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Who Should Pay for Bad Genes?

Eric Rakowski†

Parents have long been able to influence the genetic composition of their children through their choice of a reproductive partner, if only very approximately. They are, however, increasingly able to determine the genetic make-up of their children in other, more precise ways, such as by selecting a particular gamete or embryo or by genetically modifying an embryo prior to artificial implantation. This Article discusses parents’ obligations to their children and other members of the community stemming from their children’s genes. In a just state, it argues, parents would be responsible for redressing any genetic disadvantage their children suffer as a result of parents’ voluntary actions. Within the context of a liberal egalitarian account of distributive justice, this responsibility might most fairly be discharged through a compulsory insurance plan that provides compensation to genetically disadvantaged children by means of a uniform per-child charge paid by parents. However, those parents who chose to bear genetically disadvantaged children when they might have had non-disadvantaged children instead would in some circumstances incur greater liability, because they could not fairly push the cost of their choices off on other members of the insurance pool.

The Article also asks whether parents wrong a child by allowing it to be born with a genetic impairment when, had they taken steps to remove the impairment, the unimpaired child they had would have been a different person from the genetically disadvantaged child because the better-off

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child's capacities and experiences differed considerably from those that
the disadvantaged child would have had. Contrary to many people's moral
intuitions, the Article argues that parents do not wrong such a child. Nev-
ertheless, parents remain morally obligated to bear any added costs occa-
sioned by the child's impairment. Any other approach would allow them
unjustly to shift the burden of their choices to other parents.

Finally, the Article takes up the much debated question of whether
parents harm a child by allowing it to be born with a life not worth living
when they could have prevented its birth. It suggests that the answer to this
question should be irrelevant to parents' legal liability. Acting on behalf of
the parental insurance pool, the state may nonetheless adopt a variety of
measures to help potential parents avoid giving birth to such children,
which one can assume virtually all would prefer.

INTRODUCTION

Children need many things if they are to lead fulfilling lives. They
need warmth, schooling, nourishment, and a myriad of other stimulants,
services, and resources. They also need good genes. Although rare, the
worst genes can condemn children to lives that are worse than non-
existence. Less bad genes—the kind all of us have—may enable children to
live rewarding lives, judged either from their perspective or by any evalu-
ative standard one thinks more appropriate. But their genetic constitution
might nonetheless be counted bad in one of two senses. First, their genes
may compare unfavorably to other people's genes, leaving their prospects
bleaker than those of some of their peers. Second, even if someone is born
with the finest genes nature has so far conferred (to the extent that the im-
mense plurality of desirable genetic traits allows a judgment of overall su-
periority), she may not have as good a set as she might have had—or at any
rate could have had without ceasing to be herself by virtue of too large a
change in the personal characteristics integral to her identity. Her genes are
bad, in this second sense, relative to what might have been, rather than to
what was or is.

In many cases, of course it may be impossible for reasonable people
to agree on whether one genetic constitution is better than another. Because
the relative value of a child's genetic make-up depends on her later

1. That one person's prospects are worse than another person's prospects, or worse than some or
all other people's prospects, may or may not be morally significant, depending upon one's preferred
moral theory. For a catalogue of views concerning who rightly can complain of an inequality by
reference to various peer groups and how the strength of their complaints ought to be measured, see
LARRY S. TEMKIN, INEQUALITY 19-52 (1993). It is likewise a subject of considerable disagreement how
a person's opportunities or achievements should be valued by comparison with those of other people
and what such a comparison implies about the duties of one person to another or of the community to
the person who is worse off.
opportunities, education, experiences, preferences, and choices, differing judgments of its superiority or inferiority may stem from divergent forecasts of the future. Disagreements about the comparable value of a child's genes may, however, reflect differences in values rather than different guesses about what the future holds. People often disagree about how various aptitudes, susceptibilities, or physical traits contribute to or detract from a fulfilling life. Not everyone ranks marginal improvements in mental acuteness, emotional stability, or bodily beauty in the same way. The overwhelming likelihood of differing predictions and conflicting normative assessments across a broad band of cases raises substantial problems for any theory of distributive or compensatory justice that makes either entitlements or obligations to provide assistance depend on genetic differences. At a minimum, these difficulties would limit the application of theories of justice that give salience to these genetic differences to exemplary instances of advantage or disadvantage. Consequently, only the most generally acknowledged genetic inequalities could give rise to legal requirements to provide help or governmental assistance, and it would be surprising if any plausible theory of private morality extended the range of required assistance much further within families.

Exemplary instances of genetic disparity do exist, however. Some people are born with heightened intellectual or sensory powers, an ability to concentrate over long periods, or physical allure that in widespread if not universal estimation markedly favors them over others. The same is true of deficits. Some people are born blind, mentally impaired, physically reduced, or saddled with propensities to develop disabling conditions or diseases that typically leave them worse off than those of their peers who lack these propensities. The fact that complete sets of genes frequently can be ranked according to broadly shared values prompts two related questions around which this Article revolves. First, when (if ever) do people with bad genes—genes that are worse than the genes of some reference group or worse than they could have been for that person given existing technological constraints—have a claim of justice to resources or opportunities on that account alone? Second, who should supply them with any resources, services, or opportunities they validly may claim?

2. Bruce Ackerman insists that one person is genetically superior to another only if every member of society conscientiously believes that his genetic endowment gives him what the evaluator believes is a better chance at living what the evaluator considers a good life. BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 115-24, 131-33 (1980). Philippe Van Parijs accepts this unanimity requirement for the purposes of his theory of justice as well. PHILIPPE VAN PARIJS, REAL FREEDOM FOR ALL 72-74 (1995). This requirement seems too strong, however, not only as a practical matter but also theoretically, given the vast range of idiosyncratic or minority values in many liberal societies. For example, some deaf parents regard deaf children as better off than children with normal aural capacities. Nevertheless, that belief should not, I think, stand in the way of compensation for deaf children based on a widely shared contrary view.
This Article offers only incomplete answers to both questions for two related reasons. First, fully defending a reply to either would entail justifying, as against plausible rivals, a comprehensive account of distributive justice. In the current state of philosophical thinking about justice, that kind of justification is the work of books, not several journal pages. Second, overall accounts of distributive justice rarely supply highly specific recommendations as to the way in which those who unfairly are worse off ought to be helped or even, within wide boundaries, as to the magnitude of help that others are morally required to give them. Determining whether cash, job set-asides, educational preferences, or some other transfer mechanism best curbs the effects of an unwanted trait traceable to a genetic abnormality requires further argument. This Article's discussion does not proceed at that level of detail. My chief goal here is to determine, as an ideal matter, what response justice demands to genetic disparities. Consequently, my main conclusions do not necessarily yield prescriptions for a society, like ours, that is far from just. They may help enlighten state policy all the same, however, by suggesting small improvements within an order that will not likely see substantial reform.

This Article has three Parts. Part I traverses the spectrum of views of who should bear the cost of bad genes, before describing more exactly one liberal egalitarian ideal for helping victims of poor genetic luck. Although I endorse that ideal and offer some reasons for adopting it publicly, I do not defend it fully here.\(^3\) That would be possible only as part of a far larger account of distributive justice, familial obligations, and state power. Instead, my aim in describing the implications of that liberal egalitarian ideal is to clarify some of the difficult choices that need to be made in responding appropriately to substantial inequalities in people's prospects stemming from their genetic differences. There is no plainly correct account of a community's potential obligation to reduce or remove genetic inequalities.

Part II explores the moral puzzles that arise if one assumes, as much philosophical writing does, that major changes in an unborn child's genetic make-up can alter that child's identity, causing it to be born a different person (in morally significant ways to be explained) than it would have been had those changes not occurred. These puzzles have no satisfactory solution if most people's moral beliefs are correct.

Although for now government policy and legal liability need not be altered to take account of these difficulties, future policies and laws might require change, as our ability to alter people's traits and identities grows. I argue that parents generally should be held financially responsible for meeting their children's needs, as those needs are defined by the

equal-opportunity account of justice outlined in Part I. A uniform, per-child charge on all parents to cover children's education, health care, and other important goods would ensure that parents' obligations of support would not be affected by their own genetic inequalities, insofar as those inequalities affect their offspring's abilities. In contrast, neither other parents nor the broader community is obligated to pick up the tab for additional child-rearing expenses that come about intentionally. Parents who choose to have children who are worse off than the children they might have had do not wrong the children they bear if their actual children are different persons from the children they might have had. But parents would be wronging their fellow citizens if others were morally bound to pay more as a result of those parents' decision to have children who are genetically worse off than they could have been. Justice assigns the additional costs of parents' choices to them alone.

Part III discusses the situation of children who might be or are born so genetically impaired that their lives are not worth living either from the moment of birth or, as with Tay-Sachs disease and Lesch-Nyhan syndrome, beginning a short while later. It considers the duties of potential parents, medical personnel, and state actors to prevent or discourage the birth of children with genetic conditions that render their lives worse than non-existence when it is known with some certainty that a particular child is doomed to such an awful life unless it never is conceived, its genes are altered after conception, or the fetus that would become that child is aborted. Part III also considers these decision makers' possible obligations to end a child's life when the likelihood of its future suffering outweighs any blessings life might offer that child. Finally, it reviews the suitability of legal sanctions for enforcing those obligations.

4. Tay-Sachs disease results from a genetic mutation that causes the body to manufacture insufficient quantities of an enzyme needed to break down certain fatty substances in brain and nerve cells. The disease primarily affects young children, although one form strikes a much smaller number of people in their twenties. Symptoms typically appear at between four and six months of age. Nervous system and muscular deterioration follow, resulting in blindness, paralysis, and death by four or five years of age. Between one in twenty-five and one in thirty descendants of Ashkenazi Jews in the United States carry the recessive gene; members of other ethnic groups carry it in far smaller numbers. Simple tests can determine whether a person carries the gene. Prenatal fetal screening can be done through amniocentesis or chorionic villus sampling. Nat'l Tay-Sachs & Allied Disease Ass'n, Inc., Tay-Sachs Disease, at http://www.ntsad.org/pages/t-sachs.htm (last visited May 30, 2002).

5. Lesch-Nyhan syndrome is caused by a genetic mutation that leaves a person unable to produce a necessary enzyme. It usually appears between three and six months of age in male children and causes a variety of symptoms, which may include kidney stones, swollen joints, spasticity, speech impairment, mental retardation, and neurological problems. By four years of age, many of those stricken engage in compulsive self-injury or self-mutilation. Symptomatic treatment is possible, but progressive degeneration usually results in death at a young age. Lesch-Nyhan syndrome afflicts approximately 1 in every 380,000 children. Matheny Sch. & Hosp., Lesch-Nyhan Disease, at http://www.matheny.org/about/ab_les.html (last visited May 30, 2002).
I
WHO OWES WHAT TO CHILDREN FOR GENETIC DEFICITS THAT ARE NOT INTEGRAL TO THEIR IDENTITIES?

Everybody's genes could be better. We all can imagine improvements in our genetic constitution that would not change who we are. Genetic changes that would reduce our chances of developing some disease or disabling condition late in life, after our identities have hardened, are prime examples. By contrast, more radical genetic changes, especially those that would work major alterations in a person's psyche or physical condition, might well alter a person's identity for at least some moral purposes. This is especially true if those changes occurred prior to the advent of a person's conscious life or in the formative stages of that person's conception of herself, her desires, and her values. Mainstream philosophical theories of personal identity, which regard identity in its morally relevant aspects as wholly or mainly a function of a person's psychological states at different times, may be thought to support that claim. Less influential genetic changes, however, apparently would leave a person's identity unaffected or insufficiently affected (insofar as identity is regarded as a matter of degree rather than all-or-nothing) for us to treat her as a different person. If we had sharper memories, dodged cancer, or were more musical, we tend to think, we would still be ourselves, only better off.

One must beware of overly hasty conclusions, of course. This is a murky area conceptually. Any time one seeks to imagine oneself genetically altered, one necessarily imagines oneself remaining constant, with one's chief values and overriding preferences or desires intact and any changes to one's personal identity being accidental rather than essential. Looking at the effects of any number of influences on somebody else's life, however, one is apt to be struck by the precariousness of an individual's identity, if identity is regarded as an intellectual construction from psychological states over time. From a biographer's vantage point, even tiny changes might warrant thinking of someone as a different person from the one he otherwise would have become. The wrong nose could kill a film career—and the resulting experiences, preferences, and values of one frustrated insurance salesman might bear little resemblance to those that his imaginary near twin would have had as a Hollywood heartthrob. The same is true of parental, educational, and other influences. Subtle changes in these variables or a child's chance encounters can work large changes in her later life. An inspiring experience can spark a passion for the stage, instill a religious vocation, or bind one lover to another, making life

thereafter not remotely what it otherwise would have been. Partly for this reason, normative theories of education or child-rearing that appeal to what would be good for a particular child, or what would be desired or valued by a particular child if he were rational and more knowledgeable than in fact he is, run into familiar difficulties. Educational and other formative influences, at least early in life, are meant to fashion a child's values and preferences and thus the child's identity, not respond to pre-existing preferences and values. If a person's identity is highly malleable, however, then even small prenatal genetic alterations might substitute one person for what would have been another, because the forks of identity split much more widely at the start of a life than after much of life's path has been traversed.

It is hard to say at what point along the continuum of possible genetic alterations a person's identity shifts (if there is such a point). For example, it can be difficult to resolve whether genetically caused conditions that are present from birth and frequently have an enormous impact on people's lives, such as blindness or deafness, result in a change in identity. It is hard to say at what point along the continuum of possible genetic alterations a person's identity shifts (if there is such a point). For example, it can be difficult to resolve whether genetically caused conditions that are present from birth and frequently have an enormous impact on people's lives, such as blindness or deafness, result in a change in identity. One of the attractions of utilitarianism is that personal identity has no direct bearing on its directives. Theories of justice that tie entitlements to what a person might have had by way of internal resources, however, may have to

7. Four prominent co-authoring philosophers, Allen Buchanan, Dan Brock, Norman Daniels, and Daniel Wikler, appear to think that deafness is not essential to a person's identity. Although a child born deaf generally will lead an extremely different life than a child born with normal hearing, with dissimilar experiences, goals, and values, they seem to believe that the very same person could have been born either deaf or able to hear. One therefore meaningfully can ask whether the same person could have had his hearing repaired before birth and could rationally have preferred hearing to deafness while remaining the same person. They write:

7.

It is much less plausible to say that a reasonable person confronted with a choice between suffering the limitations of deafness while gaining the benefit of [sign language as a] mode of expression and avoiding the limitations of deafness but not being able fully to appreciate the unique expressive power of sign language would choose the latter. Yet it seems that the appropriate standpoint from which to decide whether to intervene to prevent children from being born deaf or continuing to be deaf is that of a reasonable person confronted with a choice ex ante.


Is their thought experiment sensible? Ex ante choice provides an argumentative fulcrum only if the imagined assessor comparing the lives of a deaf person who never knows what it means to hear and of a person with normal hearing who has never been deaf can genuinely envision himself leading those two lives and then weighing their advantages and demerits. But it is at a minimum difficult, and maybe impossible, to conduct this thought experiment when one alternative's worth, or the well-being it embodies or gives rise to, depends partly on experiential ignorance of the alternative point of view. This difficulty is particularly acute in cases in which one point of view is thought to depend, from a different perspective, on deception, false consciousness, or wrongheaded values. (Try imagining what it is like to be a woman who is born into and accepts a male-dominated, caste society, unaware of or rejecting beliefs or values according to which the acceptance of that social role is illegitimate.) But it extends to sizable differences in sensory or intellectual powers, too. If the thought experiment they recommend cannot be performed, one might say that the two people they are comparing, one with normal hearing and one without, are different persons for the purpose of determining what if anything is owed to the deaf child. Part II considers what might turn on this determination.
give close consideration to the constituents of personal identity. If a person’s genes could not have been better in a certain respect because better genes would have made him a different person, then it seems that being born with the poorer set of genes cannot have harmed him, because that poorer set is a precondition of his very existence. Part II explores this issue in detail and suggests that this problem may not anchor as formidable an objection to a range of non-utilitarian theories of justice as many worry it does. In this Part, I focus exclusively on genetic changes that would not make somebody a different person for purposes of a theory of distributive justice or a broader moral theory, taking as given whatever set of principles a reader endorses for marking that division. On any reasonable theory of identity, some significant genetic differences that plainly would be positive or negative will not change who somebody is. With respect to these identity-invariant genetic changes that would make someone significantly better off, two questions arise. First, in which circumstances is compensation owed to a person whose genes might have been better? Second, who is obligated to provide the required recompense?

A. Genetic Disadvantage and Justice: Competing Approaches

Different theories of justice have widely varying implications for compensating people with less than ideal genes and for apportioning the costs of compensation. Austere versions of libertarianism regard bad genes as nothing more than the bad luck of the person who has them, warranting no redress. If parents or private benefactors choose to help the unlucky more than the lucky, that would be a welcome turn of the tables for the unlucky. But justice does not compel generosity, in the libertarian view, even if (and here there is disagreement) morality might demand or recommend it, either as a special duty that family members bear to one another or as an imperfect duty of benevolence of the sort that Kant defended.

Even philosophers who espouse some egalitarian values may draw distinctions leaving the genetically disadvantaged without claims to compensation. Thomas Nagel, for example, contends that, unlike inequalities that are social in origin, naturally occurring inequalities in people’s prospects lie outside the scope of justice. Their amelioration, in his view, is entirely a matter of private charity. Thus, people who are unhealthy or

lack intelligence through no fault of anyone must look to their own re-
resources or the generosity of others to overcome their natural deficits,
whereas children born into poor or dysfunctional families are entitled, in
justice, to assistance from those who are better off.

Allen Buchanan has argued that private charity can justify a public
grant funded by mandatory taxation if enough citizens individually would
have made contributions on the condition that others did likewise and if the
difficulty of coordinating their actions collectively in the absence of gov-
ernment compulsion prevented these individual citizens from making their
conditional gifts. As a justification for public assistance to the genetically
disadvantaged, however, Buchanan’s argument encounters two major diffi-
culties. First, it is doubtful that a government may, consistent with libertar-
ian premises, require people to contribute who dissent from the majority
view. Buchanan needs a further argument to show that some majoritarian
principle takes precedence over the libertarian premise from which his ar-
gument proceeds. Second, Buchanan’s argument makes the rights of the
disadvantaged turn on the charitable impulses of the more fortunate, not on
a theory of justice. Thus, many genetically disadvantaged people might not
receive assistance because in many countries, including the United States
today, the requisite majority may exist only for slight transfers to members
of this group.

Self-named left-libertarians support some redistribution from people
whose genes offer them finer prospects to those whose genes supply fewer
desirable opportunities, but generally not as much as would be needed to
give everyone the same chances, even if that level of equalization lay
within human power. Peter Vallentyne, for example, believes that the
rental value of all natural resources, including land, constitutes a collec-
tively owned asset that ought to be divided so as to reduce inequalities in
people’s opportunities, whether stemming from their genes or other
sources. But he acknowledges that outstanding differences in people’s
abilities and chances of leading a fulfilling life will remain, given the

abilities, aptitudes, beliefs, and desires, presupposes a normatively privileged social order or a set
of social orders, because one can always imagine ways of rearranging social institutions to yield more
sizeable benefits to people with certain natural traits. Social advantages generally turn in part on natural
differences and the form of that dependence can be altered by human will. Nagel does not work out a
full defense of certain social orders as normative baselines. He rests with the claim that certain
naturally occurring conditions, such as diseases that cause pain, shorten life, or limit sensory awareness,
are likely to prove personally disadvantageous in virtually any workable society.

For a slightly different attempt to distinguish between the private detriments accompanying natural
disadvantages, which allegedly lie outside the scope of egalitarian concern, and the consequences of
natural disadvantages for a person’s effective functioning within a society, which are said to be matters

11. See Allen E. Buchanan, The Right to a Decent Minimum of Health Care, 13 Phil. & Pub.

12. For representative libertarian objections, see Nozick, supra note 8, at 93-94.
biological and technological limits on corrective action and the size of the common pool from which they may permissibly be funded.  

At the opposite end of the spectrum of collectivism, utilitarianism may or may not decree that the genetically more fortunate transfer resources or make opportunities available to those born with a worse complement of genes. Whether monetary redistribution or other forms of assistance are morally required depends on whether the marginal cost of those measures in foregone utility is smaller than the utility gain to those who are helped. Some utilitarians seem to believe that the genetically disadvantaged would be due assistance by those who are more enviably endowed, especially if their disadvantage takes the form of physical constraint or disability. But there is reason to think them mistaken if the genetically unlucky suffer from profound disabilities that are expensive or impossible to transcend or from disadvantages that are hard to mitigate.  

One view that accords with many people’s sympathies and, to a considerable degree, with the actual practices of modern welfare states holds that those who are better off owe redress to those whose genes substantially curtail their opportunities. Redress may take the form of special education, medical assistance, or welfare benefits if they are unable to obtain employment. This conclusion may follow from different premises. For example, the many versions of prioritarian consequentialism, a philosophical theory that advocates distributional rules giving precedence to the needs or welfare of people who are worse off before considering the needs or welfare of those who already are better off, directly support this view. This prescription also coheres with John Rawls’s “difference principle,” which endorses (subject to limits) distributional rules that maximize the primary goods available to a representative member of the least advantaged class, even though Rawls himself declined to specify how a just society should


14. For an account of some problems that utilitarianism encounters in dealing with handicaps, see RAKOWSKI, supra note 3, at 36-39.


16. As one of the foremost rule-consequentialist philosophers acknowledges, “If I have disabilities and you do not, then I might well get less benefit from a stock of material goods than you get from the very same stock.” BRAD HOOKER, IDEAL CODE, REAL WORLD: A RULE-CONSEQUENTIALIST THEORY OF MORALITY 64 (2000). Hooker’s response is to suggest that priority be given to the well-being of the worst off, instead of maximizing the sum of well-being without regard to whose well-being it is. Id. at 55-65.

treat unhealthy or disabled individuals (and, by inclusion, those whose prospects are hampered by their poor genes), and at whose expense.\textsuperscript{18}

Norman Daniels's position is broadly similar in its implications.\textsuperscript{19} He assumes that communities are bound to adopt effective measures to reduce disparities in people's opportunities arising from various social inequalities and suggests that justice might ask even more: that society take steps to reduce inequalities in people's opportunities stemming from their natural differences, such as genetically caused deafness or multiple sclerosis. Rather than take sides on whether justice has this further, apparently more far-reaching implication, Daniels argues that for almost all practical purposes, one need not settle the matter. The view that society is morally obligated to correct for natural misfortunes (subject to constraints flowing from sometimes competing values) and the view that it should eliminate unequal opportunities it has created almost always converge, he claims, in common prescriptions regarding genetically grounded inequalities.

Genetically linked diseases or impairments can adversely affect a person's chances of living a normal life within any given society. Insofar as these disabilities represent departures from species-typical normal functioning within a particular society, Daniels maintains, justice demands their redress, unless more prominent social values take precedence in a certain case or past a certain point. Redress may take the form of genetic intervention, medical treatment, special opportunities, cash, or other types of accommodation. Whereas justice requires medical intervention or treatment to lessen disadvantage, however, it does not in Daniels's view command intervention to enhance the abilities of somebody who already falls within the normal range. Justice requires what he calls a "genetic decent minimum," insofar as that is humanly possible, but nothing beyond that baseline.\textsuperscript{20} In his view, disagreements about which changes represent improvements and about where the lower bound of normality falls strengthen the case for settling for this seemingly modest objective. Because Daniels

\begin{itemize}
\item \textsuperscript{18} John Rawls, A Theory of Justice 60-61, 76-80 (1971). In a later book, Rawls maintains that his theory of justice as fairness can be extended to prescribe how health care should be provided in a mainly just society, though he does not sketch how that might be done. John Rawls, Political Liberalism 21, 244-45 (1993).
\item \textsuperscript{19} See Norman Daniels, Am I My Parents' Keeper? An Essay on Justice Between the Young and the Old 66-82 (1988); Norman Daniels, Just Health Care 36-58 (1985). Daniels's view is reiterated in Buchanan et al., supra note 7, at 63-103. Apparently, his three co-authors now share that view.
\item \textsuperscript{20} In his co-authored book, Daniels writes: Taken together, the fact of value pluralism and the fact that the value of traits is relevant to social conditions call for caution about any commitment to genetic equality—and perhaps point toward a more modest goal. At least for the foreseeable future (if not forever), the appropriate objective, from the standpoint of both the brute luck conception of equal opportunity and resource egalitarianism, may be something more like the attainment of a "genetic decent minimum"—to the extent that this can be identified with a reasonable degree of consensus—than the elimination of all inequalities in natural assets. Buchanan et al., supra note 7, at 81-82.
\end{itemize}
does not describe the "genetic decent minimum" precisely, however, it is hard to evaluate this claim.

In his various publications, Daniels never proposes who should bear the cost of assistance. Nor does he explain why the burden of compensation or correction is social in nature, rather than an obligation that rests with the parents of those who qualify for assistance. He also offers no opinions about what principles of taxation or regulation would best bring about a genetically just world.²¹

The foregoing sketches delineate today's major schools of thought about what justice demands by way of redress for significant genetic differences. Rather than criticize them in detail, I try in the remainder of this Part to lay out a competing ideal of justice for genetic differences. These alternative views usefully highlight the distinctive features of what seems to me a more attractive ideal.

B. Outline of a Theory of Genetic Compensation and Responsibility

It is not possible, in a brief compass, to present persuasively an overarching theory of distributive justice, defend one of numerous possible accounts of its implications for the provision and funding of health care generally, and then detail its requirements for treating, genetically altering, or compensating people whose genetic make-up could have been better without their identity changing. I have tried to perform the first two of these tasks elsewhere.²² In this Section, I largely take for granted and do little more than summarize my previously expounded account of justice as applied specifically to health care. My aim is to explore its implications for genetic inequalities.

When is compensation, treatment, or genetic alteration morally required for genetic disadvantages that are not integral to a person's identity? My answer starts from one version of the equal opportunity principle I call "equality of fortune." In its broadest formulation, this principle of justice requires that nobody have less desirable opportunities or resources than others due solely to chance events against which that person could not have insured or which she could not reasonably have avoided. It sets as a goal the elimination of bad brute luck (as opposed to luck in activities undertaken voluntarily), so that how well people's lives go depends on their values and choices in the face of inevitable but sufficiently comprehensible uncertainty, rather than on fortunate or unfortunate events wholly beyond the reach of their will. Unlike traditional libertarian theories, it considers

21. Daniels has recently written about how the procedures for making decisions about health care must be tailored to ensure legitimacy and fairness. Norman Daniels & James E. Sabin, Setting Limits Fairly: Can We Learn to Share Medical Resources? (2002). Daniels and Sabin do not say, however, which substantive outcomes offer the most convincing elaboration of whatever more general theory of justice they endorse.

the compensation of those who could not have guarded against their bad genetic luck to be a duty of justice, rather than a matter of individual or group charity. And unlike left-libertarian views, it does not take the stock of resources available to compensate the unlucky to be limited to the world's natural resources, but instead treats a wider swathe of social wealth as potentially subject to the claims of the unfortunate.

The principle of brute luck limitation that forms the theory's backbone needs to be qualified in numerous ways, which I will not try to defend here nor even describe fully. For example, the reference to "equality" in "equality of fortune" denotes a desideratum rather than a value to be weighed against others in deciding which rules to adopt or actions to perform. It signals a state of affairs we ideally would secure but cannot ever achieve, given limitations on human power and rival values that sometimes thwart the equalizing of opportunities. Not all measures that could make people's opportunities more nearly equal are necessarily demanded by justice, all things considered. Thus, transfers from the more fortunate to the less lucky are not required by justice, I maintain, when the contributor's sacrifice becomes unduly large relative to the transferee's benefit. This is a prioritarian rule, one that gives precedence to the interests of the unfortunate but does not consider them infinitely more important than the interests of the more fortunate. One implication of this prioritarian rule is that the lucky may not be harmed to lower them to the same plane of opportunity as persons who cannot be helped further. Justice does not demand leveling down in blind service of equality.

A further constraint on equality might arise in the case of gifts. In a just society, people largely would be free to decide how to use their earnings after they paid their fair share of the costs of public goods and resource redistribution. Should that freedom include the right to benefit another person through their spending if they would rather help somebody they love instead of consuming their earnings themselves? Virtually everyone thinks that free donation should be permitted between spouses, without the donor having to share with the community via a tax on giving each time she wants to give a present to her husband. And a great many people, though not all, believe that freedom of donation should be unlimited in scope, so that individuals should not have to share with everybody if they wish to share their after-tax earnings with one specific person. Yet a donor's decisions to allow another person to consume part of her earnings in her place (after she has paid her fair share of taxes on the acquisition or

23. For fuller discussion of the distinction between prioritarian theories and theories that value equality in itself, see Parfit, supra note 17.

24. I say "might" because of some uncertainty about how the theory of equality of fortune should be formulated to handle gratuitous transfers. The position described in this paragraph is one that I have advocated, though not with complete confidence. See Rakowski, supra note 3, at 162-63.
holding of those earnings) clashes in some instances with the ideal of equality of fortune, because her gift might make the donee significantly better off than others through no merit or choices of the recipient's own. Some truce between these countervailing principles seems unavoidable.

Furthermore, in certain circumstances those entitled to share equally in gratuitous transfers of goods or opportunities because they themselves never had equally generous benefactors presumably would waive part of their right to an equal share of other people's good brute luck. The nearly confiscatory levy on certain gifts that equality of fortune appears initially to favor might well push would-be donors to work less, save less, or evade transfer taxes more energetically, leaving a smaller pot for redistribution than if the toll on giving were reduced.25 Those who in justice could demand a large share of other people's gifts might prefer a smaller share, to maximize their benefit once would-be donors have taken into account the tax implications of material generosity. They also might prefer a less grasping share to advance other values, such as an ideal of family life that depends to some degree on gifts among family members and attendant feelings of affection and gratitude and that might be imperiled if gift-giving were heavily discouraged.

These qualifications are significant but not exhaustive. All are controversial and even those who accept them may contest their dimensions. Their application is further complicated because people may differ as to whether some genetically caused condition is disadvantageous and because they may not agree on how much redress is owed in any particular case, particularly when disadvantages must be weighed against that same person's offsetting genetic advantages.

Nevertheless, there are paradigm instances of genetic infirmity or superiority and they pose a challenge for any account of distributive justice that contends that serious natural inequalities trigger an obligation of correction. What justice requires when these differences are lopsided depends upon three factors: the rational capacity of those who might demand redress, what they and others know about their genetic constitution relative to that of others, and the availability of private means, such as insurance, for shielding them from the effects of genetic misfortune. The interplay of these three factors forces one to distinguish between reasonable adults who are unaware of their genetic make-up and all other persons. It also prompts difficult questions about liability for genetic disadvantage when insurance markets cannot function.

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25. For further development of this idea, see Ackerman, supra note 2, at 204-07.
I. Normal Adults Unaware of Their Genetic Constitution

Consider first the case of people whose genetic disadvantage is discoverable only after they have become mentally competent adults. Neither the effects of those unwanted genes nor a person’s above-average proclivity to suffer those effects is known or can be known before she attains the age of majority. What does equality of fortune demand be done for her? In general, nothing at all, if there exists a market in medical, disability, and life insurance. If all adults are able to protect themselves against the ill effects of genetic adversity on the same terms because neither a disabling condition nor a genetic predisposition to develop one has been discovered or reasonably could be detected before insurance is offered to them, nobody owes compensation to another when that person’s genetic infirmity is finally manifest. If an adult suffers late in life from a genetic infirmity that he did not insure against, he is worse off partly because he failed to buy protection against this disadvantage, although his reason for not insuring against certain genetic conditions might have been that insurance was too expensive, given his means and the cost of treatment. If he is now unhappy, he may blame the stars and the undeveloped state of human medical knowledge, but he also must blame himself for neglecting to buy whatever protection is available given our economic circumstances and our understanding of human genetics and physiology.

This conclusion that he has no claim to compensation from anyone might seem counterintuitive, given the notion of equality of fortune from which I began. After all, an insurance market is unlikely to provide complete rectification for certain disabling conditions, even if people purchased especially lavish policies. How can it be an adequate mechanism for insuring equality of opportunity in the face of brute misfortune?

The first step in responding to this challenge acknowledges that justice requires those whose genetic luck is good to compensate those whose genetic luck is sub-par once the disparity appears, provided that the transfer bucket is not so leaky as to revoke moral license for the exchange.\(^26\) The second step recognizes in the face of this compulsory transfer, however, that personal autonomy is valuable. It further notes that people may not share a single attitude toward risk. Nor is it likely that people value possible forms of compensation for a particular genetic disability, from radical chemotherapy to fungible cash, in exactly the same way. The third step notices that individual liberty can be expanded in the context of what initially are mandatory compensation programs without harm to anybody else, thereby accommodating without loss any individual differences that exist in people’s risk aversion or preferences. Some people might wish to

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26. As I already noted, equality of fortune does not demand transfers from the lucky to the unlucky which are prima facie required by its egalitarian core if the benefits flowing to the unlucky are small compared to their cost to transferors.
settle for less valuable compensation should their luck turn out to be poor, as the price for a less onerous commitment to help others if those others suffer bad fortune instead. (In fact, almost everyone might want to accept less than their just entitlements in the event that their luck is sour, in return for a smaller contribution requirement if their genes are above-average.) Those who want more generous protection in exchange for more demanding obligations toward others would have no reason to prevent those who want less of both to withdraw partially from what is tantamount to a common insurance pool, so long as the same packages of safety and cost remained available to them. The fourth and last step is to see that this web of imagined transactions between individuals is equivalent to a market for private insurance. Each person can choose how much protection to acquire at a price fixed by what we know about the probabilities of various adverse conditions occurring, the curative or palliative options available to sufferers, administrative costs, and a variety of other factors. If all are equally ignorant of the future, a robust egalitarian ideal amounts to an equal opportunity to purchase insurance against bad luck, framed by an otherwise just distribution of resources and opportunities and on the assumption that people are sufficiently knowledgeable and rational to choose responsibly.

To be sure, the medical or monetary compensation paid by commercially available insurance may not fully compensate the buyer for the genetically caused loss. For most people, no amount of cash can make up for the years of life lost to Huntington’s disease. And insurance recoveries might be constrained by co-insurance provisions or other limitations to protect against moral hazard, making recovery even less complete. But these shortcomings can be justified, even when one starts from the desideratum of compensating people perfectly for the ill effects of chance events to which they ineluctably are exposed. Controls of this kind would be essential to the administration of a state-run system of compensation, as well as to a private insurance market, and they would be recognized by rational insurance buyers as desirable. Their justification lies in their being favored universally, or nearly so, within a just system by people choosing rules to govern their relations with one another.

It is furthermore worth noting that the vast majority of people, recognizing the impossibility of substantially bettering the lives of victims of certain genetic misfortunes given present therapeutic options, would choose not to buy insurance (or engage in bargaining with the social web that is tantamount to buying insurance) that provided enormous payouts to those victims. They would accept less for themselves if they turned out to be unlucky, to lower the cost to themselves if their fate were better. Justice does not constrain people to buy more expensive insurance than they want. By the same token, it does not force them to set aside risk aversion and
purchase exactly the optimal amount of insurance specified by the utilitarian calculus.

Although the argument to this stage suggests that people should be left free to make their own insurance decisions if any genetic disability from which they might suffer is not discoverable, other reasons can be offered for requiring people to buy a modicum of insurance, thus creating a social safety net against genetic adversity and its effects. We might think it irrational for people not to insure at all, given the difficulty of continuing to live if certain types of bad luck occur. In those cases, we might consider it appropriate to compel people to do what is good for them, even if they do not recognize that it best serves their interests. Or we might recognize that people sometimes fail to insure not because they judge insurance a poor investment, but from weakness of will or inattention. In those cases, pushing them to protect themselves against poor genes through a publicly run program would in fact cause them to do what they actually would want to do anyway. Alternatively, we might believe that people are obligated to help others in grave need if they can do so at little cost to themselves, regardless of how the needy person’s plight originated. If we think that people generally have this duty, we might further think that we ought to take steps never to impose on others through our own neediness and so insure that our own privation never requires the obligatory assistance of others. In this way, too, some minimum level of mandated insurance might be justified.

I will not assess these reasons for constraining a free market in insurance here, although I find them collectively forceful. What bears emphasizing is that the perfect insurance market for rational adults from which the argument started does not exist for all members of any society and that in the future it will encompass fewer and fewer people. Improved genetic-screening techniques and greater knowledge of the effects of genes on health and longevity will increasingly undermine adults’ chances to buy insurance on equal terms in an unregulated market. Moreover, given the way in which insurance markets have evolved in the United States, in the absence of government intervention many people are unable to remain with a single insurer for life. Unless they work for large employers, people’s rates will vary as information about their genetic make-up becomes available through genetic screening, disease, or other disability. Finally, comprehensive insurance against bad genetic luck is not available and would not, in a purely private market, include some types of redress, such as

antidiscrimination laws or other forms of disability accommodation, that might be broadly desired because they support people's sense of dignity or self-worth more effectively than cash.

One can imagine a plethora of government responses to these worries about insufficient insurance or the absence of fair conditions for the exercise of autonomy in insurance purchasing. Outside of non-price mechanisms such as antidiscrimination legislation, these responses range from the provision of state subsidies to insurance purchasers or providers to more or less complicated forms of price regulation, although none of these responses would give everyone a perfectly identical chance to buy insurance unless the government itself made insurance available to all buyers at the same rates.\textsuperscript{28} Government-provided insurance would have its own drawbacks, however, not the least of which are greater limitations on individual choice than a free market would supply and the loss of whatever efficiency economic competition among insurers would yield.

How these competing concerns can best be addressed is far from clear. People are apt to value free choice in the matter of insurance differently, and not everyone will find the case for mandatory minimum insurance equally persuasive. Exactly which balance is most desirable is invariably a hard question, but any answer will have to take into account a particular society's affluence, the workings of its economy, the preferences of its citizens, and practical experience with different mechanisms for modifying the market to nullify or reduce unfairness to those whose genetic disadvantage can be discovered prior to the formation of long-term insurance contracts. No defensible solution can be stated usefully in the abstract.

2. Fairness and Known Genetic Disadvantage

What does the ideal of equality of fortune require be done for people whose genetic disadvantage is manifest before they have had a fair opportunity to insure on equal terms, whether that disadvantage takes the form of a realized infirmity or a genetic predisposition to some condition that would render insurance, employment, or personal goods more difficult or expensive to secure? In my view, the ideal of equality of fortune requires one of two potentially rival approaches for assessing compensation. Both are compatible with the overall theory and their practical implications largely overlap, but they emphasize different strands of the root idea.

The first approach looks to insurance decisions that individuals rationally would have made before birth or some point prior to adulthood.\textsuperscript{29} It

\textsuperscript{28} For further elaboration, see RAKOWSKI, \textit{supra} note 3, at 89-92.

assumes that the hypothetical decision makers were unaware of their own endowments or future desires but knew the distribution of genetic traits, the technologically possible types of correction or accommodation, the expected benefits and costs of those measures, and the resources likely to be available to them later in life in a just society to compensate genically disadvantaged individuals. Any appeal to rational choice under informational and motivational constraints necessarily embodies a number of contestable normative premises in defining the circumstances of choice and the preferences of hypothesized choosers. This is true even when the presumed preferences are extrapolations from the actual insurance decisions of similarly situated adults in a given society. This approach is no exception. One of its chief strengths, however, is the continuity of its implications with the actual choices of rational adults under uncertainty; it does not require more compensation for those unable to make fair insurance decisions for themselves than people would receive if they were free to make choices about their coverage.\textsuperscript{30}

The second approach requires that disadvantages be efficiently corrected (insofar as human power can do so), so long as corrective measures do not demand too much of the better off either absolutely or relative to the benefit conferred on transferees. It therefore potentially goes beyond the first approach by giving more compensation to the disadvantaged than would flow from whatever insurance arrangements rational adults actually tend to make or could be expected to make in a society that was more nearly just than ours. The second approach privileges the value of equality of opportunity more than the first does, subject to the constraints of absolute and relative sacrifice by contributors. It does so by giving precedence to equalizing opportunities over the ascription of risk-taking preferences to persons who are not in fact autonomous subjects. Although the preferences attributed by the first approach are extrapolated from, and are thus consistent with, the preferences of normal adults who are not disabled at the time of decision making, they are not preferences that the pre-rational, hypothetical choosers actually can have. The second approach favors equality of opportunity, subject to the constraints on contributor sacrifice, unless that goal is set aside by actual, autonomous choice. A fictive hypothetical choice is not enough to override the claims of equality when the latter offers larger benefits to the faultlessly worse off.

The second approach goes on to assert that if hypothetical insurance purchases of the sort contemplated by the first approach would require even more compensation than equality would, that further benefit also must be provided, as a matter of rational self-insurance rather than justice. Why? Imagine that nobody was born worse off than anyone else but that everybody could be made better off by some relatively inexpensive prenatal

\textsuperscript{30} For a full airing of these points, see RAKOWSKI, supra note 3, at 97-106.
enhancement. Although the enhancement would not be necessary to achieve equal opportunity, it would be mandated by the ideal of rational choice inherent in the first approach. The second approach therefore takes the hypothetical insurance approach of the first as a lower boundary but suggests that it does not suffice in certain situations.\textsuperscript{31}

3. Who Should Pay?

Who should pay to cover the costs of correcting, compensating for, or accommodating genetic disadvantages to people who lacked a fair and equal opportunity to protect themselves through insurance?\textsuperscript{32} Surprisingly, this matter has received little discussion. Most who believe that compensation is warranted seem to believe implicitly that progressive income taxation ought to supply the wherewithal to even out genetic imbalances, without saying precisely why that mechanism for exacting contributions is just. That tacit belief is puzzling, especially considering how poorly existing income taxes track any plausible notion of justice in allocating the burdens of collective institutions or of redistributing resources.\textsuperscript{33}

There are at least three parties to whom the costs of relieving genetic disadvantages might be assessed: the disadvantaged themselves, their parents, and the community generally.

\textsuperscript{31} For an elaboration of this view and necessary qualifications, see Rakowski, \textit{supra} note 3, at 97-106.

It is perplexing why Daniels and the other authors of From Chance to Choice believe it a mistake to hold that we ought to act with respect to children or adults whose disadvantage was clear from the time of their minority as they themselves rationally would have wanted us to act and to do so at their later expense as taxpayers-cum-insurance-purchasers, even to the point of enhancing their naturally occurring talents or genetic constitution. Buchanan \textit{et al.}, \textit{supra} note 7, at 98, 108, 110. To be sure, intelligent policy makers or citizens might disagree about what people would have wanted at a range of prices with different payment schedules. But in some cases it is easy to assume widespread agreement on the advantageousness of some corrective measure. Imagine a cheap genetic fix, available only prior to birth, that improved everybody's resistance to heart disease with no drawbacks. If Daniels and his co-authors believe, as no doubt they do, that children should be educated, in their own interests and as an improvement on the natural state of self-instruction, then how can they oppose a moral principle requiring that their natural state be enhanced genetically in what they rationally would regard as a cost-effective way?

\textsuperscript{32} Exactly what these costs would be is a hard question. Cash transfers to the genetically disadvantaged would be one solution. But other types of assistance are imaginable, from goods or services in kind, such as government provided or funded mechanical aids or medical care, to guaranteed employment or antidiscrimination laws. Inevitably, one must confront the question of whether recipients should be given money (in a lump sum, or perhaps over time for paternalistic or other reasons) and left to decide how best to cope with their disadvantage, or whether assistance should be tethered to the need that justified compensation in the first place, thus preventing somebody facing an abbreviated life from spending cash compensation on travel rather than medical care that might prolong his life slightly. See, e.g., Anderson, \textit{supra} note 10, at 329; T.M. Scanlon, \textit{Preference and Urgency}, 72 J. Phil. 655, 659-60 (1975) (defending restrictions on the form of assistance). I set aside questions about what form correction should take.

\textsuperscript{33} For a lucid introduction to the lack of correspondence between the United States' federal tax system and attractive conceptions of justice, see Liam Murphy & Thomas Nagel, \textit{The Myth of Ownership: Taxes and Justice} (2002).
Think first about genetic drawbacks toward which justice is indifferent because those who suffer those drawbacks are no worse than average. Suppose, for example, that everybody could benefit from some genetic change that helped keep their arteries from clogging. Or suppose that a person who is well-off genetically could be made still better off through a simple, inexpensive procedure prior to birth. If the issue is who should pay for augmenting a person’s capacities beyond whatever amount is needed to equalize opportunities (subject to the constraints mentioned above), there seems little question but that the recipients should get the bill, presumably when they are adults. Whether each person should be required to pay for exactly what she received (with interest), or whether one should imagine everyone buying the same insurance policy and therefore having identical payment obligations as adults regardless of what they earlier received, is a more difficult question I shall not attempt to answer here.

What about services or resources required by the ideal of equality of fortune just to put people on an even footing (not move them beyond the norm), so far as that can be done while honoring other important values? Many writers seem to think that compensation is a community responsibility. This thought typically follows from one of two rationales: (1) the belief that resources that are in justice commonly owned should be used to reduce disparities in people’s capabilities, or (2) the conviction that the more fortunate have a duty, simply by virtue of their better luck, to share with those who are less lucky if the latter lacked opportunities to protect themselves against genetic adversity.

One should question these rationales. What they typically fail to explain is how parents can justly burden other people through their decision to have a child. The question of why people other than the parents of a genetically disadvantaged child are morally compelled to help repair his deficit is routinely ignored or pushed aside with the hopeful but unsubstantiated and improbable assertion that children produce such large benefits to people other than the children’s parents that non-parents ought to be made to pay for the unsought advantages they receive. If children were purely accidents of nature, entering the world independent of anyone’s choices, one could understand why everyone alive would share a duty to care for them. But children are never accidents in this sense, even when pregnancies are surprises. Because specific people are responsible for their existence and needs, parents alone should bear the cost of compensating their children for any disadvantage they suffer genetically or otherwise. The community may serve as a backstop should parents default on that

34. See, e.g., Vallentyne, supra note 13, at 331-32.
35. See, e.g., VAN PARIS, supra note 2, at 39.
obligation, but it should not be the principal payor. Any other rule would permit parents to impose the costs of providing children with their just share of resources on others, burdening their neighbors with higher taxes (because justice demands fair shares for the new additions) even though their neighbors never asked them to produce children and may not want them.

Of course, were this the rule, some parents might face the prospect of greater liabilities than other parents through no fault of their own. They did not choose their own genes, which limit the genetic possibilities of their children, and cannot yet control which of their genes are passed on. Would they be required to sue their parents to obtain the cash to pay their own children? If so, how far back would the chain of liability extend? Realistically, it could not run very far into the past, and it surely would be a matter of bad brute luck that one or another ancestor was held liable after eons of parental non-liability.

How a theory of justice should handle these problems requires careful thought by those who are sympathetic to the idea that parents are responsible for paying whatever their children justly are owed by virtue of their existence and endowment. One might argue that anyone who wants to have children but whose genes make him likely to owe his children more than average is himself disadvantaged and is entitled to compensation. It is not immediately evident what follows, however. One possibility would be to imagine a hypothetical insurance scheme with fixed premiums that embraces all parents and that makes premiums a function of the number of children somebody happens to have, as health insurance now increases in cost with the number of people covered. A second possibility would be to treat everybody, even those who do not wish or may be unable to have children, as participants in an insurance scheme to compensate for an unavoidable procreative disadvantage. Compulsory payments by parents to cover their potential future liabilities also might provide significant protection to children and be justified paternalistically as a mechanism for forcing people to fulfill their obligations. Consigning children to a tort remedy if parents refused or were unable to honor their parental obligations is a


37. Similar issues arise in the case of repairing historical injustices for which nobody now alive is directly responsible and from which some people perhaps benefited, but to a highly uncertain degree given intervening choices and occurrences. For thoughts on this complex issue, see Janna Thompson, Historical Injustice and Reparation: Justifying Claims of Descendants, 112 ETHICS 114 (2001); Jeremy Waldron, Superseding Historical Injustice, 103 ETHICS 4 (1992). Likewise, any transition from our current social world to a different one we consider more just raises difficult questions about how the costs of a one-time redistribution should be shared, given the significant reliance interests of some who will be expropriated and the long-term effects of demoralization if they are. See Rakowski, Can Wealth Taxes Be Justified?, supra note 36, at 325 n.105.
less attractive remedy, given the divisiveness of intra-family litigation and children’s often dim prospects of economic recovery.

These matters demand vastly more reflection and development than this sketch of a theory offers. Fixed charges for parents that would fund insurance to cover assistance to children with below-average genes, along with a tax on those who are naturally above average genetically to cover any medical assistance they received, would be far more appealing in a world in which income and wealth were more evenly distributed than they are in the United States today. They would not be workable or just across the entire spectrum of earnings and wealth in contemporary America, and even their application to the middle of the income range would be morally questionable, given the injustices that now pervade our economic and political systems. My chief aim here is not to offer detailed prescriptions for reform. I hope, instead, to stimulate thinking about how a better world might look, while fostering wariness of simple solutions for apportioning the costs of treating or compensating the genetically disadvantaged, such as hitching these expenses to existing revenue-collection methods. A morally defensible funding solution will not be found in a patchwork federal tax system that bears the hallmarks of lobbying, political compromise, and economic confusion rather than the stamp of a compelling account of distributive justice.

II
PERSONAL IDENTITY AND GENETIC IMPROVEMENTS

Parents may alter the genetic constitution of their children in numerous ways. The first is by altering the time of natural conception. Parents might engage in procreative sexual intercourse at one time rather than another, thereby almost certainly producing a child with a different genetic make-up. Alternatively, they could achieve the same result by aborting one pregnancy and beginning another. If they are relying on assisted conception, they might choose one egg, sperm sample, or fertilized ovum over others. Finally, they might modify the cell lines of a child they have conceived, though presently these options are quite limited in scope.

39. French doctors appear to have cured several babies born with severe combined immunodeficiency disease, which prevented their bodies from producing lymphocytes and forced them to live the first few months of their lives in sterile bubbles. The doctors removed bone marrow from the children, culled their stem cells, infected the stem cells with a virus carrying the gene they needed to allow their bodies to produce lymphocytes, then transplanted the stem cells back in their bodies. The toddlers are reported now to have healthy immune systems. Gina Kolata, Scientists Report the First Success of Gene Therapy, N.Y. TIMES, Apr. 28, 2000, at A1.
Most of these genetic changes would affect the identity of the resulting child. If a child has a markedly different collection of genes than another child a couple might have had, that child is, in many respects, a different person from the one they would have had under the equivocal label "their child." She will look different, have different abilities, be susceptible to different maladies, and have different inclinations. Moreover, if the child is born at a different time and experiences a different personal history from some other potential child, these differences will be compounded. If substantial differences in the genetic make-up or personal histories of children who are or might be born render them different people, a moral philosophical problem arises. This Part summarizes that problem and explains why no theory of distributive justice that considers a person's genetic endowment relevant to the size of that person's just shares or to the morality of a potential parent's decisions about childbearing seems entirely satisfactory. When judged against prevalent intuitions about what is right or wrong about specific reproductive decisions, public policies, or aid to the genetically unfortunate, no theory of justice performs perfectly.

A. The Person-Affecting Restriction and Procreation

Much moral thinking assumes that an action can be good or bad, just or unjust, only if it benefits or harms a sentient being.\(^40\) In the limited case of human beings, this "person-affecting" restriction on moral value holds, roughly, that an action or omission is wrong if it is worse for whoever will exist if the action is performed or the omission occurs, provided that the agent has a duty to prevent harm to those who are worse off as a result.\(^41\) If an action or omission does not have a negative effect on anyone who will exist if it happens, then it cannot be counted as bad because it will, in fact, be bad for no one. As Derek Parfit has shown, the person-affecting restriction is sorely tested by actions that affect the identity of whichever people ultimately exist.\(^42\)

\(^{40}\) This view has been criticized by those who believe that some physical objects (such as works of art), abstract entities (such as species), social achievements (such as cultures or knowledge), or natural processes are intrinsically valuable, in the sense that actions to advance, preserve, or create them are good even if those actions do not improve the lives of sentient beings. For discussion of this belief and its component assumptions, see Eric Rakowski, *The Sanctity of Human Life*, 103 *Yale L.J.* 2049, 2066-77 (1994) (book review).

\(^{41}\) There are many different versions of the person-affecting restriction on value or the rightness or wrongness of actions. Melinda Roberts offers the most thorough catalogue and discussion of alternative formulations. *See Melinda A. Roberts, Child Versus Childmaker: Future Persons and Present Duties in Ethics and the Law* 18-22 (1998). Some philosophers, such as David Heyd, limit the reach of the person-affecting restriction to the narrower class of persons who would exist whether or not the action being evaluated is performed. *See David Heyd, Genethics: Moral Issues in the Creation of People* 103-06 (1992).

\(^{42}\) *See Parfit, supra* note 6, at 351-79.
Imagine that any child who will be born will have a life that is worth living. Now suppose that a woman delays conception or has an embryo genetically altered to prevent her child from being born with a disability that is so serious that it would affect the identity of her child. A child born without that serious disability would be considered a different person than a child born disabled because the child’s personal qualities, its subjective experiences, its values and preferences, and the life it will lead will differ enormously as a result. Suppose, for example, that her child would be born deaf and blind if she did not delay conception or alter the embryo from which her child will grow. Has she benefited her child if she does either, causing her child to be born with hearing and eyesight?

Parfit’s disturbing observation is that she appears not to have benefited her child, because the child with the disability could not have been born without it. A child born without the disability would be a different person. By the same reasoning, if a woman neglected to take steps that would have prevented her from giving birth to a child with an identity-altering disability, her omission will not have harmed her now disabled child. Had she taken steps to ensure that her child would not be born disabled, the child she now has would never have been born.

Most people find these apparent implications of the person-affecting restriction counterintuitive. Those who balk at them usually suggest that the person-affecting restriction on what counts as wrongful or bad must be rejected, at least when actions or omissions affect the identity of whoever lives. The only plain alternative to rejecting the person-affecting restriction is to abandon the account of personal identity to which it is wed, and nobody has proposed jettisoning that account or tweaking it in a way that would remove this apparent difficulty.43

43. Id. at 358-60 (describing the “Non-Identity Problem” in the case of a woman who had a child at one time but might instead have had a different child at another time).

44. Seana Shiffrin challenges part of this characterization of the problem. See Seana Valentine Shiffrin, Wrongful Life, Procreative Responsibility, and the Significance of Harm, 5 LEGAL THEORY 117 (1999). For an earlier argument suggesting that one can wrong a person without making his overall life worse, see James Woodward, The Non-Identity Problem, 96 ETHICS 804 (1986). Shiffrin contends that harms and benefits cannot be summed for the purpose of determining whether procreation is morally permissible, so that what Shiffrin controversially counts as the benefit of being born with a life worth living cannot morally compensate for the harm of being born with a disability, thereby leaving the parents of a disabled child blameless. Shiffrin, supra, at 135-41. What is unclear is what follows from this conclusion, if it is correct. Shiffrin does not argue that it is impermissible to give birth to a child one knows will suffer from a serious disability if its life on balance will be well worth living. But she does suggest that, at a minimum, parents of a disabled child have a special obligation to compensate him for disadvantages flowing from the disability. In her view, this obligation goes beyond what she assumes is the obligation that all people responsible for a child’s existence have to furnish that child with a range of goods—an obligation that flows from the fact that practically every existence has burdens that Shiffrin would label as harms.

Shiffrin’s view is open to numerous challenges, which she takes pains to rebut. One might doubt whether existence is properly counted a benefit, for example, whether harms and benefits have the asymmetrical character Shiffrin maintains, or whether she embraces the right measure of compensation
The challenge that identity-altering actions or omissions pose to the person-affecting restriction is forceful. It suggests that an action or omission may be good or bad even if it has on balance no effect on the quality of the lives of persons who exist independently of the action or omission. Of course, generally the birth of a child with a profound disability will be worse, either economically or emotionally, for other people than the birth of a child who lacks the disability, so that almost always there are strong person-affecting reasons for not giving birth to a profoundly disabled child if one can have a non-disabled child in its place. This point cannot be overemphasized. However, in the extremely unlikely event that a person-affecting rationale is somehow absent or weak (for example, some parents may want to have a child with a particular disability, such as deafness, that is apt to be determinative of that child’s identity), some non-person-affecting justification for preventing the birth of the profoundly disabled child seems essential to most philosophers as a way of squaring our moral judgments with our intuitions about right and wrong.

B. Parfit’s “No Difference” View

Parfit offers a partial response to the criticisms he directs at the person-affecting restriction. Parfit maintains that an action or omission can be wrong even if it makes nobody worse off, provided that it increases the amount of serious suffering in the world by comparison with an alternative action or omission that would result in the same number of people existing. In evaluating an action, it makes no difference whether the action affects people’s identities; one need only compare the welfare of whoever exists if the action is performed with the welfare of whoever exists if it is

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46. Parfit, supra note 6, at 357-61.
not to determine the moral character of the action. Suppose that the same number of people will exist in each of two possible futures. If one action makes the inhabitants of the world that will exist if that action is performed better off than the inhabitants of another possible world in which an alternative action is performed, then the first action is in Parfit’s view morally preferable.\textsuperscript{47} Parfit claims that this view, which entails only a modest inroad on the person-affecting restriction because most far-reaching social policies will affect the quantity of future people and not just the quality of their lives, coheres better with our moral intuitions than its denial. Intuitive agreeableness is its sole foundation, though in that respect it is in no worse stead than many moral principles. Many philosophers find it attractive and agree with Parfit’s assertion that an action can be wrong even if it is not worse for anyone who eventually does live. But a large number also feel the tug of the person-affecting view, because its core notion also holds an obvious appeal.

In the following Section, I describe a recent attempt to meld the two positions, giving scope to both the person-affecting restriction and Parfit’s “no difference” view in an effort to do justice to many people’s conflicting moral intuitions. This compromise view has weaknesses all its own. In criticizing it, I hope to display those weaknesses but also to bring out, more clearly than previous writers have, the drawbacks to the “no difference” view in its pure form. Section D then mounts a stronger defense of the person-affecting restriction than it has so far received. That defense, I conclude, is not wholly persuasive either. Areas of agreement among the competing views are outlined in Section E. Section F describes how parental and taxpayer liability and state policies should respond to identity-altering genetic changes that parents knowingly make. It also acknowledges a shortcoming in my proposal that is directly attributable to its reliance on the person-affecting restriction. Fortunately, that failing is more theoretical than practical. It should have no effect on the laws we ought to adopt or the informal pressures that people morally may apply to prospective or actual parents.

C. The “Hybrid” View: Brock’s Attempt to Blend the “No Difference” View with Person-Affecting Values

Dan Brock has offered a novel account of wrongdoing in the case of identity-altering conduct.\textsuperscript{48} Brock accepts Parfit’s criticism of the person-affecting restriction as an essential precondition to the moral wrongness of human action, but he nevertheless incorporates a diluted form of the

\textsuperscript{47} Id. at 360-61, 378.

\textsuperscript{48} Although the three other co-authors of From Chance to Choice appear to share Brock’s view because the book’s title page bears all four names, Brock wrote the part of the book I discuss in this Section. See Dan W. Brock, Preface to Buchanan et al., supra note 7.
person-affecting restriction into his overall theory. The impulse to find space for the person-affecting view is understandable because the restriction is undeniably attractive: how can an action be wrong if nobody can claim to be harmed by it? This simple but powerful thought is apparently what leads Brock to suggest that if two states of affairs contain equal amounts of net suffering or happiness, and if one of those states of affairs is caused by an action that affects persons none of whose identity depends on that action whereas the other state of affairs is caused by an action on which the identity of one or more people depends, then we have a stronger duty to bring about good or avoid harm in the first instance than in the second. The person-affecting view is true to at least this limited degree. How far its reach extends beyond this rare case, Brock leaves unclear.

Brock’s suggested marriage of Parfit’s “no difference” view to this truncated version of the person-affecting restriction, which I call the “hybrid” view, seems to me inadequately defended as a theoretical matter and undesirable in its concrete implications. This Section describes Brock’s view more fully and measures its shortcomings.

To explain the “hybrid” view, Brock describes three cases, which he labels P1, P2, and P3. The cases are hypothetical; it is not clear whether any actual medical conditions or treatments satisfy their descriptions. The unreal character of the examples ought to make us wary of our intuitive reactions to them, but our lack of acquaintance with corresponding real-world cases should not cause us to dismiss those reactions entirely.

Case P1: A woman is informed that if she becomes pregnant now, her child will be moderately mentally retarded. Her condition, however, is easily, safely treatable. She need only take an inexpensive medicine for one month to remedy her condition so that a child conceived after she is cured will be born with normal mental ability. Nonetheless, she does not take the medicine, conceives now, and gives birth to a child who is moderately mentally retarded.

Case P2: A woman is pregnant. She is informed that, if she takes a safe, inexpensive medicine for one month, the child she is carrying will be born with normal intelligence. If she does not take the medicine, her child will be born moderately mentally retarded. She refuses the medicine and gives birth to a child who is moderately mentally retarded.

Case P3: A woman has given birth to a child who is moderately mentally retarded. If she gives her child a safe, inexpensive medicine for one month, it will acquire normal intelligence. She refuses to provide the medicine, ensuring that her child remains moderately mentally retarded.

49. Buchanan et al., supra note 7, at 244-45.
The woman’s action in P3 is uncontroversially wrong. In the United States, she could face criminal or civil sanctions if the state chose to prosecute or if a guardian ad litem sued on behalf of her child. Are the women’s actions in P1 and P2 equally wrong? Parfit and the many philosophers who agree with him would say that they are: in all three cases, the same, worse state of affairs results and could have been averted by an action that is equally costly to the three women.  

Brock assumes that David Heyd and other philosophers who make no exception to the person-affecting restriction, as well as ordinary people who consider the issue, would agree that there is no difference between the wrongness of the woman’s conduct in P2 and P3. In both cases a woman fails to take simple, safe, inexpensive steps to enhance her child’s below-average mental ability.

In my view, Brock’s assumption that P2 and P3 will be regarded as on a par may not be true. If the fetus in P2 is not yet conscious, then P2 probably should not be assimilated to P3, because the physical continuity between the fetus prior to the woman’s taking a medicine in P2 and the child born to her with normal intelligence as a result is insufficient to make them the same person for the purpose of morally appraising the woman’s actions. If personal identity cannot be established for this purpose before a person becomes conscious, as some would maintain, there is no morally significant link between a fetus early in pregnancy and the person it later becomes. In this view, P2 would be akin to P1, not P3, if the fetus in P2 is not yet conscious.

Be that as it may, the key issue is not how to classify P2 but whether the action of the woman in P1 is as bad as the action of the woman in P3, if one ignores the effects of the choices on persons other than the children and if one assumes that any benefit provided to the child in P3 will not make that child a different person by altering its identity. Those who regard

50. The three cases are not really on a par, though their differences might be considered morally trivial. The woman in P1 would have to wait at least one month before conceiving a mentally normal child in addition to taking the medicine, whereas in P2 she would not have to wait. This difference could be eliminated by hypothesizing that the woman in P1 need not take any medicine but that she need only wait until her condition changes, and supposing further that the cost to her of waiting is equivalent to the cost of taking the medicine in P2. Moreover, in P3 it is the child who must take the safe medicine, not (as in P2) the mother. If the medicine carries absolutely no risk, however, one can imagine the two being roughly the same amount of trouble or expense for the two women.


52. If more robust self-awareness is needed to establish personal identity, P2 and P3 might raise the same issue, but in that case the argument for relying on pre-reflective intuitions regarding P3 would be significantly weakened. The argument would run the other way, from the perhaps only questionable wrongness of the woman’s actions in P2 if her fetus was not yet conscious to the questionable wrongness of not administering the medicine in P3.
the person-affecting restriction as applying universally say that the woman’s conduct in P1 is not as bad; Parfit says that it is. Brock attempts to maintain an intermediate position while maintaining allegiance to most of Parfit’s view.  

How could anyone think that the woman did not wrong her child in P1, or at any rate did not wrong her child as badly as the woman in P3? The answer lies in the child’s presumed change of identity in P1. Delaying conception by one month will produce a different child from the mentally retarded child the woman will have if she chooses not to wait. Thus, the mentally retarded child cannot say that his mother wronged him by not waiting; his life is worth living and, had she waited, he would never have been born.

Brock accepts the claim that the child is not harmed in P1, but he sides with Parfit in declaring that the child’s mother nevertheless acts wrongly. She missteps because “she causes suffering and limited opportunity to exist that would be prevented and not exist if she chooses to take the medication and wait to conceive a different normal child.” We need at least one non-person-affecting moral principle to do justice to this conviction. Brock suggests that we endorse non-person-affecting Principle N:

Individuals are morally required not to let any child or other dependent person for whose welfare they are responsible experience serious suffering or limited opportunity or serious loss of happiness or good, if they can act so that, without affecting the number of persons who will exist and without imposing substantial burdens or costs or loss of benefits on themselves or others, no child or other dependent person for whose welfare they are responsible will experience serious suffering or limited opportunity or serious loss of happiness or good.  

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53. Brock writes:

We share with Parfit, in opposition to Heyd, the position that the woman’s action in P1 is wrong because of the easily preventable effect on her child. But we do not accept the “no difference” thesis. We will suggest a reason why her action in P1 may not be as seriously wrong as in P2 or P3, and also suggest that the reason her action is wrong in P1 is similar but nevertheless importantly different from the reason it is wrong in P2 and P3.

Buchanan et al., supra note 7, at 247.

54. Id. at 249.

55. Id. Brock explains the reference to “serious loss of happiness or good” as necessary to avoid preferring the creation of a child whose life would have little suffering but also little happiness or good over the creation of a child whose life would contain more suffering but also vastly more happiness or good that easily outweighs the serious suffering experienced by the second child. Id. at 250. But the phrase could also be read in a way that would allow him and his co-authors to avoid a problem associated with distinguishing between suffering and welfare improvements that occur above an average person’s baseline level. Suppose that one is morally required to choose a world with less serious suffering or limited opportunity in same-number cases because that world is better. Should one not equally be required, for the very same impersonal reason, to choose a world that contains...
By itself, Principle N is consistent with Parfit's "no difference" view and entails that the woman's action in P1 is as bad as the woman's action in P3. Brock asserts, however, that a narrowed person-affecting restriction should be conjoined to it, although he does not say precisely how the two would fit together and what deeper moral view might yield that seemingly awkward pairing. Brock's argument reads in full:

\[N\]ot preventing the same disability to a born child, as in case P3, may be more seriously wrong than not preventing it in a genesis case such as P1. This is because in P3 there is a victim who has been wronged and who can correctly think that his or her life could have been better if the mother had prevented the disability. This grievance present in P3, but not in P1, is a reason for rejecting the "no difference" thesis regarding P1 and P3; not only do different principles apply to them, but P3 is more seriously wrong.\(^5\)

There are two ways to construe this argument. The first focuses on the resentment or anger that a child might feel in P3 if the child ever discovered that his parent could have saved him from a serious disability at low substantially greater net happiness when none of the alternatives would result in serious suffering and the costs to the agent are relatively small?

Suppose, for instance, that a couple could have a child who is expected to be entirely normal. Or they could undergo treatment and have a different child later whom they expect to be far more talented or attractive and who probably would lead a better life. Are they bound to postpone conception and have the second child, as they would be bound to avoid having a child who would suffer seriously, provided that the net increase in happiness or satisfaction would be the same in the two cases? Some think that removing serious suffering is intuitively different from making happy people even happier and that this difference casts doubt on moral imperatives like Principle N. See, e.g., Roberts, supra note 41, at 115-16. But reading Principle N to place the two cases on a par would for others yield a consistent, sensible result. Whether Brock could support that result is unclear, given his unwavering support for distinguishing between "treatment" and "enhancement" and his conviction that we are responsible for redressing genetic shortcomings so far as we are able but that we are not obligated to make our children better than the norm. Buchanan et al., supra note 7, at 119-55.

Interpreting Principle N to require taking steps to improve one's already above-normal child also would allow Brock to sidestep one of the problems persistently ascribed to "negative utilitarianism," which regards the prevention or relief of suffering or evil either as more important than the creation of happiness or good or as the only source of moral duty. For a discussion of this issue in the case of procreation, see Don Locke, The Parfit Population Problem, 62 Philosophy 131, 138-40 (1987).

If one sets aside the same-number restriction, a similar issue arises with regard to the widely accepted asymmetry between a duty not to give birth to a child with a miserable life, because of the net suffering it would endure, and the absence of a duty to give birth to a child that likely would have a happy life, even when the amount of net happiness expected to be produced by having the second child exceeds the amount of net misery expected to be avoided by not having the first child. Brock acknowledges the asymmetry, but it is not clear how he would explain it if he in fact endorses the view I sketched in the preceding paragraph.

56. Buchanan et al., supra note 7, at 254. The word "may" in the first sentence suggests an uncertainty that apparently is belied by the word "is" in the quotation's final sentence, that is, unless the final sentence is meant to state an argument that only may be true. Brock's earlier reference to the "no difference" thesis is similarly equivocal. He says, using the word "may" again, that the woman's action in P1 "may not be as seriously wrong" as the woman's action in P3. But he also says forthrightly that he and his co-authors "do not accept the 'no difference' thesis," suggesting that the word "may" again is out of place, a misleadingly weak substitute for "is." Id. at 247.
cost but failed to do so, or that the state might have improved his lot if it controlled the supply of a scarce drug essential to improve his mental ability. On this reading, what makes P3 worse than P1 is the child’s possible conscious dissatisfaction if he acquires certain information. The child in P1 could not nurse this type of hurt because he must realize that, had his mother or the state acted differently, another child would have been conceived and born in his place. He could not exist without the disability that hampers his life.

There are, however, three reasons to think this reading of the quoted passage mistaken. The second and third reasons for rejecting this interpretation also are reasons to reject this version of the argument that the woman’s action in P3 is worse than the woman’s action in P1.

First, Brock takes himself to be criticizing Parfit’s “no difference” thesis, and Parfit explicitly stipulates that children in his equivalent of P3 do not learn that they have been passed over when their handicap might have been cured. Parfit agrees that “[s]uch knowledge might make their handicap harder to bear,” and he assumes it away. One can imagine Brock criticizing Parfit for putting unreasonable, unrealistic constraints on the child’s knowledge in his hypothetical, thereby erasing a possible difference in moral quality by stipulation. But he does not offer this criticism explicitly, so it seems reasonable to take him to dissent from Parfit’s view, even accepting Parfit’s assumption.

Second, if this reading were correct, the claim that the woman’s action in P3 is worse than in P1 would depend on a contingent fact: that the child in P3 came to learn that he might have been helped but was not. This contingency would not be a reason for rejecting Parfit’s “no difference” thesis across the board. Yet Brock seems to believe that he is offering grounds for a blanket rejection. Moreover, in the case of certain disabilities, such as severe mental retardation that does not prevent a life from being worth living, a child might not be able to understand that he could have been helped but was not. The morality of certain actions indeed might depend on the successful deception of somebody affected by them—deathbed lies might qualify if the hearer is soothed and dies happier—or on keeping the truth from somebody who desires it. But Brock seems to consider the woman’s action in P3 to be worse than in P1 even if the child in P3 never learns about what could have been done for him or cannot comprehend that he might have been helped at all.

Third, in deciding whether an action is right, many moral theories give no weight to the unhappiness some people would experience on account of their adherence to what these moral theories consider mistaken
moral beliefs. These theories regard dissatisfaction stemming from a person's misguided moral views as irrelevant to what ought to be done, or at best of subsidiary importance that ordinarily cannot change an otherwise warranted moral prescription. If morality requires that every equally talented person who earns a certain large sum of money at the same job share the same fraction of their earnings with the less fortunate, it would be odd to claim that those who groused most loudly should have their burden reduced, forcing others to pick up the slack.

If Parfit's "no difference" view is correct, that is, if the woman's actions in P1 and P3 are equally bad because both result in the world containing one child with a specified disability when the world would have contained a non-disabled child instead had the woman acted differently, then any resentment the child would feel in P3 might be thought of little or no relevance because that resentment would, by hypothesis, be misplaced. The child's resentment could not help show that the woman in P3 acted more wrongly than the woman in P1. Instead, a logically prior moral theory would have to specify which action was worse and the appropriateness of the child's anger would have to be appraised against that theory. If Brock assumes that the child in P3 will comprehend that he could have been helped but was not and that the child's unjustified ill feeling is morally significant, then his attack on Parfit's "no difference" thesis amounts to little. If this were the sum of Brock's objection, most people would give it hardly any weight, and it would be almost irrelevant in setting social policy.

There is a second way to construe Brock's argument. Suppose that the subjective mental states of the children in P1 and P3 do not matter. According to this reading, what makes the woman's action in P3 worse is the objective fact that she wronged a person who exists independently of her action. The woman in P1 did not, because a different child would have been born had she acted. P3 is a greater wrong even though both brought about the same bad state of affairs—a disabled child who could easily have had his disability removed at little cost to his parent. This interpretation comports with Brock's statement that not preventing the disability in P3 is more seriously wrong "because in P3 there is a victim who has been wronged," although the conjoined phrase "and who can correctly think that his or her life could have been better" favors the first, subjective account of the special harm in P3.

58. Some do, of course. For example, a utilitarian might take into account the disutility people experience under a utilitarian regime because they reject utilitarianism as a moral theory. For a discussion of problems that arise under utilitarian or welfare-based egalitarian theories of justice that attempt to give weight to citizens' convictions at odds with those theories, see RAKOWSKI, supra note 3, at 25-33, 40.

59. BUCHANAN ET AL., supra note 7, at 254.
Does this interpretation fare better than the first? Assessing it is difficult because it consists solely of an assertion that two states of affairs that are equal in their easily avoidable suffering are morally unequal if the suffering in one case is that of a person whose existence does not depend on the action subject to moral appraisal. Brock offers no other example that might give this claim intuitive corroboration, nor does he sketch a more general moral theory that could explain why it is true.

One might reply that the "no difference" view has no deeper roots. It consists of the equally bald claim that one ought to assess the morality of alternative actions entirely on the basis of their consequences for the welfare of whichever people exist after the actions have been performed, so long as the groups of people are equal in number. This reply would not be wholly fair, however. The preceding claim is central to a richly developed consequentialist account of morality that many find intuitively appealing across a range of cases, as Parfit has shown. Brock's "hybrid" view apparently accepts that consequentialist account, yet then appends to it an account of person-affecting wrongness. This is a novel idea, because it combines moral principles that commonly are regarded as rivals, each excluding the other within the relevant moral space. Unfortunately, it is unclear how these parts mesh or what morality decrees when person-affecting and non-person-affecting components pull in different directions. Perhaps such an account is possible and perhaps it can rest on something more than intuitive responses to a range of cases in which we are asked to judge the comparative wrongness of actions without relying on some theory to supply guidance. But given the ingenuity already lavished on the problems that Parfit poses, there is reason to remain skeptical until that account is offered.

Parfit's "no difference" thesis also draws support from a public policy example that Brock does not discuss. By casting doubt on the person-affecting account of moral wrongness embedded in the "hybrid" view, it shows how troubling that view is. Although a pure person-affecting view would be threatened by this example even more, the "hybrid" view is targeted by the same critique because it incorporates person-affecting values.

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60. It would be less surprising to combine them in a way that gave one or the other sovereignty over certain types of actions. Thus, one might say that consequentialist reasoning prevails in "same number" cases but that in others some principle incorporating the person-affecting restriction supplies the guiding rule. Whether this view ultimately could be defended is unclear.

61. For Parfit's own version, see PARFIT, supra note 6, at 367.

62. Melinda Roberts admits, for example, that the person-affecting account of moral wrongs she defends implies that Program B in the example that I discuss below in this Section is morally more urgent than Program A. See ROBERTS, supra note 41, at 99-101. She acknowledges that this conclusion is counterintuitive, but she seems to think that our moral intuitions are apt to be weak or uncertain in these cases anyway and that the cost of this counterintuitive result is worth bearing to espouse what is overall a better theory of moral wrongdoing.
Modifying Parfit’s example to correspond to the cases described in P1 and P3 yields the following comparison.

Parfit’s Two Medical Programs (Modified): There are two rare genetic conditions, A and B, which can be detected only by special tests and which, by different routes, produce the same serious disability in children. If a woman has condition A, she must undergo medical treatment for at least one month prior to conception to bear a non-disabled baby. Condition B afflicts children. If a child is born with condition B, doctors can cure it during the second month of an infant’s life; after the window closes, no cure is possible.

Suppose that the government has funds for only one of two medical programs. Program A would test millions of women who wished to become pregnant. Those found to have condition A would be warned to undergo treatment and to delay conception for at least one month, until their treatment was complete. Program B would test millions of infants. Those found to have condition B would be treated so that they would develop normally. Suppose that these programs would, predictably, have in one sense the same result. If Program A is adopted, there will be one thousand fewer disabled children born each year as a result of the screenings and treatments. If Program B is adopted, one thousand children each year will have their disability removed before they become aware of it, thus also causing one thousand fewer children to live without the same dreaded disability.

The two programs differ in one obvious respect: the personal costs of Program A’s preconception screening, treatment, and delayed conception are borne by the future mother (and perhaps others whose welfare depends on hers or on the timing of conception) whereas the personal costs of treating newborns, as in Program B, are borne at least in part by the infants, to the extent that treatment carries risk or unpleasantness. For the sake of evaluating the “hybrid” view, however, one can assume that these differences are trivial, as Parfit evidently does. Imagine that screening is simple, treatment is painless in both cases, and delaying conception for a month ordinarily is not burdensome. Is one program preferable to the other?

Those who share Parfit’s “no difference” view answer “no.” Both programs ensure that the world contains one thousand fewer children without a serious disability, and there is no reason to prefer one group of parents and their families to another. If the government can pay for only one program, decision makers might as well toss a coin to determine which one receives funding. The “hybrid” view, however, gives priority to Program B. If Program B is adopted, no children will exist whose lot could have been bettered by adopting Program A instead, because Program A would have resulted in children other than the disabled children being born.
Conversely, if Program A is adopted, there will be children whose disability could have been removed had Program B been chosen (although by hypothesis they will never know this to be so). Neglecting them means wronging them, which implies that they (or somebody who knew more about their history than they did) may justifiably complain. Thus, the “hybrid” view favors Program B.

If the choice were between two medical programs with equivalent results, it would hardly matter, from the consequentialist perspective implicit in Parfit’s “no difference” view, if Program B were chosen over Program A. The extra moral weight ascribed by the “hybrid” view to an action’s effect on a person who exists independently of the action would then serve as a tie-breaker, should the pans of the balance ever turn out to be equally heavy. But suppose that the pans are uneven, as they usually are. Suppose that the government must choose between two equally costly programs, but that Program A would result in two thousand children escaping disability whereas Program B would benefit only one thousand newborns. Would the “hybrid” view still favor Program B? If not, what if the choice were between 1010 children and 1000 newborns? Or what if Program B would result in just one more person’s suffering from a serious disability than Program A would?

If the “hybrid” view is correct and if the moral difference that flows from adding a person-affecting or a rights-violating principle to Parfit’s strictly consequentialist view is more than trifling, there must be some number of additional disabled children that we are morally obligated to accept as the price of honoring the person-affecting view. What this

63. This conclusion follows from Brock's assertion that the woman's action in P3 is "more seriously wrong" than the woman's action in P1 and that Parfit's "no difference" thesis is false. In making this claim, Brock implicitly rejects what seems to be James Woodward's approach. Woodward avers that the wrongness of violating a person's right calls for a different type of explanation from the wrongness of bringing about a worse state of affairs independent of any right's violation. But violating a person's right, according to Woodward, need not be worse than bringing about a worse state of affairs. James Woodward, Reply to Parfit, 97 ETHICS 800, 811 (1987) ("It is not true that, in general, any action which violates a right must be worse than any action which is wrong but not because it violates a right."). Nor are these wrongs additive: an action that brings about a worse state of affairs is not necessarily any worse if, in addition, it violates a right.

Woodward appears to say that a government would not be required to favor Program B over Program A, although his text is not free from ambiguity. He says that a government need not favor Program B over Program A to prevent the violation of children's rights if Program A "would do more to reduce the incidence of handicap." Id. at 810. For example, "[i]f people have rights that are violated by murder but no rights to a certain level of highway safety, it does not follow that governments must spend resources to reduce the murder rate to the lowest possible level before they can spend anything at all on highway safety (or hospitals or parks or museums)." Id.

These replies change the example, however, by making uneven the gains from the policies being compared. My description of the two medical programs supposes that both produce exactly the same improvement but that one avoids what are assumed to be rights violations whereas the other does not. If the violation of a right counts for nothing because one's decision is based entirely on changes in aggregate well-being, then Parfit's "no difference" thesis must be true and Woodward's reply would have no practical force.
number is and how we arrive at it remain unanswered questions under the "hybrid" view. Naturally, anyone drawn to Parfit's "no difference" view is bound to question the choice of any number greater than zero. If the children who ultimately will live under either program will never learn of those programs (or if the resentment of children who will be born in either case is rightly disregarded) even though one program changes the identities of whoever lives while the other does not, if one program results in fewer disabled children and attendant suffering, and if the number of children who will live does not vary, a proponent of the "no difference" view must wonder how we could be morally compelled to choose a medical program that leads to more disabled children.

Brock does not address this criticism, even though one can readily imagine inexpensive preconception screening programs that would reduce the incidence of certain serious disabilities competing for funds with far more expensive treatments and other expenses (education, basic amenities) for existing children. To be sure, philosophers who believe that only person-affecting harms are morally significant face a stiffer challenge from a consequentialist perspective. For them, disabilities of the sort that Program A might cure through preconception screening have no moral weight except insofar as those disabilities worsen the lives of people who care for, subsidize through taxes, suffer a reduction in benefits on account of, or come into contact with a disadvantaged child. That still might permit a government to pick Program A over Program B if many more children would be born hale under the first, because it might provide offsetting benefits to many people who would live no matter which program was chosen. This trade-off might occur, however, in what many would find a less appealing place than under Parfit's proposal or the impure prescription offered by the "hybrid" view. In some cases, a rigorous person-affecting view would yield what many people consider highly counterintuitive implications.

If the person-affecting restriction admits of no exception in cases involving procreation, the most powerful objection to it is that it offends our moral intuitions by ignoring entirely the sufferings of people who could only be born disabled or miserable. How severely this criticism applies to Brock's "hybrid" view is not clear, because he does not trace the implications of that view in a variety of cases involving different numbers of people and therefore does not say how much weight the person-affecting component has. Any theory that incorporates the person-affecting restriction to some degree will feel the force of this critique.
D. Possible Defenses and Further Critiques of the Person-Affecting Restriction on Morally Significant Harms

Although the person-affecting restriction may lead to counterintuitive results in some procreation cases, this by no means settles the question of whether its endorsement constitutes moral error. This Section supplies what seem to me the most powerful rejoinders that might be made by Heyd, Roberts, Brock, or others who believe that the person-affecting view is at least part of the truth. The persuasiveness of these rejoinders is uneven. I nevertheless state them here partly to provide a fuller defense of the person-affecting view than has, to my knowledge, been given by other writers. I also hope to make plain the difficulty that attaches to any position on this issue, including Parfit’s “no difference” view.

1. First Reply

A defender of the person-affecting restriction might begin by saying that thought experiments like Parfit’s are, so far as we know, simply cleverly contrived hypothetical choices one need not puzzle over too much because they do not actually arise. There are no real counterparts to the two medical programs, for example.

This assertion has some truth, but its reach is circumscribed. Parfit’s two medical programs might not have exact parallels today, but similar issues arise routinely. Government health care providers and private insurers need to decide, for example, whether to fund preconception screening programs that might avert the births of disabled children. This requires determining what benefits these programs would provide and how important those benefits are relative to programs that are likely to help people who will exist independently of any program considered for adoption. Of course, there are other reasons why policy makers must attend to prenatal treatments that might bring large benefits to children, even if those treatments alter their identities by profoundly changing their genes or their bodies. The desires of potential parents to avoid giving birth to disabled children generally are strong and numerous, and they always are relevant. Nevertheless, there remains a genuine question, the answer to which might affect some policy choices, as to whether the suffering of those who could only be born disabled should be included in the calculus.

2. Second Reply

Defenders of the person-affecting restriction note that many people, including potential parents, siblings, insurers, insurance purchasers, and public officials and the taxpayers they represent, will be worse off if a child is born disabled when a different child might have been born without the disability. Ordinarily, their interests alone will justify spending on preconception or intrauterine screening programs. Hence, the reply goes, it is
fanciful to imagine a public authority or a private insurer choosing between Program A and Program B. Both ought to be funded and both ordinarily would be.64

This is a fair observation. That the interests of independently existing people often will dictate a result that also is favored by the consequentialist principle underlying Parfit's "no difference" view is a powerful point. As with the first reply, it offers a reason to doubt the practical urgency of this dispute. But for precisely the same reason, it does not necessarily make the issue irrelevant to policy choices or to the decisions of private insurers.

3. Third Reply

A different sort of reply by a proponent of the person-affecting restriction would be to deny that Program B, which provides medical treatment to newborns, supplies a person-affecting benefit. Morally significant accounts of personal identity that make identity a function of the amount and character of temporal continuity with respect to memories, desires, beliefs, and aims, as Parfit's own theory does, might be said to imply that the slight cognitive links between a newborn and the disabled person he may or may not become are too meager to justify regarding the two as a single person.65

When the newborn becomes self-conscious and establishes his psychological individuality, he will be either a disabled person or a different, non-disabled person. If this is right, then juxtaposing Program A and Program B does not present an interesting thought experiment or place any pressure on the person-affecting restriction. The two programs are not morally distinguishable.

This conclusion may or may not be true, depending upon which account of personal identity is correct for this purpose. But this third defense of the person-affecting restriction has a short reach, because Program B could be redescribed. Imagine that Program B treats already self-conscious children rather than newborns or young infants, freeing them from the same disability that Program A would prevent.

64. If the costs and benefits of preventing disability are not borne or realized by the same person or group, or do not accrue to the same person or group in the same proportion, it is possible that only one program or neither program would be funded. If, however, the great majority of costs and benefits accrue to parents, then in a well-organized, just state there typically would be no need to choose between Program A and Program B.

65. Not everyone who subscribes to this type of theory of personal identity would agree with this supposed implication. For example, Jeff McMahan believes that continuity of consciousness suffices to establish the relevant sort of personal identity, even if those conscious experiences fall short of the more complex type of self-awareness adults regularly experience. McMahan, supra note 51, at 211. He believes that an individual's existence as a moral person begins in the womb, during the last two or three months of a normal pregnancy, when neural activity, which is associated with rudimentary subjective experience, first occurs in a fetus's brain. Id. McMahan therefore believes that Program B affects persons who remain the same whether or not it is adopted, whereas Program A does not.
Perhaps altering the hypothetical in this way will reduce the sense that there is no reason to favor Program B over Program A, because then there would be self-identified, already formed persons who could be benefited by Program B but not by Program A. But I doubt that this difference would in most people's minds be sufficient to make Program B categorically better than Program A, provided that the effects of both on people other than the children would be the same. If the number of children who could be born without a serious disability under Program A were much greater than the number who could be cured of that same disability under Program B, would Program B still be preferable? It may be hard to abstract from the interests of people other than the potentially disabled children, because, and this is the force of the second reply above, if the number of disabilities averted under Program A were much greater than under Program B, many more parents and siblings also would be made better off under Program A. To the extent that one can disentangle these two intuitive contributions, however, it is hardly obvious that Parfit's "no difference" view warrants rejection or that, if it does, the person-affecting character of Program B should be anything more than a weak tie-breaker.

This third response also highlights a major shortcoming of the person-affecting restriction. The restriction forces us to ask whether a person who has achieved self-awareness was made better or worse off by some action that was taken or could have been taken at an earlier time. That person need not have been alive when the action was performed to be affected by it for good or ill, nor need he be linked physically or psychologically to a being who was then alive to be better or worse off in virtue of the action. One can benefit from the establishment of a trust fund before one is born or be harmed by events set in motion years before one was conceived. The important question is whether the action or state policy under consideration altered the eventual person's identity. And this inquiry yields an apparent anomaly: actions or policies that in some sense do the most good carry the smallest moral recommendation.

For example, suppose that a surgeon modifies a fetus's genes in utero so that it is born and later lives as a self-conscious individual with normal sensory capacities. Further suppose that had the surgeon done nothing, the person would have been born and remained deaf, dumb, and blind. If the genetically altered person and the non-genetically altered person are different people, because there are immense differences in their abilities, personal histories, dependent memories, ambitions, and beliefs, then no person-affecting reason deriving from the child's own interests could be offered for surgery. But if the genetic alteration were minor, one would have to make the opposite claim, because a small difference in a person's constitution, one may assume, would not alter significantly the resulting person's life. A defender of the person-affecting restriction seems bound to
say that we have a moral reason to intervene prior to birth or in infancy to remove a small genetic drawback that would not affect a person’s identity, because doing so would benefit a person who exists independently of the intervention. But we lack a moral reason stemming from the child’s well-being to correct a much more debilitating shortcoming, because the act of correction would produce a different person.

This apparent anomaly underlies one of the most damaging objections to the person-affecting restriction. It also applies to the “hybrid” view. Adopting a looser, less protean notion of personal identity for this purpose, one that treats fewer interventions as identity-altering, would lessen the objection’s force. But only a very different account of personal identity, perhaps one that appeals to a soul or Cartesian ego or something similarly unpopular among analytic philosophers, could sidestep the objection fully. This implausible favoring of less helpful over more helpful treatments has implications for public policy as well. As noted before, more significant identity-altering changes might affect other people more dramatically than treatments with less substantial effects on their young or unborn patients, and these effects might give those more radically improving treatments the nod. But the person-affecting restriction and the “hybrid” view (which incorporates it) push toward the wrong result.

How much avoidable suffering this theoretical pressure would work in practice is impossible to determine. That would depend on how much weight person-affecting harms were given relative to non-person-affecting harms with similar consequences, and on the alternative courses of action between which policy-makers would have to choose.

4. **Fourth Reply**

The final reply available to a defender of the person-affecting restriction is to note the implausible implications of competing theories. Affirming the existence of non-person-affecting moral principles in addition to person-affecting moral principles raises at least three distinct problems.

The first difficulty is limited to the “hybrid” view. The problem is explaining how person-affecting and non-person-affecting principles cohere and why and when one must yield to another.\(^6\) No evident solution exists. It seems that the balance between these two wrong-making characteristics can only be struck casuistically, by considering a range of cases and one’s intuitive response to them. Perhaps this method for setting borders is acceptable—there is no sense in demanding clarity or precision that cannot be had—but the unavoidability of relying on uncommon moral intuitions, coupled with the absence of some deeper theory for reconciling

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\(^6\) Brock recognizes that this is a hard problem for the “hybrid” view, but he suggests no solution. Buchanan et al., supra note 7, at 254 (describing this as “an important unsolved problem”).
these two types of principle, make one wonder whether this is the wrong road to travel.

There is a second problem with the thought behind Parfit's "no difference" view, Brock's Principle N, or other comparative principles that look only to states of the world in judging moral wrongness or goodness. Their root idea is that we can compare the goodness or badness of alternative futures and favor some over others even if the actions leading to those futures affect which people come into existence. But this idea extends naturally to comparisons of futures in which different numbers of people live, not just to the seemingly ad hoc case in which an identical number of people will live in every alternative future. Extending that idea to different-number choices, however, appears to produce what Parfit calls the "Repugnant Conclusion" and others have identified as a chief defect of "total" utilitarianism: the world with the greatest net balance of good over bad in it might be an extremely populous world in which each person has a comparatively low level of welfare. Parfit also argues that extending this consequentialist idea to choices involving different numbers of people produces a related difficulty. He titles this problem the "Mere Addition Paradox," and it leads to much the same problem as the argument for the Repugnant Conclusion. Brock admits that "[o]nly person-affecting principles seem likely to avoid unacceptable implications like the Repugnant Conclusion" and that "[n]o comprehensive theory . . . has been identified that adequately accounts for both same number and different number cases." These are good reasons to question the "no difference" thesis.

Third, if the creation of a child with a life worse than non-existence is bad because it lowers the world's value, is the creation of a child with a life that is worth living a good thing, one that boosts the world's value? If it is, then people seem to have a duty to procreate, so long as any newly created children will add value rather than disvalue to the world. This duty might be outweighed by other duties or concerns in many instances, to be sure, but it remains a duty nonetheless. Most people, including most utilitarians, wish to avoid recognizing even a limited duty to procreate. Such a duty seems highly counterintuitive. But Parfit's, Brock's, and others' asymmetrical treatment of worthwhile and miserable lives is famously problematic. The importance of this objection to Principle N and similar

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67. PARFIT, supra note 6, at 381-417.
68. Id. at 419-41.
69. BUCHANAN ET AL., supra note 7, at 254-55. Jeff McMahan offers reasons for thinking that no satisfactory solution is possible, though he does not purport to show strictly that no solution can ever be found. See McMahan, supra note 51, at 235-41.
70. Some utilitarians accept a duty to procreate, if having children will add to the world's happiness, but perhaps too conveniently find it easily set aside when potential parents would prefer not to have children. See R.M. Hare, Abortion and the Golden Rule, 4 PHIL. & PUB. AFF. 201 (1975).
non-person-affecting views, and the difficulty of dealing with it in any plausible way, is by now familiar.\textsuperscript{71}

No brief rejoinder is possible to this fourth defense of the person-affecting restriction. It puts the burden on the restriction’s opponents to show that the difficulties to which their views lead are less unsettling than those to which the person-affecting restriction does. Perhaps some heretofore undiscovered way exists to avoid the troubles Parfit has identified without embracing the person-affecting restriction, though Brock seems right to doubt that a broad avenue of that kind will ever be paved.\textsuperscript{72} In the absence of a solution, one must choose between two approaches of decidedly mixed merit.

The person-affecting restriction encapsulates an apparently attractive moral thesis: the only morally cognizable harms or benefits are those to existing people. Thus, it steers clear of pitfalls like Parfit’s Repugnant Conclusion and Mere Addition Paradox. In some of its versions, it handles wrongful-life cases\textsuperscript{73} easily. In other versions, like Heyd’s, the person-affecting restriction’s verdict on wrongful-life cases might seem strained, because it implies that giving birth to a child with a life that is worse than non-existence is not itself wrong. But even in those versions its implications will not differ in practice from the “no difference” view if it is coupled with the conviction (typically held by those who defend the person-affecting restriction) that it would be wrong to keep alive an infant with a life that is not worth living. The sensible way to avoid performing this wrenching duty is not to have the child in the first place if one can avoid doing so.

More disappointing are two other implications. First, by most philosophers’ lights, the person-affecting restriction errs in evaluating variants of the two medical programs, giving the well-being of children in cases like P3 excessive priority. Second, it seems to suggest that pre-toddler interventions to cure massive disabilities are not morally obligatory because they are identity-changing, whereas similar interventions to cure less serious disabilities that are not integral to a person’s identity often are morally required. Perhaps someone will propose an account of personal identity that evades the second problem, but I cannot think of a plausible candidate.

\textsuperscript{71.} See, e.g., HEYD, supra note 41, at 110; PARFIT, supra note 6, at 391-405; Jefferson McMahan, Problems of Population Theory, 92 ETHICS 96 (1981).

An additional challenge confronting any approach that has Parfit’s “no difference” view as a component (as Principle N does) is explaining why women or couples who are assumed to have a duty to bear a non-disabled rather than a different, disabled child do not have a similar duty to have an extremely able or intelligent child over one that is merely normal if technology allows them to choose at low cost. Some might say that they are obligated to have the child that is likely to lead a more satisfying or successful life, but many would balk at that claim. See, e.g., ROBERTS, supra note 41, at 115-16.

\textsuperscript{72.} For additional reasons why, see McMahan, supra note 51, at 235-41.

\textsuperscript{73.} See infra note 90.
The "hybrid" view shares these two weaknesses because it accepts the person-affecting principle in part. Insofar as it also embraces the impersonal perspective for moral appraisal that Parfit's "no difference" view endorses, it also confronts the problems that Parfit's view faces in different-number choices. Moreover, the "hybrid" view bumps up against the intuitive resilience of the idea that harms are only harms if they make people worse off whose existence does not depend on the allegedly harmful action. The "hybrid" view therefore has battles to fight on two flanks rather than one, although by straddling two views it faces less formidable foes on both sides. Some might think that the middle ground Brock has staked out represents the best compromise. Others surely will not.

E. Points of Consensus Regarding Identity-Affecting Genetic Treatments

On some points agreement comes easily. Many people would exist independently of an action that would prevent or repair a seriously disabling genetic condition on which somebody's identity depends, including parents, siblings, taxpayers, and health care workers. Because they would be substantially better off if that disabling condition never existed or were removed, virtually everyone would support measures designed to minimize the incidence of these genetic conditions. All would save—economically, emotionally, or both—from their elimination. One therefore can expect support for any realistic analogue of Program A or Program B, and for condemnation of a woman's actions in all of P1, P2, and P3.

Which laws and norms would work best is a large question. The answer depends substantially on how just a society's distribution of income and wealth is and how people are inclined to behave in the absence of legal prompting. One can expect almost everybody to be on the same side, so far as criminal and tort law are concerned, but one likewise can expect disagreement about who should pay for what, with divergent views attributable to conflicting accounts of justice and differing views about the moral acceptability of whatever social status quo is taken as the baseline. If one thinks, as most do, that it is a poor idea to allow children (or guardians ad litem on their behalf) to sue parents for monetary damages if they fail to do what is best for whatever children they have, no significant legal changes may be needed. And one can hope that possible trade-offs between programs of types A and B, or between a program of type A and other benefits for existing people, will not have to be made outside the realm of philosophers' hypotheticals.

The harder question looming in the future is what individuals or the state may or should do if identity-altering genetic changes can substantially improve the lives of whoever lives, moving them above today's norm rather than ensuring that they merely meet that baseline. Some considerations parallel those that bear on the elimination or rectification of serious
disabilities, but others are novel, such as parents’ possible interest in not bearing children too unlike themselves and issues of just distribution over succeeding generations.

F. Equality of Fortune and Identity-Altering Genetic Changes

The merits and concomitant drawbacks to moral theories incorporating the person-affecting restriction, Parfit’s “no difference” view, and Brock’s “hybrid” view make it difficult to settle on a standard for evaluating identity-altering decisions to procreate or to alter a child’s genetic constitution before it is born. There is, however, another approach. Equality of fortune, paired with a person-affecting restriction, produces results that are intuitively congenial, without succumbing to the objections that Parfit and those who endorse his views routinely make to theories adopting that restriction. Nevertheless, this approach does encounter one problem that seems insoluble. Happily, that problem is unlikely to become a practical nuisance.

1. What Justice Requires of Parents and the Community

Suppose that a child is born with what are generally perceived to be disadvantageous genes. Perhaps they code for a significant mental or physical disability or guarantee an abbreviated life. From whom, if anyone, may that child seek redress?

Equality of fortune contends that in a just society the child’s misfortune is, in the first instance, its parents’ obligation to correct. The child should not have a less valuable set of opportunities than its peers, and the child’s parents cannot pass off the cost of redressing its genetic disadvantage, insofar as it is even possible to redress, to other members of the community. Parents typically chose to have their child or acted in a way that they knew or should have known might produce a child. Their fellow citizens did not agree to help them raise or educate that child. Others therefore cannot rightfully be compelled to contribute, unless the parents (or others who might be responsible for a child’s existence) default on their obligation.

Parents themselves may have been genetically disadvantaged in conceiving a child, however, in the sense that they were less likely than average to bear a child with a good complement of genes. If they were, then those parents also were victims of bad brute luck, because they faultlessly faced a likely support obligation that was greater than normal if they chose to reproduce.

What follows? Parents should be able to satisfy their obligation of justice to supply their children with the basic basket of resources and opportunities that equality of fortune requires on the same terms as all other parents. Given the importance of providing children with as equal a start as
equality of fortune demands, a community might reasonably decide to compel parents to meet their obligation by taxing them an equal amount per child, most sensibly over a period of years. Strictly speaking, justice does not require governments to establish a parental-tax-and-child-transfer scheme, but a polity permissibly could create one. Compulsory contributions would help ensure that all (or the great majority of) parents meet their obligation and might overcome inefficiencies in private insurance markets and economically rational discrimination by insurers against the genetically disadvantaged. Compulsory contributions also might allow the state to provide certain services, such as education, health care, or other goods, to children directly. One could imagine an equilibrium that departed from current U.S. practice in providing more generous and equal assistance to children (which more parents should be able to afford because the underlying distribution of income, opportunities, and wealth would be more equal than at present), with that assistance coming wholly or in very substantial part from parents who would pay a fixed cost per child (in effect, an insurance substitute for the equal stipends they owe their children) rather than from taxpayers generally.

The question then arises: what if parents knowingly have children who are relatively worse off, when they might have had different children instead who probably would have been better off genetically? Have they wronged the children they do have?

The answer is no. Those children could not have been born any better off. Having a different child instead might have been better for many people and worse for nobody, but it would not have benefited the badly off child himself because in that case he never would have been born. Parents might have obligations to other persons not to give birth to a child whose handicap could have been prevented, but they have none to their handicapped child.

74. Principles of justice must be elaborated in concrete circumstances. Disagreement often will arise among reasonable people as to how those principles should be implemented, as additional information about people and social conditions complicates the picture. John Rawls imagines a four-step sequence by which his two principles of justice are made more determinate, but one need not subscribe to Rawls’s account to accept the general point that theories of justice need to be given a definite form and that contextualized, often disputable, judgment is necessary in rendering ideals tangible. See Rawls, supra note 18, at 195-201.

75. The phrase “or in very substantial part” recognizes that the costs of some types of compensation cannot easily be cabined and charged to parents alone. For example, antidiscrimination legislation might be part of the most effective package of measures for providing certain disabled people with as rich a set of opportunities as equality of fortune demands, even though its costs (where on balance it has costs) would necessarily be spread broadly to specific employers, owners of capital, other workers, consumers, or a diffuse group of taxpayers. Justice does not require perfect precision in matching the varied costs of giving people their due to those who ought to cover those costs when precision is practically impossible or unduly expensive to attain and when a particular type of assistance is critical to giving some people their just entitlements.
Nevertheless, by intentionally choosing to have a child whose just share of resources or opportunities is greater because his needs are more expensive to satisfy,\textsuperscript{76} parents might well increase the magnitude of their own support obligation. In the absence of what is tantamount to a compulsory, collective insurance arrangement encompassing all parents, those who had children whose lot was below average would owe their children more than the norm if they did not insure against that eventuality privately. The same is true, however, in the presence of a universal, mandatory insurance arrangement, at least in some cases. The reason is simple: information about a child’s characteristics before it is born can create a moral hazard, and participants in any insurance arrangement could be expected to reduce the size of the threat to their pocketbooks, just as private insurers now do.

At least three paradigm cases may be distinguished. The first is one in which parents choose to have a child with a known genetic infirmity when they could, with little personal risk, instead have had a child who would not have suffered from that identity-determinative genetic characteristic. Parents using assisted conception, for example, might select an embryo that will develop into a deaf child when they might have had a child with normal hearing, or a woman might choose a sperm donor who will maximize her chance of having a deaf child.\textsuperscript{77} In these cases, the additional expense of providing for the child is not one that a parent or parents justly may pass on to others,\textsuperscript{78} nor is it one that others are likely to share.

\textsuperscript{76} I leave aside the question of whether a child with severe cognitive disabilities is owed the same consideration as a matter of justice as one whose mental faculties are relatively normal but whose deficiencies in other areas are substantial. For an exploration of this issue, see Jeff McMahan, \textit{Cognitive Disability, Misfortune, and Justice}, 25 PHIL. & PUB. AFF. 3 (1996). It is all but impossible to imagine parents deliberately conceiving such children.

\textsuperscript{77} Two female partners, both of whom are deaf, recently had their second deaf child by selecting a deaf sperm donor. \textit{See} Liza Mundy, \textit{A World of Their Own: In the Eyes of His Parents, If Gauvin Hughes McCullough Turns Out to Be Deaf, That Will Be Just Perfect}, WASH. POST, Mar. 31, 2002 (Magazine), at W22.

\textsuperscript{78} Parents who choose to have genetically disadvantaged children who are more expensive to raise, educate, and furnish with desirable professional and personal opportunities might contend that their preferences for such children are outside their control. Those preferences, they might maintain, are the products of their own disabilities, for which they cannot be blamed. Reproductive choices based on those preferences should therefore be no more expensive for them than for other parents. Part of the cost of compensating them for their disabilities, in this view, is underwriting the costs of reproductive decisions flowing from preferences that can be traced to those disabilities.

This reply might convince those who subscribe to equal-opportunity accounts of justice that do not hold people responsible for most of their tastes or convictions that are especially expensive to satisfy, in terms of the goods that they or others would have to forego to fulfill their desires. \textit{See}, e.g., G.A. Cohen, \textit{On the Currency of Egalitarian Justice}, 99 ETHICS 906 (1989). But it has no force from the perspective of resource-based accounts of justice like equality of fortune. \textit{See} RONALD DWORKIN, \textit{Sovereign Virtue} 291-99 (2000); RAKOWSKI, \textit{supra} note 3, at 56-64, 108-12. Theories of the second sort expect people to make commitments and to shape their preferences in awareness of the costs of those choices as fixed by a prior ideal of resource distribution. In normal cases, they do not ask how a person’s beliefs or desires came to be, but only whether a person endorses those beliefs or treats those
voluntarily. The increase in their child's educational, medical, and other
costs ought to be paid by that child's parents.\textsuperscript{79} What exactly this obligation
entails in the way of government policies is a separate question, and one
not likely to be answered in the same way by all. Detecting cases of this
kind through careful monitoring might be difficult or prohibitively expen-
sive. Moreover, if parents who intentionally bear children who are geneti-
cally disadvantaged cannot pay all of the extra costs of their choices, state
officials would have to decide how much extra payment to attempt to ex-
tract from them and how much of what they cannot pay to take from tax-
payers generally, other parents, or the unfortunate child through a reduction
in services or a smaller stipend later in life. The problem resembles the diffi-
culty of judgment-proof tortfeasors and the range of solutions is similar.

A second set of cases involves parents who discover that their child
will be born genetically disadvantaged, but who can avert that outcome at
some significant risk to the pregnant woman either by her consenting to
intrauterine surgery or aborting the fetus she is carrying and subsequently
conceiving another, possibly better-endowed, child. Here, the risks to the
pregnant woman from surgery or abortion, or the moral difficulty of comp-
pelling abortion on pain of financial penalty if a woman opposes abortion
on religious or moral grounds, should release the parents from any supple-
mentary payment obligation.\textsuperscript{80} In these cases, though, insurers or govern-
ment officials might find it worthwhile to encourage pregnant women to
run some surgical risks or to abort and try again, by providing medical
care, counseling, or other types of support free of charge. From the per-
spective of those affected by a woman's decision through their participa-
tion in a common insurance pool, money spent on these incentives might
save larger sums that would have to be paid out if a genetically disadvan-
taged child were born rather than a different, better endowed child. Using
that same rationale, one could defend government-subsidized or freely pro-
vided genetic screening or early treatment programs. Similar subsidies for
identity-altering genetic enhancements might be justified in the same way,
if those enhancements promised to lower collective costs or provide addi-
tional collective benefits later.

A third set of cases encompasses potential parents choosing between
adoption and having a child they know is certain or likely to suffer from

\textsuperscript{79} For a parallel defense of this conclusion, suitably qualified, see Bonnie Poitras Tucker, \textit{Deaf Culture, Cochlear Implants, and Elective Disability}, 28 Hastings Center Rpt. 6 (1998).

\textsuperscript{80} See, e.g., Katherine A. Knopoff, Comment, \textit{Can a Pregnant Woman Morally Refuse Fetal Surgery?}, 79 Calif. L. Rev. 499 (1991) (arguing that pregnant women have a moral right not to undergo intrauterine surgery that might improve the health of the children to whom they give birth).
some genetic disability, such as Huntington’s disease. The parents are not responsible for the genetic condition that they would pass on to any children they had, but they need not have their own children: they could adopt and raise a child other than their biological offspring. Is the availability of adoption a sufficiently attractive alternative to assign the costs of any genetically disadvantaged children a couple chooses to have to them alone? I think not, but this issue, like the issues posed by the two preceding cases, is one over which people might disagree in rendering concrete the more abstract ideas that constitute equality of fortune as a theory of justice.\footnote{81}

What does equality of fortune imply about the cases discussed earlier in this Part? The women in P1, P2, and P3 all act in ways that lead to children being born genetically disadvantaged, when they might at little cost to themselves have had different, better off children instead.\footnote{82} In all three cases, therefore, they would rightly be charged with greater support obligations as a result of their conduct. Does this make their actions wrong? It depends. If they can afford the additional charge, if they prefer to have the genetically disadvantaged children rather than some other children, and if they do not act badly with respect to their family or others by having the less well-off child, then I see no reason to say that the women acted wrongly. If these conditions are not satisfied, however, then their actions are wrong.

As for the two medical programs or the alleged lack of equivalence between P1 and P3, any theory that incorporates the person-affecting restriction will encounter the problems described above, with whatever implausibility that brings in train. What equality of fortune says in partial reply to that objection is that the community should not distinguish between P1 and P3, so far as parents’ liability for their action or inaction is concerned. Likewise, the government or private insurers should fund both the preconception screening and postnatal treatment programs. Choosing between them should not be necessary. What equality of fortune adds to

\footnote{81}{A similar issue is posed if a woman chooses to bear a child knowing that she will not be able to raise it to adulthood because she herself will die soon and that the child will not have a father to assume that burden. See Denise Grady, Genes, Embryos and Ethics, N.Y. Times, Mar. 3, 2002, § 4, at 6 (describing a woman who was almost certain to develop Alzheimer’s disease before age forty and who at age thirty had embryos screened before implantation so that she would give birth to a child without her genetic mutation). Can the potential mother transfer the financial and emotional costs of completing the child’s upbringing to others? Should some of her property be taken for this purpose? In reality, few women in this situation are likely to have the means to cover the additional costs, so others will have to help those women’s children. But if a woman does leave property at death to others, should the state appropriate her estate or nonprobate assets to cover the additional costs? Or should one say that her shortened life is itself a stunning example of bad brute luck, so that her failings as a mother if she has a child are beyond her control, thus depriving the government of a compelling justification for raiding her estate to succor her child?}

\footnote{82}{Case P1 assumes that a woman can become pregnant with roughly equal ease or difficulty at two different times. This might not be true. Where it is false, there would be a real cost to delaying conception, which might alter our intuitions about how the woman should act.}
other justifications for funding preconception screening is a powerful, selfinterested economic argument, on behalf of parents who are part of a comprehensive disadvantage-compensating insurance scheme, to pay for preventative measures if their expected cost is less than their expected benefit. If choice between the two programs was for some reason unavoidable, however, any theory of justice that restricts the class of harmful actions to those affecting persons who exist independently of those actions can do no better than the replies in Part II.D. For many people, however, those replies will suffice, especially given the serious drawbacks that afflict every competing view.

2. Objection and Replies

Equality of fortune sidesteps some but not all of the problems associated with identity-altering genetic changes. It claims, along with a variety of similar accounts of distributive justice, that a child born significantly disadvantaged in his abilities is owed additional resources to compensate for his deficit, either by virtue of the disparity between his means and an average set of attributes or because, had he been rational and able to borrow against his future income or assets, he would have purchased an insurance policy prior to birth that would have supplied him with additional resources if he were born genetically disadvantaged. One might be inclined to say that under either version of the theory, the most complete, least expensive form of compensation would be the prenatal removal of the child’s disability. In the great majority of cases which Part I discusses, it would be. But that answer ceases to be sensible if the removal of a disability alters a person’s identity, because eliminating the handicap prior to consciousness also would eliminate the person assumed to be staking a claim or buying insurance. If equality of fortune and related accounts of just compensation incorporate the person-affecting restriction (which of course they need not do), they seem to imply that justice mandates a remedy that is more expensive for the ultimate payor and less adequate than prenatal correction, because any identity-changing prenatal remedy would not benefit that person, but would instead have produced a different child.

To be sure, the suggestion that justice would mandate the apparently worse course is slightly misleading. If prenatal correction in fact had

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83. For examples of the first type of theory, see, e.g., Rakowski, supra note 3, at 92-106, 120-48; John E. Roemer, Equality of Opportunity (1998); Richard J. Arneson, Equality and Equal Opportunity for Welfare, 56 Phil. Stud. 77 (1989); Cohen, supra note 78. For an example of a hypothetical insurance theory, see Dworkin, supra note 29.

84. The problem is similar to that which confronts hypothetical choice theories in determining optimal population size. It makes no sense to imagine a hypothetical chooser picking a world in which that person does not exist. The perspective from which choices are made from behind a veil of ignorance presupposes the chooser’s existence, rendering it useless as a device for determining who ultimately will live.
occurred, the person from whose perspective the claim to compensation would be made would never have come into existence and, at least arguably, would have no complaint to bring forward. Yet even if justice does not demand an apparently worse world (one with a disabled child and compensatory payments rather than one with a non-disabled child whom nobody need compensate), it seems to accept the worse world as no less just than a more egalitarian, on balance happier, world. This conclusion may seem hard to swallow—which is precisely Parfit’s point.

Perhaps the right response is simply to swallow, safe in the knowledge that in practice this conclusion almost certainly will never push anyone toward intuitively wrong conduct. For those unhappy with that result, at least two radically different lines of reply are available. The first seems to me unpersuasive, though some may regard it as attractive. The second seems too clever to be right, however tempting it might appear in the absence of a stronger reason for what many think must be the right conclusion.

The first reply is to say that even if a child born with an identity-dependent disability who has a life that is worth living cannot complain that his parents failed to take steps that would have made him better off than he is with any postnatal compensation, because had they taken those steps he would not have existed, he nevertheless can complain that he has been wronged and can demand redress for his wrong. Consider James Woodward’s example of the would-be airline customer who was denied a seat on a particular flight because of racial discrimination but who subsequently was glad that he was kept from boarding because the flight crashed en route to its destination. Had he been given a chance to waive his right not to be discriminated against on racial grounds in advance, knowing that the flight he wanted to get on would crash, he surely would have done so. Yet he has been wronged and may seek damages for his improper treatment. Or consider Seana Shiffrin’s example of a poor person who is injured when a wealthy individual drops cash to him from the sky, leaving him on balance better off because the cash more than compensates him for his injury. Even if the man would have agreed to run the risk of the injury that he received for a chance at catching the bag of cash, Shiffrin maintains, the fact that he is injured entails that his wealthy benefactor owes him still more money, to compensate him for his injury over and above the cash that was dropped his way. Alternatively, consider somebody born into a relatively benign state of slavery who is told, truthfully, that he never would have been born had his enslaver not intended to use him as a slave. Although he is better off than he would have been had he not been born, he can protest strenuously if he is not given his freedom, even if he would

have consented to a lifetime of slavery as the price of existence. Finally, consider the case of reparations paid for a wrong done to a group of persons years later by the perpetrators themselves or by their descendants. Had the wrongful actions not been performed, those seeking redress almost certainly would never have existed, because large-scale wrongs frequently alter who has sex with whom and which children eventually are born. So the claimants are better off than they would have been in the absence of the wrong, and again, one may assume, they would have waived their right not to suffer wrong if necessary to gain them life. Still, we believe that compensation is due.

Why do these arguments (based on assumed moral intuitions in the four cases) fail to ground, even by analogy, an argument that a person has a right to receive prenatal corrective action for a disability integral to that person’s identity, rather than less adequate forms of compensation after birth? The reasons are varied.

Woodward’s airline customer and Shiffrin’s injured cash recipient both exist independently of the action that allegedly wrongs them. Somebody therefore exists in two alternative worlds (one without the wrongful action, one with it) who can seek recompense for the putative injury. But that is not true of somebody who complains about an earlier omission that is responsible for her very existence. Had the asserted wrong not been done in her case, the complainant would not exist to complain.

The reason why the slavery example is not equivalent to the disabled complainant’s case is slightly different. By hypothesis, the slave exists only because his enslaver planned to enslave him, just as the complainant exists only because some prenatal corrective procedure was not performed. Moreover, in neither case can the allegedly wrongful action be justified by the slave or disabled person’s presumed consent, because existence itself should not be counted a benefit to the person who exists but rather a

87. As Janna Thompson notes:
Reparative claims that hinge upon a causal relation between an injustice and injuries to descendants face serious difficulties. One of these is that injustice not only affects how people fare. It can also determine what people there are. African Americans who presently exist would never have been born if their ancestors had not been abducted and forced into slavery. But it doesn’t seem to make sense for a person to demand what she would have obtained if the injustice had not been done if, in this contrary to fact circumstance, she would not have existed at all. George Sher deals with the problem by saying that descendants of victims of injustice ought to be restored to the level of well-being that a related group of persons would have had if the injustice had not been done. The descendants of slaves would presumably be compared with those who would have been the present descendants of these ancestors in a world where they had not been enslaved. The problem is not merely that it is impossible to determine the level of well-being of these possible descendants. Since many things would have happened to these alternative family lines between then and now, it is difficult to understand how these possible people could be related in a relevant way to actual descendants.

Thompson, supra note 37, at 117 (footnote omitted) (citing George Sher, Compensation and Transworld Identity, 62 Monist 378-91 (1979)). See also Waldron, supra note 37, at 8-10.
precondition to any benefits or harms a person might experience. What distinguishes the two examples is that the wrong of enslavement can be undone simply by freeing the slave, without the slave ceasing to be who he is. Continuing to enslave somebody on any terms is an enduring wrong. In the case of omitted prenatal surgery, however, there is no way to undo the alleged wrong, because the harm is not a continuing harm that continues throughout the person's existence and that person's identity is partly constituted by the alleged wrongful action.

Lastly, although historical reparations raise issues that are very similar to those presented by the case of the omitted prenatal intervention, there is a salient difference. In most (though not all) of those historical cases, some people are better off than they would have been if the wrongful action had not occurred. Either those people have unclean hands themselves, having acted unjustly toward those demanding redress, or they have profited by unjust enrichment as descendants of the wrongdoers. Forcing them to disgorge their unmerited wealth or advantage is an understandable remedy, even if the identity of the complainants has changed. But failing to take corrective action prior to a person's birth to remove an identity-determining disability cannot be likened to a wrongful action that benefited the perpetrator. Prenatal surgical omissions leave most parents worse off, not better off. In these cases, there are no profits to surrender, no benefits to be undone.

In all of these situations, therefore, the challenge seems to fail. Parents appear to do no wrong if they allow a child to be born who could have been altered genetically before birth to become a more able child. Some will find this conclusion more disquieting than others, even if it is unlikely, as I said before, to have significant, counterintuitive practical implications.

There remains a second line of attack which is no more successful. The problem arises because foregone prenatal intervention, unlike compensation after the person exists in a disabled state, is assumed to work a change in the complainant's identity. One might contend with this difficulty by breaking the identity-altering change into smaller parts, none of which is itself sufficient to change a person's identity. With respect to any one of those smaller changes, the morally correct course is to intervene before birth. Add these small changes together, and the right course overall is still to intervene before birth, which is also what seems intuitively correct.

This argument has two shortcomings. First, given the reality of modern genetics, it might not be practical to split identity-altering change into small modifications, no one of which suffices to change a person's identity. Second, even if such small genetic modifications were possible, the argument still glosses over the all-important fact that most individually minor changes occur simultaneously, producing one major change. A child is not
born with a set of qualities that can be repeatedly altered in various minor, non-identity-changing ways to arrive at an endpoint that differs considerably from the point of origin. Arguing that such a change is really a myriad of changes is like saying that one cannot make a bushy-haired person bald by pulling out all of his follicles, because the removal of any single hair follicle, viewed in isolation, would not have affected the overall judgment that he had a full head of hair. When conceptually tiny changes come together, the change they produce may differ in kind from the insignificant changes on which it supervenes.

3. Summary

Equality of fortune does not in the first instance allow parents to shift to others the cost of remedying their children's genetic disadvantages, yet it also does not hold parents liable for their own genetic constitution, which lies beyond their control and which affects their prospects of having genetically disadvantaged children. It unites these propositions by suggesting that parents in a just state would be required to pay a fixed sum per child into an insurance pool that would be used to compensate any children that were born genetically disadvantaged. Only significant genetic disadvantages would qualify for redress, of course, given the costs of administration and reasonable disagreement over what counts as a disadvantage, but some certainly would qualify. Two important corollaries bear emphasizing. First, insurance against having genetically disadvantaged children makes sense only if their genes are the product of chance rather than design. Parents who intentionally bear children entitled to redress, in the form of additional resources, more expensive education, or special employment opportunities, as deaf children are, would be personally liable for the increased costs associated with their choices. Second, the operator of the insurance pool (possibly a government entity) has an incentive to reduce the overall cost of insurance to participating parents. The insurance pool's operator therefore might take cost-effective steps to prevent the birth of genetically disadvantaged children through educational or screening programs, subsidized health care or surgery, or similar measures. In a just state, these jobs might fall to the government; whether the same is true in imperfectly just states is a much more difficult question to answer. Equality of fortune acknowledges, as I noted, that parents who give birth to a less able child than they might do not harm him if the disadvantage is integral to the child's identity. But whatever intuitive disquiet that conclusion creates is not likely to be reflected in any practical deficiency.
We all may reach the point at which the future holds more suffering, frustration, or indignity than it does rewards, making the balance of our natural lives worse than their immediate cessation. From the standpoint of our individual well-being, judged by a purely secular standard, death would be preferable to continued life. To be sure, we might nevertheless have reasons to remain alive. Those who hold certain religious beliefs might think that intentionally taking one's life even when in great pain offends a divine command or causes spiritual loss. Some might consider a willful death to end physical suffering or disability offensive to their dignity as rational beings. Alternatively, a person might remain alive to avoid causing pain to others or to help them. However, if none of these reasons possesses overriding importance, continuing to live past the point where personal ills outweigh life's goods would be irrational, and forcing another person to stay alive would harm her.

Unless our mental faculties slip markedly, all of us will be able to decide for ourselves whether to continue on if our lives become wretched, even if the state limits the means that we may use to end them or prevents others from helping us die. But young children cannot decide their fates responsibly. And some of them, sadly, have lives that are bad from the start, or very close to the start, owing to their genes. Moreover, sometimes parents can know through genetic testing that a child will be born with a life that is worse than non-existence from nearly the time it is born. Do parents or others have a duty to prevent the birth of a child whose genes condemn that child to misery from the very beginning? If so, who should bear the cost of fulfilling that duty? If a child is born facing a short, debilitating existence, do parents or others have a duty to end the child's life once its future seems bleaker than no future at all? If they do, who should shoulder which costs? This Part addresses these questions and the role the government ought to play in shaping parents' or health care providers' choices.

A. Must a Person Exist Before Her Rights Can Be Violated?

Does giving birth to a child whose life is not worth living (from the perspective of the child's welfare alone) harm that child? It may of course harm people who exist independently of the child, such as its parents, its siblings, and any taxpayers or would-have-been beneficiaries of charitable medical care who must pay in anguish, money, or foregone treatment if such a child is born. For that reason, wrongful-birth suits by distraught and
angry parents against doctors are uncontroversial. However, does bringing a child into the world with a life not worth living cause the child itself harm?

Philosophers have long wrestled with this question, as have judges in wrongful-life cases. Some maintain that only existing people can be harmed. They claim that if a person has a right not to be harmed, his right cannot be violated until he comes into existence and thereby becomes a bearer of that right. According to this view, giving birth to a child cannot violate any right it might have to be spared a life not worth living. Keeping a child alive in intractable misery can violate that right, of course. And that violation might begin no more than an instant after its birth. But the act of giving birth cannot itself offend the child’s rights.

The alternative view is that everyone has what Brock refers to as “a right not to have been brought into existence with a life not worth living.” Brock combines this asserted right with what he calls Principle M:

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 disability or a serious loss of happiness or good, that they

90. “Wrongful-birth” suits are suits by parents who claim that the negligence of doctors or laboratories was responsible for their having severely disabled children to whom they would not have given birth had they received correct information about their prospective child. They bear the burden of showing both that a physician was negligent in diagnosing a problem or communicating a finding to the potential parents and that they would have avoided or terminated a pregnancy if they had been adequately informed. “Wrongful-life” suits are suits by children against the same defendants claiming that they were wronged just by being born with a life not worth living. See Bonnie Steinbock, Life Before Birth: The Moral and Legal Status of Embryos and Fetuses 114-25 (1992).

91. For an extended defense of the view that bringing a person into existence cannot violate any right he has because he must first exist to have a right, see Heyd, supra note 41, at 97-115.

92. Buchanan et al., supra note 7, at 236. Although From Chance to Choice has four authors, I again refer only to Brock because the book’s preface states that he is “chiefly responsible” for the sections of the book that I discuss. These sections reiterate and extend Brock’s earlier writing on these subjects. See, e.g., Dan W. Brock, The Non-Identity Problem and Genetic Harm: The Case of Wrongful Handicaps, 9 Bioethics 269 (1995).

Although Brock recognizes that “only a very small proportion of genetic abnormalities and diseases are both compatible with life and also so severe as to result in the affected child having a life not worth living,” he believes that instances exist. Buchanan et al., supra note 7, at 239. He offers Lesch-Nyhan syndrome and Tay-Sachs disease as examples. Id. Both examples are slightly odd. Children generally do not exhibit symptoms of either disease until they are several months old. Supra notes 4-5. In saying that their lives are not worth living, Brock presumably measures the intense suffering that these diseases cause once they manifest themselves against the neutral or slightly positive existence the victims enjoy for their first few months. If, however, children were euthanized at the point at which their lives stopped being worth living, Brock’s rights-based objection to creating children with these diseases would be undermined. Because a young child does not develop complex desires or future aspirations that would be frustrated if its life were ended in infancy, one might contend that giving birth to a being that will live a short while in an on-balance positive way before being killed once the balance tips does it no wrong at all. Given most people’s beliefs, though, the dispute over when a right violation occurs (at birth or a little later, when a life ceases to be worth continuing) is purely academic as a moral if not a legal matter. It is hard to imagine any couple choosing to bear children they were morally obligated to kill after several sleepy months of life.
coarse could have prevented without imposing substantial burdens or costs or loss of benefits, on themselves or others. 93

Brock counsels against misunderstanding his position. 94 The claim that people have a right not to be born with a life not worth living does not imply, for example, that persons who never come into existence have rights that existing people are bound to respect. The duty that potential parents or others might have to prevent the birth of a child whose life would not be worth living need not descend, in Brock’s view, from a right of a person not yet in existence who, if the right is respected, never will exist. Instead, he believes that this duty is owed only to children who are in fact born. 95 Brock also points out that the right he affirms is not limited to children who are born with lives not worth living, because every living person has the same right; whereas most people come to consciousness with the right intact, children whose prospects are worse than non-existence are born with it violated. 96 Furthermore, the fact that an existing child’s right was violated because of an action taken before it became conscious has no bearing on the right’s existence. A time bomb set ticking prior to a child’s birth that later explodes and kills the child would violate its right not to be killed just as surely as one switched on after he was born. 97

These points are well taken. Yet they do not decisively resolve the question of whether a child with a life not worth living is harmed by being born. Even if newborns or small children have a right not to be harmed, 98 Brock offers no direct response to the assertion that an individual’s existence logically must precede the violation of any right it has because rights presuppose the existence of right-holders. His reply consists in showing that his opposing view—that the act of giving birth (or bringing to consciousness, if consciousness of the requisite sort precedes birth) may simultaneously bring into existence a right-holder and violate the asserted right

93. BUCHANAN ET AL., supra note 7, at 226.
94. For an earlier, careful defense of this view that makes many similar points, see ROBERTS, supra note 41, at 18-22, 145-70.
95. BUCHANAN ET AL., supra note 7, at 236.
96. Id.
97. Id. at 236-37.
98. Some philosophers ascribe rights only to agents who can understand and responsibly assert or waive claims against others. Those who adopt what sometimes is called a “choice theory” of rights consider it more conducive to orderly thinking to speak of other people’s duties toward sentient beings such as animals or young children who lack this capacity. In this conceptual scheme, duties toward beings with interests are possible because their interests can be set back or advanced, but it is inaccurate to speak of those beings as having rights that they can exercise or relinquish voluntarily. For a discussion of alternative notions of rights, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 79-102 (1988).

Nothing significant turns here on the theory of rights one favors because it is safe to surmise that no rational creature would waive its right not to be born with a life not worth living, if indeed it had that right. What would best serve its self-interest and what would respect a presumed right not to be born with a serious, preventable disability making its life not worth living are identical.
not to be born with a life not worth living—does not have counterintuitive implications. This is part of a sound argumentative strategy, to be sure, but it does not establish the inferiority of the existence-precedes-harm view.

Why might one want to insist that the violation of a person’s right can be coeval with his birth? I can imagine two reasons for adopting Brock’s view. Neither is particularly forceful, although there seems to me no practical advantage to accepting the rival view that existence must precede harm either. The responsibilities and potential liabilities of parents, doctors, or state officials should not depend on which view we deem correct.

The first reason for siding with Brock is that maintaining that existence is necessarily prior to harm might seem to imply an absurd sort of hair-splitting with respect to normative prescriptions. The existence-precedes-harm view seems to suggest that giving birth to a person with a life not worth living is fine, but failing to kill the infant within a millisecond of its birth is not. What sense can this make?

There is an obvious response to this leading question. Somebody who accepts the existence-precedes-harm view might plausibly say that it would be wrong to give birth to a child if one would be morally obligated to kill it or let it die as soon as it was born, provided that one could prevent its birth at little cost or risk. Bringing such a child into the world would worsen one’s own life and the lives of others connected with the decision, and it might cause preventable suffering to the child. The existence-precedes-harm view therefore seems to support the same policies that Brock’s opposing position would. It is even compatible with Principle M.

The second reason for favoring Brock’s view is that one may want to offer a moral argument to a particular audience against having a child with a life not worth living. Somebody might believe that intentionally ending an infant’s life is wrong even when that life ceases to be worth living. He might consider killing an infant whose life turns wretched shortly after birth to be a moral abomination, and allowing that child to die no better, even if the death is painless. Although this view is not widely held, somebody might accept it for at least two separate reasons. First, he might think that only the person whose life hangs in the balance may decide to end it, so that nobody else may make that final decision on his behalf, no matter how irreproachable the surrogate decision maker’s motives. Second, he might be convinced that sound religious or moral reasons condemn suicide,

99. Peter Singer offers this as a possible argument, but less than enthusiastically:
Perhaps the best one can say—and it is not very good—is that there is nothing directly wrong in conceiving a child who will be miserable, but once such a child exists, since its life can contain nothing but misery, we would reduce the amount of pain in the world by an act of euthanasia. But euthanasia is a more harrowing process for the parents and others involved than non-conception. Hence we have an indirect reason for not conceiving a child bound to have miserable existence.

Peter Singer, Practical Ethics 87-88 (1979).
mercy-killing, or allowing a person to die if nutrition, hydration, or non-dramatic medical means could keep the person alive. Unless such a person could be persuaded that bringing into existence a child with a life not worth living itself violated an important right of that child, as Brock maintains it does, his sole moral reason not to create such a child would stem from the interests of other people (which might be quite powerful), provided that he rejected the following non-person-affecting principle: that it would be wrong to bring about a state of affairs in which a person lives a life that is worse than non-existence, even though bringing it about would not violate anyone's right.

Should our position on the question of whether existence must precede harm or whether it can be coincident with harm turn on which of these views responds better to this imagined audience? I doubt that it should. I cannot name anyone who holds that it would be wrong to end the life of a child whose future is bleaker than non-existence and who also believes that parents or others do no wrong in creating a child, knowing that its life will be worse than non-existence and that they will be barred by some religious or moral principle from ending that life once it no longer is worth living. If this position is purely hypothetical, then nothing turns on whether the existence-precedes-harm view or Brock's view is correct. One might as well say, as many naturally would, that nobody has a right not to be born because it is senseless to speak of somebody having a right before she even exists. The debate over whether life must come before harm or whether the two may be contemporaneous would, and should, have no bearing on legal policy.

Some might think that this conclusion comes too quickly. Suppose that we take for granted that the law forbids killing an infant, even if its life is worse than non-existence. Perhaps the child's parents would not even be permitted to let the infant die. That child will surely suffer before its life ends, perhaps greatly, and the child's suffering would have been avoided had he not been born. Take these background conditions as given, one might contend, and it surely does matter whether the existence-precedes-harm view is true. If the existence-precedes-harm view is correct, the argument runs, then the unlucky child's parents or their negligent health care

100. Brock supplies no example. He notes that "[t]here is no inconsistency in believing that someone does not have a life worth living, but also believing that it would nevertheless be wrong to kill him or her" and claims that "[s]uch views are common in other contexts." Buchanan et al., supra note 7, at 237. The other contexts he has in mind are those involving very seriously disabled or dying patients who, in some people's view, ought not to be killed even though their lives are worse than non-existence, unless perhaps they assent. Id. Many people, however, would distinguish between killing somebody who is unable to choose whether to continue living, such as a newborn, and killing somebody who is able to make a responsible choice. Moreover, Brock offers no real-life illustration of any person or group that conjoins the no-inconsistency view quoted above with the further view that somebody does no wrong by bringing a child into existence, knowing that its life will not be worth living and knowing that moral or religious beliefs will bar killing it or letting it die.
provider cannot owe the child compensation, because neither wronged the child by bringing him into existence. And once he is alive, his predicament is of the legislature’s making, for it is lawmakers who forbade euthanizing him or letting him die. Conversely, if Brock’s approach is correct, the child might be harmed by being born into this situation. His doctors or parents might be forced to pay for his misery.

This rejoinder has force only if one accepts the propriety of a law barring parents or others from painlessly ending the life of a child facing a horrible future and if one further accepts that a child has a right to compensation to the extent that its life is not worth living only if somebody can be faulted for it being in that condition. Both of these premises are false, in my view. The law should allow children to be euthanized or allowed to die once their lives on balance are not worth continuing, out of regard for their suffering and the decision the children themselves almost certainly would make if they could. Even if it does not, however, parents’ responsibility for compensating their children for their bad fortune should not depend on whether they are at fault. Health-care providers’ liability should be conditioned on fault, as it is now, but parents’ liability should not be. Of course, parental fault might become relevant in the context of a broad-based insurance program designed to cover the just costs of child rearing on fair terms for all participants, but fault in that case bears only on whether a parent or the entire group of parents joined in the insurance scheme should pay, not whether the child should be compensated.

There is, finally, the question of whether compensation in a case of this sort makes any sense, as a child with a life not worth living, who typically will die within a short time of reaching that point anyway, rarely will benefit from any compensation unless that term includes pain killers and other forms of medical aid. It is hard to imagine that compensation would be useful in at least the vast majority of cases, which in turn renders this discussion largely superfluous. Which policies make most sense, as I discuss below, depends not on whether existence must precede harm, but on how effective they are in preventing children from being born with miserable lives and on where justice places the burden of paying for them.

B. Morality and Public Policy

The moral and public policy issues surrounding children whose lives would not be or are not worth living from a young age can best be categorized according to the stages of a child’s development (or nondevelopment). These stages include: (1) actions to prevent the conception of a child whose life will be worse than non-existence, (2) screening and prenatal intervention to make a conceived child’s life worthwhile when otherwise it would not be, (3) abortion to prevent the existence of a child whose life would not be worth living, and (4) euthanasia or passive
withholding of medical treatment or sustenance from a child born with a life that is worse than none at all.

The moral issues at most of these stages are identical. Unfortunately but not surprisingly, there is no simple way of summing up these often opposing ethical considerations pertaining to such different stages. Couples who are thinking of having children or who have sex under circumstances in which conception might result, pregnant women, and parents of young children whose lives are not or soon will not be worth living all need to consider a variety of factors. They must take into account the physical, psychological, and monetary costs to themselves and those whose welfare is bound up with theirs of refraining from procreation, of pre-implantation screening followed by assisted conception or in utero screening, of abortion or other physical intervention during pregnancy, or of euthanizing an infant or letting it die. They also need to consider the magnitude of the harm to their child if it is born with or is living a horrible life. Their assessment of that harm will in turn depend on whether they believe that morality permits a parent to kill a child or allow it to die if its life ceases to be worth living and on what the law stipulates about euthanasia or allowing a child to die in this condition. They must pay heed to religious considerations, insofar as they believe them normatively authoritative and insofar as the law defers to people who act from them. Finally, they may need to consider their degree of responsibility for a pregnancy that will result in a child whose life is not worth living if brought to term; the greater their culpability, one might contend, the greater the risk of injury they are obligated to run or the greater the financial cost they are obligated to shoulder to prevent a child from being born with a miserable life.

Amalgamating these considerations in actual cases is made more difficult by the likelihood of factual disagreements about the risks to a child from different types of intervention, about the risks to a pregnant woman from diagnostic tests, surgery, or abortion, and about the probabilities of conceiving or giving birth to children with lives not worth living. In addition, health care professionals face a special set of ethical issues arising from their fiduciary status, the contractual commitments they have made, and their personal moral convictions. For these reasons, easy conclusions about real-world cases frequently are elusive.

Just as most of the same moral considerations arise at each step of a child’s development, the same governmental tools, broadly conceived, are available at each stage. The state can use inducements, which here can take the form of partially or completely subsidizing genetic screening, genetic counseling, sterilization, embryo or fetal screening, in vitro fertilization, prenatal surgical or other interventions, abortion, postnatal medical care for
infants, euthanasia, or comfort care if a child is allowed to die. Alternatively or in conjunction, the government might penalize undesired conduct. Possible sanctions run the gamut from physical coercion, in the form of criminal detention or compulsory medical interventions, to monetary penalties, such as fines or a refusal to cover certain medical costs that otherwise would be paid by the state. In addition, parents or potential parents might be made liable for damages through wrongful-life suits brought on behalf of their children, or civil regulatory sanctions might be imposed on health care workers or institutions. In between subsidies and sanctions lies exhortation. The government might urge parents, physicians, or other relevant actors to behave in certain ways, without lowering the monetary cost of that conduct or punishing those who do not so act.

There has been little discussion of the morality of parents' conduct in cases of children with lives not worth living or of the right blend of state policies. One possible explanation is that most potential or actual parents are thought to act blamelessly in these cases. Another is that the number of cases is small. Further, a deep distrust of government intervention in reproductive decision making allows most people to rule out criminal sanctions or compulsory medical interventions fairly easily, reducing the range of governmental tools available to shape parents' choices. This presumption in favor of individual liberty is unquestionably appealing. Nevertheless, a number of issues raised by the plight of children who have been or are likely to be born with lives not worth living bear closer scrutiny.

1. Contraception and Preconception Screening

Most people want to avoid having children whose lives are not worth living, either for selfish reasons or for the good of their other children or relatives. Most also consider it immoral to bring into existence a child whose life is horrible from the start or soon afterwards, even if doing so did not violate that child's rights or even if, implausibly, the child would not burden them or others they love. They deem it immoral simply by virtue of the miserable state the child would find itself in unless the child were killed or allowed to die by withholding nutrition once its life ceased to be worth continuing.

These convictions supply powerful motives for potential parents to undergo genetic screening, particularly if they are in high-risk groups. If the odds of passing on some terrible genetic mutation to their children are

101. If the government pays for these services directly, the cost of these inducements would be borne by some group of taxpayers in the first instance, although an analysis of the incidence of the tax and the subsidy might reveal that the costs or benefits in fact were spread more diffusely. If the government instead mandates that one or more of these services be included in private insurance policies, the cost would fall on some collection of insured individuals, employers providing insurance, health care workers, owners of health care enterprises, uninsured patients, and taxpayers, depending upon the ultimate incidence of the mandate.
substantial, they have a forceful reason not to have children, to screen artificially fertilized embryos prior to use, or to employ diagnostic techniques in utero to detect serious abnormalities before a child is born in order to correct them or, if that cannot be done, to abort the pregnancy. As Brock notes, while there is “no precise probability at which the risk of the harm makes it morally wrong to conceive or not to abort” a fetus carrying a genetic disease incompatible with a worthwhile life, the chief factors that bear on the morality of those decisions are easy to tally. The relevant factors include: the probability of harm to the child, the magnitude of the harm, how weighty the parents’ interests are in having a child, how hopeful they reasonably can be that delaying pregnancy will result in a healthier child, how costly or how dangerous diagnostic techniques or abortion would be in a particular case, how burdensome pregnancy itself is, the type of care parents will be able to furnish if a badly disabled child is born, and what the law allows in the way of non-treatment or involuntary euthanasia once a child’s life becomes hateful even with the best care reasonably available.

What should the state do to compel or encourage parents to act morally? As a practical matter, one can rule out state coercion to prevent the conception of a child whose life will not be worth living from the start or some time near to it. It is impossible to imagine a realistic case in which government officials could ascertain with high probability that a child conceived by a mentally competent couple would have a life worse than non-existence as a result of its poor genes, no matter what corrective actions they took before its birth, and in which the couple would not refrain from conception or birth of their own volition. To be sure, if state officials knew perfectly that a particular child would be born with a life not worth living and its parents would conceive and bear the child anyway, coerced contraception might well be justified. However, people are not so motivated, and the costs of government monitoring, mistaken official decisions, intentional abuse of authority, and unwanted physically invasive action, coupled with the likelihood of reasonable disagreement over the odds of a particular outcome and over the morality of conception when there is uncertainty about the prospective harm to a child, renders government action illegitimate as matters now stand.

102. Buchanan et al., supra note 7, at 241.

103. Those widely thought to be incompetent potential parents—young minors and severely mentally impaired adults—raise special problems. Nevertheless, the sad history of twentieth-century eugenics programs and the sterilization of the mentally infirm, along with the difficulty of conceiving how state officials could reliably predict that any children born to the mentally infirm would have lives not worth living, argues strongly against physically coerced contraception by the government.

A separate issue is whether the state may prohibit members of either group from having children if, by waiting, they would likely have children whose lives would go better. See supra Part II.B. If delaying childbearing probably would make little difference to the well-being of their potential children, as might be the case with the children of some mentally disabled persons, there are further
There are, however, contraceptive measures other than sterilization that the government might adopt to reduce the likelihood of children being born with lives not worth living. For example, the government might provide screening, counseling services, or contraceptives free of charge or at a below-market cost. The government could reward people who availed themselves of those services in exactly the same way as the private organization, Project Prevention, pays cash to former drug addicts or alcoholics who undergo permanent sterilization or who use certain long-term contraceptives. The government might require couples to undergo tests before marriage; it could go a step further and mandate mutual disclosure of the results. Or the government might, through legal permission or financial subsidy, make post-conception interventions possible, such as in utero corrective therapy or abortion. Finally, the government might penalize intentional or reckless conduct either directly, by fining parents or imposing criminal sanctions, or indirectly, by empowering children to sue for wrongful life.

The last of these options may be dismissed immediately. Criminal or civil penalties directed at parents are likely to achieve little deterrence and thus only increase the misery their children experience by depleting parental resources. Potential parents already have powerful incentives not to give birth to children with lives not worth living. Apart from the small groups of potential parents who might not avail themselves of screening technology or intervene in a pregnancy out of blind trust in divine providence, potential parents who do not respond to existing incentives generally fail to do so because of ignorance, poverty, or both. Adding liability laws to the books is unlikely to attract their attention any more than fines scare judgment-proof defendants.

Government subsidies for screening, contraception, abortion, or other services might be more effective, depending upon the distribution of a society's wealth and income and the structure of its health care industry. The question that all government subsidies raise is one of funding: who should pay for them? Is there any reason to saddle members of the community questions of whether appropriate compensation for their own bad fortune should include permitting them to have children, provided that childbearing and some role in childrearing would enrich their lives, and whether the costs of additional non-parental care, special education, and so forth should be borne by those with better luck. See supra Part I.A-B. In the case of young minors who often lack means to raise their children, still further questions arise as to who should have to pay if they do have children and whether coerced contraception would be warranted if they lacked the wherewithal to provide adequately for their children. See id.

104. Founded in 1994, Project Prevention offers a two hundred dollar cash payment to any woman or man of childbearing age who is or has been a drug addict or alcoholic and who adopts a method of long-term contraception such as Depo Provera, Norplant, an intrauterine device, a tubal ligation, or a vasectomy. Project Prevention does not pay for doctors' services or medical procedures. PROJECT PREVENTION: CHILDREN REQUIRING A CARING COMMUNITY, at http://www.cashforbirthcontrol.com (last visited July 27, 2002).
other than potential parents of wrongfully conceived children with these costs? If parents alone are responsible for paying the costs associated with their children, then potential parents alone should foot the bill for prenatal screening, counseling, or other interventions. In some cases parents will find these services cost-effective, in other cases they will not.

Nevertheless, this conclusion must be qualified in at least three ways. First, there may be benefits to the community as well as to parents from screening programs, if only through the greater economic productivity of parents who thereby avoid the awful travails of caring for a child whose life is not worth living. If these benefits are not taken into account by potential parents when deciding whether to pay for screening (and there is no self-interested reason why potential parents would factor them in), then the government may justifiably subsidize these programs to correct for this omission. Second, if the potential parents are poor, so that taxpayers would be morally obligated to pay the medical expenses of their children rather than let them suffer through their parents' neglect, the government might find it cheaper for taxpayers to subsidize preventative measures than to pick up later the costs of children with miserable lives. Third, in a just state, many potential parents (although not all taxpayers) probably would link their fates together through an insurance arrangement that allowed everyone to provide for their children on equal terms. In these cases, prenatal screening and other services should be made available by the insurer if they are cost-effective, so that potential parents need not decide on a case-by-case basis whether one or another option was worth the expense to them.

Thus, in a society where income and wealth are justly distributed, the government might permissibly play only a limited role in funding contraception or pre-conceptive measures to reduce the number of children born with lives that are or soon will be worse than non-existence. One important qualification to this statement is that the government might be obligated to take on a much larger role if the only way to make insurance against the costs associated with children who have expensive needs available to potential parents on equal and fair terms is for the government to provide that insurance itself, rather than to regulate private insurers. Another qualification is that one cannot easily extrapolate from this conclusion to any prescription for a society in which income and wealth are not justly distributed. A more expansive government role that provided assistance to people who are disadvantaged economically perhaps could be justified as a

105. See supra Part II.F.1.

106. In the absence of an insurance arrangement, the government might achieve the same result by mandating certain types of testing or counseling. The government might justify its requirements by arguing that what it requires furthers the rational self-interest of potential parents and saves them the time and trouble of gathering the information they would need to decide responsibly whether some diagnostic technique or service was worthwhile.
transfer of resources designed to make the overall distribution more nearly just. Whether it could would depend on a number of factors, including the nature of other transfer programs, the efficacy of government intervention, and the proper theory of distributive justice for this purpose.

2. Prenatal Corrective Intervention or Abortion

Once a woman becomes pregnant, the same concerns that militate against government coercion in the realm of contraception or preconception testing press against government intervention to avert the birth of a child with a horrible life, whether that intervention takes the form of surgery to improve the child's well-being substantially or of abortion. Indeed, the arguments against compelled in utero surgery or abortion are even more forceful. In virtually no other circumstance does the government (at least in the United States) demand that parents allow their bodies to be opened, restrained, or otherwise used to benefit their children or potential children. For example, kidney transplants and even blood transfusions from parent to child are not compelled. Moreover, in no case, to my knowledge, does the law require that parents run significant physical risks to aid their children. If consistency with existing legal rules matters, compulsory prenatal surgical intervention to aid a child may be ruled out because it unavoidably would carry significant risks, given the current state of medical technology. Requiring pregnant women to undergo surgery for their future child's benefit would be politically unimaginable in the United States today, partly because of these legal precedents and partly because of a broadly shared view that people's bodies should receive special protection against government intrusion unless intervention is essential to prevent people from harming themselves or unless the ends of law enforcement trump the concerns that underlie the law's presumption of bodily inviolability. This is especially true in the absence of clear cases in which intervention almost certainly could work an enormous benefit. Nobody has described such cases with respect to children whose lives are not worth living.

Identical concerns rule out compulsory abortion when a pregnancy is very likely to result in a child with a life that is not worth living. Those concerns are joined by two others. First, the benefit to the future child from

107. Although some women have been transfused over their religious objections to help their unborn children, those interventions have helped, or at least not harmed, the women physically, whatever spiritual harm the women fear that the transfusions may have worked. Compulsory blood sampling to establish paternity, with the aim of aiding a child whose father is unknown, also requires a physical invasion, but the risk to the person sampled is trivial. The detention of pregnant drug users to improve the well-being of their future children, which some courts have ordered in limited circumstances, does curtail a woman's liberty for her child's benefit. It does not, however, generally involve physical risk to the woman or a bodily invasion. Some would even argue that she benefits from incarceration if it prevents her from abusing drugs.
abortion—the benefit of being spared whatever net suffering is associated with a life worse than non-existence—generally would be less than the benefit of a surgical intervention that transformed what would have been a life not worth living into something better than non-existence. If the government may not require women to provide the larger benefit to their children flowing from surgical intervention, for reasons just given, it may not compel women to abort pregnancies to provide the smaller benefit. Second, while a significant number of people regard abortion as immoral or contrary to religious tenets, fewer regard prenatal intervention to improve a child’s life as equally offensive. From the standpoint of legislators setting public policy, compulsory abortion is therefore both more difficult to justify and less likely to pay electoral dividends.

Nevertheless, women appear to have a moral obligation to undergo in utero surgery to prevent their children from having lives that are not worth living if the risk to themselves is low. Given the many other burdens we expect parents to endure for their children, this one hardly seems excessive. If this view is correct, however, it is but a short step to accepting, contrary to the conclusion above, that women should also be legally obligated to undergo in utero surgery if the risks are small and if the likely benefits are large. It certainly is not conclusive that religious convictions may incline parents or potential parents to resist surgery any more than religious beliefs can excuse child neglect. Moreover, it appears highly unlikely that officials would abuse their authority more frequently or more perilously in the case of unborn children that seem destined to live abbreviated lives of enormous suffering than in the case of parents who abuse or neglect their children.

In utero surgery exhibits two features, however, that typically block the slide from moral obligation to justified government compulsion. The first is the physical nature of any surgical intervention, the fact that surgery involves bodily intrusion and that it carries some risk to a woman’s health. Of course, when the risks are minuscule and the benefits to a future child in the form of reduced or eliminated suffering are considerable, the force of this reason for not intervening legally fades, even though the intervention remains physical. By the same token, however, the need for a legal requirement would shrink as well, as prospective parents would feel less reluctance to undergo the required procedure. The second feature that makes legal regulation unattractive is the current absence of clear cases in which surgical interventions to alter a fetus’s genetic constitution would yield predictable and sizable benefits. If this were to change, our reluctance to legislate in this area might weaken, especially when many factors would diminish the chance of error or official overreaching.

Regarding abortion, there is no reason to mandate abortions to preclude children from being born with lives that are not worth living even were it constitutionally permissible, provided that any who were born
could be euthanized or allowed to die painlessly when their lives became worse than no life at all. If euthanasia or letting a child die in those circumstances were illegal, however, the moral case for aborting a pregnancy would grow far stronger. At the same time, though, the realistic likelihood that the government would require abortions would disappear, because no society that so valued life that even babies with absolutely awful lives were kept from dying would impose criminal penalties on women who failed to abort pregnancies that were likely to produce such children.

3. Postnatal Remedies

Government action to compel parents to act in a morally proper manner is somewhat more appropriate after a child has been born with a life-not-worth-living than in the preceding cases of contraception, prenatal screening, in utero surgery, or abortion. If an infant’s life is so bad that it is not worth continuing, the humane course, the one that would best advance the child’s interests, is to kill the child painlessly or let it die in a pain-free manner.\textsuperscript{108} Parents have a duty to do so if the law permits them to follow either course. What if they or their doctors refuse? On one side, keeping a child alive when it would be better off dead might easily be seen as akin to child abuse. On the other side, however, it often is impossible to know with any certainty how bad a life is, subjectively, for such a child after available palliative measures have been taken.

For now, these issues hardly merit prolonged discussion. The incidence of wrongful-life births or the wrongful continuation of infant lives not worth living is so small, and the idea that the government might step in to prevent or end such a life seems so politically daft, as to render the subject unripe for serious debate. Charging parents of wrongfully born children with the entire costs of the children’s care seems just if they carried a pregnancy to term aware of the terrible life their child would have or if they insisted that their children be kept alive after birth in spite of the children’s extreme suffering.\textsuperscript{109} However, this policy might achieve little

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\item[108.] Brock is among those who support this conclusion. Dan W. Brock, \textit{Voluntary Active Euthanasia, in Life and Death: Philosophical Essays in Biomedical Ethics} 202, 229 (1993). \textit{See also John Harris, Wonderwoman and Superman: The Ethics of Human Biotechnology} 96 (1992) (noting that where people are not competent to decide for themselves whether to continue living and where “their life is so terrible that mere existence is a cruelty . . . we should give them a humane death by legalizing euthanasia”).
\item[109.] Heyd seems to endorse this approach, although he notes that it might be hard to institute: This may also be the place to suggest a possible solution to wrongful life cases: although children cannot claim damages for having been born handicapped, once they are born, their interest must be taken care of by society. And society . . . is definitely in a position to claim that its interests have been harmed by the negligent act leading to the conception of the child. Consequently, it makes perfect logical sense for society to sue the negligent party for damages, which would be used for the support of the child (although pragmatically and legally such a proposal may turn out to be difficult to implement). If the negligent parties are the parents, there is a case for society withholding its charge-free services to them, forcing them to bear the costs of raising the child.
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change if it were adopted today, given the generous terms of many private insurance contracts that compel other policyholders to pay for the care of miserable children, hospitals' fear of adverse publicity if they deny care, Baby Doe regulations,¹⁰ and the limited financial resources of many parents. Of course, the government could change the coverage rules under state or federal assistance programs, or it could bar certain kinds of cross-subsidization within private plans. In addition, private insurers could in time curtail coverage if children are born with lives not worth living, as preconception and prenatal diagnostic and therapeutic techniques improve. Still, it would by Pollyannish to expect radical or speedy change.

**CONCLUSION**

If parents in a just society are obligated to provide their children with life's essentials and a basket of resources and services sufficient to give them a fair start in life, then parents are, I have argued, responsible in the first instance for covering the costs of their children's bad genes. In many instances, one cannot say with sufficient consensus that one set of genes is worse than another, which relieves parents of any obligation to compensate their children. And some types of disadvantage bar repair, either because redress is physically impossible or overly expensive or because the necessary means of repair would encroach upon important competing values. In a significant number of salient cases, however, the burden of relieving children's sheer bad luck falls on those responsible for their existence.

This result holds, however, only in the first instance. Insofar as it is a matter of chance which genes parents have to pass on to their children, they also are fortune's victims or beneficiaries if they decide to procreate. Moreover, it is both impracticable and unnecessary to trace the chain of ill luck and responsibility back to a primordial ancestor to whom at best partial blame could attach. Parents are best viewed as sharing one another's genetic luck through a form of insurance, I have argued, that simultaneously equalizes their responsibilities toward the genetically unequal children they will produce while ensuring that those children receive their just entitlements, entitlements they might be denied if children had to rely exclusively on the financial prudence and luck of the particular parents to whom they were born. It follows, however, that parents who intentionally give birth to children whose just shares exceed the norm, such as children born with avoidable disabilities like deafness, generally owe additional amounts to those united with them in this insurance pool even if these parents cannot be said to harm their children because their actions or

ⁱ¹⁰ For a summary of the regulations' history and current impact on efforts to withhold medical treatment or nutrition from infants facing awful futures, see Barry F. Furrow et al., Health Law: Cases, Materials and Problems 1162-64 (3d ed. 1997).
omissions resulted in different children than they otherwise would have had. Parents may not shift the cost of their choices, as reflected in their children's entitlements, to members of the community who could not influence their actions. It further follows that those bound together in this insurance arrangement, or the government acting as their agent if it plays the role of insurer, may justifiably spend money on genetic screening or enhancement programs, insofar as those expenditures lessen collective obligations to whichever children ultimately come into the world.

These moral implications, I should end by repeating, flow from one version of an egalitarian ideal of justice that presupposes a distribution of income, opportunities, and wealth that almost certainly would be more equal than that prevailing in the United States today. Therefore, translating these conclusions into contemporary public policy choices is not straightforward. Making the ideal concrete never has been.