’ they say, pointing to a vacuum in space.

Surely some confusion has arisen in this case, as we cannot sensibly talk about an entity and their rights without identifying something about that entity to which we can attach that right.

If we accept that identifiability is necessary for rights ascription then when we deploy the direct version of the rights-based proposal to assess the morality of Mary's act of conception then we cannot claim that a right is directly violated by that act at T1 when we understand the act of conception as the act of choosing to bring an entity into being. This is because future children, like Mariette, are not identifiable now in the same way that Smith is identifiable when Mary does not postpone conception at T1. Nor does it mean that the lying gardener is analogous to the case at hand. It is assumed that identifiability is not a relevant feature of the lying gardener when the analogy is proposed – but identifiability is very relevant for rights ascription. This means that we cannot justify the use of such a principle in our case without such an analogy because Mariette does not have an identity at T1 that we can point to while the neighbour does.

¹¹⁹ Note here that, as I have said previously, I do not intend to favour one proposal over another – only to show that if we took each of those views on their own merit then they are more plausible than it at first seems given the arguments I present in this thesis.

¹²⁰ This clarification is important for those who believe that a solution to the non-identity problem ought to be a narrow person-affecting one. Remember that a person-affecting solution to the non-identity problem would involve explaining the moral wrong of the act of conception in terms of its effect on Mariette in particular – and that picks out Mariette in a *narrow* person-affecting sense. It does not rest on considering the effects of my actions on ‘my child’ for example.

	Direct Rights-Based Proposal	Indirect Rights-Based Proposal
The Act of Choosing to Conceive Now	No	No

Fig2-4

The identifiability objection is not dissolved by our understanding the act of conception in this way.¹²¹ The same is true of understanding the act as the biological act of conception. We know that the biological act creates *an* entity but it is not possible to know who in particular that entity is at that time. While we can point to *some* identifiable entity at this time we cannot say with certainty how *many* existent entities there are at this point and further how many individual identifiable entities there are. This is because, in many cases, embryos split after several days, usually 6-8 days, to form twins, triplets and so on.¹²² At T1, it is not possible to say with certainty to whom we can ascribe a right.

There is a response to this problem. Some might claim that this is merely an epistemic limitation and that is not as devastating as it seems. They might claim ‘isn’t there an entity that we can identify who – absent a twins case – is Mariette? How is this a failure of identifiability?’ But the case is more complex than that. This is because the identities of those rights-bearers *depend* on the choice that is made – conceive Mariette now, or postpone conception and conceive an alternative child. As such, assigning a right to Mariette at T1 may come to be paradoxical. If *Mariette’s* right depends on that choice then how can that same choice be constrained by consideration for *her* rights? We cannot, for example, say that we have postponed conception out of concern for Mariette’s rights because Mariette would not exist, nor would she be identifiable. If the cases above are to be truly analogous to not-postponing conception then Mariette must have that right prior to/or at the time of the act. For this to be the case she needs to be existent and identifiable. But she is not identifiable. At T1 we cannot identify who in particular is affected by this action and so neither the direct nor the indirect right based solution can account for the moral wrong. For that reason, we

¹²¹ Smolkin – and others – might appeal to the thought that if Mariette is actual then there is a standpoint from which we know there *will* be a person that is born with serious defects and from a certain standpoint we know that that person is Mariette and that she will exist. Smolkin may argue that, at T1, the act of choosing to bring an entity into being is a right violation of that actual person at T1 but we know that existence and actuality are not the same thing.

¹²² This occurs usually after 6-8 days even without implantation (implantation occurs later, that is, when an embryo attaches to the uterus wall) – equally, this stage can happen in a lab without any intention of implanting that embryo.

cannot also avoid the identifiability objection when we understand the act of conception as the biological act. At T1, identifiability in the narrow person-affecting sense is not possible, even if we can point to an existent entity, and so we end up with the following scenario;

	Direct Rights-Based Proposal	Indirect Rights-Based proposal
The Act of Choosing to Conceive Now	No	No
The Biological Act of Conception	No	No

Fig3-4.

If we understand the act of conception as the act of ‘bringing’ an entity into being then the direct and indirect rights-based proposals can avoid the identifiability objection. This means that the direct rights-based proposal is – despite the prevailing view in the literature – a promising solution to the non-identity problem that is just as plausible as its alternative.¹²³ My argument here is that if we understand Mary’s act as the ‘bringing’ of an entity into being then not only is there an entity that exists at T1 Mariette is also identifiable in a narrow person-affecting sense. An entity exists at T1 when we understand the act of conception as the act of ‘bringing’ an entity into being – as per the biological act – an entity exists, and must exist prior to the implantation and subsequent bringing of an entity into being. Furthermore, an entity is identifiable at the time of the act of bringing that entity into being: remember that it is the process of ‘bringing’ an entity into being that supposedly violates Mariette’s right and by implanting/or allowing the implantation of embryo-Mariette¹²⁴ we can point to some individual in an importantly narrow person-affecting sense because we can identify that individual. This seems to avoid the challenge faced by the previous acts of conception. Given that there is an existent and identifiable entity at T1 this means that the act of implantation and subsequent bringing of an entity into existence can – in fact – be morally wrong on the direct rights-based proposal.

Provided we understand conception in this way then all of the above applies to the indirect rights-based proposal also. The promisee is existent and identifiable in the lying gardener, and so can be a right holder at T1. Given that this case is used to justify the use of

¹²³ Only on certain conditions, of course, but other conditions are not my concern here.

¹²⁴ Commonly at 8-9 days after the fusion of sperm and egg, has developed beyond the point at which an embryo can split – that point is usually 3-6 days

the principle in not-postponing conception it can be highlighted that while there is an identifiable person in the lying gardener there is not in not-postponing conception when we understand the act of conception as either the act of choosing to conceive now or the biological act of conception but there is when we understand conception as the act of ‘bringing’ an entity into being. Thus, we end up with the following situation:

	Direct Rights-Based Proposal	Indirect Rights-Based Proposal
The Act of Choosing to Conceive Now	No	No
The Biological Act of Conception	No	No
The Act of ‘Bringing’ an Entity Into Being	Yes	Yes

Fig4-4.

If we understand the act of conception as the act of ‘bringing’ an entity into being then both the direct and the indirect rights-based proposal can avoid the identifiability and existence objections. This seems to avoid the challenge faced by the previous acts of conception. Given that there is an existent and identifiable entity at T1 this means that the act of implantation and subsequent bringing of an entity into existence can – failing other objections – be morally wrong on both the direct and indirect rights-based proposals.

4.4.2 *The Indirect Version of the Rights-Based Account is Unnecessary*

An opponent of the indirect rights-based proposal will say that we already have an explanation for the right violation on this understanding of conception – the direct rights-based proposal. Not only this, but it is the simplest explanation for the wrongdoing. One reason why the indirect rights based proposal was proposed was that it was an attempt to do better than the direct version in cases where there was no existent entity at that time. I only believe that the indirect version of the proposal only shows that the indirect version works when those persons already exist. However, in that case, if we consider the case of promising we could simply say that – by the direct rights-based proposal that when we make a promise that we know we will break what we have done is violate your right the same time that you make the promise knowing you will not do it. This is enough to ground the claim that an act of promising violates a right now without needing to develop a new theory of how making a promise today will generate an interest in you that that right be fulfilled later. There is,

therefore, no need for us to postulate the existence of indirect right violations at all – and with that in mind, not only is the indirect rights-based proposal superfluous in not-postponing conception then we might wonder why we need to postulate about the existence of indirect right violations at all if we can appeal to the direct rights-based proposal in both not-postponing conception and the lying gardener. In the lying gardener, we could simply say that the right is violated when you do not fulfil the promise and avoid using the indirect version of the rights-based proposal altogether if we can apply the direct version of the rights-based proposal to the same understanding of the act of conception. But this is not the same as saying you have a duty when you made the promise – we can just say that you violate their right directly when you do not fulfil your duty, there is no need to make claims about indirect rights at T1 at all. That is good enough reason to accept that the indirect rights-based proposal is superfluous and that a plausible solution to the non-identity problem in not-postponing conception is found with the direct rights-based proposal. Thus while we end up with what was presented in Fig4-4 that we saw above, we can add an important caveat. Remembering that one purpose of the indirect rights-based account is to provide an improvement on the direct rights-based proposal, then while the indirect rights-based proposal is capable of providing a rights-based explanation of the wrong some may argue that it is superfluous given that the direct rights-based proposal gives us what we need.

	Direct Rights-based proposal	Indirect Rights-based proposal
The Act of Choosing to Conceive Now	No	No
The Biological Act of Conception	No	No
The Act of ‘Bringing’ an Entity Into Being	Yes	Yes (though some will argue that this proposal is superfluous that itself does not show that it is wrong)

Fig5-4

This is a significant conclusion. It is significant because the prevailing view in the literature is that the direct rights-based proposal cannot offer a solution to the non-identity problem in cases like not-postponing conception. However, I have shown that once we acknowledge that how we have come to understand the act of conception is ambiguous, and then gain more clarity about what we mean by it, there is an understanding of that act in

which the direct rights-based proposal is, in fact, a plausible solution to the non-identity-challenge posed to our beliefs about cases like not-postponing conception.

4.4.3 The Direct Version of the Rights-based Account is Ad Hoc

I have argued that the most plausible solution to the non-identity problem in not-postponing conception is the direct Rights-based proposal. The rights of children apply to those who exist and are identifiable, and so we can simply apply the rights of children to not-postponing conception to generate the conclusion that Mary's act of conception is morally wrong. But this makes an assumption that was also prevalent when we discussed the indirect Rights-based proposal. While we can see how rights apply to existent and identifiable beings, it is not clear what independent reasons there are to believe that the act of conception itself is the kind of act that can violate a right. Let me explain.

Some opponents of the direct Rights-based proposal argue that Smolkin's direct Rights-based proposal, for example, is motivated only by the stipulation that an act of conception is like all other right violating acts. Smolkin makes the following stipulation with respect to an act of conception and how it can violate the rights of those we bring into being, he says:

...that a future person has been wronged by some act A, if A was a necessary condition for her to come into being, and A resulted in her having a life that will in some serious sense be defective.

(Smolkin, 1999, p. 202)

But they argue that we have no independent reason to accept this right other than accepting it would allow us to draw the conclusion that conceiving Mariette is wrong. Acts of conception are identity determining in the sense that in their absence there is no entity that comes into being who has the right we are said to violate in the alternative. Thus, to avoid this charge Smolkin includes the provision for such necessary acts of existence as being morally wrong. However, he does not give any independent reason to accept this stipulation – nor is there any reason that I can think of to justify this claim. It seems to me that we have no reason to accept that Smolkin's stipulation provides a reason to accept that acts of conception are similar to all other types of right violating act beyond the fact that accepting it would generate a favourable conclusion for his rights-based argument in not postponing conception. Opponents of the direct rights-based proposal conclude that without accepting this act is the kind of act that can violate a right, then there is no right-based moral claim – and the charge applies equally to the indirect rights-based proposal.

But this is a strange objection to present in my view. In my argument, I have claimed that it is possible that an existent and identifiable entity has their right violated by an act of conception in not-postponing conception. To say this lacks justification is to ignore the fact that an existent and identifiable entity exists – even if in the alternative they do not. There is nothing strange about an entity that exists and is identifiable now having rights of some kind.

4.5 Conclusion

In this Chapter I argued that there is a person-affecting proposal that allows us to conclude that Mary's act of conception wrongs Mariette.¹²⁵ To do this I explained rights-based proposals which aim to show that Mary's act is wrong because it violates Mariette's rights. I said that there are two rights-based proposals that are relevant to our discussion. The direct-rights based solution and the indirect-rights based solution. I argued that rights are the type of concept that only apply to those who exist currently and so for rights to apply in not-postponing conception it must be the case that some entity exists at the time of the act of conception to attribute that wrongdoing to someone in a person-affecting sense. I argued that once we evaluate both of the aforementioned proposals against three understandings of the act of conception then we can conclude that both proposals are plausible once we understand the act of conception as the act of bringing an entity into being. I then presented three objections to both the direct and indirect right-based proposals. While these objections are fatal to both proposals when we have not clarified the act of conception I have shown that once the act of conception is clarified then we can see that the direct rights-based proposal allows us to conclude that Mary's act of conception violates Mariette's rights.

¹²⁵ The challenge faced by the direct rights-based proposal and the indirect rights-based proposal will be true too of wrong-without-harm solutions that focus on moral concepts like respect or fairness. It will be up them to explain why acts of conception are like other acts that we ordinarily take to be dis-respectful or un-fair, despite the fact that an act of conception is identity determining in a way that all other disrespectful and unfair acts are not.

5. Conclusion

At the beginning of this thesis, I introduced Derek Parfit's non-identity problem and then explained how David Boonin (2014) uses his non-identity argument below to argue that its five premises are plausibly true so as to reach the conclusion that Mary's act of conception is not morally wrong in not-postponing conception. Remember that Boonin's non-identity argument runs as follows:

P1: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not make Mariette worse off than she would otherwise have been.

P2: If A's act harms B, then A's act makes B worse off than B would otherwise have been.

P3: Mary's act of conceiving now rather than taking a pill once a day for two months before conceiving does not harm anyone other than Mariette

P4: If an act does not harm anyone, then the act does not wrong anyone

P5: If an act does not wrong anyone, then the act is not morally wrong

C3: Mary's act of conceiving Mariette is not morally wrong¹²⁶

(Boonin, 2014, p. 27).

I said that a satisfactory solution to the non-identity problem would require us to deny one of these premises in such a way that allows us to explain the worseness, harm or wrongdoing in terms of Mariette. This means that in order to propose satisfactory conclusions I have focused on determining whether there exists a 'person-affecting' proposal that can explain how Mariette is either worse off, harmed or wronged by that act of conception. This also meant that I could legitimately set P3 and P5 aside. This was because proposals which respond to P3 are – although person-affecting – try to explain the harm of the act in terms of its effect on anyone other than Mariette (as discussed in Chapter 1). Proposals of this kind included those which argued that Mary's act is harmful because it puts pressure on the school

¹²⁶ This is labelled as C3 as opposed to C1 to indicate that it is the third conclusion of Boonin's sub-arguments explained in Chapter 1.

system resulting in less tuition for other students. Given that this would make them worse off than they would otherwise have been but for Mary's act of conception, this means that they would be harmed by that act on the counterfactual and comparative account of harm for example. But as I have said, this is not the kind of proposal we have been looking for because it does not explain that harm in terms of Mariette. I set P5 aside for similar reasons. Owing this decision instead to the fact that P5 assumes that an act that wrongs no one is not morally wrong, and so a proposal that will explain how despite P1, P2, P3 and P4 being plausibly true Mary's act of conception is morally wrong even if it wrongs no one will not satisfy the intuitive belief that Mary's act makes things worse for, harms or wrongs Mariette. For those reasons I only assessed proposals which aim to conclude that Mariette has been made worse off, harmed or wronged by Mary's act of conception in a *plausible* person-affecting sense.

I add emphasis to *plausible* here because while I have said that I hoped to conclude that there is a person-affecting proposal that can allow us to conclude that Mariette has been made worse off, harmed or wronged I did not limit the scope of the person-affecting proposals on offer. That is to say, that I assessed both so-called 'wide' person-affecting approaches and 'narrow' person-affecting approaches. The reason I put emphasis on plausible, is because there are many people who do not believe that a 'wide' person-affecting proposal gives us a morally relevant means of showing that P1 is worse for Mariette. The truth is that it does not give us a means of showing that P1 is worse for Mariette – but it does give us a way to show that Mary's act of conception makes things worse for 'her child'. Some disagree that the 'de dicto' understanding of P1 is morally relevant, that it does not appropriately capture the complainant in the 'narrow' person-affecting sense that we are so often used to when we make claims about acts that have seeming made some particular person (in our case that person is Mariette) worse off, harmed or wronged.

Given this disagreement, I spent a substantial part of Chapter 2 The De Dicto Proposal explaining Hare's (2007) argument in support of his de dicto proposal. We now know that the main thrust of Hare's argument is that there exists a plausible obligation to make things better for some certain set of others. Not just better, but de dicto better. Hare argued that this de dicto obligation is not just sometimes *best* understood de dicto – but that these obligations can sometimes *only* be understood in their de dicto sense. When both these conditions are met, Hare says that this makes that de dicto obligation morally relevant – and he argues that in not-postponing conception Mary's obligation is meets these conditions, and so we are justified in adapting P1 to include this morally relevant de dicto obligation to make things 'better for' 'the child that Mary conceives' and to fulfil this de dicto obligation Mary

must not make ‘the child that Mary conceives’ worse off than they otherwise would have been.

I will not revisit the entire argument here. **Instead I will highlight what I take to my key contributions to the literature in this Chapter.** Having explained both the De Re Objection from Valentina Urbanek and the Harm Reduction Objection from David Boonin I proposed that we adapt Hare’s initial two conditions which he uses to determine whether a case can provide an independent reason to accept the moral relevance of the de dicto proposal. Given that both the De Re Objection and the Harm Reduction Objection target the relevance of de dicto obligations in the Safety Officer (the case that Hare uses initially to justify the moral relevance of de dicto obligations) I proposed that we add an additional condition to strengthen a future case from attacks such as this. I argued that three conditions for showing that a case can give independent justification for the moral relevance of de dicto obligations are needed:

1. The case must show that we have a special responsibility to make things better for certain people that can be understood de dicto.
2. The obligation in the case must have no de re expression.
3. This de dicto obligation to make things better for some person (or people) is most plausibly fulfilled by health maximization and not harm reduction.

I then presented a novel case which I called Swim Coach and I argued that since it meets all of these criteria then we can use it to independently justify the moral relevance of de dicto obligations in other cases like not-postponing conception. I believe that this is a much stronger case than had been used previously.

Finally, I argued against an objection to the de dicto proposal which claims that the reasons an act makes some child worse off must unify – which is to say, that in Two Prospective Parents there is an assumption that when we explain the moral wrong of both Mary and Matilda’s acts it ought to be the same unifying reason. With respect to this claim I argued – in line with Hare – that this need not be unifying. However, my justification for this relates back to using Swim Coach to independently justify the existence of a de dicto moral obligation in not-postponing conception. I use it to also show that different coaches can have different obligations which mean their obligations can be understood in either de dicto or de re sense (or both, but when it is both they ought to follow their de re obligation). I believe the reason why de dicto obligations need not be unifying across cases is grounded in a much stronger (and more rigid) version of the criteria than Hare originally presented and so represents a virtue of the criteria and the case I set out in this Chapter. Given all of this, the de dicto proposal from Caspar Hare (2007) gives us a way to deny that P1 is true in

not-postponing conception. When we interpret P1 as I have done below, then we can see clearly that Mariette makes things worse for ‘the child that Mary conceives’ and given that she fails in her de dicto obligation to make things better for ‘her child’ she does wrongs ‘her child’ by failing to fulfil that obligation.

P1: Mary’s act of conceiving now rather than later does not make *‘the child that Mary conceives’* worse off than they otherwise would have been
[emphasis added]

(Boonin, 2014; 27).

In Chapter 3, I made several significant contributions to the literature that advance an understanding of how harm-based proposals can engage with the non-identity problem. Having concluded that there exists a morally relevant understanding of P1 that allows us to conclude that Mary’s act is not just worse but that it is morally wrong I then return to the original thought of this thesis. The original thought was not to come to favour any of the person-affecting proposals that I assess but instead to evaluate person-affecting proposals more generally and determine whether there were ways in which we could show that these proposals can show that Mary’s act makes things worse for, harms or wrongs in a person-affecting sense. The person-affecting proposals that I evaluate in Chapter 3 and Chapter 4 were ‘narrow’ person-affecting proposals. I said that while it is good that we have a person-affecting proposal that is plausible in the de dicto objection it would be better to have a ‘narrow’ person-affecting proposal given the attachment that people have to such narrow principles.

I assessed the harm-based proposal in Chapter 3. This proposal aimed to show that the act of conception harms Mariette. To do this I ruled out comparative harm-based proposals by systematically rejecting them. However, I highlighted that there is a sense in which these comparative accounts can explain harm in cases where my proposed person-affecting proposals do not need to apply – such as in the Slave Child Case. As for the promise of a successful harm-based proposal in not-postponing conception, first comparative accounts of harm were rejected on the basis that they are structurally unable to explain how Mariette is harmed in a comparative sense. I then argued that an alternative way to ground a harm-based claim was to appeal to a non-comparative account of harm as a sufficient condition for harm in cases like not postponing conception. I responded to several objections to the non-comparative account and in so doing I provided reasons to limit the scope of the applicability of the proposal to only those cases that are relevantly similar to not-postponing conception (and so thereby excluding cases like the slave child case from our analysis for reasons already developed).

I said in Chapter 1 that a modest view I have adopted is that only existent entities are morally relevant. This means that non-comparative accounts have been routinely rejected because they do not harm anyone at the time of their own conception. But it is not at all clear what conception ought to mean, and I argued that if we gain more clarity on what it means to be an entity at our own conception (and indeed, what it means ‘to conceive’) then we will be able to show that the non-comparative proposal applies straightforwardly on the most plausible understanding of the act of conception.

My main contribution in this Chapter is that I highlighted what I take to be a striking ambiguity in non-identity literature – that it is not at all clear how one is meant to understand what is meant by an ‘act of conception’ and thus little clarity on whether one is supposed to know whether an entity exists at that point – and this is vital for many of my claims to apply to those we ‘conceive’ since I believe that acts that harm can only harm when the entity in receipt of that harm exists at that time.

I argued that there were three ways that we could understand an act of conception. I said that the impact of this ambiguity has been that person-affecting proposals to the non-identity – such as the ones I consider in Chapters 3 and 4 have been previously rejected in large part because we have been mistaken about the most relevant understanding of the act of conception.

To develop this argument, I presented several cases which justified the claim that there are three understandings of the act of conception and that each of these acts can – and should be – evaluated as independent moral acts. I made the case that the reason they ought to be evaluated as independent moral acts is because of the fact that when we compared cases like human cloning to others it showed that our intuitions about the same acts differ depending on the case – but what I have highlighted is that while it seems like the cases are different they all evaluate the same acts. When we have a way to describe which act we are evaluating then it means that when we apply person-affecting proposals we can do so in a way that results in conclusions which explain the harm – or wrong – of that act in person affecting terms. Of course, this is only the case if there is one act that is more relevant than others – and I argued that while at first it seems like the most morally relevant understanding of the act of conception is the biological act – indeed the fact that Parfit discusses identity in terms of origins which includes our genetic make-up suggests that the biological act of conception is an importantly morally appraisable act. I argued that the most morally relevant act that I have described is actually the act of bringing an entity into being. To do this I presented several cases which showed that what is most morally relevant about those cases is whether that embryo is implanted.

Given these arguments, I was then able to apply both comparative and non-comparative accounts of harm to these understandings. When I did this it showed that when we have clarity about the most morally relevant act of conception then we can clearly see that person-affecting proposals allow us to generate person-affecting responses to P2 which can explain the harm or wrong of that act. Having offered responses to its objections, my novel conclusion in this Chapter was that the non-comparative account can show that an act of conception can be harmful to the entity at that time. **Assuming that that the act of conception is understood as the act of bringing that entity into being then we can conclude that Mariette is non-comparatively harmed by that act** – and this would give us a person-affecting solution to the question of whether Mariette is harmed in a person-affecting sense by Mary's act of conception. With that, I claim to have shown that Mary's act of conception harms Mariette and that act harms Mariette in the non-comparative sense of harm.

In the final Chapter, I assessed whether the same approach that was taken in Chapter 3 would generate similar conclusions in Chapter 4 – which is to say that I evaluated whether the clarity gained by clarifying our understanding of the act of conception allows some rights-based proposals to overcome their most salient objections. Ultimately, I was able to conclude that there is a person-affecting rights-based proposal that allows us to conclude that Mary's act of conception wrongs Mariette.¹²⁷ To do this I explained rights-based proposals that aim to show that Mary's act of conception is wrong because it violates Mariette's rights. I said that there are two rights-based proposals that are relevant to our discussion. The direct-rights based solution and the indirect-rights based solution. I argued that rights really only apply to those who exist currently and so for rights to apply in not-postponing conception it must be the case that some entity exists at the time of the act of conception to attribute that wrongdoing to someone who is a right holder in a person-affecting sense (and note that in the discussion in Chapter 4 I understood a right holder in the narrow person-affecting sense of a right holder as opposed to a wide person-affecting sense of right holder). I argued that once we evaluate both the direct and indirect rights-based proposals against three understandings of the act of conception then we can conclude that both proposals are plausible once we understand the act of conception as the act of bringing an entity into being. I then presented three objections that target either (or both) the

¹²⁷ The challenge faced by the direct Rights-based proposal and the indirect Rights-based proposal will be true too of wrong-without-harm solutions that focus on moral concepts like respect or fairness. It will be up them to explain why acts of conception are like other acts that we ordinarily take to be dis-respectful or un-fair, despite the fact that an act of conception is identity determining in a way that all other disrespectful and unfair acts are not.

direct and indirect right-based proposals. **While these objections are fatal to both proposals when we have not clarified the act of conception, I have shown that once the act of conception is clarified then we can see that the direct Rights-based proposal allows us to conclude that Mary's act of conception violates Mariette's rights.**¹²⁸

In addition to the conclusions generated in the above Chapters, I believe that if we evaluate acts of conception with a clarified approach like I suggest we do, then it is much easier to moralise about – and understand our intuitive beliefs with – cases like human cloning. Remember, that while it seemed clear that the moratorium on human clones prevents anyone from ‘producing’ a clone the most relevant understanding of this seems to be the act of bringing that entity into being – that is to say, by implanting that embryo. Given that my claim is that this is the most morally relevant understanding for determining whether the ‘bringing’ of that entity into being was worse for them, harmful or wrong means that we can explain why research on human embryos ought to be permissible but why implanting those embryos in a host would be impermissible.

Advances in assisted reproductive technology raise challenges for the scope of my approach to the non-identity problem moving forward. This is because advances in assisted reproductive technology have meant that technology such as artificial wombs could further distort our understanding of what it means to conceive. The basics of this technology already exist, and in 2017 and 2019 proof of concept studies showed that pre-natal lambs could be kept alive for several weeks using a proof of concept design for an artificial womb system (Romanis, 2020). In my view, and given all that I have said, I believe that there will need to be more of a focus on the language that we use to describe the act that is under scrutiny in non-identity cases as we move further down these technological pathways. But the challenges for how we engage with the non-identity problem do not start here, they have been developing since the non-identity problem first came to prominence. Advances in genetic germ line modification (with CRISPRCas9) have also stirred up questions relating to personal identity at the moment of fusion with respect to the impact that genetic manipulation has on that embryo. Indeed some challenges are already generating the kind of confusion that I have highlighted in Chapter 3 for example: if the timing of one's own conception is linked so closely to the morality of the act of conceiving a child then how exactly ought we to understand the causal relationship between sex and fertilization given that they do not occur simultaneously? Yet what Kavka asks in the slave child is whether the couple ought to ‘produce’ the child – and this is ambiguous. What seems most important

¹²⁸ Note that the indirect rights-based proposal is in my view a weaker proposal than the direct rights-based proposal. This is because, as I argue, it is ad hoc and only exists to generate the non-identity conclusion.

for ones origins is the fertilization that occurs and the fact that that material came from certain persons when it did in fact come from them. In vitro fertilization has meant that we can create embryos directly in a petri dish, there is a question about what the relevant sense of the act that ought to apply in these cases is? All of these cases challenge some of the original assumptions made by Parfit in his original discussion of the problem. The way that I have set out how we ought to understand an act of conception goes some way to clarifying the acts involved as well as what intuitions are likely to be motivating claims of harms, wrongs or indifference depending on the act. Creating an embryo clone may generate indifference, and yet moral disgust may be generated by the act of implanting such a clone.

My goal here was not to provide a review of all of the challenges involved in bioethical research and how they apply to the non-identity problem – it is merely to point out that when we engage with the non-identity problem it is prudent to set aside some space to determine what exactly the act under scrutiny is that is being examined. This is because depending on one's own – perhaps modest views such as my own view that entities that do not exist are not morally relevant – a plausible solution to the non-identity problem may already have been mistakenly rejected due to an ambiguity that, unbeknownst to its interlocutors, has meant that they have simply been engaging with two separate parts of the same problem. However, my hope is that some clarity can be gained by taking advantage of the way in which I have clarified this ambiguity in the act of conception in this thesis so as to conclude that there exist three person-affecting proposals to the non-identity problem in not-postponing conception that do show us Mary's act is worse, harms or wrongs in a person-affecting sense and this is what I set out to achieve at the beginning of this thesis.

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