

## **Abortion in the Original Position**

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### ***1. Introduction***

Is the human fetus intrinsically something it is presumptively seriously wrong to kill?<sup>1</sup> Since an ordinary human person is the paradigm case of such a thing, let us call this the “issue of fetal personhood.” This explicitly moral use of the term “personhood” allows that, although ordinary human persons are paradigm persons in the moral sense of the term, other beings—chimpanzees or dolphins, for instance—might also count as moral persons. Let the “typical abortion context” be any context in which a woman seeks a nontherapeutic, non-eugenic abortion of a pregnancy that did not result from forcible rape or its equivalent. By “abortion,” I mean the intentional termination of pregnancy. In the literature on abortion, “nontherapeutic” describes an abortion performed when continued pregnancy would not threaten the life or seriously threaten the health of the pregnant woman, and “non-eugenic” describes an abortion performed for reasons other than severe fetal abnormality.<sup>2</sup> By “forcible rape or its equivalent,” I mean to describe any case of sexual intercourse to which the woman did not genuinely consent. I am of course giving the term “typical abortion context” a stipulative definition, but I suspect that the abortion context that my definition describes is “typical” in the ordinary, statistical sense as well. At any rate, I am confident that my definition picks out a significant number of actual cases.

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1. This formulation of the issue of fetal personhood is based partly on Donald Marquis’s formulation in “Why Abortion is Immoral,” *Journal of Philosophy* 86 (1989): 183. Marquis asserts, perhaps hyperbolically, that the morality of abortion “stands or falls” with the resolution of this issue; one need not agree with Marquis’s assertion, however, in order to accept his formulation of the issue.

2. See, for example, L. W. Sumner, *Abortion and Moral Theory* (Princeton: Princeton University Press, 1981), 155 n. 28, citing the categories of abortion defined by the World Health Organization.

Consider these questions. Do we know the answer to the issue of fetal personhood? If we do not, then what is the moral status of the typical abortion until we do know? I will answer the first question in the negative. As for the second, our options seem to be to err on the side of the woman seeking an abortion or else to err on the side of the fetus she is seeking to abort. Given the unresolved moral status of the fetus, we can regard the typical abortion as permissible, or we can regard it as impermissible (assuming we ascribe to it any moral properties at all). It is a difficult problem, but for reasons I give in this paper, I am persuaded that we should regard the typical abortion as impermissible. This essay says nothing about the morality of atypical abortions.

My argument rests on three features that characterize the typical abortion context: the moral innocence of the fetus, our ignorance concerning the personhood of the fetus, and the responsibility of a couple for the conception of the fetus. My discussion depends on two further presuppositions: first, that the issue of fetal personhood is a genuine question for moral theorizing—a question we can get right or wrong—and not something to be decided by social convention; and second, that fetal personhood is relevant to the moral analysis of abortion. I will not defend the first presupposition except to say that this essay and anything like it would be pointless if we could settle moral issues such as fetal personhood just by consulting our conventions. As for the second presupposition, some philosophers deny that fetal personhood is relevant to the ethics of abortion, since, they argue, even undoubted moral personhood on the part of the fetus would not make the typical abortion impermissible.<sup>3</sup> I will address their arguments in due course.

## *II. Innocence*

Regardless of its personhood, the fetus is morally innocent in the sense that it bears no moral responsibility for its situation. If the fetus is a nonperson, then it is morally innocent in the trivial way that a kidney is morally innocent. If the fetus is a person, then it is morally innocent in the way that some persons—perhaps the retarded or the insane—are morally innocent: it lacks whatever qualities it needs for acquiring moral responsibility, such as self-consciousness or the capacity for purposive agency. If the fetus acquires personhood gradually, so that later fetuses are persons while earlier fetuses

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3. See, for example, Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47–66; and Jane English, "Abortion and the Concept of a Person," *Canadian Journal of Philosophy* 5 (1975): 233–43.

are not, the fetus remains morally innocent throughout gestation.<sup>4</sup> It is morally innocent, even if it is not always causally innocent.

### III. Uncertainty

Next I claim that no one yet knows a negative answer to the issue of fetal personhood: for all anyone now knows, the human fetus, throughout its gestation, shares with ordinary persons the intrinsic property of being something it is presumptively seriously wrong to kill. To be sure, lots of ordinary folk have what we might regard as answers to the issue of fetal personhood, but none of those answers, and in particular none of the negative answers, is known to be correct—chiefly because none of the answers offered by the acknowledged *experts* on the ethics of abortion is known to be correct.

Among expert opinions on the issue of fetal personhood, we have, at one extreme, the view that neither fetuses nor newborns nor infants nor perhaps even toddlers possess the intrinsic property of being things that it is presumptively seriously wrong to kill. Proponents of this view include Michael Tooley and Mary Anne Warren.<sup>5</sup> At the other extreme, we have the view that even newly fertilized ova, or at least *very* early fetuses, do indeed possess the property that Tooley and Warren say they lack. Proponents of this view include John Noonan, Donald Marquis, John Woods, and Warren Quinn.<sup>6</sup> Between these two extremes we have every other expert on the subject, including such gradualists as L. W. Sumner, who holds that fetuses acquire the property gradually as they acquire sentience.<sup>7</sup> I have no idea which of these views is correct, but because gradualism by its very nature encounters

4. I use the term “fetus” to refer to the unborn human organism at any stage of gestation. I assume that questions of fetal personhood become meaningful only after conception (Marquis, “Why Abortion Is Immoral,” 201–2, defends exactly this assumption). Thus, nothing in my analysis casts moral doubt on methods of preventing conception.

5. Michael Tooley, “Abortion and Infanticide,” in *The Rights and Wrongs of Abortion*, ed. Cohen et al. (Princeton: Princeton University Press, 1974), 52–84; and *Abortion and Infanticide* (Oxford: Oxford University Press, 1983). Mary Anne Warren, “On the Moral and Legal Status of Abortion,” *Monist* 57 (1973): 43–61.

6. John Noonan, “An Almost Absolute Value in History,” in *The Morality of Abortion* (Cambridge, Mass.: Harvard University Press, 1970); Marquis, “Why Abortion Is Immoral”; John Woods, *Engineered Death* (Ottawa: University of Ottawa Press, 1978); Warren Quinn, “Abortion: Identity and Loss,” *Philosophy and Public Affairs* 13 (1984): 24–54.

7. Sumner, *Abortion and Moral Theory*.

problems of vagueness, my hunch is that one of the two extreme views will turn out to be right. In any case, I do not think that the mere existence, or even the symmetry, of two extreme views gives us any reason to think that the truth must fall somewhere between them.

This diversity of expert opinion, valuable though it is, has so muddied the water that we have achieved what the ancient Greek skeptics call *isosthenia*: all of the major positions on fetal personhood rest on arguments of roughly equal cogency and seem vulnerable to objections of roughly equal persuasiveness. Or, to put it more modestly, in accepting any of the major positions on fetal personhood, one faces enough undefeated epistemic “defeaters” to deprive one’s acceptance of epistemic justification or warrant and, *a fortiori*, the justification or warrant it needs in order to count as knowledge.

It is not that mere disagreement on a question entails that no one knows the answer to the question; I think I know that astrology is unreliable, even though I recognize that many people believe in its reliability. I can possess knowledge even in the face of their disagreement because I have at least some good reasons for my belief while my opponents have no good reasons for theirs. Their reasons fail to defeat the justification for my belief either because their reasons are too flimsy to count as even *prima facie* defeaters of my justification or else their reasons, while *prima facie* defeaters, are easily rebutted by my reasons.<sup>8</sup> A fair reading of the literature on fetal personhood does not, however, produce the same diagnosis. Every possible position on fetal personhood encounters at least one incompatible position backed by an argument that is not easily refuted.

I should emphasize that I do *not* claim that every actual position on personhood, let alone every possible position, is as plausible as every other. I claim only that every possible position is rivaled by at least one incompatible position that is no less plausible: the extreme positions of Marquis and Tooley are rivals, for example, and neither position is easily refuted; each of those positions is a rival to Sumner’s gradualist view, itself not easily refuted; and so on. I take that fact to be sufficient for our failing to know

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8. I hasten to emphasize that I am not likening astrology to any of the major positions on fetal personhood, nor am I suggesting that any of those positions is intellectually flimsy in the way astrology is. My only point is that, unlike astrology, the major positions on fetal personhood are not easily refuted, which suggests that we do not yet know whether fetuses are persons in my technical sense. By contrast, I do think we now know that astrology is unreliable, *even though* astrologers continue to disagree with their critics.

which, if any, of the various incompatible positions on fetal personhood is correct.<sup>9</sup> I do not favor the genuinely skeptical view that we will never have a fully satisfying analysis with which to settle the issue, but I do think that we are not there yet.<sup>10</sup> Those who still insist that they know a negative answer to the issue of fetal personhood overestimate their epistemic situation, but they can consider my reasoning in the rest of this paper hypothetically: if the personhood of the fetus were (or were to become) epistemically uncertain, what would be the moral status of the typical abortion?

#### *IV. The Rational Response*

The only rational response to that epistemic uncertainty is (or, for those reading hypothetically, would be) to follow the so-called maximin rule of decision theory. I will offer what I take to be the maximin solution to the decision problem posed by the typical abortion context. I will then argue that in this context, as in equally serious moral contexts, the single rational solution is the single morally permissible solution.

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9. In the course of rejecting several rival proposals, Marquis offers a general explanation for the absence of fully plausible analyses of moral personhood: the principles invoked so far by each side in the debate are, he says, only accidental generalizations, so they are bound to fall prey to counterexamples ("Why Abortion is Immoral," 188–89). Marquis himself argues that abortion is presumptively wrong for the same reason that killing a normal adult is presumptively wrong, that a sufficient condition for the immorality of ordinary homicide also obtains in the case of abortion. Not surprisingly, however, Marquis's own theory—based on the claim that "the standard fetus" actually (and not just potentially) possesses a future of intrinsic value—has its share of critics who propose their own counterexamples (see, e.g., the three replies to Marquis published in the *Journal of Philosophy* 87 [1990], 262–77; and David Wasserman and Alan Studler, "Persons and Potential Persons," *Report from the Institute for Philosophy and Public Policy* 10:2 [spring 1990]: 4–5).

10. Disavowing skepticism about the issue of fetal personhood does not, of course, commit me to taking a substantive position on the issue. One can reject skepticism about a domain, such as ethics, because one sees no reason in principle why knowledge in the domain is impossible without thereby committing oneself to any substantive position within the domain. Indeed, I think that the main interest of this paper lies in showing that one can ascertain the moral status of the typical abortion even without taking a position on, let alone resolving, the issue of fetal personhood. I do not hold a position on fetal personhood, and since my argument crucially assumes that no one *knows* whether the fetus is a person in my technical sense, it would be odd, if not irresponsible, for me to advance a position on fetal personhood even if I held one.

In chapter 3 of *A Theory of Justice*, John Rawls gives two famous arguments that bear on the typical abortion context more directly than he seems to appreciate.<sup>11</sup> First, he argues that the Rawlsian “original position,” in which rational agents deliberate behind a “veil of ignorance,” ensures the impartiality that is essential for choosing correct first principles of “justice as fairness.” Second, he argues that rational agents deliberating in the original position would use an analogue of the maximin rule to guide their choices. I regard Rawls’s arguments here as successful in establishing at least these two claims: correct judgments about basic justice, like correct moral judgments generally, require an impartiality that the original position adequately ensures; and agents deliberating in that position have no rational alternative to the maximin rule. In what follows, I will assume that these two claims are true.

As Rawls explains, “The maximin rule . . . tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.”<sup>12</sup> He endorses the canonical view that, although it is irrational to follow maximin in many or even most situations, “the maximin rule is . . . attractive in situations marked by certain special features. . . . First, since the rule takes no account of the likelihood of the possible circumstances, there must be some reason for sharply discounting estimates of these probabilities. . . . Thus it must be, for example, that the situation is one in which a knowledge of likelihoods is impossible or at best extremely insecure.” Second, the difference between the *worst* possible outcome and the outcome guaranteed by maximin exceeds the difference between the *best* possible outcome and the outcome guaranteed by maximin. That is, by adopting a rule other than maximin, one stands to lose more than one stands to gain. Third, “the rejected alternatives have outcomes that one can hardly accept. The situation

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11. John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). By invoking Rawls’s arguments in favor of the maximin rule, I do not mean to suggest that mine is a “Rawlsian” view of abortion, much less a view that Rawls actually holds. *A Theory of Justice* is silent on the subject of abortion, but the book contains evidence that expanding Rawlsian decision procedures to include the interests of fetuses does no obvious violence to those procedures (see 505 and 509). For the record, Rawls’s book *Political Liberalism* (New York: Columbia University Press, 1993) comes down in favor of a “duly qualified” right to first-trimester abortion.

12. This quotation and all later quotations of Rawls come from *A Theory of Justice*, 152–54.

involves grave risks.” Rawls defends his two principles of justice, in part, by arguing that they result from the only rational rule to follow in a situation possessing these features, namely maximin; indeed, he suggests that the maximin argument for his principles of justice is “conclusive.” I will argue that the typical abortion context also possesses these three features, making the maximin rule the only rational alternative. I will then offer what I take to be the maximin solution in that context.

First, our knowledge of the probability that the fetus is a person at a given stage of gestation is, as Rawls puts it, “at best extremely insecure.” Lacking any satisfactory analysis of moral personhood, we cannot reliably assign a “probability of personhood” to the developing fetus, so an ordinarily rational strategy such as maximizing *expected* utility is not rational here.<sup>13</sup> Many people will confidently assert that the eight-month fetus “probably is a person” and that the week-old fetus “probably isn’t.” But such probability claims usually rest on one or another implicit notion of personhood that no one, I have argued, knows is correct. Moreover, the two probability claims just mentioned are themselves controversial: people will differ regarding these claims on account of differing conceptions of personhood.<sup>14</sup> When it comes to the likelihood that a fetus is a person, our intuitions are unsettled, and none of the competing intuitions has yet found a philosophically adequate defense.

This fact defuses one potential objection to my argument in this paper. One might object that the choice whether to forego the typical abortion is the choice between an epistemically *certain* hardship for the pregnant woman and the merely *possible* killing of an innocent person, and given that choice we ought to avoid what is certainly a hardship over what is only possibly a

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13. Given our inability to judge the relevant probabilities, one should not misconstrue my maximin-based argument as a version of Pascal’s Wager. Pascal’s Wager crucially depends on estimates of probability, at least when the various outcomes possess only finite utility and disutility, as they do in the case of the typical abortion.

14. By “probability” I mean—as Rawls does (*A Theory of Justice*, 173)—an objective notion, rather than mere degree of belief. Lots of people accept answers to the issue of fetal personhood with varying degrees of belief, sometimes quite high degrees of belief, but that fact does not mean that any of them grasp the relevant probabilities in a way that makes maximin inapplicable. In terms of degree of belief, then, the probability of a proposition is the degree of belief in that proposition which would be possessed by a fully rational person equipped with all of the relevant evidence. In that sense, I am arguing, we do not yet know the probability that the fetus is morally a person.

homicide. But we do not always avoid a certain loss rather than avoid a merely possible one. You might rationally submit to a vaccination that is certain to be unpleasant in order to avoid a dreadful disease that you only possibly will contract. Why? Because you compare the expected disutility of getting the disease—the disutility of getting the disease, discounted by the probability that you will get it—with the disutility of getting the vaccination. In this and in all similar cases, the rationality of avoiding the certain loss or instead avoiding the merely possible one depends on a probability-weighted judgment of utility. In the typical abortion context, however, we lack a sound grasp of one of the crucial probabilities, so the objector’s reasoning does not apply.

Second, when we compare the possible gains and losses of using a strategy other than maximin, it becomes clear that, although they are significant, the possible gains are smaller than the possible losses. Assume that we are to choose between following—that is, acting on—a generally permissive view of the typical abortion and following instead a generally restrictive view of the typical abortion. (I know of no other way of judging different moral perspectives than by judging the consequences of *acting according to* those perspectives.) We confront the following payoffs in such a case:

*Payoff Matrix for the Typical Abortion Context*

Situation: A woman whose pregnancy did not result from forcible rape or its equivalent seeks a nontherapeutic, noneugenic abortion.

		(C1)	(C2)
		PERMISSIVE VIEW	RESTRICTIVE VIEW
(R1)	Fetuses are persons	Abortion performed; (innocent) person killed	Abortion declined; no person killed
(R2)	Fetuses are not persons	Abortion performed; no person killed	Abortion declined; no person killed

Best Possible Outcome = (R2, C1)  
 Maximin-Guaranteed Outcome = (R1, C2) [= (R2, C2)]  
 Worst Possible Outcome = (R1, C1)

I have simplified the alternatives, but that fact does not defeat the essential point. Each row represents an epistemically possible state of the world. Epistemic possibility is the kind of possibility born of ignorance; for an omniscient being, nothing is epistemically (merely) possible. Which state obtains, R1 or R2, in no way depends on which choice, C1 or C2, we make. The cells of the matrix give the corresponding payoffs, in the typical case, resulting from following the permissive or the restrictive view. Imagine that you are to judge impartially, as if from behind the veil of ignorance, not knowing which, if either, of the two principal parties to a typical abortion you might be. You would judge that the best possible payoff you might get, cell (R2, C1), is small compared to the worst possible payoff you might get, cell (R1, C1). That is, the best possible gain, relative to the maximin-guaranteed outcome contained in cells (R1, C2) and (R2, C2), is smaller than the worst possible loss. Foregoing the typical abortion means at least a temporary loss of liberty for the pregnant woman, and it can impose even harsher burdens than that. But ask yourself if you would rather suffer a similar temporary loss of liberty (and all that comes with such a loss) or instead be killed, assuming those were your only options. "Give me liberty or give me death" is a rhetorically effective slogan, but it is not always the rational attitude to take; it is irrational, in particular, when the potential losses are those described in the matrix.

My argument assumes that in the typical abortion context there are two principal parties, the pregnant woman and the fetus, an assumption that does not beg the question in favor of fetal personhood. The fetus need not be a rational agent or in *any* sense a person in order to be affected crucially by the decision whether to abort. But one might object that invoking the original position in this context is incoherent *unless* we assume that the fetus is a person: "I cannot let the worry that I might be the fetus rather than the pregnant woman guide my deliberations," one might say, "unless it is metaphysically *possible* that I am the fetus. I am a person, and thus essentially a person, so unless the fetus is also a person, it is metaphysically impossible that I am identical to it."

I think that this objection misunderstands the imaginative exercise Rawls wants us to undertake in the original position. Rawls's veil of ignorance purposely hides from the deliberators many of their traits, including traits (for example, biological sex) that may well be metaphysically essential to anyone who has them. In any case, however, the objection proves far too much to be plausible. The point of the original position is to ensure a kind of impartiality on the part of the deliberators, and there is no reason to think it is impossible for me to deliberate impartially about the welfare of someone

essentially different from me. Indeed, *everyone* (else) is essentially different from me; everyone else is someone I could not possibly have been, a fact that does not by itself make it impossible for me to consider his or her welfare impartially. On the contrary, it is at least possible for me to deliberate impartially about the welfare of other persons, even though I could not have been any of them; about the welfare of beings, such as dogs, to whose *species* I could not possibly have belonged; and about the welfare of fetuses, even if they are nonpersons and I am essentially a person. My use of the original position assumes only that kind of impartiality.

There is a closely related worry that my use of Rawls's method begs the question in favor of fetal personhood.<sup>15</sup> "It is unreasonable," one might say, "to assume that the veil of ignorance would preclude knowledge of one's personhood, for only persons can deliberate behind the veil. Thus, if the fetus is not a person, the deliberator need not consider the position of a being he or she has no chance of turning out to be when the veil is removed." Granted that only persons can deliberate, one can answer this worry by attending to the phrase "no chance," which admits of both a metaphysical and an epistemic reading. If indeed all persons are essentially persons, then it is impossible that the deliberator should turn out to be a fetus unless fetuses are persons; in that (metaphysical) sense, there is no chance of the deliberator's turning out to be a fetus unless fetuses are persons. By the same token, however, since one's sex at birth is genetically determined, one's sex at birth may well also be an essential property, in which case there is no chance of a male-born deliberator's turning out to be female-born. But surely the veil of ignorance is meant to allow male-born deliberators to ponder the fate of those born female, even if it is impossible that the former should turn out to be the latter. Otherwise not all deliberators would be able to ponder and reject, as Rawls would say they must, a society that enslaved all of its female-born members.

These considerations show that the metaphysical reading of "no chance" is irrelevant to deliberation behind the veil of ignorance; only the epistemic reading is relevant. On the epistemic reading, a deliberator has no chance of being born female only if the deliberator *knows* that he was born male, and the veil of ignorance precludes such knowledge. It is thus false that a male-born Rawlsian deliberator has epistemically no chance of being born female, and so the deliberator can coherently ponder the fate of those born female. Similarly, as I have argued, the deliberator (like everyone else) does not

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15. I owe this objection to an anonymous referee for this journal.

know that fetuses are not persons, and so, in the relevant (epistemic) sense, it is false that there is no chance that fetuses will turn out to be persons like the deliberator. Thus, there is no reason why the deliberator cannot coherently ponder the fate of fetuses.

Now for the third condition necessary for applying maximin. In no way do I wish to minimize the importance of an abortion in the life of a woman who seeks one. But as long as it is possible that the fetus is an innocent person, killing it remains not only the worst possible loss in the matrix, judging impartially, but also an unacceptable loss, given the typical abortion context. Thus, the third condition obtains for the rationality of maximin. Those inclined to dispute that claim should consider whether, in order to secure the gains of a typical abortion, they would accept the killing of paradigm moral persons such as themselves.

Of course some philosophers, most notably Judith Thomson, say that they would indeed accept such a loss. Nevertheless they recognize, as they must, a defeasible *presumption* against killing a morally innocent person. It is simply that, they argue, any abortion context, including the typical abortion context, defeats that presumption. I will address below their claims about what *happens to* the presumption against killing a person, but my ranking of the various payoffs in the matrix depends only on the *existence* of such a presumption: all else equal, the killing of an innocent person is unacceptable. Alternatively, it may be that Thomson and other like-minded philosophers would acknowledge the *irrationality* of accepting such a loss but would still insist on the *moral permissibility* of accepting it. They would argue for that claim on the ground that every pregnant woman's moral right of self-defense, broadly construed, makes it permissible for her to abort the fetus even if impartial judgment declares her decision to be irrational. If Thomson et al. adopt that alternative strategy, then they have no reason to dispute my ranking of outcomes in the matrix, but it then becomes crucial for me to address, as I will, their claim about the right of self-defense. According to my ranking, at any rate, the maximin rule would reject option C1 in favor of C2, an alternative whose worst outcome, in the typical case, is more tolerable. The maximin rule thus rejects as irrational what I have called "the permissive view."

### ***V. From Rationality to Morality***

Even if impartial, rational deliberators would judge the typical abortion to be irrational, how does that judgment bear on the *morality* of the typical abortion? The relation between rationality and morality is a topic too complex and controversial to be settled here, but I think that the current state

of the debate justifies at least this conclusion: if any defense of objectivity in ethics is to succeed, it will need to base morality on rationality in some way or other. This basic contractarian insight is, I think, now accepted by all sides in the debate over the foundations of ethics; indeed, it seems that the most promising defenses of objectivity in ethics analyze what is morally permissible as a subset, proper or otherwise, of what is in some sense rational.

Suppose, then, that every impartial, rational agent would reject a particular option precisely because the option is morally too risky—because in choosing it he or she would risk causing a morally unacceptable loss. I have argued that the typical abortion is just such an option. It is hard to see what more is needed in order for that option to count as itself immoral, at least according to the most plausible, if not the only plausible, way of defending objectivity in ethics. If there are any objective moral truths at all concerning the behavior of agents, then those truths supervene, though perhaps irreducibly, on truths about what it is objectively rational for agents to do. On that way of understanding moral objectivity, then, the typical abortion satisfies a sufficient condition—objective irrationality, judged impartially—for being immoral.

### ***VI. The Relevance of Consent***

In the typical abortion context, pregnancy does not result from forcible rape (of the woman) or its equivalent: the cause of the pregnancy is an act—whether sexual intercourse, artificial insemination, or in vitro fertilization and later implantation—to which the woman genuinely consented. I have argued for the moral impermissibility of abortion in that context. What difference, one might ask, does consent make? What moral relevance does it have? This: provided that the other elements of the typical abortion context also obtain, the woman's genuine consent deprives her of the moral right to use lethal self-defense against the fetus, because, in genuinely consenting, she morally assumes the risk of pregnancy, and no other feature of the typical abortion context relieves her of that assumed risk.

Thomson is, of course, acutely aware of this argument. In considering whether the pregnant woman has a "special kind of responsibility" for the fetus "issuing from the fact that she is its mother," Thomson replies, "Surely we do not have any such 'special responsibility' for a person unless we have assumed it, explicitly or implicitly." Thus, she grants that assumption of risk is relevant to one's moral duties, but she insists that consenting to sex does not mean assuming the risk of pregnancy: "if [a couple voluntarily engage in intercourse after having] taken all reasonable precautions against having

a child, they do not simply by virtue of their biological relationship to the child who comes into existence have a special responsibility for it.”<sup>16</sup>

In an article full of analogies, Thomson uses three analogies in particular to defend her claim about the insufficiency of consent.<sup>17</sup> First, suppose you open your window to get some fresh air, and a burglar enters your house via the open window; obviously the burglar has no right to stay simply because you voluntarily provided the means by which he or she entered. However, as Thomson seems to recognize, this analogy fails since, among other things, the fetus, unlike the burglar, is morally innocent. So she proposes a second analogy: “imagine it is not a burglar who climbs in, but an innocent person who blunders or falls in.” That analogy, however, also fails, since even otherwise innocent blunderers can be culpable for their blundering in a way in which the fetus cannot be culpable for its existence. Perhaps in recognition of this problem, Thomson proposes a third analogy, the closest one of all:

people-seeds drift about in the air like pollen, and if you open your windows, one may drift in and take root in your carpets or upholstery. You don’t want children, so you fix up your windows with fine mesh screens, the very best you can buy. As can happen, however, and on very, very rare occasions does happen, one of the screens is defective; and a seed drifts in and takes root. Does the person-plant who now develops have a right to the use of your house? Surely not—despite the fact that you voluntarily opened your windows, you knowingly kept carpets and upholstered furniture, and you knew that screens were sometimes defective.

Obviously this analogy tries to capture cases where pregnancy results from contraceptive failure during voluntary sex. I suspect, however, that the analogy derives whatever persuasiveness it may have from conflating our intuitions concerning morally insignificant actions, such as opening one’s windows, with our very different intuitions concerning morally more

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16. Thomson, “A Defense,” 64–65. Thomson’s second use of “child” instead of “fetus” makes her claim stronger than necessary and perhaps stronger than she intends, for it suggests that the parents of a newborn child have no special responsibility for the child, so long as they took all reasonable precautions against conception. I think the claim would become less controversial if she replaced the second instance of “child” with “fetus”; nevertheless, it would remain false.

17. Thomson, “A Defense,” 58–59.

significant actions, such as having sex. To appreciate the different moral significance of those two actions, one need only compare the moral significance of opening X's windows against X's will and having sex with X against X's will. I doubt, moreover, that the greater moral significance of forced sex over forced window-opening stems from the difference between a property crime and a physical assault; some property crimes, such as burning down X's house, are morally more serious than some physical assaults, such as slapping X on the cheek. The greater moral significance of forced sex over forced window-opening comes from the greater moral significance of sex over window-opening considered in themselves.

People-seeds do not, of course, drift about like pollen, which is one reason opening windows is morally less significant than having sex and, thus, one reason I have no special duty to the burglar or the blunderer who comes in through my open window. If, however, people-seeds did drift about like pollen, we might then regard opening one's windows as morally more significant than, in fact, it is. Thomson's third, and closest, analogy succeeds only if we implausibly assume that having sex is, in fact, only as morally significant as opening one's windows.

Let us grant Thomson's implicit claim that sexual abstinence is not the only reasonable precaution against conception; reasonable precautions, then, include artificial means of contraception. Why, though, is reasonableness the relevant standard of conduct? Thomson's reliance on the notion of "all reasonable precautions" is yet another false analogy, this time an implicit one: it is an analogy to the standard of "reasonable care" that is the foundation of the negligence regime of modern tort law. According to that standard, one incurs no liability for damage that one causes in circumstances in which one takes reasonable care to avoid causing damage. But I contend that, in the context of abortion, the standard of reasonable care—indeed, the negligence regime itself—is completely misplaced.

In addition to the standard of reasonable care, the negligence regime allows for defenses based on contributory and comparative negligence. That is, an admittedly negligent defendant can argue that the plaintiff's own negligence should bar recovery, or, alternatively, that the plaintiff should recover an amount proportionate to the defendant's *share* of the fault. These defenses recognize that the tort victim's own behavior matters and that sometimes the victim is partly to blame. The negligence regime crucially assumes that fault can be shared between the parties, and such an assumption is just false in the case of abortion. The fetus lacks any moral responsibility, so analogy to the defenses allowed in the negligence regime—analogy to the regime at all—completely misses the mark. But with that analogy stands or

falls Thomson's claim that reasonable care absolves a couple of the assumed risks of pregnancy. Given the moral innocence of the fetus and the moral agency of the parents, taking all reasonable precautions does not suffice. If contraception fails, the couple cannot escape moral responsibility by any defense analogous to reasonable care, contributory negligence, and the like.

If an analogy to tort law makes any sense here, then the regime of strict liability is the only one appropriate to the case of abortion. Strict liability, or "liability without fault," usually applies in cases such as defective products and medical malpractice where victims are at the mercy of tortfeasors, making defenses like contributory fault improper. One might object here that my talk of moral responsibility makes sense only if the fetus is indeed a person, something I began by claiming we do not know. But I think that objection is mistaken. Even if persons are the paradigm examples of things to which one can have moral obligations, it does not follow that persons are the *only* things to which one can have moral obligations. I see nothing absurd about supposing that we might have moral obligations to things such as lower animals that are, in the ordinary and in the specifically moral senses, nonpersons.

I suspect I should also add the qualification that expectant parents cannot be held morally responsible unless they knew (or should have known) that intercourse can result in pregnancy, and unless they knew (or should have known) that any contraception used might fail. This qualification is explicit in each of Thomson's analogies: she concludes—wrongly, I have argued—that even fully knowledgeable parents, let alone ignorant ones, lack moral responsibility for the fetus if contraception fails. Notice that if the appropriate analogy is to strict liability, and not to negligence, then it may not matter whether the parents had actual (or constructive) knowledge of the consequences of sex or of the fallibility of birth control. Nevertheless, I accept this qualification to my claim about parental responsibility.

## ***VII. Conclusion***

Having emphasized our collective ignorance concerning the personhood of the fetus, I should address the objection that my argument commits the fallacy of appealing to ignorance because, allegedly, it argues from our ignorance about whether the typical abortion is wrong to the conclusion that the typical abortion therefore *is* wrong. This objection misunderstands my argument. Consider these two propositions:

(P) The fetus is intrinsically something it is presumptively seriously wrong to kill;

(Q) Nontherapeutic, non-eugenic abortion of a pregnancy that did not result from forcible rape or its equivalent is seriously wrong.

I have argued that our failure to know the falsity of P does, given other plausible premises, entail Q: formally,  $\sim K(\sim P) \rightarrow Q$ . But the fallacy of appealing to ignorance has this form:  $\sim K(\sim P) \rightarrow P$ , the claim that P is true since we do not know that P is false. In order, then, for the charge of fallacious reasoning to stick, my argument would have to be guilty of presupposing that Q entails P. But it presupposes no such thing. Q can be true even if the fetus is not intrinsically something it is presumptively seriously wrong to kill: it can be wrong to abort the fetus even if the fetus lacks the intrinsic features that make for moral personhood. My argument shows that the wrongness of abortion can supervene on our epistemic situation with regard to the fetus without having to supervene on the intrinsic properties of the fetus itself. Of course, for all we now know, the wrongness of abortion also derives from intrinsic properties of the fetus—and so, if it does, the typical abortion is wrong on two counts. But I need not prove that second count and will not try to.

I want to close by mentioning what strike me as interesting similarities between my argument in this paper and standard ethical arguments for vegetarianism. First, even if they cannot refute the standard vegetarian arguments, many people, myself included, have trouble taking those arguments seriously: “Come on!” we say; “It can’t be seriously wrong to factory-farm chickens, let alone seriously wrong just to buy poultry produced that way.” People also have trouble taking seriously my arguments here. They find it hard to take seriously the epistemic possibility that even the early fetus is intrinsically something it is presumptively seriously wrong to kill—“Come on. It still looks like a guppy!”—and they are unmoved by that possibility even if they do take it seriously. Second, universal adherence to the recommendations of ethical vegetarians—the kind of adherence such vegetarians seek—would have drastic economic, personal, and political consequences; it would be costly, disruptive, and inconvenient, at least in the short term. The same goes for the recommendations of my argument. There are, I suppose, psychological or sociological explanations why so few people abandon meat-eating even in the face of vegetarian arguments they can find no reason to reject; some of those explanations no doubt apply here as well. Being neither a psychologist nor a sociologist, I will not speculate about what those explanations might be. I will make only the philosophical point that these common reactions to vegetarian arguments hardly refute such arguments; likewise for similar common reactions to the argument I have given here. DF