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CONSENSUAL SEX WITHOUT ASSUMING THE RISK OF CARRYING AN UNWANTED FETUS; ANOTHER FOUNDATION FOR THE RIGHT TO AN ABORTION*

Alec Walen[†]

INTRODUCTION

Twenty-five years after *Roe v. Wade*,¹ the legal right to an abortion seems reasonably secure. The immediate threat to *Roe* was beaten back in 1992 when the Supreme Court decided *Planned Parenthood of Southeastern Pennsylvania v. Casey*.² Given the subsequent appointment of Justices Ginsburg and Breyer, it seems unlikely that the Court will change its position any time soon. In addition, recent threats such as the possibility that the Republican Party would employ an anti-abortion "litmus test" as a condition for receiving party funds seem to have lost momentum.³ The reason seems to bode well for those who value a woman's right to an abortion: the Republican Party leadership is convinced that a strong stand against abortion would put the Party outside the mainstream in America and might cost them their majority in Congress.

Nonetheless, this is not a time for those who think that women should have a legal right to an abortion to be complacent. Presently, there may be no real pressure for an amendment or a Court decision to overturn *Roe*, but the anti-abortion

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¹ 410 U.S. 113 (1973).

² 505 U.S. 833 (1992).

³ Brian McGrory, *GOP Rejects Antiabortion Litmus Test*, BOSTON GLOBE, Jan. 17, 1998, at A1 (the litmus test concerned opposition to a procedure its detractors call "partial-birth abortion").

forces are hardly withering away.⁴ For example, the Republican Party platform still calls for an amendment to ban abortions,⁵ and the Christian Coalition would still like the Republican Party to make opposition to abortion a litmus test for Party support.⁶ The Pope has recently confirmed that the official Catholic view is that abortion is "murder,"⁷ and by casting blame, among other places, on legislatures where abortion is legal, he makes it plain that in his view Catholics have a political duty to oppose abortion.⁸ Indeed, since the Pope thinks that the duty to oppose abortion is based upon an "unwritten law which man, in the light of reason, finds in his own heart"⁹ (i.e. that it is wrong to kill innocent people), his audience is meant to be not only Catholics but all people. Even some who believe there should be a legal right to an abortion think that the right should be settled democratically, rather than by the Court taking the decision out of the people's hands.¹⁰ If this argument prevails, and the issue is returned to the states

⁴ Though 83% of Americans think abortion should be allowed in some cases, only 47% favor *Roe*, and 56% think abortion should not be legal in cases where the woman's reason is simply that she does not want the baby. From a telephone poll of 1,102 adults conducted Jan. 8-12. Eun-Kyng Kim, *Abortion Poll Shows Many Feel Conflicted*, BOSTON GLOBE, Jan. 20, 1998, at A3.

⁵ The Republican Party platform states:

The unborn child has a fundamental individual right to life which cannot be infringed. We support a human life amendment to the Constitution and we endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children. Our purpose is to have legislative and judicial protection of that right against those who perform abortions. We oppose using public revenues for abortion and will not fund organizations which advocate it. We support the appointment of judges who respect traditional family values and the sanctity of innocent human life.

The 1996 Republican Platform, Adopted August 12, 1996 (visited Jan. 18, 1998) <<http://rnc.org/hq/platform96/>>.

⁶ "Republicans were wrong on principle and wrong on politics in their decision [not to make opposition to partial-birth abortions a litmus test]." Cited in McGrory, *supra* note 3, at A5.

⁷ POPE JOHN PAUL II, *THE GOSPEL OF LIFE [EVANGELIUM VITAE]* 104 (1995).

⁸ *Id.* at 106.

⁹ *Id.* at 101.

¹⁰ See, e.g., Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 *ETHICS* 64, 65, 73-74 (1990); John Rawls, *The Idea of Public Reason Revisited* 64 *CHI. L. REV.* 765, 798 (1997). It should be noted that Gutmann and Thompson seem more supportive of *Roe* in their book, *DEMOCRACY AND DISAGREEMENT* 86 (1996); even so, the idea that this issue should be handled democratically still has currency.

where people can democratically decide the matter, it is clear that in many states the right to an abortion, under most circumstances, will be lost.¹¹

It seems then that a woman's legal right to an abortion is, in the long term, fragile. But this fragility is premised upon the issue remaining one in which no broad consensus is possible. This is a premise we should question. Must the right to an abortion be so divisive? Have the arguments really reached a dead end, foundering upon the metaphysically and politically irresolvable question: Is a fetus a person? Is there no way to "break the abortion deadlock"?¹² I argue here that there is. Along with a long, distinguished line of commentators on the issue,¹³ all taking their cue from the seminal work of Judith Jarvis Thomson,¹⁴ I argue that we can defend a moral, and relatedly a constitutional, right to an abortion under many conditions, even if we take the fetus to be a person.

The type of argument I develop here allows one to argue for the right to an abortion in the alternative: either the fetus, because of its undeveloped nature, does not have the same kind of rights as a born person; or, even if it has the rights of a born person, because of the position it is in, it does not have a right not to be killed. Though this strategy has been around for over twenty-five years, it has yet to get much recognition in

¹¹ See BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, *ABORTION AND AMERICAN POLITICS* 281 (table 8.1) (1993) (grouping states according to likelihood that they will restrict abortion given the chance). See also LAURENCE TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 49-51 (1992) (discussing how little democratic movement there really was to create a right to an abortion in the states just before *Roe*).

¹² The phrase is taken from Eileen L. McDonagh's book, *BREAKING THE ABORTION DEADLOCK* 172 (1996).

¹³ This list includes: GUIDO CALABRESI, *When Ideals Clash, in, IDEALS, BELIEFS, ATTITUDES, AND THE LAW* 87 (1985); Jane English, *Abortion and the Concept of a Person*, 5 *CANADIAN J. PHIL.* 2 (1975), reprinted in *THE PROBLEM OF ABORTION* 151 (Joel Feinberg ed., 1984); FRANCES KAMM, *CREATION AND ABORTION* (1992); MCDONAGH, *supra* note 12; CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993); TRIBE, *supra* note 11; Ellen Willis, *Abortion: Is a Woman a Person?*, in *POWERS OF DESIRE: THE POLITICS OF SEXUALITY* 471 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983); David Boonin-Vail, *A Defense of 'A Defense of Abortion': On the Responsibility Objection to Thomson's Argument*, 107 *ETHICS* 286 (1997); Donald H. Regan, *Rewriting Roe v. Wade*, 77 *MICH. L. REV.* 1569 (1979), and Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261 (1992).

¹⁴ Judith J. Thomson, *A Defense of Abortion*, 1 *PHIL. & PUB. AFF.* 47 (1971), reprinted in *THE PROBLEM OF ABORTION* 173, *supra* note 13.

the popular discussion of abortion, which continues to focus almost exclusively on the status of the fetus: person or mere potential person. There may be many reasons for this, including the seeming simplicity of an argument that turns on one point, as well as the problems that people have found with Thomson-like arguments.¹⁵ Simplicity at the cost of intractable social division, however, is ultimately unreliable, and the criticisms of a Thomson-like argument can, I believe, be met.

My aim, therefore, is to reformulate a Thomson-like argument to meet the objections of its critics. In Parts I and II, I start with the core of Thomson's argument, which many accept; namely, that a woman who is raped has done nothing to assume responsibility for the fetus and therefore should be allowed to abort it. I then argue that even if a woman engages in consensual heterosexual intercourse (for the sake of brevity, I will call it "consensual sex" from here on) and accidentally becomes pregnant, there may be good reasons not to treat her as having assumed the risk of carrying an unwanted fetus ("carriage" for short).

Two points need to be clarified here. First, when I speak of "assuming the risk of carriage," I refer to running the risk that if she gets pregnant, the woman acquires an obligation to carry the unwanted fetus for some significant period of time. The obligation would extend either to carrying the fetus to term or, if she wants to be rid of it prematurely, carrying it some significant number of months until it can be placed in some other environment where it can safely develop to the point at which it can live with normal infant care.¹⁶ Second, when I say there may be good reasons not to treat a woman who engages in consensual sex as having assumed the risk of carriage, the "may" refers to variations that depend on the precautions she took. There may be a difference here between moral and legal obligations. Morally speaking, it is plausible that a woman

¹⁵ The problems include the claims that the argument works only for rape cases, that it does not work for any other cases because of the violence of abortion, and that it neglects the special obligation a mother has to her child.

¹⁶ If technology improves and fetal viability outside the womb comes significantly sooner, or it becomes possible to transplant a fetus from one womb to another at some early point in a pregnancy, then the presence of such an option may change the moral picture. These possibilities will be discussed *infra* Part IV.D.

should take certain precautions if she is not to assume the risk of carrying a fetus. Legally speaking, there are reasons to avoid scrutinizing the precautions a woman takes, and therefore there are reasons to grant women a more unconditional legal right to an abortion.¹⁷

After arguing that a woman does not assume the risk of carriage simply in virtue of having consensual sex, I address the gap between not having assumed responsibility for the welfare of another and having the freedom to kill, or to hire someone else to kill, that other. This part of the paper presents a two-fold argument. In Part III, I criticize and reject a faulty strategy which argues that an unwanted fetus can be killed because of the position it is in, namely the self-defense strategy.¹⁸ I then articulate in Part IV a better strategy which appeals to what I call the detaching/killing model.¹⁹

Finally, in Part V, I return to assess the factors which determine when, if ever, it is appropriate to take a woman to have assumed the risk of carriage, resulting in a waiver of her right to an abortion. I conclude that the detaching/killing model combined with the reasons not to infer that a woman engaging in consensual sex has assumed the risk of carriage, provide a more generally acceptable foundation for the moral, and relatedly the legal, right to an abortion than is found in the simple insistence that a fetus is not a person.

I fear that my hope that the abortion debate can become more tractable may be naive. It may be that the abortion debate, as Kristin Luker, Reva Siegel and others argue, is driven by profoundly different views about a woman's place in society.²⁰ Is a woman free to pursue her own goals like a man,

¹⁷ These topics are discussed *infra* Parts V.C. and V.D.

¹⁸ Of the authors listed in notes 10 through 13, *supra*, Thomson, English, Regan, Willis, Tribe, Kamm, McDonagh, and Boonin-Vail all think that the self-defense argument at least works. Though some are reserved or skeptical in their endorsement of it, it is the central theme of McDonagh's book. The self-defense argument has already been subject to sustained critique in Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175 (1984), and KAMM, *supra* note 13. Davis, I will argue, is too dismissive of the prospects of justified self-defense against a fetus, while Kamm is not critical enough. See *infra* Parts III.F and III.G.

¹⁹ This part of the argument occupies *infra* Parts III and IV.

²⁰ KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* chs. 7 & 8, esp. at 214-15 (1984); and Siegel, *supra* note 13, at 327-28. See also SUNSTEIN, *supra* note 13, at 277.

balancing career and family, or should she put family ahead of career? If this culture clash is the crux of the debate then my derivative hope is to further expose the inegalitarian foundation for anti-abortion sentiment by helping to undermine the claim that abortion is wrong simply because of the fetus's right to life.

One final preliminary note on methodology is called for. The argument presented here is largely a moral critique of the law.²¹ When appropriate, I will appeal to legal authority, but I will not restrict myself to it. For what is at issue here is the proper framing and reach of legal rights. Insofar as they are not determined by the text of the Constitution, and insofar as constitutional precedent is being questioned, we need a moral compass. This is not to assert the necessity of a tight link between law and morality. Laws can properly be based on mere efficiency concerns, and morals can best be left in the private sphere. But when thinking about what the law ought to be, in contexts that include, but are not limited to, those in which one is choosing between legally plausible interpretations of the Constitution, moral soundness ought to count as a significant factor.

This approach is not so different from the standard form for constitutional arguments about fundamental rights that are not enumerated in the first eight Amendments. The standard form turns on whether they are "deeply rooted in this Nation's history and tradition."²² I interpret this standard to refer not only to basic rights themselves but to the principles which justify them.²³ Appealing to principles is crucial if constitutional rights are to hang together as a coherent system of rights. This is not radically different from an appeal to actual laws, policies and events which make up our history and tradition; it is only a more self-reflective approach that seeks to cor-

²¹ For a general account of the relevance of morality to constitutional law, see RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

²² *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). Older formulations have asked whether they are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); or whether they are implicit in "an Anglo-American regime of ordered liberty," *Duncan v. Louisiana*, 391 U.S. 145, 150 n.14 (1968).

²³ Here I follow Ronald Dworkin in, among other places, *LAWS EMPIRE* (1986) (discussing "law as integrity").

rect tradition insofar as it does not stand up to reasonable scrutiny by the light of the very principles that animate it. This method does not aim to produce a timeless, context-free critique. Rather, it assumes that there is a common, widely shared base of moral intuitions and principles, sufficient to make moral reasoning more than a rhetorical attempt to grab power for some narrow sectarian view.²⁴

I. FROM *ROE V. WADE* TO THE RISK OF CARRIAGE

A. *The Right to an Abortion Under Roe, and Its Problems*

The *Roe* line of cases holds that a woman has a fundamental liberty interest, grounded in the right to privacy,²⁵ to choose an abortion. Balanced against this interest is the State's interest in the life of the fetus. The Court's balance gives a woman a constitutional right to an abortion until the fetus is viable; fetal viability, which occurs at around the end of the second trimester,²⁶ marks the point at which the State's interest in fetal life becomes compelling and the State can prohibit abortions.²⁷ Viability is held to be a significant transitional point in *Roe*, "because the fetus then presumably has the capability of meaningful life outside the mother's womb."²⁸ A woman has a constitutional right to an abortion after viability only if it would be "necessary to preserve the life or health of the mother."²⁹

²⁴ The approach I take aspires to fit the description of "public reason" given by John Rawls in *The Idea of Public Reason Revisited*, *supra* note 10. See also JOHN RAWLS, *POLITICAL LIBERALISM* (1993). It rejects some of the unduly cynical views about moral reasoning as put forward by, for example, John Hart Ely, who claimed that "[t]here simply does not exist a method of moral philosophy," and that reason, as a source of values would be either empty or "so flagrantly elitist and undemocratic that it should be dismissed forthwith." JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58, 59 (1980). See also Justice Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 855 (1989).

²⁵ 410 U.S. at 152-53.

²⁶ *Id.* at 160.

²⁷ *Id.* at 163. The State also has an interest in the health of women. *Id.* at 162. This interest can be used to regulate abortions, but given the relative safety of many forms of abortion, it cannot be used to ban abortions.

²⁸ *Id.* at 163.

²⁹ *Id.* at 164.

The right to an abortion under *Roe* is only a negative right. As the Court made clear in *Maher v. Roe*, the right exists only against "unduly burdensome interference" from the State; it does not contain or imply a right to any aid.³⁰ The undue burden standard was addressed most recently in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.³¹ The part of Pennsylvania's law that was struck down as posing an undue burden was the section which required spousal notification. Because of the risks of spousal abuse and child abuse, it was held that a spousal notification rule would deter a significant number of women "from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases."³² Other "burdens" in the law, however, were not held to be "undue." For example, the twenty-four-hour waiting period was upheld on the grounds that it was "a reasonable measure to implement the State's interest in protecting the life of the unborn,"³³ one that would not constitute a "substantial obstacle" even though some women would find it "particularly burdensome."³⁴ Though the Court said that a state may not pass a regulation which "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,"³⁵ it held that a state may enact measures "designed to persuade [a woman] to choose childbirth over abortion . . . if reasonably related to that goal."³⁶

There are a number of problems with the right to an abortion under *Roe*. On a practical level, it gives women a distinctly unrobust right, with the State's interest in protecting fetal life pressing in at all the edges.³⁷ The right is not presented

³⁰ 432 U.S. 464, 474 (1977); see also *Harris v. McRae*, 448 U.S. 297, 316 (1980) (affirming this reasoning in *Maher*, and extending it so that even medically necessary abortions for impoverished women need not be covered).

³¹ 505 U.S. 833 (1992). According to Tribe, the Court did not so much clarify as "water down" the undue burden standard. TRIBE, *supra* note 11, at 247f.

³² *Casey*, 505 U.S. at 894.

³³ *Id.* at 885.

³⁴ *Id.* at 886-87.

³⁵ *Id.* at 877.

³⁶ *Id.* at 878. Just how closely related to persuasion a measure must be, and how much of an obstacle it can put in a woman's way is hard to know. For example, would a tax on abortions, designed to raise money for a campaign to choose life, be constitutional? If so, at what level would the tax provide a "substantial obstacle"?

³⁷ Contrast the fundamental right to free speech, which pushes the other way

as protecting a morally legitimate option; rather, it is presented as protecting what may well be an illicit choice, one that the State must tolerate, but not one that the State must support. Indeed, the choice is one which the State can try to dissuade a woman from making.

Since a woman's right is linked to viability, it will surely be eroded as technology improves.³⁸ Viability measures the point at which a fetus can be maintained outside a womb if the best technology in existence is used; it does not, however, depend on the real availability of the technology in any particular case.³⁹ It is conceivable therefore that viability will be pushed back to the moment of conception, though this could be accomplished only at such great expense that it would not be economically feasible to support all unwanted fetuses outside of the wombs in which they were conceived. Since fetuses would all be viable from the moment of conception, the effect of improved technology would simply be to remove the right to be rid of a fetus from all but the very wealthy, who alone could afford to have a fetus removed from and supported outside of the mother's body.⁴⁰

to prevent "chilling effects." See *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964).

³⁸ Justice O'Connor noted as much in *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). This is not to deny that there are a number of physiological reasons why fetal development cannot allow a fetus to survive outside the womb prior to about 25 weeks of gestation with anything like current medical technology. See HAROLD J. MOROWITZ & JAMES S. TREFIL, *THE FACTS OF LIFE : SCIENCE AND THE ABORTION CONTROVERSY* ch. 7 (1992). But given the continual progress of science, one cannot rule out the possibility that a set of scientific breakthroughs will allow for fetal viability at an earlier stage sooner or later.

³⁹ The Court left viability a "flexible" concept, to allow for "advancements in medical skill." *Colautti v. Franklin*, 439 U.S. 379, 387 (1979). But of course, such advancements are not simultaneously available and affordable to all. Justice Scalia notes as much in *Casey*, 505 U.S. at 990 n.5.

⁴⁰ One way to view this situation, in which a woman is forced to carry a fetus because the resources for taking care of it are not available, is as a taking, a taking of her liberty. See TRIBE, *supra* note 11, at 226. The idea that the government could force a woman to carry a fetus to term, and compensate her by paying her off, is highly problematic, however. Tribe thinks it is "curious" that the government must "compensate people when taking their *property* for public use but not when restricting their *liberty* for public purposes." TRIBE, *supra* note 11, at 226. See also Siegal, *supra* note 13, at 336. But "curious" is an inapt word, as if we would solve the problem by compensating a woman for carriage. Property properly has a price (at least in most cases; sometimes sentimental value is not lost on the

The most profound problem with *Roe*, however, is that it makes the right to have an abortion depend on the status of the fetus. There are two reasons why this is problematic. First, the viability line is ungrounded. Under *Roe*, the State is taken to have a compelling interest in the life of the fetus once it is viable, but many people think that a state has a compelling interest in the fetus from conception onwards. They think that abortion is, with rare exception, murder,⁴¹ and *Roe* gives them no good reason to think they are wrong, morally speaking. The Court claimed that it had "logical and biological justifications" for using viability to determine the point at which a state's interest in fetal life is compelling,⁴² but it overstated its case. The viability of a fetus is logically relevant to some questions, such as whether a woman who wants to be rid of a fetus must endure the kind of procedure which will not kill it.⁴³ But the fact that a fetus cannot live without a certain kind of life support in no obvious way speaks to whether it is reasonable for the State to claim "a compelling interest" in its welfare.⁴⁴ Perhaps viability has been a fair proxy for having reached a certain point in development, a point at which there is moral reason to take a greater interest in its welfare (say, because it

market); liberty and things intimately associated with our identity as persons, often do not. Thus no one thinks the military draft could be justified simply by paying a living wage. And with regard to the more personal service of carrying a fetus, something we are independently loath to commercialize (See Elizabeth S. Anderson, *Is Women's Labor a Commodity*, 19 PHIL. & PUB. AFF. 71 (1990); SUNSTEIN, *supra* note 13, at 285-89; Murray L. Manus, *The Proposed Model Surrogate Parenthood Act: A Legislative Response to the Challenges of Reproductive Technology*, 29 U. MICH. J.L. REFORM 671, 673 (1996) (pointing out that no state has yet legalized surrogacy contracts, although Virginia "permits surrogacy, provided that no compensation is paid to the surrogate, aside from reimbursement for expenses.")), we should be loath to allow a state to seize a woman's womb like a piece of property, and "compensate her" at some market rate despite her desire to have no part in such a "transaction."

⁴¹ John Noonan, for example, argued that abortion could be morally allowed only in cases of self-defense, and then only when the woman's life was endangered. See *An Almost Absolute Value in History*, in THE PROBLEM OF ABORTION 14, *supra* note 13. The Pope seems to take an even stricter line, denying that abortion can be justified even to protect "important values such as [the mother's] own health," and insisting that "[n]o circumstance, no purpose, no law whatsoever can ever make licit an act which is intrinsically illicit." POPE JOHN PAUL II, *supra* note 7, at 105, 113.

⁴² 410 U.S. at 163.

⁴³ See *infra* Part IV.D.

⁴⁴ See, e.g., PHILIP BOBBITT, CONSTITUTIONAL FATE 159 (1982).

can now feel pain).⁴⁵ But if technology improves in some significant way, then viability could lose even that form of significance.⁴⁶ So it seems that the Court, reaching for logical and biological justifications, dogmatically drew a line, and in doing so it left a deep objection to the law unaddressed.

Second, the Court wrongly, or so I argue, assents to the idea that if the fetus does count as a person, then a woman has no right to an abortion: "If [Texas's] suggestion of personhood is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."⁴⁷ The only way a woman can have a constitutional right to an abortion under *Roe* then is if no state is free to recognize a fetus as a person and act accordingly.⁴⁸ The problem is that those who think that from the moment of conception, a fetus deserves the same respect as a born baby are not so obviously wrong. The Court explored the history of law in the United States and the text of the Constitution to determine that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."⁴⁹ But even if they got their history right,⁵⁰ their point

⁴⁵ See MOROWITZ & TREFIL, *supra* note 38, at 157-59.

⁴⁶ It is worth noting that the significance of viability is also being challenged by certain states, e.g., Louisiana and California, which allow wrongful death suits and murder charges to be brought against people who abort a woman's pregnancy without her consent. See Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases*, 22 PEPP. L. REV. 933 (1995); and Agota Peterfy, *Fetal Viability as a Threshold to Personhood*, 16 J. LEGAL MED. 607 (1995). The idea that one could be guilty of murder for killing a fetus without the mother's consent, and that a woman nonetheless has a right to an abortion, makes sense on the assumption of risk argument. The difference between a woman seeking an abortion and someone else inducing an unwanted miscarriage is like the difference between turning off someone's life support equipment upon her request, and turning it off without it. The former act is respectful of a person's autonomy, the latter is murder. This difference makes no sense under *Roe* because it holds that the fetus is not a person under the law.

⁴⁷ *Roe*, 410 U.S. at 156-57.

⁴⁸ In *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 504-05 (1989), the Court decided that it was constitutional for Missouri to declare that a fetus is a person from the moment of conception on in the preamble to an abortion regulation statute. That claim was held to be merely an expression of a value judgment, as opposed to a real regulation.

⁴⁹ *Roe*, 410 U.S. at 158.

⁵⁰ For the claim that they do not have their history right, see CALABRESI, *supra* note 13, at 93-95.

is not altogether secure since the constitutional meaning of words is not always held static. For example, the word "liberty" in the Due Process Clause was originally held to protect freedom of contract in such a way as to preclude restrictions such as minimum wage laws, but that changed in the late 1930s when the Court handed down *West Coast Hotel v. Parish*.⁵¹ Similarly, even if fetuses have not traditionally been considered persons under the law, the law regarding fetuses in areas outside of the right to abortion may be changing,⁵² and there is no reason the Court should not respect the democratic desire of the people of the various states to define personhood to include fetuses or not as they see fit.⁵³

In summary, the right to abortion as set out in *Roe* is not well framed. Many who think the fetus ought to be accorded all the legal protections of a person are dedicated to overturning *Roe*, and given their beliefs about the status of the fetus, their opposition to *Roe* is warranted. For according to *Roe*, the right to an abortion turns on the status of the fetus. In addition, and of equal importance, there seems to be no room for rational discussion, since the view that a fetus is a person from conception is neither subject to scientific refutation nor easily influenced by secular philosophical argumentation.⁵⁴ If the right to an abortion hangs on the status of the fetus, then it is a fragile one which will continue to divide deeply us as a people.

⁵¹ 300 U.S. 379 (1937) (upholding a minimum wage for women).

⁵² See Klasing and Peterfy, *supra* note 46.

⁵³ See ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 3 (1990).

⁵⁴ See, e.g., LUKER, *supra* note 20, at 196-97; RONALD DWORKIN, *LIFE'S DOMINION* 35-36 (1993). Dworkin also argues that there are two issues: whether the fetus has interests and rights to protect them, and whether the life of a fetus has intrinsic value. The answer to the first he thinks is obviously no, and while he thinks the answer to the second may be yes, he thinks the question is religious in nature and its answer should not be inscribed in law. *Id.* at 17-20. His diagnosis of the abortion debate is deep and interesting, but I for one am not convinced that it makes no sense to say that fetuses have rights simply because they do not have, before the twenty-sixth week or so, the ability to have subjective states; their identity over time with beings that can have subjective states seems sufficient to me. See also GUTMANN & THOMPSON, *DEMOCRACY AND DISAGREEMENT*, *supra* note 10, at 76.

B. *The Core of Thomson's Alternative*

Judith Jarvis Thomson, in her famous Article, "A Defense of Abortion,"⁵⁵ introduced the argument that it does not matter whether a fetus is taken to be a person; a woman's right not to carry an unwanted fetus is stronger than its claim to be nurtured and kept alive in her body. She supports this conclusion, that the right to life does not include the right to carriage, by way of an analogy. She introduces the example of a famous violinist who is now unconscious and dying of "a fatal kidney ailment:"

[T]he 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. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you."⁵⁶

This case can clearly be distinguished from normal abortion cases on a number of grounds: The violinist is not your genetic progeny, you did not do anything to make him dependent on you, and you do not have to attack him to detach yourself.⁵⁷ But there is a common core in that this person needs something from you or he will die. Moreover, he is already attached to you and receiving what he needs, but continuing to stay attached would have nontrivial costs. Yet, as Thomson observes,

the fact that for continued life that violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys. . . . [I]f you do allow him to go on using your kidneys, this is a kindness on your part, and not something he can claim from you as his due.⁵⁸

⁵⁵ See *supra* note 14.

⁵⁶ *Id.* at 174.

⁵⁷ For a similar list, see John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFF. 117, 143 (1973).

⁵⁸ See Thomson, *supra* note 14, at 179.

In other words, your staying and helping would be a super-erogatory act but your detaching yourself, though it would cause him to die, would not be murder. "[H]aving a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body."⁵⁹ You could justifiably unplug yourself, and it would be impermissible for anyone else to force you not to do so. All of this is true despite the fact that the violinist is clearly a person.

There are two lessons here. First, an act may not be wrong even though it leads to the death of another; to show that it is wrong, more argument is required. Second, we cannot demand a large sacrifice of people simply because they are in the position to be good samaritans. There are many helpful things people can do that are neither legally nor morally required.⁶⁰ These acts of self-sacrifice, while praiseworthy, are supererogatory. The burden of carrying a child that one has not assumed the responsibility for carrying seems to fit this description. A woman may choose to help the fetus, but just as there are very few bad samaritan laws in this country—and those that exist are very limited in scope⁶¹—so a woman has no duty to be a good samaritan given that the demands of pregnancy are high. Indeed, while carrying a child may be a wonderful, even transcendent, experience for a woman who wants to do so, it is an invasive, physically demanding, health endangering, and possibly humiliating burden to a woman who does not want to do so.⁶² It is unreasonable and immoral to force a woman to carry a fetus she neither wants nor has assumed the responsibility for carrying.

A point of contrast between the approach in *Roe* and Thomson's argument is worth highlighting here. Thomson's argument does not simply weigh the interests of the woman and the fetus, as *Roe* does.⁶³ *Roe* runs into trouble because it

⁵⁹ Thomson, *supra* note 14, at 180.

⁶⁰ The legal point is argued for at length by Regan, *supra* note 13. The moral point is claimed explicitly by Thomson, *supra* note 14, at 185.

⁶¹ See Regan, *supra* note 13, at 1610.

⁶² Regan marks this distinction in the course of arguing that the burdens of pregnancy, especially the physical burdens, are very hard to justify imposing on anyone under American law. See Regan, *supra* note 13, at 1579-91.

⁶³ See Regan, *supra* note 13, at 1589.

tries to balance the interests of a woman in controlling her body and her reproduction against a fetus's interest in living. Unless the fetus, because of its status, is less deserving of legal protection than the woman, the balance will almost always go in the direction of the fetus. Thomson's argument, by contrast, elucidates why a woman has priority over the fetus by identifying an asymmetry between the fetus and the woman. The reason a woman's interests have priority is that a fetus needs to use a woman to live and grow, and the right not to be used by another is not dependent on a simple weighing of interests.⁶⁴ The priority of the woman's claim, a claim not to be used simply as a means, is a basic component of any system of rights like ours, grounded in autonomy and aiming to give people the space in which to lead their own lives.⁶⁵

Meredith Michaels has objected that there really is no asymmetry here; that if we look at things from the perspective of the fetus, then we come to wonder how we can "require that the fetus terminate the course of its life in order that the woman may pursue uninterruptedly the course of hers."⁶⁶ She grants that this may seem to be a "conceptually illicit" objection since the fetus is "incapable of agency," but she goes on to insist that Thomson's position still requires of the fetus "that it die."⁶⁷

Michaels seems to have a devastating point, so it is important to be clear about the confusion represented in it. Thomson's argument does not require of the fetus that it die. In fact, if it could live outside the womb, Thomson's argument

⁶⁴ It is not that *Roe* or subsequent cases failed to mention that carrying an unwanted fetus to term can be very demanding on the woman. In *Casey*, for example, the Court notices that "[t]he mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Casey*, 505 U.S. at 852. And the Court refers to these as "sacrifices." *Id.* But the Court in *Casey* fails to draw the inference that because the fetus makes demands of the woman, their interests should not count on a par, regardless of the status of the fetus.

⁶⁵ See THOMAS NAGEL, *EQUALITY AND PARTIALITY* 139, 148 (1991). I also argue for the priority of negative claims in *Doing, Allowing, and Disabling*, 80 *PHIL. STUD.* 183 (1995).

⁶⁶ Meredith W. Michaels, *Abortion and the Claims of Samaritanism*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 220 (Jay L. Garfield & Patricia Hennessey eds., 1984).

⁶⁷ *Id.* at 221.

cannot license killing it.⁶⁸ The core of Thomson's argument says only that a fetus has no right to carriage in a woman, that a woman has a right not to serve it, and that she therefore has a right to detach from it. In a sense, Michaels is right to think there is no asymmetry: a woman would have no more right to stay attached to a fetus that wanted out than a fetus has a right to stay attached to a woman that wants it out. The asymmetry results from the fact that the conflict only arises in one direction. From that direction there is an asymmetry, an important one, between a fetus whose interest is in using the woman's body and a woman who has a right to control whether her body is so used.

C. *Consensual Sex and Assuming the Risk of Carriage: A Conceptual Gap*

Thomson's violinist analogy has been accepted by many as valid, as far as it goes; but many think it does not go very far.⁶⁹ It applies most clearly to the case of pregnancy caused by rape, but when a woman consents to sex, the analogy breaks down. It seems that a better analogy is with a case in which you join some sort of risk pool, from which someone will be chosen to support the violinist. If your number comes up in that voluntary setting, it is not so clear that you can then refuse the violinist the use of your body.⁷⁰

But is this the right analogy? Does a woman assume the risk of carriage simply by having consensual sex? Consider this contrasting analogy. You consent to visit a friend who has gone temporarily insane and has been hospitalized with delusional fantasies.⁷¹ You know that by visiting him you risk being attacked, and you know that if he attacks he will not be morally or legally culpable because he is delusional.⁷² Yet you do not

⁶⁸ See *infra* Part IV.D.

⁶⁹ See, e.g., Mary Anne Warren, *On the Moral and Legal Status of Abortion*, in THE PROBLEM OF ABORTION, *supra* note 14, at 107. See also Boonin-Vail, *supra* note 13, at 287 n.2.

⁷⁰ This analogy is provided by Warren, *supra* note 69, at 108, and Richard Langer, *Abortion and the Right to Privacy*, 23 J. SOC. PHIL. 23, 42 (1992).

⁷¹ Others have used a mugger analogy, but it is less apt because of a mugger's guilt in contrast to a fetus's innocence. See, e.g., MCDONAGH, *supra* note 12, at 49-50; Boonin-Vail, *supra* note 13, at 296-97.

⁷² He might be tortiously culpable, since insanity is not a tort defense. See W.

necessarily assume the risk of passively enduring an attack which he might launch at you if you visit him. It is plausible that you retain the right to defend yourself. In other words, there is a conceptual gap between taking a risk and assuming a risk. There may be reasons to fill the gap. We sometimes decide that there should be a convention whereby consenting to A and thus risking B is assuming the moral and legal responsibility for dealing with certain consequences (C) of B, for certain As, Bs and Cs. Whether we should have such a convention for having sex, risking getting pregnant, and assuming the obligation of carriage is a question I address in Part V. For now it is enough to see that consenting to sex is conceptually distinct from assuming the risk of carriage.

It could be argued that consent to one thing can sometimes automatically count as consent to something else, which entails a responsibility not to resist the second condition. And it could be argued that sex and pregnancy are one of those pairs. But it seems that the connection must be tighter than it is with sex and pregnancy. Two models exist for this kind of consensual entailment and neither extends to the sex and pregnancy relationship. First, if doing one thing is simply a means of reaching some other state, then it seems plausible to say that you consent to the consequence by consenting to the means, even if it is not certain to work.⁷³ For example, if you consent to get on a shuttle bus, you presumably consent to be taken where it goes, even though it might break down and fail to get there. Second, if one thing logically entails another, then consent to the former may be taken to be consent to the latter. For example, consenting to box is consenting to get hit by the fists of another. But sex is like neither of these. It may be used as a means of having children, but it is not simply that and may be engaged in for its own sake or for purposes other than procreation. And sex does not logically entail pregnancy. Even when couples try to conceive, the odds of conceiving on any particular occasion are fairly low.⁷⁴ Thus it is fairly clear that

PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 135 (5th ed. 1984). But then again, you might have assumed the risk. *See id.* § 68.

⁷³ This is a corollary of Kant's principle that one who wills the end, wills the means. *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 27, (James W. Ellington trans., Hackett Publishing 3d ed. 1993) (1785). The corollary works only if the means are willed qua means.

⁷⁴ The maximum probability of conception among fertile people for a single act

consenting to sex is not automatically consenting to go along with any pregnancy that might result.⁷⁵

D. *Constitutional Credentials of the Assumption of Risk Approach*

Assume for the moment that we can flesh out good moral reasons not to treat consensual sex as assumption of risk of carriage. I argue here that if the moral right to an abortion can be made out along assumption of risk lines, then a constitutional right should follow. Consider first the right of nonsubordination found in the Thirteenth Amendment. As Justice Hughes wrote: "The plain intention [of the Thirteenth Amendment] was to . . . make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude."⁷⁶ Clearly, forcing a woman to serve a fetus that she has neither voluntarily assumed responsibility for serving nor morally assumed the risk of having to serve is an example of involuntary servitude and is therefore arguably precluded by the Thirteenth Amendment.

Second, there is the due process right to liberty. The State cannot deprive people of fundamental liberties without a compelling state interest. The liberty to control one's reproduction has been recognized as fundamental,⁷⁷ and many believe that the liberty to engage in sexual activity without taking on the burden of childbearing has also been held to be fundamental.⁷⁸ Under *Roe*, the Court held that a woman's liberty to

of intercourse on a day randomly picked from a woman's cycle is 1.2%; it goes to a maximum of 33% on the day of ovulation. See MCDONAGH, *supra* note 12, at 52.

⁷⁵ Even if consenting to have sex were certain to lead to pregnancy, two questions would remain. First, was pregnancy intended or merely foreseen? If merely foreseen, it could be that consent does not carry over. See KAMM, *supra* note 13, at 60. Second, even if a woman consents to be pregnant, it does not follow that she cannot change her mind. *But see infra* Part V.C & Part V.D.

⁷⁶ *Bailey v. Alabama*, 219 U.S. 219, 241 (1911) (striking down criminal penalties for breach of labor contracts). Regan makes this point, *supra* note 13, at 1619. See also Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990).

⁷⁷ *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

⁷⁸ See TRIBE, *supra* note 11, at 94 (discussing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965)); see also Alan Brownstein & Paul Dau, *The Constitutional Morality of Abortion*, 33 B.C. L.

control whether she will have to endure an unwanted pregnancy is also fundamental. The problem with *Roe* is that this fundamental liberty interest can be overcome if the State has a competing compelling interest, and the Court held in essence that whenever the fetus counts as a person, the State has such an interest.⁷⁹ But this reflects a mistake; it overlooks the asymmetry between the fetus and the woman.

When it is recognized that the fetus is not merely making a claim not to be killed, but a claim to be served, it should no longer seem that the interests of the woman and the fetus are competing on a par. The fetus's claim to be served should be recognized as weaker than the woman's claim not to have to serve (again, assuming we can make out the argument that the woman does not assume the risk of carriage by having consensual sex), and it should seem implausible that the State has a compelling interest in satisfying that claim of the fetus at the cost of infringing upon this fundamental right of the woman. This point was implicitly recognized by Justice Blackmun in his opinion in *Casey*: "By restricting the right to terminate pregnancies, the State *conscripts women's bodies into its service*, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care."⁸⁰

Finally, two equal protection arguments—one based on suspect classifications and one based on fundamental rights—can be made. First, under the suspect classification heading,⁸¹ forcing a woman to carry an unwanted fetus puts a burden on her that a man does not face: she must either give up intercourse or risk carriage, with all of its psychological and physical costs.⁸² With regard to the first prong, there are those who would suggest that women should simply abstain from vaginal intercourse if they do not wish to become pregnant. But one should consider that it is not just young girls we are talking about here; we are talking about mature women,

REV. 689, 751 (1992).

⁷⁹ See *Roe*, 410 U.S. at 156-57.

⁸⁰ 505 U.S. at 928 (emphasis added).

⁸¹ After *Craig v. Boren*, 429 U.S. 190 (1976), gender discrimination has called for an intermediate level of scrutiny.

⁸² See, e.g., CALABRESI, *supra* note 13, at 106; SUNSTEIN, *supra* note 13, at 272-73.

many of whom are married, who are being told that they should be abstinent, as if that would not be a significant sacrifice—as if it would be tough but ultimately no different from, say, giving up smoking. As Sylvia Law put it:

For humans, sexual relations are invaluable expressions of love and bonding that strengthen the intimate relationships that give life meaning. More than one hundred years after Freud it is depressing to have to insist that sex is not an unnecessary, morally dubious self-indulgence, but a basic human need, no less for women than for men.⁸³

It could be objected that sexual relations do not require vaginal intercourse. But for many people sex is not complete unless it culminates in vaginal intercourse. Indeed, if either member of a couple feels this way, abstaining from vaginal intercourse can put a real strain on an otherwise healthy intimate relationship.

The other prong of the equal protection argument—that dealing with carriage—is obviously just as problematic for the woman who does not want to be pregnant. Therefore denying women access to abortion imposes a harsh dilemma on them that is not imposed on men. This inequity—one which is not inevitable, but would be the product of a law prohibiting abortion⁸⁴—can only be justified if there is an important state interest in ensuring that the fetus is served.⁸⁵ It is hard to see how the State can meet that burden when the fetus's claims to be served are weaker than the woman's claims not to be made a servant.

Oddly enough, a constitutional argument can be made that it is not the suspect class of women per se who would be affected by abortion restrictions, but rather the nonsuspect class of "pregnant people." This argument is in a straightforward way foolish, for it is both the case that only women get pregnant, and that almost all women for many years of their lives have

⁸³ Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1019-20 (1984) (citing in part Willis, *supra* note 13, at 474) (embedded quotations omitted). See also Holly Smith, *Intercourse and Moral Responsibility for the Fetus, in ABORTION AND THE STATUS OF THE FETUS* 237-38 (William B. Bonderson et al. eds., 1983).

⁸⁴ See Siegal, *supra* note 13.

⁸⁵ See the discussion of intermediate review in LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-32, at 1602-10 (1988).

to deal with the threat of handling the risk of pregnancy if they are sexually active.⁸⁶ Yet the Court made this distinction in *Geduldig v. Aiello*,⁸⁷ so the objection cannot be simply brushed aside.

If this distinction between pregnancy and pregnant people blocks use of the suspect classification analysis, the equal protection argument can still be made under the fundamental rights analysis. The right to refuse to serve another at great cost to oneself, when one has not assumed a moral obligation to give it, is arguably a fundamental right, and it should not be denied one class of people, those who become pregnant, when no one else is forced to carry similar burdens.⁸⁸

The objection that naturally arises here is that there is one other category of person that may seem to carry a similar burden, namely those who are drafted into military service.⁸⁹ To accommodate this, I do not argue that the draft is unacceptable; rather, I argue that there is a significant disanalogy between forcing people to serve their country and forcing women to carry unwanted fetuses.⁹⁰ The moral significance of this difference may not be immediately obvious. It may seem that forced service is forced service. But we all owe a duty of loyalty and service to our country that we do not owe to other individuals. We rely on our country to provide us with the peace and prosperity without which none of us could do much of anything. This is not generally true of our relationship with other individuals.

The response might be that some are called to fight in wars and some are called to carry fetuses; both can be considered kinds of national service if the nation's government decides to make those kinds of demands. But the two kinds of

⁸⁶ See, e.g., Law, *supra* note 83, at 1017-19.

⁸⁷ 417 U.S. 484 (1974).

⁸⁸ This is the core of Regan's argument. See Regan, *supra* note 13, especially at 1621f. See also Curran v. Bosze, 566 N.E.2d 1319 (Ill. 1990); SUNSTEIN, *supra* note 13, at 274; MCDONAGH, *supra* note 12, at 102-03. But see Brownstein & Dau, *supra* note 78, at 744 n.130.

⁸⁹ This objection and the following reply are covered in more depth by Regan, *supra* note 13, at 1604-09.

⁹⁰ See also SUNSTEIN, *supra* note 13, at 276-77 (discussing how this division of labor, women carrying fetuses and men serving in the military, reinforces different roles for men and women and the second-class citizenship for women that comes with such sexism).

service are not grounded in the same kind of interest. Military service aims to defend the common welfare; pregnancy serves a private interest. It might be different if there were a shortage of babies; then it is conceivable that women could justifiably be drafted to produce more of them. But that is not the situation in which we live.⁹¹ The interest behind a law restricting abortions is not our country's need for babies; at worst it is an interest in maintaining women's traditional roles as baby makers and child raisers,⁹² and at best it is a concern for the welfare of the individual fetus. Assuming the best, no one else is called to serve for that kind of private interest.⁹³ Unless and until we are willing to draft people quite generally to serve other individuals who happen to be in need, forcing women to carry fetuses they have not voluntarily agreed to carry will be

⁹¹ Arnold Loewy criticizes Regan for, among other things, not seeing that some military service involves serving specific individuals (e.g., a general), and for not recognizing that "until artificial wombs are perfected, natural ones will be necessary for the public purpose of perpetuating the human race." Arnold H. Loewy, *Why Roe v. Wade Should Be Overruled*, 67 N.C. L. REV. 939, 946 (1989). The second point shows that Loewy failed to see the point I just made in the text, namely that we are suffering no shortage of babies; and the first shows that he failed to appreciate the difference between who one serves and the interest that justifies the service. One who serves a General presumably helps in the overall functioning of the military. It is not for the General's sake that he or she is served; it is to allow the General to do his or her job, serving the country, better.

⁹² See LUKER, *supra* note 20; Siegel, *supra* note 13.

⁹³ Michaels reads Regan to argue that "every public interest is ultimately reducible to a private interest." Michaels, *supra* note 66, at 219. This is a clear misreading of Regan. But she gives two independent arguments against Regan's distinction: (1) she observes that the boundary between public and private interests is hard to define; and (2) she claims that all public interest can be seen ultimately to be private interest because the government (arguably) exists simply to protect the rights of its citizens. See Michaels, *supra* note 66, at 219. In response I say (1) that boundary problems come up all over the place (for example, how far must a man's hair line have receded before he is bald?), and yet that does not show that clear cases do not exist on both sides of the difficult to draw but meaningful line; and (2) that the government exists not only to protect the rights of its citizens, but also to serve their interests. Insofar as it seeks to serve their interests, it ought not to serve the interests of specific individuals, but interests that are generally shared, such as national defense, general economic growth, and domestic tranquillity. Of course, it is true of each government action that some will benefit from it more than others, and some may even be harmed. But given a range of policies, with some people selected to serve the interests of others at one end, and common sacrifice for common benefit at the other, government policies ought to steer clear of the former and aim for the latter. Michaels fails to recognize this spectrum, and thus fails to see that prohibiting abortion is a clear case of the bad end of the spectrum.

an unmatched intrusion on the liberty of people who happen to become pregnant; as such it should not be constitutional.

Thus if we can finish making the moral case that consensual sex does not entail assumption of the risk of carriage, there are a number of ways the constitutional right to an abortion can be grounded.⁹⁴

II. PROBLEMS WITH THE ASSUMPTION OF RISK ARGUMENT

A. Overview of the Most Serious Problems

The most obvious problem with the assumption of risk argument is that a woman does not simply risk *having* a fetus impose itself upon her; by engaging in sex, she risks *causing* a fetus both to impose upon her and to be dependent on her. Eileen McDonagh tries to address this problem by emphasizing that the fetus, rather than the man or the woman, is the proximate cause of the woman's pregnancy.⁹⁵ This argument is unpersuasive. First, because the fetus is not an agent in any sense of the word (it can be a person and not an agent just as a sleeping person can), it is not clear that it can be the proximate cause of a female's pregnancy. Second, there are responsible agents in the situation, namely the man and the woman. Their joint action is the proximate cause of the presence of any fetus which is conceived. As an analogy, imagine that you knew someone was standing on a platform above you and you moved about in a way that you knew would risk causing the platform to collapse. If the platform does collapse and the person falls towards you, his body is a threat to you, but it would be incredible to think that you could label him the proximate cause of your danger and thereby justify blowing him up to save yourself.⁹⁶ Perhaps you would be allowed to defend your-

⁹⁴ Even if the moral argument to come were not convincing, there would still be an equal protection problem in forcing women to carry unwanted fetuses and not forcing fathers to donate their organs for children of theirs who happen to be in need. See *infra* note 101 and accompanying text.

⁹⁵ See MCDONAGH, *supra* note 12, at 42-46.

⁹⁶ The issue is one of allocating responsibility, and clearly it falls on you, not the person who is falling towards you. See the analysis of proximate cause into five problems, including "shifting responsibility" in PROSSER & KEETON, *supra* note 72, at 279.

self, but whether you would be allowed to defend yourself should depend on such factors as whether you should have moved as you did, whether he should have been on the platform, and whether self-defense against innocent threats can generally be justified. Your freedom to defend yourself cannot be established by a simple appeal to the notion of proximate cause.

The fact that the woman is partly causally responsible for the fetus being in the position it is in presents what I take to be the most difficult problem for the assumption of risk argument, but one that can be addressed. Since the solution is somewhat involved, I will save it for the last part of this section. Presently, I want to raise a number of other possible problems for the assumption of risk argument, problems with more straightforward answers.

B. *Straightforward Objections and Replies*

One problem with the assumption of risk argument is that to someone who is wrapped up in the joys of parenting, the idea that carriage is a serious burden can seem absurd and disgusting.⁹⁷ It seems to fly in the face of the joy that many women experience in pregnancy. It seems to sully the very idea of a baby to suppose that while a fetus it was some kind of threat to its mother. But while it may be hard to keep the emotions disentangled, there is a good reason to do so. Consider the following analogy: sex can be a wonderful, beautiful, fulfilling thing, but when unwanted it can be among the most distressing experiences of a lifetime. Saying that rape is truly horrible does not imply that all sex is horrible, or that when a woman has consensual sex she is merely acquiescing in being raped. Likewise, saying that an unwanted pregnancy can be a truly horrible invasion of a woman's body does not imply that all pregnancies are horrible invasions of a woman's body.

Another problem with the assumption of risk argument is that a fetus is not just some stranger but a member of the woman's family, her child. We are reluctant to hold a stranger who walks by a person in distress responsible for failing to

⁹⁷ For an early expression of the gist of this paragraph, see Willis, *supra* note 13, at 473.

help out,⁹⁸ but if a parent were to leave her child in distress, that would be a crime.⁹⁹ Other than in cases of fetal implantation, the fetus a woman carries is her child, and it could be argued that she has a special responsibility for its welfare; she should do what she can (perhaps short of giving her life for it) to ensure that it makes it into the world alive and healthy.

There are two responses to this argument. One is to question how parents come to have special obligations towards their children, and the other is to question just how strong that parental obligation is. With regard to the acquisition of parental responsibility, one source is surely the voluntary act of taking a child home and assuming responsibility for it.¹⁰⁰ A woman with an unwanted fetus in her body, who never intended to get pregnant, has never voluntarily taken responsibility for it; rather, in seeking an abortion she is acting to renounce responsibility for it, as parents do by putting a child up for adoption. The fact that she is seeking to renounce responsibility for it does not of course mean that she has no responsibility for it. But keeping our focus on the voluntary assumption of responsibility, that factor is not to be found.

It could be suggested that when a woman has sex she tacitly consents to assume responsibility for it. But tacit consent is given by acting in a way which indicates that one voluntarily agrees to some proposition (in this case, that one will be responsible for any fetus conceived), where one's agreement is signaled in a nonexplicit way. Even if abortion were illegal,

⁹⁸ In Vermont (VT. STAT. ANN. tit. 12 § 519 (1973)), Minnesota (MINN. STAT. ANN. §§ 604A.01 (West 1988)), Massachusetts (MASS. ANN. LAWS ch. 268, § 40 (Law. Co-op. 1992)), Rhode Island (R.I. GEN. LAWS §§ 11-37-3.1, 3.3, and 11-56-1 (1994)), and Wisconsin (WIS. STAT. ANN. § 940.34 (West 1996)) there are statutes establishing some positive duties between strangers in emergency circumstances. But the requirements are very limited. Vermont's statute, for example, provides a fine of up to \$100 for breaking the following law:

A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.

VT. STAT. ANN. tit. 12 § 519 (1973).

⁹⁹ See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW §3.3(a), at 203 (2d ed. 1986), including n.9 for a list of cases.

¹⁰⁰ Thomson makes this point, that biology alone does not explain the special responsibility of a parent for a child. Thomson, *supra* note 14, at 186. See also Regan, *supra* note 13, at 1597.

a woman having sex could reasonably deny that such an act can be interpreted as tacit agreement to the requirement that if she conceives she must carry the fetus. She can protest that the law may try to force her to carry any fetus that she conceives, but that she will do so involuntarily only through coercion or physical restraint. And if this is true in a regime in which abortion is illegal, how much clearer is it that tacit consent to carry a fetus cannot be inferred from consensual sex in a regime in which abortion is legal? Therefore, the fact that a woman finds herself pregnant cannot be a sign that she has voluntarily assumed responsibility for the fetus.

It may be maintained, however, that a woman has some responsibility for the welfare of a fetus she conceives simply by virtue of being its mother. Parents cannot simply abandon a child; if they want to give a child up for adoption they must transfer responsibility for the child to others, and if others are not available to take up the responsibility, then the parents retain the duty to guard the welfare of their child until such time as someone or some institution will assume that responsibility for them.¹⁰¹ This raises the question: Just how strong is that duty to aid, the one that lies somewhere between the duty to aid a stranger and the duty a willing parent assumes to aid her child? Is it so strong that a woman should have to carry a fetus? Imagine that a newborn whose parents intended to give it up for adoption needed the father to attach himself to it for another nine months, as in Thomson's violinist example. We presumably would not require this, as we do not even require family members to donate organs to one another.¹⁰² Thus there is good reason to think that we should not impose a legal duty to carry a fetus on a woman simply because it is family.

One might object that we are engaging in a moral critique of the law, and thus we cannot simply assume that the law allowing family members to refuse to give organs to each other is morally sound. In fact, in cases in which the risk and physical costs are low, refusal to donate, say, blood or bone marrow to an immediate family member seems to be an immorally

¹⁰¹ Jeff McMahan made this point to me in personal correspondence.

¹⁰² See *supra* note 93. The comparison between organ donation and abortion is implicit in Thomson's violinist example. See *supra* text accompanying note 56. It is endorsed by many, including Regan, *supra* note 13, at 1586, and SUNSTEIN, *supra* note 13, at 274.

selfish choice. In this spirit, Sylvia Law likened the failure to carry a child with the failure to throw your child a rope if it is drowning.¹⁰³

But Law's analogy reflects a failure to appreciate the difference between supererogatory and morally mandatory positive duties. We may morally demand small sacrifices of people but not big sacrifices.¹⁰⁴ Of course, this gets into matters of degree, and judgments about where to draw the line will differ. But months of nausea, pain, and swelling, risk of permanent injury, feeling invaded and ashamed¹⁰⁵—these all add up to nontrivial costs. Refusal to endure these costs to save the life of a family member with whom one has formed no personal bond and to whom one has made no commitments does not strike me as obviously immoral.¹⁰⁶

It might seem that kinship is not the only reason a woman could owe a special duty to a fetus. One might suggest that a pregnant woman has acted so as to set up expectations. But the only person whose expectations could matter here, short of a situation in which a woman signs a contract to carry a child for another,¹⁰⁷ are those of the fetus, who has none. Another possibility is that having begun to give aid, a woman can be held responsible for following through. This might apply to a woman who intends to get pregnant and then decides she

¹⁰³ See Law *supra* note 83, at 1022.

¹⁰⁴ As Kamm puts it, it is "inappropriate to refer to the refusal to undergo a large imposition as 'selfish.'" See KAMM, *supra* note 13, at 23.

¹⁰⁵ For a detailed discussion of the physical effects of pregnancy, see MCDONAGH, *supra* note 12, at 70-71. See also Siegal, *supra* note 13, at 371-72; TRIBE, *supra* note 11, at 104.

¹⁰⁶ Objections to the assumption of risk argument have also been raised on the grounds that men who used contraception which failed, and who formed no relationship with the child are nonetheless required, in some jurisdictions, to pay for child support. See Keith Pavlischek, *Abortion Logic and Paternal Responsibility: One More Look at Judith Thomson's "A Defense of Abortion"*, 7 PUB. AFF. Q. 348 (1993). If they can be required to support the child for years to come, then why cannot the woman be required to give birth to it? I follow the response given by Professor Boonin-Vail. He points out that "[t]he woman is required to suffer a distinctly intimate and physical burden while the man is required only to hand over some money." Boonin-Vail, *supra* note 13, at 289 n.4. Since earning money requires labor, this can seem an insignificant difference, but at least in this culture one has a lot of freedom in deciding how to earn one's money, and at no point need the obligation be as intrusive into one's life as carrying a fetus.

¹⁰⁷ To date no surrogate contract is enforceable. See Manus, *supra* note 40.

wants an abortion,¹⁰⁸ but it does not apply to a woman who did not intend to become pregnant. She has at most "taken a small risk, and lost."¹⁰⁹

An editorial writer who responded to Eileen McDonagh's variation on the assumption of risk argument raises another objection: the fetus, on McDonagh's account, is dismissed as an innocent aggressor¹¹⁰ without the right to an attorney.¹¹¹ The complaint can be generalized to any model of the assumption of risk argument; but its merit is easy to see in the context of self-defense. Self-defense is justified in part by the idea that the State cannot always be there when an emergency arises.¹¹² But the need to get rid of an unwanted fetus is not so urgent as to require action before the State can intervene. It is conceivable that a hearing could be held early enough to allow an abortion to be a meaningful option, i.e. in such a way that a required hearing would not present an "undue burden."¹¹³ Therefore, there is reason to think that a fetus ought to have a hearing where someone could represent its interests.

But the fact that a lawyer could be brought in to represent a fetus at a hearing does not mean that a lawyer should be brought in. Consider an analogous case involving life and death: the right to cease life-sustaining treatment on the basis of a living will. Since *Cruzan v. Director, Missouri Department of Health*,¹¹⁴ there is no call to try cases in which the patient has clearly and in writing expressed her wish not to be on a life-support system. A suit to prevent a patient from terminating life support even though her living will is clear should be thrown out for failure to state a claim.¹¹⁵ Likewise, a rule could be set out in the abortion context which would obviate

¹⁰⁸ Whether she can withdraw aid if she changes her mind is discussed *infra*, Part V.C.

¹⁰⁹ Regan, *supra* note 13, at 1599.

¹¹⁰ On page 13 she calls an unwanted fetus "an aggressive intruder," but earlier, on page 9, she acknowledges that it is innocent. See MCDONAGH, *supra* note 12.

¹¹¹ See Nat Hentoff, *Abortion as Self-Defense*, WASHINGTON POST, Feb. 1, 1997, at A21.

¹¹² See LAFAVE & SCOTT, *supra* note 99, § 5.7(a).

¹¹³ Such procedures are already in place for minors in states where parental approval is required. See *Akron*, 462 U.S. at 427n.10 (citing *Bellotti v. Baird*, 443 U.S. 622, 643-644 (1979) (plurality opinion)).

¹¹⁴ 497 U.S. 261 (1990).

¹¹⁵ FED. R. CIV. P. 12(b)(6).

the need for a trial. In fact, since the status of the fetus is not relevant to the right to an abortion under the assumption of risk argument, a trial would almost always be a waste of time. It is not as if one fetus could make a stronger claim to be kept alive than another if personhood is granted from conception. The only exceptions where hearings might be called for are cases in which the woman is not clearly competent to decide what to do, or it is unclear whether she has assumed the risk of carriage or waived her right to abort.¹¹⁶ These exceptions hardly establish a general fetal right to representation.

C. *Problem of Causing a Fetus To Be What It Is: Dependent*

The most difficult problem with the assumption of risk argument is that a woman with an unwanted pregnancy does not merely find herself faced with an unwelcome presence, but with an unwelcome presence whom she caused to be in that position (assuming she had consensual sex). Normally, if one causes someone to be in a state of need, one cannot simply assert that one owes the other nothing special in the way of help.¹¹⁷ Not only morality but tort law is clear on this point; one has a special obligation to render aid to those whom one puts in a state of need, even if one created the need innocently through no fault of one's own.¹¹⁸ So why not say that when a woman has sex and risks creating a fetus that will die if not carried in her womb, she acquires an obligation to carry the fetus at least until it can be safely removed, assuming that it would not kill her or seriously injure her to allow it to use her body that way?

Donald Regan addressed this argument almost two decades ago.¹¹⁹ He suggests that if one leaves another no worse off than she would have been had one not affected her at all,

¹¹⁶ See Part V.D *infra*, discussing reasons why the law should not look into certain causes why a particular woman does not have a moral right to an abortion.

¹¹⁷ See *Jones v. State*, 220 Ind. 384, 43 N.E.2d 1017 (1942) (defendant guilty of murder for intentional failure to rescue from drowning a girl he raped who, as a result of the rape, fell into a creek in distress); LAFAVE & SCOTT, *supra* note 99, § 3.3(a)(5). LaFave & Scott note, however, that it is not so clear whether one owes a duty to rescue if one innocently or "accidentally" creates the situation of danger.

¹¹⁸ See PROSSER & KEETON, *supra* note 72, at 377; RESTATEMENT (SECOND) OF TORTS §§ 321, 322 (1965).

¹¹⁹ See Regan, *supra* note 13.

then no special duty to aid follows. Regan calls this the "no worse off" principle,¹²⁰ and he explains it this way:

If we allow a potential samaritan to refuse aid to someone he has harmed or endangered, he will have made the other worse off by his entire course of conduct. The pregnant woman who has an abortion, however, does not make the fetus worse off by her entire course of conduct. For all practical purposes, the abortion leaves the fetus in just the state it was in before it was conceived.¹²¹

In other words, the claim is that it is not worse to be created and to live a few months in the womb than it is never to have been conceived at all. As long as this is true, the no worse off principle states that one who conceives a fetus does not have the kind of special obligation to it that otherwise would follow from causing someone to be dependent.

It may seem that a kind of metaphysical nonsense is afoot here; that it makes no sense to ask if a fetus is worse off being conceived and aborted than never having lived at all.¹²² After all, there is nothing which can be identified as the fetus which did not get conceived, and thus there is nothing to which we can compare the short life of the fetus. It is not like saying that you would have been better off if you had not, for example, drunk some unclean water. In that case we can identify the subject through the two options; we cannot when talking about being better off not being conceived. But things are not completely metaphysically intractable, for we can sensibly ask if one's life as a whole is a positive thing or a negative thing. To say that a fetus is not worse off for its short life is just to say that its life is not as a whole a bad thing; it is to say that if it could form such thoughts, it should not wish never to have been conceived.¹²³

¹²⁰ Kamm points out that this principle isn't exactly right since there can be two or more people who will harm someone, and if one is the first, then one leaves her no worse off by harming her, which would seem to falsely imply that one can permissibly do so. See KAMM, *supra* note 13, at 28-29. The refinements necessary to fix this problem, however, are not relevant here.

¹²¹ See Regan, *supra* note 13, at 1601.

¹²² See, e.g., Susan M. Wolf, *Creation and Abortion: A Study in Moral and Legal Philosophy*. By Frances Myrna Kamm, 10 CONST. COMMENT. 502, 507 (1993) (book review).

¹²³ See, e.g., Brownstein & Dau, *supra* note 78, at 730-34; Partha Dasgupta, *Savings and Fertility: Ethical Issues*, 23 PHIL. & PUB. AFF. 99, 114-15 (1994).

It is important to understand that the no worse off principle does not deny that death is a bad thing for a fetus. It is the loss of a whole future life. If we are willing to agree that a fetus is a person, then we should agree that the loss of this future is a harm to a fetus just as it is for a young child. The no worse off principle is not meant to license killing or to belittle the interests of a fetus. It is addressed only to the question of whether one acquires an extra or special obligation to the fetus if one conceives it and thereby causes it to be in a state of need. It answers that one has no extra or special obligation to it as long as, were one to cease aiding it, it would be no worse off than before one caused it to be in that state of need. One may have a special obligation to it for other reasons, but not for the reason that one caused it to be in a state of need.

Regan offers this principle but does not provide an analogous case by which to consider it; in fact he says over and over that the case of a pregnant woman seeking an abortion is unique.¹²⁴ David Boonin-Vail, however, shows that we can conceive of analogous cases, more or less the way Thomson did in introducing the violinist. He constructs a case he calls "Imperfect Drug:"

You are the violinist's doctor. Seven years ago, you discovered that the violinist had contracted a rare disease which was on the verge of killing him. The only way to save his life that was available to you was to give him a drug which cures the disease but has one unfortunate side effect: five to ten years after ingestion, it often causes the kidney ailment Thomson has described. Knowing that you alone would have the appropriate blood type to save the violinist were his kidneys to fail, you prescribed the drug and cured the disease. The violinist has now been struck by the kidney ailment. If you do not allow him the use of your kidneys for nine months, he will die.¹²⁵

In this case, as in conception, you create a life where none would have been, only here it is not by conceiving it but by extending it. And yet, though you have done something which created the violinist's current needy state, it is clear that you

¹²⁴ See, e.g., Regan *supra* note 13, at 1570. Regan states that "the situation of the pregnant woman is *sui generis*. If we regard the pregnant woman as a potential samaritan, there is no other potential samaritan whose situation is not in some important way distinguishable."

¹²⁵ Boonin-Vail, *supra* note 13, at 303. He based his example on one given by Harry Silverstein in *On a Woman's "Responsibility" for the Fetus*, 13 SOC. THEORY & PRAC. 106-07 (1987).

do not owe him the use of your kidneys for nine months.¹²⁶ Indeed, even if you were not aiming to give him the extra years of life but simply did something which allowed him that benefit and then caused him the need, you could reasonably claim that you should still not be liable for rendering the use of your kidneys for nine months.¹²⁷

The analogy to conception is plain. If the woman had not had sex, there would not be a fetus in need of a womb in which to grow. Therefore, if she denies it the use of her womb, she does not make it worse off than it would have been had she not had sex. She merely allows it to have a few months of life which she then refuses to extend because of the cost to her. Of course, if the cost to her were negligible, she would be morally required to help the fetus, and presumably there would be nothing objectionable in a law which forced her to carry that moral obligation. But the same is true in the Imperfect Drug case. The reason you have no duty to help in that case is that the cost to you is far from negligible. It probably will not kill you, but it is a significant cost, and since your extending another's life and creating a state of need where none would have been does not harm him relative to your not having extended his life, you have no special obligation to come to his rescue. The same is true of a woman with an unwanted fetus. In sum, if the no worse off principle is right, it shows that by conceiving a fetus, a woman does not thereby incur the obligation to carry it to term.

Two arguments have been raised to contest this principle. One is that the fetus is worse off for having lived such a short life;¹²⁸ the other is that the no worse off principle simply does

¹²⁶ It matters that there is no way to extend his life without causing him to be needy; use of an inferior drug could constitute malpractice and make you liable. See Boonin-Vail, *supra* note 13, at 304. Pregnancy clears this hurdle. In pregnancy, there is currently no possibility of creation without dependency on the woman. And even if there were, that is, even if artificial wombs came into existence, the fact that there is no way to make sense of that same fetus having been conceived in vitro and nourished in an artificial womb (not unless we could tell which sperm contributed half its genetic information, and could have selected that sperm and ovum in advance), indicates that the malpractice worry, the worry that by "aiding" the fetus in this way the woman interferes with what the fetus could have otherwise been given, does not apply.

¹²⁷ David Boonin-Vail discusses this in the case he calls "Pleasure-Seeking Doctor." See Boonin-Vail, *supra* note 13, at 312-13.

¹²⁸ See Boonin-Vail, *supra* note 13, at 306-07.

not capture all that is morally significant about creating a human life. With regard to the first, it might be thought that the pain of being aborted is not compensated for by any meaningful experiences in the fetus's life. Imagine the Imperfect Drug case changed so that the violinist would have died a quick painless death, but you gave him a drug which will give him an extra three months in a coma, followed by a final recovery of consciousness only to experience sheer terror and excruciating pain.¹²⁹ By giving him that drug you would arguably have made him worse off, and if you could save him from the terror and pain, giving him instead the prospect of waking to years of health, by giving him use of your kidney while he's in his coma, you arguably should do so. Perhaps the same can be said for conceiving a fetus and the option of aborting it versus carrying it.

Even if it is true that it is worse to be a fetus who is conceived and aborted than never to have lived at all, there are two responses that can be given in the spirit of the no worse off approach. One is that it cannot be all that much worse to be conceived and aborted than never to be conceived at all. Even if a fetus is capable of sensations (which is doubtful before twenty-six weeks or so),¹³⁰ it never achieves self-awareness, so any pain it suffers is momentary. There may of course be other reasons why it is worse to live a short life than none at all, but if the way we deal with miscarriages is morally sound, then it cannot be much worse. Current data indicates that about one third of all pregnancies end in miscarriage,¹³¹ yet we do not feel that each such pregnancy is a really bad thing for the fetus who does not make it. Frances Kamm drives this point home with three examples:

(1) a woman who deliberately becomes pregnant, even though she knows that she has a high risk of miscarriage; (2) a woman who knows that she will lose her first conceived child but becomes pregnant anyway because she is told that this is the only way to have a child eventually; (3) a woman who knows that her pregnancy will end in miscarriage but would have to make a significant effort to avoid getting pregnant (taking a dangerous birth-control drug or

¹²⁹ Boonin-Vail gives a similar example. See Boonin-Vail, *supra* note 13, at 305-06.

¹³⁰ See *supra* note 44.

¹³¹ See MCDONAGH, *supra* note 12, at 53.

avoiding heterosexual intercourse altogether).¹³²

If a short life in the womb were a serious harm to a fetus, then these women would all be acting wrongfully, but it is hard to believe that this is so. Therefore it seems that a short life in the womb cannot in itself be a serious harm to a fetus.¹³³

The second response is that there has to be some kind of proportional relationship between how much worse off a fetus would be and what a woman would owe it. Consider a case in which you cause someone to have a moderate itch for a week, and you could stop that itch but only by having one of your kidneys cut out to extract a balm from it. We would not require you to sacrifice your kidney to cure the other's itch. Likewise, we might require some extra sacrifice from a woman if it would prevent the fetus from leading a short life with negative value overall, but the sacrifices of carriage, particularly unwanted carriage, are too substantial to require in response to whatever is the overall harm of living only a few months in a womb.

The second argument contesting the no worse off principle is that it simply does not capture all that is morally significant about creating a life. Frances Kamm devotes the fifth chapter of her book, *Creation and Abortion*,¹³⁴ to the idea that respect for life requires more than is captured in the no worse off principle. She argues that a created person can demand that her creator provide her with a certain minimal quality and quantity of life. This might help explain, among other things, why parents cannot merely abandon their children if they do not want them; why they must ensure that their children will be adopted and properly cared for.¹³⁵ But she concludes, as I just did, that the burdens of carriage are greater than can be required to meet the obligations attendant upon being a creator. In other words, she argues, I believe correctly, that a fetus can

¹³² KAMM, *supra* note 13, at 85-86; *but see* KAMM, *supra* note 13, at 127-30 for competing considerations.

¹³³ This could be taken to be an argument that a fetus is not a person, but it need not. It can show only that the no worse off thesis is not far from the mark.

¹³⁴ *See* KAMM, *supra* note 13, at 132.

¹³⁵ *See supra* notes 96-104 and accompanying text.

demand that a woman bear certain costs for it but that these costs generally do not extend to carrying a fetus until it can be safely delivered from her.¹³⁶

With this I conclude that any special obligation a woman may have to a fetus in virtue of either having created it or having made it dependent on her is not so great as to obligate carriage.

III. SELF-DEFENSE AND THE PROBLEM OF THE INNOCENT THREAT

A. *Problems with Self-Defense Against Innocent Threats*

So far the assumption of risk argument seems at least promising as a way to justify a right to abortion, even if we assume the fetus is a person. But we have been talking as though a woman could simply refuse to take care of the fetus and that would be that. In reality, most abortions involve attacking a fetus and killing it as part of the process of freeing a woman from the burden of carrying it.¹³⁷ How are we to justify this feature of abortions? Should we conceive of an abortion as a form of either self-defense or other defense against an innocent threat?¹³⁸ In other words, can we argue from the assumption that the woman has no responsibility to carry the fetus to the conclusion that any fetus in her is a threat, even if an innocent threat, to her bodily integrity which she therefore has a right to kill? Consider this statement by Eileen McDonagh:

[I]f a woman does not consent to pregnancy, the issue is that the fetus has made her its *captive samaritan* by intruding on her body

¹³⁶ See KAMM, *supra* note 13, at 165. The one exception Kamm allows for are cases in which the woman has not done what she should have done to avoid conception. This is the kind of matter I will take up in Part V.

¹³⁷ This was one of the early criticisms of Thomson's argument. See, e.g., Baruch Brody, *Thomson on Abortion*, 1 PHIL. & PUB. AFF. 335, 338-39 (1972); Finnis, *supra* note 57. For documentation regarding how a fetus is attacked, see (visited May 10, 1997) <<http://www.rtl.org/abormeth.htm>>. See also Michelle Lynn Lakomy, *A Meaningful Choice: Two FDA Approved Drugs Are Combined to Perform Medical Abortions*, 18 WOMEN'S RTS. L. REP. 49, 52 n.38 (1996).

¹³⁸ A medical abortion may be properly conceived as self-defense, while a surgical abortion would be other defense (the surgeon defending the woman against the fetus).

and liberty against her will, and thus on the woman's right to be free from that status. Women must . . . have a right of self-defense comparable to others in our society to use deadly force on their own behalf to stop fetuses from taking over their bodies.¹³⁹

Is this a promising line of argument? I argue that it is not. Indeed, I argue that the right of self-defense against innocent threats is such a weak right that if the right to an abortion relied on the right to defend oneself against innocent threats, then a woman should be allowed to have an abortion only if her life were in danger and the fetus were the cause of the danger,¹⁴⁰ and even then, not if she were carrying twins. If this is where the self-defense argument leads, it is more foe than friend to the right to an abortion.

To make the argument cleaner, I shift away from abortion cases to cases involving external threats. This will avoid the confusion that might arise from the fact that the fetus is not merely a threat, but a person in need of aid. The next Part considers whether one can justify detaching from another who is in need of aid.

Imagine that you see a person headed straight for you who, unbeknownst to him but known to you, has been sprayed with a chemical that will produce in you all the physical symptoms that normally accompany a pregnancy: nausea, bloating, weight gain along with all the same risks of permanent injury and mortality, culminating after nine months in an excruciatingly painful series of muscle contractions lasting from one to twenty-four hours or maybe more. Clearly such a person threatens you with less harm than one who simply threatens to kill you. So we can make another simplifying assumption,

¹³⁹ MCDONAGH, *supra* note 12, at 172.

¹⁴⁰ It is worth noting that this has been rare for a long time. Indeed, "the improvement in obstetrical science [had] by the 1950s . . . virtually eliminated the need to perform abortions simply in order to save the life of the mother." LUKER, *supra* note 20, at 77. See also Roy Rivenburg, *Partial Truths In the PR War Over a Form of Late-Term Abortions, Both Sides Are Guilty of Manipulating the Facts. Here's What They Are (and Aren't) Saying*, L.A. TIMES, April 2, 1997, E1, at 16 ("The late Dr. James McMahan, who specialized in third-trimester abortions and helped pioneer partial-birth techniques at his Eve Surgical Center in Los Angeles, submitted documents to Congress analyzing the reasons for nearly 2,000 of his cases. He said 9% were done for maternal health problems, most commonly depression and rape."). Note that depression and rape are not threats to the mother's life, so it is not clear that any of Dr. McMahan's 2,000 cases involved that kind of threat.

namely that if you are not allowed to kill a lethal innocent threat, then you shouldn't be allowed to kill the innocent threat who has been sprayed with the chemical that simulates pregnancy. We can therefore focus our discussion on lethal innocent threats; any limits on responding to them presumably carry over to the case of pregnancy.

There are two kinds of problems with using a self-defense argument against a lethal innocent threat. First, it is generally agreed that you cannot justifiably kill an innocent bystander to save yourself,¹⁴¹ and there is a problem distinguishing an innocent threat from an innocent bystander. They differ in virtue of the fact that one threatens another, while the other does not, but upon reflection, it is not easy to see why this is a meaningful difference.

Here is how Michael Otsuka frames the problem.¹⁴² There seems to be a spectrum of possibilities, with the innocent bystander at one end and the innocent threat at the other. An innocent bystander would be someone faultlessly occupying a position such that if you took action to save yourself, you would kill her. For illustration, consider a case in which you are in danger of being crushed by a runaway trolley car with no one on board. You can save yourself by blowing up the trolley, but that would kill an innocent bystander near the tracks. On the other end of the spectrum we have the innocent threat. For illustration, consider a person who has been tossed off a ledge and who will soon crush you if you do not blow her up. Killing the innocent bystander is impermissible; can killing the innocent threat be different? Compare this intermediate case. Suppose that the innocent bystander, instead of standing near

¹⁴¹ See LAFAYE & SCOTT, *supra* note 99, §5.7(g); Sanford Kadish, *Respect for Life and Regard for Rights in the Criminal Law*, 64 CAL. L. REV. 871, 877 (1976); Jeff McMahan, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252, 254-55 (1994); Michael Otsuka, *Killing the Innocent in Self-Defense*, 23 PHIL. & PUB. AFF. 74, 75 (1994); Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 289-90 (1991). *But see* Phillip Montague, *Self Defense and Choosing Between Lives*, 40 PHIL. STUD., 207, 209 (1981).

Note, I am not suggesting that it is always wrong to kill an innocent bystander. If it is a mere side-effect of saving more people, it will often be justified. But when the numbers are one-on-one, common sense says that you cannot kill an innocent bystander even if his death is merely a foreseen side-effect of saving yourself.

¹⁴² This is a restatement of his argument. See Otsuka, *supra* note 141, at 85. I abbreviate it somewhat since he concerns himself also with innocent aggressors.

where your grenade would land if you were to try to blow up the trolley, is aboard the trolley through no fault of her own (say she was overpowered and placed there by another who then cut the brake cables). What difference can it make that she is on the trolley rather than next to it? Change in location seems morally irrelevant. Now suppose that instead of her making up a negligible portion of the mass coming towards you, she makes up the bulk of it. Instead of being put in a trolley, she was tossed off a ledge at you. What moral difference can depend on the fact that her body makes up most of the mass? Percentage of a lethal mass that is a person's body seems a morally irrelevant concern as well. It seems we have two distinctions without a difference. An innocent threat is, as far as morality seems to be concerned, essentially an innocent bystander aboard her own body.¹⁴³ If you cannot kill her as an innocent bystander, then it seems you cannot kill her as an innocent threat.¹⁴⁴

The second kind of problem with self-defense against innocent threats is that it seems to involve an impermissible shifting of harm. As Jeff McMahan points out, "There is a strong moral presumption against causing harm," and "to shift a harm is normally to do [or cause] a harm."¹⁴⁵ It is tempting to think of an innocent threat as imposing a harm on the innocent victim she threatens, doing something she should not do and thereby acquiring a kind of liability for it. But if we think of such situations as involving two innocents, then we recognize the more basic fact; that it is the innocent victim who is threatened. The innocent victim would do wrong to shift that threat of harm onto an innocent bystander. Likewise, it follows that the innocent victim would do wrong to shift the threat onto the innocent threat. Bringing this back to abortion, it seems that the woman with an unwanted pregnancy is the one

¹⁴³ See Otsuka, *supra* note 141, at 87.

¹⁴⁴ Of course, we could run this the other way and say that if you can kill her as an innocent threat, then you can kill her as an innocent bystander. But people seem more wed to the belief that it is impermissible to kill an innocent bystander than that it is permissible to kill an innocent threat. See Otsuka, *supra* note 141, at 88.

¹⁴⁵ See McMahan, *supra* note 141, at 252.

with the problem, and she should not shift that problem onto the fetus inside of her, even if the fetus is to her an innocent threat.

B. *Three Necessary Conditions for an Adequate Solution*

An account of self-defense against an innocent threat then must do at least three things if it is to ground a right to an abortion (these are not meant to be sufficient for a comprehensive account of self-defense against innocent threats, but necessary to any account which can handle abortion). First, it must show why self-defense is relevantly different from the impermissible act of killing an innocent bystander in self-preservation. Second, it must address the problem presented by the presumption against shifting harm. Third, since most abortions involve third party aid, it must show why a third party should be allowed to intervene on behalf of a threatened party but not on the other side.

The only way to meet this third condition is if we find a justification for self-defense against an innocent threat, rather than a mere excuse.¹⁴⁶ An excuse would indicate that you are not to be held liable for what you do, even though what you do is not what society wants you to do. If, for example, you kill someone because you are coerced into doing so, you may be (at least partially) excused by duress. But a third party who is not likewise under duress would be neither justified nor excused in helping you. Likewise, if defending yourself against an innocent threat were simply excused, no one could help you because if you were acting rightly you would not be defending yourself. Now it may be that you are justified in defending yourself and third parties still cannot help you. Justification is not a sufficient condition for getting third party aid.¹⁴⁷ (For

¹⁴⁶ See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 954 (1985); KAMM, *supra* note 13, at 46. But see Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984).

¹⁴⁷ If we distinguish what Larry Alexander calls full justification from limited justification, where full justification would warrant third party aid and limited justification would not, then getting a full justification would be sufficient. See Larry Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177, 1189 (1987). For my present purposes, however, it will suffice to show that whatever kind of justification can be found for self-defense against innocent threats, it will not have the necessary strength to serve the right to an abortion well.

example, a boxer is justified in hitting his opponent in the face but no one else is justified in jumping in the ring and hitting his opponent for him.) But it is a necessary condition.

C. *Some Inadequate Proposals*

What types of explanations does the law provide for self-defense against innocent threats? There are two crude candidates that we can dismiss quickly, namely the lesser evil principle and justified partiality.¹⁴⁸ The lesser evil principle presumes that it causes less harm to kill a threat than to allow her to kill or to help her to kill her victim. Obviously when one innocent threat threatens one innocent victim, the lesser evil principle cannot be based on the numbers. And when dealing with innocent threats and victims, it cannot reflect the importance of innocence, since both the innocent victim and the innocent threat are morally blameless. One could suggest that the threat is tainted by being a threat. But if she is morally blameless, can it really make sense to say that her life is worth less than the life of the innocent victim?¹⁴⁹ What justification is really being offered here for thinking that her life is worth less? It seems that the appeal to lesser evil is just a conclusory confirmation of a practice that remains substantively unjustified.¹⁵⁰

The idea in justified partiality is that you are not allowed to kill except as necessary to protect yourself from a harm we cannot expect you to endure: loss of life, serious bodily harm, rape, or kidnapping (some jurisdictions will allow you to kill even if not necessary to avoid one of these harms if the alternative is retreating from your home).¹⁵¹ But the concept of partiality does not explain why you should be allowed to kill an innocent threat but not an innocent bystander.¹⁵² The

¹⁴⁸ The lesser evil principle is addressed by George P. Fletcher, *Proportionality and the Psychotic Aggressor: A Vignette in Comparative Criminal Theory*, 8 ISRAEL L. REV. 367, 374-78 (1973). Justified partiality is addressed by McMahan, *supra* note 140, at 270.

¹⁴⁹ See Fletcher, *supra* note 146, at 378. See also Kadish, *supra* note 140, at 882.

¹⁵⁰ See Alexander, *supra* note 147, at 1186.

¹⁵¹ See MODEL PENAL CODE § 3.04(2)(b) (Proposed Official Draft 1962).

¹⁵² See McMahan, *supra* note 141, at 270.

need to act to save your life does not vary, and you kill just the same in both cases. It might be suggested that the need is felt to be greater in the case of self-defense against an innocent threat. But even if there is some difference in the phenomenology of killing a threat and killing a bystander to escape a threat, that difference would seem to depend on a prior sense that there is a moral difference between the two types of killing: the first seems justified, the second not. If this sense is to be relied upon, it must have some other foundation, since the cost either to you or to the innocent bystander or innocent threat is the same. And at this point the idea of justified partiality ceases to be helpful because it depends, if it is to be at all plausible, on a moral difference which we are seeking to justify.

Another problem with appealing to the idea of justified partiality is that it cannot explain why the innocent victim (a woman who wants an abortion) has a right to defend herself against an innocent threat (an unwelcome fetus), but an innocent threat has no right to defend herself against an innocent victim who threatens the innocent threat in self-defense. Both the innocent threat and the innocent victim can appeal equally to partiality. Some think this is the proper result; that there should be no asymmetry between two such innocent parties.¹⁵³ But the third necessary condition for an adequate solution to the problem of the innocent threat (a solution adequate to justify abortion, at any rate), is that there must be an asymmetry. An adequate solution must show why a third party should be allowed to intervene on behalf of an innocent victim (a woman who wants an abortion), but not on behalf of an innocent threat (an unwelcome fetus). Both parties are equally justified in acting out of justified partiality, then there is no reason to think that if third parties can get involved they can do so only on the side of the innocent victim.

This criticism is not meant to imply that one cannot be justifiably partial to oneself. In most of one's life, one can. The problem with appealing to partiality is that it will not explain why an innocent victim can be partial to herself in defending against an innocent threat but not in responding to a threat

¹⁵³ See McMahan, *supra* note 141, at 269. See also Davis, *supra* note 18, at 193.

when the only escape involves killing an innocent bystander. And it will not explain why there is an asymmetry such that an innocent victim can justifiably receive third party aid but an innocent threat cannot.

Sanford Kadish proposed a Hobbesian social contract variation on the partiality account that attempts to justify the right of self-defense on the grounds that it is a residual freedom, retained when we left the state of nature for civil society.¹⁵⁴ More specifically, the argument is that we gave up a number of freedoms to enter and enjoy the benefits of civil society. We did so trusting that the State could provide us with security better than we could provide for ourselves in the state of nature.¹⁵⁵ But we retain the liberty to fend for ourselves when the State cannot come to our aid. When faced with an imminent threat, the State usually cannot aid us. Therefore, in those circumstances we can defend ourselves.¹⁵⁶ And a third party can come to our aid under the same emergency circumstances because it would do so as a stand-in for the State.¹⁵⁷

The problems with this theory mirror those that confronted the justified partiality account: it cannot distinguish the innocent bystander from the innocent threat, and it cannot justify third party aid only to an innocent victim and not an innocent threat. To clarify the first problem, suppose you are an innocent victim and you are threatened by an innocent threat, and the only way to save yourself is by killing the innocent bystander. In the Hobbesian state of nature you would be free to do so. If the right you retain is to provide yourself as much security as you would have in the state of nature, on a case by case basis,¹⁵⁸ then you must retain that right in civil society as well. Kadish can respond that he did not appeal to

¹⁵⁴ See Kadish, *supra* note 141, at 884-88.

¹⁵⁵ See Kadish, *supra* note 141, at 885.

¹⁵⁶ See MODEL PENAL CODE § 3.04 (1) (Proposed Official Draft 1962); and LAFAVE & SCOTT, *supra* note 99, § 5.7 (d).

¹⁵⁷ See Kadish, *supra* note 141, at 886. Kadish asserts that "the right of the victim to the law's protection would be violated as much by denying a third person's liberty to intervene as by denying the victim's liberty to defend."

¹⁵⁸ This proviso is crucial, for without it no right to self-defense would follow; for presumably the State does a better job of providing for your security overall than you would be able to do in the state of nature, even if it denied you the right to defend yourself. See David Wasserman, *Justifying Self-Defense*, 16 PHIL. & PUB. AFF. 356, 360 (1987).

the right to preserve your security as much as if you were in the state of nature, but the more limited right to resist aggression as if you were in the state of nature. This right would not allow you to kill an innocent bystander because an innocent bystander is not an aggressor. The question is, can he properly invoke only the more limited right? The answer is no; he is really sneaking the limitation in without justification. The basic assumption in Kadish's argument is that we trade-off natural freedom for the benefits of civil freedom, but only insofar as it is in our interest. It is hard enough to justify the thought that we relinquish the right to resist even justified aggression, aggression we bring on ourselves through some fault of our own, on such a self-interested theory.¹⁵⁹ The claim that we retain the right to preserve our lives, when we are not at fault, by killing threats (innocent and culpable) but not innocent bystanders is completely unsupported. Kadish almost admits as much in discussing innocent threats. He says, "[T]he justification of the victim's defensive action does not arise from the wrongdoing of the threatener but from the right of the victim to preserve his life against a threat to it."¹⁶⁰ Clearly, there is nothing here that can justify allowing an innocent victim to kill an innocent threat but not an innocent bystander.

To see the second problem, consider why Kadish thinks there is an asymmetry between the innocent victim defending herself and the innocent threat defending herself against an innocent victim engaging in self-defense. He says: "To say [the innocent threat] has a right to life in the circumstances would be incoherent, since it would contradict the theory that gives the victim the right to kill him."¹⁶¹ This argument ignores an obvious response, however. There is no logical reason why the innocent victim and innocent threat cannot each have the right to fight the other. The innocent victim has the right to kill the innocent threat because the innocent threat threatens her, and the innocent threat has the right to try to kill the innocent victim in response because the innocent victim who responds

¹⁵⁹ Hobbes thought you could not relinquish the right to resist the State if its agents were coming to execute you. See THOMAS HOBBS, *LEVIATHAN* chs. 14 & 21 (1651).

¹⁶⁰ Kadish, *supra* note 141, at 885.

¹⁶¹ Kadish, *supra* note 141, at 885.

threatens her. Nothing in the Hobbesian framework upon which Kadish relies privileges the innocent victim's position, and thus if a third party can come to the aid of an innocent victim, she can also come to the aid of an innocent threat who is attacked by an innocent victim or a third party.

Another kind of social contract suggestion appeals to John Rawls's device, the veil of ignorance.¹⁶² The idea is that if we were designing the rules of society from behind a veil, so that we did not know who we would be in the society that would result, we would give ourselves the right to defend ourselves against innocent threats but give up the right to defend ourselves against innocent bystanders. One problem here is that it is not so clear what advantage is gained by protecting one class of innocents over another. Perhaps, given that a single innocent threat may threaten more than one innocent victim,¹⁶³ there is some reason to think one is more likely to be an innocent victim than an innocent threat. But this would not apply across all categories of innocent threats; it would not apply, for example, to inelastic innocent threat projectiles. And thus there would be no reason to favor innocent victims over innocent threats. More importantly, this justification has great difficulty explaining other basic rights. If one is not very careful to build in the right constraints regarding the choice behind the veil, the result is sure to be a kind of utilitarianism that would condone clearly unacceptable practices.¹⁶⁴ For example, it could justify carving up innocent people to give their organs

¹⁶² See JOHN RAWLS, A THEORY OF JUSTICE 12 (1971). No one I know has made this kind of argument in the context of self-defense, except critically. See Alexander, *supra* note 147, at 1186-88. But Thomson makes a similar argument in the related context of "The Trolley Problem." See *infra* Part III.E. See also JUDITH JARVIS THOMSON, *The Trolley Problem*, in, THE REALM OF RIGHTS 195 (1990). She does not explicitly refer to Rawls, but her concern with finding a time when all could noncoercively agree on a policy, and requiring that people not know how they will be affected, makes her argument essentially one that appeals to the veil of ignorance.

¹⁶³ I owe this point to personal correspondence with Rachel Kadish (no relation to Sanford Kadish).

¹⁶⁴ Eric Rakowski, who is generally sympathetic with Thomson's approach to the "Trolley Problem" in the *Realm of Rights*, is nonetheless critical of using veil of ignorance type reasoning, for just this reason. See Eric Rakowski, *Taking and Saving Lives*, 93 COLUM. L. REV. 1063, 1112, 1124 (1993). See also John Harsanyi, *Ethical Theory and Utilitarianism*, 44 SOCIAL RESEARCH (1977), reprinted in UTILITARIANISM AND BEYOND 46-47 (Amartya Sen & Bernard Williams eds., 1982) (Harsanyi endorses the utilitarian conclusions).

to others as long as those in need were in no way to blame (say, through unhealthy lifestyles) for their need. Therefore it is not clear that we can appeal to the authority of a veil of ignorance procedure, even if it ultimately gives us the result we desire.

D. *Lawful Versus Unlawful Force; Focus on the Victim's Rights*

The Model Penal Code provides a framework for a justification that seems, at first, to work better than those just discussed. It is an approach that is aligned with the views of at least two philosophers and at least one prominent legal thinker,¹⁶⁵ but we will see that it fares no better in the end.

Section 3.04. Use of force in self-protection

(1) . . . the use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion.

. . . .

Section 3.11. Definitions

(1) "unlawful force" means force, including confinement, which is employed without the consent of the person against whom it is directed and the employment of which constitutes an offense or actionable tort or *would constitute such offense or tort except for a defense* (such as absence of intent, negligence, or mental capacity; duress; youth; or diplomatic status).¹⁶⁶

The comment to section 3.11 is also illuminating:

The reason for legitimating protective force extends to cases where the force it is employed against is neither criminal nor actionable—so long as it is not affirmatively privileged. It must, for example, be permissible to defend against attacks by lunatics or children and defenses to liability by the aggressor, such as duress or family relationship, are plainly immaterial. . . . Whatever may be thought in tort, it cannot be regarded as a crime to safeguard an innocent person, whether the actor or another, against threatened death or injury that is unprivileged, even though the source of the threat is free from fault. The definition accordingly assimilates such conduct to unlawful force.¹⁶⁷

¹⁶⁵ See, e.g., Thomson, *supra* note 141; SUZANNE UNIACKE, *PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE* (1994); Fletcher, *supra* note 146.

¹⁶⁶ MODEL PENAL CODE §§ 3.04, 3.11 (Proposed Official Draft 1962) (emphasis added).

¹⁶⁷ MODEL PENAL CODE AND COMMENTARIES, Comment to §3.11, at 159 (Pro-

This last sentence highlights what is particularly important about this approach to self-defense, namely the distinction between lawful and unlawful force by the threat or aggressor. If the threat or aggressor has a right to use such force, then the potential victim has no justification for defending herself. But if the threat or aggressor lacks a right to use force, that is, if his use of force is unprivileged, then the potential victim has a justification for defending herself. For example, if an officer of the law restrains you because you have broken the law, you do not have the right to resist. But if someone lacking the authority of an officer of the law tries to restrain you, and you have not broken the law, then you do have a right to resist.

It may seem at first problematic to "assimilate" force that is neither criminal nor actionable to unlawful force. But "unlawful" does not mean contrary to the law; it means unprivileged or not endorsed by the law. Given that there is a category of force that is neither criminal nor privileged, and that it has to be assimilated to one or the other category for purposes of the right of self-defense, there is nothing contradictory in assimilating it to criminal force by holding that any force that is not privileged can be resisted.

But now we must ask why this assimilation is the right one. What is the significance of using force, i.e. threatening to cause a harm? How is this different from simply restating that innocent threats have a different causal role than innocent bystanders? The Model Penal Code does not address itself to this question, but as indicated above, some others have, and they consistently emphasize the right of the innocent victim not to be harmed. As George Fletcher put it, while approvingly discussing German law: "The focus is not upon the culpability of the aggressor, but rather on the autonomy of the innocent agent [or victim]. The assumption is that the innocent agent has a right to prevent encroachments upon his autonomy."¹⁶⁸ Likewise, Thomson, discussing an innocent aggressor, says that "he really does, however faultlessly, violate a right of yours if he kills you."¹⁶⁹ And Suzanne Uniacke endorses Thomson's view, saying "that in order to threaten or violate

posed Official Draft 1962).

¹⁶⁸ Fletcher, *supra* note 147, at 379.

¹⁶⁹ Thomson, *supra* note 141, at 301.

someone else's right not to be killed one need not be acting. . . . [An innocent threat falling on an innocent victim] is an unjust threat . . . because his landing on her would be an assault on an unoffending person were it to be an act on his part."¹⁷⁰

The common thought here is that people generally have a right not to be harmed. There are circumstances under which they lose or forfeit that right, but those generally involve doing something that wrongs another. If people who have done nothing to forfeit their right not to be harmed are attacked, then their right not to be attacked is violated. A violator, whether morally innocent or morally culpable, wrongs the person she violates and loses her right not to be attacked in return. That is, an innocent threat can be justly attacked (within the limits of proportionality) because she is violating or threatening to violate the rights of another, an innocent victim. And this sets her apart from an innocent bystander, who clearly does not violate the rights of the initial innocent victim, who might need to harm the innocent bystander to escape harm herself. Following Jeff McMahan, I will call this the "Rights" account.¹⁷¹

E. *Two Reasons Why the "Rights" Account Fails*

There are two kinds of problems with this "Rights" approach. First, it has a certain kind of implausibility as an account of rights. Second, it does not so much address the philosophical worries as assume them away or ignore them.

One reason to think "Rights" has a peculiar notion of rights is that it seems disconnected with duties. Generally, we think that when A has a right against B that B not harm her, then B has a duty towards A not to harm her.¹⁷² But an innocent threat falling out of control towards an innocent victim may have no opportunity to avoid the innocent victim. If she cannot do anything about her condition, then, if one accepts the old adage that ought implies can, one cannot say she has a duty. One could respond that the innocent threat's duty was to

¹⁷⁰ UNIAKE, *supra* note 165, at 175.

¹⁷¹ McMahan, *supra* note 141, at 275.

¹⁷² Thomson herself endorses this view in *THE REALM OF RIGHTS*, *supra* note 162, at ch. 1.

avoid becoming an innocent threat,¹⁷³ but if the innocent threat is really innocent, then she cannot have violated any duty in becoming an innocent threat. And if we acknowledge that an innocent threat violates no duty by threatening an innocent victim, how can we say that the innocent victim's right is violated by the innocent threat?

Another way to make this point is to recognize that an innocent threat falling out of control is not, *qua* threat, an agent. As McMahan put it, "an [innocent threat] is no more an agent than a falling boulder."¹⁷⁴ Since a boulder cannot violate your rights, neither can an innocent threat. To confirm the validity of this critique of "Rights," consider a case in which an innocent threat does have the ability to sacrifice herself rather than kill an innocent victim. Imagine an innocent threat who has been pushed down a steep, icy hill on a sled. She can safely coast to a stop if she does not turn aside, but she will in the process wipe out and kill an innocent victim who is positioned on the only safe trajectory for the sled; if she turns the sled, she will fly off a cliff face and die. I am fairly convinced that the innocent threat has no duty to turn away from the innocent victim at such a cost to herself. She would not be allowed to turn onto an innocent bystander to avoid going off the cliff, but if she is already headed towards the innocent victim, I believe she would not be required to turn away.¹⁷⁵ But how can it be both that she will violate the right of the innocent victim if she hits her, and that she is not required to turn away?

An additional problem has to do with the oddness of the claim that an innocent threat "wrongs" an innocent victim. This is the kind of "wronging" that Jules Coleman argues for in a torts context.¹⁷⁶ He imagines a situation in which you have to use someone else's property without her permission to survive through a crisis. He then asks why you have to pay her back if you are able. His answer: because you "justifiably wrong" her when you avail yourself of her property.¹⁷⁷ This is

¹⁷³ David Boonin-Vail made this criticism in personal correspondence.

¹⁷⁴ McMahan, *supra* note 141, at 276. Michael Otsuka makes the exact same point, *supra* note 141, at 81.

¹⁷⁵ See KAMM, *supra* note 13, at 48.

¹⁷⁶ See generally JULES COLEMAN, *RISKS AND WRONGS* (1992).

¹⁷⁷ *Id.* at 332.

analogous to what Thomson and others say about an innocent threat, that she is innocent and yet wrongs another.

One reason not to endorse this view is that concepts such as justifiably wronging and innocently wronging seem to be oxymorons. This problem could be overcome if there were some reason to speak this way, but there is none. The only justification for Coleman's use of "wrong" is the desire to account for the fact that you would owe compensation for using another's property. But the obligation to make compensation need not be explained that way. It can be a simple fact about property rights that when they must give way to need, a derivative right to compensation arises.¹⁷⁸ More importantly, the right to harm another is independent of any subsequent duty to compensate. Suppose, for example, you turn a trolley from five innocent victims onto an innocent bystander.¹⁷⁹ You seem to "justifiably wrong" the innocent bystander just as you would a property owner whose property you appropriate to save your life, but surely you do not owe the innocent bystander or his family compensation. Compensation is a separate issue, and it is only an illusion that the notion of wronging is doing any work here.

Moreover, the notion of wronging as used in "Rights" seems to give the wrong answer to certain self-defense cases. Suppose again you turn a trolley from five people onto one person. According to "Rights," you are violating the innocent bystander's right not to be killed; therefore, the innocent bystander has a right to kill you. But this seems quite inappropriate, because you are doing something that is morally justified, something that you should get moral praise for doing. Furthermore, assuming the innocent bystander were to try to shoot you to prevent you from turning the trolley, I think you would not only have a right to shoot back, but a third party would have a right to come to your rescue but not to hers. This seems to indicate that the innocent bystander actually lacks a right to self-defense. Despite the fact that the innocent bystander is innocent and nonthreatening, you would not wrong

¹⁷⁸ See Alexander, *supra* note 147, at 1182.

¹⁷⁹ This is the classic trolley problem as set forth by Philippa Foot in *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. (1967), reprinted in PHILIPPA FOOT, VIRTUES AND VICES 25 (1978).

her by turning the trolley onto her. Indeed, if she tried to kill you, *she* would wrong you. And if an innocent bystander can fail to have a right of self-defense, an innocent victim who is similarly innocent and nonthreatening can likewise fail to have a right of self-defense against an innocent threat.¹⁸⁰

In summary, I think it is misleading to say that an innocent threat violates an innocent victim's right not to be harmed. The concepts of rights and wrongs do not support the kind of account "Rights" offers to justify self-defense against an innocent threat.

This brings us to the second problem with "Rights," namely that it bypasses in a seemingly unmotivated way the philosophical problems with (1) distinguishing an innocent bystander from an innocent threat and (2) the shifting of harms. The method underlying "Rights" is the assimilation of unprivileged force to truly unjust or culpable force, thereby setting up the claim that any use of unprivileged force violates the victim's rights. But if we are already wondering why self-defense against innocent threats is permissible, then "Rights," as McMahan says, "offers an ingenious exercise in begging the question."¹⁸¹ It does not tell us why this assimilation is legitimate.

F. *The Best Account: Focus on Location of the Burden*

I think there is a way to justify self-defense against innocent threats: the key is to question the way we have deployed the presumption against shifting a harm. We have operated as if the principle that harms should not be shifted is the strongest determinant of the question: Who should suffer a harm, given that threat of harm has to be directed at someone? I call this fundamental question the question of who has the burden of a threat. While I think the original location of the threat of harm is one of the strong factors in determining where the burden of a threat lies, it is not the only factor, and not necessarily the strongest factor.

¹⁸⁰ Jeff McMahan discusses this case in a similar way in his review of Suzanne Uniacke's *Permissible Killing*. See Jeff McMahan, (Article title), 106 *ETHICS* 641, 642 (1996) (book review).

¹⁸¹ McMahan, *supra* note 141, at 278.

The concept of a burden tracks the idea that there may be one or more parties towards whom the risk of harm in a situation can properly be directed or redirected. If an innocent victim should be allowed to kill an innocent threat, then the burden falls on the innocent threat; if an innocent victim should not be allowed to kill an innocent threat, and the innocent threat can kill the innocent victim in self-defense if the innocent victim tries to kill the innocent threat, then the burden falls on the innocent victim; if they are allowed to fight it out, then the burden falls evenly on the two of them.¹⁸² Third party intervention, assuming the same options, tracks possible first party actions. So if the burden is on an innocent threat, then a third party can help an innocent victim kill the innocent threat; if the burden is on an innocent victim, then a third party can help an innocent threat defend herself in the event an innocent victim tries wrongfully to harm the innocent threat in self-defense; if the burden falls evenly on the two of them, then a third party can either take a side or stay neutral (while in war third parties choose their sides or remain neutral, in private matters I would think that a third party should almost always stay neutral to keep conflicts from escalating).

We can extend this concept of a burden to cover more complicated cases, such as one which involves all three: an innocent threat, an innocent victim, and an innocent bystander. The traditional legal view with regard to all three can be stated this way: between an innocent threat, an innocent victim, and an innocent bystander, the burden falls on the innocent threat. But if the choice is between an innocent victim and an innocent bystander, the burden falls on the innocent victim, who may not shift or be helped to shift the harm onto an innocent bystander.

Adopting the concept of a burden makes the normative nature of the rights in question explicit. The question is, on whom should the burden fall and why? It is tempting to rely on the simple physical fact that the innocent victim is the

¹⁸² It is important to frame it this way if our concern is with the right of self-defense. The obvious alternative is to ask whether the innocent threat has a duty to sacrifice herself, if she can. This will not do, however, since an innocent victim may be entitled to kill an innocent threat in self-defense even if the innocent threat is not required to sacrifice herself if she can. *See supra* note 173 and accompanying text.

person who would be harmed if no one acted to determine who should bear the burden. Indeed, this principle for burden location makes sense of the idea that each person has her own luck which she is primarily responsible for handling on her own.¹⁸³ As I said above,¹⁸⁴ the innocent victim is the one who is threatened; that is her bad luck. But of course, the innocent threat has the bad luck to be an innocent threat. So the important question is whose bad luck should count for more in burden location.

I claim that the burden should fall upon the innocent threat because the innocent threat brings the problem, namely that someone must die, to the innocent victim.¹⁸⁵ In other words, the problem comes to the innocent victim *through* the innocent threat. I do not mean to imply that an innocent threat *actively* brings a problem to an innocent victim, for she may be quite passive, like a mere projectile. An innocent threat should not want to harm an innocent victim, and yet because of the state she is in, she threatens to do just that. An innocent victim too should not want to be in the state she is in, and there is a certain symmetry because there would be no victim without a threat and no threat without a victim. Yet the direction of causation warrants our saying that the innocent threat brings the problem to the innocent victim, and this warrants our conclusion that the burden is on the innocent threat.

I am not suggesting that an innocent threat violates an innocent victim's rights by being in this state she should not want to be in. Instead, I argue that the innocent threat's claim not to be killed is weaker than it otherwise would be. She is not simply an innocent bystander. Because of her condition, her claim not to be killed is sufficiently weak so that she can be killed if necessary to save an innocent victim. Of course, if the innocent victim can be saved by some less harmful means, then the innocent threat's claim not to be killed should be

¹⁸³ See my discussions of moral luck in Walen, *Doing*, *supra* note 65, at 191.

¹⁸⁴ See *supra* Part III.A.

¹⁸⁵ Kamm makes almost exactly this point. See KAMM, *supra* note 13, at 47. But she does not frame it as a matter of burden location. Instead, she says "One simply has a right not to have someone on the body or property to which one is entitled, even if the wind put them [sic] there." This comes too close to the "Rights" view that I have already rejected. In fact, she is taken to task on this score by Michael Otsuka. See Otsuka, *supra* note 141, at 80-81.

strong enough to count as a right. But if it is necessary to kill the innocent threat to save the innocent victim's life, then the innocent threat can be killed because the burden falls upon her.

I think this sketch of an account responds sufficiently well to the skeptical views of Nancy Davis, who thinks that an innocent victim has, at most, a prerogative to try to preserve her life, but no more so than an innocent threat (i.e. the burden is always split between them).¹⁸⁶ She argues,

[s]ince who poses a passive threat [i.e. who is an innocent threat] to whom may have nothing whatsoever to do with the morality of either person's conduct . . . and is, indeed, just a matter of luck, we cannot reasonably suppose that victims of passive attacks [i.e. innocent victims] have, as such, a stronger claim to the preservation of their lives than their (merely passive) attackers.¹⁸⁷

But this premise that only morally responsible action can affect one's claims, that luck cannot, is groundless. There is nothing but moral luck separating an innocent victim from an innocent bystander, yet we put the burden on the innocent victim. By parallel reasoning, there is nothing problematic in similarly putting the burden on an innocent threat.

Before we conclude that we have an account of an innocent victim's right to use self-defense against an innocent aggressor, we need to be sure that we can answer Michael Otsuka's challenge. Recall that he argued that there is a middle position between being an innocent threat and an innocent bystander, and that neither transitional step could carry any moral weight.¹⁸⁸ The answer to his challenge is that each step carries some weight, more than Otsuka recognizes, but not enough to explain the difference between an innocent threat and an innocent victim all in that step. The difference between being a person on a runaway trolley and being an innocent bystander next to the trolley tracks is that the person on the trolley has become tied up in a regrettable way earlier in the process than an innocent victim, whereas an innocent bystander is tied up in the process further down the line. This quasi-temporal element explains part of what puts the burden on the

¹⁸⁶ See Davis, *supra* note 18, at 192-93.

¹⁸⁷ See Davis, *supra* note 18, at 192.

¹⁸⁸ See *supra* notes 140-42 and accompanying text.

innocent threat, but not all of it. Perhaps, then, given the competing principle that the burden should fall on the person in the line of the harm, the burden should be split between a person on a runaway trolley and an innocent victim. They should be free to fight it out, just as Nancy Davis imagines innocent threats and innocent victims are always free to fight it out.¹⁸⁹ What is missing in the runaway trolley scenario is that the person herself does not actually bring the problem to the other by bearing a threat. That missing element is provided in the switch from the runaway trolley case to an innocent threat case, that is in making the person's mass the lethal element. Thus the response to Otsuka is that there are intermediate steps in burden location that match the steps in his argument.

Eventually, of course, unless someone is able to take the effort to avoid the harm, a burden settles out into a harm upon someone. By saying that the burden is on the innocent threat, I do not mean to imply that the innocent threat would be liable for any harm that actually befalls an innocent victim. The burden location before there is a harm need not be the same as that after the harm hits.¹⁹⁰ When looking at self-defense, our concern is with *ex ante* liability, not *ex post*, and the two need not go together.

G. *Weakness of the Best Account in the Face of Consequentialist Considerations*

Now the question is, how strong are the reasons for putting the burden on an innocent threat? Can they stand up if there are two or more innocent threats, or would numbers shift the burden? What if the harm to an innocent victim would be injury rather than death? Would that put the burden on the innocent victim if the only way to relocate the harm were to kill the innocent threat? In other words, can the claim that the burden is on the innocent threat stand up to substantial consequentialist reasons to shift it?

¹⁸⁹ See Davis, *supra* note 18, at 193.

¹⁹⁰ Burden location after a harm hits is a matter for tort theory.

I believe the answer is no, because the case for putting the burden on an innocent threat seems no stronger than that for putting the burden on an innocent victim rather than on an innocent bystander.¹⁹¹ In fact, the case seems to be weaker. One factor in burden location is common between the two cases: While an innocent threat brings the problem to an innocent victim, an innocent victim would bring the problem to an innocent bystander. The other factor, the trajectory of the harm, gives us reason to put the burden on the innocent victim with respect to both the innocent threat and the innocent bystander. Therefore, since the innocent bystander's protection vis-à-vis the innocent victim seems to be sensitive to consequentialist considerations, so too, presumably, is the innocent victim's protection vis-à-vis the innocent threat.

To see that an innocent bystander's protection seems to be sensitive to consequentialist considerations, consider the trolley case again,¹⁹² only imagine that you are one of two people standing where the trolley is now headed, and you have the ability to turn the trolley onto the other track where only one person would be hit. If you were alone, it would not be permissible for you to turn the trolley, but since there are now two of you, it seems that it would be permissible to do so. For it would be quite anomalous if a third party could act on your behalf but you could not, and most people agree that the trolley can be rerouted so that fewer people are hit.¹⁹³ Further confirming the relevance of consequentialist considerations, consider a trolley scenario in which the trolley could be turned away from one onto another who would be injured but not killed. Again, it seems that a third party can turn it, and if a third party can, then presumably the innocent victim can as well.

The implications for self-defense against an innocent threat are clear, although they may seem counter-intuitive. The implication is that if you were being threatened by two or

¹⁹¹ Kamm raises these questions, but declines to give an answer for the abortion context, i.e., she declines to assess how significant the consequentialist reasons would have to be to shift the burden. See KAMM, *supra* note 13, at 49-50.

¹⁹² See *supra* note 177 and accompanying text.

¹⁹³ John Taurek famously questioned whether the numbers count in *Should the Numbers Count?* 6 PHIL. & PUB. AFF. 293 (1977), but Derek Parfit decisively rebuts his arguments in *Innumerate Ethics*, 7 PHIL. & PUB. AFF. 285 (1978).

more innocent threats, you would have no right to kill them in self-defense. And if you were being threatened with serious harm, but not death, and you could save yourself only by killing a single innocent threat, you would not be allowed to do so, contrary to the rules governing self-defense against culpable aggressors.¹⁹⁴ Third parties, of course, would not be free to help you in either circumstance.

The conclusion that the right to defend yourself against innocent threats is so hemmed in by consequentialist considerations may seem counter-intuitive. It is not the position defended, seemingly on the basis of moral intuition, in the Model Penal Code. But it seems to be as close as we can get to justifying a general right to self-defense against innocent threats. Indeed, it is closer than some think we can get. Otsuka thinks it is morally wrongful to defend yourself against even one lethal innocent threat, and McMahan doubts whether such self-defense is justifiable.¹⁹⁵ In addition, my view is no more pessimistic than a number of other views about the right of self-defense against innocent threats. Ronald Dworkin and Donald Regan, for example, believe that self-defense against an innocent threat is morally dubious,¹⁹⁶ and Susanne Uniacke doubts that it would be permissible to defend against more than one innocent threat at one time.¹⁹⁷ Given such pessimism, the account I have offered aims about as high as one

¹⁹⁴ Kamm refers to this as the duty to "pick up the slack." See KAMM, *supra* note 13, at 48, 54. But that may be misleading since what is at issue is not a positive duty on your part to act, but a negative duty not to act.

¹⁹⁵ See *supra* note 139 and accompanying text.

¹⁹⁶ Dworkin, discussing the attempt to appeal to self-defense to justify abortion, says "very few people believe that it is morally justifiable for a third party, even a doctor, to kill one innocent person to save another." DWORKIN, *supra* note 54, at 32. Regan, distinguishing morality from law, says that he "would not have claimed that there is a [moral] right to kill an innocent rapist." Regan, *supra* note 13, at 1646. See also Joel Feinberg, who concludes his discussion of the self-defense justification of abortion about where I do, saying that it would justify abortions only if "the mother will probably die if the fetus is not aborted." Joel Feinberg, *Abortion, in FREEDOM AND FULFILLMENT* 64 (1992).

¹⁹⁷ See UNIAKE, *supra* note 165, at 174 n.20. What if the threats come seriatim? Uniacke thinks they should be considered separately. This makes a certain amount of sense. After all, it is not as if you use up your right to defend yourself by killing one. But if you know that more than one is headed your way, and that you will have to kill all of them, then the fact that they do not all come at once seems less meaningful. How closely they have to be linked is a matter we may never work out unless strings of innocent threats become a common problem.

might dare hope, and comes as close as one might think possible to defending the practice endorsed by the Model Penal Code.

If this is as close to justifying self-defense against innocent threats as we can come, the result for abortion is not good. My account would not allow abortion unless the mother were very likely to die if she carried the fetus. Even then, she could justify an abortion only if the fetus were itself the cause of the threat to her health, rather than being an innocent bystander who would have to be harmed, for example, in order to operate and remove a tumor. And even if the fetus were a lethal threat to the woman, my account would not allow abortion if she were carrying twins.

I am not here describing the law, of course. The law, as represented by the Model Penal Code,¹⁹³ still allows one to kill innocent threats without restrictions other than proportionality and necessity (the same restrictions that apply when dealing with culpable aggressors). But either there is a better defense of the law than has yet been provided, our beliefs regarding the wrongfulness of killing innocent bystanders are mistaken, or the Model Penal Code is morally out of line and there ought to be much tighter restrictions on killing innocent threats than the law currently imposes. It seems to me that the law governing self-defense against an innocent threat is too permissive. Therefore, if we are looking to reform the law on abortion, we ought not to look to what is bad law on self-defense. In our effort to make good law for abortion, we should appeal only to good law and sound moral reasons.

IV. THE DETACHING/KILLING MODEL

A. *A Woman's Right to Detach from a Fetus*

I argue in this section that the detaching/killing model can justify a much broader right to an abortion than the appeal to the right of self-defense against innocent threats. The foundation upon which the detaching/killing model rests is the premise that a woman's right not to serve a fetus is significantly

¹⁹³ See *supra* notes 164-65 and accompanying text.

stronger than a fetus's claim to be served.¹⁹⁹ This premise is an application of an idea that is at the very core of our moral beliefs, namely that people should not be treated simply as a means.²⁰⁰

It need not be any worse for the woman to be used simply as a means than it is to be threatened. But it is not worse to be pushed in front of a trolley than to be hit by one as side-effect either. Magnitude of harm is not all that figures into the strength of a person's claims; the nature of the claim itself, whether it is a claim not to be used simply as a means or some other kind of claim, also figures in.²⁰¹

Of course, a woman seeking an abortion does not merely seek not to serve the fetus; in a typical case she hires someone to help her expel it from her body. Without worrying yet about the attacking dimension, does the difference between detaching and not attaching make a difference? One reason to think it should not is that detaching is taken to be the equivalent of not attaching in other contexts. Consider the context of refusal of medical treatment. The Supreme Court held in *Cruzan* that one is free to refuse unwanted medical treatment,²⁰² but they did not take this to be limited to refusal to start receiving medical treatment. Nancy Cruzan was on life-support,²⁰³ and the Court's message was that if she had a proper living will, she would be entitled to be detached from that life support. Similarly, if a woman would be entitled not to be attached to a fetus, then she should be entitled to detach from it.

¹⁹⁹ See *supra* Part I.B.

²⁰⁰ See *supra* note 64 and accompanying text. Utilitarians, and consequentialists more generally, would reject the idea that there is anything morally fundamental in the idea that persons should not be used simply as a means. But some non-utilitarians also reject the significance of the distinction. See, e.g., Rakowski, *supra* note 164, at 1072. Rakowski presses some hard objections to accounts of our moral intuitions that rely on what he calls the "ends not means" principle, but I believe that in the end his reading of that principle is not sufficiently nuanced, and he fails to notice how counter-intuitive his alternative proposal is, that is, he fails to address just how deeply objectionable the uses of humans it would allow are.

²⁰¹ See, e.g., Frances Kamm, *Non-Consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 PHIL. & PUB. AFF. 354, 386-88 (1992); Warren Quinn, *Actions, Intentions and Consequences: The Doctrine of the Double Effect*, 18 PHIL. & PUB. AFF. 334 (1989), reprinted in WARREN QUINN, *MORALITY AND ACTION* 191-93 (1993); and *supra* note 64.

²⁰² *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 270, 278 (1990).

²⁰³ *Id.* at 265.

At a deeper level there are two issues here. One is whether detaching should count as killing or letting someone die;²⁰⁴ the other is whether that distinction makes a difference in this context. On the first point, Jeff McMahan has convincingly argued that not all cases of withdrawing aid amount to killing.²⁰⁵ My interpretation of that phenomenon is that when you remove something over which you have authority, but which was necessary to preserve the life of another, you merely allow the other to die.²⁰⁶ Think of the little Dutch boy with his finger in the dike.²⁰⁷ When he takes his finger out and the town is flooded, he ceases to prevent the flood, rather than causing it. It would be different if he pulled out a cork, because the cork, once put in place, would be something over which he had no authority. Even if he owns the cork and has merely lent it to the town as a stop gap, his authority over it is essentially lost as long as it is necessary to protect the town; all he can demand is compensation, not the return of the cork. However, his authority over his finger is not so easily lost, and by taking it back, he merely allows the flood to take place. The flood kills the townspeople; he merely allows it to do so. Likewise, it seems that since a woman has authority over her body, if she withdraws its support, she merely allows the fetus to die.

Even if this analysis is unconvincing, that is, even if it is reasonable to say that a woman who detaches from a fetus kills it, nothing significant follows. The fetus's claim that the woman provide aid is still not strong enough to require her to make the kind of ongoing sacrifice necessary to save it. Calling it killing if she ceases to carry it does not change the moral picture.²⁰⁸ This is not to say that killing is no worse than let-

²⁰⁴ Regan argues that abortion is more an omission than an act. Regan, *supra* note 13, at 1573-75, 1636. See also SUNSTEIN, *supra* note 13, at 274. But Regan is diffident, saying in the very last paragraph that his "principal nagging doubt" concerns this very point; he does not suggest that he is wrong, but that "a reasonable American legislature" might disagree. Regan, *supra* note 13, at 1646.

²⁰⁵ Jeff McMahan, *Killing, Letting Die, and Withdrawing Aid*, 103 ETHICS 250 (Jan. 1993).

²⁰⁶ This is my account of what makes the difference; McMahan does not want to turn so quickly to other normative ideas. See generally McMahan, *supra* note 205.

²⁰⁷ See McMahan, *supra* note 205, at 257.

²⁰⁸ Arnold Loewy objects that good samaritan issues involve asking someone to

ting someone die. In many instances it is. As far as I can see, this is for two reasons. First, in the typical case killing, but not letting someone die, involves causing someone who is independently living to die. That is not what happens in an abortion, because the fetus is dependently living.²⁰⁹ Second, in the typical case the restriction on killing leaves the agent free in all other respects, whereas the requirement not to allow someone to die limits the agent to a narrow class of effective life-saving actions. This difference with regard to agency explains why a requirement to aid is typically harder to justify than a prohibition on harming.²¹⁰ But this second point also does not apply to abortions, because the requirement not to kill the fetus amounts to a requirement to carry the fetus, which is not only a burden, but can impose fairly sweeping limits on what the woman can do.²¹¹ Thus to say that killing is generally worse than letting someone die is not to impugn the act of killing a fetus if that is how we describe the otherwise justified act of a woman detaching herself from a fetus.²¹²

make a situation better, whereas prohibiting a woman from getting an abortion is "precluding the woman from making the fetus' situation worse." Lowey, *supra* note 91, at 945. Of course, he is right that the fetus is worse off if the woman detaches from it before it is viable than if she carries it at least to that point. But the same criticism could be leveled at anyone who starts doing something for another and then wants to stop. Yet the baseline for making things worse is generally taken to be the state of no effort; not continuation of the status quo if that involves continued sacrifice for another.

²⁰⁹ Kamm makes a similar point. See KAMM, *supra* note 13, at 31. Of course, the fact that someone is living dependently does not justify your killing him in general. You can't shoot someone and justify that act by pointing out that he was on life support. But if you have authority over the resource someone needs to live, say it is your medicine, then it seems to me that once we factor out things like raised expectations and the second point I make in the text, it makes no difference whether you take it back or fail to provide it.

²¹⁰ See TRIBE, *supra* note 11, at 130-31.

²¹¹ See, e.g., Siegal, *supra* note 13, at 373-74. Professor Siegal writes:

Childbearing, like childrearing, involves work to be performed in accordance with detailed prescriptive norms. A woman who attempts to conduct her pregnancy in conformity with such norms will find herself making daily judgments as she attempts to accommodate her life to the process of making life: choices about what to eat and drink, about how to exercise, about securing appropriate medical care, and about negotiating quotidian forms of risk associated with travel, leisure activities, and the work she performs on the job and at home. The work of gestation thus involves on-going calculations and compromises that can have a pervasive impact on women's lives. (footnotes omitted).

Siegal, *supra* note 13, at 373-73.

²¹² As Thomson puts the point, you kill the violinist by unplugging him, but

It might be argued that even if a woman can detach herself from a fetus, abortions typically involve third-party aid,²¹³ and this is still problematic. But why is it problematic? As long as a woman has a right to detach from a fetus, why should she not be free to hire an agent to help her do what she has a right to do? As noted before, the right to third-party aid does not automatically follow from the idea of a justification; justification is a necessary but not sufficient condition for it.²¹⁴ For example, in boxing one is justified in hitting one's opponent, but that does not mean that one can get help hitting him. But it seems that we limit the power to transfer a right to another only in special cases, cases in which that party is supposed to do it on her own, or in which delegation could lead to unacceptable harms. No such reason is present in the abortion case. It looks rather like justified self-defense, in the sense that there is equal reason to think that a third party can aid the person doing what she has a right to do in response to an aggressor or threat, or in this case, an unwelcome presence.²¹⁵

B. Pareto-Superiority of Killing

Now we come to the second problem, which is that abortion is not usually like pulling one's finger out of the dike: it usually involves directly attacking or hiring someone to directly attack a fetus, and then disposing of it.²¹⁶ Does this make abortion more problematic? I believe it does not, as long as killing the fetus directly is Pareto-superior to letting it die. If a fetus is not viable,²¹⁷ and killing it directly is no worse for it

you do not wrong him because you do not "kill him unjustly." Thompson, *supra* note 14, at 180.

²¹³ This may change with improved medical abortion techniques. But so far even the new Methotrexate and Misoprostol drug treatment is only effective in the first eight weeks; after that surgery would be called for. See, e.g., <<http://www.rtl.org/abormeth.htm>>; Lakomy, *supra* note 135, at 65 n.39.

²¹⁴ See *supra* Part III.B.

²¹⁵ There is consensus on the appropriateness of third-party aid in the context of self-defense. See, e.g., RESTATEMENT (SECOND) OF TORTS § 76 (ALI 1966); PROSSER & KEETON, *supra* note 72, § 20; LAFAVE & SCOTT, *supra* note 97, § 5.8; MODEL PENAL CODE § 3.05 (Proposed Official Draft 1962).

²¹⁶ See, e.g., <<http://www.rtl.org/abormeth.htm>>; Lakomy, *supra* note 135 at 52 n.38.

²¹⁷ See *infra* Part IV.E.

than letting it die and maybe even better for it, and it is better for the woman, then killing it directly is the Pareto-superior, reasonable, humane thing to do.

The evidence that killing a fetus directly is Pareto-superior to allowing it to die is compelling. There are two methods of abortion that do not necessarily kill the fetus directly: prostaglandin induced premature birth and an early Cesarean section ("C-section").²¹⁸ At least with regard to the former, doctors "now customarily kill the child first" in order to avoid a live birth, which some doctors describe as "the dreaded complication."²¹⁹ I can only surmise that the reason a live birth is considered a "dreaded complication" is not that the woman wants the fetus dead, but that the fetus will only suffer more before dying if not given what is essentially a coup de grâce, i.e., if it is not killed directly out of mercy.²²⁰ If a fetus before the age of about twenty-six weeks cannot feel pain,²²¹ then the real concern may be more to avoid the appearance of a suffering fetus than to avoid causing a fetus actually to suffer. Either way, killing the fetus directly is at least as good an option for the fetus as allowing it to die.

If killing the fetus directly also allows for less intrusive methods of abortion, then we must conclude that directly attacking the fetus is clearly a Pareto-superior option. This is almost certainly the case. Prostaglandin induced premature birth is purported to be "a very painful abortion for the mother," and prostaglandins are said to be "accompanied by serious problems of their own, including potentially lethal side effects."²²² A C-section is obviously a highly invasive form of surgery, accompanied by "inherent difficulties, possible complications, and a potentially painful recovery."²²³ Other methods are not without their trauma, but if a woman's doctor

²¹⁸ See <<http://www.rtl.org/abormeth.htm>>.

²¹⁹ *Id.*

²²⁰ A secondary reason may be cost: doctors may feel that they have to offer expensive but ultimately fruitless palliative care to even a clearly nonviable premature baby.

²²¹ See MOROWITZ & TREFIL, *supra* note 38.

²²² See MOROWITZ & TREFIL, *supra* note 38.

²²³ See MOROWITZ & TREFIL, *supra* note 38.

recommends them as less dangerous and traumatic, then, assuming her doctor is correct, the recommended method would be a Pareto-superior option.

It could be argued that Pareto-superiority of an outcome does not justify violating someone's rights. Suppose, for example, that I would prefer having your car and you would prefer having mine. That does not by itself license me to swap our cars. Respect for you requires that I get your consent before making the trade.²²⁴ Similarly, it could be argued that without the fetus's consent, Pareto-superiority cannot justify killing it directly.

This argument assumes that absent consent one must act as if the person positively refused to consent. But that assumption is ungrounded. When consent is not possible, we should ask which policy makes more sense: acting as if it were given or acting as if it were denied. Perhaps there should be a slight presumption in favor of acting as if consent were denied; consent does normally operate to open a door that is otherwise assumed shut.²²⁵ But such a presumption can easily be turned around if there is good reason on the other side. So we allow doctors to give necessary medical treatment to people who have not consented to it but who also have not expressed a clear desire not to be treated.²²⁵ Likewise, in the abortion context we should allow the Pareto-superior option to be pursued, because it would be both more sensible and more humane. To insist otherwise would be to cling fetishistically to the significance of the distinction between killing and letting someone die.

²²⁴ It might be pointed out, in response, that contract doctrine allows for efficient breach, which is justified as exactly this kind of Pareto-superior swapping. See ALLAN FARNSWORTH, *CONTRACTS* § 12.3, at 846 (2d ed. 1990).

²²⁵ So, for example, sexual contact with an unconscious woman counts as rape because we assume that unless she positively consents to such contact, she should be treated as though she has positively refused it. See MODEL PENAL CODE § 213.1(1)(c) (Proposed Official Draft 1962); and SANFORD KADISH & STEPHEN SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES* 381 (5th ed. 1989).

²²⁵ This is essentially the position the Court took in *Cruzan*, that because she had not clearly indicated her desire not to be put on life support, the policy in favor of protecting life would allow the state to keep her on life support as long as possible. See *Cruzan*, 497 U.S. at 281.

This last comment may call to mind the current debate over physician-assisted suicide, in which the relevance of the distinction between killing and letting die is being hotly contested.²²⁷ Although I do not mean to engage in a discussion of physician-assisted suicide I want to be clear that I am not generally rejecting the importance of the "killing versus letting die" distinction; I am claiming only that it should not be relied on in the abortion context.²²⁸ And I would point out that there are at least two issues or concerns that arise in the debate over physician-assisted suicide that, arguably, do not arise with the same force in the abortion context. These are: (1) the fear that there will be a slippery slope towards a more permissive attitude towards death,²²⁹ and (2) the concern that killing might become a cheap solution that would displace more expensive palliative care.²³⁰ Since a nonviable detached fetus would die quickly anyway (more quickly than almost all terminally ill patients), these issues do not really arise in the context of deciding whether to kill it more directly. Therefore, since killing it directly is the Pareto-superior option, I conclude it should be allowed without concern for what is judged acceptable in the area of assisted suicide.

C. *The Doctrine of the Double Effect Objection.*

One other objection deserves to be addressed before concluding that killing a fetus directly is acceptable, namely the claim that killing a fetus directly conflicts with the doctrine of the double effect ("DDE").²³¹ According to this doctrine, there are cases in which it is permissible to pursue certain worthy ends, foreseeing that one will cause certain bad effects, even though it would not be permissible, all else equal, to act intending to bring about those bad effects as a means to those

²²⁷ See *Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *Vacco v. Quill*, 117 S. Ct. 2293 (1997).

²²⁸ See *supra* notes 211-214.

²²⁹ See, e.g., *Glucksberg*, 117 S. Ct. at 2274 n.23, 2291; Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 749-53 (1995).

²³⁰ See, e.g., Michael Walzer, *Feed the Face*, 216 NEW REPUBLIC 29 (June 9, 1997); *Glucksberg*, 117 S. Ct. at 2290.

²³¹ See Finnis, *supra* note 57, at 133-41.

worthy ends.²³² This doctrine is commonly appealed to, for example, in medical ethics cases involving terminally ill patients and pain control.²³³ The thought is that by appealing to the DDE we can explain why it is sometimes permissible for a doctor to give a patient a lethal dose of morphine if she intends only to ease his pain, foreseeing that she will kill him, even though it would not be permissible, all else equal, for the same doctor to give the same patient morphine intending to kill him and thereby end his pain. In the abortion context, the DDE could be taken to imply that even if it is permissible to carefully remove an unwanted fetus from a woman's body, foreseeing that it will then die, it is nonetheless not permissible to attack the fetus directly, intending to kill it as part of the process of removing it from the woman's body.²³⁴

One way to respond to the claim that the DDE implies that abortion should not be permissible is to deny that, as a matter of fact, the DDE is a part of our law. Donald Regan takes this path,²³⁵ but his dismissal of the DDE as not being part of our law is not plausible as the recent Supreme Court case of *Vacco v. Quill*²³⁶ shows. In that case, the law allowing physicians to hasten death as long as they aim only to relieve pain, rather than to cause death, is defended with an explicit appeal to the DDE.²³⁷ Moreover, even if the DDE were not part of our law, since we are engaging in a moral critique of law, we could not rest there. If the law should take the DDE into account, then we cannot dismiss it.

Before we conclude that we have to choose between the DDE and the right to the kind of abortion which involves directly attacking the fetus (a standard abortion), we should distinguish the formal principle from its substantive applica-

²³² See Nancy Davis, *The Doctrine of Double Effect: Problems of Interpretation*, 65 PAC. PHIL. Q. 107, 108 (1984).

²³³ See, e.g., *Vacco*, 117 S. Ct. at 2301 n.11; 16 J. MED. & PHIL. 465-585 (1991) (the whole issue is devoted to the topic of *The Double Effect: Theoretical Function and Bioethical Implications*).

²³⁴ See Foot, *supra* note 179, at 20-21.

²³⁵ See Regan *supra* note 13, at 1575-76 n.4.

²³⁶ 117 S. Ct. 2293 (1997).

²³⁷ *Vacco*, 117 S. Ct. at 2301 n.11. See also Glanville Williams, *Oblique Intention*, 46 CAMBRIDGE L.J. 417, 435-38 (1987) (arguing that there are some areas of the law, such as those involving possibility of mental stress or treason, in which the DDE is relevant).

tion.²³⁸ I endorse the formal principle that there are cases in which it is permissible to aim at a good end while foreseeing a bad consequence of doing so, even though it would not be permissible to aim at the same good end by way of the bad consequences as a means. But this by itself gives us no compelling reason to fill in the substance of this principle in such a way as to rule out standard abortions. In fact, I believe the best way to fill in the substance of the DDE shows it to be compatible with standard abortion procedure.

Unfortunately the DDE is too contentious a doctrine, and the literature on it is too voluminous, to try to argue in any depth for my interpretation here.²³⁹ I will not try to justify the basic moral distinction, nor will I attempt to interpret the concept of intention. Rather, I hope it will suffice merely to propose my own substantive reading, demonstrating its plausibility by applying it to a few basic cases, and then explaining why it is compatible with standard abortion procedure (assuming the rest of the assumption of risk argument succeeds).

On my substantive reading, the DDE marks the significance of *not intending* a wrong that is independently identifiable as such. This conception helps us to explain why it is wrong to intend that another be wronged even though it is sometimes permissible to act foreseeing as a consequence that others would be wronged.²⁴⁰ This issue comes up when one is in a position to influence third-party behavior that could be wrongful.²⁴¹ It can also help explain how the way one frames

²³⁸ I am indebted to Joseph Rahill for helping me become clear on this distinction.

²³⁹ Its supporters include CHARLES FRIED, *RIGHT AND WRONG* 40-41 (1978); Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 *ETHICS* 527 (1980); John Finnis, *Intention and Side-Effects*, in *LIABILITY AND RESPONSIBILITY*, at 32-64 (R.G. Frey & Christopher W. Morris, eds., 1991); and Jorge Garcia, *The New Critique of Anti-Consequentialist Moral Theory*, 71 *PHIL. STUD.* 1 (1993). Its critics include Foot, *supra* note 177; Jonathan Bennett, *Morality and Consequences*, in *THE TANNER LECTURES ON HUMAN VALUES II* 47 (S. McMurrin ed., 1981); SHELLY KAGAN, *THE LIMITS OF MORALITY*, ch. 4 (1989); and Michael Gorr, *Should the Law Distinguish Between Intention and (Mere) Foresight?* 2 *LEGAL THEORY* 359 (1996).

²⁴⁰ This interpretation of the DDE is, as far as I know, uniquely mine, though it is close to the view taken by Quinn, *supra* note 201, at 190-93.

²⁴¹ On the claim that it would be wrong intentionally to aid or abet a third party to do wrong, see Philippa Foot, *Utilitarianism and the Virtues*, reprinted in *CONSEQUENTIALISM AND ITS CRITICS* 238 (S. Scheffler ed., 1988). *But see* Amartya Sen, *Evaluator Relativity and Consequential Evaluation*, 12 *PHIL. & PUB. AFF.* 113

an action to oneself can make it right or wrong, by determining what kind of action it is. In this way, we can explain the moral difference between, for example, a terror bomber and a strategic bomber.²⁴² The terror bomber kills civilians as a means of ending a war; a strategic bomber aims at a military target as a means of ending a war, foreseeing but not aiming to produce the civilian casualties that necessarily accompany bombing the military target. The difference between the two of them may not be discernible by looking at where they drop their bombs; it may depend completely on how they conceive of their actions. Nonetheless, the difference is real, because civilians have a right not to be used simply as a means, and that is how the terror bomber, but not the strategic bomber, intends to use them.

On this conception of the (explanatory role of the) DDE, it should be clear that there is no automatic problem with intending to harm another. If one can legitimately claim that the harm that one intends to cause is one which the other has no right not to suffer, then one should not take the DDE to give one reason not to act that way. For example, if a particular act of self-defense is justified, then the intention to inflict the harm of death may be perfectly acceptable.²⁴³ Analogously, if directly harming a fetus is justified as a Pareto-superior alternative to detaching it from the woman and letting it die, then the intention to kill it should be perfectly acceptable.

I do not deny that there is utility in rules that embody the DDE as more traditionally interpreted to apply to harms. For example, if it is unclear whether certain patients can find pain relief without being medicated to death, then a rule prohibiting doctors from aiming to kill their patients, allowing them only to relieve pain, may prevent deaths that are not necessary to relieve pain. In addition, if doctors start admitting to them-

(1983). Sen thinks one can encourage another to wrong someone as long as the overall consequences would be better.

²⁴² This case is discussed by, among others, Quinn, *supra* note 201, at 77; and Bennett, *supra* note 239, at 95.

²⁴³ Saint Thomas Aquinas, *SUMMA THEOLOGIAE*, II, ii, Q. 64, a.7. In criticism of Aquinas, see McMahan, *supra* note 141, at 272. Of course, the attacker's death should not be one's ultimate aim. Stopping him should be one's ultimate aim. But if one reasonably thinks that the only way to be sure to stop him is to kill him, then one may aim to kill him.

selves that they can sometimes kill their patients, then it may be impossible to keep such behavior in check.²⁴⁴ But we should not adopt unduly broad rules. If we can be certain that fetuses below a certain age are not viable, then no fetal lives will be unnecessarily lost if we allow such fetuses to be attacked directly. And there is no reason to think that doctors who are willing to engage in abortions will somehow lose their ability to distinguish between killings that are justified by someone's right to be free of a burden and unjust killings. The rule restricting direct attacks on a nonviable fetus would therefore not have any utility benefits, and would instead have utility costs. Thus insofar as the DDE is supported for its utility, it should not be taken as a reason to oppose the use of traditional abortion techniques.

D. *Abortion of a Viable Fetus*

The next question is whether a woman should be allowed to abort a fetus that is viable. This may not be a very pressing question now since, given current technology, a woman typically has plenty of time to decide whether to have an abortion before the fetus is viable.²⁴⁵ Viability is an issue these days only for those women who discover relatively late in their pregnancies some reason why they should not carry to term (great-

²⁴⁴ See, e.g., Kamisar, *supra* note 229.

²⁴⁵ It is not clear exactly what percentage of abortions are performed after fetuses reach viability, but the numbers are small. "[A]ccording to federal studies, the percentage of abortions occurring past 20 weeks averages about 1.3% nationwide." Rivenburg, *supra* note 140, at 10. This number is confirmed by another: "based on 1992 research by the Centers for Disease Control and Prevention and the Alan Guttmacher Institute (an affiliate of Planned Parenthood), . . . 20,000 of the nation's 1.5 million estimated annual abortions occur at 21 or more weeks of pregnancy." Rivenburg, *supra* note 140, at 11. Viability does not occur until a few weeks later. Rivenburg goes on to state that:

At 23 weeks, one in four babies survives at least 30 days, says Dr. Valerie Rappaport, professor of maternal medicine at the University of New Mexico. By 25 weeks, which is the national medical standard for viability, about 40% live, but many suffer severe disabilities, usually cerebral palsy, chronic lung problems or blindness.

Rivenburg, *supra* note 140, at 11. Furthermore, "[F]ormer Surgeon General C. Everett Koop estimated, in 1984, about 4,000 abortions of all kinds in the seventh, eighth and ninth months (although he now can't recall his source)." Rivenburg, *supra* note 140, at 12. This estimate is higher than others, and yet it is still only .267% of all abortions nationwide, using the 1.5 million base.

er health risk than anticipated, fetal deformity, drastic change in the woman's life circumstances, etc.).²⁴⁶ But the significance of viability may grow if technology improves. In the future viability may occur very early in a pregnancy, or fetuses may always be viable.²⁴⁷ Because of these possibilities, we need to know how viability affects the right to have an abortion quite generally.

A viable fetus uses a woman just as a previable fetus does, but it would not necessarily need to use her. Since it is still using her, it should be clear that she can still detach herself from it (unless she has somehow obligated herself to carry it to term or has waived her right to detach by carrying it that long).²⁴⁸ So the right to an abortion, insofar as it is just a right to detach from the fetus, is not what is at issue here. What is at issue is the right to kill the fetus once it reaches viability, for that option is no longer a Pareto-superior alternative to detaching in a way that does not kill it. Detaching in a way that kills the fetus may be less taxing on the woman, but it is clearly worse for a viable fetus. Does this mean that once a fetus is viable a woman must either carry it to term or endure a more invasive procedure to get rid of it than she would have had to endure to be rid of a previable fetus?

The answer depends on whether the Pareto argument is necessary to justify the killing step in the detaching/killing model. Frances Kamm, for one, does not rely on the Pareto-superiority of killing. According to her, the real question is whether the costs of a procedure are more than a woman is required to bear for the sake of a fetus.

If removal is possible, but at a cost beyond what the woman would have to [pay] in order to avoid killing the fetus, it will be no worse off by being killed than it has any right to be, given that it has no right to the means necessary to get it outside of her and no right to all the body support it needs otherwise. That is, the fetus will not retain its life independently of her if it needs her help to be free of her, and if these efforts are excessive, it has no right to them.²⁴⁹

²⁴⁶ There has been dispute over this. See Rivenburg, *supra* note 140, at 12-18. I list only what seem like the obvious categories of good reasons.

²⁴⁷ But for a cautionary note, see MOROWITZ & TREFIL, *supra* note 38.

²⁴⁸ See *infra* Part V.

²⁴⁹ See KAMM, *supra* note 13, at 94.

The argument is set hypothetically, but her conclusion is clear. Since a fetus can neither demand the cost of exiting nor the cost of "residency in her body for nine months,"²⁵⁰ a woman has a right to kill even a viable fetus. That would not be the case if it could be taken out in a way with very low cost to the woman,²⁵¹ but if the cost is high, as it surely would be for a C-section, then a woman can kill it instead.²⁵²

Kamm's argument is based on the view that a woman would have a fetus removed alive for its sake. But the truth is more two-sided than that. The fetus is not asking to be removed; the woman is having it removed for her sake. The question is, can she have it removed any way she wants? The answer is not as clear as Kamm suggests. Even if it has no right to further residency in her body, its claim to be treated decently while being evicted is a different kind of claim from its claim to be able to stay. Think of a property analogy. If I own a building, and you have no lease to the property, then you have no right to stay if I want you to leave. But that does not mean that I can kick you out in the cheapest way possible for me. If you fail to leave on your own, I am not free to go in and shoot you and then throw your dead body in the trash; I have to use less drastic, even if more expensive means.²⁵³ The same principle, it seems, should apply in some way to a wom-

²⁵⁰ KAMM, *supra* note 13, at 94.

²⁵¹ KAMM, *supra* note 13, at 94.

²⁵² Kamm also thinks that differential cost does not matter, that a woman can kill a fetus to have it removed even if an operation to remove the fetus intact would not be more costly to her, as long as the cost of both is more than she is required to bear. KAMM, *supra* note 13, at 119-20. This strikes me as much less plausible than the rest of her position.

²⁵³ See, e.g., RESTATEMENT (SECOND) OF PROPERTY § 14.3 (1976). The Restatement holds that:

If the controlling law permits the landlord, or an incoming tenant, to use self-help to recover the possession of leased property from a tenant improperly holding over after the termination of the lease, neither the landlord, nor the incoming tenant, is entitled to resort to self-help to recover the possession of the leased property from the tenant, unless recovery by self-help is accomplished:

(2) without causing physical harm, or the reasonable expectation of physical harm, to the tenant, or anyone else on the leased property with the permission of the tenant; and (3) by using reasonable care to avoid damage to the property of the tenant, or of others on the leased property with the tenant's permission.

an who wants to be rid of a viable fetus.

Granted, there are some important differences here. Unwanted occupation of a woman's body is a much more pressing problem to the woman than the unwanted occupation of a landlord's property is to a landlord. In addition, part of the issue in the landlord-tenant case is the risk of violent confrontation if self-help is used;²⁵⁴ this does not apply in an abortion context. On the other side, a fetus does not act and breaks no law, whereas an illegal occupant of property actively disobeys the law. Nevertheless, despite these and other differences, I think there is a common principle: if A wants to be rid of B, and has a right to be rid of B, A can try to get rid of B, but can use violence only to a minimal degree. I suggest that violence has to be limited by proportionality and necessity. Indeed, since the Pareto-superior rule cannot be invoked with regard to a viable fetus, the only alternative justification available for using violence against the fetus seems to be that of self-defense. And since the fetus is an innocent threat, self-defense would have to be limited to a very small range of cases.²⁵⁵

To make this more concrete, suppose a medical breakthrough occurs and fetuses come to be viable from the eighth week on, but that the only way to get them out alive is by C-section, a fairly expensive C-section because the fetus would be so small and delicate. Would that mean that a woman who cannot afford a C-section would have to endure an unwanted pregnancy that she detected only at week eight? What if having a C-section would leave her sterile in the future? What if a C-section would carry a fifty percent chance of death for her? What if she found out she were pregnant at week seven? Could she refuse to wait a week before getting rid of the fetus? And what if the fetus is technically viable, but it would cost, say, a million dollars to provide it with an artificial womb so that it could one day grow to be a normal, healthy child? I will try to address each of these questions.

How much can a woman be required to spend to get a viable fetus out alive? I suggest that the answer is as much as a normal C-section would cost.²⁵⁶ Her primary responsibility

²⁵⁴ Thus many states do not allow self-help. *See id.*

²⁵⁵ *See supra* Part III.G.

²⁵⁶ As of June 1997, a C-section at Massachusetts General Hospital in Boston

is to allow the fetus to be removed. Once her womb has been cut open and the surgeon can reach in to remove the fetus, any extra costs are those due to the fetus and its special needs. They are the first costs of fetal care. What does that mean? Suppose, for example, it would cost an extra \$1,000 to remove a ten-week old fetus without killing it. If the woman were not at all responsible for the fetus after it is removed, then she would not be required to spend that money. But if she has some extra responsibility for the fetus, as a parent would have to ensure that a child she does not want is given to a responsible agency, then she might be required to pay that extra amount.²⁵⁷

This question may actually be moot, because as it currently stands, health insurance companies typically cover C-sections.²⁵⁸ But, it is conceivable that insurance companies and the government would only want to cover them when medically necessary, not when used to elect to terminate a pregnancy early.²⁵⁹ Whether procedures used to terminate pregnancies should be covered will be discussed below.²⁶⁰ If they are not covered, I believe it would be reasonable enough to suppose that a woman can be required to pay for a C-section, even a somewhat expensive one.²⁶¹

What if a C-section that would be maximally safe for the fetus would cost \$100,000? That is clearly more than we can require a woman to pay to ensure the fetus's safety. If someone else is willing to put up the funds, then, all else equal, she could be required to undergo that expensive surgery. But if no

would cost \$2,780 if under two hours, and \$3,095 if over. Telephone call to the billing department at Mass. General (June 4, 1997).

²⁵⁷ See *supra* notes, 96-104, 133-34 and accompanying text.

²⁵⁸ For example, Massachusetts Blue Cross and Blue Shield will generally cover a C-section as part of maternity care, even though they generally will not cover abortions. Telephone call to Massachusetts Blue Cross and Blue Shield (June 4, 1997).

²⁵⁹ The Massachusetts Division of Medical Assistance, for example, will pay for C-sections only when medically necessary. Telephone call to— (June 4, 1997).

²⁶⁰ *Infra* Part V.E.

²⁶¹ It seems reasonable to think that the man who unintentionally fathered the child should also have a responsibility to pay. But it is not obvious how to handle a situation in which he would choose to have the child born. There is no question that he cannot insist that the woman carry the fetus, but if he does not want her to abort it, there is something odd about requiring him to help pay for the abortion.

one will cover the costs, then since they are due to the fetus's special needs, that kind of surgery could be bypassed.

What if the C-section would harm the woman, either leaving her sterile or carrying a fifty percent chance of death? If detaching without killing the fetus would be too risky for her, then the question is, can she justify killing it in some other way? The only alternative I see, given that killing it is not a Pareto-superior option, is self-defense. But if she appeals to self-defense, she faces all the limits we saw earlier. If she is not in real danger of dying because of the fetus, then self-defense is not available to her. And even if the fetus is a threat to her life, she could only kill it rather than remove it alive if the latter option were also a threat to her life.

What if the fetus were nearly viable, but not yet viable? Would a woman have to wait till it is viable and have it removed alive? I think the answer here has to depend on how burdensome the wait would be.²⁶² The wait would be for the sake of the fetus. Clearly she could be asked to endure a day, and clearly she could not be asked to endure many months. Where the line should be drawn is hard to say. Ideally this kind of question would be addressed by a legislature seeking to represent reasonable democratic opinion on the matter.

Finally, and perhaps most importantly, there is the issue of real viability, as opposed to mere technical viability.²⁶³ Suppose, as was suggested above, that it would cost a million dollars to provide an eight-week old fetus with an artificial womb so that it could one day grow to be a normal, healthy child. And suppose, as seems likely, that no such money exists for the care of each unwanted eight-week old fetus, nor for this particular fetus. Does that mean that the woman has to carry it until it is further developed and the costs of care would go down sufficiently for the costs of care to be provided? Clearly, unless she is within the window of time discussed in the previous paragraph, the answer is no. She cannot be made to serve a fetus simply because no one else nor society in general will

²⁶² It may also depend on how far into the pregnancy she is, since the farther in she goes before seeking to end the pregnancy, assuming no coercion is present, the more she indicates that the state of being pregnant is not an overwhelming burden to her.

²⁶³ See KAMM, *supra* note 13, at 94. See also *supra* notes 38-39 and accompanying text.

put up the money to do so. And if it is the case that were she to detach herself it would die for lack of care, then the Pareto-superior argument again is relevant and she can kill it directly.²⁶⁴

The same reasoning applies if another woman is willing to provide a surrogate womb, but only for a steep price. Overlooking the ethical problems with surrogate motherhood,²⁶⁵ if someone, including the State, is willing to put up that money, then the woman who wants to be rid of the fetus should be required to transfer it. But if no one is willing to pay for the use of another woman's womb, we cannot assume that the biological mother has an obligation either to carry the fetus or pay for the transfer herself. Again, it is the fetus's needs that call for that expense, and if the woman who conceived it is not that much more responsible for its welfare than anyone else, then she cannot be denied the choice simply to abort it.

In summary, real viability does change a woman's rights to an abortion. It removes the Pareto-superior justification for killing the fetus directly. A woman retains a right to detach herself from the fetus, but unless she is seriously threatened by it,²⁶⁶ and can only escape the threat by killing it directly, she cannot kill it directly. However, this need not significantly undermine the general right of women to have abortions that attack the fetus directly. Even though technical viability, through artificial wombs or surrogate wombs, is likely, sooner or later, to get pushed back into early pregnancy, if not to conception, real viability, given the costs of technology (and of paying for another woman's womb if that is seen as an ethical option), is unlikely to get pushed back any time soon. For those few women who seek abortions after real viability, they should generally have the fetus removed alive. But other women should retain the right to kill it directly as a Pareto-superior option to detaching and letting it die.

²⁶⁴ See KAMM, *supra* note 13, at 94, and the discussion in *supra* notes 38-39 and accompanying text.

²⁶⁵ See, e.g., Anderson, *supra* note 40.

²⁶⁶ This is very rare with today's medical skill. See *supra* note 138.

V. ASSUMPTION OF RISK

A. *Factors in the Assumption of Risk*

A woman does not automatically consent to carry a fetus by having sex,²⁶⁷ but it could be argued that there should be a moral and a corresponding legal norm that holds a woman who has sex to have assumed the risk of carriage.²⁶⁸ For an analogy, suppose you wanted to enter the panda cage at the zoo. It would not be unreasonable for the zoo keepers to make you assume risk for your own welfare. They could inform you that if you are attacked, they will try to restrain the pandas, but they will not shoot them, and they will not allow you to bring in a gun with which to shoot them in self-defense. Analogously, we as a society might hold that a woman should know that intercourse, even with contraception, puts her at risk of pregnancy, and just as you might have to assume a risk and give up the right to defend yourself in the panda case, so we could require women to assume the risk of carriage if they choose to engage in sex.

How should we decide what the rules should be for assumption of risk? As a first approximation, the rule should reflect a balance between how important the activity is (how much it should be supported, or, if a fundamental liberty is at stake, how strong the liberty interest is), and how much harm might accrue to innocent parties if the risk is not assumed by the person who engages in the risky behavior. We must weigh the benefit to the woman and her partner of maintaining the freedom to have sex against the possible harm to a fetus (and others who may bear some cost) if she conceives it and then does not carry it. But in striking this balance we must keep in mind that if a woman does not have sex, then no fetus would exist, so the harm to the fetus is not the harm of being killed, but the harm, if that is what it is, of being created and then not carried to term.²⁶⁹

²⁶⁷ See *supra* Part I.C.

²⁶⁸ See PROSSER & KEETON, *supra* note 72, § 68.

²⁶⁹ See *supra* Part II.C.

B. *Balance of Reason, Against Assumption of Risk*

What are the reasons to establish the rule that a woman assumes the risk of carriage if she gets pregnant? It seems there are three. First, life should not be treated lightly. If a person's life hangs in the balance, then if nothing equally weighty weighs against it, we should have rules the effect of which is to save that life. Second, according to some, sex should not be handled casually; it should be used not for recreation, but for procreation.²⁷⁰ Third, the normal reasons not to impose good samaritan duties do not apply as clearly in this context. There is no problem identifying who should carry the duty, and it is not a duty between strangers, but between family.²⁷¹

Responses can be given to each of these. First, with regard to sex, making a woman assume the risk of pregnancy puts a vastly unequal burden upon the sexes with regard to establishing a more restrained attitude towards sex.²⁷² Tradition may have reserved the role of guardian of chastity for women, but we can no longer expect women to accept such an unequal burden. If there were a strong reason not to abort based on the needs of the fetus, then the fact that only women can save fetuses would put the burden on women despite the inequality that would result.²⁷³ But insofar as the argument for assumption of risk is based on the desire to suppress casual sexual activity, such unequal treatment is unacceptable. And of course this response concedes what need not be conceded, namely the claim that nonprocreative sexual activity should be suppressed. Many people do not accept this goal; they regard sex as fundamentally important to a healthy adult life for both women and men.²⁷⁴ Their views are legally protected by the widely accepted legal precedent that people have a fundamental liberty

²⁷⁰ See, e.g., LUKER, *supra* note 20, at 163-68. The Pope has also stated that: "A general and no less serious responsibility [for abortions] lies with those who have encouraged the spread of an attitude of sexual permissiveness and a lack of esteem for motherhood." See Paul John Paul II, *supra* note 7, at 106.

²⁷¹ See, e.g., PROSSER & KEETON, *supra* note 72, § 56; Regan *supra* note 13, at 1593-1601.

²⁷² See, e.g., CALABRESI, *supra* note 13, at 106; KAMM, *supra* note 13, at 104-110; SUNSTEIN, *supra* note 13, at 282.

²⁷³ See KAMM, *supra* note 13, at 179.

²⁷⁴ See *supra* note 82.

right to choose to engage in sex without intending to reproduce.²⁷⁵ This reflects a basic principle of a liberal society, that if some consider a liberty fundamentally important, others who disagree should nonetheless be reluctant to deny them the liberty. Taken together, these equal protection and liberty interests decisively outweigh the interest in promoting chastity.

With regard to the importance of life, it was already argued that relative to the baseline of not taking the risk at all, there is little to no harm to the fetus if it is not born.²⁷⁶ Why is this the right baseline to use, rather than the baseline of being alive? The answer is that we are concerned with the course of a woman's behavior as a whole. Does a woman who conceives a fetus and then aborts it cause a real harm overall? No, or at most, not much of one. But what of the fetus? Once it is conceived, does it not have an interest in staying alive? Is this interest not relevant? Yes, but relevant to a different question. Now the question is, given that the fetus is alive, what claim does it have on the woman? That brings us back to our good samaritan starting point. Should we say, when someone allows another to die, that she harms him? Perhaps, but even if we do say that, we ought to discount that harm relative to the autonomy of the agent who should be free to lead her own life without being the servant of those who happen to be in need.²⁷⁷ Both legally and morally, it is a much worse thing to positively harm someone than to allow someone to continue suffering a harm. And if it is objected that the woman caused the fetus to be in need, then we are simply back to the point of the no worse off thesis: Since it would not have been alive otherwise, she has no special obligation to it, or at least none so great as to require carriage.

It is also relevant that many people do not think the fetus is a person. We have been assuming it is for the sake of argument all along, but there are good reasons to think that it is not a person, with the full human capacity to have interests, to be harmed, and to have claims.²⁷⁸ The view that the fetus is

²⁷⁵ See *supra* note 77.

²⁷⁶ See *supra* Part II.C.

²⁷⁷ *Supra* note 203.

²⁷⁸ See, e.g., DWORKIN, *supra* note 54, at 16-18; Brownstein & Dau, *supra* note 78, at 703-13, 720-22. See also Michael Tooley, *Abortion and Infanticide*, 2 PHIL. &

a person is still primarily a religious view.²⁷⁹ Given the uniquely high demands for good samaritan sacrifice involved in requiring a woman to carry a fetus to term, the fundamental right to engage in sexual behavior without aiming to procreate, and the problem of unequal burdens on men and women, it is problematic to force upon those who do not think a fetus is a person a rule that requires that they nonetheless assume the risk of carriage if they engage in sex.

Finally, the argument regarding good samaritan demands overlooks the fact that difficulty choosing the person upon whom to impose a burden and the reluctance to impose burdens upon strangers are not the only two sources of limits on such demands.²⁸⁰ Even between family members there are limits as to what we demand. For example, we do not require family members to give their kidneys to each other. And we do not require people to accept serious burdens even if they are the only ones who can help out.²⁸¹ These limits on bad samaritan laws reflect our deep commitment to the idea that we each have our own lives to lead, that we do not live simply to serve. A life without service may be less meaningful than a life with it, but the choice of whom one will serve and when is a matter that must be left to the individual. This is as true for women as it is for men, even if the world has not always recognized that fact. Therefore, I conclude that it would be contrary to the basic principles of our legal and moral tradition to impose a blanket policy reading assumption of risk into the choice to have sex.

C. *Limited Assumption of Risk, Morally Speaking*

This section has tacitly assumed that the woman has taken reasonable precautions to avoid pregnancy (i.e. used birth control in a responsible manner), and that she has decided she wants an abortion in a timely manner. It has also presumed that a woman's reason for not wanting to carry a fetus is reasonable. These are issues that deserve our attention before we

PUB. AFF. 37, 44f (1972).

²⁷⁹ See, e.g., LUKER, *supra* note 20, at 196-97; DWORKIN, *supra* note 54, at 35-36.

²⁸⁰ See *supra* notes 96-104 and accompanying text.

²⁸¹ See *supra* note 203 and accompanying text.

conclude that we have a sound foundation for a general moral and legal right to an abortion. I will argue in this subsection that moral concerns place fairly strict limits on the moral right to an abortion. I argue in the next subsection that the law, because of administrative and privacy considerations,²⁸² should be more generous with the right to an abortion. It may not, however, have to be quite as generous as some pro-choice activists would like.

Morally speaking, it could be reasonable to assert as a social norm that since innocent lives are at stake, a woman who does not take reasonable precautions and gets pregnant has waived her claim not to be responsible for carriage. After all, we already noted in Part II.C that there may be some responsibility that comes with creating someone, and it may not be fully accurate to say that a fetus is *no* worse off for having been conceived and aborted than never having been conceived at all.²⁸³ The claim we made above was that the responsibility that flows from these factors, even augmented by the responsibility for another that comes from biological relatedness, was not sufficient to require that a woman choose between the risk of carriage or abstinence. But they are certainly sufficient to require the woman to take reasonable precautions. Failing to do so, she could be held morally responsible for the fetus she negligently or recklessly caused to be dependent upon her. (To be clear, she may be no more guilty of carelessness than her male partner, but biology determines that either she or the fetus must pay the price, and if she is complicit in the joint irresponsibility, the moral burden should fall upon her.)

Similar points could be made about the morality of choosing an abortion in a timely manner. Once a woman knows she is pregnant, she has a responsibility to decide what she wants to do about that fact. Is she willing, if not eager, to carry the fetus, or does she want to be rid of it? Of course, that can be a very difficult decision, but if another life is at stake, it is morally reasonable to demand that she take it seriously and make it in a timely manner.

²⁸² On the right to privacy, see *Griswold*, 381 U.S. at 484; see also TRIBE, *supra* note 13, at 133.

²⁸³ See *supra* Part II.C.

Eileen McDonagh argues that even if a woman does consent at one point to carry the fetus, this consent should not be irrevocable.²⁸⁴ Following up on her claim that pregnancy can be like sex—a good thing if desired and a really bad thing if not—she says that just as a woman who has consented to have sex can decide that she wants it to stop, and then the man must then cease and desist,²⁸⁵ so a woman who consents to allow a fetus to grow in her womb can change her mind and reclaim the womb for herself. But McDonagh fails to address any objections that might arise. One obvious objection is that there is a crucial disanalogy between stopping sex and aborting a pregnancy. A man will not die if the woman he is having sex with says that she needs the sex to stop at once; a (preivable) fetus, on the other hand, will die. To see the relevance of this difference, imagine that men would die if they commenced having sex with a woman and had to stop before ejaculating. Is it so clear that a woman could withdraw consent once a man had started? Perhaps she could say that the man takes the risk that she will demand he stop. But this would give women an unjustifiable degree of control over men; either men would have to give up sex or put their lives at the mercy of women. But if consent is not revocable in that fictitious context, the analogy seems to cut the wrong way for McDonagh. It seems clear to me that the more reasonable thing to say is that if a woman has had enough time to make a considered judgment about carriage, and to seek an abortion if she decides she does not want to carry the fetus, then she waives her right to an abortion if she carries a fetus beyond that point (assuming that no new relevant information comes to light).

Turning now to reasons for an abortion, there are a number of problematic possibilities. Should abortions be available, for example, to select the sex of the child, or to prevent the birth of a child with certain birth defects?²⁸⁶ What about rea-

²⁸⁴ See McDonagh, *supra* note 12, at 79.

²⁸⁵ See McDonagh, *supra* note 12, at 68.

²⁸⁶ Another reason which may be problematic would arise in a case in which a woman intended to abort all along and used the pregnancy only as a means of achieving some end. This involves treating the fetus simply as a means, and therefore if the fetus has the standing of a person is morally impermissible. See KAMM, *supra* note 13, at 124-25.

sons having to do with the quality of the life of the mother, rather than the nature of the fetus? What if her relationship to the father is not good or ends during her pregnancy, or she loses her job, or she simply decides that she is not ready to be a mother?

Let us start with reasons having to do with the nature of the fetus. Sex selection is a particularly ugly reason. We expect parents to be able to bond with children of either sex; a woman who so prefers girls over boys, or vice versa, as to abort a fetus if it is not the sex she wants seems to be making a moral mistake, putting too much weight on sex of a child. It is one thing to look for a spouse among people of only one sex (whether the same or opposite). Sexual attraction, for most people, is strongly oriented either towards one sex or the other, but to feel that way about one's child seems to reflect a morally indefensible form of sexism.

Birth defects are not as simple. On the one hand, we do not want to treat those who are handicapped or deformed as being any less deserving of basic human respect than others. On the other hand, the choice to carry a fetus is usually the first step in the choice to be a parent, and being a parent of a handicapped child is much more demanding and stressful than being the parent of a normal child.²⁸⁷ How are we to balance these considerations? Frances Kamm offers an important consideration on the topic of postnatal burdens.²⁸⁸ She distinguishes the unwanted effects of an taking an action or undergoing a process from the burdens of the action or process itself, and she argues that even if one does not object to taking an action or undergoing a process in itself, one can refuse to do so if the outcome will be undesirable and the act or process makes significant demands of one. Since the burdens of pregnancy are not trivial, a woman need not endure them if the result will be other than one she wants. This might seem to morally license having an abortion for any reason, but I think it is better read as morally licensing an abortion for any significant reason that is itself not morally illicit. A strong prefer-

²⁸⁷ The National Opinion Research Center found, in a 1980 poll, that 83% of people think a woman should be able to get an abortion if a fetus is deformed. Karen L. Bell, *Toward a New Analysis of the Abortion Debate*, 33 ARIZ. L. REV. 907, 913 (1991).

²⁸⁸ See KAMM, *supra* note 13, at 105.

ence for one sex over another in one's child is a morally illicit reason; a strong preference for a normal over a handicapped child, given the extra burden involved in dealing with a handicapped child, is not. This is not to deny that there is something ugly in the decision not to sacrifice for someone simply because that person is or will be deformed in some way, but it is not just the child's deformity that is at issue; it is also the parent's extra responsibility to accommodate the handicapped child's special needs.

It is worth adding one more reason to be concerned with child-focused reasons for an abortion, namely the specter of designer children (i.e. children born to fit narrowly defined specifications).²⁸⁹ I see three serious concerns here, all having to do with the care we offer children. First, there is the abstract concern that we will devalue children in general by making them into products that we seek for their performance, rather than humans deserving love unconditionally. Relatedly, and more concretely, there is the concern that a child who is "designed" by his or her parents will face even more pressure to conform to a preset norm than most children. Given that one of the hardest tasks of childhood is coming to discover one's own way in life, and that one of the hardest tasks in parenting is finding the balance between providing guidance and allowing the child to be his or her own person, rather than an extension of one or both parents, anything that makes these tasks harder only raises the probability of emotional child abuse.²⁹⁰ Third, there is a danger of a new form of social caste system arising, as wealthy people design successful children, while poor people do not.²⁹¹ For all of these reasons, abortion based on the nature of the fetus is something that we should treat as morally problematic.

Finally, there are those reasons having to do with the woman's life: her emotional readiness to be a mother, her relationship with the father, her financial condition, her desire not

²⁸⁹ For some worries in this area, see Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L.J. 951 (1996). See also Leon R. Kass, *The Wisdom of Repugnance*, 216 THE NEW REPUBLIC 17 (June 2, 1996).

²⁹⁰ This problem is clearest with clones, which for that reason alone I think should not be legal.

²⁹¹ See Rao, *supra* note 289, at 953.

to endure the hardship of a pregnancy when she does not want to be a mother, etc. Of these I have little to say, other than that the reason should be well matched to the seriousness of the choice. That means that they should take into account the legitimate, even if not compelling, claim the fetus makes for the chance to be born into the world. In addition, if a woman is going to choose abortion, the desire not to endure the hardship of pregnancy must play a prominent role. If the woman would not mind being pregnant, but she does not want to be a mother, then she should give the baby up for adoption rather than abort it.²⁹²

In sum, there are good reasons to think that the moral norms setting the conditions by which a woman can become pregnant without having assumed the responsibility for carriage should be fairly stringent. A woman should take reasonable precautions against pregnancy such that it can reasonably be said that any pregnancy that results is not her fault. Furthermore, if she does not want the burden of carriage, she should seek out an abortion in a timely manner, and she should have morally acceptable and sufficiently weighty reasons for seeking an abortion.

D. *Limited Assumption of Risk, Legally Speaking*

Should the law track morality on acceptable conditions for an abortion? Not completely. As I noted above,²⁹³ the law, because of administrative and privacy considerations, should be more generous with the right to an abortion. In particular, the law will have great difficulty looking into the responsible use of birth control and the reasons for an abortion. It seems likely that it would not be possible to justly administer laws examining whether a woman actually responsibly used birth control or determining whether the reasons she gives for wanting an abortion are pretextual or really sufficient. Is the government to require that all broken condoms be reported to the police the day after they break? Is the government to put on a trial asking for character witnesses to assure that a woman has good reasons for wanting an abortion? Obviously, these ideas are

²⁹² See *supra* note 286 and accompanying text.

²⁹³ See *supra* Part V.C.

silly. Even if they could be made workable, there is no reason to cede to the government the power to invade privacy sufficiently to settle such matters.

A more administrable suggestion (indeed a suggestion close to our current regime), reflecting the fact that it is not too hard to tell approximately how long a woman has been pregnant, would be to set a time limit, assuming all the relevant information is available, for obtaining an abortion, after which a woman would be taken to have waived her right to an abortion.²⁹⁴ Presumably a woman would have a reasonable window in which to discover that she is pregnant, followed by a reasonable period of time to think over the decision about whether to carry the fetus to term, and then a reasonable time to obtain an abortion should she choose to do that. Clearly, four months or so would be the minimal period of time required.

The big question, however, is why, given that the moral concerns with proper precautions and acceptable reasons cannot be accommodated in the law, abortion should be legal. We have the following choice to make. Either some women who morally have a right to an abortion will be legally denied that right, or some women who morally have no right to an abortion will be legally given that right. Why should the choice be for the second of those two options? Indeed, are not women who immorally seek an abortion engaging in murder, i.e., the wrongful killing of another? How can the law allow for that?

This is one of the most important questions in this paper. But we should be careful inferring murder is the right name for actions that kill another without sufficient moral justification. Consider self-defense: we legally allow people to kill others in self-defense even when the harm they are threatened with is not death but merely "serious bodily injury."²⁹⁵ In some jurisdictions people don't even have to retreat from their homes; they can kill instead. Arguably these policies legally sanction immoral killings. That is, it is arguably immoral to kill someone rather than suffer a broken arm, or to kill some-

²⁹⁴ See, e.g., Regan, *supra* note 13, at 1643; Brownstein & Dau, *supra* note 78, at 753-54. Regan also notes that the waiver line could probably be drawn earlier than the beginning of the third trimester. Regan, *supra* note 13, at 741 n.117.

²⁹⁵ See *supra* note 149. See also LAFAVE & SCOTT, *supra* note 99, at 456.

one rather than to flee from one's home. But that does not mean that the law sanctions *murder*. These are close calls. These are instances in which people are giving their own interests too much priority, but it is reasonable to err, at least a little, on the side of a potential victim (at least when she is confronted by a culpable aggressor).

I am not arguing that there is a strict analogy between abortion and self-defense; I am only making the point that not all immoral killings are so clearly and substantially wrong that the law is immoral if it fails to prohibit them. In some cases, a woman's reason is not quite sufficient to pass moral muster, but that can be a close call such that the law does no wrong to allow it. In other cases, a woman has become pregnant through complete disregard of prudent birth control precautions, and an abortion in her case may be clearly morally wrong. But given that such a moral judgment depends on a finding that on balance she should be held to have assumed the risk of carriage if she did not use reasonable birth control measures, it does not seem to me to be a substantial moral wrong. It is not as if her initial act was itself a culpable one; it is only that she is ducking her moral responsibility, given how her luck played out. It is a selfish and immoral act, but not a monstrous act. And given that the costs of carriage are so high, and the harm to the fetus, relative to the preaccident baselines is not great, the temptation to duck responsibility is understandable. To be clear, I am not saying that a woman should not be held responsible for carriage if the law could efficiently and without unduly invading privacy determine that she is morally responsible for it. But given that the law cannot properly distinguish moral from immoral intentions to seek an abortion, and given that the moral failure at issue here is not terribly grave, women in general should not lose the right to an abortion because of the moral failures of some.

E. *State Funding*

One final issue that should be covered in a discussion of assumption of risk is state funding. Although I think there are compelling reasons for funding in many instances, I do not think we should recognize a constitutional right to state fund-

ing.²⁹⁶ Eileen McDonagh is once again my target here. She claims that "it violates the Equal Protection Clause to protect preborn life by allowing it to impose serious injuries on a woman that the State stops born life from imposing."²⁹⁷ She continues:

[A] woman's bodily integrity and liberty is just as violated by a preborn life that implants itself, using and transforming her body for nine long months without consent, as she [sic] is when a born person massively imposes on her body and liberty without consent, as in rape, kidnapping, slavery and battery.²⁹⁸

Then, relying on the idea that the woman is violated by an unwanted pregnancy, she claims that "when the fetus injures a woman by imposing a wrongful pregnancy, its action violates state laws that restrict private parties from injuring others."²⁹⁹ By conceiving of the activity of a fetus in this way, McDonagh argues that even a minimal state, one that did not fund welfare or any social services other than law enforcement, would have a duty to fund abortions: "[T]he size and authoritative scope of the state is kept to the minimum necessary for providing law and order by stopping private wrongful acts rather than expanded [sic] to cover such natural forces as disease, poverty, or the havoc wreaked by fires, earthquakes, floods, or hurricanes."³⁰⁰ Of course, insofar as the fetus is not treated as a person, then the minimal State would not have to protect a woman from it, but McDonagh claims that insofar as the State seeks to protect the fetus as a person, holding it responsible as a person is "merely a symmetrical extension" of such protection.³⁰¹

Her argument is multiply flawed, but my critique starts with the symmetry claim. It does not follow from that fact that someone is protected by the criminal law as a person that she can be treated by the law as a possible criminal. We can hold that a fetus is a person and still easily recognize the absurdity of the claims that a fetus "violates state laws" and is guilty of

²⁹⁶ None has been recognized. See, e.g., *Maier*, 432 U.S. at 473-74; *Harris*, 448 U.S. at 316.

²⁹⁷ See McDonagh, *supra* note 12, at 144.

²⁹⁸ McDonagh, *supra* note 12, at 145.

²⁹⁹ McDonagh, *supra* note 12, at 146.

³⁰⁰ McDonagh, *supra* note 12, at 152.

³⁰¹ McDonagh, *supra* note 12, at 146.

trying to impose a "wrongful pregnancy" by using a woman's body without her consent. These sound like criminal accusations, yet criminal laws apply only to possibly criminal actions. What the fetus does cannot fit that category. For an act to be criminal it must be voluntary, and clearly a fetus's "actions" are not voluntary.³⁰² This point is captured in the general claim that "infants," that is children under some specified age (seven at common law), are held to be without criminal capacity.³⁰³ Clearly, a fetus is without criminal capacity.

McDonagh could reply that she is, of course, not suggesting that an unwanted fetus is a criminal. But if not, then it is completely unclear what her argument is supposed to be. There is an obvious gap between the right to defend oneself and the right to aid. She tries to fill that gap by invoking the imagery of defense against culpable aggressors. But no fetus is a culpable aggressor, and the claim that the State must aid people in self-defense against innocent threats does not follow from the fact that the State must aid people in self-defense against culpable aggressors. At the core of her argument stands the claim that the State has a duty to defend "law and order," but the fetus is so far from threatening any law that her argument simply has no connection to reality.

The harm a woman suffers if she finds herself accidentally facing an unwanted pregnancy is essentially a natural harm, like being hit by a falling object tossed by the wind. Thus the claim to protection should be the same as it is against natural threats. Such a claim may not rise to constitutional proportions, but it is not trivial either. Insofar as the State takes an interest in the welfare of its citizens, it ought to help women deal with this threat.

In fact, if my argument so far has been sound, much of the resistance to state funding is misplaced. The idea behind the Court's decisions that there is no constitutional right to abortion funding is that the "State [can] make a value judgment favoring childbirth over abortion."³⁰⁴ But why should a state want to make that value judgment? Under the *Roe* paradigm the answer is plain: many people consider abortion an illicit,

³⁰² See LAFAYE & SCOTT, *supra* note 99, § 3.2(c).

³⁰³ See LAFAYE & SCOTT, *supra* note 99, at § 4.11.

³⁰⁴ *Maher*, 432 U.S. at 474.

inappropriate activity, and they should not be forced to support with their tax dollars something of which they do not approve. If the assumption of risk argument is accepted, then abortion should seem less illicit. Since the right does not turn on the status of the fetus, that is on whether it counts as a person or not, those who think it is a person should be satisfied that a woman has a right to have an abortion as long as she has not yet waived it. If abortions are not illicit and are important to the welfare of women who need them, then there should be much less call for the value judgment that women should not be supported in obtaining abortions.

The right way to approach this topic, as with assumption of risk in general,³⁰⁵ is through a balancing inquiry. How important is the activity of sex through which a woman takes the risk of becoming pregnant, how much harm will come to her if she is not aided in ending an unwanted pregnancy, and what reasons are there to encourage her to take the risk only if she is willing to deal with the consequences on her own? Obviously, the activity itself is very important, even constitutionally protected. But it has never been held that people have a constitutional right to state aid in having sexual intercourse, say through free contraception or therapy for impotence, or the like. The harm of an unwanted pregnancy is serious, and the State should take an interest in helping a woman avoid that harm. But on the other side, there are reasons to encourage people not to use abortion as a method of birth control. It is more expensive and less safe than other forms, and if the fetus is considered a person, it involves a killing which is roughly morally equivalent to allowing an innocent person to die. Since these are serious considerations on both sides, but considerations that fall short of constitutional proportions, it seems that the issue of funding should be left to the political process. I suggest, however, that when the woman faces the danger of permanent harm, she should be given financial assistance, and if she is pregnant through rape or incest, the government may have a constitutional equal protection duty to provide her with an abortion, at least if it provides other victims of crime with aid.³⁰⁶

³⁰⁵ See *supra* Part V.A.

³⁰⁶ See, e.g., SUNSTEIN, *supra* note 13, at 317.

CONCLUSION

In summary, I believe that the assumption of risk argument provides a better foundation for the right to abortion than is contained in *Roe*. It is better primarily because it does not turn on the question of whether a fetus is a person. Even if a fetus is a person, a woman should not be taken to have consented to carry it simply because she had consensual sex. An argument of this form holds out the hope that a broader social consensus on abortion can be formed. Those who think the fetus is a person may be able to accept that abortion is a moral option, at least for women who took reasonable precautions not to get pregnant and who have serious reasons to abort which they act on in a timely manner.

The assumption of risk argument is based on a few simple moral claims. First among them is that people should not be used simply as a means of serving the welfare of others. Second, there are moral factors that ground the thought that a woman should not be held to have assumed the risk of carriage simply by engaging in consensual sex. These include the importance of sex; the relatively insignificant harm to the fetus of not being carried, compared to the baseline of not being conceived; the burdens of unwanted carriage; and the unfairness of imposing this burden on women without imposing a similar burden on men. Finally, there is the detaching/killing model, as opposed to the self-defense model, for explaining why it is acceptable to attack the fetus in the process of getting an abortion.

If I have correctly presented these moral claims, then there is a strong moral foundation for a right to an abortion. The corresponding constitutional right can be grounded in the due process liberty right to engage in sexual activity without aiming to reproduce, and the Thirteenth Amendment and equal protection rights of women not to be burdened with a uniquely demanding bad samaritan law.

I do not deny that there may be conditions under which a woman can be taken to have assumed legal responsibility to carry a fetus, conditions which ought to be determined by the political process, and which can rightly reflect views on whether a fetus is a person. But these conditions should be subject to constitutional limits protecting the basic idea that a woman

does not assume the risk of carriage simply because she has consensual sex. Until at least the fourth month or so of pregnancy, a woman should have a constitutional right to refuse the burden of carriage, and the correlate right to abort her pregnancy.