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Proactive procreation: ethical implications of new genetic technologies for parental obligations to future offspring

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PROACTIVE PROCREATION:
ETHICAL IMPLICATIONS OF NEW GENETIC TECHNOLOGIES
FOR PARENTAL OBLIGATIONS TO FUTURE OFFSPRING

by

L. Syd M Johnson

A Dissertation
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Abstract

This dissertation examines the ethical implications of recent genetic innovations, particularly preimplantation genetic diagnosis, for the obligations and duties of parents to future children. I critique common but uncompelling objections to the use of genetic information, diagnosis, and technology to influence the characteristics of future offspring, and conclude that genetic selection and enhancement are not different in kind or degree from other means of selection, direction, and enhancement that parents engage in to shape the lives of their children. Procreation is morally risky — it risks imposing substantial burdens on persons who would not otherwise have to bear those burdens, but for decisions made (or not made) by their creators. Proactive procreation that takes advantage of available technologies and information is always permissible. There is nothing inherently better or morally superior about leaving procreation to chance, or not choosing when choices are available. I propose a Parental Harm Principle, which would obligate parents to avoid conditions that will cause their future children to experience harm and suffering, and to create children who could flourish, and lead healthy lives unrestricted by avoidable pain, hardship, and disability.
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This dissertation considers the ethical implications of recent genetic innovations, particularly preimplantation genetic diagnosis (PGD), for the obligations and duties of parents to future children. The implications are interesting and controversial because it is not immediately clear that there are any parental obligations or duties to children who do not yet exist. If it is agreed that there are such obligations, however, it is not obvious what those obligations might be. Do potential parents have the same obligations to their future children that they have to existing children? Are there special obligations to those possible offspring not yet conceived or born? Or are the obligations different, or weaker perhaps, than the obligations we have to children who already exist? Is it even possible that parents have no obligations to their future, possible children?

I try to address these questions, and some of the possible answers to them, in the chapters to follow. Progress through the core problem — what obligations do we have to the people we create, and when do we have them? — is not particularly linear, and the answers emerge gradually, and don’t admit of quick summary. I will argue, in the end, that parents do indeed have special obligations of care and protection to their children — including children not yet conceived or born. This argument will have to overcome some obstacles, including metaphysical puzzles concerning the identity of non-existent future persons.
Outline of the dissertation

In the first part of the dissertation, I argue that there are parental obligations to prevent harm to future, possible children. In chapter one, I look at some objections to preimplantation genetic diagnosis and other genetic interventions. Such objections generally fall into two basic categories: consequentialist objections that raise concerns about potentially harmful consequences, and objections that say there is something intrinsically wrong with genetic interventions. Objections in the latter category include the “playing God” objection and the appeal to nature, as well as the claim that genetic selection bespeaks unnatural parental desires and “disfigures” the parent-child relationship. These concerns are related to anxieties about the use of genetic selection for eugenic purposes, to eliminate persons with disabilities, for example. What these objections all share in common is worries about suspect or deficient parental motives. Parental motives, however, do not by themselves make it wrong to use technology to select for or against children on the basis of genetic characteristics.

In the second and third chapters, I discuss common conceptions of harm to persons, and consider the special case of genetic harms. There is abundant discussion in the philosophical literature of the moral status of fetuses and embryos, and I will not reiterate it here, but I do assume that fetuses and embryos are not persons with moral status, and moreover, that fetuses and embryos are not harmed by abortion or embryo culling.¹ To the extent that it matters what happens to fetuses or embryos, then, it matters because of

¹ A possible exception is the abortion of late term, conscious fetuses who can experience pain. Such a fetus might be harmed by experiencing pain, however briefly, during an abortion. But the loss of its life would not itself be a harm, as it would be for a person capable of valuing its life.
the persons they could later become, if brought into existence. Any discussion of prenatal or preconception harming requires looking at the status of future, possible people, and considering the contentious matter of wrongful life, and cases in which possible future lives are inseparable from illness, disability, and other unfavorable circumstances. When the only means of preventing harm to some future person is to prevent the existence of that person, we run aground at the Non-identity Problem. In chapter four, I contend with this problem, which arises when there are only two alternatives: existence with a disability (or other adverse or suboptimal condition) and nonexistence. The non-identity problem implies that, in cases where reproductive choices affect the identity of a future person — whether one particular child will exist or a different particular child will exist — nothing a parent does can harm a future child, since the only alternative for that child is nonexistence.\(^2\) It is frequently argued that in non-identity cases, person-affecting principles cannot locate the wrong done to a child, because there can be no corresponding harm to the child. Non-person-affecting principles, it is claimed, can handle non-identity cases by locating wrongdoing not in terms of harm to a child but in terms of diminishing overall well-being in the world. A parent in such a case could do wrong by failing to avoid a suboptimal condition by substituting a different, better-off child.

I argue that because a possible person cannot be harmed by never existing, and because we have good and compelling reasons to prevent our own children from experiencing avoidable suffering, diminished well-being, and diminished opportunity,

\(^2\) The only exception generally agreed to by all is conditions that are incompatible with a life worth living, or conditions that might be judged worse than death.
parents have obligations to avoid creating children who will, if they exist, suffer thusly. Our reasons for avoiding the creation of children who will experience suffering are person-affecting. It will be bad for a child if he experiences unusually severe suffering and diminished well-being and opportunities for human flourishing. In non-identity cases, there can be no reasons to create a future harmed person, except for those reasons affecting already existing people. We have compelling reasons to avoid creating children solely for our own sakes, if those children will suffer unavoidably as a result of being born.

In the second part of the dissertation, I try to further refine the nature and extent of parental obligations by looking at some specific and controversial cases where genetic technology is used to select for or against particular kinds of offspring. In chapter five, I look at the contentious matters of selecting for and against disability. Although children with disabilities can and often do live worthwhile, happy, and productive lives, that in itself does not argue in favor of creating a child with a disability, or any other child for that matter. Neither, I argue, should future children with disabilities be created for the sake of already existing persons with disabilities. There is no moral imperative to create any of the infinite number of possible children who might live worthwhile lives. If such children are created, it will be for the sake of others who already exist. There must be compelling reasons to impose the burdens of existence on a child, and the strength of those reasons ought to be commensurate with the burdens. If the burdens are exceptional, with the potential to cause unusual suffering or harm, there will rarely, if ever, be compelling enough reasons.
In chapter six I consider the use of PGD for non-medical sex selection. I argue that questions about sex selection are unusually sensitive to economic, social, and cultural contexts, and that we ought to take care to treat different cases differently. In social contexts where discrimination against females is widespread, and where sex selection is most likely to result in disproportionate selection of male offspring, there is considerable potential for negative social consequences as a result of sex selection technology. Nonetheless, I argue that there may still be compelling reasons why prenatal and preconception sex selection are preferable to the birth and subsequent neglect or infanticide of unwanted female children. In western societies, sex selection is generally used for the purpose of family balancing, and there is a documented (though minimal) preference for female children among families who choose to select the sex of a future child. I look at several arguments against sex selection in such a context, including that it is inherently sexist and perpetuates misogynist ideologies, as well as slippery slope objections. As in other cases of genetic selection, objections against sex selection often rest, ultimately, on suspicions about improper parental motives. I conclude that none of these arguments have merit, and that there is little danger to allowing sex selection.

In chapter seven, I examine the case against creating “designer babies” and “savior siblings.” I consider the question, posed by Julian Savulescu, “should we have the best children possible?” The answer is a highly qualified yes. I develop a Parental Harm Principle, a limited principle of procreative beneficence that obligates parents to prevent harm to their children, both before and after birth. Such a principle would obligate parents with known genetic risk factors to test embryos or fetuses, and would also
obligate them not to select for genetic conditions that would cause disease or disability.

Creating the best children possible could ultimately require genetic enhancement, or the creation of “designer babies.” Assuming that the risks are small, there is nothing inherently immoral about using genetic technologies to enhance future children. Neither are there relevant objections to the creation of “savior siblings,” or HLA-matched donor siblings who can provide potentially life-saving tissue or bone marrow transplants to existing children. There too, the objections often rest on suspicions of parental motives, or on the potential to exploit children for their body parts. What can permissibly be done to savior siblings is no different than what can permissibly be done to any existing child — that a child who was otherwise desired might also save the life of a sick child only adds another compelling and morally worthy reason to create that child.

What then, ought parents do? Clearly, there are some widely accepted prenatal obligations to future children, such as avoiding drugs and alcohol during pregnancy. These are obligations to ensure, as much as possible, the birth of a healthy infant. It is not necessary to spell out all of the obligations parents have to future children in order to claim, plausibly, that they have some obligations to these possible people who do not yet exist. Parents ought to do what is good for their future children, but good does not necessarily mean that they must do anything and everything to produce the perfect child. We ought to strive for lives that are good enough to be worth beginning, where the quality threshold for lives that are worth beginning is higher (perhaps considerably higher) than the threshold for continuing lives already underway. Lives worth beginning are more than minimally decent lives, or lives barely worth living. Even at the lower end,
creating lives worth beginning would impose substantial burdens on would-be
procreators. We have obligations to create children who can lead healthy, happy lives
unrestricted by avoidable pain, hardship, and disability. Avoiding pain, hardship and
disability may require not bringing some possible individuals into existence. There is
nothing that precludes parents from trying to prevent any heritable condition, however
minor, that might result in harm or suffering to a future child, because, as noted before, it
harms no one to never come into existence.

Procreation is morally risky — it risks imposing substantial burdens on persons
who would not otherwise have to bear those burdens, but for decisions made (or not
made) by their creators. Proactive procreation that takes advantage of available
technologies and information is always permissible. There is nothing inherently better or
morally superior about leaving procreation to chance, or not choosing when choices are
available. As choices, options, and possibilities expand, however, new questions will
undoubtedly emerge about just how far we are required to go, and just how many choices
we are required to make.
Chapter 1: PGD and Genetic Prevention

§1. Terra Incognita

The project to sequence the human genome has yielded some surprises. Among them: we’re not as complex as we thought we were, as evidenced by the number of genes that have been found. Although the final count has yet to be determined, it’s somewhere in the neighborhood of 20,000\textsuperscript{1}, or roughly the same as that of the lowly roundworm \textit{Caenorhabditis elegans}. If the number of genes is, as scientists have widely held, a way of quantifying genetic complexity, then perhaps genetic complexity ain’t all it’s cracked up to be. Or maybe we should reconsider the way we think about roundworms.

The first rush of excitement about the marvelous possibilities of mapping the human genome have, over time, been tempered by the realities of putting the information to use. Perhaps early explorers felt the same rush of excitement when looking at incomplete maps of the world, the ones where words like \textit{Terra Incognita} and \textit{Hic sunt dracones} served as warnings (or enticements?) to the adventurous and foolhardy. \textit{Are there dragons there? What will we do if we find them?}

We have not found dragons. If we had, we might have had to reconsider the way we thought about them. The genome sequencing and mapping projects, as well as a wealth of other research in human genetics, have already yielded some fruits, but whether

\textsuperscript{1} http://www.ornl.gov/sci/techresources/Human_Genome/home.shtml
those fruits are beneficial, or poisonous, will depend on how we think about them, and how we use them, if we can use them.

Twenty years ago, state of the art in prenatal diagnosis was amniocentesis, a crude, risky test that had to be done relatively late in pregnancy, and which took agonizing weeks to produce results\(^2\). By the time a mother learned that her future child’s genome included a telltale chromosome, she could already feel the movement of the fetus in her womb. She had entered a fearsome terra incognita -- an extra chromosome could not tell her much about her future child, about the degree of disability that child might experience, about how long that child might survive, or how much the child might suffer. It didn’t tell her how to prepare for that child’s life. It presented her with a heartbreaking choice, far from simple, between continuing with the pregnancy, or ending it and terminating a journey where the map ended, unable to venture into an unknown land of untold, potentially terrible possibilities.

Today, there are a multitude of prenatal tests, able to detect scores of fetal and genetic anomalies at various stages of pregnancy. Some, like ultrasound, have become routine parts of prenatal care. Alpha-fetoprotein screening (AFP) is an noninvasive blood test that can detect conditions including chromosomal abnormalities and open neural tube defects (spina bifida). Other tests, like Chorionic Villus Sampling and Amniocentesis, are more commonly performed following a positive AFP screening, when there is advanced

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\(^2\) Early amnio was able to detect trisomies, or the presence of an extra third chromosome where there should have been only two. Trisomies include Down Syndrome, Edwards Syndrome, and Patau Syndrome, and can cause a variety of birth defects, some serious and devastating, and some less so.
maternal age, during high-risk pregnancies, or when parents are known carriers of genetic mutations. Preimplantation Genetic Diagnosis is a relatively recently developed diagnostic test, used in conjunction with IVF, which makes it possible to examine the genome of extracorporeal embryos, before they are implanted in the womb, to detect genetic mutations and chromosomal abnormalities, and to select for or against certain genes. PGD is a different kind of test: it allows for genetic screening of embryos before pregnancy, thus eliminating the potentially difficult decision to terminate a pregnancy. Although its use remains relatively rare, PGD has a great deal of potential for expanding the possibilities of genetic testing (as well as genetic manipulation and enhancement), and correspondingly, it provokes a great deal of ethical concern.

§2. Preimplantation Genetic Diagnosis

In-vitro fertilization (IVF) creates a human embryo outside a human body, and also creates the possibility of checking an embryo, through Preimplantation Genetic Diagnosis (PGD) for genetic indicators of disease, disability, gender, and donor compatibility with an already existing person. PGD is far less commonly employed than IVF — to date, only about a thousand babies have been born following PGD — but it is a reproductive tool that engenders a great deal of concern and controversy.

PGD is performed by either biopsy of the polar body, or by blastomere biopsy. The polar body is a small structure expelled by a fertilized egg. It contains only the 23 maternal chromosomes, and therefore provides only a partial genetic picture of an
embryo. It is used to detect aneuploidies, or abnormal numbers of chromosomes. The benefit of polar body analysis is that it does not require removing any cells from the fertilized embryo. Blastomere biopsy is required to obtain a more complete genetic picture of an embryo, including the paternal genes and the sex chromosomes. Blastomere biopsy involves removing cells from a fertilized embryo, and is used to detect paternal and maternal aneuploidies, translocations, single gene disorders and embryo sex. Since PGD is performed in vitro, it allows for prenatal testing (and potential culling) of an embryo before implantation. Embryos can be screened for genetic abnormalities and eliminated as candidates for implantation. Embryos can also be screened for sex and, through HLA-typing, or tissue-typing, for donor-compatibility with an already existing person. The benefits of PGD include avoiding the risks associated with invasive prenatal testing such as amniocentesis, and avoiding the necessity of decisions about aborting or continuing a pregnancy already underway because of genetic abnormalities detected during pregnancy. When a donor sibling is sought, PGD can screen out incompatible embryos so that only donor-compatible embryos are implanted. PGD has drawbacks as well, among them the expense and a slightly lower rate of pregnancy following PGD compared to pregnancy rates following IVF alone.

3 80 to 90% of chromosomally abnormal embryos result from extra or missing chromosomes in the egg.

4 Unbalanced translocations are chromosomal abnormalities that result in an extra amount of one chromosome and a missing piece of another chromosome. Unbalanced translocations can cause severe problems, including several types of cancer, and also greatly increase the risk of miscarriage.

5 PGD aneuploidy screening (PGD-AS) is used as an adjunct to IVF to improve success rates by eliminating genetic factors that contribute to miscarriage.
PGD is infrequently utilized, relative to IVF, but it raises ethical concerns that sometimes overlap with concerns about IVF, and some that overlap with issues related to the genetic engineering of humans. Some see in PGD the beginning of eugenics, a step onto the slippery slope of designer babies and genetic perfectionism, accompanied by intolerance of people who are “imperfect,” and discrimination, even prenatal infanticide, against persons with disabilities. On the flip side are ethical issues surrounding the use of PGD to select for certain genes, rather than against genes associated with disability or disease. Whether the genes being selected for are associated with disabilities, or whether they are intended to genetically enhance offspring, selecting for genes raises concerns about a conflict between parental desires and the best interests of future children. PGD used for sex selection brings up worries about sex discrimination and female feticide, and PGD for donor-compatibility testing prompts concerns about parental motives, treating children as products, and using them as means to some other person’s ends. There are further ethical concerns about the destruction of fertile embryos, which is a more general concern related to any reproductive technology that results in unwanted embryos, whether those embryos are “extras,” or are unwanted for genetic reasons. This issue obviously overlaps with ethical concerns about abortion.

§3. PGD as an alternative to prenatal diagnosis

PGD does not eliminate entirely the need for prenatal testing during pregnancy. A number of potentially serious conditions with heretofore unknown genetic components can arise during fetal development, including spina bifida, anencephaly, and other birth
defects. At present, PGD can only screen for those conditions that have their origin in a known single gene mutation or a detectable chromosomal abnormality, and it can only rule out those conditions that are tested for. The list of known genes associated with illness and disability is expanding daily, so PGD has tremendous potential as a tool for preventing many genetic conditions, but it cannot guarantee that a baby will have no genetic or congenital condition. PGD cannot ensure a “perfect” or even a healthy baby. Moreover, because of the high cost of PGD, as well as the odious level of medical intervention required to achieve pregnancy through IVF, PGD is unlikely to completely replace other methods of prenatal diagnosis\(^6\). For those already undergoing IVF, or for those unwilling to consider selective abortion of affected fetuses, PGD offers an alternative.

§4. *PGD as an alternative to selective abortion*

PGD does not eliminate all concerns about abortion. On the most conservative view of abortion and prenatal life, which holds that any fertilized embryo is a person with the full moral status of born persons, the destruction of embryos involved in IVF and PGD makes them, in fact, worse alternatives than abortion. Abortion kills a single fetus (or, in the case of twins and multiple pregnancies, more than one fetus). IVF and PGD generally involve the creation of far more embryos than will ever be implanted. Unwanted embryos — unneeded extra embryos, or those found through PGD to have undesirable genes — are either discarded or frozen indefinitely. The very purpose of PGD

\(^6\) PGD adds about $3000 to the cost of IVF. Average costs of IVF are approximately $10,000 per cycle.
is to eliminate embryos with undesirable genes, so the destruction of embryos is not just a
byproduct of the technology, but rather its expressed purpose. Moreover, the
 technological limitations of IVF, which necessitates the harvesting of numerous ova per
cycle, as well as the fact that it is often a method of last resort for high-risk women who
have difficulty achieving or sustaining pregnancy, all but guarantee that many embryos
will never “make it,” will never result in a live birth7. If the destruction of embryos is
viewed as morally equivalent to abortion (or infanticide and homicide), then PGD,
because it involves the destruction of many embryos, must be viewed as morally
unacceptable. PGD can reduce the number of abortions, however, through earlier,
preimplantation detection of some anomalies. Thus, for those who do not view embryos
(or extracorporeal embryos) as morally equivalent to fetuses or persons, PGD can be a
less controversial alternative to later prenatal screening and selective abortion.
Increasingly, PGD aneuploidy screening (PGD-AS) is being used as an adjunct to IVF to
improve success rates of pregnancy, by eliminating genetic factors that might contribute
to miscarriage following IVF. Thus, there is potential for PGD to contribute to the loss of
fewer implanted embryos and fetuses when IVF is already being used to achieve
pregnancy.

7 In a study by Ao, et al., (1996) preimplantation genetic diagnosis (PGD) was attempted in 12 couples in
whom both parents carried the common delta F508 deletion causing cystic fibrosis (CF). A total of 18 cy-
cles resulted in 137 normally fertilized embryos. Genetic analysis was successful in 83 embryos (73 per
cent) and five (33 per cent) clinical pregnancies were established following embryo transfer. Thus five sin-
gleton infants were born, out of 137 embryos.
§5. Reasons and persons

People have many and complex reasons for wanting children. In the normal course of events, they don’t have to think about those reasons very much. Babies happen. When things go wrong however, when babies don’t just happen, or when illness and disability happen to babies, parents are often forced to put considerably more thought, effort, and money into procreation. The use of PGD in conjunction with IVF seems to invite speculation and concern about parental motives in a way that less considered procreation does not. That’s a little odd. Why question the motives of parents who have invested considerable thought and effort into creating a chosen child, instead of the parents of the randomly selected child who results from the unpredictable shuffling of the genetic deck? Why question proactive procreators rather than the ones who rely on, or are the victims of, chance?

There are two worries here: the first involves concerns about people having children for the wrong reasons. Are there bad reasons for having children? Are there good reasons? Which reasons are right and which are wrong? The other worry concerns the welfare of a child whose parents have, to a greater or lesser degree, sought not just any child, but a particular child. What happens if the child is not the one the parents had hoped for? Will a child who fails to live up to the expectations of his parents — the child who becomes ill or disabled, the child who is deaf, or not deaf — be an unwanted child, a child who can be discarded as easily as unwanted embryos are discarded? The two lines
of concern ultimately run together: will parents who have the wrong reasons for wanting a child come to view a child who does not meet their criteria as the wrong child?

There is underlying these concerns the idea that some reasons for wanting a child are unseemly and morally suspect — that some reasons for wanting a child are wrong, and some reasons are right. Clearly, wanting a child to sell it into slavery, or to torture it, would be wrong. Those would be uncontroversially bad reasons for wanting a child, bad reasons for creating a child, and bad things to do to a child. A closer look at moral intuitions about procreating tend to reveal that it is not wanting a child per se that is morally questionable, but wanting a particular kind of child — a child with certain traits, or a child who lacks certain traits, a child with certain abilities, or who lacks certain disabilities, for example. That is, there is nothing morally suspect about wanting any child, but only about wanting, or not wanting, a particular type of child. To want only a particular child seems to suggest a kind of commodification or instrumentalization, a valuing of a child not for its own sake, but because it is the bearer of certain valuable qualities. Choosing a doll from a toy store shelf because it has blue eyes and blond hair is one thing, but choosing a child because it has those traits, this view suggests, would be to treat that child as a thing, to use it as a means to some parental end, rather than as an end in itself. Is that so wrong?

Children are not created for their own sakes. Children are created for many reasons: carelessness, recklessness, companionship, to carry on the family name, to provide labor, to salvage faltering marriages, to provide siblings for other children, to
save empires, to fulfill a basic human desire to love and nurture. Not all of these reasons are equally good, perhaps, but they are all fundamentally selfish reasons for having children. They are reasons for parents to create children not for the sake of those children, but for the sake of themselves or other people. The concern that there might be wrong reasons for wanting to create a child tends to surface when parental desire for a child appears to be somehow contingent on properties possessed by the child. If the model of good parenting is unconditional love, then, it seems to follow, conditional parental love is not indicative of good parenting, but is, instead, typical of bad parenting. Surely parents who could not love their children if they were not well-behaved, or not pretty, or had an IQ below 150 would not be model parents.

There is, however, a considerable difference between loving one’s children conditionally, and wanting certain conditions to obtain in a child’s life. That is, there are two senses of “condition” in play here, and conflating them appears to be a source of confusion that leads to the mistaken claim that the use of PGD is somehow motivated by, or indicative of, conditional parental love. Parents might want to avoid certain medical conditions in their children, and they might want to avoid these conditions of illness or disability both for their own sakes and for the sakes of their possible children. To wish to avoid passing on to a future daughter one of the genes that greatly increases susceptibility to breast cancer is to wish for certain conditions to obtain in that child’s future. No mother would want to doom her daughters to a disfiguring and potentially lethal disease, nor would any parent want to experience the loss of a child to cancer. But surely the
reasons behind the desire to prevent passing on BRCA-1 have nothing to do with a parent’s inability to love a child with the BRCA-1 gene, but rather stem from the parent’s unconditional love of her child, sick or well. That is, wanting to prevent certain illnesses or disabilities in one’s future children is not motivated by conditional love on the part of potential parents, but reflects the same reasonable and caring motives parents have for preventing illness, injury and disability in children who already exist: the unconditional desire to protect one’s children from harm and suffering.

Absent any evidence that parents who employ PGD fail to love their children unconditionally, there is no support for the speculative claim that parents whose children unexpectedly do have an undesired condition will be disappointed with their children, or will fail to cherish those children. If parents who employed PGD simply would not care about a “defective” child, or would not love a “defective” child, there would be little reason to use PGD at all, since such parents would have no emotional investment in the children who did not measure up to their hopes and expectations. The unwanted child could be discarded as easily as the unwanted embryo. It is the emotional investment parents have in both their existing and their possible, future children, that motivates the use of PGD to prevent illness and disability. Young children of school age can sometimes seem like little more than germ-infested disease vectors, but they are not mere vessels for illness or disability or health and vigor, valuable only when unbroken or beautiful or of a particular shape or quality. The attachment we have to people, particularly to our own children, persists whether those children are perfect or imperfect, ill or healthy. The
desire for a healthy child is properly understood as the desire that one’s own child, the child who does or will exist, should be healthy because it would be better for the child. Parents reasonably and rightly want their children to enjoy the benefits of health, and to be free of the hardships that may come with disability or illness.

The worry, of course, is that the children born following PGD may be perceived (and conceived) as mere vessels for parental desires and expectations, whatever those desires or expectations might be. There is no doubt that parents have many expectations and desires when it comes to their children, and not all of those expectations and desires are selfless and benevolent. But this is how parents were before PGD, and how they are without PGD, and how they will be ever after, whatever technologies may come along. There is nothing peculiar about PGD as a mode of wish-fulfillment that should cause us to worry about a lack of benevolence in parental motives.

The mere fact that a controllable technology is being used is not, by itself, a reason to hold its users to a different or higher standard than we hold other parents. Parents do many things to try to ensure the health of their existing and future children, from preventative pediatric care to prenatal care. We do not suspect such parents of using medical technology for selfish and nonbenevolent purposes. Indeed, women who do not avail themselves of available prenatal care, or who fail to take recommended precautions during pregnancy (by drinking, or smoking, or abusing drugs, for example), are subject to social stigmatization and in some cases legal sanctions. Parents who fail to adequately care for children can be subject to child abuse or neglect charges. Viewed as a
technological extension of standard preventative prenatal care, there is nothing particularly extraordinary about the use of PGD to prevent illness or disability. It does what many other prenatal tests, like CVS, amniocentesis, and fetal ultrasound have done, but in a more proactive way. Similarly, PGD can be viewed as an extension of preventative health care, like inculcating healthy eating habits and providing routine vaccinations. Using PGD to prevent inherited illness can be far more effective than promoting a healthy lifestyle. A child who does not have the gene that causes Huntington Disease will not get HD as an adult, and so, using PGD to screen out embryos with the mutated *huntingtin* gene will completely prevent HD. Moreover, it can provide protection to all future descendants of the unaffected child, which is something traditional preventative health care measures such as promoting a healthy lifestyle, or vaccinating against disease, cannot do. Using PGD for the purpose of creating a child with the potential for good health is not frivolous or morally suspect, and is compatible with loving one’s offspring unconditionally. Indeed, using PGD to prevent illness or disability in the child who will be created is the least morally suspect reason parents might have for using PGD. If it is ever possible to do something for the sake of a future person yet to be created, this is it.

Parents already exercise considerable choice when it comes to procreating (or not procreating), and if we are more comfortable with those more traditional ways of

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8 Because HD is an autosomal dominant disorder with nearly complete penetrance, only a single copy of the mutated gene must be inherited to transmit the illness. Carriers have a 50% chance of transmitting the HD allele to their offspring. The age of onset tends to decrease from generation to generation, as the number of CAG codon repeats multiplies. Inheritance from the father rather than the mother also tends to result in earlier onset. If persons with the HD allele do not reproduce, or do not bear children with the HD allele, the HD allele can be removed from a family’s genome within a single generation.
choosing, it is probably only because they are traditional, that they have long been customary, or become commonplace, rather than that they are less technological or invasive. Concerns about parental motives or the welfare of children born following reproductive and genetic interventions may really be stalking horses for more general unease about the growing ability to intervene in human reproduction and make choices about our children before they are born or conceived. As Gregory Stock argues, if such concerns are ethically valid, we ought to be equally concerned about adoption practices which permit adoptive parents to choose their children on the basis of gender, race and ethnicity, health status, age, and even country of origin. There is no moral imperative for potential adoptive parents to accept any random child who comes along, any more than there is an expectation that anyone should adopt a child, say, left on the doorstep in the middle of the night. Why is it ethically preferable for genetically-related parents to roll the dice with their children? Why is chance more ethical than choice?

§6. Uneasy feelings

The unease about intervening in procreation may just be a psychological fact about human beings, a symptom of our wariness of novelty. When Louise Brown was born in 1978, the birth of the world’s first “test-tube baby” was heralded as a technological advance, but it also raised concerns and fears, ultimately unfounded, about the brave new world ahead. IVF and other forms of Assisted Reproductive Technologies (ART) are now relatively commonplace, but conscious selection of the genetic

constitutions of our offspring would be a substantial departure from traditional procreation. It is not at all clear that it is correspondingly substantially more ethically suspect, given the myriad ways that people already genetically tweak their children, consciously or unconsciously, in the choosing of their mates, in the choosing of sperm and egg donors, and through prenatal diagnosis and selection. People do not, generally, pick their mates by lottery. Women and couples who use donor sperm and eggs select the donor based on characteristics that are partly genetic, and pay for the use of the donor’s genetic material in order to produce a child. The idea of being assigned randomly selected sperm or eggs would be downright repugnant to some and unappealing to most. Parental desires for offspring with particular characteristics like hair or skin color, potential for athleticism or intelligence, and more, factor into the choices made when selecting donor gametes. David Plotz describes the intensive screening process for gamete donation at a leading sperm bank:

Today the California Cryobank—probably the world's premier sperm bank—tests for a dozen genetic disorders and for almost as many infectious diseases. Donors must complete a 38-page, three-generation medical history, and submit to months of blood testing. The cryobank accepts only college graduates or students enrolled in a four-year program. (The cryobank's offices are in Westwood, Palo Alto, and Cambridge, Mass., meaning that most of its donors hail from USC, UCLA, Stanford, Harvard, and MIT.) And donors must stand at least 5 feet 9 inches tall. By the time it weeds out the sickly, the short, and the dim, the California

\[10\] For an interesting history of the “bad old days” of donor insemination, see Plotz, (2001).
Cryobank accepts only 3 percent to 5 percent of applicants.\textsuperscript{11}

If choosing the most promising sperm is less morally suspect than choosing a future child’s sex or genetic makeup through PGD, it can only be because choosing sperm is more similar to traditional methods of genetic choice, such as mate selection. Sperm banks are lucrative businesses, and the proliferation of sperm banks has not pushed us out onto a slippery slope of genetic engineering and eugenics, because, however much sperm bank clients might view themselves as customers purchasing a product with a pedigree, the kind of selection being practiced is not significantly different from more traditional selection of offspring characteristics through mate selection, except that sperm donors tend to be anonymous, while couples engaged in ongoing relationships are not\textsuperscript{12}.

Objections to reproductive and genetic interventions can generally be divided into two categories: consequentialist objections that raise concerns about dangerous and harmful consequences, and objections that say there is something intrinsically wrong with genetic interventions. Objections of the consequentialist type can be limited to specific types or uses of intervention, such as using PGD to prevent (or select for) disability, or to create donor siblings, or for germ-line genetic enhancement, or they can express more general worries about the potential for harm with any genetic intervention, including

\textsuperscript{11} \textit{ibid}.  
\textsuperscript{12} It is possible, given the type and amount of screening undergone by sperm donors, that sperm bank clients could know more about the genetic makeup and medical history of potential donors than they know about their spouses.
damage to the parent-child relationship. Objections of the second type, which claim that there is something intrinsically wrong with genetic interventions, can turn on claims about the wrongness of “playing God,” or of the unnaturalness of genetic intervention. They can also encompass objections to viewing humans, and especially our own children, in a new and presumably wrong or unnatural way: as malleable objects to be molded as suits our whims, as scientific experiments, as vessels of our own desires, as objects, as products of breeding — as anything but human beings as we are used to (and should be still) viewing them. Mary Midgley calls the underlying feeling of such objections “the yuk factor,” or a “sense of disgust and outrage,” but whatever we call the feelings — the heebie jeebies, the creeps, repugnance — they can express a range of qualms and suspicions about both the process and the outcome of interfering with the natural order. Such objections, however inarticulately they might be expressed, can be undergirded by legitimate and rational concerns about the pace and direction of genetic engineering, as well as the (sometimes hubristic) claims being made about the possibilities of genetic engineering and biotechnology in general. It is important, therefore, to make sense of the objections before dismissing them outright as unintelligible, by looking both at what they object to, and what ethical stance, if any, underlies the objections.

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13 Later chapters will address these specific uses for PGD and genetic intervention, and the particular objections to them.

14 Midgley, Mary. (2000); p9
§7. Playing God and the Appeal to Nature

The charge of playing God has almost become a cliché in discussions of genetics, and human genetic modification. What counts as “playing God” is far from fixed, and the boundaries have moved, sometimes rapidly, throughout history. Any number of medical interventions might be called “playing God,” including removing life support, euthanasia, abortion, and altering the human genome. The charge of playing God has been overused and ill-defined, and apparently presupposes a moral framework or appeal to a moral principle that is rarely explicitly stated. Generally, playing God is to act, presumably with hubris, in ways that alter the way things are or would be without our action — to act, presumably, to alter God’s plan. What “playing God” means in practice, however, is even less clear, and, as Grey notes, the accusation “is unhelpful and serves to darken rather than to clarify discussion.”

It may also be invoked as a literal accusation of violating God’s providence or, in its secular iteration, vexing nature. But can such a charge survive inspection?

But in one sense all human activity that produces changes that otherwise would not have occurred interferes with nature. Medical activities as routine as the prescription of eyeglasses for myopia or as dramatic as the repair or replacement of a damaged heart are in this sense “unnatural.” In another sense human activity cannot interfere with nature—in the sense of contravening it—since all human activities, including gene splicing, proceed according to the scientific laws that describe natural processes. Ironically, to believe that “playing God” in this sense is even possible would itself be hubris according to some religious thought,

which maintains that only God can interfere with the descriptive laws of nature (that is, perform miracles).\textsuperscript{16}

Any health program, including water fluoridation, measles vaccination, and Tay-Sachs carrier screening, \textit{could} be accused of altering God’s or Nature’s plan, but such programs are generally \textit{not} accused of the moral crime of playing God. If they were, we might rightfully call into question precisely what is wrong with playing God if doing so saves lives and reduces human suffering. We might also wonder, if God plans for all that suffering, if we are indeed playing \textit{God}, and not something else, by diminishing it.

John Harris argues that the “playing God” objection amounts to very little:

\begin{quote}
You don’t have to be an atheist to see that the idea that we ought not to be playing God is a non-starter. Even believers must believe it can be right to disturb and redirect the course of nature otherwise the practice of medicine itself would be wicked. For people naturally fall ill and naturally have reparable defects; if the practice of medicine has a coherent aim it must be seen, if anything, as the comprehensive attempt to frustrate the course of nature. No one who believes it right to take an antibiotic or to vaccinate her children believes either that God is doing a great job unaided or that it is wrong to disturb the natural order.\textsuperscript{17}
\end{quote}

The charge of playing God might also mean to act imprudently in risky enterprises. The underlying assumption is that God, or nature, knows best, and that any alteration of the natural or divine plan is a “dangerous Promethean adventure which involves appropriating knowledge which is properly the province of the deity.”\textsuperscript{18} The

\textsuperscript{16} President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research. (1982) p55

\textsuperscript{17} Harris, John. (1998) p 178

\textsuperscript{18} Grey, William (2001) p338
suggestion — and danger — is that we lack the knowledge of the consequences, or lack the wisdom to manage the consequences of our efforts to master and manipulate the human genome. If this is the rationale behind the admonition against playing God, then it is a consequentialist concern, and not a claim that it is inherently wrong to play God or vex nature. It is an acknowledgement of human limits and fallibility.

Does the charge of playing God amount to nothing more than a fear of novelty? Perhaps, as medicine and science have become more complex, and harder to understand, as their goals have expanded in newer and more foreign directions — as we explore, once more, *terra incognita* — there is more unease about the distant shores towards which, if we believe the scientific hype, we are inexorably headed. As novelty gives way to familiarity, the fear of “playing God,” or the fear that a particular instance of changing or manipulating human bodies is an act of hubris diminishes. When our goal is to reduce suffering, to improve human lives, and when our actions, however novel or unconventional, achieve these goals, the accusation of playing God loses its moral force. When our goals are otherwise, when we seek to control nature, or to improve upon nature with a kind of presumption and arrogance that invites Nemesis, the charge of playing God can be seen as a charge of imprudence or rashness, as a case of us “asking for it.”

When “playing God,” which is presumably intrinsically wrong, becomes “asking for it,” it is transformed into something about which we can raise consequentialist objections. That is, an act which appears to be wrong in itself can also be expected to have bad effects which are causally related to the act. An example is habitual lying, which
destroys trust and renders the liar, like the boy who cried wolf, vulnerable to the bad effects of being deemed untrustworthy. The degradation and destruction of the natural environment for short-term gain has bad effects, both in the short-term and the long-term. The moral and causal can run together in our thinking about the wrongness of acts like lying, or destroying the planet. Midgley, citing the case of the British outbreak of Creutzfeldt-Jakob disease, which occurred in humans who consumed cows that had been infected after being fed sheep brains, notes that confluence of the moral and causal isn’t as simple as saying that the wicked will always be punished, nor even that there is some causal law that directly links improper animal husbandry practices to human illness. CJD can be seen as a moral consequence of acting in ways which are intrinsically wrong:

You can’t expect to go on forever exploiting living creatures if you don’t pay some attention to their natural needs. You ought not to be trying to do that in the first place. Neglecting the species-nature of cows is wrong in itself. It is a gross insult to the life of the animals. So it should be no surprise that this insult upsets their health, with unpredictable further consequences. These consequences are not, then, an accident. They flow directly from the moral obtuseness that goes with greed.19

By these lights, we might view the playing God objection as an expression of fear of the unknown consequences of acting against nature, whether that is meant as Nature, in general, or our own human nature. Thus, the charge of “playing God” can also be characterized as a variant on the “appeal to nature,” a kind of natural fallacy that conflates what is “natural” with what is “good” in the same way that “playing God”

19 Midgley, p8
conflates the assumption of god-like powers by ungodly beings with what is bad. In arguing against human cloning, Leon Kass praises “the wisdom of repugnance,” calling repugnance “the emotional expression of deep wisdom, beyond reason’s power to articulate it… We are repelled by the prospect of cloning human beings not because of the strangeness or novelty of the undertaking, but because we intuit and feel, immediately and without argument, the violation of things that we rightfully hold dear.”20 Under attack by reproductive technologies, Kass claims, is natural procreation, whereby “human beings come together, complementarily male and female, to give existence to another being who is formed exactly as we were, by what we are…”21 The process of turning natural procreation, the way “we” were formed, into manufacture has “already begun with in vitro fertilization and genetic testing of embryos.”22

It can be safely said that humans lack god-like powers, and any characterization of biotechnology as god-like would be to seriously underestimate the gods, and seriously overestimate biotech. We have, to be sure, changed the ways in which we do things. The “natural” way of reproducing, through sexual intercourse, is more or less duplicated in assisted reproductive technologies like ICSI and IVF — the basic biological facts, at least, remain the same, and a sperm and egg must still meet and join together to produce an embryo. That this sometimes occurs outside the genetic mother’s body is certainly not “natural” in the strictest sense, but neither is it entirely unnatural. If it is a good thing that

21 ibid p23
22 ibid
couples who want to bear children can do so with medical assistance, then the fact that
IVF is not natural does not by itself make it ethically suspect. Neither does the fact that it makes some people, like Kass, uncomfortable. Kass concedes that “repulsion is not an argument,” but he further adds that it is *not possible* to give an adequate rational justification for the feeling of repulsion inspired by unnatural practices like incest, bestiality, and murder, any more than it is possible to rationally justify the repulsion inspired by human genetic engineering. I can think of quite a few rational arguments against incest, bestiality, and murder, none of which require an appeal to their unnaturalness. Among other things, they each cause harm to a sentient being. Kass’ position boils down to nothing more than subjectivism, albeit in consultation with “deep wisdom.” It comes down to to this and nothing more: genetic testing is unnatural, and thus it fills some individuals with repugnance, and thus it is ethically wrong. As Bertrand Russell once observed, “I cannot see how to refute the arguments for the subjectivity of ethical values, but I find myself incapable of believing that all that is wrong with wanton cruelty is that I don't like it.”

23 As with wanton cruelty, so with cloning, genetic selection, IVF, and PGD. If there is something wrong with genetic testing and selection of embryos, it is not just that some people don’t like it.

We might reasonably be cautious about genetic tinkering that amounts to a substantial departure from “natural” reproduction for fear of unknowable consequences — “playing God” in this context might be seen as acting as if we are above the

23 Quoted in Holmer, Paul L. (1964) p 161
consequences, whatever they might be, or as assuming that we can predict in advance what the consequences will be. Some outcomes are easy to predict: in the case of sex selection, we can foresee that in cultures where male offspring are overwhelmingly favored over females, the availability of sex selection technology will eventually result in unnaturally skewed sex ratios. Other effects are harder to predict: the cloning of transgenic mammals — glow-in-the-dark mice, sheep who produce therapeutic human proteins in their milk — has taken scientists where angels fear to tread, with potential benefits, but also potential dangers. If the world is conquered by transgenic bioluminescent mice hopped up on enhanced sheep’s milk, it will have been with our unwitting and foolhardy assistance. We can reject the language of “playing God,” and still be cautious about venturing too quickly and too rashly in departing from the known world, when it comes to creating people. This is not to accept without qualification that God or nature knows best (or knows anything) when it comes to making babies. Rather, the objection to “playing God” can be seen in secular terms as a call for prudence and caution, less a claim that “God knows best” and more an an affirmation of the adage “better the devil you know than the devil you don’t.”

Nonetheless, it’s those devils we know — the ones who sow misery, disability and death — from which we rightly wish to shield our progeny, and which we strive to expunge from our bloodlines. Yet there can be something unsettling about viewing our children as literally the products of good breeding through intentional genetic tinkering. An objection related to the playing God objection is the objection that genetic
interference in the creation of children treats them not as “gifts from God,” which presumably we ought not tamper with (or exchange), but rather as something that we are free to manipulate to suit ourselves and our goals. Are children “gifts from God,” or are they perhaps more like “gift cards from God,” to be redeemed as parents see fit?

Michael Sandel, in arguing against genetic enhancement, claims that genetic selection undermines the “ethic of giftedness” that is fundamental to parenting. To select one’s children, Sandel argues, is to reject the “unbidden,” and to reject, as it were, the lessons of parenthood:

To appreciate children as gifts is to accept them as they come, not as objects of our design or products of our will or instruments of our ambition. Parental love is not contingent on the talents and attributes a child happens to have. We choose our friends and spouses at least partly on the basis of qualities we find attractive. But we do not choose our children. Their qualities are unpredictable, and even the most conscientious parents cannot be held wholly responsible for the kind of children they have. That is why parenthood, more than other human relationships, teaches... an "openness to the unbidden."25

The old proverb, “Don’t look a gift horse in the mouth,” comes to mind. Accepting children as gifts requires, on this view, that we accept them *as is*, as it were, without questioning their condition or value. But it is one thing to want only the best for your children, and another to want only the best children. Not all genetic selection can be reduced to a rejection of anything less than perfection in a future child. Neither is it the

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case that all genetic “enhancement” is a rejection of imperfection. Parental love is not conditional or contingent on the attributes of the beloved child. This is true. An oenophile’s love of a fine wine might depend on the particular characteristics of the wine, its specific properties. Were those properties missing, or if they were lost through, say, cooking the wine, the love itself would not persist. The love of parents, on the other hand, generally doesn’t depend on the properties and characteristics of their children — their attractiveness, their intelligence, their talents, their agreeableness, their stubbornness. And so, if children were to lose some of their properties, and change from happy-go-lucky infants to sullen teenagers, parental love would persist, unlike the oenophile’s love for his bottle of sullied wine. It is neither the case that the exemplar of parental love is conditional love, nor should we think that it ought to be. But there is a difference between loving your children only if they have certain desirable properties, and loving your children such that you desire that they have certain properties. We might wish that our children will have happy dispositions and abundant curiosity and that they will be free of the genetic mutation that causes CF. Desiring the properties does not preclude loving children who lack them, but loving a child does not require that parents be utterly indifferent to the qualities a child does (or does not) happen to have. It is the proper role of a parent to encourage the development of good qualities in a child, and to discourage the bad, and this is done in part for the child’s sake. If there is a relevant moral distinction between designing or enhancing a child genetically, and doing it through appropriate training, education and, where required by circumstances, medical intervention, the distinction can’t be found solely in the lack of “openness to the unbidden.”
Perhaps to love a child unconditionally, to “accept them as they come” is to be open to “the unbidden,” but it does not follow that, because unconditional parental love and acceptance of children is good, everything unbidden is also good. Sandel does not propose that we accept just anything that might come along in the course of parenting. Rather, he appeals to the therapy/enhancement distinction, and adds an appeal to nature to the mix:

To appreciate children as gifts or blessings is not, of course, to be passive in the face of illness or disease. Medical intervention to cure or prevent illness or restore the injured to health does not desecrate nature but honors it. Healing sickness or injury does not override a child’s natural capacities but permits them to flourish.  

Accepting children as gifts, then, does not require accepting everything that might happen to them in the course of a lifetime as a similar gift. But if we can even make sense of the treatment/enhancement distinction Sandel embraces here, how will we ever distinguish between those gifts we ought to graciously accept, and those to which we might permissibly say, “Thanks, but no thanks”? If it is acceptable to employ medical intervention (and presumably, genetic intervention) to cure or prevent illness, at what point do we cross the line from honoring nature to desecrating it? Healing, Sandel notes, “does not override a child’s natural capacities, but permits them to flourish.” What capacities count as natural in this context? Would it be natural to try to raise the IQ of a child from 75 to 100? Does it count as enhancement to bring a capacity up to the norm?

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26 Sandel (2004)

27 For more on the treatment/enhancement distinction, see chapter 6
The use of growth hormones in children of short stature surely counts as an enhancement — shortness is not an illness — yet a short child with natural athletic skills might well flourish were a few inches added to his height. Do we permit a child’s capacities to flourish if we prevent the mental retardation associated with PKU through the imposition of an unnatural diet? Or is that a case of overriding nature? Nothing Sandel proposes suggests that he thinks a child ought to be allowed to suffer the preventable mental deterioration of PKU, yet I’m not sure that the phenylalanine-free diet is not an enhancement, if what we are relying upon to make this distinction is what is “natural.”

The assumption Sandel makes is that nature is sacred, and we ought not desecrate it. What is sacred, presumably, is also good. But many natural things — *Staphylococcus aureus*, *Ebolavirus*, earthquakes and tsunamis — are not good, and few of us hold *S. aureus* so sacred that we would not unleash an arsenal of unnatural antibiotics against it. The appeal to nature cannot support an argument for the impermissibility of genetic selection and enhancement.

Sandel does not think the most serious objection to enhancement is the unnaturalness of enhancement itself, but rather something unnatural about the desires that motivate it. He says:

...the deepest moral objection to enhancement lies less in the perfection it seeks than in the human disposition it expresses and promotes. The problem is not that parents usurp the autonomy of the children they design. The problem lies in the hubris of the designing parents, in their drive to master the mystery of birth. Even if this disposition did not make parents tyrants to their children, it would disfigure the
relation between parent and child, and deprive the parent of the humility and enlarged human sympathies that an openness to the unbidden can cultivate.  

It is quite remarkable that he thinks the “deepest moral objection” is the disposition — the drive for mastery over nature — that enhancement expresses and promotes. It suggests, among other things, that it is not the mastery over nature (or the mysteries of birth) per se that is objectionable so much as the desire for that mastery. Sandel’s argument here reiterates a common complaint about genetic selection, which is that it reveals unseemly parental desires, and that having a bad attitude is in itself enough to make the actions that spring from that attitude impermissible. We might reflect here on what Kant had to say about the difference between acting in accordance with duty, and acting from the motive of duty. The person who acts from a motive of duty can be sure that her actions have moral worth; the person who merely acts in accordance with duty will do the right thing, and the permissible thing, but will do it for the wrong reasons. For this reason, two otherwise identical actions might not have the same moral worth. Sandel is, perhaps, here appealing to something like Kant’s distinction when he argues that the drive for mastery over nature, and the hubris of parents, constitutes a moral objection to genetic enhancement and selection. But Kant would not claim that an action that springs from hubris is necessarily morally impermissible, but only that it would lack moral worth. If all we are questioning here is the moral worthiness of parental motives, then we can agree that some motives and desires are better than others, and some might be downright suspect. But that is not to say that the actions they produce are impermissible.

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nor that they are bad. A parent might well have selfish reasons for desiring a child free of genetic disease, but that does not mean that it would be bad for the child (or for anyone else) if the child is born without an inherited illness. Nor would we violate our moral duty to that child, or treat it as less than a person to so design its genome. Even if someone desired mastery over nature for its own sake, as an end in itself, and not for the sake of the good ends that might come of it (such as curing diseases), it is only the desire we are justified in criticizing, and not any actions or consequences that might happen to come of it. The bad attitudes and intentions of an agent can reflect badly on that agent’s character without affecting the permissibility of his actions. As Thomas Scanlon puts it, “What an agent takes as counting in favour of a course of action does seem to bear on a moral assessment of that person in a way that it may not bear on the permissibility of what the agent does. There is such a thing as doing the right (or a permissible) thing for reasons that show one to be a bad person.”

The mastery of nature and the mysteries of birth might produce good or bad consequences, and might or might not produce results that are in accord with our moral duties, regardless of the attitudes and motives behind them. Mastery over nature is usually desired as a means to an end (such as curing diseases), and this, presumably, Sandel would not object to, for treating illness does not desecrate nature. But even if we allow that the desire for mastery as an end in itself is bad, and not being open to the unbidden is bad, it can still be the case that mastering nature and the mysteries of birth can be good, can be a way, among other things, of preventing dreaded,

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29 Scanlon, Thomas. (2000) p305
unbidden, and unwanted diseases. Like some things natural, some things unbidden are quite awful.

Sandel further claims that the relationship between parent and child might be disfigured by the disposition of the parent who desires mastery over nature and the mysteries of birth. Sandel’s argument is not that such parents would be “tyrants to their children,” but rather that the parents would be deprived of “the humility and enlarged human sympathies that an openness to the unbidden can cultivate.” Again, this argument appeals to bad attitudes and motives on the part of parents as an argument against enhancement and selection. The underlying assumption is that the kind of parents who would desire enhancement would also be the kind with the questionable disposition. Moreover enhancement “promotes” this disposition, Sandel claims. One of the bad effects of enhancement, then, would be the promotion of bad parental dispositions — we would become bad, unvirtuous people if we sought mastery over nature and the mysteries of birth. (Perhaps a kind of escalating child-enhancement keeping up with the Joneses would result.) The objectionable disposition would be the one that desires mastery not as a means to another end, but rather as an end in itself. But is the parent who desires to genetically select or enhance a child really seeking mere mastery over the mysteries of birth? This seems an unlikely motive for genetically tweaking your own progeny. We might still question the motives and attitudes of parents who just want their kids to be superior in some specific ways, but the character flaws of parents do not by themselves

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render their actions wrong. Moreover, it is likely that seeking mastery as an end in itself would be the exception rather than the rule. Mountain climbers might strive to conquer mountains simply because they are there, but I can think of no examples in which scientific or medical endeavors had no purpose other than to master nature. Even when we consider such questionable accomplishments as splitting the atom, the motive and purpose behind the effort was not mere mastery over nature. Similarly, parents who seek to enhance or select children generally do so for a reason, good or bad, and not merely because they can. If the “deepest moral objection” to genetic enhancement lies in “the human disposition it expresses and promotes,” there is hardly any objection there at all.

A more significant concern related to parental character is expressed by Frances Kamm, who worries that a “lack of imagination” will result in people seeking enhancements that are “too simple and basic a set of goods.”31 We may do better to let chance design us and our children, she argues, because “when creatures of limited imagination do not design themselves and others, they are likely to extend the range of their appreciation of goods because the range of goods is likely to be larger.”32

§8. Backdoor eugenics

Having healthy children is an important goal, and one that often motivates genetic interventions such as PGD. But this kind of choice raises suspicions of perfectionism and eugenicist motives. Do parents who use PGD want to have the best children possible, to


32 ibid, p 14
build a better baby, as it were, or do they want the best lives possible for whatever children they have? Is there really a difference?

Perfectionism is the pursuit of some ideal of perfection, whether aesthetic, intellectual, athletic, physical or emotional. The charge against perfectionism is that it judges and evaluates the worth of human beings against some standard of human achievement which can be achieved only by very few individuals, and more importantly, judges their worth against a non-moral standard. Many parents hope that their children will be smart, attractive, athletic, healthy, and happy, not least because it will, presumably, make for a better life for the child. There are, as well, parents for whom the achievements of their children are a source of pride. Sometimes, parents hope to “live through” their children and their achievements, to vicariously enjoy the child’s athletic accomplishments, for example. The fathers who are too aggressively involved in the Little League team, or who drill their kids for the spelling bee, or the stage mother who pushes her daughter into dance classes or music lessons, are stereotypical examples of such perfectionist parents. The standard criticism is that the children of such parents are not allowed to choose their own life paths, to pursue their own interests, to enjoy their childhoods, that they are forced to live the life their parents wanted for themselves. Moreover, those noodgy parents annoy the rest of us and our naturally superior kids. Sandel criticizes such overbearing parents, whether they seek to engineer their children through genetics, or through other means:
Improving children through genetic engineering is similar in spirit to the heavily managed, high-pressure child-rearing that is now common. But this similarity does not vindicate genetic enhancement. On the contrary, it highlights a problem with the trend toward hyperparenting. One conspicuous example of this trend is sports-crazed parents bent on making champions of their children. Another is the frenzied drive of overbearing parents to mold and manage their children’s academic careers.\footnote{Sandel (2004)}

This much is true: some parents may seek to genetically engineer their children as an extension of parenting practices that are potentially deleterious for their children. If those other methods of parenting are not to be endorsed, Sandel argues, neither should genetic enhancement and engineering be. When we are talking about preimplantation embryos, there is an important difference between genetically engineering one’s children, and the “hyperparenting” Sandel describes. An embryo is not a child who might be nooged, harassed or embarrassed by an overbearing parent. An embryo, even a genetically engineered one, cannot be harmed by the “heavily-managed, high-pressure” circumstances of its creation. The resulting child, on the other hand, will likely be subjected to parental nooging whether it has been genetically selected or engineered, or not. Unless we accept, again, that the “disposition” to hyperparent itself renders the genetic engineering of children morally impermissible, the character flaws of noodgy parents have no bearing on the permissibility of genetic tweaking. Secondly, genetic and reproductive technologies are very far from being able to create perfect, natural athletes and brainiacs. Traits like athleticism and intelligence are not reducible to single genes, but are rather the result of a complex interaction of many factors, of which genetics is
only one, and probably one of the least influential. A great athlete may have been born with a predisposition to a particular body type such as exceptional height, but simply being tall does not guarantee anyone a spot on the hardwood with the Boston Celtics. One might also have a genetic predisposition to having long, agile fingers, but as Arthur Rubinstein famously observed, it is “practice, practice, practice” that gets you to Carnegie Hall. Thus, if we are worried that some parents will attempt to extend their perfectionist pushiness prenatally, we need not be worried that they will succeed, and thereby diminish the value of the natural gifts and hard work of those who earn their excellence the old fashioned way. The genetic lottery is more likely to produce future Michael Jordans and Arthur Rubinsteins than is biotechnology. Will perfectionist parents value their children less if they fail to live up to lofty expectations? This is possible, if perfectionist parents fail to love their children unconditionally. Genetic technology is but one of many means perfectionist parents might employ in the attempt to enhance their children. It is also, for the foreseeable future, likely to be the least effective one. It will still require “practice, practice, practice” to get to Carnegie Hall.

Genetic enhancement to create faster, smarter, prettier, more talented children may smack of perfectionism, but what of genetic testing of embryos to screen out genes that cause disease and disability? Is the prevention of illness and disability also a form of perfectionism, secretly motivated by the desire for perfect (as opposed to defective) children? Is avoiding the birth of children with diseases and disabilities a form of hidden
perfectionism, a politically correct way of saying that defective children are somehow substandard?

As a practical matter, selecting an embryo that is free of particular genes that cause disease or increase the risk of disease is a limited proposition. It does not guarantee a perfect child, nor even a healthy child. A child born without the BRCA-1 gene will be pretty much like any other, but without one gene (out of possibly many) that increases her risk of developing breast and ovarian cancers. Selecting a BRCA-1-free embryo is not to select the perfect embryo, nor the perfect child, nor one who might be expected to be particularly gifted as a result of her genetic endowment. It does not even guarantee that the resulting child will never be stricken with breast or ovarian cancer, although it will improve her odds somewhat. Likewise, selecting an embryo that does not have one of the 52 mutations of the IDUA gene which cause Hurler syndrome will not result in a perfect child, but the child who is born will not suffer the physical deformities, mental retardation and progressive decline followed by early death that afflict children with Hurler syndrome.34 While we might think less of the parent who rejected a child born with an inherited disease or disability, the parent who seeks to prevent disease or disability does nothing morally suspect. Choosing embryos that are free of selected genes known to cause disease or disability is to choose against a very limited set of possibilities,

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34 Hurler syndrome is an inherited error of metabolism in which there is deficiency of the enzyme alpha-L-iduronidase which normally breaks down molecules called mucopolysaccharides. Affected children have progressive mental retardation, gargoyle-like facial features, enlarged and deformed skulls, dwarfism, corneal opacities, hepatosplenomegaly (enlargement of the liver and spleen), valvular heart defects, thick skin, joint contractures, and hernias. Death generally occurs by age six from obstructive airway disease, respiratory infections, or cardiac complications.
but leaves far more possibilities as wide open as ever. That is not so much desiring
perfection as striving for adequacy.

But is even striving for adequacy a backdoor way of selectively eliminating those
who don’t measure up, tantamount to eugenics? Preventing the birth of children with
inherited diseases and disabilities requires either selective abortion of affected fetuses, or
selectively discarding embryos, thereby preventing them from developing into persons.
Fetuses and embryos are not persons with moral status, so they are not harmed by
abortion or embryo death. Moreover, fetuses and embryos do not experience disability
and disease, so neither do they benefit from being spared those conditions. Thus, if there
is harm in selectively eliminating embryos because of genetic indicators of future disease
or disability, the harm must be to someone else. Some in the disability rights community
claim that the harm of prenatal testing is done to existing persons with disabilities, that
PGD and prenatal testing of embryos and fetuses is an endorsement of the eugenicist
belief that people with disabilities should not exist, and that people with disabilities
should never have been born. Selecting against embryos and fetuses is another way of
saying that there ought not be any more people with disabilities, of saying, as Justice
Oliver Wendell Holmes bluntly put it, that “Three generations of imbeciles are enough.”

Adrienne Asch explains it thusly:

Undoubtedly, the prospective parents (whether with prior knowledge of disability or virtual ignorance of life with
disability) sincerely believe that disability is best avoided

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35 Holmes, O. W. in *Buck v. Bell*, 1927
by discarding affected embryos or delaying pregnancy after terminating the one with an affected fetus… health professionals reinforce society’s negative views about what disability means for life. They endorse the idea that these traits are not acceptable if they can’t be avoided and that people should not be born with these traits if women and couples have the means to prevent their birth… For people with disabilities to work each day against the societally imposed hardships can be exhausting; learning that the world one lives in considers it better to “solve” problems of disability by prenatal detection and abortion, rather than by expanding those resources in improving society so that everyone — including those people who have disabilities — could participate more easily, is demoralizing. It invalidates the effort to lead a life in an inhospitable world.36

There is a distinct difference between claiming that existing people with disabilities should not have been born, and that future persons should be born without disabilities. To say that persons born in the future ought to be free of detectable, avoidable disabilities is not equivalent to saying that all existing persons with disabilities are undesirable, or worthless of life, or that they do not, somehow, measure up to our standards for human beings. Neither is it to justify the mistreatment of the disabled for eugenicist aims. To say that children ought not to be afflicted with polio, and to prevent polio through vaccination, is not to say that existing children with polio are undesirable or substandard. We can accept all people as they are, and still endorse without contradiction the idea that, in the future, we ought to prevent disabling conditions like polio. We can value children with polio without valuing polio itself, and we can value persons with disabilities without valuing or desiring their disabilities. For while we may not be able to separate a person from his or her disability, and however much persons

with disability may construct their personal identity around the fact of their disability, persons with disabilities are not identical with their disabilities. Franklin D. Roosevelt is not polio; Woody Guthrie is not Huntington’s Disease.

Assuming that Asch is right, however, and that harm is done to existing persons with disabilities every time an embryo is discarded or a fetus is aborted because of genetic indications of disability, what, precisely, is the remedy for that harm? To insist that embryos be implanted, and that fetuses be carried to term, despite whatever suffering and hardship will be experienced by the resulting person(s) and their families, is to use those people as a means to another’s ends, and that is not to treat them as persons. Nonmaleficence and respect for persons requires that we do not inflict preventable suffering on others for our own purposes, with no regard for their interests, needs, desires or welfare. There is a persistent claim made by advocates for the disabled that the nondisabled overestimate the hardship and suffering caused by disability. While that may well be true, it in no way requires that the hardship and suffering — even if it isn’t so bad — be inflicted on a future child for the sake of already existing persons. A possible person who does not yet exist cannot be harmed if it never exists, but to bring that person into existence to serve another’s ends is a harm even if the resulting life is, all things considered, a good life.37 For the sake of argument we can agree that existing persons with disabilities are harmed by the message sent by embryo discard and selective abortion, but that harm will not provide adequate justification for inflicting harm on

37 See chapters 3 and 4 for discussion of wrongful life and the non-identity problem.
another person — who would not otherwise be harmed — by bringing her into existence\textsuperscript{38}. Nonexistent, possible persons have no moral duties to benefit others, and there is no duty on the part of potential parents to bring a person into existence for the benefit of another.\textsuperscript{39} Persons with disabilities have a right to exist, but that right does not entail a further right to be brought into existence, or to have others like them brought into existence.\textsuperscript{40}

\textbf{§9. Preventing people, or preventing disease and disability?}

To prevent Roosevelt’s disability today, we would prevent his polio infection; to prevent Huntington’s today, we can prevent an embryo with the defective \textit{huntingtin} gene from developing into a person. There is a distinct preventative difference, of course, since in the former case, we can prevent a disabling disease without preventing the existence of a particular person, while in the latter case, we must prevent the existence of a future, possible person in order to avoid the disease. This is a fact about the genetic transmission of disease and disability. Were we to take our modern medical technology into a time machine, we could prevent Roosevelt’s paralysis without preventing the existence of the man who became the 32nd president; to prevent Guthrie’s HD, we would have to prevent

\textsuperscript{38} For more discussion of harm and causing harm by bringing about a person’s existence, see chapter 4

\textsuperscript{39} This is not to say that it is not \textit{permissible} to bring a person into existence at least partly for the sake of another, only that we are not morally obligated to do so. A child might permissibly be conceived in the hopes of creating a donor sibling for an existing child. The constraint on doing so would be whether or not it would be consistent with nonmaleficence and respect for persons. To use that child solely as a means to an end — even a good end such as saving the life of another child — would not be permissible. To subject a child to considerable risk, or to inflict considerable pain and suffering, by taking a kidney from an infant, for example, would not be permissible. For more on issues related to donor siblings, see chapter 7

\textsuperscript{40} For further discussion of disability, see chapter 5
him from ever existing. Instead, perhaps, his parents would have had a different child, one who did not inherit the defective *huntingtin* gene, but also one who did not write “This Land is Your Land,” did not have a son named Arlo who sang “Alice’s Restaurant.” And Billy Bragg’s musical career might have been profoundly different. Perhaps, for all those reasons, looking backwards, we would not want to prevent Woody Guthrie’s existence (and perhaps, neither would he), but if our goal is to prevent the pain and suffering associated with the physical, mental and psychological deterioration and early death of HD, preventing the birth of persons with the incurable, untreatable disease is, for the time being at least, the only option. Thus, we can say that it would have been better, all things considered, if Woody Guthrie had not been afflicted with HD, because we value Woody Guthrie and his contributions to folk music, but regret the suffering associated with HD. There is no inconsistency in valuing individual persons with HD and not wanting HD to affect future persons, and not wanting the suffering and hardship associated with HD to be experienced by our own children.

In the absence of effective treatments for inherited disorders and disabilities, preventing the birth of persons with those disorders and disabilities is the only option. To date, gene therapy has had very limited success in curing inherited illness, and shows very limited promise in the near future. Some inherited disorders, such as Phenylketonuria (PKU), are treatable, though not curable, through lifestyle adjustment and therapy. Cystic fibrosis patients today have a range of treatment options not available
a few decades ago, both to relieve symptoms and extend life. Early intervention, including physical and developmental therapy and surgery, can treat some of the myriad complications associated with Down Syndrome, and leads to improved, longer lives. But many genetic disorders remain untreatable by any currently available means. Some, like Hurler Syndrome and Tay-Sachs Disease, result in rapid deterioration and early death in childhood. Others, like Huntington’s Disease, Amyotrophic lateral sclerosis (ALS), and familial Alzheimer’s, affect only adults, but result in great and prolonged suffering and premature death. Preventing untreatable inherited disorders requires preventing the birth of affected persons. We might think that it is possible to draw clear lines between those lives that ought to be prevented, and those lives that we ought to bring forth. There are obvious difficulties with drawing lines, and we might ask why it is necessary to draw them at all, since embryos and fetuses are not harmed if they are not allowed to become actual persons, even if the persons they might have become would have had good lives.

§10. Parental obligations to future possible children

Parents have many obligations to their children, including the obligation to protect them from avoidable harms. Not all harms, of course, are avoidable, and prudent parenting can present numerous occasions when lesser harms must be inflicted, or allowed, to prevent even greater harms. What kinds of obligations do parents have to their future possible children? Does knowing of a risk of inherited disease or disability

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41 In the 1950s, few children with cystic fibrosis lived to attend elementary school. Today, advances in research and medical treatments have further enhanced and extended life for children and adults with CF, and many people with the disease live into their 30s and beyond.
create an obligation to prevent the disease or disability either by refraining from
procreation, or by using genetic technologies to test embryos and fetuses? Is there a
parental obligation to know if one is a carrier of genes that might cause disease or
disability? Does it matter what kind of disease or disability it is, whether or not it is
treatable, or how severe it is?

If we accept that there is a parental obligation to refrain from harming a future
child by, for example, availing oneself of prenatal care, avoiding drug and alcohol abuse
during pregnancy, and engaging in other practices known to protect infants from such
harms as birth defects and premature birth, then we accept that there are at least some
parental obligations to future children. On the assumption that an embryo or fetus is not a
child, measures taken to ensure a safe and healthy pregnancy are measures taken to
ensure the birth of a healthy child, and not to protect an embryo or fetus per se, except to
the extent that doing so protects the future person who will develop from these earlier
stages of life. The question is whether or not these obligations expand as the available
means to prevent disease and disability expand. In the early 20th century, it was not
known that smoking and drinking alcohol were harmful during pregnancy. Even later
than that, the role of folic acid in preventing neural tube defects was discovered. An
obligation to avoid alcohol and tobacco during pregnancy, if there is such an obligation
(and I think there is) would have emerged along with the discovery of the deleterious
effects of those drugs on the health and well-being of future children. Similarly,
obligations to prevent birth defects through proper nutrition during pregnancy arise, and
change along with, information about the benefits of proper nutrition. Unless genetic
technologies are sufficiently different from such preventative measures as abstaining
from alcohol and taking prenatal supplements, it would appear that there is a *prima facie*
obligation to use them, when available, and when feasible. Given the prohibitive financial
cost of some technologies like PGD, it would not always be feasible to use them. We can
imagine for the sake of argument, however, that cost is not an issue, that the tests are
available free of charge to anyone who desires them. Are parents obligated to use PGD or
other genetic technologies?

One possibility is that they are, in all cases. To prevent disease and disability in
future children is an important goal for most parents.\(^{42}\) If preventing avoidable disease
and disability in future children is obligatory, then it’s plausible that all available means
ought to be employed to achieve that goal. Yet, there are many currently available tests,
such as amniocentesis, CVS, and even fetal ultrasound, which are not used in all
pregnancies, even when available and offered. Not all parents are willing to abort a fetus
after a test shows the presence of, say, Trisomy 21, so some are not even willing to test
for the telltale extra chromosome. PGD could be performed every time embryos were
created in vitro for IVF, but it is actually performed in only a small percentage of IVF
procedures. Yet it is likely that those same parents who did not test their embryos and
fetuses desired, if not for their own sakes, then for the sake of their future child, that a
healthy child, free of disease or disability, would be born. If there is no obligation to use

\(^{42}\) For a discussion of parents who use PGD to select *for* genes that cause disability, see chapter 5.
all available tests to detect anomalies in embryos and fetuses, then what is the limit of parental obligation when it comes to testing for genetic abnormalities?

Perhaps the obligation to prevent increases with the severity of the heritable condition. Walter Glannon suggests that this might be the case, that as the severity of the disease or disability increases, and as the likelihood of genetic transmission increases, so too does the strength of the obligation to test and, should the test come back positive, to prevent the development and birth of a future person who will suffer as a result of disease or disability.\textsuperscript{43} The problem with using a sliding scale of severity, however, is knowing what is required, and when. Consider contagious viruses: parents ought to take some measures to prevent the spread of a contagious flu virus in their homes, such as practicing good hygiene, disinfecting hands and surfaces, et cetera. But given the highly contagious nature of the illness, and the ordinarily relatively mild nature of the illness, parents would not be acting immorally if they failed to take all possible precautions (such as quarantining infected family members). Parents with more serious infectious diseases, such as AIDS, can be expected to take proper measures to prevent transmission to their children as well, but although AIDS is a very serious and dangerous disease, it is not so easily transmitted to others. A parent with a highly contagious, very dangerous disease (say, the Ebola virus), is obligated to take more serious measures to prevent transmission, including, probably, isolating or quarantining infected family members. Thus, it appears that the strength of our obligations to prevent contagious illness, and the degree of

\textsuperscript{43} Glannon (2001)
hardship and inconvenience we are required to endure to prevent contagious illness, may well depend very much on the seriousness of the illness under consideration. We might, as Glannon suggests, apply the same model to preventing heritable illness or disability. The strength and seriousness of our obligations increases as the severity and likelihood of transmission of the condition increases, and the moral seriousness of shirking our duties increases accordingly. How do our obligations track with the ease of prevention? Does the obligation to prevent disease or disability increase as the cost and inconvenience of doing so decreases? The virus examples suggest that this is not the case — it is easier to prevent influenza, and harder to prevent Ebola, but the far greater danger posed by Ebola requires us to endure harsher measures and greater inconvenience to protect others from infection. This suggests that eliminating the financial burdens of expensive reproductive technologies would not by itself generate an increased obligation to use them.

Using a sliding scale, we can assume that anything at the far end of severity and high likelihood of transmission creates a strong parental obligation to test. There is pretty comprehensive agreement among philosophers who otherwise disagree about many things that lives that will be so restricted, and filled with so much suffering that they will not be worth living ought to be prevented. Conditions at the opposite end, where the chance of transmission is low, and the disease or disability is comparatively minor, create a weaker obligation to test, if there is any obligation at all. The problem, as always, lies in the vast, ambiguous middle, where line-drawing is always problematic. Some conditions compound the problem, and confound us further, with unpredictable outcomes. The mere
presence of Trisomy 21 cannot predict the severity of disability that will be experienced by the child with Down Syndrome. Achondroplastic dwarfs might experience numerous musculoskeletal complications, but might also live lives that are quite similar to the lives of big people. A child born with a mutated *huntingtin* gene will live a normal life into early adulthood, but will die prematurely after prolonged deterioration and suffering. As the list of genes associated with conditions grows, so too will the list of genes for which there will be prenatal and preimplantation tests available. What will be our obligations to test for conditions in the ever-expanding ambiguous middle?

If there is an unlimited obligation on the part of parents to prevent, when possible, disease or disability, this would solve the sliding scale problem, but would tend to butt up against procreative autonomy and the ethical concerns many people have about abortion and destroying embryos. Moreover, an unlimited obligation to test for everything implies that parents have an obligation to ensure that their children have the best lives possible, rather than merely adequate or sufficiently good lives, and this suggests that perfectionism grounds parental obligations to future children. There are any number of ways in which a child’s life might fail to be perfect and yet still be good enough to satisfy moral obligations grounded in beneficence and nonmaleficence. A girl child might face more limited opportunities than a boy child. A homosexual boy might experience more hardship and discrimination than a heterosexual boy. A non-white child might experience limited opportunities and racial discrimination. But surely parents are not obligated to bear only white, heterosexual, male children in order to ensure the maximal benefits and
opportunities — the perfect existence — for a future child. Glannon argues that principles grounded in nonmaleficence, beneficence and justice obligate us “to ensure that the people we cause to exist have a minimally decent life, not the best possible life.” I think we ought to aim higher than that, and that the sweet spot is somewhere between lives that are only minimally decent and lives that are perfect.

Whatever obligations there might be to prevent, parents are not precluded from trying to prevent any heritable condition, even a minor one, which might result in harm or suffering to a future child, by preventing the child’s existence. Because no one is harmed by not being brought into existence, there is nothing morally wrong with choosing not to bring about a possible person’s existence because of even a minor abnormality. There are many possible lives that would be good enough to satisfy parental obligations to protect future children from harm and suffering, but the obligation to ensure that future, existing children have lives that are good enough is not an obligation to bring about the existence of a child, any child, even if its life would be good enough.

Chapter 2: Harm to Persons

1. Harms and wrongs

The notion of harm is complex, particularly when harm to persons who don’t yet exist is considered. Conventional conceptions of harm generally describe adverse effects on the interests or rights of persons. Such adverse effects, to be considered harms, generally leave the victim worse off than she was before, either by setting back, thwarting or defeating her interests. Feinberg defines harming as having two components:

(1) It must lead to some kind of adverse effect, or create the danger of such an effect, on its victim’s interests; and

(2) It must be inflicted wrongfully in violation of the victim’s rights.¹

Adverse effects do not necessarily leave a person worse off on balance. It is possible to harm without worsening someone’s condition, by impeding interests or acting in a way that violates her rights without setting back or impeding her interests on balance. Such harms would involve not promoting an interest as much as it could or should have been promoted.² This way of defining harm collapses the distinction between failing to benefit (or failing to benefit adequately) and harming. An individual can be harmed in a counterfactual sense if she is left better off than she was before, but worse off than she would have been if other things had happened, or if, as Feinberg puts it, her “personal interest is in a worse state than it would be had A acted as he should have instead of as he

¹ Feinberg, (1986) p146-7. In fact, although Feinberg here includes the second condition as part of the definition of harming, it is only a condition of “wrongful harming,” not harming per se. One can be harmed in ways and by things that do not violate any rights. Hurricanes, for example, might cause injuries without violating anyone’s rights.

² ibid. p147
Harming, then, does not necessarily leave an individual worse off than she was before, but it requires being left worse off in some way. On this conception of harm, there are scenarios in which someone might be left worse off, or in a “harmful condition” without having been harmed by anyone. Feinberg argues that in rescue cases, where, for example, injury is inflicted in the course of a rescue, the rescued individual is not left in a condition that is “harmful on balance” because it is offset “by the overriding benefit of rescue.” In such a case, the victim might be left worse off, or in a harmful condition, but she has not been harmed or wronged by anyone. Curiously, Feinberg claims that “the overriding benefit of rescue” rather than the prevention of greater harm justifies the injury inflicted in a rescue case. On this view, it appears that the distinction between preventing harm and bestowing benefits disappears, and there is a suggestion that what justifies inflicting harm in rescue cases is not removing someone from a harmful condition but rather bestowing a benefit upon that person. This equivocation on “benefiting” is necessary when Feinberg looks at wrongful life cases where, he claims, we can make an analogy between being rescued and being born with a serious handicap that could only have been prevented if one were never born at all. It is questionable, however, whether the analogy is apt, for it suggests that a child born with a “harmful

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3 Feinberg (1986) p150 (footnote)

4 A “harmful condition” is one in which “a person is handicapped or impaired, a condition that has adverse effects on his whole network of interests,” while a “harmed condition” is a state of harm that is “the product of a prior act of harming” (Feinberg, 1986, p148). Thus, one might be in a harmful condition as a result of, for example, a tornado, although we would not say that one has been harmed in Feinberg’s sense of having had harm inflicted wrongfully in violation of one’s rights.

5 Feinberg (1986) p169
condition” has been, in a sense, “rescued.” Such an analogy only makes sense if it is the bestowing of a benefit (life, presumably), rather than the prevention of greater harm that does the justificatory work in rescue cases.⁶

There can arise situations in which we want to say that a person has been harmed even when she has been compensated such that that she is overall better off, comparatively speaking, than she was before. A person might be disabled by another’s negligence, for example, and be subsequently compensated substantially enough that, overall, she is better off than she was before. Nonetheless, it is counterintuitive to say that she was not harmed by being disabled. For this reason, we may want to reject a conception of harm that is strictly comparative, and avoid the counterintuitive conclusion that a negligently disabled but well compensated person has been benefited rather than harmed. Feinberg’s counterfactual conception of harm doesn’t quite offer a satisfactory response to such cases either, for the “victim” is neither worse off than she was before nor worse off overall than she otherwise would have been. She might, indeed, be somewhat better off than before if she is compensated substantially enough. The matter of harms is thus muddied by a definition that limits harms to conditions that leave one in some way worse off. Consider the case of the widget factory worker:

The widget factory worker loses his right arm in an industrial accident, as a result of his employer’s negligence. He receives a very substantial monetary settlement that enables him to quit his menial factory job and pursue his

⁶ See chapter 4 for further discussion of Feinberg’s rescue analogy.
lifelong interest in collecting Fabergé eggs. He enjoys his leisurely life of globe-hopping and Fabergé egg collecting, and overall, is much better off than he was before, when he was stuck in a dead end job in a widget factory.

Are we to say that the factory worker was not harmed by the accident that cost him his right arm? That seems rather odd, even though, all things considered, he might strongly prefer his new lifestyle to his old one, and might even view the loss of his arm as an acceptable price to pay for his new life. Nonetheless, at first blush, a permanently disabling accident that costs one a limb is decidedly a harm, and it is counterintuitive to change the status of a disabling accident from harm to benefit because of compensation received in the aftermath. Indeed, to say that the monetary settlement was compensatory is to suggest that it compensates for something — a harm that has been inflicted. But if we view harm as only that which makes one worse off overall, then it seems that a well-compensated disability is not a harm.

The problem with the factory worker case isn’t that he was compensated for his injury. The problem lies in looking at his overall status, post-injury, and comparing that to his overall status, pre-injury, in order to determine if he has been harmed. If we consider only that he has lost his right arm, an arm he once had and used, it is clear that he has been harmed. If we change the conditions slightly, the case becomes clearer:

A widget factory worker loses his arm in an industrial accident, owing to the factory owner’s negligence. No monetary settlement is forthcoming because his employer let his insurance lapse, and absconded with the company’s assets. But, the factory worker has a stroke of luck —
wins millions in the lottery, which enables him to pursue his Fabergé egg dreams.
Overall, the factory worker is better off than he was before the accident, but by disconnecting the injury from the compensating factors, we have no difficulty in thinking that he has still been harmed, in part, perhaps, because he could have been even better off had he not lost his arm just before he won the lottery. Had the order of events been simply reversed, and had he won the lottery before he lost his arm, we could say that he was better off before the accident, even though he is now better off than he was before he won the lottery. Events — including compensatory events — that occur after the fact might compensate for harms, but they do not alter the status of those harms, nor do they justify them.

A noncomparative alternative is to call harmful any actions or events which set back or defeat interests, or inflict suffering, even if they don’t leave the subject of harm worse off overall. The benefit of such a conception is that a person who suffers an injury or setback of her interests is considered harmed even though other interests might have been promoted overall. Losing an arm, for example, would be considered a harm under this model of harm, even if substantial compensation left one overall better off. Losing an arm in order to prevent a greater harm (such as death) would still be considered harmful, but the moral significance of such harm changes — harms that prevent or avoid greater harms can be viewed as the costs of avoiding those greater harms. Harms inflicted in the course of rescues, for example, would still be harms, but the special circumstances —
that a greater harm is avoided — justifies inflicting such harms.\textsuperscript{7} For this reason, we do not think a rescued person is entitled to compensation for injuries inflicted by her rescuer. This is intuitively plausible, and has the added feature of recognizing that there is a deep asymmetry between benefits and harms. Failing to benefit is usually considered less morally serious than both harming and failing to prevent harm, and this intuition is preserved on a noncomparative model of harm. By contrast, if we adopt a counterfactual comparative model of harm, where we consider only the final position of a person relative to where she might otherwise have been, the difference between failing to benefit and harming may disappear if the withheld benefit is large enough.\textsuperscript{8} Comparative and counterfactual models of harm give us counterintuitive results in thinking about harms to existing persons, and can’t handle at all problems related to genetic harms to future, possible persons.

Shiffrin’s account allows is more robust, and handles more cases. We can accommodate the moral asymmetry of harms and benefits if our conception requires that we identify harms and benefits with noncomparative conditions, such as identifiable evils and goods. A harm, for example, could be described as an undesirable state or condition that causes suffering, pain, frustration, or the inability to exercise important human rights and enjoy the experiences that make human life distinctively valuable. Benefits might be those things or conditions that contribute to our welfare and well-being, including health,

\textsuperscript{7} Shiffrin, Seana Valentine. (1999) p125

\textsuperscript{8} \textit{ibid.} p121
prosperity, or the elimination of deleterious conditions, such as the curing of a painful illness, or relief from famine or crushing poverty.

Whether or not a harm is considered wrongful need not depend on the nature or extent of the harm inflicted. Wrongful harms are those that are unjustifiable or morally indefensible. Harms that prevent greater harms, such as harms inflicted in the course of rescues, are not wrongful because they can be justified by the prevention of greater harm. Harms inflicted knowingly, maliciously, willfully, selfishly, or negligently are usually wrongful. Failing to benefit, or failing to benefit adequately, might result in harm in a counterfactual sense in which someone could have been better off had we acted differently, but doing so neglects different and in some cases weaker moral obligations than failing to prevent harm.9 The failure to prevent the genocide in Darfur is not merely a failure to bestow benefits on the people of Darfur, but a failure to prevent harm, a failure to rescue in a case in which there is a moral obligation to rescue. Even in cases where we might bestow a benefit — such as food aid — the moral imperative is not to benefit, but to prevent the harm of starvation, and the failure to do so, at least in circumstances where doing so would not impose severe hardship on ourselves, constitutes negligence. That is, we have far stronger obligations to prevent harm to others than we have to bestow benefits on them, and we can see this clearly when we consider whether or not we would be justified in inflicting injury in order to bestow a benefit rather than to prevent harm. If we were to drop pallets of champagne and chocolate truffles on the

9 There are some special obligations attached to specific roles, such as being a doctor or parent, which render morally serious the failure to benefit dependent persons adequately.
citizens of Darfur, just so they might experience the pleasures of these things, we would not be able to justify destroying a house or injuring a person who happened to be in the drop zone, even if we had no other way of delivering champagne and truffles. On the other hand, if we were to unavoidably injure a person or destroy property in the act of delivering lifesaving food or medicine, we might justify it by the prevention of the even greater harm of starvation or death. The prevention of harm does justificatory work that the bestowal of benefits simply cannot do, and a conception of harm that ignores the distinction between bestowing benefits and preventing harm will allow acts of harming that would otherwise be wrongful.

II. Genetic Harm

§1. Genes and Persons

Crude tools for controlling which genes children are born with are already well within our grasp. Aside from the obvious genetic control exercised in choosing a mate, there are currently hundreds of genetic tests available and, through carrier screening, prenatal diagnosis with selective abortion, and preimplantation genetic diagnosis (PGD), parents have the ability to avoid the birth of children with numerous genetic diseases and disabilities such as Tay-Sachs, sickle cell anemia, cystic fibrosis, and Huntington’s disease as well as some genetic predispositions to diseases like breast cancer and familial Alzheimer’s.¹⁰ With the completion of the Human Genome Project, the next few decades

promise accelerated progress in the number of genetic disorders that will be detectable prenatally.

Similar progress in treating genetically based disease and disability, through gene therapies or traditional medical therapies, may be much farther off. At present, and for the foreseeable future, the most effective and widely available means of preventing genetically based disease and disability are preimplantation selection of embryos, selective abortion of affected embryos and fetuses, non-procreation, or procreation using donor gametes.

In the future, it might conceivably be possible to “fix” deleterious genes through gene therapy and genetic enhancement. The success of somatic gene therapies has so far been extremely limited and of questionable benefit. Gene therapy is most promising for the treatment of recessive, single gene disorders, but many of the conditions parents would wish to avoid are polygenic (involving multiple genes), or involve entire chromosomes or dominant genes. Most of the traits parents would be most interested in enhancing in their children — intelligence, aesthetic beauty, athletic ability, behavioral dispositions — are unlikely to involve single genes, but rather are multifactorial traits influenced both by multiple genes and environmental factors.

Genetic causation is important in two ways: first, because genes play a role in causing harmful diseases and disabilities, and second, because genes are involved in the formation of persons, and, importantly, in the development of personal identity.
The role of genes in causing disease and disability is complex. Still more complex is how genes affect the development not just of a body, but of a person. There are some 20 to 25 thousand genes in the human genome, and they influence many common human traits, from eye and skin color to chin clefts to the ability to bend the thumb backwards or forwards.\textsuperscript{11} Persons have both a personal identity and a genetic identity, and the latter is the physical and causal link between preconception and prenatal actions and harms (or benefits) to future persons.

Genes encode the information required for the development of a human organism, but “in no sense can they be taken to be adequate physical or conceptual proxies of the organism in question.”\textsuperscript{12} That is, neither an animal, nor a \textit{person} is identical, in any morally relevant sense, with a \textit{genotype}, although we might properly speak of a genotype as being \textit{the} genotype of a particular individual person. DNA is nothing more than a very long chemical molecule, and genes are merely stretches of DNA, combinations of amino acids that, when present in a living cell within a living organism, provide transcription information for the creation of proteins that are utilized in the expression of phenotypic traits, including some traits that are harmful. In the absence of a living organism, DNA and genes are not sufficient for life, not sufficient to cause an organism to exist. We can’t simply assemble a bag of human genes, shake it up, and make a human being. A bag of genes does not a person make.

\textsuperscript{11} Lewis, Ricki (2001) p 75
\textsuperscript{12} Keller (1994) p90
What does make a person then? There are different conceptions of personal identity. Some pick out physical properties of persons, such as bodies, or brains, and locate personal identity in the continuity of a particular, gradually changing physical organism. A different conception of identity adopts some type of psychological criterion, such as memory, consciousness or self-awareness. Such a view of personal identity is compatible with the view that embryos and fetuses have no personal identity in that they lack the mental and cognitive capacity for it.\textsuperscript{13} I am sympathetic with the view that personal identity, like personhood, requires consciousness, and brain structure and function sufficient to support minimal consciousness and at least a rudimentary mental life. Although this view excludes most prenatal life, it is still a fairly thin conception of personal identity. I am inclined as well to agree with Locke’s richer conception of personhood and personal identity in which a person, in the fullest sense, is “a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places, which it does only by that consciousness, which is inseparable from thinking, and ... [is] essential to it.”\textsuperscript{14} Such a conception of personhood would encompass numerous non-human animals (Locke himself imagined

\textsuperscript{13} This “all in your head” identity is also compatible with the possibility that more than one person can occupy a single body (at once, or at different times). This possibility raises intriguing questions about gene therapies that might affect personal identity by, for example, preventing the neural and psychological devastation of diseases like Huntington’s and Alzheimer’s, the latter of which, in particular, appears to result in the loss of personal unity and integrity which might be sufficient to alter or destroy personal identity.

\textsuperscript{14} Locke, John. \textit{An Essay Concerning Human Understanding}. XXVII:9
that an intelligent, rational parrot, although not human, could be a person\textsuperscript{15}), but might exclude human neonates and humans who are severely cognitively impaired.\textsuperscript{16}

To the extent that genes are implicated in the development of the brain, genes are implicated in personal identity because they participate in the formation of the structures necessary for it. But genes alone are not persons, and genetic identity is not personal identity. In some sense, every person can be said to have existed, or begun to exist, at fertilization, but that is not to say that a person is identical (in sharing personal identity) with a zygote or an embryo or a pre-sentient fetus, or that a \textit{person} exists at fertilization in a morally relevant sense. I take it that only persons have personal identity, and although embryos and early fetuses are future, contingent persons, they are not actual persons, and they lack personal identity.

While there is no \textit{personal} identity at conception, or in early fetal development, there is, relevantly, \textit{genetic} identity. The combination of genes that results from the union of a sperm and egg is the genotype of a future, contingent person.\textsuperscript{17} The zygotic, embryonic, and fetal stages of a human organism all have the same DNA — they are genetically identical with the person who later develops from them. No existing person could have developed from a different conceptus, but from any given conceptus, a

\textsuperscript{15} Locke, \textit{Essay} XXVII:8

\textsuperscript{16} That neonates or the severely cognitively impaired might not satisfy the criteria for personal identity or personhood does not mean, of course, that they cannot or should not be treated as subjects of moral concern. Infants and the cognitively impaired most certainly are subjects of moral concern as existing human beings and sentient creatures.

\textsuperscript{17} Or, in the case of monozygotic twins and triplets, the identical genotypes of multiple people.
number of different persons might develop, given environmental contingencies: persons
with different psychological characteristics, different phenotypic traits, and different life
experiences.\textsuperscript{18} Persons are morally considerable, and our concerns about the development
of embryos and fetuses stem from their physical and genetic continuity with future actual
persons. The genetic inheritance of a future person sets in motion a causal chain that can
have favorable or deleterious effects on the actual person who develops, dooming him, in
the worst cases, to a life of serious illness, disability and suffering. To the extent that
embryos and fetuses are morally considerable, it is because they could become persons at
a later stage of development, and not because they already are persons with moral status.
Thus, prenatal precautions to prevent prematurity and birth defects can benefit the
persons who develop from cared-for fetuses, but they do not benefit fetuses themselves.\textsuperscript{19}
Thus, concern for the welfare of an actual person motivates concern about the health and
well-being, and the genetic status, of the conceptus that could eventually develop into
that person.

\textbf{§2. Genetic harms and genetic harming}

Genes are not themselves living organisms, and cannot be harmed. By
themselves, they are not \textit{harmful}. But within a complex organism, such as a mammal, and

\textsuperscript{18} Such contingencies can include umbilical cord accidents which can cause devastating brain damage, fetal
alcohol syndrome, which can have serious psychological effects, and so on. The person who results would
be, on the psychological view of personal identity, different than the person who would have been born had
devastating brain damage not occurred. Similarly, we might think that certain kinds of disorders, such as
dementia or autism, can alter personal identity even years after birth.

\textsuperscript{19} And similarly, fetuses are not harmed by abortion, which prevents the fetus from developing further. Nor
are fetuses harmed by, say, alcohol abuse during pregnancy. Fetuses do not suffer from fetal alcohol
syndrome. Rather, it is the future child who will suffer as a result of alcohol abuse. (See also note 37 on p. 66)
within a particular environment, some genes contribute to conditions that can be harmful because they cause pain and suffering, the loss or absence of species-typical functioning, and death. In some cases, genes cause conditions that are harmful only within particular (albeit typical) environments, while in other cases, they cause conditions that would be considered harmful, deleterious or disabling in almost any context or environment. Abnormalities in the number and structure of chromosomes in a human genotype can result in genetic conditions such as Down Syndrome, which results in a typical phenotype that includes mild to severe mental retardation, distinctive facial features, heart and organ defects, small stature, and a shortened lifespan. The \textit{huntingtin} gene mutation causes Huntington’s Disease in virtually all of the people who carry the gene, dooming them to mental and physical deterioration in early to middle adulthood, followed by premature death.\(^{20}\) Phenylketonuria (PKU) is an inborn error of metabolism, an autosomal recessive genetic disorder characterized by a deficiency in the enzyme phenylalanine hydroxylase (PAH). If not managed with proper diet, the inability to metabolize phenylalanine causes it to accumulate in the body, and can eventually lead to a number of symptoms, including mental retardation. The disease can be avoided by controlling the environment, i.e. controlling the amount of phenylalanine in the diet. Managing the diet, while inconvenient, makes it possible to avoid the harmful effects of PKU, and to neutralize the harmful effects of the PAH gene mutation. In the case of PKU, then, it is not a gene by

\(^{20}\) Huntington’s disease was until fairly recently thought to have 100 percent penetrance, but recent studies have concluded that there is incomplete penetrance in the range of 36-39 CAG repeats in some families with \textit{de novo} expression of HD. See McNeil, et al (1997). Nonetheless, in the majority of cases, the \textit{huntingtin} mutation all but guarantees HD in affected individuals.
itself, but the combination of a gene and an environment in which food contains abundant phenylalanine that results in disease. Similarly, in certain contexts, congenital deafness or blindness might be less disadvantageous than they are in most human communities. The combination of genes that cause deafness or blindness and an environment in which hearing and seeing are important for communicating with others, getting around, and participating in a rich cultural and artistic tradition, can result in significant, though not life-threatening, handicaps. It would be possible to adapt many typical human environments to make them more hospitable to the deaf and blind, and to other persons with disabilities, just as the diet of a person with PKU can be adapted to meet his particular genetically-influenced needs.

Recognizing that a complex interaction between genes and environment is the cause of what we commonly call genetic diseases and disabilities complicates the matter of genetic harm, but not hopelessly so. After all, interactions between organisms and their environment account, on some level, for all harms that befall persons. Famine, for example, occurs when regional food shortages are coupled with other factors, such as poverty, a refugee crisis, war, geopolitical strife, and so on. Food shortages can be caused by those same factors, along with environmental factors such as agricultural practices, and factors beyond human control, such as global weather patterns. The way the body reacts to a lack of food is partly genetically determined — evolution appears to have prepared humans for lean times. The physical and psychological effects of starvation, particularly prolonged starvation, and especially when a child starves, are profound and
can cause lasting harm. Unlike cases of child abuse by starvation, where responsibility for the harm can be attributed to an agent, assigning blame or responsibility might be complicated in cases of widespread famine. But whatever the causes of famine and starvation, given proper and adequate nutrition, a human within the range of normal functioning will not suffer the harms of starvation. Thus, we might say that a child died of the effects of starvation, which was in turn caused by famine, which was in turn caused by prolonged drought in Ethiopia.

Genetic harms are harms caused, in whole or in part, by genes through a complex interaction between genetic and environmental factors. The harms are the conditions — the disabilities, diseases, and deaths — that the genes cause or contribute to. Some diseases are caused by mutations that occur in normal genes — many cancers, for example, result when normal cells turn cancerous through a series of somatic genetic changes. But some forms of cancer are inherited, or the result of germline gene mutations. The BRCA-1 and BRCA-2 genes contribute to greatly increased susceptibility to breast and ovarian cancer in the women born with the genes; several hereditary prostate cancer (HPC) genes have been identified; an inherited mutant allele for the

21 Some diseases, such as Whipple’s Disease, celiac disease, cystic fibrosis, as well as some parasites, can cause malabsorption and malnutrition resulting in starvation.

22 The p53 gene, which is especially prone to point mutations, may be involved in about 55 percent of all human cancers, including cancers of the colon, breast, bladder, lung, liver, blood, brain, esophagus and skin. It is suspected that the p53 gene acts as a genetic mediator in environmentally triggered somatic mutations. (Lewis, R. p314)

23 Approximately 1 in 500 men is believed to possess an altered version of the HPC-1 gene, and researchers estimate that alterations in the HPC-1 gene are responsible for at least a third of familial prostate cancer. Familial prostate cancer accounts for about 1 in 10 cases of the disease, while the numbers for the early onset form of the disease are somewhat higher. A number of environmental factors, such as smoking and high fat diets, may also contribute to the disease. <http://www.genome.gov/10000484>
Retinoblastoma (RB) gene causes retinoblastoma, bone cancer and bladder cancer in some individuals.\(^{24}\) Other genes do not merely increase susceptibility to disease or disability, but effectively guarantee it. The *huntingtin* gene causes Huntington’s Disease in nearly 100 percent of individuals who have the gene; they are also carriers, with a 50 percent chance of passing the gene on to their offspring. Most chromosomal abnormalities such as trisomies and monosomies are congenital, but not inherited. They are the result of random errors that occur during cell division.\(^{25}\) Many of these abnormalities cause a spectrum of phenotypic symptoms that range in severity, but some are almost invariably severe and incompatible with life.

Whether genetic diseases and disabilities are inherited or caused by random somatic or germline mutations, what distinguishes them as *genetic* diseases or disabilities is that the genetic factor is a significant risk factor that in some cases greatly increases the risk of disease, and in some cases, all but guarantees it. Cancer, it is often said, is “100 percent genetic and 100 percent environment”\(^{26}\) — that’s an apparent contradiction, but one that demonstrates the complexity of human genetics. The etiology of cancer is

\(^{24}\) Retinoblastoma is an example of the “two-hit hypothesis” of cancer causation. Inherited retinoblastoma requires two genetic mutations, one inherited, the other somatic, to cause cancer. In sporadic, noninherited retinoblastoma, two somatic mutations in the RB gene occur. Mutant RB genes have been found in the cells of lung, breast, and prostate cancer patients, and patients with acute myeloid leukemia. (Lewis, R. p313)

\(^{25}\) Some chromosomal conditions are caused by changes in the number of chromosomes. These changes are not inherited, but occur as random events during the formation of reproductive cells. For example, a reproductive cell may accidentally gain or lose one copy of a chromosome. If one of these atypical reproductive cells contributes to the genotype of a child, the child will have an extra or missing chromosome in each of the body’s cells. Changes in chromosome structure can also cause chromosomal disorders. Some changes in chromosome structure, such as translocations, can be inherited, while others occur as random accidents during the formation of reproductive cells or in early fetal development. [http://ghr.nlm.nih.gov/handbook/inheritance/chromosomalinheritance](http://ghr.nlm.nih.gov/handbook/inheritance/chromosomalinheritance)

multifactorial, with genetic, environmental, medical, and lifestyle factors interacting to produce a given malignancy. A woman might develop breast cancer even if she does not have BRCA-1 or BRCA-2, and she might *not* develop breast cancer even though she has BRCA-1 or BRCA-2, but BRCA-1 and BRCA-2 are identifiable genetic risk factors for breast cancer. Not having the BRCA-1 gene would eliminate one risk factor for breast cancer, out of the many risk factors. Trisomy 13 is the genetic cause of a litany of anomalies, including several that are incompatible with life. Although the processes that result in the birth of a healthy infant are complex, and a multitude of things can go wrong, not having an extra 13th chromosome would result in an infant who does not have Trisomy 13 (also known as Patau Syndrome), and so we can say that Trisomy 13 is a genetic condition.

Harmful conditions with a genetic cause are instances of harms for which there has generally been no prior act of harming that can be attributed to an agent. In some instances the factor that contributed to a somatic mutation, for example, might have been something done by the harmed individual, such as smoking, which is implicated in over 90 percent of lung cancers. In many cases, persons are born with inherited genetic abnormalities that were previously unknown or unsuspected in their parents, such as the autosomal recessive disorder Sickle Cell Anemia. In many instances in which trisomies, such as trisomy 21, occur, the usual risk factors, such as advanced maternal age, are not present. Thus, we might say that a child’s sickle cell anemia was caused by the HbS mutation, which in turn was caused by the random combination of HbS genes from both parents.
of his carrier-status parents, which in turn was caused by the various events which led to two HbS carriers meeting and producing a child. In cases where the risks of passing on a genetic disease or disabling condition are known in advance, we might consider the harms that result as having been caused by the actions (or inactions) of an agent or agents. In 2001, for example, a deaf couple, Sharon Duchesnau and Candace McCullough sought to produce a deaf child by using sperm from a deaf donor. Their son Gauvin was born with profound deafness. If deafness is a harmful disabling condition — a claim that Duchesnau and McCullough, and many others in the Deaf Community would dispute — then the case of Gauvin would be one in which a genetic harm was intentionally inflicted, and Gauvin’s deafness would be a harmful condition that was the result of an act of harming.

In the context of knowingly inflicted genetic harms, it is necessary to consider whether or not inflicting a genetic harm can ever be justified. This problem presents unique and difficult challenges for the standard conception of harm (or the counterfactual conception), under which harming requires some kind of worsening of an individual’s condition. Using presently available technology, preventing genetic harm requires preventing the existence of a person with genes that can cause disease or disability. So, on the assumption that harming is a worsening of an individual’s condition, whether or not knowingly inflicting a genetic harm can be justified depends on whether or not causing an individual to exist counts as a worsening of that individual’s condition. Or put

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27 Mundy, Liza. (2002)
another way, can nonexistence be viewed as a greater harm than existence in a genetically harmed state?

§3. Preconception Nonexistence and Harm

Nonexistence is no better or worse for the child who is never born than it is for the child who is never conceived. If two parents conceive a particular child at a particular time, there are hundreds, if not thousands, of other possible children that, because of the limits of human reproduction, and the possibility of only one pregnancy at a time, they will never conceive. None of those possible children who might have existed if only mom and dad had waited a month more are harmed by the decision not to wait, and to conceive a child in December rather than January. Similarly, if parents fail in several attempts to conceive, and finally conceive on the eighth try, the hundreds of children who might have been, but were not conceived during those failed attempts are not harmed. Nonexistent, merely possible people cannot be harmed by nonexistence, even if their nonexistence is the result of a conscious choice on the part of two possible parents. Those who will never exist, either by someone’s choice, or by happenstance, or because of simple biological and reproductive limitations, do not lose anything. The preconception nonexistence of merely hypothetical beings involves no loss of the goods of a life — there is no one who could suffer such a loss, and no one who could lay claim to those goods.

Feinberg proposes that in cases where an infant is born with severe impairments, but a worthwhile life, we must conclude that he has not been harmed or wronged by birth. In choosing to bring the child into existence, the child’s mother has “picked the option
which had the best total consequences for the child that eventually emerged,” and should not be held liable for the child’s harmful (but not harmed) condition. 28 “To hold [the mother] liable anyway would be (at least with respect to the harm element) something like holding a rescuer liable for injuries he caused an endangered person that were necessary to his saving that person’s life.” 29 The suggestion, then, is that by bringing about a person’s existence, we are rescuing him or her from nonexistence, and existence, even with serious impairments, is preferable (at least after the fact) to nonexistence.

Since nonexistence is not a condition from which anyone requires rescue (unlike, say, a burning building), we can’t say that the prevention of greater harm justifies being brought into existence in the same way that it justifies, say, breaking someone’s arm to remove them from a burning building. It is only if we view rescuing as bestowing the benefit of life that the analogy makes any sense. But even there, we ought to distinguish between bestowing life and bestowing further life, for if there is a benefit to rescue, it is the latter. In pre-existence cases, on the other hand, it is bestowing life, tout court, rather than further life, that is the benefit, and it is not having “a life” but merely being alive that matters. For in a rescue case, it is generally the case that a life is saved, a life that a living person would like to continue, a life the loss of which would defeat the interests of that individual. In a pre-existence case, on the other hand, there is no person whose interest in continuing with her life would be defeated by nonexistence, for there is no life yet to be

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28 Feinberg (1986) p. 169
29 ibid.
continued. If there is any benefit to be bestowed in the pre-existence case, where no individual with interests in continuing life yet exists, the benefit must be merely being alive rather than continuing a life. It makes little sense, however, to speak of a nonexistent person having an interest in being alive, except in some retrospective sense in which, having already been brought into existence, a person can say that it was a benefit to have had that happen. In a classic rescue case, however, it is not just that, retrospectively, a person can claim that it was a benefit to have been given further life, but also that, before the rescue, it was in her interest to be saved, even at the cost of suffering an injury, because it was in her interest to avoid the greater harm of losing her life or suffering even worse injury. Moreover, in equating bringing about a person’s existence with rescuing a person, the moral distinction between benefiting and preventing harm dissolves, and so too the distinction between failing to benefit and failing to prevent harm. If that distinction disappears, then if there is a moral duty to prevent harm (at least under some circumstances), there is also a moral duty to bestow benefits, and if there is a moral duty to prevent the loss of life (at least under some circumstances), there is also a moral duty to bestow the benefit of life. There are infinitely many possible persons who never have the benefit of life bestowed upon them, but surely we ought not equate our failure to bring about their existences with, say, failing to prevent the Holocaust or the genocide in Darfur. It matters, in rescue cases, that there is someone to be rescued, and that the act of rescuing prevents harm from befalling that someone. In pre-existence cases, where it is a question of whether or not a person’s existence should be brought
about at all, there is yet no someone to benefit (or be harmed), no someone to be rescued at all.30

Every man produces billions of sperm in his lifetime, every woman hundreds of ova, and every couple, or possible couple (for we might as well count as possible people those who could result from every possible combination of sperm and egg from every possible combination of male and female parent) could potentially create vastly many possible children. If every woman bore as many children as she could possibly bear, there would still be millions of other possible children she might have had who failed to make it.31 If we believe that nonexistence is harmful, then those nonexistent beings would be in the harmful condition of nonexistence but not a harmed state, so long as every adult produced as many children as humanly possible. But since few adults produce as many children as humanly possible, many of those nonexistent children are in both a harmful condition, and a harmed condition, one in which their nonexistence is the result of a decision made not to bring about the existence of any (more) children. There is no realm of nonexistence, occupied by beings waiting to escape into existence, but if there were, there would be virtually no limit to the number of beings there, and no limit to the number of beings in the harmful condition of nonexistence. It is worth noting, of course, that although the realm of nonexistence might be infinite, the physical world is not, and

30 See chapter 4 for more discussion of the rescue analogy.

31 The highest officially recorded number of children born to one mother is 69, to the first wife of Feodor Vassilyev (1707-1782) of Shuya, Russia. Between 1725 and 1765, in a total of 27 pregnancies, she reportedly gave birth to 16 pairs of twins, seven sets of triplets, and four sets of quadruplets. 67 of them survived infancy. <http://www.britannica.com>
rescuing from nonexistence every child it is physically possible to produce would have a seriously negative impact on the well-being of all existing people. We could use technological means to produce more multiple births, in order to rescue even more children, but there would be as a result more infants born prematurely and with serious disabilities, and infant mortality rates would increase accordingly. The result would be that more existing people would die prematurely, in order to prevent more nonexistent people from never existing. At some point, we would have to expect diminishing returns from such a rescue operation, and it would quickly become the case that nonexistence would be preferable to existence for nearly everyone, and not just the relatively few people whose lives now are worse than death. Preventing the harm of preconception nonexistence could only be achieved, then, by imposing significantly greater harm upon the nonexistent (as well as already existing people), which could hardly count as any kind of rescue.\footnote{Such a scenario would be even worse than the one in Parfit’s Repugnant Conclusion, for we would eventually produce a world where everyone’s life was not even marginally better than death, but a world in which life was worse than death. Rescuing might then require dispatching persons into the better realm of posthumous nonexistence.}

Everyone who currently exists, and everyone who existed in the past was, at some point before they were actualized, nonexistent. That preconception nonexistence did not prevent future existence, or rob the nonexistent of the future goods that would be theirs to enjoy. Persons who will exist in the future are currently nonexistent, but they will, when they eventually exist, be able to enjoy whatever goods are available to them. Preconception nonexistence, then, does not rob us of future goods, or of a life we
currently enjoy, so it is not like posthumous nonexistence, which does rob us of future goods and the goods we currently enjoy. Death is an event that affects an existing person — someone dies, and loses both what they valued in life, and a valued life. Preconception nonexistence does not affect a person — no person suffers it. Nagel sensibly notes:

If there is a loss, someone must suffer it, and he must have existence and specific spatial and temporal location... The fact that Beethoven had no children may have been a cause of regret to him, or a sad thing for the world, but it cannot be described as a misfortune for the children that he never had... it cannot be said that not to be born is a misfortune.33

If a possible, hypothetical child is not conceived, the possibility of existence is gone forever and irrevocably, but no one is injured by the loss of the existence option. Preconception nonexistence is thus sufficiently different from death that we generally view it as not as bad as death. Indeed, in cases where death would follow a brief life that involved much suffering, many would view preconception nonexistence as a far preferable fate.

Benatar argues that “being brought into existence is not a benefit but always a harm.”34 Although some lives have advantages over others, Benatar notes, “existence holds no advantages over non-existence” because “there is nothing bad about never coming into existence, but there is something bad about coming into existence.”35 The something bad is the presence of pain and the frustration of desires. Given the fact that all

33 Nagel, Thomas.(1979) p7
34 Benatar, David. (1997) p 1
35 ibid. p3
living creatures must eventually die, and death is something we find unpleasant and undesirable, all living creatures are born to suffer. In a slightly more conciliatory mood, Benatar agrees that “the way to understand the notion of harming somebody by bringing him into existence is in terms of the preferability of either existing or never existing,” but not in terms of whether an already begun existence is worse than death.\textsuperscript{36} It is “unusually severe hardships,” those that exceed the “ordinary expectations people can have for their children,” which count as wrongful on Benatar’s view.\textsuperscript{37}

§4. The moral status of future, possible people

So what is the status of nonexistent, hypothetical, possible future persons? One possibility is that they have no status. They are, like invisible monkeys, things that simply do not exist, and therefore have no moral status. We do not have to conduct our daily lives with concern for the well-being of invisible monkeys, worrying about whether or not we might accidentally step on invisible monkey babies or destroy the habitat of invisible monkey colonies. But having no concern for the well-being of possible, but occurrently nonexistent children does not accord with our intuition that we should be concerned about the welfare of at least the nonexistent children who will eventually be actualized. We are morally suspicious of parents who, for example, willfully ignore the preconception advice of a genetic counselor who tells them that they could have a child with a fatal, painful genetic illness like Tay-Sachs. We morally disapprove of the parents

\textsuperscript{36}Benatar (2000) p180

\textsuperscript{37}ibid.
who engage in behavior that would be harmful to a fetus or child, and yet take no care to avoid conception or pregnancy. We morally disapprove of companies that pollute the environment with mutagenic contaminants that cause birth defects. These actions are morally suspect not because they harm someone who exists now — someone who definitely has the moral status of an existing person — but because of the effect those actions will have on a future person. Because we are morally concerned about what happens to future persons, it seems they do have some kind of presumptive moral status. Nonexistent but possible future people, unlike invisible monkeys, could exist, if certain entirely plausible events take place. Whether or not those events take place are, to some extent, within the control of the parents of possible people, which explains why our intuitions tell us that we ought, as possible parents, have some concern for the future, possible people we might produce (or why, as industrial polluters, we ought to clean up our messes). So future possible people have perhaps not the same status that existing persons have, but neither do they have the status of impossible invisible monkeys.

Future possible people are not actual. They could be, at some point in the future, but the odds of any particular person coming into existence, or having come into existence, are exceedingly small. The existence of every person was, prior to their existence, contingent on actions undertaken (or not undertaken) by their parents, by biological chance, by timing, by environmental and geopolitical factors, by decisions made by the Procter & Gamble corporation. The odds were stacked against every one of
us coming into existence. Among actual persons, all have beaten the odds. Among future, possible people, very few will.

We might well wonder, given that the existence of each person is contingent more or less until, or close to, birth, how to think about *harm* to such people. As noted before, one way to define harm is in terms of interests, and the satisfaction or defeat (or setting back) of those interests. It is clear how this applies to existing people who have a variety of interests, some more critical than others. It is not at all clear how this model of harm applies to future, possible people who have no occurrent interests. A late-term fetus is a possible future person with, perhaps, minimal interests.\(^{38}\) I suspect those interests are limited to avoiding physical pain, and do not include an interest in existing. A preconception possible person is merely hypothetical, and lacks even that basic interest. Nonetheless, it seems intuitively right that there are future-oriented interests that a future possible person has. They are not occurrent interests to be sure. Future, possible persons don’t think about going to Harvard or what kind of sandwich to have for lunch. They don’t have occurrent interests in particular careers or life paths. They don’t think about being president one day. Future possible persons don’t have these kinds of occurrent interests because they lack the necessary psychological states, attitudes and concerns. It might yet *be* in the interests of a future possible person to go to Harvard, or to be a veterinarian. But can a future possible person have an interest in, say, avoiding great pain,

\(^{38}\) I assume that to have interests, a creature must be sentient. I assume that a fetus with a fairly well-developed nervous system and brain, i.e. a third trimester fetus, will be sentient and capable of some sensation, and that such a fetus will have at least a minimal interest in avoiding pain, but will not have in interest in existing. My standard for sentience is not particularly strict. I suspect that earthworms and insects and jellyfish are capable of sensation, although I don’t know if they can formulate an interest in continued existence.
or in having all four (and not more) limbs, that is, an interest in his future well-being or welfare?

We should discard the notion that it is only existing persons with occurrent interests who can be harmed. The thorny question of whether or not a fetus is a person aside, it is clear that things can be done to fetuses (exposure to thalidomide, for example) that will harm interests the possible person-to-be will have later in life by causing serious disability or illness. Even the not-yet-conceived can have future interests set back or thwarted, in the event that they are actually conceived. As Powers notes, “What matters morally it seems is the prospect of interests being adversely affected in the future by actions of persons at a time clearly prior to the existence of actual interests of lives in being… harm to a future person is a readily comprehensible possibility.”

Feinberg provides the example of a bomber who sets a device to detonate at a kindergarten several years in the future. None of the children who will be harmed by the bomb were yet born or conceived at the time of the bomber’s actions, and yet it is undeniable that the children will suffer harm as a result of the bomb. There is no question that actions taken now can harm the interests of persons who do not yet exist, but who will exist in the future. The more difficult question is whether or not it can harm a person simply to bring about his or her existence, or if harmful conditions that are inseparable from a person’s existence can even be called harms. In the kindergarten bombing case, the bomber’s actions were in no way responsible for his victims being conceived or born, nor even attending school on the

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39 Powers, Madison (1996)
day of the bombing. But in a case where existence is inseparable from the harmful condition in question, there are doubts about whether bringing about a future person’s existence is really harming them. Those doubts arise in the context of wrongful life torts.
Chapter 3: Wrongful Life

The literature on procreative and genethical obligations has focused primarily on rights. From the perspective of children’s rights, the emphasis has often been on birthrights, a somewhat vaguely defined set that encompasses those minimal rights essential to the most basic of human interests and needs. From the perspective of parents, the emphasis is frequently on procreative liberty, but in cases where procreation is morally suspect, the question often turns on whether or not a possible child will be harmed by a parent’s procreative choices. One way of being harmed is to have one’s rights violated, but where the realm of rights under consideration is limited to birthrights, there will be few instances where a rights violation occurs as a result of procreative choices. The obligations of possible or prospective parents to their future, possible children are extremely limited if they only extend to those duties that correspond to a minimal conception of birthrights.

The emphasis on birthrights is the solution to a difficult problem: wrongful life torts, or suits brought on behalf of infants for damages arising from having been born. The original wrongful life lawsuit concerned a child suing his father for causing him to be born illegitimately. Subsequent wrongful life torts have generally focused on claims involving severe injury, disability or illness. The courts have struggled mightily with wrongful life torts, with the difficulty arising from a conceptual problem. To recover

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1 Most writers who have considered the question of birthrights within the context of procreative choice limit the range of birthrights to include only those rights necessary to advance a person’s most basic and essential interests.

2 Zepeda v. Zepeda. The Illinois courts rejected the child’s claims.
damages in a tort, one generally must show that one has been harmed by the negligence of the defendant. A simple example of this would be one involving a person injured in a car accident. In such a case, an injury — an unfavorable deviation and diminution from one’s prior condition — can be demonstrated, the negligence of the driver at fault can be demonstrated, and the damage award necessary to restore the injured party to his prior condition can be demonstrated. Clearly, wrongful life torts are not so simple. To begin with, the party claiming damages in a wrongful life tort is claiming injury as a result of having been born. By definition, an infant in a wrongful life tort has had no prior condition, unless nonexistence can be considered a condition. Can the infant claim that his existence made him worse off than he would have been had he never existed? Someone or something that does not exist can neither be improved upon nor made worse off, so we immediately encounter difficulty with the claim that a child is either better off or worse off for having been born. If a claim of actionable injury requires comparison with a prior (better) condition, the infant in a wrongful life tort cannot claim such injury because there was no prior condition to which to compare his current condition. Put another way, if no person can be made worse off by coming into existence, it is impossible to harm someone by bringing about their existence. If there is no harmed or injured party, there is no person who can bring a wrongful life action, and no person who can be held responsible for an injury that never occurred. Furthermore, assessing damages is difficult, if not impossible, because, even if one could show that an infant is worse off for having been born, nothing can restore the infant to his previous (better)

3 Where the injured party cannot be restored to his prior condition, it may still be possible to provide compensation that restores him to an overall comparable condition, or to a best possible condition.
condition — there is no condition at all to which he can be restored. Evident suffering is inflicted on a child as a result of being born, but there is no possibility that the child could have existed in any other (better) condition. Hence there is a dilemma: we seem forced to conclude either that the child has been wronged without being harmed, which at first and second blush seems an odd claim, or we must conclude that the child has not been harmed (or wronged) by being born in a condition which causes evident suffering, disability, or diminution of future life prospects. In either case, the wrongful life tort would be rejected.

Joel Feinberg sought to climb off the horns of the dilemma by appealing to birthrights:

Talk of a ‘right not to be born’ is a very compendious way of referring to the plausible moral requirement that no child be brought into the world unless certain very minimal conditions of well-being are assured, and certain basic ‘future interests’ are protected in advance, at least in the sense that the possibility of his fulfilling those interests is kept open.

Such a child has a genuine moral grievance, Feinberg continues, in the case that he “comes into existence with his most basic ‘birth-rights’ already violated.” Birthrights violations, as Feinberg describes them, would involve cases where “nonexistence...

\[4 One might think that death would be comparable to nonexistence, but there are several reasons why it is not, not least among them that death brings about the end of an existence already underway. While a dead person has no occurrent interests, most living persons do have at least a minimal interest in continuing to exist. A severely damaged infant may have no occurrent interest in remaining alive, and indeed, there may sometimes be reason to think the child would be “better off dead,” but there are obvious moral reasons for hesitating to prescribe killing an infant as the appropriate remedy for wrongfully bringing about his life.


6 ibid. p 102
would have been objectively preferable to existence.” 7 In other words, birthrights violations are limited to the most severe cases where “it is rational to prefer not to have come into existence at all.” 8 Needless to say, the severely impaired child may be incapable of having preferences, let alone expressing them, so using a substituted judgment standard may be necessary in wrongful life torts. It is not implausible that in the most extreme cases, rational people would tend to be in agreement about the preferability of nonexistence over existence. Nonetheless, Feinberg’s solution to the wrongful life dilemma is highly limited in its applicability. Only lives thoroughly devoid of positive value, or lives of negative value — that is, lives worse than nonexistence — would be wrongful. Very many dismal and limited lives would not meet that standard, and only in very few cases would it be wrongful to bring a child into existence. Underlying Feinberg’s position is the belief that the benefits of existence are substantial and weighty enough to make most lives, even those with considerable hardships, worthwhile. That is, in most cases, existence is, all things considered, a benefit, something persons have an abiding interest in, and most rational persons will view the benefit as offsetting all but the most severe hardships. It is only in limited cases where the hardships suffered are so severe that existence is no benefit at all, and life is not at all worthwhile. As a solution to the tort problem, Feinberg’s analysis also leaves unresolved the matter of compensation, as there is little sense in which someone whose life is so awful as to be worse than nonexistence could be

7 Feinberg (1986) p 159
8 ibid. The underlying assumption in Feinberg’s argument is that existence is preferable to nonexistence in most cases.
compensated. Such a child’s caregivers could presumably be compensated for costs associated with care and maintenance, but that is hardly compensation to the child for the conditions of her existence.\footnote{Feinberg acknowledges this difficulty, noting that perhaps “maintenance suits” would be more sensible than wrongful life suits in these case.}

A further dilemma arises if we take seriously the claim that only those persons have been wronged by birth whose lives are so bad that never to have been born at all would be rationally preferable. It forces us to claim either that some severely ill or disabled children, those with lives at least minimally worth living, cannot be wronged by birth, or to claim that nonexistence would be rationally preferable to lives with less severe, but nonetheless serious impairments. Steinbock avoids the dilemma by arguing that

...it is a wrong to the child to be born with such serious handicaps that many very basic interests are doomed in advance, preventing the child from having the minimally decent existence to which all citizens are entitled. While this is something less than a right to be born a whole functional human being, it is not dependent on the implausible view that a life with serious impairments is always worse than no life at all.\footnote{Steinbock, B. (1986) p. 19}

The right to a minimally decent existence is another way to formulate the notion of birthrights. One virtue of Steinbock’s less stringent wrongful life standard is that it would permit recovery and compensation to children who are less severely impaired, children for whom compensation might actually be meaningfully beneficial, by providing, for example, special educational and therapeutic programs or equipment. The most severely
impaired children, those whose lives would count as wrongful under Feinberg’s analysis, might personally benefit very little from any financial award.

Benatar, like Steinbock, offers a less stringent standard of wronging. Although Benatar has argued that existence is always a harm, he elsewhere claims that the minimum quality threshold for harming should be much higher than Feinberg sets it, even if we reject the view that life is invariably a harm.\(^\text{11}\) Benatar argues that, as a result of self-deception, few people would agree, retrospectively, that their lives were not worth living, and so too few lives will meet Feinberg’s “rational preference” standard. The standard is appropriate for questions concerning ending a life, but is not applicable, Benatar argues, to the question of beginning a life, because “The minimum quality threshold for starting a life is higher than the minimum quality threshold for ending a life.”\(^\text{12}\) The usual hardships of life can be harmful, but it is the “unusually severe hardships,” such as missing or nonfunctioning limbs and blindness, “that will tend to be viewed as unfortunate and preferably avoidable... never existing is thought to be preferable to life with these sorts of hardships — at least when a person is not making a retrospective judgment about his own life...”\(^\text{13}\) Benatar argues that there is no problem with viewing worthwhile lives with unusually severe hardships as not worth beginning. There is “no reason to think that merely because a hardship is not unusually severe that a life with such a hardship is worth starting,” but, conceding to the general preference for existence over nonexistence, Benatar allows that the lives worth starting “will be those in

\(^{11}\) Benatar, David. (2000) p180

\(^{12}\) ibid.

\(^{13}\) Benatar, David. (2000) p181
which the hardships are of the relatively mild kind.” 14 There will be disagreement among reasonable people, Benatar notes, as to which sorts of lives are worth beginning, and which are not, but there will also be “considerable agreement about what sorts of hardships are so bad that it is preferable not to bring about a life from which such hardships are inseparable.” 15

It is possible that the positions staked out by Steinbock and Benatar are not, practically speaking, very far apart. There would presumably be some overlap between what rational people would consider a minimally decent existence, and what they would consider lives worth beginning, or lives that meet a minimum quality threshold.

A fundamental challenge to the way that wrongful life torts have been approached, both by the courts and by many scholars (including Feinberg), looks to the common model of harms and benefits as the source of the difficulty. It is generally assumed that there is a benefit to life, a benefit so substantial that life is, in almost every case, a blessing, and worth living. The courts have almost unanimously arrived at this conclusion:

It is basic to the human condition to seek life and hold on to it however heavily burdened. If Jeffrey could have been asked as to whether his life should be snuffed out before his full term of gestation could run its course, our felt intuition of human nature tells us he would almost surely choose life with defects as against no life at all. (Gleitman v. Cosgrove)

One of the most deeply held beliefs of our society is that life — whether experienced with or without a major

14 ibid. p181
15 ibid
physical handicap — is more precious than non-life.  
(Berman v. Allen)

Basic to our culture is the precept that life is precious. As a society, therefore, our laws have as their driving force the purpose of protecting, preserving and improving the quality of human existence. To recognize wrongful life as a tort would do violence to that purpose and is completely contradictory to the belief that life is precious. (Blake v. Cruz)

The general assumption of these courts has been that the value and sanctity of life is such that, to be born, however impaired, cannot be an injury or harm:

There is no precedent for recognition... of “the fundamental right of a child to be born as a whole, functional human being.”... Whether it is better never to have been born at all than to have been born with even gross deficiencies is a mystery more properly to be left to the philosophers and the theologians. Surely the law can assert no competence to resolve the issue, particularly in view of the very nearly uniform high value which the law and mankind has placed on human life, rather than its absence. Not only is there to be found no predicate at common law or in statutory enactment for judicial recognition of the birth of a defective child as an injury to the child; the implications of any such proposition are staggering. (Becker v. Schwartz)

The position that the benefit of existence is so great that to be born simply cannot be a harm rests, in part, on the assumption that harms and benefits can be straightforwardly compared. In tort cases, damages are frequently assessed by comparing the prior state of an injured person to his present (harmed) state. Such a comparative model assumes a kind of symmetry and balance that fits well the metaphor of the scales
of justice. Harms and benefits sit at opposite ends of the scale, and harming a person tips
the scales one way, while compensating for harm restores the balance.\textsuperscript{16}

Feinberg employs this kind of symmetrical comparative model of harms and
benefits. Simply put, setbacks to one’s interests are harms; benefits involve the
advancement of interests.\textsuperscript{17} Evaluating harms and benefits involves assessing one’s
present position on a kind of sliding scale of interests. The comparison can be historical,
looking at the beginning and end points, or it can be counterfactual, looking at an end
point and where one would have (hypothetically) been otherwise. Either way, the
comparison leads to a judgment that either harm or benefit (or, in the case where one’s
relative position is unchanged, neither) has been bestowed. Additionally, harms count as
\textit{wrongful} if they are “inflicted wrongfully in violation of the victim’s rights.”\textsuperscript{18} Harms
that do not meet that condition — harms that result from hurricanes, for example —
count as “harms that are not wrongs.”\textsuperscript{19} Since there can be no historical comparison in
wrongful life cases, they require a counterfactual model. But if it is assumed that
existence is overwhelmingly beneficial, the scales will be tipped so far towards benefits
that only the most grievous illness or disability would tip them back in the direction of
harm. Assuming that one has been benefited (and overwhelmingly so) by being brought
into existence, and assuming that one has a substantial interest in being so benefited,

\textsuperscript{16} The general disagreeableness of harms would probably make them weightier, in our metaphor. That is, it
would take a small degree of harm to upset the balance.

\textsuperscript{17} Feinberg’s analysis of harms and benefits is much more nuanced than is implied by this simplification.

\textsuperscript{18} Feinberg (1986) p146

\textsuperscript{19} \textit{Ibid.}
carries with it the companion assumption that one cannot be harmed, let alone wronged, by existence. Hence Feinberg’s conclusion that only those conditions that make life worse than nonexistence could count as wrongful harms, and the courts’ conclusions that bringing about an existence cannot be wrongful.20

Feinberg’s “counterfactual test” for wrongful life cases is whether “nonexistence in a given case would have been objectively preferable to existence.”21 Feinberg invokes a “reasonable person” standard:

When one party says that another would have been better off had he never been born, he is claiming that the preference for the one state of affairs over the other is a rational preference... If nonexistence in a given case would have been objectively preferable to existence, as judged for example by the law’s convenient “reasonable person,” then any wrongful act or omission that caused (permitted) the child to be born can be judged to have harmed the child.22

It is only in the most extreme cases, Feinberg thinks, that it is “rational to prefer not to have come into existence at all.”23 When a child born with serious impairments has a worthwhile life, the child, according to Feinberg’s counterfactual test, can be said to be in a harmful condition, that is, “not a state of harm that is the product of a prior act of

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20 In Harm to Others, Feinberg concluded that an infant could be wronged by being brought into existence with a severe illness or disability, but it could not be harmed (p. 102). Feinberg later revised the point in “Wrongful Life and the Counterfactual Element in Harming,” and concluded that “the infant is both wronged and put into a state of harm, and therefore harmed in the full sense” (p. 167). Several other commentators have taken up Feinberg’s initial position, denying that a person can be harmed by being brought into existence (when no alternative existence was available), but claiming that wrong is still done when such a child is born. See, for example, Brock (1995).

21 Feinberg (1986) p. 159

22 ibid. p159

23 ibid.
harming.” Because such a child could not have been born otherwise, the only alternative was nonexistence, which is only rationally preferable in the most extreme cases. Feinberg does not deny that the child’s condition might be harmful, only that it is a harmed condition. In such a case, Feinberg argues, bringing about the child’s existence can be compared to a rescue situation, where the impairments (which were avoidable only by preventing the child’s existence) were necessary to save an endangered person’s life. The “rescuer” in the wrongful life case may have caused the “imperiled party’s” impairments in the “rescue effort,” but the “rescuer-defendant did not cause a condition that was harmful on balance, offset as it was by the overriding benefit of rescue, and he cannot be said, therefore, to have harmed the plaintiff (in the full relevant sense) at all.” Interestingly, Feinberg here adds a disclaimer, noting that “For all this to be true, we must assume that the rescuer was not himself responsible for the other party’s peril.” The matter of responsibility is contestable, at the very least, in wrongful life cases. So too is the claim that bringing about a person’s existence is truly comparable to rescuing them. To really be comparable, the rescue claim must be undergirded by an assumption that nonexistence is a state from which we can be rescued, and from which we ought to be rescued. In true rescue cases, there is a further assumption that there is some kind of moral duty on the part of the rescuer to effect a rescue. Nonexistence is not a state occupied by anyone, unless one holds that there is some fuzzy realm of nonbeing, a green

24 ibid p169
25 Feinberg (1986) p169
26 ibid.
27 The moral duty to rescue takes into account such factors as the cost and risk involved in a rescue. Some rescues would be costly and risky enough to count as supererogatory.
room for the could-be-born. That there is no one there to be rescued rather obviates any
moral duty to effect a rescue.

There are several reasons to have misgivings about the counterfactual model
proposed by Feinberg (and adopted by others). A comparison of a wrongful life case and
an injury case brings out one difficulty. Imagine a child, A, born with serious impairments
caued by rubella-related cerebral palsy. The child’s life is, all things considered, worth
living. The child could not have been born without his impairments; the only alternative
for A would have been nonexistence. Applying the counterfactual test Feinberg proposes,
A has not and cannot be harmed by his birth because his life is worth living. It would not
be rationally preferable for A that he never existed at all. Now consider B, a child in many
respects similar to A. B was born healthy and free of impairments, but a severe brain
injury a few months after birth caused B to suffer as well from cerebral palsy, with the
same degree and kind of impairments experienced by A. B’s case is not a wrongful life
case, but an injury case. Because B had a prior existence without injury or impairment, an
historical comparison is possible. We can say that but for the brain injury, B would not
have cerebral palsy. We can also make a counterfactual comparison in B’s case. But for
the brain injury, B, hypothetically, would have lived without serious impairments in the
future. B, according to a Feinbergian standard, is not only in a harmful state, but in a

28 Gleitman v. Cosgrove was a wrongful life tort involving a child born with severe disabilities as a result of
his mother’s prenatal infection with rubella. The Supreme Court of New Jersey rejected the infant Jeffrey
Gleitman’s claim, ruling, “The infant plaintiff would have us measure the difference between his life with
defects against the utter void of nonexistence, but it is impossible to make such a determination. This Court
cannot weigh the value of life with impairments against the nonexistence of life itself. By asserting that he
should not have been born, the infant plaintiff makes it logically impossible for a court to measure his
alleged damages because of the impossibility of making the comparison required by compensatory
remedies.”
harmed state, that is, a “state of harm that is the product of a prior act of harming.” A, on the other hand, is in a harmful state, but not a harmed state, as his disability was not caused by an act of harming.\(^{29}\)

Without knowing that the otherwise similar impairments of A and B came about at different stages in their development, there would be no way to distinguish the two cases. What reason, then, have we for concluding that B has been harmed but A has not? If we follow Feinberg’s lead, A can be compared to an endangered person in a rescue situation. A’s birth saved him from nonexistence, and thus provided a benefit. B’s injury, on the other hand, resulted in a diminution of abilities he otherwise would have developed, and resulted in a setback of his interests (or the interests he would later have had if not for the brain damage), and thus B has been harmed. The two cases are assessed differently even though, were we to plot them on a graph, the current positions of A and B would be identical:

\(^{29}\) It is assumed that A, like Jeffrey Gleitman, could not have been born without his impairments, and the only way to avoid them would have been to avoid the birth of A.
It is only relative to a hypothetical future position that there is a difference between A and B. A’s future possible position is the same as his current position. He will be neither better nor worse off. B, on the other hand, had a pre-injury position of 100, assuming that he was perfectly healthy and fully functioning. On an historical comparison, he is, say, 50 percent worse off after his brain injury than he was before. B also has a hypothetical future position that would have been 50 percent higher than his current position, so on a counterfactual comparison, he is worse off now than he would have been in the future, if not for his injury.

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30 A has been assigned a hypothetical alternative past value of -50, although it is certainly contestable that nonexistence has any value, positive or negative, at all.

31 This is hypothetical as well. Cerebral palsy is not a progressive disorder, so physically speaking, A’s condition will not deteriorate in the future. On the other hand, as A becomes older, he may suffer more from the social isolation and exclusion sometimes experienced by persons with disabilities, and his cognitive disabilities will be more limiting than they would be for an infant.
It is clear why we can conclude that \textit{B} has been harmed. He is both worse off than he was before, and will be worse off than he would have been in the future. On both an historical and a counterfactual model of harm, \textit{B} has suffered a setback in his interests, and is worse off as a result of his injury. But while it is abundantly clear that \textit{B} has been harmed, it is not entirely clear that \textit{A}, who is in the same position as \textit{B}, has \textit{not} been harmed. It is only if we assume that nonexistence has negative value that we can view \textit{A}'s life as an overall benefit.

Assigning negative value to nonexistence is a seemingly logical extension of assigning a positive value to existence. If existence has positive value — and it would seem, at least anecdotally, that it generally does — then the absence or lack of existence must have negative value. But there is a moral difference between losing something of value, or having it taken from you, and never having it at all. If I greatly value my yacht \textit{Queenie}, and you take it from me, then I have been harmed because something of positive value to me has been removed, leaving a void with negative value. Thus the conclusion that the lack of something of positive value — existence — must have negative value.

Existence/nonexistence cases are not really comparable to having-a-yacht/losing-a-yacht cases. Rather, because there is a significant difference between taking the life of someone who values their existence, and not bringing about an existence in the first place, existence/nonexistence cases are comparable to having-a-yacht/never-having-a-yacht cases. If you take \textit{Queenie} from me, you deprive me of something I value, and I have been harmed and wronged. If I never had a yacht in the first place, I might wish that
I had one, but its absence or nonexistence is not in itself a harm. I am not worse off for never having had Queenie, while I am worse off if my beloved Queenie is taken from me. Analogously, ending the life of someone who values his existence is to deprive him of something he values, namely, his life. But nonexistence is not a negative state inflicted on anyone or anything. There is no person in a state of nonexistence, a person longing for a valuable existence of which he is deprived. It is for this reason that nonexistence is unlike death, which is a prospective state inflicted on someone. Death has negative value for at least many of the living. People tend to value their lives, even when their lives, all things considered, are less than optimal. While death often has negative value, nonexistence might more properly be said to have neither positive nor negative value, not least because there are no valuers who experience it. To say that something has no value is not the same as saying it has negative value. If you deprive me of my yacht and offer me a dinghy in its place, I might say that the dinghy has no value for me, by which I mean, really, that the dinghy is not something I care about, and it certainly will not compensate me for the loss of Queenie. Offering me something less valuable as compensation for something I value is to negatively affect my interest in having the things I value. What I actually mean when I say that the dinghy has no value for me is that it has negative value — it is less valuable than my yacht. But it would be a mistake to

32 There are things, such as an education or adequate nutrition, that my never having had would constitute a harmful or harmed state. Never having such things would be harmful, while never having a yacht would not be harmful, because an education, or adequate nutrition are important components of my well-being and flourishing. Existence, on the other hand, is not important to the well-being of the non-existent, who need nothing. Thanks to Rachel Cohon for helpful comments on this point.

33 This is not to say that existing persons might not suffer because of the nonexistence of nonspecific others. Childless adults, for example, might grieve because they cannot have children. The nonexistence of biologically-related children could have negative value for the childless would-be parent, but nonexistent possible children themselves are not entities who can value, or disvalue, their nonexistence.
think that nonexistence is comparable to being offered something less valuable, or of negative value, instead of existence.

In some cases, existence might have negative value. Feinberg notes:

When a miserable adult claims that he would be “better off dead,” for example, surely he is not making some subtle metaphysical claim implying that there is a realm of being in which even the nonexistent have a place. What he is saying is that he prefers to be dead, that is, not to be at all.34

Claiming that I would be “better off dead” is to say, simply, that existence itself is undesirable, not that death, as an alternative form of existence, would be better.35 Similarly, someone who wishes that he had never been born is not wishing that he had continued in some alternative, better realm of nonexistence, but rather is expressing the negative value of his actual existence. Existence can be bad without there being a better alternative, which may account for the tenacity with which many people cling to life, even when it goes badly. That existence can have negative value does not entail that nonexistence must have positive value any more than the (presumed) positive value of existence entails that nonexistence must have negative value. Existence and nonexistence need not be viewed as if on a scale, where the weight of one counterbalances the other.

Nonexistence is not comparable to existence, whether existence has positive or negative value. A’s hypothetical nonexistent state would have the same value as B’s

34 Feinberg (1986) note 42 p158

35 There are, of course, numerous religious beliefs concerning the afterlife, but it shall here be assumed, without argument, that death results in posthumous nonexistence rather than an alternative existence. Death has negative value, when it does, only for the living. No claims are being made, or entertained, that death has negative value for the dead.
hypothetical nonexistent state: no value. A’s hypothetical nonexistence and B’s actual existence (at 100%) are simply not comparable — there is no there there to compare — and neither can we compare A’s nonexistence with his actual existence. One has no value, positive or negative, while the other has some value, whether positive or negative. There simply is no prior position for A as there is for B:

We can, however, compare A’s existence to B’s existence and see that A started out life with 50% less well-being, in terms of health, physical and intellectual ability, and future abilities, than B had at the start of his life. If we want to conclude that B is worse off for having less of the things we value in human life, what reason have we for thinking that A
is not worse off as well? Indeed, on one interpretation, we might say that A is even worse off than B, for B at least had a few good months, while A has had none. The problem begins when we think about harm only as a worsening of one’s condition, rather than simply as being badly off. If we think that B is badly off following his brain injury, it seems evident that A is at least as badly off as a result of his birth. Needless to say, there could be other persons who are much worse off than A or B, such as those who, from birth, suffer pain and disability so severe that their lives are simply not worth living. But above the threshold where life is not worth living, there is a range of disability and illness that has substantial negative value (and also positive value). The subjects of that negative value might still view their lives as worthwhile, all things considered, but that does not preclude the possibility that they have been harmed by experiencing conditions with negative value. A person left paralyzed by a car accident can still have a worthwhile life, but that does not mean he has not been harmed or wronged. Similarly, a person born paralyzed can have a worthwhile life, but that does not mean he has not been harmed or wronged by his birth. The threshold for what counts as a harmful or wrongful life can be substantially higher than the one suggested by a conception of harm that discounts anything better than a devastating illness or disability.

Whether or not a life is viewed, retrospectively, as harmful is highly subjective. People tend to value their lives, despite their hardships. Children holding signs that read, “I’m glad my mom didn’t have an abortion” are common sights at anti-abortion

36 Given how limited are the abilities and awareness of an infant only a few months old, B is probably not consciously worse off. That is, B is not aware that his brain injury has made him worse off than he was before. An adult who suffers a gradual diminution of his mental abilities, through senile dementia or Huntington’s Disease, on the other hand, could suffer the loss quite acutely because he is aware of the loss.
demonstrations. Similar statements are frequently made by disability rights activists. But such sentiments are not universal, and there are also those who have lives that are more than minimally decent, yet who wish they had never been born. Asking someone, years after the fact, if they’re glad they were born is one way to assess the rightness or wrongness of allowing that person to come into existence, but for those who, all things considered, experience lives that are not worth the struggle, it is asking far too late. Assuming that only those lives that are worse than nonexistence are harmful, and can be brought about wrongfully, is to set the bar too low.

Given the subjectivity of self-assessment about quality of life, there is understandable difficulty in fixing a definitive point at which no life should be begun. The line-drawing question is a particularly difficult one, and it is one reason for adopting a “life not worth living” standard. A standard that limits the lives worth beginning to those that will be better than nothing at all will not be accused of being too liberal, while it is easier to find fault with a standard that limits the lives worth beginning to those that meet a substantially higher standard of quality. Drawing a line at a non-arbitrary point on the quality of life continuum, a line below which it would be wrong to go, is enormously difficult. There would be considerable disagreement about where that line should be drawn, while there is considerable agreement that a line can be drawn at the point where quality of life is so poor that it is worse than nonexistence. The fact that we can’t with ease or certainty draw a line at a precise point is no reason not to approximate where that

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37 Dr. John M. Freeman, a renowned pediatric neurologist who is a strong proponent of aggressive treatment for babies with meningomyelocele, the most severe form of spina bifida, was surprised when two of his early patients, seemingly successful women who graduated college and had steady jobs, told him “We wish we’d never been born.” The women were reflecting on the hardships of lives spent in wheelchairs, with limited social contact and “no hope of marriage.” (Lerner, Barron H. 2005.)
line might be, and to make the case that, at best, bringing about lives within that
approximate range is morally suspect. And where that line might be is somewhere in the
range of unusually severe hardship that might indeed be better than “nothing” but also
better than just “minimally decent.”

Given the general and overwhelming preference for continuing existence, it is
safe to say that the minimum quality-of-life threshold for continuing life is pretty high.
When decisions are made about ending the lives of incompetents, such as persons in
persistent vegetative states, the threshold is high. But in prenatal or preconception cases,
the question is not whether a life should be continued, but whether it should be begun.38
That is an entirely different question, and it is appropriate to set a different threshold.
How high should the threshold be for beginning life? Not so high that no life would be
worth beginning, but also not so low that lives with unacceptably severe hardships cannot
be viewed as harmful and undesirable. Lives can fail to be good enough even if they are
better than nothing.

Benatar argues that there is an ambiguity in the expression “a life worth living,”
and this ambiguity leads to a conflation of “a life worth continuing” and “a life worth
bringing about.”39 Conflating the two results in the same standard being applied to
continuing, or present-life cases, and future-life cases, with that standard being the one
we can most easily make sense of — the continuing-life standard.

38 Prenatal cases might be viewed as continuing or present-life cases if one holds either that a fetus or
embryo is a living person, or that biological life is what matters. I assume neither, and will further assume
without much argument that, at least in the case of early embryos and fetuses, no life-as-a-person is affected
by decisions not to allow birth.

39 Benatar (2000) p176
The judgment that a disability is so bad that it makes life not worth continuing is usually made at a much higher threshold than the judgment that a disability is sufficiently bad to make life not worth beginning. That is to say, if a life is not worth continuing, *a fortiori* it is not worth beginning. It does not follow, however, that if a life is worth continuing that it is worth beginning or that if it is not worth beginning that it would not be worth continuing.\(^{40}\)

We require stronger justification for ending a life that has already begun than we require for not starting a new life. A life that is worth continuing may not have been a life worth beginning. There is a point at which present-life, in a morally relevant sense, begins, and a being’s having an interest in continuing to exist is a very strong argument in favor of continued existence.\(^{41}\) The stronger the interest in continuing to exist is, the more sacrifice, in terms of quality of life, we are likely to endure and justify. Similarly, the weaker the interest in continuing to exist is, the weaker need be our justification for not continuing it. Where the being in question has *no* interest in existing, we need no justification at all for not bringing about its existence. Future-life cases do not require that we adopt the perspective of already existing people who have an interest in continuing to exist (or in not continuing to exist), and it would be a mistake to do so. The question is whether a life is worth *beginning*, not whether it is worth *continuing*. The interest in continuing lives already begun is irrelevant to whether or not those lives were worth beginning in the first place. Benatar argues that it is likely that the preference among

\(^{40}\) *ibid.*

\(^{41}\) I take it that the process of coming into existence in a morally relevant sense is a gradual one in the development of a being, and that to speak of a “point” at which it occurs is somewhat misleading. Suffice it to say that it does happen, and, more significantly for this argument, the interest in continuing to exist also develops gradually and (generally) becomes gradually stronger. While one’s existence, in an ontological sense, can be said to have begun at conception or thereabouts, it does not begin in a morally relevant sense until considerably later. When morally relevant existence begins is a matter of much dispute, but it is not important for the present argument.
already existing people to have come into existence is not rational, but is rather “a form of self-deception — adjusting to one’s unfortunate circumstances by adapting one’s preferences and thereby making one’s circumstances seem less bad.” 42 We need not imagine rampant irrationality on the part of existing people, however. It is enough to argue, as I have, that their *ex post facto* preferences simply do not matter in before-the-fact questions about bringing about a life. The fact that I am now glad to be alive does not create a retroactive obligation on the part of anyone to have ensured my future existence. At best it merely creates obligations not to thwart my interests in *continued* existence.

Steinbock and McClamrock argue that “it is unfair for parents to bring children into being without some reasonable prospects at a non-miserable life,” and that “having children under very adverse conditions is *unfair to them.*” 43 Steinbock & McClamrock invoke a “principle of parental responsibility” that requires parents to think of the welfare of their possible children before reproducing. Such a principle is founded on the special relationship between parents and children, as well as the unique control parents have over the existence and well-being of their children. “Anyone willing to subject a child to a miserable life when this could be avoided, would seem to fail to live up to a minimal ideal of parenting.” 44 The principle says that it is wrong to bring children into the world with terrible lives, but does not make the further claim that people should not have children in conditions that are less than ideal. There is a great deal of latitude between

42 *ibid.* p179
44 *ibid.* p 392
“terrible lives” and “ideal lives,” and that space corresponds to the conditions under which most lives are created.

The claim that it would be wrongful to create only those children whose lives would be worse than nonexistence, children with lives such that it would be rational to prefer never existing at all, clashes with the intuition that there is something wrong with knowingly creating children who will have serious disabilities or illnesses, even if their lives could turn out, on balance, to be at least minimally worth living. This is not just to claim that all parents want their children to be healthy and smart and good looking. More fundamentally, most parents desire to give their children lives that are more than just barely tolerable, even if they don’t recognize an obligation to do so. Given a choice, most would-be parents would choose lives of health, happiness and satisfaction for their children, not lives of hardship and difficulty, not lives limited by disability, pain or suffering.45 They would choose so because a life limited by hardship, disability, pain and suffering would be bad for a child. No one can be guaranteed a life free of suffering, but some forms of suffering — such as those caused by inherited genetic diseases — can be avoided. Parents have a duty to protect their children from avoidable harms, even if those harms would be compatible with living a worthwhile life, and so it is wrong to knowingly create children who would be born to suffer needlessly, even if their lives could be worthwhile.

45 Disability rights activists would argue that the limitations of disabilities are socially imposed, but whether or not that is true -- and it is undoubtedly true to some extent -- most parents would not wish either inherent or socially imposed hardships on their children.
Imagine the life of the most perfectly happy person, someone for whom things always go right, someone in perfect health, with many happy relationships. Then imagine the life of the most wretched, miserable person, the person afflicted with unrelenting disease or pestilence or hunger, the person unable to form relationships with others, the person whose life is worse than death. Somewhere on the continuum between these two extremes, the lives of most people would fall. And somewhere along that continuum, lives can get too far from the happy extreme, and too close to the extreme of abject, unrelenting misery. It is there, in that imprecise, subjective location of misery that lives are wrongfully brought about.

Questions remain. Circumstances are sometimes such that possible future lives are inseparable from illness, disability and unfavorable circumstances. The only means of preventing a harm to a future person in cases where the harm is inseparable from the life is to prevent the existence of that possible person altogether. Some philosophers, such as Brock, argue that preventing a *worthwhile* life in order to prevent a handicap would “not be better for the person with the handicap” and “would deny the individual a worthwhile, although handicapped life.” 46 Such cases fall under the rubric of the Non-Identity Problem.

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Chapter 4: The Non-Identity Problem

“It cannot be said that not to be born is a misfortune.”¹

The use of fertility drugs to promote superovulation in women can result in pregnancies with several fetuses. Multiple births result in high risk pregnancies, and greatly reduce the chances of full-term births. The risk of premature birth and low-birth weight infants is high for all multiple births, but when there are several fetuses, the risk is extremely high. Some such infants will not survive long, having been born too underdeveloped or too soon; others will suffer long-term developmental delays, asthma, cerebral palsy, vision and hearing disorders, and low I.Q. Such micro-preemies would not exist but for the medical intervention that made conception and birth possible. The ones who survive do so because of aggressive medical care in the days, weeks and months following birth. Research has shown, however, that while survival rates have improved for micro-preemies, the majority will suffer some brain injury and permanent mental or physical disability. Some will live lives limited by disability, lives that may well be worth living, but which will nonetheless be unusually difficult, and marked by many thwarted interests. Is it harmful to the children of multiple births to bring them into existence? Do fertility treatments that result in multiple births harm the children who are born as a result?

¹ Nagel, Thomas. (1979), p7
The children of multiple births resulting from fertility treatments would not have been born if the treatments were not used. We can, then, attribute their very existence to the medical intervention without which they would not have been conceived or born. Can a child be harmed by the very act that resulted in her existence? This question gives rise to the Non-Identity Problem.

§1. The Non-identity Problem

Parfit’s Non-Identity Problem arises when there are only two alternatives: existence with a disability (or other adverse or suboptimal condition) and nonexistence. The non-identity problem implies that, in cases where reproductive choices affect the identity of a future person — whether one particular child will exist or a different particular child will exist — nothing a future parent does can harm the future child since the only alternative for that child is nonexistence. The conditions for non-identity are that:

1) The action under moral consideration is such that, had the agent acted differently, the child in fact left disabled by the action would not have existed;

2) the child who in fact exists must have a life worth living; and

3) no one else is worse off as a result of the action.

If these conditions are met, Parfit claims, the child in question cannot be worse off than he otherwise would have been, and cannot have been wronged, and further, since no one else is worse off, no wrong is done at all.

The problem is illustrated by three examples described by Brock:
P1: A woman is told that she has a condition that would be highly likely to result in mild retardation for her child if she gets pregnant now. Her condition is easily and fully treatable by taking a very safe medication. If she waits two months to become pregnant, she can expect to give birth to a normal child. She is impatient to begin a family, gets pregnant now, and gives birth to a retarded child, R1.

P2: A woman is already pregnant and is diagnosed with a condition that, if untreated, will result in her unborn child, R2, being mildly retarded. She fails to take the medicine that would prevent her child being mildly retarded, and he is born with retardation.

P3: A mother fails to provide medicine to her already born child, R3, that would prevent his being mildly retarded. He is left retarded.

P1, unlike P2 and P3, is a case in which the disability is inseparable from the child’s existence because this particular child could not have been conceived two months later, when the mother’s disease posed no threat. For this child, there were only two possibilities: existence with mild retardation, or no existence at all. Since the child’s life is worth living, and he cannot be said to be worse off than he otherwise would have been (since he would not have otherwise been at all), it appears that the child has not been harmed or wronged by his mother’s act of conceiving him when she did. Yet intuitively, R1 seems to have been harmed just like R2 and R3.

Person-affecting moral principles easily show why the mother does wrong in P2 and P3. Person-affecting, or personalist principles of harm and wrong conceive harm and wrong in terms of their effects on persons. For an action to be harmful or wrongful, it must affect the welfare of some person(s) for the worse. Personalism contrasts with

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impersonalism (or non-person-affecting principles to use Brock’s language), which does not require that any particular person(s) be harmed or wronged for there to be wrong. Rather, impersonalism evaluates wrongdoing on the basis of effects on total or average welfare, or states of affairs obtaining in the world.

The P2 and the P3 mother makes her child worse off than he otherwise would have been had she treated the condition that caused his disability. Person-affecting principles identify wrongdoing as causing harm to someone, and provide an adequate account of what the women in P2 and P3 do wrong. In P2, the woman fails to take a medication that would have prevented her child, R2, from being mildly retarded. She could have prevented R2’s handicap without preventing his existence, and thus harmed and wronged her child. Likewise in P3, by failing to prevent her child’s handicap, the mother harmed and wronged her child. Since an identifiable person is harmed in both P2 and P3, they are cases in which a person-affecting principle of wrongdoing accounts for our moral intuition that a moral wrong has been done.

Since preventing R1’s existence is the only way for the woman in P1 to prevent her child’s handicap, it appears that she has not harmed her child, and thus, if we rely solely on a person-affecting principle of wrongdoing, she has not wronged her child. But this conclusion conflicts with what Parfit calls the “No-difference View” (NDV), which describes the intuition that it makes no moral difference if harm is inflicted on a child before conception (when no identifiable individual exists), after conception, or after birth.

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3 The case would be different if the child’s handicap were so severe that his life was not worthwhile, but plausibly, mild mental retardation is compatible with a worthwhile life.
According to the No-difference View, common sense morality tells us that there is no moral difference between P1, P2 and P3. In each case, an avoidable disability is not avoided, and a child suffers, although he will live a worthwhile life, as a result. In each case, the mother’s failure to take or provide the medication necessary to prevent her child’s retardation is equally and seriously morally wrong. Brock argues that P1 is importantly different from P2 and P3, because the only way to prevent the supposed harm to the child is to prevent his existence. Had the woman in P1 done as advised, and waited two months to conceive a child, she would have conceived and given birth to a different child, D1. Preventing R1’s retardation, Brock argues, “would deny the individual a worthwhile, though handicapped, life.”

Failing to prevent the handicap in P1 does not make R1 worse off, and thus does not harm the child. If the child is not harmed by his mother’s actions, how can her actions be wrong? A wrong action, Brock claims,

must be bad for someone, but her choice to create her child with its handicap is bad for no one. So actions with effects for a child that would constitute seriously wrongful child abuse if done to an existing child are no harm, and so no wrong, if done to a child when they are inextricable from the choice to bring that child into existence with a worthwhile life.

Parfit concurs, noting that “If what we are doing will not be worse for some other person, or will even be better for this person, we are not, in a morally relevant sense,

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4 Parfit, 1984
5 Brock 1995, p398
6 ibid.
harming this person.”7 We need not assume that a child is benefited by his impaired existence for harm to be avoided, according to Parfit. It is enough that his existence is “merely not worse for [him].”8

How do we preserve our moral intuitions in the supposed absence of harm in non-identity cases like P1? Parfit and Brock both conclude that a personalist principle can’t explain the wrong in P1 because there is no person who is harmed or wronged. Only an impersonalist principle can handle non-identity cases and preserve the no-difference intuition. Brock claims that the P1 mother acts wrongly not because she wrongs her child, but because she acts in a way that results in there being more suffering and limited opportunity in the world than there might have been had she chosen differently.9 The child’s hardships should not have been prevented for his sake, but rather for the sake of less overall suffering and loss of opportunity in the world.10 Impersonalism, then, can account for the wrongdoing in P1 cases by, as it were, displacing it, moving it from an individual subject of harm to an overall state of harm obtaining in the world.

Some philosophers who reject impersonalism agree that personalist principles can’t handle non-identity cases, but argue that because we can neither harm nor benefit persons who don't actually exist, the no-difference view itself is mistaken.11 That is, there

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8 ibid.
10 Brock (1995), p400
11 See David Heyd (1992), and Melinda Roberts (1998)
is a moral difference between P1 cases and type P2 and P3 cases, because there is harm in P2 and P3, but no harm in P1. David Heyd, for example, claims that only the interests of actual persons matter in “Genesis cases” such as P1 — the interests of non-actual though possible persons are not relevant.¹²

Cases like P2 offer two comparable alternatives — life with a disability and life without a disability — that allow us to assess how each alternative will affect the welfare of an existing person, should that person exist. This makes them appear to be similar to P3-type cases where a decision can be assessed by its effects on the welfare of an already existing person. In both P2 and P3 cases, we can make a counterfactual evaluation and see that harm has been inflicted because a person is worse off than he would otherwise have been, if the responsible party had acted differently. One reason to think that the no-difference intuition may be mistaken about P1, then, is that P1 allows no such comparison, since the only alternatives for the P1 child are incommensurable: existence with a disability, or nonexistence. For this reason it is often claimed that a child can be harmed by a wrongful act of bringing about his existence only if he is born in a condition so bad that he would have been “better off if he had never been born at all.”¹³

In non-identity cases like P1, no person or conceptus yet exists, and so there is no personal, biological, or genetic identity. There is no one and no thing that yet exists to be harmed, and so the question of who is harmed or wronged by preconception decisions is indeed puzzling. In P2 cases, where prenatal life exists, there is an entity, not yet existing

¹² Heyd (1992) p99
¹³ Feinberg (1986) p177
as a person, that can be affected by reproductive decisions. Given genetic identity, we might be inclined to deny non-identity in such cases. Parfit doesn’t seem to view P2-type prenatal cases as non-identity cases.\textsuperscript{14} While no person exists in P2, genetic identity seems to make the absence of a person with a personal identity irrelevant by providing a physical mechanism whereby choices about future contingent persons can affect actual, existing persons later. We can think of genetically-based illnesses and disabilities as the delayed effects of genetic causes, effects that will later affect the lives of persons who don’t yet exist as persons when the causal chain begins. Despite genetic identity with a future person, however, in P2 cases, as in P1 cases, there is still the possibility of a different person (or no person) choice since, before a particular person exists, there is no \textit{necessity} that any particular person will exist. What I am calling a different person choice Parfit calls a “same number/different person choice.” For Parfit, it matters that the same number of different people exist given different reproductive decisions. I don’t really see the relevance of there being the same number of possible persons, unless one accepts impersonalism, as Parfit does, and claims that the sum total of avoided or unavoided misery matters.

A conceptus is a contingent future person, not an actual person. The fact of conception allows us to pick out a physical organism that can be affected by procreative choices. If the no-difference intuition is correct, then what is key to finding a personalist

\textsuperscript{14} Although it seems that he should because Parfit views the Non-identity problem as a problem of \textit{personal} identity. (Parfit p351) Parfit’s view of personal identity involves a kind of psychological criterion, the details of which aren’t really important here, but suffice it to say that no embryo or fetus would qualify. (Parfit pp204-209) If all we are worried about here is genetic identity, then that is already fixed in P2 cases.
solution to the non-identity problem is showing that personalism can handle cases involving future contingent persons. It does this in P2-type cases where a conceptus, but not a person, exists. If personalism can handle P2, I claim, then it can also handle P1, which is not significantly different because it also concerns a future contingent person, albeit one whose genotype has not been fixed. On the other hand, if personalism can’t handle P1, then it can’t handle P2 either, and the no-difference intuition will be mistaken.

In the sections to follow, I will look at proposed solutions to the non-identity problem, specifically, the impersonalist and personalist approaches to the problem that have dominated the literature. Each is beset by difficulties, but the impersonalist account is particularly anemic, and solves the non-identity problem only by adopting an unacceptable totalism. The personalist account can, I will argue, handle the non-identity problem, and I will outline my own personalist solution to the problem. There are really two problems here, or two separate claims, both of which I wish to deny: The first is that persons cannot be harmed by being brought into existence, and the second is a qualification on the first: that persons cannot be harmed by existence unless their lives are so bad as to be not worth living. The first claim gets at the heart of the non-identity problem, and we might call it the Easy Problem, although it will take many torturous pages to solve it. The second is the Hard Problem, and it is hard because it would seem to force us to reach an apparently unsettling conclusion: that some worthwhile lives should never have been begun.

\[15\] Consider yourself warned.
§2.0 Impersonalism

What Gregory Kavka called the “Paradox of Future Individuals” is that by acting such that people who would not otherwise exist do exist, we can do nothing to make those people worse off, and hence can do nothing wrong.\textsuperscript{16} If it is assumed that if no one is made worse off by an action, then no one has been harmed, then we must either abandon the intuition that the actions in question are wrong because they are harmful, or we must find an alternative account of wrongfulness that does not require harming anyone.

Brock argues that the solution to the non-identity problem is to abandon a \textit{person-affecting} (personalist) account of wrongdoing in which harming and wronging require harming and wronging a person (or persons) by making them worse off than they were or otherwise would have been.\textsuperscript{17} Abandoning personalism, Brock claims, is the only way to preserve the no-difference view (NDV) in P1. A person-affecting principle of wrongdoing applicable to P2 and P3 would say:

\textbf{Person-affecting principle:} An action is wrong if it causes some person harm by making them worse off than they

\textsuperscript{16} Kavka (1982)

\textsuperscript{17} Brock, (1995)
were or otherwise would have been if the action had not been performed.\textsuperscript{18}

The significant difference between P1 and P2/P3 type cases, Brock claims, is that P2/P3 cases involve “same person” choices, in which the same person exists in each alternative course of action, while P1 involves a “same number” choice, in which the same number of different persons exist in alternative courses of action. That is, in P1, the identity of who will exist is at stake — a different child, D1, would exist instead of R1 if the woman decides to wait to conceive. Person-affecting principles account for moral wrongdoing only in “same person” choices, but not in “same number” choices, Brock argues. That’s because it is only in “same person” choices that some person can be harmed by being made worse off. “Same number” choices do not make anyone worse off, and thus do not harm anyone, because alternative courses of action would result in different persons existing. “Same number” choices thus require non-person-affecting principles to account for wrongdoing:

\textbf{Non-person-affecting principle}: An action is wrong if it results in more suffering and limited opportunity in the world, when an alternative action is possible that would result in less suffering and limited opportunity in the world. That is, it is morally good to act in a way that makes the world impersonally better, though not better for any person.\textsuperscript{19}

\textsuperscript{18} Brock’s principle M states: “Those individuals responsible for a child’s, or other dependent person’s, welfare are morally required not to let it suffer a serious harm or handicap that they could have prevented without imposing substantial burdens or costs on themselves or others.” (1995, p399) This formulation is problematic because of the qualification concerning “substantial burdens or costs on themselves or others.” What might count as a substantial burden is an open question, as is whether or not any parental or caregiver burden would be substantial enough to render permissible causing a child to exist with an avoidable handicap.

\textsuperscript{19} Brock (1995) p 399 (paraphrased)
In P1, the woman would have acted in a morally good way if she had taken the medicine and waited two months to conceive. The suffering and limited opportunity that resulted from her action would have been “avoidable by substitution,” or avoidable, in other words, by substituting D1 for R1. R1 was not made worse off by her action, so we cannot claim that her action harmed him, but by waiting to conceive, she would not have introduced the avoidable evils of suffering and limited opportunity into the world. The woman’s wrongdoing is thus explained not in terms of harm to her child, but rather in terms of the overall suffering and limited opportunity to which her action contributed. Thus, she was morally required to wait not for the sake of her child R1 — because R1 would not exist if she had waited — but rather for the sake of creating less overall suffering and limited opportunity. Non-person-affecting principles thus help explain the wrong in cases like P1, in which, because a person’s existence depends on a suspect action having been done, it can be difficult to claim that he has been harmed by that action.

Brock, interestingly, does not claim merely that the child, R1, is not worse off for being born. He appears to claim that R1 is actually better off for having been born when he argues that preventing the handicap by preventing the child’s existence would not be “better for the child with the handicap — [it] would deny him or her a worthwhile life.”20 Denying someone a worthwhile life sounds like a worsening of that individual’s condition, but since there is no person yet in a P1 case, it’s not at all clear who Brock

20 ibid.
thinks is being denied a worthwhile life when a child with a handicap is prevented from existing. Nonexistence is not an evil or undesirable state for nonexistent beings, and it is not a worse state of being than a worthwhile life with a serious handicap. Assuming that to be “better off” means not only not being “worse off,” but to be left in a better position than one would otherwise have been, claiming that R1 is “better off” appears to conflate an action that would “deny an individual a worthwhile life” with one that leaves that individual “worse off” than he would otherwise have been, and thus harmed. However, if the woman in P1 had waited to conceive, R1 would not be “worse off,” since R1 would not exist in any way, and R1 would not have been denied a worthwhile life since there is no such person who could have been denied any such thing. It is confused to claim, as Brock does, that “preventing the handicap would deny the individual a worthwhile, although handicapped, life,” for preventing the handicap by preventing the existence of R1 would have denied no one anything. Yet a number of commentators fall into this confusing notion that a person’s interest in existing will be defeated if, in order to prevent disability or illness, he is not brought into being. Robertson argues that

Preventing harm would mean preventing the birth of the child whose interests one is trying to protect. Yet a child’s interests are hardly protected by preventing the child’s existence. If the child has no way to be born or raised free

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21 Don Marquis argues that denying a fetus a “future like ours” is a harm, and explains the moral wrongness of abortion. “The loss of one’s life deprives one of all the experiences, activities, projects, and enjoyments that would otherwise have constituted one’s future.” (Marquis, 1989, p189) This sounds quite like denying someone a worthwhile life. Marquis’s account is compatible with the abortion of seriously defective fetuses that would not have a future like ours, but so is Brock’s account of person-affecting principles of harm, in which a child born with a life that is not worth living has been harmed by his existence.
of that harm, a person is not injuring the child by enabling her to be born in the circumstances of concern.\textsuperscript{22}

It is nonsensical to claim that R1 would have been denied a worthwhile life if his mother had chosen to wait. R1 cannot be denied anything — a toy boat, a shiny penny, or a worthwhile life — if R1 does not exist. Neither can R1 be made worse off by the denial of something if he cannot be denied anything — to be made worse off, or to be denied, you must first be. An existing person, a person who has being, therefore, can be denied a worthwhile life, in any number of ways, including by being born in a condition that leads to severe suffering or premature death. I am not here claiming that by being born with mild retardation R1 was denied a worthwhile life. I claim only that it is not at all obvious that merely by being born with a worthwhile life, R1 is necessarily “better off.” Brock argues that no harm has been done to R1 on the basis of his having not been made “worse off” by being born. But neither would R1 have been made “worse off” by having never been born, and so, having never been born would not have been a harm either.

Furthermore, if we claim that R1 would have been denied a worthwhile life, and would have been worse off for having never been born, we can also say that D1 is worse off because his mother chose to conceive and give birth to R1 instead, thus denying D1 (and D2, D3, D4…) a worthwhile life. In what sense can we say that R1 is “better off” for having been born? If R1 was made “better off” by being born, the question is, better than what? The claim that R1 is “better off” for having been born is as fraught with difficulty as the claim that he is “worse off,” and for the same reasons — the alternative is

\textsuperscript{22} Robertson, John. (1994) p75-6
nonexistence, which is neither a better nor a worse state to be in, since it is no state of being at all.

There is a difficulty, then, with the assumption that harming requires making someone worse off. If harming does not require making someone worse off than they were or otherwise would have been, it is possible that a child like R1 might be harmed by his mother’s actions in P1, even though he is not “worse off.” If that’s the case, then person-affecting accounts of wrongdoing can explain the wrongdoing in “same number” cases like P1, as well as “same person” cases like P2/P3.

§2.1 Harming

As discussed in the previous chapters, being made worse off is a fairly standard way of thinking about harm. There are two evident difficulties with claiming harm and wrong in the P1 case using a straightforward account of harming as a worsening of one’s interests. The first is identifying the interests that are set back by the mother’s actions in P1; the second is identifying the rights that are violated. Feinberg sets aside his account of harming as a wrongful worsening of one’s condition in creation cases like P1. In cases of preconception and prenatal harming, Feinberg argues, a reformulated counterfactual test is required, one that asks if “nonexistence in a given case would have been objectively preferable to existence.”²³ If nonexistence could rationally be preferred over existence in a particular case, “then any wrongful act or omission that caused (permitted)

²³ Feinberg (1986) p159. Feinberg is specifically concerned here with “wrongful life” cases.
the child to be born can be judged to have harmed the child.”^24,^25 Because the alternative to existence in preconception and prenatal cases is nonexistence, the counterfactual test compares the condition of the child to nonexistence, rather than the condition of the child and some other possible condition (because there is no alternative possible condition). Thus, the counterfactual test does not ask if the child would have been better off without, for example, mental retardation, but whether the condition of the child is such that it would be preferable not to exist at all. A child B “is in a harmed state if, because of A’s breach of duty, B comes into existence in a condition such that it would be rational to prefer nonexistence to that condition.”^26 Such a child is born with his birthrights already violated, and has been harmed and wronged, according to Feinberg.^27

In the P1 case, R1’s handicap does not satisfy the reformulated counterfactual test. His condition is not so bad that it would be rationally preferable to never have existed at all. R1 is in what Feinberg calls a “harmful condition” rather than a “harmed condition.” That is, R1’s condition is harmful in that it has adverse effects for him, but “it is not a state of harm that is the product of a prior act of harming,” and thus is not a harmed condition.^28 To be in a harmed condition, R1’s existence must satisfy the reformulated counterfactual test, and must be so bad that it is not worth living, and nonexistence would

^24 ibid. p159

^25 By a rational preference, Feinberg here means” rational in a weak sense” or a preference “not contrary to reason, even though other equally rational persons might not share it.” (ibid. p165)

^26 ibid. p161

^27 The violated birthrights of the child include freedom from total impediments to development and fulfillment, and the right to some opportunity for a tolerable life (ibid. p166)

^28 ibid. p169
have been preferable. Feinberg argues that the mother did not wrong her child so long as his “handicapped existence is far preferable to no existence at all.” Feinberg’s analysis agrees with Brock’s — there is no doubt the mother acted wrongly, even though her “wrongdoing wronged no particular victim. She must be blamed for wantonly introducing a certain evil into the world, not for harming, or for violating the rights of, a person.” Feinberg, then, adopts an impersonalist, or non-person-affecting principle of wrongdoing for P1-type cases where morally suspect actions are responsible for the creation of persons who would not otherwise exist. Furthermore, holding the mother liable for her wrongdoing in P1, Feinberg argues, would be like holding a rescuer liable for injuring an endangered person, where such injuries were necessary to save the person’s life. While the rescue effort may result in harm, the harm is offset by the benefit of rescue. It follows from this line of thinking that since R1’s mental retardation could only have been avoided by preventing his existence, conceiving and giving birth to the child was comparable to rescuing him from nonexistence. Existence, then, is the overall benefit that offsets the harm of mental retardation in R1’s case.

§2.2 Harms, benefits, and the Analogy to Rescue

Life can be beneficial. Life with significant disabilities can be beneficial, rewarding, satisfying, enjoyable, and all the other things that make existence valuable to humans. For the sake of argument, we can assume that R1’s life is rewarding, satisfying,
enjoyable and valuable to him, and that all of these things are benefits. We can then say that his existence is a benefit, and that, overall, being brought into existence did more good than harm to R1. Had his mother chosen to wait a few months before conceiving a child, the benefits of existence would not be enjoyed by R1, but would have been enjoyed by some other child, D1, who would have existed instead of R1. Had she waited to conceive, R1’s mother (call her M1) would not have acted wrongfully, according to Brock and Feinberg, and would not have wantonly introduced evil into the world.

According to Brock and Feinberg:

1) M1 did not harm or wrong her child R1

2) R1’s life is worthwhile

3) M1 wrongfully introduced evil into the world in the form of suffering and loss of opportunity

Had M1 acted otherwise, and waited to conceive a child:

a) M1 would have denied R1 the benefits of a worthwhile life

b) D1 would have enjoyed a worthwhile life, without R1’s disability

c) M1 would have avoided, by substitution, wrongfully introducing evil into the world

Brock and Feinberg both agree that it would have been better if M1 had waited, and had a different child, not for the sake of her child, but for the sake of less suffering in the world.

There is an interesting asymmetry present here. While M1 did not harm or wrong her child, and, arguably, benefited R1 by acting so as to bring about his existence, she did so
at the cost of wrongfully introducing evil into the world. Had she acted otherwise, she would have denied R1 the benefits of a worthwhile existence, according to Brock, but would have avoided wrongfully introducing evil into the world. Is it the case, then, that denying R1 the benefits of existence, which Brock concludes would not be better for R1 than his handicapped existence, is less morally serious than wrongfully introducing impersonal evil into the world?

Surely causing harm to a person is more morally serious than causing impersonal harm that affects no one. Brock does not say that it would be worse for R1 if his existence were prevented, only that it “would deny the individual a worthwhile, though handicapped, life.” So it is not clear that Brock considers it a harm to deny the benefit of existence, unless that would constitute a worsening of R1’s condition. The condition, so to speak, of someone who does not exist can hardly be made worse, but neither can it be made better. So, while it is true that it would not be better for R1 to deny him a worthwhile life, neither would it be better for him if that life is brought about. Since R1 does not exist at the point at which M1 decides whether or not to conceive the child that will later be R1, R1 is no different than any of the other millions of possible persons who may or may not come to exist depending on conscious decisions, chance, and the vagaries of human reproduction. M1 would not deny R1 a worthwhile existence by deciding to wait any more than she denies a worthwhile existence to D1 (or D2, D3, D4...), the possible children she might have conceived later if only she had waited. If M1 is not

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31 Brock (1995) p398
morally suspect or blameworthy for denying the benefit of a worthwhile existence to
every possible child she might, but does not, ever have, then she would not be morally
suspect or blameworthy for denying a worthwhile existence to R1. Thus, no harm or
wrong would be done by not conceiving and giving birth to R1, and failing to bring about
the existence of a nonexistent possible person doesn’t constitute a harm, nor even a denial
of benefit. One can neither harm nor benefit nonexistent possible persons. If we are
comparing the evil of failing to bring about a possible person’s existence with wantonly
introducing impersonal evil into the world, neither action causes harm to anyone. I can’t
make sense of the notion of introducing evil and loss of opportunity into the world, if it is
bad for no one, yet Brock explicitly states that “her choice to create her child with its
handicap is bad for no one.”32 If it is bad for no one, where is the harm, where is the evil?

If harm is conceived as a worsening of one’s condition, then denying a
worthwhile existence to someone who does not yet exist, someone who has no
“condition,” as it were, is not a harm. There is the further question, however, of whether
bringing about an existence with handicaps or impairments can constitute a harm or a
worsening of one’s condition. Of course, if an otherwise unimpaired child is injured, and
impairment results, that would constitute a clear worsening of the child’s condition, and
would be a harm. The question is whether one can harm a possible person by making that
possible person actual, if that person’s existence is inseparable from certain impairments
or handicaps, or suffering due to impairments or illness.

P1 type cases are troubling because there is something morally suspect about knowingly and intentionally bringing about the existence of a person who will suffer impairment, handicap or illness, even if that person will have a worthwhile existence. And our moral intuition suggests that something wrong has been done to that person, and not merely some impersonal wrong, such as introducing evil into the world. There is discord between the idea that life itself can be inherently harmful, and the idea that life is inherently valuable. Quieting that discord is the motive for accounts of harm that disallow illnesses or impairments that are both inseparable from existence and compatible with a worthwhile life, and they frequently rest on some notion, like Feinberg’s, that creating a person with an illness or impairment is analogous to rescuing that person, in that the bestowal of an overall benefit gives the “rescuer” immunity from moral wrongdoing.

In a rescue case, what justifies the infliction of harm necessary to effect a rescue? One possibility is that bestowing a benefit, in the form of removing someone from harm, or preserving a valuable life, justifies inflicting a lesser harm. The other possibility is that averting a greater harm does the justificatory work. Imagine a more or less uncontroversial rescue scenario:

An earthquake causes a building to collapse, severely injuring Victim and trapping him beneath the rubble. Rescuer must amputate Victim’s arm in order to free him from the rubble. If he is not freed quickly, Victim will surely die from his injuries. Furthermore, the instability of the building makes it impossible to both extricate Victim and save his arm. Rescuer amputates Victim’s arm in order to save him from certain death.
Rescuer certainly harms Victim in this case by amputating his arm. The loss of a limb is a painful and permanently disabling injury, and one that surely worsens Victim’s overall condition and negatively affects his interests. But in causing this harm to Victim, Rescuer spares him from an even greater harm, which is the loss of his life. Now it might also be said that Rescuer confers a benefit on Victim by removing him from harm. Surely Victim is in a bad way, and it would be most beneficial to him to be removed from his unfortunate circumstances. But is it the conferral of benefit, or the prevention of greater harm, that justifies Rescuer’s actions? In rescue scenarios, harm caused in the course of a rescue is generally justified by the prevention of even greater harm. Since the loss of life is arguably worse than the loss of an arm, the harm Rescuer does to Victim is justified by the prevention of greater harm. Why not still call the prevention of Victim’s death a benefit to Victim? The importance of the distinction becomes clear when a case is considered where the benefit conferred is not tied to the prevention of harm. Shiffrin provides an example where harm is caused in the course of bestowing a significant benefit:

Imagine a well-off character (Wealthy) who lives on an island. He is anxious for a project (whether because of boredom, self-interest, benevolence, or some combination of these). He decides to bestow some of his wealth upon his neighbors from an adjacent island. His neighbors are comfortably off, with more than an ample stock of resources. Still, they would be (purely) benefitted by an influx of monetary wealth. Unfortunately, due to historical tensions between the islands’ governments, Wealthy and his agents are not permitted to visit the neighboring island. They are also precluded (either by law or by physical circumstance) from communicating with the island’s
people. To implement his project, then, he crafts a hundred cubes of gold bullion, each worth $5 million. (The windy island lacks paper currency.) He flies his plane over the island and drops the cubes near passers-by. He takes care to avoid hitting people, but he knows there is an element of risk in his activity and that someone may get hurt. Everyone is a little stunned when this million-dollar manna lands at their feet. Most are delighted. One person (Unlucky), though, is hit by the falling cube. The impact breaks his arm. Had the cube missed him, it would have landed at someone else’s feet.33

The features of the Wealthy/Unlucky case are analogous to the P1 case. The benefit conferred is significant, but it does not involve the prevention of greater harm. It is what Shiffrin usefully calls a “pure benefit.” Pure benefits are “goods... which are not also removals from or preventions of harm.”34 Further, the benefactor cannot communicate in advance with the beneficiary and so must act without the beneficiary’s consent, and the benefactor risks causing harm to his beneficiary in the delivery of a pure benefit. Furthermore, because the cube that injured Unlucky would have landed at someone else’s feet had it missed him, and because there was no other way to deliver the benefit, the harm he suffered appears to be inseparable from the benefit.

Surely Unlucky can be happy about his multimillion dollar windfall, while he is unhappy about the pain and suffering he endures. He benefits from the windfall, and is better off overall than he was before, but at the same time, he has clearly been harmed.35

33 Shiffrin (1999) p127
34 Shiffrin p. 124
35 Unlucky might have consented to the risk of serious injury (or even the risk of death) in order to receive the windfall, but as he was not asked, and did not consent, his consent to be harmed is not a justification for Wealthy’s actions.
Wealthy did not rescue Unlucky by dropping gold on him — Unlucky was not in danger or otherwise suffering as a result of his being comfortably well off. Wealthy’s actions cannot be justified by the prevention of greater harm, and unlike a rescuer, Wealthy acted in a negligent and morally suspect way by risking the lives and limbs of others in the service of an end that was not suitably important or morally obligatory (such as saving a life or preventing greater harm).  

Since Unlucky did receive a benefit, and is arguably better off overall as a result of Wealthy’s action, why was Wealthy’s action morally suspect and wrongful? Clearly there is a significant difference between harm undergone to prevent greater harm, and harm suffered for the sake of a pure benefit. While the prevention of greater harm is surely a benefit, it is not the beneficial aspect of it that does the work of justifying the infliction of a lesser harm. What does the justificatory work in rescue cases is that rescue prevents one from being worse off, rather than making one better off. So, although Unlucky might, all things considered, be better off than he was before his windfall, making Unlucky better off does not excuse Wealthy’s harming of him. To make this distinction more clear, consider an alternative case:

**Wealthy/Unlucky II:** While driving his Ferrari, Wealthy2 receives a phone call from his mistress. Distracted by the call, he rear-ends Unlucky2’s car. Unlucky2’s car, a 1973 AMC Gremlin, is irreparably damaged, and Unlucky2

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36 Had Wealthy dropped wheat on the famine-stricken population of the neighboring island, his actions would be morally defensible. Risking injury, or even death, in order to prevent certain death from starvation would count as a rescue, and a harm inflicted in the prevention of even greater harm. Dropping crates of Belgian chocolates on a well-fed but chocolate-deprived population would not count as a rescue, no matter how desperately they craved chocolate.
suffers a whiplash injury. After a year of painful rehabilitation, Unlucky2 recovers fully from his injury. Wealthy2 pays Unlucky2’s medical expenses and provides him with the best medical care possible in a luxurious rehabilitation center. Wealthy2 also buys Unlucky2 a new Porsche.

As in the first Wealthy/Unlucky case, Unlucky2 suffers a painful injury, but winds up better off, overall, than he was before. Wealthy2 surely owed Unlucky2 compensation for injuring him, and in this case, Wealthy2 restored Unlucky2, to the extent possible, to his original condition, and then made him even better off by buying him a significantly better car. Nonetheless, we would not think Unlucky2 ungrateful or unreasonable if, all things considered, he feels he was wronged by Wealthy2. It would not be unreasonable for Unlucky2 to prefer that the incident had never happened, even though he was ultimately better off as a result. Nor would it be unreasonable to think that Wealthy2 had wronged Unlucky2. Indeed, the need for compensation in this case points to the fact that Wealthy2 wrongfully injured Unlucky2. Wealthy2 did not destroy Unlucky2’s car and injure him in order to bestow a benefit on him. Instead, he bestowed a benefit on him to compensate for negligently and wrongfully harming him. Causing harm cannot be morally justified after the fact, by providing compensation (or compensation and then some). Wealthy2 cannot say, “Look, Unlucky2 is better off than he was before, and so my actions were morally justified and I have wronged no one.” Neither can Wealthy say that his bestowal of pure benefit on Unlucky morally excuses his causing harm and injury to Unlucky. Either claim would treat a harm as the equivalent of the cost of a benefit. Wealthy’s largesse was received at a cost by Unlucky and Unlucky2. Costs and benefits
can be weighed against each other, and indeed, they frequently are in financial transactions, business decisions and other situations in which calculated costs and benefits can be balanced. There is generally something commensurable about the costs and benefits at stake — both may be monetary, for example, or both may promote bodily health by risking adverse bodily side effects. *Harms* and benefits are not commensurable in the same way. Harms and benefits do not rest on opposite arms of a scale, capable of being perfectly balanced in a way that can excuse all morally suspect behavior. There is a special badness about harms that makes harming especially immoral. Benefits are good, but not in a way that can balance the special moral badness of causing harms. Bestowing benefits, whether after the fact, or simultaneously with harms, might *compensate* for harms, but do not morally justify them. A harmed party might be restored to a previous condition, or might, all things considered, be made better off by compensation, but compensation (or the possibility of future compensation) does not *excuse* immoral wronging.

It is worse to be harmed than to fail to be benefited. It is worse to harm another than to fail to bestow a benefit upon them. If Wealthy had dropped a heavy but worthless object on Unlucky, he would unequivocally have harmed him. On the other hand, if Wealthy had dropped his gold bullion on another, uninhabited island, and simply failed to benefit Unlucky and his fellow citizens, he would have done nothing morally suspect. To benefit another is certainly good, but failing to benefit another is morally less serious than harming another or failing to save another from harm. There is an evident asymmetry
between harms and benefits that can’t be explained by a straightforward comparative model of harms and benefits that assesses harm by comparing starting and ending positions. A comparative model, one in which harms count as a worsening of one’s condition, can fail to account for harm such as that which befalls Unlucky because it is inextricable from the windfall that puts him in a better position than he was before. Furthermore, there would be no difference between Unlucky and his neighbor Lucky, who received his windfall without suffering a broken arm if, all things considered, they wind up benefiting to the same degree. Such a conclusion is implausible, and ignores the moral significance of harm. Finally, the moral significance of harm seems to disappear altogether if being harmed or benefited depends entirely upon the affected person’s position relative to a prior position. Shiffrin writes that “whether harm has been done is not entirely a contextual, comparative matter. At least, that one has ascended the scale of overall interest satisfaction does not mean that one has not been harmed at all.”37 Indeed, both Unlucky and Unlucky2 were harmed, although overall, their interests were advanced and they were made better off.

There is no reason to think that one cannot be better off in spite of having been harmed. Likewise, that one has been harmed does not preclude being better off overall. An alternative to problematic comparative models of harm would be to identify as harms noncomparative conditions, among which would be included the usual undesirable and evil conditions and experiences such as mental and physical pain and suffering, the

37 Shiffrin p123
absence or loss of things of value, the absence of or incapacity for pleasure and satisfaction, disability, death, and so on. The list need not be complete, and it may well be the case that while harms are objectively bad, whether or not certain experiences constitute harms is subjective. That is to say, the same experience might be harmful for one person, but not for another. A child may experience great pain and suffering while receiving beneficial immunizations, for example, while an adult would experience little more than inconvenience and an insignificant amount of pain for the same benefit. An adult with a needle phobia, on the other hand, might suffer a great deal more. Some harms, such as the loss of a limb, would tend to be objectively bad for everyone, although some individuals might suffer less and adapt to it better than others. Shiffrin describes harm as “the imposition of conditions from which the person undergoing them is reasonably alienated or which are strongly at odds with the conditions she would rationally will; also, harmed states may be ones that preclude her from removing herself from or averting such conditions.”

Under such a description of harm, Unlucky and Unlucky2 have both been harmed, even though they are better off, overall, as a result.

Inflicting harm requires moral justification. In the rescue case, Rescuer inflicts harm on Victim, although under special circumstances that justify it. Those special circumstances are that Rescuer inflicts a lesser harm on Victim in order to prevent a greater harm. That the actions of Rescuer require moral justification point to the correctness of viewing those actions as harmful — nonharmful actions and the bestowal

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38 Shiffrin p 124
of pure benefits do not require moral justification. Making an analogy between bringing about the existence of a child with a handicapped but worthwhile life and a rescue case suggests that bringing about the existence of a handicapped child requires moral justification in the same way that inflicting harm in a rescue case requires moral justification. That justification can be found either by claiming that (1) the benefit of life bestowed on the child justifies bringing about its existence, or that (2) nonexistence was a greater evil from which the child needed rescue. There is a significant moral difference between harms inflicted to bestow a great benefit, and harms inflicted to prevent greater harm. (1) implies that what does the justificatory work in a rescue case is not the prevention of greater harm, but the bestowing of a benefit. As has already been discussed, and as the Wealthy/Unlucky case illustrates, this claim is implausible. (2) implies, also implausibly, that nonexistence is worse than existence with a handicap for the “rescued” person. Preserving a valuable life already underway is a benefit of rescue, but one that cannot be enjoyed by those nonexistent persons who have yet to exist. 39 Both ways of making an analogy to rescue fail.

There are no unborn children waiting in limbo to be rescued and pulled into existence. The “benefit of rescue,” as it is generally conceived, is the preservation of a life, prevention of the loss of a life, or protection from grave injury. There are no such persons who might exist in the future. It is not the case that every actual person was once a nonexistent person, since they were not persons before they existed — they were not anything at all. It is a mistake to think that there is a developmental progress from nonexistence to existence (and then back to nonexistence again in death). Preconception nonexistence is unlike the nonexistence of death in that regard. It makes sense to think of the nonexistence of death as somewhat continuous with life, the end stage in a life that began as an embryo. The differences between preconception nonexistence and postmortem nonexistence are discussed in chapter 2.

39 There is no such animal as a “nonexistent person,” but the phrase is used here to designate those possible persons who might exist in the future. It is not the case that every actual person was once a nonexistent person, since they were not persons before they existed — they were not anything at all. It is a mistake to think that there is a developmental progress from nonexistence to existence (and then back to nonexistence again in death). Preconception nonexistence is unlike the nonexistence of death in that regard. It makes sense to think of the nonexistence of death as somewhat continuous with life, the end stage in a life that began as an embryo. The differences between preconception nonexistence and postmortem nonexistence are discussed in chapter 2.
benefits to be conferred by bringing a merely possible future person into existence. Thus, there really is no “benefit of rescue” to offset the harm that a child experiences only if he is brought into existence. If anything, bringing a person into existence is the very act that makes it possible for him to suffer the harms of injury and loss of life, among other harms. Had R1 never been conceived and born, he would never have suffered the harms of mental retardation. He would have never suffered at all, since one must exist to experience suffering. Of course, neither would R1 have enjoyed the pleasures and satisfactions that can attend a good life, and surely the motive for rescuing an endangered person is to preserve a life that is valuable to him in some way. Preserving a valuable life already underway is a real benefit of rescue, but one that can only be of benefit to those whose valuable lives are already underway. While there are an infinite number of possible future persons who, if they become actual, existent persons, will enjoy valuable lives, most of those possible persons will never become actual persons, simply because of the limits and vagaries of human reproduction. Those millions upon millions of possible persons are not in need of rescue, no particular possible person is in need of rescue, and R1, before he was conceived, was not in need of rescue.

Many individuals born with disabilities or illnesses do not rue the day they were born, and are glad they exist, and glad that their parents made the choice to create them. R1 might well be happy that he exists. A possible argument in favor of bringing about the existence of possible persons who will live worthwhile lives is that they would if they could, all things considered, consent to being born. This hypothetical consent is grounded
in the well substantiated belief that many persons with disabilities are glad that they were born. One feature of rescue cases is that the rescuee does consent to rescue, even at the cost of substantial injury, or, where consent is not possible, it is highly plausible that they would consent. We can apply something like Feinberg’s reformulated counterfactual test to both scenarios in which hypothetical consent is taken for granted, and ask if “nonexistence in a given case would have been objectively preferable to existence.” If a rational person can claim that existence under the given circumstances is rationally preferable, Feinberg argues, the child (or rescuee) has not been harmed by the action that resulted in their existence (or continued existence). Feinberg argues that only conditions that make life not worth living qualify as harms in creation cases. While there are rare conditions that make life not worth living at all, in most cases, Feinberg’s reformulated counterfactual test gives a positive result. That is, it will lead to the conclusion that bringing about the existence of a child with a handicapped but worthwhile life is morally justified. The unsettling thing about this argument, however, is that there is an evident need to justify bringing about an existence, which suggests that existence can be a harm, even though Feinberg concludes that bringing about most lives is not harmful or wrongful. This suggests that in rescue cases, Feinberg is really arguing that a rescuee is not actually harmed by a rescue if the rescue can be justified. But again, where there is no harm, there is no need for justification, so why even think that a rescuer needs to justify

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40 Feinberg (1986) p 159

41 For a rescue case where the rescuee claimed that his continued existence was not rationally preferable to death, see the case of Don Cowart in Burton, “A Chronical: Dax’s Case as it Happened” in Arras and Steinbock (1999).
her actions, or that a parent needs to justify creating a child? The reason justification is required is that a rescuee, or a child born with handicaps and impairments, is harmed.

§2.3 Hypothetical consent

Another significant difference between the Unlucky case and a rescue is that in rescue cases, hypothetical (if not actual) consent can be inferred. We presume consent to have a lesser harm inflicted in order to prevent a greater harm. We would not so readily presume consent in a case where harm is the price paid for a pure benefit. There is at least anecdotal evidence that many persons with significant disabilities and illnesses are glad they exist, and would not wish that they had never been born. Nonetheless, there are exceptions, and even among those persons who enjoy rich and satisfying lives, it is possible to find individuals who prefer that they had never been born at all, or who are at least ambivalent about existence. However, that there might be ex post facto consent to the burdens or harms of existence does not necessarily justify imposing those burdens or harms before the fact. A life already underway has value for the person living it, but a person who never exists will never miss the life that “might have been.” So the “harm” or absence of benefit that results from not creating a person will never affect an existing person, for good or bad. Whatever benefit might have been bestowed will not be missed by an existing person, which makes the benefit less morally significant than a benefit that would be enjoyed, or missed, by an existing person, and far less morally significant than any harms that will be experienced by the person who will exist. Since it is not the case that creation is analogous to rescue, the hypothetical ex post facto consent to the harms of
existence have a much weaker pull on us before the fact, when decisions about creating people must be made. That is, the fact that a future possible person might have an adequately good life does not require us to create that person, nor is it a justification for creating that person knowing that he will also face considerable obstacles and experience considerable suffering. Decisions not to create specific or nonspecific future possible persons harm no one.

A problematic implication of the claim that a person cannot be harmed in nonidentity cases is that technologies that create people, or facilitate the creation of people, contain their own justification — the creation of people — and require no further justification for their use. That is, if the question is whether or not the use of the technologies to create persons can be justified, it is begging the question to say that the fact that a person is created is sufficient justification for using the technologies in question. Many of these technologies, including commonplace fertility treatments, carry with them considerable risk to the future children they make possible. Ordinarily, risky procedures, practices, or treatments require justification for the risks and harms they can impose, and that justification is generally that they either substantially benefit the subject of harm, or prevent some greater harm from befalling the subject. But in the case of creation harms, the risks and benefits are displaced in the sense that the subject of harm and the beneficiary of the risky practice are not the same person(s). Parents desire children, and have reasons for creating them, but it is not the parents but rather the children who must bear whatever burdens accompany their birth and future life. Needless
to say, parents can also experience burdens and suffer hardships when children with illness, impairment and disability are born, but they assume those burdens when they decide to procreate. The resulting children, however, have no control over their own creation, and bear their burdens as a consequence of the actions of others. The willingness to assume some of the burdens and hardships that will result from the creation of a person does not justify imposing the rest of the burdens and hardships on someone else who has no say in the matter. It is particularly egregious to claim that the costs are a relative bargain compared to the benefit conferred. The difference between inflicting risky treatments, practices and procedures on existing persons and future possible persons is that existing persons stand to benefit, and if they cannot benefit, justification will be difficult if not impossible.\footnote{There are possible circumstances in which the subject of harm — say, the subject of an experimental treatment — will not benefit directly, but his risk-taking will potentially benefit others. We do not generally think the imposition of such risks is justified without the actual consent of the experimental subject.} If risky procedures, practices and treatments require justification when inflicted on existing persons, they ought equally to require justification if possible persons are at risk — whoever those possible persons will be — and it is simply not justification enough to claim that those possible persons will be created, and will only be created, if the risky practice is carried out. As Hare says, “it would be strange if there were an act whose very performance made it impossible for it to be wrong.”\footnote{Hare, (1975) p219}

§2.4 Avoidability by Substitution

Hare collapses the distinction between harming and failing to benefit in genesis cases, casting doubt on the assumption that preventing someone from coming into

\[\text{\footnote{Hare, (1975) p219}}\]
existence renders it impossible to harm him\textsuperscript{44}:

True, he does not exist to be harmed; and he is not \textit{deprived} of existence, in the sense of having it taken away from him, though he is \textit{denied} it. But if it would have been good for him to exist (because this made possible the goods that, once he existed, he was able to enjoy), surely it was a harm to him not to exist, and so not to be able to enjoy these goods. He did not suffer; but there were enjoyments he could have had and did not.\textsuperscript{45}

Hare relies on an extension of the Golden Rule which enjoins us to “do to others as we are glad that they did do to us.”\textsuperscript{46} The injunction tells those of us who are glad that our parents created us to go forth and multiply ourselves, to do as was done “to us,” although Hare argues, somewhat tortuously, that it applies equally to those who are \textit{not} glad they were born, for even they would wish that “if they had been going to be glad that they were born, nobody should have aborted them.”\textsuperscript{47} Failing to create a person, then, is to deny the benefits of existence to that potential person, benefits that we ourselves presumably enjoy, and ought, therefore, to spread around. Even if we do not enjoy those benefits ourselves, we would like to, and would like it to have been the case that if we \textit{were} going to enjoy those benefits in life, someone would have created us so that we might. Now, Hare assumes here without argument that a potential or possible person is the sort of creature to whom the Golden Rule applies, and this assumption seems to be grounded on the further assumption that each of us was once a possible or potential

\textsuperscript{44}Hare, (1975) p221.
\textsuperscript{45}ibid.
\textsuperscript{46}ibid. p 208.
\textsuperscript{47}ibid. p209.
person. Both of these are arguable assumptions. Assuming, for the moment, that a potential person is the sort of creature to whom the Golden Rule applies, denying the benefits of existence to potential persons, according to Hare, is a failure to apply the Golden Rule where it ought to be applied, is a nonfulfillment of our moral duty, and is wrong. But wrong to whom? We can have duties to potential people, according to Hare, so presumably we fail to fulfill a duty to one of those when we deny it the benefits of existence. Hare is not concerned about the nonactuality of potential persons who can, he argues, be identified by some description, even if it is as vague as “the person who will be born if these two people start their coitus in precisely five minutes…” But if there are duties to create potential persons, those duties will result in inevitable conflicts given the way reproduction happens. Any potential child who is made actual will have closed the door on actuality behind him for other potential children. Do we not have the same duties to the potential persons left behind?

Hare recognizes that the substitution of a happier child for an unhappy one provides a moral reason for not creating some persons, and substituting others instead:

If the present fetus is going to be miserably handicapped if it grows into an adult, perhaps because the mother had rubella, but there is every reason to suppose that the next child will be completely normal and as happy as most people, there would be reason to abort this fetus and proceed to bring to birth the next child, in that the next child will be much gladder to be alive than will this one… It is not necessary to assume… that the present fetus will turn into a person who is positively miserable; only that

48 ibid. p220
that person’s expectation of happiness is so much less than the expectation of the later possible person that the other factors… are outweighed.49

Thus, Hare’s position gives us reasons to not create some individuals, and to create others instead. In the case of the P1 mother, then, her moral duty was to create the happier possible child, which both increases total utility and fulfills the obligations of the Golden Rule (on the assumption that we would all wish to have been happier rather than less happy). M1’s failure to wait constitutes a failure to create the happier possible child (D1), rather than a failure to avoid the unhappier child (R1). Failing to benefit R1 is a harm to R1, for it is “a harm to him not to exist,” and likewise, being denied the benefits of existence would be a harm to D1, although neither would suffer as a result of these harms. R1 would have been denied the benefits of existence if D1 were born instead, but this denial of benefit is outweighed by the creation of D1, who contributes more to total utility than R1 would have. On the alternative, D1 would have been denied the benefits of existence, and would have been denied even more benefits than R1 would have been (on the assumption that R1 would have benefited less from existence than D1 will).

Hare leaves open the question of whether we ought to create the same number of substitute persons, or if it would suffice to create more possible persons with less individual utility, such as triplets who individually experience less utility, but combined add to more total utility. Misgivings about a substitution scheme like Hare’s (or Brock’s) as a way of explaining the wrongdoing in P1 abound. If we care about individual

49 ibid. p212-3
happiness, then we ought to care that the individuals we create are happy, and if we are enjoined to create the happiest children we can, then it seems we ought to avoid creating children who are, individually, less happy, even if they are more numerous and thus create more total utility. If I were to have a total utility of, say, ten units to divide up amongst my children, to have one very happy child rather than ten barely happy children seems the better alternative, and one that avoids the familial equivalent of Parfit’s Repugnant Conclusion. If we are to explain the wrongdoing in P1 as a failure to contribute the greater amount to total utility, or put another way, the failure to avoid subtracting utility by introducing avoidable evil into the world in the form of a handicapped child — the failure, that is, to avoid by substitution — it seems not to matter how (or to whom) utility gets distributed so much as how much of it we create. I might offset my utility footprint by substituting less happy triplets for the one handicapped child, so long as the total increases. This conclusion is avoidable so long as we are enjoined to create someone by Hare’s extended Golden Rule, or enjoined, as Brock would have it, to avoid by substitution rather than to simply avoid harming possible future persons.\footnote{Brock refers to P1 type cases as “same number, different person” cases, which suggests that it does matter to him that the individuals created are happier, and not merely happier in the aggregate. But this is not required by considerations of total utility in general, which is what gives rise to the repugnant conclusion.}

Melinda Roberts argues that totalism problematically “implies that the agents must produce the new person and have done something wrong if they do not.”\footnote{Roberts (1998) p113} Indeed, the “same number, different person” designation of P1 type cases does appear to require
that a substitute child be produced if the handicapped child is not, and moreover, that the second child must in some way be better, in the sense that it increases total utility. Personalism, on the other hand, is indifferent as to whether or not a substitute child can or will be produced.

Hare contends that it is a harm to a possible child if that child is caused not to exist. Hare does this by collapsing the distinction between harming and failing to benefit. But it does not follow that failing to act in a way that would benefit a person (or potential person) harms that person (or potential person). It might benefit me if George Soros gives me a yacht, but it does not harm me if he fails to do so. Any moral duty that requires that we benefit others, as Hare’s modified Golden Rule does, would make beneficial, noncharitable gift giving obligatory, so long as we are (or would hypothetically be) glad that someone had benefited us in a similar way. Hare’s claim that “it would have been good for him to exist… surely it was a harm to him not to exist” entails that the moral obligation to avoid harming others (including the infinite potential others) requires us to procreate so as to avoid harming all those potential others with nonexistence. It would thus be the case that we cannot but cause harm to countless

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52 Brock might argue this as well, depending on how his claim about denying an individual a worthwhile life is interpreted.

53 Hare (1975) p221

54 Charitable giving may well be morally obligatory, but not necessarily because it benefits others so much as because it reduces suffering or prevents harm. See Peter Singer’s “Famine, Affluence, and Morality” for a discussion of the moral obligation to relieve suffering.
others, given the physical impossibility of bringing to existence all those possible persons. Nuns, monks, and other celibates are among the worst offenders.\textsuperscript{55}

Brock argues that it is \textit{not better} for a child who would have a worthwhile life if he is denied that life in order to avoid a possible handicap, and in fact, the child is \textit{worse off} if he is denied the worthwhile life.\textsuperscript{56} This too collapses the distinction between harming and failing to benefit, for it says that the child who is not \textit{better off}, i.e. the child who is not benefited, is a child who is \textit{worse off}, i.e. a child who is \textit{harmed}. But surely I can fail to be better off without being worse off. If George Soros denies my request for a yacht, I will not be better off, but neither will I be worse off than I am now, in my currently yacht-less state. The nonexistent possible child, if he is not brought into existence, will be nothing at all. He will not be better off, but neither will he be worse off in any way that it makes sense to think of being worse off.

Neither Brock nor Hare claims that we are required to bring about all possible lives. Both also argue along the lines that the P1 mother’s wrongdoing can be located in her failure to avoid the birth of a handicapped child through the substitution of a different, better off child. In Hare’s case, we would all like to have had it be the case that if we were going to be the better off child, that we should have been born, and thus the Golden Rule tells us to create the better off child. This injunction creates an obvious conflict between our duty to the child who would not have been better off, but who

\textsuperscript{55} Other moral considerations will weigh on us, according to Hare, in determining the right “population policy,” and such considerations may require that we limit procreation in order to avoid causing harms to actual or potential persons that would outweigh the benefits of existence. (Hare, p211, 218)

\textsuperscript{56} Brock (1995) p398, 400
might, should he be born, be glad that it had been the case that he was born, and our duty to the better off child who, equally, would be glad that it was the case that he was born. We can resolve this conflict of duties by taking into account the various probabilities of being born, and being born into a potentially happy life, and favoring the alternative with the best prospects for maximizing utility, according to Hare.\footnote{Hare, p213. I question whether or not genuine moral duties can be so easily shrugged off.} For Brock, because “it is morally good to act in a way that makes the suffering and limited opportunity avoidable by substitution,”\footnote{Brock, (1995) p400} the P1 mother does wrong by failing to substitute the better off child for the handicapped child. She does not wrong anyone in particular, but rather “the class — her children — whom she permits without adequate reason or justification to be worse off than her children could have been.”\footnote{Ibid.} Hare argues that we can harm a possible future child by failing to bring about its existence, but not by causing it to exist, even in a suboptimal state. Brock claims that not bringing about the life of a future child with a worthwhile existence would deny that individual a worthwhile life, but does not harm or wrong the child who does not subsequently exist. Where we do wrong, for both Brock and Hare, is in failing to maximize utility by bringing about the less happy life instead of the happier one. We create a generalized decrease in total utility when we bring about the less optimal existence, which gives us a compelling moral reason not to do so. We might question, however, whether or not the possible child with the handicap might be happier than the substitute child, all things considered. There is nothing implausible about
claiming that a child with mild retardation might have been happier than the “normal” child who replaced him. Indeed, individuals with some genetic conditions such as Down Syndrome generally appear quite happy, and might be subjectively happy and satisfied with their lives. Even subtracting some utility for the hardships and difficulties experienced by a person with Down Syndrome and his caregivers, it is possible that the happier life will be the one with the handicap. Indeed, one of the arguments frequently made in support of allowing children with disabilities to be born is that they enhance the lives of others. Merely looking at total utility, then, does not give us adequate reason to substitute one child for another.60

Harris argues that we can benefit an actual person by bringing about her existence, but we cannot harm a potential person by failing to bring her into existence. Simply put, a person who does not exist cannot be harmed, and so harming and benefiting require having been brought into existence in the first place:

Failures to benefit a potential person, or harms done to such an individual which result in its death, are harms to that potential person but are not harms to the person he might have become because that person does not exist at the time the harm is done and will in fact never exist. In this respect causing the death of a potential person is morally on a par with failing to bring a person into existence. Whereas benefits done to the potential person which save her life are benefits to the actual person she will become if and when

60 We can, and should, consider more than subjective happiness, or objective total utility, in assessing whether or not lives should be created. A number of factors contribute to overall human flourishing, including capacities for freedom and autonomy, future vocational and avocational opportunities, the possibility of important emotional relationships, the capacity for full cultural engagement, and so on. Many of these capacities and opportunities will be lacking or significantly impaired in individuals who, subjectively speaking, are “happy.”
that person starts to exist.\textsuperscript{61}

The language of harms and benefits is somewhat tortuous in that passage, for while Harris says that we can fail to benefit and “harm” and cause the “death” of a potential person, he is not suggesting that we do any wrong to potential persons when we act in a way that fails to benefit, or harms, or causes them (in the case of fetuses) to die. Harming and benefiting \textit{actual} persons matters morally, and accounts for the no-difference view in the P1 and P2 cases, Harris argues, and explains “why causing someone to start to exist [benefits] them while failing so to do [does] not harm them”\textsuperscript{62}:

This accounts for how we benefit persons by saving the lives of the human potential persons they once were, but at the same time shows why we do not wrong the potential person by ending that life, whether it be an unfertilised egg or a newborn infant.\textsuperscript{63}

It appears that Harris’ account provides justification for infanticide as well as feticide and non-procreation. “The important feature of this account of what it takes to be a person, namely that \textit{a person is a creature capable of valuing its own existence}, is that it makes plausible an explanation of the nature of the wrong done to such a being when it is

\textsuperscript{61} Harris, John. (1990) p162

\textsuperscript{62} Harris, (1990) p163

\textsuperscript{63} \textit{ibid.} p163. Harris wishes to describe a kind of biological continuum, the “life-cycle of a given individual” through which an individual passes from potential person to actual person. This accounts for the myriad ways and times at which things might be done, prenatally and after birth, that will harm or benefit a person. I would argue that there is no sense in which an “unfertilised egg” can meaningfully be called a person or even a potential person. An unfertilized egg has no potential to develop into a person at all. (Cloning \textit{might} conceivably be a counterexample, in which fertilization is replaced with a different method for causing an ovum to develop into a human.) Nonetheless, we can allow for the possibility that by causing damage to a woman’s unfertilized ova (say, through mutagenic environmental pollution), we can begin a causal chain that will eventually, given certain circumstances, result in harm to an actual person.
deprived of existence.” Since fetuses and neonates are not capable of valuing their own existences, we do not deprive them of anything they value when we deprive them of life. We can also benefit the person who will later develop from a fetus or neonate by not killing her, since she will later be a person capable of valuing her own existence. Alternately, we might harm that person if later her life is such that it is of no value, or negative value, to her. However, Harris explains the wrong avoided in P1 and P2 cases (in his examples, the mothers choose not to have handicapped children) not by looking at the harm that could be done to actual persons, all of whom, he argues, would benefit by being brought into existence, but rather by the fact that avoidable suffering was not introduced into the world:

I want to suggest that the wrong they all try to avoid is the wrong of bringing needless suffering into the world. Each decided that when faced with the choice between having a healthy child or a handicapped child they should choose to have a healthy child. Each could satisfy their desire to have a child without bringing into the world a child that would necessarily suffer. None wronged anyone, all benefited someone.

The two possibilities for wrongdoing here are "bringing needless suffering into the world" and causing a child to needlessly suffer. One is non person-affecting, the other is person-affecting. By acting so that the child who does exist is not handicapped, each mother avoids “bringing needless suffering into the world.” She also acts, needless to say, so that the child who exists does not suffer whatever harms the handicap would have

64 ibid.
65 ibid. p164
caused, but in P1, the child who would be handicapped and the child who is not are
different individuals. While it is somewhat implausible that the P2 mother is acting not to
benefit her child, but rather to avoid subtracting utility from the world, if we want an
account that handles both cases, Harris thinks it must be the impersonal account which
explains wrongdoing in terms of bringing “needless suffering into the world.” Yet, Harris
insists that “it is in the interests of the child she is carrying to be born” except in the case
where the handicap is so severe that it would be better not to be born.\textsuperscript{66} To say it is in the
child’s interests to be born — presumably, the actual child who will later develop, for
whom it was in her interests to have been born — he suggests a personalist account of
why we ought (or at least are allowed to) bring potential persons into actual personhood.
He stops short, however, of saying that we do wrong when suffering is needlessly
inflicted on a child, except in the extreme cases, and provides an additional example to
clarify what is meant by “needless” suffering. In this case, a woman (we’ll call her M4) is
told that any child she can have now or in the future will be handicapped:

If this woman decides to go ahead and have her child even
though it will be handicapped, she is acting in the best
interests of that child. Any suffering that her child
experiences due to its handicap is unavoidable just in the
sense that she can have no child that will not be subject to
such a handicap and whatever suffering goes along with it.
This mother wrongs no-one in having a handicapped child
because it is in that child’s interests to be born, she benefits
that child by continuing her pregnancy and although the
child will inevitably suffer, it will have a life worth living
and such suffering as it will experience is unavoidable.\textsuperscript{67}

\textsuperscript{66} ibid. p165

\textsuperscript{67} ibid. p165
By avoidability, then, Harris means only that suffering is avoidable by substitution, as opposed to avoidable simpliciter. For Harris, that the suffering is not avoidable by substitution of a different child gets the mother off the hook. But why should it? M4 could avoid having children altogether, and thus avoid both causing a child to suffer, and “bringing needless suffering into the world.” It is not impossible for M4 to avoid giving birth to children with handicaps — if it were, then she would indeed be blameless and guilty of no wrongdoing whatsoever. It is the third alternative open to M4 — having no children — which makes her choice to have a handicapped child morally suspect. As M4’s plight illustrates, avoidability by substitution leaves the matter of right and wrong contingent on whether or not there are desirable options available to the parents, and ignores the effects of their decisions on future children. But morality doesn't depend on what you wish could happen. There are issues of moral luck here, and while it is unfortunate for some that they have no desirable options — assuming they find childlessness and adoption both undesirable — having no options they like does not excuse them from moral culpability for the choices they make. It simply makes those choices difficult and tragic, as moral choices sometimes are. The lack of a desirable alternative similarly does not obviate M1’s culpability, and neither does the fact that there is no more desirable alternative existence available to R1.

Feinberg suggests a possible alternative way of using avoidability by substitution to assess moral wrongdoing.\(^68\) Under this formulation, a child is harmed by conception or

\(^{68}\) Feinberg (1986)
birth if “the child is worse off than the child the woman would (or might) have had would have been, had she acted otherwise.”

This formulation “translates even minor injuries into harms” so long as they were avoidable by substituting another child, but offers no account of wrongdoing — even when devastating illness or injury occurs — when a “better off” child is not possible. It locates harm in the individual child who is born, but only by comparing it to another hypothetical child who might have been born if the mother had acted differently. It would compare, for example, R1 to D1, and find that R1 is personally harmed by his mother’s failure to bear D1 instead. As Philip Peters notes, this “does not explain how the injured child could be ‘worse off’ by virtue of this failure.”

Peters proposes that it might be profitable to consider whether “avoidability by substitution” offers an opportunity to reduce suffering in children considered as a class. “Even though failure to substitute causes no apparent harm to any individual afflicted child as long as her life is worth living, the failure to avoid unnecessary human suffering is palpably harmful to the interests of the children so conceived as a class.”

That class includes “all those who might have defects and their healthy possible substitutes.” Parents can maximize the interests of children as a class by choosing to bear the child who is likely to suffer the least. This approach, Peters argues, is person-affecting because

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69 ibid. p174 note 29

70 Peters, Philip G. (1989) p514

71 ibid.

72 ibid. p510-511

73 ibid. p510 note 131
it compares different possible children, but it also acknowledges that the failure to avoid illness or injury by substitution is “victimless” in the sense that no one can claim that they have been harmed or wronged by the failure to have substituted a different child:

While parental choices between possible children may not victimize the child actually born, the problem of identifying a victim should not obscure the actual increase in unnecessary human suffering that may flow from these reproductive decisions… because the parents can choose between a child who will suffer and one who will not, their decision is indeed person-affecting in the novel and expansive sense dictated by the unique identity problems arising in connection with the unconceived. An analysis which focuses on the collective interests of the class of children who could be born captures this insight.74,75

This approach can be defended on utilitarian grounds because “substitution of the happier children increases total social utility,”76 but it can also be defended on nonutilitarian grounds if it is accepted that “inducing unnecessary human suffering is prima facie immoral.”77 Peters’ approach implies that there is a moral duty to substitute in order to maximize the health of one’s offspring and reduce avoidable human suffering. Peters does not seem to regard as unavoidable those injuries or illnesses which would afflict any of the class of children a set of parents might have.78 In other words, parents who might avoid birth defects in their children only by not conceiving any children at all

74 ibid. p516-517
75 Peters calls this “person-affecting,” but I am skeptical of his move here, and don’t think it will stick.
76 ibid. p516
77 ibid. p517
78 ibid. p511
do not, presumably, have a duty to substitute a child less likely to suffer since any of the children they might conceive have the same likelihood of suffering. So long as those children do not suffer injuries or illnesses that make nonexistence preferable, their children suffer no harm. 79

Is it necessary to consider the interests of possible children as a class in order to make use of person-affecting moral evaluation in nonidentity cases? Considering the class of possible children expands the definition of harm by making the notion of comparative harm inclusive of a larger set of possibilities for comparison. The nonexistence problem limits the set of possibilities for an individual to existence and nonexistence, and on the assumption that existence is beneficial, implies that only in the most extreme cases can conceiving a child be considered harmful. That is, if we compare existence to nonexistence for the same child, existence will rarely be the worst option available. Considering children as a class allows us to expand the notion of comparative harm by comparing a possible child to a different possible child within the same class, just as we might compare quarterbacks within a team. Of all the possible quarterbacks for the Patriots, Tom Brady is the least likely to lose a game. Of all the possible children for M1, D1 is least likely to suffer, while R1 is most likely to suffer, and thus, there is a duty to substitute D1 for R1 in order to avoid unnecessary suffering. On the reasonable assumption that parents have a moral duty to avoid inflicting unnecessary suffering on their children (and possible children), considering the entire class of possible children

79 ibid. p511
allows us to compare one child within that class to another child within that class. But the so-called duty to substitute is questionable. Does it imply that there is a parental duty to consider the benefits of existence for nonexistent possible children? Peters argues that it does not obligate parents to “have children they do not want. This duty requires only that parents who do decide to have children ‘do a decent job of it’”\(^{80}\) by maximizing the health of their children. However, this approach is still not person-affecting in the sense that it captures why we ought not inflict harm on an individual child, nor does it account for the possibility of wrongdoing in cases where a different (in kind) child cannot be substituted. Even if we consider the possible interests of an entire class of children for the purposes of comparing the welfare of one possible child to the welfare of another possible child, it is not clear how the duty to avoid inflicting unnecessary suffering on one’s offspring translates into a duty to substitute a better off possible child for a different, worse off possible child. The duty to substitute can only apply to those cases where it is possible to substitute a different, better off child (such as the P1 case), but it obviously has nothing to say about cases where substitution is not an option. If the duty to substitute springs from the duty to avoid inflicting unnecessary suffering, are we not needlessly multiplying moral duties where one might do the work? Peters claims that “only by comparison can we identify whether unnecessary suffering will occur,”\(^{81}\) but surely it is possible to compare a possible child’s well-being against some standard that does not depend on the possibility of there being another possible child. A child might be

\(^{80}\) Peters, p517, paraphrasing Bayles.

\(^{81}\) ibid. p517
deprived of adequate nutritious food, and thereby be harmed, not in comparison to how
other children are fed — perhaps the other children in the family will be fed well, perhaps
there are no other children — but rather by comparison with what the individual child
needs in order to thrive and experience well-being. That is, there is a fact of the matter
about whether or not a child’s needs are met, and the facts have normative weight,
determining whether or not our obligations have been met. We can fail to maximize the
well-being of an individual child without reference to how we treat other children in the
same class, and regardless of whether or not there are other children in the same class.
We do not need to compare one child’s possible welfare to another’s — we need only
look at what obligations are imposed by our duties to any of our children, and consider
whether or not those obligations are, or can be, adequately met for a particular individual.
When they cannot, or when it is impossible to avoid inflicting harm by desirable means,
we may still be obligated to do so by less desirable means. We cannot have duties to do
the impossible, but that does not mean that our moral obligations end when we exhaust
the possibilities of the options from which we wish to choose. Yet avoidability by
substitution limits what we are required to do — it requires us to avoid inflicting
unnecessary suffering on a child only when we can do so by substituting a different,
better off child. Yet ordinary (non-supererogatory) moral obligations frequently require us
to do what is inconvenient or undesirable, to do what we do not want to do, and the
obligations imposed on parents and possible parents are no different. Harming possible

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It is not uncommon, in cultures with a strong sex-preference for male offspring, for unwanted daughters
to suffer malnutrition, as well as lack of access to health care and education, while their male siblings are
cared for well. Such girls are harmed not because their brothers are better off, but because their own needs
are not met. They are comparatively worse off, but also objectively harmed by their maltreatment.
children may still be avoidable by substitution, but it may be by substituting less desirable means for desirable ones — including, perhaps, not conceiving any children — rather than by substituting other children.

Glover argues that we can make a relevant comparison between the distinct lives of two distinct people. Such an impersonal comparison would allow us to claim that harm has been done even when no identifiable persons have been made worse off. This is different from claiming that we do wrong when we fail to substitute a better off child for a worse off child — rather, Glover maintains that we can assess harm by looking at the condition of other possible, better off children. For example, if a factory emits pollution that causes children to be born blind, “what we should say here is not that the pollution made the blind children worse off than they would have been otherwise, but instead that their condition is worse than the condition of the other children who would have been born in the absence of the pollution.”

Glover’s solution has the benefit of allowing us to call a harm a harm — if it is worse to be blind than to be sighted, then it is a harm to be born blind, even if one could not have been born sighted. Nonetheless, Glover is conceding that it is only by comparing a worse off child with a better off child that we can make an assessment of harm.

§2.5 Does Impersonalism solve the non-identity problem?

Impersonalism preserves the no-difference view by accounting for the mother’s wrongdoing in P1 in totalist terms. The mother does wrong by introducing impersonal

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83 Glover, quoted in Glannon, p55-6
evil into the world — by increasing the total amount of disutility (or decreasing utility) in
the world. In so doing, she harms no one, and wrongs no one. Her wrongdoing, instead,
was her failure to substitute a different, better off child (D1) for the child (R1) who was
born disabled. Brock and Robertson both arrive at this conclusion by implying that R1
would be worse off if “denied a worthwhile existence,” or worse off if he were never
born. They are forced to this conclusion by a conception of harming that requires that the
subject of harm must be worse than he was or otherwise would have been. It is nonsense,
however, to claim that a nonexistent person would be worse off if he never exists.

Nonexistence is not a state in which one can be either worse or better off. Feinberg
attempts to make an analogy to rescue, and argues that bestowing life is analogous to
rescuing. This approach backfires, however, for it admits that bringing about a life can
inflict harm that requires justification. The analogy to rescue, then, implies that bringing
about a life can be harmful, and if it can’t be justified, it is also wrongful. Because
nonexistence is not a state from which anyone requires rescuing, the supposed benefits of
rescuing cannot justify bringing about a life. Neither can the benefit of existence justify
harming that is inseparable from existence.

Impersonalism makes M1’s wrongdoing avoidable by substituting a different
child for R1, and totalism implies that we are required to substitute another person, and it
would be wrong not to. (Personalism is indifferent as to whether or not a substitute child
can be produced.) Totalism fails, however, to explain why a nondisabled child should be
substituted for R1. Even accounting for the hardship and difficulty that might attend life
with a disability, we may fail to maximize utility by substituting a nondisabled child for R1. If that’s the case, then totalism fails to explain what M1 did wrong in creating R1. Additionally, in cases where substituting a better off child is not possible (because any child M1 produces will be similarly afflicted), M1 cannot do wrong. The suffering of the child, as Harris argues, is “unavoidable.” But is it? It is actually the mother’s suffering (assuming she suffers) that would be unavoidable, and not her child’s. M1 has the option of not procreating, and thus her choice to procreate, despite the inevitability of producing a child with a disability, is made for her own sake. In other words, she sacrifices her future child’s well-being for the sake of her own. To do so requires a compelling reason, but preventing her own suffering is not sufficiently compelling. Since the mother has the option of not procreating, Harris would appear to make wrongdoing contingent on there being a desirable alternative for her. But right and wrong are not contingent on what we desire could happen, and the lack of a desirable option does not obviate the mother’s moral culpability.

Peters tries to make substitution person-affecting by comparing the well-being of a future child to all future children, taken as a class, that two parents might have. Of these, Peters argues, they have a duty to substitute the child who will, comparatively speaking, suffer least. But a child can be harmed by a noncomparative standard, regardless of how another individual, or the rest of a class, might fare. If a sister is abused while her brothers are not, her abuse is not harmful only because her brothers are not

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84 Peters calls his theory person-affecting, but it fits better with impersonalist theories.
similarly abused, nor would it cease to be harmful if she had only similarly abused sisters, or no siblings at all. Glover proposes an impersonalist comparison between a worse off child and a better off child. He hangs on to the notion that we can only make an assessment of harm by considering whether someone is better or worse off. But by comparison, many possible lives might be considered suboptimal — being born female, or black, or being short or elderly or tone deaf. This would multiply harms too much, and make too many lives harmful. Noncomparative harms are identifiable evils — pain, suffering, frustration, loss of opportunity, the inability to exercise important rights and capacities, etc. While we may be able to compare these harms to their absence or negation, we need not do so to find them harmful. They are bad in themselves, and bad for the persons who experience them, regardless of whether or not anyone else experiences them.85

If impersonalism explains wrongdoing as just a matter of failing to choose the option that maximizes total utility, and only in those cases where there is an alternative that is desirable for the individual chooser, and only when all of the alternatives involve producing the same number of substitute children, then it is an anemic account of moral wrongdoing that fails to accord with our moral intuitions, and fails to account for what’s wrong (or right) with decisions made in cases where the welfare of future individual children is (or ought to be) morally considerable.

85 We must limit harms to possible conditions, of course. It might be undesirable or regrettable for me that I cannot fly, but it is not a harm for me that I cannot, unless I am a bat. For a bat, not to fly would be a terrible handicap, and not merely because other bats can fly, but because as a bat, flying is essential to my welfare and well-being, to my bat flourishing. This is what it is like to be a bat.
§3.0 Personalist (Person-Affecting) reasons against harming future, possible people

The alternative to impersonalism is personalism. Personalist philosophers have adopted some ingenious strategies to get around the obvious difficulties with a personalist account of harm in preconception cases, where there is yet no person to be affected. Heyd adopts a strange kind of personalism, and limits the scope of “ethical arguments in genesis contexts,” and argues that “genesis problems can be solved only by reference to actual people.” That is, potential people, “people whose existence is dependent on human choice” do not count in ethical decision-making. Heyd calls this the “conceptual noncount of potential people” who have no moral status at all, and are owed no moral consideration. Paradoxically, it is only those future individuals whose existence is entirely without our control to whom we owe any moral consideration. The welfare of those individuals whose existence is within our control do not factor into our genethical decisions. So for Heyd, R1 would have no moral standing, and his mother need not consider the welfare of her future child(ren) in making decisions about childbearing. At most, Heyd claims, she ought to consider actual persons, including herself and her family, and perhaps, the rest of society, in deciding whether or not to risk giving birth to a child with a handicap. This is what Heyd calls the generocentric (or parentocentric) thesis:

Only actual people have moral standing, that is, rights, claims to being morally considerable, a status of belonging to the moral community, or to the class of those whose welfare or utility is to be taken into account. Potential

86 Heyd, (1992) p 89
87 ibid. p 99

166
persons have no such standing. In genesis contexts (viz., when decisions regarding their creation are taken) this essentially means that they have neither a right to be born nor a right not to be born. Derivatively, it means they do not have a right to be born with a certain nature or a certain number. And since they — as potential persons — have no moral standing, the only ethical considerations relevant to decisions regarding their creation are those that refer to actual people, either present or future.\footnote{ibid. p 106}

Heyd’s personalism resolves the non-identity problem by claiming the irrelevance of the “interests” of non-existent, future, potential persons to anyone who can control whether or not they will exist. He does not account for the NDV, because on his view, P1 cases are morally different than P2/P3 cases, and the NDV is mistaken. Parents have no moral obligations to their potential children until those children become actual. The mother in P1 does nothing wrong to her child, and does not harm her child, because she violated no possible moral duty to that child by bringing about his existence. This goes beyond the frequently asserted position that a child is harmed only if it is born into a life that is worse than death. Even a child born into a terrible, painful, short and doomed existence can make no moral claims against her parents for having carelessly or recklessly brought about her existence. Such parents cannot act \textit{carelessly} for they need not be \textit{careful} in bringing about a child’s existence, except to the extent that they might affect life for other actual persons, present or future.

There is perfect symmetry within personalism, Heyd claims, for “logical reasons make the quality of potential lives (both negative and positive) irrelevant to decisions
about procreation.” That is, we have no duties to potential persons — whether they are potentially happy persons or potentially miserable persons — at all. Whether or not a potential child will be happy or miserable is a matter of indifference, unless it matters to someone actual. Nor can we say that it matters if a potential child’s life will be miserable because it will (later) be miserable for him. Value (and disvalue) require valuers. “Life is of value only if it good for its subject,” but the notion of a potential life that falls below a minimum standard, says Heyd, is incoherent. While it is true, Heyd agrees, that a person might perceive their life as being not worthwhile (in the sense of having either no worth, or negative worth), “even the most miserable people who wish not to live cannot say that they would be better off not conceived. Regretting one’s very existence is... logically incoherent” within a person-affecting view, because there is no subject of the “better state” of nonexistence.

Actual people, according to Heyd, may exist now as living people, or they may exist in the future. What distinguishes the actual from the potential person is that the existence of potential persons depends on human choice. The “logical dependence of their existence on our decision” results in their conceptual noncount, Heyd argues. On the other hand, future actual people — people who do not yet exist — do exert a moral

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89 ibid. p 110
90 ibid. p 120
91 ibid. p 122
92 ibid. p. 98
93 ibid. p. 97
94 ibid. p99
pull on us. “They deserve some sort of concern, as does any existing human being,” Heyd claims.\textsuperscript{95} The billion future persons who will be born in China in the next century have the moral status of actual persons, although they do not now exist. Their existence is a given, and their futurity is no obstacle to their being “actually present in the class of people whose interests, welfare, and rights we have to consider in making decisions and changing the world.”\textsuperscript{96} But individually, those billion potential Chinese children have no moral status in a genethical context, where their existence depends on decisions made by their parents.

Although Heyd’s argument explains the claim that it is impossible for a parent to harm an individual who would not exist but for a parent’s decision to create him, it does not remove the sense in which this claim remains counterintuitive and paradoxical. There is a real sense in which nearly everyone who will exist in the future will do so because of human decisions. The invention of air conditioning changed patterns of conception in the United States, resulting in the births of more spring babies conceived during the hot summer months.\textsuperscript{97} Demographic shifts in population, economic conditions such as fuel prices and the availability of employment can all affect who will be born, as well as when and where they will be born. The upshot is that few future persons will exist

\textsuperscript{95} ibid.

\textsuperscript{96} ibid. p98. The strength of the moral claims of future actual persons is “dependent on the degree to which we are sure that they are indeed going to exist and the nature of our knowledge about their characters, interests, preferences, conditions of life, needs, and ideals. Such knowledge might be scanty and hence imply a lesser degree of moral obligation to those people; but in principle it would not deny them the right to be ‘morally considerable’.” (p103)

\textsuperscript{97} Meade & Earickson (2005) p 182
independently of human decisions and choices, which suggests that “our capacity to
manipulate the environment ecologically and economically makes practically all future
people potential… and hence lacking moral standing.” To get around this, Heyd refines
his definition of potential persons such that “insofar as the identity of future individuals is
dependent on our choice… they are (for us) potential and hence do not have any moral
rights against us.” Thus, a “person may have a claim for moral consideration on the part
of one person but not on that of another.” I’m not sure this really solves the problem.
Surely the overseas manufacturers of cheap air conditioning units do not have in mind to
affect patterns of conception in Alabama, yet their products may do just that, and affect
the identity of future persons by affecting the timing of conception. If Susannah would
not have been conceived in Alabama in the middle of a searing heat wave, has not the
cool comfort provided by her parents’ new AC unit affected her identity? If her mother,
moreover, is simultaneously on leave from a military assignment, have not the Army’s
decisions about troop deployments also affected the identity of the future Susannah? This
would seem to extend the number of individuals for whom the potential person does not
count morally, unless we add a further qualification that one person (presumably in most
cases the mother) has ultimate decisional capacity about identity, and therefore is the sole
person for whom a future child does not count morally. This would certainly get M1 off
the hook, but I remain unconvinced that Heyd’s distinction can stand, and with it, his

98 Heyd p103
99 ibid. p104
100 ibid. p101
claim that potential persons cannot count morally.

Heyd’s contention that I can have moral obligations only to those persons whose existence does not depend on anything I do gets me off the moral hook when it comes to creating persons. What is unsettling, of course, is that I might maliciously create a child who will live the worst possible life, say, a lifetime of agonizing pain coupled with an inability to communicate and complete and utter dependence, and I will be morally blameless not only for having done nothing to prevent the child’s miserable existence, but also for having intentionally brought it about. This strikes me as nutty, at least, but it is grounded in the belief that potential people cannot have any moral standing.\textsuperscript{101}

Some personalists account for the NDV by arguing that parents have special obligations to their future offspring, and these obligations, when violated, explain the wrong of creating children who will experience suffering. Doran Smolkin interprets the existential dependence of future persons upon decisions made by parents as creating unique obligations. He argues that “this very special power of being able to determine who will come into being generates particularly strong obligations to dependent people,”\textsuperscript{102} and that

\begin{quote}
when acting in ways which will effect the identity of future people, [we] have more than the responsibility of just making sure that their lives are not worse than nothing, but rather that earlier people have the responsibility of making
\end{quote}

\textsuperscript{101} As Mary Midgley writes, “An ethical theory, which, when consistently followed through, has iniquitous consequences, is a bad theory and must be changed… We cannot directly conclude that the consequences cease to stink the moment they are seen to follow from our theory.” (Midgley in Singer 1994, p 376)

\textsuperscript{102} Smolkin, Doran. (1994) p326
sure that the lives of dependent people are expected to be
(in some sense of the word) good.\textsuperscript{103}

Smolkin questions the assertion that one’s rights cannot be violated by an act
which does not, on balance, make one worse off, an assertion that grounds the
assumption that acting in a way that results in the existence of a person cannot harm that
person. Heyd argues that the application of rights-based theories to genesis cases involves
incoherence, and that rights-based theories are “logically incapable of dealing with
genesis problems.”\textsuperscript{104} Smolkin, by contrast, reasons from the disanalogy between
dependent (future) person cases and independent (existing) person cases to argue that
there is nothing implausible or incoherent about claiming that an action responsible for
bringing about one’s existence could also violate one’s rights, even if one is not left in a
worse condition. There is a difference, Smolkin claims, between our obligations to
existing persons, which include duties to rescue and protect from harm, and our
obligations to future persons. There is a significant disanalogy between saving the life of
an existing person (by making continued existence possible) and causing a future person
to come into being. In the former case, there is (generally) a strong moral requirement to
rescue or protect from harm; because failure to do it will leave the victim worse off, there
is justification for inflicting some (lesser) harm. In the latter case, however, there is no
moral requirement to make existence possible, nor is there justification for inflicting
harm in order to make existence possible, because the failure to do so will not leave the
victim worse off. From this, Smolkin reasons that acting in a way that results, say, in the

\textsuperscript{103} ibid.
\textsuperscript{104} Heyd, p41
absence of an arm, might violate the rights of a dependent (future) person because “non-performance of the act would not have been worse for that person,” while acting in a way that results in the loss of an arm for an independently existing person would not violate that person’s rights if “non-performance of the act would have been even worse for that person”. Moreover, the power to affect not only the well-being of a dependent future person, but also whether or not that person exists at all gives force to the intuition that, “given the differential and greater powers… it is reasonable to think that the obligations would be different and greater in the case of dependent people than in the case of independent people.” Smolkin is right that parents have special obligations of care and protection towards their children, although I am not sure that we can count the absence of an arm as a violation of one’s rights. It is never worse to not exist, so anything might count as a rights violation according to Smolkin’s account, and that would be unnecessarily restrictive. Children may not have a right to be born whole — I would argue they have no right to be born at all — but there is surely a limit on the hardships and suffering parents can knowingly inflict on their future offspring. Finding that limit is what makes the hard problem so hard.

Another way to think about the special obligations owed to future persons is offered by Tooley and Woodward, who both argue that inasmuch as it is wrong to make promises one cannot keep, it is also wrong to create a person to whom one will have

105 Smolkin, p326
106 Smolkin p327
obligations that will be impossible to fulfill.\textsuperscript{107} Woodward argues that “a reason a certain course of action would be wrong is that it would involve the creation of rights and obligations that would probably or inevitably be violated,”\textsuperscript{108} and appeals to the notion that parents have “specific obligations and duties to treat and care for their children in certain ways.”\textsuperscript{109}

Tooley proposes a principle Q which states that

\begin{quote}
Violating an obligation of some type R, which one has regarding some individual, when it is possible not to do so, and bringing it about that there is an individual with respect to whom there is an obligation of type R which cannot be satisfied, are prima facie wrong to precisely the same degree.\textsuperscript{110}
\end{quote}

An action would be “prima facie wrong if and only if either it involves a failure to fulfill an obligation concerning some individual, when it was possible to do so, or it makes it the case that there will be some individual with respect to whom there will be an obligation that cannot be fulfilled.”\textsuperscript{111} Tooley also assumes that every individual has a right to a life that is worth living, but more than that, “Every person has a right to an equal chance of enjoying those natural resources, both environmental and genetic, that a person living in his society might enjoy, and that make it possible for one to lead a

\textsuperscript{107} Tooley, Michael (1998), and Woodward, James (1986).

\textsuperscript{108} Woodward, (1986) p 821

\textsuperscript{109} \textit{ibid.} p815

\textsuperscript{110} Tooley, (1998) p120

\textsuperscript{111} \textit{ibid.}
satisfying life." Thus, it would be wrong to create persons to whom our special obligations — as parents and persons responsible for the creation of others — cannot be fulfilled. Tooley’s approach multiplies the number of moral duties to future children, but in a way that may be simply redundant. Does it add anything to already existing obligations to protect our offspring from avoidable harms to say further that causing it to be the case that there will be a person in existence to whom we have duties that cannot be met is also wrong?

Glannon argues that we need both an impersonal and a person-affecting principle for genesis cases:

The impersonal comparative principle explains the wrongfulness of the act of bringing the child into existence, and the person-affecting principle explains the harmfulness of the act. We need both principles to explain and justify what parents are obligated to do and what they are responsible for in causing people to exist.\(^{113,114}\)

We ought to act in a way that prevents actual people from experiencing pain and suffering, and to avoid adding “to the total amount of suffering in the world,” Glannon argues, and thus we are required “to ensure that the people we cause to exist have a minimally decent life.”\(^{115}\) Ensuring that those who exist have minimally decent lives

\(^{112}\) Tooley (1998) p 120

\(^{113}\) Glannon, (2001) p56

\(^{114}\) Brock, by contrast, asserts that a complete moral theory needs both person-affecting principles and non-person-affecting principles, because the former explains wrongdoing in “typical cases of harm where a distinct individual is made worse off,” and the latter handles genethical and non-identity cases (Brock, in Wasserman, Bickenbach & Wachtbroit, p84).

\(^{115}\) Glannon, p56.
would seem to fall rather short of our obligation to either avoid adding to the total suffering in the world, or to prevent actual people from experiencing pain and suffering. Glannon is right that both impersonalist and personalist principles “give us reasons to bring a healthy child into existence rather than a diseased or disabled one,” 116 but unless “minimally decent” is defined as being free of disease or disability, neither principle would give us a reason to prevent the existence of children who will suffer diseases or disabilities that place their lives somewhere on the spectrum above “minimally decent” but who will still experience significant hardship. Glannon contrasts the “minimally decent life” with the “best possible life,” noting that principles grounded in nonmaleficence, beneficence and justice do not require that we create only those children who will have the best possible lives. But again, there is a tremendous gulf between a minimally decent life and a best possible or perfect life, and within that range of difference, a great deal of suffering and hardship is possible. Why not better than just minimally decent?

By setting a low threshold for what counts as minimally decent, Glannon argues, “there can be reasonable objective agreement about lives that are not worth living because they fall below the baseline.” 117 That baseline, for Glannon as for many other philosophers, is a life “not worth living on the whole,” which, when taken to mean a

\[116 \text{ ibid.}\]
\[117 \text{ Glannon, (2001) p62}\]
“person’s lifetime well-being” can encompass a wide range of early- and late-onset diseases and disabilities.\textsuperscript{118}

On this model, the more severe the pain, suffering, and disability associated with the disease, the earlier the time of onset of symptoms, and the longer the period of time between onset and death, the stronger will be the reason for saying that the life is not worth living on the whole. Correspondingly, there will be a stronger reason for preventing such a life...\textsuperscript{119}

A genetic disease associated with early-onset, short-duration, and early-death, such as Tay-Sachs, would seem to fall into a grey area, if Glannon’s criteria are comprehensive. Yet most would view an illness like Tay-Sachs as sufficiently awful, and the quality of the lives of affected children so poor, and the compensations so meager, that the birth of a child with Tay-Sachs should \textit{always} be avoided. It is conceivable, however, that the total amount of suffering associated with the rapidly terminal Tay-Sachs would be smaller than the amount of suffering associated with Alzheimer’s Disease or Huntington’s, which can persist several years before resulting in death. More significantly, there is no reason to knowingly create a child who will suffer Tay-Sachs since, as Glannon argues, “Terminating the development of a human organism at the embryonic stage does not kill a person but only prevents a person from coming into existence. There is no one who could be harmed because there is no identifiable individual with particular interests who exists at the time of the termination.”\textsuperscript{120} If we harm no one by preventing a possible

\textsuperscript{118} \textit{ibid.} p62-3
\textsuperscript{119} \textit{ibid.} p62
\textsuperscript{120} Glannon, p54
person from existing, and if we have no obligations to bring a possible person into existence, what reasons do we have for creating persons who will inevitably suffer? A child born with the huntingtin gene will suffer a terrible and inevitable physical and cognitive decline and die a premature death, although the early life of that person has the potential to be normal and healthy. 121 What reason do we have, in the absence of obligations to create people, to create a person who will, in the future, unavoidably and substantially suffer? That future suffering, even if it is 25 or 30 years in the future, gives us a reason to avoid creating that person. Glannon writes that “parents would be justified in preventing a potential person from existing if a late-onset disease the person would have involved severe mental and physical symptoms and a considerable period of time between the onset of symptoms and death.” 122 But this gets it backwards. Preventing existence harms no one, and requires no justification. What requires justification is creating a doomed person. The question is not whether the benefits and burdens of a life weigh more heavily on one side than the other — that will rarely be something that can be accurately predicted in advance. Nor is it a matter of asking, after the fact, whether or not the life was worth living. The question is whether or not, knowing (more or less) how a life could go, that life would be worth starting.

How a life will go is, more often than not, difficult to predict in advance. Children with the best starts in life can have their lives go horribly wrong. Children doomed from

121 There is the potential for significant long-term psychological suffering associated with knowing that one will eventually be afflicted with HD, particularly since it is likely the affected person will have seen close relatives suffer and die from the disease.

122 ibid. p63
the start to disease or disability can have lives that go well. Glannon cites Stephen
Hawking, who famously suffers extremely debilitating ALS, and just as famously has a
rich and rewarding intellectual life that makes his life, on balance and for him, well worth
living.\textsuperscript{123} We could say the same, however, about the life of Helen Keller, who was deaf
and blind, yet overcame those disabilities to live a long life filled with significant
accomplishments. It is entirely possible that Keller’s extraordinary life would have gone
much differently if she were not deafblind. It is possible that she would have lived an
utterly ordinary life had she been sighted and hearing. But Keller’s success, the goodness
of her life, do not give us a reason not to prevent (or treat) the illness — a “brain fever”
believed to be either scarlet fever or meningitis — that caused her to be deafblind. Rather,
her impairments give us a reason to prevent (and treat) those illnesses in children, just as
the significant impairments Hawking experiences give us a reason to prevent ALS. Lou
Gehrig, the namesake of Lou Gehrig’s Disease, famously said “today, I consider myself
the luckiest man on the face of the earth,”\textsuperscript{124} but surely it was not lucky that ALS cut
short a stellar and rewarding baseball career, or that it took Gehrig’s life just days short of
his 38th birthday. Glannon argues that “It would be difficult to adduce reasons for
preventing [Hawking’s] life, despite the fact that ALS is a severely disabling disease.”\textsuperscript{125}
But it is \textit{not} difficult at all to find reasons to prevent the lives of persons who will suffer
the significant impairments associated with ALS. To frame the matter in terms of

\textsuperscript{123} Hawking has said in an interview “I don’t think motor neurone disease can be an advantage to anyone.
But it was less of a disadvantage to me than to other people, because it didn’t stop me doing what I wanted,
which was to try and understand how the universe operates.” Hawking (1993) p 168

\textsuperscript{124} Gehrig, Lou. Farewell speech. <http://www.lougehrig.com/about/speech.htm>

\textsuperscript{125} Glannon p65
preventing Hawking’s life is to alter the question in a way that makes only one answer acceptable: Knowing what we now know, should Hawking’s life have been prevented? Because Hawking’s life is worth living for him, we can only now answer in the negative. But the proper question is: should ALS be prevented, just like scarlet fever and meningitis? Indeed it should, even if preventing ALS means preventing some lives that would be, on balance, worth living. Philip Kitcher frames the issue in this way:

To learn that a fetus carries a genetic condition that will lead to irreversible muscular degeneration in early childhood, that the person born would be able to move and to communicate only with the aid of equipment and considerable human support, would incline many parents to conclude that the life would not be worth living. Yet is this not to impose values from without? People born with such disabilities develop self-conceptions whose corresponding central goals can be attained without independent mobility — they draw their horizons around their distinctive talents. Their accomplishments belie the old stereotype of patients with spina bifida or severe forms of muscular dystrophy doomed to lives of unacceptably low quality. But while being rightly impressed with what they have achieved, we should beware of concluding from prominent examples that there will always be distinctive talents to be developed, that excluding the entire array of personal goals for which independent mobility is required will leave something toward which a life can be successfully directed.

Before we know if the life of a person with ALS will be worth living, before we can know that, the question is whether or not that life should be started. That question requires that we give reasons to justify not the prevention of a possible life, but rather not

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126 Hawking has children of his own, and so far as is known, his form of ALS is not the familial, inherited form, which accounts for a relatively small percentage of ALS cases.

127 Kitcher (1997) p292-3
preventing a preventable illness that has significant negative value for those affected. Given the *possibility* that a life will go badly, will cause pain and suffering and frustration and limitation, we ought to avoid creating persons who will suffer from ALS. The limitations of those lives need not be complete for them to be unacceptable limitations. Not everyone with ALS is a Stephen Hawking, able to forge a successful and fulfilling intellectual life in defiance of physical incapacity. Hawking’s genes, the ones that doomed him to life in a wheelchair, unable to speak with his own voice, did not at the same time determine his intellectual gifts. As Kitcher notes,

> We are not infinitely plastic, capable of being molded in any direction by the appropriate environment. The thought that people born with severe degenerative muscular disorders that will confine them to bed or a wheelchair from childhood will — always? often? — be able to make satisfying lives for themselves by engaging with intellectual problems, so long as they are provided with a supportive environment, is as unjustified as comparably sweeping genetic determinist doctrines.\(^\text{128}\)

To cite the examples of inspirational famous people (Hawking, Keller, Beethoven) who created rich and fulfilling lives for themselves in spite of their disabilities as reasons *not* to prevent the existence of persons with those disabilities is to miss the point entirely. One need not wish that Hawking be snuffed out of existence in order to wish that ALS did not exist to cause the suffering it does for Hawking. Surely we would be terribly misguided and possibly malicious to wish that our children would suffer from ALS so that they could “be like Hawking.” And we would be equally misguided to think that

\(^{128}\) Kitcher p294
genius only thrives in an atmosphere of physical limitation and suffering — the vast majority of brilliant cosmologists have not been afflicted with ALS. Any number of possible geniuses have not existed because of happenstance, because some other dull child was born instead. This does not give us a reason to create every possible child, that we might avoid missing every possible appearance of genius and bootstrap-pulling-up. At the same time, suffering need not be so severe that it makes life unbearable and utterly worthless in order for us to have a reason to prevent it. We are doomed to fail if we try, like the parents of Buddha, to shield our children from all suffering, but we can prevent some suffering. There are many ways any life can go — good, bad, so-so. A person with ALS can have a life that is on balance good. A deafblind person can have a life that is on balance good. It’s not the good parts that are the problem — it is the parts that go badly. When some of the things that can make a life go badly are preventable, we have reasons to prevent those things from happening, whether those things are illnesses like meningitis, or accidental poisoning, or child abuse, or inherited diseases and disabilities. We have reasons to prevent those things from happening, as well, whether the means to do so require action before birth, or after it.

§4.0 Justifying Procreation: a personalist solution to the non-identity problem

The non-identity problem can be solved on personalist grounds, preserving the NDV and couching moral wrongdoing in terms of harm to future children. This conclusion will follow from premises already argued for in the foregoing:

a) Nonexistence is not a harm. To never exist harms no one.
b) Not creating persons requires no justification.

c) Creating persons risks imposing substantial risks and burdens, which requires justification.

d) Life can be a benefit.

e) There are good reasons to benefit persons.

f) There are stronger reasons to avoid harming persons. We have a greater obligation to avoid harming than to bestow benefits.

Additionally, I will adopt the following principles:

(1) There are reasons against acting in a way that will cause suffering and loss of opportunity to future persons.

(2) It is wrong to act in a way that will harm future persons who will suffer as a result, unless there are sufficiently compelling reasons that outweigh the suffering of future persons.

(3) There are reasons in favor of acting in such a way that it benefits future persons who will not exist if another course of action is undertaken.

I conclude that the mother in P1 has compelling reasons to wait, and to create D1 instead of R1, and that those reasons are person-affecting — they concern the welfare of R1. She should wait because not waiting will result in a child who will experience otherwise avoidable harm and suffering, and not because his existence will result in a net loss of total utility. Her reasons for not waiting are also person-affecting, because they concern herself. But in the conflict between benefiting an existing person (herself), and not harming a future person (her child), the balance tips, as it must, in favor of not
harming. Thus, we have person-affecting reasons to avoid or prevent the conception of children whose lives might be worthwhile, but who will nonetheless experience otherwise avoidable hardship and suffering.

Creating persons is not a morally neutral act. It is frequently asserted, or at least assumed, that it is morally neutral, unless the life of the person created is sufficiently bad that it is not worth living. But even routine procreation, although it is most often undertaken without moral anxiety, risks imposing significant burdens on future persons — persons who would not exist, and therefore would not suffer, if they were never created. Imposing such risks and burdens on future persons who can have no say in the matter, and who are not in danger of suffering greater harm if they are not created, requires moral justification. This is not to say that all procreation is wrong. It is not necessarily morally impermissible to engage in risky behaviors, but it is morally suspect. If we accept the commonly held view that life is, generally speaking and in most cases, beneficial, the benefits, however substantial, do not by themselves justify imposing whatever burdens might also be inextricable from the life in question.

There are good reasons against harming people who exist, and those reasons have a strong moral pull on us. It is bad to cause harm to others, and, although it is sometimes necessary to prevent greater harm, it is frequently wrongful to harm others. Harming others does not necessarily mean that they have been made worse off. That is, being made worse off is a sufficient condition for having been harmed, but it is not a necessary condition for having been harmed. As the rescue and Unlucky cases illustrate, one can be
harmed even if, all things considered, one is better off than one was before, or would have been. In other words, one may benefit, all things considered, from a harmful act, but that does not affect whether or not harm has been done. It does affect the moral blameworthiness of the harmer, and sometimes, as in rescue cases, it can entirely excuse harming.

There are also good reasons to benefit people, and those reasons have some moral sway over us as well. I have argued, however, that there are stronger reasons against harming than there are reasons for benefiting. Our obligation to avoid harming others is greater than our obligation to benefit them. Wealthy had good reasons to benefit his neighbors, but he had a much stronger moral obligation to avoid harming them, which explains why Wealthy’s actions, although they benefited Unlucky overall, were wrongful. There are times, of course, when the benefit bestowed just is the prevention of even greater harm, as in straightforward rescue cases. In such cases, what does the justificatory work of excusing the harm inflicted is the prevention of greater harm. Preventing harm from befalling others, like avoiding harming others, is a stronger moral obligation than benefiting others.

In non-identity cases that concern who will exist in the future, there is frequently conflict between benefiting existing people and not harming future people. The P1 case can be explained in such terms. The P1 mother benefited from not waiting to conceive her child. She did so at the cost of harming her future child, who was born disabled. Brock and Feinberg both argue that she did not harm her child, since he is not worse off
than he otherwise would have been, nor is his life so bad that it is not worth living. We might also argue that the child R1 benefited from his mother’s decision, for he enjoys a worthwhile, satisfying life.

Is there a way to argue against the permissibility of the mother’s actions in P1 on personalist grounds? Let us stipulate that R1 experiences harm, in the form of suffering and reduced opportunity, even though his life is overall a benefit. We can further state that:

(1) There are reasons against acting in a way that will cause suffering and loss of opportunity to future persons.

and:

(2) It is wrong to act in a way that will harm future persons who will suffer as a result, unless there are sufficiently compelling reasons that outweigh the suffering of future persons.

R1 will not suffer if he does not exist. So we have no reasons to create R1 for R1’s sake — he need not be rescued from nonexistence. The mother’s reasons in P1 are not sufficiently compelling. She would be inconvenienced, and, owing to her impatience, perhaps would even suffer emotionally if forced to wait two months before conceiving and giving birth to a child.\(^{129}\) Whatever benefits the mother might receive from conceiving now, they do not outweigh the harms to another person that will result from

\(^{129}\) In a later essay, Brock imagines that the mother would be inconvenienced by the disruption of her vacation plans if she waits. (see Wasserman, et al.) Any number of possibilities, some more morally frivolous than others, are possible. Waiting might interfere with a job, for example, or with an arbitrarily set deadline for childbearing. It does not much matter why the mother does not wish to wait, so long as her reasons are not sufficiently compelling to justify imposing the risk of harms on her child.
It could be objected, however, that this has not take into account the benefits to R1 of his mother’s decision not to wait. So we might also claim that:

(3) There are reasons in favor of acting in such a way that it benefits future persons who will not exist if another course of action is undertaken.

Thus we have the following reasons the P1 mother should not wait:

If she does not wait, R1, a future child, will exist and will enjoy many benefits during his life

If she waits, she will be inconvenienced and might suffer emotionally

And reasons the P1 mother should wait:

If she waits, D1, a future child, will exist and will enjoy many benefits during his life

If she does not wait, the future child, R1, who will thereby exist, will suffer and experience loss of opportunity

The benefits of either action are roughly the same. A future child will exist and will enjoy many benefits of his existence. The reasons for waiting, however, appear to tip the balance in favor of waiting. Avoiding inconvenience to oneself is not a sufficiently compelling reason to inflict harm on another. Even if the mother suffers emotionally during her wait, her temporary suffering does not provide a sufficiently compelling reason to risk inflicting lifelong suffering on a future child. And since parents have special obligations to protect their children from harm, inflicting harm on one’s child to
avoid inconvenience to oneself has a special moral stink about it. So, even if we grant
that R1’s life would be a benefit to him, there are reasons against his mother conceiving
now, and those reasons concern the harm that will befall R1. There is an alternative
available to the P1 mother, one in which she does not cause a child to suffer, but bestows
the same benefit. All other things being equal, i.e. the same benefit being present if the
mother waits or does not wait, it is wrong for the mother to choose not to wait, and wrong
because it causes her child to suffer. Although R1 is not worse off than he would
otherwise be, R1 is harmed by the suffering and loss of opportunity he will experience in
life.

Elizabeth Harman argues that, in both P1 and P2 type cases, “Because each
woman has an alternative in which she provides parallel benefits without parallel harms,
her harming action is wrong.” ¹³⁰ Harman, it should be noted, argues that harm itself
doesn’t explain the wrongness of the mother’s actions because harm never fully explains
wrongness. Rather, it is that the mother had an alternative available which harmed no
one, and that her reasons for not waiting to conceive were not sufficiently strong to
render her decision permissible.¹³¹ I agree with Harman that the P1 mother can provide
the same benefits, without, in one choice, causing harm, but I would argue that the
possibility of choosing an option with parallel benefits and no harm does not itself
account for the wrongness of the mother’s action. As I have already argued, there is
always the third option of not procreating at all, and having no desirable options, or no

¹³⁰ Harman, Elizabeth (2004) p 95
¹³¹ Harman, p 102
options that produce a better off substitute child, does not obviate the mother’s wrongdoing. We have no moral obligation to bestow the benefit of existence, so the alternative of being able to provide benefits without harm is irrelevant to whether there is wrongdoing in P1.

R1 will not benefit from his existence if his mother waits to conceive a child because R1 will not exist. Does his mother have reasons concerning benefits to her future child, to not wait? If his mother does not wait, R1 will exist but some other possible child will not, and she would have the very same reasons, if any, to benefit her other possible children by creating them. We need not claim that life is not a benefit, or that there is no obligation to benefit others in order to argue that the mother does no wrong by waiting and conceiving a different child, or no child at all. There are many reasons to create happy people, and they include benefiting others and acting in ways that will be good for another person. But those reasons are quite different from the reasons we have to avoid harming others, reasons against acting in ways that will be bad for another person. Reasons against harming others are stronger than reasons to benefit others. Benefiting others is good, and creating happy people is good, but it is not wrong to refrain from doing so. By not creating happy people, we merely fail to do something that would be good, which is not the same as doing something that would be bad. This asymmetry in harms and benefits supports the claim that there is no duty to bring happy people into existence, but that there is a duty to avoid bringing unhappy people into existence. The moral asymmetry is that it matters morally when a potentially miserable child is
produced, but it does not matter morally if a potentially happy child is not produced. We have no duty, it follows, to produce children who will be happy, but we do have a duty not to produce children who will be miserable. Or alternately, we do wrong and cause harm when we produce a potentially miserable child, but we do not do good when we produce a potentially happy child. Should the mother in P1 choose to wait, she would not harm or wrong R1 by failing to bring about his existence, although, assuming his life would be good, she would fail to bring about a good life. But again, that failure would be experienced by no child. No existing person would experience the lost opportunity for a good life, so she would fail to benefit no person. There is a significant moral difference between acting in such a way that it has a harmful effect on an existing person in the future, and acting in a way that never has an effect on any person. Harming an existing person, even if that person would not exist if you acted otherwise, is morally impermissible, absent morally compelling reasons for inflicting harm. In non-identity cases, where an individual’s existence is inseparable from a harm, there can be no compelling reasons to create a future harmed person for the sake of that harmed person. That is, a person cannot be created for his or her own sake, as there is no sake at stake until he or she has been created. The only possible reasons to create a child who will be harmed if he exists would be those reasons affecting already existing people. We have compelling reasons to avoid creating children for our own sakes, if those children will suffer unavoidably as a result of being born.

Are we painted into a corner? If we cannot create a person for her own sake, can
we *avoid* creating her for her own sake? The answer must be no. Not creating a person will, of course, result in there being no person who will benefit from the prevention of harm. That is precisely why we cannot “rescue” persons who do not exist, either by bringing about their existence, or by preventing their existence. However, in creating a person, we create the very possibility of harm to the created person. Thus, to avoid harming a person in the future, we must sometimes avoid creating the conditions necessary for causing harm. Arguably, the creation of any person results in the possibility of harm to that person, but we cannot have a duty to prevent, in advance, harms that cannot be foreseen. We certainly have duties to prevent foreseeable and serious harms, even if the persons who might be harmed do not yet exist. Why else should we cover our electrical outlets and avoid bed-of-nails cribs when setting up an expected baby’s nursery?\(^\text{132}\) We have those duties to prevent foreseeable harms in P1 and P2 cases, where no person yet exists, but where the person who *might* exist in the future will experience harm that could have been avoided without cost to the *subject* of harm.

\(^\text{132}\) This does not translate into a duty to never procreate. Surely our ordinary reasons for procreating are sufficiently compelling to justify procreation despite ordinary and foreseeable harms like bruised shins, bouts of influenza, dashed hopes and dreams, and other expected setbacks. Such harms might be avoidable, but at too great a cost to a child’s freedom and well-being, and at the risk of making *all* procreation too risky to pursue. (Thanks to Rachel Cohon for raising this concern.) On the other hand, we do not have a duty to procreate, and not creating persons requires no justification, so avoiding relatively minor harms and setbacks are *sufficient* reasons to avoid creating persons.
§1. Selecting for Disability

Most of the time, when prenatal or preimplantation diagnosis is used, its purpose is to prevent potential illness or disability in a future child by selecting against genes that might be implicated. In a relatively small number of cases, however, families wish to use prenatal diagnosis and other assisted reproductive technologies to select for particular disabilities. There have been a number of controversial cases, for example, involving deaf couples who seek assistance in ensuring the birth of a deaf child.

Arguments in favor of selecting for disability may well be double-edged swords, cutting both ways. The effort to have a child with a disability using assisted reproductive technologies undermines one of the key arguments used to oppose the employment of ART and prenatal diagnosis to select against disabilities. Selecting for disability, that is, deliberately selecting one embryo or fetus and rejecting another for reasons of disability (or the absence of disability), is at least a tacit admission that disability is a valid reason for embryo/fetus selection and/or discard. If it is claimed that parents can unproblematically choose a particular child over a different particular child, based on one (or more) possible traits that child might have, it must be allowed that parents can legitimately make reproductive decisions based on the particular genetic traits of their possible children. Such choices could include (and more commonly do) the choice to avoid the birth of a child with a disability. Arguing for selection of disability counts as an
admission that disability is not off the table when it comes to discussions about parental choices and preferences. It admits that categories like “disabled” and “non-disabled” or “deaf” and “hearing” have a legitimate place in our thinking about reproductive freedom, parental choice, and the welfare of future children. Adrienne Asch argues that it is “problematic to select for a disabling trait”1 for the same of the same reasons that it is problematic to select against a disability:

Because I oppose using selective abortion to avoid any traits, I oppose efforts of deaf parents or parents with achondroplasia to abort fetuses that would not share those particular traits. People with disabilities who seek such likeness in a child make the same mistake as those who reject children based on one characteristic — believing that the presence or absence of a trait predicts a satisfying life for a child, a fulfilling parent-child relationship, and a happy family life. 2

Kyle Anstey argues that parents who deliberately want to ensure the birth of deaf children cannot appeal to the claim that the only harms such children will experience will be socially imposed.3 While there is nothing inherently unjust about the preference for a deaf child over a hearing child, such preferences are nonetheless problematic because of their social consequences. Specifically, Anstey points to negative social consequences for deaf persons which would result because the same arguments that speak in favor of selecting for deafness can be appealed to in arguments for preventing the existence of a deaf child. By allowing selection for deafness, and for the right of parents to select a

1 Asch in Parens & Asch p 241
2 Asch in Parens & Asch, p253
3 Anstey opposes both selecting for and selecting against deafness on consequentialist grounds. Anstey 2002.
particular type of child, or a child with a particular type of disability, the arguments for selection admit that the categories of “disabled” and “non-disabled” or, specifically, “deaf” and “hearing” have a legitimate place in reproductive decision-making. “The same logic underpinning support for the assurance of a deaf child can be employed by arguments supporting the avoidance of children with this impairment,” Anstey notes.\(^4\) That is, if reproductive freedom includes the right to choose a child with a disability, it includes as well the right to avoid bearing children with disabilities, whenever possible. Additionally, if the deaf are understood to count as a minority culture, and a minority culture that can improve its overall standing by increasing its membership through the birth of deaf children, the possibility that its membership will instead decrease must be a genuine concern. It is likely, Anstey argues, that preferences for avoiding deafness will outweigh (or outnumber) preferences for deaf children, and the reproductive technologies like artificial insemination, IVF and PGD necessary to ensure the birth of a genetically deaf child will remain inaccessible to most, while prenatal screening to avoid deafness is more widely available. The upshot is that the efforts of a few to ensure the birth of a deaf child will open the door to the many who will seek to avoid bearing a deaf child, and this will likely result in there being, in the future, a smaller deaf community. By seeking to ensure their child’s membership in a minority culture, Anstey argues, parents who select for deafness may undermine that very culture, “and in so doing [reduce] the political power of a deaf culture. Because their action contributes to social injustice, this couple therefore cannot be absolved of responsibility for the harms their children will face on the

\(^4\) Anstey, Kyle W. 2002
grounds that these are socially imposed.” Some in the Deaf Culture community claim that selecting against deaf children amounts to genocide and the destruction of unique culture. If Anstey is right, efforts to guarantee the birth of a deaf child may be impermissible as well because the consequences are equally deleterious. To the extent that the disabled in general count as a distinct minority group, the same considerations ought to apply.

McMahan argues that in practice, the distinction between positive selection, or selection *for* certain traits, and negative selection, or selection against certain traits, evaporates. Positive selection is thus objectionable if negative selection is objectionable, because “the attempt to bring a person of a certain type into existence is simultaneously an attempt not to bring into existence a person who is not of that type.” The upshot is that if negative selection is objectionable to persons with disabilities, positive selection ought to be equally so, since they amount to the same thing.

Among the most prominent proponents of selecting for disability are members of the Deaf community, who argue that deafness is not a disability, that Deaf persons participate in a unique culture, with its own language, and that deafness is an essential criterion of membership in that culture. For that reason, Deaf couples sometimes wish to have children who are Deaf. Like many minorities and members of minority cultures, it is further argued, the Deaf are victims of discrimination that imposes burdens and

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5 *ibid.*

6 McMahan 2005 p77
disadvantages on them. Arguments in favor of selecting for disability often rest on the claim that many, if not all, disabilities are socially constructed in that way. The disabling features of deafness, for example, are not, according to this argument, biologically imposed, but are the result of latent and blatant discrimination in societies that are not structured to allow for the full participation of the deaf. The disadvantages of being deaf, on this view, are analogous to the disadvantages of being African American — if some people do worse because of their deafness compared to their hearing peers, it is for the same reasons that some people do worse because of their skin color, compared to their white counterparts. It’s not because deafness, or having dark skin, are in some way inherently inferior or disadvantageous, but rather that the disadvantages are, within particular social and cultural contexts, the result of discrimination. There are two distinct arguments being made here. The first is that the disability in question is not a real disability, and therefore there is nothing wrong with selecting for it. The second is that selecting a deaf child is not wrong, any more than having an African American child is wrong, because the associated harms the children will experience are entirely socially imposed.

There is certainly some merit to the claim that not every disadvantage of a given disability is inherent to that disability. When wheelchair accessible transportation is made available, it improves the mobility of wheelchair bound persons. Likewise the many other accommodations that assist persons with disabilities, such as closed captioning on television, TTY and other telecommunications devices for the deaf, Braille signs,
wheelchair ramps, etc. If society were better constructed so as to accommodate a wider range of abilities, many of the impairments associated with disability would be less limiting. Nonetheless, it paints too rosy a picture of disability (or perhaps, too dim a view of society), to suggest that all of the burdens and disadvantages of disability are socially constructed. Severe cognitive impairment, for example, will significantly reduce opportunities for employment and for social relationships. As Steinbock notes, “Someone who is severely mentally retarded may have a life worth living, but cannot hold a job, marry, or raise children. This is not a matter of social prejudice, but of reality.”\(^7\) Being deaf, while perhaps less limiting on the disability spectrum, and despite the possible compensations of membership in Deaf Culture, will also result in some estrangement from mainstream culture and society, will limit the range of employment opportunities, and will (for better or worse) deprive an individual of access to experiences that only the hearing can enjoy: listening to music, or to a poet reciting her own words, or to the sound of birds singing, or hearing the voice of one’s own child. It is at best an exaggeration to say that deafness is in its entirety a socially imposed disability when hearing is, not only for most humans but for most animal species on the planet, both the norm and an important tool for interacting with and navigating through social and natural environments. Achondroplastic dwarfism is a condition that is relatively easily accommodated, so far as concerns the handicaps associated with short stature. Nonetheless, enhancing public accommodation cannot compensate for the many orthopedic problems associated with dwarfism, including bone malformation and

\(^7\) Steinbock, in Burley & Harris, p180
degenerative joint disease, or for restricted lung growth resulting in reduced pulmonary function. Many of these effects of dwarfism require frequent surgical correction and painful therapy, and such effects cannot be eliminated by increased public accommodation. The same is true, to a lesser or greater degree, with other disabilities. While there is considerable variation within the range of what counts as normal for humans as a species, there are some conditions that fall outside the range of normal (on both ends of the spectrum), and some of that variation has disabling effects that diminish opportunities and the prospects for human flourishing. There is no doubt that some of the disadvantages of disability are socially imposed, but it is also undoubtedly the case that disabilities that constitute a significant divergence from the norm may not be capable of adequate compensation through adaptation of social structures. There might be much that can be done to minimize the disadvantages and burdens of disability, but those disabilities may remain to some extent not fully remediable. While a hearing child born to deaf parents and immersed at birth in Deaf Culture might have a maximally open future, with access to and the capacity to participate in the fullest possible range of cultures and languages, a deaf child will not have the same access or opportunity to participate in the larger, mainstream culture in which hearing is an integral part of communication and participation, as well as a source of significant cultural experiences.

A companion to the argument that disabilities are socially constructed is the argument that the preference for avoiding disability in one’s offspring is based on misinformation and misunderstanding of the nature of disabilities, and an exaggeration of
the negative aspects and ignorance of the positive aspects of life with a disability. There is, according to this argument, both a lack of understanding about how disabilities affect disabled persons themselves, and about how difficult or challenging it is for parents and families to live with disabled children. A further claim is often made that living with a disabled child is a life-enhancing experience, one that makes us better parents, better siblings, better people, and one that creates opportunities for the appreciation and understanding of otherwise unknown and different ways of living and flourishing.

Harriet McBryde Johnson, a disability rights activist and attorney, makes the case that her disability, which requires the use of a motorized wheelchair, a special diet, and the employment of a personal assistant, does not make her life worse than any other:

Are we worse off? I don’t think so. Not in any meaningful sense. There are too many variables. For those of us with congenital conditions, disability shapes all we are. Those disabled later in life adapt. We take constraints that no one would choose and build rich and satisfying lives within them. We enjoy pleasures other people enjoy, and pleasures peculiarly our own. We have something the world needs.8

To make the case that disabilities are entirely socially constructed, and that disability itself is inherently neutral, is to deny that there are valuable and meaningful options that are foreclosed to some individuals with disabilities solely because of the nature of the disability itself. But surely this goes too far. We cannot plausibly deny that disabling traits close off some possibilities, or that some disabilities foreclose more possibilities than others. As Asch notes, “The inability to move without mechanical aid,

8 Harriet McBryde Johnson, 2003
to see, to hear, or to learn is not inherently neutral. Disability itself limits some options.”

That closing off or limiting of some options is generally viewed as disvaluable, and provides a reason for those who are able-bodied to want to avoid disability in themselves, and reasons for parents to want to avoid disability in their children.

A child with Down syndrome may never climb Mount Rainier because his strength, agility, and stamina may preclude it; he may also never read philosophy because he does not have the skills to decipher abstract material. Granting that people who can climb mountains and read abstract papers derive enjoyment and meaning from such activities, then being foreclosed from them, not by one’s own choice, is regrettable. The lack of possibility is widely seen as disvaluable. In addition, these lacks of capacity stem from the characteristics of the individual who is not strong enough or agile enough to climb, or who is unable by any teaching now known to us to grasp complex abstract discourse. In that sense, disability community critics acknowledge that these facets of some disabilities are “real” — inherent in the characteristic itself — and not an artifact of any interaction with the environment.

Not all of the foreclosed options will be of value to affected individuals, and this will be in part because we adapt our desires and values to the lives we have available to us. A child or adult with Down syndrome will likely not miss being able to read philosophy books. McBryde Johnson might not value the mobility and independence that are not available to her, but adapting one’s preferences to one’s circumstances implies that the loss of some things that are generally valued by humans requires adaptation, and an adjustment to circumstances that are beyond our control. We do not generally think

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9 Asch, A. 1989, quoted in Parens & Asch, p23
10 Parens & Asch in Parens & Asch, p24
that being forced to adjust to circumstances beyond our control is neutral — rather, it is often viewed as tragic, unfortunate, and undesirable. That we, like many other species, are able to adapt to such circumstances does not make it a matter of indifference when we are required to.

It is entirely possible that the non-disabled general public has an exaggerated sense of the negative aspects of disability. It is also possible that persons with congenital disabilities, who know no other life, either do not know what they are missing, or are incapable of appreciating the value of experiences they cannot have. Benatar, who argues that existence is *always* a burden and a harm, and that it is better to never come into existence, claims “it is quite possible that we could be engaged in mass self-deception about how wonderful things are for us.”11 When we are used to making lemonade out of lemons, that is, we cease to see that a surfeit of lemons (and lack of anything sweeter) is a problem.

Amongst people without any serious disease or disability it is often thought that such conditions are sufficiently serious harms to make never coming to exist preferable to existence with such diseases or disabilities. Very often, however, people who have or acquire these same appalling conditions adapt to them and prefer existence with these conditions to never existing (or ceasing to exist)... Our judgments of what constitutes acceptable limits of suffering are deeply rooted in the state of our well-being. How can we be so confident that we are not guilty of self-deception?

11 Benatar (1997) p352

12 Benatar (1997) p 352
The adaptive preference shows, Benatar argues, that “the mere belief that one has been benefited is not sufficient to show that one has been benefited or that one’s appraisal is rational.” This applies equally to the disabled and non-disabled — Benatar’s ultimate point is that everyone may be mistaken about the supposed benefits of existence.

We need not suppose that mass self-deception is at work, or that people’s preferences are irrational to see that on both sides — for the disabled and the non-disabled — it is plausible that there are misconceptions and misjudgments, both about how bad life with a disability can be, and about how good life with a disability (or without one) really is. Just as it is part of the human condition to suffer, it is also part of the human condition to sometimes exaggerate one’s suffering, and sometimes to minimize it, as suits the requirements of the moment. In this aspect of human nature, the disabled and non-disabled can find common ground.

Does the existence of the disabled benefit others in perhaps intangible ways?

Writing about her severely retarded daughter Sesha, Eva Feder Kittay says:

...I agree that the world would be a poorer place without persons with Down syndrome or other sources of retardation… Our household has been immeasurably enriched by Sesha. People like [Sesha] force us to think more profoundly about what it is to be human, what our obligations are to others, why we have these obligations, what the source of human joy and human sorrow is… We understand so much more about who we are and what moves us when we see what moves Sesha. I understand so

13 ibid.
much more of what it is to be a parent and love a child…”

There’s no profit in arguing that the lives of the disabled do not have the potential to be rich and full, nor that their existence enriches the lives of others as well. Stories of persons with disabilities overcoming their adversities abound in literature, movies and television, and are frequently inspirational, and often enhance our understanding of the human condition, and of the value and meaning of life. It may well be that we are all better off because of the disabled individuals among us, and that it is desirable, from that perspective, that such persons exist to challenge our preconceptions, to show us what it possible, and to give us access to true and profound insights. There is, however, an evident difficulty in suggesting that parents ought to bring children with disabilities into existence in order that the experience of parenting such children will enhance their own lives, or enrich the lives of others. If we take seriously the possibility that disabilities result in burdens, hardships and suffering for disabled individuals that the non-disabled do not experience, then we are asking disabled individuals — our own children — to assume those burdens, hardships and sufferings for the sake of others, and to do so without the possibility of consent ing in advance. Kittay writes of her daughter,

I felt the hurt for her impairments, for the profound limits of the life she could experience, for the multiple aspects of life she could never know or even know that she couldn’t know. I wept for Sesha — not for me, not for Jeffrey [my husband]… but for her, her sweetness, her limitation, and the pain of knowing what a small aspect of human life she would inhabit.

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14 Kittay, E.F., in Parens & Asch p172

15 Kittay p166
To suggest that parents ought to bring such children into the world is to say, as well, that the families of those children ought to assume the burdens, hardships and suffering that go along with parenting and living with disabled children and siblings, and to do so at least in part so that others, the world in general, might gain by it. If we ought not exploit others for our own personal gain (even to make ourselves “better” persons), then we ought not exploit persons with disabilities, or their families, for whatever tangible or intangible benefits our associations with them might bring. That we might ennable ourselves because there are persons with disabilities in the world does not justify our ensuring that there continues to be a steady supply of such persons available for our potential betterment.\textsuperscript{16} Kittay argues that “it is terribly cruel to burden a couple with the responsibility for a severely handicapped child when prenatal testing can determine in advance the condition of the fetus.”\textsuperscript{17}

Steinbock notes that the burdens associated with caring for children with disabilities can continue well into the adulthood of those children, when their parents are of an advanced age. Such burdens are not trivial. The desire to avoid them does not suggest a character flaw. The seriousness of many of the hardships associated with some disabilities gives parents good reason to want to avoid burdening their children with them as well:

It is reasonable for parents to wish to avoid having a

\textsuperscript{16} Preventing the birth of children with genetic disabilities will not in any way make disabilities disappear, since disabilities have many causes.

\textsuperscript{17} Kittay p168
child with a serious disability, like spina bifida or Down syndrome or cystic fibrosis, because these conditions may involve undesirable events, such as pain, repeated hospitalizations and operations, paralysis, a shortened life span, limited educational and job opportunities, limited independence, and so forth. This is not to say that everyone with a serious disability will experience these difficulties, only that they may, and these are problems parents reasonably wish their children not to have.\textsuperscript{18}

Whether or not parents have unrealistic expectations of what life with a disabled child will be like, whether or not they are wrong in thinking that disabilities are unusually burdensome and require greater sacrifices than they are willing or able to make, it is not unreasonable, nor is it morally impermissible, for parents to try to avoid the challenges and difficulties they foresee (even if their foresight is myopic). They may well lose opportunities for enrichment that only the parents of a disabled child can ever experience, but in so doing, in making \textit{that} sacrifice, they will satisfy one of their obligations as parents by preventing the suffering and hardship that would have been experienced by their child. Thus, even if it is true that the world is made a better place because people with congenital handicaps are in it, we cannot require the creation of such persons without exploiting them in a way that is not morally permissible.

\textit{§2. Creating disabled people vs. disabling existing people}

One argument against selecting embryos with indications for disability is that doing so is morally equivalent to disabling an already existing person. Selecting a deaf embryo would be analogous to and the moral equivalent of deafening a hearing child,

\textsuperscript{18} Steinbock in P
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according to this argument.\textsuperscript{19} Clearly it would be immoral for parents who desired a deaf child to intentionally cause their hearing child to become deaf, and so, the argument goes, intentionally selecting a disabled child, when one could have a child without a disability, is also immoral.

Matti Häyry rejects the analogy, arguing that it is “based on the assumption that only the objective, or impersonal outcomes of our actions are morally relevant.”\textsuperscript{20} Selecting an embryo is giving “that specific potential person a chance to live,” whereas deafening a hearing child changes “the qualities of an already existing individual.”\textsuperscript{21} Although the outcome — that a deaf child exists — appears to be the same, the difference is evident if we ask, counterfactually, who would have existed and what would have happened if the choice in question were not made. Deafening a hearing child would not be in that child’s best interests, and would at least arguably be a change for the worse for that child, which would trump considerations of reproductive autonomy.\textsuperscript{22} In the case of selecting an embryo, Häyry argues, arguments from the child’s best interests cannot apply, for “any individual who comes into existence will, other things being equal, have

\textsuperscript{19} See Harris (2000) p97 for an example of this argument. Harris writes “I don not belief there is a difference between choosing a preimplantation deaf embryo and refusing a cure to a newborn. Nor do I see an important difference between refusing a cure and deliberately deafening a child.”

\textsuperscript{20} Häyry, M. 2004, p510

\textsuperscript{21} Häyry, p510

\textsuperscript{22} Some in the Deaf community argue that deafness is not a disability at all, a position that would seemingly imply a rejection of the claim that deafening a hearing child would not be in the child’s best interests.
the best possible life for her.” Häyry argues. The freedom to select a desired embryo “can be supported by appeals to reproductive autonomy,” Häyry argues.

The case is less clear, however, when we consider altering an embryo or fetus in order to ensure the birth of a deaf child. There, so long as we do not maintain that an embryo or fetus is a person with interests or rights that might be violated, there seems to be little difference between altering or injuring an embryo or fetus, and selecting an embryo with genetic indicators for deafness.

McMahan argues that the position of disability rights opponents of preimplantation and prenatal screening and selection implies that it is permissible to cause a child to be disabled:

The crucial premise here is that if it is impermissible to try to prevent a certain type of outcome, such as having a disabled rather than a normal child, and if the prevention of that type of outcome is so objectionable that it is even permissible to deprive people of the means of preventing it, then it ought to be permissible to cause that outcome, provided one does so by otherwise permissible means. In short, if the outcome must be allowed to occur, how could it be impermissible to cause it to occur? McMahan imagines a scenario in which a woman takes an aphrodisiac drug that will enhance sexual pleasure, but will also enhance fertility by inducing ovulation. It also has a high probability of damaging the egg “in a way that will cause any child conceived through the fertilization of that egg to be disabled,” although the child’s life will be worth

23 Häyry, p511
24 McMahan 2005 p91
If we condemn a woman who takes the drug for causing herself to have a
disabled child instead of a normal child, if we accept that there is a moral objection to
causing this to happen, then we ought also to “accept that it is permissible for people to
try, by morally permissible means, to avoid having a disabled rather than a normal
child.”

Put another way, if it is wrong for us to prevent the creation of children with
disabilities, we should also be allowed to cause children with disabilities to exist, but if
we should not cause children to be disabled, we can permissibly prevent disabled children
from existing. Thus, McMahan argues, opponents of preimplantation or prenatal
screening and selection must allow that there can be no moral objection to a woman
taking the aphrodisiac drug, even if it causes her to conceive a child with a disability.
Furthermore, there can be no objection to causing a prenatal injury to a fetus that results
in a disability, as in the P2 case where the mother failed to take a drug that would have
prevented her child from being born with a disability.

It seems, therefore, that opponents of screening and selection who also claim that it is not worse to be disabled
have no basis for objecting to the infliction of prenatal injury that causes congenital disability. Moreover, to object
to the infliction of disabling prenatal injury or to enact measures to prevent it would seem to express a negative
view of disability and perhaps of the disabled themselves. And, if effective, efforts to prevent disabling prenatal injury
would have other effects comparable to those of prohibiting or restricting screening for disability and selection, such as
reducing the number of disabled people who would be born, thereby also threatening the sense of collective

25 McMahan 2005 p90
26 ibid p91
identity and solidarity among the disabled as well as diminishing their visibility and political power. So for those opponents of selection who also hold that it is not a harm or misfortune to be disabled, it seems that there are not only no reasons to object to the infliction of disabling prenatal injury, but even positive reasons, if other things are equal, not to object to it or try to prevent it. While these people can recognize the impermissibility of causing a person to be disabled, they cannot — unless they embrace the implausible view that a fetus is a person with a right to bodily integrity — reject the view that it is permissible to inflict prenatal injury that causes an individual to be congenitally disabled rather than normal.²⁷

If McMahan is right, then the objection to preimplantation or prenatal screening and selection ought to extend as well to any prenatal measures taken to prevent birth defects and disabilities, including routine prenatal precautions such as taking vitamins and abstaining from drugs and alcohol. Although routine prenatal precautions are clearly intended to promote the birth of normal, healthy babies and prevent birth defects and disabilities, they are not generally considered objectionable, which points to the fact that a disability is not generally conceived as a “neutral” trait, but is rather considered a harm or a misfortune to be avoided when possible. If one takes the view that a trait such as deafness is not a disability at all, then it would clearly be permissible to alter or injure a fetus so that the resulting child would be deaf. But it should also be permissible, if

²⁷ McMahan p98
deafness is *no disability at all*, to alter or injure an existing child so that it would be deaf.28

If causing a fetus to be injured or altered in a way that results in a disability for the future child is no different than causing a person with a disability to be conceived, then the no-difference intuition appears to hold. That is, the distinction between P1 and P2 type cases dissolves. That no person exists yet to be harmed in non-identity cases would be irrelevant, for no person yet exists in P2 cases either, but in both kinds of cases, a future person is affected by prenatal causes that result in disability. Thus, deliberately creating a child with a disability, and simply allowing a child to be born with a disability — whether the cause was accidental, or negligent, or deliberate — are no different.

§3. Selecting Against Disability

There are several significant challenges to prenatal screening, selective abortion and PGD made by disability rights scholars. A significant challenge is presented by the Expressivist Argument, which claims that these practices send a negative and hurtful message to existing people with disabilities, a message that says people like them should not exist. The Expressivist Argument, like other disability critiques, considers the welfare of existing people with disabilities, and ignores the legitimate interest people might have in avoiding disabilities, or in not having children with disabilities. The hurt feelings of

28 There are generally so-called adjustment costs associated with becoming disabled — hardships associated specifically with adjusting to a newly acquired disability. Such costs would presumably be temporary, but might nonetheless be substantially negative. Imposing such costs could argue against deafening a hearing child, if the child were old enough to experience and regret the loss of hearing. A fetus or embryo would not have to pay those costs.
any group, while not trivial, must be viewed as far less significant when weighed against the suffering and harm, and the impairment of significant interests, that an avoidable disease or disability, even one compatible with a worthwhile life, can cause.

I'll address other disability rights arguments, including: the claim that a loss of support for existing people with disabilities will follow from a reduction in the number of people with disabilities and the Social Construction argument which claims that disabilities are entirely socially constructed. I’ll also address the Deaf Culture argument which specifically claims that deafness is not a disability (except as a socially constructed one), but in fact is a prerequisite for membership in a unique, albeit different, culture. The “parental attitude” argument maintains that prenatal testing to select against disability is symptomatic of improper attitudes towards parenthood, attitudes informed by misconceptions and stereotypes about disability, and unrealistic expectations about creating ideal children. An additional argument made by Adrienne Asch contends that the evaluation of a single trait, rather than a whole person, is morally problematic. Letting a single “undesirable” (and morally suspect) characteristic trump all the positive aspects of a possible life is as objectionable as discriminating on the basis of race or gender, she claims.

I will argue, generally, that not all “undesirable” traits or genes are morally suspect as grounds for choosing against certain offspring in the way that, say, skin color might be. It is not only morally permissible for parents to choose against diseases and
disabilities that cause significant harm to the physical or emotional well-being, or to the rights and interests of a contingent child, it is morally imperative.

§3.1 The Expressivist Argument

An important objection to prenatal screening and selective abortion is the so-called Expressivist Argument. Much ink has been spilled and various arguments have been employed to counter this objection. That the argument attracts as much attention as it does suggests that there is something intuitively compelling about it. I will argue that it is indeed a compelling argument, but one that ultimately cannot carry as much weight as those who make the objection would have it.

The Expressivist Argument says that prenatal screening and selective abortion send an overwhelmingly negative message to the disabled, a message that says “we don’t want people like you to be born” or “people like you shouldn’t exist.” Prenatal screening and selective abortion, on this view, are acts that express discriminatory and offensive attitudes about certain disabling traits, and send “a hurtful message to people who live with those traits.” The hurtful message is “that people are reducible to a single, perceived-to-be-undesirable trait,” and that single trait can obliterate the whole. The attitude or belief expressed by prenatal screening and selective abortion, that having a disability is so undesirable and unacceptable that nothing else matters about the person-

29 This section contains work from a previous paper, “The Expressivist Argument.”


31 Parens & Asch, p 14
to-be who is prevented from existing, implies by extension, the argument claims, that nothing else matters about existing persons with disabilities either.

The Expressivist Argument does not claim that prenatal screening and selective abortion are wrong because a fetus is harmed. Many proponents of the argument, including Asch, defend reproductive freedom and the right to abortion, but criticize selective abortion of “defective” fetuses not because it harms a fetus — they accept the view that fetuses are not persons with rights — but because it harms existing disabled persons. Nancy Press puts the point this way: “the choice to abort an otherwise desired fetus on the basis of one trait or characteristic sends the message that the lives of those with disability are not valuable.”32 Thus, prenatal testing and selective abortion harm existing disabled persons because they express hurtful negative attitudes towards the disabled — attitudes, it is claimed, that are founded on ignorance and misconceptions about life with disability. Selective abortion of an otherwise wanted fetus, because of a disability, offends and insults existing persons with disabilities by telling them that their lives are not worth living, and that they have no right to exist. For people living with the disabilities that can be diagnosed through prenatal screening, Asch says, it is “demoralizing” to learn that “the world one lives in considers it better to ‘solve’ problems of disability by prenatal detection and abortion... It invalidates the effort to lead a life in an inhospitable world.”33


33 Asch, Adrienne. “Why I Haven’t Changed My Mind about Prenatal Diagnosis: Reflections and Refinements” in Parens & Asch, p240
It is clear why the Expressivist Argument is so compelling. If the disability rights community is correct about the message sent by prenatal screening and selective abortion, then practices endorsed by a substantial segment of society and the medical profession are deeply offensive to a minority group that has historically been oppressed and discriminated against. Asch puts it this way: “support for prenatal diagnosis and selective abortion contravenes the goals of people with disabilities for full acceptance and inclusion in our society.”

That’s a serious charge, one that should give persons of good conscience pause. Given the nature of the Expressivist Argument, it is no surprise that a common counter-argument is that the disability rights community is somehow wrong about the message sent by prenatal screening and selective abortion.

Steinbock is unpersuaded by the Expressivist Argument. “From the fact that a couple wants to avoid the birth of a child with a disability, it just does not follow that they value less the lives of existing people with disabilities, any more than taking folic acid to avoid spina bifida indicates a devaluing of the lives of people with spina bifida.” Buchanan argues “it is not the people with disabilities that we devalue; it is the disabilities themselves... We devalue the disabilities because we value the opportunities and welfare of the people who have them.” Thus, Buchanan writes, “there is nothing irrational, motivationally incoherent, or disingenuous in saying that we devalue the

34 Asch, p234

35 Steinbock, Bonnie. “Disability, Prenatal Testing, and Selective Abortion” in Parens and Asch, p121

36 Buchanan, Allen; Brock, Dan W. et al. From Chance to Choice: Genetics and Justice. Cambridge; Cambridge University Press, 2000. p278
disabilities and wish to reduce their incidence while valuing existing persons with
disabilities, and that we value them the same as those who do not have disabilities.”
Mary Ann Baily argues that her choice to have amniocentesis “expresses only the fact
that given a choice, I would rather my child did not have a disability. That’s all.”
The main point of arguments like these is that one can rationally and consistently separate
persons from their disabilities, respecting and valuing the life of the person with a
disability, while at the same time seeking to prevent disability in future persons. The
belief that prenatal screening and abortion convey some contrary message that existing
people with disabilities are not valuable is mistaken, according to these arguments.

Nelson takes a slightly different tack, arguing that the “semantic force of
diagnostic tests and pregnancy termination is not well defined within our shared symbol
systems.” In other words, the meaning or message of prenatal screening and selective
abortion are simply not clear. Sometimes, prenatal screening and selective abortion will
indeed express a discriminatory bias against the disabled, other times they will express
the thwarted hopes and expectations (perhaps unrealistic or trivial) of prospective parents,

37 ibid.
38 Both Steinbock and Buchanan have much more fully developed responses to disability critiques of pre-
natal screening and, in Buchanan’s article, genetic interventions. I focus here only on direct responses to
what I take to be the main thrust of the Expressivist Argument -- that prenatal testing (and genetic interven-
tion) insults and offends persons with disabilities. In developing his response to the Expressivist Argument,
Buchanan also offers an account of the moral status of fetuses, as well as a discussion of “what it means to
say that a decision expresses (or presupposes) a particular judgment.” (Buchanan p274). Both of these ar-
guments support his conclusion that one can rationally separate persons from their disabilities, and consist-
tently hold the view that persons with disabilities are valuable, but disabilities are not.
39 Baily, Mary Ann. “Why I had Amniocentesis,” in Parens & Asch, p 68
tive Decision Making and Policies” in Parens and Asch, p197
and other times, they might merely express practical concerns about, for example, the economic impact of a child with a disability. But absent a settled meaning of the acts within the social discourse, “screening and aborting do not wear their meaning on their sleeves.”

It is safe to assume that offending the disabled is in itself never the reason that motivates selective abortion. It is equally safe to assume that the decision to abort an otherwise wanted fetus for fetal indications is generally not a decision taken lightly or approached cavalierly by those faced with it. But suppose it was. Suppose that expectant parents faced with the prospect of a disabled child never gave a second thought to terminating the pregnancy. Suppose it never even crossed the minds of such parents that they might actually keep and raise a disabled child. Even if the attitudes that inform a decision to abort a “defective” fetus reflect bigotry and bias against the disabled, or reflect a belief that lives with disability are not worth living, it is still implausible to say that the abortion itself is undertaken for the explicit purpose of expressing one’s contempt or dislike for existing persons with disability. But while offense is not intended, it is clearly taken by at least some in the disability rights community. As Asch and Parens note, “That prospective parents do not intend to send a hurtful message does not speak to the fact that many people with disabilities receive such a message and are pained by it.”

For this reason, the counter-arguments offered above don’t really address the central point

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41 Nelson, p 211

42 Parens and Asch, p 15
of the Expressivist Argument: prenatal testing and selective abortion hurts, offends, insults and demoralizes existing persons with disabilities. At best, the arguments may point to reasons why persons with disabilities ought not be hurt and offended, or why the hurt and offense are based on a misunderstanding of the motives behind prenatal screening and selective abortion. Taking this approach to the Expressivist Argument, however, only results in the two sides talking past each other.

In the town where I live, there has been for years a heated, frequently nasty political debate about the local high school’s use of a Native American mascot. Although Native American leaders have asked the school to abandon the stereotypically depicted mascot, traditionalists in the community have strongly objected, claiming that they mean no offense by the mascot, and, in fact, that it is a sign of respect and reverence for Native Americans. The parallels to the Expressivist Argument should be clear. The same arguments used against the Expressivist Argument are used in defense of the high school mascot: offense is not intended, the mascot shows not that we don’t value and respect Native Americans, but that we do value and respect them. It may well be true that these sentiments are sincere, but the counter-arguments, when examined, imply rather bizarrely and implausibly that Native Americans, an historically oppressed and marginalized people, are not qualified to judge what insults and offends them. I would argue that only Native Americans are truly in a position to judge what offends and insults them, and there is no reason to think that the matter is any different for persons with disabilities.
I suggest that there is something deeply subjective about being a member of an
oppressed and marginalized minority group — it’s an experience the privileged majority
(in whatever context that majority is realized) can’t really fathom. There is also
something deeply subjective about being a person with a disability. Few, if any, able-
bodied persons have the conceptual tools adequate to imagine what life with a serious
disability would be like, what it would be like to never see or hear, walk or talk. Given
that, it is quite plausible that the disabled are uniquely qualified to judge what is offensive
and insulting to them, and if they say that prenatal screening and selective abortion carry
a hurtful message, we ought to take them at their word. But even if it’s not true that the
experience of disability is deeply subjective, even if a non-disabled person with sufficient
imagination can formulate a robust conception of life with a disability, there is no reason
to think that persons with disabilities are somehow mistaken about being offended and
hurt by prenatal screening and abortion. Being hurt and offended is subjective; being told
that you have no reason to be hurt and offended, or that the offense was not intended,
does not always make the hurt go away. It would be more fruitful to concede that to the
disabled, the expressive meaning of prenatal screening and selective abortion is quite
clear in a way that it may never be clear to the nondisabled. No individual or group can
speak for all persons with disabilities any more than any individual or group of Native
Americans can speak for all Native Americans, but the fact that some in the disability
rights community are insulted, hurt and offended by prenatal screening and selective
abortion is reason enough to concede the Expressivist Argument, and to stop making
claims that the offense is based on a misunderstanding of some kind. It will cost little to do so.

At the end of the day, the Expressivist Argument can’t carry the weight it must if the remedy it proposes is to limit the availability of prenatal testing and selective abortion for disabling conditions. Limiting reproductive choice is too severe a remedy for the problem of offending a minority group. It’s not the fact that the disabled are a minority that makes the remedy too harsh — it would be too harsh even if the persons who took offense to prenatal screening and selective abortion were in the majority. It is too harsh because the remedy would violate the right to reproductive freedom when no comparable right belonging to the disabled is violated by the reproductive services in question. We simply don’t have the right not to be offended or have our feelings hurt. The purpose of prenatal screening and selective abortion is not to oppress persons with disabilities — it is nearly impossible to conceive of parents who would abort an otherwise wanted fetus for that reason.

It may well be that the underlying cause, the motive behind selective abortion is the same motive behind the social and political exclusion of persons with disabilities — attitudes of bias against the disabled. But the fact that two actions may have the same motive does not make them morally or causally equivalent. Exterminating existing disabled persons could also be motivated by an attitude of bias against the disabled, but, unless the claim is made that a fetus is a person with a right not to be killed, exterminating existing persons and killing disabled fetuses are not on an equal moral
footing. Exterminating the disabled would harm existing persons and violate their rights; killing a disabled fetus prevents a potential future person from existing, but violates no one’s right to live — not the fetus’s rights, for it doesn’t have any — nor the rights of any existing person. If anyone takes from prenatal screening and abortion the message that existing persons with disabilities ought to be exterminated, they will be hard pressed to demonstrate any causal connection between the expression and actual exterminations. 

Absent hard evidence that prenatal screening and selective abortion result in substantial harm to persons with disabilities, either in the form of increased discrimination and hostility towards the disabled, or in the form of other conditions that violate the rights of persons with disabilities, limiting reproductive choice is an excessive remedy for the problem of causing offense to persons with disabilities.

Some disability critics of prenatal testing do claim that the message implicit in prenatal testing, that “your kind isn’t wanted” or “your kind shouldn’t exist,” manifests in explicit discrimination against the disabled. The existence and availability of prenatal testing and selective abortion, on this view, “engenders or reinforces public perceptions that the disabled should not exist, making intolerance and discrimination toward them more likely.”

But if there is a causal connection between access to prenatal testing and discrimination against the disabled, it is obscure. Indeed, some of the evidence suggests that the increased availability of prenatal screening has been concurrent with an increase

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43 Genocidal campaigns such as the Nazi exterminations of the disabled are a notable exception.

44 Robertson, John. “Genetic Selection of Offspring Characteristics” quoted in Steinbock, p 120.
in social resources and access to employment and educational opportunities for the disabled, as well as increased legal protection through, for example, the Americans with Disabilities Act (ADA). There is no definitive correlation between the greater availability of prenatal screening and greater access and protection for people with disabilities — they may well be independent phenomena — but neither is there a demonstrable correlation between prenatal screening and explicit discrimination against the disabled. In the absence of such a correlation, limiting reproductive choice, including parental choices about the kinds of lives their future children might have, can’t be justified. Moreover, the Expressivist Argument makes the claim that parents ought not select against a fetus or embryo with a detectable disability for the sake of existing persons with disabilities. That is, to avoid offending existing persons with disabilities, and to avoid (perhaps) exacerbating discrimination against existing persons, the welfare of one’s future children ought to be sacrificed. The goal of making life better for existing persons with disabilities, while a good and reasonable goal, cannot justify causing preventable harm to future children. We could not justify creating more thalidomide babies for the sake of existing thalidomide babies, even if the existing babies could benefit. To treat one’s own children as a mere means to further one’s own goals, or the goals of a group — even an historically oppressed group — is to treat those children as less than persons.

§3.2 Loss of support for existing persons with disabilities

The goal of prenatal screening in most cases is to prevent birth defects, disabilities and illnesses in future children. If that goal is achieved, and the numbers of persons born
with disabilities decreases substantially, could that have a negative effect on existing persons with disabilities? Would it result in a loss of support and services, for example, or in a hardening of social attitudes, in increased intolerance towards the disabled? Some speculate that it would.

Disabilities would not disappear with more widespread and effective genetic diagnosis. There are thousands of genetically-linked disabilities, and a thousand other ways for disabilities to happen, through accidents of birth, injuries later in life, through illness, and as a result of the natural aging process. Thus, PGD will not result in the prevention of all disabilities, but only in the prevention of those which can be detected in embryos. It would be unfortunate if resources and social support for the disabled decreased as a result of there being fewer cases of genetic disability, or if intolerance of the disabled increased as a result. Nonetheless, preventing such a shift in resources and attitudes — if indeed they are influenced at all by mere numbers — would not provide adequate justification for diminishing the welfare of future children, or for not preventing disabilities when they can be prevented. A vicious cycle might result — diminished resources and support might provide even more reason to avoid bringing into existence children who would be adversely affected by the diminished resources and support. Such a state of affairs would make it even more rational for parents to wish to avoid disabilities, in order to avoid the suffering caused by socially-imposed hardships. As with sex selection, when practiced in countries where female children and women experience deprivation and diminished opportunities, and are doomed to face a lifetime of
discrimination, a society in which the same fate befalls the disabled provides even more reason for parents concerned about the welfare of their future children to avoid bearing children with disabilities. Nor can the welfare of future children be sacrificed in order to prevent an increase in socially-imposed hardships on existing persons with disabilities — children, including future individual children, ought not be exploited for the benefit of existing persons, even if those existing persons are already burdened by wrongful, socially-imposed hardships.

As both Anstey and McMahan argue above, allowing selection for disability would, if we embrace the notion that all should have equal access to reproductive assistance, likely result in there being even fewer persons born with congenital and genetic disabilities, because it would be more likely that diagnosis will be used to prevent disability. Thus any claim that parents ought to be able to select disabilities for their future children could ultimately undermine social support for those same children.

Some in the Deaf Community claim that deafness is not a disability, and that the Deaf constitute a minority group with a unique and distinctive language and culture. In recent years, as awareness and information about autism have increased, and in particular forms of high-functioning autism such as Asperger’s Syndrome, claims that autism is not a disability, but rather a “difference” have also proliferated. The ultimate claim is that some conditions that are typically classified as disabilities or deficits ought to be reclassified, such that the distinctive differences of, for example, autistic or deaf

\[\text{For more on sex selection, see Chapter 6}\]
individuals can be appreciated and acknowledged as part of the normal, ever-widening diversity of human beings.

Greater tolerance of human diversity can, of course, include greater tolerance of persons with disorders and disabilities, without asserting that illness and disability are simply wrongly classified. The argument that deafness or autism are simply differences and not disabilities doesn’t offer many benefits — it undermines claims for increased public support for the deaf and autistic, and also provides no more compelling reasons to create such persons than there are to create any other persons.

§3.3 The “parental attitude” argument

Asch argues that prenatal testing, by focusing on a single characteristic or trait of a possible child, reduces that possible child to that single trait:

Prenatal testing is a clear case of first impression, and as with any such impression, it is an incomplete impression; when followed by selective abortion or by discarding an otherwise implantable embryo, that first impression includes a decision never to learn about the rest of who that embryo or fetus could become after its birth.46

Do we treat potential children like match.com candidates, dismissing them from membership in the family on the basis of a single characteristic, some superficial deficit or defect? Prenatal and preimplantation genetic testing provides limited information about the presence (or absence) of specific genes and chromosomal abnormalities. It can not tell us whether those children will have “nice personalities,” or if they will have a

46 Asch in Parens & Asch, p235
“good sense of humor,” or like walking in the rain and drinking green Koolaid. Yet we can reject one gene, or one genetic anomaly without making the mistake of thinking that it is associated with nothing more than a single, limited characteristic. Deafness is a single characteristic with profound and multifaceted effects on a person’s life, just like skin color might be a single characteristic, but one that can affect many aspects of a person’s life for better or worse. The cultural and social milieu into which a person with a disability is born can also profoundly affect their prospects, although the nature of that milieu, how welcoming or difficult it might be, is beyond the control of parents. What is not beyond the control of parents is whether or not any particular embryo or fetus will be brought into existence as a person, and Asch argues that there is a critical distinction between welcoming any child, and welcoming only a particular child with (or without) a particular characteristic.

I argue that the any/particular distinction is important only when someone knows that she wants a child at a particular time, and that a conception or pregnancy is desired, but only if testing determines a particular characteristic (being female) or rules out a fetus or embryo based on one characteristic or property inherent, intrinsic, inevitable in the embryo/fetus/child-to-be.\textsuperscript{47}

Asch worries that the attitude of rejection will “carry over” into the attitude of rejecting a child or family member who acquires a disability later in life, and will manifest as an inability to “respect difference” or to see it as anything but a burden. People forget, Asch says, “that along with the negative characteristic of disability come hosts of other

\textsuperscript{47}ibid. p238
characteristics that are positive and negative, that enable people with very profound impairments to enrich the lives of those who discover the personality along with the impairment.\textsuperscript{48}

Asch is not alone in making the argument that the parental attitude of rejection is in itself troubling. Similar arguments are made against sex selection and genetic engineering, and all point to the possibility that the desire to select one’s children points to, at best, unrealistic expectations about parenting and childrearing, and, at worst, serious character flaws in potential parents.\textsuperscript{49} Two distinct issues are conflated in the concern about parental attitudes: one is concern about parental rejection of an unconceived or unborn child, and the other is concern about the rejection of an existing child, perhaps one who becomes disabled or develops a serious illness later in life. The argument being made is that the first implies the second, or that a parent who would decide against creating a child with a disability would later reject (or be more likely to reject) a child who becomes disabled. While at first blush, the two attitudes do seem related, there are good reasons for thinking they are not. First and most obviously, the prospective rejection of an embryo or fetus is not a rejection of a person who is, but of a person who might be. More importantly, it is also a rejection of a particular kind of prospective life for one’s child. A child who already exists, on the other hand, is a distinct and known individual, a person to whom parents have a deep attachment and strong emotional bonds. There is no denying that parents can form an emotional attachment to

\textsuperscript{48} ibid. p251

\textsuperscript{49} See chapters 1, 6, and 7
an unborn child as well, and it provides one of the reasons for rejecting on behalf of that child a life in which there is a possibility of significant hardship. In the same way, and for the same reasons, that parents desire to prevent illness and disability in their existing children, they will desire to prevent illness and disability in a future child — the only difference is in how that goal is accomplished. A parent would not kill an existing child in order to prevent illness or disability, but preventing a future life is not the same as killing an existing person whose life is already underway.

That parents might be prospectively mistaken about the difficulty of life with a disability, for themselves, for their family, and for their disabled child is always possible, but neither overestimating nor underestimating the difficulty of the future argues against making decisions based on estimates which can never be fully informed given a multitude of unpredictable possibilities. Moreover, there is nothing intrinsically wrong with making self-regarding procreative decisions, so long as those decisions do not and will not negatively affect others. Deciding not to bring a possible child into existence does not negatively affect the child who will never exist, and so there is nothing wrong with parents deciding that they do not want a particular possible future for themselves or their child, even if their predictions are wildly inaccurate.

Katherine Beals, in writing about her own autistic son, argues that the idea that if one desires a child, one must also accept in advance any child with any disability, is going too far:

In the popular imagination, handicapped people occupy not
homes, schools, and public spaces, but more abstract, theoretical threads in society’s great tapestry of diversity... The greatest societal taboo, even in those quarters which tolerate abortion in theory, is any suggestion that you might have chosen to fray this diversity by aborting your child’s embryo if you’d known that it would turn out autistic. Many people who’ve never worked with the handicapped will insist that anyone opting for children must accept whatever challenges might accompany them. Even among those who allow that some people may justifiably abort a fetus if they don’t think they can handle its handicaps, rare is the person who will admit, publicly, that he would consider this option himself. When he does, as I and some close friends have witnessed personally, his audience fast grows chilly and silent. And so, in this intolerant, sanctimonious atmosphere, a silent minority—or is it a majority?—keeps its thoughts to itself. People must recognize that it’s impossible, unless you’ve been there, to put yourself in the shoes of someone facing some aspect of autism, whether it’s raising an autistic child, deciding whether to adopt one, or considering whether to implant, genetically engineer, or abort a susceptible embryo. Since I myself haven’t had this last option, I will never know what I would have chosen. What I do know, though, is that for me, and for so many others like myself, having had the freedom of informed choice, and the freedom to discuss my feelings about it openly, would have made my current circumstances much easier to bear.\textsuperscript{50}

Failing a parental fitness test where the correct response is to accept \textit{any} child cannot predict future failure to accept a \textit{particular} existing child with whom one already has deep emotional bonds. While parents might well not “accept” a particular illness or disability in the sense that they will not welcome it or respect it as a “difference” in their child, there is no reason why anyone should welcome a circumstance that has a significantly negative impact on the life of their child, or their family. But that does not

\textsuperscript{50} Beals, K.P. 2003 p38
imply, nor does it plausibly suggest, that parents will reject a child who falls ill or becomes disabled. Committing to a child, and all the unpredictable things that child’s life will bring, is a different matter than committing to a preventable illness or disability with a predictably negative outcome. Until an affected child exists, there is no imperative to accept illness or disability for one’s future children. Failing to accept any possible future child, moreover, does not imply that one will reject any person with a disability who already exists, or respond prejudicially towards persons with disabilities, or fail to “respect difference” in such persons.

§3.4 A Child’s Right to an Open Future

An argument against creating persons with disabilities is the presumed right of each child to an open future, a future not doomed or limited from birth, and by birth. This is a presumed birthright enjoyed by every person. The right to an open future is an anticipatory right encompassing autonomy rights children cannot exercise as children, but which can be violated, or protected, in advance, so that they can be exercised by the adults those children could become. Such rights might be violated both before and after birth. Thus, even if it makes little or no sense to refer to embryonic or fetal rights, it makes no less sense, in the case of autonomy rights, than it does to speak of children having such rights in any meaningful way. That is, autonomy rights can only be meaningfully exercised by adults (and, to a lesser extent, older children), but they are rights that can be protected, or held in trust until they can be exercised.51

51 For a detailed discussion of “anticipatory autonomy rights” see Feinberg 1992, chapter 3.
As an argument against creating a disabled child, the “child’s right to an open future” implies that disabilities can close off some of the options that would otherwise have been available to a person, absent her disability. Of course, as lives progress, some options do close, while others may open up. A child might grow up with stubby fingers that preclude becoming a virtuoso on the saxophone, or grow too tall to be a ballerina or gymnast. The open future argument applies to cases where the circumstances of birth result in there being a “radically narrow range of choices available to the child when she grows up,” impinging “substantially on the child’s right to an open future.”

Parents create and shape their children in their own image, and according to their own values. It is the proper role of parents to do so. At what point then, is desiring and creating a child like oneself a harm?

Davis argues that “Parental practices which close exits virtually forever are insufficiently attentive to the child as an end in him or herself. By closing off a child’s right to an open future, they define the child as an entity who exists to fulfill parental hopes and dreams, not his own.” Deliberately creating such a child violates the Kantian principle of treating each person as an end in itself, and this, says Davis is the moral harm done when Deaf parents act to ensure a deaf child. Parents procreate for their own reasons, and not for the sake of the child who does not exist. Nonetheless, there is a proper balance to be struck between fulfilling parental hopes, desires and needs, and

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52 Davis, Dena. 1997 p567
53 Davis, p570
54 Davis p569
safeguarding “the individual flowering of the actual child in his or her own direction.”

That is, while procreating is always a means to one’s own ends, it ought not be the case that a future child is treated as a mere means to one’s ends, with no regard to the welfare or good of the child. To completely close off future options for a child, before she is even born, in order to ensure that she bends towards only some particular lights, and not towards others, is to restrict in advance the future capacities and the future autonomy of that child. Whether or not a particular disability or lifestyle choice does irretrievably close off important options is an empirical question, but there is little doubt that in some cases, doing so is not merely an incidental effect of a parental choice, but its expressed purpose.

If deafness is considered a disability, one that substantially narrows a child’s career, marriage, and cultural options in the future, then deliberately creating a deaf child counts as a moral harm. If Deafness is considered a culture, as Deaf activists would have us agree, then deliberately creating a Deaf child who will have only very limited options to move outside of that culture, also counts as a moral harm. A decision made before a child is even born, that confines her forever to a narrow group of people and a limited choice of careers... violates the child’s right to an open future.

John Robertson argues for parental reproductive rights over the possible autonomy rights of future children. “Just as persons have rights not to reproduce because of the genetic characteristics of offspring, they have rights to reproduce in order to have

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55 Davis p570
56 ibid. p575
offspring with particular characteristics,” Robertson claims.\textsuperscript{57} Reproduction does not harm children born with disabilities if it was not possible for them to be born without disability, according to Robertson, and one of the conditions that would make it impossible for them to be born is if their parents would choose \textit{not} to reproduce unless they could be assured of a child \textit{with} a particular disability.\textsuperscript{58} Thus, “selection decisions are not like postbirth actions that harm or adversely affect children because they are determinative in the first place of whether the child will exist at all.”\textsuperscript{59} For Robertson, both procreative liberty and parental rights to rear offspring support prebirth control over offspring characteristics, and apparently do so over objections that such selection may result in harm to a child or a violation of the rights of the future child. Prebirth selection is a special case, Robertson claims, and gives parents “power over their children that parents cannot exercise once the children are born” because it is the power to determine whether the child will exist at all.\textsuperscript{60} The upshot is that for parents who would only reproduce if they could select \textit{for} a disability, parental procreative rights trump the child’s right to an open future.

If it is acknowledged and accepted that there are limits on parental rights once children are born, however, it seems there must also be limits, by extension, to what parents can do before children are born, if their decisions and actions will significantly

\textsuperscript{57} Robertson 1996, p469

\textsuperscript{58} The usual uncontroversial boundary at lives so awful that they are not worth living applies to Robertson’s arguments.

\textsuperscript{59} Roberston 1996 p479

\textsuperscript{60} \textit{Ibid.} p480
and irreversibly limit the lives of their actual future children. This is simply because prebirth and preconception decisions carry over into a child’s postbirth existence, and when those decisions involve creating a child with a disability, the carry over is by design. Indeed, the very purpose of such decisions is to create a child with a disability, and not merely an embryo or fetus with particular genetic features. The right to an open future does not begin at birth, and neither does it end there. It is a right that restrains parental choice both before and after birth, and well into childhood, and to the extent that parental choices can significantly restrict the future lives of their children. The very fact that parents have life-or-death control over their possible children does not make prebirth selection a special kind of choice, but only one of many choices for which parents, by dint of their privileged position of control, have unique duties and responsibilities to their offspring.

§4. The presumption against procreation

Arguments that parents ought to be allowed to deliberately create children with disabilities presuppose that disability is a valid and important consideration in prebirth and preconception decisions. Like procreation itself, procreative decisions are fraught with peril, and are inherently selfish, although never entirely self-regarding. Given that, the presumption ought to be that procreation is not a morally neutral activity, but one with considerable potential to create harm and suffering. It is also, needless to say, our only means of perpetuating the species, and of fulfilling desires and drives that are very important to many people. There are, then, presumptively good reasons for parents to
create children, but procreation nonetheless requires moral justification. Likewise, if there are good reasons to create children who will predictably experience significant harm or suffering as a result of preventable disease or disability, that very harm and suffering requires stronger justification than even routine procreation.

Although a child born with a disability can live a worthwhile life, that in itself does not argue in favor of creating that child, or any other child. There is no moral imperative that any of the possible children who might have worthwhile lives — or even spectacular, exemplary, blissful lives — be brought into existence, because none of those possible children will be harmed if they never exist. If such children are created, they are created for the sake of others — for the sake of their parents, for their society, for other members of their possible communities (including communities of the disabled). That those children might experience hardship and suffer if they are brought into existence provides a good reason not to create a child with a disability or illness, or any other child, for that matter. There must be compelling reasons to impose the burdens of existence on a child. The strength of those reasons must be commensurate with the burdens — if those burdens are exceptional, with the potential to cause unusual suffering or harm, suffering or harm beyond the slings and arrows of ordinary fortune, then so too must be the reasons.
Chapter 6: Sex Selection

§1. Sex Selection in Perspective

In a recent survey of US clinics that provide Assisted Reproductive Technology (ART), 42 percent provided sex selection for non-medical reasons. Of those, 47 percent said they would provide it under all circumstances, including situations where there was no medical reason to perform PGD, while seven percent were willing to provide non-medical sex selection of embryos only when there was another, medical reason to undergo PGD. PGD is the current gold standard when it comes to effective pre-pregnancy sex selection. Another less effective technique for selecting sex before conception, called MicroSort, involves sorting sperm into enriched male or female specimens to be used for insemination or IVF. While many cultures around the world have long practiced cruder folk methods for controlling offspring sex, including female infanticide, abandonment, and abortion of female fetuses, technology has made it possible for those with the financial resources to select the sex of future offspring prior to pregnancy, and clearly, there is demand. But is sex preference a frivolous or objectionable preference on the part of prospective parents?

1 Baruch, Susannah, et al. (2006)

2 ibid. p 5. Non-medical sex selection was performed in nine percent of the IVF-PGD cycles reported in 2005.

3 MicroSort remains experimental, pending FDA approval, and is less reliable than PGD, but it can be done without IVF, making it less invasive and odious. When done without IVF, MicroSort does not involve discarding unwanted embryos, which makes it more attractive to those who object to the destruction of human embryos.
Medical sex selection is used to avoid X-linked genetic illnesses and disabilities, such as Duchenne Muscular Dystrophy and hemophilia. Non-medical sex selection is not intended to prevent illness or disability, but rather to satisfy parental preferences for a child of a particular sex. Parents motivated to pre-select the sex of their offspring for non-medical purposes might do so for a number of reasons. Some parents strive for family “balancing” after the birth of previous children by controlling the sex of a second or last-born child, particularly if they are unable or unwilling to “keep trying” for a child of the desired sex. Others will want to control the sex of a firstborn child, because of strong religious or cultural beliefs about the role or importance of firstborn children of a particular (typically male) sex. Many cultures maintain strong preferences for male offspring, in part because of customs and traditions that make male offspring more practically important within families. Many Asian cultures, for example, have belief systems that strongly favor firstborn males. The practical considerations behind those preferences may largely disappear following full assimilation into a new culture, but the preferences can persist for generations among immigrant families in adopted countries. Still other parents will simply prefer that all of their children be of one particular sex, because of preferences for the different childrearing or relational experiences that they believe accompany raising girls and boys.

The question such preferences raise is whether it is morally objectionable for parents to select the sex of their future children. Does it make a difference if the parents

\[4\] I am distinguishing here between “sex” and “gender.” Sex refers, in what follows, to the genetic/biological sex of an organism. Gender I take to be largely socially and culturally constituted, and imposed from without, whereas sex is biologically determined.
are making their choice under circumstances where infanticide, abandonment or abortion
would be considered if the child conceived is of the “wrong” sex? Does it make any
difference if infanticide, abandonment or abortion would not be considered? In a family
where any child would be accepted, but a child of a particular sex is especially desired,
would it be wrong for parents to select the sex of future children through PGD?

There are a number of concerns cited in arguments against non-medical sex
selection. One is the potential that its availability and use will reinforce or increase
already existing sexism, and particularly, discrimination against women and girls. The
welfare of children born to parents who may expect them to act in gender-specific ways,
or who may be disappointed when a child of the “wrong” sex is born, is also a concern.
Such concerns are entangled with broader worries about the commodification and
 technological control of both reproduction and children, and the treatment of children as
mere means to parental ends and desires. There are also significant social issues related to
the sex ratio imbalances that might occur with widespread use of sex selection; such
imbalances have already been well-documented in countries like China and India where
prenatal and postnatal sex selection are commonly practiced.

§2. Treating different cases differently: Sex selection in cultural context

Questions about the ethics of sex selection are highly sensitive to economic,
social and cultural contexts. In cultures that practice postnatal sex selection, i.e.
infanticide, abandonment, or fatal neglect, or where the abuse of unwanted female
children is common, pre-pregnancy sex selection is clearly a preferable method of sex
selection, when the welfare of actual, existing children is considered. That is, given the alternative, which may be the murder of a born, existing infant girl, pre-pregnancy sex selection would be morally preferable. Given the expense and technology involved, however, sex selection through PGD is not available to everyone, and particularly not to people in the developing world, where postnatal sex selection is most commonly practiced. In such places, the increased use of fetal ultrasound and selective abortion in recent decades has been a technological advance over traditional methods of infanticide and neglect.

Where cultural preferences for one sex are very strong, serious imbalance on a societal level can result, and that imbalance tends, worldwide, to favor boys owing to deeply rooted patterns of discrimination against women. Some of the worry about sex selection derives from what has already happened in China and India, where there are strong cultural preferences for boys, owing in part to the critical role male offspring play in the care of elderly parents. The availability of fetal ultrasound to detect sex prenatally has led to widespread abortion of unwanted female fetuses in India, resulting in a substantial sex imbalance. In India, the abortion of female fetuses has resulted in half a million missing female births per year, or roughly 10 million missing girls in the past two decades.\(^5\) In China, there were 118 males born for every 100 females in the year 2005. If that trend continues, it is projected that in a mere 15 years there could be an excess of 30 million males in China. The social significance of such an imbalance can hardly be

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\(^5\) Prabat, et. al. (2006); p. 211
overstated. 30 million Chinese men who will be unable to form stable families in the absence of female partners is a prospect with serious implications for Chinese society. Worldwide, millions of girls are “missing,” i.e. there are sex imbalances that substantially favor males, and which cannot be accounted for by natural birth patterns.

In the U.S., by contrast, a small majority -- about 53 percent -- of those seeking non-medical sex selection for the purposes of family balancing choose girls.\textsuperscript{6} More than 90 percent of couples seeking sex preselection in the US desire it for family balancing purposes\textsuperscript{7}, and roughly 89 percent of infants born following the use of MicroSort preconception sex selection were female.\textsuperscript{8} It is clear that worldwide, sex preferences do not always discriminate against female offspring.\textsuperscript{9}

In societies where there is a highly unequal value placed on male offspring, female offspring are accordingly and disproportionately disvalued. Children are expensive, no matter where you live, and the economic costs of unwanted female children are high for families in which the basic necessities — food, shelter, clean water — are in short supply. Add to that the costs of education and health care, the burden of paying dowries, and the poor economic prospects of women, and daughters become quite burdensome. Moreover, in cultures where social and religious customs dictate strict

\textsuperscript{6} Fugger, E.F., et. al. (1998) p2369.

\textsuperscript{7} ibid.

\textsuperscript{8} MicroSort is slightly better at selecting X-bearing sperm over Y-bearing sperm, and is thus better at producing girls rather than boys.

\textsuperscript{9} Fugger p. 2368
gender roles, assigning to sons the responsibilities of caring for elderly parents, or of performing funeral rites that ensure parents a favored place in the afterlife, the strong preference for sons results in the necessity of having sons, even if it means bearing additional unwanted children in the attempt to have a much-needed son. Repeated pregnancy and frequent childbearing are risky for women. A WHO report on maternal mortality indicates that for women in the developing world, particularly Asia and Africa, the risk of dying during pregnancy is hundreds of times higher than it is for women in Europe.\textsuperscript{10} The country with the highest number of maternal deaths is India, which, not surprisingly, is a country with a very strong cultural and religious preference for sons, where mothers face the prospect of repeated pregnancies in an effort to bear male children.\textsuperscript{11} The same WHO report shows that countries in Africa have the highest maternal mortality ratio, with 17 countries having a ratio exceeding one in 100 maternal deaths per live birth. When mothers die, subsequent infant mortality is significantly higher than it is when fathers die.\textsuperscript{12} That is, the children of dead mothers are substantially more likely to die than their counterparts with living mothers. Female children are particularly vulnerable when their mothers die, most likely owing to subsequent neglect and abuse of less valuable members of the surviving family.\textsuperscript{13}

\textsuperscript{10} World Health Organization, Department of Reproductive Health and Research, (2004)

\textsuperscript{11} Maternal deaths in India in the year 2000 were estimated at 136,000, followed by Nigeria (37,000), Pakistan (26,000), the Democratic Republic of the Congo (24,000), Ethiopia (24,000), the United Republic of Tanzania (21,000), Afghanistan (20,000), Bangladesh (16,000), Angola, China and Kenya (11,000 each) and Indonesia and Uganda (10,000 each). These 13 countries account for 67\% of all maternal deaths. (WHO) It is noteworthy that these same countries exhibit strong cultural and religious preferences for sons.

\textsuperscript{12} Fathalla, M.F. (2000); p9

\textsuperscript{13} \textit{ibid.}
Daniel Goodkind presents an intriguing hypothesis when he suggests that prenatal sex selection with selective abortion amounts to a substitution of prenatal for postnatal discrimination\textsuperscript{14}. The substitution hypothesis, as Goodkind calls it, is empirically supported by data from Asian countries on infant and childhood mortality rates following the advent and adoption of prenatal sex selection. The substitution hypothesis suggests that “If parents have the option of sex-selective abortion, daughters actually carried to term would more likely be wanted, and the result might be a \textit{decline} in postnatal discrimination.”\textsuperscript{15} There is empirical evidence from several Asian countries that “daughters’ survival probabilities tend to be better if they have no other female siblings than if they have female siblings.”\textsuperscript{16} In other words, less valuable female children do better when they do not have to compete for scarce resources with other less valuable members of the family. Given those realities, Goodkind concludes, “rising sex ratios at birth could therefore be reason for guarded relief as well as worry… the results suggest the need for further reflection on the prevalence and relative evils of both prenatal and postnatal discrimination before judging the morality of sex-selective abortion.”\textsuperscript{17}

However cruel and unfair the son preference may appear, it is rational to prefer sons within social, cultural and economic contexts where male children are valuable and pregnancy and childbirth are risky for both women and their families. Where the number

\textsuperscript{14} Goodkind, Daniel. (1996); p 112
\textsuperscript{15} Goodkind, p 112
\textsuperscript{16} \textit{ibid.}
\textsuperscript{17} Goodkind. p 113
of children a family can have is limited, either by the government, as in China under population control policies, or in impoverished countries like India, where economic realities limit the number of children a family can provide for, daughters face the possibility of abandonment, neglect, starvation, and premature death. Prenatal sex selection with selective abortion can also be, in societies with high maternal mortality rates, a far safer alternative than childbirth. Pre-conception sex selection could be safer still if it prevented frequent undesired pregnancies and selective abortions.

Sex selection as it is practiced in some societies is clearly a manifestation and expression of sexist views, most often towards females. But such attitudes, and the discrimination that accompanies them, are not caused by nor facilitated by the availability of prenatal sex selection. Rather the prevailing attitudes and customs pre-date modern methods of selection by centuries, and encourage the use of ART-related sex selection where it is available. Permitting ART-related sex selection isn’t likely to solve problems of discrimination against girls and women in sexist societies, but neither will it make the problems worse. On the contrary, since childbearing women bear the brunt of the burdens and hardships associated with the preference for male children, in the form of physical and psychological abuse, abandonment by a spouse, repeated pregnancies, and the psychologically traumatizing loss of “unwanted” fetuses and born children, the use of ART-related sex selection could result in some improvement in the welfare of mothers in sexist societies.
Where legal prohibitions against prenatal sex selection have been enacted, it has been to reverse alarming and widespread sex imbalance, as in India and China. So far, such policies have been largely ineffective. In both China and India, the use of ultrasound to detect fetal sex is illegal, but the practice still persists and is widespread among those who can afford the procedure. Robertson argues that drastic changes in the sex ratio would tend to be self-correcting, because “an overabundance of males would mean fewer females to marry, which would make being male less desirable, and provide incentives to increase the number of female births.”\(^{18}\) This self-correcting mechanism has not proven to work in the countries that have already experienced significant sex imbalances, and it is likely that such long term social concerns simply do not override the more immediate on the ground concerns of parents making choices based on their own future and present needs and desires. In 2007 in the Guangxi Autonomous Region of China, for example, riots and violent protests broke out in response to the draconian birth control measures, including forced abortion, employed by local government officials to enforce China’s one-child policy.\(^{19}\) Immediate interests in childbearing have a very powerful pull on parents in any culture, whether the interest is in just having a child — any child — or in having a child of a particular sex.

The substantial financial cost, as well as the technological intrusion involved, make preconception sex selection and PGD for non-medical sex selection unlikely to be as widely used as far less expensive and more low tech prenatal and postnatal sex

\(^{18}\) Robertson, John A. (2001), p. 4

\(^{19}\) Kahn, Joseph.(2007).
selection methods, particularly in those less affluent countries where parents are typically most likely to employ such methods. For this reason, preconception sex selection is not likely to add substantially to sex imbalances in those countries already experiencing greatly skewed sex ratios.

Preconception or preimplantation sex selection are more desirable methods for those with moral qualms about abortion, infanticide and child abandonment. Cultural and religious prohibitions against abortion and infanticide might make it easier to compel some populations to avoid contributing to a serious societal sex imbalance, by strictly regulating the use and availability of sex selection. Many developing countries, however, face a more immediate threat of overpopulation, and must balance the present need for population control with the long term need to maintain a stable sex ratio. The seriousness of a large sex imbalance as a socially destabilizing force would provide a compelling reason for governments to limit access to sex selection technologies, or to regulate their use, if the threat of such imbalances does not suffice as a self-correcting mechanism.

Strong offspring sex preferences mirror the general sexual inequality of societies in which they are prevalent. Research shows little preference among parents in societies where there is relative equality between men and women. Studies in the US, UK, Canada and Germany indicate that parental interest in sex selection is fairly low, except within the context of family balancing, which is an important value to an apparent majority of

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20 Needless to say, infanticide and child abandonment are also illegal almost everywhere, but this has not stopped the widespread use of these methods for discarding unwanted girls, even in countries where the legal penalties are substantial.
parents.\textsuperscript{21} In such societies, sex selection is unlikely to have serious social consequences such as widespread sex imbalance. Given the cost and degree of medical intervention required, the preference for good old-fashioned traditional procreation, and the absence of strong sex preferences, nonmedical preimplantation and preconception sex selection are unlikely to become commonly used, and will be the exception rather than the rule. Prenatal sex selection and selective abortion carries with it the usual social and moral unease surrounding abortion, which will tend to limit its use as well. Should sex imbalances materialize, however, they would likely do so with considerable forewarning from the existing structure for monitoring population and birth statistics.

The sections to follow will address the ethics of sex selection only within the context of societies where there is relative equality between men and women, and where social and cultural traditions and economic pressures do \textit{not} favor the birth of male offspring. In this context, there are generally already strong moral prohibitions against infanticide, neglect, and abandonment of children for \textit{any} reason. Non-medical sex selection will most likely be utilized to satisfy parental desires for family balancing, although some families will use it to influence the sex of a firstborn child, or to bear children of only one sex. In a family where any child would be accepted, but a child of a particular sex is especially desired, would it be wrong for parents to select the sex of their future children through PGD?

\textsuperscript{21} Dickens (2005), p 172
§3. Consequentialist arguments against sex selection

Even in cultures that do not favor the birth of sons, there remain several potential negative effects of non-medical sex selection:

a) Firstborn males + second-born females = second-class women

b) Harms to children will result from parental gender expectations

c) Legitimizing parental sex preferences will perpetuate oppressive misogynist ideology

There are also potential positive effects:

d) Selected children will be wanted children

e) Reduced risk to mothers as a result of fewer pregnancies

f) Population control

g) Family satisfaction with the number and sex of children

a) Concern about perpetuating male dominance by choosing firstborn sons assumes that, even in cultures where son-preference is not strong, parents will still prefer that their firstborn child be a boy. Perhaps such attitudes, if they do indeed persist, are vestiges of old systems of primogeniture, but it is questionable whether such a preference actually exists, or if it is merely presumed to exist given continuing patterns of male social dominance. At any rate, there exists little legal benefit anymore in western societies to being a firstborn male.
There are two empirical questions related to the preference for firstborn males, assuming it exists. The first is whether the advantages of being firstborn are significant enough to warrant concern should the preferable birth order positions be taken up primarily by male offspring. The second question is whether male social dominance is the cause or the effect of preferences for male firstborns. An ancillary practical question is whether or not prohibiting non-medical sex selection for firstborns would have any effect on existing patterns of male social dominance, particularly given the relative infrequency of the use of sex selection.

Concerns about male dominance resulting from a preference for male firstborns implies that being a firstborn child is advantageous, but the jury is still out as to whether birth order makes a significant difference, or if it is actually advantageous to be the firstborn child in a family. Research by Susan Morton suggests that firstborns are at a long term disadvantage, and are more likely than their later-born siblings to suffer serious chronic health problems such as diabetes and hypertension. A recent study of Norwegian firstborns by Bjerkedal et al. found a 2.3 point IQ advantage for firstborns, which is attributed to family dynamics rather than to biological effects. Nurture, rather than nature, explained the advantage, the researchers concluded. There is considerable evidence, on the other hand, that later-born children tend to be more creative,

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22 The Liggins Institute, (2004). Morton’s hypothesis is that firstborns, who tend to be born smaller than later-born children, must catch up quickly, and are lavished with parental attention, and subsequently tend to grow larger than average, leading to weight-related health problems in adulthood. See: http://health.asiaone.com/print/Health/Ask%2BThe%2BDDoctor/Story/A1Story20070609-12918.html

23 Bjerkedal, et al. (2007) The research included only male subjects, but the authors speculate that, since intelligence is not linked to sex, the advantages would be the same for female firstborns.
adventurous and unconventional than their more buttoned-down firstborn siblings. Research by Baer on creativity among firstborns concluded that firstborn children benefit significantly from having siblings, and particularly siblings of the opposite sex.\textsuperscript{24} The ideal of a sex-balanced family would thus also be advantageous to firstborns.

On the whole, it appears that while there are some advantages to being born first, they may be offset somewhat by disadvantages. A preference for firstborn males, in other words, may not be advantageous for males, all things considered. In the absence of legal primogeniture, it is plausible that whatever social advantages accrue to men, they may be better explained by the fact that they are male, rather than that they are firstborns.

Just as the preference for male children is an effect, rather than a cause, of discriminatory and misogynist social attitudes, the preference for male \textit{firstborn} children may simply be a remnant of fading traditions. In the absence of strong and widespread cultural preferences, it is unlikely that the firstborn preference is prevalent or strong enough to make choosing the sex of firstborns a common practice, given the considerable burdens of sex selection. If the practice of choosing male firstborns were to become widespread enough to be problematic (assuming that being firstborn is advantageous), it would be easy enough to regulate simply by prohibiting non-medical sex selection for firstborn children.

b) Barbara Katz Rothman worries about the potential harms to children chosen through sex selection. Her concerns are twofold: first, parental expectations regarding

\textsuperscript{24} Baer, et al. (2005)
children who will “do gender” are inherently sexist; second, there is potential damage to the parent-child relationship “any time we give parents reason to think they can control the kind of people their children are…”

The desire to choose a child’s sex is really a desire to choose a child’s gender, Rothman argues, and thus it is inherently sexist:

Why does anyone want specifically a boy or a girl? To admire their genitals? I don’t think so. It’s to have a child who will bake cookies or go fishing, enter the family business or raise grandchildren, cuddle and have long talks or go out and make you proud — a child who will “do gender.” Every time we recognize, acknowledge, and respect that choice, we are underscoring that boys can give a parent one kind of experience; girls another. What could that be but sexism?

Rothman conflates wanting a child of a particular sex because of the different parenting or relational experiences such a child can provide and enforcing (or simply reinforcing) cultural stereotypes about gender. But this is too simplistic. Not every parent of a girl is interested in baking cookies (and excluding sons from the kitchen), and not every parent of a boy wants to take him fishing (and leave daughters on the shore). The broad generalizations being made here about gender roles, and the kind of parents (i.e. sexist) who adhere to those roles, assumes parental sexism without proving it. Such question begging does not amount to an argument against sex selection. There’s no denying that some parents of girls will want to dress them up like dolls, and some parents of boys will

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26 Rothman & Robertson p 3
take them to the ballgame, and there's no reason to deny it. Surely it is possible that there are as many motives and reasons for desiring children of a particular sex as there are parents, and it is too simplistic to claim that all parents are motivated by immoral and unjust sexism. We might call it sexism or discrimination whenever someone prefers, for any reason, one sex over the other, but that conflates distinguishing between the sexes and sexism in the pejorative sense. For the objection to make sense it must also deny that there are actual differences between boys and girls, and actual differences in the experience of parenting boys and girls, and that those differences might matter to some parents in a morally unobjectionable way. To deny that boys and girls are different is to deny some of the valuable and desirable differences between the sexes, and it is to be gender-blind in a particularly unrealistic and dogmatic way that does no service to either sex. Sex selection is sexist if it is undertaken to avoid the birth of a child deemed inferior because of his or her sex, but one might prefer a child of a particular sex without necessarily believing that the other sex is inferior, just as one might prefer Gilbert & Sullivan to Wagner because of differences in the operatic experience, without believing Wagner to be inferior. The doctrinaire assertion that all sex selection, whether boys or girls are chosen, is necessarily undertaken for sexist reasons is factually false. The belief that the parenting experience of raising a child of one sex would be better or more desirable than the experience of raising a child of the other sex is not equivalent to the belief that one sex is, tout court, inferior to the other. It is simply false that all parents who would choose the sex of their children are motivated by the belief in the inferiority (or superiority) of persons of either sex.
At its root, I suspect this objection to sex selection amounts to a reliance on some form of the Kantian principle that persons (children included) must be treated as ends in themselves, and not merely as a means to someone else’s ends. Since there is no unchosen person in preconception or preimplantation sex selection, it is treating the chosen child as a mere means to an end that must be at issue. Sex selection, it might be argued, treats the chosen child as a mere means to his or her parents’ ends. But voluntary, intentional childbearing always treats children as a means to the ends of their parents, and if that is not objectionable on principle, then why should choosing a child’s sex be objectionable? It is objectionable only if the further claim is made that parents who choose offspring sex must view their children as mere means to their (presumably nefarious, sexist) ends. But surely this claim can’t be supported. Wanting a child of a particular sex because of an expectation of a particular kind of parent-child relationship may be selfish, but it is no more selfish than any of the other reasons parents have for desiring children. To pick out sex as a particularly objectionable preference assumes that parents who have sex preferences — unlike all the parents who have other kinds of preferences — regard their children as mere means to their objectionable ends, and regard their sex-selected children as less than full, autonomous persons. This objection can’t amount to more than an ad hominem attack on a particular group of parents who are presumed to have suspect motives purely by dint of their preferences, and it is unsupportable and badly reasoned. As Mary Anne Warren notes, “There is a clear distinction between wishing to have a child of a particular sex and regarding the child as
something less than a potentially autonomous person.”27 Should parents who would choose the sex of their future children fall under suspicion for either their motives or their parenting? Only if there are additional or stronger reasons to fear that their children will be harmed by rigid adherence to, or enforcement of, gender stereotypes more than the children of parents who do not preselect the sex of their children. There are not.

c) Will legitimizing parental sex preferences perpetuate oppressive misogynist ideologies? Rothman argues that there is “enormous social harm that can be done as gender differences are further reified and publicly endorsed,” and by “creating a world in which sex/gender is understood as an acceptable basis on which to choose children.”28 Needless to say, sex selection is already practiced in just that kind of world, and has been for centuries. The question is whether sex selection in relatively nonsexist cultures will result in backwards movement towards oppressive sexism, misogyny and femicide. Generalizing from cultures where femicide is common to cultures where it is not, to make predictions about a future in which sex selection contributes to femicide and the strengthening of patriarchal hegemony ignores the achievements of feminism in recent decades, and assumes that patriarchy can only get worse, but never better, given the fact of sex selection. The evidence suggests otherwise, particularly in countries where the availability of prenatal sex diagnosis has coincided with greater reproductive freedom and the rise of feminism. Despite the availability of prenatal sex selection and legal abortion, the practice is not widespread in the United States and Europe. Given the level

27 Warren (1985)
28 Rothman & Robertson p5
of intervention required for preimplantation sex selection, its use is not likely to become widespread enough to have any significant impact on sex ratios or on social attitudes. Unless preimplantation sex selection has some unique capacity for spreading patriarchy, misogyny and injustice that is disproportionate to its actual level of usage, it’s hard to envision it having much of an effect at all. This is not to say that there are not reasonable fears about the abuse of sex selection for misogynistic and femicidal purposes, but it seems unlikely that it will contribute to patriarchal hegemony in places where that hegemony is not already well entrenched.

§4. Positive effects of sex selection

Among the potential positive effects of sex selection are the prospect of families with no more than the desired number of children, and children of the desired sex(es). With fewer planned or unplanned pregnancies, there will be a reduced risk to mothers, from either pregnancy or abortion, although this reduction in risk may be offset overall by the added risks imposed by the use of ART, including the use of fertility drugs and multiple birth pregnancies. Population control is an added benefit, although the effect of sex selection is unlikely to be substantial, given the relative rarity of its use. Limiting family size is the dominant reason for the use of sex selection in the developing world, where female feticide is most common. Sex selection could have the consequence of limiting population growth overall, even if the motives for it are limited to the well-being of the immediate family. The rise in the use of sex selection in China has resulted from governmental population control policies that restrict the number of children parents can
produce. The desire to limit the number of children in a family is one of the dominant factors in decisions to abort female fetuses in economically stressed families in the developing world, where female children are less valuable and more costly, economically speaking. In all cases where female feticide is common, socio-political or economic pressures are coupled with strong cultural preferences for sons, with both factors contributing to the practice. Thus, in the absence of either the socio-political/economic pressures, or the cultural preference for sons, female feticide is unlikely to become widespread. Compelling economic need obviously isn’t a factor motivating the use of expensive preimplantation sex selection, although the desire to limit the number of children, while achieving a blend or balance of the sexes, is a plausible motive. Rothman, who looks with suspicion upon the language of “family balancing,” worries that “perhaps, in a few years, those who don’t balance that second child will be seen as irresponsible, reproducing needless extra children.”

Whatever Rothman is worried about here — neighbors who “tsk”? abusive epithets? hurled fruit? forced abortion? — such a scenario seems likely only in countries facing tremendous pressures from overpopulation, where the need to limit the number of children is already compelling, or in cultures where zero or negative population growth is a widely and strongly held principle. The desire of parents to limit population growth is not unreasonable, nor is it an insidious motive for family balancing when coupled with the desire for a child of each sex.

29 Rothman and Robertson p12
§5. Slippery Slopes

Slippery slope arguments against non-medical sex selection tend to express two types of fears:

h) Non-Medical sex selection is the first step towards custom-made children and eugenics

i) Reinforcing gender stereotypes and misogynist ideologies will ultimately undermine women’s reproductive rights and freedoms in the name of expanding reproductive “choice.”

h) Does non-medical sex selection put us on a slippery slope towards custom-made children and positive eugenics? It’s important to note here that this concern is not expressed about medical sex selection done for the purpose of avoiding sex-linked genetic disease. This is, on the face of it, rather odd, since the technology used for medical and non-medical sex selection are one and the same. Why doesn’t medical sex selection push us out onto the same slippery slope as non-medical sex selection?

Presumably, the concern is that allowing sex selection for non-medical purposes will grease the skids to genetic selection of other non-medical traits, and (arguably) trivial characteristics such as eye or hair color (or, to consider something equally fraught with sociopolitical significance, skin color), or to the wholesale designing of children. The ultimate worry is that the eventual outcome of widespread genetic choice will be some kind of positive eugenics and genetic discrimination.

\footnote{ibid.}
The use of prenatal ultrasound provides an interesting case study for the way the use of medical technology can spread into non-medical uses. Prenatal ultrasound is commonly used to detect fetal abnormalities, and has become a routine part of prenatal care in countries like the United States. It is also a relatively non-invasive and reliable method for detecting fetal sex, and many expectant parents are happy to avail themselves of foreknowledge of their future child’s sex. It has become common practice to keep ultrasound images in photo albums, where they represent the first picture of the child-to-be. Detecting fetal sex, in a context where avoiding sex-linked genetic disease is not a concern, is a non-medical use of fetal ultrasound. Of course, it is possible to use prenatal ultrasound to detect fetal sex for no other reason than to avoid the birth of a child of an undesired sex, a practice that, although illegal, flourishes in China and India, where it leads to the abortion of unwanted female fetuses. What’s noteworthy here is that what began as a medical technology used for medical purposes was over time utilized (in some cases almost exclusively) for purposes of non-medical sex identification and selection. Similarly, medical use of PGD came first, and its use for sex selection followed fairly rapidly. The question this history raises is why we should only be concerned with non-medical sex selection. Why shouldn’t we worry that medical sex selection, and not just non-medical sex selection, will nudge us out onto the slippery slope of genetic discrimination and eugenics? Some in the disability rights community might argue that it already has.31

31 For more on this matter, see chapter 5
If we grant that non-medical sex selection is the first step towards custom-made children and eugenics, why is that objectionable? One argument claims that the use of non-medical sex selection is likely to lead to non-medical selection of other trivial offspring characteristics, ultimately with deleterious effects such as the commodification of childbearing and the undermining of the parent-child relationship.

Will non-medical sex selection inevitably lead to selection of other non-medical (or non-disease-related) genetic traits, including superficial traits like hair and eye color, or skin color? To start, we should address the question of whether sex is a superficial or trivial genetic trait. It is not. There are significant differences between male and female humans. Some of the differences are primarily cultural and social, or socially constructed, but many are primarily biological, so there is little comparison between, say, eye color (which makes no functional difference) and sex in terms of the biological and social significance of the differences. Indeed, choosing the sex of a child is making a significant choice about the future of that child, whereas choosing a cosmetic characteristic such as eye or hair color is not. Skin color can be fraught with tremendous social and cultural significance, but it is nonetheless a superficial trait. While there are slight functional differences associated with skin pigmentation, those differences appear to be limited to the protective role of the skin itself, and do not extend to differences in reproductive abilities, body mass or size, psychological characteristics, disease susceptibility, and other biological differences associated with sex. Skin color, thus, is insignificant, biologically
speaking, although it can have profound social implications in heterogeneous societies, and even in relatively homogeneous societies where *shades* of difference might matter.\textsuperscript{32}

Sex, it is clear, is different from other non-medical genetic traits that parents might select in their offspring in that it is both socially significant and biologically and functionally significant. It is also the basis for a great deal of discrimination (which we can call a kind of genetic discrimination, since sex, unlike many other traits, \textit{is} genetically determined). While the social significance of sex can be highly variable between cultures and malleable over time within cultures, the functional significance of sex is neither variable nor malleable. Thus, there is a significant difference between choosing the sex of one’s child, and choosing other more superficial traits. If non-medical sex selection is going to grease the skids for the selection of other trivial genetic traits, it will not be because sex is itself a trivial genetic trait. There is nothing peculiar about sex selection that makes it more likely to open the floodgates of genetic selection or manipulation. Indeed, what \textit{is} peculiar about sex selection is that it is relatively easy, compared to the selection of single gene traits or multifactorial traits. Because sex is determined by a single chromosome, sex selection is comparable to the selection of other traits and conditions that are chromosomally determined, such as Down Syndrome. At present, manipulating genes to create a made-to-order child is not technologically feasible, and given the complexity of the genetics involved with traits like eye, hair, and

\textsuperscript{32} In many sub-Saharan African cultures, for example, there is a marked preference for lighter-skinned women over those with darker complexions, and the preferences can have profound social significance. Anthropological evidence suggests that these preferences pre-date colonization by white Europeans, and are indigenous to these cultures. See Van den Berghe, P. L. and P. Frost. (1986).
skin color, selecting for or against such traits would not be as simple, ironically, as selecting for a more profoundly significant trait such as sex. Neither is it likely, given the cost and degree of intervention required, that many parents would go to the trouble and expense of choosing green-eyed, curly-haired children, even if they had the option. The majority of parents who want biologically-related children want children like themselves, not children with cherry-picked characteristics. Would the desire for Mini-Mes disappear if it became technologically possible to customize made-to-order children? Were making a made-to-order child as simple as customizing a Mini Cooper, people might become cavalier about it, and tempted to tinker with nature and select their children from an à la carte menu of options, but that would require a change in procreative priorities so profound (and so contrary to the vanity of most parents) that it seems highly unlikely. Neither is it likely to be technologically possible any time in the near future. That is, even if non-medical sex selection did promote attitudes favorable to trivial trait selection, or even to positive eugenics and the creation of Better-Than-Mes, the substantial technological hurdles associated with creating designer children make it unlikely that such attitudes or desires will be easily gratified. Slippery slope arguments must always face the uphill climb of finding supporting empirical evidence for their suppositions, and the evidence, for now, is against a slippery slope toward genetic customization.

A further concern is that non-medical sex selection could contribute to a kind of eugenics through gender favoritism, dominance, discrimination, and injustice. A similar argument is made against prenatal testing for genes associated with disability. The
Discrimination Argument claims that making available such tests encourages their use to prevent the births of people with disabilities, and also encourages attitudes of discrimination against existing people with disabilities. The very existence and use of such tests can express discriminatory attitudes, it is claimed.\textsuperscript{33} Moreover, the technology might be misused, and people might be pressured to use it to select against embryos that do not have serious genetic disease. Such misuse might “change people’s attitudes in a way that will increase or support injustice, stigmatization, and discrimination towards disabled people.”\textsuperscript{34} To extend this line of argument to sex selection, it could be claimed that making available preconception sex selection would encourage its use beyond current demand, and would encourage discriminatory, sexist attitudes. The fear is that making available non-medical sex selection will exacerbate existing prejudices and discrimination based on sex, and might even make such discrimination and prejudice more likely by inducing parents, through subtle or unsubtle pressure, to choose against the culturally disfavored sex.

When parents have preferences regarding the sex of their future offspring, those preferences can vary significantly in their strength, from desires that would cause parents to choose for or against certain embryos, to desires that would not. There is no evidence that genetic counselors or other medical providers would, or even could pressure parents to select for or against embryos based on sex in cultures where there are not powerful culturally-entrenched preferences, and there is little reason to think that such pressures, if

\textsuperscript{33} For more on the Expressivist Argument against disability testing, see chapter 5

\textsuperscript{34} Petersen, T.S. (2005); 31 p 231
brought to bear, would have a significant effect on parental attitudes. The kinds of campaigns targeted towards educating the public and changing parental attitudes (about the dangers of secondhand smoke or baby-shaking, for example) tend to be society-wide and very public, employing such means as billboards, posters in doctor’s offices, and radio and television commercials. It is hard to imagine similar campaigns being used to change parental attitudes about offspring sex in societies with relative sexual equality. Neither is it likely that reproductive healthcare providers or genetic counselors would try to pressure parents to select the sex of their children absent either medical need or a pre-existing parental desire. The mere existence of PGD would not, by itself, provide adequate pressure to use it on a wide enough scale to send us sliding down a dangerous slope.

The further claim might be made that, whatever the parental motives, the very existence and use of sex selection sends a negative and harmful message to existing female children and adults that their kind are not wanted. Such a message negatively affects the well-being of all female children and adults. The “negative message” claim would indeed be true in discriminatory cultures, but the impact of private discriminatory acts of sex selection, even if widespread, would be rather minor compared to the blatant and harmful discrimination that female children and adults suffer in such societies. It is hard to see how this claim can stand up given the empirical fact that in cultures with relative sex equality, female offspring are more likely than male offspring to be chosen by

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35 This assumes, of course, that it is generally women rather than men who suffer from sex discrimination, and thus generally women who will feel the sting of any negative message sent by sex selection.
parents employing sex selection. In societies with relative equality, where the preference among parents using sex selection is for female children, there would be no such message attached to the relatively infrequent use of sex selection. If anything, the message sent would be that female children are so valued that their parents were willing to endure great expense and inconvenience to bear them.

i) *Reinforcing gender stereotypes and misogynist ideologies will ultimately undermine women’s reproductive rights and freedoms in the name of expanding reproductive “choice.”* Rothman makes the argument that women face subtle and unsubtle family pressures to produce sons in all cultures.

Contemporary U.S. data still shows us that women prefer — if not for themselves, then for their husbands’ sake — to have sons first. Women worry, and rightly so given the data, that men may walk away from families they’ve started. Women try to entice men to love their children. One time-honored way of doing that is to produce a son.³⁶

Rothman fears a “greased chute” through which we will slide from the relatively rare use of sex selection procedures for family balancing (about which she also has concerns) to the commonplace use of sex selection for firstborn and all-born children, at which point, the selected children will be predominantly male.³⁷ Just as assisted reproductive technologies have become widely accepted and used, so too will sex selection, Rothman speculates. “A woman with one or two daughters will face more, not less pressure to

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³⁶ Rothman & Robertson, p12.

³⁷ Rothman & Robertson p6
produce a son if sex selection becomes part of ordinary practice. The new ‘choice’ will probably pretty quickly become an obligation.”

There are two claims here: the first is that women are under pressure to produce sons. The second claim is that the availability of sex selection will make its use obligatory, given already existing pressures to produce sons. Having the ability to choose will result in having an obligation to choose, and that obligation will ultimately become an obligation to choose sons.

Assuming for the sake of argument that American women are pressured to produce sons, why would it be problematic for “a woman with one or two daughters” to select the sex of her next child? Is the problem that women will be pressured by the availability of sex selection to bear additional children they do not want, or that they will be pressured to produce male children they do not want? If the latter, then those women who do not want sons would be motivated by sexism, by Rothman’s reasoning. If the former, we should ask if the pressures to “try again” for a boy become more pressing when the sex of the next child (perhaps the last?) can be guaranteed. That is, is the pressure greater than it otherwise would have been because sex selection is an option? It is plausible that some couples who otherwise wouldn’t have another child would be tempted to do so if they could guarantee the child’s sex. Rothman is concerned about people who “try again” out of what she is “convinced are sexist values,” but at the same time, she is concerned that “perhaps, in a few years, those who don’t balance that second

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38 Rothman & Robertson p5
child will be seen as irresponsible, reproducing needless extra children.”^39 It’s not clear what the objection really is here. The concern appears to be that women will experience pressures to have more children only if they are selecting the sex, and only if they are selecting male children, and perhaps that they will be pressured to refrain from childbearing if they prefer to leave it to chance. This is highly implausible, not least because there are families that prefer to have only female children, as well as those who prefer to have whatever children they have the old fashioned way, rather than through odious, risky, expensive, stressful, uncertain and un-fun technological means. Clearly there are parents willing to endure the costs of selecting the sex of their children, but it would require a considerable shifting of the childbearing priorities of many, many parents for sex selection to have a significant social impact.

The concern here, however, is that making the technology available will either promote or legitimize discriminatory attitudes, thereby resulting in more discrimination against women by creating pressures on mothers to bear male children first or exclusively. Thus the availability of sex selection would result in more reproductive “choice” for parents, but, as a result of social pressures, there would be less “freedom” to choose for women. Given the unlikelihood of widespread use of sex selection, the concern here can properly be focused on the individual women who will be pressured to make childbearing choices they would otherwise not make. But their problems surely go beyond sex selection, and reflect a general lack of equality within their familial

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^39 Rothman & Robertson p 12
relationships. The availability of reproductive technology does not create the conditions for such inequality, but rather responds to whatever demand such inequality creates.

Offspring sex selection will not address familial inequality (nor, I think, will it make it worse), but as is the case with mothers living in highly unequal and discriminatory societies, it is plausible that some women in sexist and unequal relationships are better off being able to choose offspring sex than not.

For women in relatively nonsexist societies, the availability of sex selection might, like other reproductive technologies, open up the range of choices available to them. But as with other technologies, making those choices involves consideration of many factors, including personal and religious values, economic factors, familial concerns, and so on. There is no promise that sex selection comes without strings attached, or without cost, but that is true of all medical technologies. Rothman expresses a particularly grim view of male-female relationships, leading her to conclude that the existence of sex selection will create an obligation on the part of women to select sons. Undoubtedly there will be families in which husbands pressure wives to bear sons (or daughters), but there will also be families in which wives will pressure husbands for the same, and sex selection makes it possible for those couples to choose the sex of future offspring rather than having to take their chances. It is a significant disadvantage, and one that argues against its widespread use, that sex selection cannot guarantee that there will be future offspring, but rather makes pregnancy less likely (for fertile couples) than traditional conception.
§6. Is Sex Selection inherently sexist?

Some critics of sex selection, such as Rothman and Tabitha Powledge, contend that sex selection is inherently sexist and discriminatory. It is clearly the case that in some cultures, female children are deemed undesirable, and the message of sex selection is indeed that such children ought not be born. But as noted above, it is not necessarily the case that existing females are worse off because of prenatal or preconception sex discrimination. Indeed, many mothers might be better off if they can prevent the conception or birth of unwanted children, and daughters might be better off if they are not competing for scarce resources with female siblings. Given the widespread gender discrimination in such societies, male children would experience more well-being, in the course of a lifetime, than female children born to the same families. If it is rational, then, for parents to choose to bear children whose lives will be best in their given circumstances, it would be rational for parents in sex-discriminatory cultures to choose male offspring rather than female offspring. It is not clear that, on balance, women in sexist societies would be worse off because they have access to sex selection. Indeed, many might well be better off, at least as concerns their childbearing activities.

In societies with relative sex equality, non-medical sex selection is generally not discriminatory in the pejorative sense. That is, parents do want to select offspring of a particular sex, and so they are, in that sense, discriminating between the sexes for the purpose of choosing one over the other, but not necessarily for sexist reasons. Even in cases where parents prefer only children of one sex (as opposed to a “balanced” mix),
the choice is not necessarily motivated by sexist attitudes, but rather by the desire for the particular childrearing experience associated with the desired sex. But even that, Rothman claims, is inherently sexist. It reifies sex “as the basis on which we judge the potential for a relationship,” and parents who select the sex of their children “are being ‘sexist,’ — as social scientists define it, parallel to the notions of ‘racist’ — that is, assuming qualities other than the biological ones.” 40 The phrase “family balancing” lends legitimacy and respectability to desires that are really motivated by sexist values.41 By Rothman’s lights, it is simply impossible for sex selection to be motivated by anything other than sexism, however benign that sexism might appear. But is that necessarily so?

One line of argument that sex selection is inherently sexist trades illegitimately on a conflation of two senses of “discrimination” to suggest that any sex-based preference is discriminatory in a “sexist” way, and any act of distinguishing between the sexes is discriminatory in the pejorative sense. Rothman argues that recognizing any differences between the sexes is to discriminate between them in the negative sense because it does not distinguish between naturally occurring (or, if you will, biologically imposed) differences, but rather imposes those differences from without in a sexist way. Therefore, the preference for a child of either sex, boy or girl, is a desire for a child who will “do gender,” and is inherently sexist and discriminatory in a bad sense.

40 Rothman & Robertson p8
41 Rothman & Robertson p12
This is a simplistic argument that does not distinguish between the desire for a child of a particular sex, and the desire to “do gender,” and conflates gender preferences with sex preferences. Gender is culturally imposed, sex is biologically imposed, and the differences between males and females are not all differences in gender. Rothman’s argument also conflates different senses in which the word “discriminate” might be used. To discriminate is to recognize differences or make distinctions, as in having a discriminating palate. To discriminate between people, on the other hand, is generally perceived to be showing favoritism for some over others, to engage in “the unjust or prejudicial treatment of different categories of people or things, especially on the grounds of race, age, or sex.”

But distinguishing between people is not always discriminatory in a pejorative sense. To distinguish between persons of very young age, such as toddlers, and persons of more advanced age, say, thirty year olds, involves recognizing significant mental, physical and developmental differences. A two year old child would be significantly inferior to a thirty year old adult in many ways that matter. We would not trust a toddler to do our taxes, or drive a taxi, or watch young children. A two year old toddler might be superior, in some ways, to a thirty year old, say, in terms of physical flexibility, or in her capacity to rapidly learn a new language. There is nothing negatively or immorally discriminatory about recognizing the significant differences between two year olds and thirty year olds, and giving preference to thirty year olds in areas where age matters. It would be a different matter if we were to give preferential treatment to two year old boys over two year old girls on the basis of sex alone. If two year old boys

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42 Oxford American Dictionary
received more food, medical care, nurturing, and education than two year old girls, that would be discriminatory in a negative sense. But is it equally discriminatory, in a morally problematic way, for parents to want a boy instead of a girl, or a girl instead of a boy? Is appreciating the differences between parenting boys and girls like appreciating the differences between toddlers and adults, or is it negatively prejudicial, like the belief that all Asians are good at math and all African Americans are athletic?

Sex selection would be sexist if it were utilized on the assumption that one sex is superior to the other, or if its practice lead to discrimination against one sex, in favor of the other. Recognizing that there are differences between the sexes is not sexist, per se, and neither is recognizing that there can be substantial differences in the experiences of raising boys and girls. There can be legitimate nonsexist reasons for parents to prefer rearing girls instead of boys, and vice versa. There is no reason to assume that parents who would utilize sex selection are more likely than others to hold sexist views or to act in a discriminatory manner, yet this is precisely what Rothman seems to imagine: “There really is potential for harm there — any time we give parents reason to think they can control the kind of people their children are, I think we are doing damage to the child, the parent, the relationship.”43 While parents who prefer one sex over another may be swayed by gender stereotypes, and may expect a particular childrearing experience on the basis of such stereotypes, parents who do not use technology to ensure that their procreative preferences are satisfied are equally susceptible to such stereotypes. It would simply be

43 Rothman & Robertson p5
 naïve to suppose that parents who leave the sex of their children to chance are, purely by dint of their lack of proactive procreation, going to be better parents, or will somehow parent in a more gender-blind way. Given the myriad ways that parents do — and should — try to control the kind of people their children are, vague worries about overly gender-conscious childrearing do not amount to much. There is value in appreciating and celebrating the differences between boys and girls — to do so does not assume the superiority of one over the other, but rather recognizes, as Justice Ruth Bader Ginsburg wrote, that “the two sexes are not fungible,” and “inherent differences between men and women… remain cause for celebration.”44 Indeed, if we adopt the kind of gender-blindness Rothman appears to value, the kind in which it is neither here nor there whether parents have boys or girls, the kind in which the sexes are fungible, then what would it matter if parents had only boys? What would it matter if Indian families, or British or American families, stopped bearing girls altogether? If the sexes are fungible, if there is no difference between boys and girls, it shouldn’t matter at all. But it does matter. It is the inherent differences — not the culturally and socially imposed differences — between boys and girls, men and women, that make it important and valuable that there are both male and female children in the world, and make it important to some parents, but surely not all, that they control the sex of their own children. Absent evidence that the children of parents who use sex selection will be worse off than their non-selected peers, there’s no reason to negatively prejudice parents who would use technology to stack the deck in favor of their preferences, nor to assume that their motives, while inherently

44 Ruth Bader Ginsburg, quoted in Rothman & Robertson, p4
discriminatory, are discriminatory in a negative way. There are ethical reasons, often
enough, to be concerned about parents and their childbearing motives, but none of those
reasons are exclusive to parents who choose to select the sex of their children.

Powledge argues that sex selection amounts to judging the worth of a human
being entirely on the basis of sex:

I want to argue that we should not choose the sexes of our children because to do so is one of the most stupendously sexist acts in which it is possible to engage. It is the original sexist sin. This argument applies to both pre- and post-conception technologies… They are wrong because they make the most basic judgment about the worth of a human being rest first and foremost on its sex.\footnote{Powledge, Tabitha M. in Holmes et al. (1981) p197}

We frequently make decisions about people on the basis of sex. When people choose their life partners and mates, they do so, in part, because the potential mate is of either the opposite sex or the same sex. There is nothing inherently wrong or unjust about discriminating on the basis of sex when choosing a mate or life partner, even though to do so is to make a choice that rules out one half of the entire human race for no other reason than that they are of the “wrong” sex. Mate/partner selection amounts to making “the most basic judgment about the worth of a human being rest first and foremost on its sex.” But such a choice does not imply that the only characteristic about the chosen (or unchosen) person that matters is their sex. If it did, then choosing an appropriate mate or partner would be quite easy: the first available man or woman to happen by would do. Nor does it imply that all persons of the undesired sex are worthless — only that they do
not fit certain criteria that matter a great deal. What matters in choosing a partner, of course, is the whole person, and the potential for a satisfying relationship, and not just the arrangement of X and Y chromosomes. Such choices are never made entirely and only because of sex.

Similarly, when parents choose a girl or a boy, they are likely hoping to have a particular type of relationship with the chosen child, or, in the case of a second child, hoping to provide a particular type of sibling relationship for an existing child. While they cannot know anything about the potential child other than its sex (and the arrangement of some other genes), this is not to say that the child’s entire worth is based on its sex, or that all children of the other sex are worthless. Unless one makes the untenable claim that there are no differences between males and females, or that all the differences are culturally-imposed gender differences, the sex of a child is a reasonable basis on which to hang some of a parent’s hopes. Will some parents be motivated by sexism? Undoubtedly. Will some parents find their expectations unmet? Undoubtedly, just as will parents who do not choose the sex of the children they will bear.

Parents who desire to choose the sex of their children need not be motivated by sexism. There are many reasons for selecting the sex of potential children, some rational, some not, some sexist, some not. There is good reason to believe that male children will have better lives, overall, than female children, in most if not all cultures. In cultures

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46 Even in cultures where arranged marriage is practiced, it is not merely sex that determines who will be partnered with whom, but a variety of characteristics, needs, and social circumstances. This is not to defend arranged marriage, but only to suggest that it is never as simple as choosing entirely and only on the basis of sex.
where there is considerable and entrenched sexism, parents motivated to produce children who will live the best possible lives have reason to produce sons instead of daughters. A single mother, or lesbian mothers, might choose a daughter because a son — even a son raised from birth to be a feminist — could not share with his mother(s) the most basic experience of being female in a society where males enjoy a privileged position. So, even when sexism within a society underlies, to a lesser or greater extent, the decision to choose a future child’s sex, it is not necessarily the case that the child’s parents are themselves motivated by their own sexist beliefs, nor that they must believe that one sex is superior to the other. As Warren puts the matter, “the use of sex selection is not an inherently sexist act. That some parents wish to preselect their children’s sex is largely a result of sexism at a social level. But this does not show that what they do is wrong.”

There is nothing incoherent about believing that sexism is wrong and still wishing that your child will have the best possible life within a sexist society, nor in wishing for a child who can be, in certain basic and fundamental ways, a compatriot and companion.

The claims that parents are sexist, or have unrealistic and perhaps harmful expectations of their sex-selected children amount to little more than ad hominem attacks based, I suspect, not on rational principles or empirical data, but on fears of unnatural selection or reproduction. Though presented as consequentialist fears of slippery slopes, they are really nonconsequentialist objections to doing things in a different (and presumably worse) way. The fear of novelty is not an argument against sex selection, not

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least because there is hardly anything novel about sex selection — parents have practiced it for centuries. Mere custom cannot be the reason for preferring not choosing a child’s sex over choosing it. After all, what many find morally objectionable about sex selection in the deeply sexist societies where it is commonly practiced are the kinds of customary attitudes and preferences that influence the choices actually being made. Whether or not a choice is morally objectionable might depend on many things, but the mere fact that a choice has been influenced by custom makes it neither right nor wrong. I am not here defending any form of cultural relativism. Many cultural customs and traditions are morally objectionable because they are discriminatory or sexist, and because they harm women. Female infanticide and abandonment, and the abuse and neglect of female children in sexist societies are reprehensible practices, and the fact that they are customary and accepted within a culture is no moral defense. But it is the customs themselves that are objectionable, and not the mere fact that they are customary. Being customary is itself a morally neutral property of practices, one that confers neither rightness nor wrongness on them. Likewise, being noncustomary is a morally neutral property of choices and practices.

The mere fact that it has long been the practice and custom in most liberal societies to “let nature decide” when it comes to the sex of our offspring does not make adhering to such customs morally preferable to actively choosing the sex of one’s offspring. Custom and tradition may have been good enough for our parents (who, at any rate, had little choice in the matter), but the new possibility of making noncustomary
choices is not in itself immoral or suspect. There is nothing inherently better, morally speaking, about the randomness and chance of reproduction without intervention, nothing virtuous about abandoning proaction in procreation in favor of inaction, unless one subscribes to religious, traditionalist or superstitious views of children and the superiority of letting nature, or God, make one’s childbearing choices. Parents engage in all kinds of selection of and on behalf of their children, from choosing daycare providers and schools, to choosing diet, sports and music lessons, television shows, and so on. So long as those choices are not too harmful, society generally sees fit to leave the choices to families without interference, and without, for the most part, moral disapproval. If we are not going to limit reproductive freedom, if we’re not going to impose criteria of health, intelligence, lifestyle, or age on parents in general, why focus only on their desires when it comes to sex selection and what that says about their fitness as parents?

There are practical reasons to be prudent and cautious about sex selection and all forms of reproductive intervention, as well as all forms of medical intervention, but mere custom and tradition are no argument against using PGD for sex selection any more than they are an argument against PGD tout court.
Chapter 7: Designer Babies and Savior Siblings

§1. Should we have the best children possible?

What’s the conscientious would-be parent to do? There are myriad possibilities for testing embryos and fetuses, many of them prohibitively expensive for all but a few, and many of them unnecessary for all but those unlucky few couples who have a genetic combination that could prove harmful or lethal to possible offspring. Is there a parental duty to have the best children possible, or just to give the best lives possible to the children they have? Ought we to aim for a “decent minimum” in terms of quality of life, or something better? Is it enough to give your child a life worth living, or can we, should we, strive to do better than that?

If we limit our attention to genes that cause or predispose to disease or disability, we may yet fail to give our children the best possible start in life. In circumstances where there is a known risk factor for inherited disease — Tay-Sachs, Huntington Disease, Cystic fibrosis, or familial Alzheimer’s, for example — there is a clear case to be made that parents have a moral obligation to test, or to employ ART to ensure the birth of an unaffected child. Yet some would argue that we ought to do more than test for disease-causing genes. Julian Savulescu argues that “we have a moral obligation to test for genetic contribution to non-disease states such as intelligence, and to use this information in reproductive decision-making.”

1 Savulescu, Julian (2001). p414
The spectre of eugenics haunts such enterprises. The notion that we ought to build a better baby, create a stronger race, improve humanity through genetic screening, or tweaking, or outright modification, smacks of the sort of negative eugenics programs that had currency in the early 20th century, including the Nazi program of creating a master, Aryan race.\(^2\) Can we build a better baby, engage in positive eugenics for the sake of future children, without sliding into the worst, most discriminatory practices of past negative eugenics efforts?

Julian Savulescu argues that procreative beneficence requires that we choose the children most likely to have the best outcomes in life. The principle of Procreative Beneficence says:

> couples (or single reproducers) should select the child, of the possible children they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant, available information.\(^3\)

On the assumption (which is speculative, at best) that there is a genetic contribution to non-disease states such as intelligence, aggressiveness and criminal behavior, homosexuality, and so on, Savulescu says that, to the extent that genes contribute to these states, we have a reason to select for or against those genes. On the further assumption that features like intelligence and memory have positive instrumental value for persons, we ought to test for and select contributing genes. To use Savulescu’s example, if

\(^2\) Negative eugenics refers to the use of genetic techniques to reduce fertility among the “genetically disadvantaged,” while positive eugenics is typically thought of as encouraging reproduction among the genetically advantaged. Encouraging the use of ART to ensure the birth of genetically “normal” or “superior” children over those with genetic defects might be called either negative or positive eugenics.

\(^3\) Savulescu 2001 p415
memory (M) relates to well-being, then there is “a positive obligation to test for M and select the embryo (other things being equal) with the best M profile.” Likewise, we ought to select against genes that would reduce well-being, and do so for the very same reasons we ought to select against disease-causing genes.

A complete discussion of obligations of beneficence is beyond the scope of this chapter, but assuming there are obligations of beneficence, and specifically, that there are obligations of procreative beneficence, the question remains what those obligations would require of parents. Beneficence, generally understood, does not require that we must always do what is best or most beneficial for another. Rather, our moral obligation requires us to act for the benefit of others, helping them to further their important and legitimate interests. Preventing disease and disability would surely count among the minimum requirements of procreative beneficence, but as principles of beneficence often are, a principle of beneficence would be quite vague regarding anything more than that. There could be no limit to what parents would be obligated to do for their future children on the broadest interpretation of such a principle — ought we to ensure that our children have the skin and hair color that will be most beneficial, and lead to the best opportunity for future success? Should we ensure that our children are tall, and free of genes that might predispose them to obesity or acne? A further implication of such an obligation is that only those who would have access to genetic testing would benefit, leading to potential exacerbation of existing inequalities. Savulescu argues that the well-being of

4 *ibid.* p420
future children takes primacy there, and “In so far as a non-disease gene such as a gene for intelligence impacts on a person’s well-being, parents have a reason to select for it, even if inequality results.”

Given the tremendous cost of genetic diagnosis, and the ever-expanding range of testable conditions (which does not even include such features as intelligence), the “best possible children” would be born only to parents with the most money. To expand such testing to all potential parents within a national healthcare system would quickly bankrupt such a system, and would be unfeasible.

§2. Parental Harm Principle

A more limited principle of procreative beneficence, which we might call a Parental Harm Principle, would obligate parents to prevent harm to their children, where harm is broadly construed to include both harms that might occur after children are born, and those harms which might have their initiating cause in prenatal and preconception conditions that will affect future children, including genetic conditions. Such a principle would obligate parents with known genetic risk factors to test embryos or fetuses, and would also obligate them to not select for genetic conditions that would cause disease or disability. A more limited principle of parental harm has the benefit of not sending potential parents on a wild goose chase in search of any and all possible deleterious (or beneficial) genes (or combinations of genes). This allows for more sensible and focused genetic testing, and more affordable and therefore accessible genetic testing, the cost of which might be offset by the savings accrued through the prevention of illness and

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5 ibid. p423
disability. It would not catch the random mutations that can cause disease and disability, except in those cases where non-genetic risk factors such as advanced parental age call for testing. Nor would it catch the cases that occur to parents whose risk factors are as yet unknown (although future additional offspring could be tested). As always, any scheme for systematic genetic testing of embryos or fetuses will leave out those parents from the poorest countries and with the least access to sophisticated healthcare. A parental harm principle would not prohibit such persons from reproducing, any more than simply being economically disadvantaged ought to do so, but would rather potentially create social and governmental obligations to improve access to healthcare, where possible.

§3. Designer babies

Creating the best possible children — the smartest, the most athletic, the healthiest — could ultimately require genetic enhancement, either by the selection of embryos with the best genetic profiles, or through genetic manipulation of “sub-par” embryos. Given the complexity of many desirable traits, and the complicated interplay of genes and environment involved in traits like intelligence and athleticism, the ability to effectively alter or select embryos for enhancement purposes remains a distant possibility, if it’s possible at all. Nonetheless, the possibility of genetic enhancement, or the use of genetic technologies not merely to select healthy children, but to select superior children, causes speculative uneasiness for many.
§3.1 The Treatment-Enhancement Distinction

Critics of genetic enhancement often cite the moral importance of the distinction between genetic treatment or therapy, and genetic enhancement. There is an underlying assumption that treatment/therapy is morally permissible, and fits well with the goals of medicine, while genetic enhancement is at best morally questionable and at worst, simply immoral. There is great difficulty, however, in drawing a fixed line between what counts as treatment and what counts as enhancement, and genomic information, which has the potential to reveal a more fine-grained picture of human variation, is likely to make the boundaries even less distinct.

Daniels proposes that the line between what counts as treatment and what counts as enhancement can be drawn at “species-typical functioning.”6 That is, the goals of medicine involve meeting medical needs that normalize people, generally taken to mean “treatment of a disease or disability, where disease or disability are seen as departures from species-typical normal functional organization or functioning.”7 This is contrasted with medical services that “merely enhance human performance or appearance.”8 Enhancements could make individuals better than normal in some respect, and thus might result in a departure from species-typical functioning, although in a way that would be advantageous for the enhanced individual. Enhancement might also serve to alter undesirable features, as with cosmetic surgery. Such enhancements would not alter

6 Daniels, 1994. p237
7 ibid.
8 ibid.
functioning, but would alter appearance in a way that is presumably advantageous.

“Enhancement does not meet a medical need even where the service may correct for a competitive disadvantage that does not result from prior choices. Accordingly, medicine has the role of making people normal competitors, not equal competitors…”

Enhancements can improve human performance or appearance, so cosmetic surgery that does not affect functional features, such as rhinoplasty to reshape or reduce a nose, or a tummy tuck, would count as enhancements, for Daniels.10 Reconstructive surgery to repair a broken nose, on the other hand, would serve a medical need, although it might at the same time serve to enhance appearance.

This way of drawing the distinction between treatments and enhancements can be effective in some of the simpler cases, but there are numerous harder cases that challenge the species-typical norm. Might treatment of osteoarthritis, which is a common condition in old age — perhaps a normal feature of aging — count as an enhancement? Wouldn’t treatment of infertility always count as enhancement? Infertility is itself not an illness, although it is sometimes the result of illness, and sometimes a normal feature of aging. PGD itself doesn’t fit neatly into either the treatment or enhancement categories. Treating cystic fibrosis might restore a patient to some approximation of species-typical lung functioning, but using PGD to prevent the birth of a child with CF could not count as a treatment — PGD is not a treatment at all, but a means of avoiding disease by sifting out embryos with CF genes. Likewise, for conditions such as HD, for which there are no

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9 Daniels (1994) p 237
10 ibid.
effective treatments, prevention through PGD results in, all things being equal, the birth of “species-typical” individuals, but the use of PGD to select against undesirable genes is not obviously a treatment or an enhancement.

Imagine we could genetically alter an embryo so that the resulting child had an enhanced immune system. Surely that would be desirable, and beneficial to the child, who might avoid the four hundred colds she would otherwise suffer in her lifetime. Would it be significantly different than immunizing the same child against diseases like influenza, diphtheria, or pneumonia? Immunization is a common means of achieving an important medical and social goal — it prevents illnesses that can result in suffering, death, and disability. Immunization has as at least one goal to maintain species-typical functioning, yet it does this not by treating disease, but by enhancing the human immune system to prevent disease. By the same token, enhancing the human immune system genetically would help maintain species-typical functioning rather than restore it, but it would do so by creating, as it were, a super-immune system that is more effective than normal or typical. Would it count as an enhancement, or a treatment? Enhancement, Daniels argues, “does not meet a medical need even where the service may correct for a competitive disadvantage.” Surely preventing illness is a legitimate and important role for medicine, but does it meet a “medical need?”

If we accept that there is an important distinction between genetic treatment and enhancement, it must make room for something like the genetically improved immune system. One way to think about such cases is that by preventing medical needs that
require treatment from arising, a genetic enhancement is meeting a medical need. This would make room under the “treatment” umbrella for some genetic enhancements like better disease resistance, increased tolerance for pain, greater resistance to tooth decay, enhanced fertility, better eyesight, stronger bones, and so on. But as long as we’re being inclusive, why not include other conditions that cause suffering and are medically treatable, such as acne or short stature?

Promoting health and curing disease are comprehensible aims of medicine, yet there are numerous examples of species-typical conditions for which there are medical solutions that do seem to (arguably) qualify as both treatments and enhancements. For example, if we could alter human genes to make teeth and gums more resistant to decay and disease, we would be enhancing humans, but in a way that, like creating a better immune system, meets medical needs.

Daniels resists classifying such enhancements as therapeutic insofar as they involve “optimizing capabilities that are not departures from normal functional organization or functioning.”

We regard medical services as meeting urgent needs, when they are aimed at restoring or maintaining “normal functioning.” Our consensus about where to draw the line focuses on eliminating disease and disability. We already have many technologies that can enhance functioning for individuals, even giving them advantages (such as beauty or athletic performance) they previously did not have. But we generally resist assimilating these cases of enhancement.

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11 Daniels, (1994) p239
to cases of treatment because we do not see them as meeting important needs.\textsuperscript{12}

Oscar Pistorius is a South African runner born without the fibula in his lower legs, and with defects in his feet. Both of his legs were amputated below the knee when he was 11 months old. Wearing carbon-fiber Cheetah Flex-Foot prosthetic legs, Pistorius, nicknamed “Blade Runner,” has set Paralympic world sprinting records. When he started competing with able-bodied athletes in South Africa in 2004, he began to draw attention, and spark controversy. In 2008, the International Association of Athletics Federations, track and field’s governing body, ruled that Pistorius’s flexible j-shaped blades, attached below his knees, actually gave him a competitive advantage over able-bodied runners, and barred him from competing in the 2008 Summer Olympics.\textsuperscript{13} The prosthetic legs do not fatigue like a runner’s muscles, the compression of the j-shaped blade stores energy that propels the runner forward, and the prosthetic limbs make Pistorius taller than he would be on natural legs. Pistorius’s case is a clear example of how muddy the treatment-enhancement distinction can become in the real world. Prosthetic legs, by any sensible definition, count as restoring normal or “species-typical” functioning. Advances in prosthetic technology, resulting in a synthetic limb like the Cheetah Flex-Foot, which looks nothing like a natural leg or foot, have resulted in functionally isomorphic artificial

\textsuperscript{12} ibid.

\textsuperscript{13} The Court of Arbitration for Sport overturned the ban and ruled that Pistorius was eligible to try to qualify for the Olympics. Pistorius did not qualify for the Beijing Olympics. See Robinson & Schwarz \textit{The New York Times} (May 17, 2008).
limbs that function as a human limb, without functioning exactly like a human limb.\textsuperscript{14} The Cheetah Flex-Foot is also, arguably, an enhancement that functions better than a natural leg for some purposes. Pistorius, a double amputee, is close to achieving the speed necessary to qualify for the Olympics, and he is close enough that it is safe to say that he can run faster on his synthetic legs than the vast majority of able-bodied humans can run on their natural legs. There is no way to know, of course, how fast he might have run had he been born with normal, functional legs, like the able-bodied runners he competes against. But it is safe to say that all of those able-bodied, competitive runners can also run faster than the vast majority of humans. If their athleticism is partly the result of some advantageous shuffling of the genetic deck, resulting in greater than average speed, leg strength, or endurance, then they too are enhanced, albeit by random, natural processes.\textsuperscript{15} To restore such an athlete to his own previous condition after an injury would count as enhancement relative to the species-typical norm, but this would seem to stretch the definition of enhancement past the point where it is useful at all.

Problems with drawing a clear line between treatment and enhancement have led many to simply abandon the distinction as ethically insignificant. Resnik argues that the

\textsuperscript{14} No prosthetic limb functions exactly like a natural limb, whether it is as simple as a hook or as complex as a DARPA Proto-1 fully integrated prosthetic arm “that can be controlled naturally, provide sensory feedback and allows for eight degrees of freedom.” (http://www.jhuapl.edu/newscenter/pressreleases/2007/070426.asp) But prosthetics are functionally isomorphic to the extent that they function as an effective (and not merely cosmetic) replacement limb. A wheelchair, for example, while it would enhance mobility for a paraplegic or amputee, doesn’t function like a leg, and would not be functionally isomorphic.

\textsuperscript{15} Caplan (2008) argues that allowing Pistorius to compete would “subvert” the notion of sport because Pistorius’s legs represent too significant an alteration of a crucial human body part, and make him too unlike other competitors. “To be a sport you need something approximating a fair playing field, some boundaries on the attributes of those who compete so they are comparable to one another and some ability to compare today’s performance with those in the not-so-distant past,” Caplan argues.
goals of medicine “do not set a morally sharp dividing line between genetic therapy and enhancement,”\textsuperscript{16} and that genetic enhancement is not inherently problematic on other grounds either:

we should not use the therapy-enhancement distinction as our moral compass in human genetics. In evaluating the ethical aspects of any particular genetic intervention, we should ask not whether it is therapy or enhancement, but whether the intervention poses significant risks, offers significant benefits, violates or promotes human dignity, is just or unjust, and so on.\textsuperscript{17}

Given the difficulty in delineating treatments from enhancements, even without considering what complications genetic information and technology might add, the distinction can be safely abandoned. Daniels acknowledges that genetic information about human variation “may make [the] distinction seem more arbitrary.”\textsuperscript{18} The human genome project may shed light on new ways to “enhance” normal human functioning, but whether or not those enhancements serve as a significant departure from the norm is an empirical question, one that depends in part on how the norm is construed.\textsuperscript{19} As McGee notes, “the species-typical account of normalcy posits without justification that members of the species are born with largely determined sets of capacities.”\textsuperscript{20} Such an assumption may require substantial revision as more genetic information becomes available. It is

\textsuperscript{16} Resnik (2000) p369
\textsuperscript{17} Resnik p374
\textsuperscript{18} Daniels (1994) p237
\textsuperscript{19} A further question, not considered here, is whether the “norm” is objective and biological, or socially constructed. For discussion of this question, see Resnik (2000), Kitcher (1996), & McGee (2000).
\textsuperscript{20} McGee (2000) p125
likely that many humans are already genetically enhanced to a lesser or greater extent when compared to the norm. It is also likely that deliberate efforts to enhance the genome will not work as well as random variation does at building strong bodies and minds. Assuming that the risks of genetic tinkering are small (or small relative to substantial and beneficial advantages), there is nothing inherently immoral about using genetic technologies to enhance future children rather than merely repairing and restoring them to some arbitrarily defined norm.

§4. Savior Siblings

Among the more controversial uses for PGD is when it is used in conjunction with human leukocyte antigen (HLA) typing to select an embryo that will be a good tissue donor match with an existing person, usually a sibling. In many such cases, PGD is desirable because a child has already been afflicted with an inherited disease such as Fanconi Anemia or Beta Thalassemia. Using PGD, parents can select an embryo that will be free of the genes associated with the disease. HLA typing used in conjunction with PGD allows parents to not only select a disease-free embryo, but one that will also be a suitable tissue donor match for an existing child in need of haematopoetic stem cell (HSC) transplantation.\(^\text{21}\) The better the match between the HLA types of donor and recipient, the higher is the likelihood of a successful transplant, and HLA identical siblings are ideal.

\(^{21}\) Haematopoetic stem cells are harvested from umbilical cord blood in a procedure that is noninvasive and presents no risk to the donor. HLA compatible siblings would also make ideal donors for bone marrow transplants, as well as organ donation. Such donations, because of the inherent risks, are far more controversial than HSC donation.
candidates. In the case of diseases like leukemia or aplastic anemia, which are not inherited, PGD would be used not to prevent disease in a possible child, but only so that HLA typing could be used to select an HLA compatible sibling to serve as a donor.

A number of objections have been raised to the use of PGD in conjunction with HLA typing to create donor siblings. The objections tend to be similar to the objections to PGD in general, including concerns about (a) the welfare of the possible child, (b) the use of a possible child as a mere means to another’s ends, and (c) suspicions about the goodness or purity of parental motives. An additional concern is that (d) creating babies to serve as tissue donors puts us on a slippery slope towards creating “designer babies” for more frivolous reasons.

Objection (a): There are no known risks to the donor associated with HSC donation. PGD requires the extraction of cells from an embryo, and the long term effects of PGD — whether PGD itself might increase risk of damage to an embryo that may later affect a child — are as yet unknown. Given the possibility of future harm, some critics of PGD plus HLA contend that PGD should only be undertaken when there is clear benefit to the embryo/child-to-be — a benefit substantial enough to outweigh the risks. Thus, PGD to avoid Tay-Sachs, or Fanconi Anemia, or any other serious inherited disorder, would justify the use of PGD. Presumably, this argument could also be extended

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22 Success rates for transplant from HLA identical siblings are significantly higher than transplants from other donors. Each sibling has a one in four chance of being HLA identical to a sibling, and taking into account the average size of families in Western countries, the chance of having a randomly occurring HLA identical sibling is no more than 15%. See Devolder, 2005, p582.

23 Current studies indicate that embryo biopsy doesn’t increase the incidence of major malformations when compared to IVF or ICSI alone. Liebaers, I, as cited in Devolder, 2005.
to include PGD to select for beneficial genes such as an “intelligence gene.” PGD used solely to select for HLA type would not be justified, on this argument, because it would not benefit the embryo/child-to-be, but would only benefit an existing sick child. Suzi Leather, Chair of the UK’s Human Fertilisation and Embryology Authority, puts it this way:

PGD can secure an outcome which is much better than the horrible early death say, of an infant with Tay-Sachs condition. Clearly then the resulting child benefits from the PGD to the extent that it owes its serious-disorder-free life to PGD. But an intervention which imposes risks without benefits, or where the benefits accrue to another person, is very different.24

This is a mistaken view of the benefits of PGD for the selected child. The child born after PGD owes its existence, tout court, to PGD, but not its “serious-disorder-free life.” The embryos that might have been born with a serious disorder were not selected, and would never have been selected. PGD did not cure an embryo of a serious disorder; an embryo was selected because it was already free of the serious disorder. By the same token, any child born after PGD owes its life to PGD, without which it would not have been selected (and in all likelihood, would not have been created in the first place). The child selected solely to be a tissue donor owes its life to PGD just as much as the child selected solely because it was free of a serious disorder. PGD was a necessary condition for either child to be born at all. The benefit, in other words, for any child born after PGD is the same. Presumably, that benefit must be existence itself. If coming into existence is

24 Leather, Suzi. 2003
not a benefit, then no child benefits from PGD. If existence is a benefit, it is a benefit enjoyed by all children born after PGD, and all children in general. Thus, the child born after PGD plus HLA typing, even if it were later to suffer as a result of PGD-related damage, would be no worse off than the child selected because it was free of a serious disorder. If we do not condemn PGD to select against disease and disability, we have no further reasons to condemn it for HLA typing, at least not on the grounds that it involves unwarranted risk and not enough benefit to the embryo/child-to-be.

Of course, PGD plus HLA typing has a substantial additional benefit to an already existing person — the potential child recipient of HSC donation. This would seem to make the case for PGD plus HLA typing (all things being equal) even stronger than the case for PGD for prevention of genetic disorders. Yet some critics argue that it would be psychologically damaging to a donor sibling to find out that it was created to serve a purpose:

I wonder how [HFEA][25] assessed how a child is going to cope with the knowledge that it was born for the benefit of its older sibling - not because the parents actually wanted another child, but just to make sure that their existing child would survive. Why should we assume that the child is going to be delighted to have been able to be of altruistic use to its older sibling[?][26]

If we accept, for the sake of argument, that a child would be distressed to learn that its birth was desired mainly for the purpose of saving a sibling’s life, we ought to ask

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25 Human Fertilisation and Embryology Authority, the UK regulatory authority for clinics that provide ART.

26 Nicholson, R. 2003
if that child would be any less happy than a randomly conceived sibling within the same family, one who could not serve as a tissue donor. The randomly conceived child could end up in a family struggling with a child’s serious illness, or death, experiences that would certainly affect his happiness as well. He might even come to feel his entire existence to be a failure because he could not save his sibling. The donor sibling, on the other hand, might save both his sibling and his family from an unhappy fate, which would surely increase the overall happiness of all concerned. And unless we think parents are obligated to produce the happiest children possible, as opposed to children whose lives are adequately or sufficiently happy, there is no reason to prefer either the donor sibling or the randomly conceived non-donor, except that the donor sibling has the potential to save the life of another person. That in itself is a weighty consideration in favor of creating donor siblings. It is simply implausible to suggest that the lives of donor siblings will be so awful that they will regret having been born at all.

Objection (b) suggests that to create a child to be a tissue donor is to create it for merely instrumental purposes, or to use that child as a mere means to another’s ends, and not to value it for itself:

> What might be the impact of knowing you owe your existence to serving another's purpose, however laudable? We speak of ‘saviour siblings’: words with a messianic ring. We might equally speak of ‘spare part sisters’ or ‘bred to order brothers.’

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27 Leather, S. 2003

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The assumption underlying this objection is that so-called savior siblings are created and desired only because they can serve to help an already existing child, and that this motive for having a child is wrong. Thus, objections (b) and (c) run together into a general concern about the potentially unseemly or immoral motivations of parents who would use PGD plus HLA typing. But why should parental motives matter here if they do not call for scrutiny in more routine childbearing? Assuming that there are “wrong” reasons for having a child — having a child solely to sell it into slavery, or to torture it would qualify if anything does — given the wide range of reasons and motives for having children “it is difficult to argue convincingly that having a child to save the life of an existing sick child is such a bad parental motivation.”

Clearly, there are moral limits to what parents could do to a child born after PGD plus HLA typing. To kill such a child to use it as a vital organ donor would clearly be immoral, but the same would be true of using any sibling, born with or without PGD. The same restrictions to using children and siblings as donors would apply to HLA-matched siblings, without regard to HLA status. That is, the fact that a child is an ideal match would provide no justification for exploiting or harming that child. But the objection is that deliberately creating an HLA-matched child is itself somehow exploitative and wrong:

28 Kahn and Mastroianni, 2004, p86.
29 Children with Fanconi Anemia often need kidney transplants later in life, due to the side effects of immunosuppressive drugs. An HLA matched sibling would be an ideal donor.
What is the difference, ultimately, between using human beings in that way and using other human beings for slavery? Where do we draw a moral distinction between slavery, which still goes on in many countries, and creating what I would prefer to call slave siblings, not saviour siblings?\textsuperscript{30}

Suppose a donor child were created, its cord blood harvested, and then the child were placed for adoption. We might be inclined to say that the child was created solely for the purpose of using its “spare parts,” after which it was discarded by parents who did not want the child for any other purpose. Would that be comparable to slavery, and to creating a child solely to use it (or sell it, or give it away) as a slave? Hardly. Should we think any differently about such parents than we would think of any other birthparents who give a child up for adoption? There are any number of reasons why birthparents would give a child up for adoption, including that the child was an “accident” or a “mistake,” an unintended consequence of sexual intercourse. Yet in many cases, these accidental parents are praised for making an unselfish decision to provide a better life for their child by giving it away. Unless we are willing to accuse all birthparents who give a child up for adoption of having used that child as a mere means (to what end?), then the fact that a child is not raised by its birthparents doesn’t count as a case of using that child as a mere means. Perhaps a donor sibling would be better off in a family not already struggling with a seriously ill child. As Devolder asks, “If we accept that there is a risk of abandonment in human reproduction, why should we forbid people to have a child to save their pre-existing child because of the risk of ‘instrumentalisation’ and/or

\textsuperscript{30} Nicholson, R. 2003
abandonment?" Giving or selling the child to a slaver would be a different matter, of course, but there it is what is done to the child after it is born that is immoral, and not the creation of the child. Creating a child who can be a donor sibling is not in itself to use that child as a mere means any more than the creation of any other child, and it certainly doesn’t count as slavery.

There are relatively few cases of donor siblings, even fewer of donor siblings created using PGD and HLA typing, and no known cases of donor siblings being abandoned by their birthparents. Rather, they are loved and cherished both for themselves, and for their unique role in saving the life of a sibling. Kahn and Mastroianni suggest that giving a donor sibling up for adoption might qualify as a case of using him as a mere means to the ends of his parents and sick sibling. But they suggest a different scenario in which that would not clearly be the case: abortion of the unwanted fetus. Haematopoieic stem cells are present in the fetal liver after approximately 16 weeks of development. An unwanted fetus could be aborted after 16 weeks, and the HSCs collected from the fetal liver. This might be done in cases where the chances of finding an unaffected embryo that is also an HLA match would be extremely low. Whether this qualifies as a mere means use really depends on whether or not a fetus is a person. On the assumption that a fetus is not a person, and has no ends of its own that ought to be respected, and that a fetus cannot be enslaved, there would seem to be no objection to

31 Devolder, 2005. p584
32 Kahn & Mastroianni, p87.
33 Directed donation and use of discarded fetal tissue is prohibited under US federal law.
harvesting fetal HSCs, at least not on the grounds that it would use the fetus as a mere means, or make of it a slave.

The creation of a donor sibling does not constitute using a child as a mere means to another’s ends any more than ordinary cases of procreation. If we do not object to parents creating children as a means to self-regarding or other-regarding ends (to have a sibling for an already existing child, for example), PGD plus HLA-typing provides no additional cause for ethical concern.

§4.1 Slippery Slopes and Designer Babies

Does creating donor siblings put us on a slippery slope towards creating designer babies? PGD plus HLA-typing is used for a morally significant, and morally good reason — to save the life of an existing child. The same cannot be said for using PGD and genetic testing to create so-called “designer babies.” There may well be other good reasons to select for or against certain genetic traits, but the concern about creating designer babies tends to focus on concerns about using technology to select for non-health traits, such as sex, intelligence, height, and so on. The slippery slope concern is that “HLA-matched siblings might be considered a significant step further down that slippery slope towards designer children.”

That is, allowing the selection of donor siblings will inevitably lead to the selection of children based on frivolous or trivial traits. The argument is premised on questionable assumptions: (1) that allowing parents to choose genetic characteristics or “design” a baby is wrong, (2) that there is no moral

difference between selecting for HLA-compatibility and selecting other traits, or (3) that allowing parents to select for frivolous traits is even wronger, and (4) that selection of HLA-compatible donor siblings will unavoidably grease the skids to top to bottom designer babies. Therefore, we are encouraged to conclude, to avoid designer babies, we ought to forbid PGD plus HLA-typing.

The first assumption is that it is wrong to “design” a baby. Aside from speculation (which may or may not prove true) that there may be unforeseen risks involved in PGD, on what basis is it wrong for parents to select or “design” a particular child? At present, existing technology allows for the selection (or rejection) of embryos, not for tinkering with the genes of a particular embryo. Germ-line Genetic Therapy, in which the genes of an embryo are altered to correct for a genetic defect, is unnecessary given PGD, which allows for the selection of different, unaffected embryos prior to implantation. PGD is not only available now, but it would be easier and more certain than GLGT. Germ-line Genetic Enhancement, in which the genes of an embryo are altered for purposes of enhancement is similarly speculative. Given the complexity of such desirable but multifactorial traits as enhanced intelligence or height, it is unlikely that we will succeed in conferring any significant advantage (if any at all) through genetic tinkering alone.

Assuming we still think it desirable to avoid designing babies for trivial or frivolous reasons, there is a distinct difficulty in drawing clear lines between the frivolous and the morally acceptable traits. Even if we assume that illnesses and disabilities that reduce lifespan and result in pain and suffering, such as Alzheimer’s, HD, CF, diabetes,
hypercholesterolemia, breast cancer, and so on, might be candidates for genetic selection, there are a vast number of traits with some genetic component that straddle the line between frivolity and seriousness. Studies have shown that taller people enjoy some advantages over their shorter cohorts, such as greater economic and career success. So, is greater height — perhaps an extra inch or two — a frivolous enhancement? Would alterations that reduce a child’s risks for acne or obesity be frivolous? Or do we count as frivolous only those characteristics that are entirely cosmetic, such as breast and nose size, skin color, and hair color? If we can draw the line there, why draw it at the use of reproductive technology? Why are we not suspicious of parents who chose each other as genetic mates on the basis of traits like intelligence, or hair and skin color, breast and nose size?

To get a top to bottom designer baby, one with numerous customized traits, would require an onerous amount of reproductive intervention. Achieving it through PGD would require a very large number of preimplantation embryos, including, perhaps, some produced from donor egg and sperm, which would impose considerable cost and inconvenience on designing parents, which would tend to act as a deterrent. Who would be so motivated to design a future child that they would endure such costs, including bearing children who are not genetically related to either parent? On the other hand, most parents would go to the ends of the earth, and bear any necessary cost, to save the life of an existing child, and so the motivation to produce a savior sibling would be considerably

35 Engineering children to be taller would have diminishing returns, since height has relative advantages, and when everyone is taller, the advantages vanish. There’s an upper limit to advantageous height, even for basketball players — the freakishly tall will not enjoy the benefits of the relatively tall.
stronger than the motivation to merely design a better baby. Additionally, it would be relatively easy to regulate the use of reproductive technologies to allow for the creation of savior siblings, or to permit selection against illness and disability — that is, to permit its use for morally weighty purposes — without encouraging the creation of designer babies. The slippery slope is really not so slippery.

§5. Parental obligations to future offspring

We return to the original question: ought we have the best children possible? The answer is a very qualified yes, that may really be closer to a no. The qualification is that while we ought to do what will be good for the child created, “good” does not necessarily mean that any and all means must be exhausted to produce the perfect child. It also does not mean we can merely “try our best” but settle for less than what will be good for a child. We ought to strive to create lives better than minimally decent and barely worth living at the lower limit — and this imposes substantial obligations on would-be parents — but that does not mean that the sky’s the limit at the upper end. The desire to create perfect children is not wrong, it is not a goal that necessarily speaks badly of parents, but procreative perfection is not required. Parents are not obligated to create only the happiest, healthiest, tallest, smartest, most athletic, most beautiful children possible. We ought to strive for lives that are good enough to be worth beginning, where the quality threshold for lives that are worth beginning is higher (perhaps considerably higher) than the threshold for continuing lives already underway. Lives worth beginning are more than minimally decent lives, or lives barely worth living. Even at the lower end, creating lives
worth beginning would impose substantial burdens on would-be procreators. The Parental Harm Principle imposes an obligation to avoid conditions that will cause harm and suffering, and to create children who could flourish, and lead healthy, happy lives unrestricted by avoidable pain, hardship, and disability. This is an obligation grounded in parental beneficence, but a beneficence that recognizes limits, to wit, that life can be hard for the luckiest of us, and that we cannot shield children from all suffering and misadventure if they are to live at all. Avoiding pain, hardship and disability may require not bringing some possible individuals into existence. There is nothing that precludes parents from trying to prevent any heritable condition, however minor, that might result in harm or suffering to a future child, because, as noted before, it harms no one to never come into existence.

Procreation is morally risky — it risks imposing substantial burdens on persons who would not otherwise have to bear those burdens, but for decisions made (or not made) by their creators. Proactive procreation that takes advantage of available technologies and information is always permissible. There is nothing inherently better or morally superior about leaving procreation to chance, or not choosing when choices are available. As choices, options, and possibilities expand, however, new questions and concerns will undoubtedly emerge, and we will be forced to revisit, again and again, just how far we are required to go, and just how many choices we are required to make.
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