

Is Moral Theory Perplexed by New Genetic Technology?

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TABLE OF CONTENTS

I.	INTRODUCTION	715
II.	DO GENETIC TECHNOLOGY ADVANCES REQUIRE RETHINKING DISTRIBUTIVE JUSTICE?	718
III.	TOWARD PLAUSIBLE CANDIDATE FUNDAMENTAL MORAL PRINCIPLES	719
IV.	THE MORALITY OF INCLUSION: PUZZLES AND A SOLUTION.....	722
	A. <i>Not New</i>	724
	B. <i>Already Available Theories of Justice Address the Issue</i>	724
	C. <i>In Reply</i>	726
V.	FAIR EQUALITY OF OPPORTUNITY	729

I. INTRODUCTION

*From Chance to Choice: Genetics and Justice*¹ intelligently addresses difficult issues at the intersection of medical ethics and the theory of justice. The authors Allen Buchanan, Dan W. Brock, Norman Daniels, and Daniel Wikler repeatedly emphasized their opinion that advances in genetic technology force upon us entirely new ethical questions that previous moral theories lack the resources to resolve.² The claim that

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1. ALLEN BUCHANAN ET AL., *FROM CHANCE TO CHOICE: GENETICS AND JUSTICE* (2000).
2. The authors pointed to “another set of distributive justice issues raised by rapid

new scientific discoveries render previous moral theories obsolete should be regarded with suspicion. Suspicion should be further aroused when readers note another feature of the authors' theorizing that neatly fits the claim that we stand at the dawn of a new world of ethical theorizing. The authors' discussion from start to finish stayed at a middle level. That is, the authors began each chapter with a few moral principles taken to be plausible or possibly plausible and examined their implications for issues raised by new genetic technology.³ This is not an exercise in applied ethics, because the principles initially invoked are subjected to criticism and scrutiny. But in almost every significant case, the results are inconclusive. The moral puzzles that are raised are left unsolved, with moral reasons pointing towards opposed conclusions and the principles that generated these opposed reasons left in an unordered state, with no guidance as to how much relative weight to assign to one or another of these principles. The authors endorsed Rawlsian reflective equilibrium methodology⁴ in ethics, but tentative reflective equilibrium⁵ tends to remain beyond reach in the chapters of this book.

These results might be thought to justify the conclusion that the problems we now face require new age theories not yet constructed.

advances in genetic science that have not even been systematically articulated, much less resolved." *Id.* at 62–63. The authors also stated that "as the possibilities of what may be called radical genetic intervention come closer to realization, the most fundamental single framing assumption of our ordinary ways of thinking about justice, both in theory and in practice, will be shattered." *Id.* at 84–85.

3. For example, chapters 3 and 4 discuss interpretations of equality of opportunity in the light of genetic advances. *Id.* at 61–154. Chapter 5 discusses possible moral limits on would-be parents' freedom to use genetic science interventions to enhance their children's traits that are posed by equality of opportunity and the child's right to an open future. *Id.* at 156–203. Chapter 6 discusses how properly to balance reproductive freedom and the duty not to cause harm to those who do not voluntarily consent to bear the risks and costs of one's actions. *Id.* at 204–57. Summarizing their approach, the authors stated that they did not "offer a comprehensive theory," but instead deployed several "broad principles" including equality of opportunity, the prevention of harm, individual freedom, citizenship and political participation, and inclusion in society. *Id.* at 308–09.

4. The authors noted that they employed the method of wide reflective equilibrium. *Id.* at 371. The method is drawn from John Rawls. JOHN RAWLS, *A THEORY OF JUSTICE* 40–46 (rev. ed. 1999). Using this method, one tests proposed particular moral claims by seeking to identify acceptable moral principles that imply them, and one tests proposed moral principles by checking to see if the particular moral claims they would imply are acceptable. In reflective equilibrium, one embraces general moral principles and particular moral claims that are mutually consistent and that strike one as plausible after reflection. Wide reflective equilibrium is that state of reflective equilibrium one would reach after ideally extended and rationally conducted moral reflection.

5. As used in this Essay, a tentative or provisional reflective equilibrium means to refer to the outcome of an ethical discussion in which all considerations presented are accounted for and all particular moral claims defended are implied by moral principles that the discussion has found no good reason to reject.

However, this conclusion would be premature. Another possibility is that when middle level theorizing yields no decisive results, we need to shift the discussion back to first principles. Issues that appear intractable when viewed through unordered midlevel principles may be resolvable when we step back to the level of fundamental moral principles.

One should also notice the possibility that quite independently of scenarios suggested by the development of new genetic technologies, our current understanding of morality at the fundamental level is quite shaky. Different kinds of problems pull our intuitions in different directions, and no set of moral principles currently available provides a stable and intuitively acceptable reconciliation of these conflicting ethical tugs and pulls. If this is our actual situation, then a finding that current ethical theory cannot resolve in a satisfactory way some problem brought up by new genetic technologies should not lead us to the trumpet call that we are witnessing the dawn of a revolutionary new age. What we are witnessing is business as usual.

This Essay argues that *From Chance to Choice: Genetics and Justice* exhibits both of the possible flaws just mentioned. In some cases the authors discussed midlevel principles and took the inability of these principles to resolve some problem in medical ethics as evidence that the problem is, for now, intractable. However, if one looks for a more fundamental level principle adequate to resolve this impasse, one is ready at hand, and its deftness in rendering the tractable intractable provides evidence that this candidate fundamental level principle deserves to be taken seriously. In other cases the authors presented new genetic technologies as posing entirely new puzzles that current theories are inadequate to resolve. Upon examination, however, it turns out that the new problems, though genuinely perplexing for current theory, are versions of problems that have always been with us and have always been perplexing. In one case, while discussing equality of opportunity, the authors upheld a principle that I shall argue is plagued with difficulties that warrant its rejection.⁶

6. BUCHANAN ET AL., *supra* note 1, at 16. One should note that the authors stated in the preface that they disagree among themselves to some extent “regarding some aspects of the theory of just health care and the place of equality of opportunity in a comprehensive theory of justice.” *Id.* at xiii–xiv. They pointed out that Allen Buchanan was the primary author of chapters 3 and 7 while Norman Daniels authored chapter 4. *Id.*

II. DO GENETIC TECHNOLOGY ADVANCES REQUIRE RETHINKING DISTRIBUTIVE JUSTICE?

A notable attractive feature of *From Chance to Choice: Genetics and Justice* is its extended discussion of the implications for the theory of justice of puzzle cases suggested by advances in genetic technology. These discussions proceed at an admirable level of clarity and rigor. However, I discern a tendency to exaggerate the extent to which the puzzles suggested by these medical advances really require rewriting the book on social justice.

The authors asserted that several contemporary theories of distributive justice start their discussions by postulating a world of individuals differing in native talents, and, more generally, in native dispositions to develop prudentially desirable and undesirable traits.⁷ The individuals also differ in childhood social environments that they experience. In these discussions a set of institutions and practices is implicitly presupposed, so that individuals as described face unequal life prospects at the onset of adulthood. The question for social justice then becomes what compensation, if any, is morally required to improve the life prospects of worse-off individuals. The authors then stated that this framework comes unhinged if we add the possibility that medical interventions after birth can alter an individual's genes and hence her tendency to develop certain traits.⁸ Rather than compensate individuals for lack of natural talent, one perhaps should intervene to alter genes and equalize talents across individuals. The expanded possibilities for interventions to improve individuals' traits that genetic science advances might bring would expand the requirements of some egalitarian conceptions of distributive justice in radical and perhaps disturbing ways.

But why would the possibility of administering gene therapy with a view to altering someone's traits to improve her life prospects differ in principle from the familiar possibility of administering an education regime or a socialization regime with a view to altering someone's traits to improve her life prospects? A society might intervene to make an individual's social environment more conducive to individual development, boosting the individual's life prospects. This might occur by way of instituting public health programs such as vaccination, maintaining state-run public schools free to students, establishing public playgrounds, and monitoring parents and guardians to enforce a

7. *Id.* at 76.

8. *Id.* at 76–79.

sufficient level of parental nurturing and prevention of child abuse. Providing genetic therapy would be just one more tool in society's tool kit to be deployed to improve individuals' life prospects according to principles of distributive justice.

The authors noted another possibility, one that has to some extent already become actual.⁹ In a world in which genetic testing of fetuses becomes more sophisticated, potential parents can decide whether to bring to term a fetus that is diagnosed as having a condition deemed undesirable. One can envisage the development of medical technologies that enable intervention before or after conception to affect the genetic qualities of what will become new persons. The social justice issues then become, one might think, utterly transformed, from what we owe to given people to improve their life prospects to what sort of people should we bring into being.¹⁰ But of course the new issue is familiar in broad outline. It has been common knowledge for a very long time that if a smart person marries another smart person, the two are more likely to give birth to a smart child than would have been the case had the smart person married the village idiot. Assortative mating raises the moral issue of what sort of people we should bring into being. But I acknowledge that increasing genetic knowledge renders salient certain extreme possibilities that can put strain on existing distributive justice categories, much as the development of nuclear weapons might be thought to pose a new challenge for traditional just war theory. This is not to deny that increasing scientific knowledge could radically undermine the basis of a moral theory—in fact, modern science decisively threatens traditional and deep-seated notions of agency and responsibility and free will.¹¹ However, the genetic technology scenarios presented by the authors do not remotely correspond to this deep conceptual paradox production.

III. TOWARD PLAUSIBLE CANDIDATE FUNDAMENTAL MORAL PRINCIPLES

In chapters 3 and 4, the authors addressed difficult issues of distributive justice as they emerge in the context of health care policy

9. *Id.* at 2–3.

10. *Id.* at 84–86; *see also id.* at 204–57.

11. For a fine recent treatment of this topic, see DERK PEREBOOM, *LIVING WITHOUT FREE WILL* (2001).

issues.¹² Before considering their discussion of these matters, this Essay sketches an approach to social justice that is plausible and may be worthy of further examination.

Perhaps the most fundamental idea in this package is found in Amartya Sen's writings on social justice.¹³ Sen noted that people's individual characteristics vary, so that different individuals are unequally able to transform resources into goal fulfillment or well-being for themselves and others.¹⁴

If the imperative of social justice is to help enable people who are disadvantaged to lead better lives, then the basis of interpersonal comparison for the theory of justice should be the quality of life that given resources in a particular environment enable an individual to reach. One's resource or primary social goods holdings can only be a rough indicator, not the ultimate social justice concern. Here, the term "quality of life" refers to the individual's objective level of well-being, not her preference satisfaction level or happiness. We all want to achieve lives of value, not merely to satisfy our preferences, which might be confused or otherwise misdirected. Happiness, the experience of pleasure, or more broadly, a subjective sense of well-being, is a component of the good life, not the whole of it. In short, the currency of justice should be well-being.¹⁵

The authors of *From Chance to Choice: Genetics and Justice* asserted a claim that could reasonably be regarded as a significant objection against taking well-being to be the basis of interpersonal comparison for the theory of justice: citizens in modern democracies disagree about what constitutes human good.¹⁶ The wide diversity of religious belief in democratic societies indicates the depth and breadth of this disagreement. The claim that is supposed to follow is that some version of a resource-oriented theory of justice must be correct, because no welfarist alternative could elicit the reasoned agreement of all citizens. However, this thought eliminates objective well-being as the basis of interpersonal comparison for justice purposes only by invoking a skepticism about prospects of reasoned ethical agreement that would

12. BUCHANAN ET AL., *supra* note 1, at 61–155.

13. See AMARTYA SEN, *INEQUALITY REEXAMINED* (1992) (explicating the complex notion of equality of condition and explaining its place in theories of justice).

14. *Id.* at 19–21, 79–87.

15. Sen himself is cautious about drawing the inference his arguments may warrant, that the currency of justice (the standard of interpersonal comparison employed in fundamental social justice principles) should be an objective standard of utility or well-being. For a discussion of this issue, see MARTHA C. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 29–54 (1999). See also MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 11–115 (2000).

16. BUCHANAN ET AL., *supra* note 1, at 80–81.

shrivel the theory of justice if it were applied evenhandedly across the concepts of the good and the right.

Setting aside such skepticism, reflective equilibrium methods in ethics can generate stable agreement regarding both the good and the right. Much actual disagreement about the good is rooted in ignorance, confusion, superstition, and bad reasoning. But a just society that provides people fair shares of opportunity to lead genuinely good lives is not somehow rendered unjust or morally illegitimate by the fact that some citizens regard themselves as unfairly treated or having inadequate opportunity for the good because they have incorrect beliefs about the nature of human good. One should also be prepared to accept partial commensurability—some goods and ways of life may be indeterminately choice worthy, neither better nor worse than each other nor exactly as good as each other.

What constitute fair shares of opportunity for well-being? Some propose a norm of equal distribution.¹⁷ The approach favored in this Essay does not regard everyone's having the same as morally valuable, much less that it is a requirement of justice for everyone to have the same. The imperative of morality, and of justice as the social arm of morality, is to bring about improvement in the quality of people's lives, with priority given to boosting the well-being of those whose prospects for well-being would otherwise be poor.

This is the doctrine known as the priority view or prioritarianism.¹⁸ It says that acts and policies should be chosen to maximize moral value, this being a function of well-being and its distribution.¹⁹ The moral value of obtaining a well-being gain (avoiding a loss) for an individual is greater, the greater the well-being gain the benefit achieves, and greater, the lower the person's lifetime well-being expectation before receipt of the benefit. This characterization identifies a family of principles; a

17. For a defense of equality of condition, see LARRY TEMKIN, *INEQUALITY* (1993). Temkin also defends equality against priority. *Id.* at 245–82.

18. For the first published discussions on the priority view, see Paul Weirich, *Utility Tempered with Equality*, 17 *NOÛS* 423 (1983); SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 31 (rev. ed. 1994). For a thorough exposition, see DEREK PARFIT, *EQUALITY OR PRIORITY?* (1995). See also Dennis McKerlie, *Equality and Priority*, 6 *UTILITAS* 25 (1994).

19. More generally, the prioritarian holds that it is more valuable to bring about a benefit (or avoid a loss) for someone the worse their condition. This Essay ties the priority view to a particular claim about how to assess someone's condition as better or worse. Well-being refers to whatever makes a person's life intrinsically better for that very person.

specific principle is obtained by specifying how much extra moral value accrues from provision of gains to the badly off.

Prioritarianism as so far characterized is well defined only for decision problems in which the number of individuals who will exist can be regarded as fixed. This Essay will not try to formulate a version of the principle for variable population.²⁰

The question arises whether what we owe to an individual by way of boosts to her well-being varies depending on her exercise of responsibility. This might be done by stipulating that what we owe to one another is the provision of prioritarian shares of opportunity for well-being rather than any guarantee of any level of well-being itself. It might be done in other ways. I favor responsibility-catering versions of prioritarianism, but this Essay, for the most part, ignores this issue.²¹ This Essay alternates between formulating prioritarianism as requiring provision of opportunities for well-being and as requiring provision of well-being.

IV. THE MORALITY OF INCLUSION: PUZZLES AND A SOLUTION

The authors posed as an unsolved puzzle for morality the issue of inclusion of disabled people into schemes of cooperation.²² They began with the observation, first made by Daniel Wikler in 1979, that whether an individual with given traits qualifies as able in the normal way or disabled depends on the matching between the individual's traits and the

20. One promising proposed principle that fixes what should be done when population is variable is critical-level utilitarianism. This view holds that adding a person to the world is not per se morally valuable unless the person has lifetime utility (well-being) above some critical level. The critical-level idea can be joined to the priority view. See generally Charles Blackorby et al., *Critical-Level Utilitarianism and the Population-Ethics Dilemma*, 13 *ECON. & PHIL.* 197 (1997).

21. For more on this issue, see Richard J. Arneson, *Rawls, Responsibility, and Distributive Justice*, in *JUSTICE, UTILITY, AND POLITICAL LIBERALISM: THEMES FROM HARSANYI AND RAWLS* (Maurice Salles & John Weymark eds., forthcoming) (arguing that integrating a sensible account of personal responsibility into the theory of justice requires rejecting Rawls's views). See also Richard J. Arneson, *Egalitarianism and Responsibility*, 3 *J. ETHICS* 225 (1999) (urging that plausible judgments about when and why we should aid those who are worse off are better explained and justified by the priority view than by rival principles of equality or sufficiency); Richard J. Arneson, *Equal Opportunity for Welfare Defended and Recanted*, 17 *J. POL. PHIL.* 488 (1999) (arguing that principles of justice should be prioritarian not egalitarian, responsibility catering, and welfarist); Richard J. Arneson, *Luck Egalitarianism and Prioritarianism*, 110 *ETHICS* 339 (2000) (arguing that personal responsibility as reflected in the distinction between brute luck and option luck should be incorporated in fundamental moral principles, which should be prioritarian); Richard J. Arneson, *Welfare Should Be the Currency of Justice*, 30 *CAN. J. PHIL.* 497 (2000) (arguing that the measure of people's condition for the theory of distributive justice should be well-being objectively understood).

22. BUCHANAN ET AL., *supra* note 1, at 20–21, 95–99, 258–303.

going schemes of cooperation.²³ They added that the set-up of these cooperative schemes is a human contrivance and one that can be altered by deliberate policy.²⁴ The issue then becomes what limits justice places on the morally permissible constitution of cooperative schemes, given that any choice of scheme includes some and perhaps excludes some. The authors focussed on the latent or explicit choice of a dominant scheme of social cooperation, set by the entry requirements for full participation in the market economy and the governmental process and the educational system and similar large institutional schemes.²⁵

The authors set up the issue nicely but left it unresolved. One is left with conflicting considerations pulling in opposite directions, with no guideline for reconciling them. On the one side, people with diminished capacities have a legitimate interest in being able to participate fully in the dominant scheme of social cooperation, which would assure them a status of basic equality and reciprocity. Justice inclines toward the imperative of revising and opening the dominant scheme of social cooperation to render it ever more inclusive of as many marginal participants as possible. But justice is pulled from the other side as well. The countervailing tug is what the authors called the “maximizing interest” and explained in these words: “Each individual has an important and morally legitimate interest in having access to a cooperative scheme that is the most productive and rewarding form of interaction in which he or she can participate effectively.”²⁶ Beyond emphasizing the significant justice reasons that urge us to give full measure to the claims of the morality of inclusion, the authors did not offer a proposal for balancing the conflicting considerations that they adduced.²⁷

The authors did claim that identifying the problem of the morality of inclusion is itself a novel achievement. Of the conflict between the interest in widening access to the dominant cooperative scheme and in making that scheme maximally productive, they wrote: “Theorists of

23. *Id.* at 285–86; Daniel Wikler, *Paternalism and the Mildly Retarded*, 8 PHIL. & PUB. AFF. 377, 386–89 (1979).

24. BUCHANAN ET AL., *supra* note 1, at 284–87.

25. *Id.* at 20, 258–60, 288–91.

26. *Id.* at 291–92.

27. But see the authors’ interesting discussion. *Id.* at 301–02. Here the authors tentatively suggested that there might be a strong moral requirement, as a first priority, to bring as many individuals as possible to a threshold level of participation that is good enough. *Id.* Beyond that threshold, the maximizing interest has more weight.

justice have not only failed to supply a principled account of how these conflicting interests ought to be balanced; they have almost without exception failed to identify the problem as one of justice.”²⁸ Benighted theorists of justice have assumed the problem of justice to be a fair division of the benefits of social cooperation. But the prior and more fundamental problem, identified by the authors, is the choice of a framework of social cooperation.

However, the problem as characterized by the authors is not new, and there are already available theories of justice that address it.

A. Not New

All human societies have contained disabled and partially disabled individuals, more generally individuals with varying abilities. Any theory of justice that supposes that better-off individuals have some moral obligation founded on justice to aid worse-off individuals will generate an account of what is owed to the disabled, so long as the theory countenances disability as a form or component of being worse off. The account of what is owed to the disabled will fall out from the account of what is owed to those who are badly off, disadvantaged. One might get a contrary impression from reading John Rawls’s famous *A Theory of Justice*, but Rawls did not ignore or overlook the problem of disability. He explicitly assumed it away, along with all serious accidents and disease, by assuming that all members of society are able to be fully contributing participants over their entire lives.²⁹ This move is a simplifying assumption, made so he could concentrate his analytical attention on the problems his account highlights. In the wake of his book, other theorists of justice have relaxed this simplifying assumption.³⁰

B. Already Available Theories of Justice Address the Issue

This problem is one that is very plausibly treated by the prioritarian principle. The plausibility of the prioritarian approach to the problem is

28. *Id.* at 293.

29. Rawls’s most explicit discussion of this aspect of *A Theory of Justice* occurs in his later book. JOHN RAWLS, *POLITICAL LIBERALISM* 183–85 (1993). Rawls wrote: “I have assumed throughout, and shall continue to assume, that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life.” *Id.* at 183.

30. For example, see SEN, *supra* note 13. See also NORMAN DANIELS, *JUST HEALTH CARE* 1–56 (1985); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000).

interesting in its own right and indicates that prioritarianism itself merits serious scrutiny.

Recall that the prioritarian view is that social arrangements should be set and actions chosen to maximize weighted well-being. The lower an individual's lifetime well-being, the greater the value of increasing it.

Disability tends to lower well-being prospects. Other things being equal, one has higher life prospects if one has normal eyesight than if one is blind. So other things being equal, the prioritarian has a reason to channel resources toward the disabled, in so far as disability status correlates with low well-being.

Disability sometimes has another effect. Being disabled can reduce the amount of well-being gain that one is enabled to achieve by a given infusion of resources, compared to what an able person could get with the same resource infusion. For example, if an individual is blind, deaf, legless, and in chronic pain, that person's well-being may well be very low even if enormous resources are expended on him, and even though his well-being always increases a little with each increment of aid. At some point, these two effects will balance, so that bringing it about that the conditions of his life improve further gains less weighted well-being than would using these same resources to bring about improvements in the conditions of people who are already relatively better off in well-being.

Prioritarianism registers the common sense judgment that able people owe some moral consideration to the disabled, and have some significant responsibility for improving their lives. But this responsibility is limited, because at some point the gains from further aid to the disabled are morally outweighed by the greater moral value that would accrue if the aid is channeled elsewhere. The priority view clarifies the nature of this trade-off and uses a sensible yardstick for measuring gains and losses to people from alternate social arrangements.

This sensible yardstick claim has been challenged.³¹ Consider Tiny Tim, the cheerful cripple in Charles Dickens's story *A Christmas Carol*. He is immensely cheerful and is perhaps happier than the average person. According to prioritarianism, the judgment that some special consideration is owed to the disabled depends on the factual claim that having a disability makes one worse off. But, the argument goes, at this point prioritarianism diverges from common sense judgment. The latter

31. See G. A. Cohen, *On the Currency of Egalitarian Justice*, 99 *ETHICS* 906, 917–21 (1989).

holds that what we owe to the disabled does not vary with any estimate of their overall well-being prospects—a happy Tiny Tim is no less deserving of a motorized wheelchair.

C. *In Reply*

The Tiny Tim example illustrates the importance of understanding well-being as access to the full range of genuinely important human goods and not merely as having subjectively satisfying mental states. Even a cheerful Tiny Tim, we think, suffers misfortune. But it is not objectionable that the priority view holds that the special reason to aid a person that stems from the fact that she suffers a disability may be outweighed by other factors that render it the case that she is overall enjoying a good quality of life compared to others. Moreover, we must be careful to distinguish judgments made at the level of ideal theory with full information and judgments about public policy here and now, that must be made with limited information in nonideal circumstances. A law that provides for governmental assistance to the needy must identify the needy recipients of aid by markers that are reasonably easy to identify and verify, and costly to fake. Hence a sensible law that was warranted by prioritarian principle would *provide* aid in some circumstances where an agent with full information would *deny* it and *deny* aid in some circumstances in which an agent with full information would *provide* it. (So some Tiny Tims would merit aid by the terms of a sensible legal policy or social practice but not by the terms of ideal moral principle.)

The authors of *From Chance to Choice: Genetics and Justice* might object that this Essay's discussion of what to do about people with disabilities makes exactly the error they are concerned to correct.³² They might argue that I have slipped into writing as though the problem was simply one of fairly dividing the benefits and burdens of social cooperation. However, the morality of inclusion is focused on a prior and more fundamental issue—how to design the framework for social cooperation so that it is adequately inclusive.

The objection misfires. Fairly dividing the benefits and burdens of social cooperation requires envisaging alternative schemes of cooperation that might produce greater benefits or a more fair division. What the authors regard as the problem of inclusion is an aspect of the fair division problem, rather than an analytically distinct issue. In given circumstances the priority view might require small adjustments at the

32. See BUCHANAN ET AL., *supra* note 1, at 303 (one of several passages that suggest they would make this objection).

margins of the existing scheme of cooperation (for example, altering the eligibility requirements for food stamps), but in other circumstances it might require wholesale transformation (for example, moving from a socialist to a free market capitalist economy or the reverse).

Moreover, there is something unsatisfactory about framing the issue as the extent to which we should widen the dominant scheme of cooperation. This language tends to convey the impression that we face one large decision—the choice of a dominant scheme. But however exactly one demarcates the dominant framework from the rest, the fact is that the effects of the operation of the dominant framework can be modified by adjustment of *nondominant* aspects of the cooperative scheme. The underlying issue is what adjustments to the status quo, large or small, can be made at what cost in order to achieve what level of gain for what number of individuals at what prior well-being level. How does focusing on the dominant scheme of cooperation³³ help determine what policy choices should be made?

These decisions to include or exclude, whether made explicitly or by inattention, will typically be piecemeal. One may decide that the benefit if any to severely retarded persons that would accrue to them from guaranteeing them the franchise and gearing political debate to their level of comprehension is outweighed by the resultant lowering of the expectable quality of democratic decisionmaking, so this form of inclusion should not be implemented. Other forms of inclusion may be more cost-effective when judged by the proper moral standard. For example, regulation and taxation of business firms to stimulate the provision of paid employment to severely retarded persons might prove to be a morally required form of inclusion according to prioritarian principle. By contrast, some forms of severe mental illness that tend to make people disruptive in social settings requiring complex coordination of tasks, but do not make people less able than others, on the average, to vote wisely (should they choose to vote at all) might prompt the reverse judgments—inclusion of people with these forms of mental illness by way of extension of the political franchise but no special attempts to include them in the workplace.

A careful reader might well complain that the argument that prioritarianism satisfactorily addresses the problem of inclusion is entirely unfounded. Prioritarianism as characterized here is a family of

33. *Id.* at 288–91.

moral principles. To determine a specific principle that would yield definite implications for policy, one would have to specify a particular weighting. To what degree exactly does the lifetime level of well-being a person would have, absent some benefit, raise or lower the value of getting the benefit for that person? I do not claim to know the answer. But then surely this Essay's assertion that prioritarianism resolves the conflict of claims that generates the problem of inclusion is a sham.

This objection has some force. However, viewing the problem through a prioritarian lens sharpens our understanding. The weighting problem that we must resolve to get determinate policy implications is exactly the problem we do need to solve to arrive at sound principle. In particular, the prioritarian position is that the terms in which the interests at stake should be balanced should be cast in terms of people's well-being levels. The right policy choice depends on its long term impact on the actual quality of people's lives. Finally, one can say something vague but nontrivial toward a solution of the weighting problem. At one extreme, a prioritarianism that gives almost no extra weight to well-being gains that accrue to those with low well-being collapses into a version of straightforward aggregate utilitarianism. This position is too extreme. At the other extreme, a prioritarianism that gives infinite extra weight to providing a benefit of any size to someone whose well-being level is just slightly lower than the well-being level of alternative recipients of the benefit collapses into leximin. This position is too extreme. One should espouse a "Goldilocks principle" that assigns a weighting in the middle range and splits the difference between these extremes.

In an interesting discussion, the authors tentatively suggested a moral balancing of interests different from what the priority view as modified above recommends.³⁴ They suggested that morality might require as a first priority, bringing as many individuals as possible to a threshold level of participation in the cooperative framework, a level that is good enough. Above that level, the moral concern to promote inclusion legitimately has less weight, compared to the concern to make cooperative schemes maximally productive.

The authors made this suggestion in an exploratory spirit without committing themselves to it. It might still be worth noting that this suggestion is inadequate, and the inadequacy points toward the priority view. First, one surely does not want to assign strict priority to boosting those who are below the threshold over bringing about benefit for those who are already above the threshold. Some individuals might have traits that render boosting them to the threshold extremely costly. Some

34. *Id.* at 301–02.

individuals will inevitably remain below threshold, but vast expenditures of resources would move them just slightly closer to it. In some circumstances, very small expenditures of resources would provide great benefit for those already above threshold, and, in some cases, for those barely above threshold. Whether one understands the authors as recommending (a) giving strict priority to bringing as many individuals as possible to the threshold, or rather (b) giving strict priority to bringing about gains for those who are below the threshold (whether or not they can be brought to it), the recommendation should be rejected, because for any individual, no matter how badly off she is, if the cost to other better-off people of bringing about a small benefit to her becomes larger and larger, at some point, the priority should switch to helping the others. Second, one cannot identify nonarbitrarily a threshold level of participation in cooperative schemes, bringing people to which has special moral value. There is no such threshold. There is rather a continuum of well-being levels, from hell to heaven as it were, and for any individual, it is better to be closer to the heavenly end of the scale.

V. FAIR EQUALITY OF OPPORTUNITY

In chapters 3 and 4, the authors considered how best to interpret the ideal of equality of opportunity, regarded as a fundamental justice norm that *inter alia* determines what we owe one another by way of medical care provision.³⁵ The authors opted for a Rawlsian conception of equality of opportunity as modified by Norman Daniels's suggestion that fundamental moral rights to medical care should be included within the requirements of Rawlsian fair equality of opportunity.³⁶ The authors defended this Rawls-Daniels approach to equality of opportunity against more expansive and demanding conceptions and urged that it provides a sound framework for exploring the moral ramifications of new genetic technologies.³⁷ To evaluate these claims, some stage setting is needed.

The Rawlsian principle that the authors at least tentatively embraced holds that social and economic inequalities must be (a) attached to positions and offices open to all under fair equality of opportunity, and (b) to the maximal long run benefit of the least advantaged members of

35. *Id.* at 65–86, 108–49.

36. *Id.* at 109.

37. *Id.* at 108–49.

society.³⁸ Fair equality of opportunity obtains when all persons with the same native talent and the same ambition have the same prospects for success in competitions for positions that yield above-average shares of social and economic goods.³⁹ In this principle (a) has strict priority over (b), so that no inequalities are permitted, even if they would work to optimize the prospects of the least advantaged, unless the fair equality of opportunity norm is satisfied.⁴⁰ In the application of this principle, social and economic benefits are measured in terms of primary social goods (other than basic constitutional liberties).⁴¹

Norman Daniels proposed to include health care within the fair equality of opportunity principle.⁴² In any given arrangement of society, with fair equality of opportunity otherwise provided, the native traits of an individual afford her access to a certain share of the array of reasonable life plans people can choose in the society (including a certain level of expected success in competitions for positions of advantage).⁴³ Ill health and the lingering effects of chronic and episodic disease and injury deprive an individual of her share of this normal opportunity range, to which she has an entitlement.⁴⁴ Health care provision aims to restore individuals to their shares of the normal opportunity range so far as this is feasible.⁴⁵ Fair equality of opportunity extended to include health care holds that this must be done as a matter of justice. Extended fair equality of opportunity then, is not obtained unless persons with the same native talent and same ambition have the same prospects for competitive success, despite any differences among them in their health history and in their susceptibilities to injury and disease (within constraints of feasibility).⁴⁶

This position has its attractions, but its chief weakness is that it gives a special and arbitrary priority to making sure that all individuals with the same native talents have the same prospects for success in competitions for advantage, come what may. The position need not suppose that talents are metaphysically set. Whether a given trait an individual is born with counts as a talent or not depends on the contingencies of the given social and natural environment. Suppose, however, that the meshing of individual traits and environment in a given society brings it about that one person is talented and susceptible to disease and another

38. RAWLS, *supra* note 4, at 266.

39. *Id.* at 63.

40. *Id.* at 266–67.

41. *Id.* at 78–81.

42. DANIELS, *supra* note 30, at 36–58.

43. *Id.* at 32–35.

44. *Id.* at 54.

45. *Id.* at 53.

46. *Id.* at 37–48.

is untalented and not susceptible to disease. Why suppose that it is a special requirement of justice that the bad effects on the individual's life of susceptibility to disease are to be blocked as far as is possible so that the talented individual enjoys the identical share of the normal range of opportunity that goes to all other equally talented and ambitious individuals? The special entitlement linked to possession of native talent on this approach embeds a meritocratic element at the core of the principles of justice.

This summary judgment might be resisted on the ground that fair equality of opportunity must be assessed as it interacts with the other principles in the Rawlsian system, and especially the difference principle.⁴⁷ The competitions that assign positions of advantage are to be set so that they work to the long term maximal benefit of the least advantaged citizens. Moreover, if fair equality of opportunity is not fulfilled, the response required by Rawlsian theory is enforcement of equal distribution of social and economic benefits, not class privileges for the talented.⁴⁸

But something is amiss. One way to see this is to notice that fair equality of opportunity might be a strongly binding constraint on the pursuit of the amelioration of the lot of the least advantaged. In situations where inequalities could be instituted that would violate fair equality of opportunity and work to the significant benefit of the least advantaged, doing this is forbidden by Rawlsian justice.⁴⁹ This conclusion is counterintuitive unless fair equality of opportunity itself commands our strong allegiance. The words "equality of opportunity" conjure images of denial of equal opportunity by horrible practices of arbitrary exclusion such as Jim Crow laws or a regime in which all good jobs are reserved for men only. But the Rawlsian principle extends equality of opportunity requirements far beyond these types of cases,

47. BUCHANAN ET AL., *supra* note 1, at 127–28.

48. The claims in the two preceding sentences in the text are straightforward implications of Rawls's second principle of justice, that includes the equality of fair opportunity and difference principle components, along with a priority rule linking them. *See* RAWLS, *supra* note 4, at 266–67.

49. According to Rawls, an inequality in social and economic benefits is permissible only if it is attached to positions and offices open to all under conditions of equality of fair opportunity. For example, if allowing employers to hire and fire at will increased economic production and hence (via redistributive taxation) the share of benefits going to the worst off, but resulted in discriminatory patterns of employment, Rawls's principle with its priority rule would forbid this grant of discretion to employers. *See id.*

and the Daniels expansion of the principle extends them even further. Suppose a wealthy, charming, intelligent youth has a chronic mild disease condition that is very difficult and expensive to treat. Contrary to extended fair equality of opportunity, justice does not require as a matter of special priority that health care resources be channeled to the well off but not healthy youth without regard for the cost of such provision on the well-being opportunities of the worst off.

Several issues are joined here. They need to be disentangled. One issue is whether health care is morally special as compared to a wide range of social provisions that might improve the quality of people's lives. Another is whether social and economic justice requires equal provision of any sort, whether equal opportunity or equal something else. Yet another is whether the different elements in a theory of justice can plausibly be ordered by way of Rawls's strict lexical priority relations. Finally, there is the issue of whether, at the level of fundamental moral theory, distributive justice should take resources (in particular, primary social goods), or instead the quality of life that provision of resources affords, as the standard of interpersonal comparison. These are large issues, which this brief Essay cannot settle.

This Essay briefly indicates what is problematic about the Rawls-Daniels resolution of these issues. Consider again the extremely talented person, leading a great life, who falls victim to accident or disease. We stipulate the person does not command a large share of material resources, primary social goods such as income and wealth. She uses her talents informally, outside the market, a way that is congenial to her. Suppose resources are limited, and society can choose to cure this overall fortunate individual's medical condition, restoring her to normal species functioning, or install a public park in a neighborhood where people who are in the pink of health but leading lives of very low quality reside. What determines whether priority should attach to bringing about benefits for the sick but fortunate individual or for others depends on the overall lifetime well-being level each affected person would reach, absent our contemplated policy intervention. In the example, contrary to the Rawls-Daniels theory, priority should go to helping the worse off, though what should be done depends also on the amount of benefit that the worse off and better off would gain from alternative policies. Neither people's resource shares nor an amalgam of resource shares plus health conditions registers what we must know in order to determine who is truly needy and deserving of extra aid. Moreover, neither establishing equality of condition nor maximizing the resource level of the worst off subject to equal opportunity constraints, is what fundamentally matters from a moral standpoint. In a nutshell, what matters morally is priority for the badly off, not equality or maximin.

The measure of how well off or badly off one is should be well-being, not resources (and not resources adjusted for health status either).

In chapter 4 the authors presented an apparent counterexample to the Rawls-Daniels extended account of fair equality of opportunity as applied to health care provision.⁵⁰ This account draws a sharp moral distinction between conditions of disease and disability that detract from the individual's share of the normal opportunity range that is set by the individual's native talent and conditions that are not health care problems in this sense but could be ameliorated by medical treatment.⁵¹ The former conditions *prima facie* deprive the individual of fair equality of opportunity. Justice requires that the conditions be ameliorated if that is medically feasible. The latter conditions do not in this way trigger fair equality of opportunity requirements. Hence, a child whose disease condition, if untreated, will lower her expected adult height is owed medical treatment according to the Rawls-Daniels approach, but a child whose normal genetic disposition gives her the identical expected adult height and could be ameliorated by medical treatment just as cost-effectively is not owed medical treatment under the Rawls-Daniels approach.

The weaknesses the counterexample exposes are debilitating. What is special about health care needs is that bad health threatens well-being. But at the level of fundamental moral theory, nothing gives health care needs a moral priority over anything else that is needed for well-being. What we owe one another is a decent chance at living a good life, and anything and everything that improve the odds or boost the expected well-being that people can attain are morally on a par. Saying this is, of course, compatible with choosing social and legal policy, which must be coarse grained,⁵² on the basis of distinctions that roughly track what ultimately matters from the moral standpoint. Again, for the prioritarian, the right coarse-grained distinctions are those that produce the morally best outcomes for people.

50. BUCHANAN ET AL., *supra* note 1, at 115–16.

51. *Id.*

52. A policy is coarse grained if it prescribes that actions should not vary in response to variations in some morally relevant feature of the situation in which action is to occur. For example, a welfare state policy of aid to the needy is coarse grained if it provides that all people with demonstrated low income should get the same aid regardless of how they came to have low income. A policy should be coarse grained if making the policy finer grained produces worse results as evaluated by fundamental moral theory.

The authors oddly introduced considerations of efficiency in support of the Rawls-Daniels theory of equality of opportunity. They did so by contrasting this relatively restricted conception of equality of opportunity with other more expansive conceptions that do not take the natural distribution of native talent as a baseline, but rather require that all persons should have equal initial opportunity to achieve the good life. This is what the authors called the brute luck conception of equality of opportunity.⁵³ Within this paradigm, opportunity is understood such that if one has an opportunity for *X*, then chooses *X* and tries to get it, one gets it. These more expansive conceptions of equal opportunity require that all factors that affect a person's prospects for the good life, should they choose seriously to pursue it, must be offset or adjusted so that no factors beyond the individual's control give her lesser prospects than anyone else enjoys. The authors sensibly responded that any such expansive conception of equal opportunity, if fully implemented, would be enormously expensive in terms of other values and might well leave everyone worse off than they would be if this expansive conception were not implemented.⁵⁴

But there are distinct questions here that need to be kept straight. One question is how best to interpret the ideal of equality—either as equality of outcome or equality of opportunity. A quite different question is what relative moral importance to assign to equality when it conflicts with other moral values. The authors argued against the brute luck conception of equality of opportunity on the ground that it is implausible to suppose that this ideal of equality trumps all other moral values. But it may well be the case that the best conception of equality should not trump all other moral values, so this consideration is misplaced if directed as an objection against any proposed interpretation of equality.

Matters are yet more complex in ways that undermine the authors' dismissal of the brute luck conception of distributive justice. This conception, broadly understood, holds that what we owe one another by way of justice obligations is to prevent or alleviate misfortune, but in each case the extent of our obligation varies depending on the degree to which the misfortune we are considering is due to sheer brute luck or is mediated by the individual's voluntary choice or negligence that might have prevented the condition.⁵⁵ For example, we might owe more to Smith, who is badly off because a foreign invasion he could not have foreseen devastated his life, than to Jones, who is badly off because he

53. BUCHANAN ET AL., *supra* note 1, at 66–73.

54. The authors emphasized that principles of justice must integrate concerns for equality, liberty, and efficiency rather than go whole hog for equality. *Id.* at 127–28; see also *id.* at 132–33.

55. DWORKIN, *supra* note 30, at 73.

failed to utilize attractive opportunities and instead chose to dabble in recreational drugs that proved destructive, even if the same infusion of aid would do just as much for Jones as for Smith and have no further consequences. It is obvious that the idea that the distinction between brute luck and option luck should matter for distributive justice—the idea that what we owe to needy individuals depends on their degree of personal responsibility for their plight—is entirely independent of the idea that distributive justice bids us to pursue equality or some other goal. This Essay posits that the distinction between brute luck and option luck should register significantly in the formulation of fundamental moral principles. This view might be right or wrong. It is not impugned by the claim that the goal of equalizing people's condition does not trump all other moral values, nor even by the claim that this sort of equalizing has no moral value *per se* at all.

The authors linked this disagreement between expansive and restricted conceptions of equal opportunity with an issue concerning the scope of justice obligations.⁵⁶ Does distributive justice, in its role of catering to the disadvantaged, require compensation for natural disadvantage, such as being born with low intelligence, or require only compensation or elimination of socially constructed disadvantage? The Rawlsian response, toward which the authors incline, is complex. On the one hand, equal opportunity in the fair equality version requires only that those with the same talents and ambitions should have the same competitive prospects. On the other hand, the social mechanisms that confer unequal shares of primary social goods other than basic liberty must be set so that the long term primary goods expectations of the least favored social group are maximized. The authors added the interesting observation that the line between what is naturally given and what is socially constructed shifts with new genetic technologies, because technologies give us the power to determine with increasing precision exactly what genetic predisposition to traits any newborn individual will possess.⁵⁷

The comparison of restricted and expansive conceptions of equality of opportunity is itself too restricted to facilitate clear judgments about the major issues raised by the Rawls-Daniels approach to equal opportunity. The discussion in this Part attempts to explain how this is so.

As already noted, the comparison of two rival interpretations of equal

56. BUCHANAN ET AL., *supra* note 1, at 75–77, 109, 126–41.

57. *Id.* at 82–84.

opportunity leaves undiscussed the issue of whether any sort of equal distribution of opportunity is a fundamental justice requirement. On the prioritarian view, everyone's having the same is not intrinsically morally desirable.⁵⁸

Once the scope issue is separated from the equality issue, there is much to be said for wide scope as interpreted by prioritarianism. On this view, our obligation to assist an individual depends on what well-being gain we can achieve for her at what cost (measured by the standard of prioritarian values) and on what her well-being expectation is prior to receipt of this benefit. If an individual is badly off and can be aided at reasonable cost, whether her disadvantage is socially or naturally caused does not affect impediments to well-being and, in this respect, are morally on a par. Disadvantage is disadvantage.

58. See PARFIT, *supra* note 18, at 19–20.