PRE-IMPLANTATION AND PRE-NATAL SELECTION OF OFFSPRING:

CAN THERE BE A DUTY TO SELECT AGAINST DISABILITY?

A thesis submitted to the University of Manchester for the degree of

PhD in Bioethics and Medical Jurisprudence

in the Faculty of Humanities.

2014

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## PRELIMINARIES

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PRELIMINARIES
The question of whether there might be a moral obligation to select against disability in our offspring has received considerable attention and attracted great controversy within both the philosophical community and beyond over the last couple of decades. Within this thesis I examine this question, taking as a basis for discussion the view that prospective parents should be formally free to choose whether or not to select against disability in their offspring in the absence of adequate justifying reasons to the contrary. I then move on to examine and outline arguments that suggest variously and for a plethora of different reasons that selection against disability should be condemned morally or required.

After this is done and it is noted that the sheer volume of different positions and arguments requires a more specific focus I, in my thesis articles take what I view to be the strongest of moral reasons, person-affecting reasons, and look to the question of whether it is possible to ground a moral obligation to select against disability in our offspring in the person affecting harms that our reproductive choices might produce. In the first paper I ask whether the non-identity problem really poses such an insurmountable obstacle to the claim that to select against disability may harm those that are created as a result of our selection choices. This leads to the conclusion that on certain accounts of personal identity over time and trans-world identity it is possible to determine harm in a number of previously non-identity cases of which the selection against disability case is one. In the second paper I broaden my focus slightly by looking to the possible harms that our procreative choices might impose on others than the children we may create: ourselves, our existing dependents and existing members of society. In doing this it is shown that our reproductive choices do, at least in societies with advanced social and medical welfare systems, have the potential to impose significant burdens on others. However, whilst this is so, it is also demonstrated that this is not necessarily a decisive reason to condemn a reproductive choice to select for or to fail to select against disability in our offspring. In my final paper I take a slightly different approach, focusing less on the question of whether there should be a moral obligation to select against disability in our offspring and more on the question of whether there should exist a legal imperative to do so. Taking as a basis a liberal approach to the moral limits of law I suggest that impingements on individual liberty may only be justified when it can be shown that our reproductive choices cause significant harms or offence to others, I ask whether the recent insertion into English and Welsh Law of a prohibition on selection for disability can be justified. In line with the findings of the previous two papers which are far from conclusive and by examining the reasons given in legal and policy documents in England and Wales relating to this prohibition I suggest that as it stands such a prohibition cannot be justified.

This ultimately leads to a rather unsatisfying – but perhaps inevitable, in light of the messy nature of reproduction – conclusion: It is possible to discuss the ethics of selection against and for disability on person-affecting accounts of morality and to discuss the matter in this way offers sensitive and sensible prescriptions. However, such discussions turn out to be, in virtue of the many competing claims of those affected by reproductive decisions and policy, far more complex than might be assumed and do not fit neatly with the commonly held moral intuition that it is always morally preferable to select against disability in our offspring.
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___________________________________ 1st September 2014
Nicola Jane Williams
DEDICATION

Over ten years ago, a man whose first name I never learned introduced me to questions of philosophy. Such was the case in the school hall where the teachers guarded their names as if they contained classified information.

For this gift Mr Travis, it is to you that this thesis is dedicated.
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THE AUTHOR

EDUCATION

The University of Manchester

Course Title: PhD Bioethics and Medical Jurisprudence

Awards and Successful Funding Bids: AHRC Doctoral Studentship, AHRC Conference Travel Award, School of Law Conference Travel Award, APC Funding Award for open access publishing of article ‘Possible Persons and The Problem of Prenatal Harm.’

Thesis Title: Pre-Implantation and Pre-Natal Selection Of Offspring: Can There Be A Duty To Select Against Disability?

The University of York

Course Title: MA Practical Ethics: Bioethics, The Environment & The foundations of Law

Awards and Notable Achievements: Department of Philosophy MA Bursary/Studentship, Highest MA Essay Mark 2009/2010 for a paper on the punishment of failed attempts at crimes (Department of Politics)

Modules: Bioethics, Environmental Philosophy, Ethical Thinking and Contemporary Philosophy of Law

Dissertation Title: Rights, Responsibilities and New Reproductive Technologies: Can the liberal framework offer a coherent account of the common moral intuition that prospective parents act wrongly in failing to avoid, or deliberately seeking, disability in their offspring?

The University of Reading

Course Title: BA Philosophy and Politics (First Class Honours)

PUBLICATIONS AND CONFERENCE PAPERS

Publications


Conference Papers

- European Association of Centres for Medical Ethics (EACME) Conference 2012, 19th-21st September, Bristol: United Kingdom.
  Contribution: Paper Presentation
  Title of Paper: “On our Duties Towards our Descendants”
  Contribution: Paper Presentation
  Title of Paper: “On Our Duties Towards our Descendants”
• Postgraduate Law Conference, The University of Manchester, 17th October 2012, Manchester, UK.
  Contribution: Paper Presentation
  Title of Paper: Non-Identity and The Time Dependence Claim
• International Association of Bioethics (IAB) Congress, 25th-29th June 2014, Mexico City, Mexico.
  Contribution: Symposium
  Title of Symposium: Cross Border Stem Cell Therapies: International governance and harmonisation

DESTINATION
From the 1st September 2014 I will be working as a research associate in the department of Politics Philosophy and Religion at the University of Lancaster on the Wellcome funded project: Reproductive Donation and The Transfer of Human Biomaterials.
TABLE OF STATUTES

Abortion Act 1967
Adoption Act 1976
Adoption and Children Act 2002
Bail Act 1976
Child Support Act 1991
Children Act 1989
Congenital Disabilities (Civil Liability) Act 1976
Equality Act 2010
Habeas Corpus Act 1640
Habeas Corpus Act 1679
Habeas Corpus Act 1862
Habeas Corpus Act 1867
Human Fertilisation and Embryology Act 1990
Human Fertilisation and Embryology Act 2008
Immigration Rules HC 395, (last updated 8th April 2014)
Magna Carta 1215
TABLE OF CASES

An NHS Trust v SR [2013] 1 F. L. R. 1297
Christie v Leachinsky [1947] 1 All ER 567
Re (A) (Children) (Conjoined Twins: Medical Treatment) (2) [2001] 1 F.L.R. 267
Re (O) (A Minor) (Medical Treatment) [1993] 2 F.L.R. 149
Re (R) (A Minor) (Blood Transfusion) [1993] 2 F.L.R. 377
Re S (A Minor) (Medical Treatment) [1993] 1 F.L.R. 377
Wisconsin v Yoder [1972] 406 U.S. 205
WL (Congo) v Secretary of State For The Home Department [2009] EWCA Civ. 44
PART I.

INTRODUCTION
CHAPTER 1

THE PROBLEM

“The ability to control the ‘quality’ of our children may ultimately cost us the right not to control that quality.”

The last one hundred and fifty years have seen the birth of, as well as an explosion in, human knowledge regarding the nature and mechanisms of inheritance in human beings. This explosion is widely viewed to have begun with the gentle experiments and writings of Gregor Mendel on the hybridisation and inheritance of genetic traits in white and purple flowering pea plants, which disproved blending models of inheritance. Whilst read by few and cited by even fewer during Mendel’s lifetime, this work provided inspiration for Walter Sutton and Theodor Boveri who in the early 1900’s independently developed the chromosome theory of genetic inheritance, explaining the mechanism underlying the laws of Mendelian Inheritance and thus closing the gap between heredity and cell morphology. This in turn provided a valuable basis for the work that led to the discovery of the structure of DNA by Francis Crick and James Watson in 1953, the production of the first recombinant DNA molecules in 1973, the beginning of the human genome project in 1988 and the completion of its mapping stage in 2003, and research into the genetic bases of heritable diseases and all manner of other human traits.

On the basis of the work outlined above it is now possible to determine via the use of in vitro fertilisation (IVF) technologies and pre-implantation and pre-natal genetic diagnosis, whether embryos and foetuses possess a great number of simple Mendelian and certain semi-complex traits and decide, with reference to the results of these tests, whether or not to implant them and/or bring them to birth. Indeed, whilst our ability to influence the genetic make-up of persons is currently restricted to selective breeding practices, it is widely assumed that at some point all of the research that has been and is currently being undertaken will culminate in a human “ability to use the knowledge of how genes function to intervene in significant ways in human life.” In the slightly further future then, it is expected that in addition to our current capabilities we will be able to identify a great many more genetic traits in our offspring, cure

2 A. Buchanan et al., From Chance to Choice: Genetics and Justice (New York: Cambridge University Press, 2000), p. 64.
genetic diseases in extant persons via somatic and germ-line gene therapy and gene surgery, treat those diseases that may not be cured with ‘personalised’ genetic pharmacology and even synthesise genes to enhance our own and our offspring’s genetic traits.

However, whilst such technologies have provided a great many benefits to some individuals and promise to provide a great many more in the future, they have also raised a plethora of questions concerning what we should and should not do with the knowledge we may now acquire. These questions are many and range from the rather generic yet still unresolved question of the moral status of the human embryo to fears about slippery slopes into a *Gattaca* style situation of designer children and a genetic underclass. More interestingly however, to this author at least, is how the widespread and increasing availability of genetic technologies, especially in the arena of reproduction may have changed, or be changing, real or perceived notions about the responsibilities of prospective parents towards what has been termed by Julian Savulescu and Guy Kahane ‘The Selection Against Disability view’ which suggests:

If reproducers have decided to have a child, and selection is possible, then they have a significant moral reason to select, of the possible children they could have, one of those who are expected to be non-disabled.  

The reasons given as supporting a subscription to this view vary greatly depending on whom one asks. Some suggest that we may ground an obligation to select against disability in our offspring in the interests of the children we might create. Others suggest that we may ground such a duty in deontological obligations or parental virtues by arguing that the good parent will provide their children with capacities required for flourishing in society, or at least the capacities which will ensure that such children’s lives will be well worth living. Others still suggest that this view can be grounded in the notion that to fail to select against disability in one’s offspring somehow constitutes an irrational choice: a choice to live in a world that is worse, in some particular way, than it may have been had we made a different choice.

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7 See, for example: R. Bennett and J. Harris, 'Are There Lives Not Worth Living? When Is It Morally Wrong to Reproduce?', in D. L. Dickenson (ed.), *Ethical Issues in Maternal-Fetal Medicine* (Cambridge:
Yet, regardless of how we base this subscription the selection against disability view can be seen clearly in the negative media reactions to couples who have deliberately selected for children with disabilities,\textsuperscript{8} the recent addition of a prohibition on deliberate selection for disability in England and Wales,\textsuperscript{9} and even the public condemnation of some who are aware they risk conceiving and bearing a disabled child yet choose to leave their offspring’s health to chance.\textsuperscript{10} On a more subtle level it can also be seen in reactions to those who discover an unexpected genetic abnormality in a foetus and choose not to abort.\textsuperscript{11} For, although few tend to outwardly condemn such a decision it seems that pre-natal testing followed by selective abortion is no longer seen, at least among secular sections of society, as just one among a number of equally acceptable routes a woman may choose to take should she so wish, but the most desirable of such routes. A route that, in the absence of adequate justifying reasons not to, she \textit{should} take.

Yet, the selection against disability view has also been vociferously criticized by some. It has been suggested, for example, that whilst the act of selection against disability is not intrinsically wrong and should thus be allowed on the basis of appeals to the autonomy of reproducers, arguments which suggest \textit{a duty} to avoid disability in our offspring are either unconvincing or riddled with logical fallacies.\textsuperscript{12} Others take a stronger stance, arguing that the use of such technologies should be prohibited in all or all but the most serious cases of disability. Those who hold this view suggest variably that: selection against disability is impermissible in virtue of the special moral status of the human embryo\textsuperscript{13}, that selection against disability devalues and is offensive to disabled persons: sending out the message that they are of less value than non-disabled persons\textsuperscript{14}, that all forms of pre-natal selection unjustifiably treat our future children as

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\footnotesize
\textsuperscript{8} D. Jeffreys, 'Born to Be Deaf', \textit{The Daily Mail}, 2002.
\textsuperscript{9} Human Fertilisation and Embryology Act 2008, ss. 14 (4) (9).
\end{flushleft}
a means to an end\textsuperscript{15} and are thus incompatible with the virtues we often associate with parenthood\textsuperscript{16}, or that the availability of such technologies may well serve to degrade, not only the parent-child relationship\textsuperscript{17}, but also common conceptions of justice and the relationships that obtain between different members of society.\textsuperscript{18}

With such deep conflicts in opinion concerning the questions of whether and why this practice is permissible, impermissible, or even perhaps morally required, it can be noted that the central questions this thesis attempts to answer are relatively simple:

1. Is there a moral obligation to select against disability in our offspring?
   And if so…
2. In what circumstances?
3. Should this obligation be translated into a legal imperative?

The articles that are the focus of this thesis address this wider question in a number of ways. Before we get to the articles themselves however, this early section provides some background and foundational information for these articles. It also explains why I have chosen to address certain specific aspects of this question and why I have chosen to take the approach that I have in these articles. As such, in this introductory part Chapter Two addresses a number of foundational questions regarding this topic and outlines arguments from the literature suggesting such selection should be morally condemned, accepted as a valuable component of reproductive choice, or morally required. It also identifies the key questions I will explore throughout the rest of this thesis and explains why I feel that such lines of enquiry warrant examination at the expense of others. Chapter Three then introduces the key commitments underpinning the answers given to these questions. A brief summary of the thesis articles and their abstracts are then provided in Chapter Four. After this introductory section Chapters Five, Six and Seven are comprised of the three articles and then finally Chapter Eight provides an overarching conclusion to the thesis, drawing the conclusions of the three articles together in order to explore their overall impact.

\textsuperscript{18} See, for example: \textit{ibid}, p. 89.
CHAPTER 2

PHILOSOPHICAL AND LEGAL BACKGROUND

2.1. INTRODUCTION

As has been shown in Chapter One this thesis focuses on the question of whether there can be a moral obligation on the part of prospective parents to select against disability in their offspring. This chapter provides some background to this question by exploring existing philosophical debates in this area in order to provide a solid grounding for the more in depth discussions that will take place later on in this thesis. I thus begin by exploring the presumption in favour of allowing individuals to exercise their autonomy within the reproductive realm and beyond, make a brief nod to the question of the moral status of the embryo and then explore two different categories of argument which suggest that moral and/or legal limits should be placed on the autonomy of reproducers in this case.

2.2. INDIVIDUAL AUTONOMY AND THE PRESUMPTION IN FAVOUR OF LIBERTY

After a decade of abstinence, Landsman took up smoking again not quite three years ago. His then-wife was pregnant at the time. It was a much discussed and in some quarters a long-desired pregnancy—her first—but not a planned one. As with many pregnancies that are discussed too long there was a history of ambivalence in the prospective father. At seventeen weeks and a day—the day Landsman bought his first packet of Broadways in ten years—they got a bad result. Some of the cells that made up the foetus, code named Django, had an extra chromosome on the twentieth pair. A mosaicism, it was called. It might cause grave abnormalities. It might have no effect at all. In the available literature, a faithful person could find encouragement, and a faithless one ample reason to despond. Landsman’s view of things—ambivalent, despondent, and with no faith in anything—prevailed. A doctor with half a dozen laminaria dilators broke the seal on the life of Django Landsman.19

In *The Yiddish Policeman’s Union*, a Jewish policeman named Meyer Landsman and his pregnant wife Bina Gelbfish, are given some news. They are told, after a routine pre-natal

testing procedure, that if they bring their pregnancy to term their child is likely to be born with
Trisomy 20, a rare genetic mosaicism associated with high mortality, congenital abnormalities
and cognitive delay. They are then left to determine what to do with such information. Do they keep
the child and hope for the best, whilst preparing themselves for the worst? Or, do they terminate
the pregnancy with a mind either to try again or remain childless? They decide ultimately, after much
soul searching and against their religious beliefs, to terminate the pregnancy for reasons that, although
undoubtedly complex, are never made entirely clear. Their story however is not just their own. It is played out
every day, over and over again by different couples, concerning different genetic diseases, all over the world, in hospital waiting rooms, the
offices of genetic counsellors and in family homes. The outcome of the decision that must be
made is sometimes different from that decided by Meyer and Bina and more often than not the
same. However, it is generally held that absent the provision of justifying reasons suggesting
otherwise, this decision is one that prospective parents should be allowed to make for themselves without external pressures.

This is so, as on virtually all moral, political and legal theories the freedom to exercise our
personal autonomy –understood here as self rule or self-governance - is held to be of great value
either for its own sake or as a means to the pursuit of a higher goal. For some, liberty is valuable
as “to be free to choose, and not to be chosen for is an inalienable ingredient in what makes
human beings human.” 20 Thus to deny us liberty is, in some particular sense, to diminish us. For
Kant, for example, individuals must be free from excessive external influence as it is only in the
freedom of the will and its voluntary submission to the universal laws of practical reason that
we may bind ourselves to the moral law of which we ourselves are the source of authority. 21 For
others autonomy is valuable because it is an integral component of or tends to promote other
important values such as welfare and the moral equality of persons. We can note, for example,
regarding equality that respect for individual choice provides protection to those who are vulnerable or whose conception of ‘the good life’ differs from the views of the majority. In
regards to welfare or happiness we can note that there are good pragmatic reasons to limit
infringements of personal autonomy. We might appeal, for example to the truism that generally
the individual is in the better position to know what will forward or diminish his welfare or happiness than other persons. For, he has a strong interest in his welfare whereas the interest
others have in it “except in strong cases of personal attachment, is trifling.” 22 We might observe

21 I. Kant, Groundwork for the Metaphysics of Morals, ed. L. Denis, trans. T. K. Abbott (Toronto:
22 J. S. Mill, On Liberty, eds. D. Bromwich et al, (Rethinking the Western Tradition; New Haven: Yale
that persons tend to gain more pleasure and pride from their own successes and accept more readily the burdens they impose on themselves than those imposed on them from the outside and that therefore this is a good reason to increase or at least not diminish freedom to exercise personal autonomy. History has, after-all shown that oppressive moral, social and political environments tend not to be conducive to welfare or happiness as persons “deprived of liberty…think of its absence as a genuine personal loss.”

Regardless of why we hold autonomy to be of value, however, many philosophers and jurists alike have suggested that individual freedom should be the appropriate baseline assumption when discussing the permissibility of acts or omissions performed by moral agents. John Stuart Mill, for example, held that “in practical matters, the burden of proof is supposed to be with those who are against liberty.” John Locke held that man is naturally in “a State of perfect Freedom to order their actions…as they see fit…without asking leave or depending upon the Will of any other Man” and that this should place limits on the liberty limiting abilities of the state, whose goal should be seen to preserve and protect natural liberties and property. This sentiment is also expressed clearly in the work of Thomas Hobbes, Immanuel Kant, Jean Jacques Rousseau and Herbert Spencer all of whom hold that the state of nature is one of freedom and that any limits placed on liberty by the state or other means of social control must be justified.

More recently, Stanley Benn has suggested too that when it comes to moral matters “The burden of justification falls on the interferer, not on the person interfered with.” John Rawls too suggests that in a just society “there is a general presumption against imposing legal and other restrictions on conduct without a sufficient reason.” Joel Feinberg has suggested similarly that when it comes to the criminal law there should always be a ‘Presumption in Favour of Liberty’ requiring that:

29 H. Spencer, *Social Statics, Abridged and Revised Together with the Man Versus the State* (London: Williams and Norgate, 1892).
Whenever a legislator is faced with a choice between imposing a legal duty on citizens or leaving them at liberty, other things being equal, he should leave individuals free to make their own choices. Liberty should be the norm; coercion always needs some special justification.  

Indeed, although the authors appealed to above are some of the most famous proponents of this presumption, it seems to be the background assumption of most philosophers concerned with practical questions of ethics. We can note, for example that those who oppose the practice of abortion, euthanasia or animal testing are generally required to provide ‘moral reasons’ as justification for their view, which are then subjected to strict scrutiny. Conversely, those who view such actions to be acceptable are generally only forced to provide justification for their views in the face of such opposition. There, after-all, exists no Defence of Stone Skipping but there does exist ‘A Defence Of Abortion’.  

33 This is because firstly, few are asked to justify themselves when stone skipping, and secondly because – although there are undoubtedly better ways to spend one’s time – stone skipping is an action with very few critics and even fewer who can back up an aversion to it with sound moral reasons.

Indeed, this presumption is also present in the common law of England and Wales and has been since 1215’s Magna Carta. 35 It can be seen in the presumption of bail set out in the Bail Act 1976, the tort of false imprisonment as well as the successive Habeas Corpus Acts among others. It has also received considerable mention in the courts with arguably the clearest statement of this presumption made in Christie v Leachinsky. For, in this case “Viscount Simon considered the tort of false imprisonment and explained that the prima facie right of personal liberty gave way only when a person knows in substance the reason why it is claimed that this restraint should be imposed.”

As such throughout this thesis it should be noted that for both reasons of personal conviction regarding its moral importance - and because it seems fitting to place our moral enquiry into our intuitions regarding disability avoidance within the tradition to which the vast majority of the members of our society subscribe - this presumption, in favour of individual autonomy is upheld. It is thus suggested that just as in the case of acts generally where individuals should, in the absence of compelling reasons to the contrary, be formally free to do as they so choose, the same rules should apply to the case of reproduction. Thus, persons should be formally free to choose whether they wish to procreate, with whom they wish to procreate, when they wish to do

34 Benn, A Theory of Freedom, p. 87.
35 Magna Carta 1215, ch. 39. 25 Edw. 1, c. 1.
36 'Intervention on behalf of Justice' (R. Singh and E. Prochaska, 2010) in WL (Congo) v Secretary of State For The Home Department [2009] EWCA Civ. 441, s. B (9).
so, how many children they wish to have and *what kinds of children they wish to have*\(^{37}\), provided that their choices cannot be demonstrated to cause unjustifiable harm to or to wrong others.

### 2.3. SELECTION AGAINST DISABILITY: WHY WE SHOULDN’T

As has been noted above I assume that when it comes to the placing of limits in the reproductive realm the burden of proof lies with those who wish to limit the autonomy of reproducers. Thus, those who view selection against disability should either be condemned or required *must* provide good moral reasons to back up their claim. With this in mind, within this section I survey the existing academic literature surrounding the question of whether there exist good moral reasons to *condemn the practice of selection against disability*.

#### 2.3.1. A BRIEF NOD TO THE MORAL STATUS OF THE FOETUS AND EMBRYO

Selection against disability is an act that, in all but rare cases – such as sperm selection for the purpose of avoiding sex linked disease or the relatively new practice of pre-implantation genetic diagnosis of ova – necessarily involves the destruction of either foetuses or embryo’s. Thus, because of this, like abortion and the destruction of IVF embryos generally, it is a practice that is vulnerable to criticism from those who hold, for various reasons, that the embryo and/or foetus are entities that possess the right not to be killed. The most prominent of those who make this claim hold variously that this is because the foetus and/or embryo is in possession of a God-given soul or is made in God’s Image\(^{38}\), is a human being\(^{39}\), is a member of a rights-bearing species\(^{40}\), is a living thing\(^{41}\), has the potential for personhood/ a future of value\(^{42}\), or is a member of a ‘kind’ of which a characteristic is personhood.\(^{43}\)

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37 Buchanan et al., *From Chance to Choice: Genetics and Justice*, pp. 209-211.
42 See, for example: Marquis, ‘Why Abortion Is Immoral’, pp. 188-194.
However, whilst this is the case, to do justice to this complex question and consider the merits and demerits of all possible accounts of the moral status of the human foetus/embryo would require a thesis or a book in itself. As such and because a discussion of the vast literature regarding moral status would likely prevent the discussion of other aspects of selection against disability, such arguments will be conspicuously absent from this thesis. Instead it will be assumed, in line with current law regarding abortion and the destruction of embryo’s in England and Wales\(^44\), personhood\(^45\), and sentience/interest based accounts of moral status\(^46\), that we generally do not risk wronging a foetus or embryo by killing it. For, an interest in avoiding death is one that requires capacities developed long after birth such as a sense of self and a concept of death. Thus, pre-natal selection against disability via the painless abortion of affected foetuses and the disposal of affected embryos, will, within this thesis not be deemed morally problematic on the basis of appeals to the moral standing of such entities.

\(\uparrow\)(2)

\(\uparrow\) See the Abortion Act 1967, s. 1(1)(a-d) and Human Fertilisation and Embryology Act 1990, sch. 3. (2)

\(\uparrow\) What constitutes moral personhood is still under debate but most definitions follow Locke in viewing a person as ‘a thinking intelligent being, that has reason and reflection, and can consider itself, as itself, the same thinking thing, in different times and places; which it does only by that consciousness which is inseparable from thinking’. See: J. Locke, An Essay Concerning Human Understanding (Oxford: Clarendon Press, 1924). Book II, Chapter XXVII. Some of the most famous contemporary accounts of moral personhood are those of Warren, Harris, Tooley, Dennett and Midgley. Warren, for example, suggests that the most central traits to the concept of personhood are consciousness, reasoning, self motivated activity, the ability to communicate, a concept of self and self awareness: see M. A. Warren, ‘On the Moral and Legal Status of Abortion’, The Monist, 57/4 (1973), p. 55. Harris suggests simply that persons are nothing more or less than beings capable of valuing their own lives: see J. Harris, The Value of Life (London: Routledge, 1985), pp.16-17. Tooley views a person as a being who possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such an entity: see M. Tooley, ‘Abortion and Infanticide’, Philosophy and Public Affairs, 2/1 (1972), p. 44. Dennett’s account, which seems to be the hardest to satisfy suggests two sets of cognitive features that are required for personhood. He holds first that persons must not only be intentional agents: creatures whose behaviour is governed by… internal representations that allow them to follow goals with alternative means and generate expectations about events, and react to these expectations before the actual events have happened but suggests that persons must also possess a kind of reciprocity in terms of intentionality, that is they must hold: beliefs, desires and intentions about beliefs, desires and other intentions: see, D. C. Dennett, ‘Conditions of Personhood’, in A. Oksenberg Rorty (ed.), The Identities of Persons (California: University of California Press, 1976), p. 181. Midgley, taking a slightly different approach suggests that personhood is indicated by social and emotional complexity: that only those who are sensitive, conscious and endowed with emotions should trouble our sleep with moral claims. See: M. A. Midgley, ‘Is a Dolphin a Person?’, in S.J. Armstrong and R.G. Botzler (eds.), The Animal Ethics Reader (London: Routledge, 2003), p. 169.

\(\uparrow\) For those who hold sentience/ interest based accounts of moral status such as Bentham and Singer that which separates those who may place moral claims upon us and those who may not is nothing more than the capacity for suffering. Bentham, for example states that when it comes to moral consideration: “the question is not, can they reason? Nor, can they talk? But, can they suffer?” See J. Bentham, An Introduction to the Principles of Morals and Legislation (1907 reprint of 1823 edition edn.; Oxford: Clarendon Press, 1907), ch. XVII, note 122. Singer notes similarly: “If a being suffers, there can be no moral justification for refusing to take that suffering into consideration.” See Singer, Practical Ethics, p. 65.
2.3.2. PRE-NATAL SELECTION AGAINST DISABILITY IS DISCRIMINATORY, OFFENSIVE AND BASED ON MISINFORMATION

By far the most prominent arguments within the academic literature suggesting there exist good moral reasons to condemn selection against disability – barring, of course, those appealing to the moral status of the foetus and embryo as condemning abortion and the destruction of embryos during IVF procedures more generally – focus on either the message such selection sends to those living with disabilities or the idea that the choice to select against disability is based on misinformation. In regards to the first, the crux is the notion that at the heart of a decision to do so lies a discriminatory belief that the lives of those with disabilities are somehow worth less morally than the lives of those without, which means such selection should be condemned because of this and as part of the larger project of securing the equality of all persons. In regards to the second, on this argument it is held that the decision to select against disability is based on misinformation regarding the true nature of disability and thus that such selection should be condemned as an inappropriate response to a social problem.

2.3.2.1 Selection Against Disability is Offensive and Discriminatory

The underlying reason for prenatal screening and testing is the elimination of the impaired foetus. This sends a discriminatory message to say that disabled people’s lives are not worth living or worthy of support.47

The above quote is a good example of an argument often called the ‘Expressivist Argument.’ Its “central claim is that prenatal tests to select against disabling traits express a hurtful attitude about and send a hurtful message to people who live with those same traits.”48 Those who subscribe to this view thus hold that selection against disability is a discriminatory practice for “as with discrimination more generally, with prenatal diagnosis, a single trait stands in for the whole, the trait obliterates the whole. With both discrimination and prenatal diagnosis, nobody finds out about the rest. The tests send the message that there’s no need to find out about the rest.”49

Yet whilst it is the case that some of those who wish to select against disability in their offspring may well hold discriminatory beliefs regarding the value of those with disabilities which may

48 ibid., p. S2.
cause harm to those who live with such conditions and such beliefs should, undoubtedly be challenged. Many authors have suggested that this is not a decisive reason to condemn pre-natal testing. Glover, for example notes that it is important to “send a clear signal that we do not have… ugly attitudes to disability… to show that what we care about is our children’s flourishing: that this, and not shrinking from certain kinds of people, or some horrible project of cleansing the world of them, is what motivates us.” Yet, he also suggests: “To think that a particular disability makes someone’s life less good is not one of the ugly attitudes. It does not mean that the person who has it is of any less value, or is less deserving of respect, than anyone else.” Harris too, for example, has argued that, provided we continue to work towards the equality of existing disabled persons within society, attempts to prevent disability in our offspring no more necessarily discriminates against the disabled as a group “than medical treatment of disease discriminates against the sick as a group.” James Nelson has noted that in addition to reasons relating to the flourishing of a child with a disability “many motivations can be imagined for trying to avoid the birth of a baby with disabilities, and many reasons can be provided for such an action that do not involve… the belief that a life with disabilities is not worth living” such as resource based concerns about one’s ability (financial or otherwise) to provide for the needs of a disabled child.

2.3.2.2. Selection Against Disability Is Based On Misinformation About The True Nature Of Disability

Others who criticise the use of prenatal technologies to select against disability do not hold that it is undesirable to prevent the occurrence of disability in our offspring but instead suggest that prenatal testing and the destruction of foetuses and embryos with traits liable to result in disability is an inappropriate response to a problem that is wholly or largely social in nature. This critique is generally made by individuals associated with the disability rights movement who hold that the way in which we tend to define disability within our society rests upon an assumption of a particular and problematic socio-political model of health and illness.

50 Glover, Choosing Children, p. 34.
51 ibid., p. 34.
This assumption is that the disvalue of particular inabilities/disabilities is inherent, that is, it is attached to the individual and causes disadvantage, as opposed to being extrinsic in nature, a product, not of biological limitation, but of the structure of society, like sexism and racism. Such an assumption can be seen clearly in the ways in which we define disability within our society. It can be noted for example that according to the Equality Act (2010) a person (P) is defined as disabled if “(a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities”\(^\text{55}\), a definition which necessarily links the existence of the impairment with the existence of the disability. This way of understanding disability and impairments is often termed the medical model and tends to rest upon notions of species typical functioning where departures from the norm are often viewed to be maladaptive, inherently limiting “the range of opportunity open to the individual in which he may construct his plan of life or conception of the good”\(^\text{56}\). According to such a definition it is understandable that a desirable way to combat the effects of disability on individuals would be to prevent genetic traits that result in impairments even if the only means of doing so would be to prevent the births of those who would be disabled.

Many of those within the disability rights movement contend that the medical understanding of disability is erroneous. They, in a similar way to how the feminists of the early 1970’s distinguished between sex as biological difference and gender as a social category, adopt a social constructivist model of disability, drawing upon materialist and Marxist perspectives\(^\text{57}\), suggesting that disability can be attributed “not to the physical, cognitive, or emotional characteristics of individuals, but to the failure to account for everyone when designing physical, economic and social institutions”\(^\text{58}\) and that thus, in choosing how to construct our societies we also choose who will and will not be disabled. This point is well made as society is designed to cater for the majority of the populous and thus does place barriers to the participation of those who depart from societal norms whether this is due to their physical and mental characteristics, or their membership of a minority culture or religion.

Those who subscribe to such a view suggest that in a great number of cases what is needed is not a “cure” for the inabilities that certain disabled persons have but instead a cure for the institutions that allow inabilities to be disabilities. Those unable to walk – so the argument goes

\(^{55}\) Equality Act 2010 s. 6 (1).
– need wheelchairs and wheelchair accessible buildings, those who are D/deaf require adaptations to the environment which make lack of hearing inconsequential in their daily lives and those who view those with inabilities to be incapable of work that is not ruled out by their inabilities need education. Such a definition of disability is thus intrinsically tied to notions of social justice, to the idea that in a liberal, pluralist society, justice requires that we “arrange society so as to accommodate and facilitate a maximally plural range of views and ways of living.” Thus, it is suggested that as disability is not a feature that is intrinsic to those who suffer it but is socially constructed, to attempt to prevent disability by preventing the lives of those who will be disabled is akin to attempts to prevent sexism by preventing the births of women or racism by preventing the births of black people and thus constitutes an inappropriate response to a social problem.

Taken to extremes however, social constructivism is often viewed as irredeemably flawed by the academic community and a great number of able bodied and disabled persons alike. Robert Kitcher expresses this well when he notes that if we take a wholly social constructivist view “attempts to decrease the incidence of Tay-Sachs will be no different from Northern Indian sex selection or from anticipated future efforts to cure lesbians” and Harris notes too that if it were the case that inabilities were just harmless human variation it would be the case that there would be nothing wrong with our painlessly deafening a hearing infant in utero or blinding her provided society was set up to cater for her needs. Inability is thus thought not to be an entirely neutral trait like gender, skin colour and sexual preference. Eva Kittay, for example, when reflecting upon her relationship with her daughter Sesha who is profoundly physically and intellectually disabled, notes that in her daughter’s case inability and disability, regardless of how well society adapts, are very nearly coincident yet also notes that there do seem to be some genetic conditions that would not prove disabling at all in a society different from our own and conditions that although considered normal in our society could prove disabling in another.

It is easy to, and thus many do, focus upon those with disabilities such as Deafness and Achondroplasia, whose sufferers often consider their inabilities to be a positive component of

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59 Throughout this thesis I refer to deafness generally with a lower case d and those who view themselves to be culturally deaf with an upper case D.
their cultural and narrative identities. This can be seen in the rich culture and language of the Deaf community and the reaction of the Deaf community to the advent of cochlear implants, and their promise to ‘cure’ deaf children, as belittling, humiliating and, even in some circles, constituting a form of cultural genocide. To focus upon such examples however, is to fail to take into account the views of many individuals who do see their inabilities as limiting, or at least difficult, and would thus rather not be party to them. Disability is not homogenous and thus has been suggested that it is as laughable to expect that one can gain an understanding of the vast spectrum of disability by listening to the voices of a small group of disabled activists as it is as to expect that any black person or woman can speak for the experiences of all black people or women.

Yet, even if this is so and many of the difficulties associated with disability are socially constructed, for those whose inabilities are inextricably linked with chronic illness and pain, the notion that their predicament could be solved by the elimination of social barriers is often viewed to be nothing more than a fiction that may prove to be a hindrance to real attempts to understand the complexity of the experience of illness and disability. Tom Shakespeare thus notes the need for a more holistic understanding of disability that takes into account the fact that the experiences of disabled persons result from the relationship between both factors that are intrinsic to the individual such as “the nature of and severity of her impairment, her own attitudes towards it, her personal qualities and abilities, and her personality” as well as extrinsic, contextual factors such as “the attitudes and reactions of others, the extent to which the environment is enabling or disabling and wider cultural, social and economic issues relevant to disability in that society.”

2.3.3. PRE-NATAL AND PRE-IMPLANTATION SELECTION IS INCOMPATIBLE WITH PARENTAL VIRTUE AND MAY LEAD TO HARMFUL AND UNREALISTIC EXPECTATIONS ON THE PART OF PROSPECTIVE PARENTS

An offshoot of the disability rights approach with implications not only for selection against disease and disability, but also the positive selection of non-disease traits and genetic enhancement technologies, focuses on the motivations and attitudes that the availability of pre-implantation and pre-natal selection and screening technologies seems to be fostering and
facilitating in prospective parents. These attitudes are held to be incompatible with commonly held parental virtues such as unconditional love and acceptance.\textsuperscript{69} It has been suggested, for example that the advent of such technologies is leading us “toward the commodification of children, towards thinking about them and treating them as products rather than gifts or ends in themselves”\textsuperscript{70} and that this is not only wrong in itself but may lead to the degradation of the parent/child relationship.

This shift in parental attitudes \textit{can} be seen in the phenomenon of the tentative pregnancy – the fact that since the advent of pre-natal screening technologies many women no longer feel pregnant until it has been shown that their foetus is not subject to any abnormalities\textsuperscript{71} - and is said to represent faulty motivations on the part of prospective parents. Within the disability rights community this type of argument is often made in the form of Adrienne Asch’s “any/particular distinction” – where she argues that whilst abortion is acceptable for many reasons, it cannot be justified by focusing upon the particular attributes of a potential child – or in the form of the “parental attitude argument” – which suggests that good parents “will care about raising whatever child they receive and about the relationship they will develop, not about the traits the child bears”\textsuperscript{72} and that thus as selection requires us to view our prospective children through a lens of judgement, not an attitude of unconditional acceptance, it is viewed as inappropriate.

It can also be seen in Peter Herrisone-Kelly’s “parental love objection” to sex selection which may be seen to apply equally in cases of selection against disability – which suggests that selection instrumentalises children and is thus incompatible with the ‘any incumbent model’ of parental love: “if A loves B parentally she loves B just because B is her child”\textsuperscript{73} – and in various other Kantian approaches to reproductive technology which suggest that in selecting their offspring parents commit a category error, treating their children as objects of desire and thus violating “the Kantian principle of treating each person as an end in herself and never as a means only.”\textsuperscript{74} For, whilst reproduction is primarily a selfish endeavour on the part of

\textsuperscript{69} Or, at least a far less conditional love and acceptance than one needs to extend to persons who are not their child that still allows for the withdrawal of love from a child who grows up to do monstrous things.


\textsuperscript{74} Davis, 'Genetic Dilemmas and the Child's Right to an Open Future', p. 12.
prospective parents75 – we do not, after-all, contemplate the possible lives of our pre-conception offspring and think we will benefit them by bringing them into existence and have them instead because we anticipate that in doing so we will benefit in some way from our choice - we should balance our own selfish desires against the reality that once born, a child “will exist for [its] own sake, with [its] own talents and weaknesses, propensities and interests, and with [its] own life to make.”76

These types of arguments have been criticised however, for taking too narrow an approach to the notion of the good parent, and William Ruddick, for example, who has written extensively on the parent/child relationship, notes three different conceptions of parenthood that can, when not taken to extremes, be perfectly adaptive modes of parenting. The first is the familiar and traditional “Maternalist” conception of parenthood held by those who subscribe to the arguments above where the mother views the foetus as her child from the moment of conception and the notion of the child as a gift is prevalent. The second and third, termed the “Projectivist” and “Familialist” accounts of parenthood however, depart from the idea that parents should be willing to accept any child they are given and instead suggest that parents may also legitimately view their prospective children, in a certain sense, firstly as “projects”, attempting to ensure within reason that their children start out in life with the capacities that will allow them to fulfil the hopes and dreams their parents may have for them and secondly that they may also view them, not just as individuals but as a member of a family unit, as a sister or a brother or indeed, in the future as a parent.77

Indeed, some have also questioned why it is the case that the virtues of a prospective parent should be seen to be the same as those of an actual parent. For although some suggest that a desire to select certain of the characteristics of their children “is part of a broader desire to become a parent”78 and that this therefore requires “committing oneself to acting and evaluating one’s actions and decisions in light of the project of parenthood”79 others argue that it just doesn’t follow that selective mentality is incompatible with such a commitment. For, it is suggested that even if we accept that two of the virtues of a good parent are that of acceptance

76 Davis, Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures, p. 12.
and unconditional love it is still the case that the prospective parent is not yet a parent. Thus it seems that, provided the prospective parent is willing to take on the virtues associated with parenthood once he actually becomes one, there seems to be little reason to assume that he cannot both seek to select the characteristics of his child and commit to accepting and loving her regardless of her characteristics. After all, as Stephen Wilkinson notes regarding a hypothetical example of two prospective parents who seek to select for a blue eyed child and agree that they will put the child up for adoption after its birth:

It is not the desire to select that violates the principle (of unconditional love), but rather the plan to reject the child if it does not live up to expectations. This is important because it is entirely possible to want to select characteristics while not having this problematic attitude of rejection.80

Others have suggested however, that whilst a selective mentality in scenarios such those above can be considered legitimate by appealing to more modern conceptions of parenthood and noting the difference between prospective parenthood and actual parenthood, we should still be concerned about the human disposition that selection expresses and promotes and the effects of this disposition on the child created.81 Such individuals express the fear that a selective mentality when it comes to reproduction may well be the forefather of selective as opposed to unconditional love once the child is born and may too lead to unrealistic expectations and feelings of entitlement concerning parental intervention throughout the child’s life. Thus, it is suggested, for example, that a concert pianist who goes to great lengths to select against deafness in her child might either reject her child should it become deaf during childhood or, in virtue of the time, effort and money involved in this child’s selection, feel more justified in chaining it to a piano once it is born and that her child would thus suffer as a result. This kind of argument is usually made in the context of the selection of ‘saviour’ offspring: where parents utilise HLA tissue typing in conjunction with PGD and IVF in order to pick an embryo for implantation capable of donating life-saving tissue to an existing person. Concerns have, for example, been raised that a saviour child might be harmed by the knowledge that they were selected82, that they may be less likely to be loved and cared for by their parents than other children conceived not just as a means to the end of another’s health83, that such children might be coerced or feel coerced into further donations against their will.84

81 Sandel, The Case against Perfection - Ethics in the Age of Genetic Engineering, p. 46.
83 ibid.
84 See, for example: K. D. Macleod et al., ‘Pediatric Sibling Donors of Successful and Unsuccessful Hemoatopoietic Stem Cell Transplants (HSCT): A Qualitative Study of Their Psychosocial Experience’,
In cases of selection generally however, it should be noted that whilst it may be important to encourage within parents a proper balance between the expression of both an accepting and unconditional love that “affirms the being of the child”\textsuperscript{85} and a ‘transforming’ kind of love “that seeks the wellbeing of the child…[promoting] their child’s excellence”\textsuperscript{86}, it is, again, not at all clear that the link between a selective mentality in reproduction and an excess of transforming love is a necessary one. Overbearing parents are, after-all, found within the population generally and not just among those who would select certain of the characteristics of their offspring. Indeed, as Melissa Fahmy rather eloquently notes when considering ethical arguments against selection for disability:

Parental hubris does not depend on biotechnology. Inappropriate parental expectations, expectations hostile to the virtue of openness, are not new. One can presume to know more about one’s child than is appropriate without actively selecting genetic traits. Biological parents, for instance, know that their children share their genes and this alone may be sufficient to encourage inappropriate assumptions and expectations. Parental hubris might lead one to think that because he is MY son, he is going to be a great athlete or attend Yale. Even if we did select our children’s genetic traits…children are so much more than their genetic features. Only the most naïve parents would presume to know what they are getting simply because they had a hand in selecting some of their child’s genetic features; and a naïve parent would receive a lesson in humility soon enough\textsuperscript{87}

Indeed, others have noted that even if it is likely that a selected chid is more likely to experience suffering or to be the victim of overzealous parenting styles than non-selected children we must ask whether these effects will be so terrible that it would have been better for such children that they had never been conceived or born or, in other words, whether we can really say that they will be harmed on balance by their selection. For as Stephen Wilkinson and Sally Sheldon note in the case of saviour selection which applies equally to all other cases of selection: “even if the children created face very severe psychological problems [as a result of their selection]… in the absence of other unconnected problems the chances of [their] having negative quality lives are remote.”\textsuperscript{88} Absent selection, such children, would after-all be highly unlikely to exist at all. This argument rests on the conclusions of a problem in philosophy known as the non-identity problem and will be explored further in ss. 2.4.2.1 of this chapter.


\textsuperscript{85}Sandel, \textit{The Case against Perfection - Ethics in the Age of Genetic Engineering}, p. 49.

\textsuperscript{86}ibid


2.3.4. SELECTION AGAINST DISABILITY MAY THREATEN COMMON CONCEPTIONS OF JUSTICE AND SOCIAL SOLIDARITY

Another interesting criticism of selection and prenatal testing for the purpose of selection against disadvantageous genetic traits focuses not upon the parent-child relationship, but upon the relationships that obtain between different members of society, and our intuitions regarding what justice may require of us both in an individual sense and within our social institutions. Michael Sandel, for example, suggests that the availability of technologies that allow us to select against disadvantageous traits in our offspring and the corresponding “explosion of responsibility for our own fate and that of our children may diminish our sense of solidarity with those less fortunate than ourselves”\(^{89}\) may lead to an unwillingness on the part of existing members of society to provide support for such persons. Wilkinson notes similarly that “it is claimed… if disability were to become rarer as a result of PGD and PND, this would both increase societal intolerance of disability and weaken the economic and political case for making social institutions and the built environment ‘disability-friendly’”\(^{90}\). Taken at face value such an argument is faced with a patent flaw which as is noted by Frances Kamm & Dov Fox is the fact that:

“It makes no sense to hold a designer child morally responsible for the natural tendencies with which she is born, since it would be either her parents or reproductive physicians who chose… those characteristics prenatally, and she could not have done anything herself, before she was born, to have made her genetic characteristics come out any different.”\(^{91}\)

Yet to read the argument in this manner would lack charity and miss the subtlety of the claim, which is not that people would be right to be less willing to provide support, but that regardless of the rightness/wrongness of their attribution of responsibility, they would still be more inclined to do so. Such a claim is evidenced in people’s willingness to take pride in their appearance despite the fact that they have played no more of a part in its creation than had their beauty been crafted by a plastic surgeon.\(^{92}\) Politically, one can also see such sentiments in affirmative action and intergenerational reparations for historic injustices in which people are held to be “accountable for the wrongs of their ancestors or the groups to which they

\(^{89}\) Sandel, *The Case against Perfection - Ethics in the Age of Genetic Engineering*, p. 89.
belonged”\textsuperscript{93}, not just because they benefit from those wrongs, which is a valid reason for reparation, but because persons are representatives of family lines, generations can be tied together and as such their relation is viewed to be morally relevant. Yet, whilst such is the case, that some persons seem to attribute responsibility for things beyond their control seems less to be an issue for philosophy and more of an issue for education, requiring concerted attempts to remove this fiction.

It might be suggested however, that whilst we should not attribute responsibility to the child created and that his claims, should he have any, to additional support should remain unaffected, parents who do not avail themselves of pre-natal and pre-implantation genetic testing procedures are now more likely to be held responsible for the extra claims to justice that their children might have.

This suggestion has, in fact already been made by Eric Rakowski who suggests that “in a just state… parents would be responsible for redressing any genetic disadvantage their children suffer as a result of parent’s voluntary actions.”\textsuperscript{94} In cases where individuals are thus unable to afford to provide for such additional claims to justice where they are likely to arise, it is thus suggested that a choice to select against disability may well constitute no choice at all. That such may be the case, however, does not seem to be a reason for condemnation of genetic testing. For, where it is the case that a decision not to select against disability is one that would impose few costs on prospective parents and may impose significant burdens on existing members of society, to expect individuals to bear the costs of their own voluntary choices would seem to be in keeping with the prescriptions of most responsibility catering theories of justice.

Those within the feminist care contingent offer arguments in a different vein based upon the value of caregiving relationships and the added value that differently abled persons bring to society in terms of tolerance towards and diversity in different modes of existence and that the availability of pre-implantation and pre-natal testing technologies may well lead to a diminishment of such tolerance and diversity. Yet, again even if we do grant the premise that the differently abled add value to society it should be noted that only a small percentage of disabled persons are actually born with disabilities and the vast majority become disabled later in life\textsuperscript{95} and thus diversity will always be found and tolerance will always be useful. Indeed,

\textsuperscript{93} Fox, 'Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos', p. 603.
\textsuperscript{95} According to the 2007/8 Family Resources Survey, whilst there are over ten million disabled persons living in the UK, children with disabilities amount to less than 10% of the total and those over state pension age make up around 50% of the number. See: Office for National Statistics and National Centre for Social Research, 'Family Resources Survey', (London: Department For Work and Pensions 2007/8).
others have noted that “it is unclear how this benefit compares to the additional burden placed on society”\textsuperscript{96} in terms of care and requirements of access, or why it is the case that education in compassion and tolerance, paired with the availability of such technologies could not provide the same benefits.

### 2.4. SELECTION AGAINST DISABILITY: WHY WE SHOULD

With the most prominent arguments forwarded against selection against disability outlined and explored in the previous section I now begin to explore the liberty limiting philosophical arguments that lie at the heart of this thesis. These are arguments suggesting that selection against disability is not only a permissible reproductive choice, but also may, in fact, be morally required. Within this section I thus first explore the move towards this view within both philosophy and society and examine existing arguments that have been given in support of this obligation.

#### 2.4.1 THE MOVE TOWARDS THE SELECTION AGAINST DISABILITY VIEW IN SOCIETY AND PHILOSOPHY.

In Chapter One of this thesis I briefly surveyed the ways in which the increasing availability of genetic technologies for the purpose of selection against disability seems to have complicated the once simple business of reproduction. For, whilst people were previously only responsible for copulation, after which “nature took its course and people had to accommodate it”\textsuperscript{97} the availability of such technologies has imposed upon reproducers a forced choice to either pursue or refuse to pursue new technological options.\textsuperscript{98} Indeed, their availability also seems to have changed or be in the process of changing, common views regarding the responsibilities of prospective parents towards what has been termed by Savulescu and Kahane ‘The Selection Against Disability View’:

If reproducers have decided to have a child, and selection is possible, then they have a significant moral reason to select, of the possible children they could have, one of those who are expected to be non-disabled.\textsuperscript{99}

\textsuperscript{96}Fahmy, ‘On the Supposed Moral Harm of Selecting for Deafness’, p. 6.  
\textsuperscript{97}Vehmas, 'Just Ignore It? Parents and Genetic Information', p. 473.  
It was noted, for example, that the idea that there might be a limited moral obligation not to deliberately select for disability in our offspring is becoming increasingly prevalent within society generally. Such a view can be seen clearly in the negative media reaction and public outrage directed towards the Deaf couple Sharon Duschesneau and Candy McCullough who, after deliberately conceiving a deaf child in the early 2000’s via the use of a fifth generation deaf sperm donor, were vilified by the tabloid media, who described them as cruel and inhuman, and were even condemned by the National Association of the Deaf.\textsuperscript{100} It can also be seen in the fact that this view that has been enshrined in the law governing the uses of assisted reproductive technology in England and Wales. For, since 2008 that the Human Fertilisation and Embryology Act - the primary piece of legislation regulating the practices of artificial reproduction and embryo research in England and Wales – has included a clause that states that in the case of those who choose to utilise PGD or donor gametes:

Embryos or persons that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop:

(a) a serious physical or mental disability,
(b) a serious illness, or
(c) any other serious medical condition,

must not be preferred to those that are not known to have such an abnormality.\textsuperscript{101}

The purpose of this clause, as can be seen by looking to the official explanatory notes to the HFE bill, was to limit the autonomy of those who may wish to choose to implant disabled over non-disabled embryo’s. For, it states: “outside the UK, the positive selection of deaf donors in order deliberately to result in a deaf child has been reported” and “this provision [in the Bill] would prevent selection for a similar purpose”\textsuperscript{102}

Chapter One hinted too at the notion that this duty can be viewed, not just as a negative one, limited only to those already utilising assisted reproductive procedures, but as a positive duty to actively avail oneself of pre-implantation selection procedures in certain circumstances. This can be seen in the fact that public criticism has not only been met by those who deliberately


\textsuperscript{101} Human Fertilisation and Embryology Act 2008, s. 14(4)(9).

\textsuperscript{102} Department of Health, 'Explanatory Notes to the HFE Bill', (HL Bill 6 - EN; London The Stationary Office, 2007a), para. 109.
conceive disabled offspring but by those who are aware that they risk doing so, yet choose to leave the health of their offspring to chance. This can be seen, for example, by considering the case of Bree Walker-Lampley, an American television personality with Ectrodactyly who was condemned for her decision to choose to have children despite the high risk that she would pass on her condition to her children\textsuperscript{103} on a nationally broadcast radio show\textsuperscript{104}. For, the suggestion buried behind such criticism seems to be that persons who are more likely to conceive and give birth to children with disabilities should either choose to forego reproduction altogether, and remain childless or adopt, or avail themselves of pre-implantation selection technologies in order to ensure the birth of a ‘healthy child.’ Indeed, it is also a suggestion that has been made not so subtly in the philosophical arena. For, in a recent article Janet Malek and Judith Daar suggest that parents who “know they pose a significant risk of passing a lethal or serious genetic anomaly to their offspring have a duty to use PGD to avoid birthing an affected child.”\textsuperscript{105}

Indeed, whilst few tend to outwardly condemn decisions\textsuperscript{106} not to abort foetuses after pre-natal testing has revealed an abnormality, testing followed by abortion seems no longer to be just one of a number of equally acceptable routes a woman may choose to take. For, it seems, at least among certain sections of society, to be held to be the most desirable of such routes: A route that in the absence of adequate justifying reasons not to, she should take. This can be seen by looking to examples of the shifts in individual attitudes since the advent of pre-natal testing with one prominent author in this field noting:

Twenty years ago, seeing a woman in the supermarket with a child who has Down syndrome, my immediate reactions were sympathy and a sense that that woman could be me. Now when I see such a mother and child, especially if the mother is older, I am more likely to wonder why she didn’t get tested.\textsuperscript{107}

For, this reaction seems to rest on the assumption that should the woman have been tested, this encounter would not have occurred. That it is generally viewed to be preferable to abort a foetus

\textsuperscript{103} Ectrodactyly is normally an autosomal dominant genetic trait although autosomal recessive and x-linked modes of transmission have also been discovered. For more information regarding this see: K. Y. Leung, N. A. Maclachlan, and W. Sepulveda, ‘Prenatal Diagnosis of Ectrodactyly: The 'Lobster Claw' Anomaly’, Ultrasound in Obstetrics and Gynaecology, 6/6 (1995), pp. 443-446.
\textsuperscript{106} This is likely on the basis of the fact that Gestated entities are strongly incorporated into the mother’s body and especially subject to bonding relationships and to abort a much wanted child on this basis may well cause a pregnant woman a great deal of lasting psychological pain especially if she feels coerced into doing so.
\textsuperscript{107} Davis, Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures, p. 18.
with disabling genetic traits, although not required is an observation that can also be supported in a number of other ways. We can note that the choice in English and Welsh abortion legislation to place no time limit on abortion for foetal abnormality despite placing a limit of 24 weeks on abortion for ‘social’ reasons\textsuperscript{108} points to a bias in favour of abortion over the birth of viable disabled foetuses. Additionally, it should be noted that prenatal testing is now thought to be a routine part of prenatal care, and the existence of government mandated uptake targets means that much effort is made to “secure the testing of not only those women who would have elected to be tested, but also those women who would not specifically have chosen to be tested.”\textsuperscript{109} This seems to send the message that prenatal screening for abnormality is something women should avail themselves of. Indeed, as medical rather than social information about disability is emphasised by those who perform the tests\textsuperscript{110}, it seems that a preference for certain outcomes, such as the abortion of impaired foetuses, is now built into the structure and practice of our medical system. As Clarke succinctly puts it:

The very existence of a screening programme amounts in effect to a recommendation that the testing thereby made available is a good thing. Health professionals and society would hardly establish and promote antenatal screening for Down’s syndrome unless they wanted people to make use of it – the existence of such a programme is an implicit, but powerful, recommendation to accept any screening offer made. Screening programmes therefore, simply cannot be non-directive. Health professionals may respect the decisions of those who decline the offer of screening, not coercing them into compliance, but those who decide against participation will carry a label of social deviance unless great efforts have been made to avoid this.\textsuperscript{111}

\subsection*{2.4.2. HOW MIGHT WE GROUND THIS DUTY?}

The idea that there might be a moral duty to select against disability in our offspring, even where this duty is limited only to an obligation not to select for disability, has the potential to impose significant limits on the autonomy of reproducers. For, even in the absence of legal constraint and other formal means of social control, informal methods such as public opinion, media representation of certain activities and the more personal acts of criticism and shaming are highly effective in influencing individual behaviour. Thus, just as with arguments

\textsuperscript{108} The Abortion Act 1967, s. 1(1)(a-d).
suggesting an obligation not to select against disability, those who suggest a duty to do so must show why such incursions into reproductive autonomy are necessary.

2.4.2.1. A Focus On The Interests Of/Rights Of The Child Created

Some suggest that we might ground a duty to select against disability by focusing upon the rights or interests of the child that may be brought to birth as a result of our selection decisions. This seems to be the route taken in UK legislation where the prohibition on selection for disability has been justified in explanatory documents by reference to the welfare of the child created.

Indeed, in cases of lives commonly described in the philosophical literature as “empty of all the things that make life worth living”, “dominated by pain and suffering”, “intractably miserable”, “not worth living”, or “worse than no life at all”, there do seem to be good moral reasons – based on the extent that such a child would suffer once born – not to choose to bring him into existence.

Yet, in cases that fail to meet this high standard of misery, where the benefits of existence are commonly held to outweigh the suffering associated with a particular child’s genetic constitution, these arguments have been suggested not to apply. After all, if we are concerned purely with the impact that a selection decision may have on the interests/welfare and/or rights of the child created and are unable to change the conditions of our children’s existence, it seems bizarre to suggest that in cases of serious but not terrible disabilities we should protect our children’s interests by preventing their existence.

112 Or, as in the case of the current UK prohibition a duty not to select for disability.
115 Bennett, 'The Fallacy of the Principle of Procreative Beneficence', p. 266.
conundrum, attributed to Derek Parfit, and known in philosophy as ‘the non-identity problem’\textsuperscript{121}

In its most simple terms the non-identity problem is an issue that arises on person affecting accounts of morality in certain specific contexts normally relating to same number genesis questions, where our intuitions tell us that an act is wrong or right but there is no discernable reason as to why this is so. In such cases, either \textit{no one can be judged as harmed or wronged} by a seemingly wrong action, or \textit{no one can be identified as benefited} by what seems to be the right course of action. Such is the case as the harm/wrong or benefit to which we wish to appeal in order to justify or condemn a particular course of action in regards to the interests of some particular person turns out to be causally inextricable from his or her existence. A typical non-identity case thus involves, firstly, the holding of an intuition that some particular person (x) has been harmed or benefited by some other particular person (y)’s performance of some particular action and secondly, the examination of this intuition and the conclusion that it must be mistaken because were it not for the actions of y, x would never have come to exist.

It is argued then, that in line with the conclusions of the non-identity problem in a case where a prospective parent must choose between implanting one of two embryo’s: X who will be disabled and Y who will not, she has little reason to choose Y over X, provided it is the case that X’s life will not be so terrible, that he or she, once born, would have a rational preference not to exist. For, in such cases her choice is a choice between lives. X could not exist born without his disability and y could not exist with it. In other words, being brought into existence suffering from a disability cannot be said to constitute a harm for X. For, whilst he might rationally prefer a life without his affliction, the alternative for him is not a life without the effects of his disability, but no life at all. His disability is a condition of his very existence and his life, being unquestionably worthwhile is not a burden to him and we can hardly protect his interests by preventing his very existence.\textsuperscript{122} This has led some to view non-identity, not as a problem to be solved, but as an argument, suggesting that whilst many of us would \textit{prefer} our children were not subject to a disability and would \textit{prefer} to live in a world free from disability, what we \textit{prefer} tells us nothing about the moral character of decisions regarding whether or not to have offspring with disability.\textsuperscript{123}

2.4.2.2. A Focus On Harms To Others

In virtue of the conclusions of the non-identity problem and their implications for the notion that we may support the obligation to avoid disability in our offspring by appeals to the interests of the children created as a result of our selection choices, some have suggested that we look to the harms that our selection decisions have the potential to impose on others.

Historically, arguments based on the distribution of resources and the notion that one should take into account the interests of other members of society when considering procreation were relatively easy to find and can be traced back to ancient Greece where it was common for parents to ‘expose’ deformed and disabled infants to the elements, believing they would constitute a drain on resources whilst contributing little of value to society.\(^{124}\) This type of argument however is often shied away from for fear of association with the discredited and openly despised eugenics movements of the 19th and early 20th centuries that has, among other things, on its hands the blood of those disabled and undesirable persons killed and sterilised in Nazi Germany. As such, the question of whether an obligation to select against disability may be grounded in appeals to the interests of others has been relatively neglected in recent academic literature.

Yet, whilst this is the case some writers have attempted to address this question. Melinda Roberts, for example has asked whether we might ground an obligation to select against disability in our offspring in the burdens that our decisions might impose on those to whom we have partial duties such as our existing dependents.\(^{125}\) Fahmy has noted that we might ground a duty to select against disability in notions of ‘civic responsibility’ by suggesting that “it is irresponsible to deliberately create a child who will require significantly greater public assistance in order to pursue normal development and a happy and meaningful life”\(^{126}\) and David Heyd has noted similarly that if decisions not to avail oneself of pre-implantation and pre-natal selection technologies are likely to impose significant costs on existing members of


\(^{126}\) Fahmy, ‘On the Supposed Moral Harm of Selecting for Deafness’, p. 133.
society there may be good reasons to regulate “by direct and indirect means the medical practices which might reduce these costs.”\footnote{127}

2.4.2.3. A Focus On Impersonal Considerations

A more commonly found argument suggesting a duty of disability avoidance on the part of prospective parents appeals not to the interests of the child created or the interests of others but to the supposed irrationality of a choice not to select against disability. For, it has been suggested that whilst, in line with the conclusions of the non-identity problem, those who choose not to select against disabling genetic traits in their offspring are not likely to harm the child they create such a choice nevertheless constitutes an irrational decision as it represents a choice to live in a world that is worse in some or other way – a world that contains more suffering, more pain, less opportunity, less pleasure etc. – than it could have been had a different choice been made.\footnote{128} The most famous of arguments falling into this camp is likely that of Savulescu’s Principle of Procreative Beneficence which suggests that in the absence of adequate justifying reasons “couples or single reproducers should select the child of the possible children they could have, who is expected to have the best life, or at least as good a life as the others based on the relevant available information”\footnote{129} because “selecting the most advantaged child would make the outcome better, even if it is not better for the child created.”\footnote{130}

Similarly, those concerned with questions of distributive justice have also suggested that we might ground a duty to select against disability in impersonal considerations. Allen Buchanan, for example, has stated that the advent of pre-implantation and pre-natal selection technologies means that “those who believe that justice is concerned with the effects on individuals’ life prospects [are] no longer... able to assume that justice requires only that we compensate for bad luck in the natural lottery by intervening in the social lottery.”\footnote{131} He thus suggests we should “abandon the simple picture of justice being about distributing goods among individuals whose identities are given independently of the process of distribution, and...revise certain basic assumptions about the relationships between justice, human nature, and moral progress”\footnote{132} and

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\textit{\footnotesize 128 See, for example: Bennett and Harris, ‘Are There Lives Not Worth Living? When Is It Morally Wrong to Reproduce?’, pp.321-335; Glover, Choosing Children, p. 414.}
\textit{\footnotesize 129 J. Savulescu, ‘Procreative Beneficence: Why We Should Select the Best Children’, Bioethics, 15/5-6 (2001), p. 413.}
\textit{\footnotesize 131 Buchanan et al., From Chance to Choice: Genetics and Justice, p. 64.}
\textit{\footnotesize 132 ibid., p. 63.}
accept that if we are committed to compensating people for poor genetic luck, it is incoherent to deny that if it is possible to prevent conditions of poor genetic luck we should do so.\textsuperscript{133}

The type of argument set out by Harris, Glover and Savulescu has been the subject of a great deal of criticism. Some have suggested that appeals to impersonal harms devalue those who are disabled by suggesting that their lives are worth less than those of non-disabled persons.\textsuperscript{134} Others have suggested that “complex concepts, such as those of the good life, the best life, and human flourishing, are not reducible to simple elements or constituent parts which might be identified by the testing of embryo’s”\textsuperscript{135}, and that as such, principles based on impersonal harms are ‘undetermining’ and thus often unworkable.

Yet, whilst such is the case a great deal of the criticism faced by the arguments above is based less on their implications and more on their impersonal nature and the fact that claims of impersonal harm are often dismissed out of hand. For, even if it is possible to determine what it is that makes a life go well and such determinations can be made at a foetal stage and it can be shown that such arguments do not discriminate against the disabled it is still the case that whilst the concept of person affecting harm intuitively makes sense, the idea that harm may also be impersonal – floating free and attaching to no entity – is often considered to be baffling. Arguments such as those above entail a commitment to the view that welfare, justice, happiness, equality etc. are values we should seek for their own sake as opposed to values sought in virtue of the tangible benefits they produce for currently existing and future members of society, that a world can be better or worse than another even if such worlds contain two entirely different populations. Yet, whilst this is so, such a suggestion flies in the face of the prescriptions of ‘the slogan’ adopted by many modern moral and political philosophers: “one situation cannot be worse (or better) than another if there is no-one for whom it is worse (or better).”\textsuperscript{136} Indeed, even where we do not dismiss appeals to impersonal harms out of hand, it should be noted that those who appeal to impersonal considerations, as providing us with reason to act in certain ways, will struggle to formulate an account of impersonal harm that does not lead to some seriously unpalatable conclusions.\textsuperscript{137}

\textsuperscript{133} \textit{ibid.}, pp. 61-86.
\textsuperscript{135} Parker, ‘The Best Possible Child’, p. 281.
2.4.2.4. A Focus On Deontological Considerations

Attempts to ground a duty to select against disability that fall into this fourth category are in fact remarkably similar in nature to a number of arguments outlined in subsection 2.4.2. For, they focus, as did such arguments on the role specific duties that prospective parents might have in relation to their prospective offspring and the kinds of virtues that a good parent should possess. Thus, just as the arguments in subsection 2.4.2 suggested that a selective mentality when it comes to procreation is incompatible with the concept of ‘the good parent’ others have suggested that appeals to the concept of the good parent actually provide us with compelling reasons to select against disability in our offspring.

The most famous of such arguments is likely Steinbock and McClamrock’s “principle of parental responsibility” that requires persons to “refrain from having children unless certain minimal conditions can be satisfied… that in deciding whether to have children, people should not be concerned only with their own interests in reproducing. They must think also, and perhaps primarily, of the welfare of the children they will bear, [as] loving, concerned parents – will want their children to have lives well worth living.”

Saenz, suggests similarly, in line with a virtue ethics framework, that where a genetic trait is genuinely necessary for a child’s flourishing “then it is reasonable to claim that parents have a moral obligation to provide those traits.”

Yet she, as did those noted above who critiqued the Principle of Procreative Beneficence on the grounds that it is undetermining, questions how many traits there are on which flourishing actually depends.

Steinbock and McClamrock’s argument that loving parents should want to ensure their children have lives of much higher quality than the zero line, minimal condition implied by acceptance of the non-identity problem has been widely cited by those concerned with reproductive ethics. However, it has also been suggested that the conditions it sets do not seem to imply that disability avoidance will always be the correct route to follow as one can safely assume, in scenarios such as the much publicised case of Duschesneau and McCullough, that those who deliberately set out to produce a child who shares the same disability as them are at an epistemological advantage over those who do not have the condition to judge the life prospects.

140 ibid. p. 506.
of their future children\textsuperscript{142}. Indeed, as one can see by looking to the plurality of visions and versions of the good life within society, it will be the case that many persons with disabilities can have lives that are “well worth living” and that accordingly Steinbock and McClamrock’s argument is weaker than it may seem. For, those who deliberately create disabled children or do not actively seek to prevent their existence may often legitimately bet on the fact that their children, once born, will greatly value their lives.

2.5. CONCLUSIONS

Within this chapter existing arguments suggesting that there should be moral and/or legal limits placed on the practice of selection against disability were outlined and explored. This was done in order to provide a background for the discussions that will follow later on in this thesis and in order to help me to identify areas of this debate ripe for further and more detailed discussion in the thesis articles. Taking as a baseline a presumption in favour of the liberty of reproducers I thus explored two classes of liberty limiting arguments: those which suggest that selection against disability should be condemned and those which suggest, conversely, that selection against disability should be morally and/or legally required.

In section 2.3 arguments which suggested that selection against disability should be morally condemned for reasons relating to discrimination against disabled persons, the notion that disability is a social as opposed to a medical problem, the idea that it wrongfully treats our future children as a means to an end, the idea that it is incompatible with parental virtue, and the idea that the availability of such selection may pose threats to common notions of social solidarity were outlined. Existing rejoinders to such arguments in the academic literature were also noted and it became apparent that the vast majority of the academic community does not find such arguments to be compelling enough to prohibit selection against disability.

For, it seems to be the case that such arguments are either unconvincing when subjected to philosophical scrutiny (selection is incompatible with parental virtue, selection necessarily expresses discriminatory attitudes), only convincing to a certain extent (disability is socially constructed) or based on slippery slope arguments and projected consequences that may easily be protected against. Thus, provided we ensure, for example, that we do not allow the use of such technologies to affect our attitudes towards existing disabled persons, that we do not hold future children responsible for their parents reproductive choices and that those who wish to

select their offspring do not allow a selective mentality when it comes to reproduction to translate into a selective kind of love once their children are born, there seems little reason to condemn such selection.

In section 2.5 I moved on to provide an account of philosophical arguments suggesting that selection against disability is not only a permissible reproductive choice, but also may, in fact, be morally required. I began first by exploring the selection against disability view itself and the ways in which it has been expressed within philosophy and society as a whole. In doing so, it was shown that the selection against disability view is a view that is more widely held than is often assumed. For, it can be seen in societal attitudes towards those who select for disability in their offspring and those who choose not to avail themselves of prenatal and pre-implantation screening procedures, in the structure of the practice of reproductive medicine, in the legal rules in England and Wales regarding the use of assisted reproductive technologies and abortion as well as within the philosophical arena. Yet, it was also shown that the arguments often given in support of a duty of disability avoidance are generally viewed to have significant limitations or have not been truly unpacked in the philosophical literature.

2.5.1. REFLECTIONS: NARROWING THE FOCUS

As can be seen from the conclusions of this chapter the ethics of the use of selective reproductive technologies for the purpose of disability avoidance touches on a great number of important philosophical questions. Such questions include but are not limited to the moral status of the foetus and embryo, parental duties and virtues, the value of the exercise of personal autonomy and how a presumption in favour of the exercise of autonomy should be balanced against the interests of the children we may create, the interests of existing citizens generally and specifically such as disabled persons and women, as well as how our choices in the reproductive realm affect the state of the world generally and whether this should matter.

Because of the sheer size of the existing literature it has become apparent that a more selective approach to the ethics of selective reproduction is necessary in the articles that make up the bulk of the thesis. As such, certain of the questions within the philosophical and legal background are to play a less central role in the remainder of the thesis than they might have done. Throughout the rest of this thesis I shall thus be focusing on questions of the person-affecting harms that have been said to result from their use and whether or not these harms can be said to be of sufficient gravity to ground a moral obligation to select against disability in our offspring in certain situations. As such, I will not be focusing on questions of the intrinsic rights and wrongs of selection decisions or on the impersonal harms that may result from such decisions.
Part of the reason for this choice is personal preference. For, I find the notion of an independently discoverable moral law and appeals to free-floating and impersonal harms to be bizarre and thus prefer to situate my questions within the person affecting tradition and analyse the affects of our actions in order to answer questions of morality. Another reason for this is that I wish to challenge the assumption that person affecting accounts of morality, whilst highly useful when discussing the rights and wrongs of acts relating to extant persons, come up short in the reproductive context by producing highly counter-intuitive prescriptions such as can be seen by consideration of the non-identity problem which flies in the face of common-sense beliefs regarding pre-natal harm. Yet, for the most part this decision is the result of pragmatism. For, this project focuses not only on questions of ethics but of legislation too. “The branches of the law that most closely concern procreation – tort law, family law and… privacy law – are intransigently person-affecting in nature. They protect persons from harms and from risks of harms [and] do not recognize wrongdoing when there is and can be no claimant” and “conduct that does not involve a loss of wellbeing for any person, existing or future… [is] legally invulnerable.” Thus, it seems that if the aim of this project is to create a body of work that can be linked together, an enquiry into the person affecting harms associated with selection against disability is the most appropriate.

As such, in pursuit of an answer to the central question to be addressed in this thesis: ‘Can there be a moral obligation to select against disability in our offspring?’ I have decided to focus on three questions throughout the remainder of this thesis. These are set out below.

2.5.2. THESIS QUESTIONS

2.5.2.1. In virtue of the conclusions of the non-identity problem, can it ever be appropriate to ground a moral obligation to select against disability in the harms that our reproductive choices might impose upon our offspring? (Article 1)

Throughout this chapter it became apparent that when speaking of the ethics of prenatal selection against disability, most claims regarding the rightness or wrongness of selection decisions that focus on the interests or welfare of the child created seem to be blocked by the fact that should selection not have occurred the children we intuit to be harmed or benefited by

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143 See, for example: Parfit, Reasons and Persons, p. 378.
144 Roberts, ‘What Is the Wrong of Wrongful Disability? From Chance to Choice to Harms to Persons’, p. 11
145 *ibid.*
our choices would not exist (see ss. 2.3.3 and 2.4.2.1). For, provided the conditions of any particular child’s existence cannot be said to cause them such great harm that they would rationally prefer not to exist, it is generally suggested that there is little reason to praise, condemn, require or prohibit any form of selection on the basis of the interests of the child created.

With this in mind and because the conclusions of the non-identity problem in areas relating to selection and beyond are generally viewed to be so counter-intuitive, I have decided within the first article of this thesis to explore the implications of the non-identity problem for cases of prenatal harm. This is done in order that I may firstly contribute to and forward existing debates regarding non-identity and secondly that I may apply this work to questions of whether there might be moral duty to select against disability.

2.5.2.2. Is it possible to ground a moral obligation to select against disability by consideration of the harms that our reproductive choices might impose on others? (Article 2)

Throughout this chapter it was also shown that arguments suggesting a moral obligation to, and a moral obligation not to, select against disability in our offspring, have been made on the basis of the harms that our selection decisions may impose on others. Those within the disability rights community, for example, have suggested that a decision to select against disability may ultimately harm them by expressing a negative attitude about their disabilities (see: ss. 2.3.2.1) or by possibly leading to reductions in services for them in the future (see: ss. 2.3.4).

Yet, whilst arguments focusing on the harms that may be imposed on others as a result of selection against disability are well represented in the literature and much journal space has been devoted to these observations, it was shown that arguments focusing on the broader person-affecting harms that may result from a failure to select against disability have not, at least in recent years, been so well addressed in the literature.

I found it highly interesting that those who appeal to consequentialist arguments in order to ground a duty to select against disability have tended to jump straight into claims of impersonal harms after they have found claims of harm to the child to fail without looking first to the question of harms to others. As such, I attempt to make sense of this and to fill this gap in the literature by outlining and examining the least well known set of arguments in the academic literature suggesting a moral obligation of disability avoidance: those which attempt to ground
such a duty in the harms that a failure to do so may impose on other individuals than the child created.

2.5.2.3. Should our moral prescriptions regarding the act of selection against disability be translated into law in a liberal democracy such as England and Wales? (Article 3)

During this chapter much space has been devoted to philosophical arguments regarding selection against disability and comparatively little devoted to questions of legislation and policy except in cases to show where moral arguments and public sentiments relating to this practice have resulted in legislative provisions. This was partly because discussions within legal and policy documents of the matter of selection against disability tend to closely mirror the philosophical debates in this area and it seemed foolish to replicate them. Yet, whilst this is so, on reading the legal and policy documents relating to this practice I became highly interested in the question of the kinds of moral arguments to which we may appeal in a liberal society such as England and Wales as justifying a particular legislative provision.

As such, after outlining an account of the moral limits of law in a liberal society in the following chapter, within the third article contained in this thesis I critically explore and examine the reasons set out in existing legal and policy documents, as providing justification for the insertion in the 2008 HFE Act of a provision prohibiting selection for disability.\footnote{Human Fertilisation and Embryology Act 2008, s. 14 (4) (9).}
CHAPTER 3

PHILOSOPHICAL AND LEGAL APPROACH

3.1. INTRODUCTION

In order to address the questions outlined at the end of the previous chapter in my thesis articles, there are a number of prior questions I need to answer. Relevant to all three of the thesis articles for example, is the question of what it is to cause harm or benefit to someone and when such harms or benefits should be deemed morally and/or legally relevant. For, absent an answer to these questions it is, of course, impossible to discuss sensibly the real or perceived harms and benefits that have been said to result from decisions to, or, indeed not to, select against disability in our offspring. Relevant to the first article is the question of what it is for a particular numerical entity to persist through time and change: of what it is that is important when determining personal identity over time. For, as will be shown in Article 1: ‘Possible Persons and The Problem Of Pre-Natal Harm’, dependent on the answers we give to this question the kinds of scenarios in which the non-identity problem can be said to arise differ greatly and so too do the kinds of arguments we might offer in response to the non-identity problem. Finally, relevant to the third article are the questions of the roles that the law should properly be seen to inhabit and the extent, in virtue of this role, to which its contents should mirror prevailing moral sentiments. For, dependent on the answer we give to this question we may find that certain moral arguments that may be used to justify our moral prescriptions regarding selection for or against disability may not be used in order to justify legislative provisions. As such, within this section I shall outline the approaches to be taken in the three articles regarding these questions.

3.2. ON HARMS AND HARMING

That this thesis focuses greatly on questions regarding the extent and occurrence of harm is unsurprising given my commitment to a broadly person affecting approach to questions of ethics. Indeed, claims regarding the moral significance of harm can be found virtually everywhere. Mill’s harm principle, for example, “requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such
consequences as may follow: without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.” Ross suggests that we have a prima facie duty of non-maleficence - not to harm others. The Hippocratic oath too contains much reference to harm: “I consider for the benefit of my patients, and abstain from whatever is deleterious and mischievous… Into whatever houses I enter, I will go into them for the benefit of the sick, and will abstain from every voluntary act of mischief and corruption.” Indeed, much of contemporary deontology too is “concerned with attempts to distinguish between doing and allowing harm and with justifying non-consequentialist constraints against harming others” although this, of course is not my focus. Despite this fact however and the importance that is often attached to harm and harming in moral philosophy and elsewhere:

Almost nobody bothers to say what it is. This would not be a problem if harm were a primitive, undefinable notion, and if there were no significant disagreements about what counts a harm. But harm is not plausibly a primitive undefinable notion. And there are significant disagreements about what counts a harm. So, it is incumbent on philosophers to say what it is.

As this is the case I will now discuss two things. Firstly I will explain what is meant throughout this thesis when it is stated that some particular numerical person (p) has been harmed by some act or occurrence and why I have chosen to take this particular approach to harms and harming. Secondly, I will explore the question of when we can state that some other numerical person can be said to have unjustifiably harmed another in both a moral and a legal sense.

### 3.2.1 WHAT IS IT TO BE HARMED?

When it comes to questions of harm and harming there is one thing that is certain: harm is not something that can happen to all things. We do not and cannot harm a painting by slashing it, a stone by skipping it or a mirror by breaking it and this is because harm is something that is experienced and thus only experiencers (sentient creatures) can be harmed. Most accounts of harm currently on offer within the academic literature are also state-based accounts and I follow such accounts in viewing that “to suffer harm is to be put into (or is perhaps simply to be in) a

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151 *ibid.*
certain sort of bad state or condition… [and] a harm’s status as a harm derives from the badness of this state.” Yet, whilst this is the case, there are two distinct classes of state-based accounts of harm to which it is possible to hold an allegiance.

The first class is comparative in nature, holding that “to suffer harm is to be put into a certain sort of comparatively bad state – a state that is worse for one than some relevant alternative state.” Examples of such accounts are that of the diachronic/temporal and subjunctive historical accounts of harm. According to the diachronic/temporal account some particular action (or inaction) (a) done at time t₁ is harmful iff it causes some person (p) to be worse off at some later time t₂ than they were at t₁. On this account then we can state that Phillip (p) is harmed when he is shot in the chest (a) because he was better off before the shooting occurred and a’s occurrence has thus made him worse off. According to the subjunctive historical account, made famous by Feinberg in his counterfactual account of harm, some particular action (or inaction) (a) done at t₁ is harmful for p if and only if (iff) it causes p to be worse off at t₂ than they would have been at t₂ had (a) not occurred. On this account harm is determined a little differently, by looking to the counter-facts, the ways things could have been. P will be determined to be harmed when he is shot in the chest (a) not because he was better off at t₁ (before the shooting occurred) than he is at t₂ (after the shooting occurred) but because: by looking to the possible states of affairs that could have obtained we can see that he would have been better off at t₂ had events turned in a different way and he had not been shot. In other words, the difference between what could have been the case for p, and what turned out to be the case for p is, on the subjunctive historical account what constitutes the harm p suffers.

The second class of state based accounts however, are non-comparative, holding that “to suffer harm is to come to be in—or perhaps better, is simply to be in—a certain sort of non-comparatively bad state. It is to come to be in (or is simply to be in) a state in which one fares, not worse than one fared, or would have fared, in some alternative state of affairs, but simply badly. The seriousness of a given harm, according to this way of thinking, is proportionate to the (non-comparative) badness of this state.” The accounts of harm forwarded by Harris, Shiffrin and Harman are all examples of non-comparative accounts. Harris, for example, holds that a particular individual can said to be harmed when it is simply the case that he has been put into a condition that is harmful, a situation “in which the individual is disabled or suffering in

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155 Ibid., p. 422.
some way or in which his interests or rights are frustrated."\(^{156}\) Shiffrin similarly suggests: “To be harmed primarily involves the imposition of conditions from which the person undergoing them is reasonably alienated or which are strongly at odds with the conditions she would rationally will”\(^{157}\) and Harman too suggests that to harm someone is nothing more or less than to be responsible for his being in a ‘bad state’: “to be in pain, to be in mental discomfort, to be in physical discomfort, to have a disease, to be deformed, to be disabled, or to die.”\(^{158}\)

Generally, however, comparative accounts of harm are thought to be more compelling than non-comparative accounts and this is because when we state that some particular numerical entity (p) has been or will be harmed by some particular event or occurrence we are not normally seeking merely to identify p as an entity who suffers. Our concept of suffering after-all does this job well enough. Instead, it is thought that when we identify some particular person as harmed we are identifying him as an entity that has been made worse-off as a result of some particular event or occurrence and thus that to harm someone is primarily to cause someone harm and to be harmed is to be caused harm. We tend therefore to assume that to be worse off than others or to be in a state where we are suffering, whilst unfortunate for us is not harmful to us unless it is the case that we could have been better off if some particular act had not been performed or if some other act could be done to elevate our position and ameliorate our suffering without worsening the position of others significantly. That p suffers or is worse off than others, will, of course, be morally relevant, as we should seek always to avoid the imposition of unnecessary suffering and to ameliorate such suffering where we can. However, where we can neither avoid its imposition or work towards its amelioration it does not seem appropriate to state that p is harmed.

We assume, for example, that whilst it may be unfortunate that Melissa lacks legs in virtue of the fact that her life would be preferable to her if she was able to walk on the beach, up the stairs or to work she will not be harmed by being in possession of the property ‘lacks legs’ if it is the case that there is no possible state of affairs in which she has them. That she lacks legs may well be unfortunate for her but she seems to be harmed only if others respond to her possession of this property inappropriately. She might, for example, be harmed if we fail to provide her with a wheelchair or prosthetics or if we point and laugh at her or discriminate against her when she applies for a job for which the possession of legs is not necessary.


Similarly, among comparative accounts subjunctive historical accounts tend to be held to be more compelling than diachronic/temporal accounts. This is because on the temporal/diachronic account worsening is held to be both a necessary and sufficient condition for a determination of harm and this too seems incorrect. For, as Roberts states:

“A person can be made better off, or at least not worse off, from one moment to the next and still incur a loss [harm]. The reason we think that the surgical team who has done a sloppy job restoring your vision – you can now see, but not well – has caused you to incur a loss is that we understand that the team could have done more for you than it has... That you are better off does not mean you have not been harmed or that you have not incurred a loss.”

With this in mind, within this thesis when I state that some particular person (p) has been harmed by some particular event or action (a) I use the term harm to mean:

**Harm:** p is harmed when it is the case that p’s interests – defined as distinguishable components of his welfare – have been set back, thwarted, defeated or not improved as much as they could have been as a result of a, or, counterfactually, that p is worse off than he would have been had a not occurred and some other event occurred instead.

### 3.2.2. WHAT IS IT TO BE HARMED IN A MORALLY OR LEGALLY RELEVANT SENSE?

On the comparative counterfactual account of harm sketched above it can be noted that p will be harmed when it is the case that he is shot by x in the chest, when y gives him five pounds when he could have given him five hundred, when a surgeon does a sloppier job than he could in restoring his vision and when he is struck unawares by lightning or bitten by a dog. In all of these cases p has a valid claim to being harmed. In fact p can be said to be harmed in virtually all scenarios where we do not act in a way that maximises his welfare such as when we fail to buy him a Ferrari if to do so would increase his wellbeing. That this is the case is sufficient for the first paper, of which the aim should be seen to be an attempt to determine when and whether it is possible to harm a particular potential or future person by acts done to it prior to birth.

Yet, it is not enough for the second and third papers which examine the question of not only

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160 Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others*, p. 34.
when some particular person can be said to be harmed by some act or omission but when such harms can be said to be morally and/or legally relevant, that is, when such harms also constitute a wrong. A wrong occurs only when some harm can be causally linked to an act or omission on the part of a moral agent (a being capable of right and wrong). So, for example, we can note that when p is shot in the chest by x, provided x is a moral agent, x’s actions will, in the absence of adequate justificatory reasons (such as self-defence or temporary insanity), be highly likely to constitute both a harm and a wrong. Yet, we can also note that when p is struck by lightning, whilst he is harmed by this occurrence, he is not wronged, because lightning cannot wrong. Similarly in the case of the dog bite, if the dog is a stray, p will be harmed but not wronged by the bite as dogs are, like lighting, not moral agents. If the dog is not a stray however, we might suggest that whilst the dog is not morally responsible for the harm that befalls p, his owner might be. Thus, dependent on the circumstances in which the bite occurred p may have been wronged and the dog’s owner might be morally and legally accountable for the wrong that occurred.

As can be seen above there are at least two barriers for a determination of a normatively or legally relevant harm. The first of these relates to moral agency as only those who are capable of right and wrong can harm someone in a normative sense. The second relates to the circumstances in which the harm occurred and whether such harms can be justified. Thus, we can alter our definition of harm for normative cases of harm:

**Normatively relevant harm**: p is harmed in a normatively relevant sense when it is the case that some particular morally responsible agent (x) has unjustifiably set back, thwarted, defeated or not improved as much as he could, p’s interests or, in a counterfactual sense, that p is worse off than he would have been had x not done what he did or performed some other action instead, and x’s act cannot be justified by appeals to other normative considerations.

Dependent on the moral theory to which we subscribe vastly different conclusions regarding when a harm may constitute a wrong, can be arrived at. Yet, whilst this is so, as has been noted above, my allegiance in this thesis lies with a person affecting, consequentialist account of morality. On this account, which is broadly welfarist, it is held simply that right actions will be those which forward the good: lives going well for those who live them, and wrong actions will be those which contribute to lives going poorly. As such, a harm is deemed morally relevant in cases where it can be shown that the benefits for individuals accrued from an act do not outweigh the harms the same act produces.
Similarly, we can alter our definition of harm for legal cases such that it reads:

**Legally relevant harm:** p is harmed in a legally relevant sense when it is the case that some particular legally responsible agent (x) has unjustifiably set back, thwarted, defeated or not improved as much as he could, p’s interests or, in a counterfactual sense that p is worse off than he would have been had x not done what he did or performed some other action instead and x’s act cannot be justified by appeals to existing legal principles and rules.

### 3.3. ON THE IMPORTANCE OF PERSONAL IDENTITY FOR HARM CLAIMS

In order to address the first of the thesis questions consideration needs not only to be given to questions of what it is to harm someone in a morally relevant sense and by what standard we determine that which is right and wrong but also to the question of what it is for a particular numerical person to persist through time and change. After-all, on a person affecting account of morality judgements regarding the occurrence of and the extent of a particular harm or benefit will differ depending upon one’s theory of personal identity over time.

As has been noted above, *the conception of harm and benefit appealed to in this thesis is comparative* and as such before deciding whether our acts are harmful or beneficial or claim that an individual must be compensated for harm incurred, it must first be determined that the individual whom we claim is harmed is the same person to whom the harm occurred.

There are a great number of views and intuitions regarding what it is that constitutes the nature of personal identity and before we can determine whether a particular person is the same person that he was at some earlier time, it must first be decided what it is that furnished him with his distinct personal identity in the first place. In the absence of appeals to noumenal entities such as souls and Cartesian Egos, which by their nature are independent of the senses and accordingly unknowable, there are limited options for a *testable* criterion of personal identity. In denying appeals to separately existing entities we commit ourselves to the idea that persons can consist only in the sum of their parts. As “each person’s existence just involves the existence of a brain and a body, the doing of certain deeds, the thinking of certain thoughts, the occurrence of certain events, and so on”\(^\text{161}\) we have only two real options when attempting to determine

\(^{161}\) Parfit, *Reasons and Persons*, p. 211.
what it is that makes one person the same person over time and change: the continuity of either biological or psychological features:

1. **The Biological/Physical Approach:** What is important in personal identity over time is *physical continuity*. Thus, for persons, just as for all physical objects one’s being the same numerical entity over time consists in one’s being the same particular physical thing over time and as persons are primarily biological organism’s if \( x \) is a particular numerical person at time \( t \) and \( y \) is a particular numerical person at \( t^* \), \( x = y \) iff y’s biological organism is continuous with x’s biological organism.\(^{162}\)

2. **The Psychological Approach:** One’s being *psychologically continuous* with past and future entities is that which is important in personal identity over time. Thus, if \( x \) is a particular numerical person at time \( t \) and \( y \) is a particular numerical person at \( t^* \), \( x = y \) iff \( y \) is psychologically continuous with \( x \).

The second option seems to be most in line with our intuitions regarding the persistence of personal identity over time when dealing with sentient creatures such as human beings. This is so because, regarding the Biological/Somatic criterion, whilst we instinctively view our own identities and the identities of those we hold relationships with in a biological sense – I am an adult, I was a teenager, I was a child, I was an infant and before that a foetus – on reflection not all of these time slices despite bodily continuity, seem to be important when it comes to discovering what it is that makes me, me, (or my friends, family and acquaintances themselves) over time as we are not most importantly physical organisms but *psychological persons*. This can be illustrated easily when considering scenarios of relatives of patients with late stage dementia or in persistent vegetative states who tend to comfort themselves when seeing their once vibrant and independent loved one’s loss of dignity with the rationalisation that this person, whilst physically identical with the person they loved is no longer that person, cases of full body transplants and with the following thought experiment:

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\(^{162}\) Traditionally it has been held that for person’s \( x \) at \( t = y \) and \( t^* \) iff it is the case that \( y \) shares the same physical brain and/or body. Yet, whilst the material composition of an object such as a table is unlikely, in the absence of a Ship of Theseus type scenario, to change greatly over time, the material composition of living things changes constantly as cells are replaced and regenerated in order to maintain and improve biological function. As such a less controversial approach seems to be to appeal instead to a particular living organism that whilst originally constituted from certain particular physical materials, undergoes constant physical change as part of its very nature. For an account of the Biological Criterion please see E. T. Olson, *The Human Animal: Personal Identity without Psychology* (Oxford: Oxford University Press, 1999), pp.125-153.
**Alexis’ New Job**

“It is 2056 and I am a newly qualified engineer heading to my first day of work overseeing the construction of new housing ... on Mars. A new technology has just been invented which means that I need not take the shuttle to work as did my predecessors as I can step into a machine that will scan my brain and body and immediately create an exact replica of me at the space station where I work. In scanning me the new technology destroys my body and it’s weird to think that every workday I will essentially live in three different bodies but it’s something I think I can live with. After-all, the shuttle would take two weeks to transport me to Mars and I have a wife and two children who miss me terribly when I am away, so, that I can come home every evening after work is very congenial to me.”

Were we to argue that what is of importance for Alexis’ persistence over time is the continuation of the life of his organism it would seem that Alexis’ positive attitude towards the new technology that he views will transport him to work rapidly and allow him to spend more time at home with his family is mistaken. For, by entering the machine he would not be agreeing to use a new method of transportation but would instead be agreeing to death. The men who would do Alexis’ work on Mars and come home to his wife and children before heading to work again the next day would be both physically and psychologically identical to Alexis, but they would not be that which is important about him for what is important is his being the same physical thing that he was at some earlier point in time. Should Alexis then choose to take the shuttle to work and only see his wife and children a couple of times a year despite the fact that it could instead be the case that a different biological organism could come home after work each night to spend time with them? Should Alexis’ children prefer a living yet absent father to a set of different men that are psychologically continuous with him, love them and want to come home to them every day? Should Alexis’ wife grieve for the death of her husband and slam the door on the replica when he comes home after work in the evening with a bottle of wine and the newest instalment of their children’s favourite book series? It seems unlikely that many of us would answer these questions positively and this leads to the conclusion that when it comes to deciding whether physical or psychological continuity is that which is important for personal identity the persistence of psychological features is key.

What, however, are these psychological features that are so important for the persistence of personal identity? Until recently Locke’s Memory Criterion which is well summarised by Flew as essentially the idea that “if anyone can remember doing something then necessarily –

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163 This thought experiment is a condensed variation of Parfit’s Teletransporter Case. See: Parfit, Reasons and Persons, chapter 10.
according to Locke's account – he is in fact the same person as did that deed”\textsuperscript{164} was the most common of the psychological approaches. Yet, it is an approach with distinct flaws that even Locke himself noted such as the fact that a lack of memory during periods of sleep do not seem to obliterate personal identity, person’s can hold false memories, and that memories fade and sometimes disappear altogether\textsuperscript{165} resulting in paradoxical scenarios such as the following:

\textit{Charlotte and the Memory Criterion}\textsuperscript{166}

Charlotte is reprimanded by a teacher for continually forgetting to bring her Latin vocabulary book to school (t1). 20 years later, when her own child is reprimanded by teachers for a similar reason Charlotte remembers the experience and laughs (t2). Thirty years later Charlotte remembers her daughter’s distress over the detention but no longer remembers the similar experience that she had as a child (t3).

According to the Memory Criterion, Charlotte, whilst continuous with t1 at t2 and continuous with T2 at T3 is not continuous with t1 at t3 and therefore is, in t3, the same person as at t2 but not the same person as she was at t1 despite the fact that she, at t2, was continuous with herself at t1. As logic requires that if A bears some relation to B and B bears the same relation to C, A must also bear it to C it seems that the memory criterion is too narrow, violating the transitivity of identity. For the psychological approach to provide a plausible account of personal identity memory cannot be our only criterion as, our criterion of identity “must have the same logical form as the relation of identity itself, and identity is both transitive and all-or-nothing (that is, there cannot be degrees of identity).”\textsuperscript{167}

As such, it is held that for a psychological account to prove plausible relations of psychological continuity must appeal to more direct psychological connections than memory alone such as the connection “which holds between an intention and the later act in which this intention is carried out” and the connections required for the holding over time of a belief, a desire, a goal or any other psychological feature as well as indirect psychological relations which will allow that Charlotte can be the same numerical person at T1, T2 and T3 despite a lack of memory because that which occurred at T1 will still have left its mark on her identity by it’s influence on her at


\textsuperscript{165} John Locke, \textit{An Essay Concerning Human Understanding} (Oxford: Oxford University Press, 2008), book II, chapter X.


T2. As such we might formulate the persistence conditions for persons as follows: if x is a particular numerical person at time t and y is a particular numerical person at \( t' \), \( x = y \) iff y is uniquely psychologically continuous with x where psychological continuity is defined as “the holding of overlapping chains of strong connectedness”\(^{168}\)

Yet whilst this solves the above problem, a major issue for the psychological approach is that it is very difficult for those who subscribe to it to give a sensible answer that doesn’t violate the transitivity of identity when faced with cases of fission. In such cases we are faced with a person (p) who at some particular point in time divides into two resultant persons, both of whom are psychologically continuous with p and candidates to be p’s successor. An example of such a case would be that of p having his brain removed from his body and divided in half with each resultant half transplanted into two separate bodies whose brains have also been removed.

The problem fission highlights is that whilst the psychological approach allows for the survival of an individual if just one hemisphere of the brain is transplanted (a distinct advantage for the psychological approach over certain somatic approaches), it does not allow for the idea that P can survive as both persons after fission as due to the fact that identity is necessarily one-one and thus: “if survive implies identity, this description makes no sense – [one] cannot be two people.”\(^{169}\) This, of course, leaves us with the surprising conclusion that whilst we would survive if just one brain hemisphere was transplanted and the other destroyed, we would die if both were successfully transplanted. This seems bizarre as surely if faced with the choice between transplanting one half and destroying the other or transplanting both halves into two different bodies, most of us would prefer to have both transplanted as we are inclined to disbelieve that what seems patently to be a double success is a failure.\(^{170}\)

With this in mind, it is held throughout this thesis that prudentially it is not identity itself that matters for survival, but rather the facts in which personal identity consists (psychological connectedness and continuity) that provide it with significance and that, as such, whilst after fission numerical person P no longer exists, the existence of his personal successors is equivalent to his survival. Holding connectedness and continuity as what is important about personal identity as opposed to the relation of identity itself means therefore not only that one can say that biological entity P at T2 is importantly the same person as P at T1 because he holds strong overlapping chains of continuity and connectedness even in cases of fission, but also that in cases where relations of continuity and connectedness are vague or where they only hold to a

\(^{168}\) Parfit, Reasons and Persons, p. 206.


\(^{170}\) ibid.
small degree between T1 and T2 such as in cases of brain damage and early childhood we may suggest that X may or may not be or may only to some degree be importantly the same person as he was at some earlier time and that in cases where X at T2 is not psychologically connected at all to X at T1, such as in cases of late stage dementia or retrograde amnesia, that he is not importantly the same person at all.

3.4. ETHICS, LAW AND THE MORAL LIMITS OF LEGISLATION

In the third of my thesis articles I take on the question of whether the reasons given as justifying the current legal prohibition on selection for disability in English and Welsh Law are both philosophically sound and can be seen as providing valid reasons for a prohibition in a liberal democracy. The answer given in this article hinges, to a great extent, on the discussions contained within the first and second articles of this thesis and the philosophical assumptions underpinning them which have been outline above. Yet, whilst such is the case, it also requires a slightly broader focus. This is so as account must be taken of a number of important differences between ethics and law, and the roles that the law and morality should be seen to properly inhabit.

With this in mind, within this section I outline firstly the ways in which I hold morality and the law to be distinct from one another. I then move on to outline an account of the proper limits of the law in a liberal society such as our own which serves as a grounding for the discussions that follow in the third article.

3.4.1. LAW AND MORALITY: SOME IMPORTANT DIFFERENCES

As can be seen in chapters 3 and 4, the bulk of this thesis consists in an attempt to provide an answer to a number of key questions relevant for the ethics of genetic selection. These relate mainly to questions of the real or perceived harms and benefits to specific numerical persons that may, or may not, arise as a result of a decision to utilise or to fail to utilise reproductive technologies for the purpose of selection of future offspring. Little attention is paid within the first two articles to questions of law and policy and this is because, generally, I hold that one can learn little about the rightness or wrongness of a particular activity by looking to the legal and policy documents that regulate, demand, allow or prohibit its performance that cannot also be learned by applying the tools of analytic philosophy to commonly held beliefs regarding their moral status. With this in mind, it is unsurprising to note that I view, along with the positivists
that “The Law of a State or other organised body is not an ideal, but something which actually exists. It is not that which is in accordance with religion, or nature, or morality; it is not that which ought to be, but that which is” and as such should not be viewed as necessarily providing any more moral authority than documents which hold no legal authority.

Yet, whilst I hold that the question: ‘is it right to do x?’ is an entirely different beast to the question ‘is it legal to do x?’ and that one cannot answer the former by answering the latter, I hold too that the answers we give to the former question when backed up with sound and valid argument should, in many cases, have significant bearing on whether the laws of a particular nation should be amended to reflect that which morality gives us reason to, or indeed not to, do. I note that this will often the case as within liberal societies, which are the only societies with which I am concerned within this thesis, the job to be done by the law is held to be both broader in certain respects, and more limited in others, than the job of morality. For, that which should be legally condemned, demanded or tolerated will not always be that which should be morally condemned, tolerated or seen to have no moral content at all.

It should be noted, for example, that the job of the philosopher concerned with questions of applied ethics is not necessarily to keep everyone happy, or indeed to keep anyone happy. His work will often take place in an abstract arena where ideal theories and traditions of thought are applied to contemporary questions and little concern needs to be given to the fact that individuals often reasonably disagree when it comes to questions regarding political, philosophical and religious matters. For, whilst philosophers need not be concerned when their discussions regarding such matters reach an impasse and may turn their attention to more fruitful debates, reasonable disagreement – where individuals who think and converse in good faith and apply “the general capacities of reason that belong to every domain of inquiry” constitutes a major problem for the law and the law maker. For, the role of the law is not just that of an arbiter of that which we generally deem ‘right’ or ‘good’ or ‘just’ but is also and importantly that of a tool which should be used by the state to provide a practical framework where in the face of such reasonable disagreement its citizens “can nonetheless live together in peaceful political association.”

A good example of the difference between law and morality in this sense can be seen when it comes to questions regarding the moral and legal status of acts such as abortion. For whilst in

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173 *ibid.*, p. 134.
philosophy it is relatively unproblematic that in virtue of very different ontological beliefs concerning the moral status of the foetus, those who hold the most extreme pro-life stances and those committed to the most liberal stances are unable to reach an agreement, acceptance of such differences is just not an option for the jurist. For, to say nothing about the legal permissibility of particular highly contested practices is, in effect, a stance in its own right that whilst admirably progressive, allowing unrestricted freedom to citizens, neither pleases nor placates anyone. Thus, those who make the law must sometimes act as mediators between two or more sides unable to reach compromises amongst themselves, to create rules that whilst fully satisfying neither party and perhaps sometimes being guilty of arbitrariness (as can be seen in the 14 day rule regarding embryo experimentation in England and Wales\textsuperscript{174}) allows them to exist alongside one another with as little friction as possible.

It should be noted too that in many cases the law, in virtue of its practical nature, may create rules that seem directly contrary to the ethical slogan that we must treat like cases alike, for reasons of nothing more than prudence. One might note, for example, that according to the Congenital Disabilities (Civil Liability) Act a foetus, born in a harmed state in virtue of the deliberate or negligent actions of its mother cannot have a cause of action against its mother for harms done to it in utero unless she has been driving dangerously.\textsuperscript{175} This does not apply to anyone except pregnant women who can and have had claims brought against them for such harms. Thus, despite the fact that there seems to be no relevant moral difference between a woman who deliberately ingests known teratogenic substances or exposes herself to them with little care for her unborn child and a manufacturing company that does not provide clothing for its pregnant workers that protects against known teratogens in the workplace, only the company can be sued. This obviously seems unfair as both the mother and the company have acted in a cavalier manner regarding the health of the foetus. Yet, whilst this is so such a law does make sense. For, a child who sues his mother would only deprive her of the money she needs to raise him but to sue her for dangerous driving, or the company she works for, as they did not provide adequate protections to her in the workplace is different. For, in such cases “the damages payable will not come out of [her] pocket; rather they will come out of the pocket of the [her or the company’s] liability insurer.”\textsuperscript{176}

Indeed, whilst it should be noted that laws often do have moral character and may often be justified by appeals to moral principles it should also be noted that where this is the case laws tend not merely to replicate the content of moral norms but also add to them in order to make

\textsuperscript{174} Human Fertilisation and Embryology Act 2008, s. 4(3)(b).
\textsuperscript{175} Congenital Disabilities (Civil Liability) Act 1976, s. 2.
such prescriptions practically workable. An example often given of this is the fact that whilst there exist good reasons not to crash our cars into the cars of others and thus to impose both a legal and moral imperative to drive on one side of the road in order to minimise accidents, morality has no preference as to what side of the road we actually drive on. The law however, can take such moral reasons, choose between equally worthy options (such as driving on the left or the right) and intervene within society to coordinate our behaviours in order to help us do what we already have good moral reason to do.\footnote{J. Gardner, ‘Ethics and Law’, in J. Skorupski (ed.), \emph{The Routledge Companion to Ethics} (London: Routledge, 2010), p. 422.}

3.4.2. ON THE PROPER LIMITS OF THE LAW IN A LIBERAL SOCIETY

Within the above subsection I described some ways in which the roles and functions of the law should be seen to be separate from that of morality. I noted, for example that whilst one should not look to the law for moral authority but to morality as that which gives the law authority, a ‘good’ set of legal rules and prescriptions will not and should not always mirror prevailing moral sentiments in virtue of the laws practical nature. I noted too that the law can not fail to legislate in scenarios where there is considerable disagreement as to the ‘right’ way to act, that the law must add non-moral content to moral prescriptions in order to make them practically workable and that sometimes there will be good practical reasons to condemn a particular act morally, but not impose legal sanctions on that same act.

What I only hinted at however is that in addition to such practical reasons there may too be good moral reasons not to legislate against particular actions, not because we may not condemn them morally, but because whether or not we choose to do so is held to lie outside some principled limit on the state’s power to compel a particular course of action in the citizens from which it is constituted. This, for example, bears on how the law should legislate in cases of ‘reasonable disagreement’ regarding contentious moral questions but also on the moral reasons that we may give as justifying legislation and specifically criminal prohibitions.

There are many different accounts of the purposes for which the state may legitimately use its power to compel a particular course of action in its citizens and how we characterise this depends generally on from what authority the state gains its right to govern. However, as the work undertaken within this thesis regards the principled limits that should be placed on the reach of the state’s power and thus on the limits of the law within a liberal and democratic society it will be assumed that within liberal democracies such as England and Wales, a liberal and democratic framework is appropriate. As such, whether a government is legitimate will be
determined firstly, historically, by looking to the route through which the state gained its power and whether the process by which it gained its power can be said to be truly democratic and secondly by whether it governs in accordance with principles generally agreed upon as providing adequate reason for compulsion in a liberal society.

When Mill published *On Liberty*, he set out the groundwork for a society in which individual freedom, in a moral, intellectual and political sense was paramount, provided one’s actions do not impinge upon the liberty and wellbeing of others. While there is no one version of liberalism to which all who subscribe to a broadly liberal framework for society will agree, there are a number of fundamental ideas common to the most prevalent accounts such as commitment to moral individualism, the basic equality of persons and the belief that there should be a distinction between public and private morality. Thus, regardless of the extra content one adds, the primary job of any liberal state is seen as to work out the terms under which persons, who naturally differ and disagree in their fundamental religious, philosophical and moral convictions can live together in peaceful political association in a way that preserves and enlarges freedoms by accommodating these fundamental differences instead of reducing them by the legal enforcement of agreement.\(^{178}\)

With such an aim in mind a foundational feature of government in any liberal democracy is that its power should be limited by a presumption in favour of liberty. This presumption was outlined in Chapter 2 in ss. 2.2 and I shall thus not repeat the discussions contained there here. However, it should be noted that such a principle serves to ensure that the burden of proof regarding the necessity of limitations on liberty lies with those who wish to impose such restrictions. It is not only an integral part of any ideal liberal theory but is a central part of the common law of all liberal nations. Yet, whilst such is the case, a formal presumption of liberty does not make a liberal society unless that presumption is also paired with only liberal justifications for prohibition.

In his four volume book series *The Moral Limits of The Criminal Law* Feinberg identified four candidates – which he termed ‘liberty limiting principles’ commonly proposed as providing adequate justification for a state’s placing of limits on individual liberty. The first of such reasons has come to be known as ‘the harm principle’ and those who subscribe to it hold that “it is always a morally relevant reason in support of a proposed criminal prohibition that its enactment would prevent harm to parties other than the persons whose conduct is to be

\[^{178}\text{Larmore, The Morals of Modernity, pp. 121-127}\]
The second principle is known as “The Offence Principle” according to which “it is always a good reason in support of a proposed criminal prohibition that it would probably be an effective way of preventing serious offence (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end.” The third of such reasons identified by Feinberg is Legal Paternalism, the doctrine that “it is always a good reason in support of prohibition that it is necessary to prevent harm (physical, psychological or economic) to the actor himself.” The fourth is termed Legal Moralism and is defined as the view that “it can be morally legitimate for the state, by means of the criminal law…to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offence to the actor or to others.”

According to Mill, only the first of such reasons, the Harm Principle, may be used in a liberal society as a justification for the states placing of limitations on individual liberty. Yet, whilst the prevention of harm to others is, on any liberal account, always a relevant reason for prohibiting an action and is often, when it can be shown that “the harm to be prevented is great enough, and the various mediating maxims are satisfied, and the costs of enforcement reasonable… not just a good reason but a decisive one” more modern liberal theorists such as Feinberg, Hart, Nagel and Dworkin, whilst sharing Mill’s ideology tend not to wholly share Mill’s ‘simple’ view. Feinberg, for example, viewed that the harm principle set the bar for the prohibition too high and using his now famous ‘A Ride on the Bus’ example suggested that in cases of highly offensive activities that are not reasonably avoidable, those who engage in them may legitimately be penalised.

Regarding the third category of reason however, there has been considerable debate. Feinberg, for example argued legal paternalism is incompatible with the right to personal sovereignty at the heart of any liberalism suggesting that:

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The life that a person threatens by his own rashness is after all his life; it belongs to him and to no one else. For that reason alone, he must be the one to decide—for better or worse—what is to be done with it in that private realm where the interests of others are not directly involved.\textsuperscript{186}

It has been argued in response to the claim that paternalism is never an adequate reason for the prohibition of any activity that certain kinds of paternalism, often termed ‘soft paternalism’, are more justifiable than straightforward and hard forms of paternalism and may well constitute justification for prohibition in a liberal society. Examples of soft paternalism are where our current and irrationally held desires are denied in order to preserve those desires which we would deem to be rational if we were thinking clearly\textsuperscript{187} as in the case of forcing motorcyclists to wear helmets, or where the state is held to have the right to intervene temporarily in order to establish the voluntariness of a preference\textsuperscript{188} such as when we stop a rambler from walking across a very high and rickety bridge in order to check he is aware of the danger he may place himself in but do not stop him from walking across the bridge should he ignore our advice.

In regards to the fourth class of reason, it is almost universally agreed by those who subscribe to a broadly liberal framework that prohibitions falling into the category of \textit{legal moralism} should be rejected. Perhaps the most famous of contemporary defenders of legal moralism is Devlin, who argued:

\begin{quote}
…If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For, society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.\textsuperscript{189}
\end{quote}

Yet, whilst Devlin might have been correct in his assumption that the preservation of some form of shared morality is necessary for the continuing existence of society, it does not necessarily follow that this applies in all circumstances. For, as Hart noted in regards to Devlin’s claim that it is permissible for the state to legislate against homosexual activity on the grounds of the protection of society it seems implausible to suggest that “deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of

\begin{footnotes}
\item[187] G. Dworkin, 'Paternalism', \textit{The Monist}, 56/1 (1972), pp. 76-80.
\end{footnotes}
society." Thus, generally, it is held that if law and the sharing of a common morality is truly necessary for the proper functioning of a society, a claim which I do not dispute, there will be "some disagreements about the good life and ultimate values that we do not have to settle in order to decide collectively how we will pursue justice and the common good" and that such disagreements might predictably be those which regard activities that take place in a private as opposed to public arena, cause no harm or no reasonably avoidable offence to others or satisfy the *volenti* maxim.

As such, throughout the third of the articles that constitute this thesis I hold that within a liberal state there are only three possible justifications for a state limiting the liberty of its citizens: to prevent harm to others, to prevent serious offence to others and to prevent *certain* harms to self where the voluntariness of a preference is held in question until such point as that voluntariness can be determined.

3.5. CONCLUSION

Within this chapter I have provided answers to a number of questions that required addressing before embarking on the writing of the thesis articles. These were as follows:

1. What is it to be harmed?
2. What is it to be harmed in a legally and morally relevant sense?
3. What is important in personal identity over time?
4. What are the main differences between law and morality and how is this relevant to their particular roles?
5. What kinds of moral reasons may we legitimately appeal to within a liberal democracy as providing justification for legislation?

In response to the first question it was decided that of all of the accounts of harm on offer a subjunctive historical comparative account is to be preferred as it fits best with commonly held intuitions regarding harm and harming. In response to the second question it was shown that not all harms should be seen to constitute a wrong and that our answers to this question hinge greatly on the moral theories to which we subscribe. Thus, it was held that as this thesis takes place within the consequentialist, person affecting tradition harms of moral relevance will be those which are the result of acts which cannot be justified by appeals to their consequences.

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and/or fail to weight the harms and benefits to which we appeal against each other appropriately. Similarly it was shown that for a harm to be legally relevant it must be contrary to the legal principles and rules governing a particular nation. In response to the third question after examining the possible options for a testable criterion of personal identity over time it was held that psychological accounts should be preferred over biological accounts. However, in the Parfitian tradition it was held too that prudentially it is not identity itself that matters for personal identity over time, but rather the facts in which personal identity consists (psychological connectedness and continuity). In response to the fourth question it was shown that law and morality should be seen to differ in a number of important ways and that lawmakers and ethicists will often have conflicting aims. Finally, in response to the fifth a liberal account of the limits of law was set out according to which it is held that within a liberal state there are only three possible justifications for a states limiting the liberty of its citizens: the prevention of harm to others, the prevention of serious offence to others and the prevention of harms to self where the voluntariness of a preference is held in question.
CHAPTER 4

ARTICLE SUMMARIES

4.1. ARTICLE 1: POSSIBLE PERSONS AND THE PROBLEM OF PRE-NATAL HARM

4.1.1. ABSTRACT

When attempting to determine which of our acts affect future generations and which affect the identities of those who make up such generations, accounts of personal identity that privilege psychological features and person affecting accounts of morality, whilst highly useful when discussing the rights and wrongs of acts relating to extant persons, seem to come up short. On such approaches it is often held that the intuition that future persons can be harmed by decisions made prior to their existence is mistaken. For, it is suggested that identity is a most fragile thing with even the smallest differences in the conditions under which we procreate affecting not the interests of distinct future persons, but the identities of those who will come to exist in the future.

Within this paper I reject this view, holding that a subscription to these two accounts need not result in the conclusion that virtually all acts relating to possible persons are permitted. Further, I argue that such accounts may in fact allow a great deal more scope for the determination of prenatal harms than accounts of personal identity that privilege physical features. Finally, by interpreting claims regarding causal identity such as Parfit’s Time Dependence Claim in terms of Counterpart Theory I suggest that a solution to the non-identity problem can be found in the acceptance of, as relevant in prenatal cases, three kinds of objective similarity relations: Biological, Environmental and Decisional counterpart relations.

4.1.2. DETAILED SUMMARY

Within this paper I attempt to provide a partial solution to one of the most pernicious problems in modern applied philosophy: The Non-Identity Problem. Taking as a starting point the question: “when and how can we determine that a particular person has been harmed or benefited prenatally by our actions in line with a commitment to both a psychological account
of personal identity over time and a person affecting account of harm?" I examine the steps leading to the generation of different versions of the non-identity problem on such an account and in doing so suggest that a solution to many of the problems we face when attempting to determine the occurrence of prenatal harms can be found.

The paper begins with an exploration of why those who subscribe to psychological accounts often have such a problem when attempting to determine when and whether some particular numerical person is harmed or benefited prenatally. It then contrasts this with biological accounts where the answer is much more easily found. After this it moves on to explain how authors such as Parfit have attempted to overcome this difficulty by attempting to marry the psychological approach to personal identity over time with an account of causal identity: identity across possible worlds/sets of possibilities. I then move on to explore and explain how authors such as Parfit have attempted to marry the psychological approach in prenatal cases with an account of personal identity across possible worlds/sets of probabilities. According to this approach it is held that particular essential properties or features such as the possession of a particular genome allow us to create links between possible persons across different possible worlds. Thus, determinations of prenatal harm can be made even when two persons across possible worlds cannot be said to be either psychologically connected or continuous with one another.

This marriage is then explored and criticized and it is argued that whilst such an account is understandable on accounts of personal identity over time that privilege physical features such is not the case on the psychological account. At this point an alternative approach for linking both persons and potential persons across different sets of possible worlds is suggested which draws heavily on Lewisian Counterpart Theory according to which a particular person in one world can be said to possess a counterpart in another when it is the case that certain persons in those worlds resemble him in certain relevant respects and to certain relevant degrees. With that done, the kinds of counterpart relations that allow us to determine the occurrence of harm in prenatal cases is questioned and expanded throughout the final sections ultimately leading to the conclusion that prenatal harms can be determined in far more scenarios than is most often assumed and, most importantly, in a number of previously non-identity cases.
4.2 HARMS TO ‘OTHERS’ AND THE SELECTION AGAINST DISABILITY VIEW

4.2.1 ABSTRACT

In recent years the question of whether prospective parents might have a moral obligation to select against disability in their offspring piqued the attention of many prominent philosophers and bioethicists and a large literature has emerged surrounding this question. Rather than looking to the most common arguments given in support of a positive response to the above question such as those focusing on the harms disability may impose on the child created, deontological considerations and impersonal harms, a less commonly made set of arguments is focused upon which look to the harms that such a decision may impose on others. With this in mind three different possible arguments supporting a limited duty of disability avoidance focusing on the possible harms resulting from a decision not to select against disability are identified and subsequently explored: harms to parents, harms to existing family members and harms to other existing members of society.

4.2.2 DETAILED SUMMARY

Within this paper I address the question of whether prospective parents might have a moral obligation to select against disability in their offspring on the basis of the harms that the creation of disabled persons might impose on others than the person created. I begin by outlining and explaining the position that is now often termed as The Selection Against Disability (SAD) view and its variants which I class as falling into one or some number of four distinct categories focusing on: harms to the child, violations of parental duties and virtues, impersonal harms and harms to others. I note that whilst much attention has been paid within the literature to the first three classes of argument the fourth category has been largely neglected. As such, I move on to examine three possible arguments supporting a limited duty of disability avoidance based on the fourth category which focus outwardly, on the costs – financial, emotional, relational and otherwise – that a decision to select for disability or to choose not to select against disability may impose upon already extant persons.

Taking as a basis a comparative account of harm as setbacks to interests I gradually widen the area of concern from which I analyse the real or perceived harms that a failure to select against disability might impose on others. Where such harms are found I then ask whether they might
be deemed wrongful, providing a defensible moral foundation for a subscription to some version of the SAD view. I thus begin by looking to the harms that prospective parents might be said to impose upon themselves by a failure to select against disability. The focus is then widened slightly to include family members whose interests might be negatively affected by such a decision. Finally, after this is done, I widen the focus to its furthest reach, looking to the idea that a failure to select against disability may impose unjustifiable harms on our fellow citizens in virtue of the moral claims that such decisions impose upon them regarding the proper and just division of social resources.

4.3. SO, YOU WANT A DEAF BABY? A LIBERAL EXPLORATION OF THE LEGAL PROHIBITION ON SELECTION FOR DISABILITY IN ENGLAND AND WALES.

4.3.1. ABSTRACT

This paper concerns the insertion into English and Welsh law of a prohibition on selection for disability in one’s offspring via the use of artificial reproductive technologies. It explores the changes in law that have occurred since the 2008 HFEA Act and subjects to philosophical scrutiny, from a liberal perspective of the limits of law, the reasons that have been given within legal and policy documents for its insertion. After this is done, it is suggested that there is only one option for legislation in a liberal state that prohibits selection against disability: the harms that such decisions might impose on others.

4.3.2. DETAILED SUMMARY

Within this paper I critically examine, from a liberal perspective of the limits of law, the recent insertion into English and Welsh law of a prohibition on selection for disability. In order to provide context for readers I begin the paper by providing an account of the desire to select for disability itself and give examples of some who have been shown to hold such a desire. I then move on to compare how a request to select for disability would or could have been met prior to the 2008 amendments to the HFE Act with how such a request will be met now. This is done in order to show the reader how the law has changed since the 2008 amendments. After this introductory section I briefly sketch an account of the liberal limits of the law, which was provided in more depth in Chapter Three and move on to examine what exactly this account means for selective reproduction.
I then move on to examine the reasons that have been given in legal and policy documents as providing justification for this prohibition and note that generally the reasons given focus on the welfare of the child created as a result of such selection. Within the next section a number of problems faced by this justification are explored and it is suggested that a prohibition on selection for disability may only be justified in accordance with liberal principles by appeals to harms and offences other than those already appealed to within existing legal and policy documents. These are harms and offences that those who would select against disability in their offspring might impose on the interests of others by their choice. With this in mind, possible arguments focusing on such harms and offences are explored.
PART II.

THE ARTICLES
CHAPTER 5

ARTICLE I:
POSSIBLE PERSONS AND THE PROBLEM OF PRE-NATAL HARM

PUBLICATION DETAILS:

5.1. INTRODUCTION

As a small child I had a penchant for fairy tales and a very active imagination. Due to this, a large proportion of my time was spent wondering who I would have been had my mother met and married, not my father, but a king, making me a princess. My imaginings were vivid and I created, in my mind, an alternate version of myself whom I would visit daily in moments of boredom and in my dreams. ‘Princess Nicola’ looked very much like ‘me’ (although she possessed long golden curls and slightly rosier cheeks) and definitely was, in terms of character, like myself at that time in my development. However, in my imaginings ‘I’ wore beautiful dresses, lived in a castle, ate mainly boiled sweets and spent most of ‘my’ time riding around on my pony, kissing frogs and finding ‘myself’ in mildly perilous situations. This was a far cry from my actual existence, which consisted mainly in school and a seemingly unending series of dance, drama, gymnastics and singing lessons. I had all but forgotten about this colourful internal world until two summers ago, when, during an impromptu game of tennis in the garden, my young cousin threw her racquet to the ground and rather unexpectedly stated “I wonder what I would have been like if daddy wasn’t my daddy and mummy had made me with someone else” and memories of my imaginings came flooding back.

Now, this kind of musing is apparently a relatively common phenomenon among armchair philosophers as well as children. For, in Reasons and Persons, Parfit mentions a woman who once wrote; “it is always fascinating to speculate on who we would have been if our parents had
married other people.” He notes, somewhat scornfully, that by wondering such things she, and by association my cousin and childhood self, had ignored the obvious answer to our musings, which is no one. Our lives, in the way we had meant it, would, had our parents chosen to procreate with others, not have been like anything, as they would not have been ours. We would not have existed, and some other persons who may, or may not, have looked, acted and lived like us, would have existed instead. That our existence is highly precarious as “which particular future people will exist is highly dependent upon the conditions under which we and our descendants procreate, with the slightest difference in the conditions of conception being sufficient, in a particular case, to [ensure] the creation of a different future person”193, is an observation that has been made by many eminent philosophers such as Adams194, Kavka195, Parfit196 and Schwartz.197

It also tends to leave us with a problem when attempting to account for our intuitions in cases of alleged prenatal harm where such intuitions are paired with a person affecting account of morality according to which it is held broadly that nothing is good (bad) unless it is good (bad) for someone. After all, if our coming to exist is indeed as precarious as is suggested, and our acts can have no moral status unless it can be shown that they affect the interests of some actual person, it will often be the case when discussing the rights and wrongs of acts relating to possible persons that what seems to be a moral decision will affect, not the interests of existing or distinct future persons, but the identities of who it is that will come to exist in the future.

Depending upon the criterion of personal identity to which we subscribe, the scenarios in which we can determine the occurrence of prenatal harm and benefit will differ and so will the problems we face in accounting for our intuitions. Those, for example, who privilege physical features when determining what it is that makes one person the same person over change and time—such as the possession of a particular body198 or being a particular biological organism199—will have a much easier job of determining the occurrence of prenatal harm and benefit in cases where acts regarding possible persons can be viewed as attaching to a particular body or biological organism than those who hold that psychological continuity is that which is of importance for personal identity. After all, whilst it is easy to determine physical continuity

192 Parfit, Reasons and Persons, p. 351.
between foetuses/embryos and persons who later come to exist, it is a far harder task to
determine psychological continuity between foetuses and future persons.

Despite this, a subscription to a biological approach is not a panacea. Provided one subscribes to
any reductionist account of identity and pairs it with the Person Affecting Principle there will be
certain cases in which regardless of how much and long we look, the intuition that some child
has been harmed or benefited prenatally by our actions cannot be accounted for. Such cases,
when they arise, have come to be known as ‘Non-Identity Cases’, termed as such because they
are subject to what Parfit calls the ‘Non-Identity Problem’ which, in its most simplistic terms,
arises where our intuitions tell us one thing regarding the moral permissibility of an act but there
is no person-affecting reason as to why this should be so. No one is harmed by a seemingly
wrong action and no one is benefited by a seemingly right action as the act in question, far from
causing harm or benefit to a particular person, should actually be seen as the cause of that
person’s existence. The problem is also far more common than is often assumed and poses an
“intriguing theoretical obstacle” for cases of wrongful life, prenatal injury, the use of genetic
technologies to screen for and select out disease, questions of intergenerational justice,
affirmative action, apology, and reparation for historic injustices.200

The following case constitutes a classic example of a non-identity case on both reductionist
accounts of personal identity and will serve throughout this paper as a practical example to help
ground our theoretical discussions:

**The Reproductive Dilemma** 201

Deborah and Edward have decided to have a baby. They have been together many years
and are both in stable, well-paid jobs. Edward has just been given a promotion and
Deborah’s work offers fantastic maternity benefits so they feel that the time is right to
expand their family. They decide to visit a doctor before attempting to become pregnant
to check that everything is working properly and they are both healthy enough to
embark on the journey they have planned. The doctor gives them both a thorough
examination, frowns, and sits them down to discuss the results. He tells Deborah that
she is currently suffering from a rare and bizarre condition that will result in any child
she conceives within the next five months being born with a painful – but not so bad as

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200 D. Heyd, 'The Intractability of the Nonidentity Problem', in M. A. Roberts and D. T. Wasserman,
(eds.), *Harming Future Persons* (International Library of Ethics, Law and the New Medicine 35; London:

201 Those familiar with the non-identity problem will recognise this case as a variation on a micro non-
identity case set out by Parfit in ‘Rights, Interests and Possible Persons.’
to make its life less than worth living – disability for which there is currently no treatment. Deborah and Edward are faced with 2 choices:

1. **Conceive** now and give birth to a child who will have a painful but not terrible disability.
2. **Wait** five months and conceive a child without a disability

Faced with *The Reproductive Dilemma* many of us judge that waiting is the right course of action to take. We believe that it is better to be born without a disability than with one. Such a belief tends not to cause too much controversy. Some particular condition or state of affairs is defined as disabling by its constituting a disadvantage or barrier for the interests of he who suffers it. That which is not disadvantageous is not a disability and as such, any particular child is, *ceteris paribus*, more likely to live a happy and fulfilled life without the disadvantages that constitute disability. Yet, whilst such may well be the case, it does not necessarily follow that it is morally preferable for Deborah and Edward to wait to conceive. After all, if we accept that our existence is highly precarious and hold too that our actions only have moral status when they affect the interests of distinct numerical persons, we can see that regardless of the decision Deborah and Edward make, their child will not be harmed. Different children will come to exist depending upon their choice. Any child conceived within the 5-months waiting period could not have been conceived after the wait and thus could not have been born without a disability and neither could any child born after the wait have been born with one. In other words, whilst the child conceived either before or after the wait can later say to his parents “I am glad that you chose to/not to wait as had you waited/not waited I would not have come to exist”, the child conceived during the waiting period, whilst he might dream of an easier life—just as I dreamed of being a princess—cannot claim that he has been harmed by his parents choice as to prefer that his parents had waited would be to prefer non-existence and his life is not so bad that such a preference would be rational.

When faced with such cases those of us who have previously accepted the propositions that lead to the generation of the Non-Identity Problem are often told we have two choices. We can deny that our intuitions in such cases have moral character, accepting that they represent nothing more than strongly held preferences or we can deny the Person Affecting Principle in favour of some impersonal criteria for morality according to which the value or disvalue of actions should be measured in terms of their effects on the ‘world’ as opposed to specific individuals. Such solutions, however, come at a cost some are unwilling to pay and there have thus,
unsurprisingly, been myriad attempts to solve the Non-Identity Problem whilst retaining the Person Affecting Principle, or to lessen the sting of its implications for common sense morality.

This paper constitutes such an attempt and the driving force behind its creation is a strong commitment to both a person affecting account of morality and an account of personal identity over time which privileges psychological as opposed to physical features. Yet, whilst akin to many treatments of the non-identity problem in terms of its overarching aims, the route that will be taken throughout this paper is markedly different. For the question asked throughout is not, ‘Can we solve the non-identity problem?’ but is instead ‘when and how can we determine that a particular person has been harmed or benefited prenatally in line with a commitment to both a psychological account of personal identity over time and a person affecting account of harm?’ By approaching the issue in this manner and examining more closely the steps that lead to the generation of different versions of the non-identity problem on this particular account of personal identity, it will be suggested that a solution to many of the problems we face when attempting to determine the occurrence of prenatal harms can be found.

We will begin by exploring firstly why those who subscribe to the psychological approach often have such a problem when determining the occurrence of prenatal harms. We will look then at how authors such as Parfit have attempted to marry the psychological approach in prenatal cases with an account of personal identity across different sets of probabilities/possible histories of the world. On this approach particular essential properties or features are held as allowing us to create links between possible persons across different possible worlds such that determinations of prenatal harm can be made even when two persons across possible worlds cannot, in any real sense, be said to share a particular psychology. This marriage will then be explored and criticised. It will be argued that whilst such an account proves useful and is understandable on an account of personal identity over time that privileges physical features, such is not the case on a psychological approach. For, on such an approach, if it is the case that any of our properties are essential to our coming to exist, such properties seem to consist in a sum of all of the features and properties that lead to the development of one as opposed to another psychology.

At this point, an alternative approach for linking both persons and potential persons across different sets of possible worlds will be suggested. This approach draws heavily on Lewisian Counterpart Theory\(^\text{204}\), determining identity across possible worlds via looser relations of objective similarity, according to which a particular person in one world can be said to possess a counterpart in another when it is the case that certain persons in those worlds resemble him in

certain relevant respects and to certain relevant degrees. With that done, the kinds of counterpart relations that allow us to determine the occurrence of harm in prenatal cases will be questioned and expanded throughout the final sections. This will ultimately lead to the conclusion that prenatal harms can be determined in far more scenarios than is most often assumed and, most importantly, in previously non-identity cases such as *The Reproductive Dilemma*.

5.2. **PRELIMINARIES: PERSONAL IDENTITY AND HARM TO PERSONS**

How we should determine and what it means for a particular numerical entity to persist through time and change will often be a fundamental consideration for those who hold that persons are the relevant metaphysical units to which we should appeal when discussing questions of ethics. When we hold someone morally responsible for some particular action we presuppose personal identity, viewing that persons can only be responsible for their own actions. When we discuss whether we should uphold someone’s advance directive, whether she is the same person that wrote and signed the document will often be at the heart of the issue we are discussing. Similarly, when someone who holds the marriage vow to be sacred asks if a man whose wife is in an irreversible coma should be condemned for leaving her for another woman, whether she should still be considered the person he married will be of great import. More pertinently to the issues at hand however, is that on a person affecting account of harm judgements regarding the occurrence of and the extent of a particular harm or benefit will differ depending upon the criterion of personal identity to which we subscribe.

On such an approach a harm or benefit is generally deemed to have occurred when it is the case that one’s actions have adversely affected the interests of another or, in a counterfactual sense, when it is the case that the interests of another are in a worse condition than they would have been had one not acted in the way that one did. Judgements of whether harm or benefit has occurred will thus be comparative and as such before deciding whether an act is harmful or beneficial or claiming that an individual must be compensated for harm incurred, it must be shown that the individual whom we claim has been harmed is the same person to whom the harm occurred. Just as determinations of moral responsibility presuppose personal identity such that we can be responsible for our own actions but not for the actions of others, so too do harm claims presuppose personal identity as we may only determine the occurrence of and the extent of harms and benefits when it is the case that we can identify that some particular person has been left in a worse or better state than they would have been had we acted otherwise.

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205 Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', p. 7.
Often, when dealing with harm claims relating to persons, the theory of personal identity to which we subscribe will sit comfortably in the background. Regardless of what we believe to constitute the nature of personal identity and the persistence conditions for persons our conclusions will be the same. Yet, there are also cases where different accounts of personal identity will offer vastly different answers to the questions: has x been harmed/benefited by a particular act and if so, to what extent? A good example of such a case can be seen in a hypothetical scenario where to treat the severe and debilitating epilepsy of a patient, a doctor, having exhausted all other options has only one left: to perform drastic brain surgery which, should it go well, will cure the epilepsy but will irreversibly destroy a large proportion of the memories of the patient’s life before the operation. On approaches that determine the persistence of personal identity via appeal to physical features, such an operation would surely be beneficial to our patient as despite memory loss he will be better off without his debilitating and painful condition. Yet if identity is determined in a different way, by appeal to psychological continuity for example, whilst such an operation will cure the epilepsy from which the patient suffers, there seems to be little benefit for him in agreeing to the operation as the person who will exist after the operation will, in lacking any memories of life before the operation likely be a different person.

With that stated, it should be apparent that before we may even begin to discuss questions of harm and benefit to persons or possible persons we must first determine the account of personal identity to which we shall subscribe. This paper sits firmly in the psychological camp holding after Parfit, that it is not the relation of identity itself that is important for personal identity over time. Rather, what is important are the facts in which that relation consists: “psychological connectedness and continuity with the right kind of cause”\textsuperscript{206}, termed by Parfit ‘Relation R’. In accordance with this if x is a particular numerical person at time t and y is a particular numerical person at t*: $x = y$ (or $x$ is R related to $y$) iff $y$ is psychologically continuous with $x$ and $x = \text{possibly} y$ in cases where relations of continuity and connectedness are vague (such as in certain cases of brain damage and early childhood). The reasons for this subscription are many and varied and will not, for fear of re-treading an already well-worn road, be addressed here.

5.3. HARM CLAIMS, PSYCHOLOGY AND THE PROBLEM OF POSSIBLE PERSONS

As can be seen in the previous section: when we claim, on a person-affecting account of harm that a particular numerical person has been harmed or benefited, either directly or indirectly, by the actions or inactions of another we are required, before even beginning to discuss whether the act can be justified to have done the following two things:

1. Ensure that we are appealing to the same numerical person both before and after the alleged harm or benefit has occurred.
2. Established a causal link between the act in question and the benefits or burdens that have been imposed on the numerical person to whom we are appealing.

A particular numerical person (P), defined as such by relations of psychological continuity and connectedness, will thus be harmed by the actions of another particular person (Q) only when it is the case that P’s interests are left in a worse state after the actions of Q because of Q’s performing such actions. The same is true for any sentient being (S). S is harmed by Q’s actions only when it is the case that S’s interests are left in a worse state than they would have been had Q not acted in the way he did. Again, such is true for foetuses and embryos.

The interests of embryos and foetuses, however, are limited. They, despite being a phase sortal in the life of an organism of which a latter stage is personhood, should not be viewed as persons or as possessing the same interests as persons as they possess none of the capacities generally thought to be required for personhood. They are not thinking intelligent beings; they have no capacity for reason, or for reflection. They possess neither representational or meta-representational abilities, nor a concept of self. They cannot value their own lives or even feel pain until around the 18th week of gestation when the thalmo-cortical connections necessary for pain perception are developed. Actions or inactions that we might normally deem to have harmed or benefited persons may not, when done to them, automatically result in judgements of harm or benefit. Consequently, whilst we might harm a foetus from the 18th week of gestation if we operate on it without anaesthesia by causing it pain we would not harm it by performing an abortion as despite the fact that abortion ends a life, a foetus, in lacking an interest in the continuation of it’s own life, cannot be said to be harmed by death.

207 Locke, An Essay Concerning Human Understanding, Book II, Chapter XXVII
208 Tooley, 'Abortion and Infanticide', p. 44.
209 Harris, The Value of Life, pp. 16-17.
210 Singer, Practical Ethics, pp. 136-137.
This will be deemed irrelevant to considerations of prenatal harm in cases where harm can be straightforwardly attributed to the interests of the foetus or embryo itself, but generally, when making harm claims relating to possible persons such is not the case. This is so as harm claims relating to possible persons tend not to focus upon the harms that may be incurred by the embryo or foetus as a result of our actions but instead upon the harms that acts done to them might incur upon persons that will come to exist in the future. Again, this would not matter if it were the case that foetuses and embryos could be viewed to be the same numerical entities as persons, but by subscribing to a psychological account of personal identity over time such a claim cannot be sustained. In lacking the capacities required for personhood, embryos and foetuses, despite being identical to an organism which will, ceteris paribus, later be a numerical person, are de facto not candidates for being numerically identical to any person that will ever, or could ever, exist. Such a point is put well by Jeff McMahan when he notes regarding newborn infants (and for the same reason embryos and foetuses):

Their mental life is so sparse that there cannot be more than a few direct psychological connections from day to day. It therefore follows that [a] two day infant cannot be strongly psychologically connected with itself the day before, that there is therefore no psychological continuity in infancy, that none of us now is psychologically continuous with a new-born infant, and thus that none of us is now numerically the same individual as a new-born infant.\footnote{McMahan, \textit{The Ethics of Killing: Problems at the Margins of Life}, p. 45.}

\section*{5.4. Appealing to a Causal as Opposed to Evaluative Sense of Identity in Cases of Alleged Prenatal Harm}

This obviously causes us a problem when attempting to determine the validity of prenatal claims of harm and benefit. For, there seems to be no necessary link in terms of a shared personal identity over time between persons and embryos/ foetuses. Yet, despite this, when it is intended that an organism that possesses the potential for personhood should develop into a person we still view that we cannot do just what we will with it. We often claim that a pregnant woman should take vitamins in order to ensure the health of her future child, that she should not smoke, that she should do her best not to expose herself to people with rubella and toxoplasmosis and that her doctor should not prescribe her teratogenic drugs such as thalidomide lest exposure to such things should cause her future child to be born with a disability. We make these claims because despite the fact that foetuses and persons cannot share a personal identity, we view that they are importantly linked together through the foetus’
possession of, not only the properties that will allow for the development of personhood at some future point in the life of their organism, but also of certain distinctive features that determine, either fully, or in part, the identities of those persons who will come to exist in the future.

These distinctive causal features, or as Parfit terms them ‘distinctive necessary properties’ thus play a large role in our determinations of prenatal harm or benefit for those who subscribe to the psychological approach and are defined as those features that any particular person (P) could not exist without as “If characteristics (C) are identity determining for P, then any child born with characteristics different from C would have been a different person from P (even if all other characteristics were the same).”\(^{212}\) With this in mind, when discussing the validity of claims of prenatal harm or benefit, the sense of identity we utilise must be importantly different from, although still compatible with, the sense of identity we utilise when attempting to determine the validity of claims or harm and benefit in relation to actual persons with distinct numerical identities. For such claims relate less to the answers we give to questions of personal identity over time and more to the answers that we give to questions regarding how to identify individuals across different possible histories of the world/sets of possible states of affairs.

Whilst we may not then, if we wish our discussions to have any semblance of meaning, ask in cases where we have a person x who claims to have been harmed prenatally: “is x the same numerical person both before and after the occurrence of the alleged harm or benefit?” as x cannot be the same person as the foetus/embryo (pp) from which he developed, we may ask instead: Was pp in possession of the distinctive causal features that were necessary for the coming to exist of x? And if so, was pp in possession of such features both before and after the alleged harmful act?

When we answer these two questions in the affirmative it is suggested that we can judge that x has been harmed by acts that were done to pp. For, provided it is the case that were it not for the act in question a numerical person with the same necessary causal properties as x would still have come to exist and would have been better off, our judgements of harm and benefit should conform straightforwardly with similar judgements regarding extant persons. For, across different possible histories of the world it is the case that all numerical persons or possible persons with the same distinctive necessary features as x are held to be either x or were, at some point in their existence candidates for being x. In possible worlds where a person with x’s distinctive necessary properties would have been better off had we not acted in the way that we

did, and there are no justifying reasons for our acting in such a way, it is thus held that x may justifiably feel aggrieved. When, however, we answer either question negatively it will be judged that x cannot have been harmed by acts done to pp and this will be so for one of two reasons:

1. Pp’s causal features/properties were not compatible with the coming to exist of x and we have made a mistake in pairing these two entities as anything done to pp could not have affected x’s interests.

2. The act in question altered pp’s causal features/properties such that it is the case that only after the act in question could we legitimately pair x and pp’s causal features/properties as the act in question, far from causing harm or benefit to x is actually the reason for his existence as had we not acted in the way that we did x would not have existed and some other person would have come to exist instead.

Yet, what are these causal features that we could not exist without and that determine the validity of claims of prenatal harm? Were we to subscribe to a biological account of personal identity over time the answer to our question would be simple. On such an account it would be the case that foetuses and embryos were already in possession of the feature that grounds claims to both prenatal and personal harms—their organism. From the moment of conception, despite the changes in shape, size and moral status that occur throughout its lifespan, the numerical identity of any living organism is set by the elementary particles from which it is constituted. It will remain that entity until that organism is no longer living and, provided that organism develops to have interests, such interests can be affected by any act regardless of whether or not that act was done to it whilst it was not a person.

On the psychological account however an answer proves a little more elusive. The causal properties to which we must appeal cannot be those psychological features that ground our claims of personal identity over time and must instead be the properties which would allow for the development of a particular psychology. Consequently, we must ask, what would have made it such that we would not have existed? What features or properties were necessary for our coming to exist? Not the particular versions of ourselves in existence now, but the earliest versions of ourselves from which our identities could have branched, those whom we properly identify as ourselves across different possible histories of the world/sets of possibilities.
5.5. PARFIT'S ACCOUNT OF CAUSAL IDENTITY: THE (STRONG) TIME DEPENDENCE CLAIM

As the approach regarding what is important in personal identity over time taken in this paper has much to owe to Parfit it would be imprudent not to give serious consideration to his account of what constitute the causal features that were necessary for our coming to exist. On his account, what would have made it true that we never came to exist is as follows (albeit with ‘one qualification’):

The (strong) Time Dependence Claim (TDC1): If any particular person had not been conceived when he was in fact conceived, it is in fact true that he would never have existed.\[213\]

There are thus three claims that we might interpret the TDC1 to include and they are as follows\[214\]:

1. **The Origins Claim:** Our material origins are necessarily determinative of our personal identities and we could thus not have come to exist had we not been constituted from anything other than the particular matter from which we were actually conceived.

2. **The Temporal Claim:** The timing of our conception was necessarily determinative of our personal identities as they currently stand and we would therefore not exist had we not been conceived when we were actually conceived.

3. **The Genetic Claim:** Our exact genome is necessarily determinative of our personal identities and we could therefore not exist possessing a different genome.

The first claim in the list: *The Origins Claim* leaves the TDC1 looking remarkably like the view regarding distinctive necessary properties that would be held by those who subscribe to a physical account of identity such as the biological criterion and this is so because, for those who subscribe to such an approach it is. Indeed, Parfit terms this approach ‘The Origin View’ in homage to the fact that it can be recognised as a version of the ‘Necessity of Origins’ view forwarded by Saul Kripke after a long discussion regarding whether Queen Elizabeth could have been born naturally of different parents. The view is as follows: “If a material object has


\[214\] My decision to format the different claims inherent in the TDC1 as a 3-point list should be attributed to Wrigley, who in ‘Genetic Selection and Modal Harms’ also distinguishes between the modal claims inherent in the TDC in the same way. See: A. Wrigley, ‘Genetic Selection and Modal Harms’, *The Monist*, 89/4 (2006), pp. 505-525.
its origin in a certain hunk of matter, it could not have had its origin in any other matter.”\textsuperscript{215} This implies that just as a particular wooden table could not have been made from anything but the particular piece of wood from which it was actually made, so too could a particular human being such as Queen Elizabeth II not have been constituted from anything but the gametes from which she grew.\textsuperscript{216} In itself, this claim is relatively uncontroversial, as it represents nothing more than the basic metaphysical fact that all physical things could not have had their origins in anything other than the physical things (read: elementary particles) from which they were constituted.

Yet, as the psychological account denies that our physical identity is what is most important for persistence The Origins Claim actually ends up telling us very little about the ways in which we could have been different. Consequently, when we view The Origins Claim as a modal claim representing the possibility of existence across possible worlds as being determined by strict genetic origin it becomes of little use to us.\textsuperscript{217} For our concern here is not with the requirements of how a particular physical thing can come to be. Instead, we are asking under what circumstances and in accordance with which criteria a particular person could come to exist in different possible histories of the world. Thus, as our being a particular person consists in the persistence of a certain psychology, our possession of, or embodiment in, certain biophysical materials is of only instrumental importance to us in so far as such features will impact upon the psychological features that determine numerical identity.

The claims of most relevance to us, regarding distinctive necessary properties, are thus those of the second and third claims inherent in the TDC. Now, the genetic claim is relatively lucid, being the claim that we could not exist were we to not possess the exact genome that we actually possess as “differences in material make for later differences in virtually all aspects of a person: Change the sperm, and there will be substantial changes (of both a physical and psychological kind) in the later human being.”\textsuperscript{218} The Temporal Claim, however, can be

\begin{footnotes}
\footnotetext[216]{This claim is actually slightly misleading. For, as Elliot and Gallois point out in a short but devastatingly perceptive paper whilst the necessity of origins view demands that an object could not have had its origin in anything other than its actual origins, this does not necessarily mean that a table could not have been constituted out of a different piece of wood than that from which it was originally constituted or that a child could not have been conceived from anything other than the particular egg and sperm from which it was actually conceived. What is important is the configuration of elementary particles and not the object itself meaning that in some possible world it could be the case that a particular table could be made and a particular person could have been conceived from a different piece of wood or different gametes provided the self same elementary particles from which they were actually created were present and arranged in a specific way. See: R. Elliot and A. Gallois, 'Would It Have Been Me?', \textit{Australasian Journal of Philosophy}, 62/3 (1984), pp. 292-293.}
\footnotetext[217]{Wrigley, 'Genetic Selection and Modal Harms', p. 508.}
\end{footnotes}
understood in at least two ways. First, it can be understood as relating to scientific facts regarding the timing of the female menstrual cycle and if so may merely be another way of expressing The Genetic Claim: If it is the case that we could not exist were it not for the meeting of the two specific gametes from which we were actually conceived, it is the case that we would have to have been conceived within a month of the time (at most) from which we were actually conceived. We might also however, understand it as recognising the importance of the environment to personal identity and it could thus be of relevance to questions regarding the ethics of decisions relating to the timing of the implantation of frozen embryos.\textsuperscript{219}

\textbf{5.6. HOW SHOULD WE UNDERSTAND THE TIME DEPENDENCE CLAIM ON THE PSYCHOLOGICAL ACCOUNT?}

Barring the second understanding of The Temporal Claim, we might note that the TDC still looks remarkably like the approach that would be taken regarding distinctive necessary properties by those who adhere to the somatic approach as it still amounts to the claim that in any possible world, only those who possess the same genome have the distinctive necessary properties that would allow them to be considered the same person. It is however, also compatible with psychological approaches as whilst our possessing a particular genome/being conceived from the two particular gametes from which we were actually conceived, is viewed as necessary for our becoming the particular numerical entities we are, the TDC1 does not state that this is a sufficient condition for our existence. Thus, whilst compatible with both reductionist accounts of personal identity over time, the implications of the TDC1 on these accounts are markedly different.

This can be seen when considering the different possible histories of the biological entities that eventually became each one of us. According to the Biological/Kripkean approach, regardless of the environment in which a genetic individual develops and how his personality is shaped by his circumstances, his personal identity will remain the same as it is determined by either his genome or his origins in the elementary particles from which he was conceived. Across all possible worlds, the possession of a particular genome should thus be viewed as both necessary and sufficient for our being the same persons. This means, for example, that even if the parents of the genetic individual who eventually became me had, in some possible world, when she was an infant, dropped her on her head resulting in her having a severe intellectual disability or had died in a car accident, leading to her being sent to live with her Uncle Oleg in Volgograd,

\textsuperscript{219} ibid., p. 272.
learning Russian as her first language and eventually becoming a famous gymnast (instead of becoming a perpetual student with no known cognitive problems and two very much alive parents who raised her in the South of England) she would still be the same numerical person.

According to the TDC1 on the Psychological Approach, however, this would not be the case. For, although ‘Intellectually Disabled Nicola’ (IDN) ‘Actual Nicola’ (AN) and ‘Russian Nicola’ (RN) would share the same genetic origins, would all have possessed the same distinctive necessary properties and were thus, at their pre-personal stages candidates for being the same numerical person, they would not now likely be sufficiently psychologically connected with one another that we may say that they are importantly the same person, despite the fact that their origins made it such that they could have been. Thus, on the psychological approach the TDC1 should be read as a statement that whilst it is necessary for the existence of a particular person that he was conceived from the two gametes from which he was actually conceived, this condition is not sufficient for his existence. Regardless of whether it is fulfilled, the genetic origin of a particular potential person is the self same genetic origin of a potential myriad of other potential persons who may or may not have come to exist had things turned out differently, depending upon how the genetic determinants of their identities were shaped and influenced by environmental factors.

5.7. A MARRIAGE MADE IN HEAVEN: HOW A SUBSCRIPTION TO THE TIME DEPENDENCE CLAIM HELPS ACCOUNT FOR OUR INTUITIONS IN CASES OF ALLEGED PRENATAL HARM

When closely examined, the TDC1 does seem to sit well with the psychological approach. After-all, it is pleasingly straightforward and not as overtly genetically essentialist as it may at first seem, viewing our origins as necessary but not sufficient for existence, and thus of causal but not evaluative importance to personal identity over time, allowing that our environments still have a large role to play in the development of personal identity. This means that we need not accept that RN and AN are the same person, or that Queen Elizabeth II could have been conceived by different parents but also allows us, by looking to genetic origins, to differentiate between entities such as embryos and foetuses that on the psychological account of personal identity over time would seem, prima facie, to possess no relevant distinguishing features at all.

More importantly however, that the TDC1 gives us a set of causal properties which, whilst not sufficient for the existence of any particular numerical person are still viewed as necessary,
means that those who adhere to the psychological account are able to place limits on the kinds of behaviours that are morally acceptable regarding potential persons. On the psychological account even the smallest environmental changes are identity implicating, leading to the unfolding of a wholly different psychology and the existence of a different person. Without such a causal claim distinguishing between potential persons and creating links between certain of them across possible worlds, those who adhere to the psychological approach would be forced to argue that nearly every decision made in relation to possible persons would be morally benign. How, after-all, can we suggest that a pregnant woman should not smoke, drink too much wine or expose herself to teratogenic substances during pregnancy if such actions will not harm her unborn child but will instead determine that one child, as opposed to another will come to exist? How can we justify the compensation that was awarded to the ‘victims’ of the thalidomide disaster of the 1960s if it turns out that Grünenthal, the pharmaceutical company that produced and approved thalidomide as safe for use in pregnant women, did not harm any of the children that came to exist after their mothers unwittingly took the drug, but was instead responsible for their very existence?

Such claims and judgements rely upon our holding that the above actions and inactions will not importantly determine the ‘identity’ of potential persons but will instead bestow, either directly or indirectly, harms and benefits upon a discrete entity. Yet, a straightforward reading of the psychological approach will, as we have seen, yield no such determination. By pairing the psychological approach with the TDC1 we can therefore save our intuitions in such cases, arguing that whilst these actions are indeed identity affecting and will result in the existence of different persons, each of these resulting persons, in possessing the same distinctive necessary properties constitutes a branch on a possibility tree inherent in these properties and that thus, provided we have a conception of what is good for a particular individual once born, may legitimately be conflated when we are making determinations of prenatal harm and benefit.

5.8. GROUNDS FOR DIVORCE? WHY A LACK OF SUFFICIENCY PLACES A PSYCHOLOGICAL SUBSCRIPTION TO THE TDC1 IN JEOPARDY

In doing away with The Origins Claim those who, on the psychological approach, note the utility of the TDC in matching our determinations of harm and benefit in most genesis cases, however, are faced with a problem. For without the sufficiency claim inherent in The Origins View there seems to be no justifying reason for those who subscribe to the psychological
approach to accept that a common origin in a specific set of gametes or the possession of a particular genome should, by itself, constitute reason enough to link distinct numerical persons across possible worlds. On the psychological criterion, numerical identity can survive change and a particular numerical person can be very different in different possible histories of the world due to the branching off of a psychology from a common origin in one of a number of ways. However, whilst such is the case a common origin in a particular genome does not seem to be the right kind of origin to make determinations of trans-world identity.

For, whilst the former “develop from and preserve connections with a psychology already extant” and can be identified across possible worlds by reference to points in which their psychologies overlap, the existence of the latter depends upon not only the properties inherent in their genomes, but also the environmental events which caused these distinct psychologies to unfold. Thus, the “distinctive necessary properties” of any particular person seem to consist in the sum of all of the causal factors that came to influence the development of their psychology, and the possession by certain individuals across possible worlds of some of these features, such as a distinct genome, is not enough to imply trans-world identity. Exact similarity of genetic origins does not, on the psychological approach, imply causal identity and whilst the different potential identities of a particular foetus all share in common a distinct genome, it is not at all clear why this should be enough to identify such features as implying relations of trans-world identity.

Indeed, on the psychological approach, the only kind of essentialism – defined as “the view that individual things have essential properties, where an essential property of an object is a property that that object could not have existed without” – that truly seems compatible is a kind of Leibnizian Hyper-Essentialism according to which any and all properties held by an individual that have contributed to the genesis of a particular identity are necessary for their very existence as without them a different person would exist. RN, IDN and AN are not the same person, and nor are they candidates for trans-world identity. Any individual in any possible world, whose causal properties in that world differ from the causal properties of another specific individual, cannot be viewed as the same person, even if they are exactly similar in nearly all respects.

\[220\] ibid., p. 267.
5.9. A ROUTE FOR RECONCILIATION? A COUNTERPART THEORETIC UNDERSTANDING OF THE TIME DEPENDENCE CLAIM

What then, is to be done? A subscription to the psychological approach without a causal account of identity leaves us with the uneasy conclusion that virtually all acts relating to possible persons are permitted. A subscription to the TDC1, although helping to account for our intuitions in cases of alleged prenatal harms, is a subscription that arbitrarily picks out certain features as essential for our coming to exist despite the fact that the only essentialism that truly seems compatible with the psychological approach is one like that forwarded by Leibniz. With this in mind, it is suggested that on the psychological approach the best way to make sense of claims relating to trans-world identity and possible persons that does not collapse into a list containing all of the causal factors that lead to the development of one as opposed to another psychology and confirm that virtually all acts relating to possible persons are permitted, is to appeal to a different, non-essentialist, modal basis for determinations of identity across possible worlds where the criteria are slightly looser.

Such a basis, it has been suggested223, can be found in Lewis’s modal realism224, according to which identity across possible worlds is determined not by reference to essential properties or strict identity relations, but instead via counterpart relations, defined as objective similarity relations.225 This view, I suggest, fits best with the psychological approach as it allows us to separate identity within worlds from identity across worlds. For on this approach, it is held that the world in which ‘we’ actually exist is just one of many worlds like it, all of which are spatiotemporally isolated from one another, concrete, abundant and satisfy a principle of restricted recombination according to which shape and size of the world permitting, any number of possible things can exist alongside each other or fail to do so.

As these worlds are isolated from one another, particular individuals can exist in only one world, no individual will be identical to an individual in another world and thus identity across possible worlds is determined via counterpart relations, where, “In general, and independently of any specific context, the counterparts of an individual x, are those individuals that are similar

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224 Lewis, *On the Plurality of Worlds*.

to x in some relevant respects and to some relevant degree.” Accordingly, the truth of a de re modal claim such as “AN is possibly a Russian gymnast/intellectually disabled” is determined, not by whether they are the same numerical person, as across worlds this is impossible, but instead by whether AN has, in a different possible world, a counterpart who is a Russian gymnast or is intellectually disabled. As the criteria for identity across possible worlds are less strict on this approach and there is no possibility of our existing in worlds other than our own, just the possibility of the existence of counterparts whom we deem to be similar to us in certain relevant ways, we have the required modal basis to argue that identity across possible worlds may be determined in a different way to identity within worlds, depending upon which similarities we accept as giving rise to counterpart relations.

Yet, despite this, the question of what these similarities are and how their relevance should be decided must be answered. If any and all similarities were allowed on a counterpart theoretic approach, it could be argued that all persons, by being homo sapiens, are candidates for being my and your counterparts and the most imaginative of us could even argue that each of us could have been a banana, a talking canine or even a self aware home security system. If such were the case, we would “have abandoned any useful means of specifying individuals across possible worlds on the grounds that any possible entity could be one’s counterpart.” Such a reading is, however, erroneous for, as Lewis notes when describing the counterpart relation, in order to be considered our counterparts, otherworldly individuals must resemble us “closely in content and context and in important respects...[and] more closely than do other things in their worlds.” As such, whilst it is the case that “the kinds of properties that are relevant and the stringency of the relations that’s required, is something that can vary from context to context,” due to this context sensitivity it will be the case that when we are asking specific questions about who, across possible worlds should be considered the counterpart of a particular numerical person, the counterparts available to us will often be very limited in number.

On the psychological approach paired with the TDC, then, we can note that there will be two relations of objective similarity, which should be viewed as relevant when determining personal identity across possible worlds. The first of which consists in the sharing of a common psychology which we shall call ‘branching counterpart relations’ according to which those who share a common psychology, whether it be linear or branched, should be viewed as my counterparts in virtue of their possession of this shared psychological history. Any and all...

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226 ibid., p. 44.
229 Meacham, 'Person-Affecting Views and Saturating Counterpart Relations', p. 260.
persons across possible worlds that have branched from this common psychology will be my counterparts and depending upon the properties that they possess, such as being \( x \), doing \( x \), and so on, I possess the property “could have been/done \( x \)”. Such a counterpart relation will be relevant when making harm claims regarding extant persons.

The second relevant relation consists in the sharing of a distinct genome\(^{230}\), which shall be termed ‘genetic counterpart relations’ and it is viewed as relevant in virtue of the fact that individuals who share a genome could have, despite differences in numerical identity, had environmental events lined up in different particular way, been virtually indistinguishable from one another. If we return to the example given earlier in the paper of embryo ‘N’, who, in this world eventually became AN, but in another became RN, we can note that despite the fact that they are different numerical persons in both having a common origin in the possibility set inherent in N, RN is a genetic counterpart of AN as she stands in an objective similarity relation to AN due to this origin. Consequently, as there is a possible world in which N became RN, AN possesses the following properties: could have been an orphan, could have been sent to live with her Uncle Oleg in Volgograd, could have learned Russian as her first language and could have been a gymnast as her counterpart possesses these properties.

Regarding prenatal harms then, provided we have a concept of what broadly constitutes a good or a bad life and can make comparisons between lives, where it is the case that two numerical persons (\( x \) and \( y \)) share a branching/genetic counterpart relation and \( x \) is better off than \( y \) as a result of a particular course of action taken by another, we can state that in being \( x \)’s counterpart \( y \) is harmed by this action. Relating to a particular prenatal case of harm—provided that we view it is better for a person not to have an intellectual disability than to have one—as AN and IDN should be viewed as genetic counterparts, that AN is better off than IDN as she was not dropped on her head as a baby, we can state that IDN was harmed by this particular action as she possesses a counterpart, AN, who, in not being dropped on her head, is better off in lacking IDN’s intellectual disability. The same can be said in thalidomide cases. For if we view that the birth defects associated with prenatal ingestion of thalidomide such as Dysmelia and Phocomelia are harmful features, for each thalidomide victim (TV) there will, across possible worlds, be a different numerical person who shares a genetic counterpart relation with TV who is better off in virtue of her mother not ingesting thalidomide whilst she was in the womb. In having such a counterpart TV possesses the property ‘could have not been prey to the harmful

\(^{230}\) I have separated these counterpart relations from one another in virtue of the fact that, whilst most of my psychological counterparts, will also be my genetic counterparts it is the case that in certain scenario’s this would not be the case, such as in Parfit’s Teletransporter Case set out in *Reasons and Persons* and cases of fission.
congenital defects associated with the ingestion of thalidomide’ and can thus claim to have been harmed by her mother’s ingestion of thalidomide.

5.10. A RETURN TO THE NON-IDENTITY PROBLEM

By subscribing to both a counterpart theoretic account of trans-world identity and the TDC as providing the relevant counterpart relations necessary for determinations of harm and benefit in cases of prenatal harms, those who hold that psychological connectedness and continuity is that which is key for personal identity are thus able to account for their intuitions in a great many cases where it is commonly viewed that an act done to one numerical entity will result in harms or benefits for a different numerical entity in spite of a lack of connectedness and continuity. Yet, despite this, holding only genetic counterpart relations to be relevant in cases of prenatal harm still leaves us with a problem in accounting for our intuitions regarding the occurrence of harm in cases such as The Reproductive Dilemma in which our intuitions tell us that Deborah and Edward should wait to conceive and our account of the features necessary for determinations of trans-world identity tells us another.

By subscribing to the TDC as providing the relevant counterpart relations necessary for determinations of prenatal harms, our intuition is still mistaken. Regardless of the decision Deborah and Edward ultimately make, their resulting child cannot be harmed prenationally by their decision. For as it is the case that in order to be identified as sharing an identity across possible worlds two numerical persons must share either a branching or a genetic counterpart relation, and the possible results of their decision will share neither, there is no reason that attaches to the interests of their offspring that should sway their decision in either way. Any child conceived within the 5 months waiting period could not possess the distinctive necessary properties of any child conceived after the wait and thus could not have been born without a disability and neither could any child born after the wait have been born with one.

If cases such as The Reproductive Dilemma were few and far between, it might be tempting to ignore them or to bite the bullet with respect to them and argue that our intuitions represent little more than strongly held preferences, akin in many senses to the preferences of the hardened/pretentious coffee drinker who derides those who choose to sully their daily caffeine fixes with milk. Yet, when it is the case that the problem occurs on a macro scale our intuitions are harder to bury due, in main, to the volume of persons that we intuit will be harmed. An
example of such a case is as follows:

**The Policymakers Choice:** A group of policy makers are faced with the choice of deciding between certain policies concerning how best to make use of our natural resources. After much debate and deliberation they have been able to whittle down a very long list of potential candidates to just two:

1. The first policy is entitled **Depletion** and it involves just that, the depletion of our natural resources and the cessation of research into viable alternative energy sources. Adopting this policy would mean that for the next two hundred years we, and our descendants, will live very comfortable lives as the money that would have been spent on research will be spent on community enrichment activities and our natural resources will allow for frivolous energy consumption. After those two hundred years however, because we will have depleted our resources, our descendants will live relatively miserable lives until they manage to find suitable alternatives and will have to spend a great deal more money on research and development, leaving little money left to supplement the lifestyles that citizens have been used to.

2. The second policy is entitled **Conservation** and requires that we be sensible with our resources, living lives of slightly less comfort than in Depletion in order to ensure that two hundred years down the line our descendants will live much happier lives than they would under the depletion policy.

Faced with *The Policy Makers Choice*, we tend to view that *Conservation* would be the right policy to choose as a little sacrifice on our parts will lead to great benefits for future citizens, whereas in *Depletion* we would not gain so much as future generations would stand to lose. Yet again our intuitions are mistaken. For if it is the case that our counterparts across possible worlds can only be those whom have branched off from a common psychology or who share the same genetic origin, there is no reason to choose *Conservation* by appealing to the interests of future people. After all, as these policies will affect the ways in which people live out their lives, people will likely meet/marry different people and conceive children at different times, increasingly over time different people would exist depending upon our policy choice. After a few hundred years the entire population would likely be made up of people who would and could not have existed had the other policy been chosen. Therefore, whilst the persons in existence under *Depletion* would undoubtedly live far less comfortable lives than those under

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231 This case is a simplified version of a non-identity case regarding the choice of one of two social and economic policies set out by Parfit in *Reasons and Persons*. 

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Conservation, they would not exist had the other policy been chosen and vice versa, meaning, once more, that provided their lives were on balance worth living they cannot claim to be harmed by our choice as had the other choice been made they would not have come to exist.\(^{232}\) Indeed, as Depletion would actually serve to benefit those already in existence whilst causing harm to no one and Conservation would place burdens on those already in existence whilst providing no tangible benefits to future persons it seems that Depletion may, on balance, be the most beneficial policy choice.

We must thus ask again, what is to be done? Were we to come to the same conclusions in cases such as those above from an essentialist standpoint the answer would be nothing. For what is important in personal identity is our being a particular organism and a particular organism necessarily has its origin in the particular things from which it was constituted, meaning no person can claim to have been harmed prenatally (or pre-prenatally as in The Policy Makers Choice) in cases such as those above. Thus—unless we are to appeal to the interests of other persons or abandon the person affecting principle in favour of some non-person affecting moral principle—there is little room for manoeuvre. On the psychological approach, however, there may well be a glimmer of hope, an appeal to certain other features as constituting relevant counterpart relations and grounding claims to prenatal harm. It is this that shall be explored in the following sections.

5.11. EXAMINING THE TDC: CAN WE LOOSEN THE CRITERIA FOR TRANS-WORLD IDENTITY TO INCLUDE SLIGHT GENETIC VARIANCE?

Whilst a subscription to counterpart theory can allow us to make sense of the genetic claim inherent in the TDC by viewing the sharing of a distinct genome, in virtue of its identity determining features, as a relevant relation of objective similarity giving rise to counterpart relations once we subject the TDC1 to close scrutiny, a flaw emerges. As on the psychological approach our genes are not in possession of magical properties\(^{233}\) whilst those who share my genetic origin should be viewed as my counterparts—why it should be the case that only those who share my genetic origin\(^{234}\) may be viewed as such is unclear. For whilst it is almost impossible for us to imagine our having a different genetic origin yet still being the same persons we are today, the fact that we find this idea difficult to grasp does not mean that its

\(^{233}\) Wolf, 'Do Future Persons Presently Have Alternate Possible Identities?’, p. 100.
\(^{234}\) Or have a psychology that has later branched off from a being with my genetic origin and now reside in a body with a different genetic origin.
being the case is not a logical possibility. Indeed, as one considers this it becomes gradually more apparent that certain aspects of our genetic inheritance do not seem to be as necessary for the development of our personal identities as the TDC1 suggests and questions regarding whether we could still be the same persons with a slightly different genetic code begin to be met (in certain cases) in a hesitantly affirmative manner. How important, after-all, was the natural colour of my hair for the development of my psychology? Could I have a dark haired counterpart? How important was my eye colour? Must all of my counterparts have blue eyes?

Whilst such examples might be questioned, there are straightforward cases where it seems that a change in genetic code at the prenatal stage of development should not compromise the development of a particular psychology. For if we are to look at adult onset genetic disorders such as Huntington’s or the cancers associated with the BRCA1/2 or FAP mutations which present symptoms only later in life, it seems that if it became possible to repair, switch off or replace the affected mutated genes with ‘normal’ genes prenatally, a change in genetic make-up in such cases would not necessarily imply a change in identity unless such changes were also accompanied by identity affecting environmental changes. In these cases it would seem that an individual in world w possessing a BRCA2 mutation might well have a counterpart in worlds other than his own who is not in possession of a BRCA2 mutation and as such would possess the property ‘could have lacked the BRCA2 mutation.’

Parfit himself pre-empts some similar questions regarding the idea that perhaps our exact genomes are not as necessary for determinations of trans-world identity as the TDC1 suggests in the following paragraph:

Suppose that my mother had not conceived a child at the time when in fact she conceived me. And suppose that she had conceived a child within a few days of this time. This child would have grown from the same particular ovum from which I grew. But even if this child had been conceived only a few seconds earlier or later, it is almost certain that he would have grown from a different spermatozoon. This child would have had some, but not all my genes. Would this child have been me?235

Parfit suggests that the answer to his question may not be able to be found, that the child may well have been him/his counterpart, may not have been him/his counterpart or that his identity might have been indeterminate.236 In light of this, he proposes a weaker version of the time dependence claim, as he wishes the TDC to be ‘uncontroversial’ on all reductionist accounts of

236 ibid.
personal identity, including his own, the TDC2:

**The (weak) Time Dependence Claim (TDC2):** if any particular person had not been conceived within a month of the time when he was in fact conceived, he would, in fact, never have existed.\(^{237}\)

There are again 3 claims that we might interpret the TDC2 to include:

1. **The (weak) Origins Claim:** If a material object has its origin in a certain hunk of matter, it must have had its origin in at least some of its originating matter and thus as human beings have their origin in two gametes, in any possible world, a particular numerical person could possibly exist iff they were conceived from at least one of the gametes from which they were actually conceived.

2. **The (weak) Genetic Claim:** Our possession of at least half of our genome is necessarily determinative of our personal identities as they currently stand.

3. **The (weak) Temporal Claim:** The timing of our conception was necessarily determinative of our personal identities as they currently stand and we would therefore not exist had we not been conceived within a month of the time from which we were actually conceived.

According to an understanding of the TDC2 in accordance with The (weak) Origins Claim it would be the case that provided a particular person was conceived from at least one of the actual gametes from which he was actually conceived, it is a possibility that he would be the same person now as he would have been had he been conceived from a different spermatozoon, as such a person would retain at least some of his originating matter. Thus, a particular biological entity could, in some possible world, be ‘me’ with a different hair or eye colour or have been genetically modified in utero provided the above condition is met and would in fact allow that a particular numerical person could exist with a potential myriad of different genomes resulting from the fertilisation of a particular sperm or egg with any number of different gametes. However, as we have already noted that the TDC1 should not, on the psychological approach, be viewed as a version of The Origins Claim, we should for the same reasons agree that the TDC2 should not be viewed as a weaker version of that claim. As such we may read the TDC2 as encompassing only weaker versions of the second and third Genetic and Temporal Claims.

When we read the TDC2 in such a way we can note that whilst the temporal claim is easily

\(^{237}\) *ibid.*
understood as an environmental claim regarding the fact that a change in environment both pre and post-natally will influence the psychology of those who come to exist, the genetic claim becomes slightly more complicated. For as it is the claim that our possessing the genetic information from at least one of the gametes from which we were actually conceived is necessary for our and our counterparts existence, rather than the claim that at least half of our originating genetic material is necessary for our existence, it seems that our existence should also be a possibility, in not only cases allowed by The Weak Origins Claim above, but also a number of cases that any version of The Origins Claim could not allow. A particular person could possibly exist had he been conceived not only from at least one of the gametes from which he was actually conceived, but from two different gametes that between them shared at least half of the genetic information present in his originating genetic material or from one or two numerically distinct but exactly similar (cloned) gametes.

An appeal to the TDC2, therefore, meets the above objections levelled against the TDC1 regarding the fact that our genomes do not seem to be as determinative as it suggests. Thus, on the TDC2 the number of relevant counterpart relations are increased so that we should view not only those individuals who share our exact genomes as our counterparts, but also those individuals across possible worlds who share at least half of our exact genomes and those who would have been created from exactly similar (cloned) gametes. By appealing to a weaker genetic counterpart relation, we can now increase the number of scenarios in which harm and benefit can be determined prenatally to include cases of foetal and genetic enhancement and the genetic selection of disadvantageous traits. After all, if it were the case that a child whose parents genetically engineered him to be deaf can be said to possess the property ‘could have been hearing’ and thus, if being deaf constitutes a harm, he could claim to have been harmed by their choice.

Yet, accepting a weaker genetic counterpart relation still makes little difference to our determinations of the occurrence of harm in our non-identity cases. For whilst the psychological approach when paired with either version of the TDC allows for the impact of one’s environment on numerical identity, our genetic inheritance is still viewed as a necessarily determinative factor in our coming into existence. Thus, in The Reproductive Dilemma we can see that regardless of whether we judge that Deborah and Edward should wait to conceive so as to avoid having a child with a disability, acceptance of this weaker relation gives us no reason, in regards to the interests of their resulting child, as to why we should care. For as any child born after the 5 months wait would have been conceived from both a different egg and sperm, the child born after the 5 months wait could not be a counterpart of the child born before the 5 months wait because such children would not be in possession of the genetic properties required.
for counterpart relations. The choice faced by Deborah and Edward remains a decision regarding whom, of two numerically distinct persons who lack the counterpart relation required for determinations of prenatal harm, to create. Similarly, in The Policymakers choice whilst we view that Conservation is the obvious policy to choose, there is still no person affecting reason as to why this should be the case. For, as according to the TDC a particular person could only exist provided he was conceived within a month of the time from which he was actually conceived and from at least one of the gametes from which he was actually conceived, after 200 years there is likely to be no one in existence in both policies who possesses the properties required for a determination of trans-world identity.

5.12. TOWARDS A MORE HOLISTIC APPROACH REGARDING TRANS-WORLD IDENTITY IN CASES OF ALLEGED PRENATAL HARM: INTRODUCING THE ENVIRONMENTAL COUNTERPART

Despite the fact that the TDC2 can allow for counterpart relations in a great number more scenarios than the TDC1, it still raises a number of interesting questions regarding why it is that half a genome should be viewed as enough to secure the (very slim) possibility that a foetus/embryo could possess the necessary causal properties that would allow us to view them as the counterparts of a genetically distinct foetus but less than half should be viewed as a step too far. Now, readers of this paper might at this point note that the TDC2 should not be viewed in the way in which it has been formulated and should be seen as little more than a concession on Parfit’s part regarding the fact that whilst he views it unlikely that we could have been genetically different, as identity is a very fragile thing, answers to the question of whether we could still be ourselves with a slightly different genetic code are an epistemological impossibility and we should thus allow for the very small possibility that it could be the case.

However, it remains the case that as the TDC2 places the genetic line to be drawn regarding whether a particular foetus possesses the causal properties required for counterpart relations and thus for judgements of preconception harms and benefits at half a genome we can charge the TDC2 with arbitrariness or at least with missing the mark in oversimplifying a remarkably complex matter. For it does not seem that it should matter when determining whether any particular embryo possesses the causal properties required for trans-world identity exactly how much of a specific genome they are in possession of, but instead, the extent to which the identity determining features inherent in their genome restrict their future life possibilities such that the genetic characteristics they possess would preclude the possibility of their being a
Thus, whilst the rule imposed by the TDC – regarding the necessity for our existence and thus for the existence of our counterparts at the possession of at least half of our originating genetic material – will often lead to uncontroversial determinations of identity and non-identity in most genesis cases, the TDC, even in its weaker form, leads to some counter-intuitive answers regarding questions of causal identity in certain other scenarios. For example, it will not allow that in a different possible world, a child born to my parents on my birthday and like me in all respects, barring the fact that we possess completely different genomes could be viewed as my counterpart. It will not allow this even if all of the genetic differences between us, by some remarkably unlikely occurrence did not determine any phenotypic differences so that the resultant person would, or could, *ceteris paribus*, look, act and live exactly like me.\(^{238}\)

Yet, it will allow for the possibility of my counterpart’s existence in a possible world where the two specific gametes from which I was conceived misdivided at some point after fertilisation and was thus born with the mosaic form of trisomy 21 and subject to severe learning and moderate physical difficulties. This person, on any version of the TDC, in possessing my genome in a large percentage of her cells and only a slight variation in a smaller percentage, would be the only candidate in that possible world for possessing the relevant relations required for determinations of trans-world identity. Of course, as we have already discussed with the case of AN, RN and IDN, the fact that we would be so different from one another would not make much difference to determinations of identity across possible worlds as counterpart relations are similarity relations and not relations of strict identity.

Despite this, the fact that the latter would still have been a candidate for being my counterpart because she can be identified in that possible world as sharing my genome and the former cannot be, despite all of our similarities, seems, ultimately, to be nothing short of bizarre and it is thus suggested that the TDC2 fails to provide a non-arbitrary account of causal identity on the psychological account. Thus, as the above cases show, the possession of at least half a genome seems to be neither necessary nor sufficient for determinations of counterpart relations. The conception of a child with a completely different genome by my parents at the time of my conception does not seem to necessarily imply that ‘I’ could not have come to exist and neither does the conception of a child with my exact genome imply that ‘I’ could.

If we are to accept the possibility that the child mentioned above who was born on my birthday

\(^{238}\) Wolf, ‘Do Future Persons Presently Have Alternate Possible Identities?’, p. 100.
and like me in all respects might be a candidate for being my counterpart due to the fact that we possess a great deal of similarities in terms of the environmental determinants of our identities it becomes the case that on the psychological approach, the ‘truth’ that the TDC asserts seems to be relatively unremarkable. This is so because whilst it may be likely the case that had my parents not conceived me within a month of the time that I was conceived I would not, in fact, have existed, whether it is necessarily the case that I could not have existed is a question to which an answer cannot be found regardless of how much and how long we look.

I suggest, then, that environmental factors should also be viewed as relevant for determinations of trans-world identity. For as counterpart relations are relations of objective similarity and we determine such relations by whether trans-world individuals resemble us more closely and in relevant respects than do other individuals in those worlds, that it is a possibility that an individual with an entirely different genome will resemble me more in one possible world than an individual with my specific genome in another, gives us cause to believe that counterpart relations should be determined by not only genetic properties, but also by environmental factors. Indeed, as on the psychological approach it is the sum of all of the causal factors that led to our existence that determines our identity within worlds, with even a slight difference altering identity we can note that just as our possession of our exact genomes was necessarily determinative of our numerical identities in actuality, so too were the environmental factors necessary for our coming to exist.

Thus, if we are able to determine relevant counterpart relations by saying w is a counterpart of x, where w and x possess the same/similar genetic code despite the fact that the environmental determinants of their identities were different, we should also be able to determine that y is a counterpart of z in virtue of their sharing the same or similar environmental determinants of their identities despite the fact that they are in possession of a different genetic code. This claim is counterintuitive as “to envisage an individual as having a different origin is harder, or involves a greater departure from actuality, than to envisage its having a different subsequent history”\textsuperscript{239}, yet its being so, does not make it any less salient.

Indeed, research in developmental psychology points to the fact that the above claim is not as bold as it may at first seem. For, certain authors have termed the newly born baby an “external foetus”\textsuperscript{240} or an “unfinished embryo”\textsuperscript{241}, in reference to the fact that whilst most of us view that

\textsuperscript{239} Mackie, How Things Might Have Been: Individuals, Kinds and Essential Properties, p. 93.


once born, a baby is, in a sense, ‘box ready’, this is not at all the case. Their genomes do set a blueprint for their development in certain ways. But this blueprint allows for a great deal of customisation by the families and the societies in which they find themselves and a great deal of the environmental factors that influence development influence both somatic and psychological systems. The development of the baby’s brain is a good example of this as the brain develops the most in the first year and a half of life and before birth whilst the nerve cell structures are in place, they remain unconnected and only begin the process of creating the connections that allow messages to travel between different parts of the brain after birth.242 Thus, differences in the persons with whom and the physical environments in which a baby spends much of its early life will cause different psychological and physical features to obtain, a fact which also makes a great deal of evolutionary sense as it allows each baby to be “tailored to the circumstances and surroundlings in which she finds herself.”243

In accordance with this we should view each potential person as not possessing a potential personal identity in the singular sense, but instead as holding in their grasp a myriad of vague and crude potential personal identities, one of which will eventually develop, depending upon, not only their genomes but environmental and social factors. When viewed in this way the boundaries between different possible persons become weaker, and provided we subscribe to a psychological account according to which what is important in personal identity admits of degrees, we might find relevant shared features between genetically distinct foetuses and distinct differences between different versions of a particular foetus’s potential identities. It might be the case, for example, that some of the possible identities of one particular foetus might be almost identical to the possible identities of other, genetically distinct foetuses, others may share relevant features, and other possible identities of a particular foetus may be so different from one another that apart from being attached to the same sack of DNA are virtually unrecognisable.

Thus, if we have good reason to accept genetic counterpart relations, we also have reason to accept as relevant, what I shall call ‘environmental counterpart relations’ where an individual shares with another individual across possible worlds, not their distinct genome or a similar genome, but the environmental determinants of their identities such as growing in the same uterine environment, growing up during a particular period in history, the sharing of social parents (or counterparts of their social parents), the sharing of a sibling and other family members (or counterparts of their siblings and other family members), the same cultural positions, and in virtue of this: a particular belief system and memories of very similar

243 ibid., p. 18.
Such types of similarity relations are again unlikely to offer us any help in accounting for our intuitions in *The Policy Makers Choice*, as the decision that the policy makers must make will result in both genetic and environmental differences between the individuals created. They do, however, explain why a focus upon causal genetic features is insufficient for determinations of trans-world identity and might in fact help us to understand why it is that we believe that Deborah and Edward would do the right thing in choosing to wait to conceive in *The Reproductive Dilemma*. For whilst it is the case that the children that they could have conceived before and after the 5 months waiting period cannot be seen as genetic counterparts it is a possibility that certain of the possible identities of each of the possible children in virtue of their shared parentage, familial and cultural positions could have been similar enough in terms of their subsequent histories that we might view them as environmental counterparts.

### 5.13. A FINAL CONSIDERATION: THE ‘DECISIONAL COUNTERPART’

Might there be another type of counterpart relation to which we can appeal in order to ground claims of harm in non-identity cases such as *The Policy Makers Choice* where Genetic, Branching and Environmental counterpart relations cannot explain our intuitions? It seems unlikely if the only counterpart relations relevant for determinations of trans-world identity are determined by our being causally linked with other persons across possible worlds. The numerical identity of any particular person, defined by relations of connectedness and continuity, cannot be causally determined by anything other than genetic and environmental factors. To be my/ your counterpart any particular person across different possible worlds must be similar to me/you in certain relevant respects. If such relevant respects consist in only whether they are in possession of all, or most of, the causal determinants of our identities, then it seems we have reached our limit when attempting to determine the occurrence of prenatal harm. Yet, there is a different approach to which we might appeal in cases of prenatal harm if we are willing to broaden our approach regarding the kinds of objective similarity relations necessary for determinations of trans-world identity.

I suggest that, in cases of alleged prenatal harm where it is the case that we cannot account for our intuitions by appeal to the causal features that determine identity, what is important about the identity of possible future persons is very similar to a class of views regarding distinctive necessary properties discussed by Parfit in *Reasons and Persons*. The class to which I refer is
termed ‘The Descriptive View’ and it refers to views that state that our counterparts across possible worlds need not be causally related to us as is the case with genetic and environmental counterparts, but may instead be persons who can be identified as across possible worlds by the sharing of a definite description. On such views we might identify Immanuel Kant across possible worlds as the person who wrote the Critique of Pure Reason, or the person who wrote most of the books that Kant actually wrote such that “in any possible history in which a single person wrote those books that person would have been Kant”. Or we might identify persons across possible worlds via certain specific roles that they inhabit with respect to other persons such that as I possess the role ‘second daughter’ in relation to my ‘parents’ any person across possible worlds who also possesses the role of ‘second daughter’ in relation to ‘parents’ who are counterparts of my parents might be identified as my counterpart. Parfit dismissed such a view as being “too implausible to be worth discussing”, noting: “I am the second of my mother’s three children. This claim implies absurdly that, if my mother had conceived no child when she in fact conceived me, I would have been my younger sister.”

Yet, whilst this observation is well made, the notion that we might identify persons across possible worlds by reference to certain descriptive terms as opposed to their causal properties is not so absurd that a number of philosophers have not attempted to define our moral responsibilities regarding possible persons in this manner. Clark Wolf, for example, notes in a paper regarding the non-identity problem:

Where the question involves responsibility, our theory concerning the identity determining characteristics of future persons should capture what is significant about them from the moral point of view, and this may be quite different from other senses of identity that we use to individuate persons for other reasons, or within other theories and projects... Once we recognize that the articulation of the [non-identity problem employs a very specific concept of “identity,”] and recognize in addition that different conceptions of “identity” are appropriate in different circumstances, we have new resources to address this problem. To find a non-arbitrary criterion, we need to identify the conception of “identity” that is appropriately employed in cases where the non-identity problem seems to arise.

Inspired by a rather tentative footnote where Maclean suggests that “Perhaps we should insist on a person-affecting criterion for harm but a place-holder criterion for wrong” and Hare’s concept of de dicto wrong he suggests that we may find what is significant about future

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244 Parfit, Reasons and Persons, p. 354.
247 Harm de re: where S1 and S2 are the possible states of affairs resulting from a decision x is subject to a de re harm when it is the case that the thing that the thing that is actually x’s interests are left in a worse condition in S1 than S2, and we choose S1. Wrong de dicto: where S1 and S2 are the possible states of affairs resulting from a decision, x is subject to a de dicto wrong when the thing that occupies the position of x in S1 is worse off than the thing the occupies the position of x is in S2 and the decision maker who,
persons from the moral point of view in cases of alleged prenatal harm by referring not to a numerical account of personal identity or to the causal properties that allow such identities to develop, but instead to the identities of future persons as particular place-holders. Thus, he proposes that in cases of alleged prenatal harm the morally significant feature to which we should refer is that of their being “the class of persons whose interests will be influenced as the consequences of our present choices”, and that as such “the putatively different people we might bring into existence are all the same from the moral point of view” in virtue of their holding of this feature.

Such an approach is not as bizarre as it may first look as it is the case that in the eyes of others quite often what is important about us in the moral sense seems to have less to do with our numerical identities and more to do with our possession of certain roles. For example, it is the case that I, to those responsible for my conception, as well as being identifiable as the numerical person ‘Nicola Jane Williams’ inhabit a certain role, that of ‘daughter’. My inhabiting such a role entailed certain partial duties on their part when I was still a child. They, in choosing not to give me up for adoption, accepted a role that required that they take appropriate steps, whilst I was unable to look after my own interests, to look after them for me. They accepted a moral and legal obligation to prefer, ceteris paribus, to feed and clothe me and to ensure that I was happy and healthy, than to feed and clothe and ensure that some other child who was not their child was happy and healthy. Yet such duties would have obtained regardless of who inhabited the role of ‘daughter/son’ provided there was someone that actually inhabited that position. Had they chosen to give me up for adoption, they would be subject only to obligations that obtain between them and I in virtue of my being a person. Indeed, now that I have reached majority their duties to me have changed despite the fact that my numerical identity remains the same, although they are still partial to me, preferring, for example, to bail me out of dire financial straits than strangers. I am also both a British and European citizen. Those in government have a duty to represent my interests locally, nationally and internationally in virtue of my role as citizen but they cannot really be said to possess a duty towards me. For should it be the case that I chose to relinquish my citizenship, their duties would no longer apply, as the duty to protect my interests as a citizen applies not to me ‘the person’ but to whomever happens to inhabit the role of citizen. Indeed, we can see too that in certain cases, conventional, non-role specific obligations seem to attach less to the numerical identities of others and more to ‘anyone who might be affected by our actions’ as when we “Consider the obligation not to shoot bullets into

in normal circumstances, would have a de re duty to choose S2 chooses S1. See: C. Hare, 'Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?', *Ethics*, 117/3 (2007), pp. 498-523.

Wolf, 'Do Future Persons Presently Have Alternate Possible Identities?', p. 108.
the woods when one cannot see whether there is anyone there, or the obligation to care for one’s brakes in case one needs to stop suddenly for a pedestrian.\textsuperscript{249}

As such, I suggest that there is a further type of counterpart relation relevant for cases of prenatal harm. A counterpart relation that identifies persons across possible worlds by reference to certain descriptive properties as constituting a relevant relation of objective similarity, the property of being the result of a particular decision made by a particular person at a particular time. After all, that one’s existence is contingent upon a decision made by a particular decision maker at a particular time and so is the existence of certain other persons across possible worlds is most definitely a similarity. As it is the case that our questions regarding the occurrence of prenatal harms hinge upon our consideration of this very similarity, such a similarity should be viewed as relevant to our moral decisions. Such a counterpart relation is thus formulated as follows:

**The Decisional Counterpart:** where a particular numerical person x’s existence is contingent upon a decision made by agent y at a particular time (t), across possible worlds those whose existence is also contingent upon the same decision made by counterparts of y who are indiscernible with y at t should be viewed as x’s counterparts.

By employing the Decisional counterpart relation in addition to Branching, Genetic and Environmental counterparts it is suggested that those of us who subscribe to a psychological account of personal identity can find an answer that satisfies both our intuitions and the person-affecting principle in cases such as *The Reproductive Dilemma* and *The Policy Makers Choice*. For in *The Reproductive Dilemma* we can note that not only might some of the possible children of Deborah and Edward be viewed as counterparts across possible worlds in virtue of their sharing an Environmental counterpart relation, their being the result of a decision made by Deborah and Edward/Deborah and Edward’s counterparts, at a particular time of whether to wait or not to wait to conceive constitutes a Decisional counterpart relation. Similarly in *The Policy Makers Choice* we can note that whilst none of the possible results of the policy decision across possible worlds may be viewed as Genetic or Environmental counterparts, in being the result of the decision made by the policy makers or their counterparts, those who are the result of whichever decision is made should be viewed as counterparts in virtue of their being the result of that decision. Thus, provided in both cases we are able to determine that certain of one’s counterparts across possible worlds are better off in virtue of a different decision having been made, we have the required basis for determining the occurrence of prenatal harm.

\textsuperscript{249}ibid., p. 109.
5.14. CONCLUSION

Within this paper the question of when and whether it is possible to determine the occurrence of prenatal harm in accordance with both a psychological account of personal identity over time and a person affecting account of harm was addressed. It has been shown that whilst it may initially seem hard on such an approach, provided we utilise a causal account of identity when answering such questions, it is possible to have meaningful discussions regarding the occurrence of harm in prenatal cases despite the fact that no foetuses and persons can ever be said, in an evaluative sense, to share an identity.

Parfit’s account of the causal properties that determine existence across different possible histories of the world was then explained and examined and it was suggested that the way in which it is generally read, as a version of Kripke’s necessity of origins claim, is not appropriate on the psychological account. It was suggested that it is better to read such claims in terms of Lewisian Counterpart Theory according to which claims such as the TDC are true when they pick out individuals across possible worlds as sharing a trans-world identity or an identity like relation in virtue of their being similar to each other in certain relevant respects and to certain relevant degrees. After this it was argued that if persons across possible worlds can be said to share an identity across worlds when they fulfil the conditions of the TDC, we have good reason to expand our approach regarding the kinds of features that determine trans-world identity to include both weaker genetic relations and also environmental features that determine identity in a similar way. Finally, it was suggested that we might appeal to another kind of counterpart relation, determining identity across possible worlds in prenatal cases by not just the features that lead to the development of one as opposed to another psychology but via appeals to the conditions of each person’s existence. According to such counterpart relations, when across possible worlds one’s existence hinges upon a decision made by a particular decision maker at a particular time all of those individuals whose existence hinges upon that same decision at that same time by that decision maker’s counterparts should be viewed as one’s counterparts in virtue of this.

Yet, whilst the fact that harm can be determined in prenatal cases by appeals to both strong and weak genetic counterpart relations, environmental counterpart relations and decisional counterpart relations constitutes a major step forward in the debate, work still needs to be done. That harm can be determined does not, for example, necessarily mean that such harms cannot be justified in certain cases by appeals to other considerations or that the harm claims generated will be strong enough to warrant the infringing of reproductive autonomy in micro cases of prenatal harm such as The Reproductive Dilemma. Nor indeed does the fact that harm can be
determined in micro cases such as *The Reproductive Dilemma* mean that those responsible for the existence of an individual with a harm claim are necessarily responsible for the harm incurred by their offspring. For whilst the external features of particular possible worlds such as is the case in *The Policy Makers Choice* might straightforwardly be determined as not particularly conducive to the living of a good life, and thus, harmful to any person that is subject to them, that all disadvantageous genetic features should be viewed as intrinsically harmful is not so apparent. Disability itself need not always inhibit flourishing, and a better way to mitigate the person affecting harms associated with disability may well be to alter the structure of society so that such traits are no longer disadvantageous, rather than to alter the numerical identities of the players themselves. Thus, whilst the fact that harm can be determined in prenatal cases and such harms can be viewed as attaching to possible persons is good enough for this paper, the debate regarding who is responsible for such harms, which harms can be justified and the actions we should take when responding or attempting to prevent such harms is one that, for now, remains open.
6.1. INTRODUCTION

The reproductive realm – historically characterised as an arena overwhelmingly dominated by chance – is steadily becoming one over which individuals have the potential to exercise a significant degree of choice and control. Prenatal and pre-implantation genetic screening technologies, for example, have made it increasingly possible to determine whether our potential offspring are in possession of genetic traits widely viewed to be disabling. Such technologies have, for example, greatly increased reproductive choice for individuals who would prefer not to parent disabled offspring and enabled them to make a considered choice regarding whether or not to bring a disabled child into existence. They have also provided them with the opportunity, should they decide to do so, to make adequate preparations for the birth of children who may have complex medical and social needs. Their advent however has also prompted many to consider the relative moral obligations of prospective parents: asking whether they might now be morally obliged to take steps to screen out disability in their offspring in situations where they have a choice, where such a decision will not prove overly burdensome to them.

This question has been raised in the media in response to high profile cases of selection for disability such as that of Duchesneau and McCullough, a deaf couple who successfully ensured the birth of a deaf child in the early 2000’s via the use of a fifth generation sperm donor.\(^{250}\) It has also been raised in cases of failure to select against disability in the case of Bree Walker Lampley, an American television personality with Ectrodactyly who, “became the subject of a

public discussion about whether it was appropriate to conceive a child who faced a 50-50 chance of inheriting the same condition after she was condemned for her decision to reproduce on a nationally broadcast radio show. A preference for selection against disability has also become evident in public attitudes towards those who discover unexpected genetic abnormalities in a foetus. Davis, for example, notes a shift in her own attitudes, occurring since the advent of pre-natal screening technologies:

Twenty years ago, seeing a woman in the supermarket with a child who has Down syndrome, my immediate reactions were sympathy and a sense that that woman could be me. Now when I see such a mother and child, especially if the mother is older, I am more likely to wonder why she didn’t get tested.

The question of whether prospective parents might have a moral obligation to select against disability in their offspring has piqued the attention of many prominent philosophers and bioethicists and a large literature has emerged surrounding this question. Some couch their discussions in more positive terms asking if there might be a moral obligation to create the best child possible. In most cases, regardless of whether we frame the question negatively or positively, it is evaluated by considerations of the value of parental autonomy, the welfare of the child created, parental duties and obligations to their children and considerations of impersonal harm. However, what, at least in part, seems to be the focus of this question, although it is often only alluded to in the literature, is the burden disability places on others. In light of this, this paper asks a slightly different question to the usual one in this area. It asks: Might we have a moral obligation to select against disability in our offspring in virtue of the harms that the creation of disabled persons might impose on others than the person created?

6.2. THE SELECTION AGAINST DISABILITY VIEW AND ITS VARIANTS

Before discussing whether there might be good moral reasons in favour of selecting against disability in our offspring it is important to first define what exactly is meant when it is stated that some individual is disabled. What constitutes a disability, and whether or not disability is intrinsic or extrinsic to the individual who experiences it, is a heavily contested topic and countless papers have already been written with the aim of providing an accurate account. For

253 Davis, Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures, p. 18.
the purposes of this paper however, a more general and hybridised definition covering all major views will suffice. As such, the term disability shall here refer to a social and/or physical barrier to participation/activity or a disadvantage that can be construed of as either intrinsic or extrinsic to the individual who suffers it, and a genetic trait will be referred to as disabling when it fulfils any of such criteria.

The Selection Against Disability (SAD) View should be described as encompassing an umbrella of views which pick out some or some number of negative characteristic/s associated with disability (for example: limited opportunity or suffering) and hold that in virtue of this association it is, *ceteris paribus*, normatively preferable to choose to bring to birth a child absent this/these characteristic/s. The SAD view is thus not a monistic view and can be found in both weak and strong forms. For, dependent on the characteristic/s of disability to which a proponent of the SAD view appeals as justifying their normative preference, and the relative strength of competing moral claims, vastly different answers will be given to the question: should person (p) select against some disabling trait (x) in some particular scenario (s)?

Arguments that may form the basis of a subscription to some version of the SAD view should be seen as falling into four distinct categories focusing on different justifications. The major positions associated with such justifications will now be outlined before moving on to focus on the fourth in order to provide a basis for our discussions:

1. Harming and Wronging The Child
2. Violations of Parental Duties and Virtues
3. Impersonal Harms
4. Harms To Others

The first class of argument suggests we may find a moral basis for the SAD view by focusing on the interests of and/or the rights of the children that will result from our procreative decisions. Arguments falling into this category thus focus on person-affecting reasons, picking out the harms or limits to opportunity associated with certain disabilities as providing good reason to select against traits liable to result in such harms and limits to opportunity. Perhaps the most straightforward argument of this type would be that as disability is, by definition, a harmful or disadvantageous state for an individual to be in it would be *better for* some/all disabled foetuses/embryo’s should they not be brought into existence. This however, requires one to commit to the claim that the lives of disabled individuals are often dominated by suffering and has very few, if any, proponents. For, to say a life is not worth living places a large burden of proof on those who make such a claim. As such, it is generally assumed that
arguments focusing on the harms that disability may impose on our children may legitimately be made, if at all, only in cases of extremely serious and/or painful disabilities.

Others attempt to lessen the threshold level of disability, suggesting that we might ground a subscription to a version of the SAD view by focusing on the rights of those that may be brought to birth as a result of selection decisions. The most famous of such approaches is Davis’ application of Feinberg’s Open Future Argument to the prenatal context where she suggests that a decision to implant an embryo that may be subject to a genetic disease over a healthy embryo violates the prospective child’s ‘rights in trust’; a corollary of the autonomy rights that adults possess requiring that parents not close off certain important choices their children may wish to make when they are adults whilst they are still minors.

Reasons falling into the second category look to the kinds of role specific duties that parents owe to their children and the kinds of virtues that a good parent should possess. They focus, like the first, on the harms and limits to opportunity that may result from the possession of disabling genetic traits, arguing that a good parent should not want to create a child who is likely to be disadvantaged in such a way. This is the case with Steinbock and McClamrock’s “principle of parental responsibility” which requires persons to “refrain from having children unless certain minimal conditions can be satisfied…[as] loving, concerned parents – will want their children to have lives well worth living.”

Arguments falling into the third category appeal to non-person affecting concerns such as the effects of a failure to select against disability on the state of the world by arguing that the creation of persons with disabilities may in some or other way make the world a poorer place. Parfit, Glover and Harris, for example, have all famously argued that states of affairs need not be good or bad ‘for’ anyone in order to be morally blameworthy but may instead be good or bad tout court and applied this reasoning to the question of whether there might be a moral obligation to select against disability. They argue that those who fail to avoid disability in their offspring act wrongly as they deliberately or negligently choose to create a state of affairs that is strictly worse (in terms of some particular value such as happiness/preference satisfaction) than

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256 See, for example: Hare, 'Voices from Another World: Must We Respect the Interests of People Who Do Not, and Will Never, Exist?', pp. 498-523. & Wolf, 'Do Future Persons Presently Have Alternate Possible Identities?', pp. 93-114.
258 Steinbock and McClamrock, 'When Is Birth Unfair to the Child?', p. 17.
the state of affairs that could have been created had they chosen differently.\textsuperscript{259} This kind of argument can be seen in Savulescu's Principle of Procreative Beneficence which states that prospective parents have a duty to “select the child of the possible children they could have, who is expected to have the best life, or at least as good a life as the others, based on the relevant available information”,\textsuperscript{260} a duty which, although not limited to selection against disability would, in the vast majority of circumstances, require such selection. It can also be seen in the eugenics policies of the late 19\textsuperscript{th} and 20\textsuperscript{th} centuries that attempted to build a ‘better’ society via the implementation of selective breeding programmes and the forced sterilisation of those deemed genetically undesirable.

Finally, the fourth class of reason, like the first, consists of arguments suggesting that a subscription to the SAD view may be grounded in the person-affecting harms liable to result from a failure to select against disability. Unlike the first class however, variants of the SAD view falling into this category should be seen to focus outwardly, on the costs – financial, emotional, relational and otherwise – that a decision to select for disability or to choose not to select against disability may impose upon already extant persons.

In recent years, much attention has been given to the first three of the above classes of reason. Both those who champion and criticise a version of the SAD view have written extensively on such matters, as, indeed, have the many authors who have written papers offering both in depth and surface surveys of different incarnations of this debate.\textsuperscript{261} Yet, despite this, arguments falling into the fourth category have been largely neglected in the literature regarding the SAD view. Yet, why this has been the case is mysterious and this is so for two reasons:

Firstly, as there is a general tendency within society and philosophy to question the moral acceptability of acts including but not limited to choices to engage in extreme and dangerous sports, go on exotic holidays, smoke, or eat unhealthily from the perspective of analysis of the

\begin{footnotesize}
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\item \textsuperscript{259} Parfit, Reasons and Persons; Glover, Choosing Children; Harris, 'One Principle and Three Fallacies of Disability Studies', pp. 383-387.
\item \textsuperscript{260} Savulescu, 'Procreative Beneficence: Why We Should Select the Best Children', p. 415.
\item \textsuperscript{262} I note that this is largely the case as opposed to wholly so in virtue of the fact that a small number of philosophers have attempted to justify a version of the SAD view by consideration of such harms. The most notable of such attempts can be found in T. Douglas and K. Devolder, 'Procreative Altruism: Beyond Individualism in Reproductive Selection', \textit{Journal of Medicine and Philosophy}, 38 (2013), pp. 400-19; J. Elster, 'Procreative Beneficence - Cui Bono', \textit{Bioethics}, 25/9 (2011), pp. 482-88; Roberts, 'What Is the Wrong of Wrongful Disability? From Chance to Choice to Harms to Persons', pp. 1-57.
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externalities such choices produce it seems bizarre that acts of procreation should be immune from criticism on the same grounds.

Secondly, it should be noted too that as it is now generally held that arguments focusing on harms to the child fail to provide a defensible moral foundation for a subscription to the SAD view in virtue of the conclusions of the non-identity problem and that bioethics as a discipline tends to be populated by consequentialists as opposed to deontologists, most theorists have only two real options when it comes to possibilities for a moral grounding for such a subscription: appeals to impersonal harms and harms to others. That impersonal harms have received more attention than those affecting actual persons constitutes the second mystery. For, even if we accept that impersonal harms are possible and will often prove relevant for determining the moral status of our actions acts causing harm to actual persons are generally held to be of more moral gravity than those causing impersonal harms. As such, if a failure to select against disability can be shown to cause unjustifiable harms to actual persons as opposed to only impersonal harms, it may be the case that such harms can provide a stronger moral basis for a subscription to the SAD view.

With this in mind, and taking as a basis a comparative account of harm as setbacks to interests – according to which it is held, that some particular numerical entity (p) is harmed by some particular action (x) when it is the case that, all things considered, x has adversely affected the interests of p, or counterfactually, when it is the case that the interests of p are, all things considered, in a worse condition than they would have been had x not been done263 – I gradually widen the area of concern from which I analyse the real or perceived harms that a failure to select against disability might impose on others.

Where such harms are found I then ask whether they might be deemed wrongful, providing a defensible moral foundation for a subscription to some version of the SAD view. I thus begin by looking to the harms that prospective parents might be said to impose upon themselves by a failure to select against disability. The focus is then widened slightly to include family members whose interests might be negatively affected by such a decision. Finally, after this is done, I widen the focus to its furthest reach, looking to the idea that a failure to select against disability may impose unjustifiable harms on our fellow citizens in virtue of the moral claims that such decisions impose upon them regarding the proper and just division of social resources.

263 Feinberg, 'Wrongful Life and the Counterfactual Element in Harming', p. 7.
6.3. PERSONAL HARMS: AUTONOMY AND THE COSTS OF PROCREATION

Whatever the reasons we have for reproducing very few of us do so because we believe that in procreating we will benefit our future children. Nor, indeed, do any but the most collective-minded of us decide to reproduce for the reason that we believe our child’s existence will provide some benefit to humanity. Instead, our decisions to reproduce tend to be based in considerations of self-interest, individual perceptions of obligation or a-rational in nature: undertaken with no specific purpose in mind but perhaps out of a sense of inevitability.

We may, for example, believe that in undertaking the project of parenthood we will be better off, that we might find love, fulfilment, companionship or a sense of purpose, that a child might provide the antidote to an ailing marriage, or provide us with security and support in our senescence. We may instead, or in addition, view that there is an obligation on our part to continue the family line or name, to provide our partners or parents with children, believe that parenthood is socially or culturally required, or perceive a religious obligation to ‘be fruitful and multiply.’ We may too find that reproduction is not really a ‘choice’ at all, because we find ourselves pregnant and/or in possession of beliefs that tie our hands or because we have been conditioned to think that to have a child is, in some sense, inevitable, not required as such, but a natural part of human life that we tend not to fail to avoid except upon significant motivation.

For the self-interested among us, who procreate not merely out of a sense of obligation or a-rationally, it can be noted that decisions to do so tend to be based on a belief that in accordance with the information we have available, we will be better off should we conceive/give birth to/raise a child, or will, at the very least, not be caused harm by our decision on balance. Thus, we accept (implicitly or explicitly) the costs of parenthood, such as the time, money and effort that it takes to rear a child, in anticipation that the benefits we seek will outweigh such costs.

Yet, despite this, in certain scenarios, a decision to bring some particular child to birth will leave us worse-off than we would have been had we chosen differently. To make such a decision, when in full knowledge of this, is one that cannot be considered rational if we are seeking to act self-interestedly. As such, it may be possible to claim that in cases where a reproductive choice (including but not limited to a decision not to select against disability) will leave prospective parents worse off than they would have been had they made a different choice such individuals might well wrong themselves, or be wronged by others who fail to stop them from harming themselves. Dependent on the account of autonomy to which we subscribe it might thus be
claimed that a decision to fail to select against disability cannot be autonomous and thus may well be a decision that results in a moral wrong regardless of whether we are held responsible for it or others are responsible because they failed to prevent us from harming ourselves.

Whether or not such a claim can be made if it is held along broadly Millian lines that it is the possession of certain capacities (such as reason, reflection and representational abilities) as opposed to their exercise that is required for autonomous choice that a decision is irrational provides no reason to claim that those who make irrational choices either wrong themselves or may be wronged by others who fail to stop them from acting irrationally. Provided an individual possesses such capacities, is not being coerced by others and is in possession too of the information that is required to make such a decision, he may just as easily consent to causing himself harm as he may to furnishing himself with benefits. This is so as if we hold that the moral agent in such cases is the same as the moral subject, the idea that he can have a moral obligation to himself constitutes a contradiction. For, the moral subject, in his position as a moral agent with the capacity to release others of their moral obligations to him, has the capacity too to release himself from his own.

On other accounts however, such as in the position taken by Kant regarding the possibility of duties to self, this contradiction does not occur. On this account persons are dualised entities, the *homo noumenon*, a perfectly rational legislator, and the *homo phaenomenon*, a finite and imperfect being who, by possessing the capacity of free will may both obey the law of the former and fail to obey it. Such entities thus stand together, creating a state of dialectical opposition between the demands of duty and the pull of inclination. On such an approach while one can, as the latter entity, make an autonomous choice and consent to doing the irrational: one cannot as the former in virtue of the fact that the perfectly rational legislator *cannot* consent to the irrational. One can, by acting only as the latter entity and ignoring the prescriptions of the prior, wrong oneself, just as one can wrong others by failing to act in accordance with duty. As such, those who subscribe to this view can claim that in situations where one has a choice between a rational and an irrational procreative decision, to choose to act irrationally will constitute a moral wrong.

One need not, however, subscribe to the Kantian account to locate the wrong of an irrational procreative decision in the harms that a procreative decision-maker may impose on himself. On thicker accounts of personal autonomy, for example, we may claim that the individual who ‘chooses’ to act irrationally actually makes no choice at all as an autonomous choice is a

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rational one. Irrational choices are necessarily inauthentic in the sense that the decision maker will lack either the information sufficient to make the ‘right’ decision, or his capacity to understand that information has been compromised. Thus, whilst an agent will not wrong himself, others might well be said to wrong him by failing to intervene and stop him from harming himself in such scenarios.

Should we adopt such an approach however, this may still not justify the outward imposition on those who would make such decisions of a moral duty to act in a rational manner. For, whilst paternalistic attempts to save individuals from themselves may have their place in the writings of Rousseau\textsuperscript{265} and Plato\textsuperscript{266} they are at odds with the insistence common to most, if not all mainstream ethical theories including that of Kant himself, that we should aim to preserve and enlarge the arena of his life over which the individual can be said to be sovereign. In accordance with this commitment it is held that individuals should be given the freedom – both morally and politically – to make their own decisions regarding how to live their lives, regardless of how foolish others may view such decisions to be\textsuperscript{267}, provided their decisions are autonomously made and do not cause unjustifiable harms to others. Indeed, oppressive moral, social and political environments have proven themselves, time and again throughout history, not to be particularly conducive to individual wellbeing. This is in virtue of the fact that persons tend to give special weight to those decisions we make ourselves, both gaining more pleasure and pride from our own successes and accepting more readily the harms that we impose upon ourselves than those imposed upon us from the outside.

However, whilst we may, on certain accounts of autonomy claim that those who harm themselves act wrongly or may be wronged by our allowing them to do so, it is yet to be demonstrated that those who decide not to select against disabling genetic traits in offspring or who deliberately select for them are actually liable, on balance, to be harmed by their decision. In favour of this judgement we can note that it has been well documented that raising a disabled child will often prove more costly for parents than raising a non-disabled child. Economically speaking, on top of the normal costs associated with raising a child, depending on the nature and severity of the disability parents may need to make significant adjustments to their homes. They may need to purchase special equipment, adapted specialist toys, food and medicines. One or both parents may need to stay at home to care for the child which will lower their earning

\textsuperscript{265}Rousseau, \textit{The Social Contact and Other Later Political Writings}, SC: 1.
\textsuperscript{267}Sentiments of this kind are littered through the work of Mill and Kant. See, for example: Mill, \textit{On Liberty and Other Writings}. & Kant, \textit{Groundwork for the Metaphysics of Morals.}
potential and mean they have less financial resources to satisfy their own interests. Emotionally and socially too, the stress of dealing with these financial costs may take a toll on their relationships; without adequate support from others they may feel isolated; and the pain of seeing their child struggle with the mastering of tasks that come easily to other children or watching them suffer from the painful effects of certain disabilities may also prove detrimental to their welfare.

Yet, whilst there are undoubtedly extra costs associated with the raising of children with certain disabilities it is still to be demonstrated that such costs will not be outweighed by compensating benefits. In the case of persons who wish to select for disability in their offspring, for example, this seems, for obvious reasons, to be untrue. Such individuals, in making a concerted effort to create a child with a particular set of genetic characteristics tend to express a belief that raising such a child will, for them be just as, if not more, fulfilling, worthwhile or enjoyable than raising a child absent the particular characteristics they seek.

Even in cases of severe and un-chosen disabilities that the birth of a disabled child will, on balance, prove harmful for his parents is questionable. A review undertaken of studies regarding the impact on family life of parenting a child with a severe disability notes that despite such costs the lives of parents of children with disabilities tend to resemble the lives of parents generally. Indeed, another study comparing child related and parenting stress in parents of children with and without disabilities notes that parents of disabled children “exhibit variability comparable to the general population with respect to important outcomes such as parental stress... family functioning... and marital satisfaction.” In other words, whilst parenting a disabled child might pose certain challenges – especially in terms of finances – as society tends not to provide the conditions conducive to the trouble free rearing of severely disabled children, the act of parenting a disabled child seems no more or less likely to be fulfilling, unfulfilling, stressful, enjoyable, damaging to one’s relationships or difficult for parents on balance than parenting a non-disabled child.

Yet, even if we fail to be convinced by the above arguments it should also be noted that in a number of cases the act and process of selection against disability has the potential, just as might

the raising of such a child, to impose great harms on prospective parents. Regarding abortion after the discovery of foetal abnormality, for example, we can note that for those who subscribe to a pro-life view, feelings of guilt after an abortion might be overwhelmingly strong. Indeed, even where this is not the case, it should be noted too that gestation involves a great deal of intimacy between the foetus and the mother. For as Anstey notes “Gestated entities are strongly incorporated into the mother’s body and especially subject to bonding relationships.”272 As such, the decision to abort an impaired child, may be one that would cause a great deal of lasting psychological pain, which could, dependent upon its intensity, outweigh the benefits the performance of an abortion would produce.

6.4. SELECTION AGAINST DISABILITY AND THE JUST DISTRIBUTION OF FAMILIAL RESOURCES

Attempts to ground a subscription to the SAD view in the harms that raising a child with a disability may impose upon parents themselves seem, for the reasons outlined above, to be unlikely to succeed. However, whilst parents may be said, in the vast majority of cases, to consent either explicitly or implicitly to the harms and benefits they impose on themselves by their procreative choices, reproductive decisions, like all others, do not take place in a vacuum. They affect, for better or worse, not just ourselves and the objects of our procreative efforts, but, virtually all members of society, producing harms and benefits, which regardless of whether we intend them or not, will be relevant for determining the moral status of any particular procreative act.

That others might be harmed to the extent that a decision not to select against disability might constitute a wrong seems most likely to hold in situations where those to whom we owe special moral obligations might be negatively affected by this choice. A case might thus be made for a moral duty to select against disability in situations where a decision not to do so would be made by those with existing children, or, who have taken on responsibility for ensuring the welfare of dependent adults such as elderly or disabled relatives. For, whilst the addition of a new member to a family will, in most cases, affect the interests of existing members as both familial resources and the time and attention spent satisfying and nurturing the interests of existing dependents will have to be spread more thinly, when the new member of a family suffers from a disability such issues may be compounded. Disability costs and parents bear a large proportion of these costs even in societies such as our own where a great number of the costs of both child

rearing and disability are socialised and this will, if they have any, affect their existing dependents. The needs of a disabled infant may be far greater than the needs of a non-impaired child and may sometimes not reduce as the infant becomes a child and that child becomes an adult. This means that in such circumstances the needs of one’s other children will often be addressed only after the needs of the impaired child.

This is not in itself necessarily morally problematic. For, provided we hold that familial resources should properly be diverted to those with the most need for them it will be the case that to take one’s eldest child to ballet lessons, to save money for her university years, or to help her with her homework, although good things to do, must come second to ensuring that the safety and basic needs of one’s other dependents are met. This view is illustrated well by Nagel in the following example:

Suppose I have two children, one of which is normal and quite happy and the other of which suffers from a painful handicap… I am about to change jobs. Suppose I must decide between moving to an expensive city where the second child can receive special medical treatment and schooling, but where the family’s standards of living will be lower and the neighbourhood will be unpleasant and dangerous for the first child—or else moving to a pleasant semi-rural suburb where the first child, who has a special interest in sports and nature can have a free and agreeable life.273

He argues that even if the benefits of moving to the semi-rural suburb for the first child will be far greater than the benefits that the second child will receive by a choice to move to the city it will be the case that as the needs of the second child are more urgent he should still choose to move to the city. Provided the welfare of the first child does not fall below some threshold level such that he would be made worse off than the second child by the move, or the benefits accrued by the second child are so minimal that they are virtually non-existent, a decision to place the interests of the second child over those of the first child will be morally required.274

Yet, whilst this may be so, some such as Roberts have noted that whether or not we view that parents of disabled children should distribute benefits and burdens unequally between disabled and non-disabled offspring, is irrelevant. For, she notes in reference to a case similar to Nagel’s where an existing sibling is expected to make sacrifices for the welfare of one who is disabled, differing only in the sense that the parents make a conscious decision to bring to birth a disabled child:

That the parents, having chosen to produce the impaired child, then make the further choice to distribute wellbeing appropriately between that child and others—and hence, not to unjustifiably harm those others by that further choice—does not imply that the harm imposed by the original choice can itself be justified. There are two distinct choices—and two distinct distributive effects.\textsuperscript{275}

Put more simply, the claim made is that the choice to bring an impaired child into the world is that which is under scrutiny, not how to distribute resources or welfare within a family once that decision has been made. Roberts thus argues that when we assess the rightness or wrongness of a particular procreative choice we must compare “(1) the effects of that choice on each person, against (2) the effects of each alternative choice, including those that exclude bringing [the impaired child] into existence.”\textsuperscript{276} This leads her to suggest that as it is the case that when prospective parents choose to bring into existence a child with a disability they \textit{will often} create less wellbeing for their existing child than they would have done should they have chosen differently. This decision constitutes a harm for the existing child regardless of whether the parents can be said to appropriately distribute well-being between him and the disabled child once born.

Whether or not such harms constitute a wrong, however, depends greatly on what we view to constitute the moral obligations that parents have towards their children. For, whilst “parents who decide to bring a child into the world have special duties to that child because, in deciding to procreate, they take upon themselves responsibility for this child's well-being and development”\textsuperscript{277} there are many competing accounts of the kinds and extent of obligations they consent to take on.

Do those who take on the role of parent, for example, have a moral duty to always do the best for their children, to act in their best interests regardless of the sacrifices that they themselves must make? If such is the case it would seem that in cases where prospective parents have existing dependents a decision to bring to birth a disabled child has the potential, in many circumstances, to be a decision that constitutes a moral wrong. Yet, on such a strong account of parental obligation it would also seem that parents are constantly at risk of unjustifiably harming their children. Loving but poor parents may unjustifiably harm their offspring by

\textsuperscript{275}Roberts, ‘What Is the Wrong of Wrongful Disability? From Chance to Choice to Harms to Persons’, p. 22.
\textsuperscript{276}ibid., p. 29.
failing to hand them over to equally loving and wealthy adopters if such persons are in a better position to care for their child, the parents of an incredibly intellectually gifted child would unjustifiably harm him by failing to mortgage their homes in order to provide him with an exclusive and incredibly expensive education. Any decision that parents make, taken with their own, or the interests of others, as opposed to their child’s, in mind would seem to be vulnerable to moral criticism, as the parents would be, in virtue of their role, morally responsible for any and all decisions with less than optimal results for their child. Similar problems seem to plague Feinberg’s account of parental obligation, which requires that parents send their children out into the world “with as many open opportunities as possible, thus maximising [their] chances for self-fulfilment.”278

With this in mind it is suggested that a defensible account of parental obligation must take both a weaker and more complicated form than the requirement to always act in the best interests of one’s children, or to furnish them with maximally open futures. Such an account should take into account the interests of parents themselves but should also and importantly prove compatible with the moral claims of other members of society. Yet, whilst this is so the extent of parental obligation still differs greatly on different accounts. Some, for example, suggest only that parents satisfy their children’s basic needs or that their children reach some minimum threshold level of wellbeing. Others hold that parents must do what they can to ensure that their children have good lives and others still make less concrete claims regarding a parental obligation to ‘love’ or to exhibit a kind of “natural affection”279 that requires personal sacrifice and must be sustained even in the face of difficulties that might destroy most relationships.

On the most minimal conception of parental obligation we can note that parents will be required merely to satisfy their children’s basic needs for food, shelter, education, clothing and comfort until their child is able to satisfy such needs herself and that any other benefits they may choose to bestow on their child should be seen as supererogatory. On this account unless a parental decision will, in some way or other cause parents to be unable to meet these basic needs, their choices would be deemed irrelevant, morally speaking, in respect to their role. Provided a decision to have another child, disabled or not, will not impact negatively on parental ability and willingness to attend to such needs, that one’s existing child may claim “I would have been better off had you not acted in the way you did” will not constitute a valid moral complaint and will therefore not provide moral reason to select against disability.

278 Feinberg, 'The Child’s Right to an Open Future', p. 84.
Indeed, even on the more substantial accounts noted above where parental obligations extend to loving and forwarding certain of their children’s less basic interests we should note that the comparative harms prospective parents may impose upon them by a decision not to select against disability may well be quite high. Requiring parents to do their best to ensure their child has a good life, is after-all, far less demanding than a requirement that we ensure she have the best life available to her and so too is the demand that a parent exhibit a kind of sacrificial love when making decisions that impact upon their children. Thus, on such accounts, whilst a parent should undoubtedly take into account the sacrifices their child may have to make in order to satisfy the needs of a disabled sibling, such a sacrifice will likely, in all but the most severe cases of disability not prove morally relevant.

6.5. **SOCIETAL RESOURCES AND THE DEMANDS OF JUSTICE**

In the previous section the kinds of harms that existing dependents might face as a result of a parental decision not to select against disability were explored. It was noted that unless we are to subscribe to a strong account of parental obligation the kinds of harms to interests that siblings are likely to face is often justifiable. For, whilst parents undoubtedly have obligations to furnish their children with certain goods, the kinds of goods existing children are liable to be denied by such a decision are not the kinds of goods we generally deem parents morally required to provide. Yet, there is another, more widely applicable sense in which a decision not to select against disability could be said to impose unjustifiable harms on others in certain situations. For, dependent upon the account of distributive justice to which we subscribe, the structure of the society in which we live and, the nature of the disability with which we are concerned, a parental choice not to select against disability in their offspring has the potential to impose substantial costs on existing members of society. This is so as the moral claims to assistance of both children and their parents regarding the financial and other costs of childrearing generally and of the disabled to extra assistance in virtue of certain inabilities, differ greatly on different accounts of distributive justice and in different societies.

In a society, for example, where social institutions are built on the austere libertarianisms of authors such as Nozick and Narveson it would be the case that reproduction, childrearing and disability should not impose any costs on others as inequalities in education, health, intellect and capacity lie outside the scope of distributive justice. Provided a particular distribution of resources satisfies initial requirements of justice neither parents and their children, or those with
disabilities, would have a claim to societal support, as inequity itself requires no redress. In another society, this will not be the case. In one built on the principles of justice espoused by Nagel, social inequities must be ameliorated or compensated for, whilst natural inequalities will impose no added claims for accommodation and support.

For the vast majority of modern political philosophers however, the moral requirement to ameliorate or reduce inequity among the citizens of a particular society is greater. It is now generally held that if justice requires redistribution on the basis of social inequality we should, for fear of arbitrariness, redistribute on the basis of natural inequalities too. For, both are the result, not of the considered choices each of us make in our lives, but of lotteries for which no desert base can be identified. This is the case on prioritarian consequentialist accounts of distributive justice, which hold that satisfying the interests of the worst-off members of society has a higher utility value than satisfying those of the well off. It is the case too on Rawls’ difference principle which requires us to arrange of social institutions in such a way that they are of the greatest benefit to the least advantaged members of society (subject to certain constraints) and on Daniels account of Just Health Care which is, in many senses an application of Rawlsian principles. It is also so on virtually all egalitarian theories of justice that require us to equalise among citizens some particular currency of justice such as luck, opportunity, resources or welfare. On such accounts, in addition to the requirement that each individual be provided with a basket of resources and services that either ameliorates or compensates for social inequalities additional resources and services must be provided where individuals are subject to natural inequalities to some greater or lesser extent. This may be in the form of specialised educational provisions, less basic medical care, special equipment, adjustments to the workplace and welfare benefits where a particular inability means an individual is unable to work or adjustments are unfeasible or prohibitively expensive.

6.5.1. DISTRIBUTIVE JUSTICE AND REPRODUCTIVE CHOICES

With this in mind, we can note that on such theories and in societies such as our own with advanced socialised medical, educational and welfare systems, the decision to procreate and

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281 Characterised as the limits to opportunity, welfare, and the holding of resources imposed on an individual by his social position, such as inadequate education, housing, nutrition, a lack of basic healthcare and discrimination on the basis of irrelevant characteristics like race or sex.
282 Such as differences in intellectual ability and physical capacity
285 Daniels, Just Health Care.
rear a child is expensive and will only increase in expense the closer our society comes to embodying egalitarian ideals and the greater the inequities that may be faced by our children. For, as is noted by Steiner “virtually everything that goes into the production of us, following conception is something supplied by our parents or by people elected or employed for that purpose. They… supply us with our pre-natal environment, our medical care, our schooling… and all the rest of it.” Yet, whilst the provision of resources to ameliorate or compensate for inequality may be required by the theory of justice to which we subscribe, that such is the case has little bearing on who should be responsible for providing such resources and thus on whether and when parents are morally justified in imposing a burden of support on other members of society. Just as in the case of procreative decisions and the just division of familial resources, whether a claim to a particular share of resources is a fair and valid one is a different question to that of who should be obligated to provide such resources. It is, in fact, far from clear that those who make a decision to reproduce have an enforceable right to demand others share in the costs that are associated with their choice.

Indeed, whilst theorists of distributive justice have tended to say little about who should bear the costs of procreation and child-rearing, only that such costs must be met by someone, the idea that parents may act wrongly by reproducing when unable or unwilling to provide their children with the basket of resources required to satisfy their claims to justice has, in recent years, been explored in some depth by some prominent scholars. Some have provided compelling arguments that parents should, in a just society, be held responsible for meeting the costs of any claims to justice that their children might have as a result of parents’ voluntary actions due to the fact of their voluntariness. Rakowski, for example, notes provocatively:

“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… Because specific people are responsible for their existence and needs, parents alone should bear the cost of compensating their children for any cost they suffer

In most cases however, a decision to provide societal support to parents in the upbringing of their children and in meeting the claims to justice of such children whilst they are children and once they reach majority can be justified by appeals to self-interest and where this is not the case, by appeals to the non-ideal conditions under which procreation tends to take place.

In terms of self-interest, for example, it can be noted that whilst individuals tend not to ask for permission to reproduce this will not often be morally problematic as reproduction generally produces a positive as opposed to negative externality. Children do not remain children forever and constitute “the future workforce and taxpayers whose economic contributions everyone, nonparents included, will depend on when they reach old age.”290 Existing citizens have an interest in investing in the production of healthy, productive and well-educated citizens as in doing so they will likely increase the stock of resources available for distribution to themselves. Indeed, as most of us accept the benefits created by the production and rearing of children it may be said that there is a moral imperative to share in the costs involved in their production. This argument has its basis in the principle of fairness/fair play which requires that “if some people engage in a cost-incurring, benefits-producing cooperative scheme it is unfair to free ride on them, and thus that those who accept the benefits resulting from procreative decisions, have an obligation too to do their fair share in maintaining, or bearing the costs of maintaining, the scheme.”291 There are good pragmatic reasons to adhere to the prescriptions of the principle of fairness too. For, whilst reproduction produces seemingly non-excludable goods and thus it could be argued that it is in the interests of existing members of society to free ride on reproductive and parental labour, to do so may jeopardise the production of such goods, creating a version of the tragedy of the commons, or threaten their privatisation.

Indeed, where self-interested reasons do not apply, there exist other reasons to provide societal resources to support those who desire to procreate and who would be unable to meet all of the costs associated with their decision without such assistance. Firstly, we can note that whilst reproduction can hardly be classified as a basic need - we can survive without children but not food, water and shelter and are able to “form, to revise and to rationally pursue… what we regard for us as a worthwhile human life”292 absent the former, but not the latter – an interest in bearing and rearing children is not exactly trivial either. Even if we deny the credibility of

289 Rakowski, 'Who Should Pay for Bad Genes?', pp. 1365-1366.
290 George, 'Who Should Bear the Costs of Children?', p. 31.
accounts of a biological ‘need’ to reproduce, strong social and cultural pro-natal messages most definitely contribute to a psychological need and thus to the distress, depression, and feelings of bereavement often experienced by those unable to do so whether the reasons for this inability are somatic or social in nature. Thus, if as a society, we are able to accommodate this need, preventing the suffering of those who wish to reproduce but would be unable to do so without our help, and such accommodations do not prove prohibitively expensive or deny the satisfaction of the more pressing interests of others there is good moral reason to do so. Secondly, the ability of individuals to bear the costs of producing and raising children is often determined in great part by factors over which they have little control. As such, dependent on the theory of justice to which we subscribe, those who have done well in the natural and social lotteries may well be morally required to subsidise the ambitions, both procreative and otherwise, of those whose starting positions in society were less fortuitous.

Yet, whilst this may be so it does not necessarily follow that such reasons apply in all cases of reproduction. Pragmatically, for example, it can be noted that there seem to be few good reasons for existing members of society to contribute to the costs of the production and rearing of children who are highly likely to “have initial life prospects that are sufficiently low (for example, below average) that others will suffer either increased [justice] demands (to help the offspring) or reduced…entitlements (because the offspring displace them).” For, such increased demands are likely to lead to “diminished per capita resource availability in the short term but also greater depletion of non-renewable resources in the long-run” and/or other negative effects when such effects are not outweighed by the production of other benefits or justified by the claims to justice of reproducers.

In many cases, of course, we are unable to determine whether a decision to reproduce is likely to diminish or forward the welfare and resource holdings of others. As such it might be argued that as this is the case there are good pragmatic reasons to pool risk and bear the costs collectively in order to preserve a scheme that is, on balance, to our benefit. Yet, in other cases, informed predictions can be made based on information available to us. A decision to have a child (or many children) in a time of famine or when overpopulation threatens and resources are already stretched beyond reasonable limits, for example, is always likely to be one that produces a negative externality and it thus can be argued that in such cases there might be a duty not to knowingly disadvantage others by our procreative decisions.

Since the advent of genetic testing technologies it seems that the same reasoning may well apply in certain cases where reproductive choices are liable to result in the birth of a child who will require costly accommodations or expensive medical treatments in order to fully participate in society, or who is unlikely to be able to participate at all. In many cases of reproduction, the birth of a disabled child should be seen as the result of poor brute luck such as when a woman at average or low risk of producing a child with a disability discovers an unexpected genetic abnormality in a foetus, where she unknowingly comes into contact with a teratogenic substance during pregnancy, or where complications during pregnancy and birth result in the birth of a disabled child. Yet, in others – where a couple or single reproducer selects for disability in their offspring (such as in the case of Duchesneau and McCullough), fails to take reasonable precautions during pregnancy to avoid exposure to situations and substances that may cause disability in their offspring, or makes a conscious decision not to avail themselves of services and technologies that will reduce the likelihood of producing children with disabilities – when to do so would not impose substantial or unreasonable costs on them there does seem to be an important sense in which the disability and its costs for others are chosen. A sense that whilst not lessening the claim to compensation on the part of the child created – she is not responsible for her coming into existence and is just as entitled to a certain and already agreed upon level of welfare, opportunity, resources as any other member of a given society – may well, at least on desert sensitive accounts of the demands of justice, shift some of the responsibility for bearing such costs onto those responsible for her existence. Thus, in cases where such costs cannot or will not be borne by reproducers, those members of society left to foot the bill may well complain that in these cases parents may be charged with unjustly “exploiting public resources that were not designed for the purpose of accommodating unique procreative preferences” and in cases where such resources are finite seem to display a complete lack of concern for other members of society who would, had a different decision been made, be entitled to their use.

6.5.2. DO DISABLED PERSONS ACTUALLY ‘COST MORE’? DOES THIS MATTER?

Whether or not the above argument will succeed in providing prospective parents with good moral reason to select against disability in their offspring in situations where they have a choice depends, however, on our providing a positive response to two questions.

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The first of these is empirical in nature: Is a choice not to select against disability or to deliberately select for disability in this particular case likely to produce an all things considered burden of support on existing members of society that will not be justified by appeals to the claims to justice of the parents themselves? This question is ideally one for economists to answer as opposed to philosophers. However, whilst such is the case, the claims to justice of disabled persons do seem *generally* to cost more to meet than the claims of those without disabilities.

It can be noted, for example, that whilst surveys regarding the financial costs of disability for families and society are rarely undertaken, in the UK parents of children classed as ‘seriously disabled’ spend, on average, double that spent by parents of non-disabled children on living expenses excluding food\(^{297}\) and that whilst such is the case, the annual cost to parents of ensuring that the minimum essential needs of a child with disabilities are met was estimated in both 1998 and 2012 to be closer to around three times higher.\(^{298}\) Thus, as it is the case too that double the proportion of parents of children with disabilities are not in paid employment or only in part time employment compared to parents of children without disabilities\(^{299}\) find it difficult to sustain paid employment and tend to command far fewer resources than those with children without disabilities\(^{300}\) these added costs will often be paid for by the welfare benefits they and their children receive. Similarly, whilst there are no studies available in the UK comparing the costs of educating children with special educational needs and disabilities (SEND) with the costs of educating those without, the government estimates that is costs around 7-9 times more than it costs to educate a student in a special school than it costs, on average, to educate a child in a mainstream school.\(^{302}\) We can also note that as in 2012 in the UK only 46.3% of working age persons with disabilities were in employment compared to 76.4% of working age non-disabled persons\(^{303}\), individuals with disabilities are more likely than those without to be dependent on benefits for a large proportion of their income\(^{304}\) and thus that the added costs of disability do not necessarily reduce when a child becomes an adult.


\(^{298}\) Dobson and Middleton, 'Paying to Care: The Cost of Childhood Disability', p. 1.


\(^{300}\) Dobson and Middleton, 'Paying to Care: The Cost of Childhood Disability', p. 6.


\(^{304}\) C. Wood and E. Grant, *Counting the Cost* (London: Demos, 2010), p. 34.
It should also be noted, however, that the picture painted above will not apply to all cases of disability and it may well be the case, as has been noted by Wilkinson that “for some disabilities… lifetime consumption of health and welfare resources is at or below the national average”\(^{305}\) and thus that the creation of those with certain disabilities is no more likely to burden existing members of society than the creation of non-disabled persons. This point is illustrated well by reference to a study undertaken in the 1990’s by Barendregt, Bonneux and van der Maas which showed that smokers tend, on average, to incur between 7 and 11% less healthcare costs over the course of their lifetime than non-smokers which means that even before taxes, smokers cost public health care systems less than non-smoking citizens\(^{306}\) because “smoking tends to cause few problems during a person’s productive years, and then kills them before social security and pensions payments are made.”\(^{307}\) We can note therefore, that persons with certain late-onset genetic disorders, disabilities and propensities towards certain illnesses may well, in virtue of their conditions causing them few problems during their childhood’s and productive years end up contributing far more and costing far less, in terms of social and healthcare resources than the average citizen. In such cases, arguments for a duty to select against disability based on the costs associated with accommodating disability will not apply.

The second of our questions is more theoretical. For, when it can be shown in a particular case that selection for disability is liable to involve added costs that are not justified by appeals to the claims of justice of the parents themselves or made irrelevant by the production of other benefits, it must be shown too that these extra costs are not themselves the result of injustice. How we respond to this question is determined by the extent we hold disability itself to be maladaptive – inherently limiting “the range of opportunity open to the individual in which he may construct his plan of life or conception of the good”\(^{308}\) – socially constructed – “a result of a failure to account for everyone when designing physical, economic and social institutions”\(^{309}\) – or a mixture of the two. Should we subscribe to the former view, it is understandable that we might hold those who choose to bring into the world lives liable to impose a burden on other members of society morally and financially responsible for their choices. Should we subscribe to the latter or a mixed view however, that we should condemn those who make such a decision when they might have chosen differently becomes less apparent. For, on such views, disability and its costs are, to some greater or lesser extent, non-normative and external to the individual, fixed by one’s status as member of a minority group. On such views the costs associated with


\(^{306}\) ibid., p. 103.


\(^{308}\) Daniels, *Just Health Care*, p. 27.

accommodating disability are akin to the costs of ensuring the equal participation of black persons and women in a historically racist/sexist society. Thus, whilst real they are, at least partly, of our own making and should arguably be borne not only by those who choose to reproduce but also by those who benefit from such social structures.

It would, after-all seem foolish to design our social structures in such a way that means that the basic needs of the minority are cheaper to meet than the basic needs of the majority and unrealistic, in a society with finite resources, to expect that we should design our social institutions in such a way that means that all can access them when to do so would be prohibitively expensive. For, if we assume that a basic requirement of a just society is that all reach some certain level of some particular currency of justice (welfare, resources, capabilities etc.) and note too that we have limited means of achieving this distribution, it seems that in order to use our resources wisely we must ensure a just distribution that is also maximally efficient. We must therefore design our structures in a way that fits the needs of the majority and retain sufficient resources to make adjustments for and ensure the ability to fully participate of those whose needs differ from the norm, and where this is not possible, provide such individuals with compensation.

6.6. CONCLUSION

In this paper the question of whether prospective parents have good moral reason to select against disability in situations where they have a choice was addressed. Rather than looking to the most common arguments given in support of a positive response to the above question such as those focusing on the harms disability may impose on the child created, deontological considerations and impersonal harms, a less commonly made set of arguments was focused upon which look to the harms that such a decision may impose on others. This was done in order, firstly, to fill a gap by developing and providing a detailed account of arguments often alluded to but rarely examined satisfactorily in the literature. Secondly, and more importantly, this was done too to show that we need not appeal to impersonal harms or deontological considerations to locate the wrongs of a decision to select for, or to fail to select against, disability in certain scenarios, as such decisions can and often do result in empirically discoverable harms. With this in mind three different possible arguments supporting a limited duty of disability avoidance, focusing on the possible harms resulting from a decision not to select against disability were identified and subsequently explored: harms to parents, harms to existing family members and harms to other existing members of society.
The first argument, regarding the harms parents may impose upon themselves by failing to select against disability was found, at least, on conventional accounts of autonomy to be wanting, as it was held that firstly parents will be able to consent to the harms that they impose upon themselves by such a decision and secondly that it is not at all apparent that such a decision is likely, on balance, to cause them harm, all things considered. The second, regarding the just division of familial resources and the loss in future wellbeing that may be suffered by existing dependents as a result of a failure to select against disability was found to be more promising on certain accounts of parental obligation but is not widely applicable. The third, focusing on the social and economic costs associated with disability and claims to social justice was found to be the most compelling. For, although justice may demand that we compensate members of our society for poor natural and social luck, the decision to procreate and the costs associated with it is one for which parents should ultimately be held primarily responsible. Whilst it is generally both prudent and just for us to socialize some of the costs associated with procreation, those who deliberately produce children in possession of genetic traits with greater than average chances of creating a negative externality - who would not be unduly burdened by taking steps to screen out disability - and who are unable or unwilling to shoulder the extra costs associated with their choice, might be seen as free-riding on a system not designed for accommodating unique procreative preferences and may thus be criticized at the bar of justice. Yet, whilst such was the case it was also shown that that the success of appeals to such arguments also depends, to a great extent on the particular disability with which we are concerned and the account of disability to which we subscribe such as whether disability should be seen to be inherent or exherent to the person that suffers it.

Finally, it should be noted that whilst appeals to harms to others than the foetus do seem to result in a rather complex and unsatisfying answer to the question of whether prospective parents might be said to have a general moral duty to select against disability in their offspring, as no clear answer can be found, consideration of such harms does seem to offer valuable insight into the complex and difficult decisions that must be made in the reproductive arena. For, when we look to such decisions on a case-by-case basis, careful consideration of the all things considered harms and benefits produced by individual reproductive decisions yield both sensible and sensitive answers.
CHAPTER SEVEN

ARTICLE III:

SO… YOU WANT A DEAF BABY?
A LIBERAL EXPLORATION OF THE LEGAL PROHIBITION ON
SELECTION FOR DISABILITY IN ENGLAND AND WALES.

7.1. INTRODUCTION

In January 2004 the UK government announced a review of the Human Fertilisation and Embryology Act 1990\textsuperscript{310} – the primary piece of legislation regulating the practices of artificial reproduction and embryo research in England and Wales – in an attempt, primarily, to update the law regarding such practices in order “to keep pace with new avenues of scientific research and… reflect wider change in our society”.\textsuperscript{311} Four years later, after a great deal of debate and discussion the Human Fertilisation and Embryology Act 2008 – which provides 127 pages of amendments for what was originally a short and vague document of only 39 pages – received royal assent. In many cases such changes should be seen as constituting a liberalising force for those who wish or need to make use of assisted reproductive technologies (ARTs) when making decisions relating to reproduction. The Act, for example, now recognises both members of same sex couples as the legal parents of children conceived via donated gametes, and has replaced the ‘need for a father’ provision present in the 1990 Act with a more inclusive gender neutral provision regarding a child’s need for ‘supportive parenting.’

Yet, whilst many changes have been met with approval by groups the 1990 Act might have been seen to ignore or devalue and some have even criticised those responsible for the legislative changes for having taken an ‘extreme libertarian approach’\textsuperscript{312}, not all of such changes should be viewed as so liberalising. Elliston notes that “in one area the HFEA 2008 has taken a uniquely restrictive step…[seeking] for the first time in the UK to make it impermissible

\textsuperscript{310} Hereafter to be referred to as the Act or where specification is required the 1990 Act, the 2008 Act or the amended Act.
\textsuperscript{311} HC Deb, 12 May 2008, c1066.
at least in certain circumstances, to choose to try to have children that are known to have particular genetic constitutions\textsuperscript{313} where prospective parents seek to use ARTs such as Pre-implantation Genetic Diagnosis (PGD) and In Vitro Fertilisation (IVF). Such restrictions apply generally to any and all forms of pre-implantation selection of which the purpose is not:

1. To avoid the birth of a child with a gene, chromosome or mitochondrial abnormality,
2. To select embryos with tissue types compatible with already extant siblings with serious medical conditions that can be treated with umbilical cord blood stem cells, bone marrow or other tissue
3. Or to determine, in cases where uncertainty has arisen, the parentage of embryos before implantation.\textsuperscript{314}

They also apply specifically to two particular types of selection: sex selection for social reasons via PGD\textsuperscript{315} or gamete selection\textsuperscript{316} and the comparatively rare practice of deliberately selecting for disability in one’s offspring using the same means\textsuperscript{317} with those who perform PGD or other forms of selection without a license or outside the terms of a licence now guilty of a criminal offence punishable by a prison sentence of up to two years and/or a fine.\textsuperscript{318}

This paper concerns the second of these specific restrictions: the insertion into English and Welsh law of a prohibition on the use of ARTs for the purpose of selecting for disability. In order to provide context for readers I begin by providing an account of the desire itself and examples of some who have been shown to hold such a desire. A comparison of how a request to select for disability in one’s offspring would have been met prior to the 2008 amendments with how such a request will be met now is then made. This is done in order to show the reader firstly how the law has changed and secondly to bring together the reasons that were given in legal and policy for this change. Such reasons are then subjected to philosophical scrutiny from the perspective of a liberal account of the limits of law. Once it is explained why these reasons are inadequate, other possible reasons that may ground a legal imperative against selection for disability in the UK are explored.

\textsuperscript{314} Human Fertilisation and Embryology Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008, Sch. 2.3. 1ZA. s. (1).
\textsuperscript{315} \textit{ibid.}, sch. 2, x.3 para. 1ZC (3).
\textsuperscript{316} \textit{ibid.}, sch. 2, S. 4. Para. 1A.
\textsuperscript{317} \textit{ibid.}, s. 13 (9).
\textsuperscript{318} \textit{ibid.}, s. 41 (2).
7.2. LAW AND POLICY REGARDING SELECTION FOR DISABILITY

For most prospective parents, that their child might be born with a disability is a possibility that haunts their dreams at night. Parents tend to want for their children long, happy, and fulfilling lives and disability – commonly defined as a physical or intellectual impairment, a barrier to social participation or a disadvantage – will often make the achievement of such a life more difficult. Until relatively recently, however, all that most pregnant women could do to increase the chance of giving birth to a healthy child was to lead a healthy lifestyle, take prenatal vitamins whilst abstaining from risky behaviour and exposure to teratogens. Those at an increased risk of transmitting genetic diseases onto their offspring or bearing children with deleterious genetic mutations could do even less still: choosing to forego reproduction altogether, adopt or gamble. In the last 60 years however, since the Abortion Act 1967 made legal termination for reasons of foetal abnormality, and pre-natal screening techniques were developed such as Amniocentesis in the late 1950s, Chorionic Villus Sampling (CVS) in the 1970s, IVF and PGD in the 1980’s and maternal blood screening in the 2000s, reproductive choice has increased dramatically for all reproducers who are both willing and able to make use of them.

These technologies have, for the most part, been used to help potential parents conceive and give birth to children free from genetic disease and disability or to make adequate preparations for the birth of a child who may have complex medical and/or social needs. In recent years however it has become apparent that a small minority of prospective parents harbour a desire to select for traits widely viewed to be deleterious. The most publicised example of this is likely that of Duchesneau and McCullough, a profoundly deaf couple from the USA who, in the early 2000s, successfully ensured the birth of two congenitally deaf children via a fifth generation deaf sperm donor and artificial insemination.

Such cases, however, are not isolated and a number of surveys and anecdotal studies published in the last few years show that for deaf persons, especially those who identify as culturally deaf (Deaf), a desire for a deaf child is not as uncommon as many would assume. One study undertaken at a Deaf Nation conference showed 29% of respondents gave a positive answer to the question of whether they would prefer to parent deaf children. Indeed, despite a widespread distrust of pre-implantation and pre-natal genetic diagnosis within the deaf

319 Abortion Act, 1967, s. 1 (d).
community\textsuperscript{322}, the idea of employing ARTs to increase the likelihood of the birth of a deaf child has been met with enthusiasm by some deaf persons, with a small number of respondents to another survey noting they would consider aborting a foetus if it was discovered it could hear\textsuperscript{323}, and a study of the practices of United States IVF clinics showing 3\% of the 190 clinics involved had received requests for, and provided PGD to, prospective parents who wished to select for disability in their offspring.\textsuperscript{324} Indeed, when the 2008 amendments to the HFE Act regarding selection for disability were proposed Tomato Lichy, a deaf artist and broadcaster, appeared on the BBC’s \textit{Today} programme\textsuperscript{325} and in various newspapers expressing his disappointment at the fact that their implementation would mean he and his wife would be unable to use PGD to select for deafness should they require IVF in the future.\textsuperscript{326}

Desires like this are also \textit{not} confined to the deaf community. A 2006 article in the New York Times reported the stories of two women with Achondroplasia, Mary Ellen Little and Barbara Spiegel, who when undergoing genetic testing during their pregnancies – in order to ensure their foetuses were not subject to a fatal double dose of the Achondroplasia gene – expressed a desire for a child who was ‘little’ like them. Indeed, Spiegel noted too that were IVF and PGD less invasive procedures she would be willing to use such technologies in order to secure the birth of a child with Achondroplasia.\textsuperscript{327}

It should be noted too that although only members of Deaf and Achondroplasic communities have, so far, been identified within literature as possessing the desire to select for disability in their offspring it is possible that persons with other disabilities may express a similar desire. This seems especially likely for those with impairments around which a strong culture, based on a shared experience of the world, has developed and for those whose disabilities are relatively easily and often compensated for by society or who have learned to accept and embrace their disabilities as either a neutral or positive characteristic. Indeed, it is not beyond the realms of

\textsuperscript{322} \textit{ibid.}, p. 1176.
possibility that certain non-disabled individuals may express a desire to select for disability in virtue of their association of that particular disability with characteristics they view to be desirable. Hearing persons may, for example, wish to have deaf children if most of their family are deaf and individuals who view that children with Down’s Syndrome are invariably bundles of joy ready to furnish those around them with unconditional love, may, on the basis of this faulty belief, wish to select for it. With this in mind, the question of how a request to select for disability would have been met prior to the 2008 Act and how such a request will be met now will be addressed.

7.2.1. SELECTING FOR DISABILITY PRIOR TO THE 2008 AMENDMENTS: THE HFEA AND THE WELFARE PRINCIPLE.

In England and Wales The Human Fertilisation and Embryology Authority (HFEA) regulates the activities of fertility clinics. A fertility clinic may only offer fertility treatments licensed by the HFEA and the kinds of fertility treatments the HFEA may license are, in turn, limited to those that fulfil licensing conditions set out in the Human Fertilisation and Embryology Act. Clinics found to have licensed the use of ARTs for any purposes other than those outlined as acceptable in the 2008 Act may well lose their license to perform such activities and persons found guilty of such an offence are liable, on conviction, to be imprisoned “for a term not exceeding two years or a fine or both, and… on summary conviction, to imprisonment for a term not exceeding six months or a fine not exceeding the statutory maximum or both”. 328

Despite this, until the 2008 amendments the HFEA actually had a great deal of discretionary power when deciding which fertility treatments to license. For, the licensing conditions for fertility treatment, set out in sections 12-15 of the 1990 Act were rather vague, providing no statutory prohibitions. Indeed, they actually contained only one provision of relevance to HFEA decisions regarding the circumstances and purposes for which it would provide fertility treatment to couples requesting it.

This provision is known as ‘The Welfare of The Child Provision’ and is derived from and viewed to be an extension of a principle that has, over the last century, become an increasingly dominant feature in both family and criminal law in England and Wales: the Welfare Principle (WP) 329. In its most simple form WP consists in a requirement that the welfare of children be taken into account by the courts in scenarios where their interests will be affected by its decision. It can be found expressed in a number of statutes with slight variations in terms of

328 Human Fertilisation and Embryology Act, 1990, s. 41 (4).
329 Lord McGregor, HL Deb, 6 March 1990, col. 1100.
strength between them\(^{330}\), but is usually understood in the way it is set out in the Children Act (1989), which provides:

“when a court determines any question with respect to – (a) the upbringing of a child; or (b) the administration of a child’s property or the application of any income arising from it, the child’s welfare shall be the courts paramount consideration”. \(^{331}\)

Within the HFE Acts the welfare of the child provision is slightly less strict, requiring that before licensing any kind of fertility treatment account, as opposed to paramount consideration, is taken – of both the welfare of the child who may be born as a result of the fertility treatment and of any other child who may be affected by the birth. It is expressed as follows:

A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment… and of any other child who may be affected by the birth. \(^{332}\)

Provided it could be shown account had been taken of the welfare of children affected by a decision to provide fertility treatment the HFEA was therefore relatively unconstrained in the kinds of activities it could choose to license, especially as nowhere within the 1990 Act – or indeed any legal documents that contain a version of WP – can be found a definition of what constitutes child welfare.

Within the Children Act 1989 and the Adoption and Children Act 2002 however, a set of factors is included to which the court and other relevant authorities are directed to have regard, all of which are noted by Barlow to “have been commonly used to identify a child’s needs and to determine… the best way to meet them”. \(^{333}\) These factors were not included in the 1990 Act and

\(^{330}\) Jackson explores the differences in strength between versions of WP set out in The Children Act 1989, The Adoption Act 1976 and The Child Support Act 1991, noting that the principle can be seen in its strongest form in s. 1 of The Children Act where the welfare of the child is held to be the paramount consideration of the courts, in a slightly weaker form in The Adoption Act 1976 where it is held to be the courts first but, by implication, not only, consideration and in a weaker form still in the Child Support Act 1991 where Child support officers are required only to have regard to the welfare of any children who might be affected by their decisions. It should be noted however that The Adoption Act 1976 is no longer in force, having been replaced by the Adoption and Children Act 2002 within which a version of WP still exists, but a version which is identical to that found in the Children Act 1989. See: E. Jackson, ‘Conception and the Irrelevance of the Welfare Principle’, The Modern Law Review, 65/2 (2002), pp. 176-203.

\(^{331}\) Children Act, 1989, s.1 (1).

\(^{332}\) Human Fertilisation and Embryology Act, 1990, s. 13 (5).

\(^{333}\) Such factors include the requirement that the courts take into account the child’s wishes regarding their decision (should he have any); what his needs may be (whether they be physical, emotional and/or educational); how a change in his circumstances might affect him and whether it would be better for him should no change occur, his age; his sex, background and other characteristics; any harm he has suffered.
the HFEA was thus left to determine the kinds of activities that may and may not engage WP. Yet, whilst WP was open to HFEA interpretation, HFEA understanding of the demands of the principle was rather broader than it might have been. Since the first edition of the Code it was held that any disease or disability might well engage s. 13. Thus, in order to properly take account of the welfare of the child it was noted: “centres should bear in mind… any risk of harm to the child or children who might be born, including the risk of inherited disorders”. 334

This was further expanded in later versions of the Code, which by the 7th edition read:

In order to take into account the welfare of the child, the centre should consider factors… likely to cause serious physical, psychological or medical harm, either to the child to be born or to any existing child of the family. These factors include… any aspect of the patient’s (or, where applicable, their partner’s) medical history which means that the child to be born is likely to suffer from a serious medical condition. 335

Those who might have requested the use of ARTs to ensure the birth of a child with a disability would thus have been highly unlikely to have their request granted pre 2008 where it could be demonstrated that the condition to be selected for was of sufficient gravity to be classed as a ‘serious medical condition.’ For, testing embryos for some particular disability and then selecting for the condition may well have been viewed to violate the welfare provision, as understood in the Codes. Of course, as s.13 of the 1990 act required only that the welfare of children created be taken into account when determining whether or not to license a particular treatment, the HFEA could have concluded that the welfare interests of the child selected would be outweighed by the interests of those who seek to create him.

As the Codes became longer and more detailed the likelihood anyone would be permitted to use ARTs to ensure the birth of a deaf child became smaller still. For example, since 1998 it has been HFEA policy to refuse donations of gametes from those with genetic diseases or other “deleterious recessively inherited” genetic conditions. 336 In 2003 when policy regarding the use of PGD was first given it was noted that PGD should be used only to test for genetic abnormalities where there is “a significant risk of a serious genetic condition being present in

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the embryo" ³³⁷ and when it is known that one or more members of a couple possess a high likelihood of transmitting a genetic condition onto their offspring “all reasonable steps should be taken to prevent the transmission of serious genetic disorders” ³³⁸

Thus, although the Code held since its 6th edition that HFEA licensing committees must, when deciding whether or not to license PGD, consider “the unique circumstances of those seeking treatment, rather than the fact that they carry a particular genetic condition” ³³⁹ – and thus the possibility that potential parents might, in line with social constructionist accounts of disability, argue that the disability should not be considered serious– the HFEA had never licensed the use of PGD for the purpose screening in any specific genetic traits for social reasons. Indeed, since the 3rd edition of the Code it was noted too that they would refuse to license other forms of social selection such as sex selection and allow for the possibility of screening or selecting of embryo’s in only a very small handful of circumstances. ³⁴⁰

7.2.2. SELECTION FOR DISABILITY AND THE HFE ACT 2008

Since the HFE Act 2008 the law governing the activities of fertility clinics in England and Wales has tightened greatly. Where there were once only instructions to take into account the welfare of those who might be born as a result of fertility treatment, far stricter legislative provisions governing the purposes for which PGD and other means of selection may be used in fertility treatment are now in place. The Act provides an exhaustive list of the purposes for which PGD may be licensed and while accepted purposes include the testing of embryos in order to discover whether they have a “gene, chromosome or mitochondrion abnormality… a gender related serious physical or mental disability… a gender related serious illness… or any other gender related serious medical condition” ³³⁴, selecting for disability after such testing reveals a positive diagnosis is now prohibited. In relation to the selection of donors and donor gametes the same rules apply. For, the licensing conditions now state that when determining:

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³³⁸ ibid., para. 4.10.
³⁴⁰ These were summarised by the Department of Health in their ‘Review of the Human Fertilisation and Embryology Act: A public Consultation’ as follows: in order to avoid the transmission of inherited disorders and diseases, to avoid sex linked diseases, to screen out chromosomal abnormalities in order to increase the likelihood of live birth or in order that the child created via fertility treatment was able to become a tissue donor for a seriously ill sibling. See: Department of Health, ‘Review of the Human Fertilisation and Embryology Act: A Public Consultation’, (London: DoH, 2005).
³³⁴ Human Fertilisation Act 1990 (as amended by the Human Fertilisation and Embryology Act 2008), Sch. 2.3.1ZA, s.(1).
the persons who are to provide gametes...the woman from whom an embryo is to be taken... [and] which of two or more embryos to place in a woman... persons or embryos that are known to have a gene, chromosome or mitochondrion abnormality involving a significant risk that the person with the abnormality will have or develop – (a) a serious physical or mental disability, (b) a serious illness, or (c) any other serious medical condition, must not be preferred to those that are not known to have such an abnormality. 342

The HFEA thus no longer possesses the discretion that made a positive response to a prospective parent’s request for disability selection prior to the 2008 Act a very slim possibility. For whilst there still exist some technical loopholes in the law343 – unless it is the case that testing reveals all embryos to be affected, only affected embryos are viable, or all embryos are implanted – potential parents would not be able to choose to implant such embryos even if it can be successfully argued that to do so would not violate the WP (which is still present in the 2008 legislation). This is so as if PGD is licensed to test for a particular condition it is licensed on the basis that the condition is classified as serious rather than trivial, where a determination of seriousness is made after consideration of medical and social factors such as “the likely degree of suffering associated with the condition... the availability of effective therapy now, and in the future, the speed of degeneration in progressive disorders... the extent of any intellectual impairment... the social support available”. 344 Thus, those who wish to select for disability cannot argue that the condition they desire to test for should not be considered a serious medical condition, disease or disability by reference, for example, to social constructivist accounts of disability. For, if this were so the use of PGD to test for it would be prohibited just as is sex selection by provisions banning the use of embryo testing for anything other than the purposes specified in schedule 2 of the amended Act.

7.3. WHY PROHIBIT SUCH SELECTION?

As can be seen in the previous section, the HFE Act 2008 has significantly changed the possible outcomes of requests regarding the use of ARTs to select for disability. For, whilst it was

342 ibid., s. 13(8-9)
343 Elliston notes in her 2012 paper that it may be possible for couples to circumvent the 2008 amendments in order to select for implantation an embryo that has a known disability after PGD by creating only one embryo at a time such that the embryo selected cannot be said to have been ‘preferred to other available embryo’s’ where such a preference is judged to have occurred when one embryo from one particular IVF batch is preferred as opposed to all of the embryo’s available to a woman for implantation ( which would include all spare IVF embryos/embryo’s available via embryo adoption schemes). See: Elliston, ‘The Welfare of the Child Principle and the Use of PGD: Selecting for Disability’, pp. 136-189.
344 Human Fertilisation and Embryology Authority, ‘Code of Practice, 8th Edn (R4)’, s. 10.7.
unlikely under the 1990 Act that the HFEA would approve such requests, the legislative provisions inherent in the 2008 Act have now made such selection virtually impossible. Indeed, whilst many might view this development to be uninteresting in light of the minute number of individuals who are and will, in the future, be affected by it, the question of whether any legislative change can be justified in accordance with the principles that underpin our legal system should be of interest to any jurist regardless of the number of individuals affected. With this in mind, I now turn to the question of the justifications that have been given for the legislative change just outlined.

Whilst there are numerous accounts of the purposes, functions and limits of the law to which we might possibly appeal as providing justification or condemnation of a legal prohibition on selection for disability, a treatment of all of such accounts cannot be attempted in this paper. Instead, it will be assumed that within broadly liberal democracies such as England and Wales a liberal framework for law is appropriate. The reasons for this assumption are twofold. The first of these should be seen as preference as I subscribe to a liberal account of the limits of law for reasons mainly relating to the epistemic benefits of this approach. The second however, relates to the tendency within English and Welsh Law itself towards this view. As such, whether a prohibition can be justified will be determined in accordance with those principles agreed upon as providing adequate reason for the prohibition of particular activities in a liberal society.

7.3.1. TO WHAT REASONS CAN WE APPEAL AS JUSTIFYING A PROHIBITION IN A LIBERAL SOCIETY?

While there is no one version of liberalism to which all who subscribe to a broadly liberal framework for society will agree, there are a number of fundamental ideas common to the most prevalent accounts such as commitment to moral individualism, the basic equality of persons and the belief that there should be a distinction between public and private morality. Thus, regardless of the extra content one adds, the primary job of any liberal state should be seen as to work out the terms under which persons, who naturally differ and disagree in their fundamental religious, philosophical and moral convictions can live together in peaceful political association in a way that both preserves and enlarges freedoms by accommodating these fundamental differences instead of reducing them by the legal enforcement of agreement.\(^\text{345}\).

It should therefore be noted that whilst there have been identified by Feinberg - in his four volume series *The Moral Limits of The Criminal Law* - four broad candidates to which we might

\(^{345}\) Larmore, *The Morals of Modernity*, p. 121-127
appeal when attempting to provide justification for state imposition on individual liberty - harms to others, offence to others, harms to self and legal moralism—only the first two of these and, perhaps to some limited extent, the third, may be seen, in a liberal state as providing good reason for prohibition. Arguments falling into the fourth category should however, be wholly rejected as it is held that “there are some disagreements about the good life and ultimate values that we do not have to settle in order to decide collectively how we will pursue justice and the common good”. As such it is generally held that the criminal law should be concerned only with what Feinberg termed ‘Legislative Evils’, defined as “reasonably foreseeable or preventable consequences of human beings’ actions or omissions”.

With this in mind it is prudent before examining the reasons that have been given within legal and policy documents for a prohibition on selection for disability, to briefly sketch an account of what it means for some action to cause harm or offence to others in a legally admissible sense. Generally, when we state that some particular person (x) has been harmed by some particular event or action (y) we use the term to mean that x’s interests—defined as distinguishable components of his wellbeing—have been set back, thwarted or defeated as a result of the action or event in question, or, in a counterfactual sense, that x is worse off than he otherwise would have been had y not occurred. Therefore, x is harmed when struck unawares by lightning or by some person (z) with a broken bottle because both events cause x to experience something he has an interest in avoiding: significant and unwanted pain. When we state that x is harmed by y in a sense that may justify our legislating against it we utilise the concept of harm slightly differently. We cannot, after all, prohibit lightning and wouldn’t condone z’s striking x with a bottle if it turned out that by some fluke z’s act actually benefited x on balance. This is because the legal sense of harm involves a normative component: an account of moral responsibility. Thus, when we claim that x is harmed in a legally admissible sense we claim not just a harm but also a wrong: a deliberate or negligent and unjustifiable violation or invasion of x’s interests.

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346 As has been noted in the Philosophical and Legal Approach section Dworkin, for example suggests in his 1972 paper “Paternalism” that ‘soft paternalism’ can be justified in a liberal state in cases when our current and irrationally held desires are denied in order to preserve those desires we would deem rational if we were thinking clearly as in the case of forcing motorcyclists to wear helmets and Feinberg suggests too in The Moral Limits of The Criminal Law Volume 3: Harm to Self that the state may be justified in temporarily curtailing our liberty or in order to establish the voluntariness of a preference.

347 Nagel, ‘Progressive but Not Liberal’.


349 Feinberg, The Moral Limits of the Criminal Law Volume 1: Harm to Others, p. 34

350 Such is of course, unlikely but possible. It could be the case, for example, that y’s striking x with the bottle could lead to doctors discovering whilst x was in hospital for his injuries that he has a brain tumour that whilst currently operable would, left untreated, have killed him within the next few weeks and that thus whilst y did indeed cause great harm to x by his actions, he also saved his life.
7.3.2. WHAT DOES THIS MEAN FOR SELECTIVE REPRODUCTION?

In order for a liberal government to be justified in prohibiting some action it must be shown that a particular action will not only cause or be likely to cause harm/offence to some identifiable party but that it is also unjustifiable. Thus, when it comes to questions of what we should and should not allow prospective parents to do within the arena of reproduction, the liberal approach offers a clear account of the limits of reproductive freedom: persons should be formally free to choose whether they wish to procreate, with whom they wish to procreate, when they wish to do so, how many children they wish to have and what kinds of children they wish to have, provided that their choices do not cause unjustifiable harm or offence to others.

Certain moral criticisms that we might, in a philosophical arena, level against practices such as selection for disability cannot — in good conscience — be used to justify legal prohibition. For, although such arguments may be available to each of us when it comes to the formulation of our own private morality, they are incompatible with the basic liberal principles of non-perfectionism and reasonable pluralism required in the public sphere. These arguments are easily identifiable and tend to fall into one of two camps.

The first type of argument consists in the denial that the state should only concern itself only with the consequences of human beings’ acts and omissions in favour of a broader account of the limits of the criminal law according to which certain actions are held to be inherently wrong, in virtue of their contravening some universal and, supposedly, undeniable moral principle or right. On such accounts, those who wish to select for disability might be charged with the possession of a faulty desire, of committing a category error in treating their prospective children as objects of desire or of wronging, but not harming their child, by violating some right on their part ‘to be born perfect’ or with ‘at least an average chance of living a good life’, among other things.

Arguments falling into the second camp retain the liberal focus on consequences but widen those consequences deemed relevant to encompass not only harms determined by reference to their impact on the interests of some particular person (person-affecting harms) but also those which are impersonal in nature (such as when it is claimed that to select for disability would harm ‘the world’ by lowering total net or average happiness).

351 Buchanan et al., From Chance to Choice: Genetics and Justice, pp. 209-211.
352 For those unfamiliar with the notion of impersonal harm an account of both impersonal total and average harms as well as their implications can be found in Parfit, Reasons and Persons, part IV. For examples of moral arguments for a duty to select against disability in one’s offspring based upon notions of impersonal harm see: Harris, Wonderwoman and Superman; Savulescu, ‘Procreative Beneficence: Why
7.3.3. WHAT REASONS HAVE BEEN GIVEN IN LEGAL AND POLICY DOCUMENTS AS PROVIDING JUSTIFICATION FOR THIS PROHIBITION?

With these restrictions in mind let us now turn to the reasons that have been given as to why it was HFEA policy prior to the 2008 amendments to refuse to license PGD for the purpose of selection for disability. The answer to this question is not hard to locate and can be found in HFEA’s concern that to select for disability in one’s offspring might engage the welfare provision of the licensing conditions of the 1990 Act due to the fact that the code also holds that the risk of inherited disease or disability is a risk of serious harm. This concern can be found in all versions of the HFEA Codes of Practice yet nowhere within such documents or other relevant documents is it expanded to explain exactly how this type of selection should be viewed as possibly causing serious harm to the child created and thus as being contrary to the welfare of the child provision.

The first discussion of whether selection for disability should be prohibited within the HFE Act can be found in the HCSTC report on Human Reproductive Technologies and The Law. The report noted the general tradition within English and Welsh law that “decisions which fall into the private domain are generally regarded as not of interest to the state” In a subsection of the ‘Selection and Screening’ section entitled ‘undesirable characteristics’ they summarised their position on the matter in the following rather ambivalent paragraph:

We can imagine that many clinicians would baulk at the idea of selecting, for example, a deaf child using PGD, but we do not feel that the creation of a child with reduced life opportunities is sufficient grounds for regulatory intervention, else we might logically deny poor people IVF. Professor Tom Shakespeare told us that PGD should not be allowed to select out “minor or trivial” conditions such as restricted growth or deafness. On this basis, it is difficult to argue that they should not be selected rather than deselected. A more challenging but unlikely scenario

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would be the desire to select a child who would suffer obvious discomfort (rather than disadvantage), or worse. In this area there needs to be further debate.355

The DoH in their Review of the HFE Act: a Public Consultation also took an interest in the question of selection for disability, noting the existence of a “commonly expressed concern” regarding “the possibility that techniques used to screen out disabilities or impairments could also be used for screening in”356. In the report the case of Duchesneau and McCullough was outlined (although not by name) as an example of the desire of some to select for disability in their offspring: “there has been a well-publicised case in the United States, of a deaf couple who wished to select a deaf donor so that the resulting child would also be deaf, and therefore share more closely the parents’ experience of the world,”357 noting that “The House of Commons Science and Technology Committee considered this issue and concluded that the desire to select a child who would suffer obvious discomfort or worse was an area needing further debate”.358 A question (no. 32) regarding this matter was thus inserted in the document: “Do you think that there should be a prohibition on deliberately screening in, or selecting for impairments or disabilities – as opposed to screening out, or selecting embryos free from diseases?”359

After the consultation closed the 535 replies sent in by organisations, medical and legal professionals and individual members of the public were collected and summarised.360 The summary of responses to question 32 is as follows:

Those respondents who wanted to see screening in, or selecting for impairments banned did so because they saw it as against the best interests of the child and reflecting the parents’ needs as opposed to the child’s…There were also responses in favour of allowing screening in, or selecting for impairments. Some arguments put forward related to freedom of choice and the rights of adults to make choices… Some responses felt that the answer was not clear-cut and there may be circumstances when screening in might be desirable because ‘the basic classification of disabilities and impairments is not straightforward.’ The regulator was felt to be the relevant organisation in these cases … but the HFEA response said that they would like parliamentary guidance.361

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355 ibid., para. 145.
357 ibid., s. 5.13.
358 ibid., s. 5.13.
359 ibid., Annex B, Q. 27.
361 ibid., s.5.3.
Despite large variations in the content of the responses to the consultation document the DoH proposals for revised legislation largely ignored the state of split opinion on the matter of selecting for disability among respondents to the consultation document. For, after “carefully considering a full range of viewpoints, suggestions and proposals” and balancing “competing claims of reproductive liberty and responsibility” the DoH seemed convinced by the arguments of those who wanted to see screening in for impairments banned and published the following recommendation regarding selection for disability: “the government will propose that the law is changed to include explicit criteria for the testing of embryos… Deliberately screening in a disease or disorder will be prohibited.”

Such was indeed the case and in May 2007 the Human Tissues and Embryos (Draft) Bill was published containing as part of the Conditions of Licensing for Treatment (s.21) the following:

(8) In determining –
(a) The persons who are to provide gametes for use in pursuance of the licence in a case where consent is required under paragraph 5 of Schedule 3 for the use in question,
(b) The woman from whom an embryo is to be taken for use in pursuance of the licence, in a case where her consent is required under paragraph 7 of Schedule 3 for the use of the embryo, or
(c) Which of two or more embryos to place in a woman, persons or embryos that are known to have a gene, chromosome or 5 mitochondrion abnormality involving a significant risk that a person with the abnormality will have or develop a serious physical or mental disability, a serious illness or any other serious medical condition must not be preferred to those that are not known to have such an abnormality.

In May 2007 The Joint Committee on the Human Tissue and Embryos (Draft) Bill was appointed by a motion in the Houses of Commons and Lords with “terms of reference to consider and report on any draft Human Tissue and Embryos Bill presented to both Houses by a Minister of the Crown” by the 25th of July 2007. Their consideration of the matter of selection for disability was however, limited to nothing more than a description of the proposed changes to the act. No further mention was made of selection for disability or the rather serious lack

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363 ibid., s. 2.43.
of discussion regarding possible justifications for this proposed restriction of liberty in the
government response to the joint committee report and by December 2007 when the Bill was
introduced to the House of Lords the question of why it was imperative to ensure that selection
for disability was prohibited had still not been answered.

Indeed, sustained and reasoned discussion of why selection for disability should be prohibited in
the UK can also be found nowhere in either the Lords or Commons Hansard. This is not,
however, to say that the prohibition was ignored as selection for disability was mentioned in
both Houses discussions of the Bill. Baroness Deech noted during a discussion regarding the
parameters for screening and selecting embryos that “I hope your lordships will be pleased that
the deliberate choice of an embryo that is, for example, likely to be deaf will be prevented”. 367
Earl Howe, too noted, in a rather stirring monologue:

New Subsections (9), (10) and (11) of Clause 14, which would amend Section 13 of the
Act, focus upon pre-implantation genetic diagnosis and take us to a particular aspect of
that issue which, but for these provisions, many of us might not otherwise have thought
much about. They explicitly prohibit embryos being selected with a view to increasing
the chance of having a child with a serious disability or medical condition. Consciously
to wish such a disability or condition on a child may seem extraordinary, but there have
been well-documented cases where parents who are disabled in a particular way have
expressed a desire to have a child with the same disability. I find that idea repellant
because it ignores one of the issues central to any IVF procedure, namely, the future
welfare of the child. Therefore, I wholly support a ban on that type of embryo selection.
The techniques available to diagnose the presence of genetic conditions in any embryo
should be used, if they are used at all, to reduce the risk of a child being born with a
serious handicap and to reduce the risk of suffering. 368

This was to be the end of the Lords discussions on the matter and Commons discussions also
failed to provide any explanation of justifications for the prohibition. Indeed, whilst the
Commons Hansard shows that officials within the Department Of Health had made contact with
several Deaf organisations that had publicly criticised section 14 of the new bill 369370, the only
mention of selection for disability was in a summary of the Bill’s proposals regarding PGD.

369 Such groups included the Royal National Institute for the Deaf, the British Deaf Association, Islington
Deaf Campaign and the Stop Eugenics group.
370 HC Deb, 2 April 2008, col. 1098W.
7.4. HARM TO THE CHILD

As can be seen above, the main justifications advanced in legal and policy documents in favour of prohibiting selection for disability in the UK have been based upon the notion that those who would use ARTs for such purposes would cause harm to the child created and thus fail to take into account WP as it has been expressed in both HFE Acts. Should this be the case a prohibition on such selection would be justifiable in accordance with liberal principles. However, it has also been observed that there has actually been very little, if any, real discussion within legal and policy documents of how exactly selection for disability might be seen to harm or to threaten the welfare of children created as a result of such selection.

7.4.1. CHILD WELFARE AND THE NON-IDENTITY PROBLEM.

It is, in general, rather hard to find anyone with broadly liberal sensibilities willing to criticise the insertion of a welfare principle into the laws governing matters relating to children and those arguments that do withstand scrutiny tend not to attack the spirit of such a principle as it is currently understood: the view that “children, being vulnerable, impressionable and dependent, must be protected from harm and given every opportunity to become successful adults.” Instead, such arguments tend to bring into question whether actual versions of the principle can be said to embody that spirit, of whether the principle is too strong or of whether it requires too much from judges and other legal figures in balancing conflicting factors such as the child’s wishes, current interests and future interests and predicting the outcomes for the child of various different arrangements. This is so as regardless of one’s opinion on the matters above, it is a common feature of all reasonable religious, philosophical and political doctrines that persons are fundamentally equal, and must thus be treated with equal concern and respect. That someone has not reached majority is little reason to ignore their interests or treat such interests as of only secondary importance and steps must thus be taken to ensure that the interests of those who might easily be ignored are taken into account. The WP and principles like it serve this purpose by forcing the court and other legal bodies to take notice of the interests “the person whose voice may be the quietest both literally and metaphorically... who has the least control over whether the issue arrives before the court or in the way that it does... the person with whom the court is least able to empathise”, the child.

372 ibid., p. 5.
With almost universal support for the inclusion of the WP in the laws governing decisions relating to children it is unsurprising that when it was suggested that the principle be included in the laws governing the use of ARTs such a suggestion was met with resounding approval. Jackson, for example, notes that the inclusion of the principle was “greatly welcomed by every peer who expressed an opinion”\(^{373}\) when section 13(5) of the HFE Act 1990 was debated in parliament. Indeed, it does seem intuitively to make sense that if we are concerned with ensuring the welfare of children once they are born we should be concerned too with taking steps to ensure that welfare prior to their birth. Yet, that it has been used to justify limiting the purposes for which ARTs may be licensed seems to be a step too far. This is so as there is a crucial difference between taking into account the welfare of a particular extant/future child when making decisions that will impact his welfare, as in custody disputes and adoption hearings, and attempting to do the same when deciding whether or not to license the use of PGD for a specific purpose.

This difference hinges upon the fact that whilst in former cases there is an actual child whose welfare may be affected by a court’s decision or protected by a particular piece of legislation, decisions made regarding the kinds of fertility activities to license seem to affect the identities, as opposed to the welfare of those children created. This problem is often termed ‘the wrongful handicap conundrum’ and is a variation of a problem in philosophy known as ‘the non-identity problem’ which essentially states that in cases where a child “could not have existed otherwise than in his suboptimal state… he has not been harmed by being born in his damaged state”\(^{374}\) unless his life will be less than one worth living.

Parfit illustrates this point well with a thought experiment where he asks us to imagine two women, \(A\) and \(B\). \(A\) is in the early stages of pregnancy and has been told by her doctor that unless she takes the pill he has just given her, the child she is carrying will develop a serious and painful disability. \(B\) is not yet pregnant, but plans to become so soon. The doctor tells \(B\) she has a rare and bizarre medical condition which means that should she conceive now her child will be born with a disability similar to that which \(A\)’s child will have should \(A\) not take the pill but that if she waits three months she will be able to conceive a healthy child. Both women are thus faced with a choice: \(A\) must choose whether or not to take the pill and \(B\) must decide whether to wait or not to wait to conceive.

He suggests the vast majority of us intuit that both \(A\) and \(B\) should, \textit{ceteris paribus}, act in such a way so as to ensure they give birth to a healthy child: \(A\) should take the pill and \(B\) should wait to


\(^{374}\) Davis, \textit{Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures}, p. 35.
conceive and should they not make these decisions they would act wrongly. If A and B choose not to prevent disability in their offspring they are viewed to harm their child because a child born without a painful disability is likely to have a far better life than a child born with one. In the case of A, Parfit notes that our intuition that she should take the pill in order to ensure the birth of a healthy child is in line with a commitment to harm prevention, since, if A does not take the pill, once born, her child might claim that in failing to prevent his disability, at very little personal cost, she has greatly harmed him. He could, after all, have been born without his disability. In the case of B however, harm based accounts of wrong give B no moral reason to choose to conceive now or to wait, based on the interest of her child. For, although we might feel that B should wait, she has no reason to do so if we are to focus only upon whether her child would be harmed. If B heeds the doctor’s advice and waits for three months to conceive, the end result will be a different child from that she would have conceived three months prior because our coming into existence depends upon both the timing and manner of our conception. Thus, whilst A’s child has a claim to having been harmed should A choose not take the pill and can thus be deemed straightforwardly worse off, B’s child would not be harmed should B prove impatient, since while he might prefer not to be disabled he cannot claim he has been harmed by her choice as to prefer that she had waited to conceive would be to prefer non-existence, an irrational preference if it is the case that his life is worth living.375376

A decision regarding whether or not to select an embryo or gamete donor on the basis of their possession of certain disabling genetic traits is a decision more akin to B’s than A’s. Just as B’s decision will lead to the coming into exist of different persons, selection for a disabling genetic trait such as deafness will change, not the capacities of a particular possible person, but the identity of the person who will come to exist. Should a pair of prospective parents deliberately create a deaf child via PGD and IVF, such a child could not exist without her disability. She may not complain that she has been harmed by the negligence or cruelty of her parents unless her life is so bad that existence is harmful. As we can relatively safely assume firstly that most disabilities, deafness included, do not render one’s lives less than worth living and that a life

376 It should be noted that dependent on the theory of personal identity to which we subscribe the conclusions of the non-identity problem may not pose an insurmountable obstacle to determinations of prenatal harm in cases such as that of B. If, for example we subscribe not to a biological or psychological criterion of personal identity, according to which our identities are fixed by our being a particular numerical entity or being psychologically connected to past and future versions of ourselves, but instead, to a placeholder account, according to which certain morally relevant aspects of our identities are fixed by the relationships in which we stand to others, the non-identity problem may not hold. I have explored this question in some depth in the paper: N. J. Williams, ‘Possible Persons and the Problem of Prenatal Harm’, The Journal of Ethics, 17/4 (2013), pp. 355-385. Regardless, however, it should be noted that English and Welsh law tends to determine both claims to harm and moral responsibility in accordance with biological accounts of personal identity.
lived is a more desirable prospect than a life never lived at all\textsuperscript{377}, we may conclude that her parents would not harm her by bringing her into existence.

### 7.4.2. A RIGHT TO AN OPEN FUTURE?

Some however, have argued that to appeal to a violation of the interests of the child created by such forms of selection need not fall into the trap of the wrongful handicap conundrum. Davis proposes that rather than view the ethical challenge posed by selection for disability as a conflict between the liberal requirements both to respect autonomy and to prevent harm we should “recast it as a conflict between respecting parental autonomy and the child’s potential autonomy”.\textsuperscript{378} She does so by applying an argument of Feinberg’s concerning children’s rights, known as the Open Future Argument (OFA) to the prenatal context, arguing that those who deliberately create impaired children violate the child’s “rights in trust.”

Feinberg derives a child’s possession of such rights from the rights adults in liberal societies possess to choose their own paths in life. As a corollary of such rights, Feinberg suggests children possess a similar type of right that requires we not close off certain key choices they may wish to make when adults whilst they are still children.\textsuperscript{379} Such “rights in trust” protect children from decisions they themselves may make concerning their futures, such as deciding to drop out of school early as their future career plans as dancers or rock stars do not require much schooling and from parental beliefs and practices that may conflict with their future autonomy. They require parents not make serious and final commitments on their children’s behalf, waiting “until the child grows to maturity and is legally capable of making them himself”.\textsuperscript{380} An embodiment of these rights can be seen in the right of the state to act as \textit{parens patriae} and has been used by the courts in cases such as in \textit{Re O}\textsuperscript{381}, \textit{Re S}\textsuperscript{382}, \textit{Re R}\textsuperscript{383}, \textit{Re A}\textsuperscript{384} and \textit{An NHS Trust v SR}\textsuperscript{385} where parental decisions to deny life saving medical treatment for their offspring on the basis of religious/spiritual beliefs have been overruled on the grounds that as such children were too young to have formed their own religious convictions regarding the matters at hand and such parental decisions would ensure that they would not live long enough to do so.

\textsuperscript{377} There are those who suggest otherwise such as Benatar who, as an anti-natalist argues that this ‘cheerful belief’ is grossly misinformed and that coming into existence is always a serious harm. See D. Benatar, \textit{Better Never to Have Been} (Oxford: Oxford University Press, 2008).


\textsuperscript{379} Feinberg, ‘The Child's Right to an Open Future’, pp. 76-78.

\textsuperscript{380} ibid., p. 80.

\textsuperscript{381} \textit{Re O (A Minor) (Medical Treatment)} [1993] 2 F.L.R. 149.

\textsuperscript{382} \textit{Re S (A Minor) (Medical Treatment)} [1993] 1 F.L.R. 377.


\textsuperscript{384} \textit{Re A (Children) (Conjoined Twins: Medical Treatment)} (2) [2001] 1 F.L.R. 267.

\textsuperscript{385} \textit{An NHS Trust v SR} [2013] 1 F.L.R. 1297
A less stark example for the case of selection for disability can be found in the American case of *Wisconsin v Yoder*[^386] where members of an Amish community won the right to withdraw their children from school at the age of fourteen as opposed to the state requirement of sixteen. Their request was granted after they managed to persuade the court of two things. The first of these was that sending their children to school past the age of fourteen was antithetical to their religion and could potentially destroy the Amish way of life as “higher learning tends to develop values they reject as influences that alienate man from God.”[^387] The second was that as education’s value is assessed by its ability to prepare children for life:

> [It] is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority live, but it is quite another if the goal of education be viewed as the preparation of a child for life in the separated agrarian community that is the keystone of the Amish faith.[^388]

While the courts found in favour of the Amish, they did so by begging the question “against anyone who suggests that some Amish children might freely and even wisely decide to enter the modern world if given the choice”[^389] and thus ignoring the right of Amish children to enter the world as an adult with as open a future as possible. Feinberg agreed with the ruling, noting that in the modern world the difference between eight and ten years of education is relatively trivial and likely to make little difference to the prospects of any particular individual.[^390] However, others, also committed to the OFA, disagree. Davis argues, “if Wisconsin had good reasons for settling on high school graduation or age sixteen as the legal minimum to which children are entitled, then the Amish children were entitled to that minimum as well, despite their parents objections”[^391]

She proposes that as in *Wisconsin vs. Yoder*, those who deliberately seek to create disabled children impinge upon their child’s right to an open future, wilfully narrowing their child’s future range of options so considerably that “liberalism requires us to intervene to support that child’s future ability to make her own choices about which of the many diverse visions of life she wishes to embrace.”[^392] According to Davis’ reading of the OFA, a liberal state is justified in prohibiting the deliberate selection of disability in one’s offspring as to permit such selection is

[^386]: *Wisconsin v Yoder* [1972] 406 U.S. 205


[^389]: *ibid.*, p. 86.

[^390]: *ibid.*, p. 86.

[^391]: Davis, *Genetic Dilemmas: Reproductive Technology, Parental Choices and Children's Futures*, p. 27.

[^392]: Davis, ‘Genetic Dilemmas and the Child's Right to an Open Future’, p. 11.
to give prospective parents too much control over their offspring’s futures. Yet, while this reading of the OFA does sit well with the current legal status of selection for disability, questions regarding how open it is acceptable for a child’s future to be and at what level of expected openness a parent may violate their child’s right to an open future, remain. No person can have a truly open future and in the process of helping their children to fulfil their potential parents will close off certain future options to their children. A parent of a gifted child musician may, for example, forego ensuring she develop a complement of rounded talents to help her fulfil her dreams, just as the child of a parent who places a great deal of import on a balanced education and fostering independence will never have the option of doing a great many things that involve intense and focused training from an early age. Those who subscribe to such an application of the OFA might feasibly reply to such an objection by stating that the parental decisions in the cases above are of insufficient gravity to invoke the OFA and that whilst parents should be free to, shape their children’s futures, limiting certain opportunities in order to open up others, there should be limits on such freedoms. Consequently, whilst parents should be free to spend or refrain from spending thousands of pounds on their children’s musical education this does not mean they should be free to deny them their education, or, by the same token, a particular ability, such as hearing in the case of selection for deafness. This line of thought is understandable as it is the case with lives, just as it is with coats or shoes, that we are more likely to find one that fits when we are provided with a large number of choices.

We must, however, question whether Davis’ application of the OFA to the pre-natal case is coherent. After all, one cannot harm someone by conferring existence on them. When we look to the OFA to determine whether a particular parental action is justified we find the answer by looking to its effects on that child’s future. Amish parents may be criticised for a decision to remove their child from school at fourteen because that child, if she chooses to leave the Amish community, will be disadvantaged by her parents’ decision. She would have a legitimate complaint against her parents as they saw fit only to provide her with the education necessary to follow their chosen path for her. If we return to the case of selection for disability however, we can see that although it is true that a child who is deaf, for example, is likely to have a less open future than a hearing child and may be born at a disadvantage, she would have no complaint as she could not be born hearing. Deafness is a condition of her existence and her right to an open future is one that may only exist within her genetic limitations.

This does not mean that her parents cannot be charged with violating her right to an open future by denying her opportunities to hear after her birth by deliberately failing to provide her with

393 Mill, On Liberty and Other Writings, p. 67.
hearing aids, adequate language therapy or a cochlear implant. In such circumstances their child may have a legitimate complaint but this is an altogether different issue that although may influence parental decisions regarding selection for deafness may not be addressed fully here. Either way, it seems that by itself the OFA can offer no reason to avoid disability in our offspring but could possibly render the decision to select a child with a ‘curable’ disability self-defeating if the prescriptions of the OFA require parents to make reasonable attempts to cure their children of such conditions. 394

7.5. HARM OR OFFENCE TO OTHERS?

During the Lords debates on the HFE Bill, Earl Howe attempted to define a serious disease or disability and thus whether it should be prevented as something to be assessed, not from the point of view of the NHS or a prospective parent or indeed the interests of any other interested parties, but from “the point of view of the child when they are born.” 395 However, as explained in the previous section it cannot be shown that the practice of selection for disability causes harm to the interests, whether current or future, of the child created. As such, despite such protestations it seems to be the case that a prohibition on such selection may be justified in accordance with liberal principles only by appeals to harms and offences other than those that have already been appealed to within existing legal and policy documents: harms and offences that those who would select for disability in their offspring may impose on the interests of others by such a decision.

In this section the question of whether decisions to create impaired offspring might be said to cause unjustifiable harm or offense to others to an extent that would constitute reason enough for prohibition will thus be explored.

7.5.1 HARMS TO OTHERS: RESOURCES AND THE COST OF CARE.

By far the most likely candidate for an attempt to justify a prohibition on selection for disability by reference to the harms that such selection might impose on others is based on the fact that in

countries with advanced public healthcare and social welfare systems such as England and Wales, the decision to deliberately create a child with a disability may (dependant on the nature of the disability with which we are concerned) be a decision that imposes a significant burden of support on existing members of society.

This is, of course, the case with all procreative decisions. In choosing to reproduce prospective parents not only impose on themselves certain responsibilities such as to provide for, maintain and protect their children’s interests but they also, in all but the most libertarian societies, impose a potential obligation on other members of society to maintain and protect that child’s interests in the absence of parental ability to do so and an obligation too, to some agreed extent, to contribute via taxation to that child’s maintenance, even where parents are in the position to provide such maintenance themselves.

That other members of society are expected to bear some of the costs associated with reproductive choices is, in general, not deemed to be problematic. This is so as the provision of socialised education, medicine and welfare payments to aid parents in the rearing of children can be justified by little more than an appeal to mutual advantage. Children tend to produce a positive as opposed to negative externality as they constitute “the future workforce and taxpayers whose economic contributions everyone, nonparents included, will depend on when they reach old age” and thus a refusal to contribute to the rearing of children generally is to everyone’s detriment, placing great burdens on reproducers and threatening both the production and privatization of the benefits children produce. Indeed, as generally little information is available that allows us to determine whether a decision to reproduce is liable to impose an all things considered burden on others there are good reasons too to pool risk and bear such costs collectively in order to preserve a scheme that is, on balance to the benefit of all citizens.

However, in cases where it can be shown that reproductive choices are highly likely to cause harm to other members of society, the liberal state does seem justified, just as it is in arenas not relating to reproduction “to interfere with the actions of individuals if they have consequences which might be significantly costly to society.” Thus just as the state may and has, placed conditions on the addition of new members of society when it comes to immigration in order to protect existing citizens from harm – by placing limits on the immigration of those who are unable to maintain themselves without recourse to public funds by requiring that non EEA spouses and partners only be given entry to the UK should this be the case except in

exceptional, compassionate circumstances\textsuperscript{397} and that account be taken of whether a person seeking entry to the UK is suffering from a disease or illness that might interfere with his ability to take care of himself when deciding whether or not to admit him\textsuperscript{398} – it may be argued too that the state should take on the role of gatekeeper in the reproductive realm by prohibiting certain reproductive choices in order to protect the interests of already extant members of society.

In the selection for disability case then, we can note that a liberal state will be justified in prohibiting selection for disability if it can be shown that: Firstly, decisions to select for disability are liable to cause significant harm to others in terms of their either increasing the burden of support or in terms of diminishing personal entitlements to publicly funded services. Secondly, this increased burden of support or diminishment of personal entitlements cannot be justified by appeals to liberal principles. Thirdly, a prohibition on such selection is not likely to cause more harm than benefit.

Thus we might formulate an argument that supports a prohibition on selection for disability in a liberal state as follows:

1. People who are disabled tend to require more publicly funded resources than other people.
2. In societies with needs-based public health and social service systems those who deliberately create disabled children will impose additional costs on such resources.
3. This will cause harm to other members of society in terms of access to such resources and/or in terms of the money needed to pay for such services.
4. In the absence of adequate justifying reasons a liberal state has a right to prohibit behaviour that causes harm to others.
5. There are no justifying reasons.
6. Selection for disability should therefore be prohibited\textsuperscript{399} for the reason that those who would select for disability in their offspring unjustly attempt to “exploit… public resources that were not designed for the purpose of accommodating unique procreative preferences.”\textsuperscript{400}

The issue however is not so simple. For, while those with disabilities do tend to withdraw more from and contribute less towards the social pot than other ‘healthy’ members of society the

\begin{footnotesize}
\textsuperscript{397} Immigration Rules, HC 395 (as amended), last updated 8\textsuperscript{th} April 2014, para. 290.
\textsuperscript{398} Immigration Rules, HC 395 (as amended), last updated 8\textsuperscript{th} April 2014, para. 37.
\textsuperscript{400} Fahmy, ‘On the Supposed Moral Harm of Selecting for Deafness’, p. 6.
\end{footnotesize}
reasons given for this differ greatly depending upon whether one views the disvalue of particular inabilities/disabilities to be inherent, or exherent, a product, not of biological limitation, but the structure of society. On the former view, it is understandable that a desirable way to combat the burden of disability is to prevent the births of those who would be disabled. On the latter view however, disability is held to be socially constructed with many of the disadvantages normally associated with impairments attributed “not to the physical, cognitive, or emotional characteristics of individuals, but to the failure to account for everyone when designing physical, economic and social institutions”.

Thus, in choosing how to construct our societies we choose who will and will not be disabled. This point is well made as society is designed to cater for the majority of the populous and thus does place barriers to the participation of those who depart from societal norms.

Those who subscribe to the above view suggest that in a great number of cases what is needed is not a “cure” for the inabilities certain disabled persons have but instead a cure for the institutions that allow inabilities to be disabilities. Those unable to walk – so the argument goes – need wheelchairs and wheelchair accessible buildings, those who are D/deaf require adaptations to the environment which make lack of hearing inconsequential in their daily lives and those who view those with inabilities to be incapable of work that is not ruled out by their inabilities need education. Such a definition of disability is thus tied to notions of social justice, to the idea that in a liberal, pluralist society, justice requires that we “arrange society so as to accommodate and facilitate a maximally plural range of views and ways of living”.

Certainly, to alter the arrangements of society in this way would require increased spending of common resources, which seems to lend support to the argument that perhaps we should implement measures that prevent the birth of those with disabilities in order to lessen the strain on our already stretched resources.

Yet, as only a small percentage of disabled persons are born disabled and the vast majority become disabled later in life it is questionable as to whether any money would actually be saved by preventing the small minority of disabled persons who seek to select for disability in their offspring from doing so. One might therefore note that the money society spends on increasing access to disabled persons to healthcare and society would likely not be reduced

403 According to the 2007/8 Family Resources Survey, whilst there are over ten million disabled persons living in the UK, children with disabilities amount to less than 10% of the total and those over state pension age make up around 50% of the number. See: Department for Work and Pensions, ‘Family Resources Survey’, (London: The Stationary Office, 2007/8).
unless we abandon our commitment to equality or choose “a campaign of eliminating disabled people in addition to preventing the births of those who would be disabled”. Thus, whilst those with disabilities may have a claim to being harmed by the attitudes of non-disabled persons towards their inabilities and the structure of society it is unlikely that those who would be affected negatively by the decision to select for disability would have a justifiable claim to being harmed by such a choice as such harms are liable to be justified by appeal to the background inequalities faced by those with disabilities.

7.5.2. MIGHT ALLOWING SELECTION FOR DISABILITY CAUSE HARM TO THOSE WITH DISABILITIES?

A slightly more interesting possible justification for a prohibition on selection for disability is based on the idea that to allow some individuals to select for disability in their offspring may result in an unwillingness on the part of non-disabled members of society to provide support to persons with disabilities for which certain couples have deliberately chosen in their offspring. Such a criticism focuses upon the relationships between different members of society, and commonly held intuitions regarding the limits of what justice may require of us both in an individual sense and within our social institutions. For while justice may require that we compensate for inequalities of birth and natural endowments and that the better off make _some_ sacrifices in order to elevate the position of the worst-off, people are generally more willing to provide compensation to others for inequalities in terms of welfare, opportunity and resources when such inequalities are held to be the result of brute luck as opposed to considered choices. This can be seen easily when one considers the decision of the NHS Blood and Transplant Service to use pictures and videos of sick children, wholesome looking families and athletes in their attempts to get people to sign up to the organ donor register or to donate blood instead of images and videos of alcoholics who need liver transplants and gang members with knife wounds.

Sandel, for example, speaking of genetic testing in general has suggested that the availability of such technologies has resulted in an “explosion of responsibility for our own fate and that of our children [that] may diminish our sense of solidarity with those less fortunate than ourselves” and that as a result of this we may feel less willing provide support for such persons. Taken at face value such an argument is faced with a patent flaw, noted by Kamm and Fox which is that

405 Rawls, _A Theory of Justice_, p. 86.
406 Sandel, _The Case against Perfection - Ethics in the Age of Genetic Engineering_, p. 89.
“it makes no sense to hold a designer child morally responsible for the natural tendencies with which she is born, since it would be either her parents or reproductive physicians who chose or manipulated those characteristics prenatally, and she could not have done anything herself, before she was born, to have made her genetic characteristics come out any different”. Yet to read the argument in this manner would lack charity and miss the subtlety of the claim, which is not that people would be right to be less willing to provide support, but that regardless of the rightness/wrongness of their attribution of responsibility, they would still be more inclined to do so.

Such a claim is evidenced in people’s willingness to take pride in their appearance despite the fact that they have played no more of a part in its creation than had their beauty been crafted by a plastic surgeon. Politically, one can also see such sentiments in affirmative action and intergenerational reparations for historic injustices in which people are held to be “accountable for the wrongs of their ancestors or the groups to which they belonged”, not just because they benefit from those wrongs, which is a valid reason for reparation, but because persons are representatives of family lines, generations can be tied together (although as time passes relations are viewed to become weaker) and as such their relation is viewed to be morally relevant. Yet, whilst such is the case, that persons seem to attribute responsibility for things beyond their control seems less to be an issue for philosophy and more of an issue for education, requiring concerted attempts to remove this fiction.

7.6. CONCLUSION

Within this paper the legal prohibition for selection for disability in England and Wales was examined and explored. The reasons that have been given in legal and policy documents for this prohibition were also outlined and subjected to philosophical scrutiny from a liberal perspective. Liberal approaches regarding the purposes, functions and limits of the law were explored and it was suggested after Feinberg that the criminal law should be concerned only with ‘legislative evils’, which were defined as reasonably foreseeable or preventable consequences of human beings’ actions or omissions. As such, in order for a liberal government to be justified in prohibiting the practice of selection for disability it must be shown that the act in question will cause, or be liable to cause harm or offence to others by deliberately and/or negligently and unjustifiably violating, setting back or thwarting their interests.

409 ibid., p. 603.
The reasons given within legal and policy documents for the prohibition were then outlined and it was noted that such reasons, where, indeed, they have been given, have focused on the idea that to allow selection for disability would cause harm to the child created as a result of such selection. By reference to the non-identity problem it was shown that such arguments do not stand up to philosophical scrutiny as in cases where a child could not exist otherwise than with his disability he cannot be harmed by being born with a disability unless his life can be shown to be one that is less than one worth living. The question of whether a child’s future autonomy might be violated by such selection was also examined and it was found that whilst convincing when applied to extant children such arguments lack coherence when applied to cases of pre-natal selection. It was thus suggested that within a liberal society only those reasons that focus upon the harms and offences that such selection may cause to already extant persons are liable to offer good reason to prohibit selection for disability. Yet, whilst it was noted that those with disabilities do tend to command more societal resources than others it was shown, by appeals to the fact that disability is, in part socially constructed and that it is questionable as to whether any money will actually be saved by preventing such selection, although those with disabilities may have a claim to being harmed by the attitudes of non-disabled persons towards their inabilities and the structure of society it is unlikely that those who would be affected negatively by the decision to select for disability would have a justifiable claim to being harmed by such a choice.

It is thus suggested that within a liberal society no good reason can be found for the prohibition of selection for disability and that the insertion into English and Welsh Law of such legislation represents an unfortunate and misguided encroachment by the state into what should be seen as a matter of private morality. For, whilst many of us may question the wisdom of a desire to select for disability in one’s offspring these very differences of opinion regarding what it is that constitutes the good life were what the liberal political order was designed to accommodate. However, whilst such is the case whether or not those who seek to deliberately create disabled offspring should be helped to do so requires further debate as, indeed, does the question of whether the prohibition of selection for other genetic traits should be lifted or remain in place.
PART III.

CONCLUSION
CHAPTER EIGHT

CONCLUSION

8.1. INTRODUCTION

This thesis has had as its general theme current philosophical, societal and legal attitudes regarding the use of assisted reproductive technologies for the purpose of selection against disability. It has sought in relation to this, to move some way towards answering three questions:

1. Can there be a moral obligation to select against disability in our offspring? And if so…
2. In what circumstances?
3. Should this obligation be translated into a legal imperative in a liberal society?

In line with these questions Chapter Two provided a general background to the philosophical and legal debates in this area by looking to existing arguments, which consider whether the use of selective reproductive technologies for the purpose of disability avoidance is morally permissible, impermissible, or required. It began with an outline of the presumption in favour of liberty or the liberal baseline. With this in mind it was suggested that in the absence of adequate justifying reasons to the contrary, prospective parents should be permitted to choose whether they wish to procreate, with whom they wish to procreate, when they wish to do so, how many children they wish to have and what kinds of children they wish to have. After this was done, arguments suggesting selection against disability is morally impermissible in all, or the vast majority of cases, were outlined. These suggested that selection against disability is impermissible in virtue of the special moral status of the human embryo; that it devalues and is offensive to disabled persons, sending out the message that they are of less value than non-disabled persons; that all forms of pre-natal selection unjustifiably treat our future children as a means to an end and are incompatible with the virtues we often associate with parenthood; or that the availability of such technologies may well serve to degrade common conceptions of

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410 See: s.2.2.
411 See: s. 2.3.1.
412 See: s. 2.3.2.
413 See: s. 2.3.3.
justice and the relationships that obtain between different members of society. Arguments that suggest conversely that selection against disability is not only morally permissible, but may in fact, be morally required, were then explored. The move towards this view in society and philosophy was noted and four possible bases for a moral obligation to select against disability in our offspring were then briefly explored: appeals to harms to and the interests of the children created as a result of our selection choices; appeals to harms to ‘others’; appeals to impersonal considerations; and appeals to deontological principles. After this was done the issues and viewpoints explored in this section were reflected upon and it was decided for various reasons to place a number of limits on the scope of enquiry throughout the rest of the project. Throughout the remainder of the project I decided to assume that selection against disability is morally permissible. For, after examination of arguments which suggest a duty not to select against disability in s. 2.3 it was concluded that such arguments are unsatisfactory as they are either unconvincing, only moderately convincing or based on slippery slope arguments and projected consequences that may easily be protected against. I decided too that throughout the rest of the project I would not engage so fully as I might have done with arguments that suggest a duty of disability avoidance on the basis of impersonal harms or deontological considerations and would focus on broadly person-affecting arguments that may be used to suggest such an obligation. This was decided upon mainly because of my subscription to ‘the slogan’: the notion that “one situation cannot be worse (or better) than another if there is no-one for whom it is worse (or better)” and also due to my desire to challenge the claims made by some, regarding the perceived inability of person affecting morality to adequately account for our moral intuitions in non-identity cases.

With this in mind I identified three questions to answer within the thesis articles, which would help to answer the central questions of the thesis. These were as follows:

414 See: s. 2.3.4.
415 See: s. 2.4.1.
416 See: s. 2.4.2.1
417 See: s. 2.4.2.2
418 See: s. 2.4.2.3
419 See: s. 2.4.2.4
420 See: s. 2.5.1.
421 See arguments suggesting selection against disability is necessarily discriminatory or offensive (outlined in s. 2.3.2.1) and/or incompatible with parental virtues (outlined in s. 2.3.3).
422 See arguments suggesting selection against disability is based on misinformation about the true nature of disability (outlined in s. 2.3.2.2)
423 See arguments suggesting selection against disability may lead to harmful and unrealistic expectations on the part of prospective parents (outlined in s. 2.3.3) and may threaten common conceptions of justice and social solidarity (outlined in s. 2.3.4).
424 Ramsay, 'Teleological Egalitarianism Vs. The Slogan', p. 94.
425 See, for example: Parfit, Reasons and Persons, p. 378.
1. In virtue of the conclusions of the non-identity problem, can it ever be appropriate to ground a moral duty to select against disability in the harms that our reproductive choices might impose on our offspring?

2. Is it possible to ground a moral obligation to select against disability by consideration of the harms that our reproductive choices might impose on others?

3. Should our moral prescriptions regarding the act of selection against disability be translated into law in a liberal democracy such as England and Wales?

In Chapter Three I then explored various options regarding the approach I would take within my thesis articles. In s. 3.2 I outlined and examined a number of different accounts of harming before settling on a counterfactual comparative account. This was done in order that within the first article (Chapter Five) I would be able to apply this account to questions regarding the possibility of harm being done to persons pre-natally, that within the second article (Chapter Six) I would be able to identify clearly the harms that our reproductive decisions may impose on others and identify when they might be deemed wrongful, and that in the third article (Chapter Seven) I would be able to apply the work done regarding this in Chapters Five and Six to the legally relevant harms a decision not to select against disability might impose on both the foetus and others.

In s. 3.3 I outlined and explained the relevance of questions of personal identity over time for harm claims relating to both actual and possible persons and discussed two different testable criterion of personal identity: the Biological/Physical approach and the Psychological Approach. After examining both arguments I decided that the psychological approach best represents our intuitions when it comes to the persistence conditions of personal identity. This meant that within the first article I was able to situate my discussion of the non-identity problem and its implications for the act of selection against disability within a particular approach regarding personal identity over time. In s. 3.4, I then outlined a number of important differences between ethics and law and explained why, whilst the two often reflect one another, they will not and should not always do so. I then moved on to explore the question of the moral limits that should be placed on the law in a liberal society and concluded in line with Feinberg that generally there are only two valid moral reasons for prohibition in a liberal society: Harms and offences to others. This was done in order to provide background for the third article (Chapter 7), which asked whether the current prohibition on selection for disability in England and Wales can be justified in accordance with an account of the limits of the law based on liberal principles.
In Chapter Four I then provided brief summaries of the three thesis articles and their abstracts before their inclusion in Chapters Five, Six and Seven (Part II). The articles, their key findings, their contributions to existing research regarding selection against disability and directions for future research and limitations are explored in the following section.

8.2. KEY FINDINGS OF THE THREE ARTICLES AND THEIR CONTRIBUTIONS TO EXISTING LITERATURE

8.2.1. ARTICLE ONE: POSSIBLE PERSONS AND THE PROBLEM OF PRE-NATAL HARM

In this article the question of whether and when it might be possible to harm persons pre-natally was explored. This article was written with two specific aims in mind. The first of these was to see whether the now commonly held view that appeals to the interests of our future children cannot be used to support a moral requirement to select against disability in our offspring – and thus cannot be the basis for moral praise or condemnation of decisions to select for or against disability in our future offspring – can be successfully challenged. The second aim however, was not so specific to this thesis. During my undergraduate and masters level studies I became highly interested in the non-identity problem and the difficulties it has been said to pose for questions relating not only to pre-natal selection of offspring but also for questions of inter-generational justice generally, affirmative action, and reparation for historic injustices. Thus, in writing this article my secondary aim was to contribute to literature surrounding the non-identity problem more generally and to move some way towards a solution to this pernicious problem.

8.2.1.1. Key Findings

1. There is no escape from most variations of the non-identity problem on biological accounts of personal identity over time or psychological accounts of personal identity over time when not paired with a causal account of identity. For, in such cases psychological accounts of personal identity over time seem unable to determine a shared identity between virtually all foetuses and embryos.426

426 See: s. 5.2 & 5.3.
2. Those who subscribe to Parfit’s time dependence claim and Kripkean accounts of causal identity will be unable to determine harm in non-identity cases such as *A Reproductive Dilemma* and *The Policy Makers Choice*.427

3. On the Lewisian account the kinds of objective similarity relations that may give rise to trans-world identity are broader than those that give rise to trans-world identity on Parfitian and Kripkean accounts. Thus, those who hold a psychological account of personal identity over time and are willing to pair it with a looser account of causal identity based on Lewisian counterpart theory may, despite suggestions to the contrary, find it easier to determine harm in prenatal cases than those who do not.428

4. Provided one is willing to subscribe to the Lewisian account and accept not only genetic counterpart relations as sufficient for trans-world identity but environmental and decisional counterpart relations too, one is able to determine shared identity and thus harm in a great many previously non-identity cases.429

5. In cases of selection against disability as well as a number of other non-identity cases harm to offspring can be determined on certain accounts of trans-world identity and will thus be relevant to questions of the ethics of selection against disability.430

### 8.2.1.2. Contribution To Literature

In general terms, regarding the non-identity debate, the discussions contained within this article fulfilled the aim of original contribution in a number of ways. The first of these consisted in an explanation and exploration of the different ways in which the non-identity problem can turn on different accounts of personal identity over time and trans-world identity. This has never been fully unpacked within the literature, let alone within a single paper.431

The second original contribution consisted in an exploration of the true extent of the non-identity problem for those who subscribe to the person affecting principle on accounts of personal identity over time that privilege psychological features in the absence of an account of causal identity. In doing this it was shown that on such accounts – as future persons lack the capacities for personhood and cannot therefore be identical to any person that will ever or can ever exist – virtually all acts done to future persons will be identity affecting and will not be candidates for moral condemnation or praise. Thus, *the importance of a subscription to an account of causal identity for those who subscribe to psychological accounts of personal

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427 See: s. 5.10.
428 See: s. 5.11, 5.12 and 5.13.
429 See: s. 5.11, 5.12, 5.13 and 5.14.
430 See: s. 5.11, 5.12, 5.13 and 5.14.
431 See s. 52-5.3.
identity over time was plainly demonstrated. For, in order to make what are commonly held to be straightforward moral judgements regarding, for example, moral responsibility in cases of deliberate maternal ingestion of known teratogens and prescription of teratogenic drug, an account of causal identity is required. 432

The third consisted in an examination of different possible understandings of Parfit’s accounts of causal identity: The Time Dependence Claim (1&2) and the extent to which they make sense on accounts of personal identity over time that privilege psychological over biological features. In doing this I was able to show that whilst a subscription to the Time Dependence Claim allows us to satisfy some of our intuitions in cases of pre-natal harm, it can be charged with arbitrariness. This is so as it picks out certain features as essential for our coming to exist when the only kind of essentialism that seems truly compatible with the psychological approach seems to be a kind of Leibnizian hyper-essentialism.433

The fourth original contribution to the non-identity debate consisted in my suggestion that a partial solution to the non-identity problem can be found by appealing to a different, less strict and non-essentialist modal basis for determinations of trans-world identity: Lewisian Counterpart Theory. This suggestion has been before by Wrigley and Meacham. However, in explaining why if we are to subscribe to the time dependence claim we should also accept other kinds of counterpart relations, I was able to show that a subscription to an account of personal identity over time that privileges psychological features can result in determinations of harm in many previously non-identity cases.434

I also proposed that by subscribing to a Lewisian account of trans-world identity, we might express the suggestions made on certain deontological accounts regarding the role specific obligations of prospective parents and policy makers in non-identity cases, in person-affecting terms. This again, is a suggestion that has, to my knowledge, never been made within the non-identity literature.435 Indeed, even though not all will be willing to subscribe to a psychological account of personal identity over time or a Lewisian account of trans-world identity it should be noted that despite this the discussions contained in the paper should help them to clarify the implications of their own positions.

432 See s. 5.3-5.4.
433 See s. 5.5-5.9.
434 See s. 5.14.
435 See s. 5.13.
In terms of a contribution to the selection against disability debate more generally, in writing this paper I have shown that the non-identity problem may not be as intractable as is generally thought. For, dependent on one’s alliances it is possible to claim that a future person can be harmed by a selection choice even where this will lead to the existence of a different numerical person.

8.2.1.3. Reflections and Future Research

The discussions contained within this article were limited in one important respect: comparatively little attention was given to the question of whether and when such harms may be deemed wrongful. That this is the case is not necessarily problematic as my purpose in this paper was, as was noted from the outset, to determine the occurrence of harms and not wrongs. However, this does point to the idea that more work does need to be done on this question to determine when such harms will constitute a wrong.

In a recent commentary piece, co-written with John Harris (which is included in Appendix B) I explored the question of how the non-identity problem might turn on different accounts of harm and it was noted that on non-comparative accounts of harm such as those suggested by Harris, Shiffrin and Harman, a problem remarkably similar to the non-identity problem occurs:

…not because the life in question has not been impaired, not because the individuals are not suffering, not because they have not been harmed: it has, they are, and they have: rather because it is not possible to regard them as having been wronged. You might harm someone in order to benefit them, but if so, you do not wrong them unless you violate their will in order to do so or breach some other obligation to them. The mother giving a life with some measure of disability to a child who will find such a life worth having does not wrong her child. She is like the doctor giving a drug [that] has damaging side effects but side effects [that] are worth enduring for the sake of staying alive.

Thus, although on a Lewisian account of trans-world identity we may determine harm on a counter-factual account of harm, just as we may determine harm on a threshold account of harm it may be the case that – whilst this is more in keeping with our moral intuitions than were we unable to determine harm at all – this determination may still leave us unable to determine

436 Harris, Wonderwoman and Superman.
439 Harris, Wonderwoman and Superman, p. 95.
wrong and thus make little difference to our prescriptions in previously non-identity cases. With this in mind, I plan to explore the implications in this respect of a counterpart theoretical solution to the non-identity problem.

8.2.2. ARTICLE TWO: HARMS TO OTHERS AND THE SELECTION AGAINST DISABILITY VIEW

In this article the question of whether it may be possible to ground a moral duty to select against disability in our offspring in the harms that our reproductive choices might impose on others is explored. In general this paper should be seen to fulfil three purposes.

The primary aim should, as was noted in s. 2.5.2, be seen as an attempt to fill a gap in the literature by outlining and examining a set of less commonly made arguments (in recent years at least) that can be given in support of disability avoidance. Whilst much attention has been given in the academic literature to the real or perceived tensions between the interests of reproducers and the children they would create comparatively little attention has been given to the tensions between the interests of reproducers and the interests of others.

The secondary aim was to show that whilst appeals to such arguments do not generally result in strong moral prescriptions regarding selection against disability, an all things considered approach to the harms and benefits of our reproductive choices will tend to lead to sensible and sensitive answers in the reproductive realm.

Finally, I also wished to demonstrate in this paper that arguments that suggest we may ground a duty to select against disability on the basis of the harms our reproductive choices can impose on others need not necessarily be discriminatory or based on prejudices against persons with disabilities. I wished to show that those who make this kind of argument need not subscribe to the notion that we would better our society by avoiding the birth of disabled children or to the idea that the disabled are of less moral importance than others: that they are not worth the time, money and effort that it may take to rear them. In other words, I wished to show that appeals to the harms our reproductive choices may impose on others in the selection against disability case can be made in a sensitive and non-discriminatory manner.

8.2.2.1. Key Findings

1. The birth of a disabled child has the potential to cause great harm to parents – economically, emotionally and socially – but these costs may be outweighed by the
benefits of childrearing, parental beliefs about disability, the benefits of allowing individuals to make their own choices, and the personal harms that selection against disability may impose upon them.\textsuperscript{440}

2. The choice not to select against disability must also be balanced against the harms that such a decision might impose on one’s existing dependents, should there be any. The decision to bring to birth a child with a disability may require parents to distribute familial resources unevenly between their already existing children and the disabled child once born and thus lead to their possession of less welfare than they would have done had a different choice been made. Yet, whilst this is so, the extent to which the distributional harms imposed on existing dependents will be morally relevant depends greatly on the strength of the account of parental obligation to which we subscribe.\textsuperscript{441}

3. On the vast majority of modern theories of distributive justice and in societies with advanced social safety nets, disability and child rearing require redistribution of social resources for both reasons of justice and self-interest.\textsuperscript{442} Thus, as both disability and the production and maintenance of children will tend to impose a burden of support on other members of society and the production and maintenance of children with disabilities has the potential to impose an even greater burden; we must also take into account the interests of others when making reproductive choices.

4. The burdens our reproductive choices might impose on others will often be justifiable in virtue of the benefits of the preservation of a scheme that is generally in the interests of all citizens, the non-ideal conditions under which procreation takes place, and the claims to justice of potential and actual parents themselves. Yet, the move from chance to choice in the reproductive realm has meant that in cases where prospective parents are aware that their reproductive choices are liable to impose significant burdens on others, there seem good moral reasons to suggest that they should take this into account and seek to minimise this burden where they can and doing so would not prove overly burdensome to them.\textsuperscript{443}

5. Despite this, disability is partly socially constructed, not all disabilities require high levels of societal support and that the costs often associated with selection against disability are high. As such any duty to select against disability should be seen to be a limited one.\textsuperscript{444}

\textsuperscript{440} See: s. 6.3.
\textsuperscript{441} See: s. 6.4.
\textsuperscript{442} See: s. 6.5.
\textsuperscript{443} See: s. 6.5.1.
\textsuperscript{444} See: s. 6.5.2.
8.2.2.2. Contribution To Literature

The discussions contained within this paper fulfilled the aim of an original contribution to the selection against disability literature in a number of ways. Little discussion has taken place in the literature so far regarding each of the three questions addressed in this paper: Can a decision not to select against or to select for disability, be an autonomous one? Might decisions not to select against disability cause unjustifiable harm to our existing dependents? Might existing members of society be harmed unjustifiably by a deliberate choice to select for disability or a failure to select against disability?

In looking to the first question and asking when a procreative choice might be deemed harmful to parents themselves or constitute an irrational choice appeals to existing studies regarding the burdens, financial, emotional and social that rearing a disabled child may place on prospective parents showed that a decision to fail to select against or to deliberately select for disability in one’s offspring is no more likely to harm prospective parents on balance than most reproductive choices. Thus, it was shown that such arguments are unlikely to prove a fruitful line of enquiry for future work.\textsuperscript{445}

In looking to the second question I examined and subjected to scrutiny for the first time an argument put forward by Roberts in her paper ‘What Is The Wrong Of Wrongful Disability.’\textsuperscript{446} In doing this I was able to show that although Roberts is correct in her suggestion that those with dependents who choose not to select against disability will often create less wellbeing for them and must thus take this into account when making such choices, unless we subscribe to a remarkably strong account of parental obligation such harms will tend to be justifiable.\textsuperscript{447}

In applying work done in political philosophy regarding questions of parental justice - the extent to which parents should, in a just society, be entitled to the assistance of others in fulfilling their procreative ambitions – to the selection against disability debate I have shown that those who might appeal to the harms that our reproductive choices might impose on others need not be charged with the holding of discriminatory attitudes. It turns out that the closer our theories and societies come to embodying egalitarian ideals – actively seeking to ameliorate poor social and natural luck and meeting the claims to justice of those with disabilities – the more likely we are too, if our theories are responsibility catering to hold a decision to select for or not to select

\textsuperscript{445} See: s. 6. 3.
\textsuperscript{447} See: s. 6.4.
against disability in our offspring to be a selfish and unjustifiable choice, a choice to free-ride on a system of mutual cooperation that was not designed to accommodate unique procreative preferences. 448

Finally, by examining these questions, it was shown that although no definitive conclusions are reached in this paper, whilst appeals to harms to others than those created as a result of our reproductive choices do seem to result in a rather unsatisfying and complex answer to the question of whether there might be a moral obligation to select against disability in our offspring, consideration of such harms offers valuable insight into the complex and difficult decisions that must be made in the reproductive arena. 449

8.2.2.3. Reflections and Future Research

Throughout the writing of this paper I experienced a number of problems, based mainly on the lack of empirical data that exists regarding the true costs of disability for parents, existing dependents and other members of society. While there definitely existed a consensus that disability does have the potential to impose significant burdens on others the data available in support of this view was hard to find and difficult, especially for someone without a background in economics, to interpret. Thus, with this in mind, the conclusions reached in this paper were limited by this and more work needs to be done in this area.

It should also be noted that in a different society and on different ideal theories of justice the conclusions of this paper have the potential to turn very differently. That such is the case points to the suggestion that further research should be done regarding this matter by both those concerned with ideal theories of justice and those concerned with how we should respond to such decisions in different already existing societies. For, it seems that ultimately our answer to this question turns on our views regarding how we should justly distribute resources within society as selection for disability or decisions not to select against disability would not be a problem in a society in which there were no constraints on the number and kind of resources available for distribution. With this mind I wish, in future papers, to explore in further depth the question of whether there might be a moral obligation to select against disability on different ideal theories of distributive justice.

448 See: s. 6.5.
449 See: s. 6.6.
8.2.3. **SO, YOU WANT A DEAF BABY? A LIBERAL EXPLORATION OF THE LEGAL PROHIBITION ON SELECTION FOR DISABILITY IN ENGLAND AND WALES**

In this article I attempted to apply the philosophical discussions of the previous two papers to a more practical arena: questions of law and policy regarding the practice of selection against disability. With this in mind, I decided to focus on a recent addition to the law governing reproduction in England and Wales: the insertion into the HFE Act 2008 of a prohibition on the act of selection for disability and which therefore constitutes a *weak* legal imperative to select against disability in our offspring. The aim of this paper was to determine whether the current legal prohibition on selection for disability in England and Wales can be justified in accordance with a liberal account of the limits of the law. As such, I explored the events that led to the insertion of this prohibition, the reasons given in legal and policy documents for this, explored whether such reasons fit with liberal principles regarding the moral limits of legislation and when such arguments were found wanting explored whether there might be other reasons that can be forwarded in justification of this prohibition.

### 8.2.3.1. Key Findings

1. In a liberal society a prohibition on a particular activity may only be justified by appeals to the harms and offences that our reproductive choices might impose on others.\(^{450}\)

2. The main reasons forwarded in defence of a prohibition on selection against disability focus on the interests of the children that may be created as a result of such selection and the notion that a decision to select against disability will, in some way harm the child created.\(^{451}\)

3. On a straightforward reading of the non-identity problem in accordance with a biological account of personal identity over time our prospective children cannot be harmed by selection choices.\(^{452}\)

4. A person-affecting reading of Davis’ application of Feinberg’s open future argument to reproductive choices also leads to the non-identity problem.\(^{453}\)

5. A prohibition on selection for disability may only be justified by appeals to the interests of those other than the child created as a result of our selection choices.\(^{454}\) As such, in its current form, a prohibition on selection for disability cannot be justified.\(^{455}\)

\(^{450}\) See: s. 7.3.1-7.3.2.

\(^{451}\) See: s. 7.3.3-7.4.

\(^{452}\) See: 7.4.1.

\(^{453}\) See: 7.4.2.

\(^{454}\) See: 7.5.
8.2.3.2. Contribution To Literature

By exploring how a request to select against disability would have been met prior to and post the 2008 amendments by analysing all versions of the HFEA Codes Of Practice I have been able to show the true extent to which the law has changed in relation to this act and how even prior to legal prohibition steps were being taken to ensure that such selection would not be possible.\textsuperscript{456} Indeed, I have also shown that the main impetus for the current prohibition on selection against disability lies in a concern for the welfare of the children created.\textsuperscript{457}

By situating my discussions within the liberal framework I was also able to show that in the absence of an ability to appeal to the interests of the children we may create as a result of selection choices, in a truly liberal society there is only one other real option for justification: appeals to the harms that such reproductive choices might impose on others. By exploring this possible justification I showed that there does exist precedent for the insertion of such a prohibition in the law regarding immigration in England and Wales. Yet, by drawing on the work done in the second paper I also showed the difficulty of appeals to such harms and the complex relationships between the claims to justice and support of reproducers and the disabled and the similar claims of existing members of society.

8.2.3.2. Reflections and Further Research

In many senses, this paper fulfilled its purpose by showing, via appeal to liberal principles why it is the case that the current law in England and Wales regarding selection for disability cannot be justified as it has been in existing legal and policy documents which appeal to concerns regarding the welfare of the children created as a result of such selection. Yet, despite this, whilst within the paper I suggested that harms and offences to others should be seen to be the only valid reason for prohibition in a liberal society I focused only on questions of harms and not offence. This was done as it was my opinion that the offence that may be caused by such selection is unlikely to be of such gravity that it would justify a prohibition on it. However, whilst this is so, this suggestion does warrant further discussion and it is thus suggested that further work is done regarding this question.

Within the first of the papers contained in this thesis I suggested that harms can be determined in non-identity cases by appeals to a Lewisian account of causal identity that such is the case

\textsuperscript{455} See: 7. 6.
\textsuperscript{456} See: s. 7.2.
\textsuperscript{457} See s. 7.3.3.
was not discussed in this paper. This may seem strange as much effort was exerted in showing that on psychological accounts of personal identity over time a Lewisian account best fits our intuitions. In future work I wish to see whether a psychological or biological account of personal identity over time is most in keeping with law in England and Wales and whether a counterpart theoretic account of trans-world identity might be appropriate and illuminating for discussions of cases of not only pre-natal harm but the torts of wrongful life, wrongful birth and wrongful conception.

8.4. CONCLUDING COMMENTS

As has been noted numerous times throughout this thesis my focus has largely been on the person-affecting harms that a failure to select against disability or a deliberate choice to select for disability might impose on both the children created as a result of such selection and existing members of society. Much focus was thus directed towards the real or perceived tensions between the autonomy rights and claims to justice of reproducers and the autonomy rights and claims to justice of those that may potentially be affected by their choices. That this was deliberate still makes little difference to the fact that for many, and especially for those outside the western liberal tradition, questions of ethics cannot be answered by looking to the harms and benefits that our choices produce and are far richer in nature.

As such, I acknowledge that for some the questions addressed in this thesis only touch the surface of a debate that goes far deeper than I have allowed myself to delve here. Indeed, The question of whether there might be a moral obligation to select against disability in our offspring is a question to which, in the absence of appeals to impersonal harms and unyielding deontological principles, is difficult to answer. Yet, this is not, as has been suggested by authors such as Parfit, because person-affecting morality lacks the resources to cope with this question. Instead, it is because, as has been demonstrated within the three thesis papers: the answers it gives in this case are so complex and multifaceted that it is hard to draw a definitive conclusion. Thus, whilst it has been demonstrated that there can definitely be found moral reasons to select against disability in our offspring these reasons that must be weighted appropriately against other considerations. As such until further work is done, whether there can be a moral obligation to select against disability on the basis of appeals to the harms that a decision not to do so may produce, and accordingly whether or not selection for disability should be prohibited, as it currently is in England and Wales remains open.


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APPENDIX A.

PAPER ONE:
POSSIBLE PERSONS AND THE PROBLEM OF PRENATAL HARM.

PUBLICATION DETAILS:
Possible Persons and the Problem of Prenatal Harm

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Abstract When attempting to determine which of our acts affect future generations and which affect the identities of those who make up such generations, accounts of personal identity that privilege psychological features and person affecting accounts of morality, whilst highly useful when discussing the rights and wrongs of acts relating to extant persons, seem to come up short. On such approaches it is often held that the intuition that future persons can be harmed by decisions made prior to their existence is mistaken as identity is a most fragile thing with even the smallest differences in the conditions under which we procreate affecting the interests of distinct future persons, but the identities of those who will come to exist in the future. Within this paper I reject this view, holding that a subscription to these two accounts need not result in the conclusion that virtually all acts relating to possible persons are permitted. Further, I argue that such accounts may in fact allow a great deal more scope for the determination of prenatal harms than accounts of personal identity that privilege physical features. Finally, by interpreting claims regarding causal identity such as Parfit’s Time Dependence Claim in terms of Counterpart Theory I suggest that a solution to the non-identity problem can be found in the acceptance of: as relevant in prenatal cases, three kinds of objective similarity relations: Biological, Environmental and Decisional counterpart relations.

Keywords Counterpart theory · Future generations · Prenatal harm · Reproductive ethics · The non-identity problem · Trans-world identity
1 Introduction

As a small child I had a penchant for fairy tales and a very active imagination. Due to this, a large proportion of my time was spent wondering who I would have been had my mother met and married, not my father, but a king, making me a princess. My imaginings were vivid and created, in my mind, an alternate version of myself whom I would visit daily in moments of boredom and in my dreams. ‘Princess Nicola’ looked very much like ‘me’ (although she possessed long golden curls and slightly rosier cheeks) and definitely was, in terms of character, like myself at that time in my development. However, in my imaginings ‘I’ were beautiful dresses, lived in a castle, ate mainly boiled sweets and spent most of ‘my’ time riding around on my pony, kissing frogs and finding myself in mildly perilous situations. This was a far cry from my actual existence, which consisted mainly in school and a seemingly unending series of dance, drama, gymnastics and singing lessons. I had all but forgotten about this colourful internal world until two summers ago, when, during an impromptu game of tennis in the garden, my young cousin threw her racquet to the ground and rather unexpectedly stated “I wonder what I would have been like if daddy wasn’t my daddy and mummy had made me with someone else” and memories of my imaginings came flooding back.

Now, this kind of musing is apparently a relatively common phenomenon among armchair philosophers as well as children. For, in Reasons and Persons, Parfit mentions a woman who once wrote: “It is always fascinating to speculate on who we would have been if our parents had married other people.” (Parfit 1984, 351) He notes, somewhat ruefully, that by wondering such things she, and by association my cousin and childhood self, had ignored the obvious answer to our musings, which is no one. Our lives, in the way we had meant them, would, had our parents chosen to procreate with others, not have been like anything, as they would not have been ours. We would not have existed, and some other persons who may, or may not, have looked, acted and lived like us, would have existed instead. That our existence is highly precarious as “which particular future persons will exist is highly dependent upon the conditions under which we and our descendants procreate, with the slightest difference in the conditions of conception being sufficient, in a particular case, to [ensure] the creation of a different future person” (Kavka 1982, p. 93), is an observation that has been made by many eminent philosophers such as Adams (1979), Kavka (1982), Parfit (1984) and Schwarz (1978).

It also tends to leave us with a problem when attempting to account for our intuitions in cases of alleged prenatal harm where such intuitions are paired with a person affecting account of morality according to which it is held broadly that nothing is good (bad) unless it is good (bad) for someone. After all, if our coming to exist is indeed as precarious as is suggested, and our acts can have no moral status unless it can be shown that they affect the interests of some actual person, it will often be the case when discussing the rights and wrongs of acts relating to possible persons that what seems to be a moral decision will affect, not the interests of existing or distinct future persons, but the identities of who it is that will come to exist in the future.
Depending upon the criterion of personal identity to which we subscribe, the scenarios in which we can determine the occurrence of prenatal harm and benefit will differ and so will the problems we face in accounting for our intuitions. Those, for example, who privilege physical features when determining what it is that makes one person the same person over change and time—such as the possession of a particular body (Thomson 1975) or being a particular biological organism (Olsen 1999, pp. 125–153)—will have a much easier job of determining the occurrence of prenatal harm and benefit in cases where acts regarding possible persons can be viewed as attaching to a particular body or biological organism than those who hold that psychological continuity is that which is of importance for personal identity. 

After all, whilst it is easy to determine physical continuity between foetuses/ embryos and persons who later come to exist, it is a far harder task to determine psychological continuity between foetuses and future persons.

Despite this, a subscription to a biological approach is not a panacea. Provided one subscribes to any reductionist account of identity and pairs it with the Person Affecting Principle there will be certain cases in which regardless of how much and long we look, the intuition that some child has been harmed or benefited prenatally by our actions cannot be accounted for. Such cases, when they arise, have come to be known as “Non-Identity Cases”, termed as such because they are subject to what Parfit calls the “Non-Identity Problem” which, in its most simplistic terms, arises where our intuitions tell us one thing regarding the moral permissibility of an act but there is no person-affecting reason as to why this should be so. No one is harmed by a seemingly wrong action and no one is benefited by a seemingly right action as the act in question, far from causing harm or benefit to a particular person, should actually be seen as the cause of that person’s existence. The problem is also far more common than is often assumed and poses an “intriguing theoretical obstacle” for cases of wrongful life, prenatal injury, the use of genetic technologies to screen for and select out disease, questions of intergenerational justice, affirmative action, apology, and reparation for historic injustices (Heyd 2009, p. 5).

The following case constitutes a classic example of a non-identity case on both reductionist accounts of personal identity and will serve throughout this paper as a practical example to help ground our theoretical discussions:

**The Reproductive Dilemma**

Deborah and Edward have decided to have a baby. They have been together many years and are both in stable, well-paid jobs. Edward has just been given a promotion and Deborah’s work offers fantastic maternity benefits so they feel that the time is right to expand their family. They decide to visit a doctor before attempting to become pregnant to check that everything is working properly and they are both healthy enough to embark on the journey they have planned. The doctor gives them both a thorough examination, frowns, and sits them down to discuss the results. He tells Deborah that she is currently suffering from a rare and bizarre condition that will result in any child she conceives within the next five months being born with a painful—but not so...
bad us to make its life less than worth living — disability for which there is currently no treatment. Deborah and Edward are faced with 2 choices:
1. Conceive now and give birth to a child who will have a painful but not terrible disability.
2. Wait five months and conceive a child without a disability.

Faced with The Reproductive Dilemma many of us judge that waiting is the right course of action to take. We believe that it is better to be born without a disability than with one. Such a belief tends not to cause too much controversy. Some particular condition or state of affairs is defined as disabling by its constituting a disadvantage or barrier for the interests of he who suffers it. That which is not disadvantageous is not a disability and as such, any particular child is, ceteris paribus, more likely to live a happy and fulfilled life without the disadvantages that constitute disability. Yet, whilst such may well be the case, it is morally preferable for Deborah and Edward to wait to conceive. After all, if we accept that our existence is highly precarious and hold too that our actions only have moral status when they affect the interests of distinct numerical persons, we can see that regardless of the decision Deborah and Edward make, their child will not be harmed. Different children will come to exist depending upon their choice. Any child conceived within the 5-months waiting period could not have been conceived after the wait and thus could not have been born without a disability and neither could any child born after the wait have been born with one. In other words, whilst the child conceived either before or after the wait can later say to his parents “I am glad that you chose to (not to) wait as had you waited (not waited) I would not have come to exist”, the child conceived during the waiting period, whilst he might dream of an easier life—just as I dreamed of being a princess—cannot claim that he has been harmed by his parents’ choice as to prefer that his parents had waited would be to prefer non-existence and his life is not so bad that such a preference would be rational.

When faced with such cases those of us who have previously accepted the propositions that lead to the generation of the Non-Identity Problem are often told we have two choices. We can deny that our intuitions in such cases have moral character, accepting that they represent nothing more than strongly held preferences (Bennett 2009) or we can deny the Person Affecting Principle in favour of some impersonal criteria for morality according to which the value or disvalue of actions should be measured in terms of their effects on the “world” as opposed to specific individuals (Parfit 1984, p. 360). Such solutions, however, come at a cost some are unwilling to pay and there have thus, unsurprisingly, been myriad attempts to solve the Non-Identity Problem whilst retaining the Person Affecting Principle, or to lessen the sting of its implications for common sense morality.

This paper constitutes such an attempt and the driving force behind its creation is a strong commitment to both a person affecting account of morality and an account of personal identity over time which privileges psychological as opposed to physical features. Yet, whilst akin to many treatments of the non-identity problem in terms of its overarching aims, the route that will be taken throughout this paper is markedly different. For the question asked throughout is not, “Can we solve the non-identity
problem!" but is instead "when and how can we determine that a particular person has been harmed or benefited prenatally in line with a commitment to both a psychological account of personal identity over time and a person affecting account of harm?" By approaching the issue in this manner and examining more closely the steps that lead to the generation of different versions of the non-identity problem on this particular account of personal identity, it will be suggested that a solution to many of the problems we face when attempting to determine the occurrence of prenatal harms can be found.

We will begin by exploring firstly why those who subscribe to the psychological approach often have such a problem when determining the occurrence of prenatal harms. We will look then at how authors such as Parfit have attempted to marry the psychological approach in prenatal cases with an account of personal identity across different sets of probabilities/possible histories of the world. On this approach particular essential properties or features are held as allowing us to create links between possible persons across different possible worlds such that determinations of prenatal harm can be made even when two persons across possible worlds cannot, in any real sense, be said to share a particular psychology. This marriage will then be explored and criticised. It will be argued that whilst such an account proves useful and is understandable on an account of personal identity over time that privileges physical features, such is not the case on a psychological approach. For, on such an approach, if it is the case that any of our properties are essential to our coming to exist, such properties seem to consist in a sum of all of the features and properties that lead to the development of one as opposed to another psychology.

At this point, an alternative approach for linking both persons and potential persons across different sets of possible worlds will be suggested. This approach draws heavily on Lewisian Counterpart Theory (Lewis 1986, Part V), determining identity across possible worlds via looser relations of objective similarity, according to which a particular person in one world can be said to possess a counterpart in another when it is the case that certain persons in these worlds resemble him in certain relevant respects and to certain relevant degrees. With that done, the kinds of counterpart relations that allow us to determine the occurrence of harm in prenatal cases will be questioned and expanded throughout the final sections. This will ultimately lead to the conclusion that prenatal harms can be determined in far more scenarios than is most often assumed and, most importantly, in previously non-identity cases such as The Reproductive Dilemma.

2 Preliminaries: Personal Identity and Harm to Persons

How we should determine and what it means for a particular numerical entity to persist through time and change will often be a fundamental consideration for those who hold that persons are the relevant metaphysical units to which we should appeal when discussing questions of ethics. When we hold someone morally responsible for some particular action we presuppose personal identity, viewing that persons can only be responsible for their own actions. When we discuss whether we should uphold someone's advance directive, whether she is the same person that wrote and
signed the document will often be at the heart of the issue we are discussing. Similarly, when someone who holds the marriage vow to be sacred asks if a man whose wife is in an irreversible coma should be condemned for leaving her for another woman, whether she should still be considered the person he married will be of great import. More pertinently to the issues at hand however, is that on a person affecting account of harm judgements regarding the occurrence of and the extent of a particular harm or benefit will differ depending upon the criterion of personal identity to which we subscribe.

On such an approach a harm or benefit is generally deemed to have occurred when it is the case that ones actions have adversely affected the interests of another or, in a counterfactual sense, when it is the case that the interests of another are in a worse condition than they would have been had one not acted in the way that one did (Feinberg 1992, p. 7). Judgements of whether harm or benefit has occurred are necessarily comparative and as such before deciding whether an act is harmful or beneficial or claim that an individual must be compensated for harm incurred, it must be determined that the individual whom we claim has been harmed is the same person to whom the harm occurred. Just as determinations of moral responsibility presuppose personal identity such that we can be responsible for our own actions but not for the actions of others, so too do harm claims presuppose personal identity as we may only determine the occurrence of and the extent of harms and benefits when it is the case that we can identify that some particular person has been left in a worse or better state than they would have been had we acted otherwise.

Often, when dealing with harm claims relating to persons, the theory of personal identity to which we subscribe will sit comfortably in the background. Regardless of what we believe to constitute the nature of personal identity and the persistence conditions for persons our conclusions will be the same. Yet, there are also cases where different accounts of personal identity will offer vastly different answers to the questions: has x been harmed/benefited by a particular act and if so, to what extent? A good example of such a case can be seen in a hypothetical scenario where to treat the severe and debilitating epilepsy of a patient, a doctor, having exhausted all other options has only one left to perform drastic brain surgery which, should it go well, will cure the epilepsy but will irreversibly destroy a large proportion of the memories of the patient’s life before the operation. On approaches that determine the persistence of personal identity via appeal to physical features, such an operation would surely be beneficial to our patient as despite memory loss he will be better off without his debilitating and painful condition. Yet if identity is determined in a different way, by appeal to psychological continuity for example, whilst such an operation will cure the epilepsy from which the patient suffers, there seems to be little benefit for him in agreeing to the operation as the person who will exist after the operation will, in lacking any memories of life before the operation likely be a different person.

With that stated, it should be apparent that before we may even begin to discuss questions of harm and benefit to persons or possible persons we must first determine the account of personal identity to which we shall subscribe. This paper situates firmly in the psychological camp holding after Parfit that it is not the relation of identity itself that is important for personal identity over time. Rather, what is important are the
facts in which that relation consists: "psychological connectedness and continuity with the right kind of cause", termed by Parfit ‘Relation R’ (Parfit 1984, p. 215). In accordance with this if x is a particular numerical person at time t and y is a particular numerical person at t': x = y (for x is R related to y) iff y is psychologically continuous with x and x = possibly y in cases where relations of continuity and connectedness are vague (such as in certain cases of brain damage and early childhood). The reasons for this subscription are many and varied and will not, for fear of re-treading an already well-worn road, be addressed here.

3 Harm Claims, Psychology and the Problem of Possible Persons

As can be seen in the previous section: when we claim, on a person affecting account of harm that a particular numerical person has been harmed or benefited, either directly or indirectly, by the actions or inactions of another we are required, before even beginning to discuss whether the act can be justified to have done the following two things:

1. Ensure that we are appealing to the same numerical person both before and after the alleged harm or benefit has occurred.
2. Established a causal link between the act in question and the benefits or burdens that have been imposed on the numerical person to whom we are appealing.

A particular numerical person (P), defined as such by relations of psychological continuity and connectedness, will thus be harmed by the actions of another particular person (Q) only when it is the case that P’s interests are left in a worse state after the actions of Q because of Q’s performing such actions. The same is true for any sentient being (S). S is harmed by Q’s actions only when it is the case that S’s interests are left in a worse state than they would have been had Q not acted in the way he did. Again, such is true for foetuses and embryos.

The interests of embryos and foetuses, however, are limited. They, despite being a phialae social in the life of an organism of which a latter stage is personhood, should not be viewed as persons or as possessing the same interests as persons as they possess none of the capacities generally thought to be required for personhood. They are not thinking intelligent beings; they have no capacity for reason, or for reflection (Locke 1924, Book II, Chapter XXVII). They possess neither representational or meta-representational abilities, nor a concept of self (Teeley 1972, p. 44). They cannot value their own lives (Harris 1985, pp. 16–17) or even feel pain until the 17th week of gestation when the thalmo-cortical connections necessary for pain perception are developed. Actions or inactions that we might normally deem to have harmed or benefited persons may not, when done to them, automatically result in judgements of harm or benefit. Consequently, whilst we might harm a foetus after the 17th week of gestation if we operate on it without anaesthesia by causing it pain we would not harm it by performing an abortion as despite the fact that abortion ends a life, a foetus, in lacking an interest in the continuation of it’s own life, cannot be said to be harmed by death.
This will be deemed irrelevant to considerations of prenatal harm in cases where harm can be straightforwardly attributed to the interests of the foetus or embryo itself, but generally, when making harm claims relating to possible persons such is not the case. This is so as harm claims relating to possible persons tend not to focus upon the harms that may be incurred by the embryo or foetus as a result of our actions but instead upon the harms that acts done to them might incur upon persons that will come to exist in the future. Again, this would not matter if it were the case that foetuses and embryos could be viewed to be the same numerical entities as persons, but by subscribing to a psychological account of personal identity over time such a claim cannot be sustained. In lacking the capacities required for personhood, embryos and foetuses, despite being identical to an organism which will, ceteris paribus, later be a numerical person, are de facto not candidates for being numerically identical to any person that will ever, or could ever, exist. Such a point is put well by Jeff McMahan when he notes regarding newborn infants (and for the same reason embryos and foetuses):

Their mental life is so sparse that there cannot be more than a few direct psychological connections from day to day. It therefore follows that [a] two day infant cannot be strongly psychologically connected with itself the day before, that there is therefore no psychological continuity in infancy, that none of us now is psychologically continuous with a new-born infant, and thus that none of us is now numerically the same individual as a new-born infant. (McMahan 2003, p. 45)

4 Appealing to a Causal as Opposed to Evaluative Sense of Identity in Cases of Alleged Prenatal Harm

This obviously causes us a problem when attempting to determine the validity of prenatal claims of harm and benefit. For, there seems to be no necessary link in terms of a shared personal identity over time between persons and embryos/foetuses. Yet, despite this, when it is intended that an organism that possesses the potential for personhood should develop into a person we still view that we cannot do just what we will with it. We often claim that a pregnant woman should take vitamins in order to ensure the health of her future child, that she should not smoke, that she should do her best not to expose herself to people with rubella and toxoplasmosis and that her doctor should not prescribe her teratogenic drugs such as thalidomide lest exposure to such things should cause her future child to be born with a disability. We make these claims because despite the fact that foetuses and persons cannot share a personal identity, we view that they are importantly linked together through the foetuses' possession of, not only the properties that will allow for the development of personhood at some future point in the life of their organism, but also of certain distinctive features that determine, either fully, or in part, the identities of those persons who will come to exist in the future.

These distinctive causal features, or as Parfit terms them 'distinctive necessary properties' thus play a large role in our determinations of prenatal harm or benefit.
for those who subscribe to the psychological approach and are defined as those features that any particular person (P) could not exist without as "If characteristics (C) are identity determining for P, then any child born with characteristics different from C would have been a different person from P even if all other characteristics were the same." (Wolf 2009, p. 102) With this in mind, when discussing the validity of claims of prenatal harm or benefit, the sense of identity we utilise must be importantly different from, although still compatible with, the sense of identity we utilise when attempting to determine the validity of claims of harm and benefit in relation to actual persons with distinct numerical identities. For such claims relate less to the answers we give to questions of personal identity over time and more to the answers that we give to questions regarding how to identify individuals across different possible histories of the worldsets of possible states of affairs.

Whilst we may not always, if we wish our discussions to have any semblance of meaning, ask in cases where we have a person x who claims to have been harmed prenatally: "Is x the same numerical person both before and after the occurrence of the alleged harm or benefit?" as x cannot be the same person as the foetus/embryo (pp) from which he developed, we may ask instead: Was pp in possession of the distinctive causal features that were necessary for the coming to exist of x? And if so, was pp in possession of such features both before and after the alleged harmful act?

When we answer these two questions in the affirmative it is suggested that we can judge that x has been harmed by acts that were done to pp. For, provided it is the case that were it not for the act in question a numerical person with the same necessary causal properties as x would still have come to exist and would have been better off, our judgements of harm and benefit should conform straightforwardly with similar judgements regarding extant persons. For, across different possible histories of the world it is the case that all numerical persons or possible persons with the same distinctive necessary features as x are held to be either x or were, at some point in their existence candidates for being x. In possible worlds where a person with x's distinctive necessary properties would have been better off had we not acted in the way that we did, and there are no justifying reasons for our acting in such a way, it is thus held that x may justifiably feel aggrieved. When, however, we answer either question negatively it will be judged that x cannot have been harmed by acts done to pp and this will be so for one of two reasons:

1. pp's causal features/properties were not compatible with the coming to exist of x and we have made a mistake in pairing these two entities as anything done to pp could not have affected x's interests.
2. The act in question altered pp's causal features/properties such that it is the case that only after the act in question could we legitimately pair x and pp's causal features/properties as the act in question, far from causing harm or benefit to x, is actually the reason for his existence as had we not acted in the way that we did x would not have existed and some other person would have come to exist instead.

Yet, what are these causal features that we could not exist without and that determine the validity of claims of prenatal harm? Were we to subscribe to a
biological account of personal identity over time the answer to our question would be simple. On such an account it would be the case that foetuses and embryos were already in possession of the feature that grounds claims to both prenatal and personal harms—their organism. From the moment of conception, despite the changes in shape, size and moral status that occur throughout its lifespan, the numerical identity of any living organism is set by the elementary particles from which it is constituted. It will remain that entity until that organism is no longer living and, provided that organism develops to have interests, such interests can be affected by any act regardless of whether or not that act was done to it whilst it was not a person.

On the psychological account however an answer proves a little more elusive. The causal properties to which we must appeal cannot be those psychological features that ground our claims of personal identity over time and must instead be the properties which would allow for the development of a particular psychology. Consequently, we must ask, what would have made it such that we would not have existed? What features or properties were necessary for our coming to exist? Not the particular versions of ourselves in existence now, but the earliest versions of ourselves from which our identities could have branched, those whom we properly identify as ourselves across different possible histories of the world/set of possibilities.

5 Parfit’s Account of Causal Identity: The (Strong) Time Dependence Claim

As the approach regarding what is important in personal identity over time taken in this paper has much to owe to Parfit it would be imprudent not to give serious consideration to his account of what constitute the causal features that were necessary for our coming to exist. On his account, what would have made it true that we never came to exist is as follows (albeit with "one qualification"):

**The (strong) Time Dependence Claim (TDC1):** if any particular person had not been conceived when he was in fact conceived, it is in fact true that he would never have existed. (Parfit 1984, p. 351)

There are thus three claims that we might interpret the TDC1 to include and they are as follows:

1. **The Origins Claim:** Our material origins are necessarily determinative of our personal identities and we could thus not have come to exist had we not been constituted from anything other than the particular matter from which we were actually conceived.

2. **The Temporal Claim:** The timing of our conception was necessarily determinative of our personal identities as they currently stand and we would therefore not exist had we not been conceived when we were actually conceived.

3. My decision to format the different claims inherent in the TDC1 as a 3-point list should be attributed to Weyl who in ‘Genetic Selection and Modal Harms’ also distinguishes between the modal claims inherent in the TDC in the same way.

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3. **The Genetic Claim**: Our exact genome is necessarily determinative of our personal identities and we could therefore not exist possessing a different genome.

The first claim in the list: The Origins Claim leaves the TDCI looking remarkably like the view regarding distinctive necessary properties that would be held by those who subscribe to a physical account of identity such as the biological criterion and this is so because, for those who subscribe to such an approach it is. Indeed, Parfit terms this approach "The Origin View" in homage to the fact that it can be recognised as a version of the 'Necessity of Origins' view forwarded by Saul Kripke after a long discussion regarding whether Queen Elizabeth could have been born naturally of different parents. The view is as follows: "If a material object has its origin in a certain hunk of matter, it could not have had its origin in any other matter. (Kripke 1950, p. 114) This implies that just as a particular wooden table could not have been made from anything but the particular piece of wood from which it was actually made, so too could a particular human being such as Queen Elizabeth II not have been constituted from anything but the gametes from which she grew. In itself, this claim is relatively uncontroversial, as it represents nothing more than the basic metaphysical fact that all physical things could not have had their origins in anything other than the physical things (read: elementary particles) from which they were constituted.

Yet, as the psychological account demands that our physical identity is what is most important for persistence The Origins Claim actually ends up telling us very little about the ways in which we could have been different. Consequently, when we view The Origins Claim as a modal claim representing the possibility of existence across possible worlds as being determined by strict genetic origin it becomes of little use to us (Wrigley 2016, p. 508). For our concern here is not with the requirements of how a particular physical thing can come to be. Instead, we are asking under what circumstances and in accordance with which criteria a particular person could come to exist in different possible histories of the world. Thus, as our being a particular person consists in the persistence of a certain psychology, our possession of, or embodiment in, certain biophysical materials is of only instrumental importance to us in so far as such features will impact upon the psychological features that determine numerical identity.

The claims then of most relevance to us, regarding distinctive necessary properties, are those of the second and third claims inherent in the TDC. Now, the genetic claim is relatively lucid, being the claim that we could not exist were we to

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2 This claim is actually slightly misleading. For, as Elliot and Gallon point out in their short but devastatingly perspicacious paper "Would it have been me?", whilst the necessity of origins view demands that an object could not have had its origin in anything other than its actual origins, this does not necessarily mean that a table could not have been constituted out of a different piece of wood than that from which it was originally constituted or that a child could not have been conceived from anything other than the particular egg and sperm from which it was actually conceived. What is important is the configuration of elementary particles and not the object itself meaning that in some possible worlds it could be the case that a particular table could be made and a particular person could have been conceived from a different piece of wood or different gametes provided the self same elementary particles from which they were actually created were present and arranged in a specific way.

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not possess the exact genome that we actually possess as "differences in material make for later differences in virtually all aspects of a person: Change the sperm, and there will be substantial changes (of both a physical and psychological kind) in the later human being" (Belshaw 2000, p. 269). The Temporal Claim, however, can be understood in at least two ways. First, it can be understood as relating to scientific facts regarding the timing of the female menstrual cycle and if so may merely be another way of expressing The Genetic Claim: If it is the case that we could not exist were it not for the meeting of the two specific gametes from which we were actually conceived, it is the case that we would have to have been conceived within a month of the time (at most) from which we were actually conceived. We might also, however, understand it as recognising the importance of the environment to personal identity and it could thus be of relevance to questions regarding the ethics of decisions relating to the timing of the implantation of frozen embryos (Belshaw 2000, p. 272).

6 How Should We Understand the Time Dependence Claim
on the Psychological Account?

Barring the second understanding of The Temporal Claim, we might note that the TDC still looks remarkably like the approach that would be taken regarding distinctive necessary properties by those who adhere to the somatic approach as it still amounts to the claim that in any possible world, only those who possess the same genome have the distinctive necessary properties that would allow them to be considered the same person. It is, however, also compatible with psychological approaches as whilst our possessing a particular genome/beings conceived from the two particular gametes from which we were actually conceived, is viewed as necessary for our becoming the particular numerical entities we are, the TDC does not state that this is a sufficient condition for our existence. Thus, whilst compatible with both reductionist accounts of personal identity over time, the implications of the TDC on these accounts are markedly different.

This can be seen when considering the different possible histories of the biological entities that eventually become each one of us. According to the Biological/Kripkean approach, regardless of the environment in which a genetic individual develops and how his personality is shaped by his circumstances, his personal identity will remain the same as it is determined by either his genome or his origins in the elementary particles from which he was conceived. Across all possible worlds, the possession of a particular genome should thus be viewed as both necessary and sufficient for our being the same persons. This means, for example, that even if the parents of the genetic individual who eventually became me had, in some possible world, when she was an infant, dropped her on her head resulting in her having a severe intellectual disability or had died in a car accident, leading to her being sent to live with her Uncle Oleg in Volgograd, learning Russian as her first language and eventually becoming a famous gymnast instead of becoming a perpetual student with no known cognitive problems and two very much
alive parents who raised her in the South of England; she would still be the same numerical person.

According to the TDCI on the Psychological Approach, however, this would not be the case. For, although ‘Intellectually Disabled Nicola’ (IDN) ‘Actual Nicola’ (AN) and ‘Russian Nicola’ (RN) would share the same genetic origins, would all have possessed the same distinctive necessary properties and were thus, at their pre-personal stages candidates for being the same numerical person, they would not now likely be sufficiently psychologically connected with one another that we may say that they are importantly the same person, despite the fact that their origins made it such that they could have been. Thus, on the psychological approach the TDCI should be read as a statement that whilst it is necessary for the existence of a particular person that he was conceived from the two gametes from which he was actually conceived, this condition is not sufficient for his existence. Regardless of whether it is fulfilled, the genetic origin of a particular potential person is the self same genetic origin of a potential myriad of other potential persons who may or may not have come to exist had things turned out differently, depending upon how the genetic determinants of their identities were shaped and influenced by environmental factors.

7 A Marriage Made in Heaven: How a Subscription to the Time Dependence Claim Helps Account for Our Intuitions in Cases of Alleged Prenatal Harm

When closely examined, the TDCI does seem to sit well with the psychological approach. After all, it is pleasingly straightforward and not as overtly genetically essentialist as it may at first seem, viewing our origins as necessary but not sufficient for existence, and thus of causal but not evaluative importance to personal identity over time, allowing that our environments still have a large role to play in the development of personal identity. This means that we need not accept that RN and AN are the same person, or that Queen Elizabeth II could have been conceived by different parents but also allows us, by looking to genetic origins, to differentiate between entities such as embryos and fetuses that on the psychological account of personal identity over time would seem, prima facie, to possess no relevant distinguishing features at all.

More importantly however, that the TDCI gives us a set of causal properties which, whilst not sufficient for the existence of any particular numerical person are still viewed as necessary, means that those who adhere to the psychological account are able to place limits on the kinds of behaviours that are morally acceptable regarding potential persons. On the psychological account even the smallest environmental changes are identity-implicating, leading to the unfolding of a wholly different psychology and the existence of a different person. Without such a causal claim distinguishing between potential persons and creating links between certain of them across possible worlds, those who adhere to the psychological approach would be forced to argue that nearly every decision made in relation to possible persons would be morally benign. How, after all, can we suggest that a pregnant woman should not smoke, drink too much wine or expose herself to teratogenic
substances during pregnancy if such actions will not harm her unborn child but will instead determine that one child, as opposed to another will come to exist? How can we justify the compensation that was awarded to the ‘victims’ of the thalidomide disaster of the 1960s if it turns out that Grunenthal, the pharmaceutical company that produced and approved thalidomide as safe for use in pregnant women, did not harm any of the children that came to exist after their mothers unwittingly took the drug, but was instead responsible for their very existence?

Such claims and judgements rely upon our holding that the above actions and inactions will not importantly determine the ‘identity’ of potential persons but will instead bestow, either directly or indirectly, harms and benefits upon a discrete entity. Yet, a straightforward reading of the psychological approach will, as we have seen, yield no such determination. By pairing the psychological approach with the TDCI we can therefore save our intuitions in such cases, arguing that whilst these actions are indeed identity affecting and will result in the existence of different persons, each of these resulting persons, in possessing the same distinctive necessary properties constitutes a branch on a possibility tree inherent in these properties and that thus, provided we have a conception of what is good for a particular individual once born, may legitimately be conflated when we are making determinations of prenatal harm and benefit.

8 Grounds for Divorce? Why a Lack of Sufficiency Places a Psychological Subscription to the TDCI in Jeopardy

In doing away with The Origins Claim those who, on the psychological approach, note the utility of the TDC in matching our determinations of harm and benefit in most genets cases, however, are faced with a problem. For without the sufficiency claim inherent in The Origins View there seems to be no justifying reason for those who subscribe to the psychological approach to accept that a common origin in a specific set of genes or the possession of a particular genome should, by itself, constitute reason enough to link distinct numerical persons across possible worlds. On the psychological criterion, numerical identity can survive change and a particular numerical person can be very different in different possible histories of the world due to the branching off of a psychology from a common origin in one of a number of ways. However, whilst such is the case a common origin in a particular genome does not seem to be the right kind of origin to make determinations of trans-world identity.

For, whilst the former “develop from and preserve connections with a psychology already extant” (Belshaw 2000, p. 267), and can be identified across possible worlds by reference to points in which their psychologies overlap, the existence of the latter depends upon not only the properties inherent in their genomes, but also the environmental events which caused these distinct psychologies to unfold. Thus, the “distinctive necessary properties” of any particular person seem to consist in the sum of all of the causal factors that came to influence the development of their psychology, and the possession by certain individuals across possible worlds of some of these features, such as a distinct genome, is not
enough to imply trans-world identity. Exact similarity of genetic origins does not
on the psychological approach, imply causal identity and whilst the different
potential identities of a particular foetus all share in common a distinct genome, it is
not at all clear why this should be enough to identify such features as implying
relations of trans-world identity.

Indeed, on the psychological approach, the only kind of essentialism, defined as
"the view that individual things have essential properties, where an essential
property of an object is a property that that object could not have existed without"
(Mackie 2006, p. 1), that truly seems compatible is a kind of Leibnizian Hyper-
Essentialism according to which any and all properties held by an individual that
have contributed to the genesis of a particular identity are necessary for their very
existence as without them a different person would exist (Leibniz 1989, pp. 72–73),
RN, IDN and AN are not the same person and nor are they candidates for trans-
world identity. Such is the case as any individual, in any possible world, whose
causal properties in that world differ from the causal properties of another specific
individual, cannot be viewed as the same person, even if they are exactly similar in
nearly all respects.

9 A Route for Reconciliation? A Counterpart Theoretic Understanding
of the Time Dependence Claim

What then, is to be done? A subscription to the psychological approach without a
causal account of identity leaves us with the uneasy conclusion that virtually all acts
relating to possible persons are permitted. A subscription to the TDC1, although
helping to account for our intuitions in cases of alleged prenatal harms, is a
subscription that arbitrarily picks out certain features as essential for our coming to
exist despite the fact that the only essentialism that truly seems compatible with the
psychological approach is one like that forwarded by Leibniz. With this in mind, it
is suggested that on the psychological approach the best way to make sense of
claims relating to trans-world identity and possible persons that does not collapse
into a list containing all of the causal factors that lead to the development of one as
opposed to another psychology and confirm that virtually all acts relating to possible
persons are permitted, is to appeal to a different, non-essentialist, modal basis for
determinations of identity across possible worlds where the criteria are slightly
looser.

Such a basis, it has been suggested (Wrigley 2006, 2012; Meacham 2012), can be
found in Lewis's modal realism (Lewis 1986) according to which trans-world
identity is determined not by reference to essential properties or strict identity
relations, but instead via counterpart relations, defined as objective similarity
relations (Divers 2007, p. 42). This view, I suggest, fits best with the psychological
approach as it allows us to separate identity within worlds from identity across
worlds. For on this approach, it is held that the world in which "we" actually exist is
just one of many worlds like it, all of which are spatiotemporally isolated from one
another, concrete, abundant and satisfy a principle of restricted recombination
according to which shape and size of the world permitting any number of possible
things can exist alongside each other or fail to do so. As these worlds are isolated from one another, particular individuals can exist in only one world, no individual will be identical to an individual in another world and thus identity across possible worlds is determined via counterpart relations, where, “In general, and independently of any specific context, the counterparts of an individual x are those individuals that are similar to x in some relevant respects and to some relevant degree” (Divers 2007, p. 44). Accordingly, the truth of a de re modal claim such as “AN is possibly a Russian gymnast/intellectually disabled” is determined, not by whether they are the same numerical person, as across worlds this is impossible, but instead by whether AN has, in a different possible world, a counterpart who is a Russian gymnast or is intellectually disabled. As the criteria for identity across possible worlds are less strict on this approach and there is no possibility of our existing in worlds other than our own, just the possibility of the existence of counterparts whom we deem to be similar to us in certain relevant ways, we have the required modal basis to argue that identity across possible worlds may be determined in a different way to identity within worlds, depending upon which similarities we accept as giving rise to counterpart relations.

Yet, despite this, the question of what these similarities are and how their relevance should be decided must be answered. If any and all similarities were allowed on a counterpart theoretic approach, it could be argued that all persons, by being homo sapiens, are candidates for being x and your counterparts and the most imaginative of us could even argue that each of us could have been a banana, a talking canine or even a self-aware home security system. If such were the case, we would “have abandoned any useful means of specifying individuals across possible worlds on the grounds that any possible entity could be one’s counterpart” (Wrigley 2006, p. 180). Such a reading is, however, erroneous for, as Lewis notes when describing the counterpart relation, in order to be considered our counterparts, otherworldly individuals must resemble us “closely in content and context and in important respects[,] and more closely than do other things in their worlds” (Lewis 1971, p. 206). As such, whilst it is the case that “the kinds of properties that are relevant and the stringency of the relations that’s required, is something that can vary from context to context” (Meacham 2012, p. 260), due to this context sensitivity it will be the case that when we are asking specific questions about who, across possible worlds should be considered the counterpart of a particular numerical person, the counterparts available to us will often be very limited in number.

On the psychological approach paired with the TDC, then, we can note that there will be two relations of objective similarity which should be viewed as relevant when determining personal identity across possible worlds. The first of which consists in the sharing of a common psychology which we shall call ‘branching counterpart relations’ according to which those who share a common psychology, whether it be linear or branched, should be viewed as my counterparts in virtue of their possession of this shared psychological history. Any and all persons across possible worlds that have branched from this common psychology will be my counterparts and depending upon the properties that they possess, such as being x, doing x, and so on, I possess the property “could have been/done x”. Such a
counterpart relation will be relevant when making harm claims regarding extant persons.

The second relevant relation consists in the sharing of a distinct genome, which shall be termed 'genetic counterpart relations' and it is viewed as relevant in virtue of the fact that individuals who share a genome could have, despite differences in numerical identity, had environmental events lined up in different particular way, been virtually indistinguishable from one another. If we return to the example given earlier in the paper of embryos ‘N’, who, in this world eventually became AN, but in another became RN, we can note that despite the fact that they are different numerical persons in both having a common origin in the possibility set inherent in N, RN is a genetic counterpart of AN as she stands in an objective similarity relation to AN due to this origin. Consequently, as there is a possible world in which N became RN, AN possesses the following properties: could have been an orphan, could have been sent to live with her Uncle Oleg in Volgograd, could have learned Russian as her first language and could have been a gymnast as her counterpart possesses these properties.

Regarding prenatal harms then, provided we have a concept of what broadly constitutes a good or a bad life and can make comparisons between lives, where it is the case that two numerical persons (x and y) share a branching/genetic counterpart relation and x is better off than y as a result of a particular course of action taken by another, we can state that in being x’s counterpart y is harmed by this action. Relating to a particular prenatal case of harm—provided that we view it is better for a person not to have an intellectual disability than to have one—as AN and IDN should be viewed as genetic counterparts, that AN is better off than IDN as she was not dropped on her head as a baby, we can state that IDN was harmed by this particular action as she possesses a counterpart, AN, who, in not being dropped on her head, is better off in lacking IDN’s intellectual disability. The same can be said in thalidomide cases. For if we view that the birth defects associated with prenatal ingestion of thalidomide such as Dysmelia and Phocomelia are harmful features, for each thalidomide victim (TV) there will, across possible worlds, be a different numerical person who shares a genetic counterpart relation with TV who is better off in virtue of her mother not ingesting thalidomide whilst she was in the womb. Having such a counterpart TV possesses the property ‘could have not been prey to the harmful congenital defects associated with the ingestion of thalidomide’ and can thus claim to have been harmed by her mother’s ingestion of thalidomide.

10 A Return to the Non-identity Problem

By subscribing to both a counterpart theoretic account of trans-world identity and the TDC as providing the relevant counterpart relations necessary for determinations of harm and benefit in cases of prenatal harms, those who hold that psychological connectedness and continuity is that which is key for personal

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4 I have separated these counterpart relations from one another in virtue of the fact that, whilst most of my psychological counterparts, will also be my genetic counterparts it is the case that in certain scenarios this would not be the case, such as in Parfit’s Teletransporter Case set out in Reasons and Persons and cases of illusion.
identity are thus able to account for their intuitions in a great many cases where it is commonly viewed that an act done to one numerical entity will result in harms or benefits for a different numerical entity in spite of a lack of connectedness and continuity. Yet, despite this, holding only genetic counterpart relations to be relevant in cases of prenatal harm still leaves us with a problem in accounting for our intuitions regarding the occurrence of harm in cases such as The Reproductive Dilemma in which our intuitions tell us that Deborah and Edward should wait to conceive and our account of the features necessary for determinations of trans-world identity tells us another.

By subscribing to the TDC, as providing the relevant counterpart relations necessary for determinations of prenatal harms, our intuition is still mistaken. Regardless of the decision Deborah and Edward ultimately make, their resulting child cannot be harmed prenatally by their decision. For as it is the case that in order to be identified as sharing an identity across possible worlds two numerical persons must share either a branching or a genetic counterpart relation, and the possible outcomes of their decision will share neither, there is no reason that attaches to the interests of their offspring that should sway their decision in either way. Any child conceived within the 5 months waiting period could not possess the distinctive necessary properties of any child conceived after the wait and thus could not have been born without a disability and neither could any child born after the wait have been born with one.

If cases such as The Reproductive Dilemma were few and far between, it might be tempting to ignore them or to bite the bullet with respect to them and argue that our intuitions represent little more than strongly held preferences, akin in many senses to the preferences of the hardened/pretentious coffee drinker who derides those who choose to sully their daily caffeine fixes with milk. Yet, when it is the case that the problem occurs on a macro scale our intuitions are harder to bury due, in part, to the volume of persons that we intuit will be harmed. An example of such a case is as follows:

**The Policymakers Choice**

A group of policy makers are faced with the choice of deciding between certain policies concerning how best to make use of our natural resources. After much debate and deliberation they have been able to whittle down a very long list of potential candidates to just two:

1. The first policy is entitled *Depletion* and it involves just that, the depletion of our natural resources and the cessation of research into viable alternative energy sources. Adopting this policy would mean that for the next two hundred years we, and our descendants, will live very comfortable lives as the money that would have been spent on research will be spent on community enrichment activities and our natural resources will allow for frivolous energy consumption. After those two hundred years however, because we will have depleted our resources, our descendants will live relatively miserable lives until they manage to find suitable alternatives and will have to spend a great deal more money on

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5 This case is a simplified version of a non-identity case regarding the choice of one or two medical and economic policies set out by Porte in *Reasons and Persons*.

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research and development, leaving little money left to supplement the lifestyles
that citizens have been used to.
2. The second policy is entitled Conservation and requires that we be sensible
with our resources, living lives of slightly less comfort than in Depletion in
order to ensure that two hundred years down the line our descendants will live
much happier lives than they would under the depletion policy.

Faced with The Policy Makers Choice, we tend to view that Conservation would be the
right policy to choose as a little sacrifice on our part will lead to great benefits for future
citizens, whereas in Depletion we would not gain so much as future generations would
stand to lose. Yet again our intuitions are mistaken. For if it is the case that our
counterparts across possible worlds can only be those whom have branched off from a
common psychology or who share the same genetic origin, there is no reason to choose
conservation by appealing to the interests of future people. After all, as these policies will
affect the ways in which people live out their lives, people will likely meet/marry
different people and conceive children at different times, increasingly over time different
people would exist depending upon our policy choice. After a few hundred years the
entire population would likely be made up of people who would and could not have
existed had the other policy been chosen. Therefore, whilst the persons in existence under
Depletion would undoubtedly live far less comfortable lives than those under
conservation, they would not exist had the other policy been chosen and vice versa,
meaning, once more, that provided their lives were on balance worth living they cannot
claim to be harmed by our choice as had the other choice been made they would not have
come to exist (Parfit 1984, pp. 361–366). Indeed, as Depletion would actually serve to
benefit those already in existence whilst causing harm to no one and Conservation would
place burdens on those already in existence whilst providing no tangible benefits to future
persons it seems that Depletion may, on balance, be the most beneficial policy choice.

We must thus ask again, what is to be done? Were we to come to the same
conclusions in cases such as those above from an essentialist standpoint the answer
would be nothing. For what is important to personal identity is our being a particular
organism and a particular organism necessarily has its origin in the particular things
from which it was constituted, meaning no person can claim to have been harmed
prenatally (or pre-emptively as in The Policy Makers Choice) in cases such as those
above. Thus—unless we are to appeal to the interests of other persons or abandon
the person affecting principle in favour of some non-person affecting moral
principle—there is little room for manoeuvre. On the psychological approach, however,
there may well be a glimmer of hope, an appeal to certain other features as
constituting relevant counterpart relations and grounding claims to prenatal harm. It
is this that shall be explored in the following sections.

11 Examining the TDC: Can We Loosen the Criteria for Trans-World Identity
to Include Slight Genetic Variance?

Whilst a subscription to counterpart theory can allow us to make sense of the
genetic claim inherent in the TDC by viewing the sharing of a distinct genome, in

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value of its identity determining features, as a relevant relation of objective similarity giving rise to counterpart relations once we subject the TDC1 to close scrutiny, a flaw emerges. As on the psychological approach our genes are not in possession of magical properties (Wolf 2009, p. 100)—whilst those who share my genetic origin should be viewed as my counterparts—why it should be the case that only those who share my genetic origin may be viewed as such is unclear. For whilst it is almost impossible for us to imagine our having a different genetic origin yet still being the same persons we are today, the fact that we find this idea difficult to grasp does not mean that its being the case is not a logical possibility. Indeed, as one considers this it becomes gradually more apparent that certain aspects of our genetic inheritance do not seem to be as necessary for the development of our personal identities as the TDC1 suggests and questions regarding whether we could still be the same persons with a slightly different genetic code begin to be met (in certain cases) in a button-tasting affirmative manner. How important, after-all, was the natural colour of my hair for the development of my psychology? Could I have a dark-haired counterpart? How important was my eye colour? Most all of my counterparts have blue eyes.

Whilst such examples might be questioned, there are straightforward cases where it seems that a change in genetic code at the prenatal stage of development should not compromise the development of a particular psychology. For if we are to look at adult onset genetic disorders such as Huntington's or the cancers associated with the BRCA1/2 or FAP mutations which present symptoms only later in life, it seems that if it became possible to repair, switch off or replace the affected mutated genes with 'normal' genes prenatally, a change in genetic makeup in such cases would not necessarily imply a change in identity unless such changes were also accompanied by identity affecting environmental changes. In these cases it would seem that an individual in world 1 possessing a BRCA2 mutation might well have a counterpart in worlds other than his own who is not in possession of a BRCA2 mutation and as such would possess the property 'could have lacked the BRCA2 mutation'.

Parfit himself pre-empted some similar questions regarding the idea that perhaps our exact genomes are not as necessary for determinations of trans world identity as the TDC1 suggests in the following paragraph:

Suppose that my mother had not conceived a child at the time when in fact she conceived me. And suppose that she had conceived a child within a few days of this time. This child would have grown from the same particular ovum from which I grew. But even if this child had been conceived only a few seconds earlier or later, it is almost certain that he would have grown from a different spermatozoon. This child would have had some, but not all my genes. Would this child have been me? (Parfit 1984, p. 352)

Parfit suggests that the answer to his question may not be able to be found, that the child may well have been him/his counterpart, may not have been him/his counterpart or that his identity might have been indeterminate (Parfit 1984, p. 352).

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6 Or have a psychology that has later branched off from a being with my genetic origin and now reside in a body with a different genetic origin.

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In light of this, he proposes a weaker version of the time dependence claim, as he wishes the TDC to be 'uncontroversial' on all reductionist accounts of personal identity, including his own, the TDC2:

**The (weak) Time Dependence Claim (TDC2):** If any particular person had not been conceived within a month of the time when he was in fact conceived, he would, in fact, never have existed. (Parfit 1984, p. 352)

There are again 3 claims that we might interpret the TDC2 to include:

1. **The (weak) Origins Claim:** If a material object has its origin in a certain bank of matter, it must have had its origin in at least some of its originating matter and thus as human beings have their origin in two gametes, in any possible world, a particular numerical person could possibly exist if they were conceived from at least one of the gametes from which they were actually conceived.

2. **The (weak) Genetic Claim:** Our possession of at least half of our genome is necessarily determinative of our personal identities as they currently stand.

3. **The (weak) Temporal Claim:** The timing of our conception was necessarily determinative of our personal identities as they currently stand and we would therefore not exist had we not been conceived within a month of the time from which we were actually conceived.

According to an understanding of the TDC2 in accordance with The (weak) Origins Claim it would be the case that provided a particular person was conceived from at least one of the actual gametes from which he was actually conceived, it is a possibility that he would be the same person now as he would have had he been conceived from a different spermatozoon, as such a person would retain at least some of his originating matter.

Thus, a particular biological entry could, in some possible world, be 'me' with a different hair or eye colour or have been genetically modified in utero provided the above condition is met and would in fact allow that a particular numerical person could exist with a potential myriad of different genomes resulting from the fertilisation of a particular sperm or egg with any number of different gametes. However, as we have already noted that the TDC1 should not, on the psychological approach, be viewed as a version of The Origins Claim, we should for the same reasons agree that the TDC2 should not be viewed as a weaker version of that claim. As such we may read the TDC2 as encompassing only weaker versions of the second and third Genetic and Temporal Claims.

When we read the TDC2 in such a way we can note that whilst the temporal claim is easily understood as an environmental claim regarding the fact that a change in environment both pre and post-natally will influence the psychology of those who come to exist, the genetic claim becomes slightly more complicated. For it is the claim that our possessing the genetic information from at least one of the gametes from which we were actually conceived is necessary for our and our counterparts existence, rather than the claim that at least half of our originating genetic material is necessary for our existence, it seems that our existence should
also be a possibility, in not only cases allowed by The Weak Origins Claim above, but also a number of cases that any version of The Origins Claim could not allow. A particular person could possibly exist had he been conceived not only from at least one of the gametes from which he was actually conceived, but from two different gametes that between them shared at least half of the genetic information present in his originating genetic material or from one or two numerically distinct but exactly similar (cloned) gametes.

An appeal to the TDC2, therefore, meets the above objections levelled against the TDC1 regarding the fact that our genomes do not seem to be as determinative as it suggests. Thus, on the TDC2 the number of relevant counterpart relations are increased so that we should view not only those individuals who share our exact genomes as our counterparts, but also those individuals across possible worlds who share at least half of our exact genomes and those who would have been created from exactly similar (cloned) gametes. By appealing to a weaker genetic counterpart relation, we can now increase the number of scenarios in which harm and benefit can be determined prenatally to include cases of foetal and genetic enhancement and the genetic selection of disadvantageous traits. After all, if it were the case that a child whose parents genetically engineered him to be deaf can be said to possess a counterpart who is not deaf, he would possess the property 'could have been hearing' and thus, if being deaf constitutes a harm, he could claim to have been harmed by their choice.

Yet, accepting a weaker genetic counterpart relation still makes little difference to our determinations of the occurrence of harm in our non-identity cases. For whilst the psychological approach when paired with either version of the TDC allows for the impact of one's environment on numerical identity, our genetic inheritance is still viewed as a necessarily determinative factor in our coming into existence. Thus, in A Reproductive Dilemma we can see that regardless of whether we judge that Deborah and Edward should want to conceive so as to avoid having a child with a disability, acceptance of this weaker relation gives us no reason, in regards to the interests of their resulting child, as to why we should care. For as any child born after the 5 months wait would have been conceived from both a different egg and sperm, the child born after the 5 months wait could not be a counterpart of the child born before the 5 months wait because such a child would not be in possession of the genetic properties required for counterpart relations. The choice faced by Deborah and Edward remains a decision regarding who, of two numerically distinct persons who lack the counterpart relation required for determinations of prenatal harm, to create. Similarly, in The Policymakers choice whilst we view that Conservation is the obvious policy to choose, there is still no person affecting reason as to why this should be the case. For, as according to the TDC a particular person could only exist provided he was conceived within a month of the time from which he was actually conceived and from at least one of the gametes from which he was actually conceived, after 200 years there is likely to be no one in existence in both policies who possesses the properties required for a determination of trans-world identity.
12 Towards a More Holistic Approach Regarding Trans-World Identity in Cases of Alleged Prenatal Harm: Introducing the Environmental Counterpart

Despite the fact that the TDC2 can allow for counterpart relations in a great number more scenarios than the TDC1, it still raises a number of interesting questions regarding why it is that half a genome should be viewed as enough to secure the (very slim) possibility that a foetus/embryo could possess the necessary causal properties that would allow us to view them as the counterparts of a genetically distinct foetus but less than half should be viewed as a step too far. Now, readers of this paper might at this point note that the TDC2 should not be viewed in the way in which it has been formulated and should be seen as little more than a concession on Parfit’s part regarding the fact that whilst he views it unlikely that we could have been genetically different, as identity is a very fragile thing, answers to the question of whether we could still be ourselves with a slightly different genetic code are in epistemological impossibility and we should thus allow for the very small possibility that it could be the case.

However, it remains the case that as the TDC2 places the genetic line to be drawn regarding whether a particular foetus possesses the causal properties required for counterpart relations and thus for judgements of preconception harms and benefits at half a genome we can charge the TDC2 with arbitrariness or at least with missing the mark in oversimplifying a remarkably complex matter. For it does not seem that it should matter when determining whether any particular embryo possesses the causal properties required for trans-world identity exactly how much of a specific genome they are in possession of, but instead, the extent to which the identity determining features inherent in their genome restrict their future life possibilities such that the genetic characteristics they possess would preclude the possibility of their being a different particular person.

Thus, whilst the rule imposed by the TDC, regarding the necessity for our existence and thus for the existence of our counterparts at the possession of at least half of our originating genetic material, will often lead to uncontroversial determinations of identity and non-identity in most genesis cases, the TDC, even in its weaker form, leads to some counter-intuitive answers regarding questions of causal identity in certain other scenarios. For example, it will not allow that in a different possible world, a child born to my parents on my birthday and like me in all respects, having the fact that we possess completely different genomes could be viewed as my counterpart. It will not allow this even if all of the genetic differences between us, by some remarkably unlikely occurrence did not determine any phenotypic differences so that the resultant person would, or could, ceteris paribus, look, act and live exactly like me (Wolf 2009, p. 100).

Yet, it will allow for the possibility of my counterpart’s existence in a possible world where the two specific gametes from which I was conceived mated at some point after fertilisation and was thus born with the mosaic form of trixonomy 21 and subject to severe learning and moderate physical difficulties. This person, on any version of the TDC, in possessing my genome in a large percentage of her cells and only a slight variation in a smaller percentage, would be the only candidate in
that possible world for possessing the relevant relations required for determinations of trans-world identity. Of course, as we have already discussed with the case of AN, RN and IDN, the fact that we would be so different from one another would not make much difference to determinations of trans-world identity as counterpart relations are similarity relations and not relations of strict identity.

Despite this, the fact that the latter would still have been a candidate for being my counterpart because she can be identified in that possible world as sharing my genome and the former cannot be, despite all of our similarities, seems, ultimately, to be nothing short of bizarre and it is thus suggested that the TDC2 fails to provide a non-arbitrary account of causal identity on the psychological account. Thus, as the above cases show, the possession of at least half a genome seems to be neither necessary nor sufficient for determinations of counterpart relations. The conception of a child with a completely different genome by my parents at the time of my conception does not seem to necessarily imply that I could not have come to exist and neither does the conception of a child with my exact genome imply that I could.

If we are to accept the possibility that the child mentioned above who was born on my birthday and lived in all respects might be a candidate for being my counterpart due to the fact that we possess a great deal of similarities in terms of the environmental determinants of our identities it becomes the case that on the psychological approach, the 'truth' that the TDC asserts seems to be relatively unremarkable. This is so because whilst it may be likely the case that had my parents not conceived me within a month of the time that I was conceived I would not, in fact, have existed, whether it is necessarily the case that I could not have existed is a question to which an answer cannot be found regardless of how much and how long we look.

I suggest, then, that environmental factors should also be viewed as relevant for determinations of trans-world identity. For as counterpart relations are relations of objective similarity and we determine such relations by whether trans-world individuals resemble us more closely and in relevant respects than do other individuals in those worlds, that it is a possibility that an individual with an entirely different genome will resemble me more in one possible world than an individual with my specific genome in another, gives us cause to believe that counterpart relations should be determined by not only genetic properties, but also by environmental factors. Indeed, as on the psychological approach it is the sum of all of the causal factors that led to our existence that determines our identity within worlds, with even a slight difference altering identity we can note that just as our possession of our exact genomes was necessarily determinative of our numerical identities in actuality, so too were the environmental factors necessary for our coming to exist.

Thus, if we are able to determine relevant counterpart relations by saying w is a counterpart of x, where w and x possess the same/similar genetic code despite the fact that the environmental determinants of their identities were different, we should also be able to determine that y is a counterpart of z in virtue of their sharing the same or similar environmental determinants of their identities despite the fact that they are in possession of a different genetic code. This claim is counterintuitive as...
"To envisage an individual as having a different origin is harder, or involves a greater departure from actuality, than to envisage its having a different subsequent history" (Mackie 2006, p. 94), yet its being so, does not make it any less salient.

Indeed, research in developmental psychology points to the fact that the above claim is not as bold as it may at first seem. For certain authors have termed the newly born baby an "external foetus" (Gerhardt 2004, p. 18), or an "unfinished embryo" (Gould 1978, p. 70), in reference to the fact that whilst most of us view that once born, a baby is, in a sense, "box ready". But this is not at all the case. Their genomes do set a blueprint for their development in certain ways. But this blueprint allows for a great deal of customisation by the families and the societies in which they find themselves and a great deal of the environmental factors that influence development influence both somatic and psychological systems. The development of the baby's brain is a good example of this as the brain develops the most in the first year and a half of life and before birth whilst the nerve cell structures are in place, they remain unconnected and only begin the process of creating the connections that allow messages to travel between different parts of the brain after birth (Gerhardt 2004, pp. 18–21). Thus, differences in the persons with whom and the physical environments in which a baby spends much of its early life will cause different psychological and physical features to obtain, a fact which also makes a great deal of evolutionary sense as it allows each baby to be "tailored to the circumstances and surroundings in which she finds herself." (Gerhardt 2004, p. 18)

In accordance with this we should view each potential person as not possessing a potential personal identity in the singular sense, but instead as holding in their grasp a myriad of vague and crude potential personal identities, one of which will eventually develop, depending upon, not only their genomes but environmental and social factors. When viewed in this way the boundaries between different possible persons become weaker, and provided we subscribe to a psychological account according to which what is important in personal identity admits of degrees, we might find relevant shared features between genetically distinct foetuses and distinct differences between different versions of a particular foetus's potential identities. It might be the case, for example, that some of the possible identities of one particular foetus might be almost identical to the possible identities of other, genetically distinct foetuses, others may share relevant features, and other possible identities of a particular foetus may be so different from one another that apart from being attached to the same sack of DNA are virtually unrecognisable.

Thus, if we have good reason to accept genetic counterpart relations, we also have reason to accept as relevant, what I shall call 'environmental counterpart relations' where an individual shares with another individual across possible worlds, not their distinct genome or a similar genome, but the environmental determinants of their identities such as growing in the same uterine environment, growing up during a particular period in history, the sharing of social parents (or counterparts of their social parents), the sharing of a sibling and other family members (or counterparts of their siblings and other family members), the same cultural positions, and in virtue of this, a particular belief system and memories of very similar childhoods.

Such types of similarity relations are again unlikely to offer us any help in accounting for our intuitions in The Policy Makers Choice as the decision that the
policy makers must make will result in both genetic and environmental differences between the individuals created. They do, however, explain why a focus upon causal genetic features is insufficient for determinations of trans-world identity and might in fact help us to understand why it is that we believe that Deborah and Edward would do the right thing in choosing to wait to conceive in the Reproductive Dilemma. For whilst it is the case that the children that they could have conceived before and after the 5 months waiting period cannot be seen as genetic counterparts it is a possibility that certain of the possible identities of each of the possible children in virtue of their shared parentage, familial and cultural positions could have been similar enough in terms of their subsequent histories that we might view them as environmental counterparts.

13 A Final Consideration: The ‘Decisional Counterpart’

Might there be another type of counterpart relation to which we can appeal in order to ground claims of harm in non-identity cases such as The Policy Makers Choice where Genetic, Branching and Environmental counterpart relations cannot explain our intuitions? It seems unlikely if the only counterpart relations relevant for determinations of trans-world identity are determined by our being causally linked with other persons across possible worlds. The numerical identity of any particular person, defined by relations of connectedness and continuity, cannot be causally determined by anything other than genetic and environmental factors. To be my/your counterpart any particular person across different possible worlds must be similar to me/you in certain relevant respects. If such relevant respects consist in only whether they are in possession of all, or most of, the causal determinants of our identities, then it seems we have reached our limit when attempting to determine the occurrence of prenatal harm. Yet, there is a different approach to which we might appeal in cases of prenatal harm if we are willing to broaden our approach regarding the kinds of objective similarity relations necessary for determinations of trans-world identity.

I suggest that, in cases of alleged prenatal harm where it is the case that we cannot account for our intuitions by appeal to the causal features that determine identity, what is important about the identity of possible future persons is very similar to a class of views regarding distinctive necessary properties discussed by Parti in Reasons and Persons. The class to which I refer is termed ‘The Descriptive View’ and it refers to views that state that our counterparts across possible worlds need not be causally related to us as is the case with genetic and environmental counterparts, but may instead be persons who can be identified as across possible worlds by the sharing of a definite description. On such views we might identify Immanuel Kant across possible worlds as the person who wrote the Critique of Pure Reason, or the person who wrote most of the books that Kant actually wrote such that “in any possible history in which a single person wrote those books that person would have been Kant”. Or we might identify persons across possible worlds via certain specific roles that they inhabit with respect to other persons such that as I possess the role ‘second daughter’ in relation to my ‘parents’ any person across
possible worlds who also possesses the role of 'second daughter' in relation to 'parents' who are counterparts of my parents might be identified as my counterpart.

Parfit dismissed such a view as being "too implausible to be worth discussing", noting: "I am the second of my mother's three children. This claim implies absurdly that, if my mother had conceived no child when she in fact conceived me, I would have been my younger sister." (Parfit 1984, p. 354) Yet, whilst this observation is well made, the notion that we might identify persons across possible worlds by reference to certain descriptive terms as opposed to their causal properties is not so absurd that a number of philosophers have not attempted to define or moral responsibilities regarding possible persons in this manner. Clark Wolf, for example, notes in a paper regarding the non-identity problem:

Where the question involves responsibility, our theory concerning the identity determining characteristics of future persons should capture what is significant about them from the moral point of view, and this may be quite different from other senses of identity that we use to individualize persons for other reasons, or within other theories and projects... Once we recognize that the articulation of the non-identity problem employs a very specific concept of "identity," and recognize in addition that different conceptions of "identity" are appropriate in different circumstances, we have new resources to address this problem. To find a non-arbitrary criterion, we need to identify the conception of "identity" that is appropriately employed in cases where the non-identity problem seems to arise. (Wolf 2009, pp. 105-107)

Inspired by a rather tentative footnote where Maclean suggests that "Perhaps we should insist on a person-affecting criterion for harm but a place-holder criterion for wrong" (Maclean 1983 cited in Wolf 2009, p. 106), and Hare's concept of de dicto wrong (Hare 2009) he suggests that we may find what is significant about future persons from the moral point of view in cases of alleged prenatal harm by referring not to a numerical account of personal identity or to the causal properties that allow such identities to develop, but instead to the identities of future persons as particular place-holders. Thus, he proposes that in cases of alleged prenatal harm the morally significant feature to which we should refer is that of being "the class of persons whose interests will be influenced as the consequences of our present choices", and that as such "the putatively different people we might bring into existence are all the same from the moral point of view" (Wolf 2009, p. 108) in virtue of their holding of this feature.

Such an approach is not as bizarre as it may first look as it is the case that in the eyes of others quite often what is important about us in the moral sense seems to have less to do with our numerical identities and more to do with our possession of certain roles. For example, it is the case that I, to those responsible for my

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7 Harm de m: where S1 and S2 are the possible states of affairs resulting from a decision x is subject to a de m harm when it is the case that the thing that the thing that is actually x's interests are left in a worse condition in S1 than S2, and we choose S1. Wrong de dicto: where S1 and S2 are the possible states of affairs resulting from a decision, x is subject to a de dicto wrong when the thing that occupies the position of x in S1 is worse off than the thing that occupies the position of x is in S2 and the decision maker who, in normal circumstances, would have a de re duty to choose S2 chooses S1.
conception, as well as being identifiable as the numerical person 'Nicola Jane Williams' inhabits a certain role, that of 'daughter'. My inhabiting such a role entailed certain partial duties on their part when I was still a child. They, in choosing not to give me up for adoption, accepted a role that required that they take appropriate steps, whilst I was unable to look after my own interests, to look after them for me. They accepted a moral and legal obligation to prefer, ceteris paribus, to feed and clothe me and to ensure that I was happy and healthy, than to feed and clothe and ensure that some other child who was not their child was happy and healthy. Yet such duties would have obtained regardless of who inhabited the role of 'daughter/son' provided there was someone that actually inhabited that position. Had they chosen to give me up for adoption, they would be subject only to obligations that obtain between them and I in virtue of my being a person. Indeed, now that I have reached majority their duties to me have changed despite the fact that my numerical identity remains the same, although they are still partial to me, preferring, for example, to bail me out of dire financial straits than strangers. I am also both a British and European citizen. Those in government have a duty to represent my interests locally, nationally and internationally in virtue of my role as citizen but they cannot really be said to possess a duty towards me. For should it be the case that I chose to relinquish my citizenship, their duties would no longer apply, as the duty to protect my interests as a citizen applies not to me 'the person' but to whomever happens to inhabit the role of citizen.

Indeed, we can see too that in certain cases, conventional, non-role specific obligations seem to attach less to the numerical identities of others and more to 'anyone who might be affected by our actions' as when we "Consider the obligation not to shoot bullets into the woods when one cannot see whether there is anyone there, or the obligation to care for one’s brakes in case one needs to stop suddenly for a pedestrian" (Wolf 2000, p. 109).

As such, I suggest that there is a further type of counterpart relation relevant for cases of prenatal harm. A counterpart relation that identifies persons across possible worlds by reference to certain descriptive properties as constituting a relevant relation of objective similarity, the property of being the result of a particular decision made by a particular person at a particular time. After all, that one's existence is contingent upon a decision made by a particular decision maker at a particular time and so is the existence of certain other persons across possible worlds is most definitely a similarity. As it is the case that our questions regarding the occurrence of prenatal harms hinge upon our consideration of this very similarity, such a similarity should be viewed as relevant to our moral decisions. Such a counterpart relation is thus formulated as follows:

The Decisional Counterpart, where a particular numerical person X's existence is contingent upon a decision made by agent y at a particular time t, across possible worlds those whose existence is also contingent upon the same decision made by counterparts of y who are indiscernible with y at t should be viewed as X's counterparts.

By employing the Decisional counterpart relation in addition to Branching, Genetic and Environmental counterparts it is suggested that those of us who subscribe to a psychological account of personal identity can find an answer that
satisfies both our intuitions and the person-affecting principle in cases such as *A Reproductive Dilemma* and *The Policy Makers Choice*. For in *A Reproductive Dilemma* we can note that not only might some of the possible children of Deborah and Edward be viewed as counterparts across possible worlds in virtue of their sharing an *Environmental counterpart relation*, their being the result of a decision made by Deborah and Edward/Deborah and Edward’s counterparts, at a particular time of whether to wait or not to wait to conceive constitutes a *Decisional counterpart relation*. Similarly in *The Policy Makers Choice* we can note that whilst none of the possible results of the policy decision across possible worlds may be viewed as *Genetic or Environmental counterparts*, in being the result of the decision made by the policy makers or their counterparts, those who are the result of whichever decision is made should be viewed as counterparts in virtue of their being the result of that decision. Thus, provided in both cases we are able to determine that certain of one’s counterparts across possible worlds are better off in virtue of a different decision having been made, we have the required basis for determining the occurrence of prenatal harm.

### 14 Conclusion

Within this paper the question of when and whether it is possible to determine the occurrence of prenatal harm in accordance with both a psychological account of personal identity over time and a person affecting account of harm was addressed. It has been shown that whilst it may initially seem hard on such an approach, provided we utilise a causal account of identity when answering such questions, it is possible to have meaningful discussions regarding the occurrence of harm in prenatal cases despite the fact that no foetuses and persons can ever be said, in an evaluative sense, to share an identity.

Paut’s account of the causal properties that determine existence across different possible histories of the world was then explained and examined and it was suggested that the way in which it is generally read, as a version of Kripke’s necessity of origins claim, is not appropriate on the psychological account. It was suggested that it is better to read such claims in terms of Lewisian Counterpart Theory according to which claims such as the TDC are true when they pick out individuals across possible worlds as sharing a trans-world identity in virtue of their being similar to each other in certain relevant respects and to certain relevant degrees. After this it was argued that if persons across possible worlds can be said to share an identity across worlds when they fulfill the conditions of the TDC, we have good reason to expand our approach regarding the kinds of features that determine trans-world identity to include both weaker genetic relations and also environmental features that determine identity in a similar way. Finally, it was suggested that we might appeal to another kind of counterpart relation determining trans-world identity in prenatal cases by not only the features that lead to the development of one as opposed to another psychology but via appeals to the conditions of each person’s existence. According to such counterpart relations, when across possible worlds one’s existence hinges upon a decision made by a particular decision maker...
at a particular time all of those individuals whose existence hinges upon that same decision at that same time by that decision maker’s counterparts should be viewed as one’s counterparts in virtue of this.

Yet, whilst the fact that harm can be determined in prenatal cases by appeals to both strong and weak genetic counterpart relations, environmental counterpart relations and decisional counterpart relations constitutes a major step forward in the debate, work still needs to be done. That harm can be determined does not, for example, necessarily mean that such harms cannot be justified in certain cases by appeals to other considerations or that the harm claims generated will be strong enough to warrant the infringing of reproductive autonomy in micro cases of prenatal harm such as the reproductive dilemma. Nor indeed does the fact that harm can be determined in micro cases such as the reproductive dilemma mean that those responsible for the existence of an individual with a harm claim are necessarily responsible for the harm incurred by their offspring. For whilst the external features of particular possible worlds such as is the case in the policy makers’ choice might straightforwardly be determined as not particularly conducive to the living of a good life, and thus, harmful to any person that is subject to them, that all disadvantageous genetic features should be viewed as intrinsically harmful is not so apparent. Disability itself need not always inhibit flourishing, and a better way to mitigate the person affecting harms associated with disability may well be to alter the structure of society so that such traits are no longer disadvantageous, rather than to alter the numerical identities of the players themselves. Thus, whilst the fact that harm can be determined in prenatal cases and such harms can be viewed as attaching to possible persons is good enough for this paper, the debate regarding who is responsible for such harms, which harms can be justified and the actions we should take when responding or attempting to prevent such harms is one that, for now, remains open.

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References


APPENDIX B.

WHAT IS THE HARM IN HARMFUL CONCEPTION?

ON THRESHOLD HARMS IN NON-IDENTITY CASES

PUBLICATION DETAILS:
What is the harm in harmful conception? On threshold harms in non-identity cases

Nicola J. Williams · John Harris

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Abstract Has the time come to put to bed the concept of a harm threshold when discussing the ethics of reproductive decision making and the legal limits that should be placed upon it? In this commentary, we defend the claim that there exist good moral reasons, despite the conclusions of the non-identity problem, based on the interests of those we might create, to refrain from bringing to birth individuals whose lives are often described in the philosophical literature as ‘less than worth living’.

Keywords Threshold harms · Derek Parfit · The non-identity problem · Comparative harms · Non-comparative harms · Reproductive decision making

Introduction

Has the time come to put to bed the concept of a harm threshold when discussing the ethics of reproductive decision making and the legal limits that should be placed upon it? This is the question asked by Anna Smadoul in her article in this issue. For her, the answer is a resounding yes. She claims—after outlining the concept of the harm threshold in reproductive decision making, noting its many proponents in the philosophical community, and observing its inclusion in legal and policy documents
related to reproduction—that no entity can be harmed by being brought into existence, regardless of the extent to which they will suffer once born.

Smajdor comes to this conclusion by appealing to a well-known literature that supports the notion that the act of creation cannot be identical with the acts of harming and benefiting. For it, in accordance with this literature, she suggests, existence should not be considered to be a ‘real’ predicate—that is, if existence cannot be considered an attribute of an object and thus fails to add to the concept of a thing—no entity can be harmed or benefited by being born. In short, her argument is based on the following simple claim: there does not exist a logical connection between the assertion that some lives are not worth living, and the claim that such people are harmed by being conceived [1]. Thus, her article, although he does not choose to characterize it in this way, actually constitutes the suggestion that those who subscribe to a harm-based and person-affecting account of morality (or of the limits of law) must acknowledge that, in holding this view, they are also required to accept the conclusions of a remarkably strong version of a problem in philosophy, known as the ‘non-identity problem’.

In this commentary, we defend the claim that despite the conclusions of the non-identity problem, there are good moral reasons, based upon consideration of the suffering that would be experienced by the individual concerned, not to decide to bring him or her to birth. We have in mind cases in which a fetus or embryo is likely to become an individual whose life is variously described in the philosophical literature as: ‘empty of all the things that make life worth living’ [2], ‘dominated by pain and suffering’ [3], ‘intricately miserable’ [4], ‘not worth living’ [5], or ‘worse than no life at all’ [6].

Our arguments are, however, more than mere commentary. We aim to settle some tenacious misunderstandings of the logic of this corner of moral discourse by exploring and explaining the difference between the use of comparative and non-comparative accounts of harm in non-identity cases and the problems that occur when such accounts are conflated. We thus begin our commentary by providing a reconstruction of the major components of the arguments contained within Smajdor’s article. We then question whether Smajdor’s use of Derek Parfit’s arguments in her own is a charitable one that truly captures the spirit in which they were made. After this, we note that although a threshold account of prenatal harm may not be compatible with comparative accounts of harm, the logical inconsistencies Smajdor associates with this account do not occur on non-comparative accounts of harm, such as the one championed by one of us, John Harris, in his book *Wonderwoman and Superman*.

**Doing away with the harm threshold: reconstructing, summarising, explaining, and situating Smajdor’s position in relation to our own**

Smajdor begins her attack on the harm threshold in reproductive decision making by noting the benefits that are often associated with harm-based, person-affecting

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1. Provided they accept some version of the claim that our existence is dependent on our being conceived from the gametes from which we are actually conceived.

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accounts of morality and the proper limits of legislation. She notes, for example, that although she does not subscribe to the belief that harm to offspring is the sole focus of moral concern in reproductive decisions [1], there is something to be said for a harm-based approach to legislation and morality. This can be found, she suggests, in the fact that a focus on the harms our choices may impose on others is more identifiable and less subjective than a focus on deontological principles or impersonal and free-floating harms. She thus suggests that because of this more empirical focus, harm-based approaches may be a useful interface between morality and legislation [1]. She then observes, however—in recognising the conclusions of the non-identity problem, as have many before her, including ourselves (see, for example, [7, 8])—that this approach seems to offer very few of the benefits it provides in cases of harms to extant persons in the context of reproduction.

This is so because if we limit moral and legal criticism only to those acts which can be said to negatively affect the interests of some particular entity, it turns out that our reproductive decisions will, in many cases, have little or no moral content, despite our intuitions to the contrary. That is, if we also accept the relatively uncontroversial proposition that our coming into existence is highly precarious—dependent on the conditions under which we and our descendant’s procreate, with the slightest difference in the conditions of conception sufficient, in a particular case, to ensure the creation of a different (more person) [9].

There are a number of versions of what might be called ‘the precariouslyness proposition’, which produce slight differences in the kinds of circumstances in which non-identity cases are generated. This is so as the particular version to which one subscribes depends greatly on one’s views concerning what it is that makes one numerical person the same numerical person over time and change. However, the version to which Smagor appeals in her article seems to be based on an acceptance of the precariouslyness proposition as it is formulated in the work of Parfit in his two versions of the ‘time dependence claim’ (TDC). As she does not make it clear to which version she subscribes—and this actually makes little difference in the cases she considers—we will assume her allegiance is to the slightly weaker form, which, as Parfit notes, is in fact true [10], although not necessarily so:

TDC 2: ‘If any particular person had not been conceived within a month of the time when he was in fact conceived, he would in fact never have existed’ [10, p. 352]

This version of the precariouslyness proposition may be interpreted in three different ways. It can be seen, firstly, as a causal claim regarding the importance of our genome for the development of personal identity understood as psychological connectedness and community by noting, for example, that ‘differences in [genetic] material make for later differences in virtually all aspects of a person: change the sperm, and there will be substantial changes (of both a physical and psychological kind) in the later human being’ [11]. Secondly, it can be viewed as a weak version of Kripke’s origins claim regarding the importance of our material origins for numerical identity on biological accounts of personal identity over time. This interpretation suggests that just as all material things must have their origin in
least some of the matter from which they are constituted, so too must all numerical persons have their origins in, *inter alia*, the genetic material from which they are constituted in order to be considered the same numerical entity [8]. Thirdly, however, one might view it as a temporal or environmental claim regarding the importance of possible epigenetic factors and others flowing from the time, place, and manner of our conception. Time, place, and manner may thus embrace factors such as differences in the method of conception, gestational environment, maternal nutrition, the general external environment, and exposure to potentially teratogenic substances during pregnancy.

Depending on one’s interpretation, it can therefore be noted that non-identity is not simply related to conception and factors tied to the timing of conception, nor, as the Parrit of Reasons and Persons perhaps believed, simply to genetic identity [8, 11, 12]. However, Smajdor’s interpretation of the claim does seem to fall into either the causal or Kripkean camp, as she notes numerous times in her article, the importance for personal identity of our being conceived from the particular egg or sperm from which we were conceived. This means that, whilst non-identity may not occur in cases of straightforward prenatal harm, such as when a pregnant woman ingests a teratogen or a foetus is injured in some other way during pregnancy, it will be commonplace in cases of genetic decisions regarding, for example, with whom we choose to procreate and when we wish to do so. For this understanding of the TDC2, when paired with a person affecting account of morality that rests on a comparative account of harm, yields a particular prescription. This is that many reproductive decisions turn out to affect not the interests of persons created as a result of such decisions but their identities, and thus cause no harm to those created as a result.

Indeed, the trap of non-identity is not only evidenced in cases of seemingly harmful conceptions. Many people at the time of World War II, for example, including the parents of one of the present authors, decided to await the result of the war and the defeat of Nazism before conceiving or conceiving again. Such people believed they were somehow acting in the interests of the child that would be born to them, despite the fact that they seemed to be “guilty” of falling into the trap of non-identity. It should be noted too that non-identity poses an “intriguing theoretical obstacle” [13] to questions of intergenerational justice and, as has been most recently noted, to cases of affirmative action and of apology or reparation for historic injustices. For, ironically, were it not for the wrong that was done to the ancestors of those now seeking apology or compensation, the latter would almost certainly never have existed [14].

Smajdor illustrates this point in the reproductive case by providing an example of a woman who is receiving treatment for syphilis and must make a choice between conceiving now and giving birth to a child with congenital syphilis, or waiting until after she has been cured and giving birth to a “healthy” child (free from congenital syphilis). Like Parrit, Smajdor suggests that despite many people’s intuitions to the contrary, the woman has little reason based on the interests of the children she would create to choose to wait. For, whilst many of us tend to believe that it is better to be born without a disability than with one, as disability is, by definition,
disadvantageous, person-affecting morality actually gives us little reason based on the interests of the child created to wait to conceive.

If one accepts the TDC2 and holds too that our actions only have moral status when they affect the interests of distinct numerical persons, one can see that regardless of the decision she makes, her child will not be harmed as different children will come to exist depending upon her choice. For, whilst it is true that if she conceives now, her child will be born with congenital syphilis—an undoubtedly harmful condition which may result in cerebral palsy, hearing loss, and musculo-skeletal deformities—should she wait to conceive a child free of syphilis, a different child will be born as ‘a different egg and sperm will be involved, resulting in a genetically different individual’ [1]. The child the woman could conceive now could not exist without suffering from congenital syphilis. Being brought into existence suffering from such a condition cannot harm him. For, whilst he might rationally prefer a life without his affliction, the alternative for him is not a life without the effects of congenital syphilis, but no life at all, as syphilis is a condition of his very existence.

Here, however, is where Smajdor takes her position to depart from Parfit’s. For, whilst she agrees that in the case of congenital syphilis, the woman would not harm her child by bringing him into existence with this affliction, non-identity statements are not always so simple.

For although this is not always the case, such statements often come with a qualifier that warns against the creation of lives that are ‘empty of all the things that make life worth living’ [2], ‘dominated by pain and suffering’ [3], ‘intrinsically miserable’ [4], ‘not worth living’ [5], ‘worse than no life at all’ [6]. This qualifier can be found in the works of many authors who write on the non-identity problem. Smajdor, for example, notes that Robertson suggests that although it is normally the case that ‘a child’s interests are hardly protected by preventing that child’s existence… this objection would not hold if the … conditions of his life would be so harmful to him that from his perspective he would prefer not to live’ [15, p. 75].

It is this qualifier with which Smajdor takes issue. For, she holds that its addition entails a commitment to a questionable view: the view that ‘a child born with a worse disease than congenital syphilis could have been harmed— if the disease is so terrible as to mean that she does not have a minimally acceptable quality of life’ [1]. In other words, she claims that to add this qualifying phrase entails a commitment to the view that conception can constitute a harm to the child in the latter but not the former case because ‘a threshold has been passed … which was not breached in the case of the child with congenital syphilis’ [1]. Despite the fact that Smajdor fails to truly unpack the threshold account of harm as it is said to apply to non-identity cases, her characterisation of the account is accurate albeit bare. For, those who subscribe to a threshold account of harm in such cases should be seen to hold that some procreative choice made at T, harms a person if and only if it causes into existence a person who falls below some normatively defined threshold of wellbeing, interest satisfaction, etc.

For Smajdor, such accounts are deeply problematic as she is sceptical about the existence of a ‘logical connection between the assertion that some lives are not worth living, and the claim that such people are harmed by being conceived’ [1].
After a rather long section in which she notes the seeming arbitrariness of a threshold account of harm and a number of troubling conclusions associated with this [1], she provides support for her scepticism by asking the reader to consider Kant’s refutation of Anselm’s ontological argument for the existence of God.

In his *Prolegomena*, Anselm claims to derive the existence of God from definitions: the concept of God as ‘something than which nothing greater can be thought’ [16]. He held that if such a definition is true, God must exist in reality, since if He does not, a greater being can be conceived of—one than which nothing greater can be thought, and which, in fact, exists. Kant, however, argued that Anselm committed a grave error in his argument, suggesting that although Anselm treats existence as a property that things may either possess or fail to possess, to say that some entity exists is not to confer existence on it. Instead, it is to say that the concept of the thing is exemplified in the world, just as to say that some entity does not exist is not to state that a thing lacks the property of existence but to say that the concept of that thing is not exemplified in the real world. In other words, Kant argued that a God that exists is identical to a God that does not. For, whether something exists or does not exist does not add to or alter the properties it possesses, it is the mere possession of a thing: ‘a hundred real thalers do not contain the least coin more than a hundred possible thalers’ [17, pp. 1626-7] and ‘the real God is not a few degrees more perfect than a conceptual one’ [1].

With this done, Smajdor suggests that we may straightforwardly apply Kant’s argument to the act of creation and the question of whether an entity can be harmed by creation itself. For, she notes, ‘the act of creation can be construed uncontroversially as the act of bringing something into existence.’ and thus, ‘whatever is logically true of existence in general should be true of creation insofar as it is the conferring of existence.’ If existence itself cannot entail any other property, then it follows that the mere act of giving existence cannot encompass the act of conferring any property—other than existence—on the entity which is created’ [1]. With this in mind, Smajdor concludes that creating something, or bringing it into existence, cannot be the same as harming it. For, although harm is not a predicate in the usual sense, the fact of having a harmful genetic constitution is. It qualifies an entity in the same way as other predicates. Thus, she suggests that ‘if we cannot make X greater, more perfect, or more valuable by bringing it into existence, neither can we harm X by bringing it into existence however greatly X must suffer’ [1]. She therefore concludes:

There is no specific act that can be construed as harming a future child when the child’s condition is directly linked with the circumstances surrounding its conception. Nor can these questions be a matter of degree, since the logical and metaphysical constraints that prevent us from concluding that a child born with a moderate amount of suffering has been harmed apply equally to all cases of creation. [1]

Is Smajdor’s characterisation of Parfit’s position fair?

With the major components of Smajdor’s argument explained and laid out above, we now return to the point at which she takes her position on the possibility of
harming by the act of creation to differ from Parfit’s. For, we contend that the characterisation she offers of Parfit’s view on the matter of harms to individuals with ‘lives that are less than worth living’ is, at best, uncharitable, and at worst, based on a misunderstanding of the claims made by Parfit on this matter.

The point at which she holds her position to diverge from Parfit’s occurs just after an acceptance of the conclusions of the non-identity problem in the case of the child with congenital syphilis. For, as noted above, she and Parfit agree that in this case there is little reason for the woman to choose to wait based upon the interests of the child she creates. Her choice is a choice between lives opposed to a choice of whether to harm or benefit her child. However, whilst this is so, Smajor argues that Parfit does not discount the possibility that there is a point at which the woman’s child could be harmed by his conception; the point at which this child’s life would be less than worth living, dominated by suffering, or where the quantity and quality of whatever it is that makes life worth living falls below some threshold level, such that the harms he would suffer throughout his life outweigh its pleasures.

Smajor, however, denies that this could be the case, holding that even if the woman’s choice was between a worthwhile and a less than worthwhile life, no harm would be done to the child created should she choose to bring to birth a child whose life falls below this threshold level. She characterizes Parfit’s view regarding lives that are dominated by suffering as follows: ‘that the child could not have existed without that condition does not prevent us from concluding that [he] has been harmed. A threshold has been passed in the latter case, which was not breached in the [former] case’ [1].

She then explores what Parfit might mean by this: asking why Parfit should hold that in the case of congenital syphilis the child created cannot be harmed by his mother’s choice, but would be harmed should he suffer more seriously. What, she asks, is it that makes the suffering of the child bear on questions of the morality of the mother’s actions in the latter but not the former case? Why does Parfit seem to divorce the concept of harm from its normal relationship with suffering, turning it into a mercurial entity that flashes into existence only in certain very specific circumstances? [1]

After all, Parfit claims, as do many others who accept the conclusions of the non-identity problem, that non-identity is a logical and metaphysical problem as opposed to one relating to the degree of suffering an individual must endure before he can be deemed harmed, all things considered. The mother is—according to its logic—not morally responsible ‘because there is no causal mechanism by which we can understand him to be harmed’ [1]. Her blamelessness has nothing to do with the fact that her child does not suffer enough or because the harms of his existence fail to outweigh the pleasures his life contains. Her child is not harmed and she may not be criticized morally because she could not have existed absent his condition and she could have done nothing to alleviate his suffering without causing some other child to exist instead of him.

Smajor thus notes that due to this there is no reason to assume that the conclusions of the non-identity problem should not apply equally in the more serious case. The relevant facts are, she contends, the same in both, regardless of the extent to which the created child suffers once brought into existence. Thus, she
holds that Parfit and others are guilty of contradicting themselves when they state that in cases of "lives less than worth living", the child created could be harmed as they are essentially asserting that despite their logical position, "existence cannot harm someone ... [but] it is, after all, a question of degree" [1].

Yet, whilst Smajdor's point is well made—the non-identity problem does seem to apply equally to cases of worthwhile and less than worthwhile lives as the facts relevant to its generation are the same—at no point within Reasons and Persons does Parfit suggest that this is not so. He does not claim, despite Smajdor's assertion, that the child created in the more serious case can be harmed by the act of his creation because his life is less than worth living. He leaves open to interpretation just as he leaves open to interpretation the question of whether causing someone to exist can be said to cause them some peculiar benefit. He does this in virtue of the fact that he views both a negative and positive answer to the question of whether existence can constitute a predicate as being defensible [10, p. 358].

It should be noted too, in fairness to Smajdor, that because of this, Parfit does not make clear that the conclusions of the non-identity problem may still hold in cases of less than worthwhile lives dependent on the views one holds regarding this. All of his non-identity cases, for example, regard unquestionably worthwhile lives and thus say nothing about the conclusions of the non-identity problem in cases of lives which are less than worth living. Parfit considers, for example, a child whose mother had him too young but whose life, despite its 'bad start ... [is] predictably worth living' [10, p. 358], a choice between conserving our resources for future generations or depleting them such that future generations will live lives of much lower but still acceptable (although barely so) quality [10, pp. 361-4]; and a woman who must choose between wanting to conceive or having a child with a painful but not terrible disability [18]. In other words, although Smajdor asserts that Parfit's claim is based on a mistake—the formation of an untenable connection between the assertion that some lives are not worth living and the claim that such people are harmed by being conceived—the mistake here seems to be her own. The claim she attributes to Parfit can, on a close reading, be found nowhere in the work she references although, as can be seen in appendix G of Reasons and Persons, he is sympathetic to this view.

Can a child be harmed by his own conception? On comparative and non-comparative accounts of harm in genesis cases

Smajdor seems to suggest that the only plausible accounts of harming are those that are comparative in nature. That is, she seems to recognise as proper only accounts of harming that compare some particular numerical entity's current state of welfare, happiness, interest satisfaction, etc. to the state that he would have been in had some particular action not occurred. Examples of such accounts are that of the diachronic account, according to which some particular action or inaction done at time t₁ is harmful iff it causes some person (p) to be worse off at some later time t₂ than they were at t₁, and the subjunctive historical account made famous by Joel Feinberg.
which suggests that some particular action (or inaction) done at \( t_1 \) is harmful for \( p \) if it causes \( p \) to be worse off at \( t_2 \) than he would have been at \( t_2 \) had it not occurred \([5]\).

Such accounts necessarily exclude the possibility that present persons may harm future and merely possible persons by acts of creation in cases of both worthwhile and less than worthwhile lives. This is so because in order to make a harm claim on comparative accounts, one is required to compare the state of \( p \)’s interests, welfare, happiness, etc. with the state he would have been in had the act not been performed (subjunctive historical) or was in prior to the performance (diachronic). Thus, as the alternative in non-identity cases is non-existence and non-existence is no state at all, there can be no way to make such a comparison. The writing is, on such accounts, already on the wall as it is nonsensical to discuss a harm threshold when its existence is precluded by the nature of the account in question.

Yet, that this is so does not preclude the possibility that comparative accounts may be compatible with the following argument: although a child who will have a less than worthwhile life may not be harmed by his conception, he may be harmed if his suffering does not end as soon as it begins (whether before or after birth), and this may constitute a good reason not to conceive such a child in the first place. This is not the question addressed by Smajda in her article, and as such, it has been understandably glossed over. However, it does seem important. For, it means that on comparative accounts, although we may not say that a child can be harmed by his conception even if his life is one that is less than worth living, we can provide good person-affecting reasons to support a moral requirement to prevent the suffering of a child whose life will be dominated by suffering.

For, if there exists a moral duty not only to refrain from causing persons to suffer but also to actively seek to ameliorate suffering where it occurs, we may find that in cases of lives dominated by suffering, there is a moral duty to end the lives of such individuals as soon as they come to suffer. We need not claim that the child created is harmed by his own conception or that those responsible for his conception are to blame for his poor prospects. He is not and they are not, as nothing could have been done to avoid this unfortunate stacking of the deck. Yet, whilst the prospective child may not be harmed by his conception, we may hold that those responsible for his conception are morally blameworthy for failing to stop his experience of such severe and uncompensated suffering in the face of full knowledge of his devastatingly poor life prospects.

Consideration of the nature of different accounts of harm seems to uncover another major problem inherent in Smajda’s article. This can be found in the fact that it is poor philosophical practice to attempt to criticise one account by merely showing that it is different from another. That such is the case is already transparent. The utilitarian may not fairly criticise the Kantian by stating only that he is not a utilitarian. He must instead uncover some fatal flaw in the theory of his foe or appeal to good reasons suggesting his account is more plausible. With this in mind, we can note that those who subscribe to comparative accounts of harm cannot refer to the inadequacy of non-comparative theories by merely noting that they are not the same as their own. The threshold account is a non-comparative theory. As such, what is needed on Smajda’s part is an explanation of why the particular account of harm she seeks to criticise should be seen to be lacking in some sense, and this can only
be done via explication or the provision of an explanation of why one’s own account
overcomes such shortcomings by demonstrating both its superiority and its
avoidance of other equally troubling conclusions.

Comparative accounts are, however, not the only plausible accounts of harm to
which one may appeal. To be sure, they are intuitive, since generally, when we think
of harm, we think of things going worse for someone than they otherwise might
have. Yet, despite this, such accounts are not a panacea. They face a number of
problems that are not limited only to the fact that they fail to account for our
intuitions in non-identity cases. Thus, although we might be willing, as Searle is,
to bite the bullet in such cases and accept the counterintuitive conclusions
comparative accounts engender in such cases, these are not the only counterintuitive
conclusions such accounts are often argued as entailing. Comparative accounts have
been said, for example, to fail to account for circumstances in which we wish to say
that an individual has been both significantly harmed and greatly benefited by an act
which causes an on-balance benefit, such as in Samir Shiffrin’s example of the
generous but dangerous millionaire who drops large blocks of gold bullion from the
sky as gifts to citizens of a neighbouring town where the million dollar manna ends
up falling on and injuring one of the recipients [19]. They are charged with
multiplying harms excessively due to the fact that, on such accounts, harms are
grounded in comparisons, leading to confusing and questionable determinations. For
when one is harmed, one does not undergo a separate harm relative to each earlier
moment in one’s life at which one fared better [20], as would be the case on the
diachronic comparative account, and neither does one undergo a number of different
harm in cases where one is shot just because one would have been better off had
one’s assailant not pulled the trigger, had the gun not gone off, or had the bullet
missed one’s body, as would be the case on the subjunctive historical account [20].
Comparative accounts, it has been said, fail to account for the harm in beneficent
cases of self-harming, as in the case of the ‘Blighty’ wound [7, p. 92], and for pre-
emptive harms [20]. Indeed, whilst this is not the place for a lengthy discussion of
these shortcomings, they are numerous and have been widely discussed within the
literature.

One account of harm often presented as a credible alternative to comparative
accounts, and which seems to overcome a great number of the problems often
associated with them, has been championed by one of the authors of this
commentary, Harris. It is set out in great detail in his book Wondertwoman and
Superman and is often termed the ‘harmful state account’. On this account, and on
other similar accounts of harm such as that proposed by Shiffrin [19], the notions of
harming and wrongdoing set out in comparative accounts of harm seem to be turned
upside down, and a particular numerical entity can be said to be harmed when it is
simply the case that he has been put into a condition that is harmful. As Harris
explains:

2 The term ‘Blighty wound’ is often used to refer to a wound (often self-inflicted) sustained by a soldier
during wartime that is serious enough to get him sent home from the battlefield but not so serious as to kill
or reduce his quality of life in any significant way, thus benefiting him overall.

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A condition that is harmful … is one in which the individual is disabled or suffering in some way or in which his interests or rights are frustrated. The disability or suffering may be slight, just as harms are trivial … I would want to claim that a harmed condition obtains wherever someone is in a disabling or harmful condition, even if that condition is only marginally disabling and even if it is not possible for that particular individual to avoid the condition in question. [7] p. 88

On this account of harm, therefore:

To suffer harm is to come to be in—or perhaps better, is simply to be in—a certain sort of non-comparatively bad state. It is to come to be in … a state in which one faces, not worse than one faced, or would have faced, in some alternative state of affairs, but simply badly. The seriousness of a given harm, according to this way of thinking, is proportionate to the (non-comparative) badness of this state. [20]

Such accounts therefore leave open the possibility of all sorts of harms befalling future and present individuals even if they cannot be said to have been made worse off. Quite often, such individuals will, of course, be made worse off, but this is not a central question. As such, the possibility is left open that individuals can, and quite often will, be deemed harmed in non-identity cases, because although they would never have come into existence had the act not been done, in order to determine harm, one needs only to point to the fact that the individual suffers.

Returning to the congenital syphilis case, then, we note that should the woman choose to conceive now, she will conceive a child who suffers from the effects of congenital syphilis, and thus, her child will be born harmed by her action. Despite the fact that had she made a different choice he would not exist, she is still to be held responsible for the harm that has occurred as “where B is in a condition that is harmed and A and/or C is responsible for B’s being in that condition, then A and/or C have harmed B.” [7, p. 89]. Non-identity does, however, still represent a problem on such accounts if we are unwilling to appeal to impersonal harms and wrongs ... in cases such as the above, resulting in harmed but still worthwhile lives, but it occurs for the reason that no wrong can be determined. It remains a problem:

Not because the life in question has not been impaired, not because the individuals are not suffering, not because they have not been harmed, it has, they are, and they have rather because it is not possible to regard them as having been wronged. You might harm someone in order to benefit them, but if so, you do not wrong them unless you violate their will in order to do so or breach some other obligation to them. The mother giving a life with some measure of disability to a child who will find such a life worth having does not wrong her child. She is like the doctor giving a drug [that] has damaging side effects but side effects [that] are worth enduring for the sake of staying alive. [7, p. 95]

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1 Broadly defined as those resulting from the bringing of avoidable suffering into the world.
In the congenital syphilis case, the child should be seen as harmed by his mother’s act, but the mother is saved from blameworthiness because her child has a life that is worth living. He will not be wronged by her because, “like those with Blighty wounds or those who have to endure the harmful side-effects of beneficial drugs, [he] has received a net benefit from what has happened to [him] and none of [his] rights have been violated” [7, pp. 95-6]. It would be irrational for him to condemn his mother for her choice as he would not have existed without his condition and his existence is, although not perfectly so, pleasurable.

Yet, returning to the more serious case of the choice to bring to birth a child whose life will be less than worth living, we note that non-comparative accounts can state that to make such a choice, in full knowledge of this fact, constitutes both a harm and a wrong. In other words, non-comparative accounts are, unlike comparative accounts, compatible with a subscription to a harm threshold. This, of course, requires an answer to the question of what it actually means for an individual to be in a worse off condition than non-existence, and to make a determination of where this threshold lies. However, despite Smadar’s protestations, an answer can be easily found. For, although non-existence is not a state of being and thus cannot be said to be preferable for an individual, it can be in an individual’s interests to end her life or to have her life ended for her. If it were not, we would not view it to be ‘better’ to painlessly end the life of a suffering animal than to allow it to continue existing in a state that is both terrible and terrifying for it, and neither would we seriously consider questions relating to rational suicide or voluntary euthanasia. As Parfit notes:

A certain kind of life may be judged to be either good or bad—either worth living or not worth living. If a certain kind of life is good, it is better than nothing. If it is bad, it is worse than nothing…. Consider someone dying painfully who has already made his farewells. This person may decide that lingering on would be worse than dying. To make this judgement, he need not compare what it would be like to linger on with what it would be like to have died…. he might consider what lay before him, and decide whether he did or did not want to undergo it. [10, p. 487]

With this in mind, it is held that for existing individuals, the question of what constitutes a less than worthwhile life can only be answered subjectively, for in such cases we ask it in regards to ‘individuals who can have a view about the desirability of their own existence’. In this sense, ‘a condition is worse than non-existence if and only if the subject would rather not exist than exist in such a condition’ [7, p. 93]. Where the threshold lies for conception to be considered wrongful is trickier to determine, however. For in such cases, we cannot ask the child to be created whether he would consider his life worth living, and nor may we appeal to the

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Note that in cases where the decision to bring to birth lives that are highly likely to be less than worth living for reasons other than the child’s own limitations, such as for reasons of social justice, there may be other proper subjects of blame than the mother. Consider, for example, the choice to bring to birth a black child in a highly racist society or a case in which an individual would have a life that is worth living but for the denial of the resources that should, in accordance with one’s particular theory of justice, be provided to him.
conditions under which we would consider our own lives to be less than worth living. Instead, we must attempt to determine, in light of the information available to us, whether the child to be created is likely to consider his life to be worth having, and this is to be done by assessing 'whether or not such a life has a favourable balance of satisfactions over miseries' [7, p. 93].

If we turn, then, to Smajdor's concerns regarding whether existence can constitute a predicate, we can note that it is not at all clear how such considerations bear on the question of harmful conceptions and wrongful lives on threshold accounts. For on such accounts, whether we do or do not choose to bring to birth a child with a harmful genetic constitution has little bearing on the properties with which he would enter the world. To be sure, non-existent things lack all properties, as existence is a precursor for having properties, and thus, to state that a child can be harmed or benefited by not being brought into existence is nonsensical; however, existent things can, on non-comparative accounts of harm, possess as a necessary property the property of harm itself. For example, we can note that in the congenital syphilis case, whether or not the mother decides to birth the child/children she could have before the cure, it will be deemed that his/her necessary properties are harmful as such properties result in suffering. The harm is inherent in that child's necessary properties, and thus, the concept of the child with congenital syphilis already contains harm, which is not altered in the least bit by our choice of whether or not to bring him to birth or by whether we view existence to constitute a predicate.

Indeed, the corollary on such accounts seems to confirm this: for, non-comparative accounts such as Harris's also hold that if an effective treatment were discovered after the child's birth it is the harm that the child experiences which provides the motive for administering the treatment. If the child were not in a harmed condition, if the condition is not harmful, then why attempt to treat the congenital syphilis or seek to discover a cure?

The same, incidentally, goes for understanding the moral imperatives engaged by the possibility of human enhancement, the possibility of improving on normal species functioning or species typical functioning. The moral motive for human enhancement is generated by the possibility of ameliorating the human condition, of seeing the harmfulness of things as they are, the imperfections of human nature. If there is such a thing as human nature, this 'fact' does not prevent us from seeing its limitations and harmful effects, even when we have no different extant states of being with which to compare. The possibility of enhancing evolution, of improving on human nature, seems, on such accounts, to create a new conception of what it is to be in a harmed condition, not relative to existing alternative states, but to possible enhancements [21, pp. 86-109].

Conclusion

We have considered a number of arguments forwarded by Anna Smajdor in her article 'How Useful is the Concept of the “Harm Threshold” in Reproductive Ethics and Law?' where she sought to uncover a number of problems inherent in the
concept of the harm threshold by appealing to Kantian arguments concerning the question of whether existence can constitute a predicate. After exploring and explaining Smajdić’s arguments, we acknowledged that the question of whether existence can constitute a predicate is relevant for questions of the ethics of reproductive decision making on comparative accounts of harm, and that, the concept of the harm threshold lies on shaky ground on such accounts. However, while such is the case, we have also shown that Smajdić’s characterisation of Partin’s position on the possibility of threshold harms in non-identity cases rests on a mistake and that the arguments to which Smajdić appeals do not seem to apply on non-comparative accounts of harm, which, incidentally, tend to be the accounts of harm to which those who actually appeal to the concept of a harm threshold subscribe.

Smajdić, therefore, fails to provide compelling reasons for those who subscribe to non-comparative accounts to abandon their claim that in cases of lives less than worth living, persons can be both harmed and wronged by being brought into existence. With this in mind, we suggest that should Smajdić wish to continue her work in this area, she must try to engage more fully with non-comparative accounts of harm and provide arguments giving those who subscribe to such accounts reasons to abandon their view. For, if she believes, as her article seems to suggest, that we may only appeal to comparative harms when making ethical and legal decisions, such a position cannot be defended along the lines she proposes.

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