

Compensation for Wrongful Life?

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NB: This is work in progress and is both incomplete and very rough in the final sections.

1 Three Types of Case

In law, there are various causes of action grounded in the claim that an individual ought not to have been caused to exist. They have several labels: wrongful life, wrongful conception, and wrongful birth. A basic distinction is between cases in which the plaintiff is the individual who it is alleged ought not to have been caused to exist and cases in which the plaintiff is a parent of this individual. In the first type of case, it is the interests of the child that are claimed to have been adversely affected, whereas in the second it is the interests of the parent, or parents. There is some confusion about the application of the various labels. In a recent case in the UK that I will discuss at some length, a suit brought by a child against her mother's physician was consistently referred to in the press as a wrongful conception case, whereas in the writing of at least one legal theorist, wrongful conception cases are said to be "brought by parents against their doctor."¹

I will be concerned primarily with suits brought by, or on behalf of, individuals of whom it is claimed that they ought not to have been caused to exist. I will ignore matters of nomenclature and will refer to these suits as "wrongful life" suits. I will not consider cases in which it is claimed that a pregnancy ought to have been aborted.

We can distinguish three basic types of case. In the first type of case, a child is caused to exist with a life that is not worth living – that is, a life that is overall bad for the child, or below the neutral level for well-being. If, moreover, the parents or a physician had acted differently, so that a child had been caused to exist with a life worth living, that child would have been a *different* individual. This might be, for example, because the parents would have had to conceive a child at a different time to have had a child without whatever harmful condition makes their actual child's life not worth living. And if they had had a child at a different time, the child would have developed from different gametes, which would have been sufficient for it to be a different child.² Finally, in this first type of case, it is possible to ameliorate whatever conditions make the child's life not

¹ Seana Valentine Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999): 117-48, p. 117.

² Parfit, *Reasons and Persons*...

worth living, thereby making the life worth living. It might be, for example, that there is a very expensive therapy, which is not provided by the state, that can substantially alleviate the bad effects of a congenital condition, enabling an individual afflicted with that condition to have a life that is worth living.

In this type of case, the act that caused the child to exist with the harmful condition was not *worse* for the child; for the claim that it was worse implies that if the act had not been done, that would have been *better* for the child. But if the act had not been done, there would have been no child for whom anything could be better. Yet seems that the act ought not to have been done. The challenge to explain why an act that is not worse for the person affected by it can nevertheless be wrong is referred to in the philosophical literature as the "Non-Identity Problem." In this particular case, there is an obvious explanation – namely, that the act was *bad*, though not worse, *for the child*, and thus harmed the child *noncomparatively*. It therefore ought not to have been done.

Although this explanation seems to me correct, it raises difficult questions. According to this explanation, to cause a miserable person to exist is noncomparatively *bad* for that person and there is a strong moral reason not to cause people to exist when this would be bad for them. But, if this is correct, it seems that to cause a well-off person to exist must be noncomparatively *good* for that person; and it seems that there should also be a moral reason to cause people to exist when this would be good for them. Yet most people believe that there is a strong moral asymmetry – often referred to in the literature on population ethics as "the Asymmetry" – between causing miserable people to exist and causing well-off people to exist. Most people seem to believe that, while there is a strong moral reason not to do the former, there is *no* moral reason to do the latter. But if the explanation of why there is a strong moral reason not to cause a miserable person to exist is that to do so is to harm the person noncomparatively and there is a reason not to harm people in that way, one must accept either accept that there is a parallel reason to cause a well-off person to exist or else explain why causing a person to exist cannot be good for that person or why there is no reason to benefit people in this noncomparative way. I will briefly return to this problem later.

In this first type of wrongful life case, if the person who did the act that caused a child to exist with a harmful condition was at fault in doing that act, that person seems to be morally liable to pay necessary and proportionate costs to enable the child to have the therapy. In the circumstances, harm is unavoidable: either the child will continue to suffer the bad effects of the condition or the person responsible will suffer a loss of funds. It is a matter of justice that the person who is morally responsible for the unavoidability of harm

should be the one to suffer harm, rather than being allowed to impose harm on an entirely nonresponsible individual.

This is the type of case in which a wrongful life suit seems to make most sense. One person is responsible for having caused another to suffer a harm (albeit a noncomparative harm) and has the ability to ameliorate that harm, or to prevent it from continuing. The action required of this person cannot be to *compensate* the victim, at least not in the traditional sense. Compensation for a harmful act is normally understood as action that makes the victim as well off as she was prior to the harmful action or as well off as she would have been had the act not been done. But in this sort of case, the victim did not exist prior to the act and would never have existed had the act not been done.

The aim of awarding damages in such a case must therefore be different. At a minimum, damages might be intended to prevent the harm from continuing by making the person's life worth living. And they might further be intended to compensate the person in a further way that is separable from the two ways just noted – namely, through the provision of benefits that would offset the harms the person had already suffered (even though the act that caused these harms was not worse for the victim). If, however, the damages were to fulfill only these purposes, they would ensure only that causing the person to exist would have caused no net harm. That could be compatible with the person who was caused to exist being left with a life of overall neutral value – neither good (worth living) nor bad. It seems clear that more would be required morally but on what basis would the one who caused the person to exist be liable to provide more?

Cases of this first sort are, moreover, quite rare. The main reason for this is that most cases in which it can be reliably determined that a life is, and is likely to remain, not worth living are cases in which the cause is a physical and perhaps also psychological affliction that cannot be significantly alleviated. Examples of such conditions that appear very early in life include Tay Sachs disease, Lesch Nyhan syndrome, and Dystrophic Epidermolysis Bullosa.

These conditions are examples of the second type of case. In cases of this second sort, a child is caused to exist with a life that is not worth living. As in the first type of case, this particular child would not have existed had action been taken to avoid the existence of a child with whatever harmful condition makes the life not worth living. Had such action been taken, a different child would have been caused to exist instead (or, perhaps, no child would have come into existence). What differentiates this type of case from the first, however, is that there is nothing that can be done to make the child's life worth living. If, of course, the child's life can be made less bad and someone is at fault in causing the child to exist, that person may be liable to fund whatever can be done to

alleviate the child's condition. But often in such cases, all that can be done is already being done and the only adequate remedy is euthanasia, which the person at fault cannot provide. If there is a person who is at fault other than the parents, that person might be required to compensate the parents; but that is another matter altogether.

In the third type of case, an act is a necessary part of the cause of a child's existence – so that the child would never have existed had this act not been done – but also causes or allows the child to have some harmful condition. Had the act not been done, a different child would have come into existence who would not have had the harmful condition. Although the actual child's life is worth living, it is less worth living than it would be if, per impossibile, the harmful condition were absent. Although the harmful condition cannot be eliminated, the child's life, which is already worth living, can be improved. There is a person who was at fault in doing the act that caused the child with the harmful condition to exist rather than a different child without the condition.

There is a similar type of case that must not be confused with this third type. In this further type of case, an act for which a person is at fault both causes a child to exist with a life that is worth living and also causes that child to have a harmful condition. The child's life can be improved. This type of case differs from the third type of case in that it was possible that the same child who has the harmful condition could have been caused to exist without it.

Because of the Non-Identity Problem, this further type of case is rare. If the conditions of a child's coming into existence had been sufficiently different that the child would not have had the harmful condition, they would also have been likely to be sufficiently different to ensure the existence of a different child. But cases of this fourth sort are possible. For the sake of argument, assume – what I believe to be true – that, although each of us developed from a particular embryo and would never have existed in the absence of this particular embryo, we nevertheless did not exist as embryos. Next suppose that there is a frozen embryo that will develop into one particular person whenever it is implanted. If it is implanted during a certain period, the resulting child will have a life worth living but will also have a harmful condition, but if it is implanted at any other time, the same child will have a better life without the condition.

If in this example a person were at fault in implanting the embryo during the period in which the child would be caused to have the harmful condition, that person could be liable to compensate the child for the harm. But this would not be an instance of wrongful life. The complaint would not be that the child ought not to have been caused to exist but that the child ought to have been caused to exist without the harmful condition. The act that caused the condition was worse

for the child because that same child could have existed without the condition. Although the action in this type of case is not a ground for complaint of wrongful life, it can raise some of the same questions that arise in cases of the third type. I will therefore return to cases of this last type in section 4.

2 The Case of Evie Toombes

In the UK, late in 2021, a 20-year-old woman with spina bifida, Evie Toombes, sued her mother's physician for allegedly having failed to provide her mother appropriate advice about reducing the risk of having a child with spina bifida. Toombes's claim to the court was that her mother, before becoming pregnant, sought advice from her physician, who neglected to advise her to postpone conception for several months, take folic acid supplements during that period, and only then conceive a child. This advice has standardly been given to women who want to have a child because it is known that spina bifida can be caused by a woman's being deficient in folate during early pregnancy. The risk of having a child with spina bifida is thus significantly reduced by regular ingestion of folic acid supplements for several months before and after conception. In her judgment, the judge in the case concluded that

had she [the mother] been provided with the correct recommended advice she would have delayed attempts to conceive. In the circumstances, there would have been a later conception, which would have resulted in a normal healthy child. I therefore find that the claimant's claim succeeds on liability.³

I will assume, for the sake of argument, that the plaintiff's factual claims are true. Although the most important of these claims were denied by the defendant, they were accepted by the court, which apparently simply chose to accept the assertions of the plaintiff rather than those of the defendant. But who was actually telling the truth, or accurately remembering what had happened more than 20 years earlier, is irrelevant for my purposes.

Toombes's own counsel conceded that, if her mother had postponed conception, she would have conceived a child who would have been a "genetically different person" from Toombes. One assumes that this indicates recognition both by the plaintiff and by the court that, had the physician not acted as he is alleged to have done, Toombes herself would never have existed. It was, moreover, evident to everyone that Toombes, a successful equestrian and show jumper, has a life that is well worth living; nor did Toombes claim otherwise. Hers, therefore, was a case of the third type described in section 1.

³ *Toombes v Mitchell* [2021] EWHC 3234 (QB) [80].

Given that, by her own admission, Toombes would never have existed had the physician advised her mother to delay conceiving a child, the physician's failure to do as he ought to have done was not *worse* for her. And given that her life is worth living, the physician's action was also not *bad* for her on balance. Hence the explanation of why the physician's action was wrong cannot be that which I proposed for cases of the first type described in section 1. Indeed, the physician's action in Toombes's case was, if anything, *good* for her (though not *better*). She is the beneficiary – albeit the unintended or accidental beneficiary – of the physician's negligence. How, then, can she deserve compensation from him?⁴

Again assuming that the facts are as Toombes alleges, the physician acted wrongly in failing to advise Toombes's mother to postpone conception and to take folic acid supplements before and after becoming pregnant. The wrongness of his action, or omission, is explained by what I call the

Selection Principle

When one has decided to cause an individual to exist, or when it is unavoidable that a person will come into existence, and one can determine which one of two or more possible people will come into existence, there is a moral reason to cause or allow a better-off individual to exist rather than cause or allow a different, less well-off individual to exist, if other considerations are equal.⁵

In failing to give Toombes's mother the proper advice, the physician allowed a less well-off individual to come into existence rather than causing a better-off individual to come into existence instead.

One way to understand the Selection Principle is to interpret it as assuming

- 1) that it can be good or bad for an individual to be caused to exist,
- 2) that individuals can therefore be benefited or harmed, albeit noncomparatively, by being caused to exist,

⁴ I am assuming that the physician is at fault, and indeed culpable, for his negligence. There are some, however, who believe that negligence cannot be culpable. They can simply substitute "recklessness" for negligence in the discussions that follow. That substitution seems compatible with the facts of the case – for example, that the physician discussed folic acid supplementation with the mother but told her that it was unnecessary if she had a healthy diet.

⁵ Compare Parfit's "Same Number Quality Claim," Frick's "non-identity intuition," and Savulescu's "principle of procreative beneficence." Parfit, *Reasons and Persons* ...; Johann Frick, "Conditional Reasons and the Procreation Asymmetry," *Philosophical Perspectives* 34 (2020): 53-87; Julian Savulescu, "Procreative Beneficence: Why We Should Select the Best Children," *Bioethics* 15 (2001): 413-26.

- 3) that noncomparative benefits and harms can ground reasons either to cause or not to cause individuals to exist (reasons that Parfit refers to as “wide person-affecting reasons,” which I call “wide individual-affecting reasons to allow that they can apply to causing or not causing animals to exist as well),
and as asserting
- 4) that there is a wide individual-affecting reason to confer a greater noncomparative benefit by causing a better-off individual to exist rather than causing or allowing a different, less well-off individual to exist.

Both Toombes’s claims and the court’s judgment presuppose that a different child without spina bifida would have been overall better off than Toombes herself. Given that assumption (and, perhaps, the further assumption that the physician knew that spina bifida is a condition that generally makes a life go less well), the physician’s negligent action is condemned by the Selection Principle. And there is a sense in which the charge against the physician is indeed a charge of “wrongful life.” Toombes’s case is a case of wrongful life in that she claims, with good reason provided by the Selection Principle, that she ought not to have been caused to exist *because a different*, better-off child ought to have been caused to exist instead. But what the court’s judgment fails to explain is how this can ground a claim to compensation or damages by Toombes, who is the accidental beneficiary rather than the victim of the physician’s negligent and wrongful action.

3 Two Digressions

3.1 *Wrongful Birth as an Alternative*

One option that would not have raised this awkward question about Toombes’s entitlements would have been for Toombes’s mother, who is alive and who supported Toombes during the trial, to have brought an action grounded in an appeal to her own interests. The mother might have claimed that the physician’s negligence was worse for *her* in that her own interests have been adversely affected by having had to worry about and care for a child with a seriously harmful condition when, had the physician acted differently, she would have had, in the judge’s words, “a normal healthy child.” Such an action would, as I understand the terminology, have constituted a suit for “wrongful birth.”

There are, however, problems with this suggestion. One can imagine how hurtful it would have been to Toombes had her mother claimed in court that having had her as a child had been against the mother’s interests. More importantly, such a claim would have been unlikely to be true. This is because of

what I have elsewhere called the *Divergent Lives Problem*. It may well be true that, if the mother had had a different child without spina bifida, her subsequent life would have been better from an impartial point of view. And it may have been prudentially rational at and for a short period after Toombes's birth for the mother to have wished that she had given birth to a different child without spina bifida. But once she had developed the deep love she no doubt has for her actual daughter, it presumably became impossible for her rationally to wish that she had had a different child instead.⁶ Given how much of what the mother has rationally cared about for her own sake since her actual daughter was born more than 20 years ago has been bound up in their relations with one another, it seems clear that most of the interests she has had in her actual life since her daughter was born have been and will continue to be better satisfied in the life she has with her actual daughter than those same interests would have been in a different alternative life with a different child. It is true, of course, that if she had had a different child, she would also have had different interests, and that those interests would have been better satisfied in the alternative life with the different child. But those are not the interests that are relevant to her possible claim to compensation for the physician's negligence.

The mother could, I believe, coherently claim to be owed reimbursement for her daughter's medical costs from the physician without asserting that his negligent action was worse for her, overall bad for her, or against her interests. She might simply claim that she has been unfairly burdened with medical costs, though not in a way that has been overall worse for her. I do not know whether a court could have recognized and supported such a claim.

3.2 The Defense's Argument

It is perhaps worth mentioning that, according to counsel for the defense, it "was the Defendant's primary argument that Mrs Toombes was likely already pregnant at the time she saw" the physician.⁷ This seems an astonishingly self-defeating strategy for counsel for the defense to have followed. One can only imagine that the court was meant to infer that, if Toombes's future existence was already assured by the presence of the embryo when her mother consulted the physician, her development of spina bifida had also already been made inevitable by the mother's folate deficiency prior to becoming pregnant. This, however, presupposes the mistaken factual assumption that a folate deficiency prior to conception cannot be prevented from resulting in spina bifida by folic

⁶ For further discussion, see Jeff McMahan, "Preventing the Existence of People with Disabilities," in David Wasserman, Jerome Bickenbach, and Robert Wachbroit, eds., *Quality of Life and Human Difference: Genetic Testing, Health Care, and Disability* (NY and Cambridge: Cambridge University Press, 2005): 142-71.

⁷ <https://www.clydeco.com/en/insights/2021/12/evie-toombes-v-dr-m-clyde-co-act-for-gp-in-claim>.

acid supplementation during early pregnancy. If that assumption were true, there would be no point in physicians urging women who discover early that they are unexpectedly pregnant to begin taking supplements immediately (unless the *only* point in taking supplements early in pregnancy is to mitigate the severity of spina bifida that has been predetermined by a deficiency prior to pregnancy – which seems not to be true). Whether spina bifida will develop is not always determined at conception. It can, for example, be caused by increased maternal bodily temperature during the early weeks of pregnancy, or by a folate deficiency that could be immediately remedied by folic acid supplementation early in pregnancy.

Suppose that the defense's claim was true and that the mother had become pregnant shortly *before* consulting with the physician, so that it was already determined that Toombes would later exist. But suppose that it is also true, as is likely, that if the mother had begun to take folic acid supplements immediately after meeting with the physician, that would have prevented Toombes from developing spina bifida. If both of these assumptions are correct, the defense's case implies that the physician's negligence probably made the difference between Toombes's having spina bifida and her existing without it. In that case, the judge would have had stronger grounds for ruling in Toombes's favor – namely, that the physician's negligence was worse for Toombes and, perhaps, against her interests. On these assumptions, the physician's negligence made the difference between Toombes's having a worse life with spina bifida rather than a better life without it. Thus, the defense's reliance on these assumptions would have been entirely self-defeating had the court appreciated their implications.

There is, however, some doubt about whether, at the time of the trial, the implications just noted would in fact have significantly strengthened the case for Toombes's claim to compensation. This is because of the Divergent Lives Problem. It may be doubted whether, at the age of 20, Toombes could rationally have wished never to have had spina bifida – or to have claimed that having had spina bifida had been against her interests. If she had not had spina bifida, her life would have been utterly different from birth onward. Although she would of course have had the same parents, she would have been unlikely to have met and become attached to most of the other people in her actual life to whom she is closest. She would have been unlikely to have become a champion show jumper. And she would not have acquired the wisdom and understanding she has said that she has learned from the hardships she has endured with spina bifida. In short, much or most of what she cares about most in her actual life would have been missing in an alternative possible life in which she did not have spina bifida.

4 An Argument for Damages Even When a Condition is Neither Bad Nor Worse for the Claimant

Let us compare the two divergent accounts of the facts in the Toombes case. According to the account given by Toombes and accepted by the court, Toombes was conceived shortly *after* her mother consulted the physician. Had the physician emphatically advised her to take folic acid supplements, the mother would have postponed conception for several months and would have had a different child who would not have had spina bifida. We can call this version of the case *Preconception Negligence*.

According to the account given by the defense, Toombes was conceived shortly *before* her mother consulted the physician. But let us assume that even in this account, the physician was negligent and failed to urge the mother to take folic acid supplements. If he had done so, Toombes herself would have been born without spina bifida. We can call this version of the case *Prenatal Negligence*.

In *Preconception Negligence*, the physician's negligence was not worse, or on balance bad, for Toombes, but was indeed good for her. But in *Prenatal Negligence*, the physician's negligence was worse for her – at least in what one might call the “life-comparative sense,” in that we are assuming that it caused Toombes to have a worse life, impartially considered, rather than the better life she would have had if she had not developed spina bifida. (There is another way of understanding the notion of a “worse life” that is relativized both to the perspective from within a life and to different times within that life. As I noted at the end of the previous section, it may not be egoistically rational for Toombes, at the age of 20, to regret that she was born, in *Prenatal Negligence*, with spina bifida rather than born without it. If that is correct, Toombes cannot claim at the age of 20 that the physician's negligence was worse for her in the “egoistic-reason sense.” I will not here discuss this other sense of whether a life is worse for someone, or whether an alternative life would have been better for someone.⁸)

This difference between the two cases – that in *Preconception Negligence* the physician's omission was not worse for the child whereas in *Prenatal Negligence* it was (at least in one sense) – may seem morally significant. Yet Derek Parfit has argued that whether an act that has a bad effect in a person's life is worse for that person makes no moral difference. In both *Preconception Negligence* and *Prenatal Negligence*, a child is born with spina bifida, a harmful condition. In both cases, the child has spina bifida because of a physician's negligence. It

⁸ For further discussion, see Jeff McMahan, “‘It Might Have Been!': Abortion, Prenatal Injury, and What Matters Across Possible Lives,” unpublished manuscript.

makes no moral difference, Parfit argues, that the physician's negligence was worse for the child in Prenatal Negligence but not in Preconception Negligence.

Parfit refers to the view that it makes no difference whether an act with a bad effect is worse for someone as the "No-Difference View." He seeks to demonstrate the intuitive plausibility of the No-Difference View by appealing to a comparison between two different policy options - "The Medical Programmes" - that is closely analogous to the comparison between Preconception Negligence and Prenatal Negligence, though on a larger scale.⁹ Parfit would therefore accept that, if the physician is liable to pay damages to Toombes in Prenatal Negligence, he must also be liable to pay her the same damages in Preconception Negligence.

Those who accept the No-Difference View might defend its implication in the comparison between these two instances of negligence by considering a case exactly like Prenatal Negligence in which a child with spina bifida was awarded millions of pounds in damages and then imagining that Toombes's suit in Preconception Negligence had failed on the ground that the physician's negligence was not worse for her. Consider, defenders of the No-Difference View might argue, how unfair it would seem to Toombes in Preconception Negligence that she had received nothing while the other child in Prenatal Negligence had received millions. Both children had been caused to have the same harmful condition by the negligence of a physician. The difference between them is only that the negligence of the physician in the one's case occurred shortly before she was conceived while that of the physician in the other's case occurred shortly after she was conceived. It may seem morally arbitrary that one of these children should fare so much better than the other just because of a small difference in the timing of the physicians' negligent acts.

Defenders of the No-Difference View could concede that, in Preconception Negligence, Toombes cannot claim either a right to be made as well off as she was before her mother's physician's negligent omission or a right to be made as well off as she would have been had the physician not been negligent. But, by appealing to the No-Difference View, and reasoning in the way just described, she might claim a right to be made as well off as a different child - the child without spina bifida that her mother would have had if her physician had not been negligent - could reasonably be expected to have been.

⁹ Parfit, *Reasons and Persons*, 1987 reprinting, p. 367. Like Preconception Negligence, the cancellation of Preconception Testing allows children to have a harmful condition that is not worse for them. And, like Prenatal Negligence, the cancellation of Pregnancy Testing allows children to have a harmful condition that is the same as that which occurs as result of cancelling Preconception Testing but *is* worse for these other children.

This would not, strictly speaking, be a right to compensation. Nor is the physician's liability a matter of corrective justice, strictly speaking. But this is a case involving the Non-Identity Problem and, according to Parfit, the Non-Identity Problem never makes a difference of moral substance. At most it affects the nature of the explanation of why we have the reasons we have. (These claims of Parfit's are, in effect, an alternative way of stating the No-Difference View.) So, assuming that the physician in Prenatal Negligence has a moral reason to make the child with spina bifida as well off as she herself would have been if she had not developed spina bifida, the physician in Preconception Negligence must, according to the No-Difference View, have just as strong a moral reason to make the child with spina bifida as well off as the *different* child without spina bifida would have been had he not been negligent.

5 Against the No-Difference View

I have argued elsewhere that the No-Difference View is, as a general claim, false.¹⁰ There are, I concede, cases in which the No-Difference View is true – that is, cases in which it makes no moral difference whether a bad effect in an individual's life is worse for that individual. These cases include, for example, bad effects in the lives of sentient individuals that lack any psychological connections to the past or future – what I call “unconnected individuals.”¹¹ They may also include cases in which a person is caused to have a less good life than she could have had but, because of the Divergent Lives Problem, there is never a time in the less good life when it is egoistically rational for the person to regret not having had the better life (that is, no time in the actual life when the individual's actual interests would have been better satisfied in the alternative, better life).¹² And there are other cases that I will discuss later in section 8. But, as a general claim, the No-Difference View is, I believe, refuted by certain counterexamples. Perhaps the most intuitively forceful counterexample is a comparison between two acts.¹³

¹⁰ Jeff McMahan, “Climate Change, War, and the Non-Identity Problem,” *Journal of Moral Philosophy* 18 (2021): 211-238. Also in “‘It Might Have Been!': Abortion, Prenatal Injury, and What Matters Across Possible Lives.”

¹¹ See Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (NY: Oxford University Press, 2002), pp. 75-77 and 475-76. Also see Jeff McMahan, “Suffering and Moral Status,” in Stephen Clarke, Julian Savulescu, and Hazem Zohny, eds., *Rethinking Moral Status* (Oxford: Oxford University Press, 2021).

¹² Again, this is discussed in “‘It Might Have Been!': Abortion, Prenatal Injury, and What Matters Across Possible Lives.”

¹³ This example is taken from “Climate Change, War, and the Non-Identity Problem.

Case 1: For a blameworthy reason, a person intentionally kills a 60-year-old person who would otherwise have lived to 80 with a high level of well-being.

Case 2: For the same blameworthy reason, a person intentionally causes a person to exist who will live to 60 rather than allowing a different person to come into existence who would have lived to 80 and would have had the same high level of well-being between the ages of 60 and 80 that the person who is killed in Case 1 would have had during his or her last 20 years.

The killer's action in Case 1, which prevents 20 additional years of good life from being lived, is worse for the person who would have lived those years of good life. The action of the equivalently-motivated person in Case 2 also has the bad effect of preventing 20 additional years of good life from being lived. But this person's action is not worse for anyone. According to the No-Difference View, there is no moral difference between the two acts. But I doubt that even Parfit could have accepted this implication with equanimity.

The No-Difference View, as Parfit understands it, implies only that the reason to cause a better-off person to exist rather than a different person who would be to a certain degree less well off is as strong as the reason to cause an existing person to be better off rather than less well off to the same degree. This leaves it open, however, what sort of reason the first of these two reasons is. Suppose, as I have suggested elsewhere, that it is a wide individual-affecting reason – that is, a reason to confer a greater noncomparative benefit on one person rather than confer a lesser noncomparative benefit on another person. But, if this is right, this wide individual-affecting reason should apply not only in choices between causing a better-off person to exist and causing a different, less well-off person to exist, but also in choices between causing a well-off person to exist and not causing anyone to exist. But, as I noted when I mentioned the Asymmetry in section 1, this is contrary to what most people believe. If, moreover, there is a reason to cause people to exist just because they would be well off, it seems that this reason can weigh against and potentially outweigh the reason to benefit existing people. If, for example, one could either cause a person to exist who would have an exceptionally long and happy life or else save the life of a person who would live for only a few more years at a modest level of well-being, the reason to do the former might be stronger, and thus outweigh, the reason to do the latter. But this seems intuitively implausible.

There is, moreover, a further objection to the implications of the No-Difference View in the comparison between Preconception Negligence and Prenatal Negligence. If Toombes has a claim to damages that is as strong as the

claim to compensation of the child in Prenatal Negligence, it seems that anyone who is at fault in causing or allowing a less well-off child to exist rather than causing or allowing a better-off child to exist must be liable to pay damages to the less well-off child. Consider, for example, the example that Parfit uses to introduce the Non-Identity Problem.

The 14-Year-Old Girl. This girl chooses to have a child. Because she is so young, she gives her child a bad start in life. Though this will have bad effects throughout this child's life, his life will, predictably, be worth living. If this girl had waited for several years, she would have had a different child, to whom she would have given a better start in life.¹⁴

If the No-Difference View implies that Toombes has a claim to damages from the negligent physician, it should also imply that the child of the 14-year-old girl has, or will have, a claim to damages from her mother – perhaps, as I suggested in the case of Toombes, a claim to be made as well off as the different child would have been had the 14-year-old girl waited a few years before having a child. In short, if the No-Difference View has the implication I have suggested it might have in the Toombes case, it then seems to imply that whenever a person is at fault in acting contrary to the Selection Principle, that person is liable to pay damages to the less well-off person who has been caused to exist rather than a different, better-off person.

Here is another example. Suppose that a woman wants to become a single parent but does not want to have a child who would be the product of an anonymous sperm donation. She has several male friends who indicate that they would be happy to have sex with her to enable her to have a child. They are all more or less equally intelligent and virtuous, but one of them is rather ugly. Just on a whim, she chooses this one to be the biological father of her child. Her child turns out to be rather ugly as well, which is disadvantageous in various ways. If she had chosen one of the other men, she would have had a different child who would have been more physically attractive. The reasoning I offered as a basis for Toombes's claim against the physician in Preconception Negligence seems applicable in this case as well, and implies that the woman's unattractive child has a claim to damages against his mother – and perhaps his biological father as well, as the father may have been equally at fault in knowingly displacing one of the other, more attractive volunteers. Yet it seems implausible to suppose that either of them owes damages to the child for having caused him to exist rather than causing a different, more attractive – and therefore, we may suppose, better-off – child to exist instead.

¹⁴ *Reasons and Persons*, p. 358.

Consider next a variant of this example. Suppose that the woman chooses one of the more attractive volunteers and has a more attractive – and therefore presumptively better-off – child by this man. But, at some point after the child is born, she acts on a whim to disfigure him in some way, making him resemble the unattractive child in the original version of the example. It seems, intuitively, that this child has a much stronger claim to damages than the child in the original version has. Yet, if other considerations are equal, this is inconsistent with No-Difference View.

6 A Challenge to the Selection Principle

As these examples illustrate, the No-Difference View implies that an act that violates the Selection Principle – that is, an act that causes a less well-off person to exist rather than causing or allowing a different person to exist whose life would have contained more well-being – grounds as strong a claim to damages as an act that reduces the well-being in a single person's life by an equivalent amount. According to Parfit and other defenders of the No-Difference View, that the first act is not worse for the less well-off person while the second act is worse for the victim makes no difference morally. Yet consideration of the examples at the end of the preceding section suggests that this is not the case. These examples challenge the reasoning I developed in section 4 in support of Toombes's claim to damages. They show, I believe, that acts that violate the Selection Principle do not in general ground claims to damages that are as strong as claims deriving from acts that are worse for people – that is, acts that have victims. If this is right, the No-Difference View is, as a general claim, false. Yet it leaves open the possibility that acts that violate the Selection Principle do create claims to damages, albeit claims that are weaker than those generated by acts that have equally bad effects and are also worse for those who experience those effects.

There is, moreover, a further problem with the idea that a violation of the Selection Principle grounds a strong claim to damages by the less well-off person who has been caused to exist. This problem emerges if we consider a further example, a variant of the actual case of Evie Toombes.

Suppose that Toombes's mother knew about the risk of spina bifida and knew that she could greatly reduce that risk by taking folic acid prior to becoming pregnant. She could have postponed conception and waited a couple of months before conceiving a child. But suppose she had an aversion to swallowing pills and thus decided to try to become pregnant immediately, without taking the supplements. For the sake of argument, let us make the mistaken assumption that counsel for the defense in the actual Toombes case seems to have made: namely, that folic acid supplements reduce the risk of spina bifida *only* if taken

before conception. Next suppose that Evie Toombes is born with spina bifida but, had her mother waited to conceive a child until after taking folic acid supplements for a few months, she would have conceived a different child who would not have had spina bifida. Finally, suppose that Evie Toombes brings a suit against her mother for wrongful life, making the same claims she has actually made in the action against her mother's physician.

In this case, the mother, or her counsel, might concede that she had violated the Selection Principle but argue that it states only a moral reason, not a moral requirement, and that it can be permissible to act contrary to the principle by causing a less well-off person to exist rather than a different, better-off person. Suppose the mother reasons as follows.

It is certainly *better* to cause a better-off person to exist rather than a different, less well-off person. But assume that the less well-off person would still be well off, and indeed would have a life well worth living, a life like Evie's, for example. According to common sense morality, it is morally permissible not to have any child at all. Indeed [the mother now demonstrating that she is well versed in population ethics], this is one of the two claims that constitute the Asymmetry – the claim that the eminent moral philosopher Jeff McMahan calls the “Negative Claim.” Assuming that the Negative Claim is true, I had no moral reason to cause the child to exist who would not have had spina bifida and would therefore have been better off than Evie is. It was permissible for me not to cause that child to exist. And I ruled out the option of causing that child to exist because of my aversion to swallowing pills. I realize, of course, that swallowing some pills every day for a few months is not particularly bad. But my desire for a child was not strong and I would have preferred not to have a child than to have had to swallow all those pills. That left me with two options. One was to have a child who had a significant risk of having spina bifida, and therefore of having a life that, while well worth living, was likely to be less good than the life of a different child without spina bifida. The other option was not to have a child. But I did want to have a child. And if it was permissible for me not to have any child, it seems that it should also have been permissible for me to have a child with a life well worth living, though a life less good than that of another child I might have had instead. If, in other words, it was permissible for me not to confer any noncomparative benefit at all, it seems that it should also have been permissible for me to confer a substantial noncomparative benefit, even though it would be a significantly lesser noncomparative benefit than another I could

have conferred on a different person at a relatively insignificant additional cost. Surely, once I had permissibly ruled out the non-obligatory option of having the best-off child I could have, it could not have been *impermissible* for me to have a less well-off, but still well-off, child. After all, if it had been the case that *any* child I might have had would have had spina bifida and a life like Evie's, it would have been permissible for me to have such a child rather than not have any child at all. Surely, therefore, my permissible options could not have been limited to having the best-off child I could possibly have and having no child at all.

We can refer to these points as "the mother's argument." If the mother's argument is correct, the mother acted permissibly when she acted contrary to the Selection Principle by deliberately conceiving a child without first taking folic acid supplements for a few months. And if she acted permissibly, not just in the evidence-relative sense but also in the fact-relative sense, then it is open to her to argue that, although she took a risk of having a child with spina bifida, she was not at fault in doing so. And, she might argue further, she cannot, in the absence of fault, be liable to pay damages to her child – especially when her act was not worse for her child but was, rather, on balance *good* for that child. When there is no fault and no victim, she might say, there cannot be liability.

The mother's argument can, of course, be challenged. One might argue, for example, that the Selection Principle applies whenever one has the two options of causing a better-off person to exist and causing a different, less well-off person to exist. If it is *unavoidable* that someone will come into existence and one can determine, at no cost to anyone, that it will be a better-off person rather than a different, less well-off person, one is required to cause the better-off person to exist, if all other considerations are equal. And it makes no difference, morally, whether there is a third option of not causing anyone to exist. If, when there is this third option, one *decides* to cause someone to exist and one has a choice between a better-off person and a different, less well-off person, one is required to cause the better-off person to exist. That is compatible with its remaining permissible not to cause anyone to exist. One is required to cause a better-off person to exist only if the alternative is that a less well-off person will come into existence instead. Causing a less well-off person to exist is impermissible only when it is possible, at no cost to anyone, to cause a different, better-off person to exist instead. That is compatible with the permissibility of causing a less well-off person to exist when the only other option is not to cause anyone to exist. Even though, therefore, it would have been permissible for the mother in the variant of the Toombes case not to have the better-off child by not having any child, it was *impermissible* for her not to have the better-off child by having the less well-off child instead.

This reasoning, which challenges the mother's argument, parallels the way we might think about benefiting existing people. Suppose that, at no cost to anyone, I could benefit one or the other, but not both, of two strangers. I could either confer a greater benefit on S1 or a lesser benefit on S2, and all other considerations are equal. Many people believe that I would be morally required to confer the greater benefit. If that is right, it supports the parallel claim that the Selection Principle states a requirement, albeit a defeasible one.

The parallel fails, however, in one obvious and crucial respect. According to the challenge I have presented to the mother's argument, even when one is required to cause a better-off person to exist (thereby conferring a greater noncomparative benefit) *rather than* cause a less well-off person to exist (thereby conferring a lesser noncomparative benefit), it remains permissible for one not to cause anyone to exist (thereby not conferring any noncomparative benefit). But when the benefits are comparative benefits and the potential beneficiaries are existing people, it does *not* seem permissible not to confer any benefit, *if* one is required to confer the greater benefit *rather than* the lesser. If, that is, one is required to confer the greater benefit on S1 rather than confer the lesser benefit on S2, it makes no sense to suppose that it could be permissible to confer neither. Whatever the reason is to confer the greater benefit rather than the lesser benefit, it must also be a reason to confer the greater benefit rather than confer no benefit.

In the case of existing people, whether one is *required* to confer a greater benefit on one stranger rather than a lesser benefit on another one when one can do either at no cost to anyone thus seems to depend crucially on whether one is morally *required* to benefit others when one can do so at no cost. Suppose it were true that there is no general requirement to confer benefits on existing people, only a general requirement not to harm people and specific requirements to benefit people to whom one is specially related, to whom one has made a promise, and so on. In that case, since it would be permissible for me to benefit neither S1 nor S2 even if I could benefit either at no cost to myself or anyone else, it seems that, if I were to *decide* to benefit one of them, I would not be morally required to confer the greater benefit on S1. And even if it were *unavoidable* that one of them would receive a benefit to which he had no claim, and that S2 would receive a lesser benefit unless I intervened to enable S1 to receive a greater benefit instead, I would not be required to intervene even if I could do so at no cost to anyone. (It is perhaps worth making explicit what is implicit in these remarks – namely, that I am not presupposing that the reason why benefiting people is in general not required is not that, in general, benefiting people is supererogatory. It is generally assumed that, if benefiting a person is supererogatory, that is because conferring the benefit would involve costs to the

agent that the agent is not morally required to incur; but, if there were no such costs, then the agent *would* be required to confer the benefit.)

If these claims about the conferral of comparative benefits on existing people are true, it seems that parallel claims about the conferral of noncomparative benefits by causing people to exist should be true as well. That is, if, as the Negative Claim asserts, there is not only no moral requirement but not even any moral *reason* to cause a well-off person to exist rather than not cause anyone to exist, it seems that there cannot be a moral *requirement* to cause a better-off person to exist rather than a different, less well-off person, either when someone's coming into existence is unavoidable or when one decides to cause someone to exist, and even when causing the better-off person to exist involve no cost to anyone.

Most people seem to accept the Negative Claim. And most people *do* accept the weaker claim that there is no general moral requirement to cause a well-off person to exist rather than not cause anyone to exist, even if causing a well-off person to exist would impose no cost on anyone. We cannot, therefore, infer that the Selection Principle states a requirement from the parallel with the requirement (if indeed there is one) to confer a greater benefit on one existing person rather than a lesser benefit on a different person, when conferring either would have no costs for anyone and all other considerations are equal. But, if the Selection Principle states only a moral reason and not a moral requirement, this supports the mother's argument that she acted permissibly, and therefore without fault, in having a child with spina bifida rather than a different child without spina bifida.

There are, moreover, further objections to the Selection Principle itself, at least as I have stated it. It seems to imply, for example, that if one wants to have another companion in life, it would be wrong to breed a dog in order to have a puppy rather than to have a child, if one could not do both.¹⁵ And it seems also to imply that it would be wrong to breed a hamster rather than breed a dog, assuming that dogs are in general better off than hamsters, as they tend to have higher levels of well-being and to live many years longer. These claims seem implausible.

Yet, even if the No-Difference View is false and there are counterexamples that raise doubts about the Selection Principle, there are also compelling grounds for thinking that the reason asserted by the principle is an exceptionally strong reason, rising in many cases to the level of a moral requirement. For example,

¹⁵ "Wrongful Life: Paradoxes in the Morality of Causing People to Exist," in John Harris, ed., *Oxford Readings in Bioethics* (Oxford: Oxford University Press, 2001): 445-75.

because of the Non-Identity Problem, the reason to prevent the worst effects of climate change from occurring more than a century from now cannot be that these effects will be worse for, or on balance bad for, those who will experience them, for these people will exist only if we continue to follow the policies that will produce the effects. The reason to prevent the worst effects of climate change is instead given by the Selection Principle. It is the reason to cause better-off people to exist in the future who would not experience the effects of extreme climate change rather than to cause people to exist who would be less well off because they would experience those effects.¹⁶ The implication of the No-Difference View about the remote effects of climate change seems correct. Thus, in its application to action to prevent the worse effects of climate change, the Selection Principle seems to state a moral *requirement*, not an optional moral reason.

This, like so much else in population ethics, leaves me in a state of deep perplexity – though I will have more to say about climate change, the No-Difference View, and the Selection Principle in section 8.

7 The Conditional View

A critic of the mother's argument might reply that comparisons between benefiting existing people and benefiting people by causing them to exist are always misleading. This is because there is a fundamental difference between comparative benefits and noncomparative benefits. A reason to confer any benefit, the critic might claim, is always conditional on the present or future existence of some person.¹⁷ That condition is always satisfied by the conferral of comparative benefits on existing people. But in the case of noncomparative benefits, it is satisfied only if it is either *unavoidable* that someone *will* exist or if one *will* cause someone to exist. It is not satisfied when one is choosing between causing a well-off person to exist and not causing anyone to exist. We can call the view that there is a reason to confer a benefit only when one of these three conditions obtains the "Conditional View."

If it is true that reasons to confer benefits are conditional on the prior existence of potential beneficiaries or on *someone's* coming into existence, this could explain the following claims that writers in population ethics struggle to justify as consistent with one another:

¹⁶ For a defense of this claim, see McMahan, "Climate Change, War, and the Non-Identity Problem."

¹⁷ For an excellent, detailed elaboration and defense of this view, see Frick, "Conditional Reasons and the Procreation Asymmetry."

- (1) If, at no cost to anyone, one could confer a greater benefit on one person or a lesser benefit on another, and neither potential beneficiary has any claim to be benefited, one ought to confer the greater benefit (and one ought not to confer neither).
- (2) If, at no cost to anyone, one can confer a greater noncomparative benefit by causing a better-off person to exist or confer a lesser noncomparative benefit by causing a different, less well-off person to exist, one ought to confer the greater benefit (that is, it would be wrong to confer the lesser).
- (3) If, at no cost to anyone, one can confer a great noncomparative benefit by causing a well-off person to exist, one is not required to cause that person to exist rather than not cause anyone to exist.

It is, in particular, difficult to explain and justify the view that, although there is no moral reason to cause even an exceptionally well-off person to exist rather than not cause anyone to exist, there *is* a reason, and perhaps a requirement, to cause such a person (perhaps even the same person) to exist when the alternative is that a different, less well-off person will come into existence instead. The explanation cannot, for example, be that to cause a less well-off person to exist is somehow worse than not to cause anyone to exist.

The Conditional View, of course, offers such an explanation – namely, that in these cases either a potential beneficiary already exists or *someone* will come into existence. Yet it is questionable whether this is actually an explanation and justification or just a restatement of the three widely accepted beliefs just noted. One can understand why there should be a reason to benefit a person who already exists. And one can understand why there should be a reason to benefit a person who will exist in the future independently of the act that confers the benefit. In both these cases, there is, or will be, a determinate person whose well-being is the source of the reason and for whose sake one acts in conferring the benefit. But when one’s action will determine who will come into existence, as when one may choose to cause a better-off person to exist or cause or allow a different, less well-off person to come into existence, there is no one for whose sake one can act.¹⁸ In short, the Conditional View offers no real explanation or justification of the Selection Principle.

¹⁸ Frick recognizes this and thus argues that the reason stated by the Selection Principle is not grounded in the well-being or moral status of the better-off person but is instead what he calls a “standard-regarding reason” – that is, a reason to satisfy the normative standard that governs causing people to exist and is better satisfied by the creation of a better-off person than by the creation of a less well-off person.

A further objection to the Conditional View is that, if all reasons to confer benefits are conditional in the three ways that the View stipulates, it seems reasonable to assume that all reasons not to inflict harms must be conditional in the same three ways. But, while there is a requirement, if all other considerations are equal, to ensure that a less miserable person comes into existence rather than a different, more miserable person, and while there is always a reason or requirement not to inflict suffering or misery on an existing person, it is clearly not the case that there is no moral requirement, and not even a moral reason, *not* to cause a miserable person to exist rather than cause that person to exist, just because the person's life would be miserable. The Conditional View is therefore challenged, perhaps decisively, by the fact that what it claims about reasons to confer benefits is not true of reasons not to inflict harms. The reason not to inflict noncomparative harms by causing a miserable person to exist is *unconditional*. To be acceptable, the Conditional View must be supplemented by a cogent explanation of why reasons to confer noncomparative benefits are conditional on someone's coming into existence while reasons not to inflict noncomparative harms are unconditional.¹⁹

One possibility is that the Negative Claim of the Asymmetry is false. If there is a general moral reason, even if not a requirement, to cause well-off people to exist, it would then be more plausible to understand the Selection Principle as stating a moral requirement, even if a defeasible requirement. One might, indeed, argue *from* the intuitive plausibility of understanding the Selection Principle as a requirement *to* the conclusion that the Negative Claim is false. Suppose, for example, that the best understanding of the Selection Principle is that the reason it states is a wide individual-affecting reason – that is, a reason to confer a greater noncomparative benefit on one person rather than a lesser noncomparative benefit on another person. That wide individual-affecting reason should then apply not only when the alternative to causing a well-off person to exist is that a different, less well-off person will come into existence, but also when the alternative is that no one will come into existence.

¹⁹ Frick offers an explanation by arguing that there is a “standard-regarding reason” to cause a better-off person to exist rather than a different, less well-off person, but no standard-regarding reason to cause the better-off person to exist rather than not cause anyone to exist. I have argued elsewhere (“Moral Reasons to Cause Well-Off People to Exist,” unpublished manuscript) that this explanation fails because the reason to cause a better-off person to exist rather than a less well-off person is not plausibly understood as standard-regarding in Frick's sense. Frick argues that both the reason to cause a better off rather than a less well off person to exist and the reason not to cause a miserable person to exist are standard-regarding reasons. I argue that, at most, standard-regarding reasons merely reinforce different and more fundamental reasons both for causing better off rather than less well off people to exist and for not causing miserable people to exist.

But if the Selection Principle states a requirement, that undermines the mother's argument for the permissibility of her action in having a child with spina bifida rather than a different child without it. And that, in turn, undermines her claim to have acted without fault and therefore to be exempt from liability to pay damages to her child with spina bifida.

8 Another Comparison with Benefiting Existing People

In the Toombes case a person was caused to exist with a life well worth living but also with a harmful condition *rather than* a different person who would have had an even better life because it would have lacked the harmful condition. It might be instructive to consider a parallel case involving causing a person to *continue* to exist, though with a harmful condition, rather than causing a different person to continue to exist without the harmful condition. Suppose, for example, that a potential rescuer has a choice between two rescues.

Rescue 1: He can save the life of a young person but this would unavoidably involve injuring that person in a way that would cause her to have to live with a harmful condition. Her life would, however, remain well worth living.

Rescue 2: He can save the life of a different young person without causing any injury to that person.

He cannot, however, save both. Suppose that both potential victims would benefit equally from being saved, apart from the bad effects of the injury that would be inflicted in Rescue 1. When the injury is factored in, however, Rescue 1 overall provides the lesser benefit, as the harmful condition in effect diminishes or offsets some of the benefits of the person's being saved.

If we accept the Negative Claim, we might make this case more like a choice between causing a better-off person to exist and causing a less well-off person to exist by assuming that both rescues are equally costly and costly to the extent of being supererogatory. If we reject the Negative Claim, we might assume that both rescues would be costless, so that the rescuer is morally required to save one or the other person.

Although there is a moral reason to conduct Rescue 2 rather than Rescue 1, it may seem that it would nevertheless be permissible to conduct Rescue 1. And this may suggest, further, that it is also permissible to cause a person to exist with a life worth living but with a harmful condition rather than cause a different person to exist with a life worth living but without the harmful condition. In both cases, choosing the option that involves causing a harmful condition seems

morally criticizable, but not necessarily impermissible. If that is right, conformity with the Selection Principle may be morally optional rather than required after all.

One might argue, however, that there is a crucial difference between the rescue cases and the choice between causing a better-off person to exist and causing a different, less well-off person to exist, which is that considerations of *equality* require that one give each of the potential victims in the rescue cases an equal chance of survival, just as one might be required to do if one of the potential victims was younger and therefore had more to lose by not being rescued.

Advocates for people with congenital disabilities or congenital diseases might, however, make a similar claim about considerations of equality in a choice between causing a person to exist with spina bifida and causing a different person to exist who would not have spina bifida. I will not pursue this here. I will simply mention one point that challenges Toombes's claim to be entitled to damages, which is that if, in the choice between rescues, one were to conduct Rescue 1, the person saved would have no grounds for claiming damages from the rescuer for having been caused to have the harmful condition. This is not, however, sufficient on its own to demonstrate that Toombes's claim is ungrounded, for there is an important difference between the two cases. This is that the person who conducts Rescue 1 intends to benefit the person saved, whereas in neither the actual Toombes case nor any hypothetical variant I have presented does anyone intend to benefit Toombes by causing her to exist.

The relevance of an agent's intentions, motives, and mode of agency in these cases can be seen in other cases as well.

9 Liability Grounded in Fault, Even When a Harmful Act is Not Worse for the Victim

In the Toombes case, most of us believe that the physician acted wrongly, not just because of the effect on the mother but also because his negligent action violated the Selection Principle. Yet, because of the Non-Identity Problem, his action was not worse for Toombes. Again, there are also cases in which a person acts negligently, and wrongly, thereby causing a bad effect in the life of an *existing* person, and yet the act is not worse or on balance bad for the person affected. In these cases, the reason why the act is not worse for the person is different. It is unrelated to the Non-Identity Problem.

We can illustrate this with a pair of examples.

First Negligent Driver

A taxi driver is taking a passenger to the airport, where she plans to fly off for a week's vacation. During a moment of carelessness, he crashes the car, injuring the passenger, who has to be taken to the hospital for treatment of a broken arm. She misses her flight and her vacation.

Second Negligent Driver

The details are the same as in First Negligent Driver except that the plane she would otherwise have boarded crashes on takeoff as a result of a mechanical failure, killing everyone on board. Had the taxi not crashed, the passenger would have been killed.²⁰

In the first case, the taxi driver's negligence was worse for the passenger. But in the second case, it was not. It was, indeed, *better* for the passenger, assuming that nothing else would have prevented her from boarding the plane. That the driver's negligence in the second case was not worse for the passenger, and in fact benefited her, was simply a matter of good moral luck.

It is clear that in the first case the driver owes compensation to the passenger. And it would seem unfair if the second driver were to be exempted from liability just because of his good moral luck. It seems, intuitively, that the second driver owes damages to his passenger just as the first driver owes them to his passenger. This may be even more obvious if we consider a third example.

Malevolent Driver

The details are the same as in Second Negligent Driver except that the driver becomes annoyed with the passenger and deliberately crashes the car with the intention of injuring her. He does not foresee that, in doing this, he saves her life.

It is highly implausible to suppose that this driver should be exempted from liability to pay damages to the passenger just because his malevolent action turned out unexpectedly to save the passenger's life.

It will be no surprise to those familiar with notions of liability in morality and law that an agent's liability can depend not only on the effects of that agent's action but also on what his or her motives or intentions were. Thus, if the taxi driver somehow knew that the plane would crash, was unable to prevent it from taking off, and unable to convince the passenger not to board, and if he had no other means of preventing the passenger from boarding, it would have been not

²⁰ The second case is modeled on an example in Joel Feinberg, "Wrongful Life and the Counterfactual Element in Harming," *Social Philosophy and Policy* 4 (1986), pp. 150-51.

only permissible but perhaps even obligatory for him to crash the taxi, thereby injuring the passenger as a necessary means of preventing her from boarding.

The case of the second negligent driver is relevantly analogous to the actual case of Evie Toombes. In the Toombes case, the physician's negligence both caused Toombes to exist with a life well worth living and caused a bad effect in her life: spina bifida. The physician did not, however, intend or even foresee the good effect, at least under the relevant description – namely, “causing a person to exist with a life worth living who would otherwise never exist.” Similarly, in *Negligent Driver*, the taxi driver caused the passenger to *continue* to exist with, we may suppose, a life well worth living, but did not intend or foresee this good effect. The driver is thus not morally responsible for the benefit of saving the passenger's life, as it was simply an unforeseen side effect of his otherwise culpable action. He does seem, however, to be morally responsible for the immediate harms caused to the passenger by his negligence. In the same way, the physician in the Toombes case may seem to be morally responsible for the harmful condition – spina bifida – but not for the benefit to Toombes of a life worth living.²¹

Although the second negligent driver's good moral luck does not seem to exempt him from liability to pay damages to the passenger – the fact that his action was not worse for the passenger does make it difficult to determine a counterfactual baseline for the measurement of the damages owed. It cannot, of course, be that the driver is liable to make the passenger as well off as she would have been had the accident not occurred. Perhaps it could be that he is liable to make the passenger as well off as she was before the accident.

If it is correct that the driver is liable to pay damages to the passenger, it seems that it should also be coherent to suppose that the physician owes damages to Toombes, even though she would not exist if he had not acted as he did (just as the passenger would not exist *now* if the driver had not acted as he did). But the counterfactual baseline for the measurement of damages that I suggested for the case of the driver will obviously not work in the case of Toombes. She cannot, as I noted earlier, be made as well off as she was before the physician's negligent act, as she did not then exist. But perhaps, as I also suggested earlier, she could reasonably claim a right to be made as well off as the different child her mother might have had would have been.

10 Suffering, the Non-Identity Problem, and the No-Difference View

²¹ I am grateful to Kida Lin for helpful discussion of this point.

As I have repeatedly noted, most people seem to believe that there is no general moral reason to cause a well-off person to exist rather than not cause anyone to exist. And even among those who reject the Negative Claim, most believe that the reason to cause a well-off person to exist rather than not cause anyone to exist is weaker than the reason to confer a substantial benefit on an existing person rather than not benefit anyone. Yet many people believe that the reason not to cause a miserable person to exist is as strong as the reason not to inflict equivalent misery on an existing person – even though causing a miserable person to exist is not worse for that person, whereas causing a person to become miserable is worse for that person. Many people accept, in other words, that while the No-Difference View does not apply to the conferral of benefits, it does apply to the infliction of harms, or at least harms that involve suffering or misery. They accept that, while it makes a moral difference whether the conferral of a benefit is better for the beneficiary, it does not make a moral difference whether the infliction of suffering or misery is worse for the victim.

If this is correct, the Non-Identity Problem makes no difference to the reason not to cause suffering in the future. But, if the reason to confer a benefit is stronger when the failure to confer it would be worse for the potential beneficiary, then the Non-Identity Problem does make a difference to the strength reason to confer – or not to prevent – benefits in the future. If the benefits are noncomparative, the reason is weaker than if they are comparative. If saving a life is a benefit rather than the prevention of a harm – and in particular, given that it is not the prevention of suffering or misery – then the Non-Identity Problem makes a difference to the reason to prevent future deaths but not to the reason to prevent future suffering.

If, again, this view is correct, it has implications for cases of wrongful life like the Toombes case – that is, cases of Preconception Negligence. Suppose that in a case of Preconception Negligence, the bad effect in the life of the child who is caused to exist consists in limitations to the child's capacity for well-being, such as limitations to the forms or heights of well-being accessible to the child. The bad effect, in other words, simply limits the benefits that life affords to the child. Toombes's spina bifida, for example, seems to deny her the pleasures of eating, for she has to take nutrition through a feeding tube. Because this sort of bad effect is the prevention of a benefit, the strength of the reason not to cause it is affected by the Non-Identity Problem, and the No-Difference View does not apply. Even if the act that both caused the child to exist and caused the bad condition grounds a claim for damages, the claim is not as strong as it would be if the case were one of Prenatal Negligence rather than Preconception Negligence.

But now suppose that in a case of Preconception Negligence, the bad effect in the life of the child who is caused to exist consists in repeated episodes of

suffering. In this case, the strength of the reason not to cause the bad effect is not affected by the Non-Identity Problem, and the No-Difference View applies – that is, it makes no moral difference that the act that caused the suffering was not worse for the child because it was also a necessary condition of her existence. In this case, therefore, the act that both caused the child to exist and caused the bad condition grounds a claim for damages that is just as strong as it would be if the case were one of Prenatal Negligence rather than Preconception Negligence.

[Incomplete]