"*To Be Or Not To Be":* The Wrongful Life Action Between the Legal Reality And Moral Dilemmas

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Index

Preface

The purpose of this research paper is to analyse and explain the controversial phenomenon of the wrongful life action, which represents at the same time, a legal reality and a moral dilemma because its peculiarity resides in the fact that, the claim presented through it, is a claim against existence itself.

At first the attention of the paper will be devoted to the description of the origins of such a controversial action, which is identifiable with the non-identity problem, which is devoted to the analysis of future people's interests, and its relationship with procreative choices; thus the discourse will be devoted to the presentation of the different theoretical approaches to this complex question.

The second part of the first chapter will be, indeed, dedicated to the description of natalist and anti-natalist conceptions of the non-identity dilemma, with a particular attention on which reasons can be advanced to defend either of the two positions.

Then the discourse will be directed to the analysis of a practical case of wrongful life action: the *Affaire Perruche*. This case will be fundamental in order to frame the theoretical reasoning into a practical scenario, which raises questions and further reflections over this paradoxical kind of legal action.

The second chapter of this research paper, will properly be devoted to the analysis of this case, which will stress the evident political and theoretical nature of the non-identity problem and thus of the wrongful life action itself.

The final part of the paper will be, instead, devoted to the explanation of how this wrongful life action works in legal terms and which are its main features.

The third chapter will at first make a distinction between similar but distinct forms of legal actions such as wrongful conception and wrongful life, posing then the attention on the latter by describing its development over time, thus analysing the different models which have been adopted, in order to define what "wrongful" life means and which borders this concept has.

The final part of the chapter will then be focused on the description of the main recurrent legal issues, originating by this kind of legal action.

Chapter 1: The Origins Of The Non-Identity Problem

1. What is the non-identity problem?

The non-identity problem concerns the obligation that we have in respect of people whose existence depends on us, or better those people who have been brought into existence by us.

The non-identity problem intervenes in many fields and one of its applications can be registered properly where the lives of those individuals are damaged and imperfect, due, for example, to a serious disability: the so-called wrongful life cases.

It is in this case that the non-identity problem enters our consciences by leaving the agent with a unique alternative: indeed in front of a person's unavoidably flawed existence, the only possibility results to be not having brought that person into existence at all.

In order to be able to approach the wrongful life controversy, it is necessary, at first, to take a look at the philosophical origins of this issue: the non-identity problem.

One of the first and most famous theorizations of the non-identity problem was made by Parfit, who tries to define what weight we should give to the interests of future people; he starts his reasoning by giving us an example:

> Suppose that I leave some broken glass in the undergrowth of a wood. A hundred years later this glass wounds a child. My act harms this child. If I had safely buried the glass, this child would have walked through the wood unharmed" and then he poses a crucial question " Does it make a moral difference that the child whom I harm does not now exist?
>
> (Parfit 1984: 357)

In the opinion of Parfit there is not any kind of moral difference , he indeed insists that we are able to affect the identity of future people; thus a precise reasoning concerning future people is necessary:

> When considering future people, we must answer two questions:
> (1) If we cause someone to exist, who will have a life worth living, do we thereby benefit this person?
> (2) Do we also benefit this person if some act of ours is a remote but necessary part of the cause of his existence?
>
> (Parfit 1984: 358)

As the author clarifies if we can answer "Yes" to both these questions, we can say that the act of causing existence can benefit.

The problem instead arises if we cannot answer "Yes" to both these questions. To make this issue fully understandable the author uses the example of the *"The 14-Year-Old Girl"* by proposing a scenario in which a girl chooses to have a child, but she is too young to raise a child and thus she gives him a bad start in life.

Even if this will have bad effects on the child's existence, his life will be worth living; now if this girl had waited several years before having a child, she would have had a different child, to whom she would have given a better start in life.

Considering this scenario, imagine that we try to persuade this girl not having her baby, but we fail; she decides anyway to have this child.

Parfit goes on by saying:

> In one sense, this girl's decision was worse for her child. In trying to persuade this girl not to have a child now, we can use the phrase 'her child' and the pronoun 'he' to cover any child that she might have. These words need not refer to one particular child. We can truly claim: 'If this girl does not have her child now, but waits and has him later, he will not be the same particular child. If she has him later, he will be a different child.' By using these words in this way, we can explain why it would be better if this girl waits. We can claim: (A) The objection to this girl's decision is that it will probably be worse for her child. If she waited, she would probably give him a better start in life.
>
> (Parfit 1984: 359)

The principle underlying statement (A) is what the author calls *The Same Number Quality Claim*, or *Q* that is: « If in either of two possible outcomes the same number of people would ever live, it would be worse if those who live are worse off, or have a lower quality of life, than those who would have lived ». (Parfit 1984: 360)

This means that the child the 14-Year-Old Girl has now will have a worse start in life than the child she would have had if she had waited.

Thus this results in the idea that the choice made by the girl was the worse of the two possible outcomes. *Q* implies that it would have been better if this girl had waited, and had a child later.

Anyway Parfit adds also:

> I believe that, if I was the actual child of this girl, I could accept that it would have been better if the child who existed had not been her actual child. This does not imply that my existence is bad, or intrinsically morally undesirable. The claim is merely that, since a child born later would probably have had a better life than mine, it would have been better if my mother had waited, and had a

> child later. This claim need not imply that I ought rationally to regret that my mother had me, or that she ought rationally to regret this. Since it would have been better if she had waited, she ought perhaps to have some moral regret. And it is probably true that she made the outcome worse for herself. But, even if this is true, it does not show that she ought rationally to regret her act, all things considered.
>
> (Parfit 1984: 360)

Anyway *Q* does not solve the Non-identity Problem because it covers only cases of different outcomes, but in which the same number would ever live.

We need a claim that covers cases where, in the different outcomes, different numbers would ever live.

The Non-Identity Problem can arise in these cases. To show the composition of this problem in a situation in which different outcomes produce different numbers, the author turns to a different reasoning:

> Suppose that we are choosing between two social or economic policies. And suppose that, on one of the two policies, the standard of living would be slightly higher over the next century. This effect implies another. It is not true that, whichever policy we choose, the same particular people will exist in the further future. Given the effects of two such policies on the details of our lives, it would increasingly over time be true that, on the different policies, people married different people. And, even in the same marriages, the children would increasingly over time be conceived at different times. As I have argued, children conceived more than a month earlier or later would in fact be different children. Since the choice between our two policies would affect the timing of later conceptions, some of the people who are later born would owe their existence to our choice of one of the two policies. If we had chosen the other policy, these particular people would never have existed. And the proportion of those later born who owe their existence to our choice would, like ripples in a pool, steadily grow. We can plausibly assume that, after one or two centuries, there would be no one living in our community who would have been born whichever policy we chose. It may help to think about this question: how many of us could truly claim, "Even if railways and motor cars had never been invented, i would still have been born?"
>
> (Parfit 1984: 361)

Parfit then goes on by posing a general question "why should this constitute a problem?", because we have to think of the effects that the two policies will have on future generations. Indeed for the author we can choose among two main policies: depletion and conservation; if we choose depletion, this will result in two centuries of a slightly higher quality of life than if we had chosen conservation, but it would result later in a much lower quality of life than if we had chosen conservation. We are not measuring the

quality of life comparing it with our present quality of life, but with the quality of life those people could have enjoyed if we had chosen conservation. Thus we are not saying that the life of those people are not worth living; moreover if we wouldn't have chosen depletion those people would never had existed.

Now the author concentrates on a crucial question:

> Suppose that we do not assume that causing to exist can benefit. We should ask, "If particular people live lives that are worth living, is this worse for these people than if they had never existed?" Our answer must be No. Suppose next that we do assume that causing to exist can benefit. Since these future people's lives will be worth living, and they would never have existed if we had chosen Conservation, our choice of Depletion is not only not worse for these people: it benefits them.
>
> (Parfit 1984: 363)

Thus, as it is showed in the passage above, in both cases our choice will not be worse for future people. Anyway the author pushes the reasoning further: « we know that, even if it greatly lowers the quality of life for several centuries, our choice will not be worse for anyone who ever lives […] Does this make a moral difference*?* ». (Parfit 1984: 363)

The answer to this question depends on the perspective we adopt to look at the problem; indeed if we adopt the perspective according to which: « what is bad must be bad for someone ». (Parfit 1984: 363)

Then, on this view, no problem arises because our choice does not have any bad effect. Anyway the author clarifies that, « the great lowering of the quality of life must provide some moral reason not to choose Depletion ». (Parfit 1984: 363)

Once this point becomes clear the next step concerns two questions:

1)What is the moral reason not to choose Depletion?

2) Does it make a moral difference that this lowering of the quality of life will be worse for no one? Would this effect be *worse*, having greater moral weight, if it *was* worse for particular people?

Question number one, represents what the author calls The Non-identity Problem: it can be answered with the *Q* the author has provided above, but this is true only for the case in which for different outcomes the numbers would be the same. Instead to cover cases in which numbers differ we will have to make reference to what the author calls Theory X. In order to find

this Theory X the author continues his reasoning by analysing if an appeal to people's rights could be the right path to solve the problem; indeed he starts by asking:

> Can we solve our problem by appealing to people's rights? Reconsider the 14-Year-Old Girl. By having her child so young, she gives him a bad start in life. It might be claimed: "The objection to this girl's decision is that she violates her child's right to a good start in life."
>
> (Parfit 1984: 364)

Anyway, as he clarifies, even if the child has this right, it could not have been fulfilled; indeed the girl could not have had this same child once she had become a mature woman. Thus since the child's right cannot be fulfilled the girl cannot be blamed for having violated it; at the same time we can imagine what kind of objection could be made to this assertion: « it is wrong to cause someone to exist if we know that this person will have a right that cannot be fulfilled ». (Parfit 1984: 364)

Can this be the objection to this girl's decision? The answer given to this question is a negative one and it is built on a real event that the author reports about a British politician who expressed his positive reaction to the fact that, in the previous year, there had been fewer teenage pregnancies. Following this episode a middle-aged man wrote in anger to *The Times;* his anger was due to the fact that he was born when his mother was only fourteen, he recognised that, because of this, the early years of his life were difficult but that his life was now worth living.

Thus, in his opinion, the politician's assertion was outrageous, because it seemed to suggest that it was better if he would never had born. Indeed the politician view was properly this: the idea that it would have been better for this woman to have waited several years before having a child. Probably many of us share this view, but can we support it by claiming that this angry man had a right that was not fulfilled?

We cannot, because the reason for which we think that it would have been better if this man's mother had waited does not concern what she did for her actual child but what she could have done for any other child that she could have had when she was mature.

Thus the rights' appeal does not work here, because, in the case we are considering, the mother has not violated a right of the child; the kind of start in life she had given to her child was the only possible in that moment. In order to give her child a better start in life she would have had to wait several years, but in that case the child entitled to receive that better kind of start in life would have not been the same child she could have had at

fourteen, he would have been another. This reasoning applies also to the case of Depletion, indeed the author poses a question:

> Suppose that we choose Greater Depletion. More than two centuries later, the quality of life is much lower than it would have been if we had chosen Conservation. But the people who will then be living will have a quality of life that is about as high as ours will on average be over the next century. Do these people have rights to which an objector can appeal?
>
> (Parfit 1984: 365)

Certainly, as the author states, each generation shall have a right to an equal range of opportunities; clearly if we choose Greater Depletion, the people who will live more than two centuries later will have fewer opportunities, and a lower quality of life, than some earlier and some later generations. We could think that an objection based on a rights appeal concerning these future generations but as the author clarifies again:

> If we had chosen otherwise, these people would never have existed. Since their rights could not be fulfilled, we may not violate their rights […] It is not clear that this is a good objection. If these people knew the facts, they would not regret that we acted as we did. If they were glad to be alive, they might react like the man who wrote to The Times. They might waive their rights. But, since we cannot assume that this is how they would all react, an appeal to their rights may provide some objection to our choice.
>
> (Parfit 1984: 365)

According to Parfit the reason for which the Non-identity problem cannot be solved through an appeal to rights, it's because of the wrong conception of the Principle of Beneficence; indeed according to it: « since we deny these people very much greater benefits, this provides some moral reason not to make this choice ». (Parfit 1984: 365)

But our choice does not deny these people any benefit, since if we had not made this choice but another, they would have not existed at all.

Thus once we have realised that our choice of Depletion will be worse for no one, does this make a moral difference? The author tries to convince us that in reality it does not and he calls this perspective "The No Difference View".

To explain what this perspective involves he proposes an example, which concerns two medical programmes:

> The Medical Programmes. There are two rare conditions, J and K, which cannot be detected without special tests. If a pregnant woman has Condition J, this will cause the child she is carrying to have a certain handicap. A simple treatment would prevent this effect. If a woman has Condition K when she conceives a

> child, this will cause this child to have the same particular handicap. Condition K cannot be treated, but always disappears within two months. Suppose next that we have planned two medical programmes, but there are funds for only one; so one must be cancelled. In the first programme, millions of women would be tested during pregnancy. Those found to have Condition J would be treated. In the second programme, millions of women would be tested when they intend to try to become pregnant. Those found to have Condition K would be warned to postpone conception for at least two months, after which this incurable condition will have disappeared. Suppose finally that we can predict that these two programmes would achieve results in as many cases. If there is Pregnancy Testing, 1,000 children a year will be born normal rather than handicapped. If there is Preconception Testing, there will each year be born 1,000 normal children rather than a 1,000, different, handicapped children.
>
> (Parfit 1984: 367)

Considering what has been said about these two programmes, can we say that they are equally worthwhile? To answer this question we have to take into consideration that in each of the two programmes 1000 couples (different for each programme) would have a normal rather than an handicapped child.

Taking into account that the numbers and the effects on the parents and on other people would be equivalent, the only moral difference will concern the effect on the children. Moreover we have also to consider that when we choose, none of the children has yet been conceived and all the children who will be conceived will become adults, thus the effects we are considering are those on future people. Finally the handicap presented in these cases is not so severe that we could consider our life not to be worth living.

At this point the author presents a situation in which we cannot afford both programmes and thus we have to choose one of them, which will be our choice?

In order to be able to make a decision we need to look at what differentiates this two programmes, that is the effect they have on the children.

This difference is explained by the author in the following way:

> If we decide to cancel Pregnancy Testing, it will be true of those who are later born handicapped that, but for our decision, they would have been cured. Our decision will be worse for all these people. If instead we decide to cancel Pre-Conception Testing, there will later be just as many people who are born with this handicap. But it would not be true of these people that, but for our decision, they would have been cured. These people owe their existence to our decision. If we had not decided to cancel Pre-Conception Testing, the parents of these handicapped children would not have had them. They would have later had

> different children. Since the lives of these handicapped children are worth living, our decision will not be worse for any of them.
>
> (Parfit 1984: 368)

Considering this difference, can we say that it makes a moral difference? Let us consider a further question, if we decide to cancel the Pregnancy Test, though the people, who was part of the group related to that test, do not know that they could have been cured: « would it be worse if, unknown to them, their handicap could have been cured? ». (Parfit 1984: 368)

The answer given by Parfit is the following:

> This fact would have been relevant if curing this group would have reduced the incidence of this handicap. But, since we have funds for only one programme, this is not true. If we choose to cure the first group, there will later be just as many people with this handicap. Since curing the first group would not reduce the number who will be handicapped, we ought to choose to cure this group only if they have a stronger claim to be cured. And they do not have a stronger claim. If we could cure the second group, they would have an equal claim to be cured. If we chose to cure the first group, they would merely be luckier than the second group. Since they would merely be luckier, and they do not have a stronger claim to be cured, I do not believe that we ought to choose to cure these people. Since it is also true that, if we choose to cure these people, this will not reduce the number of people who will be handicapped, I conclude that the two programmes are equally worthwhile. If Pre-Conception Testing would achieve results in a few more cases, I would judge it to be the better programme.
>
> (Parfit 1984: 369)

Through this answer the author states the No-Difference View, by adding that the acceptance of this view depends on whether we believe that, if we cause someone to exist who will have a life worth living, we thereby benefit this person.

If we believe this, it is impossible to accept the No-Difference View and its implications. Anyway if we accept the No-Difference View, then the implications are the following: « *Q*: if in either of two possible outcomes the same number of people would ever live, it will be worse if those who live are worse off, or have a lower quality of life, than those who would have lived ». (Parfit 1984: 369)

Consider next: « The Person-Affecting View, or *V*: It will be worse if people are affected for the worse ». (Parfit 1984: 369)

As the author clarifies: « In Same People Choices, *Q* and *V* coincide. In Same Number Choices, where these claims conflict, we accept *Q* rather than *V* ». (Parfit 1984: 370)

Indeed *V* gives the wrong answer for what concerns the Medical Programmes because while *Q* describes the effects in which we are interested because they result to be bad, but it is irrelevant if these effects are bad according to *V*; *V* defines a moral distinction that should not be drawn here. What will happen in Different Number Choices?

We have already said that *Q* does not cover these choices, for them we need the famous *X*, which has not already been explained here, but we can still draw the possible implications, indeed as Parfit highlights:

> In some cases X and V will conflict. They may conflict when we are making Same and Different Number Choices. And, whenever X and V conflict, we shall appeal to X rather than V. We shall believe that, if some effect is bad according to X, it makes no moral difference whether it is also bad according to V. As before, V draws a moral distinction where, on our view, no distinction should be drawn. V is like the claim that it is wrong to enslave whites, or to deny the vote to adult males. We shall thus conclude that this part of morality, the part concerned with beneficence and human well-being, cannot be explained in person-affecting terms. Its fundamental principles will not be concerned with whether our acts will be good or bad for those people whom they affect. Theory X will imply that an effect is bad if it is bad for people. But this will not be why this effect is bad.
>
> (Parfit 1984: 370)

Then Parfit adds an important statement: « My remarks apply only to our Principle of Beneficence: to our general moral reason to benefit other people, and to protect them from harm ». (Parfit 1984: 371)

Thus at this point of our reasoning it is necessary to revise the path from the beginning. Parfit departed from an assumption: « It is in fact true of everyone that, if he had not been conceived within a month of the time when he was conceived, he would never have existed ». (Parfit 1984: 371)

Considering this assumption we can state that we are able to affect the identities of future people; this means that those who will live in the future owe their existence to our choices. This becomes a problem when we have, for example, to decide what kind of policy we want to implement, the author in this case presents two kinds of policies: Conservation and Depletion.

In the case of Depletion we face a situation in which the policy produces a bad effect, but if we consider the assumption from which Parfit departed we know that Depletion will be worse for no one. At this point Parfit considers another assumption: "*what is bad must be bad for someone"*.

According to this assumption there is no moral reason to reject Depletion, indeed people who will be affected by our policy choice would never have existed if we had chosen Conservation.

Anyway the author reveals that we should reject this assumption and the reasoning it provokes and to explain this he uses the example of the *Risky Policy* in the following passage:

> As a community, we must choose between two energy policies. Both would be completely safe for at least three centuries, but one would have certain risks in the further future. This policy involves the burial of nuclear waste in areas where, in the next few centuries, there is no risk of an earthquake. But since this waste will remain radio-active for thousands of years, there will be risks in the distant future. If we choose this Risky Policy, the standard of living will be somewhat higher over the next century. We do choose this policy. As a result, there is a catastrophe many centuries later. Because of geological changes to the Earth's surface, an earthquake releases radiation, which kills thousands of people. Though they are killed by this catastrophe ,these people will have had lives that are worth living. We can assume that this radiation affects only people who are born after its release, and that it gives them an incurable disease that will kill them at about the age of 40. This disease has no effects before it kills.
>
> (Parfit 1984: 371)

According to the reasoning we have made until now, if we choose the *Risky Policy,* thousands of people will later be killed, but since we have considered the assumption "*what is bad must be bad for someone"*, then we have to agree that if we had chosen the *Safe Policy*, these people would never have existed.

Thus is our choice of the *Risky Policy* worse for anyone?

« If people live lives that are worth living, even though they are killed by some catastrophe, is this worse for these people than if they had never existed? ». (Parfit 1984: 372)

According to the reasoning made since now, our answer must be no, even if it causes a catastrophe our choice of a *Risky Policy* will be worse for no one. But this does not prevent us from being morally responsible, indeed according to the author:

> Some may claim that our choice of Depletion does not have a bad effect. This cannot be claimed about our choice of the Risky Policy. Since this choice causes a catastrophe, it clearly has a bad effect. But our choice will not be bad for, or worse for, any of the people who later live. This case forces us to reject the view that a choice cannot have a bad effect if this choice will be bad for no one ...We can deserve to be blamed for harming others, even when this is not worse for them. Suppose that I drive carelessly, and in the resulting crash cause you to lose a leg. One year later, war breaks out. If you had not lost this leg, you would have

> been conscripted, and killed. My careless driving therefore saves your life. But I am still morally to blame...We can deserve blame for doing what we believe may be greatly against the interests of other people. This criticism stands even if our belief is false-just as I am as much to blame even if my careless driving will fact save your life.
>
> (Parfit 1984: 372)

From this passage it is possible to understand the real essence of the non-identity problem, which concerns a possible future. In this future, mere existence is not enough, we should feel responsible of others' existence, not only in terms of the fact that others owe their lives to us, but by considering that in this linkage of responsibility, existence is not the highest gift we can generate, if it is not accompanied by a responsible behaviour.

In the case of the *Risky Policy* Parfit condemns the choice even if this choice could be considered bad for no one, because haven't it be taken those people affected by it would never had existed.

The example of the careless driver confirms this view, by asserting that the interests of future people must be taken into consideration; procreation and the choice of reproduction must not assume a paradoxical meaning, but should entail the consideration that life can assume a different character according to our choices.

1.1. The non-identity problem and the reproductive choices

After having framed the origins and the shape of the Non-identity Problem, it is now necessary to explain what is the connection between this moral dilemma and the reproductive choices of individuals. At first we have to say that the non-identity problem highlights and better explains the obligation we feel towards rights of future generations; in this sense there is no decision which can be considered more connected with such a moral dilemma than a reproductive one, in which an individual is brought into existence. Indeed the choice concerning the creation of life is the one which traces the course of existence of an individual; the problem arises because this choice can be considered, in some cases, to harm future people or better to make things worse for them.

In this case the choice of an alternative course of action would have brought another individual into existence, different from the previous one, a "non-identical" individual. The paradox arising from this reasoning is that we cannot state that our decision had really worsened the condition of a person because we cannot take an alternative course of action which will

intervene on the life condition of that very same person, indeed an alternative course of action will bring into life, as we said before, a non-identical individual.

Considering this, how can we justify our negative perception over a particular choice which is considered to worsen an individual's condition? This is the central dilemma concerning the non-identity problem, but considering more specifically reproductive choices how can we establish that a life is not worth living? Or better that, for example, a condition of serious disability is worse than ever being born at all?

It certainly isn't an easy question, and it entails the adoption of a particular theoretical perspective in order to be able to develop a comparative analysis of the alternative courses of action. There has been a wide philosophical debate concerning the non-identity problem and its specific application in the form of the so-called "wrongful life", but general opinion results divided on this matter.

1.2. Procreation can harm

Some authors highlight the relevance and importance of this issue, insisting on the possibility to define the quality of a living condition; this depends, as we have said before, from the theoretical approach used to analyse the matter. For example, as it has been pointed out also by Parfit, a crucial starting point in the reasoning concerning the non-identity problem is whether we consider that life can benefit a person.

Depending on what value of benefice we attribute to the gift of life, all our approach to wrongful life considerations changes; indeed, Seana Valentine Shriffin[1] centres her analysis over wrongful life matters on the idea that "people do not exist in another form prior to conception, and thus not being born at all does not represent any kind of harm for the child". Starting from this consideration the theoretical perspective applied is one which stresses the idea that life cannot benefit; thus Shriffin departs from the idea that life does not benefit a person in any case and that even if a life is overall worth living, this does not prevent a person to seek compensation

[1] Shriffin, S., 1999, Wrongful life, procreative responsibility and the significance of harm, *Legal Theory*, MCMXCIX, n.5, pp.117-148

for the burdens that, for example, a particular disability could have imposed on her condition.

In order to support her argument Shriffin relies on the controversy of Feinberg's argument; indeed Feinberg insists on the idea that, referring to the example of the disabled person, assessing liability for the burdens, which characterise that wrongful life would be like holding a rescuer liable for the injuries provoked to the endangered person during the rescue. For Shriffin this is a mistaken conception, it is indeed primarly based on the idea that the person was harmed while receiving a greater benefit, a greater benefit that, in a certain sense, outweighs the harm. Thus, according to Feinberg's interpretation, the matter is analysed on the basis of a comparative model, in which as Shriffin highlights:

> On Feinberg's natural and attractive interpretation of this symmetrical picture, harms involve the setback of one's interests, whereas benefits involve the advancement of one's interests along a sliding scale of promotion and decline. To evaluate whether an event has benefited or harmed a person, one compares, with respect to the fulfillment of his interests, either his beginning and his end points (historical models), or his end point and where he would have been otherwise (counterfactual models). If he has ascended the scale (either relative to his beginning point or alternative position), then he has been benefitted. If he moves down, then he has been harmed. Either way, one arrives at an all-things-considered judgment that either harm or benefit (but not both) has been bestowed. Thus, because he has been overall benefited, he has not been harmed.
>
> (Shriffin 1999: 121)

Anyway Shriffin insists on saying that many difficulties arise with this model; indeed the main problem represented by this comparative analysis relies on the fact that it renders harm and benefit indistinguishable, thus to make it easier to understand she proposes an example considering two subjects: A and B.

Now we can suppose that A was in a higher position, that we can call X + 2, and then is lowered to a position that we will call X; in the same way the subject B, who was in a different position, let's say X- 2, thus in a lower status, is then brought to the same position as A, that is X. Even if A and B are now in the same position according to a comparative account A has been harmed and B benefited; the author stresses further this consideration by proposing another example, departing from the analogous consideration of the two subjects A and B. In this case A moves from X+2 to X+1, while B moves from X-4 to X-3; even if in this new scenario A is better off than B, according to the comparative model A has been harmed and B benefited. Thus if we follow this reasoning it seems inexplicable why we should give

priority to harm instead that to the failure of being benefited; indeed the author clarifies that a perspective like this renders harm and benefit indistinguishable in the sense that if being placed in a position can either be cause of harm or benefit depending on the prior position which characterised the subject, it seems again impossible to understand why harm should matter more than gain for example. If we stand on this perspective insisting on a comparative analysis of reality, we cannot reach an identification of what harm is in itself; to come back to Feinberg's example, the fact that a person has been saved, does not mean that she has not being harmed.

Thus once Shriffin has identified, what she believes to be the weakness of current conception upon the definition of harm, she proceeds with the explanation of a rival account for what concerns the analysis of the concept of harm. In order to explain her rival account on the question of harms and benefits, Shriffin provides a definition of harm by saying that harm is an imposition of a condition, which alienates the subjects and it's placed at the odds of a condition which the subject would rationally will and thus it interferes with the subject's agency by preventing him from removing himself from particular averting conditions.

According to this definition disabilities and serious illnesses can be characterised as harms. From such a definition of harm, it also results another important definition, that of benefits, or better what Shriffin calls "pure benefits", that is those benefits which are good per se and do not represent preventions of harms; these benefits can also be distinguished from the mere fulfilment of a tolerable condition of life, that is to say that pure benefits are those whose lack would represent a serious interference between one's will and one's experience of life.

Thus once we have framed the Shriffin account on benefits and harms, the previous Feinberg's rescue example appears different; indeed the fact that the rescue operation results in a broken limb for the saved subject must not be underestimated. It indeed represents a harm because, following Shriffin's definition of this concept, a broken limb will impose a condition of disability and pain to the subject, thus interfering with his personal agency and will. Thus the fact that the person has been saved does not mean,that she has not being harmed; the idea that being saved represents a benefit, it does not deny the present reality of a broken limb,which certainly represents a harm.

The relevance of this harm is usually not taken into consideration because it is considered a "lesser harm" necessary for the achievement of a greater benefit, anyway, according to Shriffin, this sort of moral justification

does not make the harm less invasive or important to consider. Indeed she insists on saying that one should not think to be able to inflict a lesser harm to a person in order to avoid a greater one when she is unable to give her consent or denial; the author links this reasoning with an example in order to connect all the previous reasoning to wrongful life cases:

> Imagine a well-off character (Wealthy) who lives on an island. He is anxious for a project (whether because of boredom, self-interest, benevolence, or some combination of these). He decides to bestow some of his wealth upon his neighbors from an adjacent island. His neighbors are comfortably off, with more than an ample stock of resources. Still, they would be (purely)benefitted by an influx of monetary wealth. Unfortunately, due to historical tensions between the islands' governments, Wealthy and his agents are not permitted to visit the neighboring island. They are also precluded (either by law or by physical circumstances) from communicating with the island's people. To implement his project, then, he crafts a hundred cubes of gold bullion, each worth $5 million. (The windy islands lack paper currency.) He flies his plane over the island and drops the cubes near passers-by. He takes care to avoid hitting people, but he knows there is an element of risk in his activity and that someone may get hurt. Everyone is a little stunned when this million-dollar manna lands at their feet. Most are delighted. One person (Unlucky), though, is hit by the falling cube. The impact breaks his arm. Had the cube missed him, it would have landed at someone else's feet.
>
> (Shriffin 1999: 127)

In this case the Unlucky admits that he is overall benefited by this event because he can repair his arm with a little amount of money and benefit of the remaining amount of money of the five million gift.

Anyway, despite the subject's concession, this case disturbs, in a certain sense our morality and this depends on the fact that, unlike in the rescue case, here the harm is not inflicted in order to avoid a greater harm, but it is inflicted in order to confer a great benefit. Thus we perceive the necessity of an apology given by the Wealthy to the Unlucky; moreover it is also possible for the Unlucky to even have a cause of action against the Wealthy, in which the justification represented but the five million does not consist in a valid defence, as we can intuitively understand.

Even if the Wealthy was involved in a benefiting activity when the event occurred, this does not relieve him from liability for his dangerous behaviour. Thus we can even assert that the Wealthy owes compensation to the Unlucky because, as we have said before, his risky behaviour was not devoted to the avoidance of a greater harm.

The intention of proposing this example relies, for the author, in the demonstration that harms and benefits are incommensurable and cannot be read and analysed along a sliding scale, but even more specifically Shriffin's analysis aims at demonstrating that the nature of harm relies on the cleavage it generates between one's will and one's life experience, thus what characterises this term is properly the idea that it prevents the occurrence of one's own will.

Thus here an important question arises: does consent relieve for example the Wealthy from his liability? That is to say, if we suppose that the Unlucky would have given his consent to that particular experience of harm in order to receive the five million amount of money, would this change our perspective on Wealthy's liability ?

According to Shriffin consent would relieve the Wealthy from liability, properly because harm is defined as something that prevents the realisation of one's will, but it is extremely difficult to determine consent after the event has occurred as in the case of the Wealthy and the Unlucky. The same reasoning made until here can be applied to procreation cases, as Shriffin highlights, but procreation cases appear to be more complicated than the example made by the author; indeed in the Unlucky's case , the damage inflicted to the subject can be repaired with a little amount of money, while in a procreation case the damage, or better the harm, would not be easily repaired, but would require a very high cost in terms of physical and emotional experience, indeed the only possible escape from a procreation case harm would be represented by suicide.

How can we deal with consent in such a scenario? General consent on this kind of case seems difficult to establish, considering that the harmful consequences are not easy to repair or exit.

Thus Shriffin identifies four elements that prevent the application of an hypothetical consent:

1) The fact that any great harm would not occur if any action would be taken.

2) In the case in which action is taken the resulted harms could be very severe.

3) There is no way to escape these kind of harms without a very high cost.

4) the hypothetical consent procedure is not based on the features of the individual who will be affected by those severe harms

These four criteria are fundamental in order to understand that wrongful life cases should be distinguished from rescue ones, because, even if causing a person to exist may benefit that person, it doesn't save her from any greater harm; moreover the author insists on the idea that, while in the rescue case, if the rescuer does not act, the subject will suffer a great harm ,which could be death or an important disability; in the wrongful life case, if procreation does not occur, the subject will not experience any harm, the person will not experience the absence of her life and there will be no life going worse.

This latter observation distinguishes the wrongful life case also by the Wealthy case, because if the Wealthy refrains from performing his action, the Unlucky will not benefit from the amount of money and thus will have a comparatively worse life; anyway this is not case in a wrongful life scenario because here the subject will not experience any life at all and thus will not experience a worse one.

Someone could object to this reasoning that the subject is deprived of a pure benefit, that is the gift of life, but the author clarifies that what makes us perceive a moral obligation towards the realisation of a pure benefit is the possibility that the subject could suffer from its deprivation; anyway, again, in wrongful life cases this reasoning does not apply, because in the case in which no procreation choice is made, the subject would not exist and thus would not perceive and consequently suffer from the deprivation of this pure benefit.

Thus, according to the reasoning made until here, the liability of the imposer is applicable to wrongful life cases because of the two main elements that characterised these scenarios: the absence of prior consent released by the subject for the burden imposed by creation (we are referring here to the diseases provoked by the disability) and the absence of the necessity guiding this action, that is the idea that procreation is performed in order to avoid a greater harm (as in the rescue case) because this greater harm does not exist here.

Shriffin's reasoning goes even further in a direction that seems paradoxical. Indeed she asserts that procreation is in any case a hazardous activity, which undergoes the imposition of burdens, which are not approved by the affected subject; by burdens the author specifically means the following:

> [...] I assume that, in the vast majority of cases, causing a person to exist does actually provide an overall benefit to the resultant person. Nevertheless, even though procreators may benefit their progeny by creating them, they also impose substantial burdens on them. By being caused to exist as persons, children are

> forced to assume moral agency, to face various demanding and sometimes wrenching moral questions, and to discharge taxing moral duties. They must endure the fairly substantial amount of pain, suffering, difficulty, significant disappointment, distress, and significant loss that occur within the typical life. They must face and undergo the fear and harm of death. Finally, they must bear the results of imposed risks that their lives may go terribly wrong in a variety of ways.
>
> (Shriffin 1999: 136)

Anyway the author clarifies that her intention is not that of declaring procreation a negative activity but to advance the claim that procreation involves the imposition of a series of burdens which are not consented by the affected subject; thus this can involve, in some cases, the subsistence of liability for the imposer.

The issue at stake here is not that of defining whether life represents a negative or positive experience in absolute terms, but rather whether life can, in some cases, be wrongful. This perspective is supported by another author, Bonnie Steinbock, who sustains the idea according to which procreation can be wrongful when the so-called "non-existence" condition is met; this means in the author's words: «The person's life will be filled with suffering that cannot be ameliorated or empty of all the things that make life worth living» (Steinbock 2009: 155). This condition, as recognized also by the author, is rarely met; anyway the analysis, made by Steinbock, has the objective of defining in which adverse conditions, it is possible to consider the avoidance of reproduction, more precisely, when it can be established an obligation to avoid reproduction.

Steinbock identifies the central problem in the impossibility for an alternative course of life, that is to say, in those cases that the author calls "genesis problems" there is no possibility of preventing or repairing the harm except for not having been brought into existence at all.

In such scenarios, Steinbock sustains the so-called "non-existence condition", which as we have said above, describes a condition in which «all chlidren's interests are inexorably doomed to defeat by their incurable condition» (Steinbock 2009: 161); if this condition is fulfilled then, according to the author, the child is better off unborn. Anyway Steinbock analysis of genesis problems does not stop here, she goes by questioning whether a child can be said to be harmed only if the non-existence condition is fulfilled and in order to investigate this claim she proposes an example:

> After years of trying to have a child, an infertile couple resorts to IVF and is able to have a much-loved child, Junior. Unfortunately, Junior turns out to have an inherited disorder that causes a massive failure of bone marrow cell production,

> and can lead to leukemia. Junior is healthy at present, but he probably will need a bone marrow transplant in the future, and possibly a kidney transplant as well. As it happens, the couple has several leftover embryos in storage and one is both disease-free and a perfect tissue match. The couple hires a surrogate to bring the embryo to term, with the idea that the child will be a source of bone marrow for Junior. They do not neglect or abuse "Donor" (as they name him). They just do not feel about him as they do about Junior. Indeed, they consciously suppress any tender feelings toward Donor since that might inhibit them in using him as a source of organs for Junior, should the need arise. Unlike real-life cases," where children have been conceived as "savior siblings", but also loved for themselves as members of the family, this couple never intended to love Donor. If the couple did not want Donor as anything but a source of spare parts, they should not have had him in the first place. What they did was wrong, and moreover, a wrong to poor Donor.
>
> (Steinbock 2009: 162)

Steinbock proposes this example to demonstrate that here the non-existence condition is not met, anyway we are still able to perceive that Donor has been harmed; indeed he has not been harmed by birth and he does want to die, anyway his life results pretty bad, because has been used as a source of salvation for Junior and not as a recipient of the love of his parents.

In Donor's case, according to Steinbock, we do not find only two alternatives, that is life as an unloved child or death; there is a third alternative, that is life as a loved child. The author observes that the failure of Donor's parents to fulfil this third option has made the child worse off, we can properly say that they have harmed or wronged the child; thus the author adds that, « having Donor as a source of spare parts for Junior is wrong, even if the resulting child does not want to die, even if he regards his life as on balance, worth living ». (Steinbock 2009: 163)

After this consideration the author proposes a new criterion which could include scenarios like Donor's one; indeed she believes in the importance of defining a criterion which stresses the positive essence of life, a criterion which highlights the importance for life to represent a real benefit for the child, rather than being wretched but still worth living.

Thus Steinbock identifies this criterion with the name of "decent minimum standard"; in this name is contained the significance that the author has conferred to this new categorisation pertaining procreative responsibility: that is the idea that a decent minimum standard is reached when life is able to confer to the subject those things that make human life good, such as the capacity to experience pleasure, to learn, to have relationships with others.

The author adds that another important element, which is part of this criterion, is the capacity of a person to be a good parent, as explained in the Donor's case; in absence of the elements described by the criterion it would be irresponsible to bring a child into existence. A major objection to this criterion could be that there are many examples, also among actors and artists, of people who have developed talents from their sufferings, reaching a level of life well worth living.

The response of the author to this objection is that properly some children are able to develop these talents from their sufferings, but not all, others children may need a secure emotional basis in order to be able to conduct a life worth living; thus considering this, no one should impose such a harmful condition on a child if this could be avoided, even if this entails not bringing that child into existence. Steinbock's approach stresses the necessity of conceiving procreation not only as a right, but as an obligation towards the person you are bringing into existence; this means that it is fundamental to consider future person's interests in making that decision.

This is the reason for which the author develops the "decent minimum standard" criterion, indeed she highlights: « What i am suggesting here is that we can also say that people have an interest in not having lives that fall above the non-existence condition, if they fall below the decent minimum standard ». (Steinbock 2009: 164)

According to the author, rejecting torture is not enough to ensure a life well worth living; the avoidance of unbearable sufferings does not prevent a person from being harmed, from being better off unborn. The issue arising from this criterion is the controversial definition of when this criterion should be applied, in particular for what concerns cases, which are placed in the middle, that is which are not objectively well above or below the decent minimum. Among this cases we can mention the Down syndrome or the cystic fibrosis; indeed in these scenarios there is an evident and important disability intervening in the life condition of the subject, but this, as the author also highlights, should not anyway be enough to reject procreation because, « having a disability, even a serious one, does not entail life below a decent minimum ». (Steinbock 2009:165)

The attention of the author then shifts to a more profoundly controversial question; indeed he highlights that the reasoning made until now has been applied to cases in which the harm could be avoided only foregoing reproduction altogether, while the situation becomes more complex when harm can be avoided by delaying conception and thus giving birth to a different child. It is at this point that Steinbock links his reasoning

to Parfit's theorization, reconsidering his example of the fourteen year old girl and proposing a different version of it as follows:

> Angela is pregnant. Her doctor discovers that she has a condition that will result in mild retardation In her baby. The doctor prescribes a medication that will prevent the retardation. Angela does not want to take the medication, because a side effect of the medication is that it can cause mild acne. So she does not take it and. as predicted, her baby is born mildly retarded. Betty wants to get pregnant. However, she is on medication that has the following side effect: if she gets pregnant while on the medication, her baby will be born mildly retarded. Going off the medication is not a feasible option, as it would adversely affect her health as well as her fertility. Fortunately, she only needs to take the medication for a few months. Her doctor advises her to wait to get pregnant until she is off the medication. But Betty does not want to wait. She plans to visit her family during her summer vacation, and so she wants to have the baby in June at the latest. She gets pregnant right away and bas a baby in June who, as predicted, is born mildly retarded.
>
> (Steinbock 2009: 169-170)

Apparently the scenarios described may seem equal, morally speaking; thus the two women appear to have both harmed their children (No Difference View). Anyway, as Steinbock points out, there is a difference between these two scenarios and it resides in the fact that Angela, rather than Betty, has harmed her child and this is because Angela has caused her baby a retardation by not taking the medication, thus we can surely assert that the same baby would have been born with a normal intelligence, hadn't the mother undergone such a dangerous behaviour.

For Betty, instead, the situation is not the same because she couldn't have given birth to the very same child, had she waited before getting pregnant; thus she has not made her baby worse off, because, had she waited, she wouldn't have given birth to the very same child, but to a different one, one conceived with a different egg and a different sperm.

The example proposed by the author, is designed in order to pose a further question; indeed Steinbock chooses mental retardation, because this disease does not fall below the decent minimum, in the sense that this retardation does not prevent the person who has it from going school, making friends, get a job and thus generally achieving a life well worth living. Having considered this, how can we say that Betty has harmed her child? With this question the author undergoes an important assertion, indeed if our theoretical starting point is that something wrong must always be wrong for someone, we are keen to assert that Betty has not harmed anyone. Anyway Steinbock highlights the possibility to conceive the idea

that a wrong must not be always wrong for someone, there must not always be a victim for a wrongful act.

By asserting this the author appeal to Philip Peters ' Substitution Principle, which states that: « other things being equal, it is wrong to have a child in a harmful condition if it is possible to have a different child without the harmful condition ». (Steinbock 2009: 172)

Anyway Steinbock does not simply rely on Peters' Substitution Principle, because, as formulated by Peters, it seems to suggest a too perfectionist view, in which the parents should choose the situation in which there is a child who suffers the least, thus proposing a scenario in which parents should choose the healthiest and happiest children they could have. Thus she proposes a modification of the Substitution Principle:

> Individuals who face reproductive decisions are morally required not to bring into the world children who will experience serious suffering or limited opportunity or serious loss of happiness, if this outcome can be avoided, without imposing substantial burdens or costs or loss of benefits on themselves or others. by bringing into the world different individuals who will be spared these disadvantages.
>
> (Steinbock 2009: 172)

Formulated in this way the principle results to be impersonal and thus not valid only in a person-affecting view. The author has the objective not only of proposing a reflection over genesis problems but he also believes in the importance of judging these problems from a different perspective a less rigid one, combining different elements; indeed he asserts:

> It is important to remember that people can have lives that are well worth living, despite disabling conditions or poverty. Nevertheless, there are times when procreation is wrong, even though no one is harmed or wronged by birth. To explain these cases, we need to supplement a morality of person-affecting reasons with a comparative impersonal principle: the principle of substitution. This will explain some of the difficult cases, although it is often not easy to say when someone has an obligation to substitute.
>
> (Steinbock 2009: 174)

1.3. Procreation can benefit

Until now we have discussed theoretical perspectives, which have the peculiarity of attributing to procreation a possible wrongful effect. Anyway there are other perspectives, which have intervened in the debate over reproductive choices, that have proposed a different, or better opposed,

perspective of analysis on the matter. One of the authors, who entails this different perspective of analysis is Aaron Smuts[2], who contrasts the anti-natalist perspective proposed by Benatar; indeed the author departs from Benatar's theory and then de-constructs it, by presenting the fragilities of his arguments.

Benatar presents two principal arguments to defend his perspective of anti-natalism, that Smuts will call: the *asymmetry argument*, which is based on the idea that there is an asymmetry between goods and bads, that is the fact that the absence of pain is good, while the absence of pleasure is irrelevant, thus neither bad nor good for the non-existent; and the *argument from pessimism*, which is based on a wholesale pessimism applied to the human condition. Smuts rejects both these arguments.

At first he analyses the asymmetry argument; indeed Benatar, as we have already said above,believes that the absence of pain is good while the absence of pleasure is irrelevant for the non-existent, or better that the absence of a good thing is bad only when there is someone who is deprived of this thing. Here again intervenes the idea that something must be bad for someone, an idea that we have already discussed analysing the reasoning made by Steinbock over the definition of the Substitution Principle; anyway here Benatar uses these considerations to reach a paradoxical conclusion, that is the fact that it is always prudentially bad to be brought into existence. Thus according to Benatar being brought into existence always represents a net harm; his conclusion may be easily demonstrated through the table below:

Table 1.1

Scenario A: (X exists)	**Scenario B:** (X never exists)
Presence of pain: (Bad)	**Absence of pain:** (Good)
Presence of pleasure:	**Absence of pleasure:**

[2] Smuts, A., 2013, To Be or Never to Have Been: Anti-Natalism and a Life Worth Living, *Ethical Theory and Moral Practice*, MMXIII, n.17, pp. 711-729

(Good)	(Not Bad)

(Smuts 2013: 4)

Observing this table, which compares the two scenarios, that of existence (A) and that non-existence (B), it is easily understandable how Benatar reaches his conclusion comparing the resulting goods and bads of these conditions. Anyway Smuts disagrees with this conclusion and contests it with the construction of another table:

Table 1.2

Scenario A: (X exists)	**Scenario B:** (X never exists)
Presence of 10 units of pain: (-10)	**Absence of 10 units of pain:** (+10)
Presence of 30 units of pleasure: (+30)	**Absence of 30 units of pleasure:** (0)

(Smuts 2013: 5)

Through the help of this table Smuts wants to demonstrate the miscalculation carried out by Benatar. Indeed Smuts highlights that, even if we assume that the asymmetry claim, made by Benatar, is right, this does not result in the conclusion that it is far better not to exist at all; it instead, according to the author, demonstrates that it is far better to exist.

In order to demonstrate his opinion, Smuts, constructs Table 2 in which he assumes that it is possible to compare commensurable units of goods and harms; at this point he hypothesizes that X has, in its life, 10 units of bad and 30 units of good, thus the resulting net good of X's life is 20. Now, in order to understand whether X's condition would be better hadn't he come into existence at all, it is necessary, according to Smuts, to design the alternative condition of a non-existent X. Thus in the Scenario B, inside the table, Smuts builds the alternative condition of X assuming that the absence of bad is of equal positive value in respect to good; thus the absence of 10

units of bad would be worth 10 units of good, while we will register the absence of 30 units of pleasure in respect to Scenario A. From these two scenarios, presented in table 2, it results that Scenario B is worth a mere 10 units of prudential good, whereas Scenario A is worth a net 20; thus, according to Smuts' analysis, Benatar reached the wrong conclusion because, as the author highlights: « although never being born might always constitute a net benefit, it is not the case that coming into existence is always a net harm ». (Smuts 2013: 5)

Indeed Benatar's reasoning, according to Smuts, does not bring us to support an anti-natalist position, rather it just concludes that not coming into existence is always a net good, and he demonstrates why in the following passage:

> A formalization of Benatar's argument will help expose the error. Here is the core argument:
> (1) The absence of bad is prudentially good for the non-existent person who would have lived.
> (2) The absence of good is neither prudentially good nor bad for the non-existent person who would have lived.
> (3) Hence, "coming into existence, far from constituting a net benefit, always constitutes a net harm".
>
> The flaw should be apparent. The conclusion does not follow. Rather than (3), Benatar should have concluded:
> (3′) Hence, not coming into existence always constitutes a net benefit for the non-existent person who would have lived.
>
> (Smuts 2013: 5)

This reasoning does not exclude that coming into existence could represent a better condition than not having been brought into existence at all; indeed Table 2 demonstrates properly this possibility. Benatar proposes an analogy in order to favour his theory: he says that favouring existence over non-existence, as I did above, is much like saying that it is better to be sick and have the capacity for quick recovery than it is to never to get sick. Benatar builds a table to demonstrate this analysis:

Table 1.3

Scenario A:	**Scenario B:**
Sickly	Healthy

(1) Sickness	**(3)** Health
(2) Capacity to recover quickly	**(4)** No capacity to recover quickly

(Smuts 2013: 6)

The analogy reported in table is instrumental to the comparison between never existing and never getting sick (Scenario B), while existing with a net good life is, here. considered akin to getting sick and having a capacity to recover quickly (Scenario A). This comparison would demonstrate, according to Benatar, that asserting that it is better to exist would mean also asserting that it is better to get sick if one would have the capacity to recover quickly.

Anyway Smuts highlights that this analogy does not work because having the capacity to recover quickly cannot be compared with the goods in life, it is only instrumentally prudentially good, because it enables us to regain health and enjoy life which are the real goods.

According to Smuts there is a further problem with this kind of analogy, as he explains in the following passage:

> The problems with Benatar's analogy are not confined to worries about intrinsic and instrumental goods. There is a more significant defect. The value of the capacity to recover quickly is exhausted by the amount of health that it saves. Someone who never gets sick will have more health than someone who does, other things being equal. Hence, in lives of equal length, column A could never have more goods than B. The problem is that when we compare existence with non-existence, there is no reason to think that the situation is the same as it is between Sickly and Healthy. Sickly can never have more of the relevant good than can Healthy. But there can be more net good on the existence side than the non-existence side of the original chart. Since the Sickly vs. Healthy analogy does not allow for this, the analogy is false. It fails to properly model the comparison between existence and non-existence. This gives us an additional reason to reject Benatar's reply.
>
> (Smuts 2013: 7)

The essence of Benatar's reasoning is that he does not consider life a real advantage, he considers something an advantage or a harm in respect to the perception of the subject; this means that here we find again the

conceptualization according to which something is bad if it is bad for someone.

Thus here emerges the real controversial question concerning this reasoning: is life worth living ? Indeed, according to Smuts, the question does not concern the amount of goods which render a life worth living, thus not a question of welfare; rather it concerns the definition of whether is, all things considered, worth living per se.

The author indeed notices that the ascription of life among things worth living does not coincide with a high level of welfare, because there are situations in which a high level of welfare does make a life worth living, as well as there are things, that even if do not promote our self-interest, are still worth doing and worth living.

Considering this Smuts proposes a test in order to define a life worth living: « here's the test: a life worth living (LWL) is a life that a benevolent caretaker, given a synoptic preview, would allow someone to live rather than to never have been ». (Smuts 2013: 11)

Then the author goes on by clarifying:

> This is a pre-existence test (PET) for the worth of a life. This is not the same question as whether one would choose to live one's life over again. One can coherently decide not to live a life over again that one should choose to start. At the end of life we have excellent reasons not to repeat ourselves, reasons that we do not have prior to existing.
>
> (Smuts 2013: 11)

Anyway Smuts' definition has raised criticisms, in particular by Smilansky, who has advanced the objection according to which, even when one considers his life worth living, he can still think that it would have been better to have never come into existence, for example in a case of severe self-loathing.

At the same time a great pain can make someone's life not worth starting, but it still does not prevent the same life from being worth living.

In particular Smilanski proposes an example: a cancer survivor finds her life worth living, but the past sufferings make her think that it would have been better if she were never born. Anyway Smuts contests this example by asserting that here there is a misunderstanding of what is the essence of the dilemma that we are analysing; indeed the issue at stake does not concern a life worth continuing but a life worth starting, thus he clarifies this distinction in the following passage:

> I propose that the best way to understand the difference is to see it at as one of duration. A life worth continuing is one where the period ahead is worth living. A life worth starting is one where the entire life is worth living. When I refer to "a life worth living," I have in mind the entire life. Smilansky's cancer survivor's life is worth continuing, since the period ahead is worth living, nevertheless, the life might not be worth starting. Given the choice, if the suffering were as bad as we are asked to imagine, then perhaps the life as a whole is not worth living. There is no problem for the pre-existence test here.
>
> (Smuts 2013: 13)

The problem that arises with the pre-existence test is that there exist border-line cases, that is, those cases that cannot be associated nor with Lives Worth Living (LWL) neither with Lives Worth Avoiding (LWA) and that can be characterised as Lives Worth Nothing (LWN). In these cases the question arises: should a benevolent caretaker prevent one from living a LWN? What should ground the decision of the benevolent caretakers? It is at this point that the author shifts from the first argument proposed by Benatar for defending anti-natalism to the second one, that grounded on a general pessimism. Indeed Benatar believes that all lives are LWA, that is that everyone is overall wronged by being brought into existence.

The main explanation that the author gives to explain this assertion is that, according to the theories that identify what makes a life good for those who live it (hedonism, preferentism, objective list account), human life is intrinsically bad, because it places man in a terrible condition, which is represented by constant desire.

This condition, according to Benatar, makes human life meaningless, because the ultimate objective is always worthless, it won't endure in time, it will be dissolved as well as its original meaning; anyway Smuts contests this argument and, by criticising it, also answers the previous questions over the worth of life.

Indeed he highlights that Benatar's assertion contains a false premise, because there is no reason to think that the value of an activity is entirely determined by its ultimate outcome and he demonstrates his assertion by a simple example, « Certainly there is value in making someone laugh, even if they do not laugh forever ». (Smuts 2013: 17)

Thus, according to Smuts, eternity does not characterise the value of an activity, it does not represent the intrinsic meaning of it. Moreover he insists by saying that Benatar's idea of a human life incomplete and meaningless, ever lacking its perfection is not sufficient to establish that human life is bad as he highlights in the following passage:

> If happiness is good, it is good. If helping others is good, it is good. If making something of beauty is good, it is good. If falling in love is good, it is good. Who cares if we can conceive of an even greater state of happiness, better forms of care, more fantastically beautiful creations, or richer forms of love? The fact that things could be better does not make them bad [...] Once again Benatar fails to see that the opposite of better is not always bad; sometimes it is just less good.
>
> (Smuts 2013: 17)

The position of Smuts results clear from this passage, it entails the idea that what is good, it is not necessarily good for something, in the sense that it doesn't need an eternal immutable meaning and objective.

Life appears to be a fluid process, free even from the possibility of establishing its essential significance. Smuts is not the only one to oppose Benatar's anti-natalism, indeed Franco Palazzi[3] advances criticisms concerning Benatar's theory; he analyses, in particular, the asymmetries presented by Benatar trying to demonstrate that they do not have to bring necessarily to an anti-natalist conclusion.

Palazzi departs from the idea proposed by Benatar that, considering the asymmetry between pain and pleasure, while we have a duty not to bring into existence a person whose life will result in unbearable sufferings, we have no duty to bring into existence people who will live happy lives. Palazzi tries to explain this asymmetry making reference to the concept of possibility, thus highlighting that, while it is possible in some cases like those affected by serious malformations, to assert that a life would not be worthwhile, there are no sufficient elements to produce a similar statement concerning the certainty of a life worth living. This explanation revealed by the author clarifies also that we cannot consider procreation as a duty, as Benatar characterises it; indeed the essence of procreation is properly possibility and in order to clarify this assertion the author refers to a philosopher by saying:

> In a Kierkegaardian way, every possibility of achievement is, at the same time, a possibility of failure. In discussing of possible future people this uncertainty is particularly evident be-cause even happy people cannot be sure of the overall worthwhileness of their lives as the epilogue in Croesus' story suggests.
>
> (Palazzi 2014 page 30)

[3] Palazzi, F., 2014, A Set of Objections to David Benatar's Anti-Natalism, *British Journal of Undergraduate Philosophy*, MMXIV, n.8, pp.12-36

After having realised this we are able to understand that properly the possible, and not certain,character of existence determines our impossibility to know what is better for us. Thus Palazzi goes on by asserting:

> If we cannot be sure that the lives we create will be worth living the objection goes we should, on a (nihilistically) precautionary basis, stop creating lives at all. Now,given the fact that at least under some circumstances the great majority of the existences we create are worthwhile, criticism of this kind is unacceptable because it would lead to a variant of what Derek Parfit called "The Ridiculous Conclusion": it would attribute to harms an exponentially higher consideration than that attributed to benefits.
>
> (Palazzi 2014: 32)

This passage demonstrates that we have no authority to establish a primacy of harms over benefits, of happiness over pain. As we have said above we are characterised by the impossibility to know what is better for us, properly because existence is a possible flux of events, which shapes itself giving birth to eternally different frames, which cannot be categorised according to duty of primacy.

The theoretical field concerning the non-identity problem and the wrongful life dilemma appears to be varied and complex depending on the perspective one decides to adopt. Anyway all the debate surrounding this issue becomes even more intricate when it entrenches reality and encounters different practical scenarios. The wrongful life action is the legal representation of such a difficulty concerning the conjugation of theory and practice.

Chapter 2: From Theory To Practice

The different approaches to the Non-identity Problem discussed in the previous chapter are important in order to confer us the tools necessary to deal with difficult practical cases. There is no point in presenting such a strong and profound controversy, such as the one concerning the wrongful life dilemma, if we do not refer to practical existent cases; it is absolutely fundamental to investigate theory with practice, melting moral considerations with empirical ones.

This is the reason for which this chapter will devoted to the description and the analysis of a particular juridical case of wrongful life action, occurred in France: the so-called *Affaire Perruche.*

2. The case

The *Affaire Perruche* constituted a fundamental passage in the juridical debate over the right not to be born at all. This case is part of the French jurisprudence of the year 2000, when the French Court of Cassation, reunited with the aim of deliberating over it.

This case took its name from the subject interested by the juridical controversy; a boy whose name was Nicolas Perruche was affected, since the first year of his life, by serious and irreversible dysfunctions, due to the contagion of rubella occurred during his mother's pregnancy. What complicates the picture of this case is that Nicolas' mother, during her pregnancy, had asked for medical tests able to verify if the contagion had occurred and what permanent malformations could it had provoked to the baby.

Anyway she was misinformed by doctors over the results of the tests, thus ignoring the fact that her child would present serious dysfunctions at his birth. Thus the juridical point here emerges because of a request made by Nicolas' parents for a compensation due to the denial of a right not to be born at all of their child. Indeed if Nicolas' mother had known about the handicap by which her son would have been affected , she would have chosen abortion; the denial of this possibility, thus of the abortion possibility, the chance of not living at all is considered a serious deprivation, a form of harm.

During the trial, the court found the clinical laboratory liable for negligence and also found the doctor liable for failing to provide attentive diligent care and for breaching his duty to inform the patient. This case promoted the idea that another kind of right could be exercised by a subject: the right not to be brought into life. As we have already discussed before, this kind of claim endorses a debate that seems paradoxical, given the fact that a right not to be born could not be exerted by a dead person; that is, there is no alternative scenario, with which we can possibly make a comparison. The peculiarity and the importance, at the same time, of this juridical case can be well exposed by referring to the analysis that Brigitte Feuillet made on it; indeed Feuillet[4] explains how such a case has had

[4] *The Perruche Case And French Medical Liability* (2011)

important legal and ethical consequences. Indeed this case does not concentrate only on the deprivation of a right of abortion for the mother resulted from medical negligence, but it raises a deeper and more complex problem because the *Perruches* requested a compensation for the harm suffered by their son and the Court of Cassation allowed for it, even if previous courts had refused compensation in cases of children born with disabilities.

Thus Feuillet insists on the idea that the *Perruche* case altered previous conceptions of medical liability and legal standards; the revolutionary character of this case results from the distortion it has provoked on the legal standards of French jurisprudence. Indeed as, Feuillet points out, according to the French legal system the recognition of medical liability depends on three main conditions: the first one is that the doctor must have committed a fault, the second one instead consists of the fact that the plaintiff must have suffered a damage and in between these two conditions there must be a causal link, that is the damage suffered by the plaintiff must result from the doctor's fault.

In the *Perruche* case this juridical equilibrium of conditions is subverted by the French Court of Cassation, whose sentence breaches the requirement of the causal link; indeed the damage suffered by Nicolas was not directly inferred by medical negligence, that is, it couldn't be identified as the result of a mistake committed by the doctor. The negligence of the doctor only resides in the misinformation given to Nicolas' mother, it does not represent the causation of the damage; moreover would the doctor have given the right information, Nicolas would not have been brought into life at all.

Thus the breach of the causal link also suggested another conclusion, as Feuillet notices, that is the idea according to which compensation must not necessarily result from the presence of harm; indeed here the harm, as we have already said, was not directly caused by doctor's negligence, rather the only event caused by the doctor is represented by Nicolas' existence itself, thus it can inferred that the damage identifiable is properly the birth of a child with disabilities. The author highlights that from such a conclusion a clear ethical problem emerges, because this inference suggests the idea that being born with disabilities can constitute a harm.

This point brought the question even further establishing a link between the presence of a disability and the termination of a pregnancy. The revolutionary character of the *Perruche* case appears immediately evident and it completely changes the vision held by legal theory until its

emergence; in particular, according to Olivier Cayla[5], it is possible to distinguish two opposed perspectives surrounding the case: the *perruchiste* reasoning and the *anti-perruchiste* reasoning. Indeed the sentence given by the French Court of Cassation concerning Nicolas' history had positively answered to the question made by Sainterose (the general lawyer): "Can a child affected by a genetic handicap claim the right not to be born at all instead of being born ill?" The positive answer given by the Court of Cassation to this question dramatically changed and challenged the legal standards to which the country used to refer.

What the sentence was implicitly suggesting was a duty to born "normal", but what has emerged from the opposed perspectives, exposed by Cayla, over the case, it's that the very existence of a right not to be born at all for children like Nicolas *Perruche* seems an open and unsolved question, which provokes a profound crisis in the moral as well in the legal field. Thus the necessity that the *Perruche* case, as well as the non-identity problem, raises is the necessity of finding a tool, a middle perspective with which it could be possible to deal with such an intricate process of decision-making.

According to Cayla, it is necessary to establish a real object of denounce, an object which is socially recognised and can represent that middle perspective, or better that material particular field, to which the claim can apply. Anyway, according to the author, not only an object is needed, but also a subject, who is in the practical condition necessary to express the claim; having an object and a subject of complaint, the claim could be at the same time admissible and emitable.

Indeed it is properly on this point that the *Perruchistes* and the *Anti-perruchistes* are divided, a point which constitutes the essence of this case and of the very existence of such a claim.

2.1. Perruchistes vs Anti-perruchistes: The Object

The Perruchiste thesis is identified with the position taken by the Court of Cassation. Cayla, in his article, identifies the first controversial point between Perruchistes and Anti-perruchistes in what we have previously

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[5] Cayla O. and Thomas Y., 2002, *Il Diritto di Non Nascere: A Proposito del Caso Perruche*, Milano, Giuffrè Editore, 2004, Chapter 1 (pp. 15-74)

mentioned as the object of denounce. The author insists that according to the perruchiste reasoning the assessment of responsibility has followed three steps: the first one was the diagnostic medical mistake, the second one was represented by the prejudice, that is, the handicap by which Nicolas was affected and which constituted a valid motivation for the claim, it could indeed represent the object of the claim.

Anyway, as Cayla highlights, it is properly the third step which represents the most problematic point of the debate between Perruchistes and Antiperruchistes; indeed there must exist a causal link between the error and the prejudice in order for a denounce to be admissible, but in the *Perruche* case this nexus of causation is contested on the basis of the fact that the handicap presented by the child cannot be considered as directly caused by the medical error, but rather the very existence of the child would only be a potentiality had the doctor not committed that mistake.

Thus the causation seems to reside more properly in the rubella contagion occurred through the mother's body, but the Perruchistes contest this extremely logic and purely mechanical way of conceiving the nexus of causality by asserting, as the author reports by citing the words of Sargos (the adviser):

> [...] Seeing in the mother's rubella the only cause of Nicolas Perruche' s handicap should also lead, in the famous case of the contaminated blood, to see in donors' blood the only cause for the transfused contamination, and anyway, no one would ever think to deny that whom could avoid the distribution of contaminated blood effectively had a responsibility in the receivings' contamination.
>
> (Cayla 2004: 25-26)

From this passage emerges a different conception of the nexus causality expressed by the Court of Cassation , indeed it concentrated on two main elemenst which would constitute the validity of the prejudice and the interconnection offered by the causality link : the first one is based on the law conferring to the mother a right for abortion,a right which is recognised by the law as sovereign, which means that the mother is free of ceasing her pregnancy for reasons whose validity is determined only by herself.

Considered this assumption given by law, it could be asserted that Nicolas' mother had already taken her decision by explicitly manifesting her will of ceasing the pregnancy, in case of contagion, to the doctor.

Her right for abortion has not been respected due to the mistake committed by the doctor, this, according to the perruchiste reasoning, is a valid object of denounce based on the recognition that an admissible right to

denounce for Nicolas Perruche derives from the recognition of his mother's will to abort and her full right to do it.

On the contrary the anti-perruchiste reasoning conceives this nexus of causality in a completely different way; indeed the anti-perruchiste faction sustains that there is no link of causality between the error and the prejudice, because the handicap affecting Nicolas does not result from the medical error, but from the contagion of rubella occurred during the pregnancy.

Moreover the anti-perruchistes contest the perruchiste reasoning on a wider scale; indeed, as the author notices, the three steps characterising the anti-perruchistes are the followings: they recognise at first that there is a medical error,anyway the consequence of this error is not seen in the handicap, but in the very birth of the child.

Thus at this point the anti-perruchiste reasoning reaches a higher scale of discussion, posing into question properly a non-identity issue, that is the idea according to which the prejudice is here constituted by the idea of being brought into life; thus the question emerging from this passage is whether life per se could be considered a form of prejudice. Thus,the admissibility of the claim cannot subsist because, not only there is no nexus of causality between the error and the prejudice, but rather the prejudice does not exist at all.

The central argument underpinning the anti-perruchiste critique, thus, it is not simply a question of technical causality, but relies essentially on the admissibility of the Perruche claim, that is on the idea that birth itself cannot constitute a prejudice, and this annuls the possible existence of an object of denounce. Here emerges the political and philosophical character of the anti-perruchiste reasoning, which entails a reflection over the concept of life and the assertion that life cannot constitute a prejudice, or better the object for a claim; indeed, as the author notices, another important difference between the two approaches concerning the Perruche case, is the relevance given to the mother's will of interrupting the pregnancy.

The anti-perruche reasoning proceeeds as if the mother's will has never been exposed, it annuls the mother's will; this is the result,according to Cayla, of a different political perspective embracing the anti-perruchiste reasoning surrounding the case. Indeed it seems that the political message promoted from this faction coincides with a "pro-life" ideology, while the perruchiste analysis seems better identifiable with a "pro-choice" one.

It is evident how the *Perruche* case does not represent an ordinary juridical case, but rather it engages in a philosophical and political debate, which embraces several fields, obliging our minds to linger over the very concept of life and its weight, in a form of evaluation which escapes the

traditional legal and moral standards. This entails a reasoning dealing, in part, with the complexity of evaluating whether a life is worth living or not, or better whether a life can be considered as a harm; this issue intervenes because, as we have seen before, the result of the medical error is Nicolas ' existence itself and this raises the question whether birth can , per se, constitute a harm. In the previous chapter we have seen different theoretical perspectives analysing the value and the character of life; we have seen how life can sometimes be characterised as a harm, such as in the theory presented by Shriffin, but at the same time we have also mentioned Palazzi's considerations:

> In a Kierkegaardian way, every possibility of achievement is, at the same time, a possibility of failure. In discussing of possible future people this uncertainty is particularly evident be-cause even happy people cannot be sure of the overall worthwhileness of their lives as the epilogue in Croesus' story suggests.
>
> (Palazzi 2014 page 30)

Indeed in this passage Palazzi is highlighting the character of possibility which is a fundamental feature of human existence and which recognises the impossibility of establishing a scientific certainty over future events and over the whole future evolution of a life.

This reasoning can be found also in the anti-perruchiste reasoning over the mother's will to interrupt the pregnancy; indeed, as it has been said before, the anti-perruchistes give no relevance to the mother's will of aborting in case of a baby's handicap. This results from their conception over the expression of a particular will; indeed, as Cayla reports, their reasoning is based on the following considerations:

> [...] For the anti-perruchiste, it is not certain that Miss Perruche would confirm the will she had previously exposed to the doctor. Indeed nothing obliged her, in case she had discovered her contagion of rubella, to continue avoiding the risk of a handicap for her son, thus there is no reason , in these circumstances, to take into account the will expressed by the woman...there will always be uncertainty over what would have been the behaviour of a pregnant woman facing an adverse diagnosis.
>
> (Cayla 2004: 31)

Properly in virtue of the possibility for the woman to change her mind in front of an adverse diagnosis, there is no certainty, according to anti-perruchistes, that abortion would have effectively been her final choice.

Once this point has been clarified, Cayla reaches the core point of the anti-perruchiste argument, that is the idea that emerges as a consequence of

the annulment of the mother's will of abortion. Indeed once we skip this passage, the only result of the medical error can be identified in the very existence of Nicolas; at this point, if a prejudice exists, this must be found in the birth of Nicolas, thus in his existence; now according to the anti-perruchiste perspective, life can in any case constitute a prejudice because of the principle of human dignity, that is the core point in this argument.

In order to support this principle the anti-perruchistes depart from analysing the implications of the recognition of life as a prejudice; in this sense, Cayla highlights that according to their considerations the first implication, of such a recognition, is represented by the fact that in order to consider the very life of a child as a prejudice it is necessary also the recognition of a subjective right not to be born; indeed in order to claim for damages it is necessary that the one who claims these damages is in the position to exercise this subjective right that has been violated.

Thus once this has been asserted it follows that the right not to be born implies a right to be eliminated before birth and thus a right to be aborted, but this is impossible to support, because the subject able to exercise this right would be no more than an embryo, that is in any case a subject not already born. Moreover there is another important implication, mentioned by Cayla, which follows the anti-perruchiste critique to the Court's reasoning; this is represented by the idea that the recognition of a right to be aborted is opposed to the full freedom given to the mother to decide of the future of her pregnancy, that is to say that the recognition of the child's right denies the mother's freedom.

Thus the further implication of such a logic process would be that of concluding that, if life could be considered as a prejudice, and a duty is recognised to kill the baby for the mother; it can be concluded that the Court's reasoning allows for a eugenic policy, discriminating against the handicapped and promoting abortion of those which are considered not worth living. All this reasoning is then concluded by the anti-perruchistes with the assertion that recognising that a particular life can be regarded as a prejudice means attacking the dignity of a human person, by posing life on different levels of value and thus promoting an idea of inequality between different types of lives.

The claim advanced in the *Perruche* case results at this point inadmissible because it infringes the constitutional principle asserting the respect for human dignity; from this conclusion, Cayla highlights, that the anti-perruchiste reasoning is based on the a so-called anti-Perruche case, because it departs from completely different data by proceeding, not only as if the mother had not wanted to avoid the handicap of the baby, but rather as

if she had desired it. Indeed Cayla reports the words of Sainte-Rose (the general lawyer):

> If such a right not to be born exists, it could be opposed to everyone. To medical personnel in case of negligence , as well as to parents who decide to have a baby knowing the risk of transmitting to him a serious genetic disease, or to those who, even if they are informed of a dangerous pre-natal diagnosis, decide not to abort. This could be particularly opposed to the mother, responsible, in the case in which, before or during the pregnancy, she has behaved in a way that results dangerous for the health of the baby or in case she has decided not to engage in cures that could have been useful for the baby.
>
> (Cayla 2004: 37-38)

What emerges from this passage is that the anti-perruchistes support the idea according to which the Perruche case sentence implies its reverse, that is the idea that facts are judged applying to them an evaluation concerning completely opposed events; it is in this sense that the antiperruchistes create the anti-Perruche case.

As Cayla highlights the anti-perruchiste perspective,asserting the impossibility for Nicolas Perruche to express his claim, because of the infringement of the principle stating respect for human dignity, implies asserting that for that child there is no possibility to express his tragedy or his suffering; the author recognises that a paradox arises here, that of subordinating individual rights to humanity. It is properly at this point that another feature of the wrongful life debate emerges; this is represented by a wider field of reflection, a level of discussion which brings another question into the dilemma: is life, or better the definition or the evaluation of it, an individual or a collective and communitarian process? What Cayla highlights its properly a distortion, already highlighted by Bernard Edelman, according to which the principle of human dignity seems to negatively affect the individual in favour of humanity.

The paradox underpinning the Perruche and also the anti-Perruche cases is reflected in the entire debate involving the non-identity problem as well as the wrongful life action, in which the core issue is defining the parameters for establishing in what cases, under what circumstances and along with what consequences life can be considered wrongful. In particular this case advances another problem in this bigger debate, that is if this complex evaluation should be conducted according to an individual or a communitarian perspective. In the previous chapter we have analysed the two main different perspectives concerning the wrongful life issue, explaining how they depart from two different theoretical conceptions (life can harm vs life can benefit); indeed, as Cayla highlights, the problem is

political and philosophical, rather than legal or biological. Depending on the theoretical frame one adopts the watch over an event creates an interpretation and an anti-interpretation, a case and its reverse, as in Perruche. The logic of dignity presupposes, as Cayla notices, that: « [...] the individual does not belong to himself, but to his nature which transcends him » (Cayla 2004: 42).

This shows how the question appears unsolved because life interests the individual, but at the same time its evaluation, according to the logic of dignity, is not considered part of his faculties.

2.2. Perruchistes vs Anti-perruchistes: The Subject

There is another aspect that characterises the dispute between *perruchistes* and *anti-perruchistes*, this has to do with the subject of the claim. In the first place Cayla analyses the different conception that the two factions have over the object of the claim, or better the fact that, on one side, this object is recognised to exist and, on the other, not.

Anyway there is another element of dispute, as the author highlights, that concerns the subject of denounce; indeed the *anti-perruchistes* assert that Nicolas is not in the right position to present his claim. Indeed, the claim expressed in the *Perruche* case is not only inadmissible because of its object, as explained before, but also because of the fact that it is not issued due to the idea that life is always preferable to non-existence.

In order to demonstrate this assumption the *anti-perruchistes* appeal to a particular juridical norm, which is the right to life; anyway, as Cayla highlights, opposing to the *Perruche* claim this right, means imposing properly the opposite over a subject: an obligation to live. Moreover, Cayla, puts the attention over the core element of the *anti-perruchiste* critique, which is the central paradox emerging in the non-identity problem; this is represented by the fact that Nicolas cannot represent the subject of his claim because, the necessary condition for him to exercise his right not to be born is properly the fact of being alive, this means that the essential condition to exercise the right not be born is life, existence is the only way to claim non-existence.

This kind of reasoning has already emerged in Parfit's analysis of the non-identity problem, when he makes the example of the two policies.

In that analysis, Parfit expresses the idea according to which something must be worse for someone, but this cannot be the case if the condition in which the subject is inserted is the only possible condition for its existence

and this existence is the only possibility to lament the difficulty of such condition.

This paradoxical scenario is described by the *anti-perruchistes*, if not as a duty to live, as an obligation towards the logic discourse, which cannot neglect itself, by wishing that the condition in which the very discourse is performed would ever had occurred. Anyway Cayla poses the attention over the absurd evolution of such assumption, in his book there is a vivid and very powerful expression: « the freedom to be mad ». (Cayla 2004: 57)

This expression has the aim of reasserting the real focus of any establishment of rights: the possibility for an individual to express his freedom. The *anti-perruchiste* devotion to the principle of non-contradiction, essentially neglects the very possibility of rejection, madness and contradiction which is part of the life of an individual; at this point the debate turns again over what space of action should the right not be born occupy, that of the individual freedom or that of human nature? The *anti-*perruchiste reasoning seems to neglect this individual freedom, as Cayla's words express: « The law of nature obliges the individual to abandon his nature ». (Cayla 2004: 59)

The law of nature neglects the right of nature which is based on the free expression of humanity, it neglects the essence of human nature by asking man not to perform his particular form of freedom, would it be contradictory, in virtue of a respect for logic.

According to this reasoning we enter, as the author notices, into an Hobbesian panorama, in which the state of nature is describe as an undetermined nothing, in which blind life perpetrates itself by destroying any kind of obstacle to the survival of the individual, thus leaving space to the destruction of life itself. In this scenario, Hobbes identifies in the law of nature a necessary capacity to limit nature for the sake of nature; this law, is considered by the philosopher as a fundamental tool of protection among men.

The law of nature appears as a transcendent force, as the *anti-perruchiste* logic, which regulates lives and defines priorities. Thus can nature be an insufficient condition for the man? Can the very existence of man represent his personal destruction ? If it is so then the law of nature, the logic, is necessary for the man to escape himself, in a picture that echoes a mad mental cycle, which in the end escapes reality and practical events. In other terms the assertion made by the *anti-perruchistes* over the impossibility of contradicting one's own nature, can be contested by assuming, as Cayla reports through the words of Henri Caillavet, that:

«freedom is not only a positive element. To be free, means often not to do something or reject something» (Cayla 2004: 64).

Anyway even if we admit that this point of the *anti-perruchiste* critique fails to express a valid argument, there is still another element which must be taken into consideration; indeed, if what really counts is individual freedom, even in its negative role, then the *Perruche* case encounters an obstacle. In the *Perruche* case, the claim is presented by Nicolas' parents for two reasons: the first one is that Nicolas was underage at the time of the claim, the second is determined by the fact that Nicolas' handicap made it impossible for him to express the claim.

Anyway in this case, this procedure is unacceptable because if the validity of the claim, as it has been said until here, is that of recognising to the subject his freedom to express a rejection of himself, then this action cannot be performed by anyone who is not identifiable with the subject himself.

Thus, according to this view, no one is able to express Nicolas' rejection except for Nicolas himself, because no one is able to understand and express his feelings towards his existence. Anyway, again, this position can be read in two different ways, as Cayla highlights: from one side speaking on behalf of Nicolas would mean imposing on him feelings and thoughts, which do not belong to him; anyway on the other side, defining the impossibility for him to be a juridical subject able to express his feeling would mean reducing him to silence, obliging him to a mute misunderstood existence.

Departing from this argument Cayla exposes an alternative reasoning basing his assertion over Hobbes' conception of the "person"; indeed the philosopher conceives the "person" as an artificial representation of nature, that is a conjugation of reality, a stage at which a role is addressed to the individual. According to such a perception of the "person", it is no more conceived as a subjective perspective which belongs only to one particular individual, but rather as a construction, an artificial structure.

According to Hobbes a "person" is not the essential part of an individual, or better it is part and every individual can be a person, even if he is mad or weak, but this does not mean that the representation of this "person" should be necessarily performed by that particular individual. The "person", thus, assumes the relevance of a "sign", a juridical institution, a means to interpret and be interpreted.

Through this Hobbesian perspective, Cayla advances the idea, that this issue can be interpreted also from another point of view, in which the subjectivity is not considered as an obstacle for the powerless subject, but rather represents a tool for interpretation and impersonification; a scenario

in which the very same action performed by Nicolas' parents appears no more as a violation of the dignity of the child, but rather as a validation of his "person".

The *Affaire Perruche* is an example of the complex and intricate mechanism interesting a wrongful life action. There are many examples of cases like this and,as we will see in the next chapter, it is possible to trace some recurring features and issues characterising this kind of legal action.

Chapter 3: The Legal Arena

The wrongful life action has been characterised until here primarily as a moral dilemma involving levels of philosophical and moral debate, which differ according to the theoretical perspective to which they are associated. Anyway there is a more practical aspect of this dilemma, which is its juridical characterisation; indeed the wrongful life dilemma has taken the dimension of a legal action.

3. What is a wrongful life action?

The wrongful life dilemma has not only represented a wide and complex moral debate, which has still not been solved, it has also influenced the legal field enhancing and changing the spectrum of tort law.

In order to fully understand the methodological and legal evolution of a wrongful life action, it is necessary at first to rely on a distinction made by Shaun D. Pattinson[6].

The author analyses the different types of legal actions which can originate from a conception or birth, which, for different reasons appears wrongful, due to genetic diseases or malformations.

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[6] Pattinson, S., 1999, Wrongful Life Actions as a Means of Regulating Use of Genetic and Reproductive Technologies, *Health Law Journal*, MCMXCIX, n.7, pp.19-32

The first distinction, made by the author concerning the types of actions, is made on the basis of which subject presents the action; indeed actions can be presented by the parents and, in this case, they are identifiable with procedures called: wrongful conception/pregnancy and wrongful birth; for the actions presented by the child instead the categories are the followings: prenatal injury and wrongful life.

Pattinson provides a description of each action presented above, analysing the different procedural features. The first action mentioned above is the wrongful conception/pregnancy, which consists in action resulting from an unwanted pregnancy; Pattinson provides some examples.

> For example, where there has been negligent failure of a sterilisation operation, vasectomy, contraceptive device, fertility diagnosis or a negligently performed abortion. This action involves a claim for losses attributable to an unwanted pregnancy.
>
> (Pattinson 1999: 2)

Alternatively parents may present a wrongful birth action, in which as a result of a medical negligence there is a failure in preventing the birth of a child with a congenital disease or when it is registered a negligent failure to ensure the birth of a child with a particular trait, here too the author makes some examples.

> The type of situation I have in mind exists when, for example, there is a negligent failure to advise the parents of the risk of having a child with a congenital abnormality. Other examples include a negligent failure to carry out a prenatal diagnostic technique (at all or with due care) when this would have disclosed a congenital defect.
>
> (Pattinson 1999: 2)

The author highlights that the essence of such a legal action relies on the loss of an opportunity, the opportunity of having a particular child, that is one with no genetic disease and thus it takes into account properly the "opportunity cost" of such a failure in terms of financial and emotional costs.

Apart from these two actions, which can be presented only by parents, the other two procedures, identified by the author, are those who can be presented by the child. The first one is the prenatal injury, which intervenes where the wrongful existence of a child results from a negligence performed by another person before his birth; here again Pattinson provides some examples.

> The negligent act might occur before conception (e.g., negligent failure to offer the mother preconception immunisation against rubella), before implantation (e.g., negligent IVF treatment), during gestation (e.g., negligent prescription of drugs to a pregnant woman, or the pregnant woman's negligent use of drugs, such as, perhaps tobacco or alcohol), or during birth (e.g., negligent delivery).
>
> (Pattinson 1999: 2)

Here the opportunity cost is placed on the other side and the claim associated with this legal action concerns the losses and difficulties, that the injury will bring into the child's life; the opportunity cost of not being able to live a "normal" life. If this wrongful life is the result of a failure to abort a child who presented defects, then the action is called wrongful life action.

This kind of action is characterised by the fact that the child claims a reward for the fact of being born, in those cases in which, if the failure had not occured, the child would have not been brought into life at all.

3.1. Historical development of wrongful life actions

Having clarified what a wrongful life action is, we have now to face the question: how did such an action emerge in the juridical landscape? As it has been said in the previous paragraph wrongful life actions deal with cases in which the subject is affected by a so-called "wrongful life", that is a life interested by a distortion, due to a form of disability or genetic disease.

Thus it is possible to assert that any claim of wrongful life originates from the observation that a particular life results "wrongful" and this is only possible with the application of a particular model defining what a wrongful life is made of.

Wendy F. Hensel[7] makes an evaluation of wrongful life actions, analysing the historical development of the different models of disability, concerning the legal and the public opinion sphere, used to define a life as wrongful. The first and most persistent model, identified by Hensel, is the so-called *medical model of disability*, that is the idea according to which disability is recognised as a trait of a particular person and provokes internal functional limitations; this often results in high dependence of the subject and also consequent social and economic isolation. In this model, as Hensel

[7] Hensel, W., 2005, The Disabling Impact of Wrongful Birth and Wrongful Life Actions, *Harvard Civil Rights-Civil Liberties Law Review*, MMV, n.40, pp. 141-195

highlights: « physicians serve as the gatekeepers of disability with respect to both the identification and the remediation of disorders ». (Hensel 2005: 146)

The origin of disability is identified with biology and society is not considered responsible for posing remedy to such diseases. According to this perspective the only possible solution to disability is found in medical technology, whose improvement could guarantee the cure or the prevention of future disabilities. In this model there is no space for a legal or social solution, but rather just the possibility for governmental financial support in order to ensure medical assistance for all those suffering from disabilities.

The second model, identified by the author, is the *social model of disability*, which appeared in America around 1960s challenging the medical model. Hensel explains that this new perspective, instead of focusing the attention over the physical limitations imposed by the disability, considers the impact of the social experience of disability; indeed as the author notices.

> Because physical environments and social structures are created by the nondisabled with faulty assumptions as to the normal range of functioning, they involuntarily and inevitably transform people with functional impairments into people with disabilities.
>
> (Hensel 2005: 148)

According to this model disability is not perceived per se but in respect of an environment designed for non-disabled people; anyway, Hensel highlights that this model does not take into consideration the real functional limitations deriving from the disability, which cannot be reduced to a social construction only. Considering that the social model emphasises the role of society in the perception and treatment of disability, its solution to this issue would not be centred on biology and medical technology, but rather it follows suit, ensuring accessibility to society for all disabled people.

Another model, described by Hensel, is the so-called *civil rights/minority group model of disability*; it is the most recent among the ones presented by the author and it departs from an assumption which is similar to the one made by the social model, by recognising that the perception of disability is linked to social relationships.

Anyway departing from this concept, this model advances a further consideration, that is the fact that what really makes a disability unbearable is the isolation it provokes; thus the solution identified by this perspective resides in the possibility for a disabled person to perceive himself as part of a group, part of a social identity, even if it belongs to a minority group as

others in society. Indeed what the author stresses, here, is that dealing with a disability alone, or better identifying as a special physical disfunction, makes feel isolated, facing a problem that is only yours and private, thus encouraging alienation from society.
Such an evolution of the models designing the concept of disability has provoked, at the same time, changes in tort law procedures. Indeed this legal field has underwent an evolution across time; the early cases of wrongful life, as Hensel explains, were primarily cases of wrongful conception or wrongful pregnancy and concerned the birth of healthy children due to a medical negligence occurred in processes of sterilization or abortion.

Anyway, as the author notices.

> As a result, most jurisdictions have readily recognized this type of tort action. In virtually all cases, courts have awarded the plaintiff mothers their medical expenses and emotional distress damages associated with pregnancy and childbirth.
>
> (Hensel 2005: 151)

This kind of cases was still recallable to traditional medical malpractice actions, thus they could be treated in a similar way; anyway most courts have also showed a high degree of scepticism in awarding damages for such actions. This results by an important consideration made by Hensel:

> Although these courts acknowledged the hardship and stigma experienced by children of unwed parents, they were more concerned with the "vast" legal and social impact that could ultimately result if any person "born into the world under conditions they might regard as adverse" could sue, particularly in light of "man's […] ever greater control over the functions of nature."
> As a result, courts have concluded that the legislative branch, rather than the judiciary, is the proper place for resolving such disputes.
>
> (Hensel 2005: 153)

3.2. Key issues in wrongful life cases

Wrongful life actions have provoked high level of debate and varied outcomes throughout different countries in the world; it results difficult facing such a harsh controversy and trying to assess its features since it has been interpreted differently depending on the country and the environment in which it was analysed. An example of the fluctuant nature of this

controversy is given by Ivo Giesen[8]; indeed the author describes two wrongful life cases, comparing their outcomes:

> In 1993, a South African boy named Brian Stewart was born severely handicapped. He suffers from 'spina bifida', a congenital defect to the lower spine, which negatively affects the nerve supply to the lower limbs, bladder and bowel. He suffers from a brain defect as well. In 1994, a Dutch girl named Kelly Molenaar was also born severely handicapped. By the time she was two-and-half-years old she was diagnosed as being retarded, autistic, not fully grown, not able to walk or talk, suffering from heart disease, bad hearing and poor eyesight and she was not able, at that time, to recognize her parents. She had been admitted to hospital on nine occasions due to continuous crying, believed to be caused by pain. Comparable stories about severely handicapped children can be found in several other countries as well...The facts described above of course point to two cases on the issue of 'wrongful life', a highly debated topic within the field of both medical law and tort law (or the law of 'delict' as it is called elsewhere).This is the theme of this paper and it is so, firstly, for that very reason: it is highly debated all over the world; it leads to differences of opinion and differences in the outcomes (in South Africa the Supreme Court of Appeal handed down a decision on this matter in 2008, not recognizing this sort of claim, while, for instance, the Dutch legal system is one of the few legal systems that does allow such a claim, see below)
>
> (Giesen 2012: 35-36)

In this passage the author highlights how complex such a debate appears and how very different perspectives can be adopted to face it. Anyway the aim of Giesen consists of describing and analysing the comparative and arguments used in wrongful life cases and their impact on different jurisdictions.

The author, indeed, through his comparative study, identify some main legal issues recurring in wrongful life cases; the first issue arising in wrongful life cases is represented by the understanding of which is the cause of the sufferings affecting the child. The natural answer to this question would be the handicap, anyway this raises a problem because, in cases in which the handicap is not directly caused by the doctor as in the *Perruche* one, there is no linkage of causation between the handicap and thus the damage and the doctor's negligence. Another important issue concerning wrongful life cases interests the concept of damages, indeed as the author notices.

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[8] Giesen, I., 2012, The Use and Influence of Comparative Law in "Wrongful Life" Cases, *Utrecht Law Review*, MMXII, n.8, pp.35-54, Online: http://www.utrechtlawreview.org

> Can we say there is any damage in a wrongful life case, and if so, how can we assess that? Is the usual method of comparison to assess damages workable? What should then be compared with what? The 'non-existence' or 'not being' of a child cannot be materialized in monetary terms, so no true comparison of 'non-existence', on the one hand, and 'life with certain disabilities', on the other, is possible.
>
> (Giesen 2012: 43)

Anyway this does not mean that there is no objection raised against the impossibility of quantifying this kind of damage; Giesen makes the example of the Dutch Supreme Court, which believes that the right way to quantify this damage resides in the calculation of the cost of raising a child at that particular point in time.

Further wrongful life action appear problematic because of the belief in a kind of "slippery slope" argument based on the fear that allowing such action would lead inevitably to the recognition also of claims issued by disabled children against their mothers for not having aborted, being aware of the risk for the transmission of genetic diseases. Here, again, Giesen proposes the objection of the Dutch Supreme Court, which highlights that abortion represents a right for the mother, so it cannot be treated as an obligation or better as a basis for a child's claim against his mother, because this would infringing a mother's right.

The point is that refusing to abort cannot be conceived and neither has to be conceived as a negligence, thus again, it is impossible to construct a causal link between the negligence, or what is supposed to be the negligence, and the damage. Another complex argument interesting wrongful life actions.

Conclusions

The discussion of this research paper has begun with the description of a philosophical concern, which is the non-identity problem; this theoretical issue poses the attention over the idea that we have some obligations towards future people, because their living conditions will depend on us and our choices. This is even more true when we consider reproductive choices, in which life is the direct inevitable consequence; considering this could there be a situation in which not having been brought into life at all would be considered better than having been born? This is the fundamental question, that this research paper tries to analyse, through the description of natalist and anti-nastalist conceptions, exposing their reasons and their deficiencies. Anyway what has emerged from this discussion is that such a

question has no right answer, because controversies such as the non-identity problem cannot be simply classified as issues but rather as dilemmas, that interest all human kind and human history, and which cannot be identified and reduced. The *Affaire Perruche* has taught us that, depending on the theoretical perspective you choose, you can have a case and an anti-case of the same scenario; the very analysis of Giesen has also highlighted the fact that often in a wrongful life action the rights of the mother are opposed to those of the child and that supporting the ones of the latter would mean denying the freedom of the mother. The wrongful life action, even when it is inserted in a legal framework, is hardly identifiable only as a legal reality which can be defined and limited by specific norms; a wrongful life action appears to be more than this, it is a moral dilemma which requires a case-to case approach. The wrongful life dilemma cannot be simply technically regulated by a juridical process, as Cayla would say, it is intrinsically political in nature, and, as everything in politics, it has no unique answer, nor a unique perspective from which the problem could be analysed. Thus there is no precise question to ask concerning this dilemma, nor a precise answer to it; it is not an issue on the agenda, but rather a stimulating moral reasoning, an endless process of reflection over the only endless concept in the world: life itself.

"ESSERE O NON ESSERE": LA WRONGFUL LIFE ACTION TRA REALTA LEGALE E DILEMMI MORALI

L'elaborato espone e analizza il controverso fenomeno giuridico e sociale della "wrongful life action"; tale azione giuridica, infatti, consiste in una richiesta di risarcimento per il fatto stesso di essere venuti al mondo. Questo scenario, che può sembrare paradossale, è presentato in situazioni dove la persona, che richiede tale risarcimento, è oggetto di una cosiddetta "vita malformata", e dunque, una vita caratterizzata da gravi disabilità dovute ad una malattia o malformazione genetica. Il fenomeno della "wrongful life action" risulta, dunque, non solo una realtà giuridica complessa, ma anche un dilemma morale e sociale che concerne la valutazione della vita stessa. È proprio per questo motivo che il seguente elaborato analizza, dapprima, le origini filosofiche di questa controversia, concentrando la propria indagine, in un primo momento, sul problema della non-identità. Quest'ultimo è frutto di una teoria proposta da Parfit, il quale si interroga sugli obblighi che la generazione vivente ha nei confronti delle generazioni future, o meglio, su

quei doveri che la generazione vivente ha nei confronti delle generazioni future che dipenderanno da essa, e cioè nei confronti di quelle generazioni, la cui stessa esistenza sarà il risultato delle scelte della generazione vivente. Per rendere maggiormente chiaro questo concetto Parfit propone un esempio: " Supponiamo che io lasci dei frammenti di vetro nel sottobosco di una foresta. Cento anni dopo questi frammenti feriscono un bambino. La mia azione ha danneggiato il bambino. Se io avessi sotterrato i frammenti in maniera sicura, il bambino avrebbe attraversato la foresta senza restare ferito... Fa alcuna differenza se il bambino che io ferirò ora non esiste?". Questa domanda apre la riflessione dell'autore, poiché pone il lettore nella condizione di riflettere e dunque valutare il proprio operato in una maniera del tutto differente, considerandone gli effetti a lungo termine, gli effetti non solo sull'ambiente circostante, ma sulle persone, sulle vite stesse.
Il primo capitolo di questo elaborato si occupa, infatti, di rispondere alla domanda posta da Parfit e di indugiare su tale riflessione, in modo tale da poter definire i confini di un concetto così complesso. La riflessione di Parfit, infatti, parte dall'assunto che non vi sia alcuna differenza nel considerare il mio obbligo morale di sotterrare i frammenti in maniera sicura come vincolante; il fatto che il bambino ora non esista, cioè che la sua esistenza non mi sia evidente nel momento in cui mi accingo a lasciare i vetri nel sottobosco, non mi solleva dalla responsabilità e dall'obbligo che ho nei confronti di quel futuro bambino. Il mio obbligo nasce dal fatto che le mie scelte sono in grado di influenzare le vite di persone future, in positivo come in negativo. Ad ogni modo Parfit si interroga su un punto preciso riguardante questi obblighi verso le generazioni future: l'idea che la vita sia essa stessa portatrice o meno di un beneficio per la persona futura. È proprio a questo punto che il problema della non-identità si complica, infatti l'autore propone uno spunto di riflessione presentando l'esempio di una ragazza che rimane incinta a quattordici anni; in questo caso possiamo convenire nell'affermare che un bambino nato da una madre adolescente avrà molte più difficoltà nella vita rispetto ad altri; il problema, tuttavia, risulta dal fatto che quel bambino nato da una ragazza quattordicenne è un particolare individuo, frutto di precise circostanze, dunque la possibile decisione della ragazza di non portare avanti quella gravidanza, per via della qualità di vita che potrebbe offrire al proprio bambino, precluderebbe allo stesso ogni possibilità di esistenza poiché una gravidanza affrontata più in là nel tempo porterebbe al concepimento di un diverso individuo, nato da differenti circostanze.
Il punto essenziale riguardante la controversia della non-identità origina proprio da questo assunto, e cioè l'idea che ogni individuo è frutto di

particolari circostanze, uniche ed irripetibili. In ogni caso, nell'esempio presentato da Parfit, se l'adolescente decidesse di avere un figlio più tardi, comunque si otterrebbe lo stesso risultato: la nascita di un bambino, che però in questo caso godrebbe di condizioni di vita migliori. Il problema della non-identità si infittisce,invece, quando invece si presentano scenari in cui una particolare scelta o l'astensione dalla stessa possono provocare risultati diversi in termini di esistenze nella realtà futura. A questo proposito l'autore propone l'esempio della scelta fra due diverse politiche: una politica di conservazione e una di consumo; queste due politiche, saranno infatti potenzialmente responsabili di effetti futuri totalmente differenti e dunque porteranno al concepimento o meno di altri individui, influenzeranno la composizione e la stessa qualità di vita delle generazioni future. È in questi termini che il problema della non-identità si inserisce nel quadro delle scelte riproduttive, lasciando spazio al dilemma che concerne il valore della vita stessa; se l'argomento essenziale trattato dal problema della non-identità riguarda i diritti delle generazioni future, non vi è ambito maggiormente interessato da un tale argomento quanto quello delle scelte riproduttive.
Il dilemma che affligge le scelte riproduttive si incarna propriamente nell'idea che una nostra scelta determinerà l'esistenza di un individuo, anzi di "quel" particolare individuo e non di un altro non-identico individuo. Tutto ciò presenta un paradosso, poiché non esiste un corso d'azione alternativo per la vita malformata di un individuo, poiché se avessimo preso una decisione differente prevenendone il concepimento, tale individuo non sarebbe venuto al mondo, ma probabilmente avremmo in seguito dato a vita ad un altro non-identico individuo; dunque, a questo punto come è possibile giudicare il valore di una vita? O meglio in quali casi la prospettiva di non nascere affatto può essere considerata maggiormente auspicabile della vita stessa?
Vi sono numerosi autori che hanno cercato di rispondere ad una tale domanda.La seconda parte del primo capitolo, infatti, è dedicata all'analisi delle diverse prospettive teoretiche applicate al problema della non-identità e alla wrongful life action, in particolare nell'ambito delle scelte riproduttive, dove appunto il problema della non-identità assume la sua forma più complessa. Infatti è proprio in questo ambito che l'obligazione descritta dal problema della non-identità verso le generazioni future assume la sua piena importanza, poichè un individuo viene messo al mondo.Nel caso di una scelta riproduttiva, l'adozione di un differente corso d'azione porterebbe ad uno scenario in cui l'individuo, che avrebbe potuto essere concepito non esisterà mai; di fronte ad una tale opzione sorge il problema di dover definire se l'atto della vita sia effettivamente la scelta migliore da

fare nei confronti dell'individuo futuro. A questo punto dell'elaborato dunque, vengono esposte, attraverso la citazione e l'analisi di diversi autori, le due principali prospettive teoretiche riguardanti il valore della vita stessa: la prospettiva natale e quella antinatale. Quest'ultima si basa sulla concezione che la vita possa arrecare danno all'individuo; uno degli autori che sostengono questa prospettiva è Seana Valentine Shriffin, la quale centra la sua analisi sull'assunto che gli individuo non esistono in nessuna forma precedente al concepimento e che quindi il fatto stesso di non venire al mondo non può essere identificato come una sofferenza una qualche forma di danno arrecata al bambino.
Dunque Shriffin parte dall'assunto che la vita non è un beneficio di per sè, e che quantuque essa valga la pena di essere vissuta questo non prevenga il soggetto interessato dal poter richiedere un compenso per i danni sofferti. Questa considerazione si deve al fatto che, secondo l'autore, beneficio e danno devono essere distinti e non possono in alcun modo essere messi a confronto; a questo proposito Shriffin propone un esempio: assumiamo che vi siano due soggetti, A e B; il soggetto A è in una posizione che chiameremo X+ 2, e successivamente viene degradato ad una posizione inferiore, che chiameremo X. Il soggetto B, invece, si trova in una posizione che chiameremo X-2 e successivamente viene elevato ad una posizione che chiameremo X. Ora, entrambi i soggetti si trovano nella stessa posizione (X), eppure non si trovano nella stessa condizione, poichè secondo un'analisi comparativa, A è stato danneggiato e B beneficato. L'esempio proposto da Shriffin successivamente si evolve: infatti supponiamo che il soggetto A passi da una posizione detta X+2 ad una che chiameremo X+1 e che il soggetto B, invece, si muova da una posizione detta X-4 ad una posizione che chiameremo X-3.
In questo caso, anche se A si trova in una posizione di gran lunga più vantaggiosa di quella del soggetto B , nell'ottica di un'analisi comparativa, A è stato danneggiato mentre B risulta beneficato. In questo modo, secondo l'autrice, non è possibile distinguere un danno da un beneficio, poiché ciò che viene messo a confronto è un danno o un beneficio misurato rispetto ad una condizione precedente.
Al fine di poter presentare la propria teoria, dunque Shriffin, presenta una definizione del concetto di danno secondo la quale, il danno può essere caratterizzato come tale se risulta essere una condizione imposta al soggetto contro ciò che il soggetto,razionalmente, sceglierebbe per se stesso
e negando al soggetto la possibilità di sottrarsi a tale circostanza di vita. In questo senso disabilità e malattie genetiche sono identificabili come forme di danno. Shriffin prosegue poi dando invece una definizione dei cosiddetti

"beni puri", ovvero quei beni che risultano tali per se stessi, dunque benefici la cui assenza rappresenterebbe una grave interferenza nell'esperienza di vita del soggetto. Secondo Shriffin risulta fondamentale conferire un valore e un'importanza propria al danno che,di per sé, è in grado di pregiudicare l'esperienza di vita di una persona.

Riguardo questa considerazione, l'autrice sottolinea che l'importanza da attribuire al concetto di danno risiede nella definizione stessa del termine; infatti avendo definito il danno come una condizione che si oppone alla volontà del soggetto e ne previene la realizzazione, segue inevitabilmente che il concetto di danno non può essere misurato in un atto comparativo che lo metta a confronto con il beneficio; il danno ha un suo proprio valore e un suo peso specifico sull'esistenza.

A questo punto,tuttavia, sorge un interrogativo: supponiamo che vi sia una persona che arrechi danno ad un altra, può il consenso di questa stessa persona al danno sollevare colui che lo ha arrecato da ogni responsabilità? Secondo Shriffin, sì, il consenso solleverebbe tale persona da ogni responsabilità, essendo il danno propriamente una negazione della volontà del soggetto stesso.

Tuttavia in casi come quelli concernenti il danno da "wrongful life", risulta complesso stabilire la presenza di un consenso del soggetto; inoltre il danno provocato in una circostanza come questa è irreparabile. Dunque in questo tipo di circostanze il danno non è giustificabile nemmeno in vista di un bene superiore; infatti, l'autrice, sottolinea che un bene puro è quel bene la cui assenza provocherà una sofferenza nel soggetto, interferendo dunque con la sua volontà. Nell'ambito delle scelte riproduttive e della possibilità di un danno da vita "malformata", in caso di mancato concepimento il soggetto verrebbe privato della vita stessa; tuttavia ciò non rappresenterebbe un danno, né una privazione, poiché il soggetto non sarebbe in grado di percepirla.

L'intento dell'autrice è quello di veicolare il messaggio che la vita può in alcune circostanze danneggiare il soggetto; questa convinzione è supportata anche dall'autrice Bonnie Steinbock che tenta di definire le circostanze in cui sarebbe opportuno evitare la riproduzione, attraverso il concetto della "condizione di non-esistenza", ovvero quella condizione che impone un irreparabile e irreversibile per il soggetto.

Inoltre l' autrice sostiene vi sia un obbligo di raggiungimento del cosiddetto "decent minimum standard" per poter affrontare una scelta riproduttiva; questo "decent minimum standard" consiste nel dotare il soggetto futuro di tutti quegli elementi che rendono la vita un'esperienza positiva come per esempio la capacità di provare piacere, di imparare, di avere relazioni con

gli altri e la capacità di una persona di essere un bravo genitore; senza questi minimi presupposti mettere al mondo un bambino è una scelta irresponsabile e dannosa.
Steinbock concentra la propria analisi su un punto ulteriore, spingendo il discorso oltre e definendo il cosiddetto "principio di sostituzione", secondo il quale un genitore non dovrebbe impegnarsi in una scelta riproduttiva qualora non sia in grado di fornire il nascituro di tutte le condizioni affettive e materiali necessarie per vivere una vita piena; considerato questo punto sarebbe più opportuno per il genitore aspettare e dare vita ad un soggetto che possa essere dotato di tali presupposti fondamentali per la propria felicità.
La seconda corrente di pensiero che analizza il concetto di "wrongful life" è opposta alla corrente natale poiché tende a considerare la vita come portatrice di beneficio. Uno degli autori che supportano questa prospettiva teoretica è Aaron Smuts; questo autore si ripropone di dare una risposta alla domanda se la vita valga o meno la pena di essere vissuta.
Smuts afferma che, contrariamente a ciò che si può immaginare, il valore positivo dell'esistenza non dipende dall'ammontare del benessere che essa contiene, poiché possono esservi situazioni in cui un alto livello di benessere non determina una valutazione positiva della propria esistenza e al contrario vi sono situazioni in cui qualcosa può valere la pena di essere vissuta anche se non promuove il nostro benessere. L'autore dunque propone il cosiddetto "life worth living test", nel quale tenta di definire quali caratteristiche definiscano una vita che valga la pena di essere vissuta; questo test afferma che una vita che valga la pena di essere vissuta è quell'esistenza che un genitore benevole permetterebbe a qualcuno di vivere piuttosto che non essere venuto per niente al mondo. Questo test precede l'esistenza e non è dunque un'analisi della vita presente, ma piuttosto una riflessione precedente alla vita stessa. Questo test concerne l'analisi e la conseguente definizione di un criterio per decretare che una vita valga la pena di essere avviata, non riguarda in nessun modo la valutazione riguardo ad una vita che valga la pena di continuare.
Tuttavia il problema che questo test fa emergere riguarda quelle situazioni che non possono essere identificate né come vite che valgano la pena di essere vissute né come vite che non debbano essere vissute affatto. Dunque queste situazioni, che l'autore identifica con il nome di "Lives Worth Nothing" (LWN) sono quelle che destano le maggiori problematiche.
L'autore si interroga su quale sia la decisione più opportuna da prendere in queste circostanze, riflettendo su quale sia il valore della vita stessa; Smuts infatti parte dalla concezione supportata dalla prospettiva anti-natale, in

particolare quella di Benatar, che sostiene che la vita sia in ogni caso una condizione penosa poiché l'uomo in una condizione di costante desiderio. Secondo Benatar questa condizione è miserevole poiché è priva di utilità e non durerà nel tempo; tuttavia secondo Smuts non è l'eternità di un processo a conferirgli valore e come ragione di questo propone un esempio dicendo che per esempio far ridere una persona è un'attività ricca di valore anche se quella persona non riderà per sempre. L'eternità non rappresenta il valore intrinseco di un'attività, quest'ultima infatti non necessita di un significato immutabile; la vita è un processo fluido, libero dalla stessa possibilità di stabilire il suo significato essenziale.
Un altro autore che supporta la visione proposta da Smuts è Franco Palazzi; egli insiste sull'idea che la procreazione, più che un dovere, come viene caratterizzato da Benatar, è una possibilità; dunque,secondo Palazzi, proprio per via di questa carattere possibile che contraddistingue l'esistenza rende impossibile stabilire con certezza cosa sia meglio per noi stessi.
Il dibattito riguardante il problema della non-identità risulta complesso e piuttosto vario, ma i suoi risvolti si complicano persino di più quando dal dibattito teoretico si passa all'aspetto pratico di tale questione; un esempio viene dato nel secondo capitolo di questo elaborato, dove viene presentato un caso francese di wrongful life action: il cosiddetto Affaire Perruche. Quest'ultimo tratta di una vicenda che interessa la giurisprudenza francese del 2000; il caso prende il nome dal nome del soggetto interessato da questa controversia giuridica: Nicolas Perruche. Quest'ultimo si presenta come un ragazzo affetto da disfunzioni irreversibili sin dal primo anno di vita, a causa di un contagio da rosolia avvenuto durante la gravidanza della madre. Il quadro del caso si complica poiché la madre di Nicolas, durante la gravidanza aveva richiesto delle analisi per verificare di non aver contratto la rosolia, che aveva fatto ammalare sua figlia maggiore. In questo frangente, tuttavia, la donna era stata malinformata dai medici riguardo il risultato dei test, ignorando quindi che il proprio avrebbe presentato serie disfunzioni alla nascita ; la madre di Nicolas aveva infatti intenzione di abortire nel caso i test fossero risultati positivi al contagio della rosolia. Considerato lo svolgimento degli eventi, secondo i genitori di Nicolas il ragazzo è stato privato della possibilità di non venire affatto al mondo e dunque di non dover patire tali sofferenze. È per questo motivo che i genitori di Nicolas decidono di richiedere un compenso per questa privazione che, secondo la loro opinione, affligge il figlio.
La particolarità di questo caso viene messa in luce da Olivier Cayla, che ne presenta la complessità spiegando come tale caso giuridico abbia generato

due correnti interpretative del tutto opposte: la cosidetta prospettiva perruschiste e la prospettiva anti-perruchiste.
La prospettiva perruchiste è identificata con la posizione della Corte di Cassazione Francese. Cayla specifica che ciò che distingue queste due prospettive è il diverse approccio che riservano a due principali elementi del caso: il soggetto e l'oggetto della denuncia. Il ragionamento perruchiste attribuisce la responsabilità causale del danno arrecato a Nicolas sulla base dell'errore commesso dai medici nell'informare la signora Perruche e del pregiudizio che risulta da tale errore e che è costituito dall'handicap sviluppato da Nicolas.
Il principale contenzioso che interviene fra Peruchistes e Anti-Perruchistes riguarda proprio il concetto di pregiudizio; infatti perché una denuncia ammissibile essa deve avere un oggetto di denuncia valido, ciò vuol dire che il pregiudizio preso in esame da tale denuncia deve essere collegato da un legame di causalità all'errore che si presume lo abbia provocato.
Il nesso di causalità tra il pregiudizio e l'errore che ne deve appunto rappresentare la causa, viene contestato dalla corrente anti-perruchiste, nel caso Perruche, poiché in questa circostanza l'errore del medico non ha determinato direttamente l'handicap di Nicolas, ma piuttosto la sua stessa esistenza.
I Perruchistes contestano invece tale passaggio asserendo che la madre di Nicolas aveva espresso la volontà di abortire in caso di contagio da rosolia e che dunque l'errore medico risulta essere una piena violazione di questo diritto di abortire e dunque un valido oggetto di denuncia.
Il ragionamento presentato dalla corrente perruchiste sottolinea, secondo l'analisi anti-perruchiste, mette in evidenza che il vero pregiudizio preso in considerazione è la vita stessa di Nicolas, il suo essere venuto al mondo. Dunque è a questo punto che il caso si inserisce nella cornice di un problema di non-identità, in cui la domanda principale diventa quella che si interroga se la vita stessa possa costituire una forma di pregiudizio.
Per gli anti-perruchiste una tale conclusione appare paradossale, considerata anche la mancanza di un nesso di causalità fra l'errore medico e il pregiudizio e il fatto stesso che il pregiudizio di per sé non esiste. Per gli anti-perruchistes dunque questa denuncia risulta inammissibile. Nel considerare questo caso, la corrente anti-perruchiste sembra richiamare la considerazione di Franco Palazzi sull'essenza della vita; l'autore infatti aveva specificato che l'essenza della procreazione e della vita stessa risiede nel suo flusso di possibilità che la contraddistingue.
In questo senso gli anti-perruchistes considerano la volontà di aborto espressa dalla madre come una volontà non attendibile proprio perché

nell'incertezza che contraddistingue la vita, non è possibile accertare che di fronte ad una notizia difficile come quella di un contagio da rosolia la madre di Nicolas avrebbe, senza alcun dubbio, scelto di abortire.
Una volta annullata la volontà della madre di abortire, gli anti-perruchistes individuano come unica fonte di pregiudizio la nascita stessa di Nicolas; a questo punto, affinchè la vita possa essere riconosciuta come pregiudizio, è necessario che il soggetto sia in possesso di un diritto, in questo caso di un diritto di essere abortito che risulti violato. Tuttavia ciò risulta impossibile poiché il soggetto potrebbe esercitare questo diritto solo ad uno stato embrionale.
Inoltre il diritto di un soggetto di essere abortito si oppone alla libertà e al diritto della madre di decidere della propria gravidanza; dunque secondo l'analisi anti-perruchiste il caso Perruche risulta inammissibile e, come sottolinea Cayla,da tale risulta una configurazione del caso totalmente opposta rispetto a quella offerta dalla Corte di Cassazione e che ci spinge ad appellarci a questo come all'anti-caso Perruche, uno scenario totalmente diverso e assolutamente opposto rispetto a quello presentato dai perruchistes.
Tuttavia, come nota Cayla, l'analisi anti-perruchiste non lascia spazio al grido di Nicolas sostenendo che una tale azione si pronuncerebbe contro la dignità umana e lasciando di fatto questo individuo muto e impotente di fronte alla propria sofferenza.
Si prospetta dunque il paradosso secondo il quale la sofferenza dell'individuo viene subordinata al rispetto della dignità e della sofferenza umana; la controversia raggiunge dunque qui il suo apice privando il soggetto di giudicare ciò che più di tutto gli pertiene: la sua vita.
Il secondo elemento di contrasto fra la corrente perruchiste e la corrente anti-perruchiste riguarda il soggetto della denuncia; infatti gli anti-perruchistes sostengono che Nicolas non si trovi nella giusta posizione per poter esercitare questo diritto al risarcimento poiché l'unico modo per Nicolas di esercitare il suo diritto alla non-vita risulta quello di essere vivo; la sua condizione di vivente è necessaria per l'esercitazione di tale diritto, cosa che risulta paradossale e dunque inammissibile.
Inoltre vi è un altro elemento che complica il caso Perruche: la richiesta di risarcimento viene presentata dai genitori e non da Nicolas. Questa procedura è dovuta al fatto che Nicolas era minorenne nel momento in cui tale richiesta veniva presentata e soprattutto il suo handicap non gli permetteva di poter presentare lui stesso la richiesta. Questo tuttavia risulta incongruente con l'esercitazione di un diritto personale; infatti se il diritto

da riconoscere a Nicolas è quello di potersi rifiutare, nessuno all'infuori di lui può esercitare tale diritto.
Qui di nuovo il ragionamento si complica poiché tale conclusione può essere letta in due modi differenti: da una parte esprimersi in vece di Nicolas lo priva del suo diritto, eppure non farlo lo riduce ad un silenzio forzato che lo intrappola nella sua sofferenza.
Il caso Perruche è un vivido esempio della complessa realtà del problema della non-identità, che oltre a rappresentare un dilemma moral assume una forma giuridica e legale nella wrongful life action.
Il terzo e ultimo capitolo di questo elaborato si propone infatti di descrivere questa realtà legal e di identificarne le caratteristiche ricorrenti. All'inizio del capitolo, infatti viene subito descritta la struttura di una wrongful life action, che si configura appunto come un 'azione legale presentata dal soggetto stesso che risulta affetto da un grave handicap o da una condizione che gli impedisce di condurre una vita "normale".
All'interno del terzo capitolo grazie all'analisi di Giesen , viene fatta una ricostruzione dei problemi legali che si riscontrano più frequentemente nei casi di wrongful life action. Il primo e più frequente problema legato alla wrongful life action, è quello di identificare qual è la causa della sofferenza del soggetto, la risposta più naturale risulta essere l'handicap; tuttavia in circostanze come quelle del caso Perruche, in cui non vi è un nesso di causalità tra l'errore e il pregiudizio (handicap) è difficile stabilire l'attribuzione della responsabilità.
Un altro problema ricorrente riguarda la quantificazione dei danni; infatti risulta difficile stabilire il valore della non-esistenza di un individuo, il cosiddetto "opportunity cost" di una tale circostanza.
Infine vi è un'ultima questione che interessa questo tipo di azione legale: il cosiddetto "slippery slope argument". Con questo si vuole indicare la rischiosa possibilità che questo tipo di azione legale degeneri portando al verificarsi di situazioni in cui alcuni soggetti disabili possano citare in giudizio le proprie madri per non aver abortito essendo a conoscenza dei rischi genetici di trasmissione di determinate disabilità. Tuttavia come è già stato sottolineato in precedenza l'aborto non può essere considerato una forma di negligenza poiché prima di tutto rappresenta un diritto della madre e dunque una sua scelta.
Quello che emerge da questo elaborato è che per quanto concerne questo tipo di dilemma non esiste una risposta appropriata, poiché il problema della non-identità non può essere identificato semplicemente come una controversia, ma piuttosto come un dilemma che interessa il genere umano.
Il caso Perruche ha già dimostrato come la prospettiva che si sceglie per

analizzare una questione è in grado di generare risvolti completamente nuovi; il dilemma della wrongful life action non è di per sé né una semplice controversia teoretica né una realtà legale, ma una continua stimolazione al pensiero e alla riflessione, sull'unico concetto eterno nella storia del genere umano: la vita stessa.

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