Wrongful Life and Abortion

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Introduction

Many of us believe that to bring new life into the world is at least sometimes morally wrong. This belief is particularly liable to surface when we consider cases in which procreators cause the existence of a child with a significantly restricted quality of life – for instance, as a result of congenital disease or disability. Theories of *wrongful life* (WL) explain this thought by claiming that the imposition upon a child of an existence of poor quality can constitute an act of harming, and a violation of the child's rights. The idea that there can be WLs may seem intuitively compelling. For instance, it may seem natural to think that, when procreators disregard medical advice, and have a child whose life will include relentless suffering, this child is the *victim* of his parents' actions.

As this paper argues, however, liberals who commit themselves to WL theories may have to compromise some of their other beliefs. For they will thereby become committed to the claim that some women are under a stringent moral duty to have an abortion: a duty that could, without injustice, at least sometimes be enforced by the state. WL theories in other words imply that some women will lack a *right to choose*, under which both the decision to abort, and the decision to carry the fetus to term, are protected against interference.

Liberals face a dilemma, then, between rescinding their commitment to either (a) the rights of future people not to be subjected to a harmful existence, or (b) the

rights of women to refuse an abortion. Yet interestingly, bar a few oblique references, WL theorists tend not to explore or acknowledge this implication of their views. F.M. Kamm (1992, p. 173) says merely that, if there is a period in pregnancy when the fetus lacks moral status, then holding women under a duty to abort to prevent a WL 'might have some merit'. And Seana Shiffrin (1999, p. 117 n. 2) acknowledges only in a footnote that the complaint of WL consists in the charge that 'the parents should not have conceived or should have aborted'. To my knowledge, only David Benatar has discussed in any detail what the complaint of WL implies for women's abortion decisions. In his book, *Better Never to Have Been*, he defends what he calls the 'pro-death' view, according to which, at least in the early stages of pregnancy, it is 'preferable' that a woman have an abortion, rather than allow a child to exist in a harmed state (Benatar 2006, p. 161). His argument to that effect is carefully qualified, as follows:

> My argument has not been simply that pregnant women are *entitled* to have an abortion (in the earlier stages). I have argued for the stronger claim that abortion (during these stages) would be *preferable* to carrying the fetus to term. This is not the same as arguing that abortions should be forced on people… at least for now we ought to recognize a legal right to reproductive freedom… Thus my conclusions should be viewed as recommendations about how a pregnant woman should make use of the freedom to choose whether or not to abort. (Benatar 2006, pp. 161-2).

As we shall see, Benatar here fails to recognise just how radical are the implications of WL theories for women's reproductive rights. First, whilst he claims only that it would be 'preferable' for a woman to abort to avoid harming a future person, those

theories in fact imply, more strongly, that abortion is in some cases compulsory. Second, he claims that a legal right to choose ought to be respected. Yet, as I argue, theories of WL suggest that it would not in at least some cases be unjust for the state to abridge that right.

Before I begin, some preliminary remarks. First, for the sake of expository ease, my discussion often centres on WL cases involving children born with congenital diseases or disabilities. Note, however, that, under WL theories, healthy, non-disabled persons can also be harmed by being caused to exist, if their lives are burdened in other respects – for instance, as a result of severe poverty.

Second, in making my case I assume, in keeping with much of the Pro-choice philosophical literature, that prior to its acquisition of the capacity for consciousness, at somewhere between the 20th and 28th week of pregnancy, the fetus is not the kind of being that can be harmed, or wronged, by having its death brought about. For it is not a subject of experience during this time, and accordingly cannot be ascribed interests or moral status.

The version of this view that I believe to be the best appeals to an account of diachronic personal identity under which we are essentially minded beings, who do not come into existence until the fetal brain begins to exhibit conscious mental activity (McMahan 2002). If this is correct, it strongly supports the permissibility of early abortion (that is, of abortion performed prior to the onset of fetal consciousness). Indeed it implies that early abortion, insofar as it destroys a mere some*thing* (a non-conscious organism), and not a some*one* (a minded subject), is morally equivalent to contraception (McMahan 2002, p. 267).

The foregoing account of our metaphysical status and origins is highly controversial, however, insofar as it is at odds with two claims which many take to be

'educated common-sense' – namely, that we are essentially human organisms, and that we begin to exist in the womb whenever an organism is first present (DeGrazia 2005, ch. 1). If these claims are true then we each once existed as a non-conscious fetus (since the conceptus plausibly constitutes an organism by around two weeks post-conception, at latest). The latter conclusion, however, need not be incompatible with an evaluation of early abortion as morally tantamount to contraception. For even if we *were* once non-conscious fetuses, an abortion performed then would not have frustrated any interests of ours: rather, it would have prevented our interests from ever existing. Accordingly, if we were once non-conscious fetuses, our existence at this time lacked moral significance (Benatar 2006, p. 134). In what follows, I shall sometimes claim that we begin to exist when the fetus becomes conscious. At these junctures, those who believe that we existed earlier can continue to subscribe to my arguments by making a mental reservation. To the claim that we did not exist as a non-conscious fetus, they can add: 'in a sense that bears moral significance'.

As we shall see below, if we do not come into existence (in a sense that bears moral significance) until the fetus becomes conscious, then an abortion performed before this point is not merely permissible, but sometimes mandatory, to prevent a WL. First, however, let us explore more fully what the complaint of WL involves.

The idea of WL

Consider the child whom Parfit (1984, p. 391) calls *The Wretched Child*:

> Some woman knows that, if she has a child, he will be so multiply diseased that his life will be worse than nothing. He will never develop, will live for only a few years, and will suffer pain that cannot be wholly relieved.

To say that a life is 'worse than nothing' (or 'not worth living') is to say that it contains a ratio of burdens to benefits that is overall negative, such that every increment of its duration is a net harm to the individual whose life it is. A number of medical conditions can, in isolation or in concert, plausibly be held to blight a life in this way.[1] When they read about cases like that of the Wretched Child, many people strongly believe not only that the woman *harms* her offspring, by imposing such an unremittingly awful existence upon him, but also that she *wrongs* him. Liberals in particular are likely to find the latter inference, from harming to wronging, compelling. For the condition that must generally obtain, on a liberal view, for the infliction of harm to be permissible – namely, the provision of consent – is in the case of the Wretched Child clearly absent.

The claim that an individual can be harmed, and thereby *wronged*, by his being caused to exist is constitutive of WL theories, as I shall herein understand them. This is only one perspective on the morality of procreation, note, and stands in contrast to accounts which appeal, for instance, to *impersonal principles of beneficence*, or to the *virtues* possessed by responsible procreators. Philosophical interest in the idea of WL has grown enormously in recent years (see, *inter alia*, Benatar 2006; Feinberg 1992, pp. 3-36; Harris 1998, pp. 99-119; Heyd 1992, pp. 21-38; Kamm 1992, pp. 173-4; Kamm

[1] For example dystrophic epidermolysis bullosa, the devastating symptoms of which are described in Glover (1992, pp. 129-30).

2002; McMahan 2001; Shiffrin 1999). But it in fact goes back at least as far as J.S. Mill, who once wrote:

> The fact itself, of causing the existence of a human being, is one of the most responsible actions in the range of human life. To undertake this responsibility – to bestow a life which may be either a curse or a blessing – unless the being on whom it is to be bestowed will have at least the ordinary chance of a desirable existence, is a crime against that being. (Mill 1859/1991, p. 120).

Parfit's Wretched Child certainly doesn't have 'the ordinary chance of a desirable existence'. Many people, moreover, whose lives *are* worth living did not have, at birth, such a chance. Consider, for example:

> *The Paraplegic Child.* A woman has a medical condition, P, which for her is asymptomatic, and which will disappear within two months. She is told that if she conceives while she has P, she will pass the disease to the fetus, thereby causing it to be a paraplegic. Though her child will, throughout its life, suffer restricted motility and other bad effects, its life will predictably be worth living. If she waits two months, she can conceive a different, normal child.[2]

Suppose this woman does not wait, and has the Paraplegic Child. Common-sense morality affirms that, as in the Wretched Child case, she acts wrongly, by doing what is harmful to her child. Yet this common-sense judgement is beset by Parfit's much-discussed *Non-Identity Problem* (Parfit 1984, ch. 16). Briefly, according to the Non-

[2] I here amend an example from Parfit (1984, p. 367).

Identity Problem, the Paraplegic Child is not harmed by what the woman does, since *he* could not have existed without being a paraplegic, and his disability does not so greatly restrict the goods his life contains as to render it not worth living. Although the woman could have conceived later, she would then have had a different child. This would not have been better for the Paraplegic Child. Thus, he cannot complain about her choice.

Faced with the Non-Identity Problem, believers in WL have tended to adopt one of two strategies. The first group accepts the force of the Non-Identity Problem, and concludes that a complaint of WL is only appropriate where the life of the child is worse than nothing. These theorists take what we might call a *minimalist* view of the scope of WL.[3]

A second group argues that the fact of non-identity is no barrier to regarding the Paraplegic Child as a victim of his parents' misconduct (see, e.g., Benatar 2006; Kamm 2002; Shiffrin 1999). On their view, it is not necessary, in order for a person to be wronged by being caused to exist, that he be harmed *overall*, as minimalists maintain. Rather, it is enough that *specific* interests of his are defeated. These writers draw on scenarios in which it seems clearly impermissible to frustrate a person's interest in the course of doing what is better or no worse for him on balance. Shiffrin (1999, p. 127), for instance, cites the case of a benefactor who drops a cube of gold from a great height, simultaneously breaking a person's arm and delivering to him an overriding benefit. Analogously, some theorists of WL would no doubt say of the Paraplegic Child that, although his life contains sufficient compensatory

[3] For statements of the minimalist view, see, e.g., Feinberg (1992, pp. 3-36), and Buchanan *et al* (2000, pp. 222-57).

benefits as to be worth living, the woman harmed him in causing him to exist with a disability that dooms certain of his weighty interests, and so violated his rights. The fact that he could not have enjoyed the benefits of life without being a paraplegic, as the Non-Identity Problem emphasises, is on this view a red herring.

Philosophers who claim that causing-to-exist can wrongfully harm a child even where he has a life worth living must equip their view with a threshold on what counts as a harmful existence if they are to avoid the conclusion that procreation is *always* objectionable. For we all have deficiencies in our endowments and circumstances that thwart certain of our interests. One such threshold is Mill's 'ordinary chance of a desirable existence'. But numerous other thresholds could, of course, be drawn.[4] Theories of WL that appeal to a threshold more generous than that of a life barely worth living we can call *sufficientist*.

Finally, it pays to note the availability of a third position on the scope of WL: the *radical* view.[5] This is the view that refuses to draw a threshold on what counts as a harmful existence, and embraces the conclusion that *all* voluntary procreation is

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[4] See, in particular, F.M. Kamm's discussion of what she calls the 'minima', in Kamm (1992, ch. 5) and Kamm (2002).

[5] I say that this view is *available* to believers in WL; it is an interesting question whether any philosophers actually hold it. Benatar (2006) and Shiffrin (1999) gesture towards it, in claiming that all procreation imposes significant harm. Yet they explicitly commit themselves only to the claim that procreation is *pro tanto* objectionable, and are agnostic about the further claim that it is always all-things-considered wrongful. Nonetheless, both make comments which strongly imply the radical view. For instance, Shiffrin (1999, p. 137) says, of all procreation, that it seems 'in tension with the foundational liberal, anti-paternalist principle that forbids the imposition of significant burdens and risks upon a person without the person's consent.'

wrongful. Many will undoubtedly think the radical view too counterintuitive to warrant consideration; I mention it mainly for the sake of completeness.

So much, then, for the variety of WL theories. I now explain what they portend for women's abortion rights.

How the idea of WL implies that some abortions are obligatory

WL theorists refer to the wrongful act of causing a child's existence. But there is no act which results, all at once, in the existence of a child. Procreation is not like the science-fiction scenario discussed by Parfit (1984, Part III), in which a person is created by a replicating machine in seconds. I earlier cited the view that we do not begin to exist until the fetus becomes conscious. If this is correct, and if, as WL theorists argue, coming into existence can (in a greater or smaller range of cases) be a harm, then it follows that the act of conception need not inevitably cause this harm. Rather, conception begins a causal chain that results in harm *if an early abortion is not performed.* Only in the absence of such an abortion will there be a new subject of experience, with interests that can be advanced or frustrated.

In light of this, WL theorists are implicitly committed to the conclusion that, in a range of cases, a woman who conceives a fetus for whom existence would be harmful is under at least a *prima facie* duty to seek an early abortion. Let us focus on the most clear-cut case, in which a woman, like the mother of the Wretched Child, conceives wittingly, knowing that her child will have a harmful disease or disability. In this case it would be incoherent for a WL theorist to deny that the woman is under a *prima facie* duty to have an abortion to prevent the child from existing. For it is uncontroversial among deontologists that, when a person culpably imposes a threat

of wrongful harm upon another, she acquires a special duty, owed to the person she has placed in jeopardy, to deflect the harm if she can.[6]

Now, if an early abortion is not performed, and the fetus becomes conscious, it will ordinarily acquire an interest in continued life, such that there will be no reason to abort it for its own sake (such, indeed, that there will be a reason *not* to). But there is an exception here if the woman is carrying a fetus whose postnatal life will be worse than nothing. In such cases, the fetus' future holds no good in prospect; hence, it will never acquire an interest in continued existence, and will not be harmed by a late abortion. On the contrary, a late abortion would here *prevent* the fetus from undergoing the harm lying in its postnatal future. To prevent a WL, a woman who intentionally conceives a fetus, knowing that it cannot lead a life worth living post-birth, is therefore under a *prima facie* duty to have a late abortion if she fails to have an early one. Indeed, assuming that the life of the conscious fetus is of neutral value, there appears to be no moral (as opposed to prudential) reason for her to prefer an early over a late abortion.[7]

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[6] Considerably more controversial is the question whether a person is under a duty so to act when she is blameless, or only partially responsible, for imposing the threat of harm. I return to that issue in the paper's final section.

[7] Note that some conditions that render life not worth living manifest themselves not at birth, but only later. For instance, Tay-Sachs disease strikes after six months of normal neonatal development. In cases where the fetus has a condition that is incompatible with a worthwhile life, but of delayed onset, WL theories do *not* imply that the woman is duty-bound to abort, since the harm to the infant can be prevented via postnatal euthanasia. However, for conditions that would be symptomatic at birth (such as dystrophic epidermolysis bullosa, mentioned at fn. 3) abortion is the only post-conception option that will forestall the harm.

Insofar as conception only begins a causal chain that will culminate in harm absent an abortion, someone might infer that conception itself is not morally objectionable, under WL theory, if the remedy of abortion is available. However, this might not be so. Whether conception is objectionable depends upon whether the woman is certain that she will be able later to obtain an abortion. If she is not, the woman acts wrongly in conceiving, for she thereby initiates a harmful chain of events without being clear of her ability to later derail it. A failure subsequently to *attempt* to derail it will then constitute a second, distinct wrongdoing. In illustration, consider an analogy. Here, I cause a gas leak, knowing I may not be able to move a bystander to safety in time (first wrongdoing). I then omit to try to move him, ensuring that he is harmed (second wrongdoing).

We have seen that, under WL theories, a woman who knowingly imposes a threat of certain harm upon her future child via conception is under a *prima facie* duty to avert the threat by having an abortion. Later I shall address cases where the woman exhibits a lesser degree of responsibility for imposing the threat. First, however, I explain why two obvious ways in which one might seek to rebut the conclusion that I have developed thus far will not work, if the complaint of WL is ever apposite.

Why an appeal to the woman's interests cannot block this conclusion

Abortion carries non-negligible risks to a woman's health, insofar as it involves surgical intervention under general anaesthetic. And even where the physical risks are extremely low, as in a chemical abortion, the emotional trauma to an unwilling woman could be devastating. Accordingly, the most obvious objection to the foregoing argument avers that, since there are strict limits to the costs we can be

expected to bear to prevent harm to others, and since the costs associated with abortion can be very high, no woman is obligated to incur (a high risk of) them to prevent her child from being born and suffering harm.

This objection is, however, inapposite. It cites the limits on the costs we can be expected to bear in coming to the aid of others who are in danger through no fault of ours, rather than to the costs we must bear in order to avoid wrongfully harming others. Crucially, the latter costs outstrip the former.

To see this, consider an analogy. Here, at time t_1, I knowingly cause a trolley to be launched down the track, whereupon, at t_3, it will seriously injure a child. These being the facts, at t_2 I am under a duty to take all such steps as are necessary to prevent my earlier act from causing harm. In deflecting the harmful consequences of my earlier act I can be expected to accept costs at least as high as those that would otherwise redound upon the child. For I have made it the case that somebody must be harmed, and justice now requires that this be me rather than an innocent victim. Thus, in the last resort, I must throw myself under the trolley to halt it.

Symmetrically, if, a woman at t_1 knowingly conceives a fetus with a condition that would constitute a rights-violating harm, then she is at t_2 obligated to abort to prevent the harm occurring at t_3. To this end she can be asked to accept costs at least as high as those with which the child is threatened. And, in fact, even though we are not obliged to accept greatly disproportionate costs to avoid harming others, the woman can be expected to incur *somewhat* higher costs than those with which she threatens the child. To illustrate, suppose that, while driving, I am taken by the malicious urge to run over and break your foot. You, however, have done nothing to make yourself liable to be so attacked. Suppose also that, at the last moment, I have a change of heart. I cannot be expected to swerve into a tree, killing myself, to avoid

running over your foot. But if I would break both my feet, I can be expected under justice to accept this somewhat higher cost.

Why an appeal to the father's joint responsibility for the existence of the fetus cannot block this conclusion

Someone might next object that to hold the woman under a duty to accept the high costs associated with abortion ignores the fact that she did not bring about the conditions which threaten harm to the child by herself. Rather, she did so with a man, without whose sperm the child could not exist. Consequently, the objection goes, it would be unjust to hold the woman, acting alone, under a moral requirement to avert the threatened harm.

Note that there are likely to be cases in which a child is caused to have a harmful existence and we think the father is in no way at fault. For instance, perhaps he was fastidious in utilising preconception genetic screening, whilst his partner hid the fact that she was carrying a genetic defect. However, ignore this, and suppose that both procreators did indeed know that their child would be harmed if born, yet conceived deliberately nonetheless. An appeal to the father's joint responsibility for the existence of the fetus can show at most that, since the woman did not impose the threat of harm alone, she can be expected to incur costs that are only *half as high* as those that would be suffered by the child, in the course of fulfilling her duty to abort. And even if this is true, it does not do much to block the claim that she is under the duty. For, in many cases, an abortion would not cause more than half as much harm as the parents together risk imposing on the child. We can predict this confidently even though interpersonal comparisons of well-being can only be made in a rough-

and-ready way. It seems clear, for instance, that many abortions will not be more than half as burdensome as lifelong severe chronic pain.

In fact, however, it is not true that the woman can be expected to undergo only half as much harm. For purposes of determining the extent of the costs she can be asked to bear in averting the threat, the woman ought to be evaluated as though she were its *sole* initiator, notwithstanding that she acted in concert with another. The converse claim rests on what Parfit (1984, pp. 67-70) has called the *First Mistake in Moral Mathematics*, namely the *Share-of-the-Total View*. On the Share-of-the-Total View, the harm for which we are individually responsible when we act in a group that causes harm is the total harm, divided by the number of people who act. But, as applied in particular cases, the Share-of-the-Total View often produces the wrong results. To see this, consider an example (for the sake of which, assume that the extent of a person's pain can be measured in units):

> *Torture.* I am one of a pair of torturers, about to inflict pain, via an electrical device, on one of my victims. Before me on my control panel are two buttons. If I press button A, one of my victims will suffer 65 units of pain. If I press button B, this will open a circuit which is a necessary but insufficient condition of a second victim's suffering 100 units of pain. The other necessary condition is that my accomplice also presses a similar button. I press button B, and my accomplice presses his similar button.

On the Share-of-the-Total View, when I press button B, and my accomplice acts likewise, I am responsible for causing 50 units of pain. On this view, I act less wrongly than if I had pressed button A, and caused 65 units. But this is the wrong

result. Because of what I do, in pressing button B, somebody suffers a greater pain. Had I not acted, this victim would have suffered *no* pain, even had my accomplice pressed his button. It would be perverse, then, if I were judged less harshly for pushing button B.

As Parfit argues, when we impose harm in concert with others, and the participation of all is necessary in order to do so, then for at least some evaluative purposes it is appropriate that we be considered morally responsible for the *total*, not merely a share, of the harm. Consider punishment. In Torture, both my accomplice and I ought to be punished as severely as if we had inflicted the 100 units alone. Imagine also a revision to this case. Here, after we have pushed our buttons, there is a short delay before the victim suffers the pain. I could prevent this by putting my hand on an exposed wire, diverting the current that powers the torture device. If I do this I will experience 100 units of pain. If my accomplice and I were to simultaneously do this, we would each experience only 50 units. But only I can reach the wire in time. Again, I ought plausibly to be considered responsible for the total pain that will otherwise befall the victim, such that I can be asked to suffer the full 100 units, and not merely 50 (by the same token, my accomplice could also be asked to do this, if only he could reach the wire).

The same remarks apply to the case in which both the man and woman knowingly impose a threat of harm upon their future child. The involvement of both was necessary to create the conditions that will now lead, absent the taking of preventative steps, to an impermissible harming. Only the woman can now take these steps. But because, if she had not acted, there would be no threat, she can be held under a duty to have an abortion, and to accept costs proportionate to the total harm that would otherwise befall the child.

A legal duty to abort?

I have shown that a woman who intentionally conceives a child, knowing that, if allowed to be born, he will be the victim of a WL, is under a moral duty to terminate her pregnancy, and can be expected to bear high costs in doing so. Should her moral duty be transformed into an enforceable legal duty? Her wrongdoing is of a general type (harmful rights violations) which it falls within the state's authority to prevent. However, that does not suffice to show that the state ought to interfere *in this particular case*. First, the woman might have a claim that it not do so (which would be an example of a *right to do wrong*). Second, even if she lacks such a claim, enforcement may be ruled out on grounds unrelated to her rights.

Now, as it happens, WL theorists are often sympathetic to legal enforcement, at least on the assumption that it would be practically feasible, and would not undermine any more urgent moral goals. Indeed, where the law is concerned, they tend to address themselves to the question of what form enforcement ought to take, and how far it ought to be extended, rather than whether it ought to take place at all (see, e.g, Kamm 2003; Feinberg 1984, pp. 97-104, and 1990, pp. 25-32; Shiffrin 1999). This implies a belief on their part that causing a WL is not the kind of wrongdoing in which procreators can have an unrestricted moral claim to engage. This should be no surprise, given what the wrongdoing is seen to consist in – namely the causation of serious, rights-violating harm.

In this section, I argue first that *if* contributing to a WL ought to be made unlawful then specific sanctions ought to attend a woman's failure to have an abortion, over and above any that attend her role in the conception of the child. I then consider objections to imposing legal liability for WL. I concentrate on David

Benatar, a WL theorist who says (2006, p. 110) that his 'liberal instincts' are 'troubled' by the prospect of the state's imposing restrictions on people's legal rights to reproductive freedom. Benatar deploys two arguments designed to stave off the conclusion that these rights should be seriously eroded, appealing respectively to the *futility* of overzealous enforcement, and to the presence of *reasonable disagreement* between citizens over when and to what extent existence is harmful. I shall argue that these are exceedingly slim reeds on which to hang women's legal rights to refuse an abortion.

As noted a moment ago, WL theorists often suggest that the moral duty not to impose a harmful existence upon one's offspring is suitable for legal enforcement. Generally, they favour civil enforcement, with compensatory and punitive damages awarded to the child. However, some might be prepared to go further. For, as Feinberg (1990, pp. 25-32) argues, it would not violate liberal principles regarding the scope of the criminal law to recognise WL as a penal matter.

Which mode of enforcement is the more appropriate? Civil enforcement might be preferred on grounds that it allows the wronged party himself, or his representatives, to decide whether it is in his interests to initiate proceedings. Yet that also presents a problem, as follows. In cases where the victim's life is not worth living, there will be little point in starting a civil suit. For it is part of the meaning of such a life that the victim's suffering cannot be satisfactorily relieved or compensated. But if there is no incentive to begin civil proceedings in such cases then, perversely, some of the most serious wrongdoers will escape the law. This may incline WL theorists more favourably towards criminal enforcement (which they may also think better communicates the gravity of the wrongdoing). In sum, then, if the duty not to cause a WL ought to be legally enforced, a woman's refusal to have an abortion might

expose her to either civil or criminal sanctions, and there are good reasons for WL theorists to prefer the use of the latter over the former in at least some cases.

Now, a WL theorist might say that whatever penalties the woman attracts will be due to her involvement in the procreative enterprise generally, not her failure to abort specifically. But this response will not do. As we saw above, if the woman knows when she conceives that she will later be able to avert the threatened harm by having an abortion, the act of conception itself is not wrong. In these cases, if the woman is to face a penalty, it can only be for the wrongdoing of failing to undergo an abortion. Moreover, in cases where the woman conceives knowing there is a chance that she will later *not* be able to forestall the harm, both conception and the failure to abort are wrong. On the (fairly innocent) assumption that legal sanctions ought to accurately reflect the extent of the offender's wrongdoing, the impermissible failure to obtain an abortion should attract a separate penalty (either a separate criminal charge, or liability to pay additional damages).

On this same subject of ensuring that legal repercussions fit the severity of the wrongdoing, notice also that, even if both partners are equally responsible for imposing the initial threat of harm via conception, the female defendant in a WL case will still be held to have committed a more serious wrongdoing overall. For, unlike the man, she not only acted so as to impose a risk of harm upon her child, but also did nothing subsequently to alleviate this risk, when she could have done so. This seems significantly to compound the gravity of her wrongdoing. Shiffrin claims (1999, p. 137) that the act of wrongful conception is analogous in some respects to

setting a bomb that will one day harm a child.[8] If so, the failure to have an abortion is like watching the fuse burn when one could have snuffed it out. Accordingly, when its underlying logic is rendered explicit, WL theory implies that, even when procreative partners were equally responsible for establishing the threat of harm through conception, once the harm is actualised (the child is born) the woman should nonetheless receive the lion's share of legal disapprobation.

I have discussed enforcing the duty to abort via the imposition of civil and criminal penalties. However, the enforcement of a duty can also take the form of preventative restraint or compulsion. In the present context, this amounts for physically forcing terminations upon unwilling women – a policy which I assume few liberals would be willing to countenance. Buchanan *et al* write (2000, p. 241) that the 'use of government power to force an abortion on an unwilling woman would be so deeply invasive of her reproductive freedom, bodily integrity and right to decide about her own health care as to be virtually never morally justified.' Note that they claim it is *virtually* never justified – they do not utterly rule it out. And indeed, as believers in WL, we will not be able to object to all forced abortions – at least not on grounds of women's rights over themselves. Consider a woman who, having knowingly conceived a fetus with a harmful disease, refuses to abort right up until the last moment when one could be performed. This woman is in the process of acting

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[8] Shiffrin uses this example specifically to illustrate how an act performed now can violate the right of an individual who does not yet exist. I also use it to illustrate how acting in a way that will lead to a rights violation, and then failing to take preventative action when one can do so, is especially wrong. That limited point is not undermined by the fact that the bomb case is not a perfectly analogy to WL (principally because, in the bomb case, the act which leads to the rights violation does not cause the existence of the victim).

wrongly: if she continues to refuse, her child will be harmed. She may, therefore, be acting so as to *forfeit* the rights Buchanan *et al* identify. To determine whether she does so, we must decide whether her wrongdoing is serious enough to justify the damage to her interests of a compulsory abortion. In other words, we must decide whether the harm we would thereby inflict upon her is *proportionate* to the harm she would otherwise inflict upon her child. And there seems no *a priori* reason to rule out that, in some cases, it *will* be proportionate.

Theorists of WL who seek a *blanket* ban on forced abortions cannot, then, do so via an appeal to women's rights. Instead, they must adduce other, *non-woman regarding* objections. For example, they could argue that the rest of us would not want to live in a society in which such brutal policies are carried out. Such arguments may be decisive. But they may not wholly reassure defenders of a woman's right to choose who are discomfited by the implications of WL theories. For they implicitly concede that some pregnant women will enjoy non-interference in completing their pregnancies only as a matter of *grace*, in the sense that they are not entitled to it, and would not, if the forcings were carried out, be able to mount a complaint about it on their own account.

I have argued that, if WL ought to be recognised as a legal wrong, then a woman's culpable failure to have an abortion ought to attract specific legal penalties. However, could a WL theorist argue that the duty not to cause WLs ought to remain an exclusively moral one? As noted above, Benatar has given us two reasons for the state to resist heavily coercing procreative decision-making, pertaining to the alleged futility of doing so, and to the presence of reasonable disagreement over whether and to what degree existence is harmful. Importantly, he does not claim that state interference with procreators is *never* appropriate. Indeed, he tells us (2006, p. 112)

that, '[s]ince there is no intrinsic reason why we should treat harm caused by reproduction any differently from comparable harm caused in other ways, we should be prepared to reconceive the limits of reproductive liberty.' Someone else, however, might think that Benatar's arguments are sufficient to rule out interference altogether. I will argue, by contrast, that they do little to mitigate the anti-choice implications of WL theory.

Turn, then, to Benatar's argument from futility. This claims that enforcement would prove unworkable. Unfortunately, Benatar only considers the prospects for enforcing an *exceptionless* ban on childbearing (justified on grounds that existence always constitutes serious, wrongful harm). The possibility of such a ban's being effectively enforced may indeed be slim. People may well, as Benatar envisages, always find ways to evade the law, with much procreation being driven underground. However, even if a duty to abstain from procreation could not be *universally* enforced, this is not to say that it could not be enforced often enough for it to be a morally worthwhile goal for the state to do so. And indeed, in many cases, we can envisage that the state *will* have sufficient evidence and opportunity to open up proceedings. First, the wrong of WL is not standardly undetectable: there will generally be *pro tanto* evidence available that a wrongdoing was committed in the form of a child in a harmed state. Second, the woman's medical records can be accessed in order to discern whether she had undergone genetic counselling, and was aware of the risks at the time of conception. Third, her sexual partner, genetic counsellor and others may be able to testify as to the circumstances of conception, her expressed intentions, and so on. In such cases, it will be practically feasible to enforce her duty.

Benatar also objects to enforcement, under the heading of futility, on grounds that, even where feasible, it requires breaches of privacy. Here the suggestion may be

that enforcement is futile in the sense of being morally self-defeating: it would do more harm than good. However, although enforcement would generally be at some cost to privacy, it seems that this would at least sometimes be justified in the name of deterring the causation of serious harm and/or compensating victims. Benatar himself advises us (2006, p. 112) that it is a good guide, in thinking about the extent to which the law ought to interfere in procreative choices, to think about whether the causation of a comparable harm would escape sanction in a non-reproductive case. In that vein, if one thinks that some loss of privacy is an acceptable price to pay to ensure that, say, the malicious or reckless transmission of HIV is prosecuted, as is now done in many countries, then by that token privacy-based concerns are not powerful enough to trump the goal of deterring and punishing instances of WL involving the infliction of some seriously life-limiting diseases, at least.

Let us now turn to Benatar's claim that *reasonable disagreement* over WL gives the state a reason to abstain from imposing restrictions on reproductive liberty.[9] At first sight, this proves too much. For if we ought to avoid interfering with people in the name of holding them to what is *ex hypothesi* their moral duty (when other conditions on the use of coercion, such as proportionality, forewarning, etc., are satisfied), just on grounds that they reasonably disagree that the duty exists, then by parity of reasoning we should not enforce (e.g. by putting tax evaders in prison) well-founded principles of distributive justice which do not command universal assent (as none do). Just as importantly, Benatar never explains just what moral difference reasonable disagreement is supposed to make. Let us consider the possibilities.[10]

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[9] I am grateful to an anonymous reviewer for emphasising the need to confront this objection.

[10] In the next two paragraphs, I draw on May (2005, pp. 338-42).

First, it might be supposed that the significance of reasonable disagreement lies in its bringing into relief the sheer philosophical complexity of the issues at hand. Awareness of this, it might be argued, should incline us to resist pressing for (the most intrusive types of) enforcement, as a way of acknowledging that our position may not in the end be the correct one. This is an objection based on *epistemic frailty*. However, it fails to justify legal restraint. Uncertainty is a general hazard in all moral argumentation, and does not give us a reason to favour any particular resolution to a moral problem over another. Someone might suggest that foregoing enforcement is the less treacherous path, because it spares women from the harm of unwanted abortion. But failure to enforce is hardly cost-free: it involves exposing future people to the serious (and uncompensated) harm of existence.

Second, it might be argued that it is part of respect for persons that we take into account the views of those who reasonably disagree with us when framing the law. However, it is dubious that respecting others involves capitulating to their mistaken moral views (although it clearly does involve debating them in a civil fashion).

Third, the term 'reasonable disagreement' is associated in particular with Rawlsian *political liberalism*, which holds that, to be legitimate, a law must be defended via exclusive appeal to *public* reasons – reasons, that is, which citizens can in principle accept, irrespective of their comprehensive conception of the good. A friend of Benatar's reasonable disagreement objection might claim that the case for enforcement cannot be made within public reason, since it unavoidably depends upon claims about the moral status of the fetus, and the value of life under adverse conditions, which are strenuously contested by citizens holding different reasonable comprehensive doctrines.

It would take us too far afield to examine whether the case for enforcement can be made within the terms of public reason. However, two points bear noting. First, insofar as Benatar and other WL theorists believe that the law ought not to totally ignore procreative wrongdoing, they are either not political liberals, or do not believe that arguments about procreative harm are inadmissible at the bar of public reason. Second, if they *are* inadmissible, and some version of WL theory is true, then political liberalism cannot accommodate laws that are necessary to prevent and compensate the infliction of serious wrongful harm. That would give us a compelling reason to reject political liberalism rather than the enforcement of WL. In sum, an appeal to reasonable disagreement is not sufficient to divest WL theories of their illiberal implications for women's rights.

The limits of liability

I have argued that, as believers in WL theory, we will have to accept some severe restrictions on the rights of women to complete their pregnancies. I focused on the case of a woman who wittingly conceives, knowing her child will have a harmful impairment. That case was straightforward in the sense that the woman will unambiguously be at fault for causing harm if the child exists. Yet, since fault is a matter of degree, in other cases it may not be so easy to determine whether a woman is obligated to abort, or whether her rights forbid the enforcement of that duty.

In seeking to understand the extent to which a woman is at fault for imposing a threat of harm on her future child, at least three questions are relevant. First, in what frame of mind was conception achieved (i.e. was it done intentionally, recklessly, negligently, etc.)? Second, what was the degree of risk that the child would be harmed if allowed to exist? Third, to what extent was the woman aware of that

risk? Consider a woman who knows there is a 25% chance that any child she conceives will have a harmful genetic disorder, who resolves on those grounds not to procreate, but who nonetheless becomes pregnant as a result of a one-night-stand during which, in the heat of the moment, she fails to use contraception. Is she under a duty to end her pregnancy? Can that duty be enforced without violating her rights?

These are questions to which I cannot give complete answers, but only indicate in broad terms what would be involved in doing so. Some deontologists hold that, where there is only partial responsibility for the imposition of a threat of harm, or the threat is somewhat remote, or foreknowledge of the threat is incomplete, the scale of the sacrifices that the imposer can be expected or made to bear in forestalling the harm declines commensurately. Others argue that, even where we bear little or no fault for threats we impose on others, we must shoulder large burdens to avert them. For instance, in Judith Thomson's very demanding moral theory, even those who threaten harm to others without exercising any agency at all (as occurs, for instance, when the wind turns someone into a human projectile) can be made to bear very high costs, up to and including death, in order to forestall the harm (Thomson 1991). If Thomson is right then by implication even a woman who faultlessly conceives a child who would be harmed by existence can be coercively required to have an abortion.

Clearly, Thomson's view will strike many as rather extreme. But, given the scale of the disagreements in the literature on the question of whether, and to what extent, we must sacrifice ourselves to avoid causing harm to others, where our responsibility for imposing the threat of harm is merely partial, I cannot venture any conclusions regarding exactly what degree of responsibility is required before a women can be considered, under some theory of WL, to be under a duty to have an

abortion. I *have* shown, however, that, if one or other such theory of WL is valid, at least some women will be under that duty.[11]

Accordingly, even though I have not been able to map the precise limits of women's liability, my conclusions nonetheless expose a dilemma for believers in WL: either curtail the basic freedoms of at least some women, or allow violations of the rights of future people. Perhaps, mindful of their implications for women, some philosophers will decide to reject WL theories. Others may think that my conclusions provide a reason to move to a more restrictive view of the scope of WL (i.e. to a view that allows for a lesser volume of complaints). For instance, they might move from the sufficientist view to the minimalist view. It falls outside the scope of this paper, however, to offer recommendations as to how the dilemma to which I have drawn attention should be resolved.

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[11] An anonymous reviewer suggests that, because parents rarely know with certainty before conception that their child will have a harmful impairment, the cases that were central to my discussion will be so rare as to be largely irrelevant for practical purposes. However, recall that, although I focused on WL cases involving impairments, WL theories in fact claim that existence can be harmful for other reasons – for instance, owing to the severe poverty of the child's upbringing, the abusiveness of his home life, and so on. I think that cases in which a person is deliberately created, in the knowledge that their lives will be unavoidably restricted on these sorts of grounds, are by no means statistically irrelevant.

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