

Articles

Fetuses are Like Rapists: A Judith-Jarvis-Thomson-Inspired Argument on Abortion

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1. Introduction

A common view in the line of argument on abortion arising from Judith Jarvis Thomson's seminal piece is that abortion is permissible because the fetus has no right to be inside the woman.¹ If the fetus has no right to be inside the woman, there is then a well-developed debate on whether abortion is a doing versus an allowing (for example, a killing versus a letting die) and an intentional or merely a foreseeable bringing about of death. There is also an extended discussion about whether early abortions kill persons, that is, individuals who would be on a moral par with adult humans, rights-bearers, and so on. In this article, I argue that even if abortion is an intentional killing of a person with full moral rights, it is just. I then argue that if it is just, then it is permissible.

Section 2 of this article addresses whether abortion is just. It begins by providing Thomson's argument on why the fetus has no right to be inside the woman and proceeds to explain why abortion is just. Section 3 argues that if abortion is just, then it is morally permissible. That section argues that there is no duty to save people, and that if there is no duty to save people, then there is no duty to save fetuses. It then notes that even if there is a duty to save, the woman satisfies it.

2. Abortion Is Just

a. Concepts

Following Thomson, it is helpful to have some distinctions before us. Consider her account of a right:

Concept #1: Right. A right is a claim.

¹ See Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971), pp. 47-66.

Concept #2: Justice. One person acts justly toward a second if and only if the first respects the second's right.

Thomson illustrates this through the following case:

Case #1: Greedy Brother

A box of chocolates is given to an older brother. There he sits, stolidly eating his way through the box, his young brother watching enviously. Here we are likely to say, "You ought not be so mean. You ought to give your brother some of those chocolates." If the older brother refuses to give his brother any, he is greedy, stingy, callous—but not unjust.²

The right and justice notions then lead to her account of the right to life:

Concept #3: Right to Life. The right to life is the right not to be unjustly killed. One person infringes on a second's right to life if and only if the first infringes on the second person's right and her doing so kills the second.

Thomson illustrates this notion with the following case:

Case #2: Henry Fonda

If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no right to be given the touch of Henry Fonda's cool hand on my fevered brow. It would be frightfully nice for him to fly in from the West Coast to provide it. It would be less nice, though no doubt well meant, if my friends flew out to the West Coast and carried Henry Fonda back with them.³

These concepts then set up the argument for abortion's being just.

b. Most abortions are killings

Most abortions are killings.⁴ If one considers dilation and curettage (for example, suction curettage), dilation and evacuation (pulling a fetus apart

² See *ibid.*, p. 60.

³ See *ibid.*, p. 55. For an interesting discussion of this case, see Evangelos Protopapadakis, "A Cool Hand on My Feverish Forehead: An 'Even Better' Samaritan and the Ethics of Abortion," *Philosophy Study* 2 (2012), pp. 115-23.

⁴ For other people who argue that Thomson's argument fails because it views abortion as a letting-die problem rather than an issue of permissible killing, see Francis Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist,"

with forceps), dilation and extraction (also known as partial-birth abortion), and so on, they are all killings. They involve a doing, rather than an allowing, that intentionally causes the destruction of the fetus's body that leads to its death.⁵ This is similar to a Normandy peasant who comes upon a Viking raping a woman. The peasant cuts the Viking in half with a broadsword to end the rape. There can be some debate about whether the peasant intends the Viking's death. The peasant might have as his goal the protection of the woman and have in mind his means of disabling the attack and the means of dismembering the attacker, without having the death of the Viking as his goal or the means to his goal, but this is still considered a paradigmatic killing. If this is a paradigmatic killing, then so is abortion.

Case	Event	Mental State	Effect	Relation event & effect	Type
Normandy peasant cuts Viking with sharp blade (sword)	Doing	Intent	Dismemberment	Proximate cause	Killing
Abortion-doctor cuts fetus with sharp blade (suction curettage)	Doing	Intent	Dismemberment	Proximate cause	Killing

Some abortions are not killings. In 2011 in the U.S., 23% of abortions were early medication-abortions. The abortion pill (mifepristone)

International Philosophical Quarterly 32 (1992), pp. 105-18, esp. pp. 116-17; Frances Kamm, *Creation and Abortion* (Oxford: Oxford University Press, 1992), pp. 74-76; Iain Benson, "What's Wrong With 'Choice'," in *A Time to Choose Life: Women, Abortion, and Human Rights*, ed. Ian Gentles (Toronto: Stoddart Publishing Co., 1990), pp. 24-46, esp. pp. 43-44; Stephen Schwarz, *The Moral Question of Abortion* (Chicago, IL: Loyola University Press, 1990), 115-116; Stephen Schwarz and R. K. Tacelli, "Abortion and Some Philosophers: A Critical Examination," *Public Affairs Quarterly* 3 (1989), pp. 81-98, esp. pp. 84-87; Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge, MA: The MIT Press, 1975), p. 30; John Finnis, "The Rights and Wrongs of Abortion: A Reply to Judith Jarvis Thomson," *Philosophy and Public Affairs* 2 (1973), pp. 117-45, esp. p. 141.

⁵ On the notion that abortion is an intentional causing of death, see Patrick Lee, *Abortion and Unborn Human Life* (Washington, DC: Catholic University of America Press, 1996), p. 111; Thomas Hurka, "Review of F. M. Kamm's *Creation and Abortion*," *Journal of Medical Ethics* 20 (1994), pp. 121-22.

causes the fetus to detach from the uterine wall. If a fetus is detached from the uterine wall, then the detachment prevents the woman from keeping the fetus alive.

If one individual detaches himself from another and the detachment prevents the first from keeping the second alive, then the first lets the second die. Medication-abortions involve one individual detaching himself from another where the detachment prevents the first from keeping the second alive (that is, it is a letting die). Hence, a medication-abortion involves one individual letting a second die. If something is a letting die, then it is not a killing. Hence, a medication-abortion is not a killing.

The notion that a medication-abortion involves one individual detaching himself from another and the detachment is a letting die rests on an analogy. To see this, consider a famous case:

Case #3: Violinist

You wake up in the morning and find yourself back to back in bed with an unconscious violinist—a famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. [If he is unplugged from you now, he will die; but] in nine months he will have recovered from his ailment, and can safely be unplugged from you.⁶

Were the hooked-up person to disconnect himself from the violinist, this appears to be a paradigm case of letting die.⁷

⁶ Thomson assumes that one can disconnect oneself from the violinist. See Thomson, "A Defense of Abortion," p. 55. On some accounts, it is wrong to disconnect oneself from the violinist. See David Hershenov, "Abortions and Distortions: An Analysis of Morally Irrelevant Factors in Thomson's Violinist Thought Experiment," *Social Theory and Practice* 27 (2001), pp. 129-48; Peter Singer, *Practical Ethics* (New York: Cambridge University Press, 2011), p. 134.

⁷ Jeff McMahan argues that it depends on who disconnects the violinist. See Jeff McMahan, "Killing, Letting Die, and Withdrawing Aid," in *Killing and Letting Die*, ed. Bonnie Steinbock and Alastair Norcross, 2nd ed. (New York: Fordham University Press, 1994), pp. 383-420. He argues that if the person connected to him disconnects the violinist, it is a letting die. If a third party does so, then in some circumstances it is a killing. Elsewhere, Thomson argues that it is permissible to kill the fetus if that is necessary to detach him. See Judith Jarvis Thomson, "Rights and Deaths," in *Rights, Restitution, and Risk: Essays in Moral Theory*, ed. William Parent (Cambridge, MA: Harvard University Press, 1986), pp. 31-32.

The medication-abortion is similar to the violinist case. A rape victim who takes the abortion pill is similar to the person who disconnects himself from the violinist in terms of the action (disconnection), intention, causal relation, and effect. Hence, if a disconnection in the violinist case is a letting die, then so is the case of the rape victim who takes an abortion pill. If a rape victim who takes an abortion pill lets the fetus die, then so does the pregnant woman who is not a rape victim. Here is a table that illustrates the parallel features.

Case	Subject	Object	Act	Effect	Relation	Type
Violinist	Kidnap victim	Violinist	Disconnection	Death	Cause	Letting die
Pregnancy (Rape)	Rape victim/Pill taker	Fetus	Disconnection	Death	Cause	Letting die
Pregnancy (Voluntary sex)	Pill taker	Fetus	Disconnection	Death	Cause	Letting die

If in a given scenario killing someone is permissible, then so is letting that person die. Thus, if as I argue below, it is permissible for a woman to kill a fetus (or zygote or embryo), then it is permissible for her to let it die.

c. Argument

Here is Thomson's argument for abortion:

(P1) If abortion is unjust, then it infringes on the fetus's right to life.

(P2) Abortion does not infringe on the fetus's right to life.

(C1) Hence, abortion is just. [(P1), (P2)]

Premise (P1) rests on the nature of the right to life. Premise (P2) rests on the following three assumptions:

Assumption #1: No Right. The fetus has no right to be inside the woman.

Assumption #2: Removal. If the fetus has no right to be inside the woman, then it may be removed with proportionate force.

Assumption #3: Proportionate Force. In abortion, the woman uses proportionate force.

Thomson's argument is that sex is not consent for a fetus to be inside a woman. Even if it were consent, she can withdraw it.⁸ Thomson argues that mere intercourse is not consent because it clearly is not present in the case of rape. Nor is it present when a woman has sex with contraception. To see this, consider the following:

Case #4: Burglar 1

The room is stuffy and Alice opens a window to air it. She had had bars installed outside her windows, precisely to prevent burglars from getting in, and a burglar got in only because of a defect in the bars. It would be absurd to say, "Ah, now, he can stay, she's given him a right to use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars and burglars burgle."⁹

The analogy here is to sex with contraception. Just as the owner has not consented to the burglar to enter and stay in the house, the woman has not consented to the fetus to enter and stay in her uterus. The same is true in the case of sex without contraception. To see this, consider the following:

Case #5: Burglar 2

Same as burglar #1, but Alice did not have bars installed outside her windows.

Even if consent had been given, it can be withdrawn. To see this, consider the following case (from me, not Thomson):

Case #6: Party Pooper

Betty has a party and invites everyone to her house. She notices her boyfriend making out with another woman. She tells everyone to leave.

Just as Betty may withdraw consent to partygoers who are in her house even if she earlier granted it, a woman may withdraw consent from a fetus in her uterus even if she previously granted it.

In summary, (P1) rests on the nature of the right to life. The above arguments support the first assumption underlying (P2) (the fetus has no right to be inside the woman). The second assumption (if the fetus has no right to

⁸ For an in-depth defense of Thomson's argument here, see David Boonin-Vail, "A Defense of 'A Defense of Abortion': On the Responsibility Objection to Thomson's Argument," *Ethics* 107 (1997), pp. 286-313.

⁹ See Thomson, "A Defense of Abortion," p. 60.

be inside the woman, then it may be removed with proportionate force) rests on a standard assumption about defensive force being just only if it is proportionate to the threat. An “unjust threat” is a thing that has a significant likelihood of causing unjust harm.¹⁰ I use “threat” as shorthand for “unjust threat.” Here the threat is a trespass.

From here I switch the argument from Thomson’s to mine. What needs to be shown is that in abortion, the woman uses proportionate force. This argument begins with the notion that as a matter of justice, a person may use lethal force to prevent rape:

Case #7: Prison Rape

In prison, a large man (Big Amp) goes to rape a small one (Sheldon). The only way Sheldon can defend himself is to stab Big Amp with a shank. Given the absence of guards and the nature of the shank, it will likely kill Big Amp.

Intuitively, as a matter of justice, Sheldon may stab Big Amp if this is the only way the former can prevent the latter from raping him. On my account, this is due to Big Amp’s forfeiting his right.¹¹ However, this is compatible with Sheldon’s having this right because his right to his body overrides Big Amp’s right to life.¹² It is also compatible with Sheldon’s having this right because Big Amp’s right has a complex content. For example, the right is the following: it-is-wrong-to-penetrate-Big-Amp’s-body-unless-he-consents-or-attacks-another-or-¹³

¹⁰ I am assuming here that only doings, and not omissions, can cause harm and that a doing is a real (non-Cambridge) change in the properties of an object.

¹¹ Those who assert that a criminal forfeits some of his moral rights include Stephen Kershnar, “The Structure of Rights Forfeiture in the Context of Culpable Wrongdoing,” *Philosophia* 29 (2002), pp. 57-88; A. John Simmons, “Locke and the Right to Punish,” in *Punishment*, ed. A. John Simmons et al. (Princeton, NJ: Princeton University Press, 1995), pp. 238-52; Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), pp. 365-66; Vinit Haksar, “Excuses and Voluntary Conduct,” *Ethics* 96 (1986), pp. 317-29; Murray Rothbard, *The Ethics of Liberty* (Atlantic Highlands, NJ: Humanities Press, 1982); Alan Goldman, “The Paradox of Punishment,” *Philosophy and Public Affairs* 9 (1979), pp. 30-46; Roger Pilon, “Criminal Remedies: Restitution, Punishment, or Both?” *Ethics* 88 (1978), pp. 348-57. These theories differ with regard to whether rights-forfeiture is a fundamental feature of rights or explained by a more fundamental principle.

¹² The notion that it is a permissible rights-infringement can be seen in Phillip Montague, *Punishment as Societal Defense* (Boston, MA: Rowman & Littlefield Publishers, Inc., 1995), chap. 5.

¹³ The notion that self-defense involves a narrowly bounded right (e.g., a right to life except-where-necessary-to-save-someone’s-life) is discussed in Judith Jarvis Thomson, “Self-Defense and Rights,” in *Rights, Restitution, and Risk*, ed. Parent, pp.

If the rights that protect autonomy are alienable, they can be waived. Can they also be forfeited? It intuitively seems so. It intuitively seems that a person can forfeit some of his rights. Consider the following:

Case #8: Bar Rapist

Outside a bar, a fully responsible attacker, Don, tries to rape and kill a woman, Erin. She defends herself by hitting him with a tire iron, badly bruising his leg and discouraging him from continuing the attack.

Consider what happens to the attacker's right to his body. If the right is neither overridden nor alienated, then Erin's hitting Don was wrong, although perhaps excused.¹⁴ This intuitively seems incorrect. If the defensive action is permissible, then the right is either overridden or not infringed. If it is merely overridden by Erin's right to control her body, then there is a residual duty that Erin owes Don. She thus owes him an apology, if not compensation. This is implausible. If Don's right has a complex content: do-not-hit-unless-necessary-for-defense-or-punishment-or- . . . , then the right presupposes the conditions under which defensive violence, punishment, etc. can be done.¹⁵ If so, then the right does not explain when and why such actions may be taken; it merely reflects the conclusion with regard to these things. However, rights theorists often think that rights are part of the moral world precisely because they do such explanatory work. This explains why theorists reason from rights to conclusions about abortion, free speech, and the right to privacy, rather than vice versa.¹⁶ The best explanation of Don's right is that it is lost. Because Don does not intend this to happen, it is forfeited rather than waived.

Rights-forfeiture is consistent with the alienability of rights. Just as rights can be waived as part of a self-shaping life, rights can also be forfeited as a way of restricting some individuals from interfering with others having self-shaping lives. The underlying picture of both is that rights protect a self-shaping life, although waiver is more directly connected to the exercise of the shaping process than is forfeiture.

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¹⁴ The notion that it is a permissible rights-infringement can be seen in Phillip Montague, *Punishment as Societal Defense* (Boston: Rowman & Littlefield Publishers, Inc., 1995), chap. 5.

¹⁵ The notion that self-defense involves a narrowly bounded right (e.g., a right to life-except-where-necessary-to-save-someone's-life) is discussed in Judith Jarvis Thomson, "Self-Defense and Rights."

¹⁶ See Thomson, "A Defense of Abortion"; Judith Jarvis Thomson, "The Right to Privacy," *Philosophy and Public Affairs* 4 (1975), pp. 295-314.

On a different account, defensive violence is permissible because it involves the fair distribution of the risk of harm from an attack.¹⁷ The problem with this account is that it does not address how fairness affects the rights of the two parties. In addition, if fairness is a value that depends on other values (for example, desert, rights, or equality), then fairness-based arguments likely need to be re-cast in terms of the more fundamental values before we can assess them.

This same thing holds true if one person grants the second the right to have sex with her and then withdraws it. Consider the following:

Case #9: Didn't Stop

A couple decides to have intercourse. The woman becomes frightened and sex becomes extremely painful for her. The man refuses, increases his forcefulness, and continues onward for an hour. After an hour the woman stabs him to make him stop.

Again, as a matter of justice, the woman may stab the man.

If the above argument is correct, then it is just to use lethal force to prevent rape. Given this and if carrying an unconsented fetus is as great an unjust trespass as unconsented-to sex, then it is just to use lethal force to prevent an unconsented-to pregnancy. To see why carrying an unconsented-to fetus is as great an unjust trespass as unconsented-to sex, consider the following:

Case #10: Nazi Choice

In Auschwitz, the Nazis notice an attractive twenty-year-old Jewish woman. They tell her that she can have sex with the Nazi officers (rape), carry the fetus of an officer and his wife (unwanted pregnancy), or be killed. She chooses the sex. Other women in her position would have a difficult time making this decision and some would prefer the sex.¹⁸

One infringement is as great as a second just in case the severity of infringement of the first is as great as the second. The severity of infringement is a (weighted) product of the importance of the right and the degree to which it is infringed. This product depends on what a right protects. On different theories, it protects the rights-holder's interest, legitimate interest, or

¹⁷ For such an account in the context of torture, see Michael Moore, "Torture and the Balance of Evils," in Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), pp. 726-36.

¹⁸ The idea for this case came from a visit to the Museum of Jewish Heritage in Lower Manhattan. A spritely elderly woman who (along with her sister) was in Auschwitz explained that the Nazis did not send them to be killed on account of their being pretty teenagers.

autonomy. On a rule-utilitarian theory, rights are rules about interactions that would maximize utility were a significant number of a population to follow them. A problem with this latter theory is that it is often thought that rights are side-constraints or trumps on utility maximization, and as such are not justified by utility.¹⁹

One guide to the severity of a rights-infringement is people's preferences. That is, preferences with regard to a choice of rights-infringements are evidence, albeit defeasible evidence, of the wrongness of the infringement. This is because people are somewhat good at ranking their interests, autonomy, and so on and estimating the degree to which others' acts set these things back.

A related guide is the market for acts that would otherwise be an unconsented-to rights-infringement.²⁰ Here, while there is a market for intercourse and carrying fetuses, this is likely not an accurate guide to the market value for unconsented-to versions of these acts because the acts are so different as to be disanalogous. Even if we could estimate the disvalue of such things by looking at the market for various insurance-compensation plans and defensive measures, the former does not exist and the latter is not tied closely enough to rape.

On one account, the stringency of a right varies, at least in part, with how bad the infringement of that right would be for the rights-holder (that is, the degree of harm to the rights-holder).²¹ On a second account, the stringency varies, at least in part, with the degree to which the rights-holder values that right. On a third account, it varies, at least in part, with the possibility of compensation.²² This third account overlaps significantly with the other two accounts because compensation should track the extent to which someone is harmed or disvalues what is done to her. One way to understand the first account is that because rights protect against harm, rights-stringency co-varies with it. The second rests on the notion that a claim is justified by what the rights-holder values, and so valuation co-varies with rights-stringency.

¹⁹ See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 28-32; and Ronald Dworkin, *Taking Rights Seriously* (New York: Harvard University Press, 1977), p. xi.

²⁰ For the use of a market to rank rights-infringements, see Michael Davis, "How to Make Punishment Fit the Crime," *Ethics* 93 (1983), pp. 726-52; Michael Davis, *To Make the Punishment Fit the Crime: Essays in the Theory of Criminal Justice* (Boulder, CO: Westview Press, 1992).

²¹ See Samantha Brennan, "How Is the Strength of a Right Determined? Assessing the Harm View," *American Philosophical Quarterly* 32 (1995), pp. 383-93.

²² All three accounts are found in Judith Jarvis Thomson, "Some Ruminations on Rights," in *Rights, Restitution, and Risk*, ed. Parent, chap. 4.

On the first two accounts, were the woman in question to be harmed by or disvalue the unconsented-to-Nazi pregnancy more than the unconsented-to-Nazi sex, then unconsented-to pregnancy would be at least as severe a rights-infringement as unconsented-to sex. If rights-stringency is a function of how in general women in that situation would be harmed by or would disvalue the infringement, and if women in the Nazi case would frequently prefer the sex to the pregnancy, the pregnancy would be as severe a rights-infringement as the sex.

These accounts (harm, valuation, and compensation) take a stronger view than the theory that asserts that rights-holder preference or valuation is evidence of rights-stringency rather than a determinant of it.²³ A problem with the former accounts is that this makes rights-stringency vary between people. In addition, rights-stringency might depend on irrational preferences or uninformed judgments. This is true regardless of whether the judgments are *ex ante* or *ex post*.

Another problem is that if rights are justified by one type of interest (for example, autonomy-related interests) then the focus on overall harm or valuation is too broad in that effects on autonomy can diverge from overall interest protection. Rights might be thought to focus on autonomy-related interests because most, if not all, rights protect choices; because most rights are claims to non-interference and correlate with morally permissible options; and because the rights-holder usually, if not always, has a Hohfeldian power over the claim that is the right. A Hohfeldian power is the standing by which to eliminate, modify, or leave in place another Hohfeldian element (for example, a claim or power).²⁴ All three features (choice-protection, claims to non-interference correlating with options, and claims being accompanied by powers) are autonomy-related.

Yet a further problem is that if harm does the justificatory and explanatory work and if a right can be overridden when a benefit exceeds the harm of its infringement, then it is unclear what work rights do. The moral work would be done by harm- and benefit-elements.²⁵ One response to this last objection is that the stringency of the right is a function of harm, but the claim that is a right is not against harm. That is, harm might determine the stringency of a right without determining its content—what it requires of agents other than the rights-holder.²⁶

An additional problem that hampers the harm model is that it intuitively seems wrong to infringe on someone's rights even if doing so does

²³ See *ibid.*

²⁴ Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (November 1913), pp. 16-59.

²⁵ The idea for this point comes from Brennan, "How Is the Strength of a Right Determined? Assessing the Harm View," pp. 387-88.

²⁶ For this point, see *ibid.*, p. 392.

not harm the rights-holder.²⁷ A related notion is that something like a promise can increase the stringency of a right.²⁸ For example, Jones's promise not to steal Smith's stuff intuitively seems to strengthen Jones's duty not to do so. However, the promise might not increase the harm that would come about from Jones's stealing the stuff. If promises create or strengthen claims (that is, rights) in cases like this, then the harm model is problematic.

The right to one's body is the same in the case of *Prison Rape*, *Didn't Stop*, *Nazi Choice*, and unwanted-to pregnancy. Preventing rape warrants lethal force. The woman in *Nazi Choice* prefers the unconsented-to sex to the unconsented-to pregnancy. So do plenty of women with whom I discussed this case. I will assume that this preference is reasonable and moderately widespread. This is some evidence that the pregnancy-related rights-infringement is at least of the same magnitude as sex-related rights-infringement. This is true whether such preferences are relevant to harm, valuation, compensation, autonomy, or whatever else grounds rights-stringency. Hence, there is some reason to believe that preventing unconsented-to pregnancy warrants lethal force.

The notion that autonomy justifies rights can be seen in the will theory of rights. On this theory, rights protect choices and take the form of a Hohfeldian power over other Hohfeldian elements.²⁹ Consider the degree to which unconsented-to sex sets back autonomy as opposed to unconsented-to pregnancy. A life is autonomous to the degree it is self-shaped. While the comparison varies between individuals, the unconsented-to sex often, if not always, produces great psychological harm that hinders a woman's ability to

²⁷ See *ibid.*, p. 389.

²⁸ See F. M. Kamm, "Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status," *Philosophy and Public Affairs* 21 (1992), pp. 354-89.

²⁹ The autonomy-based theory of rights is called the "will theory of rights." This theory asserts that rights function to protect choices. As such they always include a Hohfeldian power plus the other Hohfeldian elements over which the power ranges. See, e.g., H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982); Carl Wellman, *A Theory of Rights* (Totowa, NJ: Rowman and Allenheld, 1985); and Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994). I should mention that on my version of the will theory, rights are constituted by claims, although these claims are often accompanied by powers.

In contrast, the "interest theory of rights" asserts that rights function to protect interests. As such they are constituted by a claim. See, e.g., David Lyons, *Rights, Welfare, and Mill's Moral Theory* (New York: Oxford University Press, 1994); Neil MacCormick, "Rights in Legislation," in *Law, Morality, and Society: Essays in Honour of H. L. A. Hart*, ed. P. Hacker and Joseph Raz (Oxford: Oxford University Press, 1977), pp. 189-209; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); and Matthew Kramer, "Rights Without Trimmings," in Matthew Kramer et al., *A Debate Over Rights* (New York: Oxford University Press, 1998), pp. 7-111.

shape her life according to her values, preferences, and wants. In addition, it likely hinders her exercise of this ability. On the other hand, unconsented-to pregnancy often, if not always, produces some psychological harm and, in many cases, mother-related responsibilities that also hinder women's ability to shape their own lives. It also hinders their exercise of this ability. My guess is that the latter sets back the ability and exercise more because the duties of motherhood last for years, are incredibly time-and-energy consuming, and are given up only with great effort and suffering. If this is correct, then the rights-infringement characterizing unconsented-to pregnancy is on average as severe as the rights-infringement characterizing unconsented-to sex. At the very least, if rights are autonomy-based, then we have little reason to believe that unconsented-to pregnancy is on average a less severe rights-infringement than unconsented-to sex. As a result, we cannot rule out that, as a matter of justice, unconsented-to pregnancy warrants killing.³⁰

One concern here is that I am assessing the problems with pregnancy-and-motherhood, not just pregnancy here. The concerned individual might agree that motherhood is a significant burden and one that often follows from pregnancy, but not necessarily—and it wouldn't explain our intuitions in the *Nazi Choice* example. The critic is correct here, but the burdens of pregnancy and birth are enough to explain our intuitions in that example.

Another concern is that if the demands of motherhood are what infringe on autonomy, then infanticide would be equally justified. This is incorrect because motherhood can be prevented by means short of killing. This is not so for pregnancy, at least given current technology.

A third concern is that the benefit to the fetus has enough value to override the threshold of a body-right. The idea here is that an individual may as a matter of moral permissibility override another's right if certain conditions are met. The conditions might include ones such as a net benefit and a beneficiary from the rights-infringement who gains at least as much as the rights-holder loses.³¹ The problem with this is that we don't think that

³⁰ A very different account of rights from interest- or autonomy-based models is that rights are assigned by fairness as modeled by the Rawlsian Original Position. To see this theory applied to abortion, see Stephen Maitzen, "Abortion in the Original Position," *Personalist Forum* 15 (1999), pp. 373-78.

³¹ For the idea for these two conditions and a third one (for an aggregate whose interests exceed a threshold each and every member of the aggregate has a minimum benefit from the rights-infringement), see Samantha Brennan, "Threshold for Rights," *The Southern Journal of Philosophy* 33 (1995), pp. 143-68. On some accounts, it matters whether the beneficiary is also the rights-holder; see Samantha Brennan, "Paternalism and Rights," *Canadian Journal of Philosophy* 24 (1994), pp. 419-40. For a more general discussion of how an account of overriding rights is necessary for a moderate theory of rights, see Shelly Kagan, *The Limits of Morality* (Oxford: Clarendon Press, 1989), pp. 4-5 and 50-51.

body-trespass is permissible when necessary to save another's life. For example, it intuitively seems wrong to remove a woman's spleen or kidney, or drain some of her spinal fluid, against her will even when doing so can be done with minor surgery and will save another's life.

One might be less intuitively opposed to this situation if the woman in question has only survived because someone else has undergone the same operation in order to save her life. Still, the fact that another has sacrificed for the woman is not enough to change our overall intuition about the case, namely, that this should not be done against her will. The intuition is strengthened if the one who demands that the surgery be forcibly imposed has not herself sacrificed for another.

Here is a chart summarizing my findings.

Rights-infringement	Importance of Right Infringed	Degree of Infringement	Warrants
Unconsented-to Sex (Rape)	Body ownership or body control (Value: A)	Severe (Value: B)	Lethal Force (A x B)
Unconsented-to Pregnancy (Ordinary unwanted pregnancy)	Body ownership or body control (Value: A)	Severe (Value: Greater than B)	Lethal Force $\geq (A \times B)$

In summary, then, abortion is a killing. If it is a killing, then it is just only if it is proportionate to a threat. Thomson's argument shows that the fetus has no right to be inside the woman. Standard principles of justice assert that if the fetus has no right to be inside the woman, then it may be removed with proportionate force. I have argued for the claim that in abortion, the woman uses proportionate force. My argument is that the prevention of rape warrants lethal force. If the prevention of rape warrants lethal force and an unconsented-to pregnancy is a rights-infringement as severe as rape, then the prevention of unconsented-to pregnancy warrants lethal force. Abortion prevents an unconsented-to pregnancy. Hence, abortion is just.

d. Objections

One type of objection addresses whether the fetus has a right to be inside the woman. One version of this objection is that the fetus has a right to be inside the woman because it has no other place to go. This argument goes to the first part of the argument—the part that comes from Thomson—and I will not spend a lot of time defending this issue because I wish to focus on the proportionate-killing issue. The short version of the response is that the only way for one person to get a right to be inside a second person's body is through consent or forfeiture. The woman's having voluntary intercourse is not consent. Neither does it ground forfeiture because, in ordinary cases, voluntary sex does not infringe on someone's right. As such, it does not give

rise to a claim to an apology, compensation, just defense, or punishment as it would were it forfeiture.

A second type of objection is that abortion uses disproportionate force. One version of this objection is that the fetus is merely a trespasser and preventing trespass does not warrant lethal force. For example, in *Party Pooper*, Betty may have a claim that her guests leave, but she may not force them to leave by slicing them up with a giant suction-curettage device or ripping them apart with giant mechanized forceps. Similarly, an owner of a private Gulfstream jet may not eject a particularly rude passenger, let alone subject him to one of these devices.³² The problem with this is that the trespasser invades the human body and preventing body-trespass warrants lethal force. The fact that some far less severe rights-infringements does not do so is beside the point. If the rude passenger were raping a flight attendant, the owner could eject him if this were the only way to make him stop.

A second version of this type of objection is that the fetus is innocent while the rapist is not. This is because rapists are, or at least almost always are, morally responsible agents. They are also vicious, warrant punishment, and should feel shame and guilt for what they have done. However, just defense does not require that the threat be morally responsible for his act. Consider the following:

Case #11: Psychotic Aggressor

A woman's companion in an elevator goes berserk and attacks her with a knife. There is no escape: the only way for her to avoid serious bodily harm or even death is to kill him with her gun. The assailant acts purposely in the sense that he means to further his aggressive end. He does act in a frenzy or in a fit, yet it is clear that his conduct is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity.³³

Intuitively, it seems that the woman may, as a matter of justice, use lethal force even though the attacker is innocent (that is, not morally blameworthy) with regard to his action. This is true even when the threat does not even act, but is merely an object used in an attack. Consider the following:

Case #12: Innocent Threat

You are at the bottom of a deep well. An aggressor picks up a third party and throws him down at you. The third party is innocent and a threat; had he chosen to launch himself at you in that trajectory, he

³² I owe this objection to Catherine Nolan and Ashley Bergman.

³³ This example comes from George Fletcher, "Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory," *Israel Law Review* 8 (1973), pp. 171-87.

would be an aggressor. Even though the falling person would survive his fall onto you, you use your ray gun to disintegrate the falling body before it crushes and kills you.³⁴

Just as the woman may, as a matter of justice, kill the psychotic aggressor, she may also kill a psychotic rapist:

Case #13: Psychotic Sex Aggressor

A woman's companion in an elevator goes berserk and tries to have intercourse with her. He is psychotic and believes that she is his wife and wants sex then and there. There is no escape: the only way for her to avoid being raped is to kill him with her gun. The assailant acts purposely in the sense that he means to further his sexual end. He does act in a frenzy or in a fit, yet it is clear that his conduct is non-responsible. If he were brought to trial for his attack, he would have a valid defense of insanity.

If this is correct and if, as argued above, the fetus's rights-infringement is as great as that of a rapist, then the woman may kill a psychotic rapist. For the same reason, she may kill an innocent fetus.

A third type of objection, from Nancy Ann Davis, is that the fetus is an innocent threat, not an innocent attacker, because it is not an agent. Because the fetus is an innocent threat, it does not forfeit its rights.³⁵ She uses the following case to illustrate her claim:

Case #14: Mountain Climbing

Alice and Ben are mountain climbing when a rockslide occurs that threatens to sweep Ben off the ledge that he has been standing on. If Ben falls straight down—as he is virtually certain to do—he will fall onto Alice, for she is standing on the narrow ledge beneath his, and will surely kill her. If Ben manages to land on Alice's ledge, however, he is unlikely to be killed: indeed, he is unlikely even to be seriously hurt. Alice can determine how Ben falls, for she can manipulate his rope if she chooses to do so. If she gives his rope a tug, she will deflect Ben's fall and thus preserve her life. But she will kill Ben in the process, for if he does not land on Alice's ledge, then he will tumble down the side of the mountain to his death. Alice cannot survive unless she deflects Ben's fall; Ben cannot survive if she does.³⁶

³⁴ See Nozick, *Anarchy, State, and Utopia*, p. 34.

³⁵ See Nancy Davis, "Abortion and Self-Defense," *Philosophy and Public Affairs* 13 (1984), pp. 175-207.

³⁶ See *ibid.*, pp. 190-91.

Davis argues that an innocent threat (Ben) generates an agent-relative permission to the person endangered by him (Alice) to defend herself. That is, Alice is morally permitted to tug the rope. Davis argues that the innocent threat (Ben) has a similar agent-relative permission to keep the endangered person (Alice) from killing him because they are in morally symmetrical situations. In addition, Davis claims that this agent-relative permission does not entitle third parties to intervene on behalf of the endangered person.

Here Davis is wrong because her intuitions are mistaken. First, it is intuitively permissible to use the ray gun in *Innocent Threat* and for Alice to tug the rope. It is intuitively wrong for Ben to prevent Alice from tugging the rope by shooting her with a ray gun, although it might be excusable. This is because Ben and the falling person in *Innocent Threat* are part of the initial interference with the autonomy of the other people and this gives the others priority in autonomy-based contexts.³⁷ By analogy, consider a driver who suffers from an unpredictable aneurism so that his car careens toward people in a store. The driver is not permitted to shoot someone in the store who tries to save herself by ray-gunning the car.

Second, Davis's account is inconsistent in that one person cannot have an agent-relative permission (specifically, a Hohfeldian liberty) to harm a second unless the second's right (specifically, claim to non-interference) has been lost (waived or forfeited), overridden, or does not oppose the imposition of harm. Ben did not intentionally give up his right, so waiver is not at issue. Nor is the right overridden because with regard to two opposing rights, the basis of one right cannot override a second right if the basis of the second right overrides the first right. This can be seen in two classic models of rights. On one account, autonomy justifies a consistent set of natural negative rights and all other rights are derived from them.³⁸ Rights so derived cannot contradict one another. On another account, rights are justified by utilitarianism or even rule-utilitarianism. Neither yields contradictory rights because utility in the particular situation or the tie-breaking rule will prioritize one of the rights. For the reason mentioned above, the complex-content theory of how rights operate in self-defense is implausible.

Third, if the woman has an agent-relative permission to kill the fetus (analogous to Alice's right to tug the rope) and if such permissions are accompanied by a claim to non-interference, then the woman has a right to

³⁷ The underlying assumptions here are: rights are all or mostly property rights, property rights rest on autonomy, and autonomy favors the person who is initially being interfered with in a certain way. I provide such a picture in Stephen Kershnar, "Private Property Rights and Autonomy," *Public Affairs Quarterly* 16 (2002), pp. 231-58.

³⁸ See Nozick, *Anarchy, State, and Utopia*; and John Locke, *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1988).

abortion on defensive grounds. This is true even if the fetus has a contradictory right to defend itself analogous to Davis's assertion that Ben has a right to defend himself. This is enough to show that abortion is just. The contradictory right of the fetus makes the overall moral scenario strange, but this is beside the point.

3. Abortion Is Permissible

A similar comparison to sex shows that abortion is not merely just, but also permissible. I think that once it is shown that abortion is just, then it follows that, short of preventing a catastrophe (consequentialist override), abortion is permissible. My assumptions here are that (a) except when a consequentialist override is present, an act is wrongful only if it wrongs someone and (b) an act wrongs someone only if it infringes on someone's right (that is, claim). Because these assumptions are controversial, and defending them is beyond the scope of this article, let us proceed without them. That is, let us proceed on the assumption that not all wrong acts infringe on someone's right.

Here is the argument for abortion being morally permissible:

(C1) Hence, abortion is just. [(P1), (P2)]

(P3) If abortion is just, then if it is wrong, then it infringes the duty to save.

(C2) Hence, if abortion is wrong, then it infringes the duty to save. [(C1), (P3)]

(P4) Abortion does not infringe the duty to save.

(C3) Hence, abortion is not wrong (that is, it is morally permissible). [(C2), (P3)]

Premise (P3) rests on the following notion: If abortion is just and still wrong, then it infringes on a duty not tied to a right. The most plausible duty is the duty to save.³⁹

Premise (P4) rests on two arguments. The first is that there is no duty to save. The idea here is that there is no duty to save strangers. Strangers are individuals to whom one does not stand in a special relation. Special relations include family, friends, and those whom one has harmed or put in danger. The

³⁹ David Boonin identifies other non-rights-based arguments concerning the Golden Rule, culture of death, pro-life feminism, and uncertainty about when an individual comes into existence. I assume that these arguments are less plausible than is the duty to save. See David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2003), chap. 5.

next idea is that if there is no duty to save strangers, then there is no duty to save people.

The notion that there is no duty to save strangers rests on the arguments below. One argument focuses on distance. There is no duty to save distant strangers. Consider, for example, when one spends money on a vacation rather than on feeding Somali children. This case captures this notion:

Case #15: Caribbean Holiday

Al, a hard-working plumber, enjoys taking his family on vacation to the Caribbean. He does so once a year. Were he to give the money to Oxfam International, he could save the lives of a few starving children in places like Sudan and Somalia.

Distance is irrelevant. If there is no duty to save distant strangers, and the above case intuitively suggests there is not, and distance is irrelevant, then there is no duty to save strangers.

A second argument is that if there is a duty to save strangers, then there is a disjunctive duty. To see this, consider the following:

Case #16: Lifeguard

Charley is sitting on the beach drinking tequila and tanning. He sees a cruise ship go down and sees hundreds of people drowning. Because he is a weak swimmer who will have to go out in a life preserver, he can save at most one person.

There are no disjunctive duties. It is difficult to see how a duty can exist to save (or otherwise benefit) one of a collection of strangers, when it is neither owed to any member of the collection nor to the collection.

A third argument is that if there is a duty to save strangers, then the desperate strangers have a claim against the rescuer. If desperate people have a claim against the rescuer, then they have a right to the rescuer's body or labor. If desperate people have a right to the rescuer's body or labor, then they own the rescuer's body or labor. If there is a duty to save people, then the desperate people own the rescuer's body or labor; however, they do not.

A fourth argument is that if there is a duty to rescue, then people would have a duty to give to the point of marginal utility or some other principled threshold. Marginal utility is the point at which the benefit (in utils) to the recipient is less than the cost to the benefactor. There is no duty to give to the point of marginal utility or some other principled threshold. Here is an example illustrating this:

Case #17: Cabin

Bob, a spendthrift teacher, buys a cabin high up in the northern Rockies for his family (adult children and grandchildren) to enjoy during summer hiking expeditions. He puts in expensive electronics,

high-end furniture, and a great hot tub. The cabin has a stunning view of the valleys and lakes below. He knows that if he puts in drill-proof locks on the door and windows in metal lattices, no one will be able to break in. If he does this, this will prevent any hikers caught in early-and-unpredictable winter storms (an infrequent, but real, occurrence) from breaking into the cabin to save themselves. There is also some concern about theft from other hikers.

From an impartial perspective, the costs of the security devices likely outweigh the benefits. There is no principled threshold, short of marginal utility, by which we can say that Bob is or is not permitted to install the devices. Were the marginal-utility standard to be applied, then Bob would be wrong to pay for this luxurious cabin, let alone the devices.

The same argument intuitively seems to apply to the fetus in that the purported wrong-making features of abortion are present whether the fetus arose from the pregnant woman's egg or another's egg. This might be because the fetus is not a family member in the relevant sense. Let us proceed, however, on the assumption that there is a duty to save because these arguments are controversial and defending them will take us far afield.

Even if there is a duty to save, it does not make abortion wrong. Intuitively, in the case below, the woman has no duty to save the sick man:

Case #18: Anal Intercourse

The only way for a sick man suffering from a very rare disease to survive is to have anal intercourse with a woman who has a rare combination of immunities. She has not tried anal intercourse, but knows she would not enjoy it. That said, she would prefer it to nine months of an unwanted pregnancy.⁴⁰

⁴⁰ As a side note, plenty of women appear to enjoy sex episodes that include anal sex. Consider William Saletan's analysis: "Check out the orgasm data. Among women who had vaginal sex in their last encounter, the percentage who said they reached orgasm was 65. Among those who received oral sex, it was 81. But among those who had anal sex, it was 94. Anal sex outscored cunnilingus." See William Saletan, "The Ass Man Cometh: Experimentation, Orgasms, and the Rise of Anal Sex," *Slate.com*, October 5, 2010, accessed online at: http://www.slate.com/articles/health_and_science/human_nature/2010/10/the_ass_man_cometh.2.html. There is some reason to believe that this is enjoyment of the anal sex itself and not a gift to men for doing other things women like. See William Saletan, "The Riddle of the Sphincter: Why do women who have anal sex get more orgasms?" *Slate.com*, October 11, 2010, accessed online at: http://www.slate.com/articles/health_and_science/human_nature/2010/10/the_riddle_of_the_sphincter.html. Saletan's data come from Debby Herbenick et al., "An Event-Level Analysis of the Sexual Characteristics and Composition among Adults Ages 18 to 59: Results from a National Probability Sample in the United States," *The Journal of Sexual Medicine* 7, supp. 5 (October 2010), pp. 346-61. Were the woman in the above case to enjoy anal sex, this still would not change our intuition about the case. Still, this would make it less similar to unconsented-to abortion.

If, in this case, the woman has no duty to save the sick man, then the pregnant woman does not infringe the duty to save the fetus. This rests on the notion that the duty to save only applies when there is a reasonable cost. The anal-intercourse cost is sufficiently high to cancel (undermine, override, or make inapplicable) the duty to save. The unconsented-to pregnancy cost is at least as high as the anal-intercourse cost. Hence, the unconsented-to pregnancy cost is sufficiently high to cancel the duty to save.

4. Conclusion

This article has argued that abortion is just because it does not infringe on anyone's right. The claim rests on three assumptions. First, the fetus has no right to be inside the woman. Second, if the fetus has no right to be inside the woman, then it may be removed with proportionate force. Third, in abortion, the woman uses proportionate force. The third argument rests on the notion that when the fetus's presence is unconsented to, the fetus's infringement on the woman's right is as severe as rape, and rape warrants lethal force. I then considered two objections: abortion is disproportionate because trespass does not warrant lethal force, and abortion is disproportionate because the fetus is innocent and thus unlike a rapist. I take these objections to have failed.

I then argued that abortion is morally permissible because pregnant women do not fail to satisfy the duty to save. One reason for this is that there is no such duty. A second reason is that even if there is such a duty, it does not make abortion wrong. A woman does not have the duty to engage in anal intercourse as a means of saving someone because the anal-intercourse cost is sufficient to cancel the duty to save and the unwanted pregnancy cost is at least as high as the anal-intercourse cost.

This chart summarizes the two main arguments.⁴¹

Thesis	Issue	Argument
Abortion is just.	Does abortion respect the fetus's rights?	Yes <ol style="list-style-type: none"> Assumption #1: No Right. The fetus has no right to be inside the woman. Assumption #2: Removal. If the fetus has no right to be

⁴¹ I am very grateful to James Delaney, Neil Feit, John Martin Fischer, David Hershenov, Rose Hershenov, John Keller, Catherine Nolan, Dale Tuggy, PANTC Reading Group members, and audience members at the Society of Christian Philosophers for their extremely helpful comments on and criticisms of this argument. I would also like to thank State University of New York at Buffalo and State University of New York at Fredonia for hosting debates and Niagara University for hosting a talk on this topic.

		<p>inside the woman, then it may be removed with proportionate force.</p> <p>3. Assumption #3: Proportionate Force. In abortion, the woman uses proportionate force.</p>
Abortion is morally permissible.	Does the woman satisfy the duty to save?	<p>Yes</p> <p>1. Assumption #1: No Duty to Save. There is no duty to save.</p> <p>2. Assumption #2: Duty to Save. Even if there is a duty to save, it does not make abortion wrong.</p>

