RMM Vol. 5, 2014, 93–119
http://www.rmm-journal.de/

Brad R. Taylor

Children's Rights with Endogenous Fertility

Abstract:

This paper uses hypothetical contractarianism to consider the value of children's rights laws as a means of protecting children. Laws protecting children from their parents have the unintended but predictable consequence of making child-rearing less desirable for some parents and thereby reducing the number of children born. Such laws therefore produce a trade-off between the expected wellbeing of actual and possible persons. I show that a possible child behind an appropriate veil of ignorance may rationally oppose laws which benefit some and harm no actual children.

Keywords: Contractarianism; axiological possibilism; normative population theory; children's rights.

1. Introduction

Parents have a great deal of power over their children, and this fact poses serious problems for liberal political theory and public policy in liberal democracies. Parents are given fairly wide scope to raise their children as they see fit, but liberal states routinely place limits on parental sovereignty in the name of children's rights (Archard 2004). In many cases, concern for the welfare and autonomy of children conflicts with the values of non-liberal cultural groups. Christian scientists refusing life-saving medical treatment for their children (Hickey and Lyckholm 2004), Old Order Amish refusing to educate their children beyond the eighth grade (Mazie 2005), and Islamic cultures engaging in female circumcision (Nussbaum 1999, chap. 4) are examples of this conflict. In each of these cases, parents' religious beliefs are at odds with broadly-held liberal views of how children should be treated, and debate has centered on the tension between tolerance and autonomy (Galston 1995).

In a nonideal world, the appropriate distribution of rights depends not only on moral considerations narrowly construed, but also on the normatively-relevant second-order effects of such distributions.[1] This paper considers one such second-order effect of laws which restrict parental authority: reduced fertility.

[1] On feasibility see Brennan and Hamlin (2009) and Gilabert and Lawford-Smith (2012). On nonideal theory see Schmidtz (2011). On feasibility in the context of children's rights law, though of a different type than that discussed here, see Cowden (2011).

Parents not only decide how to treat their children, but also whether to have those children at all. These choices are not independent, and this complicates liberal justifications for children's rights laws. Parents—especially those belonging to illiberal cultural groups—have strong preferences over how their children are raised. Rational choice theories of fertility suggest that limiting parental sovereignty makes some parents less willing to have children. If children raised in illiberal communities have lives worth living and additional worthwhile lives are considered valuable, this is something liberal theorists and policymakers ought to consider.

Contractarianism provides a means of impartially considering the conflicting interests of many individuals. By asking what rational individuals would choose under epistemically and motivationally idealized conditions, contractarianism provides a simulation of impartial moral judgment beginning from individual self-interest (Buchanan and Lomasky 1984; Harsanyi 1953; 1955; 1978; Narveson 2013; Rawls 1971). This paper adopts a version of hypothetical contractarianism which considers the hypothetical choice of a rational possible person behind a veil of ignorance. Following Harsanyi (1953; 1955; 1978) I assume Von Neumann-Morgenstern utility functions and assume that hypothetical contractors have perfect knowledge of how alternative options influence the welfare of individuals but complete uncertainty as to which individual they will be. Following Kavka (1975) I include possible persons whose existence depends on the choice at hand in the original position.

This approach allows us to consider the hypothetical exit behavior of those children who in reality have neither exit options nor voice. A hypothetical possible child considering whether to support legislation designed to protect them from their parents will be influenced not simply by the value of such protections given that they do exist, but also the effect on their likelihood of being actualized. Such a perspective reveals that children's rights legislation, even if perfectly effective in making *actual* children better off, can be seen as bad for children in an abstract but normatively powerful sense.

I consider only the interests of potential children and ignore the preferences of parents. Though parents no doubt have moral standing here, I do this in order to focus on the central claim by children's rights advocates which I wish to question: that protective laws are good for children. In questioning this claim I make an argument which applies *a fortiori* to more comprehensive axiological analyses which consider the interests of parents as well as children.

While the argument here is strictly axiological and does not preclude overriding deontological considerations, I suggest that the previously neglected costs of children's rights I identify here are normatively relevant—i.e. they ought to be given some consideration in policy debates over the appropriate level of parental sovereignty. Such debates might reasonably conclude that the benefits of some piece of children's rights law outweigh the costs or that there are deontological considerations which trump the interests of possible persons. My point is simply to show that some children's rights protections are less desirable than we would think if fertility were exogenous. It should also be noted that I take the moral

significance of possible persons and the appropriateness of contractarianism for the question at hand as assumptions of this paper. Although I find each of these assumptions reasonable and will have a few words to say in their support, I do not offer a rigorous defense of either proposition, since this would take far more space than is available here.[2]

2. Axiological Possibilism

Whenever we make a choice at time t among n meaningful and feasible options, we are destined to bring about one of n possible worlds at time t+1.[3] The outcome of some choices will affect the identity and number of persons who come to exist. If a person's existence depends on our choice we may call them a *contingent person*. A contingent person is one who exists in one or more, but not all, possible worlds. That is, a normal person whose existence is contingent rather than some invisible ghostly entity whose personhood is contingent. After our choice has been made and the consequences played out, some of these contingent persons will have been actualized. An *actual person* is one who exists in this (i.e. 'the real') world; a *nonactual possible person* is one who could have existed but does not. A *necessary person* is one who exists in all possible worlds, and along with contingent persons they form the group of *possible persons*. While the language of possible persons and possible worlds is sometimes interpreted as requiring strong and counterintuitive metaphysical assumptions, I here use these concepts simply as a means of counterfactual reasoning (Broome 2004, 14–15; Holtug 2001, 366–379).

Ordinary ethical behavior requires that we ignore the interests of nonactual persons—there is little point in making tea for a person who might have existed but does not, and they do not mind when we step on their hypothetical toes. When we make a choice which affects the number and identity of those who will come to exist, on the other hand, the distinction between actual and nonactual persons cannot in principle be made. At t there is simply no fact of the matter as to who exists at t+1, since the answer is contingent on the choice we make now. Facing this open future, impartiality requires that we consider the interests of all parties affected by our choice.

Many axiological systems subscribe to the person-affecting restriction, which holds that states of affairs can only be good or bad (or better or worse) insofar as they are good or bad for one or more individuals. A person whose existence depends on our choice is in an obvious intuitive sense affected by it, though

[2] On axiological possibilism, see Hare (2007) and Holtug (2001; 1999; 2012, chap. 5). On contractarianism in general see Narveson (2013). On contractarianism with possible persons, see Kavka (1975).

[3] Of course, we cannot know precisely how our actions will play out and the choices of others will interact with others in bringing about the actual world. I here ignore such complications by making a strong *ceteris paribus* assumption.

many insist that a welfare comparison of existence and non-existence is meaningless. When I consider whether to kick actual Alice in the shin, I am making a cross-world welfare comparison. If I choose to kick her, a possible world in which she has a sore shin, and perhaps a general sense of distrust, becomes actual. If I choose to contain my violent tendencies, an alternative possible world in which Alice remains pain-free and trusting is actualized. Most reasonable person-affecting axiologies will have no problem recognizing that Alice is better off in the latter possible world—since her mental states are more pleasant, her preferences more satisfied, or her basic interests better advanced—and no especial logical difficulties arise.

When I make a choice which determines whether some possible future person exists, however, it is no longer so obvious that cross-world welfare comparisons make sense. If a person does not exist, they have no actual preferences, experiences, or interests. When asked to value non-existence against lives containing a mix of joy and frustration, one obvious response is to assign good things a positive value, bad things a negative value, and non-existence the neutral value of zero. Some have disputed the validity of this approach. Heyd claims that 'there is no way to compare the *amount* of suffering of states of actual people and the state of non-existence of these people. We should resist the temptation of assigning a zero-value to non-existence, thus making it quantitatively commensurable with either the positive or the negative net value of the lives of actual people' (Heyd 1992, 113). Non-existent lives clearly have *no value*, but the claim that they have *zero value* is to inappropriately assign a definite value to something which cannot be evaluated, since there is no standard of evaluation without preferences or interests.

As Holtug (2001, 364–383) shows, a response to the claim that non-existence cannot be evaluated without preferences or interests in the relevant world will depend somewhat on the axiological position adopted. If we hold an objective list or hedonic view of (person-affecting) value, there is no logical problem. Even if outcomes can only be evaluated insofar as they affect persons, the standard of evaluation (happiness, flourishing, etc.) is independent of any person's preference. That there is nobody to long for our existence in worlds from which we are absent presents no particular logical problem compared to ontological counterfactual statements. Similarly, if we take an object version of preferentialism—that individual preferences give external states of affairs such as pleasant mental states inherent value—we can similarly take a person's preference in a world in which they do exist as a standard of evaluation for worlds in which they do not. Heyd's objection is most plausible when interpreted on a preference-satisfaction theory of value. On this account, it is the coincidence of some preferred state of affairs and a preference regarding that state of affairs which creates value. So, in a world where Bob does not exist, the claim that existence would be good for Bob is parsed as 'Bob prefers that he would have existed, but that preference is not satisfied'. This clearly makes no sense, since there is no preference in that world to remain unsatisfied.

This interpretation of preference satisfaction is, I think, a mistaken one. We need not claim there is a preference in a world which remains unsatisfied to say that there is zero preference satisfaction in that world in a comparatively meaningful sense. We have an absence of a good thing, which is neutral. If in a world in which Bob exists and has a surplus of preference satisfactions, there is more preference satisfaction in this world than another world in which Bob does not exist, despite Bob having no preferences in the latter. A world in which a person has good things is better for that person than a world in which they do not, whether they are there to realize it or not. Only a preference-frustration account of value seems capable of grounding Heyd's objection. This is not only implausible, but also inconsistent with Heyd's general argument insofar as it implies that bringing a person into existence is practically always a bad thing, since everybody can expect some of their preferences to be frustrated (Holtug 2001, 380–383).[4]

When we claim that a possible future person Bob would be benefitted (or harmed) by existence, we are claiming that it is better (or worse) for him that he exist than not. We need not assign any intrinsic value to life itself here. Rather, existence benefits a person insofar as it allows good things to accrue to them. Thus, existence benefits a person who thereafter lives a life worth living all things considered. By 'lives worth living' I mean lives in which good things outweigh bad things in the relevant sense, with worthiness defined by whatever axiology one holds (Parfit 1984, 257–258). The extent of the benefit or harm of existence depends on the balance of good or bad things.

Though the argument of this paper does not depend on the claim that non-existence has precisely zero value to a person, I do require that it is quantitatively commensurable with existence at various levels of welfare. Accepting non-existence as a natural zero point would allow us to construct a ratio scale of welfare. This is not necessary for our purposes, since we are interested in comparing only the *difference* in utility across possible worlds. The interval scale of Von Neumann–Morgenstern utility is therefore sufficient. We can arbitrarily assign non-existence the baseline value of zero, some possible life worth living the arbitrary value of one, and define the utility of other possible lives in terms of preference between uncertain prospects. If we set option x at zero and y at one, an individual indifferent between y with certainty and x or z with equal probability reveals herself to value z at 2 units of utility (Alchian 1953; Von Neumann and Morgenstern 1964). In this paper I will treat non-existence as having zero value, but it should be noted that this number has meaning only in comparison with the utility of other possible lives.

A possible person's wellbeing is determined by the sum of positive and negative utilities accruing to them throughout their existence. A nonactual person, of course, does not exist at all and thus accrues no positive or negative utilities—their welfare is zero in the very simple sense that nothing good or bad can happen to them. An actual person living a miserable life will have negative net

[4] It should be noted that some, most notably Benatar (2006), are willing to bite this bullet and claim that bringing people into existence is always blameworthy.

utility and would be better off not having existed (i.e. is harmed by existence), while an actual person living a happy life will have positive net utility and would be worse off not having existed (i.e. is benefitted by existence). It makes no *practical* sense to claim that a nonactual person has been harmed or benefitted by non-existence once the actual persons have been sorted from the nonactual, but there is nothing logically incoherent about such a claim when we consider benefits and harms as betterness relations between the relevant alternatives and assign non-existence the neutral welfare value of zero (Holtug 2001, 370–377). Moreover, such judgments are an essential component of practical hypothetical reasoning conducted *before* the relevant choice is made, since no distinction can be made between actual and nonactual persons at this point. When our choice determines which possible persons will become actual, there is no obvious basis for privileging one set of possible persons over another.

Axiologies which insist that only actual persons matter morally cannot guide action in a practical sense when the actualized population of persons is at stake. The alternative I adopt in this paper is to extend moral status to all possible persons, though there are other possibilities which it is worth briefly considering to see how axiological possibilism stacks up.[5] Although the idea that only actual people matter is intuitively appealing, many seem to have a stronger intuitive commitment to what McMahan (1981; 2009) calls "the asymmetry". Many want to claim that (1) we have moral reason *not* to bring about miserable lives (i.e. lives not worth living), and (2) we have *no* moral reason to bring about happy lives (i.e. lives worth living). McMahan recognizes the intuitive appeal of these propositions but argues that they are difficult to maintain while holding a consistent version of the person-affecting restriction and retaining an action-guiding approach to moral theory. The claim that it is bad to bring a predictably miserable individual into existence requires that we admit impersonal or non-comparative value as normatively-relevant, while the claim that it is not good (or bad) to bring a predictably happy individual into existence is premised on the idea that impersonal and non-comparative value is non-existent or normatively-irrelevant. Treating costs and benefits asymmetrically does not solve this problem, since the desirable aspects of a normal happy life are required to 'cancel' the undesirable aspects and avoid the conclusion that it is bad to create any life which has any undesirable aspect. If we cannot distinguish between the gain of being born into a happy life and the loss of being born into a miserable one, a possible response is to reluctantly accept that the former is praiseworthy in order to say that the latter is blameworthy (Broome 2004; 2005; Singer 1993, 103–105).

[5] There are further possibilities I do not consider here, but as has been adequately established elsewhere these positions produce highly counterintuitive and sometimes inconsistent conclusions. Hare (2007) and Roberts (2010, 60–69) show that 'actualist' approaches are unable to guide action, and Broome (2005) shows that acceptance of the claim that adding new and happy lives is morally neutral is inconsistent with the Pareto principle. The symposium on 'possible preferences' published in Fehige and Wessels (1998, 367–542) provides extensive discussion of the issues.

Roberts (2010; 2011) attempts to resolve the apparent contradiction of the asymmetry by arguing that although *all* possible persons matter morally and are capable of suffering loss, only losses which are suffered in worlds in which individuals exist are morally significant. All possible persons matter, but they matter *variably* depending on the modal relationship between harm and existence. Loss is here defined in terms of a comparative betterness relation: 'to say that a person p incurs a *loss* at a given world w as a result of a given act a is to say that there was still another world w' accessible to agents at the critical time such that their performance of an alternate act a' at w' is better for p than their performance of a at w is' (Roberts 2011, 337). Since Roberts accepts, as do I, that the non-existence can meaningfully be compared against happy or unhappy lives in terms of welfare, she finds claims such as 'Alice was benefitted by being born into a happy life' and 'Bob was harmed by being born into a miserable life' quite coherent. However, by restricting her normative attention to *losses* and claiming that losses are only morally relevant when incurred in worlds in which the individual exists, she is able to treat Alice's benefit as morally neutral and Bob's harm as morally bad. Alice would have suffered a loss had she not come into existence, but since she fails to exist in the world where such a loss is incurred this loss does not matter. Bob's loss occurs in a world in which he does exist, however, and this means that his suffering has full moral status even though he does not exist in the world which is better for him.

Roberts's variabilist account is, it seems to me, by far the most plausible way of grounding the asymmetry. I grant that she has established the conclusion that 'Variabilism nicely grounds both halves of the Asymmetry *and* avoids the consistency and other conceptual problems that plague its competitors' (Roberts 2011, 336). But this is not an argument for variabilism over possibilism unless we feel compelled to endorse the asymmetry. The motivation for the symmetry, it seems, is simple intuition. When Roberts does attempt to argue for variabilism over possibilism, the brute nature of her belief that making happy people must be morally neutral is clear:

> "The one distinction that Inclusion [i.e. possibilism] insists we set aside is always going to seem to us one that no sound moral analysis can conceivably set aside: that one act imposes a loss on a *real, live, flesh and blood, sentient being* and the other a loss on, well, *nothing* that does or will *ever exist at all*. There *just is* an important moral distinction to be made between 'making people happy' and 'making happy people'. In a way that can only be described as axiomatic, your actual dog *must* come before your merely possible cat." (Roberts 2010, 45, emphasis in original)

According to Roberts (2010, 75), the fact that inclusivism provides answers to moral problems involving possible persons we find counterintuitive shows that it 'is surely false'. This clearly begs the question. While Roberts shows that it is possible to sharpen the intuition behind the asymmetry in order to avoid patent absurdities, she gives us no reason beyond her own insistence to accept

variabilism over possibilism. In response, I have nothing to say to Roberts other than 'I don't share your intuitions on this matter'. Although I share the view that a moral *obligation* to make happy people whenever possible would be quite unreasonable, it does seem to me intuitively that making happy people is *supererogatory*. I am happy to have been born, and, intuitively, this happiness should count as a point in favor of my parents' decision to bring me into the world. Since carrying and raising an unwanted child would be severely burdensome we generally do not consider voluntarily childlessness blameworthy (or abortion impermissible), but this does not preclude the possibility that we benefit individuals by bringing them into a happy existence. Similarly (but with the exception of Singer 1972), we do not generally consider it blameworthy to refrain from donating a large portion of our income to poverty alleviation efforts but have no problem praising those who do. On most liberal accounts of morality, charity is supererogatory, and my intuitions suggest the same is true of making happy people. Roberts and others are free to disagree, but I here take axiological possibilism as an assumption of my argument.[6]

3. Possibilist Contractarianism

In order to consider the interests of possible persons in collective decision-making contexts, I use a version of hypothetical contractarianism. This approach is most closely associated with Rawls (1971), but my argument owes more to Harsanyi (1953; 1955; 1977; 1978). The contractarian method simulates disinterested moral reflection by asking what principles, institutions, or rules rational and self-interested individuals would choose when denied knowledge of their place in society. To borrow a couple of Rawlsian terms, the 'original position' consists of some population of contractors behind a 'veil of ignorance' which denies them knowledge of their own place in society. The population of contractors, the nature of the veil, and the decision rules used by contractors vary between contractarian theories. In terms of the nature of the veil and the decision rule adopted, I follow Harsanyi. Contractors are perfectly informed about the preferences of all members of society and how the relevant alternatives will impact resource allocations. At the same time they are denied knowledge of their place in society. Each contractor has an equal chance of taking the place of any member of the relevant population, with their combination of resource allocations and preferences determined by random chance. In thinking about the choice between alternative rules, then, the contractor approaches the choice as one between quantifiably uncertain prospects. In asking which alternative maximizes expected utility, the contractor is forced to consider the interests of all affected parties impartially. The uncertainty of this original position forces its hypothet-

[6] Though I may well be outnumbered on intuitions regarding the praiseworthiness of making happy people, I am far from alone (see e.g. C. Hare 2007; R. M. Hare 1975; Holtug 2001; Nagel 1970, 78; Parfit 1984, 487–490; Rachels 1998).

ical inhabitants to abandon their idiosyncratic preferences and to impartially balance the competing interests of all relevant parties, since each could end up being any of these parties.

While accepting Harsanyi's version of the veil of ignorance and the decision rule motivating contractors, I depart from his definition of the relevant population and instead follow Kavka (1975, 240), who points out that the standard veil of ignorance fails to obscure one potentially very important fact: that one exists. Since each individual in the original position knows that they will in fact exist, their choices may not be as impartial as we might like. Parfit provides an example of a contractor choosing between two possible worlds:

> "In *Hell One*, the last generation consists of ten innocent people, who each suffer great agony for fifty years. The lives of these people are much worse than nothing. They would all kill themselves if they could. In *Hell Two*, the last generation consists not of ten but of ten million innocent people, who each suffer agony just as great for fifty years minus a day." (Parfit 1984, 393)

If given the knowledge that they will certainly exist, a selfishly rational individual will prefer Hell Two, since it saves them from a day of agony. Intuitively, though, Hell Two looks much worse than Hell One. The standard hypothetical contractarian method completely ignores the number of those suffering, which is surely a morally relevant fact. The natural response to such problems is to populate the original position with *possible* rather than *actual* persons. Each possible person is asked to evaluate the rules of a society which they will live in if they happen to come into existence at all. Rules affect the number of individuals in society as well as the welfare of those who are actually born, and the hypothetical contractarian approach I adopt here provides the conditions for an impartial consideration of both factors.

The use of hypothetical contractarianism is motivated by the need to impartially consider the interests of all affected parties and reflects the general distinction made by constitutional political economists between choice *among* rules and choice *within* rules (Brennan and Buchanan 1985; Hamlin 2014). When it comes to in-period political choice, deliberation and voting on particular children's rights laws would be biased by each individual's idiosyncratic preferences and position. The constitutionalist's response to this problem is to push debate up a level of generality and seek agreement on the rules by which children's rights laws can be enacted. If the rules under consideration are sufficiently general and durable, individuals will be forced by a 'veil of uncertainty' to consider the matter impartially, since any unfairness cannot reasonably be predicted to be to one's advantage in the long run. Here, though, the certainty that one has been born (and if we restrict suffrage to adults, that one has reached adulthood) renders the impartiality of constitutional deliberation questionable. No matter the generality and durability of constitutional rules, the actual will always be able to stack the deck in favor of themselves and against the possible. Hypothetical contractarianism offers a conceptual solution to the problem of balancing

the interests of current and future generations if we include all those who exist today and all those who will ever exist. When the existence of some individuals is endogenous to the choice at hand, however, the affected parties whose interests we should consider include those who might never come to exist.

To make use of the original position as an analytic device in this context, we need to define the relevant population of possible persons. If we are considering the choice between two rules q and r, the possible persons we should consider are those existing in either or both of the two possible worlds (w_q and w_r respectively) realized by our choice. Let Q equal the set of individuals existing in w_q and R the set of individuals existing in w_r. The relevant set of possible persons will be the union of these two sets. The original position will thus be populated by $|N| = |Q \cup R|$ individuals uncertain of their identity. Each contractor seeks to maximize their personal utility, which depends both on their probability of being actualized and on their utility contingent upon actualization. Let E_x represent the expected utility of an individual contingent on existing in world w_x. Since we are assuming that non-existence has a utility of zero, each contractor will prefer whichever rule x maximizes $E_x(|X|/|N|)$. Other things equal, contractors prefer rules which give them a greater probability of existing and greater utility in the event that they do exist. When these two factors conflict, contractors need to weigh a greater chance of being actualized against a lower expected utility contingent upon actualization.

Some have denied that hypothetical contractarianism can meaningfully be modified in this way. Parfit states that 'we cannot assume that, in the actual history of the world, it might be true that we never exist. We therefore cannot ask what, on this assumption, it would be rational to choose' (Parfit 1984, 392). This, he says, means that the contractual method 'is not impartial unless we imagine something that we cannot possibly imagine'. It is unclear why Parfit thinks we cannot ponder the uncertainty of our own existence. Is it just that our own non-existence is hard to imagine? True, but we do not need a very thick description to do moral philosophy. Kavka's paper imagines a hypothetical choice, and the existence of such a paper seems to show that at least one human has sufficient imaginative power. Parfit might instead mean that we as actual people know that the status quo set of institutions has produced a world in which we exist. Our existence supervenes on the actual history of the world, and so we have some information that existing institutions are good for us, and this adulterates the neutrality of our moral reasoning. This may be true, but it applies more broadly and does not preclude the possibility of at least attempting to abstract from this bias in order to impartially evaluate principles, institutions, or rules.

Cowen offers a more substantive criticism, arguing that since hypothetical contractarianism assumes that those in the original position are self-interested, too much weight is given to actualizing possible persons. To illustrate his objection, Cowen (1989, 39–40) uses the example of 'Hurka's Gamble'.[7] We are

[7] Cowen borrows the example from Hurka (1983).

to imagine that some omnipotent being offers us a gamble. With probability 0.51 the current and future population doubles with the average level of utility remaining the same; with probability 0.49 the human race is extinguished. In a world of 100 people each enjoying a payoff of 10, the relevant population of potential persons is 200. Rejecting the gamble would maintain the status quo, giving each potential person a 0.5 probability of earning a payoff of 10 and a 0.5 probability of not existing and earning a payoff of 0. Accepting the Gamble would yield a 0.51 probability of existing (payoff 10) and a 0.49 probability of not existing (payoff 0). Accepting the gamble gives a higher expected payoff (5.1 versus 5), is less risky, and does not alter the payoff contingent on existence. As such, it is clearly optimal to accept the gamble. Further, it will be rational to accept the gamble however many times it is offered. As the number of completed gambles increases, the probability of the human race surviving approaches zero. Hypothetical contractarianism with possible persons should be rejected, according to Cowen, since by giving each potential life equal weight and accepting Hurka's gamble it "does not [capture] the notion that increasing numbers of individuals do not always yield a proportionately better solution" (Cowen 1989, 40).

To answer Cowen's criticism, we need to ask what 'self-interested' means in the context of contractarianism. Each potential individual is interested in maximizing the utility they can expect to enjoy, but this does not imply selfishness in the sense of indifference to the welfare of others or to other considerations. If individuals have a preference that the human race exists in some form or that as many individuals as possible exist independently of their preference for their own existence, the payoffs involved in Hurka's Gamble alter. This would involve a departure from selfishness, but not from self-interest in the sense of optimizing on one's own preference function. No hypothetical contractor knows their place in society, but if the individuals they have a chance of becoming have altruistic or non-instrumental preferences, this is a relevant consideration from a self-interested point of view. Suppose that each potential individual has a preference of intensity 1 that the human race exists.[8] Since we are engaged in a comparative exercise, the preferences of potential individuals are relevant whether or not those individuals are actualized. Thus, in a the no-gamble situation, each contractor has a 0.5 probability of existing and having the human race existing (payoff 11) and a 0.5 probability of not existing but having the human race remain (payoff 1). The Gamble involves a .51 probability of existing and having the human race existing (payoff 11) and a .49 probability of not existing and having the human race end (payoff 0). The choice is no longer so clear. With payoffs as arbitrarily defined here, rejecting the gamble yields a higher expected payoff with lower variance and would therefore be preferred by most reasonable decision rules. The contractarian method is designed to remove bias by focusing on the preferences which individuals actually have. If people are self-interested

[8] That is, any person who comes to exist in any world will have this preference. In the present case, this means that each of the 100 inhabitants of the no-gamble world receive a payoff of 1 from knowing of the existence of the human race. If the gamble is taken and won, each of the 200 inhabitants will have a similar preference.

in a narrow sense, contractarianism will produce conclusions many of us consider undesirable.

As Hurka's Gamble shows, the results of hypothetical contractarianism are vulnerable to misspecified preferences. If we make the wrong assumptions about what individuals would choose under ideal circumstances, we will get the wrong answer. This is true of contractarianism generally, and indeed all normative approaches which take preferences or interests as evaluative standards. Like formal modeling in the social sciences, the contractarian method in normative political theory does not guarantee reasonable assumptions, but it does make assumptions transparent. In addition to making assumptions more easily evaluable, this enables a form of sensitivity analysis as assumptions can be altered and the robustness of conclusions across alternative specifications observed.

4. Children's Rights and Parents' Incentives

Parents care deeply about the type of lives their children will live. Although most parents surely have a good deal of disinterested altruistic concern for their children—they simply want them to live a life as valuable as possible—parents also derive utility from their children in ways which are not in the child's best interests. This is particularly true of the cases children's rights laws are designed to deal with. The fact that many parents are willing to deny their children medical treatment or education despite strong opposition from mainstream society suggests that their cultural preferences are strong and deeply-held. In many cases, the welfare of children and the preferences of parents seem to be at odds. If, as many liberals hold, Christian scientists have mistaken theological views and harm their children by denying them life-saving medical treatment, we have a prima facie case for a liberal state to step in to protect children, at least on certain interpretations of liberalism.[9]

Such cases can be usefully considered in light of the economic approach to fertility developed by Gary Becker (1960; 1991).[10] In this rational choice framework, parents are assumed to maximize some preference function, which is positively related to services produced by the child as well as other forms of consumption. A child is both consumption good and production good as far as parents are concerned. In their capacity as consumption goods, children produce enjoyment, pride, or are otherwise directly valued by their parents. In their capacity as production goods, children contribute to the production of other goods by working within the household or on the labor market. We need not assume here that parents are selfish, but that they maximize a utility function which does not *perfectly* reflect the best interests of the child. In some cases such con-

[9] On interpretations of liberalism which would not make such an assumption, see generally Galston (1995), Kukathas (2003), and Levy (2003).

[10] See also Birdsall (1988, 501–522) and Hotz et al. (1997).

flict will be due to selfishness; in others, to misguided altruism or commitment to some impersonal moral creed.

The unusual relationship between parent and child raises special problems for liberal theory. The parent not only has unparalleled power to harm or benefit the child, but also controls the very existence of the child. Access to birth control, abortion, and reproductive technologies have dramatically increased the control of fertility in the developed world today, but fertility has always been controllable to some extent through methods such as abstinence, *coitus interruptus*, and extended breast-feeding. Fertility choices are influenced by all sorts of factors (Hondroyiannis 2010, 34–35). Among these factors, I will argue, is the extent to which parents can shape the development of their children in line with their own preferences. If institutional factors influence the very existence of some children, the liberal or utilitarian justifications for children's rights laws become much more complicated.

Raising children is costly, and parents respond to incentives when making fertility decisions. Factors such as income, opportunity cost, and fiscal policy will influence the number of children people choose to have. So too will the expected 'quality' of children defined in terms of the degree to which the child produces tangible and intangible services valued by parents. Children's rights laws which restrict parental sovereignty, if they are to alter the behavior of targeted parents and ruling out strict indifference, necessarily reduce the quality of children in this sense. Under a rational choice framework, the fact that parents are choosing to treat their children in certain ways reveals that they prefer the state of affairs in which they so treat their children. By passing laws which prevent such treatment, we tighten their budget constraint and lower their welfare. More importantly, we change the relative price of child services. Assuming that the costs of raising children remain the same, children's rights laws will make it more expensive to produce a unit of child service.

If we assume continuous demand for children, and barring the possibility that child services are Giffen goods, this will straightforwardly reduce the quantity of child services demanded, as shown in *figure 1*. The vertical axis represents the quantity of child services C, and the horizontal axis represents the quantity of all other goods, X. The budget constraint BC_1 shows the possible combinations of child services and other goods the parent could produce given the resources they have available in a world without child protection laws. Given the parents' preferences as represented by the indifference curves I_1 and I_2, the parent will demand child services in quantity Q_1. With the introduction of a children's rights law, the production function which transforms child-rearing inputs into child services becomes less technologically efficient, and this increases the price of children, thus pushing the budget constraint inwards to BC_2 and increasing the relative price of child services, as reflected in the altered slope of the budget constraint. This will reduce the quantity of child services demanded from Q_1 to Q_2.

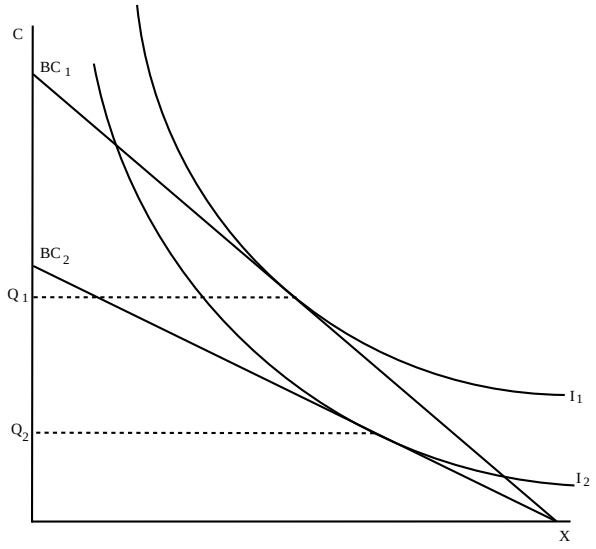

Figure 1: Children's rights and the demand for children

A recognition of the fact that child services are not entirely continuous—that is, the parent is not able to produce at any point value but is rather constrained to a set of discrete options—complicates the analysis somewhat and means that children's rights laws would probabilistically reduce the quantity of child services demanded. Given sufficiently many parents with varying budget constraints and indifference curves, however, the discrete case would approximate the continuous case described above.

Of course, child services are not the same thing as children. Economic theorists of fertility have long recognized that there is a trade-off between the quantity and quality of children (Becker and Lewis 1973). That is, a parent may have many children and derive a little satisfaction from each or may invest heavily in one or two children in order to derive greater per-child satisfaction. Fertility decline in the developed world seems to reflect a shift from quantity to quality in this sense. Thus, it is possible for the situation in *figure 1* to be realized without a decrease in the number of children born. Rather, the parent invests less in each child. This is likely true for some parents and some types of legal protections, but it seems a priori likely that in some cases a reduction in the demand for child services will be accompanied by a reduction in the number of children produced. Indeed, there are some empirical cases where legal restrictions do seem to have had an effect on fertility.

One such case is the prohibition of child labor. Child labor is not necessarily bad for children, since some households are so poor that child labor is necessary for survival. Under such conditions, even purely altruistic parents would send their children to work and restrictions on their ability to do so would be bad

for children (Basu and Van 1998). The analysis here is concerned with cases in which there is a genuine conflict of interest—i.e. the child would be better off not working. Formal theoretic models have generally concluded that restrictions on child labor will tend to reduce fertility (Dessy 2000; Doepke 2004). While there has been little rigorous empirical investigation of this question, that evidence which does exist supports this conclusion. This evidence is indirect in the sense that it suggests that child labor market conditions which alter the economic value of children to parents, rather than regulation per se, have an effect on fertility. It should be obvious that certain labor-market restrictions will reduce the economic value to parents of children. If we can know empirically that lower value tends to depress fertility, it is reasonable to conclude that certain types of regulation will reduce fertility. Early studies showed that child participation in the labor market tend to coincide with high birth rates (Schultz 1970). This tells us very little, however, since high birth rates could easily be causally responsible for high rates of child labor. Rosenzweig and Evenson (1977) show that high child wage rates in India are correlated with high levels of fertility and take this as evidence that parents respond to economic opportunities by having more children. Levy (1985) finds similar evidence in Egypt. While correlational studies of this sort can never rule out omitted variable bias, there is no obvious alternative explanation. If a law is implemented which prevents parents from sending their children to work, fertility will be affected, at least in a probabilistic sense. Children in poor countries are a productive asset for households, and anything which reduces their productivity will increase the relative price of child services and potentially reduce fertility.

Another case is the prohibition of gamete donor anonymity. A number of theorists have argued that children have a right to knowledge of their genetic heritage and that the anonymous donation of sperm or ova violates this right (Frith 2001; Cowden 2012). Without knowledge of who their biological parents are, it is argued, children are unable to form a coherent sense of identity. If we accept this argument and given that many donors wish to remain anonymous, prohibition of anonymous donation is a protection of children against the preference of their donor parents.[11] Such prohibitions harm some donors and benefit some children in a justifiable way. In recent years, many countries have used this logic to justify prohibitions of anonymous donation (Turkmendag, Dingwall and Murphy 2008, 283–284). It has been pointed out that prohibition might reduce donation rates, since prospective donors might worry about being identified and contacted by donor-conceived offspring. Since there is already a perceived shortage of suitable gamete donors, prohibiting anonymous donation makes it more difficult for recipient parents to have children (Pennings 2001). This is normally framed as a normative problem insofar as it is bad for potential recipient parents, but under the framework I am adopting here we can also see it as affecting potential children by making their realization less likely.

[11] Things get more complicated when we consider the interests of the social parents. I ignore these complications here since they do not affect the general thrust of the example.

In UK survey research, the potential for identification by and contact from offspring were the most-cited concerns among semen donors. Forty-six percent stated concern that law changes would allow offspring to identify them once they reached adulthood, and thirty-seven percent expressed concern about being contacted by offspring. These reasons were also highly cited by non-donors, though they were not so dominant. Sixty-eight percent of donors stated that they would not be willing to donate if the law changed to allow their name to be revealed to offspring once they reached eighteen years of age (Cook and Golombok 1995). Other studies have shown more modest effects, but all existing survey research suggests that a significant proportion of donors would rather not donate in the absence of anonymity.[12]

Survey research has its limitations when used to predict behavior, of course, but other forms of empirical evidence seem to point in the same direction. Political debates and eventual law changes prohibiting anonymous semen donation in the UK and the Netherlands have coincided with sharp reductions in donation rates (Janssens et al. 2006; Paul, Harbottle and Stewart 2006). More convincingly, many prospective parents are willing to travel internationally in order to undergo assisted reproduction in jurisdictions without donor anonymity prohibitions (Pennings 2010). As the Dutch law came into effect, for example, clinics in Belgium, and particularly those near the Dutch border, saw a large increase in Dutch patients (Ombelet 2007; Pennings et al. 2009).

These two cases are suggestive that laws designed to protect children from bad parents can sometimes reduce the number of children born. Theoretically, we should expect this effect to apply more broadly. Laws designed to protect children from their parents lower the value of children to their parents, and the economic analysis of fertility outlined above suggests that this will sometimes prompt prospective parents not to have otherwise desired children. In many cases the effect will be minor, but in some it could be quite significant. The purpose of this paper is not to show that any particular piece of children's rights legislation is undesirable due to its antinatalist effects, but to show theoretically that there is normatively-relevant issue which needs to be considered across a range of cases.

One argument in the utility function of many parents will be the cultural development of the child in particular directions. Other things equal, limits on parental sovereignty will shift the parent's cost-benefit analysis away from having a child. While this effect will surely be inframarginal for most fertility decisions, it will just as surely tip the analysis in some cases and reduce the number of children born to illiberal parents.

The lives of children subject to illiberal practices, we shall suppose, are worse than they would have been could they have avoided those practices. If we also think those lives would have been worth living, however, we face a normative trade-off between more and better lives. I am here interested in the set of rules which are best for the relevant population of children, and so ignore the wel-

[12] See Pennings (2001, 617–618) for a brief review of the survey literature. On Oocyte donation, see Brett et al. (2008).

fare of parents and any positive or negative externalities population imposes on third parties. The next section, in order to evaluate this trade-off, adopts the contractarian framework outlined in *section 3*.

5. Children's Rights in the Original Position

Before considering the trade-off between more and better lives, it will be useful to consider a baseline model in which a child, knowing she will actually exist, chooses whether to enact children's rights legislation. This is the situation children's rights advocates implicitly assume when they ignore the indirect effects of legislation on fertility.

Imagine a rational, self-interested child deciding at birth whether to allow parents to perform some action which will reduce the child's lifetime utility. This situation is represented in *figure 2* as an extensive form game between two players, Child and Parent. Assume that $a>b$ with certainty and that $y>x$ with some probability $p(0<p<1)$.

The hypothetical child chooses whether to implement a law to protect children's rights (L) or not ($\neg L$). If Child chooses $\neg L$, Parent chooses whether to restrict the autonomy of the child (R) or not ($\neg R$). A choice of $\neg R$ gives the same payoffs as the situation in which Child chooses L, but R gives Child payoff b and parent payoff y. Choosing L gives Child a with certainty; choosing $\neg L$ gives a with probability $(1\text{-}p)$ and b with probability p. Since $a>b$, the utility-maximizing move for Child is L. We can conclude that in such situations children's rights laws are good for children.[13]

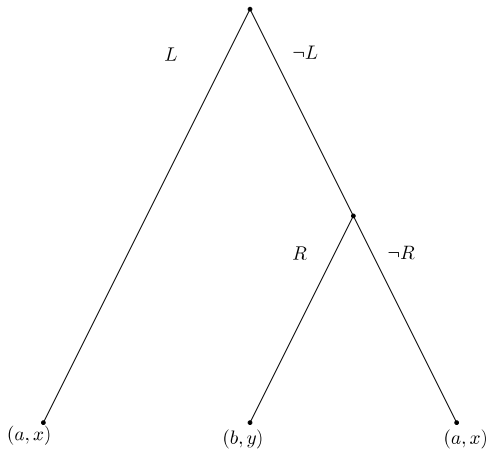

Figure 2: A baseline game

[13] Parent's payoff here includes any independent preference that Child receives a high payoff.

The hypothetical child needs also to consider the effect of institutions on Parent's willingness to have children. After the child has chosen whether or not to legislate Parent chooses whether to have a child (C) or not ($\neg C$). If Child chooses to legislate at stage one, Parent has control over their fertility but not the decision of whether to restrict. For $\neg L$, Parent chooses whether to have a child and restrict (R), have a child and not restrict ($\neg R$), or not have a child ($\neg C$). Parent heterogeneity is important here. My suggestion is that some parents will choose to have children if and only if there is no law restricting parental autonomy. That is, for some parent i: $u_i(\neg L, C) > u_i(\neg L, \neg C) \wedge u_i(L,C) < u_i(L, \neg C)$, where $u_i(X,Y)$ represents the payoff to i of the solution (X,Y).

If we place no restrictions on parental preferences, there are six possible parental types (defined in terms of strategies), labelled $s_1 - s_6$ in *table 1* below. Though each of these strategies is logically possible, it is difficult to plausibly rationalize the preference orderings behind strategies s_5 and s_6 unless the law influences their behavior indirectly rather than by directly defining their choice set. Since these strategies are rather implausible and my purpose here is to demonstrate a *possibility*, I exclude these strategies from the analysis for the sake of simplicity and consider only $s_1 - s_4$.[14]

	L	¬L
s_1 (Weakly illiberal)	C	*(C,R)*
s_2 (Strongly illiberal)	¬C	*(C,R)*
s_3 (Liberal)	C	*(C,¬R)*
s_4 (Non-breeder)	*¬C*	¬C
s_5 (Excluded)	C	¬C
s_6 (Excluded)	¬C	(C,¬R)

Table 1: Parental types

Children's rights law is designed to change the behavior of the weakly illiberal (s_1) and strongly illiberal (s_2) parents, and indeed the behavior of these types is changed by introduction of a law: the weakly illiberal have children but do not

[14] A possible rationalization for s_5 is that parents prefer not to bring children into a society with illiberal practices or because they worry about dying before the child is raised and having their new guardian restrict their autonomy. A possible rationalization for s_6 is that the parent wishes to raise an autonomous child but objects to the state limiting parental sovereignty, either on symbolic grounds or because they worry about a 'slippery slope' to more extensive limitations of parental sovereignty. Although these strategies are coherent, such attitudes seem sufficiently unlikely that we can ignore them for the purposes of this paper. Considering such groups would add to complexity of the analysis below but would only alter its result is this group is sufficiently large relative to strongly illiberal parents (for an earlier version of this argument which considers s_5 parents, see Taylor (2014, chap. 5). I here make no substantive argument that this will not be the case, and thus this possibility puts another condition on the applicability of my argument.

restrict their autonomy and the strongly illiberal choose not to have children at all. The choices of liberal and non-breeding parents are not affected by the law, with liberals always having children and giving them autonomy and non-breeders never having children. With respect to the choice between L and $\neg L$, the children of liberal (s_3) and weakly illiberal (s_1) parents are necessary persons, the children of non-breeders (s_4) are impossible persons, and the children of strongly illiberal (s_2) parents are contingent persons. Contingent persons are clearly affected by the choice between L and $\neg L$, and so too are the children of weakly illiberal parents. Though they are necessary persons, their welfare varies across alternatives. The groups affected by the decision at hand are the children of strongly illiberal and weakly illiberal meaning that we can ignore the other groups.

Our original position, then, will be populated by possible children with the knowledge that their parents are of type s_1 or s_2 but unsure which of these types and judge probability on the relative number of these types in society. We can arbitrarily set the utility value of non-existence for Child at 0, and continue to assume $a>b>0$ (i.e. that an autonomous life is better than a nonautonomous life is better than nonexistence).[15]

Similarly, we can arbitrarily set Parent's utility from not having a child at 0.[16] All illiberal parents (s_1 or s_2) most prefer to have a child and restrict their autonomy (payoff y). Weakly illiberal parents prefer an autonomous child (x) to none at all (0), while strongly illiberal parents have the opposite preference. Thus, for weakly illiberal parents, $y>x>0$, while for strongly illiberal parents $y>0>x$. This situation is represented in *figure 3* below (child's payoff is first).

[15] Some types of non-autonomous existence may be worse than not existing, in which case Child's preference ordering would be $a>0>b$. When discussing the right of parents to severely abuse their children such an ordering might be relevant and would remove the trade-off between more and better lives (since marginal lives would have negative value). In most cases where children's rights laws are up for debate, however, a non-autonomous existence is on average better than nothing. Few would deny that women generally live worthwhile lives despite clitoridectomy, though they might be significantly less worthwhile than they otherwise would have been. In this paper I am concerned with laws for which the proscribed activity would reduce the victim's welfare but not by so much that their life is not worth living. An interesting extension of my argument would be to consider cases in which mild restriction reduced welfare but did not reverse the ranking of life and non-existence while extreme restrictions did make life worse than nothing. If some parents would engage in extreme restrictions and others mild restrictions and if a law could prohibit extreme restriction only by also prohibiting mild restriction, we would have another trade-off to consider. *s1* and *s2* could each be divided into two types, those who would engage in mild and extreme restriction respectively. This would increase the desirability of legislation, and the strength of this effect would depend on relative number of extremely and mildly restrictive parents. Since I think the politically relevant case overwhelmingly involve cases in which restriction almost always leaves the child with a life worth living I do not incorporate this possibility into the analysis.

[16] It should be noted that both zero-points are arbitrary and that we cannot compare the utility of Parent and Child.

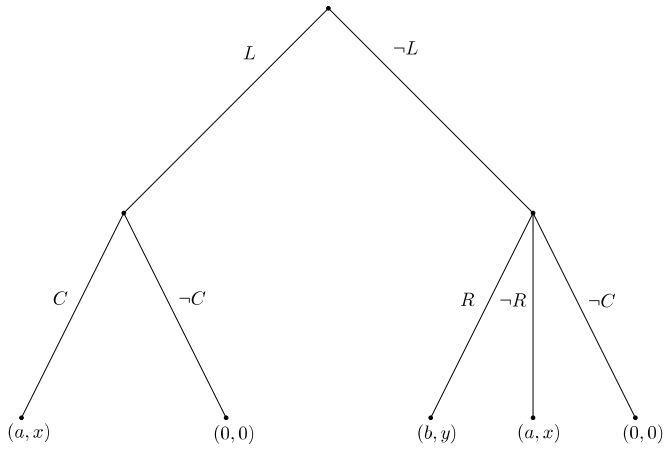

Figure 3: Children's right with endogenous fertility

When Child chooses L, Parent chooses between C and $\neg C$. If the parent is weakly illiberal they choose C for payoff x, since x>0. If strongly illiberal, they choose $\neg C$ for payoff 0, since 0>x. When Child chooses $\neg L$, Parent chooses between R, $\neg R$ and $\neg C$. Since y>x and y>0 for all relevant parents, all choose R for payoff y. Thus, $\neg L$ gives Child payoff b with certainty and L gives a or 0 with some probability determined by the relative number of strongly and weakly illiberal parents in the population.

Let $|S_1|$ and $|S_2|$ represent respectively the cardinality of the sets of weakly and strongly illiberal parents. These sets are disjoint and together exhaust the set N of relevant parents (i.e. $|S_1| + |S_2| = |S_1 \cup S_2| = |N|$). From Child's perspective behind the veil of ignorance, then, the probability p of Parent being of type s_1 is given by p=$|S_1| / |N|$. Choosing L gives Child a (autonomous life) with p and 0 (nonexistence) with 1-p. Choosing $\neg L$ gives b with certainty. The decision facing Child is shown in *figure 4* below.

What would a rational person choose in thus original position? Child, as an expected utility maximizer, will choose L if $pa > b$ and $\neg L$ if $pa < b$. The choice between L and $\neg L$ depends on two factors. Firstly, a strong preference for existence and relative indifference between types of existence makes a regime of parental sovereignty more attractive. If a-b is small relative to b-0, the low marginal benefit of autonomy will make a choice of $\neg L$ more likely. Secondly, and more interestingly, the magnitude of $|S_1|$ in relation to $|S_2|$ is important. Intuitively it seems that extremely illiberal parents would make legislation more desirable. The analysis here suggests that the existence of parents so strongly illiberal that they would rather not have children if forced to raise them liberally is reason to oppose children's rights legislation. Children of s_1 parents are better off under L, and children of s_2 parents are better off under $\neg L$. A greater proportion of s_2 parents will decrease p and thereby make $\neg L$ more attractive.

We should not push this point too far, however, since the strength of illiberalism varies on many directions. Among the most important of these is presumably the severity of restrictions imposed on children, and in this respect more intense illiberalism would indeed provide reason to legislate.

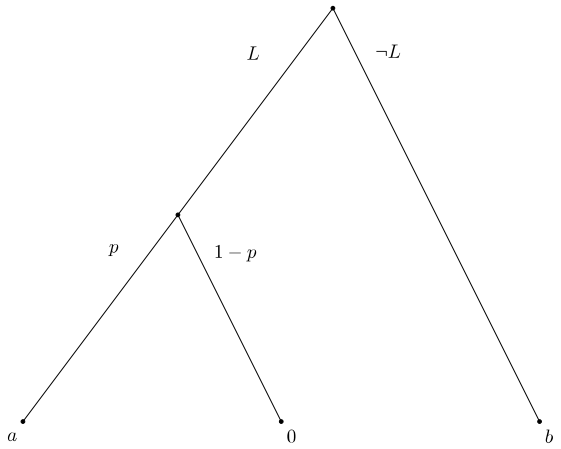

Figure 4: A decision-theoretic simplification

The potential child faces a trade-off between the probability of being born and their payoff conditional on being born. It should be noted that L is Pareto superior to $\neg L$ when we consider only actual children under L, but since the number of children born will be greater under $\neg L$ a rational possible child behind the veil of ignorance might oppose L in full knowledge that such a policy would benefit some and harm no actual children—that their choice will allow parents to abuse their authority in ways which make their life significantly worse.

The analysis given here is abstract and as such does not provide direct answers to real world policy debates over parental sovereignty and children's rights. Firm normative conclusions in such cases would require the specification of many things which cannot in practice be specified, including the relative value of an autonomous and nonautonomous existence, risk preference independent of identity, and the causal effect of legislation of fertility. What we can do, based on the assumptions I have made in this paper, is conclude that there is a potentially normatively-relevant issue which has so far been ignored in these debates. It may be that children's rights legislation remains desirable all-things-considered, but this should not be assumed too lightly if we place normative weight on those 'voices from another world' (C. Hare 2007) whose existence some otherwise desirable policies might thwart.

6. Conclusion

Even if we restrict moral standing to children, there are important trade-offs when considering the desirability of legislation designed to protect children from their parents. Parents have great control over the welfare and development of their children, and when interests diverge there seems to be a prima facie case for state intervention. At the same time, parent's ultimate control over the very existence of children provides reason for caution. If the contractarian method adopted here is accepted as a way of simulating impartial evaluation of competing interests, laws which are good for some actual children and bad for none might still be considered harmful for children generally in an abstract but important sense.

The situation here is an instance of a broader phenomenon familiar to political economists. Many policies have unintended consequences which are predictable but impossible to specify or observe empirically. Frédéric Bastiat (1995) distinguished between the seen and the unseen effects of policies, arguing that the task of the economist is to look beyond the immediate and visible effects of a policy and consider the invisible but analytically foreseeable consequences. Those children protected from parental mistreatment are visible and (imperfectly) specifiable. Those children never born as a result of regulation are invisible and nonspecific. This paper has argued that such invisibility should not diminish their moral standing. More generally, we should subject normative theory to positive analysis in order to uncover the unseen effects of proposals which seem clearly desirable at first glance. Such analysis is an indispensable component of any normative theorizing which seeks to inform real-world choices (Brennan and Hamlin 2009).

Rules never tell people precisely how to behave. Rather, rules cut off certain options but leave others open. If rules are made in the hope of preventing one type of harmful action but leave more harmful alternatives on the table, desirability is far from assured. The situation here is somewhat analogous to that of minimum wage laws in terms of logical structure. While these laws are intended to protect vulnerable workers from unfair treatment by employers, they do not mandate that vulnerable workers are hired and receive decent wages. Rather, they mandate reasonable wages conditional on employment, and this will prompt employers to hire fewer low-productivity (i.e. vulnerable) workers. Minimum wage laws will increase the wages of some relatively vulnerable workers but will tend to push the *most* vulnerable out of work altogether (Gorman 2002). Just as the existence of many highly vulnerable workers on low wages shows us that there is a problem but also indicates that the most obvious policy solution might do more harm than good, the existence of many parents strongly committed to raising their children in ways which hamper the development of autonomy does not necessarily provide an argument for prohibition on welfarist grounds.

This is not to say that such abuses of parental authority should be ignored, however. While rational possible children may prefer a regime of parental sover-

eignty to one characterized by broad negative sanctions, there may be other incentive schemes which encourage liberal treatment without depressing fertility. Interestingly, imperfect enforcement of children's rights laws could be beneficial here. I have assumed above that legislation is absolutely binding. If we relax this assumption and admit that some people will break the law and accept punishment with some probability, we can see a legal prohibition as imposing an additional cost on undesirable actions. Those with a weak preference for the prohibited activity will be unwilling to pay this cost, while those with very strong preferences will. Thus, imperfectly enforced prohibitions might encourage liberal treatment while allowing the strongly illiberal to have children and (unlawfully) raise them in accordance with their preferences. This would not completely resolve the trade-off between rights protection and fertility, since the cost of breaking the law will be a decisive factor in some fertility choices. It may be the case, however, that weakly enforced laws with various loopholes are preferable to stronger laws in some cases.

Moreover, laws interact with preferences and norms in various ways (Cooter 1998; Sunstein 1996). An obvious possibility arises when we consider the model above dynamically, with today's children becoming tomorrow's parents. If parental type is heritable via upbringing, the distribution of parental types will be endogenous to the choice between L and $\neg L$ in previous periods. Children's rights protections would put the strongly illiberal at a reproductive disadvantage. Though the normative position adopted here would see these missing generations as regrettable, it is plausible that under some conditions other groups would increase their fertility to compensate. If that were the case the normative analysis would need to be much more complicated than that presented above.

Another possibility is that the preferences of *particular* parents are endogenous to institutions. This could happen directly via a psychological reaction to policy. Parents might respond to legislation by internalizing the liberal norms embodied therein. On the other hand, unpopular laws might provoke backlash from parents and reinforcement of illiberal attitudes. Social factors suggest that law might affect preferences indirectly. It may be, as Mackie (1996) argues, that certain cultural practices such as female genital mutilation are instead the result of a suboptimal cultural norm which parents prefer to follow only when such norms are widespread, suggesting that legislation might facilitate escape from a suboptimal equilibrium. These issues need to be weighed up on a case-by-case basis. In some cases the protective benefits of children's rights laws will outweigh the costs. In others, the apparent trade-off may be illusory in the long term. The argument presented here, however, shows that the existence of vulnerable children and bad parents does not necessarily justify protective intervention.

References

Alchian, A. (1953), "The Meaning of Utility Measurement", *American Economic Review* 43(1), 26–50.

Archard, D. (2004), *Children: Rights and Childhood*, 2nd ed., London: Routledge.

Bastiat, F. (1995), "What Is Seen and What Is Not Seen", in: Cain, S. (trans.), *Selected Essays on Political Economy*, Irvington-on-Hudson/NY: The Foundation for Economic Education, 1–50.

Basu, K. and P. H. Van (1998), "The Economics of Child Labor", *American Economic Review* 88(3), 412–427.

Becker, G. (1991), *A Treatise on the Family*, expanded ed., Cambridge/MA: Harvard University Press.

— (1960), "An Economic Analysis of Fertility", in: Universities-National Bureau (ed.), *Demographic and Economic Change in Developed Countries*, New York: Columbia University Press, 225–256.

— and H. Lewis (1973), "On the Interaction between the Quantity and Quality of Children", *Journal of Political Economy* 81(2), 279–288.

Benatar, D. (2006), *Better Never to Have Been: The Harm of Coming into Existence*, Oxford: Oxford University Press.

Birdsall, N. (1988), "Economic Approaches to Population Growth", in: Chenery, H. and T. N. Srinivasan (eds.), *Handbook of Development Economics*, Amsterdam: North Holland, 477–542.

Brennan, G. and J. M. Buchanan (1985), *The Reason of Rules: Constitutional Political Economy*, Cambridge: Cambridge University Press.

— and A. Hamlin (2009), "Positive Constraints on Normative Political Theory", in: Brennan, G. and G. Eusepi (eds.), *The Economics of Ethics and the Ethics of Economics: Values, Markets and the State*, Cheltenham: Edward Elgar, 106–128.

Brett, S., R. Sacranie, G. Thomas and R. Rajkhowa (2008), "Can We Improve Recruitment of Oocyte Donors with Loss of Donor Anonymity? A Hospital-based Survey", *Human Fertility* 11(2), 101–107.

Broome, J. (2005), "Should We Value Population?", *Journal of Political Philosophy* 13(4), 399–413.

— (2004), *Weighing Lives*, New York: Oxford University Press.

Buchanan, J. M. and L. E. Lomasky (1984), "The Matrix of Contractarian Justice", *Social Philosophy and Policy* 2(1), 12–32.

Cook, R. and S. Golombok (1995), "A Survey of Semen Donation: Phase II—the View of the Donors", *Human Reproduction* 10(4), 951–959.

Cooter, R. (1998), "Expressive Law and Economics", *The Journal of Legal Studies* 27(S2), 585–607.

Cowden, M. (2012), "'No Harm, No Foul': A Child's Right to Know Their Genetic Parents", *International Journal of Law, Policy and the Family* 26(1), 102–126.

— (2011), "What's Love Got to Do with It? Why a Child Does Not Have a Right to Be Loved", *Critical Review of International Social and Political Philosophy* 15(3), 325–345.

Cowen, T. (1989), "Normative Population Theory", *Social Choice and Welfare* 6(1), 33–43.

Dessy, S. E. (2000), "A Defense of Compulsive Measures Against Child Labor", *Journal of Development Economics* 62(1), 261–275.

Doepke, M. (2004), "Accounting for Fertility Decline during the Transition to Growth", *Journal of Economic Growth* 9(3), 347–383.

Fehige, C. and U. Wessels (1998) (eds.), *Preferences*, Berlin: Walter de Gruyter.

Frith, L. (2001), "Gamete Donation and Anonymity The Ethical and Legal Debate", *Human Reproduction* 16(5), 818–824.

Galston, W. A. (1995), "Two Concepts of Liberalism", *Ethics* 105(3), 516–534.

Gilabert, P. and H. Lawford-Smith (2012), "Political Feasibility: A Conceptual Exploration", *Political Studies* 60(4), 809–825.

Gorman, L. (2002), "Minimum Wages", in: Henderson, D. (ed.), *The Concise Encyclopedia of Economics*, 2nd ed., Indianapolis: Liberty Fund, URL: http://www.econlib.org/library/Enc/MinimumWages.html.

Hamlin, A. (2014), "Reasoning about Rules", *Constitutional Political Economy* 25(1), 68–87.

Hare, C. (2007), "Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?", *Ethics* 117(3), 498–523.

Hare, R. M. (1975), "Abortion and the Golden Rule", *Philosophy & Public Affairs* 4(3), 201–222.

Harsanyi, J. (1978). "Bayesian Decision Theory and Utilitarian Ethics", *The American Economic Review* 68(2), 223–228.

— (1977), "Morality and the Theory of Rational Behavior", *Social Research* 44(4), 623–656.

— (1955), "Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility", *Journal of Political Economy* 63(4), 309–321.

— (1953), "Cardinal Utility in Welfare Economics and in the Theory of Risk-taking", *Journal of Political Economy* 61(5), 434–435.

Heyd, D. (1992), *Genethics: Moral Issues in the Creation of People*, Berkeley: University of California Press.

Hickey, K. and L. Lyckholm (2004), "Child Welfare versus Parental Autonomy: Medical Ethics, the Law, and Faith-based Healing", *Theoretical Medicine and Bioethics* 25(4), 265–276.

Holtug, N. (2012), *Persons, Interests, and Justice*, Oxford: Oxford University Press.

— (2001), "On the Value of Coming into Existence", *The Journal of Ethics* 5(4), 361–384.

— (1999), "Utility, Priority and Possible People", *Utilitas* 11(1), 16–36.

Hondroyiannis, G. (2010), "Fertility Determinants and Economic Uncertainty: An Assessment Using European Panel Data", *Journal of Family and Economic Issues* 31(1), 33–50.

Hotz, V. J., J. A. Klerman and R. J. Willis (1997), "The Economics of Fertility in Developed Countries", in: Rosenzweig, M. R. and O. Stark (eds.), *Handbook of Population and Family Economics*, Amsterdam: North-Holland, 275–347.

Hurka, T. (1983), "Value and Population Size", *Ethics* 93(3), 496–507.

Janssens, P. M. W., A. H. M. Simons, R. J. Van Kooij, E. Blokzijl and G. A. J. Dunselman (2006), "A New Dutch Law Regulating Provision of Identifying Information of Donors to Offspring: Background, Content and Impact", *Human Reproduction* 21(4), 852–856.

Kavka, G. (1975), "Rawls on Average and Total Utility", *Philosophical Studies* 27(4), 237–253.

Kukathas, C. (2003), *The Liberal Archipelago: A Theory of Diversity and Freedom*, Oxford: Oxford University Press.

Levy, J. T. (2003), "Liberalism's Divide, After Socialism and Before", *Social Philosophy and Policy* 20(1), 278–297.

Levy, V. (1985), "Cropping Pattern, Mechanization, Child Labor, and Fertility Behavior in a Farming Economy: Rural Egypt", *Economic Development and Cultural Change* 33(4), 777–791.

Mackie, G. (1996), "Ending Footbinding and Infibulation: A Convention Account", *American Sociological Review* 61(6), 999–1017.

Mazie, S. V. (2005), "Consenting Adults? Amish Rumspringa and the Quandary of Exit in Liberalism", *Perspectives on Politics* 3(4), 745–759.

McMahan, J. (2009), "Asymmetries in the Morality of Causing People to Exist", in: Roberts, M. A. and D. T. Wasserman (eds.), *Harming Future Persons*, Dordrecht: Springer Netherlands, 49–68.

— (1981), "Problems of Population Theory", *Ethics* 92(1), 96–127.

Nagel, T. (1970), "Death", *Nous* 4(1), 73–80.

Narveson, J. (2013), "Social Contract: The Last Word in Moral Theories", *Rationality, Markets and Morals* 4(72), URL: http://www.rmm-journal.de/downloads/Article_Narveson.pdf.

Von Neumann, J. and O. Morgenstern (1964), *Theory of Games and Economic Behavior*, 3rd ed., New York: John Wiley.

Nussbaum, M. (1999), *Sex and Social Justice*, Oxford: Oxford University Press.

Ombelet, W. (2007), "Access to Assisted Reproduction Services and Infertility Treatment in Belgium in the Context of the European Countries", *Pharmaceuticals Policy and Law* 9(1), 189–201.

Parfit, D. (1984), *Reasons and Persons*, Oxford: Clarendon Press.

Paul, S., S. Harbottle and J. A. Stewart (2006), "Recruitment of Sperm Donors: The New-castle-upon-Tyne Experience 1994–2003", *Human Reproduction* 21(1), 150–158.

Pennings, G. (2010), "The Rough Guide to Insemination: Cross-Border Travelling for Donor Semen Due to Different Regulations", *Facts, Views & Vision in ObGyn Monographs*, 55–60.

— (2001), "The Reduction of Sperm Donor Candidates Due to the Abolition of the Anonymity Rule: Analysis of an Argument", *Journal of Assisted Reproduction and Genetics* 18(11), 617–622.

—, C. Autin, W. Decleer, A. Delbaere, L. Delbeke, A. Delvigne, D. De Neubourg et al. (2009), "Cross-border Reproductive Care in Belgium", *Human Reproduction* 24(12), 3108–3118.

Rachels, S. (1998), "Is It Good to Make Happy People?", *Bioethics* 12(2), 93–110.

Rawls, J. (1971), *A Theory of Justice*, Cambridge/MA: Harvard University Press.

Roberts, M. A. (2011), "The Asymmetry: A Solution", *Theoria* 77(4), 333–367.

— (2010), *Abortion and the Moral Significance of Merely Possible Persons: Finding Middle Ground in Hard Cases*, Heidelberg: Springer.

Rosenzweig, M. and R. Evenson (1977), "Fertility, Schooling, and the Economic Contribution of Children of Rural India: An Econometric Analysis", *Econometrica* 45(5), 1065–1079.

Schmidtz, D. (2011), "Nonideal Theory: What It Is and What It Needs to Be", *Ethics* 121(4), 772–796.

Schultz, T. P. (1970), *Fertility Patterns and Their Determinants in the Arab Middle East*, Santa Monica: RAND Corporation.

Singer, P. (1993), *Practical Ethics*, 2nd ed., Cambridge: Cambridge University Press.

— (1972), "Famine, Affluence, and Morality", *Philosophy & Public Affairs* 1(3), 229–243.

Sunstein, C. R. (1996), "On the Expressive Function of Law", *University of Pennsylvania Law Review* 144(5), 2021–2053.

Taylor, B. R. (2014), "Exit and Voice: Papers from a Revisionist Public Choice Perspective", PhD Thesis, Canberra: The Australian National University, URL: https://digitalcollections.anu.edu.au/handle/1885/11935.

Turkmendag, I., R. Dingwall and T. Murphy (2008), "The Removal Of Donor Anonymity in The UK: The Silencing Of Claims By Would-Be Parents", *International Journal of Law, Policy and the Family* 22(3), 283–310.