JEFF McMAHAN

Cognitive Disability, Misfortune, and Justice

I. Inequalities of Natural Endowment

Human beings differ widely and significantly in their natural endowments. Many of these differences affect people's prospects for a good life. In some cases, the significance of differences of endowment is primarily instrumental. While each of two people may in principle be capable of attaining roughly the same high level of well-being, one may have endowments that facilitate the attainment of that level while the other's endowments impede it. For example, certain phenotypic characteristics, such as attractive facial features, are notoriously advantageous for securing a variety of goods; certain genotypes offer greater prospects for longevity than others; and so on. Other differences affect people's prospects more directly, by helping to determine the range of forms and levels of well-being that are in principle accessible to them. People who are born blind, for example, are thereby deprived of certain dimensions of well-being: they cannot perceive the sublimity of an Alpine landscape, create or appreciate works of visual art, and so on. Others are

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constitutionally insensible to the gratifications offered by music. And people born autistic are incapable of forming deep personal relations. Although in some cases deprivations of these sorts are on balance compensated for, there are many other cases in which they are not.

That some people's prospects are low or lower than others' because of their lesser or less advantageous natural endowments strikes many of us as objectionable, and perhaps unfair. Although he does not regard the distribution of natural assets as a matter of justice, Rawls nevertheless contends that "undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for. . . . [I]n order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets."[1] Similarly, Allen Buchanan claims that "it is unfair for some to be significantly handicapped from the very beginning of their lives by circumstances over which they had no control and hence in no way can be held accountable for."[2]

Those who hold that it is bad, or unfair, that some people's natural endowments cause them to have poor prospects in life, or poorer prospects than others, typically argue that social resources should be redistributed to compensate those with lesser natural assets. Some, however, have argued further that genetic intervention, when it becomes possible, may be required as a matter of justice to reduce or eliminate inequalities of natural endowment, or at least to enhance the genetic endowments of those who would otherwise be unable to have minimally decent lives.[3] For a certain broad range of genetic disadvantages, the arguments for social redistribution or genetic intervention seem plausible, even compelling. My concern in this article, however, is less with the plausibility of the basic arguments than with certain unresolved issues of scope. While it may seem that the strength of the case for com-

1. John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971), pp. 100–101.

2. Allen Buchanan, Dan Brock, Norman Daniels, and Daniel Wikler, *In the Shadow of Eugenics: The Human Genome Project and the Limits of Ethical Theory* (forthcoming), Chap. 5. Similar claims constitute the core of most contemporary doctrines of equality. See, for example, Richard Arneson, "Equality and Equal Opportunity for Welfare," *Philosophical Studies* 56 (1989): 85; and Larry Temkin, *Inequality* (New York: Oxford University Press, 1993), p. 13.

3. See Buchanan et al., *In the Shadow of Eugenics*, Chap. 5; and Allen Buchanan, "Equal Opportunity and Genetic Intervention," *Social Philosophy and Policy* 12 (1995): 105–35.

pensation is, other things being equal, proportional to the severity of the natural disadvantage, there are some cases of what we may think of as extreme disadvantage to which the arguments for compensation may not apply.

The problematic cases involve human beings who are congenitally severely cognitively impaired or disabled—individuals who not only lack self-consciousness but are almost entirely unresponsive to their environment and to other people.[4] We can distinguish three arguments for the claim that these individuals are owed special compensation.

First, there is a limited range of cases in which one may argue that certain specific agents are liable for compensating a congenitally severely cognitively impaired individual on the ground that they have wrongfully harmed him, either by causing or allowing him to exist at all or by causing him to exist with cognitive disabilities when he would otherwise have existed with normal cognitive capacities. This sort of argument raises many difficult questions and in any case is highly restricted in its application. For in most cases cognitive disabilities result from unforeseeable natural causes; hence there is no basis for liability among those instrumental in causing the existence of the disabled individual. Moreover, in order for an individual to be owed compensation or damages for being caused or allowed to exist at all, it must presumably be the case that the individual's life is worse than no life at all. Yet in most cases it seems doubtful that the lives of even the most severely cognitively impaired satisfy that description. Finally, even in cases in which some act can be identified as the cause of an individual's congenital cognitive disability, it is normally not the case that, had the act not been done, the individual would then have existed with normal cognitive capacities. In most cases, if the act had not been done, *that* individual would never have existed and a *different* individual with normal capacities would have existed instead. This is so for reasons having to do with the metaphysics of personal identity across different possible histories. But, if the disabled individual would not have existed at all had the act not been done, and if his life is not worse than no life at all, then

4. For the sake of brevity, I will often refer to congenitally severely cognitively impaired human beings simply as "the cognitively impaired." But the two omitted adverbs are crucial; unless otherwise specified, references will always be to human beings whose cognitive disabilities are both severe and congenital—by which I mean that their cause is physically present and operative at, or perhaps shortly after, conception. None of my claims applies to the mildly or moderately cognitively impaired.

the act that caused him to exist with cognitive disabilities cannot be claimed to have affected him for the worse. Hence it is hard to see how the act could be the basis for liability to provide compensation.

I cannot attempt to substantiate any of these claims here, though I have discussed them at length elsewhere.[5] For present purposes, we may for the most part restrict our attention to cases in which the cognitively impaired have no ground for complaint for having been caused to exist or having been caused to exist with disabilities rather than with normal cognitive capacities. In the remainder of this article, therefore, I will concentrate on the other two arguments for the claim that the cognitively impaired are owed special compensation. The first of these—the *noncomparative argument*—claims that the cognitively impaired are owed special compensation because they are very badly off. The second—the *comparative argument*—claims that they are owed compensation because they are worse off than most others. In Sections II and III, I will state and criticize the noncomparative argument. In Section IV, I will address certain objections to the claims of the preceding two sections. In Section V, I will develop and challenge the comparative argument. Finally, in Section VI, having rejected both the noncomparative and comparative arguments, I will conclude with some general reflections on the moral status of the congenitally severely cognitively impaired.

I should apologize in advance for the fact that much of what I say will be painful to those who are closely related to individuals born with severe cognitive disabilities. In some cases, there may be metaphysical disagreements that I do not address. For example, some may believe, while I do not, that the souls of the cognitively impaired are like those of other human beings except that they are inexplicably bound to brains with inadequate resources to allow them to express themselves in ways available to the rest of us. In other cases, there will be deep moral disagreement. In my defense, all I can say is that I have tried to explore the issues with as much sensitivity, honesty, and rigor as my abilities permit.

II. Nonhuman Animals, Individual Good, and the Norms for Species

Some principles of justice state criteria for distributing resources that are not based directly on comparisons among different people. Accord-

5. See "Wrongful Life and Restricted Lives."

ing to these principles, an individual may have a special claim to social resources that is independent of how his or her life compares with those of others. Principles that require distribution in accordance with personal desert are of this sort. While these principles are very unlikely to imply that the cognitively impaired are owed special compensation, there are other noncomparative principles that may seem to have this implication. One such principle holds that everyone is entitled to a decent minimum quality of life. Another, which Derek Parfit calls the *Priority View*, holds that "benefiting people matters more the worse off these people are."[6] According to these views, if the cognitively impaired are below the relevant minimum, or are badly off by some absolute measure, then they may have claims to special compensation that others who are better off do not have.

The common view is that the severely cognitively impaired are indeed badly off, or have lives that are deprived or below a decent minimum. Several reasons for regarding their condition as unfortunate might be given. First, their disabilities may obviously be instrumentally disadvantageous. They are wholly dependent on others for their continued existence and for whatever other goods their lives contain and are therefore precariously vulnerable to neglect or abuse. Second, their permanently infantile condition may seem objectively degraded. This is not to say that their lives are subjectively intolerable. As far as one can tell, their lives are subjectively similar to the sort of life that each of us lived in early infancy. Their misfortune is the indefinite extension into adolescence and adulthood of a state of being that is appropriate only to infancy.

Third, and most importantly, individuals born with only very rudimentary cognitive and emotional capacities necessarily have a highly restricted capacity for well-being. For the range of forms and levels of well-being that are in principle accessible to an individual is determined by that individual's cognitive and emotional capacities and potentials. The more limited an individual's capacities are, the more restricted his or her range of well-being will be. There are forms and peaks of well-being accessible to individuals with highly developed cognitive and emotional capacities that cannot be attained by individuals with lower capacities. The profoundly cognitively impaired are incapable, for example, of deep personal and social relations, creativity and achievement, the attainment

6. Derek Parfit, *Equality of Priority?* The 1991 Lindley Lecture (University of Kansas, 1995), p. 19.

of higher forms of knowledge, aesthetic pleasures, and so on. Their signal misfortune is thus that they are excluded from many or most of the various dimensions of a good life. This misfortune is, moreover, not purely instrumental. It is not just that the possession of capacities that they lack is necessary for the achievement of certain goods. In some cases at least, the exercise of a certain capacity cannot be altogether separated from the goods that may be achieved through its exercise. Indeed, in some instances, the exercise of a certain higher capacity, talent, or skill is itself a good, quite independently of any of its effects.

If the cognitively disabled are seriously badly off for one or more of these reasons, then this fact may be combined with an appropriate noncomparative principle of justice—for example, the Priority View—to yield the conclusion that the cognitively disabled are owed special compensation as a matter of justice. This is the noncomparative argument. For present purposes, the precise nature of the noncomparative principle on which the argument is based is unimportant. For my aim here is to press an objection to the presumed scope of principles of this sort, and this objection applies in much the same way to any principle that seems to imply that the severely cognitively impaired are entitled to special compensation on the ground that they are badly off by some absolute measure.

The objection to the comparative argument is that, if the cognitively impaired are badly off because their level of well-being is low, or perhaps because it is objectively degraded to live an entire life with rudimentary cognitive capacities, then it seems that most nonhuman animals must also be badly off in the same way. If, in other words, it is a misfortune to be natively endowed with cognitive and emotional capacities and potentials of the sort possessed by the cognitively impaired, then nonhuman animals with comparable capacities and potentials must be unfortunate as well. And, if nonhuman animals are relevantly badly off, then any noncomparative principle that requires compensation for cognitively impaired human beings should also require compensation for animals with comparable capacities—unless, of course, its application is restricted to members of the human species, which seems an arbitrary restriction on its scope.[7]

7. As Parfit states the Priority View, it applies only to people. If "people" means "human beings," his use of the term may be only a convenience of phrasing rather than a principled restriction to the scope of the view. If, however, "people" means "persons," then

This objection may seem absurd. Of course no one believes that animals are entitled to special compensation because they are endowed with inferior natural assets.[8] But this common-sense conviction need not simply beg the question regarding the scope of noncomparative principles of justice. Rather, it may instead be based on a rejection of the idea that, because animals have rudimentary cognitive and emotional capacities that prevent their achieving higher levels of well-being, they must therefore be unfortunate or badly off. A dog, for example, has a relatively low level of well-being. But, while a normal human adult with a comparable level of well-being would be very badly off, the dog may well be flourishing. Despite its comparatively low level of well-being, it may not be badly off but may instead have what counts as a good life for a dog.

This example shows that we distinguish between an individual's level of well-being, on the one hand, and whether that individual is well or badly off, or flourishing or unfortunate, on the other. This second notion—the notion of how an individual's life is going—appears to express a relation between an individual's level of well-being and a standard against which well-being is assessed. What the relevant standard is is a matter to which I will return shortly. For the moment, it would be useful to find an abstract noun for this second notion, one that denotes the range of conditions or states of being from extreme misfortune to extreme prosperity or flourishing. The closest that I can find in English is "fortune." This is not quite right, both because it is suggestive of extrinsic conditions and because the corresponding nouns referring to the conditions at the ends of the spectrum—"misfortune" and "good fortune"—more naturally refer to events than to states of the individual. Still, the adjectival forms—"fortunate" and "unfortunate"—do suggest states of being of significant duration. For want of a better term, therefore, I will use "fortune" as a technical term to refer to how an individual's life is going, which is different in a way that I will try to elucidate from the level of the individual's well-being.

The important point here is that it is fortune, not well-being, that

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Parfit is himself implicitly excluding both animals and the cognitively impaired from the scope of the principle.

8. There may be exceptions. It is said of J.M.E. McTaggart that, if he found his cat sleeping in his favorite armchair, he would forbear from ejecting it, being moved by pity for the cat's misfortune in being a cat rather than a person.

seems to be the focus of noncomparative principles of justice. If that is the case, it would help to explain why animals are not entitled to compensation under these principles. For the fact that an animal has a low level of well-being is irrelevant if what entitles one to compensation as a matter of justice is the different fact that one is unfortunate or badly off.

Why is it that, for example, a normal dog is not unfortunate despite its low level of well-being? And is the explanation compatible with the common-sense view that a human being congenitally endowed with comparable cognitive capacities *is* unfortunate? To answer these questions, we require an analysis of the notion that I have called "fortune" that indicates what the standard is against which an individual's level of well-being is assessed in order to determine whether that individual is fortunate or unfortunate, or faring well or badly. The view that most people seem to favor, whether consciously or unconsciously, is that an animal is not unfortunate for having a low level of well-being if that level is characteristic of or appropriate *for beings of its kind.* Whether an individual is well or badly off is determined by assessing its level of well-being relative to a certain norm for individuals of its kind—in particular, for members of its species. According to one version of this view, a being is unfortunate if its level of well-being is well below the normal, average, or perhaps median level for the members of its species. This version, however, is too crude. The level of well-being that is the norm for a species may vary with time. Thus there have been periods in human history when in general life really was nasty, brutish, and short. What we want to say is that virtually everyone was unfortunate then. But this would be impossible if misfortune were relative to the level of well-being that is the norm for a species at a time.

A more plausible proposal is that how well off a being is depends on how its level of well-being compares to the levels accessible to those with cognitive and emotional capacities that are the norm for the species of which the being is a member. According to this view, a being is unfortunate if its level of well-being is well below the higher levels of well-being made possible by cognitive and emotional capacities that are characteristic of its species. This way of determining how well off an individual is—the *Species Norm Account*—supports many common-sense beliefs. It implies that cognitively impaired human beings are unfortunate, though a dog with comparable cognitive capacities and a comparable level of well-being is not, provided that its level of well-

being is reasonably high relative to what is possible given the capacities characteristic of dogs.

The Species Norm Account has certain affinities with the account of the good that Martha Nussbaum has recently developed under the label "Aristotelian essentialism."[9] To avoid confusion, it is worth noting how they differ. According to Aristotelian essentialism, "continued existence as a member of the species one is in is at least a necessary condition of continued personal [i.e., individual] identity."[10] Various capacities and functions are essential to membership in a species. In the case of the human species, these properties are evaluatively determined, arising from our "self-interpretations and self-evaluations." To say that a property is essential for membership in the human species "is to say that a life without this item would be too lacking, too impoverished, to be human at all."[11] The essential properties for membership in the species are thus the minimal conditions for a good life for any member of the species. This view therefore yields a conception of the good that relativizes flourishing and misfortune to norms for species. But, because the properties that are essential to a human being are evaluatively determined, they do not coincide with the criteria that modern biology deploys for determining membership in the human species. According to Aristotelian essentialism, "it is possible . . . to be born of two human parents and not to be human at all," whereas biological species membership is a matter of genealogical linkage rather than a matter of resemblance or having a shared essence.[12]

The properties that Nussbaum cites as constitutive of the human essence are thus, despite her denials, attributes of *persons*, not members of the human species. "The defender of equality," she notes, can "say to the opponent, 'Look at these beings: you cannot fail to grant that they . . . think about the future, that they engage in ethical conversation, that they have needs and vulnerabilities similar to your own. Grant this, and

9. See her "Nature, Function, and Capability," *Oxford Studies in Ancient Philosophy*, suppl. vol. 1 (1988): 145–84; "Human Functioning and Social Justice," *Political Theory* 20 (1992): 202–46; and "Aristotle on Human Nature and the Foundations of Ethics," in J.E.J. Altham and Ross Harrison, eds., *World, Mind, and Ethics* (Cambridge: Cambridge University Press, 1995), pp. 86–131.

10. "Aristotle on Human Nature," p. 91. Compare "Human Functioning," p. 215.

11. "Human Functioning," pp. 215 and 220.

12. "Aristotle on Human Nature," p. 118. On the biological conception of species, see Stephen R. L. Clark, "Apes and the Idea of Kindred," in Paolo Cavalieri and Peter Singer, eds., *The Great Ape Project* (New York: St. Martin's Press, 1993), pp. 113–25.

you grant that they are human."'[13] But these properties might be present in Martians and they are clearly absent in the cognitively impaired. This leads Nussbaum to attribute to Aristotle, and herself to embrace, the view that the cognitively impaired are "not really human . . . and that they are, therefore, owed an ethical treatment that is different from the treatment we owe to members of our own species."[14] Because it employs this eccentric notion of species, Aristotelian essentialism fails to distinguish between the cognitively impaired and nonhuman animals in the desired way. Moreover, because it holds both that certain cognitive capacities are essential for membership in the human species and that membership in the species is essential to personal identity, it implies, implausibly, that there are various forms of cognitive impairment short of losing the capacity for consciousness that none of us could survive. For these reasons, it seems best to confine our attention to the Species Norm Account.

The Species Norm Account presupposes that each species has an essential nature the full development of which defines or contributes to defining the nature of the good for each of its members. This is similar though perhaps not identical to Aristotle's view that each species has a distinct *telos*. The good of human beings includes having and exercising high cognitive and emotional capacities. The misfortune of the cognitively impaired therefore lies in their falling so far short of achieving their natural good. They are defective or failed human beings—something that it is clearly a misfortune to be. But normal dogs and other normal nonhuman animals do not suffer this misfortune, for their natural good is to be just as they are. It is, indeed, conceivable that this view implies that a dog genetically engineered to have cognitive capacities comparable to those of a normal human being—and thus beyond the norm for its kind—would not be specially fortunate among dogs but would instead be a monster.

Despite its intuitive appeal, the Species Norm Account is undermined by counterexamples. If how well off a being is were determined by how its life compares to the good life for normal members of its species, then

13. "Human Functioning," p. 227.

14. "Aristotle on Human Nature," pp. 117–18. Compare "Human Functioning," p. 228. In *Perfectionism* (New York: Oxford University Press, 1993), Chap. 4, Thomas Hurka develops a theory called "Aristotelian perfectionism" that also excludes the cognitively impaired from the human species, although on this theory the essential properties of human beings are not evaluatively determined.

an anencephalic infant, caused to exist without cerebral hemispheres, would be at the far end of the scale of misfortune. For it is certainly a member of our biological species, and it falls even farther short of any plausible specification of the human good than any human being with a capacity for consciousness and cognition, however badly impaired. It is an utterly failed human being. Yet it seems that an anencephalic infant is not the sort of being that can be badly off. Lacking even the capacity for consciousness, it has no capacity for well-being at all. It makes no more sense to say that an anencephalic is unfortunate, or badly off, than it does to say these things of a plant.

This counterexample alone may seem decisive. But it might be argued that, since the Species Norm Account is an account of fortune, it applies only to those beings with a capacity for well-being, since the latter is a necessary condition for being well or badly off. When restricted in this way, the account no longer applies to anencephalics. It remains, however, vulnerable to other counterexamples. Suppose that a chimpanzee is genetically engineered to have cognitive and emotional capacities comparable to those of a normal ten-year-old human child. After some years of exercising these capacities, this cognitively enhanced chimpanzee (the "Superchimp") suffers brain damage that reduces it to the psychological level of a normal chimpanzee, after which it lives a contented life among other chimpanzees. Alternatively, one might imagine that it retains its capacities but is kept continuously drugged. Either way, its actual mental life is indistinguishable from that of a normal chimpanzee. According to the Species Norm Account, the Superchimp in its brain-damaged (or drugged) state is no more unfortunate than an ordinary chimpanzee. It seems clear, however, that the loss (or suppression) of its higher capacities would leave the Superchimp in an unfortunate state, just as a comparable loss would leave a human being in a deprived state. (Can the Species Norm Account at least recognize that the Superchimp suffers a harm, even if—like the loss of a million dollars by a multimillionaire—it is not a harm that leaves its victim in a deprived state? It can do so only if it does not regard the Superchimp as a monster whose good is determined by the norms for its species.)

Let us extend this example further. Suppose that the type of genetic alteration responsible for the Superchimp's enhanced intelligence affects the germ-cells and thus is heritable. Imagine that a number of cognitively enhanced chimpanzees are created at a time when chimpanzees

have become an endangered species and that the new, intelligent chimpanzees begin interbreeding and eventually become more numerous than ordinary chimpanzees. At that point, what counts as normal capacities for the species will have changed. The hitherto normal chimpanzees will have become abnormal, or retarded. According to the Species Norm Account, they will have become unfortunate, for their level of well-being will be far below the higher levels made possible by the capacities that have now become the norm for the species.

This absurd conclusion cannot be evaded by claiming that the cognitively enhanced chimpanzees would constitute a new species, with its own distinctive norms. If heritable cognitive deviation in the direction of improvement can give rise to a new species, then so should equally extreme deviation in the other direction. But if this were the case, then those whose cognitive impairment is genetically based and heritable should also constitute a different, nonhuman species (as Nussbaum's Aristotle claims).

Perhaps the Species Norm Account misunderstands the relevance of species membership to our understanding of fortune. Suppose that an event occurs that causes a human being to be congenitally cognitively impaired rather than cognitively normal. Surely this individual is unfortunate. And he is unfortunate precisely because he could have existed with considerably higher cognitive capacities than those he has. By contrast, no animal with comparable cognitive capacities could have been natively endowed with cognitive capacities higher than those that set the upper limit for its species. This suggests an alternative account of fortune. Whether a being is well or badly off is determined by how its level of well-being compares with the range of levels of well-being made possible by the highest cognitive and emotional capacities with which that being might in principle have been congenitally endowed. The relevance of species is that it fixes the limits to the psychological capacities and potentials with which an individual could have been natively endowed. Call this the *Individual Possibility Account.*[15]

According to this view, the cognitively impaired are very badly off, for they could have existed with normal human capacities, and the gap between their actual level of well-being and that which they might have

15. Strictly speaking, the comparison is not with the cognitive capacities an individual might have been congenitally endowed with, but with the highest cognitive capacities the individual might have been congenitally endowed with the *potential* for.

enjoyed had their capacities been normal is very great. But a normal dog is not badly off. For its actual psychological capacities are close to the highest with which it could in principle been natively endowed. Hence the gap between its actual level of well-being and that which it could have enjoyed had it been caused to exist with higher capacities cannot be nearly so great as the corresponding gap in the case of a cognitively impaired human being.

With one additional metaphysical assumption, the Individual Possibility Account allows us to distinguish between anencephalic infants and the cognitively impaired, holding that the latter but not the former are unfortunate. The metaphysical assumption, which is admittedly highly controversial, is that conscious subjects and their physical organisms are distinct substances.[16] If this is correct, then a cognitively impaired individual is not identical with his or her physical organism. But an anencephalic infant simply *is* a human organism. There is no conscious subject that coexists with the organism. Thus, had one of the gametes or the embryo from which an anencephalic organism developed been genetically altered so that it would later have given rise to a conscious subject, that conscious subject would have been a different and distinct individual from the organism itself. It is therefore not possible, even in principle, that an anencephalic organism could have existed with any psychological capacities at all. Anything with psychological capacities would have been a distinct individual from the organism. Hence, according to the Individual Possibility Account, the cognitively impaired are unfortunate, while anencephalic organisms are not, since the former but not the latter could have existed with higher capacities.

While superficially plausible, the Individual Possibility Account is untenable. It assumes that, if the cause of a human being's congenital cognitive impairment had not occurred, that same individual would have existed with normal cognitive capacities, and that this is true even if the cause is the individual's natural genetic inheritance rather than some aberrant event. As I suggested earlier, however, this may not be true. In some cases at least, the genetic differences that would have been necessary to produce normal cognitive capacities would, as a matter of metaphysical necessity, also have produced a different individual. The account has to treat these cases differently, saying that individuals who

16. See Jeff McMahan, "The Metaphysics of Brain Death," *Bioethics* 9 (1995): 91–126.

could not have been caused to exist without cognitive impairment are not unfortunate, although others with similar impairments that were differently caused are. And it may seem arbitrary to distinguish between cases in this way. Moreover, even in cases in which impairment is caused by an aberrant event, and in which the same individual would have existed had the event not occurred, the fact that the *event* is a misfortune does not entail that the resulting *state* of the individual is one in which he is badly off.

To these objections it might be replied that emerging techniques of genetic enhancement make it possible in principle that all cognitively impaired human beings could have come into existence with normal capacities. This reply simply ignores the claim that some genetic interventions cause a different individual to exist from the one who would have otherwise existed. Still, even if that claim were mistaken, the appeal to the prospect of genetic enhancement would prove too much. For, if it is in principle possible for genetic alterations to make the difference between congenital cognitive impairment and cognitive normalcy in a human being without affecting the identity of the individual, then it should also be possible to enhance the congenital cognitive endowments of an animal to a comparable extent (as in the case of the Superchimp). But then the Individual Possibility Account would have to judge animals to be unfortunate in the same way that it would judge the cognitively impaired to be. Furthermore, insofar as the possibility of genetic enhancement suggests that normal human beings could have been caused to exist with higher cognitive capacities, the Individual Possibility Account implies, implausibly, that all of us are unfortunate.

III. Capacity, Potential, and Misfortune

There are other cases that reinforce the conclusion that the Species Norm Account is mistaken while in addition pointing the way to a better account. Imagine that a person with extraordinarily highly developed cognitive and emotional capacities—for example, Bertrand Russell—suffers a stroke and is reduced to a state of idiocy, with a level of well-being comparable to that of a contented dog. His condition, clearly, would be terribly unfortunate. Next consider a congenitally severely cognitively impaired adult (the "Congenital Retardate") whose level of well-being is comparable to that of Russell after the stroke. Even if we

think that the Congenital Retardate is unfortunate, most of us accept that his condition is not as unfortunate as Russell's. Finally, consider an extremely dim and stolid man (the "Dullard") who also suffers a stroke that reduces him to the same level as Russell and the Congenital Retardate. While he is more unfortunate than the Congenital Retardate, he is less badly off than Russell. For it is worse for Russell to be a contented idiot than it is for the Dullard.

There are two possible ways of understanding why this condition is worse for Russell. One is that it is worse in itself for Russell, perhaps because it is an even less fitting ending to a life such as his has been than it is to the life of the Dullard. The other is that it is not worse in itself but has a worse effect on the value of his life as a whole, again because it coheres less harmoniously with the rest of his life than the same condition does with the life of the Dullard. Either way, Russell both suffers a greater loss and ends up worse off, even though his actual state may in itself be indistinguishable from that of the Dullard.

If the Species Norm Account were correct, then Russell, the Dullard, and the Congenital Retardate would all be equally unfortunate. For they are all of the same species and have the same level of well-being. But they are not equally unfortunate. Why not? The mistake of the Species Norm Account is to suppose that what counts as flourishing for an individual is determined by the nature of its kind. This may be true when the individual is a typical member of its kind, but when its individual nature diverges in significant ways from that which characterizes the kind, then its good is determined by its own nature. This suggests, as a first approximation, that whether a being is flourishing or unfortunate depends on how high its level of well-being is relative to its own native capacity for well-being, which is determined by its native cognitive and emotional capacities. If, for example, an individual's level of well-being falls well short of the higher levels made possible by its native capacity for well-being, then it is unfortunate, or badly off. Thus a cognitively normal human being with a level of well-being comparable to that of a contented dog is badly off, since her well-being falls so far short of the levels of which she is herself capable. But a dog with a comparable level of well-being would be flourishing relative to its own capacity for well-being.

The standard for comparison, however, cannot be the range of well-being made possible by the individual's *present* capacities. Both Russell

and the Superchimp after suffering brain damage may be quite well off relative to the range of well-being their present capacities make possible. But we judge them to be unfortunate because their well-being is low relative to levels that were accessible to them with the capacities that they once had but have now lost. This suggests that we determine how well or badly off a being is by comparing its actual level of well-being with the range of levels accessible to it when possessed of the peak capacity for well-being it has achieved during its life. Call this the *Peak Capacity Account.*

This gives the right answers in cases of cognitive decline and cognitive enhancement. While we do not use an individual's present, diminished capacities as the standard for comparison in cases involving cognitive decline, we do use an individual's present, higher capacities as the standard in cases involving cognitive enhancement. Suppose, for example, that it were possible to augment the brain of the Congenital Retardate, thereby increasing his cognitive capacities and thus his capacity for well-being. If he were to undergo this treatment, we would evaluate his subsequent well-being relative to his enhanced capacities. If his capacity for well-being were enhanced but his actual state remained the same, he would then be worse off. But note that, though we would evaluate how well off he is relative to his present capacities, this is not because they would be his *present* capacities but because they would be his *peak* capacities.

Despite these merits, the Peak Capacity Account is defective. Suppose that an infant suffers brain damage that arrests its cognitive and emotional development at its present levels. While its present state is not abnormal for a human being of its age, the infant will never advance beyond this state. Most of us believe that this infant has suffered a misfortune and that, as it grows, its condition will be a pitiable one. If, however, we assess misfortune relative to the range of well-being made possible by the peak capacities that an individual has achieved, then the infant may not be unfortunate at all. Both now and in the future it might fare as well as it can relative to the highest capacity for well-being that it has ever possessed.

What is unfortunate about this infant is that it will soon be faring poorly relative to the range of well-being it had the potential to achieve prior to its suffering brain damage. This suggests the following proposal. Whether a being is well or badly off depends on how its level of well-

being compares to the range of well-being made possible by the highest cognitive and emotional capacities that it has actually achieved or that it natively had the potential to achieve. Call this the *Native Potential Account* of fortune.

This view seems to me more plausible than its rivals; yet it is open to serious objections. I will state four, conceding that I do not know how to answer them all. First, consider a congenitally cognitively impaired infant with psychological capacities and potentials comparable to those of the infant that has suffered brain damage. While the Native Potential Account accepts that the brain-damaged infant is unfortunate, it denies that the congenitally impaired infant is, since the latter never had the potential for attaining a significantly higher level of well-being than it presently has. Yet, if one were to see the two infants in adjacent cots in the hospital, both unable ever to progress beyond their present psychological state, it would seem arbitrary to claim that one was terribly unfortunate while the other was not.

That the two infants presently have the same capacity for well-being and are in roughly the same psychological state is not, however, a decisive reason for thinking that they must be faring equally poorly. That, after all, is also true of a normal dog and Russell after the stroke. That the infants seem equally pitiable may be an illusion that derives from our losing sight of their respective histories. That there is a relevant difference may be more apparent if we imagine that only one of them can be raised to cognitive normalcy and that we have to choose which one it is to be. We can augment the brain of the congenitally retarded infant, providing it with neural hardware that it presently lacks. Or we can repair the damaged parts of the other infant's brain. But, because resources are scarce, we cannot do both. Intuitively, it seems more important to restore proper functioning to the one infant's brain than to enlarge and enhance the other's. The brain-damaged infant began life as a higher being but suffered the misfortune of falling from that condition, whereas the congenitally impaired infant simply is what it is. Indeed, unless one appeals either to side-effects or to the exploded notion that each species defines the nature of the good of its members, it is difficult to defend the view that it is important to augment the congenitally impaired infant's brain without also accepting that it would be equally important to augment the brains of comparably endowed animals.

The possibility of restoring functioning to a damaged brain suggests

a second objection to the Native Potential Account. For, while it would be important to repair the one infant's damaged brain, it would be even more important to restore normal functioning to Russell's brain. For Russell is even more unfortunate than the brain-damaged infant. This is true even if the infant had the potential to have capacities as highly developed as those that Russell lost. For it seems worse to lose certain capacities than to lose only the potential to have those capacities. Yet, according to the Native Potential Account, Russell and the infant are equally badly off, since they fall equally short of the highest level of well-being that they once had the capacity or potential to achieve.

This objection suggests that the Native Potential Account goes too far in treating capacity and potential as on a par. Of course, in cases, such as that of Russell, in which an individual has realized those capacities for which he had the potential, there is no distinction between comparing his actual well-being with the highest level of well-being made possible by his peak capacities and comparing it with the highest level made possible by the peak capacities for which he had the potential. But, when an individual has not realized the capacities for which he had the potential, our overall assessment of his condition must be based on both (1) a comparison between his actual level of well-being and the highest level he has had the *capacity* to achieve, and (2) a comparison between his actual level and the highest level he has had the *potential* to achieve. And, of the two comparisons, the first must have more weight in determining the overall assessment. Other things being equal, a being is unfortunate to the extent that there is a divergence between its actual well-being and the highest level of well-being it has had the potential to achieve; but an equal divergence between its actual well-being and the highest level it has had the *capacity* to achieve would be even worse.

The Native Potential Account must be revised so that it treats a divergence between well-being and capacity as a worse misfortune than an equal divergence between well-being and potential. It must also distinguish between different ways in which potential may be unrealized. Otherwise it will be vulnerable to a third objection. For, if a being is unfortunate whenever its actual level of well-being falls short of the highest levels that it has the potential to achieve, then even a perfectly normal infant must be in a profoundly unfortunate state. And this seems absurd.

Interestingly, this problem arises for the Species Norm Account as well, since infants do have low levels of well-being relative to the range made possible by the capacities that are the norm for human adults. (It cannot, of course, arise for the Peak Capacity Account.) Indeed, Aristotle, who might be interpreted as having held a version of the Species Norm Account, apparently embraced this view. He wrote that "the life we lead as children is not desirable, for no one in his senses would consent to return again to this."[17] It might seem that the Species Norm Account could avoid this implication by indexing its account of the good not just to species but also to different stages in the life of a normal member of a species. On this view, there would not be a single good for human beings but a good for infants, a good for children, a good for adolescents, and so on. One problem, however, is that a certain amount of degeneration is the norm for the very elderly. If we index the good to the norms for the different stages in a human life, we will be precluded from recognizing senile deterioration as a misfortune.

Since we have abandoned the Species Norm Account, we need not grapple with this problem. But the Native Potential Account must address the same challenge. It can do so by distinguishing between different ways in which potential may be unrealized. First, potential may go unrealized if it is lost, as in the case of the brain-damaged infant. Second, one may simply fail to realize potential that one could have realized. If, for example, one is denied an education, one may fail to realize cognitive capacities that one natively had the potential to develop. These are both *failures* to realize potential; both are misfortunes. A normal infant, by contrast, has not *failed* to realize its potential to develop higher psychological capacities and thus a higher capacity for well-being. For the opportunity to realize its potential has not yet arrived. This is not a misfortune. Hence the Native Potential Account should count a being as unfortunate when its well-being falls significantly below its maximum potential well-being only when it has failed to realize its potential.

The fourth objection to the Native Potential Account is more difficult to meet. This is that it is very difficult to delimit the notion of potential in ways that the Native Potential Account seems to require. It may seem obvious that a normal infant has the potential to have certain psycho-

17. *Ethica Eudemia* (1215b23), translated by J. Solomon, in W. D. Ross, ed., *The Works of Aristotle*, Vol. IX (Oxford: Oxford University Press, 1975).

logical capacities while a congenitally impaired child does not. Yet even in the case of the normal child, various forms of external intervention are required in order for the potential to be realized. If the normal infant is abandoned and grows up as a feral child, his psychological capacities will be stunted relative to what they could have been had he been nurtured within a family, received an education, and so on. But we do not normally consider that everything that can be externally induced in an individual is therefore inherent in the individual's potentiality. Earlier, for example, we imagined a technology that could augment the brain of a congenitally cognitively impaired human being. If this technology existed, would we say that the congenitally cognitively impaired had the potential for normal cognitive capacities? If so, then the Native Potential Account would count them as unfortunate, though now, in the absence of the technology, it does not.

It is certainly reasonable to want to resist the expansive notion of potential according to which, if this technology existed, the congenitally retarded would then have the potential for normal cognition. For this would mean that, if a similar technology existed that could boost the psychological capacities of animals, they too would have the potential for higher psychological capacities and thus for a higher capacity for well-being, and so would be counted as unfortunate by the Native Potential Account.

The obvious response to this problem is to try to defend a firm distinction between genuinely native potential—i.e., potential that is grounded in the physical constitution of the individual—and a broader notion of potential that includes all that a being could become, compatibly with preserving its identity, by being externally augmented. One could then stipulate that the Native Potential Account assesses misfortune relative to potential only in the first of these two senses. It is, however, not clear that the distinction can be comfortably drawn. In some cases we treat the possibility of external augmentation as an unproblematic form of potential. If, for example, eye transplants were a routine procedure, we would have no trouble thinking of people born blind because of defective eyes as having the potential for sight. Where cognitive capacity is concerned, we tend to insist that genuinely native potential has to be somehow present in the existing neural hardware—that to add bits of brain matter would be to go beyond eliciting native potential. But there is a large gray area here. It seems that people's psychological ca-

pacities can be enhanced by administering them certain chemicals in which their brains are deficient. When this happens, we think of it as awakening potentials that are already there. But is there really a significant difference between this and a hypothetical form of therapy that involves, e.g., stimulating the growth of new brain tissues or even surgically grafting tissues from one brain to another?

I do not have a solution to this problem. It seems unacceptable either to concede that *any* identity-preserving change, even if it results from external augmentation, counts as the unfolding of innate potential or to abandon comparisons with potential altogether by retreating to the Peak Capacity Account. The alternative is to draw principled limits to the relevant notion of potential, and this I am at present unable to do. Having noted this problem, I will nevertheless proceed on the assumption that it can be solved and that the Native Potential Account as I have stated it is a close approximation to the correct account.

Let us take stock. If the Species Norm Account were correct, the congenitally cognitively impaired would be in the same category as Russell after his stroke. They would be terribly unfortunate. It seems, however, that the Native Potential Account is the more plausible view. According to this view, the cognitively impaired need not be unfortunate since, like animals, they may have lives that are good relative to the range of well-being accessible to them given their native psychological capacities and potentials. Neither of these views is, however, congenial to common sense, which regards the cognitively impaired as unfortunate in a way that animals are not but not so unfortunate as one who has had high psychological capacities but lost them. It is unclear, however, whether the common-sense view can be sustained.

It seems to be our practice to engage in two distinct forms of evaluation. First, we rank different forms of being as higher or lower, our metric being some measure of psychological capacity and potential. Mice, for example, are a lower form of life because their psychological capacities and potentials are lower. Second, within a particular category defined in terms of relevant capacities and potentials, we assess how well an individual is faring relative to the range of well-being accessible to the members of the category. The concepts of flourishing and misfortune are, for the most part, reserved for the second form of evaluation. While it is a misfortune to fare poorly relative to the range of well-being that defines one's category, it is not a misfortune to belong to a lower

rather than a higher category. Thus we do not regard animals as unfortunate because they are incapable of achieving levels of well-being as high as ours. Nor do we regard ourselves as unfortunate because we are not gods. Yet it is better to be a higher form of being. Higher beings not only have lives that may be more worth living than those accessible to lower beings, but they also, beyond a certain threshold, have an inherent worth that lower beings lack.[18] Still, the common view seems to be that lower beings are not unfortunate or deprived simply by virtue of being lower.

As I indicated earlier, there is a curious asymmetry in our attitudes to the diminution of capacities and the enhancement of capacities. To suffer a diminution of capacity, as Russell does when he has his stroke, is *not* to become a lower being. It is instead a catastrophic misfortune. One's position in the hierarchy is determined by the highest capacities that one actually achieves, or perhaps that one ever has the potential to achieve. Thus to have one's capacities enhanced *is* to become a higher being. But, while it would be good to become a higher being, it is not a misfortune to be or to remain the kind of being one is.

The cognitively impaired have lower levels of well-being than most other human beings. But, as we have seen, it does not follow that they are unfortunate, deprived, or badly off. As in the case of the Superchimp, both before and after it suffers brain damage, how well off they are is determined not by comparing them with other members of their biological species but by comparing how well they are faring with how well it is possible for them to fare given their native psychological capacities and potentials. They are not unfortunate for having the lower psychological capacities, and thus the lesser capacity for well-being, that make them the beings they are. If this is right, then they are not owed special compensation under relevant noncomparative principles of justice.

IV. Qualifications

I have argued at length that whether a being is flourishing or unfortunate does not depend on comparisons with others of its kind. This, however, is an oversimplification, for there are cases in which there is a comparative element in our assessment of whether someone is unfortu-

18. On the distinction between the value of a life and the worth of an individual, see Jeff McMahan, "Killing and Equality," *Utilitas* 7 (1995): 10–11.

nate. All of us, for example, are handicapped in various ways that cause us to fall short of the higher levels of well-being of which we are in principle capable. I could be faring better relative to my own native capacity for well-being if I could fly or practice telekinesis, or if I were invulnerable to injury or had a perfectly efficient immune system. But I am not considered unfortunate because I lack these advantages. For my deficiencies are widely, indeed universally, shared. In other words, it is the comparison with others that blocks the conclusion that I am unfortunate. In other cases, a person may have a level of well-being that is high relative to her capacity for well-being and yet be regarded as unfortunate. A person who is among the poorest 10 percent of the people in the U.S. today may rightly feel unfortunate, even if she is quite well off in absolute terms and better off than 95 percent of the world's current population and 99.9 percent of the world's population over the past five millennia. Again, the judgment that she is unfortunate is based on a comparison with other contemporary Americans.

It is important to notice, however, that these comparative judgments presuppose different comparison classes. When we judge that I am not unfortunate for being unable to walk on walls (even though flies can and I would certainly be better off if I could), the relevant comparison class is the entire human species. If a significant enough fraction of the human population were to acquire the ability to walk on walls, then I might feel unfortunate, just as I would now if I were unable to walk at all. In the case of the poor American, the comparison class is narrower. In other cases, it is even narrower still. During his recent tribulations, Michael Jackson elicited a copious flow of pity for his unfortunate condition, the assumption being that anything less than perfect bliss must count as a deprived state for a star entertainer.

The reason why the variation of the comparison class is important is that it shows that the comparative element in our notion of misfortune does not reflect a commitment to the view that misfortune involves a deviation from some objective standard of the good (e.g., one set by the nature of the kind of which one is a member). The comparison classes for the judgments we make are not usually natural kinds, or kinds whose members are *essentially* members. How, then, are these classes determined? They are determined, it seems, by a contingent identification of the person with the group—normally by the person's own self-identification with the group. If a person identifies herself with and measures

herself against other Americans, rather than Haitians, she will feel unfortunate if she is worse off than most Americans, even if she is better off than most Haitians.

Just as there are cases in which one may seem unfortunate for having a lower level of well-being than others, so there are also cases in which one may seem unfortunate for having the psychological capacities with which one is natively endowed. Suppose, for example, that one were to wake up one morning to find that during the night the psychological capacities of every human being other than oneself had been mysteriously increased.[19] Relatively speaking, one would suddenly have become a moron. It seems clear that in these circumstances one would be unfortunate. One reason for this is that one's capacities would have become instrumentally inferior. As a result of one's cognitive inferiority, one would be likely to be left behind, lonely and ignored, or to be treated as a curious and pitiable specimen of unenhanced humanity; and one would be at serious competitive disadvantage in a society of cognitively superior beings.[20] The other reason why one would be regarded as unfortunate is that, because one identified oneself with, and measured oneself against, those who would have been cognitively enhanced, one's condition would naturally be assessed relative to theirs. And one would feel aggrieved that, without there being any special merit on their part or fault on one's own, one had been denied a great benefit that all of one's fellows had received.

Again, however, it is significant that this second reason depends crucially on one's self-identification with the others. If one were a member of a small and isolated colony on a distant planet, with hardly any contact with earth at all, and were to learn that everyone on Earth had been inexplicably cognitively enhanced, it is doubtful that one would believe that, together with one's fellow colonists, one had suddenly become unfortunate. For one's fellow colonists would constitute the primary focus of one's self-identification: one would assess one's condition by comparison with theirs rather than with that of people on Earth. In these circumstances, one would feel unfortunate if the other colonists

19. I owe this example to Michael Otsuka.

20. Aristotle notes that "much can be taken away and friendship remain, but when one party is removed to a great distance, as God is, the possibility of friendship ceases." (*Ethica Nichomachea*, 1159a3–5, trans. W. D. Ross)

were enhanced, and it would hardly matter to one's assessment of one's condition whether or not the people on Earth were enhanced as well.

It is instructive to compare this example with the earlier case in which cognitively enhanced chimpanzees become the dominant strain in the species. This too is a case in which some members of a species become markedly inferior to others because the latter have become beings of a higher sort. In this case, however, the chimpanzees who are normal by present standards would not become unfortunate. The breeding of the Superchimps would not be instrumentally bad for them. They would not become isolated or outcast; nor would they suddenly be at a competitive disadvantage. It is significant, moreover, that we do not think that they would be unfortunate merely by virtue of the contrast with the Superchimps. The explanation seems to be that ordinary chimpanzees do not have identities in the sense in which an individual's identity can be bound up with his or her membership in a group. *A fortiori*, neither they nor we identify them (in the relevant sense) with the Superchimps and thus the question of their being comparatively unfortunate simply does not arise.

What relevance do these considerations have for the status of the cognitively impaired? First, it seems clear that the lower capacities of the cognitively impaired can constitute an instrumental misfortune for them in the sense identified earlier. Unlike animals, who are equipped with instincts that make independent survival possible despite their otherwise rudimentary cognitive capacities, the cognitively impaired are utterly helpless and dependent.[21] In some cases, this sort of dependency can be a misfortune in itself. In the case of the cognitively impaired, however, the badness of dependency seems to be only instrumental. As with domesticated animals, if the cognitively impaired are neglected, their dependency will prevent their achieving levels of well-being of which they are otherwise capable. If, however, their needs are met by their caregivers, this prevents their dependency from being a misfortune.

Second, insofar as it is correct that the secondary, comparative notion of misfortune that I have identified depends on the contingent identification of the unfortunate individual with the members of the relevant

21. In conversation, both Walter Feinberg and David Gauthier stressed this difference between the cognitively impaired and otherwise comparable animals.

comparison class, this notion has no more application to the cognitively impaired than it does to chimpanzees. For severely cognitively impaired human beings are also insufficiently developed cognitively to have identities in the relevant sense. Third, even if the cognitively impaired were appropriately identified with normal human beings, their being unfortunate by comparison would not entitle them to compensation under relevant noncomparative principles. To be entitled to special compensation under these principles, an individual must be unfortunate or badly off by some absolute measure, not merely by comparison with the members of some group, however encompassing the group might be.

This, however, raises the question whether, if the cognitively impaired were judged unfortunate by comparison with other human beings—in the way that the poor American is unfortunate by comparison with other Americans—this would entitle them to special compensation under *comparative* principles of justice. The answer is that it would not. For, as we have seen, the comparison classes for judgments of this sort are variable and essentially arbitrary. And comparisons within arbitrarily determined classes are irrelevant from the standpoint of comparative justice. The scope of comparative principles of justice—which is the subject of the next section—is not determined by anything as arbitrary as people's contingent sense of group identification. Thus one may be unfortunate compared to the other members of the group that is the primary source of one's sense of identity and yet not be among the worse off people from the standpoint of justice or equality.

V. The Scope of Justice and Equality

Noncomparative principles are not the only principles of justice. Indeed, certain prominent views—namely, those that hold that justice consists in some form of equality—are essentially comparative. They hold that what individuals are entitled to as a matter of justice depends on how their states or their lives compare with those of others. According to these comparative principles, it is not necessary for an individual to be badly off in order to be owed special compensation as a matter of justice. All that is necessary is that the individual be disadvantaged *relative to others.* Even if I am right that the cognitively impaired are not unfortunate or badly off, it is difficult to deny that they are disadvantaged relative to most normal people, in that their levels of well-being

are substantially lower. But if it is the case that they are among the worst off, and if we accept some comparative principle of justice, then we ought, other things being equal and as a matter of justice, to raise their well-being in order to narrow the gap between us and them. This is what I earlier referred to as the comparative argument.[22]

One problem that the comparative argument faces is that most of the respects in which egalitarians have thought that individuals should be equal—for example, in terms of primary goods, resources (social and natural), access to advantage, welfare, opportunity for welfare, capacity for functioning, and so on—are respects in which the cognitively impaired cannot be made our equals (e.g., welfare) or in which it would be pointless to make them our equals (e.g., primary goods). This is not, however, a decisive objection. Even if perfect equality is unattainable, justice may require that we give a certain priority to the aim of reducing the gap between us and them. And, if it becomes possible to expand an individual's cognitive capacities by genetic intervention, then we would have a reason grounded in justice to provide cognitive enhancement for the cognitively impaired. The social costs that might be required to meet these demands of justice could be quite high.

The obvious objection to the comparative argument—obvious because it parallels the earlier discussion—is that, unless we can relevantly differentiate between the cognitively impaired and animals with comparable capacities, then animals too should fall within the scope of the relevant principles of equality. For they too are among the least advantaged, handicapped from birth by deficiencies for which they are not themselves responsible. Hence it might seem that they too should have a certain priority in the allocation of social resources. It seems obvious, however, that animals are outside the scope of the relevant comparative principles. (Indeed, it is worth noting that they seem to be outside the scope of noncomparative principles as well. Earlier I argued that they are not owed compensation under these principles because their low levels of well-being do not make them badly off in the relevant sense; and in general this is right. But there are, of course, some animals who are very badly off even relative to their own capacities for well-being. Yet

22. Those principles of equality that hold that inequality is a bad *state of affairs* imply that the reduction of inequality is good even when it is better for no one. I will ignore these principles here and assume that the comparative argument is based on what Parfit calls a "Deontic" principle of equality. (*Equality or Priority?*, pp. 8–9.)

we do not think that they are owed special duties of aid as a matter of *justice.*) Can we delimit the scope of equality in such a way that animals are out while the cognitively impaired are in?

This depends on how the boundaries of the sphere of justice are set. And different theories of justice set the boundaries in different ways. Contractarian theories typically hold that an individual must possess the capacities for deliberation and consent necessary for entering agreements with others in order to come within the sphere of justice. And there are related theories that hold that, to be owed duties of justice, an individual must have the ability to reciprocate certain forms of treatment or to contribute to cooperative endeavors. To my mind, the most plausible general view is that there are certain properties and capacities that give their possessor an inherent worth that demands respect. It is the possession of these properties and capacities that makes an individual one's moral equal and thus brings him or her within the sphere of justice. There are different accounts of what the relevant properties and capacities are, though there is general agreement that they are psychological rather than physical in nature. In the Kantian tradition, for example, they are the capacities necessary for moral agency: rationality and autonomy. This and the various other accounts constitute a family of theories, which Allen Buchanan groups together under the label "subject-centered justice," according to which an individual's inclusion within the sphere of justice depends upon "certain features of the individual himself."[23]

For our purposes, it is not necessary to argue for a particular account of the relevant properties. For if the properties are intrinsic rather than relational, and in particular if they are psychological rather than physical, and if animals (or at least animals other than the great apes) are excluded from the sphere of justice because they do not possess these properties, then it seems to follow that human beings with comparable psychological properties and capacities must be excluded as well. It does not follow, of course, that either the cognitively impaired or animals are outside the scope of morality altogether. Most moral theories that incorporate claims about justice and equality distinguish the sphere of justice from other domains within morality. Thus they accept

23. Allen Buchanan, "Justice as Reciprocity versus Subject-Centered Justice," *Philosophy & Public Affairs* 19, no. 3 (Summer 1990): Sec. III (pp. 233–36). For further discussion, see McMahan, "Killing and Equality," Secs. IV–VI.

that, while animals and the cognitively impaired are not owed duties of justice, beneficence requires that their interests be accorded due consideration and respect.

It is worth pointing out that, if the cognitively impaired, like most animals, are outside the scope of justice, then we cannot have a duty of justice to provide them with cognitive enhancement if the necessary techniques ever become available. For, as we have noted, certain minimum psychological capacities beyond those possessed by the severely cognitively impaired are among the bases of worth on any subject-centered theory that excludes animals from the sphere of justice. But, if these capacities function as a boundary condition for the application of principles of justice, then they cannot themselves be regarded as a good that falls within the scope of those principles. It cannot be the case, in other words, both that one has to possess certain capacities in order to be owed duties of justice and that those lacking these capacities are owed them as a matter of justice.

VI. The Moral Status of the Congenitally Severely Cognitively Impaired

I have argued that the cognitively impaired are not badly off in the sense relevant to justice and indeed do not come within the scope of comparative (and, by extension, noncomparative) principles of justice. Not only do they not have special priority as a matter of justice, but their claims on us seem even weaker than those of most other human beings. And my arguments have explicitly compared them to nonhuman animals with comparable psychological capacities. Having made these radical claims, I should conclude by trying to clarify the status of the cognitively impaired within morality. This, however, is a large and difficult issue, and all I can do here is to sketch the broad outlines of a possible view. My remarks will be schematic and tentative.[24]

How a being ought to be treated depends, to some significant extent, on its intrinsic properties—in particular, its psychological properties and capacities. With respect to this dimension of morality, there is noth-

24. I address some of the same issues in greater detail in "The Limits of National Partiality," in Robert McKim and Jeff McMahan, eds., *The Morality of Nationalism* (New York: Oxford University Press, 1996); and in *Killing at the Margins of Life* (New York: Oxford University Press, 1997).

ing to distinguish the cognitively impaired from comparably endowed nonhuman animals. There are thus three options. Where appropriate treatment is determined by intrinsic properties, we may conclude (1) that we should treat the cognitively impaired in the same ways that we have traditionally treated animals with comparable psychological capacities; (2) that we should treat animals in the same ways we have traditionally treated human beings with comparable psychological capacities; or (3) that the treatment of animals is governed by stronger constraints than we have traditionally supposed, while the treatment of the cognitively impaired is in some respects subject to weaker constraints than we have traditionally supposed. The third seems the only reasonable option. It need not, however, require that we revise all of our traditional beliefs. We might, for example, hold beliefs about causing pain to the cognitively impaired constant, while greatly revising traditional beliefs about causing pain to animals. Beliefs about other modes of treatment might be revised according to different patterns, provided that we achieve convergence for each distinct mode of treatment.

How an individual ought to be treated is not, however, determined entirely by the nature of his or her intrinsic properties. Many other considerations are relevant. Most of these—for example, what the individual has done, the competing claims of others, the limits to what can reasonably be demanded of agents, and so on—are unimportant for our purposes, since they fail to distinguish the cognitively impaired from animals. But there is one dimension of morality that may require that we distinguish between the two. According to common-sense morality, what an agent owes to an individual may be partly determined by the ways in which the agent is related to that individual. Certain relations between two individuals may give one or both of them a special moral reason—in some cases a permission, in others a requirement—to give some degree of priority to the interests of the other. A plausible account of morality must, in my view, seek to achieve a coherent and stable reconciliation of the impartial demand that we accord due respect to an individual's intrinsic properties and the fact that people's moral reasons are affected by the relations in which they stand to others.

There are numerous relations that are thought to justify some degree of partiality between individuals: for example, the relations between parents and children, other family members, friends, the adherents of a common religion, the members of a cultural community or national

group, citizens of the same state, members of the same ethnic or racial group, and so on. Most people appear to believe, moreover, that membership of the same biological species is a special relation that warrants some degree of partiality. If that is right, then each of us may have reason to give other human beings, including the cognitively impaired, a certain priority over animals, to whom we are not specially related. There are, of course, limitations to this defense of the priority of the human. If it is only our special relation to the cognitively impaired that justifies our giving them priority, then Martians would have no direct moral reason to treat them any differently from animals with comparable capacities; and many people will object to this implication. Still, the appeal to special relations may be thought to go some way to explaining our strong intuitive sense that the cognitively impaired have priority.

What makes a given relation a source of special moral reasons? We may distinguish two broad forms of explanation. According to some accounts, special relations have profound instrumental significance: they are necessary for, or elements of, the good life for persons. If, for example, people did not participate in certain relations—e.g., those involving love—and act on the basis of the feelings of partiality they engender, their lives would be immeasurably impoverished. All such justifications, however, seem radically incomplete; they fail fully to capture the morality of special relations from the inside. The special duties that a parent owes her child, for example, cannot be fully explained simply by appealing to the contribution that the relation makes to the value of each of their lives. A complete account of the morality of special relations must include a recognition that these relations are actually constitutive of certain areas of morality, that they are fundamental sources of moral reasons, and thus that their significance is not exhausted by the contributions that they make to other goods. In other words, in addition to having instrumental significance, special relations have intrinsic or foundational significance within morality.

This, however, raises a difficult problem. Some relations have been thought by many to have an intrinsic significance that in fact they lack. Membership in the same racial group is a paradigm example.[25] In other cases, special relations have been attributed a significance far in excess

25. For an excellent discussion of racial partiality that denies that there are in fact any races, see Kwame Anthony Appiah's Tanner Lectures, a version of which appear in Anthony Appiah and Amy Gutmann, *Color Conscious* (Princeton: Princeton University Press, 1996).

of their actual importance—for example, when people have left fortunes to their pets. How, then, does one determine whether, and if so to what extent, a certain relation has intrinsic moral significance? There is, regrettably, no well-developed account, and *a fortiori* no plausible one, of why certain relations have intrinsic significance while others do not. And, without such an account, we may be unable to determine whether our comembership in the human species actually provides a legitimate reason for us to accord priority to the cognitively impaired.

In the face of this uncertainty, one strategy that suggests itself is to compare comembership in the human species with other relations whose moral significance we are more confident about. This exercise is, however, far from reassuring. For, unlike the relations between friends or family members, comembership in the human species is not a personal relation but only a distant biological relation. With the exception of those who are close relatives of some cognitively impaired individual, we are only marginally more closely genetically connected to the cognitively impaired than we are to chimpanzees. In these respects, the relation most resembling comembership in the human species is comembership in the same race. In each case, genetic connections fail to differentiate strongly between members and nonmembers, so that the relation tends to be reducible to nothing more than similarity of gross morphology. What has been called "speciesism"—giving preference to members of one's own species—turns out to be remarkably like racism after all. Bare comembership in the human species, which is what we share with the cognitively impaired, does not involve personal ties, mutual sympathy, shared values, a common commitment to a certain way of life, social cooperation, or any of the other features of relations that are more readily recognizable as legitimate bases for partiality.

It would, however, be unwise to be dogmatic about these matters, given that our understanding of the morality of special relations is relatively undeveloped. It is possible that the relation we bear to the cognitively impaired gives us reason to give their interests priority over the similar interests of comparably endowed animals. Yet the apparent insignificance of the relation makes it unwarranted to assume that the degree of justified partiality is very great, or that partiality is morally required rather than merely permitted.

Where does this leave us? Let me conclude with a suggestion. The cognitively impaired do stand in important special relations to *some*

people. Their impairments do not cancel the significance of the relations that their parents and siblings bear to them. These people have special reasons to protect and care for them and are typically strongly and appropriately motivated by love and compassion to do so. And the rest of us are morally bound to respect these people's feelings and commitments. We therefore have indirect or derivative moral reasons to be specially solicitous about the well-being of the cognitively impaired that we do not have in the case of animals. These reasons, moreover, do not derive from special relations. It is not because we are specially related to certain people that we must respect their commitments to their children or siblings. Thus these reasons would apply to Martians as well. They are not, of course, our only moral reasons to protect and care for the cognitively impaired. Simple beneficence requires that we take due account of the interests of the cognitively impaired, just as it requires that we respect the similar interests of animals. In the case of the cognitively impaired, however, these reasons are supplemented by further reasons to respect the commitments of those persons who are specially related to them.