Intentional Diminishment, the Non-Identity Problem, and Legal Liability

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In her provocative new article in this Issue, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions,* Professor Kirsten Smolensky argues against tort liability for parents who use assisted reproductive technologies to produce disabled children—the recurring example she uses is deaf parents attempting to have a deaf child—when it is accomplished through the selection of pre-embryos; that is, parents who use in vitro fertilization (IVF) to produce a number of pre-embryos, use prenatal genetic diagnosis (PGD) to determine which of the pre-embryos have the desired disabling trait, and implant only those pre-embryos.

I understand Smolensky's intriguing argument to have the following structure: (1) Common sense intuitions about morality and the law suggest that intentionally producing disabled children is harmful to those children and should enable them to sue in tort for that harm. (2) There are a series of arguments for nonetheless barring tort suits by children against their parents in this circumstance that are unpersuasive, namely, that there is no parental duty on which to base liability, that it would violate a federal constitutional right to be free from violations of one's bodily integrity, and that it would violate a federal constitutional right to make certain parental decisions. (3)(a) An additional argument, however, drawn from Derek Parfit's "Non-Identity Problem" poses a real problem for liability. Had the particular pre-embryo not been selected, the individual who suffers the harm of the disability would not have existed. As long as the parental intervention does not produce a child whose "life is not worth living,"[1] we cannot say the child has been

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1. Kirsten Rabe Smolensky, *Creating Children with Disabilities: Parental Tort Liability for Preimplantation Genetic Interventions*, 60 HASTINGS L.J. 299, 336 (2008). This phrase is commonly used in the literature, although perhaps it would be more accurate to refer to it as having a life worth *not*

harmed (i.e., that *this child* is worse off) because a disabled life is better than no life at all. Therefore, tort liability should be barred for cases of intentionally creating disabled children through selection of pre-embryos (Smolensky calls these "indirect" interventions,[2] I prefer to call them "by selection").[3] (3)(b) However, if it became possible to genetically modify a pre-embryo to induce a disability (Smolensky calls these "direct" interventions,[4] I prefer to call them "by genetic manipulation"), then tort liability for this act should not be barred by reasoning based on the Non-Identity Problem, because "genetic modification does not involve a choice between living a differently-abled (or disabled) life and nonexistence; it is the choice between living a differently-abled life and living a life absent genetic modification."[5]

My focus will be on this third claim of Smolensky's in each of its parts, that reasoning based on the Non-Identity Problem should lead us to bar tort liability for creating disabled children, but only when it is done by selection rather than genetic manipulation.

In Part I of this Article I show why I find problematic the arguments Smolensky offers for distinguishing, for Non-Identity Problem purposes, cases of creating disabled children through genetic manipulation from cases of creating disabled children through selection. Her arguments are premised on the claim that the genetic manipulation cases involve identity-preserving interventions. I both raise questions about the specific arguments she offers, and discuss why I am somewhat skeptical that this is a fruitful line of inquiry to develop for law. More generally, I show that her argument entails a more dramatic extinguishing of tort liability than she focuses on.

In Part II, the more constructive Part of this Article, I examine whether legal liability should be barred even for cases where the Non-Identity Problem applies. I set out four kinds of approaches drawn from the bioethics literature that suggest that the parents have acted wrongfully by creating disabled children *notwithstanding* the Non-

living. *See, e.g.*, DEREK PARFIT, REASONS AND PERSONS 359 (rev. ed. 1987); I. Glenn Cohen, *The Right Not to Be a Genetic Parent?*, 81 S. CAL. L. REV. 1115, 1131 n.48 (2008); Seanna Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 118 (1999). What is usually meant, is that it not be so bad that, if asked ex post, the individual would prefer never to have come into existence. *E.g.*, ALLEN BUCHANAN ET AL., FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 224 (2000); Carl H. Coleman, *Conceiving Harm: Disability Discrimination in Assisted Reproductive Technologies*, 50 UCLA L. REV. 17, 45 (2002). Job's lament that "I wish I had died in my mother's womb" is the classical expression, *Job* 3:11 (Good News), though what modern authors have in mind is something more like Lesch-Nyhan syndrome. *See, e.g.*, BUCHANAN ET AL., *supra*, at 233. I will follow Smolensky in discussing only interventions that do not produce a life worth not living.

2. Smolensky, *supra* note 1, at 300–01.

3. *See id.*

4. *Id.* at 301.

5. *Id.* at 334.

Identity Problem. I then offer some tentative views about whether any of these approaches is a valid basis for legal liability, discussing tort law, which is Smolensky's focus, and also extending the project beyond tort to discuss criminal law and other forms of legal regulation.

Before I present those points, however, I want to make a threshold observation on the first part of Smolensky's argument, the idea that common sense intuitions about morality (and the law) suggest it is harmful (and should be tortious) to intentionally produce disabled children. The point is both terminological and substantive. While Smolensky discusses creating "children with disabilities," I will from here on out use the phrase "intentional diminishment," which I will define as intentionally using reproductive technology to produce a child who is *on balance significantly harmed* as compared to the "normal" child (think of "diminishment" as the antonymic concept to "enhancement," which is often discussed in the bioethics literature).

In one sense, intentional diminishment is meant to cover a narrower swath of cases than the ones with which Smolensky's argument is concerned.[6] It is possible that, even putting to one side the "benefit" associated with coming into existence that is the nub of the Non-Identity Problem, in some cases the imposition of a disability will not be on balance harmful, that is, there may be other corresponding benefits which produces a net welfare gain rather than loss *for the child*. I suspect that most parents who engage in intentional diminishment believe this is what they are doing—when asked deaf parents seeking to create a deaf child may say that their intent is to benefit the child by making the child like its parent and enabling the child to participate in Deaf culture in a way that the child could not if he/she were hearing; that while deafness carries burdens for this child the benefits it brings are greater still.[7] If

6. In another sense, this term could potentially cover a *broader* swath of cases than the ones that concern Smolensky. It recognizes that the line between disability, pain, illness, and injury is a fine one to draw, *see, e.g.*, MARK S. STEIN, DISTRIBUTIVE JUSTICE AND DISABILITY: UTILITARIANISM AGAINST EGALITARIANISM 23–24 (2006), and that from the point of view of commonsense morality it is the harm-causing nature of the intervention, not the fact that it causes what might be termed a "disability" in the colloquial sense, which seems to matter. That said, while it is not clear to me how much (if any) of Smolensky's arguments would change if instead of intentionally creating a "disabled" child one intentionally created a child with a crippling disease, in what follows I will track her article by using examples that largely fall within the colloquial meaning of disability: deafness, blindness, paralysis, etc.

The term "intentional diminishment" also acknowledges that not all disabilities are harmful to the same degree: while the selection of a pre-embryo with red/green color blindness, epilepsy, deafness, or moderate mental retardation all might be thought of as "creating children with disabilities," they represent the imposition of very different levels of harm. Moreover, as proponents of the social model of disability remind us, how harmful a given disability will be is in part a function of the existing social structure—to use a trivial example, mobility deficits requiring wheelchairs are less harmful in a world where every building has ramps than one where no building does.

7. In the real case of Sharon Duchesneau and Candy McCullough, a lesbian couple living in Maryland, both of whom were deaf and sought to produce a deaf child by using a sperm donor with five generations of deafness in his family, the reasons they gave for their actions were along these

they are right about this, it is less clear to me that common-sense morality would lead us to view the action as worthy of condemnation. Perhaps there are reasons why we think they are wrong about this—for example, because we think the magnitude of the harm outweighs the magnitude of the benefit,[8] or that a harm to a health state can never be outweighed by a benefit in another domain such as community membership and parental belongingness (a sort of separate spheres view[9])—but neither of these points are obviously true.

Therefore, even at the level of common-sense morality, the deaf child case strikes me as a genuinely hard one. It is a case where creating a disabled child may not be a case of intentional diminishment, that is, it may not create a child who (putting aside the possible benefits of coming into existence) is on balance significantly harmed as compared to one that existed without the impairment. Perhaps a different example would be clearer; others have used the example of an intervention that produces a child with moderate mental retardation,[10] a case that seems less likely to leave open the question of whether the child that results is on balance significantly harmed by the impairment. In any event, deafness is the example Smolensky has chosen, and for the purposes of symmetry I will use this example throughout the paper, and just ask readers to assume, arguendo (as Smolensky seems to assume), that the child whose parents use reproductive technologies to make it deaf is (putting aside the possible benefits of coming into existence) significantly harmed.

I. SELECTION, MANIPULATION, AND THE SCOPE OF THE CLAIMS EXTINGUISHED BY THE ARGUMENT

Smolensky's argument is focused on barring tort liability for intentionally producing disabled children (in cases that do not create a life worth not living), and even then only as to cases where intentional

lines. Margarette Driscoll, *Why We Chose Deafness for Our Children*, SUNDAY TIMES (London), Apr. 14, 2002, § 5, at 7. As they put it, "We feel whole as deaf people and we want to share the wonderful aspects of our deaf community—a sense of belonging and connectedness—with children." *Id.*

8. Even in a world where everyone spoke sign language, deafness would still prevent access to goods made possible only by sound—enjoyment of a violin concerto by Tchaikovsky, for example. That said, deaf adults sometimes refuse cochlear implants, suggesting the choice may not be completely clear cut, although in these cases the adults have already adapted to their nonhearing state such that the comparison may not be completely probative.

9. *See* Dan W. Brock, *Separate Spheres and Indirect Benefit*, 26 COST EFFECT. & RESOURCE ALLOC'N 4 (2003), *available at* http://www.resource-allocation.com/content/pdf/1478-7547-1-4.pdf.

10. *See* Dan W. Brock, *The Nonidentity Problem and Genetic Harms—The Case of Wrongful Handicaps*, 9 BIOETHICS 269, 272–73 (1995). Of course, one thing in favor of the deafness example is that there have been real cases of parents seeking to create deaf children, while I am unaware of any case of parents who have tried to use reproductive technology to intentionally produce a child with mental retardation. This is most likely why Smolensky chose this example.

diminishment is achieved through pre-embryo selection, not genetic manipulation.

It is worth noting, however, that if Smolensky is right about the Non-Identity Problem, it actually entails a broader extinguishing of tort suits by the child in this context than the one she focuses on. Smolensky's use of the Non-Identity Problem hinges on the conclusion that the resulting child was not harmed, because a disabled life (at least in cases where it produces a life worth living) is better than no life at all.[11] The argument thus turns on the lack of a cognizable harm to the would-be victim. Therefore, her argument seems to entail extinguishing liability for parents who act with a benevolent intent (to enable the child to participate in Deaf culture), a malicious one (the parent simply enjoys watching children suffer), or even no intention at all, for example, when diminishment occurs by negligence or simple misfortune.

Because Smolensky's argument turns on the claim that the resulting child has suffered no cognizable harm, it would seem to also entail extinguishing tort liability if the tortfeasor is someone *other* than the parents. For example, there is still no cognizable harm to the resulting child in a case where the doctor performing PGD is negligent in performing the screening, or, worse yet, intentionally misleads the parents into thinking the pre-embryo in question does not carry the deaf gene(s) when it in fact does.[12] Nor does it matter whether the result was achieved through an act or an omission; again, in neither case will the child suffer a cognizable harm, and therefore, says her argument, there should not be tort liability.

Smolensky does offer one limiting principle: she draws a clever distinction between what she calls "direct" and "indirect" production of disability, between selecting a pre-embryo with deafness amongst a possible set of pre-embryos, and genetically manipulating a pre-embryo before implantation to induce deafness (something that is not currently

11. *See* Smolensky, *supra* note 1, at 336.

12. Recognize, however, that even where the Non-Identity Problem applies, it does not rule out the possibility that in cases involving diminishment by third parties *the parents* may still have a suit against the doctor or other third party. When parents sue the tort is called "wrongful birth," while when the resulting child sues the tort is called "wrongful life." *See, e.g.*, Wendy F. Hensel, *The Disabling Impact of Wrongful Birth and Wrongful Life Actions*, 40 HARV. C.R.-C.L. L. REV. 141, 142–43 (2005). In a wrongful birth case the parents claim *they* have been harmed, not that the child has been, and to the extent the harm is their own (the diminishment of enjoyment they get from not having a healthy child, the difference in costs between raising this child as opposed to a child without the impairment) and not derivative of their child's harm, the Non-Identity Problem poses no obstacle to their claim. *See id.* As of 2005, however, approximately half of the states refused to recognize wrongful birth actions, while all but three have refused to recognize wrongful life actions. *Id.* at 160–62 nn.114 & 122 (collecting cases). While in the intentional diminishment cases Smolensky focuses on, this kind of liability seems unlikely because the parents have intentionally caused their own injury (if any), I discuss the possibility of liability premised on other third-party effects more fully below. *See infra* Part II.

technologically possible, but might become possible at some future time).[13] While she thinks that the Non-Identity Problem should bar liability in the selection case, she does not think it ought to bar liability in the manipulation case.

The reason she gives for such a distinction is that "PGD does not alter the identity of the selected embryo; it merely allows parents to select one genotype over another."[14] With genetic modification, however, things may be different. While ordinarily "[t]he conceptus' nuclear DNA sequence, comprised of DNA coming from the nucleus of its mother's egg and the nucleus of its father's sperm, remains virtually unchanged from the moment of conception to the moment of death," in genetic modification cases one changes the "already existing set of DNA and, arguably, changes the resulting person's identity."[15] In other words, if genetic manipulation to induce a disability creates a "change in identity," then we are exactly back in the jaws of the Non-Identity Problem, albeit in a slightly different form; there is *no* identity (in the sense of "identical") between the pre- and post-manipulation pre-embryo.[16]

Language almost fails us here, but let me try to put the point this way. If a genetic modification that induces deafness changes personal identity, then it cannot be worse for the *you* who comes into existence genetically manipulated to be deaf that this intervention occurred, because, had it not occurred, *you as you* would not have existed at all, rather a *different person* would have existed in your place. Existing in a diminished state is better than not existing at all, therefore, you have not been harmed overall.[17] The key question becomes whether the intentionally diminishing intervention is identity preserving or identity changing: if we consider the pre- and post-manipulation pre-embryo to have the same personal identity, to be the same person, then the Non-Identity Problem creates no obstacle (the comparison is between a better-off and less-well-off *you)*; if we think the manipulation creates a change in identity, then the Non-Identity Problem is as much of an obstacle for the imposition of tort liability as in the diminishment by selection cases. Which is it?

13. Smolensky, *supra* note 1, at 303.

14. *Id.* at 301.

15. *Id.* at 332–33.

16. To be clear, what Smolensky and I mean by "identity" is "personal identity"—what makes one the particular person one is—as opposed to other possible senses of identity.

17. Eric Rakowski has captured the point nicely in discussing the *opposite* problem, whether there is a duty to engage in genetic manipulation of a deaf pre-embryo to make it hearing:

> If a person's genes could not have been better in a certain respect because better genes would have made him a different person, then it seems that being born with the poorer set of genes cannot have harmed him, because that poorer set is a precondition of his very existence.

Eric Rakowski, *Who Should Pay for Bad Genes?*, 90 CAL. L. REV. 1345, 1352 (2002).

There is a vast philosophical literature on identity (with Derek Parfit being one of the leading contributors) that I cannot even begin to canvass in this short Article. For present purposes, I merely want to make two kinds of observations. First, that the two brief arguments that Smolensky offers for her claim that preimplantation genetic manipulations that induce a disability such as deafness are identity preserving rather than identity changing do not seem to prove her claim. There is also a third argument for her claim we might construct based on something Smolensky says indirectly. This third argument initially seems more plausible, but I show why I have some doubts about it as well.[18] Second, I want to explain why I am skeptical that tying the argument to changes in identity is a profitable way forward for the law that will lead us to determinate answers.

Smolensky offers two brief arguments for her position. The first argument borrows a thought experiment from Parfit where:

> He writes about a situation where his mother conceives a child a few seconds later from when she in fact conceived him and he questions whether this child would have been him. In all likelihood, that few seconds of time would have resulted in a different sperm reaching his mother's egg, and as a result he would have shared at least 50% of the same DNA with the child. Parfit suggests that it is impossible to know whether this child, one that shares at least 50% of his DNA, would have been him. Under this view, genes play a relatively small role in creating a person's identity.[19]

It is not at all obvious to me how this example proves the claim that genetic modifications that induce disabilities do not change the person's identity. Rather than proving the point, this seems like a *reductio* of the argument. Fraternal (or dizygotic) twins share 50% of their genes,[20] although they are conceived simultaneously, and yet no one thinks they are the same person. If her argument requires one to accept that I would still be *me* rather than *someone else* (i.e., that my identity would be preserved) had I undergone a genetic modification while a pre-embryo that altered my genetic make-up by 50%, such that I was now the genetic equivalent of a fraternal twin to my prior self, for many that would be a good reason to reject the argument.[21]

18. To be clear, even if I am successful in showing that the arguments Smolensky advances for her own position are unpersuasive, that does not rule out the possibility that there may be other arguments out there for her distinction that do succeed.

19. Smolensky, *supra* note 1, at 333–34 (footnotes omitted).

20. *E.g.*, Laura A. Baker, *The Biology of Relationships: What Behavioral Genetics Tells Us About Interactions Among Family Members*, 56 DEPAUL L. REV. 837, 838 (2007).

21. Moreover, as Smolensky notes, Parfit himself is unsure about this claim, and recognizes that if the time gap had been a month not seconds the two possible children would not share the same identity. Smolensky, *supra* note 1, at 334 n.194. While some might think that "if the child is born at a different time and experiences a different personal history from some other potential child," that may play a role in changing the child's identity, that conclusion does not mandate that it is the *only* thing

To be clear, I do not think that Smolensky's *claim* (that deafening a pre-embryo is not identity changing) requires us to accept that a 50% alteration in pre-embryonic genetic make-up would leave personal identity undisturbed, it is just this *argument* that she offers for that claim which seems to push in that direction. In any event, even if this argument should be rejected it usefully clarifies something about Smolensky's claim that is implicit in her discussion but never stated directly: her claim is *not* that no genetic modification one could effect on a pre-embryo would be sufficient to change identity in the sense relevant to the Non-Identity Problem;[22] rather, her claim is that while some genetic modifications could change identity in the relevant sense, those that induce disabilities are not among them.[23] However, to pick up a theme I will develop at the end of this Part, once one accepts that some amount of genetic change (50% genotype alteration? 90%?) can change identity, one faces the need to specify why that change suffices and not another, why difference of being deaf versus not deaf is insufficient, and so on.

Recognizing that many readers may find that her initial "hypothetical is unpersuasive," Smolensky offers a second argument:

> [T]ake the case of two genetically identical twins. Most readers would accept that twins have unique identities and are different persons even if they are genetically identical. If genes are only a small part of a person's identity as these two hypotheticals suggest, then it cannot be

that could change identity; indeed many think that changes in time of birth add to but do not supplant genetic changes in their effects on personal identity. *See, e.g.*, Rakowski, *supra* note 17, at 1368.

22. Such a view would not be unprecedented. In the context of genetic modification, Christopher Belshaw has noted (though not argued for) such a view, what we might call the biological view of identity, which he associates with the work of Saul Kripke. *See* Christopher Belshaw, *Identity and Disability*, 17 J. APPLIED PHIL. 263, 264–66 (2000). On this view the meeting of a particular sperm and egg is not only necessary for the formation of a particular personal identity, but it is sufficient, such that any genetic modification of the resulting entity thereafter does not disturb identity (or, on one variation, at least so long as the modification does not make the entity not human). *Id.* at 265–66. My purpose here is not to evaluate the biological view. For critiques, see, for example, *id.* at 265–66, 268–69, and David Shoemaker, *Personal Identity and Ethics*, *in* THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., rev. ed. 2008), http://plato.stanford.edu/entries/identity-ethics/. Rather, my purpose is just to note that it stands in opposition to the psychological Parfitian view of identity to which Smolensky appears drawn. *See* Belshaw, *supra*, at 273. Further, the biological view would entail that *no* genetic modification can change identity, which is a claim it appears Smolensky has rejected.

23. The closest Smolensky comes to saying this outright is when she writes "[b]ut to argue that changing a *single* gene, even a gene that controls for a central component of one's identity, *always* results in the creation of a different person seems to place too much emphasis on genetics." Smolensky, *supra* note 1, at 333 (emphasis added). The words in italics hint that this is Smolensky's position, but in any event Smolensky has confirmed to me that this is her position in correspondence.

To make a slightly different point, it would seem from the statement above that Smolensky draws something from the fact that it was a "single" gene that was changed. I, however, am not sure why the *amount* of genotypic change is what matters. There can be large genotypic changes that result in a small phenotypic differences and vice versa, and it seems plausible to me that my expressed traits (i.e., phenotype), not my genotype, play the larger role in what is essential to my personal identity.

> true that altering a single gene in an embryo's DNA necessarily results in the creation of a different person.[24]

Unfortunately, this second argument also seems unpersuasive. The example only shows that two individuals can develop *different personal identities* even though they were born with (almost) *identical genes*; that does not show that if two possible individuals were born with *different genes* they would develop the *same personal identity*.[25] It is this second claim that Smolensky's argument seems to be reaching towards, but given the truth of the first claim, the second claim could be either true or false.

Both arguments are extremely brief, so perhaps there is more here than I am seeing, yet as I understand them, neither of the arguments presented persuade. But Smolensky seems to also gesture, offhandedly, at a different kind of argument. In explaining her position she observes that "[w]hile deafening a hearing child may cause the child to have different life experiences, it does not create a different person."[26] From this comment we can try and construct a third argument, that while the arguments she offers may not be persuasive, rejecting her position leaves us in a still more problematic position: it implies that there ought also to be no harm if we deafened an adult, for example, because that would create a new identity who could only exist because the old identity ceased to be. That conclusion is absurd, and to the extent rejecting her position entails accepting that conclusion, this offers a good reason not to reject her position. This is a tempting argument, but in my view it too does not prove her claim, because the adult case differs from the genetic manipulation case in important ways, such that rejecting her claim does *not* require us to accept the conclusion that deafening an adult is not harmful.

First, one might argue that the intervention in the adult case *is* identity preserving, but because of a *different* basis for the continuity of identity, for present purposes let us call it psychological continuity through memory. The individual postdeafening would remember his predeafened state, and can experience emotional harms connected to comparisons of the pre- and post-intervention states, specifically the feeling of loss. This same basis of identity continuity is not available in the pre-embryo manipulation case, because pre-embryos do not experience their unmanipulated state; indeed given that pre-embryos

24. *Id.* at 334 (footnote omitted).

25. More particularly, it does not prove that if two possible individuals were born with the *difference in genes* that would cause one of them to have a disability but not the other, they would always develop the *same personal identity*.

26. Smolensky, *supra* note 1, at 334.

lack even a rudimentary nervous system, they do not experience anything.[27]

But what about the case of deafening a very young child, say, a four-day-old? I may not remember myself before that time. Does that mean that if I was deafened at that age, that intervention is identity changing and not identity preserving, such that I have not been harmed? What this case suggests is that the specification of the condition(s) giving rise to identity continuity must be made more precise. Psychological continuity in the form of continuity of memory, a view that originates with John Locke,[28] may not be required, only a lesser requirement of continuity of "conscious experiences" even if those experiences "fall short of the more complex type of self-awareness adults regularly experience."[29] Rakowski associates a view of this kind with Jeff McMahan, "that an individual's existence as a moral person begins in the womb, during the last two or three months of a normal pregnancy, when neural activity, which is associated

27. *See, e.g.*, Report of the Cal. Advisory Comm. on Human Cloning, *Cloning Californians?*, 53 HASTINGS L.J. 1143, 1191 (2002) (stating that "[t]he development of a nervous system and any possibility of feeling sensations comes much later than the appearance of the primitive streak[,]" which occurs at approximately fourteen days of development).

28. *See* 1 JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 449 (1984) ("[A]s far as this consciousness can be extended backwards to any past Action or Thought, so far reaches the identity of that *Person*; it is the same *self* now as it was then; and 'tis by the same *self* with this present one that now reflects on it, that that Action was done." (emphasis added) (footnotes omitted)); *see also* Mary Ford, *The Personhood Paradox and the 'Right to Die*,' 13 MED. L. REV. 80, 87–90 (2005).

29. *See* Rakowski, *supra* note 17, at 1383 n.65. The other alternative would be to accept that "the slight cognitive links between a newborn and the disabled person he may or may not become are too meager to justify regarding the two as a single person," *id*. at 1383, such that there is not identity continuity. This view, which Rakowski thinks is implied by Parfit's own work, *id*., would entail the conclusion that no harm has been done by deafening a four day old, although the same would not be true if one deafened an older child with greater cognitive development or an adult.

Because many might find this conclusion as to the four day old problematic, in the text I explain why rejecting Smolensky's view does not *require* accepting this conclusion. For present purposes, I remain agnostic as to which of these standards is either necessary or sufficient for the continuity of identity. It is worth noting, however, that in other domains of law, some have suggested that memory continuity is a necessary condition for identity continuity. I am thinking of a kind of change in identity that has nothing to do with genetics and may in fact involve fully formed adults: the man who suffers severe retrograde amnesia or brain damage such that he has no memory of who he was before. Ought we think of him as a "new" person, who should not enjoy either the burden or benefits of the one who he was before? In the case where the "old" person committed a crime, this problem has greatly interested criminal law theorists. *See, e.g.*, LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 103–13 (1987); Walter Sinnott-Armstrong & Stephen Behnke, *Criminal Law and Multiple Personality Disorder: The Vexing Problems of Personhood and Responsibility*, 10 S. CAL. INTERDISC. L.J. 277, 286–89 (2001). Such cases are not merely hypothetical, as Leo Katz has suggested that something of this sort occurred in the case of Rudolph Hess, a high-ranking Nazi tried at Nuremberg who initially pled amnesia. *See* KATZ, *supra*, at 108–10. If we believe that in these circumstances the amnesiac should not be punished on retributivist grounds that suggests that memory continuity really is a necessary condition for identity continuity. On the other hand, it is also possible that the conditions for the continuity of identity may not be general but instead context specific to particular legal and moral inquiries. If so, it might be a mistake to move too quickly from intuitions in one context to another.

with rudimentary subjective experience, first occurs in a fetus's brain," and that only from that point is there identity continuity.[30] If one accepted a view like this, that would suggest that while the Non-Identity Problem may present a difficulty for concluding that harm has been done through a genetic modifications performed on a pre-embryo (which has no nervous system yet), it will pose no such difficulty in concluding that harm has been done when a comparable intervention is performed on a late-stage fetus. Further, accepting a view like this would allow one to distinguish the case of deafening a four day old and genetically manipulating a pre-embryo to be deaf: unless one thought one could have conscious experiences before one had even a primitive nervous system, there does not seem to be this kind of continuity between one's adult self and one's pre-embryonic 'self.'

To make a separate but related point, on some normative ethics views there is a morally significant distinction between losing what one has, and never having it in the first place, and in this regard there is something special about the genetic case in that "no one is harmed in not being created, because there is no one to be harmed if we do not create someone."[31] This distinction offers one reason why we treat killing someone and failing to create them as so morally different, in the former someone loses something good that they have (life) while in the latter there is no one to be harmed if we do not create them. Similarly, one might think it is different to come into existence never being able to hear, as opposed to losing one's hearing once one had it.[32] For these reasons I do not think that the case of deafening an adult or a child poses a problem for rejecting Smolensky's claim.[33]

30. Rakowski, *supra* note 17, at 1383 n.65 (citing Jeff McMahan, *Wrongful Life: Paradoxes in the Morality of Causing People to Exist*, *in* RATIONAL COMMITMENT AND SOCIAL JUSTICE: ESSAYS FOR GREGORY KAVKA 208, 211 (Jules L. Coleman & Christopher W. Morris eds., 1998)).

31. F.M. Kamm, *Cloning and Harm to Offspring*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 65, 72 (2001–2002); *cf.* Thomas Nagel, *Death*, *in* MORTAL QUESTIONS 1, 1–10 (1979) (justifying why we regret dying young, but not the failure to be born earlier, on the ground that only the former constitutes losing something good that we had).

32. Of course, some faiths believe that there *already is* a person who exists in the pre-embryonic state, see, for example, Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 223–25 (2006), who is losing something good (the potential for hearing). This argument, however, does not seem available to Smolensky, for it would imply that the pre-embryo who has *not* been selected is also a person who has lost out on something good, the ability to live, such that there *is* a harm in the selection cases as well, which she denies. More generally, adopting such a view would counsel much more profound restrictions on reproductive technology use than I suspect Smolensky would endorse.

33. A different way of seeing this point, at least for those who believe that there exists some genetic manipulation that would be sufficient to change identity, is as follows: take whatever manipulation, however radical it is you believe *would* change personal identity if done to a pre-embryo (for example, one that induces a total loss of all sensory modalities except touch). Now ask whether you think there would be harm done if we intentionally acted to put an adult in the same state (e.g., a blow to his sensory cortex). The answer seems to be yes. However, if this argument were right, it

This leads me to the skeptical part of my analysis. While I have shown why Smolensky's arguments do not prove that genetic manipulations producing deafness or other disabilities are identity preserving, I have not proven that these interventions are *always* identity changing. Instead, it seems plausible to me that genetic manipulations are quite heterogeneous and the line between identity preserving and identity changing interventions is unlikely to map onto the line between genetic manipulations and other sorts of interventions. That is, it seems plausible that not all genetic manipulations will change personal identity—imagine a small manipulation that adds a Marilyn Monroe beauty mark above the lip where none would otherwise have been[34]—but other manipulations *do* seem to change the identity of the entity—imagine we replace 75% of your DNA with Donkey DNA to create a human-Donkey hybrid. In between is a vast spectrum of manipulations that produce very hard questions as to the continuity of identity. Even if there were continuity of identity between a deaf-born version of yourself and one that was not deaf-born, as Smolensky argues, what if we added blindness to the mix? Now add mental retardation?[35] If we also flipped your X-chromosome for a Y-chromosome and changed your gender (a nondisabling form of genetic manipulation)? And so on. To produce an argument along these lines one would have to specify, within the class of genetic manipulations, which kinds of genetic manipulations are identity preserving and why, an extremely difficult task.[36]

If the mere existence of line-drawing problems, of hard cases, was enough to doom the endeavor, then that would be the end of attempts to formulate almost any legal rule. But the problem here is not merely that there may be hard cases, but that most cases of "creating disabled children," the cases (unlike the beauty mark) where from a policy/legal perspective we care about the answer, are likely to fall within this difficult area where it will be difficult to determine whether personal identity has changed. Of course, I can simply assert that a particular

would be impossible to believe that the intervention was identity changing when done to a pre-embryo but harmful when done to an adult. That is, however, exactly what we do believe, which suggests the argument is wrong.

34. There may also be other genetic manipulations that result in no phenotypic changes at all.

35. If one accepts that some genetic modifications will be identity changing and some will not be, one intriguingly counterintuitive result is that the more severe the disability imposed, the more likely identity will be changed. If, as Smolensky would argue, in the pre-embryonic case where identity has changed we ought to bar tort liability, then the imposition of more severe disabilities produce the weakest case for liability at least on the ground of harm to the child. That said, for some of the arguments offered in Part II (which do not depend on harm to the resulting child), the strength of the argument for imposing liability grows with the severity of the imposed disability, that is, in the expected direction. *See infra* Part II.

36. *See, e.g.*, Rakowski, *supra* note 17, at 1351 ("[I]t can be difficult to resolve whether genetically caused conditions that are present from birth and frequently have an enormous impact on people's lives, such as blindness or deafness, result in a change in identity.").

genetic manipulation was identity changing, but it is not clear to me how we would know if I was "right." Claims about who we might have been had we been different people may give rise to intuitions, but whatever one's attitude towards the role of intuitions in moral reasoning generally, the basis for these specific intuitions seem particularly suspect. It is not clear to me from what experiential data I could possibly know if I would have been the same person deaf and not deaf, and I worry that these arguments are unproveable and unfalsefiable. For these reasons, from a legal perspective the game may not be worth the candle.[37]

In sum, Smolensky's argument entails a broad extinguishing of tort liability, barring suit by the child against any person (parent, doctor, etc.) for any culpability based on any preimplantation act or omission that leads to diminishment. I find unpersuasive the arguments she offers for cabining her claim by distinguishing diminishment through genetic manipulation from diminishment through selection. More generally, I am skeptical about whether this kind of argument can provide a promising basis for distinctions in normative ethics or legal liability.

In what follows, I put to one side the question of whether the Non-Identity Problem applies in the genetic modification cases. Instead I ask, for cases where the problem *does* apply (selection cases, for certain), what are the implications for legal liability more generally. Here I examine Smolensky's claim that the Non-Identity Problem, where applicable, should eradicate tort liability for suits by the child against his or her parent, and also extend the project to consider other kinds of legal liability.

II. LEGAL LIABILITY NOTWITHSTANDING THE NON-IDENTITY PROBLEM

Smolensky treats the invocation of the Non-Identity Problem, where it applies, as a conclusive reason to bar tort liability in suits by children against those who caused their diminished state. In this Part, I want to examine more closely what effect the Non-Identity Problem, where applicable, ought to have on legal liability. I set out four kinds of arguments drawn from the bioethics literature that suggest that the parents have acted wrongfully by engaging in intentional diminishment, even if we accept the objection of the Non-Identity Problem and its conclusion that the resulting child has not been harmed overall. Two of the arguments are more consequentialist (non-person-affecting principle and other-person-affecting principle approaches), while two are more

37. I also worry that our intuitions about whether an intervention is identity changing are being driven by our intuitions as to whether we want to find liability, rather than vice versa. *Cf.* Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 643–44 (1982) (making a similar point as to the relationship between determining decision-making capacity and the decision whether to overrule a patient's refusal of treatment).

nonconsequentialist (virtue ethics and wronging without overall harming approaches). This list may not be exhaustive. For each of these arguments I then move from wrongfulness to liability and look at whether the argument would provide a basis for *legal* liability in the intentional diminishment case, and what form that liability could take (tort and beyond). I should preface this discussion by noting that my goal in this short Article is not to evaluate or even fully elaborate these possible families of arguments; some are arguments that I myself would not pursue because of more general normative ethics commitments, but others with different priors may find these arguments attractive. My modest ambition is merely to start mapping the conceptual space, and begin a conversation about what the Non-Identity Problem means and does not mean from a legal perspective.

A. NON-PERSON-AFFECTING PRINCIPLES AND SAME NUMBER SUBSTITUTIONS

The Non-Identity Problem is an obstacle for any argument that says intentional diminishment is harmful because it harmed *the child that is produced*—that is, for any argument premised on the idea that "the individuals who experience suffering and limited opportunity in one alternative exist without those effects in the other alternative."[38] However, there is a separate family of what are sometimes called "non person-affecting principles" which may be used to condemn the action.[39] One such view suggests the world would be better off if instead of person A who will experience serious suffering or limited opportunity coming into existence, person B who will not experience those things came into existence—that is, "[a]lthough the person born with the condition in question would not have been harmed by birth, the world is better off if a person without that harm had been substituted in his place."[40] Thus, on the non-person-affecting principle—"[i]t is morally good to act in a way that results in less suffering and less limited opportunity in the world,"[41] and therefore morally bad to act in way that results in more of those things—the parent who purposefully produces a child who will experience serious suffering or limited opportunity has done something morally wrong. To put the point in welfarist terms, if one assumes that

38. Brock, *supra* note 10, at 273.

39. *See, e.g.*, *id.* at 272–73. Parfit himself introduces non-person-affecting principles of the same number variety immediately after presenting the Non-Identity Problem. PARFIT, *supra* note 1, at 359–61, 364–65. "Non person-affecting" may be a bit of a misnomer in that the suffering that is diminishing welfare will be experienced by some person—it is not disembodied, it is just that the principle does not require the *same person* to suffer or not suffer based on the counterfactual; the relevant distinction is between same number and same person cases. Brock, *supra* note 10, at 273.

40. John Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 16 (2004).

41. Brock, *supra* note 10, at 273.

the undiminished child will have higher welfare than the diminished one, then global welfare is maximized (and the world is better) when the undiminished child comes into existence, and any intervention ought to be keyed to creating a situation where the undiminished (rather than diminished) child comes into existence.

On its face, however, the non-person-affecting principle approach has a built-in limitation: it applies only to "same number" cases, cases where the same number of persons exist in either counterfactual and we merely substitute the undiminished (higher welfare) person for the diminished (lower welfare) person.[42] In "same number" cases the choice is between the coming into existence of one child in either scenario, and the question is whether it will be the diminished or the undiminished child. But not all cases are "same number" cases. Consider a case where, because of their genetic make up two parents are "virtually certain to genetically transmit the disability to any child they conceive" such that "[i]f they choose not to have a child with a disability and can have no other child instead, the result is one fewer child[]—a different-number case."[43] In such a case, what is best is that the disabled child comes into existence, because from this perspective, the existence of a disabled child is better than the existence of no child whatsoever (again assuming it has a life worth living). However, the application of non-person-affecting principles in different number cases may lead to problematic results.[44]

42. PARFIT, *supra* note 1, at 360–61; Brock, *supra* note 10, at 273.

43. BUCHANAN ET AL., *supra* note 1, at 255. This example given by Buchanan and his coauthors usefully illustrates the difficulty in determining exactly what is a different number case. Suppose that it is only the combination of both parents' genetic material that produces the disabled child, could they not avoid that result by using one of their gametes along with sperm or egg donated from a third party? Even if they each had genetic material certain to produce the disability, could they not still produce another healthy child with the mother serving as gestational parent using both donated sperm and egg? John Robertson has suggested that even in cases like these where we *could* make same-number substitutions, we may want to make an exception and not treat the failure to substitute as wrongful if it "unreasonably burden[s] parents," and has suggested as examples cases where "[t]o substitute a healthy child would require that the parents give up having a genetically related child and accept childlessness, adoption, or use of a gamete donor." Robertson, *supra* note 40, at 17. Whether we ought to make an exception for such cases would depend, in part, on prior normative judgments about the value of having genetically related children. *See* Cohen, *supra* note 1, at 1189–90 (discussing this issue).

44. The problem is that when applied to different number cases, the non-person-affecting principle approach appears to lead to what Parfit has called "The Repugnant Conclusion," the idea that what would be best from the non-person-affecting standpoint is to produce a very large number of children who had lives just above the threshold of a "life not worth living," since the existence of each additional child might increase total happiness by vastly increasing the population, even though we make every already existing person much worse off. *See* PARFIT, *supra* note 1, at 387–90; *see also* BUCHANAN ET AL., *supra* note 1, at 254. Some have suggested that the problems can be overcome by relying on average rather than total utility as a measure of what makes a state of the world better. *See* Robertson, *supra* note 40, at 16–17. Others think that this problem shows that non-person-affecting principles alone cannot be the stuff which normative judgments are made of, and instead that what is required is an as-yet-unarticulated comprehensive theory of how person and non-person-affecting

It might be tempting to think that all cases of intentional diminishment, whether done by selection or manipulation, are same number cases. From the point of view of moral theory, this seems correct. The test of whether we are in a same number case is whether the parents *could* have substituted an undiminished child for the diminished one, which by definition they could in intentional diminishment cases. From the point of view of using non-person-affecting principles to motivate legal rules (more on that below), however, the ex ante perspective seems more important, and perhaps the question should subtly shift to what *would* the parents have done if the law prevented them from producing disabled children. From that perspective, it seems that not all intentional diminishment cases are same number cases. Suppose the deaf parents say they will only conceive a child if it can be deaf (using either selection or genetic modification). In such a case, although the parents *could* have conceived a hearing child instead (and thus their decision not to do so was wrongful according to the non-person-affecting principle), if the legal rule prevents them from intentionally creating a deaf child, that rule *will* lead them not to have any child at all, which is *not* better on non-person-affecting grounds. Thus, in determining whether a legal intervention to prevent parents from undertaking intentional diminishment is justified on this principle, we would need to know for how many parents the introduction of the legal rule will cause them to (1) substitute an undiminished child, versus (2) refrain from having a (or a further) child. We would also need a theory of how to value each of these two possibilities, in order to determine how to trade them off in terms of what would be welfare promoting.[45]

A still deeper question as to this approach to the problem is whether legal liability is appropriately motivated by non-person-affecting principles at all.[46] Tort and criminal liability typically focus on cases

principles interact. *See* BUCHANAN ET AL., *supra* note 1, at 254–55.

45. Of course, diminishment and the number of children one has could also interact in much more complex ways—for example, it may be that the extra resources required to raise a diminished child means you can only afford to raise one such child, but if instead you had undiminished children, you could afford to have two. Moreover, if the legal rule causes the couple to adopt rather than have a child genetically related to them, how ought we to evaluate the benefit to the adopted child from an *all things considered* point of view?

46. I will highlight one other problem with the non-person-affecting principle approach that goes to its suitability as a basis for moral wrongfulness: the difficulty it poses for drawing a line between a duty to avoid diminishment and a duty to engage in enhancement. For additional critiques, see, Rakowski, *supra* note 17, at 1371–88. If it would be better to avoid acts or omissions that produce diminished children with reduced welfare, it would also seem to be better to engage in acts or omissions that produce children with *improved* welfare, that is enhancements. Thus, the philosopher Julian Savulescu argues for a "moral obligation to have the best children" that he calls the principle of "Procreative Beneficience," that is, "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." Julian Savulescu, *Procreative Beneficence: Why We Should Select the Best Children*, 15 BIOETHICS 413, 415 (2001). Savulescu himself seems to

where the behavior of one person sets back the interests of a person or set of persons, and we want to deter the harmful conduct, compensate the harmed party, or both. On non-person-affecting principles, that is not our goal; our goal is to bring about outcomes that would be better in a global welfarist sense, even if they are not better for any existing person. For that reason, I am skeptical that this approach can ground legal liability.

B. OTHER-PERSON-AFFECTING PRINCIPLES

A different response is to suggest that while the Non-Identity Problem depends on the idea that *the child* has not been harmed by being born, that does not mean that *others* have not been harmed. I call this family of arguments "other-person-affecting principles." As a first cut, we might divide this family of arguments into two types: third-party-effects arguments (a kind of externality argument) and "modified experience" or "corruption" type arguments.

Third-party-effects arguments are a familiar category for legal scholars. Very few actions are truly private; they will almost always impose costs or benefits on others. Intentional diminishment is no exception: "generally the birth of a child with a profound disability will be worse, either economically or emotionally, for other people than the birth of a child who lacks the disability."[47] These negative effects might take the form of placing burdens on the public fisc. For example, the Individuals with Disabilities Education Act ("IDEA") requires the federal government to fund state and local agencies to ensure "appropriate" education for the disabled "to meet their unique needs."[48] Title II of the Americans with Disabilities Act ("ADA") forbids state and local governments from denying to a "qualified individual with a disability" participation in or the benefits of "the services, programs, or

equivocate in stating the principle between choosing/enhancing a child with the "the best life" and one with "at least as good a life as the others," but the logic of the non-person-affecting principle and his argument suggests it really is a moral obligation to have the *best* possible children. Brock, and his later coauthors, by contrast, suggest a more restrained non-person-affecting principle, an obligation to avoid creating children who will "experience *serious* suffering or limited opportunity," Brock, *supra* note 10, at 273 (emphasis added), or "experience *serious* suffering or limited opportunity or *serious* loss of happiness or good," BUCHANAN ET AL., *supra* note 1, at 249 (emphasis added). Most attempts to draw a line between avoiding diminishment and obligating enhancement either focus on a claim that some enhancements are not good for the child (to the extent it allows parents to hegemonically foreclose certain avenues for the child instead of securing a "right to an open future"), the claim that the availability of enhancements problematically exacerbate inequalities between those who have access to enhancing technologies and those who do not, or the claim that enhancements impose externalities on third parties. *See generally id.* at 156–203. Whether these distinctions work, and whether they work for all kinds of enhancements, is a question I leave for another day.

47. *See* Rakowski, *supra* note 17, at 1370, 1382–83.

48. 20 U.S.C. § 1400(d)(1)(A) (2006); *see* Bd. of Educ. v. Rowley, 458 U.S. 176, 179–84 (1982); Little Rock Sch. Dist. v. Mauney, 183 F.3d 816, 820–21 (8th Cir. 1999).

activities of a public entity," for instance by requiring a state courthouse to have an elevator.[49] Intentional diminishment may also place burdens on private employers, for example under the accommodations requirements of Title III of the ADA.[50] Even within a family, intentional diminishment may impose substantial burdens on other family members. In the mundane case, the birth of an intentionally diminished child may require large amounts of caretaking investment by parents, reducing the amount of time available for existing children in the family. In the extreme case it may require a sibling to undergo bone marrow transplants or other invasive surgery to help the diminished sibling survive, or face the guilt of being responsible for one's sibling's demise.[51]

Because they do not rely on harm to the child, but instead the imposition of harms to others, an argument for liability premised on the negative third-party effects caused by intentional diminishment evades the Non-Identity Problem.[52] The argument does confront a different problem in that we attach a high value to reproductive autonomy, and allow individuals to make reproductive choices in the ordinary case even when it imposes costs on others. Smolensky, however, has argued that the cases of intentional diminishment are special in this regard such that, at least as a federal constitutional matter, government regulation through tort liability or other means to prevent these activities will not violate a protected autonomy right.[53] For the purposes of this Article I will just assume, arguendo, that Smolensky is correct in this claim.[54]

49. 42 U.S.C. §§ 12131–12133 (2006); Tennessee v. Lane, 541 U.S. 509, 513–18 (2004).

50. 42 U.S.C. § 12112(b)(5)(A); *see, e.g.*, Sutton v. United Air Lines, Inc., 527 U.S. 471, 477–79 (1999).

51. *See, e.g.*, Susan M. Wolf et al., *Using Preimplantation Genetic Diagnosis to Create a Stem Cell Donor: Issues, Guidelines & Limits*, 31 J.L. MED. & ETHICS 327, 330–36 (2003) (discussing real life versions of these "savior sibling" cases and the bioethics issues posed).

52. Of course, third-party effects can be positive as well as negative. If deaf parents or others also receive a benefit when a deaf rather than hearing child comes into existence, that too has to be factored into an *all things considered* welfarist evaluation.

53. Smolensky, *supra* note 1, at 306–08, 325–30.

54. For another argument suggesting that the right to engage in intentional diminishment is not part of what the Constitution protects as "procreative liberty," see, JOHN ROBERTSON, CHILDREN OF CHOICE 170–71 (1994). It is not clear whether Smolensky is making only a claim about what the Constitution actually protects or also a normative claim about what she thinks it (or common law, or statutory law) should protect. An argument for legal liability on this or many of the other theories discussed would, of course, require defeating both the normative and positive law versions of the autonomy argument.

A separate unresolved problem is how to square this approach with the fact that most of us accept the costs imposed by these statutes in the mundane case where they require us to accommodate an already existing person who has a disability. Perhaps we can draw a distinction between a duty to accommodate a disability when it is beyond someone's control versus taking steps to prevent the disability from happening at all? This would lead to interesting questions about what our obligations should be to someone who intentionally or negligently acted in such a way to bring about a disability in themselves, which in turn interfaces with a burgeoning literature on responsibility for health states. *See, e.g.*, Dan Wikler, *Personal and Social Responsibility for Health*, 16 ETHICS & INT'L AFF. 47, 49–55

Is the third-party-effects-based argument an appropriate basis for legal liability? It is beyond cavil that the prevention of negative third-party effects can serve as the basis for criminalizing certain conduct; such an argument is frequently offered as a justification for banning certain "victimless" crimes such as gambling and drug use.[55] Such an argument might also justify an action pursued by the government to recover the costs for the public fisc, which would ensure that the tortfeasor compensates the correct victim—those who bear the burdens of the negative third-party effects.[56] That said, because third-party effects are so pervasive, we will always face the question of how much harm of this kind must arise before we take action, whether in the form of criminal liability or other interventions.

In civil remedial design, in the name of deterrence, we sometimes tolerate a less exact fit between who may bring suit and who deserves compensation; the idea of a private attorney general, for example in the form of a *qui tam* False Claims Act suit or the citizen suit provisions of many environmental statutes, presupposes that a plaintiff who brings suit to vindicate the public deterrence function will line her own pocket, notwithstanding the fact that she was no more aggrieved than anyone else by the bad conduct.[57] A kind of private attorney general scheme might also be available here.

Could a third-party-effects argument justify a suit by the resulting child against its parents within the boundaries of ordinary tort law? It is commonplace to think of tort as having both a compensatory and

(2002).

55. *See, e.g.*, Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 756–57 (2002); Mariano-Florentino Cuéllar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 365 n.214. Of course, "victimless" is a misnomer in the sense that those who are victimized are those who bear the costs of the negative third-party effects.

This kind of argument might also give rise to a number of regulatory policies unconnected to liability. For example, it might lead to a policy to encourage the use of PGD, either by subsidizing hospitals who buy the necessary equipment, or through state level insurance mandates requiring that all insurers cover PGD as part of pregnancy coverage, in the hope it will help avoid *negligent* diminishment cases.

To be frank, one concern I have with the other-affecting-principle approach is that it might support an argument for legal regulation to discourage or prevent women from implanting pre-embryos that are identified as likely to carry disabilities. The existing constitutional jurisprudence prohibits the state from forcing women to have an abortion in such situations, but as I have suggested in other work, it is not at all clear that the state faces the same limitations if it tries to intervene *before* a pre-embryo has been implanted. *See* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1148–65 (2008).

56. Indeed, in cases where the doctor produces the diminishment, wrongful birth actions by parents are a form of third-party-effects tort liability. *See* Hensel, *supra* note 12, at 141–43.

57. *See* William B. Rubenstein, *On What a "Private Attorney General" Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2142–56 (2004).

deterrent function, and to recognize that it is difficult to fully achieve both simultaneously, such that in order to achieve full deterrence we must sometimes over-compensate a tort victim.[58] One example is the awarding of punitive damages in tort cases above what is required for compensation; those damages are a complete windfall for the particular plaintiff but are awarded to serve the deterrent function of torts.[59]

Allowing a resulting child damages for intentional diminishment represents a more extreme case: in the punitive damages case the victim is entitled to one category of damages as compensation but we give him a second category as a complete windfall in order to ensure the desired level of deterrence; in this hypothetical action by the child for intentional diminishment all damages are a windfall since he is the one party who has *not* been harmed, and is thus entitled to none of it as compensation. There is, of course, a pervasive disagreement in tort theory as to whether the law's conferral of a right of action against a wrongdoer on someone other than a victim of the wrong is properly considered to be tort law at all. While corrective justice and civil recourse theorists believe that it is an essential element of tort "that the defendant must make his or her payment *to the plaintiff*, and not simply to the state, the attorney, or some other party," efficient deterrence and certain other tort theorists (especially those in law and economics) do not in principle care "whether the payment is made to the plaintiff or to someone else-all that matters is that the defendant is forced to part with the money, not who receives it" and they are thus willing to tolerate a more radical uncoupling of deterrence and compensation in tort.[60] I have no illusion of resolving that

58. *See, e.g.*, Robert A. Katz, *Too Much of a Good Thing: When Charitable Gifts Augment Victim Compensation*, 53 DEPAUL L. REV. 547, 584 n.191 (2003) ("[T]o achieve optimal deterrence, tortfeasors must bear the full costs of their risky behavior, even if this overcompensates the occasional tort victim."); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 553–56 (2005).

59. On the other hand, there is a debate as to whether punitive damages should really be part of tort at all, or whether we should instead view it as something like "crimtorts." *See, e.g.*, Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 739–40 (2008). Moreover, a recent line of Supreme Court cases, culminating in *Philip Morris USA v. Williams*, have required an increasingly tight fit between the amounts of punitive and compensatory damages awarded in order to pass muster under the Federal Constitution's Due Process Clause. 549 U.S. 346 (2007). The many statutory actions giving plaintiffs multiple damages—for instance, the Equal Credit Opportunity Act, Fair Credit Reporting Act, Fair Debt Collection Protection Act, and the Magnuson-Moss Consumer Warranty Act—offer another example of the same idea. *See* Koenig, *supra*, at 776 n.168. Still another example comes from civil rights cases in which some of the circuits have explicitly upheld awards of punitive damages even in the absence of actual damages. *See, e.g.*, Cush-Crawford v. Adchem Corp., 271 F.3d 352, 357–59 (2d Cir. 2001) (Title VII); Alexander v. Riga, 208 F.3d 419, 430–34 (3d Cir. 2000) (Fair Housing Act); Timm v. Progressive Steel Treating, Inc., 137 F.3d 1008, 1010 (7th Cir. 1998) (Title VII). Of course, these are statutory actions, not common law tort.

60. *See, e.g.*, Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 700–02 (2003) (emphasis added); *see also* John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315, 1335–36 (2003) (civil recourse).

debate here, and will just note that one's position on this debate will in part determine whether one believes that a suit by the child against his parents for intentional diminishment in these circumstances is appropriate on the third-party-effects rationale.[61]

Third-party–effects-based arguments are only one kind of other-person-affecting–principle-type argument; a different strand departs from what, in the area of commodification, I have called "corruption," and Professor Altman has called "modified-experience" arguments.[62] The idea is that permitting a technology or a kind of exchange to be used might "do violence"[63] or "denigrate"[64] our views of how goods are properly valued; that they may alter our sensibilities in a way that leads us to "regard each other as objects with prices rather than as persons."[65]

In an essay directed primarily towards cloning, Leon Kass offers ideas that might be characterized along these lines, expressing his fear that increased use of these technologies wear down "the wisdom of repugnance."[66] "Repugnance," he argues,

> revolts against the excesses of human willfulness, warning us not to transgress what is unspeakably profound. Indeed, in this age in which . . . our given human nature no longer commands respect, in which our bodies are regarded as mere instruments of our autonomous rational wills, repugnance may be the only voice left that speaks up to defend the central core of our humanity. Shallow are the souls that have forgotten how to shudder.[67]

Among other things, Kass laments how reproductive technologies such as cloning (but we might add IVF and PGD) turn "procreation into manufacture," and that such technologies (in which the manufacturer

61. Even for those who are comfortable with uncoupling deterrence and compensation, nothing in the argument requires that we single out the disabled child as the one who ought to have standing to serve as the vehicle to ensure optimal deterrence, as opposed to any other plaintiff. Indeed, as the one person who was *not* harmed, there is a good argument for *not* using the disabled child in this fashion. The best argument I can think of for singling out the disabled child as the one to bring these suits is pragmatic, that the child has the best access to the information needed to bring forth the claim. But this does not seem particularly persuasive. There is a countervailing risk that the child is less likely to bring suit than other possible litigants because doing so entails disrupting the family relationship, in which case a different arrangement might produce better deterrence. It might also be thought of as particularly awkward for the child to bring suit to vindicate the claim that her existence poses undue costs on others.

62. *See* Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 294–97 (1991); I. Glenn Cohen, Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 691–92 (2003).

63. Cohen, *supra* note 62, at 698–99.

64. *Id.* at 691.

65. Altman, *supra* note 62, at 295.

66. Leon R. Kass, *The Wisdom of Repugnance*, *in* THE ETHICS OF HUMAN CLONING 3, 19 (Leon R. Kass & James Q. Wilson eds., 1998). I am not sure Kass would himself frame his arguments as "modified-experience" or "corruption" ones, though I think they lend themselves to this approach. In any event, consider the argument a variation on Kass if not strictly Kassian.

67. *Id.*

"stands above [the creation] not as an equal but as a superior, transcending it by his will and creative prowess") are "profoundly dehumanizing, no matter how good the product."[68] Designing babies to have disabilities might be particularly objectionable on this view.

The Non-Identity Problem is no obstacle to this kind of argument because the victim is not the resulting child but all of society who suffers the supposed dulling of sensibilities. This kind of argument, which is frequently offered in areas such as commercial surrogacy[69] and physician-assisted suicide[70] is, of course, very controversial, and open to all sorts of challenges. For example, what is the likelihood that the change in sensibilities will occur? What is the mechanism? What is the argument in the first place for maintaining the norm that is threatened? It may be that the form of the argument I have drawn from Kass is particularly susceptible to challenge, but evaluating that argument is not my purpose here; rather, I merely want to show that such an argument offers a reason for concluding that the parents have acted wrongfully in the intentional diminishment case that does not run afoul of the Non-Identity Problem.

Modified-experience arguments are usually operationalized by criminal prohibition—for example the decision of some jurisdictions to criminalize commercial surrogacy and bestiality—because that form of liability is thought to carry the strongest expressive message. Concluding that intentional diminishment was wrong based on this view would give a reason to prohibit it criminally. Some tort scholars have suggested that tort law can also serve this function,[71] but this seems more likely as a supplementary function for tort rather than a primary motivation for it.

C. VIRTUE ETHICS

A different kind of response to the Non-Identity Problem is drawn from a broadly virtue ethics or aretaic tradition. This tradition suggests that an action is right if the action is one that a virtuous moral agent would characteristically perform under the circumstances.[72] In *The Case Against Perfection*, Michael Sandel offers a virtue ethics style argument

68. *Id.* at 38–39.

69. *See, e.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1933 (1987) ("[In commercial surrogacy w]e must also consider the commodification of children. The risk is serious indeed, because, if there is a significant domino effect, commodification of some children means commodification of everyone."); *see also* Altman, *supra* note 62, at 297 ("Arguments for making important decisions based on concern for preserving sensibilities, especially observers' sensibilities, should be greeted with great caution.").

70. *See, e.g.*, Ken Levy, Gonzales v. Oregon *and Physician-Assisted Suicide: Ethical and Policy Issues*, 42 TULSA L. REV. 699, 727–28 nn.124–28 (collecting sources offering this kind of argument).

71. *See, e.g.*, Koenig, *supra* note 59, at 771–74 (arguing that punitive damages in tort can serve a similar boundary-setting function that prevents the erosion of social mores).

72. *See, e.g.*, Lawrence B. Solum, *Natural Justice*, AM. J. JURIS. 65, 65–76 (2006); Rosalind Hursthouse, *Virtue Ethics*, *in* STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta et al. eds., rev. ed. 2007), http://plato.stanford.edu/entries/ethics-virtue/.

against *enhancement* focusing on the parental virtues.[73] For Sandel, the problem with enhancement "lies in the hubris of the designing parents, in their drive to master the mystery of birth . . . it disfigures the relation between parent and child, and deprives the parent of the humility and enlarged human sympathies that an openness to the unbidden can cultivate."[74] While Sandel's book is focused on enhancement, the same arguments can be made as to intentional diminishment—it too is a negation of the parental virtues, by showing an inappropriate desire of mastery as to the destiny of the child, and a lack of openness to the unbidden. Indeed, intentional diminishment might seem like "unparental" action even more clearly than enhancement, in that in some cases the parent is choosing to impose a detriment on the child for the sake of the parent's own happiness or interests.

The Non-Identity Problem poses no obstacle for an argument along the lines offered by Sandel. For him, like many in the virtue ethics camp, the character of the agent doing the action is what is central in determining its wrongfulness.[75] Thus, for Sandel, it appears that the practice of enhancement is wrong even if we grant that a given enhancement benefits the resulting child.[76] Because the Non-Identity Problem's power stems from demonstrating the lack of harm to the child, it is powerless against this kind of argument, which does not depend on making a claim of harm to the child.[77]

It is much less clear, however, whether a virtue ethics argument along the lines offered by Sandel is compatible with legal liability. While virtue ethics is enjoying something of renaissance in American legal circles,[78] it is somewhat foreign to traditional tort theory which has

73. I should stress that the classification of Sandel's argument is mine and not his.

74. MICHAEL J. SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING 46 (2007).

75. *See* Hurstone, *supra* note 72; Solum, *supra* note 72, at 65–76.

76. *See* SANDEL, *supra* note 74, at 1–4, 11–19, 94–97 (emphasizing that his argument is distinct from arguments against enhancement relating to safety, autonomy, or distribution of benefits).

77. Once again, this should not be taken as an endorsement of the position offered by Sandel. Frances Kamm, for example, has critiqued an earlier version of Sandel's argument for its focus on the desire for mastery as being the wrong-causing element of enhancement—giving the example of a scientist who sought to cure blindness not out of compassion but out of a desire for mastery, and suggesting that we do not think him to have acted immorally—and questioned whether Sandel's openness to the unbidden would also make it wrong to take steps to prevent natural disasters like tornados or to cure cancer. *See* Frances M. Kamm, *Is There a Problem with Enhancement?*, 5 AM. J. BIOETHICS 5, 6–9 (2005). In his more recent work, Sandel has tried to accommodate this critique by suggesting that his point is merely that "the moral stakes in the enhancement debate are not fully captured by the familiar categories of autonomy and rights, on the one hand, and the calculation of costs and benefits, on the other. My concern with enhancement is not as individual vice but as a habit of mind and way of being." SANDEL, *supra* note 74, at 96.

78. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHIL. 178, 180–81 (2003) (collecting articles applying virtue ethics to, *inter alia*, antitrust, civil rights, corporate, criminal, employment, and environmental law, as well as offering a virtue ethics take

focused on justice and efficiency.[79] While there have been some attempts at reformulations of tort law to reflect a virtue ethics focus,[80] it is also quite clearly still at the fringe of current tort thinking.[81] A virtue ethics approach may be slightly more consonant with other forms of legal liability such as criminal law. A number of authors have suggested that concern for the character of the perpetrator is a central aspect of criminal law,[82] and there are certainly categories of crimes (vice crimes such as gambling and prostitution, for example) where the focus on character is still closer to the surface. Still, virtue ethics seems far from central as a ground for making actions criminal in our system.

D. WRONGING WHILE "OVERALL" BENEFITING

A final set of responses to the Non-Identity Problem might suggest that while the problem correctly demonstrates that we have not "overall" *harmed* a resulting child by intentional diminishment, that does not mean we have not *wronged* him.[83] To give two examples not related to bioethics, it is sometimes argued that:

> [I]f we do not allow a competent adult to make a decision for himself, we may wrong him, even if he is thereby prevented from doing something bad to himself. If we do not let a black person on an airplane because it is segregated, we have wronged him, even if the plane crashes, and his life is saved by our act.[84]

Professor Shiffrin offers one view of parental liability for procreation along these lines.[85] Shiffrin rejects the "comparative model" of harm—in

on judging).

79. Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT. L. REV. 1431, 1450–52 (2000).

80. *See id.* at 1462–66 (arguing for a view of the reasonable person standard in negligence as an attempt to determine whether the tortfeasor was one who showed the virtues of reasonableness, prudence, and carefulness).

81. *See* Kenneth W. Simons, *The Hand Formula in the Draft* Restatement (Third) of Torts*: Encompassing Fairness as Well as Efficiency Values*, 54 VAND. L. REV. 901, 933–34 (2001).

82. *See, e.g.*, Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423–44 (1995); *see also* Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CAL. L. REV. 323, 363–64 (2004).

83. Of course, for consequentialists the Right and the Good are coextensive, what is right is what maximizes good states of the world. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 19–23 (Rev. ed. 1999); L.W. SUMNER, WELFARE, HAPPINESS, AND ETHICS 3 (1996). Deontologists and other nonconsequentialists, however, believe in the priority of the Right over the Good, that there may be actions which promote good states of the world that are nonetheless wrong. *See, e.g.*, RAWLS, *supra*, at 22–26.

84. Kamm, *supra* note 31, at 72 (citing James Woodward, *The Non-Identity Problem*, 96 ETHICS 804, 810 (1986)). To be sure, some would object that these examples are explicable within consequentialism.

85. For others, see, for example, Dena S. Davis, *Genetic Dilemmas and the Child's Right to an Open Future*, 27 HASTINGS CENTER REP. 7, 12 (1997) (arguing that "disabled persons wishing to reproduce themselves in the form of a disabled child . . . violate[] the Kantian principle of treating each person as an end in herself and never as a means only" because "they define the child as an entity who exists to fulfill parental hopes and dreams, not her own"); Elizabeth Harman, *Can We Harm and*

which harm and benefit represent two sides of the same scale—and its "principle that one may inflict a lesser harm on someone simply to benefit him overall, when he is unavailable to give or deny consent."[86] She instead endorses an asymmetrical noncomparative approach on which harm is associated with noncomparative absolutely bad states such as broken limbs, disabilities, death, significant pain, etc., and benefit is associated with goods such as material advantage, sensual pleasure, goal fulfillment, etc.[87] Shiffrin then distinguishes between two types of benefits, those that represent the "removal from or prevention of harm," and a residual category she terms "pure benefits."[88] She argues for a principle that it is permissible to inflict a lesser harm to remove or prevent a greater harm, but wrong to do so in order to confer a pure benefit.[89]

For some cases both her view and the comparative view produce the same result. To use Joel Feinberg's example, when a rescuer must break the arm of an unconscious person (who therefore cannot consent) in order to save him, the comparative view suggests the action is right because the individual has been overall benefited, the harm of the broken arm is outweighed by the benefit of being saved; on Shiffrin's view the action is also permissible because the harm of the broken arm is outweighed by the benefit of avoiding a greater harm.[90]

In some cases, however, the two views diverge. Shiffrin uses the fanciful hypothetical of a wealthy inhabitant of an island, "Wealthy," who cannot set foot on another island nor communicate with its inhabitants.[91] The other island's inhabitants are comfortably well-off, but

Benefit in Creating?, 18 PHIL. PERSP. 89, 93 (2004) (arguing that "an action harms a person if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed if the action had not been performed," and "reasons against harm are so morally serious that the mere presence of greater benefits to those harmed is not in itself sufficient to render the harms permissible: when there is an alternative in which parallel benefits can be provided without parallel harms, the harming action is wrong"); F.M. Kamm, *Baselines and Compensation*, 40 SAN DIEGO L. REV. 1367, 1385 (2003) ("[C]reators owe their creations, at reasonable cost, certain things that I call the 'minima' [which] involve *more* than just things that make lives barely worth living[, such that] I do not think that giving half a loaf, as distinct from giving a whole loaf and then taking half away, is permissible if the half a loaf falls below the minima."); Woodward, *supra* note 84, at 813–21 (arguing from a principle that "it can be wrong to adopt a course of action which will both bring certain obligations into existence and make failure to meet them unavoidable, even though this course of action affects another's overall interests as favorably as any other course of action would").

86. Shiffrin, *supra* note 1, at 119–22, 131–34. I will not do Shiffrin's incredibly interesting argument full justice in this short recap, omitting, *inter alia,* her discussion of an objection from hypothetical consent and built-in compensation.

87. *Id.* at 120–25.

88. *Id.* at 124–25.

89. *Id.* at 125–27.

90. *Id.* at 123–27 (citing JOEL FEINBERG, FREEDOM AND FULFILLMENT: PHILOSOPHICAL ESSAYS 5 (1994)).

91. *Id.* at 127–28 (setting out the full hypothetical).

Wealthy desires to make them richer. The only way for Wealthy to do this, in Shiffrin's hypothetical, is to drop gold bullion cubes of five million dollars value each from his airplane while passing over the island knowing there is some risk he may hurt someone. Most people are delighted by the gold drop, but one person, "Unlucky," is hit by a falling cube and his arm is broken. If Unlucky thinks that all things considered he has been benefited since the cost of repairing his arm is less than five million dollars (though he is unsure whether he would have consented ex ante to the risk) then, on the comparative view the action is right—a harm has been inflicted to produce an overall benefit. On Shiffrin's view, however, the action was wrong, because harm was inflicted without prior consent to bestow only a "pure benefit," not the avoidance of greater harm, and therefore Wealthy owes compensation to Unlucky for that harm.[92]

Shiffrin then extends the idea to wrongful life cases, but we can apply her analysis to the case of intentional diminishment. She argues that no one is harmed by not being created, such that being born confers on the child a pure benefit but not the avoidance of harm.[93] In intentional diminishment cases, the parents have without prior consent imposed a harm (deafness) on the child not to avoid a greater harm, but to bestow a pure benefit. Therefore, they have acted wrongly even though they have benefited the child overall.

Once again, my intention is not to offer a full evaluation of this argument, but to demonstrate how it avoids the Non-Identity Problem, and to interrogate its suitability as a ground for legal liability. Shiffrin's position evades the Non-Identity Problem by revealing that the problem holds sway only on the comparative view—its power comes from the fact that we think a child with a life worth living has been *overall* benefited by being born, but on Shiffrin's view overall benefit is not the touchstone for right action, what matters is avoiding imposing harm unless one is doing so to avoid a greater harm.

Is Shiffrin's view a suitable basis for tort liability in intentional diminishment cases? Shiffrin thinks this provides a compelling basis for tort liability in wrongful life cases (and thus we can extend it to intentional diminishment cases), where the children should be able to sue for the harm inflicted even if it was offset by the bestowal of a pure benefit.[94] But is this distinction between pure benefits and the avoidance of or protection from harm one that is compatible with tort law more generally? As the *Restatement (Second) of Torts* suggests, where "equitable," we treat the fact that the tortious action "conferred upon

92. *Id.*

93. *Id.* at 119–20. One (deep) open question is whether being created is a benefit at all.

94. *Id.* at 117–19, 135.

the plaintiff a special benefit to the interest which was harmed" as a mitigation of the damages caused.[95] At the same time the *Restatement* does not adopt the "anything goes" attitude towards mitigation that would seem to follow from the comparative approach (and the Non-Identity Problem). While the *Restatement* does not constrain using Shiffrin's pure benefit versus harm avoidance distinction, it does constrain using the same interest test, explaining in the Comments that "[d]amages resulting from an invasion of one interest are not diminished by showing that another interest has been benefited,"[96] and illustrating, *inter alia,* by suggesting that in a case of false imprisonment with damages claimed for pain, humiliation, and physical harm, the fact that the victim is later able to sell his story to the newspapers and make large sums of money is not mitigative.[97] While quite different from Shiffrin's constraint, perhaps the *Restatement*'s constraints on the mitigation doctrine opens the door sufficiently to suggest some compatibility of her views with tort law.[98] This argument might also draw on other literature suggesting separate spheres of valuation and their incommensurability[99] to claim that tort law should not permit the offsetting of the benefit of existence against the harm of deafness.[100]

A problem with Shiffrin's argument is that it threatens to prove too much in the way of tort liability, in that she thinks that *in theory* tort liability ought to lie not only in the exceptional case of wrongful life but in the normal case of general procreation, because even in the normal case the child "must endure the fairly substantial amount of pain, suffering, difficulty, significant disappointment, distress, and significant loss that occurs within the typical life," harms that are imposed without consent only to bestow a pure benefit (existence).[101] One possibility Shiffrin suggests (but does not commit to) is that this does not make procreation wrong per se, but only makes it wrong "to procreate without undertaking the commitment to share or alleviate any burdens the future

95. RESTATEMENT (SECOND) OF TORTS § 920 (1979).

96. *Id.* cmt. b.

97. *Id.* illus. 6.

98. Shiffrin suggests her view may challenge the *Restatement* or give a "constrained reading of what constitutes equitable mitigation." Shiffrin, *supra* note 1, at 130 n.30.

99. *See generally* MICHAEL WALZER, SPHERES OF JUSTICE 1–10 (1983); *see also* Brock, *supra* note 9; Cohen, *supra* note 62, at 696–703.

100. Another possible way to achieve a *rapprochement* of this kind of argument (whether Shiffrin's version or another) with tort law might be to group intentional diminishment with the "dignitary" torts, such as false imprisonment, invasion of privacy, and offensive battery, for which we recognize tort liability even in the absence of a showing of harm to the individual. *See* DAN B. DOBBS, THE LAW OF TORTS § 42 (2001) (discussing these torts). Whether such an approach succeeds would depend on the viability of a claim that those torts are best seen as cases where someone has been wronged without being *harmed* (in the sense of setback of interests) rather than cases where someone has been harmed without being *physically* harmed.

101. Shiffrin, *supra* note 1, at 137–39.

child endures," and that in the normal case this duty is discharged by participation in child rearing and child support.[102] Thus, while theoretically tort suits by children against parents ought to be available in even the case of normal procreation, "[w]e need not, and standardly do not, provide judicial relief for all moral claims," such that in the normal procreation cases it may be that the ordinary duties of support make these suits unnecessary and "might justify limiting wrongful life causes of action to those children who suffer disproportionately great burdens."[103] She also suggests that the argument for liability is strongest for parents who behaved negligently in imposing these special risks,[104] and thus it ought to be very strong for intentional diminishment where we have not only negligence but intentional action.

If one were to reject Shiffrin's characterization of the usual difficulties of life as "harms,"[105] it may be possible to recast her argument as giving a reason to find intentional diminishment wrongful without entailing that all procreation is prima facie wrongful.

CONCLUSION

Smolensky's project is to try and determine whether there is room for legal liability (specifically in tort) against parents who intentionally diminish their children using assisted reproductive technology given Parfit's Non-Identity Problem. In this Article I have tried to further this project in two ways.

First, I have suggested some problems with her attempt to exempt cases of intentional diminishment done through genetic manipulation from the no-liability conclusion she reaches as to cases where it is done by selection. I have shown why I find problematic the specific arguments she offers and more generally why I am skeptical that this entire approach is a workable one for law.

The more constructive element has been to suggest that even when the Non-Identity Problem applies it may not be a bar to legal liability. I have set out four kinds of approaches drawn from the bioethics literature that suggest that the parents have acted wrongfully by engaging in intentional diminishment notwithstanding the Non-Identity Problem. I have then tentatively evaluated whether any of these approaches would

102. *Id.* at 139.

103. *Id.* at 142.

104. *Id.* at 143.

105. Frances Kamm has questioned Shiffrin's treating "as problems or being in a harmed state some of the very things that give value to human life, such as moral consciousness," and expressed her worry that "Shiffrin's argument would lead one to conclude that creating creatures incapable of moral choice, never in pain, and unaware of truths such as the prospect of death, like extremely happy, long-lived rabbits who have no other problems, would be preferable to creating human persons as they are now." Kamm, *supra* note 85, at 1384.

give rise to legal liability, and what form that liability would take. To recap, *non-person-affecting principles* (in same number cases) seem an unlikely basis for legal liability at all. When the *other-person-affecting* approach takes the form of a third-party–effects-based argument, it might serve as a basis for criminal liability, some kinds of government actions or private attorney general actions, tort suits by third parties, and possibly a tort suit by the child (depending in part on how far we are willing to extend the boundaries of tort beyond the archetypal case of harm to the plaintiff). When the argument takes the modified-experience or corruption form, criminal liability seems like the better fit. While some argue that *virtue ethics*–based arguments can form the basis for criminal and tort liability, this is still very much a fringe position, especially on the tort side. Finally, arguments premised on the idea that one can *wrong another while overall benefiting him* might form a basis for tort liability, though it will depend on how much flexibility there is in determining whether tort-produced benefits are mitigative here.

Throughout this discussion I have more or less bracketed the normative question about whether any of these approaches themselves offer a sound account of why we should treat intentional diminishment as wrongful. That analysis would depend both on an evaluation of more general moral theory commitments (e.g., consequentialism versus nonconsequentialism) and the specific instantiation of each kind of argument (e.g., while I have focused on Shiffrin's wronging-while-overall-benefiting-type argument, there are a number of other specific versions of this approach). This evaluation seems to me the next step in the intriguing project Smolensky has begun.