

Paradoxes of Abortion and Prenatal Injury*

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I. KILLING AND INJURING

Many people who believe that abortion may often be justified by appeal to the pregnant woman's interests also believe that a woman's infliction of significant but nonlethal injury on her fetus can seldom be justified by appeal to her interests. Yet the second of these beliefs can seem to cast doubt on the first. For the view that the infliction of prenatal injury is seriously morally objectionable may seem to presuppose a view about the status of the fetus that challenges the permissibility of abortion. The fear of being interpreted as implicitly endorsing such a view has thus led some defenders of abortion to be reluctant for tactical reasons to condemn the infliction of prenatal injury. In this they are encouraged by those who exploit the issue of prenatal injury in their campaign against abortion. When, for example, the House and Senate in 2004 passed legislation recognizing two victims of an assault against a pregnant woman, many viewed this as a tactic in a larger strategy to restrict access to abortion. This tactic is potentially effective. For people may find it compelling to infer that, if injuring a fetus is seriously objectionable, abortion must be even more objectionable, since killing is normally more seriously objectionable than merely injuring.

That it is common for people to believe—at least initially—that prenatal injury is worse than abortion may be obscured by the way prenatal injury has been treated in the law. Legislation that would hold pregnant women criminally liable for culpably inflicted prenatal injury

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would be difficult to enforce. It would require either excessive intrusion into women's lives during pregnancy or the resort to postnatal detection, which could be counterproductive, at least from the point of view of opponents of abortion, since it would give women who might have injured their fetus an incentive to have an abortion rather than risk prosecution if their baby were born with a defect attributable to injury. For these reasons, prenatal injury inflicted by pregnant women is likely to continue to evade criminalization, and people may infer that if prenatal injury is not illegal it cannot be seriously immoral. But the legal permissibility of abortion is continually under attack, and thus one worry is that, because abortion is more susceptible to legal regulation, a campaign to prevent prenatal injury might be less likely to result in legislation that would deter prenatal injury than in legislation imposing greater restrictions on abortion.

There is, however, a case to be made for the view that it is more difficult to justify the infliction of significant prenatal injury than it is to justify abortion. I will present this case and then argue that it does not imply that abortion is an acceptable remedy for prenatal injury. My discussion of these issues of practical morality will raise wider issues of primarily theoretical interest, such as whether the order in which acts are done can affect their permissibility, even when their effects would be exactly the same in each case, and whether the permissibility of bringing about certain effects can depend on whether they result from a single choice or from a sequence of choices. After exploring these theoretical issues, I will return briefly in the final section to the practical question of whether reasonable and effective legislation concerning prenatal injury is possible.

II. THE STATUS OF THE FETUS AND ITS INTERESTS

The case I will present for the view that abortion is easier to justify than prenatal injury by appeal to the interests of the pregnant woman is based on a set of widely accepted assumptions. I do not accept all of these assumptions, though a similar case could be constructed on the basis of assumptions I do accept. My aim here, however, is to show how a relatively permissive view of abortion and a relatively restrictive view of prenatal injury are not only compatible but are in fact implicit in a set of very common assumptions about the nature and status of the fetus and the moral significance of its interests.

I will first state four assumptions about the nature and status of the fetus and offer evidence that they are widely shared. I will then note certain nearly universal beliefs about the reason-giving force of future and possible interests and cite four further assumptions about fetal interests that seem necessary in order to justify those beliefs. These eight

assumptions, to which I believe most people are at least implicitly committed, form the foundation for the subsequent arguments in the article.

1. The fetus is the same individual as the person into whom it might later develop. Most people believe that we began to exist at conception and thus that we once existed as fetuses. And even most of those who believe that we began to exist after conception—for example, when twinning ceased to be possible, or at the onset of significant brain activity, or with the appearance of the capacity for consciousness—nevertheless believe that we began life as fetuses. Very few people believe that we began to exist only at or after birth.

2. Because the fetus would be identical with the person into whom it might develop, it has interests in its own future life, including interests in continuing to live and realizing its potential. (When I say that a fetus has an interest in continuing to live, I do not mean that it takes an interest in or cares about continued life. I mean only that it would be good for the fetus to continue to live, that it would be rational for the fetus to care, if it could, about continuing to live.)

Some philosophers argue that a fetus cannot have an interest in continuing to live because it lacks a desire—and even the capacity to desire—to continue to live. But this view is hard to sustain. If a fetus is killed, it will have had a short life containing little of value. Suppose that if it is not killed, it will have a long life containing a great deal of value. The longer life would be the better life. Since each possible life would be the life of one and the same individual, it is better for that individual to have the better of the two lives. But if it would be better *for the fetus* to have the better of the two lives, it is hard to deny that the fetus has an interest in continuing to live.

3. Although we were once fetuses, our moral status was then lower than it is now. When we lacked the capacity for consciousness, and even later when we were conscious but not self-conscious, our intrinsic nature was significantly different and did not demand respect in the Kantian sense. Fetuses, on this assumption, have interests and can be harmed but lack rights and cannot be wronged. This is what many people mean when they claim that the fetus is not a person.

Although most opponents of abortion believe that a fetus has a right to life, their substantive views suggest that they do not believe that a fetus has the same moral status or right to life as an older child or an adult. Most opponents of abortion accept that it can be permissible in exceptional circumstances, such as rape, incest, fetal abnormality, and threats to the pregnant woman's life or health. But these people cannot consistently admit exceptions for rape, incest, or deformity without implicitly accepting that a fetus has a lower moral status than a person. For they would not accept that it could be permissible to kill a child or adult because she was conceived through rape or incest or is

deformed or disabled. (I am assuming here that those who accept that abortion can be justified in certain cases on the ground that the fetus has no right to the use of the woman's body cannot limit permissible instances of abortion to just these exceptional cases.)

4. Although a fetus has interests in its own future life and thus has an interest in continuing to live, its death would not be a terrible misfortune for it. This view of fetal death is pervasive. When we learn that a woman has suffered a miscarriage, we feel sympathy for her but do not grieve to any significant extent for the fetus. And this is not because we lacked personal knowledge of or acquaintance with the fetus. If we learn that a five-year-old child has died, we know that a great tragedy has occurred even if we do not know either the child or its parents. We may also plausibly feel that the child's loss was greater than that of the parents, and that the severity of the parents' misfortune is to be explained primarily in terms of the fact that someone they love has suffered a tragic loss—a belief we do not have about parental grief in the case of a miscarriage.

There are two closely related explanations of why death is a lesser misfortune for a fetus than it ordinarily is for an older child or an adult. One is that because a fetus is only distantly psychologically related to the person it might become, its present interests in its own future life are comparatively weak. As a fetus matures and eventually becomes an infant and then a child, it becomes increasingly closely psychologically related to its future self, and its interests in its future life, including its interest in continuing to live, gradually increase in strength. On this view, death gradually becomes a greater misfortune for a fetus as the fetus develops psychologically.

I believe that a version of this view, which I have defended elsewhere, is substantially correct.¹ But some people will be skeptical of the idea that the strength of an individual's interest in some future event can vary over time. These people may think it makes better sense to say that even if a fetus's interest in continuing to live is very strong—perhaps proportionate in strength to the amount of good life it would lose by dying—a fetus is nevertheless too insubstantial psychologically to be the victim of a tragic or even a very serious misfortune. On this view, there may be no necessary correlation between the strength of an interest that is frustrated and the magnitude of the misfortune suffered by the individual whose interest it is. Rather, as an immature human being gradually becomes psychologically more substantial—as it becomes in-

1. See Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), 165–85. The argument in the book invokes the technical notion of a "time-relative interest," which I think is ultimately necessary for the plausibility of the explanation I have cited. But I will omit this complication here.

creasingly self-conscious, rational, and autonomous—it is harmed to an increasing degree by the frustration of its interests in its own future.

There are doubtless other possible explanations of why death is a lesser misfortune for a fetus, but I will assume, for the sake of argument, that it is reasonable to believe that the fetus's interest in continuing to live, or in avoiding death, is comparatively weak.²

I need next to state four assumptions about a fetus's present, future, and possible interests. In order to show that these assumptions are very widely shared, even among those on opposing sides in the abortion debate, I will, in each case, state a general assumption about interests, note the way in which it is presupposed by nearly universal moral beliefs, and then, finally, state the assumption as it applies specifically in the case of a fetus. (When I refer to the "satisfaction" and "frustration" of interests, I will be referring to what would be good or bad, or better or worse, for individuals, not to subjective states of satisfaction or frustration, or to the satisfaction or frustration merely of desires.)

5. We accept that present action must be morally constrained by respect for future interests—that is, interests that do not exist now, and indeed whose bearers may not exist now, but that will exist in the future independently of our action. This seems necessary to account for our belief that it would be wrong to plant a bomb timed to detonate 150 years later. Given this assumption, *all* of a fetus's present and future interests make moral claims on third parties, and these claims are proportional in strength to the strengths of the corresponding interests, discounted only for uncertainty. While prudence may permit an individual to discount her own future interests for the weakness of certain relations between herself now and herself in the future, morality requires that we not discount the future interests of others.³

An individual's "future interests" are those it is reasonable to expect the individual to have independently of one's present action. Those the

2. It might be thought that our third assumption—namely, that the fetus's moral status is lower—offers a further explanation. For we might hold that the weight that should be given to an individual's interests varies with that individual's moral status. If a fetus's moral status gradually increases as it develops, its interests come to have increasing moral weight. Only when an individual ceases to be a fetus and later becomes a person do his or her interests have full moral weight. I think, however, that this view is implausible and does not support common intuitions. It implies, for example, that an animal's interest in avoiding great pain matters less than the interest of a person in avoiding the same pain. And while it offers an explanation of why the *killing* of a fetus is less objectionable than the killing of a person, it does not explain why the *death* of a fetus is less bad for the fetus than the death of a person is for the person. Yet it is this latter, less controversial assumption on which I want to base my argument about abortion and prenatal injury.

3. One exception may be when one's moral reasons to protect an individual's interests are affected by one's relations with that individual and those relations vary in strength or nature with time. See McMahan, *The Ethics of Killing*, 284–85.

individual can be expected to acquire if one acts one way but not another are “possible interests.” The final three assumptions concern possible interests.

6. There is no moral reason, independent of individuals’ present or future interests, to create new interests that would later be satisfied. If there were such a reason, we would then have moral reason to cause people to exist as a means of creating interests that would be satisfied. According to this assumption, that an act would result in a fetus’s later forming interests that would be satisfied provides no reason to do the act unless the fetus has a significant present interest in the formation and satisfaction of those possible interests.

7. There is a moral reason that is independent of anyone’s present interests not to cause the existence of interests that would be frustrated. If this were not so, there would be no reason, apart from reasons deriving from effects on others, not to cause people to exist whose interests would be so extensively frustrated that their lives would be worse for them than no life at all. According to this assumption, that an act would frustrate a fetus’s possible interests, or even that it would result in a fetus’s later forming interests that would be frustrated, does provide a reason not to do the act, even if the fetus has no significant present interest in avoiding the formation and frustration of those interests.

8. Even though there is no positive reason to create new interests just in order that they would exist and be satisfied, the creation of new interests that would be satisfied does count morally to this limited extent: it is capable of offsetting the creation of interests that would be frustrated. If this were not so, there would be a strong moral reason never to have children, since all people have interests that are frustrated (that is, bad things happen to everyone).

Because of this, there is no objection, despite assumption 7, to doing what will frustrate a fetus’s possible interests or cause or enable it to form interests that will be frustrated, if both of the following two conditions are satisfied: (i) The agent cannot act in a way that would result in the existence and satisfaction of these same interests. (ii) The act that would cause or enable these interests to exist and be frustrated would also enable the fetus to form and satisfy other interests that would outweigh those that would be frustrated. In short, it is not objectionable to do what will frustrate a fetus’s possible interests when those interests could not be satisfied and the act that frustrates them will also enable compensating interests to exist and be satisfied.

III. THE SENSE IN WHICH ABORTION IS LESS OBJECTIONABLE THAN PRENATAL INJURY

These assumptions imply that abortion can often be permissible. Assumption 1 implies that one moral reason not to kill a fetus is that this

would frustrate its interest in continuing to live. But assumption 3 is that its interest in continuing to live is weak. If the interests of the pregnant woman outweigh the fetus's comparatively weak interest in continuing to live, abortion is permissible, other things being equal.

It is true that if the fetus is not killed, it will form many more interests, of which many will be satisfied. But these are possible interests, and the fetus's present interest in forming and satisfying such interests is weak and is, indeed, subsumed by its interest in continuing to live. The woman's action in either having or not having an abortion will neither satisfy nor frustrate these interests but will only determine whether they will exist. In particular, because an abortion would prevent these interests from existing, it cannot frustrate them.

It may seem that the assumptions also imply that prenatal injury can be justified for the same reasons abortion can. For if the fetus's interest in the goods of its future life is weak, its interest in avoiding future harms should be correspondingly weak. This is in fact true but does not show that the moral reason not to inflict prenatal injury is weak. For the reason prenatal injury is objectionable has little to do with the frustration of the fetus's present interests in its future life. The reason is instead that, if the fetus survives, the injury will have effects on the whole of its life. The injury it receives as a fetus will frustrate numerous interests it will later have independently of the action that caused the injury. These interests may be both numerous and strong. They might include the interest the person will have, each day, in being able to do things he is unable to do because of the injury he received as a fetus. Action that frustrates such interests is seriously objectionable. Although these interests do not exist at the time the action is done, assumption 5 asserts that this is irrelevant.⁴ (Indeed, prenatal injury is

4. I am assuming that the interest that an individual has as a fetus in having a certain good or avoiding a certain harm in the distant future is weak. But that same individual's interest in having that good or avoiding that harm will later, when the individual is a person and the good or harm is imminent, be much stronger. The earlier and later interests are the same interest at different times. Because this is a single interest persisting over time, its different manifestations at different times cannot be aggregated. Moreover, an act by a third party that would satisfy or frustrate the interest must be evaluated, not by reference to the strength of the interest at the time the act is done, but by reference to its strength at the time that the good or harm would occur. This is implied by assumption 5's requirement of temporal neutrality. So, for example, despite the fact that a fetus's present interest in avoiding severe pain at age 40 is weak, an act of prenatal injury that would cause that pain to occur would be no less objectionable than a similar act done when the victim was 39 and her interest in avoiding the pain was much stronger. Similarly, prenatal injury that would cause the victim to suffer pain every day during adulthood would frustrate each distinct interest she would have in not being in pain during each episode of pain. These interests may be aggregated, and the act that caused them all to be frustrated is objectionable to a degree proportional to the aggregate badness of their

in this respect like an act done before an individual begins to exist that will later cause that individual to be harmed, such as planting a bomb that detonates 150 years later, maiming and disabling whoever is nearby at the time of the explosion.)

In all the instances of prenatal injury that I will discuss, assume that there are no immediate effects such as pain but that the injury will cause the individual to suffer some persistent ill effect, such as chronic pain, only after he has become a person. In such cases, the interests that are frustrated are the interests of a person. Unlike abortion, therefore, prenatal injury may be objectionable not only because it frustrates interests but also because it violates moral constraints that apply only to the treatment of persons.

These considerations explain why a pregnant woman's interests are unlikely to justify the infliction of prenatal injury. The interests a woman might have that would be served by an act that would injure her fetus are seldom sufficient to outweigh the future interests of a person in, for example, being free from pain. But even if they were, a pregnant woman would be unlikely to be justified in inflicting grievous injury on another person—*her own child*—even in order to protect her own *greater* interests.

In summary, both abortion and prenatal injury frustrate the fetus's present interests, which are comparatively weak. But only prenatal injury frustrates future interests, which may be the interests of a person and also quite strong. This is why a pregnant woman's interests may often outweigh the fetus's interest in continuing to live, and thus may justify abortion, but will seldom be sufficiently strong to outweigh the interests that would be frustrated by nonlethal prenatal injury. And since the interests that would be frustrated by prenatal injury would be the interests of a person, an appeal to the woman's interests may not even be the right *kind* of justification for the infliction of prenatal injury.

Here is an example that illustrates these claims.

The Two Cures.—A pregnant woman discovers that she has a condition that, unless it is treated immediately, will cause her to suffer mild chronic pain for the remainder of her life. There are two invariably successful treatments for the condition, each of which

frustration. Acts that cause an individual to cease to exist are, however, exceptions to the claim that an act that would satisfy or frustrate an individual's interest in some future event has to be evaluated by reference to the strength of her interest at the time the event would occur. Suppose, for example, that we want to evaluate an individual's loss, through death at t_1 , of a certain good that would have occurred at t_2 . Even if we can determine how strong her interest in having this good would have been at t_2 , we must still evaluate the loss by reference to the strength of her interest at t_1 . To evaluate her loss by reference to how strong her interest would have been at t_2 would be to assign the interest a weight it will never have.

consists of taking a pill. Each pill, however, has an unwelcome side effect when taken by a pregnant woman. The Abortifacient Pill kills the fetus painlessly. The Mutagenic Pill painlessly damages the fetus in a way that will cause it, during childhood, to begin to suffer moderate chronic pain that will continue for the remainder of its life but will not cause its life to cease to be worth living. The fetus is not yet viable; hence it is not possible for the woman to have it removed alive and then to take one of the pills.

Suppose that the woman's overwhelming prudential concern is to avoid developing chronic pain. May she take one of the pills, and, if so, which should she take?

Suppose that her interest in avoiding chronic pain outweighs the fetus's comparatively weak interest in continuing to live. This is not an implausible assumption. Most people consider it a significant misfortune for an adult to suffer even mild chronic pain. But few believe that death is a serious misfortune for a fetus. Many people accept, moreover, that if abortion can ever be justified, it is in a case such as this in which the pregnant woman will otherwise suffer a serious harm to her health. In any case, given this assumption about the weights of the interests involved, assumption 1 implies that it would be permissible for her to take the Abortifacient Pill, if there are no other considerations that oppose her taking it.

It would not, however, be permissible for her to take the Mutagenic Pill. Her taking this pill would prevent the frustration of interests she has and will later have in not experiencing chronic pain, but it would frustrate more and stronger such interests that the fetus would have later. For the pain she would thereby cause her child to suffer would be more severe and of longer duration than the pain she would avoid. It is, in short, impermissible for her to avoid a lesser harm to herself by inflicting a greater harm on her own child, who is in no way responsible for the threat she seeks to avert. This case helps to explain why the infliction of nonlethal prenatal injury may be impermissible as a means of achieving a certain end even when abortion would be a permissible means to the same end.

The argument I sketched for the permissibility of abortion is often thought to appeal not just to considerations of interests but also, implicitly, to intuitions about a woman's right to bodily autonomy and the fetus's lack of a right to the use of her body. It has not been my intention to elicit such intuitions but I have made no effort to screen them out. The reason I have not is that they count equally in favor of the permissibility of abortion and the infliction of prenatal injury.

What has arguably been the most influential argument for the per-

missibility of abortion appeals to just these intuitions.⁵ It contends that because the fetus has no right to the use of the pregnant woman's body, she cannot be morally required to sacrifice her interests in order to allow it to continue to draw support from her body. Call this the "Thomson argument" in honor of its author.

To the extent that this argument is successful in justifying abortion, it also justifies prenatal injury when this is necessary for the woman to evade a significant threat to her interests. For according to the Thomson argument, because the fetus has no right to the use of the woman's body, she will not violate its rights if she withdraws that support, even if she has to kill it in order to do so. Similarly, if its presence in her body becomes an impediment to the protection of her interests, it has no claim against her that she refrain from protecting her interests, even if her protective action will injure it. Perhaps it would not be permissible for her to *use* the injuring of the fetus as a means of protecting her interests, but it has no claim against her that she not injure it as a side effect of otherwise permissible action that protects her interests. For the fetus is not a mere bystander that has a right to be where it is. If she could be justified in *killing* it in order to protect her interests, she should also be justified in injuring it for the same reasons.

This is even clearer if we drop our initial assumptions about the status of the fetus and grant, as the Thomson argument typically does, that the fetus is a person with full moral status. In that case the fetus presumably has a strong interest in continuing to live, so that killing it would frustrate stronger interests than injuring it would. The Thomson argument would then imply that in the case of the Two Cures, the fetus's presence could not make it impermissible for the woman to take one of the pills but would not give her the right to kill it if her interests could be served equally well by some less harmful means. Given these assumptions, the Thomson argument seems to imply that it would be permissible for the woman to take the Mutagenic Pill but not to take the Abortifacient Pill. Since she would not owe it to the fetus to carry it to term and would be justified in killing it in order to avoid the burden of carriage, the fetus would, if the woman could not protect her interests without either injuring it or killing it, have to accept injury as the price of continued carriage.

That the Thomson argument has these implications casts doubt on its plausibility. These implications are also suggestive of the risks that defenders of abortion rights run when they grant their opponents the assumption that the fetus is a person.

5. See Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy & Public Affairs* 1 (1971): 47–66.

IV. ABORTION AS A REMEDY FOR PRENATAL INJURY?

If the explanation I have offered of why it is objectionable to cause prenatal injury is right, it seems that the infliction of lasting prenatal injury is as seriously wrong, other things being equal and assuming that the fetus will survive and become a person, as the infliction of the same injury on a born child. Other things are seldom equal, but differences between inflicting a painless injury prenatally and inflicting the same injury postnatally tend to balance out. To cause the injury prenatally might be less bad in one respect if the effects were present from birth, for then adaptation to the effects of the injury would begin immediately and there would be no period of adjustment involving the abandonment of goals or activities. Yet to cause the injury prenatally would be worse in that the effects would be present longer.

Neither of these differences is present, however, when we compare postnatal injury with prenatal injury that causes chronic pain of delayed onset. These forms of prenatal injury are as seriously objectionable as the infliction of the same injuries on a child. Liberals must not allow their justified concern to protect the rights of pregnant women from intrusive legislation to lead them to deny or discount the gravity of the wrong involved in prenatal injury.

Consider now an example suggested to me by Alexander Pruss. Like the case of the Two Cures, this example involves a choice among three options: taking one pill, taking a different pill, and taking neither pill. I call it the Three-Option Choice.

A pregnant woman carrying a nonviable fetus develops a condition that, if not treated immediately, will cause her to suffer mild but permanent chronic pain. There are two effective treatments, each with unwanted side effects. Pill 1 inflicts a painless injury on the fetus that would cause it during childhood to develop moderate, permanent chronic pain. But pill 1 also has a further side effect: shortly after injuring the fetus, it painlessly kills it. Pill 2 inflicts the same injury that pill 1 does but does not induce abortion.

Suppose this woman became pregnant because she wants to have a child. She would prefer a normal child to a child with a problem such as chronic pain but would rather have a child with a health problem than no child at all. Yet she had great difficulty in becoming pregnant, and the doctors at the fertility clinic tell her that if she loses this pregnancy, she will have roughly a 40 percent chance of being able to become pregnant again with a fetus that would be normal. So if she were to take pill 1, she would have a reasonable chance of being able to have a normal child, though it would be more likely that she would end up with no child at all. If, however, she takes pill 2, she will be virtually certain to have a child with a health problem. Suppose that her over-

riding concern is to avoid suffering chronic pain. So she wants to take one of the pills. But where her own interests are concerned, the advantages and disadvantages of the pills seem evenly balanced. She cannot determine whether it would be better to have a modest probability of having a normal child (the best outcome), though with a higher risk of having no child at all (the worst outcome), or to have a virtual certainty of having a child with chronic pain (the intermediate outcome). From a prudential point of view, then, she wants to take one of the pills but is indifferent about which one she takes. A final detail: abortion is not an option in her society except as a side effect of taking pill 1.

What ought this woman to do? It is obviously permissible for her to take neither pill, but is that morally required? The argument against the permissibility of taking pill 2 is the same as the argument against taking the Mutagenic Pill in the case of the Two Cures. Would it be permissible, then, for her to take pill 1? Pill 1 would cause the same injury to the fetus that pill 2 would. But because the only bad effects of the injury would not be manifest until childhood, the pill itself, by inducing abortion, would prevent these bad effects from occurring. Taking pill 1 therefore seems morally equivalent to having an abortion. If we again assume that the woman's interest in avoiding chronic pain outweighs the fetus's interest in continuing to live, it seems that it would be permissible for the woman to take pill 1. So she is not required to accept the chronic pain.

These judgments about the Three-Option Choice suggest a conclusion that, if correct, is of considerable practical significance. I have argued that it is impermissible for the woman to take pill 2, which causes prenatal injury, but permissible for her to take pill 1, which causes prenatal injury but then prevents the relevant effects from occurring by causing an abortion. It is, in other words, wrong to cause prenatal injury if that results in the existence of a child with chronic pain but not if the injury is followed by abortion. This suggests that abortion provides an acceptable remedy for prenatal injury. It suggests that when prenatal injury has occurred, there is then a moral reason for the pregnant woman to have an abortion. In particular, if a pregnant woman injures her fetus—whether with wrongful intent, recklessly, negligently, or even innocently—she then has a moral reason to have an abortion in order to prevent the bad effects of the injury from occurring.⁶ Even if the abortion itself is morally objectionable, it may be morally preferable to allowing the *worse* effects of the injury to occur.

In many cases of prenatal injury, the pregnant woman may have a

6. This is not the conclusion that Pruss draws from the Three-Option Choice. Nor does he endorse the conclusion I will defend.

weighty prudential reason to have an abortion. She might, for example, be profoundly averse to the prospect of having to care for a child who suffers from the effects (pain, disability, etc.) of the injury. If her interest in avoiding what she would, rightly or wrongly, experience as a great burden outweighs the fetus's interest in continuing to live, then an abortion might be justified on prudential grounds.⁷ But let us consider only cases in which a woman has injured her fetus but, like the woman in the Three-Option Choice, would prefer a normal child to a child with a health problem and a child with a health problem to no child at all and has only a modest probability of being able to become pregnant again. In such cases, the woman's interests neither favor nor oppose abortion. Our question, then, is whether she has a moral reason to abort the pregnancy. The Three-Option Choice suggests that she does. But is this right?

V. WHY ABORTION IS NOT AN ACCEPTABLE REMEDY

It will be helpful to consider a further example involving the two pills.

The Choice between Pills.—Again a pregnant woman is threatened with permanent, mild chronic pain unless she is treated immediately. The options for treatment are pill 1, which causes injury followed by abortion, and pill 2, which causes the same injury but not abortion. But in this case the woman has to take one of the pills. Her society is paternalistic, and the hospital will force her to take a pill but will allow her to decide which to take.

Where her own interests are concerned, she is entirely neutral. Should she choose pill 1 or pill 2?

Let us make the same assumptions about the woman's preferences in this case that we made in the Three-Option Choice. Where her own interests are concerned, this woman is neutral between the two pills because she finds the expected benefits to her of each pill to be about the same as those of the other. We may assume, therefore, that her interests will be unaffected by her choice; they will be equally well satisfied whichever choice she makes. Because her interests are not engaged, the only relevant question is what would be better for the fetus. Its interest in continuing to live, though weak, would be frustrated by pill 1 but not by pill 2. And there are no interests it has or indeed will ever have that would be better served by pill 1 than by pill 2—that is, by abortion rather than by prenatal injury. It is, in short, better for the

7. David Wasserman argues that if the woman has culpably caused the injury, it would be ignoble, and perhaps even contemptible, for her to evade the consequences of her action at the further expense of her victim. This might be true even if it were permissible for her to have an abortion. See David Wasserman, "Prenatal Harm and Preemptive Abortion in a Two-Tiered Morality," *Philosophical Books* 46 (2005): 23–33.

fetus to live with chronic pain than to die. (Pill 2 would frustrate more interests of the individual that is now a fetus than pill 1 would. But that is because, unlike pill 1, it would permit that individual to develop new interests, some of which it would frustrate. But there is no option open to the woman in which the interests that pill 2 would frustrate could be satisfied. And if the woman takes pill 2, the interests that would be frustrated would be more than counterbalanced by the formation and satisfaction of other interests that the individual would not otherwise have. Taking pill 2 therefore satisfies the two conditions stated in assumption 8 that together nullify the objection to an act that frustrates possible interests.)

The same reasoning that shows that pill 2 is better for the fetus than pill 1 explains why a pregnant woman who has injured her fetus ought not, if other things are equal, to have an abortion. When the injury has already occurred, the options for the fetus are a life worth living, though with chronic pain, and an immediate death. The fetus's interests favor continued life. The woman, therefore, has no reason, for the sake of the fetus, to have an abortion. Indeed, she has a moral reason not to, for abortion would be worse for the fetus and better for no one. (It is true that she may have an *impersonal* reason to have an abortion, if the expected good of aborting the pregnancy and attempting to have a different, uninjured child would exceed that of allowing the pregnancy to continue. But our earlier assumption 6 suggests that the fetus's interest in continuing to live outweighs any impersonal reason there might be to have a better-off rather than a worse-off child. This, in any case, is the common view, and since my aim here is to explore the implications of common beliefs, I will assume that the fetus's interest, however weak, is decisive.)

Why, then, did the Three-Option Choice make it seem that a woman who causes prenatal injury does have a moral reason to have an abortion? The explanation is that the fact that pill 1 prevents the bad effects of the injury it causes makes it seem as if the prevention of those effects is part of the justification for taking it. But that is not so. In the Three-Option Choice, pill 1 is morally equivalent to an abortion. And what justifies the act that causes abortion is that it prevents the woman from suffering chronic pain. The woman's reason for taking pill 1 is not to have an abortion to rectify a prior injury; it is simply to avoid chronic pain. The abortion is merely a side effect that is proportionate to the intended effect of preventing chronic pain.

Still, it is perhaps surprising that in the Choice between Pills it is impermissible, given our assumptions, for the woman to choose pill 1 and therefore morally required for her to choose pill 2.⁸ For in the

8. The inference from the impermissibility of taking pill 1 to the moral necessity of

Three-Option Choice, pill 1 is permissible but pill 2 is not. How can pill 2 be impermissible in one case but required in the other, while pill 1 is permissible in one case and impermissible in the other?

Whether an act is permissible depends on what options are available.⁹ In the Three-Option Choice the woman may take neither pill. Her interests are engaged and thus the effects of each pill on the fetus's interests have to be weighed against her interests. Her interests outweigh the fetus's interest in continuing to live, which is the only significant interest that will be affected if she takes pill 1, but do not outweigh its future interests in avoiding chronic pain. In the Choice between Pills, by contrast, taking neither pill is not an option and the woman's interests are not at stake. The possible outcomes for the fetus—death and chronic pain—are therefore not weighed against the woman's interests but are weighed only against each other. And death is worse for the fetus than chronic pain.

VI. THE PARETO PARADOX

This brief explanation may not be fully satisfying. But we can go deeper. The challenge is to understand how it could *ever* be permissible to take pill 1 rather than pill 2. For whatever the other options are, it is *always* true that pill 1 is not worse for the woman but *is* worse for the fetus than pill 2. Pill 2 is, in short, Pareto superior to pill 1. How, then, could it be true, as I have claimed, that in the Three-Option Choice the woman may take pill 1 but not pill 2? Call this the "Pareto paradox."

The resolution of this paradox begins with an observation about the pattern we follow in making evaluative comparisons in the Three-Option Choice. First we compare taking pill 1 with taking no pill. The interests at stake in this comparison are the fetus's interest in continuing to live and the woman's interest in avoiding chronic pain.¹⁰ Because the fetus's interest in continuing to live is weak while the woman's interest is strong, we conclude, if we also accept our earlier assumption 1, that pill 1 is permissible. The interests that the fetus would later have and be able to satisfy if the woman were to take no pill do not, according

taking pill 2 presupposes that pill 2 is not equally objectionable and therefore also impermissible. If that were the case, the Choice between Pills would be a difficult kind of moral dilemma. But in the circumstances the impermissibility of pill 1 implies that pill 2 is required because the woman must take one pill or the other and pill 2 is better for the fetus and worse for no one, and the only other possibly relevant consideration—that pill 1 might be better impersonally—is outweighed.

9. See Derek Parfit, "Future Generations: Further Problems," *Philosophy & Public Affairs* 11 (1982): 113–72, 130.

10. The woman's present interest in avoiding chronic pain tends, though imperfectly, to subsume her future interests in not being in chronic pain. In this respect, persons differ from fetuses, whose present interests do not subsume their future interests in the same way. For discussion, see McMahan, *The Ethics of Killing*, 69–82, 165–74.

to assumption 6, count against her taking pill 1 because they are merely possible interests and would not be frustrated by pill 1.

Next we compare taking pill 2 with taking no pill. The interests at stake include not only the fetus's interest in continuing to live but also its later interests in not suffering chronic pain, which would be frustrated by pill 2 but would be satisfied if the woman were to take no pill. Because pill 1 is among the options in the Three-Option Choice, these are merely possible interests. But according to our earlier assumption 7, it is a reason not to take pill 2 that it would frustrate these interests. And that reason seems to stand because the conditions stated in assumption 8 that might nullify it are not met in this case. So because pill 2 would frustrate these interests and they would outweigh the interests of the woman that would be frustrated by her taking no pill, we rightly conclude that taking pill 2 would be impermissible.

In short, by first comparing pill 1 with no pill and then comparing pill 2 with no pill, we reach the conclusion that pill 1 is permissible but pill 2 is not. But we have not compared pill 1 directly with pill 2, as we do in the Choice between Pills. When we compare pill 1 with pill 2, we find that pill 2 is better for the fetus and not worse for anyone else. Perhaps this should be taken into account in our reasoning about the Three-Option Choice. Perhaps we should alter the pattern of our evaluative comparisons by first comparing pill 1 with pill 2 and then comparing the better of the two with taking no pill. This, one might claim, would yield the conclusion that pill 2 is morally permissible in the Three-Option Choice just as it is in the Choice between Pills. For if pill 1 is permissible in the Three-Option Choice and pill 2 is better for the fetus than pill 1 and worse for no one, surely pill 2 must be permissible as well.

This, however, presupposes that it is acceptable to proceed by making "pairwise" comparisons, so that if we conclude that pill 1 is worse than pill 2, pill 1 drops out of consideration so that we then need only to compare pill 2 with the option of taking no pill. But this pattern of comparison, as is well known, may make the conclusion depend on the order in which the comparisons are made. We have to take all options into account in reaching a decision about any of them.

It is, in any case, a mistake to suppose that the pattern of pairwise comparison I cited would yield the conclusion that it is permissible to take pill 2 in the Three-Option Choice. This pattern of comparison does not judge that pill 1 is permissible, compare pill 2 with pill 1, and conclude that pill 2 must be permissible as well. Rather, it first judges that pill 2 is better than pill 1 and then compares pill 2 with no pill, a comparison that implies that pill 2 is impermissible. The alternative pattern of reasoning therefore leads to the conclusion that the woman

in the Three-Option Choice may not take either pill but must allow herself to suffer chronic pain.

This is a conclusion that defenders of abortion rights will want to reject. For the idea here is that, because pill 1 (abortion) is worse for the fetus than pill 2 (prenatal injury), assuming that the fetus's subsequent life would be worth living, it seems that abortion is always more difficult to justify than the infliction of prenatal injury. If that is so, and if the infliction of prenatal injury is seldom justifiable, it follows that abortion can very seldom be justified.

There is, however, no reason to accept this conclusion, for the alternative pattern of reasoning I have sketched is unacceptable precisely because it excludes the direct comparison between pill 1 and no pill. To determine what it is permissible for the woman to do, we have to consider each option in turn. The argument that shows that pill 1 (i.e., abortion) is a permissible option in the circumstances is not disproved by the fact that pill 1 is Pareto inferior to an option, pill 2 (i.e., prenatal injury), that is impermissible in the circumstances.

But how this can be needs to be explained. And we are now in a position to understand the explanation, which has to do with the different ways in which possible interests count in the different comparisons. In the comparison between pill 1 and no pill in the Three-Option Choice, the fetus's possible interests do not count at all. The only possible interests at stake are those the fetus would have if the woman takes no pill. Many of these would be satisfied but, according to assumption 6, that does not count in favor of taking no pill. Some would be frustrated but, according to assumption 8, that does not count against taking no pill. The choice between pill 1 and no pill therefore has to be decided by reference to present interests, and those of the woman are stronger.

In the comparison between pill 2 and no pill in the Three-Option Choice, the fetus's possible interests do count. According to assumption 7, that pill 2 would frustrate possible interests of the fetus counts against taking pill 2 unless both the justifying conditions stated in assumption 8 are satisfied. But they are not. For the possible interests that pill 2 would frustrate would be satisfied if the woman were to take no pill. In the Choice between Pills, by contrast, pill 2 satisfies the justifying conditions stated in assumption 8. That it would frustrate possible interests does not, therefore, count against it in that choice. So again the only relevant interests are present interests—this time of the fetus only—and those favor pill 2.

So, even though pill 1 (abortion) would be worse for the fetus than pill 2 (prenatal injury) in the Three-Option Choice, the different ways in which the fetus's present and possible interests weigh against the interests of the woman in the different choices make pill 1 permissible even though pill 2 is not. It is a matter of how the relevant interests

weigh up, but the relevant interests are different in the different comparisons.

VII. AN ACT WITH A SEQUENCE OF EFFECTS AND A SEQUENCE OF ACTS WITH THE SAME EFFECTS

I argued in Section V that abortion is not an acceptable moral remedy for prenatal injury. But suppose a pregnant woman suddenly finds herself in a situation in which some of her significant interests will be frustrated unless she acts immediately in a way that will injure her fetus. Many people believe that it would be permissible for her to act to protect her interests if she resolves to obtain an abortion shortly thereafter. A further variant of our cases involving the two pills provides a helpful test.

Pill 2 and Abortion.—A pregnant woman discovers that she has a condition that, unless treated immediately, will cause her to have a permanent, mild chronic pain. There is only one effective treatment, pill 2, which would inflict a painless injury on her fetus that would cause it during childhood to develop moderate chronic pain that would reduce its quality of life but would not prevent it from having a life worth living.

Suppose, as before, that the woman's interest in avoiding chronic pain is strong enough to justify abortion if that would enable her to avoid the pain. And suppose that in this case abortion is an option in the woman's society. But it is not possible for her to schedule one until a week later, by which time it will be too late for her to take pill 2. May she take pill 2 now and schedule an abortion for a week later?

My contention that abortion is not an acceptable remedy for prenatal injury suggests that the answer is "no." But if the woman's interest in avoiding chronic pain is strong enough to justify abortion, it seems that it ought to be strong enough to justify the infliction of prenatal injury if this would be shortly followed by abortion, for the outcome would be the same as it would be if she were to have an abortion. Indeed, taking pill 2 and then having an abortion seems morally equivalent to taking pill 1, which would be permissible if it were available.

One possible difference is that pill 2 involves a risk that the bad effects of the prenatal injury will be realized. It would be possible, for example, for pill 2 to have the additional though unexpected effect of causing the pregnant woman to become temporarily comatose, thereby preventing her from getting an abortion. But a similar uncertainty exists even with pill 1. It is possible that pill 1 might cause prenatal injury but then inexplicably fail to cause an abortion. In neither case does the small risk that the prenatal injury will frustrate future interests rule out the permissibility of taking the pill.

But in fact taking pill 2 and then having an abortion is morally different from taking pill 1. Taking pill 1 is a single act with two effects. We take both effects into account when determining whether it is permissible to do the one act. But taking pill 2 and having an abortion are distinct acts with distinct effects. And each act has to be justified in the conditions that would obtain when it would be done. And after the woman has taken pill 2, she has decisive reason not to have an abortion. For her interest in avoiding chronic pain has already been satisfied. If we continue to make the assumptions about her personal preferences and the relevant probabilities that we made earlier, she has no self-interested reason to have an abortion. Putting aside purely impersonal considerations, the only question after she has taken pill 2 is what is in the interest of the fetus. And it would be better for the fetus to live with chronic pain than to be killed.

The woman in this case therefore cannot justify taking pill 2 on the ground that she could cancel the bad effects of the injury by subsequently having an abortion. She cannot justify the infliction of prenatal injury by pledging to do afterward what she would then have decisive reason not to do. More generally, it seems that pregnant women may not justify the infliction of prenatal injury by claiming that they will commit themselves to having an abortion afterward, even if the reason they have for doing what would cause prenatal injury would be sufficient to justify an abortion, if an abortion were necessary to achieve the same end.

One way of resisting this conclusion is to contend that the relevant unit of evaluation in such cases is not the individual act but the plan or policy. In particular, the plan to take pill 2 and then have an abortion is what should be evaluated as permissible or impermissible, not the individual acts that are constitutive of the plan. In this way taking pill 2 and then having an abortion might be collapsed into a single unit of deliberation, comparable to taking pill 1.

A similar idea has been proposed as a strategy for justifying punishment. Warren Quinn, for example, has advanced the following argument.¹¹ It would be a permissible form of self-defense to threaten potential wrongdoers by irreversibly programming a machine to retaliate against them automatically if they wrongfully harm us. There is no morally significant difference between programming such a machine and threatening the same form of retaliation for the same wrongful harm and then fulfilling the threat in the ordinary way if it is defied. Thus, if programming the machine is permissible, so is the plan that encompasses making a threat and fulfilling it if it is defied.

11. Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14 (1985): 327–73.

Although programming the autoretaliator is one act, while making a threat and fulfilling it are separate acts, Quinn's presupposition in the latter case is that each act does not require separate justification; rather, the two should be evaluated together as a unit, in just the way that there is only one justification for making the threat and fulfilling it via the programming of the autoretaliator. Similarly, it might be argued that, although taking pill 1 is only one act while taking pill 2 and having an abortion are separate acts, the two acts in the latter case do not require separate justifications. They should instead be evaluated together as a single plan. If that is right, then if taking pill 1 is permissible as a means of avoiding chronic pain, so is a plan that includes taking pill 2 and then having an abortion.

I believe, however, that the permissibility of doing y cannot be inferred from the permissibility of doing a single act that in effect involves doing both x and y . I cannot give adequate reasons for this here but I will indicate briefly why Quinn's general strategy of argument seems unacceptable.¹² The logic of this same strategy has been deployed in the debate about the rationality and morality of nuclear deterrence. Suppose that the practice of nuclear deterrence requires threatening and conditionally intending to annihilate the civilian population of an enemy country as a means of deterring that country from conducting a nuclear attack against one's own country. Arguing that the relevant unit of evaluation is the plan or policy rather than the individual act, David Gauthier claims

that if it is rational to form this conditional, deterrent intention, then, should deterrence fail and the condition be realized, it is rational to act on it [that is, to annihilate the enemy's civilian population, even though at the time the act would serve no purpose whatever]. The utility cost of acting on the deterrent intention enters, with appropriate probability weighting, into determining whether it is rational to form the intention. But once this is decided, the cost of acting on the intention does not enter again into determining whether, if deterrence fails, it is rational to act on it. Acting on it is part of a deterrent policy, and if expected utility is maximized by forming the conditional, deterrent intention, then deterrence is a rational policy.¹³

I regard this as a *reductio ad absurdum* of the idea that the permissibility of a plan encompassing a sequence of acts with specific effects is no different from the permissibility of a single act that would involve

12. For a full and persuasive critique of Quinn's argument, see Daniel M. Farrell, "On Threats and Punishments," *Social Theory and Practice* 15 (1989): 125-54.

13. David Gauthier, "Deterrence, Maximization, and Rationality," *Ethics* 94 (1984): 474-95, 486.

the same sequence of effects.¹⁴ It is possible, for example, that it could be permissible to program a doomsday machine to destroy an enemy's cities in the event that the enemy destroys one's own. I will not take a position on this here. What I do claim is that it could never be permissible to kill innocent people when this would serve no purpose whatsoever. More generally, the permissibility of a harmful act such as fulfilling a threat or killing a fetus has to be determined by reference to, *inter alia*, any forward-looking considerations of consequences. The permissibility of such an act cannot be determined merely by the act's role in a larger plan or policy.

VIII. FUTURE RIGHTS

Thus far in arguing that abortion is not an acceptable remedy for prenatal injury, I have focused on the fetus's *interests*, claiming that they provide a positive moral reason for a woman who has injured her fetus not to have an abortion. But perhaps this focus on interests ignores an important consideration: that in the absence of abortion, prenatal injury will violate the rights the fetus will later have as a person. According to our earlier assumption 1, moreover, the fetus is not now the kind of being that can have rights; therefore abortion cannot violate fetal rights. So it seems that if a pregnant woman injures her fetus, she will have done what will violate rights *unless* she has an abortion. In these circumstances, abortion would not violate any rights but would in fact prevent the violation of rights; for it would prevent the woman's own earlier action from violating possible rights that the fetus would otherwise later acquire. Perhaps, then, there *is* a moral reason for a woman who has injured her fetus to have an abortion: to make it the case that she will not violate the fetus's later rights. Because an abortion would frustrate the fetus's weak interest in continuing to live, there is a moral objection to it; therefore an abortion would not enable her to escape all wrongdoing. But because the frustration of a weak interest is less objectionable than the violation of rights, abortion would at least mitigate her wrongdoing.

If this is right, it may overturn some of our earlier conclusions. For example, I have argued that in the Choice between Pills, the only interests at stake are the fetus's and these would be better served by pill 2 than by pill 1; therefore, the woman ought to take pill 2. But if pill 2 would violate the fetus's later rights while pill 1 would not violate any rights, it may be that in fact pill 2 is impermissible, thereby making pill

14. Gauthier's explicit concern is with rationality rather than permissibility, but on his view this is a distinction without a difference: "Morality, in my view, follows rationality" (*ibid.*, 494).

1 permissible instead (a conclusion that may be congenial to defenders of abortion rights).

It is, however, a mistake to think that the woman may permissibly have an abortion to prevent her earlier infliction of prenatal injury from violating later rights. First, if what is at issue is the prevention of rights violations, and if the act that would prevent these violations is not against the agent's interests, and if other things are equal, then the act must be not merely permissible but morally required. Yet it is implausible to suppose that women who injure their fetus are then morally required, if other things are equal, to kill it.

Second, abortion would be worse for the individual that is now a fetus. And it is hardly respectful of an individual to do what is overall worse for him in order to prevent him from becoming the bearer of rights that will have been violated by one's previous action. This would shift the focus of respect for rights from individuals to rights themselves, considered as somehow detachable from their bearers.

Indeed, the idea that respect for rights favors abortion seems to presuppose a perversely agent-centered conception of rights. To see this, suppose that someone other than the pregnant woman injures her fetus. The woman would, it seems, have no moral reason to kill her fetus in order to prevent *that* person's action from having violated its rights. Yet if we accept that she *would* have a moral reason to kill her fetus in order to prevent her *own* previous action from violating its later rights, it seems that our conception of rights is implausibly agent-centered, in the sense of giving priority to the agent over the victim.¹⁵ (In fact, if the woman would have a reason to kill the fetus preemptively if she had injured it, then it seems that the third-party injurer would have the same reason to kill the fetus that *he* had injured, in order to prevent his earlier act from violating its rights. Obviously if he had such a reason it would be overridden in the circumstances by the rights of the woman; but the point is that it seems clear that he would have no such reason at all.)

Return to the Choice between Pills and assume that pill 2 would indeed infringe the rights the fetus would later have. If pill 1 would be a permissible option in the absence of pill 2—which it would be—then pill 2 must be permissible, despite the fact that it would infringe rights, on the ground that it would be unambiguously and in all respects better for the inevitable victim than another, otherwise permissible act and no worse for anyone else. Consider a parallel. Suppose that there is a special moral constraint against harming a person as a means that does not

15. There is another way in which a conception of rights might plausibly be agent-centered. It might assign the avoidance of rights violations by oneself priority over the prevention of violations by others. On such a view, it might be wrong to violate rights in order to minimize the violation of rights overall.

apply to harming a person as a side effect. And suppose that there is some very important end that one would be morally justified in achieving even at the cost of killing an innocent person as a side effect of one's action. But suppose, finally, that one could achieve the same end in a different way—a way that would require injuring that *same person as a means* in a way that would cause him to suffer moderate chronic pain. If it would be unambiguously better for that person to suffer chronic pain than to be killed, and no one else would be affected, it seems that it would be permissible to violate the constraint rather than to do what would be worse for the victim but would not violate a constraint.¹⁶ For, again, it is not a manifestation of respect for a person to do what one knows is worse for him just to avoid violating a constraint.

I have noted that the reasoning that supports the permissibility of abortion following prenatal injury has a conspicuously agent-centered character. This suggests the possibility that the reason the woman has to have an abortion may not be a moral reason but a special “moralized” prudential reason. Her reason may be, to the greatest extent possible, to maintain a positive moral ledger, to minimize her own wrongdoing, or to avoid becoming a violator of rights. If her interest in reducing the extent of her own wrongdoing is sufficiently strong to outweigh the fetus's interest in continuing to live, it could be permissible, given our earlier assumption 1, for her to give priority to her greater interest by having an abortion.

It is not obvious, however, that people have a reason to minimize their own wrongdoing in this particular way. Consider an analogous case in which you have deliberately initiated a sequence of events that will culminate in the deaths of five innocent people.¹⁷ When the sequence is completed, you will have murdered those five people. You can now stop the sequence of events but only by murdering one innocent person who is not among the five. Would you, by murdering the one, further your own interest in reducing the degree of your wrongdoing? It does seem that you would thereby make yourself guilty of a lesser wrong. But it is not obvious that this gives you a prudential reason to murder the one. And even if it did, your own interest would not justify your committing the murder.

Yet this case is importantly different from the case of a woman who has injured her fetus and might now have an abortion. For in the case

16. In this paragraph I have been influenced by Frances Kamm's important though unpublished work on “secondary permissibility.”

17. See Judith Jarvis Thomson, “The Trolley Problem,” in *Rights, Restitution, and Risk*, ed. William Parent (Cambridge, MA: Harvard University Press, 1986), 98–99. For further discussion, see F. M. Kamm, *Morality, Mortality*, vol. 2, *Rights, Duties, and Status* (New York: Oxford University Press, 1996), 242–43. The relevance of this kind of case to the present discussion was pointed out to me by David Wasserman.

we are now considering, you would have to violate the one person's right not to be killed in order to prevent your earlier act from violating five such rights. But since we are assuming that fetuses do not have rights, the woman could prevent her earlier act of injuring her fetus from violating later rights by means of action—having an abortion—that would not violate any rights.¹⁸ So the view that the woman ought to have an abortion is compatible with the idea that you ought not to murder the one.

This, however, is not the only failure of analogy between the two cases. In the case in which the greater wrong is murdering five, the victim of the lesser wrong would be someone not among the five. In the case in which abortion would prevent an earlier act of injuring from violating later rights, the victim in both cases is the same individual. If abortion would prevent the violation of the rights the fetus would otherwise later have in a way that would be better for it overall, it would surely be permissible. But, as I have noted, even though abortion would prevent the violation of the rights the fetus would later have, it would be worse for the fetus overall. It would not protect the fetus's later rights but would prevent them from ever arising by preemptively killing their prospective bearer. Such an act would offer the woman no reason to suppose that she had remedied her previous wrongdoing; therefore abortion would not serve any interest of hers in minimizing her own wrongdoing.

I will conclude this section by noting one way in which a shift in our assumptions would affect our conclusions. Recall that assumption 3 is that the fetus has moral status, though not a status as high as that which it might later have as a person, and that assumption 2 is that the fetus has an interest in continuing to live. But suppose—as I in fact believe—that there is a period from conception until some later point in pregnancy during which the fetus has no moral status at all and no interests. This might be true if, for example, we do not begin to exist at conception but at some later point. In that case, the fetal organism before the point at which one of us begins to exist in association with it would be an organism that would not support the existence of someone like you or me. It would not be identical with the person who might later develop from it and therefore would not have interests in that person's life and would arguably lack any significant moral status.¹⁹

Assume that this is true. And suppose that a woman who has injured her fetus during that period could also have an abortion during that period and would also have a high probability of then being able to

18. Here I follow Wasserman in his "Prenatal Harm and Preemptive Abortion," 27–28.

19. I defend this view in McMahan, *The Ethics of Killing*. See esp. 209–28, 267–69, 302–38.

conceive another child that would be healthy. In these circumstances the woman would have a moral reason to have an abortion. Her reason might be to avoid violating future rights. Or—more plausibly, in my view—it might be an impersonal reason to cause a better-off rather than a worse-off person to exist. If the woman had no prudential reason not to abort, her moral reason to have an abortion might be decisive in the circumstances.

IX. THE ORDERING PARADOX

I have argued that even if it would be in a pregnant woman's interest to do what would injure her fetus, she cannot justify the act that would cause the injury by resolving to have an abortion later. Yet when abortion is a possibility and the threat to her interests is sufficiently serious to justify an abortion if an abortion would eliminate the threat, it is hard to believe that she must simply acquiesce in the frustration of her interests.

Recall our earlier example (Pill 2 and Abortion) in which a pregnant woman discovers that she has a condition that will cause her to suffer mild chronic pain unless she takes the only available treatment, which is pill 2. Pill 2 would injure her fetus in a way that would cause it, during childhood, to develop a somewhat worse form of permanent, chronic pain. Abortion is an option but only after the woman takes pill 2. But now suppose that an abortion is possible immediately and that there is no urgency about taking pill 2. Might it be permissible for her to have an abortion first and then take pill 2?

It seems absurd to suppose that the order in which the acts are done could make a difference to the permissibility of either. But, surprisingly, it is arguable that it is permissible to do the acts in this different order. We are assuming that the woman's interest in avoiding chronic pain outweighs the fetus's interest in continuing to live. The fetus's presence in her body constitutes a moral impediment to her ability to satisfy her interest in avoiding the pain. Because eliminating the impediment is morally necessary for avoiding the pain, her interest in removing it is roughly equivalent in strength to her interest in avoiding the pain. She therefore has a prudential reason to have an abortion that outweighs the fetus's interest in continuing to live. Given our earlier assumption 1, it is permissible for her to have an abortion, after which it will be permissible for her to take pill 2 without causing prenatal injury or violating future rights.

As I noted, it is difficult to believe that the permissibility of these two acts—having an abortion and inflicting prenatal injury—could depend on the order in which they are done. But if the arguments I have given are right, the order does make a moral difference. It determines the permissibility of the woman's being able to avoid chronic pain for

the remainder of her life. If, for example, the woman can get an abortion today and take pill 2 tomorrow, she can permissibly avoid a future of chronic pain; but if her circumstances are such that she must take pill 2 today and cannot have an abortion until tomorrow, morality seems to require that she endure that future of chronic pain. Intuitively, this is almost impossible to believe. Call this the “Ordering Paradox.”

The arguments seem persuasive. If abortion were not an option at all, it would not be permissible for the woman to take pill 2, for that would involve inflicting a greater harm on her own child in order to avoid a lesser harm to herself. And the situation in which abortion is possible only after she has taken pill 2 is morally equivalent to the situation in which it is not possible at all, for after she has taken pill 2, an abortion would be wrong, since it would serve no positive purpose and would harm the fetus. She therefore cannot justify taking pill 2 on the condition that she will afterward do what it would then be wrong to do. Yet, given that her interest in avoiding chronic pain outweighs the fetus’s interest in continuing to live, it is permissible for her to have an abortion as the necessary means to removing an impediment to her ability to satisfy her interest in avoiding chronic pain.

The Ordering Paradox arises from the fact that what it is permissible to do depends on what reasons there are at the time of acting. And what reasons there are can be affected by the order in which acts are done. Thus, in the case in which abortion is possible immediately, the woman has a justifying reason for having an abortion, after which she would have no reason not to take pill 2. In the case in which she must take pill 2 first, however, she would have a compelling reason not to have an abortion, in which case her initial reason not to take pill 2 cannot be eliminated and thus remains decisive.

X. THE PARADOX OF SEQUENTIAL CHOICE

A similar paradox arises if we take a choice among concurrent options and break it into a sequence of choices among the same options. Here, for example, is a version of the Three-Option Choice:

The Form.—The pregnant woman with the condition that will cause chronic pain must make her choice among the possible options by filling out an official form. On the form there are three options—pill 1, pill 2, and no pill—each with a box beside it. She must check one box and submit the form.

But suppose that the bureaucratic procedures in another society are different. A pregnant woman in this other society with the same condition must fill out two forms sequentially.

The Two Forms.—She must first fill out a form indicating whether or not she wishes to be treated. This form has only two options:

treatment and no treatment. If she checks the option of receiving treatment and returns the form, she will then receive another form. This second form will have two treatment options: pill 1 and pill 2. Her instructions for this form are to choose one of the pills and return the form.²⁰

In the case involving the single form, the woman may choose in exactly the same ways I indicated in discussing the Three-Option Choice. She may choose pill 1 or no pill, but not pill 2. The case of the Two Forms is, however, surprisingly different. Suppose that the woman knows that the two available treatments are pill 1 and pill 2. Believing that pill 1 is permissible, she checks the treatment option on the first form, intending to opt for pill 1 on the second form. But when she receives the second form, her situation is relevantly like that of the woman in the Choice between Pills. In the choice she faces now, her interests are not at stake: whichever choice she makes, her condition will be cured. So she ought to be guided by what would be best for the fetus, which, for reasons we have discussed, is pill 2.

What ought she to do? She ought not to avoid chronic pain at the cost of causing her own child to suffer a *worse* form of chronic pain. It seems that she ought now to write back, revoking the choice she made on the first form. Indeed, if she were particularly clever, she might have anticipated while reviewing the first form that if she were to check the treatment option, she would then have a decisive reason, on receiving the second form, to choose pill 2. Given that knowledge, it seems that her only permissible option on first form was to choose not to be treated.

In short, if she can choose among the options concurrently, she may permissibly choose to take pill 1. But if her options are separated into pairs that she must choose between sequentially, she may not first choose to take a pill and then choose pill 1. In the Two Forms, her only permissible option is no pill. Call this the “Paradox of Sequential Choice.”

In Section VII, I argued that the option of taking pill 2 and then having an abortion is morally different from the option of taking pill 1, even though the effects in both cases would be exactly the same. In the Ordering Paradox, it is permissible to have an abortion and then take pill 2 but not to take pill 2 and then have an abortion, even though the effects would be the same in both cases. In the Paradox of Sequential Choice, the woman may choose pill 1 from among several options but may not first choose to be treated and then choose pill 1 from among the treatments. In these cases, the fragmentation of a choice among aggregated outcomes into a sequence of choices among individual out-

20. I am extremely grateful to André Gallois for devising this example.

comes, or an alteration in the order of choice, affects what the options and relevant considerations are at the time of choice. It therefore affects what reasons one has for or against acting in certain ways at the time of choice. The conclusions we reach are paradoxical but seem unavoidable—unless, perhaps, we are willing to follow Quinn and Gauthier in treating plans, policies, or strategies as wholes, rather than individual acts, as in some cases the appropriate objects of judgments of permissibility.

XI. THE ANTIDOTE

Suppose that there is a further pill, the “antidote,” that counteracts the abortifacient effect of pill 1 but has no other relevant effects. That is, taking the antidote after taking pill 1 does not interfere with either pill 1’s curative effects or its injurious effects but does prevent it from causing an abortion.²¹ What are the moral implications of the availability of the antidote?

Suppose that pill 1 and the antidote are both available and that abortion is also available at any time. A pregnant woman faced with the prospect of developing mild chronic pain would have four options. She could (1) take pill 1 without the antidote, (2) take pill 1 and then take the antidote, (3) have an abortion and then take pill 1, or (4) take neither pill and allow herself to suffer chronic pain. (There would be no point in taking pill 1 and then having an abortion, since pill 1 itself causes abortion.) As in the Three-Option Choice, option 4 is permissible. But is that morally required?

Assume, as before, that the woman’s interest in avoiding chronic pain outweighs the fetus’s interest in continuing to live. Pill 1 would prevent the chronic pain but would kill the fetus. May she take it? If she does, she will then have to choose whether to take the antidote. Suppose that she has taken pill 1 and is deliberating about whether to take the antidote. If she does not, she will have sacrificed her fetus’s weak interest in continuing to live for the sake of her own stronger interest in avoiding chronic pain. That seems permissible. But the problem is that, having taken pill 1, she now has a decisive moral reason to take the antidote. For at that point she would no longer be threatened with chronic pain and, given our earlier assumptions, her interests would no longer be engaged and the only relevant consideration would be what would be better for the fetus. So the woman would have the same reason to take the antidote that she would have not to have an abortion after having taken pill 2.²²

21. I am most grateful to Alexander Pruss for suggesting this possibility.

22. Her reason to take the antidote after taking pill 1 might be weaker than her reason not to have an abortion after taking pill 2 if it is worse, other things being equal, to cause than to allow a fetus to die.

But if she takes the antidote, the result will be the same as it would if she were to take pill 2 (were it available)—that is, she will have avoided chronic pain at the cost of causing her fetus to suffer a worse form of chronic pain. So she may not take pill 1 and then take the antidote. She must not, therefore, take pill 1, at least while she is still pregnant, since she can anticipate that if she does she will then have a decisive reason to take the antidote. (Notice that taking pill 1 and then taking the antidote produces the same effect as pill 2, though through two distinct acts—just as taking pill 2 and then having an abortion distributes the combined effects of pill 1 between two distinct acts.)

The only remaining curative option is for the woman to have an abortion and then take pill 1. This, I believe, would be permissible. For just as in the case we discussed in which pill 2 was the only treatment option, the fetus's presence in her body constitutes a moral obstacle to her being able to do what is necessary to avoid suffering chronic pain. Since we are assuming that her interest in avoiding the pain outweighs the fetus's interest in continuing to live, it is permissible for her to have an abortion as a means of enabling herself to satisfy her interest in avoiding the pain.

So, although she may not simply take pill 1, either with or without then taking the antidote, she may have an abortion and then take pill 1. Yet notice that if she has an abortion and then takes pill 1, this will be worse for the fetus and no better for her than if she had taken pill 1 and then taken the antidote. Hence we have here another instance of the Pareto Paradox.

Suppose now that, as in the case of the Three-Option Choice, abortion is not an option in this woman's society except as a side effect of pill 1. In this situation, the woman's options are (1) to take no pill, (2) to take pill 1 and then take the antidote, and (3) to take pill 1 without taking the antidote. Here the only permissible option seems to be to take neither pill. For if she were to take pill 1, she would then have an unopposed and therefore decisive reason to take the antidote, but if she were to take the antidote she would inflict on her child a greater harm than she would have avoided. Anticipating the reason she would have to take the antidote, she ought not to take pill 1.

If there were no antidote, it would be permissible for her simply to take pill 1 as a means of treating her condition. But once the antidote becomes an option, pill 1 ceases to be permissible. One possibility, therefore, would be for the woman preemptively to destroy the supply of the antidote on the ground that it posed a moral obstacle to her ability to satisfy her interest in avoiding chronic pain. For if there were no antidote, she would then be free to take pill 1. Perhaps if the destruction of the antidote would not be worse for others, this would be a rational

and permissible course for her to adopt. But it seems very odd to suppose that she would have any moral reason to do this.

XII. LEGISLATION

The last few sections have been devoted to paradoxes that are principally of theoretical interest. In closing, I will return to practical matters. I have argued that, given certain common and plausible assumptions, the infliction of prenatal injury is seriously morally objectionable. But abortion, typically, is not. Yet abortion is not, in general, an acceptable remedy for prenatal injury. A woman who injures her fetus has decisive moral reason not to have an abortion, unless the injury is so severe as to make the child's life not worth living. Moreover, women ought not to act in ways that they know carry a significant risk of prenatal injury with the intention of having an abortion if an injury results. There are, however, exceptions to these last two claims if, as many believe, there is a period in pregnancy when the fetus has no interests and no significant moral status.

But despite the moral gravity of prenatal injury, there are substantial moral impediments to enforcing legal restrictions on the injuring of fetuses by pregnant women. And the obstacles to implementing legislation against prenatal injury caused by third parties who assault pregnant women seem equally daunting. The recent legislation treats the fetus as a second, independent victim of an assault against a pregnant woman. But it fails to distinguish in the right way between an assault that kills the fetus and an assault that injures it in a nonlethal way.

Let us put aside the effects on a pregnant woman of having her fetus killed and of having it injured. Traditional legislation that recognizes that a pregnant woman is doubly victimized by an assault—victimized by being physically harmed and victimized by the killing or injuring of a being about which she cares deeply—can account adequately for the wrong done to the woman. Our concern is with how the damage to the fetus affects it as an independent victim. And if the argument in Section III is right, killing a fetus merely frustrates a weak interest of a being with low moral status, while nonlethal prenatal injury may frustrate the strong interests and violate the later rights of a person. Acts that are objectionable to such divergent degrees ought not to be treated alike by the law.

Yet the obstacles to treating these crimes differently are obvious and formidable. It would, among other things, be difficult for people to understand why the law would punish a milder assault that merely injured a fetus more harshly than a more vicious assault that killed a fetus. More important, if an assailant who kills a fetus would be guilty of a lesser crime than one who merely injures a fetus, then anyone who assaults a pregnant woman would have a reason to ensure that his assault

was fatal to the fetus. If he was in doubt about the lethality of his initial assault, he would have an incentive to strike again to make sure he finished the job. A law that established such an incentive would be pernicious.

This article therefore concludes with a dilemma: if legislation distinguishes morally between lethal and nonlethal prenatal injury, it will establish perverse incentives; but if it does not, and treats the killing of a fetus as a serious crime on a par with injuring it, it will pose a threat to abortion rights by implicitly assigning the fetus a higher moral status than it actually has.