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ON ANTI-ABORTION VIOLENCE

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Abstract

Anti-abortion violence ('AAV') is anathema to almost everyone, on all sides of the abortion debate. Yet, as this article aims to show, it is far more difficult than has previously been recognised to avoid the deeply unpalatable conclusion that it can sometimes be justified. Some of the most frequently-occupied positions on the morality of abortion will imply precisely that conclusion, I argue, unless conjoined with an especially stringent and unattractive form of pacifism. This is true not only of strict anti-abortion views, but also, more surprisingly, of some of the most familiar and influential moderate defences of abortion rights. The latter conclusion raises the question, which further work will be required to fully resolve, of what our account of abortion ethics and prenatal moral status must be if it is to enable reconciliation of the common-sense rejections of both pacifism and AAV. I end with reasons to expect that the path to an account that satisfies this demand, without generating further significant intuitive problems, will be far from straightforward.

I. Introduction

As bitterly divisive as the moral dispute over abortion so frequently is, there is one point, at least, on which all sides seem overwhelmingly agreed: that anti-abortion violence (hereinafter ‘AAV’) is not only wrong but utterly reprehensible — ‘moral madness’, as one prominent anti-abortion conservative representatively puts it (George, 2013, 300). Presumably in large part for that very reason, amidst the otherwise voluminous literature that has developed on the ethics of abortion over recent decades, very little sustained work on AAV exists. Yet it would be a mistake to assume, simply because AAV is generally considered anathema, that it can safely be ignored. Not everyone who repudiates the use of force in defence of fetuses necessarily has a consistent basis on which to do so. And, as I aim to show in this article, it is in fact far more difficult than has previously been recognised to avoid the deeply unpalatable conclusion that killing and maiming to prevent abortions from taking place can sometimes be justified. Some of the most frequently-occupied positions on the morality of abortion will imply precisely that conclusion, I argue, unless conjoined with an especially stringent and unattractive form of pacifism. This is true not only of strict anti-abortion views, but also, more surprisingly, of some of the most familiar and influential moderate defences of abortion rights. Indeed, if we aim to reconcile the common-sense rejections of both pacifism and AAV, then, as we will see by the paper’s end, there is reason to foresee that substantial disagreement over the moral status of the human fetus will be effectively precluded, and hence that the abortion debate will be more or less settled by indirect means.

I proceed in two main steps. In the first (in sections II-III), my focus is on hard-line opposition to abortion, in its traditional guise. On the view that I have in mind, fetuses have, from conception onwards, what I shall follow convention and convenience, somewhat at the expense of precision, in referring to as the moral status of a *person*. To say that fetuses are persons, as understood here, is to say three things: (1) that they are, generally speaking, full

and equal subjects of justice, owed equal concern and respect; (2) that they ordinarily have rights to life that are of equal (or at least comparable) strength to those typically possessed by children and adults; and (3) that their deaths are ordinarily equal (or at least comparable) evils to ours in what Derek Parfit (2011, 38) calls the ‘reason-implying sense’. With that conception of prenatal moral status in hand, the view under discussion avers that, outside at most rare cases, pregnant women lack a moral prerogative or right to prioritise themselves over the fetuses they carry, either by removing them prematurely, so that they die, or, a fortiori, by killing them, as do the most commonly-employed abortion techniques. Those who hold the forgoing combination of beliefs generally refer to themselves as ‘pro-life’. But if my argument succeeds that label is highly inapposite. I instead refer to the relevant position as *Restrictivism*.¹ It is, I contend, dramatically undermined by its conduciveness towards the justification of AAV.

This charge is not, to be sure, entirely unfamiliar, though it has rarely been prosecuted (or indeed resisted) in much detail. And this is clearly not because it is widely recognised as true, since, on the contrary, Restrictivism is generally regarded, including by philosophers, as an unproblematically mainstream or reasonable moral and political position, even if mistaken. Yet not only is the highlighted objection valid, I believe, but it has previously been significantly understated. What others have tended to anticipate is that Restrictivism implies, specifically, the justifiability of defensively killing abortionists.² But this is only one relevant concern.

¹ In adopting that convention, I follow Davis (1984). Restrictivism admits of a number of variants, from whose details I can largely abstract (though see, briefly, fn. 11, and the text to which it is appended).

² See especially McMahan (2002, 417-21), and, more briefly, McMahan (2007, 7). Since this paper was written, I have also become aware of independent work by Kershnar (2018, chap. 4). Kershnar argues narrowly that Restrictivists are committed to the claim that abortionists are liable to assassination (which, as I allow in section

Restrictivism lends itself, I argue, to a range of defensive responses, of which abortionists constitute only one group of victims, and among which are acts that many will predictably find, if anything, even more difficult than the targeting of abortionists to stomach. While the precise nature of the acts justified will vary somewhat according to one's assumptions about the conditions of justified defensive force, an implicit commitment to serious violence compromises all Restrictivists who are non-pacifists.³ Crucially, moreover, that commitment applies not only in principle, or the realm of fanciful thought experiments, but under circumstances that are chillingly realistic.

Even set against the various other unwelcome implications with which Restrictivism has often been thought to struggle, these findings seem to constitute a decisive case against it. Non-Restrictivists, however, ought not to be too quick to take satisfaction from this. For as I go on to show in the paper's second half (sections IV-V), many of them are similarly vulnerable. To make this case, I first set out the parameters of a *Non-Violence Constraint* ('NVC') which accurately captures, so I contend, predominant attitudes towards AAV, and with which it is natural to think any sustainable view on abortion must be compatible. I then demonstrate that this constraint will be violated if our defence of abortion allows that the fetus becomes a

III.B, they need not be). And while he makes certain points similar to mine in sections II and III, his analysis contains, I believe, many problems and mistakes, which I lack space to catalogue.

³ Thus stated, my position differs from that of McMahan, in *The Ethics of Killing*, which I take to be the existing locus classicus on the ethics of AAV. McMahan defends (at 417-21) the view that abortionists may be killed, given a Restrictivist understanding of prenatal moral status, primarily with reference to his own responsibility-based account of defensive liability. And insofar as he departs from this, it is by accepting only premises that make defensive harming, and hence AAV, easier to justify (those premises representing concessions towards his primary target, in the relevant part of the book, which is not Restrictivism itself but the view that abortion can be justified, while granting the personhood of the fetus, on grounds of a woman's right of self-defence).

person at any point prior to birth, as many if not most seem to accept. The latter conclusion gives rise to a research agenda which I cannot complete within a single paper, whose aim is to uncover an account of prenatal moral status that satisfies the NVC while being acceptable in the round. My closing section VI prepares the ground for that further work, providing reasons to expect that the path to such an account will be far from straightforward. There is, in short, a danger that the NVC will drive the moral status of early human life down so low as to generate significant intuitive problems of its own.

Before I begin, a caveat on methodology. This paper assumes, with proponents of reflective equilibrium, that incompatibility with strongly-held intuitions or settled judgements is sometimes a sufficient basis – indeed sometimes the *only* available basis – on which to reject a philosophical theory (for instance, of prenatal moral status). And I contend, too, that the judgement that AAV is wrong, in the forms later described, is sufficiently entrenched as to have the requisite sort of power — at least absent some credible story to the effect that its provenance makes it unreliable, or that accommodating it would be even costlier than abandoning it (on the latter of which possibilities, see, again, the paper’s final section). Put differently, I take the relevant judgement to be an example of what Rawls (2005, 8) calls a ‘provisional fixed point’ of moral theorising: perhaps not utterly unassailable, but extremely difficult to dislodge or disregard nonetheless. This assumption is supported by the fact that — as noted above, and elaborated further below — AAV is disavowed across the abortion divide. Insofar as that is so, popular antipathy towards AAV cannot be easily dismissed as a mere product of unjustifiable prejudice or myopic indifference towards the unborn. All the same, my argument will predictably not appeal to those who reject the dominant reflective equilibrium approach in moral philosophy. Yet the paper remains of relevance even to them. We should all want to know what we are committed to by the conjunction of our views on the ethics of abortion and defensive harm. If this paper is correct, many if not most people have

misunderstood, or failed to recognise, the far-reaching practical implications their own such views. And even if they will not concede that their views are discredited by the counter-intuitiveness of those implications, the least they can do is acknowledge them, and let others, whom they hope to persuade, be the judge of whether *they* can pay the price of accepting them.

II. Restrictivism and violence

Return now to Restrictivism. That this view is at undue risk of justifying acts of AAV is easy to anticipate, I think, once one takes into account not only its understanding of the moral gravity of each abortion, but also the sheer scale of the practice. In England and Wales, for instance, government figures show that nearly 8.7 million legal abortions took place between 1968, when the Abortion Act came into force, and 2018.⁴ In 2018 alone, 205,295 abortions occurred — somewhat but not much higher than the yearly average of 195,000 over the previous decade. In the United States, meanwhile, notwithstanding that the abortion rate has been declining since before the 21st century, the Guttmacher Institute estimates that 862,320 terminations occurred just in 2017.⁵ For comparison, in the charnel house that is Syria, one influential monitoring organisation in early 2020 put the death toll at between 384,000 and 586,100 over the nine years since the conflict began.⁶ From a Restrictivist perspective, then, the incidence of abortion is an ongoing outrage of extraordinary proportions. And it is worth emphasising the sizeable contributions that individual clinics and clinicians can make to these

⁴ The yearly figures, from which the total since 1968, and the yearly average since 2008, have been calculated, are available at <https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2018>.

⁵ See Jones, Witwer, and Jerman (2019, 7).

⁶ See Syrian Observatory for Human Rights (2020).

national figures. Many abortion facilities have caseloads running into the thousands,⁷ and physicians themselves can perform more than a thousand procedures a year.⁸ (One recent investigative report into the conditions under which abortionists work — Karlamangla [2019] — also describes a doctor performing 50 abortions within a single 60-hour shift.) Although it seems to many of us distasteful and inflammatory to liken abortion clinics to abattoirs and death camps, as the less diplomatically-minded anti-abortion campaigners do, this rhetoric would not be hyperbolic if Restrictivism were correct.

The analogy between the abortion clinic and death camp is, however, suggestive in ways that those invoking it do not generally intend.⁹ For imagine a country where such camps exist, within each of which, every year, hundreds or thousands of individuals are liquidated. Each camp is guarded, but only lightly, while inside a small number of ‘doctors’, euphemistically so-called, go about their gruesome work. For reasons on which I elaborate shortly, let us stipulate that the victims of the camps are young children, who are unwanted for whatever reason, have no conception of their fates, and are delivered to the camps, indeed, in a sedated condition, in which they remain until death. Every day, more such children pass through the camp gates, having either been rounded up by the authorities or brought in by their families. Yet peaceful means of halting this vast wrong have, let us finally add, comprehensively failed, whether because the state is oppressive, because the machinery of government moves in frustratingly slow and arcane ways, or because of simple indifference among the majority. I take it that, under these conditions, very few would deny that it would

⁷ See, e.g., Jones, Witwer, and Jerman (2019, 16).

⁸ See, e.g., O’Connell et al. (2009, 387).

⁹ For differing discussions of this analogy, see Arkes, Nathanson, and O’Connor, all writing in Alvere et al. (1994), and Kershnar (2018, 86ff).

be permissible (if not, depending on the level of risk to the rescuers, obligatory) for the members of some guerrilla resistance to resort to violence, within the usual moral constraints, to effect the closure of the camps, and eliminate the threat to the children.

Call this example *Death Camps*. If the resistance here is morally conscientious, it will of course have grounds for caution. In the circumstances described, violent action is necessary. Its permissibility would also be contingent, however, on whether it would have spill-over effects on third parties, or society at large, that might render it disproportionate all-things-considered. Yet, given the magnitude of the horror unfolding, these effects would have to be extremely serious, and likely, if the prospect of them were to defeat the case for intervention. One might also be concerned that those whom it may be necessary to intentionally attack to rescue the children, or harm as a side-effect of efforts aimed at degrading the camp's physical infrastructure, may be acting under one or more excusing conditions, which limit, perhaps substantially, the harm to which they can be liable. Perhaps, for instance, they are subject to duress. Or perhaps they act in ignorance, having been misled into thinking, say, that the killings which they conduct or facilitate constitute justifiable euthanasia. Even if we were to conclude, however, what seems to me highly unlikely — that on the right understanding of liability, the camp doctors, as well as their accomplices and protectors, entirely retain their moral rights not to be harmed, intentionally *and* foreseeably — we would then be under seemingly irresistible pressure to concede the permissibility of acting on other grounds. The most obvious alternative is that action can be justified as the lesser evil. A further possibility, however, is that the camp's victims possess (or, due to their age, have held for them in trust) personal prerogatives to cause harm in their own defence, including to non-liable threats and enablers,

which can be exercised on their behalf by others.¹⁰ I need take no stand on the criteria of liability to defensive harm, nor the full range of conditions under which the non-labile may be harmed or killed defensively. I *do* say, however, that any theory of defensive ethics on which no such justification (or combination thereof) applied in the case at hand, despite all that is at stake there, and on which the resistance must therefore abstain from the use of serious force, would be utterly discredited by that verdict.

It should already be disturbingly clear that, granted the truth of Restrictivism, the pattern of reasoning that justifies intervention in Death Camps extends fairly smoothly to the justification of AAV. As in the former example, such action seems necessary when, as is frequently the case, anti-abortion campaigners have exhausted peaceful political and judicial channels, or the wheels of change are moving too slowly to save the vast numbers of fetuses at risk *now*. If fetuses possess the moral status ascribed to them by Restrictivists, moreover, intervention seems bound to be proportionate in at least some cases.

It is worth pausing to confirm that the latter conclusion, regarding proportionality, is unaffected by potential disagreements among Restrictivists over the precise degree to which abortion is morally wrong and disvaluable. Recall that, in formulating Death Camps, we specified that the victims are abandoned young children, who are unconscious throughout their transfer and detention. These details ensure, first, that, like fetuses in utero, the children do not suffer due to their confinement, or in anticipating their deaths. And they also mirror, as far as possible, several further facts about fetuses that some Restrictivists might think have a degree of bearing on the moral status of abortion — to wit: that while fetuses (a) are deprived of the good of (practically) an entire life, they also (b) have yet to make much if any investment

¹⁰ For the view that personal prerogatives to harm can be exercised by third parties, see especially Fabre (2012, chap. 2).

in their lives, or develop meaningful, autonomous projects and pursuits which death would prematurely thwart, and furthermore (c) have no significant personal relationships, of a kind that might be taken to give an individual more to live for once acquired. At least one Restrictivist of whom I am aware seems to allow that the death of a fetus is somewhat less bad than that of, say, a healthy twenty-year-old, due to the off-setting effects of (b) and (c), relative to (a).¹¹ But since the possibility that the harm of death can be tallied up in this fashion does not plausibly jeopardise the satisfaction of the proportionality condition for defensive action in Death Camps, it does not undermine the analogical use to which that case is here being put.

This is not to say that the parallel between Death Camps and AAV is perfect. Insofar as there are points of disanalogy, however, they do not all make AAV harder to justify; indeed, some make it easier to justify. Abortion clinic staff cannot, for instance, avail themselves of the excuse of duress: they work where they do not because they are forced but because they are paid, or for vocational reasons. Nor are they subject to the sort of deception that it is natural to imagine occurring in a regime that engages in, or tolerates, the industrial slaughter of its citizens. On the other hand, it is possible that clinic personnel may have an excuse of a certain strength for the alleged wrongdoing in which they are engaged, on the different grounds that their beliefs about the morality of abortion, while *ex hypothesi* incorrect, were arrived at conscientiously, and are not the product of any culpable mistakes. It is of course controversial whether moral ignorance exculpates as do non-culpable mistakes of fact. And it is worth noting that, in the present context, an arguably decisive reason presents itself to reject the view that conscientiously-made moral mistakes vitiate defensive liability: namely that this would imply the injustice of attacking an anti-abortion vigilante in defence of *his* victims. Even on the

¹¹ See Kaczor (2018, 125). Kaczor does not conclude, however, as he might, that abortion is also therefore somewhat less wrong than killing a twenty-year-old.

sizeable twofold assumption, however, that moral ignorance exculpates, and that clinic staff are therefore entirely morally immune to harm, it again seems implausible, as it was in Death Camps, to conclude that the relevant individuals may therefore not be harmed on any grounds, even unintentionally, to prevent the continuation of an enormous unjust evil.

As noted earlier, it has previously been observed by others that Restrictivism, combined with common assumptions about permissible defensive force, implies that abortionists, specifically, may be attacked to avert the threats they pose to fetuses. And given the central causal role and significant moral responsibility which abortionists often have in relation to huge numbers of fetal deaths, it is true that the justification for harming them in particular seems especially clear-cut. But Death Camps indicates that this is far from the whole story. In the latter case it is intuitively clear that the resistance may inflict necessary and proportionate harm upon camp personnel who make lesser contributions to the deaths of the children than the doctors themselves, as well as upon those who protect the threateners. Indeed, it is a fortiori true that lesser-contributing personnel may be harmed, given that common-sense morality affirms the permissibility of harming even mere innocent bystanders when necessary to avert a sufficiently greater evil. By that token, then, AAV is also potentially justifiable, under Restrictivism, when the harm which it occasions is not confined to abortionists alone.

Nor is *this* the end of the matter. For it is worth explicitly drawing attention to one further group whom Restrictivism implies may be harmed, and very likely targeted: pregnant women. This particularly dark possibility is widely — sometimes bizarrely — overlooked. For instance, in making what she takes to be an argument against AAV, one activist writes:

The woman who hires the abortionist drives the whole machine, and picking the doctors off one by one won't stop her. Unless we reach her with help and hope, she'll just offer her money to someone else — and there will always be a taker. (Mathewes-Greene, in Alvere et al., 1994).

This statement dramatically backfires.¹² For it only succeeds in provoking the question of why the woman may not be reached, not with help and hope, but with defensive force. To be sure, she cannot typically be subjected to *lethal* force if the aim is to save the fetus. But there is at least one exception here, where the fetus is viable, and an emergency Caesarean can immediately be performed. And it is not, in any case, only lethal force that can prevent a woman from ending her pregnancy. Of course, to echo points already made, it might be said that a woman ought to be treated solicitously, in light of duress, if she is in straightened circumstances, or if she has conscientiously come to the conclusion that abortion is permissible. But while these considerations lend weight to the thought that she may not be *killed*, it is prohibitively difficult to accept that they justify leaving her to it, if the fetus is a person. After all, hardly anyone would think that, in Death Camps, the resistance must leave the parents to it as they deliver their children to the gates, even if they are similarly excused. On the contrary, it seems intuitively clear that, to rescue even a single child, it would be permissible to at least violently restrain such a parent, causing them severe pain or permanent injury.

A woman who is harmed to prevent her from undergoing an abortion is also thereby coerced into completing her pregnancy. But, to head off a potential response to the previous paragraph, this does not mean that the attacker intends the harmful use of the woman as a

¹² For similar arguments, facing similar problems, see The Ethics and Religious Liberty Commission of the Southern Baptist Convention [ERLC] (1994), and Colb and Dorf (2016, 174-6).

means of benefitting the fetus, and thus that the former's mode of agency is — as the self-defence literature often puts it, following Warren Quinn (1993) — 'opportunistic' rather than 'eliminative'. Perhaps we should say that what is intended as eliminative harming also, by co-opting the woman's labour, has an opportunistic side-effect.¹³ But it seems that this observation would not ground a substantial objection to defensive harm if Restrictivism were true. For the side-effect would only be that the woman is constrained to fulfil her duty to the fetus, which would not be problematically exploitative. Nor is there any such special objection, more generally, to defensive action on behalf of a child against an abusive parent, where it is known that the child must remain dependent upon the parent thereafter.

In sum, therefore, it is hard to see why Restrictivism would not license forms of violence against women including, *inter alia*, domestic coercion in cases where a partner's attempts to persuade a woman not to abort have failed.

III. 'Pro-life', anti-violence?

These conclusions are, as I take it most would agree, deeply disturbing. (I say more about the extent of popular opposition to AAV in section IV.) If I am right that Restrictivism implies them, then, barring all but the most compelling countervailing considerations, one would expect this to be fatal to it. It is unsurprising, therefore, that Restrictivists overwhelmingly and strenuously deny that their moral opposition to abortion, properly understood, could ever imply the justifiability of defensive killing, or other serious acts of harm. What *is* perhaps surprising is that Restrictivism's philosophical representatives have devoted, overall, so little serious attention to substantiating that denial. The existing responses tend to come from theologians rather than philosophers, to be brief, and to employ a limited number of

¹³ I follow here a suggestion, made in another context, by McMahan (2018).

argumentative strategies. In this section I refine and extend the thesis developed so far by considering and rejecting those strategies in turn, before extracting general lessons from their failure.

I put aside, meanwhile, a manoeuvre that does not typically find favour with Restrictivists themselves,¹⁴ but that others might think offers a solution to their difficulties: namely, an appeal to *public reason liberalism* (for which see especially Rawls, 2005, and Gaus, 2011). The latter holds, roughly, that it is wrong to coercively enforce philosophical or religious commitments that others can reasonably reject (on a certain, technical understanding of reasonableness). Endorsement of such a view would come at heavy cost to the political ambitions of most Restrictivists. But one might think that the payoff would be, as Rawls claims (2005, 480), a reassuringly non-contingent basis on which to reject AAV.

I believe, however, that for Restrictivists to align themselves with public reason as a means of alleviating their problems with AAV would be akin to someone's attempting to stop their boat from sinking by boring a second hole in the hull to let the water out. For when applied to a range of political problems whose resolution depends upon moral and metaphysical claims that are reasonably disputed, public reason views generate discrediting conclusions about when and in what forms coercion is permissible. I have argued extensively that this is so under the predominant Rawlsian or 'consensus' model of public reason, with reference to bioethical questions including abortion itself, and the legal definition of death (see Williams, 2015 and 2017).¹⁵ My own diagnosis of where the consensus model goes wrong

¹⁴ For a rare exception, see Hershenov and Reed (forthcoming). These authors associate themselves with Rawlsian public reason, but do not acknowledge or address the longstanding concerns, of the kind described in the text, about its handling of the political problem of abortion in particular. For more on Hershenov and Reed's argument, see fn.s 36 and 37, below.

¹⁵ For objections to my 2015, which I hope to discuss elsewhere, see Kramer (2017, 152-5) and Arrell (2019).

differs from that of other critics (e.g. Kramer, 2017, chap. 3), I should add, whose view is that Rawlsian public reason has no way at all of resolving certain political questions, rather than, as I maintain, that it resolves them in a morally unacceptable manner (including, in some cases, randomly). If I am right, moreover, parallel problems seem bound to afflict the alternative Gaussian or ‘convergence’ model that has schismed from the Rawlsian mainstream in recent years, and which erects even more demanding barriers to the enactment of intuitively-necessary coercion. Yet while I aim to return to these issues elsewhere — on which, indeed, I suspect the theme of this paper has an interesting and unexplored bearing — it would be too great a diversion to pursue them here.

A. Intentions

Perhaps the most frequently-offered response by Restrictivists to the sort of objection canvassed above is also the most obviously inadequate. This claims that AAV falls foul of an apparently exceptionless side-constraint on intentional harming, and concomitant requirement that defensive action conform to the doctrine of double effect (DDE).¹⁶ Those who offer this reply are standardly defenders of a Catholic or natural law perspective, presumably attracted by the prospect of showing that the tradition that provides the basis for their Restrictivism has the native resources to resolve Restrictivism’s problem with AAV. There is, however, no hope of this — even granting that intentional harming can never be justified, rather than, more moderately and intuitively, that it is merely more difficult to justify.

Those who contend that defensive action must satisfy the DDE do not generally mean to preclude the possibility that even a direct, lethal defensive attack can be permissible. They instead typically suggest that it is possible to engage in such attacks while intending, narrowly,

¹⁶ See, e.g., ERLC (1994), or the contributions by Alvere, Land, O’Connor, and Scheidler to Alvere et al. (1994).

only to save a life, while foreseeing the assailant's death. If so, there is no reason why this could not be true when one attacks, specifically, a threatener of fetuses. To avoid that conclusion, therefore, Restrictivists must adopt a broader understanding of when harm is to count as an intended means. Following Quinn (1993, chap. 8), for instance, they might opt for the view that harm qualifies as intended when one intentionally affects a person in a way that one knows or believes will harm them, whether or not harming them was, strictly, one's aim. Combined with the view that there is an indefeasible constraint against intentional harming, this interpretation of the intention/foresight distinction prohibits clearly acceptable instances of defensive harm. But a Restrictivist might consider this cost worth paying if the resultant position provided a robust guarantee of the wrongness of AAV. It would not, however. For acts of a kind already described would not violate the restriction, such as the bombing of an abortion clinic as a means of eliminating essential infrastructure, when the bomber's plan does not involve what is nevertheless foreseen: namely, that the night guard will be incinerated.

B. Premeditation and prevention

Part of the reason the appeal to intention fails is that it presupposes that Restrictivism's problem is exclusively one of finding a way to disavow the practice of targeting abortionists. Yet it isn't. Similarly inadequate are arguments that appeal to further purported restrictions on employing force in a way that is not merely deliberate but premeditated, or that is preventive, in the sense that the threat to be averted is non-imminent.¹⁷ Such prohibitions will undoubtedly strike many as unduly demanding of victims and rescuers, even if they apply only to private persons, rather than state agents, as they — together with the prohibition on intended harming — are generally thought to do. For the relevant prohibitions imply, *inter alia*, that even if a

¹⁷ See, e.g., ERLC (1994), and the pieces by Land and O'Connor in Alvere et al. (1994).

victim of domestic abuse knows that her spouse will eventually murder her or her child in a rage, while being unable to leave or obtain protection from others, she acts wrongly by killing him in his sleep. Even if one accepts, however, that private defence may not be premeditated or preventive, those restrictions will be ineffective against forms of AAV that do not fit the pattern of a gunman or bomber lying in wait. They are irrelevant, for instance, to the man who discovers his partner on the verge of self-administering an abortifacient drug (or indeed shortly after having swallowed it). Nor do they bear on the split-second decisions that might confront any of the many protesters in the United States who every year trespass in or invade abortion facilities, and who may initially plan only on making a nuisance of themselves, until confronted with an abortion in progress.¹⁸

C. Vigilantism

The proposed limitations on the use of force considered so far are, to reiterate, usually taken to apply to private citizens only. Restrictivists have also argued, moreover, that would-be defenders of prenatal life face further, insurmountable moral obstacles insofar as they act not merely in a private capacity but as vigilantes, in contravention of express state commands.

Those who take this sort of line sometimes cast AAV as revolutionary insurrection or violent civil disobedience.¹⁹ It is not, however, any more transgressive in those respects than defensive violence generally, since it need not aim at overturning the state, or even any particular law, in addition to saving fetuses. That point aside, there are two distinguishable variants of the argument that those who engage in AAV wrongly take the law into their own hands. The first has it that to do so illegitimately bypasses the political process, which must be

¹⁸ For recent US statistics on clinic trespasses and invasions, see National Abortion Federation [NAF] (2018).

¹⁹ See, e.g., Finnis (2000, 90), or ELRC (1994).

the preferred means of promoting justice whenever available.²⁰ And the second holds that, unless meaningful social order has already broken down, illegal defensive action will inevitably undermine it — for instance, by provoking cycles of reprisals, or inculcating disrespect for the rule of law — thus putting the safety of others at risk.²¹ These positions are consistent with its *at least sometimes* being permissible to break the law for defensive purposes. One author who advances the first view, for instance, notes that it would have allowed for defence of Jews against agents of the Nazi German state, or of slaves in the antebellum American South.²² The proponents of these arguments do, however, think that they securely establish the wrongness of AAV. They are mistaken.

Let us first observe that, if what are being proposed are principles to the effect that (a) violent law-breaking is wrong whenever political channels remain formally open, however ineffective they are, and (b) violence is wrong whenever there is any risk of undermining social order, then those constraints are far more demanding than the standard principles of, respectively, necessity and proportionality. For necessity does not enjoin endless pursuit of futile non-violent options, and proportionality is not equivalent to an extreme precautionary principle that disallows *any* risk of negative externalities, irrespective of the associated benefits. That this is so, however, leaves Restrictivists with a dilemma. On the one hand, if they do indeed mean to identify themselves with the more stringent (a) and (b) then their positions will be deeply implausible. Both (a) and (b) imply, for instance, that it is wrong to engage in defensive action in Death Camps. Indeed, they imply that, in a variant of that case, in which the victims of the camps are adults who formally retain their political rights, but find

²⁰ See, e.g., *ibid.*, or the pieces by Garton, Nathanson, Land, and O'Connor, in Alvere et al. (2018).

²¹ See, e.g., Kaczor (2011, 204), and Canavan, Garton, and Schlossberg's commentaries, in Alvere et al. (1994).

²² Nathanson, in Alvere et al. (1994).

themselves in a permanent, oppressed minority, it would be wrong for them to defend *themselves*.

On the other hand, however, if opponents of vigilantism mean only to endorse the familiar necessity and proportionality principles, they will have failed to adduce considerations sufficient to reliably rule out AAV. As noted earlier, Restrictivists have often found themselves in circumstances in which abortion continues apace despite their most determined democratic and litigious efforts. And if it is true, as international comparisons are sometimes said to show, that outlawing abortion merely drives it underground, there is further reason to think that political engagement will be ineffective, and cannot be required as an alternative to eliminating abortion providers.²³ There is, moreover, something doubly odd about the insistence that circumstances in, say, the US (for that is of course the context with which the relevant literature is overwhelmingly preoccupied) are such that any resort to AAV would necessarily strike, as one author puts it, ‘at the roots of the order on which the life, liberty, and property of all us depend’.²⁴ For on the one hand, that is to imply that such order obtains, despite the ongoing annual liquidation of hundreds of thousands of persons. And second, if the US does indeed enjoy social order, notwithstanding the prevalence of abortion, then that implies that AAV need not be fatal to it, since a striking amount of it already occurs.²⁵

Suppose, however, that there is indeed a stringent, even exceptionless prohibition of vigilantism, no matter the magnitude of the unjust killings which it aims to prevent. Even then, Restrictivism’s problems are not significantly alleviated. For this leaves open the permissibility

²³ The evidence concerning the effects of outlawing abortion is admittedly contested. For discussion, and references to relevant studies, see Foster (2018).

²⁴ Canavan, in Alveré et al. (1994).

²⁵ See NAF (2018).

of AAV in the absence of a functioning state. And it also leaves it open in cases where a ‘pro-life’ regime extends the legal justification of other-defence to AAV, or authorises its agents to engage in it (whether within its own borders, to end a persisting practice of underground abortion, or indeed beyond them, as a matter of ‘humanitarian intervention’ against a weak neighbour). The view, however, that AAV is justifiable under those conditions is no improvement on the claim that it can be justified irrespective of what the state happens to command.

D. Futility

A fourth discernible strategy for extricating Restrictivism from association with violence consists in arguing that AAV is inevitably futile. As with the reply from vigilantism, it comes in two forms. The first has it that AAV is counter-productive because it merely closes hearts and minds to the ‘pro-life’ cause, to the detriment of its ambitions for political and cultural reform (and thus, in the long term, to fetal life).²⁶ This, however, seems merely to state a hunch about how public attitudes might be formed. There is no general rule to the effect that forcible intervention on behalf of an unjustly-treated group must necessarily thwart attempts to persuade the rest of the relevant society of that group’s members’ rights and moral status. On the contrary, we know that post-war reconciliation can succeed. And even if AAV would, as a side-effect, lead some members of the public to become more hostile towards Restrictivism, it is contingent whether the damage done would be great enough to render the acts in question disproportionate. Whether it does so will depend, *inter alia*, on how firmly entrenched anti-abortion beliefs already are. Those who complain that AAV provides, in effect, negative publicity for Restrictivism are presumably presupposing a finely-balanced ‘culture war’

²⁶ See, e.g., Canavan, Hentoff, Mahony, and Mathewes-Greene, in Alvere et al. (1994).

between ‘pro-life’ and ‘pro-choice’ movements. But in a strongly religious-conservative society, for example, Restrictivism may be able to shrug off a measure of bad press, or even derive a propaganda victory from AAV, if the perpetrators can be lionised as heroes or martyrs. In any case, however, the complaint that Restrictivism is tarnished by association with violence is inapplicable to acts that can be carried out in secret (as the domestic coercion of women often is, for instance), or blamed on others. It is not really an objection to violence itself but to getting caught.

The second variant of the argument from futility was encountered earlier, in section II, and avers that killing abortionists is ineffective, because there are always more to meet demand. I have already noted how, contrary to intent, this implies the justifiability of violence against pregnant women. In addition, however, it is obviously untrue that the supply of abortionists, their time, and resources, are all inexhaustible. As convenient as it undoubtedly is, moreover, for anti-abortion campaigners to paint abortion providers as limitlessly venal, it is likewise untrue that the latter’s incentives to continue practising — material and otherwise — will always be stronger than the incentive to stop that comes from unsafe working conditions. To be sure, none of this is to deny that isolated attacks on clinics and staff will frequently be ineffective in preventing abortions if other providers continue serving the same area.²⁷ Yet even where this is so, it is insufficient to show that resort to violence is impermissible. Instead, *ceteris paribus*, it merely suggests the necessity of action on a larger scale, to neutralise all applicable threats. And Restrictivism ought not to be evaluated solely on the factual assumption that those driven to violence will always lack the coordination and resources necessary to achieve this.

²⁷ For a rare analysis of the empirical evidence, indicating that ad hoc episodes of AAV have been of negligible long-term effectiveness in reducing abortion in the US context, see Jacobson and Royer (2011).

E. Concluding remarks on the Restrictivist rebuttal

This concludes my survey of Restrictivist attempts to refute the objection that their stance on abortion implies the justifiability of AAV.²⁸ In addition to their individual deficiencies, there is a further respect in which, I believe, all of the foregoing replies fail equally. This is that they have, so to speak, a wrong-kind-of-reasons problem: even insofar as they successfully rule out the permissibility of AAV, or particular instances of it, none does so on intuitively fitting grounds. When we reflect on the basis of our own hostility towards the bombing of abortion clinics, the incapacitation of pregnant women, and so forth, few of us are likely to find, I think, that our opposition to these practices is aptly characterised as flowing from some more general rejection of, say, intentional or premeditated harming, or disobedience to the law. Still less are we likely to find that we just can't overcome our doubts that AAV would *work*. These suggestions latch onto features of AAV that we can see are merely incidental. They therefore encourage us to look deeper, for an objection that targets what is fundamental to these acts. The more fundamental objection to which, I think, the Restrictivist rebuttal will naturally make many of us gravitate is that AAV is *fanatical*, in the sense that it metes out an excessively harsh response to the practice of abortion, even insofar as the latter is agreed to be wrong (which it is, at least sometimes, on most people's view, since few believe that a woman's right to choose is exceptionless). This objection, which I take it expresses a sentiment common within public discourse, appeals to proportionality. But unlike the proportionality-based arguments of Restrictivists, it does not turn on predictions about further negative political, social and cultural after-effects of violence, that threaten to undo the good that AAV aims to achieve. Instead, the objection is, more straightforwardly, that whatever good lies in preventing wrongful

²⁸ I defer discussion of a newer, more novel such attempt until later, in notes 36-37.

abortions is insufficient to justify the serious harms caused, in the first instance, to those targeted, or caught up as collateral damage, in the immediate theatre of conflict. *That* thought, however, stands in direct challenge to Restrictivism's understanding of the moral status of the fetus, or abortion, or both. Insofar as the counter-arguments of Restrictivists themselves draw us towards this alternative explanation of the basis of our rejection to AAV, they are not only ineffective but self-defeating.

It is grist to the mill of that alternative explanation that it would still seem an intuitive strike against Restrictivism if it were found to imply the justifiability of AAV merely in principle, or under extraordinary circumstances, rather than in practice. If that were true, Restrictivism would be damaged to a degree roughly comparable to the embarrassment it suffers in the stylised thought experiment known as the 'Embryo Rescue Case', wherein an agent must choose whether to save an unconscious child or clutch of frozen embryos from a burning fertility clinic.²⁹ Yet the damage is in fact several orders of magnitude worse. And this is not just because AAV involves doing harm, as opposed to acting on defective priorities in saving. It is also because the moral reasons that agents would have, under Restrictivism, to carry out acts of AAV would arise under circumstances that are disturbingly easy to foresee.

I say advisedly that the relevant circumstances are easy to foresee: I do not rest my critique of Restrictivism on the claim that they obtain *here and now*. To be sure, we have seen that the grounds on which Restrictivists rule out resort to AAV in what is, for most of them, the here and now (to wit, the Roe-era US) are generally unpersuasive. But even were that not so, it matters just as much to the philosophical evaluation of Restrictivism what it licenses in realistic alternative social and political circumstances — including, not least, *those which Restrictivists themselves seek to bring about*. It is by no means an extravagant fantasy to envisage

²⁹ For a good account of that case, see Greasley (2018, 27-37).

national conditions in which ‘pro-life’ forces enjoy decisive cultural and political influence, abortion is illegal, and any remaining necessary action to defend the unborn from those few abortionists who continue to operate covertly need not be undertaken by lone wolves, but can instead occur with the blessing, or at the behest, of the state. Restrictivists have been notably mute on the question of whether, in such a regime, they would still reject AAV. But when John Finnis (2000, 90), for instance, unguardedly remarks that, as far as he can tell, the ‘only good reason’ Restrictivists have not to engage in violence is that, ‘under present circumstances’, this would be to begin a war without sufficient ‘prospect of winning it’, his words, far from providing reassurance, read like a warning from the future.

To avoid offering a rejection of AAV that is, in this way, intolerably conditional, Restrictivists must endorse restrictions on the use of force that go beyond the traditional constraints of necessity, proportionality, and so on, and add up, as I claimed earlier, to an especially strict form of pacifism: one that is not only, of course, non-war-specific, but that forbids non-lethal defensive harming in addition to killing — whether carried out by private persons or the state, intentionally or foreseeably, to avert even vastly greater evils. Some Restrictivists may be happy to endorse such a view. Yet their doing so is no basis for a meaningful defence of Restrictivism. For the appropriate way to evaluate Restrictivism is as (to use a Rawlsian term) a ‘module’ of moral theory, whose implications must remain tenable when it is slotted into a broader set of acceptable theoretical commitments. I have nothing original to say about the acceptability or otherwise of pacifism. It should be clear, however, that if Restrictivism were true, the case of AAV would test the plausibility of pacifism in the foregoing form well beyond breaking point, due to the facts, which I have already described, about the prodigious scale on which abortions are commonly performed. It is impossible to accept that, if a particular facility would otherwise be responsible, over the course of a year, for several thousand unjust killings, it would be impermissible to cause a single death or serious

injury, even collaterally, in the course of putting it out of business. This would require a conception of proportionality which massively undervalues the saving of lives, relative to the wrongness or badness of harming. And it will not do to reply that, in practice, eliminating one facility will not yield such a substantial return in prenatal lives saved, given that neighbouring services will pick up the slack: this objection has already been answered.

At this point, then, I conclude not only that the replies from Restrictivists considered above fail, but that no successful reply is possible. If, however, it is right, as a general matter, that an account of the ethics of abortion can be rendered ineligible if found to imply the justification of AAV, then we cannot leave matters here. For as I now argue, on that same basis we also have cause to reject a range of *defences* of abortion rights. Indeed, it seems likely that the field of acceptable views will thereby be winnowed down dramatically.

IV. The Non-Violence Constraint

It is important that I begin by setting out more precisely my assumptions regarding the extent to which a defensible perspective on abortion must be consistent with the disavowal of AAV. For while it seems clear that Restrictivism permits what is repugnant, someone might wonder whether there is some lesser level of defensive force on behalf of fetuses that could be at least reluctantly tolerated. Indeed, if it is true, as common sense suggests, that at least some of the moral limits on the permissibility of abortion are enforceable, there must presumably be *some* level of (non-lethal) cost that can justifiably be imposed nonconsensually to prevent wrongful abortions taking place. Yet if so, one might infer that our rejection of the use of violence in defence of fetuses cannot be absolute (so that one could not even, say, deliver a sharp pinch to prevent a wrongful abortion), and that, therefore, the relevant question to ask with respect to AAV is: ‘How much is too much?’

This particular line-drawing problem can be circumvented, however — at least for today. For it is, I believe, surprisingly demanding merely to require, as I propose we do (subject to a caveat issued in the paper’s final section), that an account of abortion ethics not be at undue risk of facilitating the justification of *serious* harm in defence of fetuses, at any stage in the latter’s gestation. Call this requirement the *Non-Violence Constraint*, or *NVC*. By ‘serious harm’ I have in mind, in addition to death, such things as penetrating gunshot wounds, broken limbs, and life-altering burns and scars. This is a conservative understanding of the magnitude of harm that an acceptable perspective on abortion must avoid justifying. For it is commonly also thought wrong to interfere with women and abortion providers in considerably more minor ways — say, by intimidating or upsetting them as they attempt to gain entry to the clinic. I suspect, however, that the consensus that the latter acts are wrong may often break down depending upon whether one is a supporter or opponent of abortion in the circumstances in which the individuals targeted are imagined to be engaging in it. When formulated with reference to serious harms, meanwhile, the NVC seems to enjoy very broad and deep support, across ideological divides.

It is worth pausing over evidence to this effect. Attacks on abortion clinics, staff and patients elicit overwhelming condemnation, whenever they occur, from across civil society. Importantly, moreover, AAV remains anathema to most people even when it aims to prevent instances of abortion that are especially morally divisive, such as late-term and selective abortions. The only opinion polling on this issue of which I am aware found, in 2015, that only 3% of Americans accepted that it is ever ‘justifiable to use violence to prevent abortions’ (as against 89% who said that it is not).³⁰ Since the view that abortion is justifiable under all

³⁰ The poll data, from YouGov, was retrieved from <https://today.yougov.com/topics/politics/articles-reports/2015/12/04/planned-parenthood-attack-terrorism>

circumstances is held only by a minority, this indicates a widespread belief that violence is unjustifiable even in response to wrongful abortions. Further evidence that this is so comes from observation of reactions to the 2009 murder of Dr. George Tiller, in Wichita, Kansas. Prior to his death, Tiller had for decades been demonised as a rare provider of late — including third trimester — procedures, which he performed in significant volume for women from around the US and beyond, and which he was clearly resolved to continue offering for as long as he was physically able. Yet Tiller's killing, and the long campaign of obstruction, harassment and violence that preceded it, was nonetheless repudiated across partisan divides. There was no notable dissent from the consensus that his killing was an outrage among those who believed, as many do, that abortion is impermissible under the conditions that Tiller offered it. Nor is there any reason to suppose that opposition to his killing was contingent merely on the fact that he was gunned down in front of his horrified fellow congregants at church (though this of course at least somewhat compounds the gravity of the murderer's wrongdoing).

Even late abortion, then, appears not to substantially threaten popular acceptance of the traditional liberal maxim — which the NVC reflects, and which Barack Obama, as President, articulated at the time of the Tiller killing — that however sharply citizens may disagree over abortion, their disagreements are not legitimately settled with serious violence (White House, Office of the Press Secretary, 2009). Some might be tempted, however, to put additional pressure on the NVC by devising further hard cases in which our intuitive commitment to it seems to waver. These would presumably involve not only fetuses at advanced gestational ages but agents who face the choice of whether to intervene to prevent them from being killed on increasingly spurious grounds. 'A doctor is known to carry out abortions at close to full term for women who seek to avoid inconveniences as mild as the postponement of a foreign holiday', someone might offer. 'Politico-legal channels have proven ineffective in preventing him from practising. Are we *still* so sure no one may intercede?'

There is little to be learnt, I believe, from cases of this sort, which are familiar primarily from partisan media scare stories about what abortion laws permit in practice.³¹ They are misleadingly framed. We are invited to imagine women who have entirely trivial motives for aborting. But the focus on their hypothesised motives obscures the fact that abortion always releases a woman from a great and steadily worsening bodily imposition, with its various attendant health risks, from the unpredictable and potentially traumatic experience of childbirth, and from unwanted biological parenthood. These are serious considerations, even if they are not always weighty enough to justify feticide (as, to reiterate, all but the most radical ‘pro-choice’ advocates accept). In that sense, there no such thing as an abortion for which only trivial reasons exist.

It might be responded that the moral status of an abortion — including not only its permissibility or level of objectionableness, but the strength of the reasons that third parties have to prevent it — depends not upon the rationale that *could* be invoked in its support, but upon why it is *in fact* sought. Yet even if, in general, the moral status of an act can be affected, in the stated ways, not merely by the agent’s intentions, but by the motivation with which she does what she intends, it is questionable that a woman who, to continue the foregoing example, aborts in order to go on holiday possesses a motive that is relevantly disqualifying. Arguably, such motivations are only benignly idiosyncratic, in that the woman is fixated on a minor aspect of the total benefit accruing from abortion to the exclusion of the rest. It seems, however, that the moral status of an act is not undermined by such motivations. For suppose that someone is under lethal threat from an attacker. The victim has a large amount of good in his future but is preoccupied entirely, at the crucial moment, by the desire to contemplate the sunset in his garden one more time. That the victim is motivated by this comparatively trivial good seems

³¹ Though see also, regrettably, Thomson (1971, 66).

irrelevant to the justifiability of his act of self-defence, and, indeed, the justifiability of someone's frustrating it.

In any case, however, the complications raised by these atypical cases can again be side-stepped. As long as one accepts that the NVC applies in more mundane scenarios, in which abortions are wanted for serious (even if insufficient) reasons relating to the woman's wellbeing, autonomy and health, one can follow the remainder of my argument.

V. Beyond Restrictivism: how 'pro-choice' views can violate the NVC

Having clarified the scope of the NVC, let us consider further views that fall foul of it. Identifying the full set of such views will, I believe, take at least another paper. I can, however, at least provide here a full argument to the effect that one important class of 'pro-choice' views is incompatible with the NVC – namely those on which the fetus possesses the status of a person, for all or part of pregnancy.

Note the qualification 'all or part'. Some defences of abortion, of which Judith Thomson's is the best known, grant that fetuses are persons throughout pregnancy. Others, meanwhile, hold that fetuses have little or no moral status in early gestation, but become persons upon reaching some developmental milestone, such as the onset of sentience. The latter sort of view has been advocated by a number of philosophers.³² But it also appears especially prevalent among the general public. For in popular discourse, human moral status is usually assumed to be all-or-nothing, and the moral problem of abortion is treated as equivalent to a problem of determining when, during pregnancy, full moral status is acquired. It seems to be largely assumed on all sides of the public debate that the fetus *must* acquire such status *at some point* before birth, even if it does not do so immediately upon conception.

³² See, e.g., Boonin (2003); Colb and Dorf (2016); Sumner (1981).

Those who believe that the fetus becomes a person upon passing some post-conception threshold may, and usually do, think that abortions performed later are always, or generally, morally prohibited.³³ They might, however, alternatively think that the post-cut-off abortions remain permissible, in a significant range of cases, either on grounds that the woman has a right, justified in agent-neutral terms, to act in her own defence, or on grounds that she possesses an agent-centred prerogative to show reasonable partiality towards herself at the fetus's expense.³⁴ Partiality-based justifications have, I take it, the potential to be more permissive than agent-neutral ones, since partiality is commonly interpreted to license a person's prioritising herself even when the costs avoided are substantially less than those that thereby accrue to another (assuming the costs avoided exceed some appropriate level of seriousness). Partiality-based justifications are not, however, *radically* permissive - no defender of such a view, to my knowledge, argues, counter-intuitively, that abortion *always* falls within the scope of legitimate partiality, and is thus *never* wrong, irrespective of the fetus's status at the time. As proponents of these views have themselves suggested, the most significant restrictions on the justifiability of abortion appear to emerge in the later stages of pregnancy.³⁵ Once the fetus can survive outside the womb, the bodily imposition on the woman is nearing an end, and the comparative costliness of abortion itself has significantly increased, vis-à-vis live extraction or delivery, partiality seems to justify killing with considerably lesser frequency, if at all. Insofar as partiality-based views thus restrict the permissibility of late-term abortion, they arguably align with common sense, which is likewise moderate. Yet on the assumption that neither an appeal to partiality nor to agent-neutral considerations can yield more than a

³³ Among philosophers, this is the view of, e.g., Sumner (1981).

³⁴ For the latter view, see, e.g., Boonin (2003).

³⁵ See, e.g., Thomson (1971, 66); Boonin (2003, 276-7). Cf. McMahan (2007, 155-6).

qualified defence of abortion, if the fetus is a person, it appears that anyone who accepts that fetuses have or acquire such status before birth will be vulnerable to a variant of the challenge developed earlier for Restrictivism. For on such views, in cases where abortion remains unjustified, yet nonetheless occurs, the unjust killing of a person takes place. And this re-opens the door to violent resistance - the more so, of course, as the number of deaths increases.

To resist the thesis of the previous paragraph, one must, I take it, dispute the premise in its penultimate sentence: that if the fetus is a person, unjustified abortion will accordingly constitute the unjust killing of a person. The only potentially viable way I can foresee of doing *that*, moreover, is for someone to argue that, on at least one of the relevant views — to wit, a Thomsonian, partiality-based view — impermissible abortions will instead be equivalent only to wrongly allowing a person to die. The Thomsonian defence of abortion appeals to a woman's agent-centred prerogative to refuse to render life-saving aid at excessive cost to herself. Thomsonians maintain, moreover, that although standard abortion techniques crush or dismember the fetus in the process of removing it, the distinction between killing and letting die lacks its usual moral significance in this context. As Thomson (1973, 156) herself describes her position, when the burdens avoided are sufficiently great, terminating a pregnancy can be morally 'assimilated' to an omission to save. One might infer from this that Thomsonians are insulated against the charge of being implicitly committed to AAV. The reasoning would be that, if killing via abortion is to be assimilated to a failure to save — and if, further, as common-sense morality may be read as affirming, we may not kill or cause serious harm to prevent mere wrongful failures to save — then, by that token, a person may not kill or cause serious harm

to prevent abortions, whether they lie within or beyond what reasonable partiality permits. Call this *the assimilation argument*. As I argue over the next three sub-sections, it is multiply mistaken.³⁶

A. Enforcement costs, and the woman's mode of agency

The assimilation argument greatly exaggerates, I believe, the degree of moral equivalency between killing and letting die that it is plausible to assert, in relation to the conduct of both the woman obtaining an abortion and her doctor. Let us consider first the moral significance of the woman's actions. It is one thing to claim (a) that if the costs of keeping someone alive via one's body are sufficiently great, one may be permitted to kill to avoid them, as well as let one's dependant die. It is quite another thing, however, to claim (b) that if one kills one's dependant, one's act has the significance of a letting die, and should be treated as such, even if its purpose was to avoid only costs that one was obligated to incur for the dependant's sake.

Thomson and her most prominent defenders, such as Kamm (1992) and Boonin (2003), commit themselves, as I interpret them, only to something in the vicinity of (a). What can be said in favour of the more radical (b), on which the assimilation argument depends? It is difficult to detect intuitive support for it. Indeed, there is no clear intuitive evidence of a substantial lessening of the usual moral gravity of killing in Thomson's violinist case (which I assume needs no rehearsal here), even when the costs of supporting the violinist are stipulated to be sufficiently great as to be supererogatory. As is often pointed out, most of us intuitively rebel against the suggestion that it would be permissible to, say, dismember the violinist to

³⁶ Late in this writing, I became aware of Hershenov and Reed (forthcoming), which independently stakes out a position similar to the assimilation argument, and is thus subject to the reply in the text. Interestingly, however, these authors deploy their argument in defence of Restrictivism rather than Thomsonianism. The resulting position is highly unstable, as I argue in fn. 37.

avoid the cost of supporting him, even on the understanding that he would be unconscious throughout, and notwithstanding our acceptance that it would be permissible to let him die by merely unplugging oneself. More importantly for present purposes, moreover, suppose that, in a variant of the violinist case (call it *Dismemberment*), it is sufficient to save the violinist that one be hooked up to him for a short time, during which attachment causes no significant ill-effects, while detaching early would require dismembering. If one opted for dismembering to avoid this morally compulsory cost, it would be intuitively permissible for the violinist's associates to employ significant force in his defence (assuming this would not itself result in his death, by destroying his source of aid). This is suggestive that the killing/letting die distinction retains moral salience in at least those cases in which the killer aims to escape a mandatory burden.

Theoretical considerations, furthermore, converge with intuitive ones in casting doubt on (b). In saying this, I do not mean to deny that, insofar as abortion involves killing, it is, theoretically or conceptually-speaking, an atypical form of killing. Let us follow Kamm's influential observation, in *Creation and Abortion*, that insofar as the fetus when killed loses only what it could have enjoyed with the woman's support, abortion is to that extent morally comparable to an omission to save. If I understand Kamm correctly, her view is that abortion shares this mitigating property of letting die even after the fetus becomes viable. For while a viable fetus can survive outside the woman (albeit with mechanical assistance), it cannot magically get into the outside world, but rather requires considerable effort from the woman to do so (Kamm 1992, 93-5). Let us also assume that *this* is right. The question is whether the fact that abortion is analogous to letting die in the specific respect identified by Kamm is sufficient to justify treating it no differently, for defensive purposes, from conventional omissions to save — including, crucially, where abortion remains impermissible.

It is dubious that we should accede to this suggestion. For this seems to involve fixating on one morally-relevant feature of abortion to the exclusion of others. Notwithstanding the foregoing conceptual similarity between abortion and omitting to save, and holding intentions equal, there are still other respects in which abortion, as usually performed, fits the pattern of a paradigmatic killing. As Kamm (1992, 31) herself points out, even when a victim loses only the life that the killer enables him to have, ‘actively killing someone is still an interference with him, as letting die is not.’ As Kamm puts it in later work (1996, 38), a killer exercises control over what belongs to his victim, not just himself, thereby crossing ‘the boundary between separate persons.’ Crucially, one who so acts also bears ‘full causal responsibility’ for a death (Kamm, 1992, 29), or is an ‘original cause’ of death (1996, 22), in a way that those who allow a prior threat to eventuate are not. For these reasons, Kamm plausibly suggests (1992, 29; 1996, 44-6) that one must accept additional sacrifices to avoid killing a bodily dependant, relative to those which one must incur to avoid letting die. And one would therefore naturally expect the same considerations to render the duty not to kill one’s dependent more stringent in a second sense, by increasing the costs that can be imposed upon the agent by others in the duty’s ex ante enforcement, relative to the costs that can be imposed to prevent letting die. For while perhaps not every factor that raises the costs that an individual must accept in doing her duty also, *pari passu*, raises the costs that may be imposed upon her as a matter of enforcement, considerations relating to the duty-bearer’s mode of agency *are* generally consequential in the latter regard (as the assimilation argument itself presupposes).

We have seen, then, that killing through abortion shares an important conceptual similarity with failing to save, but nonetheless has other morally-aggravating features found in standard killings. How much moral weight should be attached to these competing considerations? At one point, in *Morality, Mortality*, Kamm claims that ‘killing to terminate life-saving aid is *almost* morally equivalent to not saving someone to begin with.’ (Kamm, 1996, 37,

emphasis added.) But unless I am mistaken, she does not end up defending this claim. Instead, she articulates (at p. 44ff) only the weaker view, familiar from *Creation and Abortion*, that killing to discontinue aid is somewhat easier to justify than killing an independent person, though also less easy to justify than merely withdrawing aid without killing. As I have already noted, meanwhile, in considering Dismemberment, the conceptual property of letting die to which Kamm appeals has questionable intuitive significance when exported into a killing. It therefore seems difficult to justify ascribing overriding moral weight to this property, in determining the moral status of acts of killing through abortion. The most we are justified in concluding, it seems, is that killing to discontinue aid has a moral status intermediate between those of paradigmatic killings of independent victims on the one hand, and omissions to save by withholding one's effort and resources on the other. This, I think, is a plausible suggestion. It implies in turn, however, that the degree of force that can justifiably be applied in response to a threat to engage in wrongful abortion is itself intermediate between the levels of force that are justified in response to standard threats of wrongful killing, and threats to violate the duty to save. Since the degree of force that can be applied when someone threatens to wrongly let die (especially *intentionally*) is itself not plausibly regarded as insignificant, even if (as we can grant for now) it falls somewhat below the threshold that violates the NVC, this conclusion seems to ensure that the justified response to a wrongful abortion, when the fetus is a person, *would* exceed the relevant threshold.

The finding that, on the assumption of fetal personhood, an intermediate level of force would be justified to prevent a woman's wrongfully obtaining an abortion seems to be corroborated when we consider further factors that generally affect the magnitude of warranted defensive harm. As Victor Tadros (2013) observes, the degree to which we may harm someone to force his compliance with another's right seems to depend (in addition to causal responsibility, as already discussed, for what threatens the victim) upon (1) the adequacy

of the opportunity which the wrongful threatener has to comply with his duty, and thus avoid defensive harm, and (2) the comparative costs, to threatener and victim, of the former's compliance and non-compliance respectively. In the normal course of events, fulfilling the duty not to kill is not burdensome, and we therefore have ample opportunity to avoid being subject to defensive force. In the case of abortion, however, there is a substantial opportunity cost to the woman from not killing the fetus. Yet, while this consideration seems to drive down the harm that a woman can have imposed upon her to avert an unjust threat of feticide, it remains significant that the threat which she creates is indeed unjust (for recall that our concern, here, is with abortions that fall outside the scope of legitimate partiality). Hence, while abstaining from abortion is a significant burden, this burden is *ex hypothesi* no more than the woman is obligated to incur for the fetus's sake rather than kill it. The magnitude of this compulsory burden has also, therefore, presumably been set while taking account of the fact that the woman is a separate, autonomous being, rather than a mere tool for benefiting the fetus or anyone else. That the woman could avoid defensive harm by doing her duty, but instead threatens to kill to avoid costs that she is obligated to bear, and that are considerably less severe than the cost of death that her actions would impose upon the fetus, seems to drive *up* the level of defensive harm that it would be justifiable to impose upon her.

In sum, then, we have seen that wrongful abortion, when the fetus is a person, displays two features that militate against imposing harsh enforcement costs upon the woman: (1) the fact that, in being killed, the fetus loses only what it could have had with the woman's efforts, and (2) the fact that, to avoid defensive harm, the woman would have to endure the considerable burden of completing an unwanted pregnancy. But there are also other features present that suggest that the justifiable costs of enforcement will nonetheless be substantial, to wit: (3) the fact that the woman crosses the boundary between separate persons, in directly killing the fetus, thereby becoming the original cause of its death; (4) the fact that she has an

opportunity to avoid defensive harm by incurring only costs that she owes it to the fetus to bear; and (5) the fact that the costs with which she unjustly threatens the fetus are much greater than those she seeks to avoid. If we tally up these considerations without giving arbitrary pre-eminence to any, what again seems to emerge is, as suggested above, the view that the harm that may be imposed, in the ex ante enforcement of the woman's duty not to abort, is intermediate between the levels of defensive harm that are justifiable in paradigmatic cases of killing and omitting to save respectively.³⁷ That implies that the woman may not be killed, but may be subject to non-lethal harms incompatible with the NVC. And *that*, recall, is in line with the conclusion reached regarding defensive harms to women under Restrictivism in section II.

B. The doctor's mode of agency

Suppose that, contrary to what I have just argued, a woman does only what is fully equivalent to wrongfully letting die when she undergoes an abortion to avoid costs that she was obligated to incur for the fetus's sake. It does not follow that the actions of her doctor, in agreeing to the woman's request to perform such a termination, merit similar moral discounting. And as I shall now more briefly argue, no such discounting is in fact justified.

There are, to be sure, cases in which a person actively intervenes to discontinue life-preserving aid that is being delivered by another, yet in which his act is plausibly not only

³⁷ Hershenov and Reed (forthcoming) appeal, meanwhile, to (1), which they regard as sufficient to rule out AAV (or so I infer, since they only explicitly address the need to rule out defensive *killing*). As Restrictivists, however, they worry that (1) undermines their own view. In response, they first claim that one must bear higher costs in saving than is generally appreciated. But the case which they use to substantiate this point either involves killing, or at least engages intuitions about killing, rather than mere omission to save. They then appeal to (3), which they think helps establish the grave wrongness of abortion, and the appropriateness of ex post enforcement. But the claim that (3) is relevant to wrongness and ex post enforcement, yet not to ex ante enforcement, is ad hoc.

equivalent to letting die, but *is* a bona fide letting die. That would be true, as many would agree, in, say,

Life Support I: A is delivering bodily aid to B, as in Thomson's violinist example, at supererogatory cost. A decides that she can no longer bear that cost. Because she is unable to disconnect herself, she secures C's agreement to do so.

Conversely, however, there are cases in which discontinuing another's aid constitutes killing, even in the absence of a direct attack on the victim. This seems true in

Life Support II: A is again delivering bodily aid to B, at supererogatory cost. A decides that she wants to complete the process of saving B's life. But meanwhile, B's enemy has offered D money to disconnect A from B. D agrees, and sneaks into the hospital ward where A and B are staying, disconnecting them, and causing B to die.³⁸

What explains why, in the former case, C's act counts as a letting die, while in the latter, D kills? It would be tempting to think that a discontinuer of aid, like C or D, lets the recipient die just in case he acts with the provider's consent. This would imply that C would also let B die in

Life Support III: A is delivering bodily aid to B, but at a cost that she owes it to B to bear. Yet she refuses to bear it, and, being unable to disconnect herself, secures C's agreement to do so.

³⁸ I adapt this case from McMahan (2002, 379).

This conclusion is, I believe, incorrect. Acting on the mere say-so of someone who would have no right to discontinue aid on her own behalf seems indistinguishable, morally speaking, from acting on the say-so of the dependant's enemy, or indeed a random stranger. For if the provider has no right to discontinue aid, she must also lack the moral power to authorise a third party to discontinue it for her. The provider obviously cannot render the assistant's act *permissible* by requesting his help. But nor, therefore, is there any reason to suppose that her request can be morally transformative in any other way, including by bestowing upon the assistant's act the status of a letting die that disconnection would (so we are currently assuming, *arguendo*) possess if performed by the provider.

This account of the conditions under which an assistant to a provider of aid allows a dependant to die differs, I should note, from those of others, such as McMahan (2002, 378-92) and Fiona Woollard (2015, chap. 4), who argue that the assistant lets die as long as he acts on a request by the person to whom the resources (for instance, the body) through which aid is delivered morally belong, or by whom they are owned.³⁹ The problem with the latter views, I believe, is that, since rights of belonging or ownership can be disaggregated, all that seems to matter, for possession of the power to authorise assistance, is whether the provider has the specific right, from within the relevant rights bundle, to discontinue aid. Thus, when an assistant discontinues aid upon request from a provider who would not be entitled to withdraw it herself, he relies on what I above called a 'mere say-so', not valid authorisation. The assistant, then, remains a killer, even if the provider is not, and killing has, in the former's case, its usual, undiscounted moral significance. A fortiori, this is true of a doctor who, pursuant to a woman's

³⁹ I mention both belonging and ownership because Woollard distinguishes between them, appealing to the former. But the substance of that distinction can be bypassed here.

unjust request, causes the fetus's death by directly attacking it, as in the standard process of abortion.

C. Harming to prevent failures to save

Suppose now that the last two sub-sections were both wrong, and Thomsonians can, after all, sustain the view that wrongful termination of pregnancy can be fully morally assimilated to wrongful omission to save, on the part of both woman and doctor. The NVC is still not satisfied unless there are no cases in which the woman or doctor may be killed, or subject to serious harm, to prevent their engaging in those wrongdoings. Yet that too, I believe, is incorrect. For despite having granted it until now, we have reason to reject the assumption that the infliction of serious defensive harm in response to threats of wrongful letting die is unjustified, and uniformly repudiated by common-sense morality.

Notice first here that even if an intuitive consensus exists against the application of serious defensive force when letting die is merely foreseen, or happens unknowingly, the same judgement appears not to extend to wrongful, *intended* omissions to save. Consider, for instance, the well-known example imagined by James Rachels (1975) of an individual, Jones, who watches a child drown in the bath, in order to get his inheritance. Intuitively, Jones can indeed be subjected to serious harm as a means of rescuing the child — even if, as Kamm (2007, 17) speculates, the degree of permissible harm is lower than that justified in response to Rachels's Smith, who actively holds a child under water (a point on which I am unsure).⁴⁰ Admittedly, Jones's omission is not merely intentional but *opportunistic*, whereas the mode of

⁴⁰ For the view that Jones may be killed, and general scepticism that absence of causal responsibility for death mitigates to any degree the defensive harm to which a wrongful non-rescuer may be subject, see Fabre (2014, 422 et circa).

agency involved in removing a fetus from a woman's body to end its imposition on her is *eliminative*. But we can amend the case to accommodate this difference. Thus, suppose that Jones is the child's guardian, and lets him die to avoid having to look after him (as he is morally required to do). It still intuitively seems that force can permissibly be mustered against Jones on the child's behalf that is easily sufficient to violate the NVC. That is true, indeed, despite the fact that, relative to AAV, harming Jones is in one respect more difficult to justify. To wit: Jones does nothing while the child drowns, and hence, if harming him can prevent the child's death, this must presumably be because he can be used as a means of rescuing the child (say, by utilising his body as a float). Abortion, meanwhile, even if held to be *morally* equivalent to an omission to save, is not literally an omission, but rather standardly involves a kinetic attack on the fetus. And this means that, in contrast to Jones, a woman and those she recruits to help her terminate her pregnancy can be harmed eliminatively, to avert the attack.⁴¹

Second, moreover, there is the matter of numbers. Assume, notwithstanding what I have just said, that a person cannot be subjected to significant defensive harm to prevent a single letting die. The amount of harm that can be brought to bear for the sake of multiple victims ought nonetheless to be higher. Indeed, there presumably must be *some* number of victims for whose sake a wrongful non-rescuer may be subjected to harms that violate the NVC. To deny *that* point requires positing not merely a moral asymmetry between doing and allowing harm, but an infinite or near-infinite moral chasm between the two.⁴² Yet albeit, once again, that the assimilation argument purports to align with common-sense morality, the latter does not endorse the existence of such a chasm. We can see this insofar as common-sense morality is opposed to pacifism, which is likewise characterised by refusal to accept that killing

⁴¹ Recall the penultimate paragraph of section II on this issue.

⁴² See, on that point, Fabre (2012, 110ff).

or harming can be justified as a proportionate means or side-effect of saving lives. Yet if the numbers *do* count, and fetuses are persons, then there remains an appreciable risk, even if *everything else* I have said in this section was mistaken, that at least some abortionists, who (say) serve large geographical areas, specialise in the terminations at issue, and hence perform them in high volume, will justifiably be subject to serious defensive harm, whether intentionally or as a foreseeable by-product of destroying the facilities in which they work. If I was right above, meanwhile, that abortion cannot be morally subsumed under the heading of omission to save as the assimilation argument proposes then the risk of the justification of acts of AAV becomes all the more deadly serious.

VI. 'Pro-choice views: further problems

So much, then, for defences of abortion on which the fetus is, at any gestational age, a person. My argument suggests that the literature badly needs to move on from the question, over which considerable ink continues to be spilt, of whether abortion remains justifiable (in a sufficiently broad range of cases to satisfy the 'pro-choice' moderate) when the fetus is taken to have such status.⁴³ Even if abortion *is* often justifiable on that basis, it is crucial what our account of prenatal moral status implies about the moral seriousness of those abortions that remain unjustified, and what may be done to prevent them. The implications of the view that fetuses are persons are, in these regards, discrediting.

With that conclusion in hand, we will naturally next want to determine the maximum moral status which the fetus can be attributed without violating the NVC. To that end, it seems to make sense to start with the idea of full fetal personhood, and experimentally strip out different elements of this status, to see which subtractions would be just sufficient to ensure

⁴³ See, most recently, Boonin (2019).

that the NVC is met. I cannot embark on that task here. Instead, I want to close this paper with some observations that suggest that there will be only a very narrow, treacherous path to a conception of prenatal moral status that conforms to the NVC while being more broadly acceptable. There may well be no view available that does not require costly intuitive trade-offs.

The basic problem remains one of numbers. As I have stressed, individual abortion facilities and clinicians can and do carry out terminations in very large quantities. This creates the danger, however, that even if the moral status of the fetus is considerably lower than yours or mine, or that of a young child, the aggregated badness of many fetal deaths could nonetheless justify the infliction of serious defensive harms. The only clear way of avoiding that outcome that I can see — pending further investigation elsewhere — is to set the badness of fetal death, at all stages of pregnancy, at a sufficiently low level as to be below what McMahan (2011, 157) calls *the threshold of additivity*: the threshold, in other words, below which a harm or other bad effect is ineligible for aggregation in proportionality calculations. That move would guarantee that there can be neither a liability nor a lesser-evil justification for causing harm for the sake of even many fetuses. But it would bring with it two significant risks of its own. The first is that it may generate conclusions about the scope of the right to end a pregnancy that are uncomfortably permissive, even to committed ‘pro-choice’ advocates. And the second, more serious concern is that, unless it turns out, as is usually thought unlikely, that a step-change in human moral status occurs at birth, the view that the death of a late-term fetus is of heavily discounted badness may commit us in turn to the wrongness of taking significant defensive action for the sake of infants. Yet even if people can be induced reluctantly to accept that there is somewhat less that may proportionately be done in defence of an infant, relative to an older person, few are likely to be able to accept that a constraint of

comparable strength to the NVC applies in such cases, or that the numbers do not count here either, in determining what defensive steps may be taken.

To be sure, the dangers to which I am pointing are, at this stage, just that: dangers, not certainties. Much may depend on complex interactions between our account of moral status and theory of defensive harm.⁴⁴ Even if not certain, however, these possibilities are unsettling. Given its firm intuitive and public cultural foundations, we should, I think, strain every philosophical sinew to try to retain the NVC. Yet suppose it were to turn out that we really must choose between accepting either that serious acts of AAV can be justifiable, or that there is little or nothing that may be done to intervene when, say, a soldier is impaling the infant children of the conquered enemy on his bayonet, one by one. Not only would it then be arguable that the NVC is unsustainable, but one might also plausibly conclude that moral status represents a branch of ethical inquiry in which (as McMahan [2013, 35] worries may turn out to be true of population ethics) the sheer awfulness of our options constitutes evidence against the general proposition that moral claims can have the status of truth. There is, however, no call for such despondency yet.⁴⁵

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⁴⁴ We will also need to work out exactly what to say about so-called ‘partial-birth’ abortion, insofar as it lies between abortion and infanticide.

⁴⁵ This paper descends from material included in a talk (‘Anti-Abortion Advocacy, Violence, and Toleration’) which I gave at the Oxford Moral Philosophy Seminar and University of Birmingham Global Ethics ‘Tea’ Seminar in October 2018. My thanks to the participants for their feedback at those events. I am also very grateful to Cécile Fabre and Jeff McMahan for much helpful written advice and encouragement on an earlier draft.

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