

Future Persons and Victimless Wrongdoing

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1. The 'Deaf Baby Case'

In its edition of March 31, 2002, the *Washington Post* carried an article on a lesbian couple from Bethesda, Maryland, who, for the second time, had used artificial insemination to conceive a child.¹ What gave this story its special interest was the fact that both women, Sharon Duchesneau and Candy McCollough, are deaf from birth. In their desire to create a child that resembled them, Duchesneau and McCollough had purposefully selected a sperm-donor with a family-history of deafness in order to maximize their chances of conceiving a deaf child. Their efforts bore fruit: On Thanksgiving Day 2001, Gauvin Hughes McCollough was born; like his sister Jehanne, five years older, he is profoundly deaf.

When many people consider this case, they have the strong pre-theoretic intuition that there is something morally wrong about the mothers' actions. One ingredient of this intuition is the thought that, all else equal, it is against a person's interests to be deaf rather than hearing.² The aim of this paper is not to argue for this widespread claim about human interests. Rather, my discussion will proceed on the assumption that it is correct. In any event, the

¹ Liza Mundy, "A World of Their Own", *Washington Post*, March 31, 2002.

² Note that in affirming this claim, we need not maintain that it is inherently *worse* for a person to be deaf rather than hearing. (We *would* maintain this if we believed that, all things considered, the costs of deafness for a person – being deprived of the sensory pleasures of music or birdsong, for example – outweigh the benefits). Nor need we maintain that many of the burdens that make deafness inherently bad for people (social marginalization, etc.) are unavoidable. Instead, we can recognize that many of the distinctive burdens of deafness are contingent, and due to the regrettable manner in which society fails, in various ways, to accommodate the needs of the deaf. But even if being deaf were not on balance inherently bad for a person, it may nonetheless be against her *interests* to be deaf. This could be true, because being deaf increases her *risk* of occupying other states that are uncontroversially bad for her. For instance, being deaf puts a person at a greater risk of losing the ability to meaningfully communicate with other people, were she to become blind. (Compare: lacking immunity to smallpox may not be inherently bad for a person – it does not, *in itself*, depress her wellbeing. But it is nonetheless against her interests to lack immunity, since it increases her risk of being in a state that is uncontroversially bad – suffering from smallpox).

substance of my argument does not depend on the precise condition that Gauvin suffers from. If you are skeptical of the claim that deafness is, all things considered, against a person's interests, simply imagine that as a result of his mothers' deliberate choice of sperm donor, Gauvin suffers from a different physical condition which, while foreseeably lowering his quality of life, does not prevent him from leading a life that is well worth living.

Even with this important assumption in place, however, it is only apparently straightforward to explain why Gauvin's mothers should be thought to have committed a moral wrong. As a brief survey of non-philosophical reactions to the Deaf Baby Case will reveal, the morally relevant aspects of this case are inadequately captured by our habitual modes of moral reasoning.

Indeed, as I go on to argue in Sections 2 and 3, the Deaf Baby Case belongs to a class of cases, first discussed by Derek Parfit (1982; 1984), which raise the famous *Non-Identity Problem*. As I show in Sections 3-6, one of the reasons the Non-Identity Problem has proven to be of enduring interest to philosophers is that it appears to overturn a widely held belief about the nature of morality, the so-called *Person-Affecting Intuition*. There is no consensus in the literature on how exactly to spell out this intuition; the version that I will be examining in this paper is this: if an action is morally wrong, its wrongness is always a matter of affecting some person in a way that *wrongs* this person.

In the recent literature on the Non-Identity Problem, a number of solutions have been proposed which, in the eyes of some, may promise to explain the wrong in non-identity cases in a way that might allow us to hold on to the Person-Affecting Intuition. In Sections 7-11, I examine two such proposals: Elizabeth Harman's harm-based account in "Can We Harm and Benefit in Creating?" and two rights-based proposals by James Woodward and Doran Smolkin.³

My main aim in this paper is to argue that such hopes of defending the Person-Affecting Intuition from the force of the Non-Identity Problem are chimerical. While Harman's harm-based solution to the Non-Identity Problem has considerable plausibility, I argue that we cannot uphold the Person-Affecting Intuition simply by showing that the wrong of non-identity cases

³ *Nota bene*: That these proposed solutions to the Non-Identity Problem may appear to permit us to hold on to the Person-Affecting Intuition is *not* to say that this is what their authors *intended* them to accomplish. Elizabeth Harman, for one, explicitly states that the aim of her article is not to uphold the Person-Affecting Intuition.

can be explained in terms of harm. As for rights-based solutions to the Non-Identity Problem, I provide a positive argument why they cannot work in principle. The most plausible view of the Non-Identity Problem, I conclude, continues to be that of a particularly interesting species of ‘victimless wrongdoing’.

2. How a lot of the Commentary on the Deaf Baby Case Misses the (Non-Identity) Point

Most of the criticisms of Sharon and Candy’s actions that were publicly voiced in the wake of the *Washington Post* report, are, I claim, ‘philosophically naïve’ (which is just a philosopher’s euphemism for saying that they are *profoundly mistaken*). Consider three representative criticisms.

Peter Garrett, research director for LIFE, told BBC News Online: “This is another example of reproductive technology running riot. To deprive a baby of a natural faculty is unethical behaviour.”⁴ Wendy McElroy, in an editorial entitled “Victims from Birth”, is incredulous how Sharon Duchesneau, “knowing the pain of growing up deaf, did what she could to impose deafness upon her son.”⁵ And even R. Alta Charo, professor of law and bioethics at the University of Wisconsin, opines: “I think all of us recognize that deaf children can have perfectly wonderful lives. The question is whether the parents have violated the sacred duty of parenthood, which is to maximize to some reasonable degree the advantages available to their children. I’m loath to say it, but I think it’s a shame to set limits on a child’s potential.”⁶

These criticisms may seem plausible, until we start to ask questions about the identity of the persons they refer to. Who is it, in the first statement, who is being “deprived of a natural faculty”? Gauvin, the deaf son of Sharon Duchesneau? Surely, to say that a particular baby is being “deprived” of a natural faculty only makes sense if the baby could have existed with the natural faculty intact. But is this really the case for Gauvin? Take another look

⁴ BBC News Online, “Couple ‘choose’ to have deaf baby”, 8 April, 2002. <http://news.bbc.co.uk/2/hi/health/1916462.stm>

⁵ Wendy McElroy, “Victims from Birth”, April 9, 2002. <http://www.ifeminists.com/introduction/editorials/2002/0409.html>

⁶ Quoted in Liza Mundy, op. cit.

at the second statement: To say that Sharon Duchesneau “imposed” deafness upon her son surely only has a point if we could realistically envisage her son living his life without being deaf. But can we? Finally, consider the third statement: Whose potential is being “limited” here? Professor Charo only says the “child’s”, but whom does she mean? Gauvin, the deaf child of Sharon Duchesneau? Is there thus a practically possible scenario in which Gauvin’s potential is not limited by deafness?

The common thread running through all three criticisms is the implicit assumption that, but for the actions of Sharon and Candy, the same child, Gauvin Hughes McCollough, could have been born – just without his disability. But this is not the case.

3. The Non-Identity Problem and the Person-Affecting Claim

The Deaf Baby Case is a vivid real-life illustration of a famous theoretical puzzle discovered thirty years ago by Derek Parfit: the so-called “Non-Identity Problem”.⁷ I shall take the time to lay out step for step the Non-Identity Problem, as it presents itself in the Deaf Baby Case.

I claim, first, that the following proposition is correct:

The Biological Origin View: If a particular person had not grown from the pair of cells from which he in fact grew, he would never have existed.

The Biological Origin View can be read in two different ways: (i) as a claim about the metaphysical essence of particular persons or (ii) as a contingent factual statement. Read in the former way, the Biological Origin View puts forward a criterion for the numerical identity of persons across different possible worlds. It specifies what Parfit calls the *distinctive necessary properties* of persons, i.e. those properties that only this person could have, and that this person *could not have lacked*. (Note that having grown from the same pair of cells is not *fully* distinctive, since it is a property that identical twins would share).

⁷ Derek Parfit, “Future Generations: Further Problems”, *Philosophy and Public Affairs* 11 (1982), pp. 113-172 and *Reasons and Persons* (Oxford: Clarendon Press, 1984), Chapter 16.

Note, however, that you need not accept the Biological Origin View as a metaphysically necessary condition on the identity of persons in order to assent to it as a statement of *fact*. You might hold quite different metaphysical views about the essential properties of persons. You might, for instance, subscribe to a *descriptive* view, according to which each person has *several* distinctive necessary properties, namely this person's most important descriptive properties (e.g. what he looks like, what he did in his life, etc.). And, on your theory, these properties might not include having grown from a particular pair of cells. Nevertheless, even if you held such an alternative theory about the metaphysical essence of persons, you would still have strong reasons to affirm the Biological Origin View as a matter of *fact*. For it is *highly improbable* that someone who grew from a different pair of cells, who consequently had a different DNA, etc., would have gone on to possess exactly those properties which *you* regard as being the distinctive necessary properties of that person.

If we accept the Biological Origin View, however, we must conclude that – absent a pre-natal cure for deafness – there is no *practical* (as opposed to metaphysical) possibility that Gauvin could have been born hearing. For it is precisely those genetic features that Gauvin has in virtue of having grown from the pair of cells from which he in fact grew which are also causally responsible for his deafness. Given our present scientific and medical know-how, there is no practically possible scenario in which Sharon would have given birth to the same, numerically identical individual, without the child being deaf. If Sharon had acted differently, by using a different sperm-donor, this would not have resulted in Gauvin. A different, possibly hearing, child would have been born. But Gauvin would never have existed at all. The crucial mistake that all three of the cited criticisms make is to assume that Sharon's reproductive choices, including which sperm-donor to use, are *same person choices*, i.e. choices that would have resulted in the same person being born, just with some undesirable attributes eliminated. But as we have seen, this is not the case. What Sharon faces, in fact, is a choice between two *different* persons. Either she conceives as she did, and gives birth to Gauvin, who is deaf. Or she conceives differently, using a different donor; but in that case, the resulting individual will not be Gauvin.

Should Gauvin regret that his mothers acted as they did? Certainly not. Despite his deafness, he will, in all likelihood, have a life that is well worth living. Given that the only practically possible alternative to his being born

deaf is not his being born hearing but his not existing at all, Gauvin has reason to be glad that his mothers acted as they did.

Note that asserting that a person has reason to be glad (or, on the contrary, reason to regret) that he was brought into existence need not commit us to the claim that it was better *better* (or *worse*) for the person to be brought into existence. This claim has struck many philosophers as incoherent, since, they contend, it implies that it would have been *worse* (*better*) for that person never to have existed. But this, it is argued, cannot be the case. If the individual in question never exists, there *is* no person *for whom* non-existence is worse, and consequently no-one for whom existence would have been better. The comparandum lacks a subject.⁸ (Recall the old Yiddish joke: “Life is so terrible, it would be better never to have been born.” Response: “Who is so lucky? Not one in ten thousand!” The joke works, because people who never exist can be neither the subjects of fortune or misfortune).

There is, however, a way of putting the point that does not encounter such conceptual difficulties. As Jeff McMahan points out, it is both coherent and plausible that being caused to exist with a life worth living can be good for a person in a *non-comparative* sense, namely insofar as “the intrinsically good elements of the person’s life more than compensate for the intrinsically bad elements.”⁹ This can be true despite the fact that the alternative in which he never exists would not have been bad, or worse, for him. *Mutatis mutandis*, it can be non-comparatively bad for a person to be brought into existence with a life that is overall not worth living¹⁰, despite the fact that never existing would not have been good, or better, for him.

The Non-Identity Problem, as it presents itself in the Deaf Baby Case, can be summarized in three propositions. Sharon and Candy know

⁸ For versions of this argument, see Krister Bykvist, “The Benefits of Coming into Existence”, *Philosophical Studies* (2007), pp. 95-115 and Jeff McMahan, “Causing People to Exist and Saving People’s Lives”, *The Journal of Ethics* (2013), pp. 5-35. For a dissenting view, see Nils Holtug, “On the Value of Coming into Existence”, *Journal of Ethics* (2001), pp. 361-384.

⁹ McMahan (2013), p. 6.

¹⁰ More precisely, imagine that such a person would have a life that is, in Derek Parfit’s phrase, “worth not living”, since its life would be *worse* than a life spent in a permanent coma (which would also be *not worth* living). For stylistic reasons, I will continue to use the former locution. However, you may assume throughout that when I refer to a life as “not worth living”, this is also a life that is “worth not living”, in Parfit’s sense.

- (i) that doing φ (choosing a deaf sperm donor) will probably cause a deaf child to come into existence, whereas an alternative possible action ψ (choosing a hearing sperm donor) will probably cause a numerically distinct, hearing child to come into existence);¹¹
- (ii) that if they do not do φ , the deaf child will never exist;
- (iii) that it would be non-comparatively good for the deaf child to exist, despite the fact that it exists in a disabled physical condition.

The challenge for the moral philosopher is to explain our intuitive conviction that Sharon and Candy act wrongly if they choose to do φ , in the face of the further facts (ii) and (iii), namely that their doing φ would be good for the person whom they thereby create and who would not otherwise exist. As we have seen, the conventional explanations we reviewed above failed to answer this challenge, since they overlooked (ii).

In the eyes of many moral philosophers, non-identity cases overturn a widespread idea about morality, the so-called ‘Person Affecting Intuition’. This intuition has been stated in many different ways in the literature, and no consensus formulation has emerged to date. Melinda Roberts and David Wasserman characterize it as follows:

What makes an act or choice morally impermissible, or wrong, must be connected in some central way with a person’s having been made *worse off*, or *harmed*, or *wronged*, by what the agent has done.¹²

For the purposes of this paper, it will be useful to have on the table a more circumscribed and precise claim. I will refer to this as the Person-Affecting *Claim* or PAC for short, to distinguish it from the wider intuition:

¹¹ Note that it does not seem to matter to our moral assessment of the Deaf Baby Case that the probability of Sharon’s giving birth to a deaf child is always smaller than certainty (even when she selects a deaf sperm donor) and never zero (even using a hearing donor). The fact that the probability of obtaining some morally undesirable outcome x is less than certainty and greater than zero under any possible course of action would be no defence for someone who is, in fact, attempting to *maximize* her chances of obtaining x .

¹² Melinda A. Roberts and David T. Wasserman (eds.), *Harming Future Persons: Ethics, Genetics, and the Non-Identity Problem* (Springer, 2009), p. xiv.

The Person-Affecting Claim (PAC): An action φ is wrong only if, and because, there exists some person P who is *wronged* by the performance of φ .¹³

For the Deaf Baby Case, the PAC implies that if the mothers' action cannot be shown to have *wronged* Gauvin (or some other person), then their action can in no way be morally wrong. Such a conclusion, however, would conflict with our firm intuition that the mothers *have* acted wrongly. If, therefore, our discussion should yield the result that the mothers cannot be said to have wronged anyone by deliberately conceiving a deaf child, this result should be viewed as a counterexample to the PAC.

4. The Concept of Wronging a Person

Let us dwell for a moment on the concept of 'wronging' a person. Intuitively, if an action φ *wrongs* a person P, or is a wrong done *to* P, then (a) action φ is *prima facie* morally wrong, and (b) the *prima facie* moral wrongness of φ consists, at least in part, in the way it affects P. Condition (a) implies that if an action wrongs a person, there is at least a defeasible reason against performing that action. At the same time, (a) leaves open the possibility that, though φ wrongs P, it is not wrong *all things considered*. (This might be the case, for instance, if wronging a person was the only way to avoid some catastrophic outcome, as in the famous thought experiment from the *Brothers Karamazov*, where torturing an innocent child is the only means to avoid the destruction of the rest of humanity). It is condition (b), of course, that stands

¹³ Derek Parfit's arguments in Chapter 16 of *Reasons and Persons* are directed, not at the PAC as I define it above, but against a different way of fleshing out the Person-Affecting Intuition – what Parfit calls the *Narrow Person-Affecting Restriction*. According to this claim, an act cannot be wrong unless this act would be *worse* for some particular people than some other possible act would have been. This claim is logically stronger than the Person-Affecting Intuition, as stated by Roberts and Wasserman, but distinct from the PAC, since it maintains that a necessary condition of an act's being wrong is not that it *wrongs* a person, but that it would be *worse* for some particular person than some other possible act. However, as we shall see, one of Parfit's main arguments against the *Narrow Person-Affecting Restriction* – what I dub the *Argument from the 2-Possible Case* (discussed in Section 5 below) – also provides a powerful *prima facie* case against the Person-Affecting Intuition, as well as against the claim which concerns me in this paper, namely the PAC. Having noted these caveats, I shall therefore sometimes write of 'Parfit's case against the Person-Affecting Intuition'.

in need of further explication. Much of my substantive discussion of this claim will come later in the paper. For now, let me just note that the sense of “affect” in (b) is compatible with the idea that, in order to know how P is affected by an action φ in the morally relevant sense, it isn’t always enough to consider the intrinsic features of φ . Sometimes, we must also attend to *counterfactual*, or *modal*, or *relational* facts about φ and P. Suppose, for instance, that someone amputates P’s leg. Has P been wronged? This depends, in part, on the following counterfactual: “What would have happened, had P’s leg not been amputated?”. If nothing bad would have happened to P, and the amputation was therefore medically unnecessary, then P has most likely been wronged. By contrast, if P would have died of gangrene had his leg not been amputated, he has not been wronged (at least assuming the amputation wasn’t carried out against his will, etc.). Or suppose we want to know whether an action wrongs P, by treating him unfairly. Fairness is an essentially *relational* notion; it is a function of how someone fares or is treated *compared to* other people. Thus, in order to know whether φ wrongs P by treating him unfairly, we need to consider relational facts about how P fares and is treated compared to other persons.

What turns on the question whether an action wrongs a person or not? To answer this, consider the place that the notion of wronging occupies in the web of our moral concepts. The concept of wronging a person expresses the idea that when we commit a morally wrong action that wrongs someone, we do not just violate a moral norm or principle – we create a *victim*. Such an action generates a duality in the possible moral reactions to this act: The victim of the wrongdoing can not merely complain that a moral principle has been infringed; more importantly, she can complain about the effect this infringement had on *her*. This reaction, by contrast, is not available to an unaffected third party, who can only complain about the infraction of a general moral principle. Call this the difference between *first-* and *third-personal* moral complaints. We can thus add to our above account of wronging: If an action φ *wrongs* a person P, or is a wrong done *to* P, then (a) action φ is *prima facie* morally wrong, and (b’) the *prima facie* moral wrongness of φ consists, at least in part, in the way it affects P, *giving rise to a justified first-personal complaint on the part of P*.

Note, further, that only the existence of first-personal complaints can legitimate demands for compensation and reparation. Of course, such demands will not always be lodged by the victim in person. She might, after

all, no longer be capable of doing so – possibly as a result of the very wrongs committed against her. But even in such cases, demands for compensation or reparation would have to be lodged by someone else on her *behalf*.

The duality between first- and third-personal complaints is mirrored in the “reactive attitudes” that we experience in response to wrongdoing. It may be appropriate for me to feel *indignation* towards someone whom I know to be responsible for a morally wrong action, but who has not offended or injured me in particular. On the other hand, the feeling of justified *resentment*, according to the classic Strawsonian account, is reserved for those who have “offended or injured” *me*.¹⁴

As we see, there is a lot riding on the question whether the wrongdoing involved in the Deaf Baby Case can be described in person-affecting terms or not. Only if we can claim that the mothers have wronged their child, will Gauvin have a first-personal complaint against his parents, which might ultimately give rise to claims for compensation. And only in this case will Gauvin, should he later come to judge his mothers’ decision to have been morally wrong, be in a position to feel justified resentment towards his parents, as opposed to an impersonal indignation at the wrongness of their actions.

5. Parfit Against the Person-Affecting Intuition - The Argument from the 2-Possible Case

In Chapter 16 of *Reasons and Persons*, Derek Parfit advances a powerful argument to show that no person-affecting considerations can fully explain the moral wrongness of non-identity cases. I shall dub this the “Argument from the 2-Possible Case”. Applied to the Deaf Baby Case, the argument runs as follows:

If the Person-Affecting Intuition is true, the wrongness of any action we consider morally wrong must consist in the way it affects particular persons. Now, any attempt to explain the wrongness of the mothers’ actions in the Deaf Baby Case wholly, or even primarily, in virtue of its effects on people other than Gauvin himself – for instance, the additional strain that caring for a deaf child might put on a society’s resources – is surely unsatisfactory. We can

¹⁴ Peter Strawson, “Freedom and Resentment” in his *Freedom and Resentment and Other Essays* (London and New York: Routledge, 2008), p. 7.

imagine a scenario in which any such effects are absent, and yet we still feel that the mothers have acted wrongly. In order to hold on to the Person-Affecting Intuition, we must therefore find a way of explaining the wrongness of the mothers's action in terms of how it affects their child, Gauvin.

But now consider the case of a different woman, Lisa:

Lisa's Case: Lisa knows that because of a congenital medical condition, *any* child she could conceive, now or in the future, will be born deaf – no matter who impregnates her. She also knows that, despite being deaf, any such child would foreseeably have a life that is well worth living.

Lisa's Case is what I call a 2-possible case, whereas Sharon and Candy's case is a 3-possible case. Lisa has these two options:

- (A) Create a deaf child.
- (B) Create no child.

By contrast, Sharon and Candy have three options:

- (A) Create a deaf child.
- (B) Create no child.
- (C) Create a hearing child.

Most of us have the intuition that it would be much less problematic, indeed morally *permissible*, for Lisa to create a child, knowing that it will be born deaf. (We would believe this, I think, even if we knew that, like Sharon and Candy, Lisa actually *wants* a deaf child, and is therefore quite glad that she has her medical condition). After all, a deaf child is the only kind of child that Lisa *could* create, given her condition, and her child's life will be well worth living. By contrast, we believe that Sharon and Candy act wrongly by deliberately selecting a sperm donor with the aim of having a deaf child.

If we want to hold on to this intuition about the moral difference between the 2-possible and the 3-possible cases, Parfit argues, we must give up the Person-Affecting Intuition. For the way in which Lisa's, and Sharon and Candy's actions affect their respective children is exactly symmetrical: Both sets of mothers give birth to deaf children, with lives that are worth living. As

long as we hold the PAC, we cannot maintain that Sharon and Candy's action is morally wrong, in virtue of the way it affects Gauvin, while Lisa's action is permissible. For this reason, Parfit concludes, we should abandon the Person-Affecting Intuition.

Before I go on, let me briefly point out an interesting implication of our moral judgements about the 2- and 3-possible cases we have just considered. *Prima facie*, it might seem plausible to assent to the following

Principle of Transitivity for Moral Permissibility: If it would be permissible to do A if A and B were the only alternatives, and it would be permissible to do B if B and C were the only alternatives, then it is permissible to do A if A, B, and C are the alternatives.¹⁵

For instance, suppose I have won \$1,000 in a raffle, and let A*, B*, and C* stand for the following options:

- (A*) Spend the money on myself.
- (B*) Give the money to Oxfam (in addition to my regular donations).
- (C*) Spend the money on new toys for my children.

In this case, the Principle of Transitivity for Moral Permissibility yields the plausible verdict that if it is permissible to spend the money on myself rather than increasing my donations to Oxfam, when these are my only two options, and if it is permissible to give the money to Oxfam rather than spend it on new toys for my children, when these are my only two options, then it is

¹⁵ The label 'Principle of Transitivity for Moral Permissibility' is due to Gregory Kavka, "The Paradox of Future Individuals", *Philosophy and Public Affairs* 11 (1982), pp. 93-112, who considers a principle of this kind. On closer inspection, however, the label is a misnomer. Transitivity is a property of relations. Kavka's principle, however, does not appeal to some relation which is claimed to be transitive. Being permissible when A and B are the only alternatives is a property, not a relation, and it is a different property from the property of being permissible when B and C are the only alternatives. Nor would it help Kavka to appeal to the claim that A is not worse than B when A and B are the only alternatives, and B is not worse than C when B and C are the only alternatives, so A cannot be worse than C when A, B and C are the alternatives. Though this claim appeals to relations, it appeals to three different relations. The relation 'worse when A and B are the only alternatives' is not the same as the relation 'worse when B and C are the only alternatives'.

permissible to spend the money on myself, when all three options are available.

But if our intuitions about Lisa's Choice and the Deaf Baby Case are correct, the Principle of Transitivity for Moral Permissibility must go. Consider again:

- (A) Create a deaf child.
- (B) Create no child.
- (C) Create a hearing child.

As I have already argued in discussing Lisa's choice, if (A) and (B) are the only alternatives, it seems permissible to choose (A). And certainly, in cases where (B) and (C) are the relevant alternatives, it is permissible to choose (B). It is permissible to remain childless. So, if the Principle of Transitivity for Moral Permissibility were valid, it would have to be permissible to do (A), where (A), (B) and (C) are possible. But this conflicts with our guiding intuition about the Deaf Baby Case. Despite its prima facie appeal, we should thus reject the Principle of Transitivity for Moral Permissibility.

I note in passing that cases involving the Non-Identity Problem aren't the only counterexamples to this principle. Suppose you have the possibility of bringing a supply of some scarce drug to a remote island, where it could save a number of lives. However, the voyage to the island is so perilous that embarking on this mission is supererogatory: it is morally praiseworthy, but not morally required of you. Once you have reached the island, however, there is no further risk, and only a negligible cost, to using the drug to save as many lives as possible. Consider then the following three options:

- (A') Go to the island and save 5 lives.
- (B') Don't go to the island.
- (C') Go to the island and save 10 lives.

In a case where (A') and (B') are your only two options, going to the island and saving 5 lives is clearly permissible (indeed, it is praiseworthy). In a case where (B') and (C') are your only options, it is permissible to do (B') and not go to the island. After all, we stipulated that the mission is supererogatory, because the voyage to the island is so dangerous. However, in a case where (A'), (B') and (C') are all possible, only (B') and (C') are permissible options.

(A') is not permissible – despite the fact that choosing option (A') would do more *good* than choosing option (B'). For, conditional on undertaking the perilous mission and reaching the island, you are *required* to save as many lives as possible.

6. An Impersonal Explanation

In Chapter 16 of *Reasons and Persons*, Parfit proffers a non-person affecting solution to the Non-Identity Problem. According to Parfit, Sharon and Candy's action isn't wrong in virtue of the way in which it affects Gauvin, as the Person-Affecting Intuition would have us believe. The case of Lisa, whose child is affected in exactly the same way as Gauvin, demonstrates that this can't be the case. Rather, the source of wrongness lies in the fact that, in deliberately attempting to have a deaf child, Sharon and Candy are passing up the opportunity to have a different child in his stead who would not suffer the disability of deafness. What makes their choice morally objectionable is the fact that it creates *gratuitous* hardship.

Parfit summarizes his argument in his principle Q which, he maintains, identifies the moral considerations that are really at play in the Non-Identity Problem:

Q: 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.

This principle is *impersonal*, or non-person-affecting. Sharon and Candy have acted wrongly according to Q, but not because of the way their action affects Gauvin (or any other person who ever lives). Rather, they have acted wrongly because, by creating Gauvin, they have brought about a comparatively worse outcome than had they created a different, hearing child instead. To coin a new term, their action is wrong, not because of what it does to any person, but because of its "moral opportunity costs".

7. A Harm-Based Solution to the Deaf Baby Case?

As we have seen, Parfit rejects a person-affecting construal of the Deaf Baby Case. That is to say, he holds that the mothers' choice is not wrong in

virtue of the way it affects *Gauvin*. In fact, Parfit goes further than this, and claims that the mothers' actions do not, in a morally relevant sense, *harm* Gauvin, since the mothers' choice is in no way worse for Gauvin than any other procreative choice they might have made. In advancing this claim, Parfit (for the most part) employs a simple *counterfactual* conception of harm, according to which the following is true: An action harms a person only if it makes the person worse off than she would otherwise have been if the action had not been performed.

Under this counterfactual conception of harm, for it to be the case that Sharon and Candy's procreative choices have harmed Gauvin, Gauvin would have to be worse off than he would otherwise have been, had they chosen differently. But since Gauvin would *not have existed*, had Sharon and Candy chosen differently, and hence would not have had any level of wellbeing at all, their procreative choice cannot be said to have harmed him.

But understood in this way, the counterfactual conception of harm surely proves too much. By the same logic, it would imply that we could not harm a person by bringing her into existence even if her life is so full of unremitting and uncompensated suffering as to be not worth living. For, of such a person, too, it will be true that her level of wellbeing cannot be lower than what she would have experienced, had we not created her. But surely, whatever we think of the case of Gauvin and similar cases that raise the Non-Identity Problem, it is implausible that in causing someone to exist with a life that is so bad as to be not worth living we cannot be said to have harmed that person.

In recent years, philosophers have responded to this and other problems with the counterfactual conception of harm by developing alternative, non-comparative analyses of harm.¹⁶ Moreover, some have argued that, once we adopt a non-comparative conception of harm, a harm-based solution to the Non-Identity Problem comes within reach.

One such philosopher is Elizabeth Harman. In "Can We Harm and Benefit in Creating?", Harman puts forward a non-comparative conception of harm, according to which an action harms a person "if the action causes pain, early death, bodily damage, or deformity to her, even if she would not have existed

¹⁶ A seminal article in this literature is Seana Shiffrin, "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999), pp. 117-48.

if the action had not been performed.”¹⁷ More broadly, we can say that on Harman’s

Non-comparative account:

P is harmed =*def.* P occupies a ‘bad state’.

S harms P =*def.* S causes P to be harmed, i.e. to occupy a bad state.

In fleshing out this idea, one might list the components of a person’s wellbeing (e.g. bodily health, intelligence, material possessions, etc.), assign to each an “acceptability threshold”, and say that for a person to be in a bad state just is for that person to fare worse with respect to some component of wellbeing *X* than *X*’s acceptability threshold. Deafness, for Harman, constitutes such a bad state. Hence, in bringing Gauvin into existence, his mothers can be said to have harmed him, namely by causing him to occupy the bad state of deafness.

Armed with this non-comparative conception of harm, Harman argues, contra Parfit, that the wrongdoing in cases like the Deaf Baby Case can be explained entirely in terms of harm to future individuals. Moreover, we can do so in a way that explains the intuitive moral difference between non-identity cases and cases like Lisa’s Choice. In a nutshell, her argument is this: Reasons against harm are so morally serious that the mere presence of greater benefits to those harmed is not in itself sufficient to render the harms permissible: When there is an alternative in which parallel benefits can be provided without parallel harms, the harming action is wrong. On Harman’s view, both Sharon and Lisa harm their children, but in Sharon’s case, the reasons in favour of her action are insufficient to render the harm permissible. The benefits to Gauvin of being brought into existence cannot render the harm permissible because Sharon has the alternative of providing parallel benefits without parallel harm. The burden on Sharon herself of not being able to have a baby with the feature she desires, namely deafness, is insufficient to render the harm permissible. Lisa, on the other hand, does *not* have the alternative of providing parallel benefits without parallel harm. Moreover, the burden on her, namely of never being able to conceive a child at all, would be far greater. For these reasons, Harman concludes, Lisa’s action is morally permissible.

¹⁷ Elizabeth Harman, “Can We Harm and Benefit in Creating?”, *Philosophical Perspectives*, 18, *Ethics* (2004), p. 93.

There are many points that could be raised about Harman's harm-based solution to the Non-Identity Problem, not least about her non-comparative account of harm itself. For one thing, we may wonder whether occupying a bad state should be considered a *necessary* condition for being harmed. Suppose I give a genius a tablet that reduces her IQ to 'merely' above-average. My action does not cause the genius to occupy a 'bad state' with regard to intelligence. Yet, intuitively, I have harmed her. For another, we might question whether being caused to occupy a bad state is always *sufficient* for being harmed. Consider the following case: Suppose I am 10 units below my acceptability threshold for some component of my wellbeing, and my doctor causes me to be 5 units below my acceptability threshold for that component. My doctor causes me to occupy a bad state – that of being 5 units below my acceptability threshold for that component; but, intuitively I am not harmed. Certainly, it is not the case that *my doctor harms me*.¹⁸

However, in the context of this paper, I want to set aside such doubts about Harman's conception of harm. Indeed, I shall grant, for the sake of argument, that Harman's harm-based solution to the Non-Identity Problem is *entirely* successful. The question I wish to pursue is this: supposing we can explain why Sharon and Candy's action in the Deaf Baby Case is wrong in exactly the manner that Harman proposes; would this also save the Person-Affecting Intuition, and, in particular, the Person-Affecting Claim from Parfit's critique?¹⁹

At first blush, it may appear that this must surely be the case. For, if conceiving a child with a handicap does harm the child, as Harman maintains contra Parfit, then undeniably the harm is an *effect* that the action has on the child. And, if, furthermore, the wrongness of the Deaf Baby Case were explainable entirely in terms of harm to the child, then it appears that both the conditions we discussed in Section 4 for saying that the mothers' actions *wrong* their child are met.

I will seek to show in the following section that such hopes are misplaced. I argue that, whatever the merit of Harman's harm-based solution to the Non-

¹⁸ For a more thorough discussion of these points, to which I am indebted, see Michael Rabenberg, "Harm", *Journal of Ethics and Social Philosophy* 8.3 (2015), pp. 1-32.

¹⁹ Note that Harman herself does *not* set herself the goal of vindicating the Person-Affecting Intuition. Indeed, in her paper, she explicitly disavows this ambition (see footnote 5, p. 109 – though notice that Harman's working definition of a "person-affecting view" differs from the one I employ in this paper). Her aim, as I have said, is the more modest one of providing a harm-based explanation of non-identity cases.

Identity Problem, we cannot uphold the Person-Affecting Claim simply by showing that the wrong of non-identity cases can be explained in terms of harm. To see why, we must look more closely at Harman's argument.

8. Why Harman's Harm-Based Solution Does Not Support the PAC

At first blush, Harman's claim that what is wrong about Sharon's action is simply that she causes harm to Gauvin, may appear to fall straightforwardly to the Argument from the 2-Possible Case. For surely Sharon and Candy's action isn't wrong *merely* in virtue of the purported harm to their child; rather, it is wrong because they had an alternative way of conceiving a child, thereby bestowing on it the benefit of existence, that would have involved no such harm. This is what Lisa lacks in the 2-possible case. Does this not show that a harm-based solution cannot fully account for the wrongness of Sharon's action?

Harman seeks to evade the force of this objection as follows: She urges that the mere fact that we have to bring in additional information, namely that the reasons in favour of Sharon's action are insufficient to render the harm to Gauvin permissible, does not show that causing harm to Gauvin cannot be the explanation of why Sharon's action is wrong. For, as Harman points out, "harm *never* fully explains the wrongness of any action, in *that* sense. (...) When we say that an action is wrong in virtue of the harm it causes, we are saying that there were no reasons in favour of the action that outweighed the reason provided by the harm."²⁰

I think that this quoted passage masks an important difference between 'ordinary' harm-based explanations of wrongdoing and the harm-based explanation that Harman proffers for the non-identity problem. Consider first an ordinary case:

Two Life-Extending Treatments: In the near future, scientists have developed a drug that will extend the human lifespan by 20 years. My doctor has a choice between two ways of administering the drug to me. Both treatments will confer me the benefit of extending my life by 20 years. But Treatment 1 has the following harmful side-effect: starting

²⁰ "Can We Harm and Benefit in Creating", p. 102.

immediately, it will make me lose some mobility in my left hand for the rest of my life. By contrast, Treatment 2 has no harmful side-effects. Both treatments are equally inexpensive and easy to administer.

We can all agree that, if my doctor administers to me Treatment 1 instead of Treatment 2, he has acted wrongly. Moreover, the explanation for the wrongness of his action is harm-based (he has harmed me by causing me to lose some mobility in my left hand). However, just as Harman suggests, we cannot see that choosing Treatment 1 is wrong in virtue of the harm it causes solely by attending to features of Treatment 1 itself. After all, if Treatment 1 were the *only* way of extending my life by 20 years, it would *not* seem wrong for my doctor to administer me this treatment, despite the small harm it causes me. (A small loss of mobility in my left hand seems a small price to pay for 20 extra years of life!). We only see why my doctor has acted wrongly by considering the modal fact of what he *could* have done instead: it's because he had the option of conferring on me the same benefit without the attendant harm (namely by administering Treatment 2) that my doctor's action is wrong in virtue of the harm it causes.

But – and this is the crucial point – the relevant modal fact here is about what my doctor could have done for *me*. He could have provided the same benefit *to me* without inflicting the same harm *on me*. It is for this reason that the doctor's choosing Treatment 1 is not just morally wrong; by imposing gratuitous harm on me, he also *wrongs* me.

Contrast this with Harman's account of the role that harm plays in making Sharon and Candy's action wrong in the Deaf Baby Case: The reason why exposing Gauvin to the harm of deafness is not rendered permissible by the benefit to him of being brought into existence is that the mothers had the ability to provide a parallel benefit *to another person* without inflicting a parallel harm *on that other person*. Does this harm-based account of the Deaf Baby Case suggest that anyone was *wronged* by the mother's action? I think not.

Crucially, saying that an action A involves wrongdoing in virtue of causing harm to person P does not imply that A *wrongs* P. The two claims are not equivalent. Harman's harm-based solution to the Non-Identity Problem supports the following proposition:

- (1) The mothers' procreative decision involves wrongdoing in virtue of causing harm to Gauvin.

But (1) does not entail

- (2) The mothers' procreative decision *wrongs* Gauvin, in virtue of causing him harm.

Claim (1) is compatible with the wrongness of the mothers' actions being explained simply by the fact that they avoidably cause harm *to someone*. The mothers' action is wrong because it makes the world a place in which there is more gratuitous harm. Gauvin, himself, is merely the *locus* of something we consider undesirable to have in the world.

By contrast, to say that a harmful action *wrongs* a person is to say that the *prima facie* wrongness of the action consists in the way it affects *that person*. Thus, if (2) were true, it would imply that the mothers ought not to have acted the way they did *for Gauvin's sake*.

Note that (1), but not (2), would in fact be perfectly captured by a revised version of Parfit's impersonal principle Q:

Q*: 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, *or suffer greater harms*, than those who would have lived.

According to Q*, creating Gauvin, in a harmful state, is wrong, because the harm is gratuitous; it ought not to have been done for the sake of the *moral opportunity costs* it involves. If Sharon and Candy had chosen a different donor, they could have conceived a different child that would not have been harmed by deafness.

By contrast, to claim that the wrongness of choosing to have a deaf baby consists in the harm that this choice causes *to Gauvin* is to assert that this action ought not to have been done *for the sake of Gauvin himself*. Gauvin would have a justified complaint against his mothers because of the way their decision affected *him*. But is this the case?

It is hard to see why Gauvin, of all people, should feel aggrieved by his mothers' decision. On the contrary, it appears that Gauvin ought to be *glad*

that his mothers chose as they did – morally wrong though their choice may have been. For he has a life that, despite his harmful disability, is well worth living for him; moreover, had his mothers acted rightly and chosen a different sperm-donor, he would never have existed.

In this respect, the *Deaf Baby Case* seems analogous to the following case:

Two Rescues: I must choose between saving the life of one of two persons, Albert or Bob, who are alike in all morally relevant respects. The following is true:

- If I save Albert's life, he will live another 20 years. However, as an unavoidable side-effect of rescuing Albert's life, I will cause him to become partially paralyzed.
- If I save Bob's life, he will live another 20 years. I can rescue Bob without causing any harmful side-effect.

Suppose I save Albert's life rather than Bob's. It may be thought that I have acted wrongly. Harman might offer the following 'harm-based' explanation for this judgment, which parallels her argument about the non-identity problem: Saving Albert is wrong in virtue of the harm I cause Albert by making him partially paralyzed. This harm cannot be morally justified by the benefit I confer on Albert (giving him another 20 years of life). For by saving Bob's life, I could confer a parallel benefit without inflicting a parallel harm.

But note that, just like in the *Deaf Baby Case*, it doesn't follow from the claim that (1) saving Albert's life is wrong in virtue of causing harm to Albert that (2) saving Albert's life *wrongs* Albert, in virtue of causing him harm. Like Gauvin, Albert clearly has no first-personal complaint if we save his life. On the contrary: if there is anyone who has reason to be *glad* that I acted as I did, it is Albert.

Gauvin doesn't just lack a justified first-personal complaint against his mothers, or any reason to *resent* them. Indeed, on pain of being a hypocrite, he also seems uniquely ill-placed to express *indignation* at their actions. For, unlike almost everyone else, Gauvin could not, in good faith, claim that he would rather his mothers had acted morally rightly.

I conclude that, even if Harman's harm-based account of the Non-Identity Problem goes through, it cannot be used to prop up the Person-Affecting Claim, according to which to perform a morally wrong action is always a

matter of, and ultimately explicable in terms of, *wronging* some person. In particular, while it may be the case that Sharon and Candy's procreative decision harms Gauvin, by causing him to exist in a disabled state, this claim does not have the implications that harm-based explanations of wrongdoing usually have. While the two women harm Gauvin, their harmful action does not *wrong* him and does not give him a justified first-personal complaint against them.

9. A Rights-Based Solution?

There are, of course, cases in which someone *can* complain of having been wronged by an action, without this action having been all-things-considered bad for them. Consider, for example, the following case from James Woodward (1986):

The Nazi Prisoner: A man was imprisoned in a Nazi concentration camp, where he suffered many terrible harms. But his experience in the camp enriched and fortified his character and deepened his understanding and appreciation of life, such that overall his life was better than it would have been had he not been imprisoned in the camp.

Although, very fortunately for him, this man's experience of being imprisoned in the concentration camp did not, over the course of his life, make him worse off in the counterfactual sense, this fact seems quite irrelevant to our judgement that the Nazis committed an unpardonable wrong against him by imprisoning him in the camp. The fact that the actions of the Nazis leave the man no worse off than he would be under any possible alternative does in no ways *cancel* the wrongfulness of their actions.

One obvious explanation for this moral judgement is that the Nazis' actions wrong the man, because they violate important *rights* of his – the right to free movement, the right not to be subject to forced labour, constant fear for one's life, etc. Besides harming, there is then a second major category of wrongs against persons: rights violations. The two categories are not coextensive: There are cases of rights violations that do not, on aggregate,

harm their victim.²¹ It is the function of rights to safeguard certain fundamental interests of their bearer. These interests, however, are often quite *specific*. And crucially, the wrongfulness of violating such an interest is not, typically, negated by the fact that one's actions may advantageously affect that person's other interests in such a way as to offset (in terms of the person's self interest) the harm of the rights infraction.

Perhaps, then, a person-affecting explanation of the wrongness of the non-identity cases can be given by appealing to the rights of future individuals? This is the approach put forward by James Woodward (1986, 1987) and, more recently, by Doran Smolkin (1999).²² Turning our attention once again to the Deaf Baby Case, I shall ask, in the final two sections of this paper: In deliberately creating a deaf child, might Sharon and Candy be said to wrong Gauvin in virtue of violating some *right* of his?

Like the harm-based approach, a rights-based solution to the Deaf Baby Case will have to contend with Parfit's Argument from the 2-Possible Case. If Sharon's choice wrongs her child in virtue of violating a right of his, then are we not forced to conclude, against our moral intuitions, that Lisa's choice, which affects her child in exactly the same way, would be equally wrong – in virtue of violating a right that *her* child has?

I believe that the rights-based theorist simply has no good retort to this challenge. Her best response is to bite the bullet, and to accept the counterintuitive implication of her view that there is no relevant moral difference between the Deaf Baby Case and cases like Lisa's Choice.

10. The Objection from 'Ought' Implies 'Can'

²¹ Of course, some philosophers, especially those unpersuaded by a counterfactual conception of harm, will want to assert that, besides having his rights violated by the Nazis, Woodward's prisoner was *also* harmed by them, even if their actions didn't make him worse off than he would otherwise have been, all things considered. Elizabeth Harman (2004) makes this claim, for instance.

²² Woodward is sceptical that a plausible theory of rights could support rights against handicaps, such as a right not to be deaf. But surely, such a *generic* hostility to a right not to be deaf is misplaced. Whatever we may think of the actual Deaf Baby Case, it seems eminently plausible to suggest that if a cure for deafness (pre- or post-natal) were readily available, Gauvin would have a right to receive such treatment, and if his mothers denied it to him, they would be committing a wrong against him.

The Argument from the 2-Possible Case, however, is not the only objection that can be raised against an attempt to explain the wrong of the Deaf Baby Case via an appeal to the rights of the child. There is also what I call the Objection from "Ought Implies Can".

Since the purported rights-violating action is that of bringing Gauvin into existence in a certain condition C, any right that might be invoked to explain the wrongness of the Deaf Baby Case would have to take the form: 'Gauvin's right not to be in condition C', where C might stand for 'deafness', 'disability', and so on. But as I pointed out in Section 3, absent a cure for deafness, there is no way in which Gauvin could exist and not be in condition C. It might thus appear that ascribing to Gauvin the right not to be deaf places on us a moral obligation which is in principle unfulfillable. Gauvin's right not to be deaf seems one that we cannot but violate. And this appears to run counter to the very widely accepted notion that morality does not admit of moral obligations that are in principle unfulfillable. ("Ought" implies "can", as the slogan has it).

I believe that, plausible as it might initially seem, this objection is in fact a red herring. It misconstrues the proper role that the 'ought' implies 'can'-principle plays in constraining the content of morality. The point of 'ought' implies 'can' is to 'protect' us from situations in which we cannot but act wrongly. But, in fact, there is a perfectly straightforward way in which we *could* avoid violating Gauvin's purported right not to be deaf – namely by making sure that this right is never actualized. Since rights require a bearer, the way to avoid creating moral obligations that we cannot discharge, in this case, is simply to avoid bringing into existence anyone who would be the bearer of rights that we will be unable to honor. In this respect, my treatment of 'unfulfillable rights' is parallel to what seems to me the right way to think about another case of unfulfillable moral obligation, namely that of unfulfillable promises. Of course it is problematic to say that we 'ought' to fulfill a promise when it is, as a matter of fact, impossible to fulfill. But does this mean that in making unfulfillable promises, we aren't wronging the promisee? Surely not. The right answer is that we oughtn't to have given the unfulfillable promise in the first place – and *this* is an ought-claim that we *can* fulfil. In violating our obligation not to make unfulfillable promises, we wrong the promisee.

Likewise, it might be claimed in the Deaf Baby Case that the mothers wrong Gauvin by causing him to exist with a right that cannot be fulfilled.

11. Why There is no Rights-Based Solution to the Deaf Baby Case

I will now propose what seems to me a better objection to a rights-based solution to the Deaf Baby Case. My objection, in essence, is that this case doesn't involve the violation of any right that Gauvin could plausibly be claimed to hold.

I claim that in determining what rights there are, we should require of any purported right-ascription that it conform to the following

Minimal necessary condition for having a right to X: A has a right to X only if there are circumstances such that A would rationally prefer, or wish, his right to X not to be unfulfilled.

There are two ways in which this condition can be met: Either (i) A rationally prefers to exist and his right to X to be fulfilled, or (ii) A rationally prefers, or wishes, never to have come into existence if his right to X cannot be fulfilled. In both cases A rationally prefers his right to X not to be unfulfilled. In the first case A's right to X is not unfulfilled because A exists and A's right to X is fulfilled. In the second case A's right would not be unfulfilled because A would not exist, and, consequently could not have any rights that are unfulfilled ('rights require a bearer').

You might wonder about the double negation in the Minimal Necessary Condition. Why do I write: 'A would rationally prefer, or wish, his right to X not to be unfulfilled' and not simply 'A would rationally prefer his right to X to be fulfilled'? This formulation is needed in order to deal with cases in which a person's coming into existence would necessarily entail the violation of one of his rights. (Call the set of rights that A has, just in virtue of coming into existence, A's 'birth rights'). I argued in the preceding section that the fact that A's right to X would be impossible to fulfill once A is brought into existence is an insufficient ground for denying that A may have a right to X. For, as I argued, what the fact that A would have an unfulfillable right to X, were he to come into existence, enjoins us to do in such situations is nothing that is impossible to accomplish: it is simply to prevent A's right to X from becoming actualized, by not bringing A into existence.

Nevertheless, saying of A in such cases that he rationally prefers his right to X to be fulfilled is of dubious intelligibility. *Ex hypothesi*, it is practically impossible for A's right to X to be fulfilled; could A *rationally prefer* something that is practically impossible? By contrast, it makes very good sense to say, in a case where A lives with one his birth rights violated, that A could rationally prefer, or wish, never to have come into existence. In this case, A's right to X would not be unfulfilled.

The Minimal Necessary Condition seems independently plausible: If, for any purported right to X, there are *no* circumstances in which A would rationally prefer that his right not be unfulfilled, then surely the purported right is of no value whatsoever to A; there is no discernible interest of A that it protects. But since we conceive of rights precisely as safeguarding certain important interests of their bearer, it seems better to say that a purported right which does not protect *any* conceivable interest of its bearer is no right at all.

Furthermore, the Minimal Necessary Condition yields the intuitively correct answer to most questions about who possesses which right: Consider, for example, a purported birth right to a life that is 'minimally worth living' (any level of well-being below this threshold would make the life not worth living). Most of us, who do have lives worth living, rationally prefer that this purported right not be unfulfilled. But even a person for whom this right is unfulfillable from birth would rationally prefer, or wish, his right to a life that is minimally worth living not to be unfulfilled – but this time in the sense that implies his own non-existence. Some lives are indeed so full of pain and suffering that those who live them rationally wish never to have existed.²³ This conclusion squares with our intuitive moral judgement that if we bring someone into existence whose life, predictably, will not be minimally worth living, we *wrong* this person and violate a right of his.

What, finally, does the Minimal Necessary Condition imply for the Deaf Baby Case? Gauvin's purported birth right to be born hearing is unfulfillable; the only way in which his right could not be unfulfilled is by never bringing him into existence. But this is not something it would be *rational* for Gauvin to prefer, since he has a life that is well worth living. Since the only way in which Gauvin's purported right to be born hearing may not be unfulfilled implies a state of affairs that it wouldn't be rational for Gauvin to prefer, there are no circumstances in which he rationally prefers that the right itself not be unfulfilled. The Minimal Necessary Condition, therefore, is not met. I

²³ Note that this is not equivalent to claiming that they have a rational wish to *cease* to exist.

conclude that under the conditions of the Deaf Baby Case, we should not ascribe a right to be hearing to Gauvin.²⁴

The attempt to explain the wrongdoing of the Deaf Baby Case in terms of rights-violation was the second and final attempt to provide an explanation of the Deaf Baby Case that allows us to hold on to the Person-Affecting Claim. As I have argued in this section, a rights-based solution to the Deaf Baby Case runs afoul of a plausible condition for the possession of rights, the Minimal Necessary Condition. I therefore conclude that no explanation can be found on which the Deaf Baby Case does not constitute a counter-example to the PAC.

12. Conclusion

In sum: the PAC falls in the face of our strong intuition that a moral wrong has been committed in the Deaf Baby Case, but our inability to find any ground for a justified first-personal complaint on the part of the deaf baby.

Any attempt to cast the wrong committed by Sharon and Candy as a *wrong* to a person fails to do justice to the Deaf Baby Case. The very feature of an appeal to person-affecting moral principles that typically constitutes their advantage -- that they make the wrong a wrong done *to* the child -- are what I have argued *mischaracterizes* cases like the Deaf Baby Case. What we are faced with, it seems, is indeed a particularly interesting species of 'victimless wrongdoing'.

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²⁴ I do not consider it an objection to my solution that it implies that different individuals may hold different sets of birth rights, or even, that the same individual might hold different sets of rights, depending on the circumstances. Indeed, this might be a strength of my approach: It can explain why, as things stand, in bringing Gauvin into existence, we do not violate a right of his; whereas we *would* violate his right to be hearing if, one day, some pre-natal cure to deafness became available.

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