

## **THIS IS NOT THE FINAL PUBLISHED VERSION**

### **Can prolife theorists justify an exception for rape?**

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Prolife theorists typically hold to the claim that all human beings possess equal moral status from conception and consequently possess a right to life. This, they believe, entails that abortion is impermissible in all circumstances. Critics characterise this as an extreme anti-abortion position, as it *prima facie* allows no exceptions, even in cases of rape. Here, I examine whether the prolife claim regarding equal moral status is compatible with a more attractive moderate stance that permits an exception in the case of rape. I show that Judith Jarvis Thomson's analysis of rights can be used to modify the prolife position in this way, but that doing so involves concessions that prolife theorists are unlikely to find acceptable.

### **Introduction**

Prolife theorists typically hold to the claim that all human beings possess equal moral status from conception. An example of such a view is the *substance view of persons*, which argues that human beings are claimed to be living substances that can maintain their identity through time and change, and possess a rational nature<sup>1</sup>. This makes them equally valuable and equivalent in moral status, whether they are zygotes, fetuses, infants, children or adults. Thus,

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<sup>1</sup> Beckwith, F. (2004). The explanatory power of the substance view of persons. *Christian Bioethics* 10 (1), 33–54; Lee, P. (2004). The Pro-Life Argument from Substantial Identity: A Defence. *Bioethics* 18(3), 249–263.

all human beings possess a right to life and cannot be unjustly killed. Consequently, substance view theorists argue that abortion is not permissible under any circumstances.

A key criticism of prolife theorists who hold to this view regarding abortion is that it is an ‘extreme’ anti-abortion position. This is because it allows for no exceptions, even in cases such as rape. Prolife theorists agree that pregnancy via rape is horrendous, but they typically maintain that it does not justify violating the fetus’s right to life<sup>2</sup>. Perhaps they are to be admired for their consistency, but it is an important question whether prolife theorists can feasibly moderate their position to allow for the permissibility of abortion in cases of rape—while still maintaining that embryos and fetuses possess equal moral status to adults.

Matthew Scarfone argues that prolife theorists cannot coherently do so by arguing that the right to life overrides the right to bodily autonomy<sup>3</sup>. However, using Judith Jarvis Thomson’s analysis of rights in her violinist thought experiment<sup>4</sup>, I show that it is possible for prolife theorists to allow an exception for rape if three conditions are met. Firstly, Thomson’s analysis of rights must be accepted—that a right to life does not include a right to life support. Secondly, they must show that Thomson’s reasoning does not apply for non-rape abortion cases, but justifies permitting abortion in cases of rape. Thirdly, they must explain how abortions can be regarded as withdrawing life support. This last condition, however, carries heavy costs for prolife theorists.

### **Why a moderate prolife position?**

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<sup>2</sup> Kaczor, C (2014). *The ethics of abortion: Women’s rights, human life, and the question of justice*. 2nd ed. New York, NY: Routledge. p. 195-197; Steinbock, B. *Life Before Birth: The Moral and Legal Status of Embryos and Fetuses*. 2nd edn. Oxford: Oxford University Press. 2011.

<sup>3</sup> Scarfone, M. (2020). Incoherent Abortion Exceptions. *Journal of Social Philosophy*. DOI: 10.1111/josp.12366.

<sup>4</sup> Thomson, J. (1971). A Defense of Abortion. *Philosophy and Public Affairs* 1: 47–66.

The so-called ‘extreme’ prolife position that does not permit exceptions in cases of rape is an uncomfortable view to hold. Kathleen C. Basile et al estimate that almost 3 million U.S. women become pregnant via rape during their lifetime<sup>5</sup>, and there are also many pregnancies that are a result of child rape, including incest. It is likely that many women will be permanently traumatised by being forced to continue with their pregnancies; it is difficult to imagine the damage this could do to a child.

Unsurprisingly, public opinion is in favour of permitting abortion in cases of rape. For example, Ben Clements & Clive D. Field explain that since the 1967 Abortion Act in the United Kingdom, it is rare for people to reject abortion in all circumstances<sup>6</sup>. During the period 1983 to 2016, the percentage agreeing that abortion was permissible in the case of rape was between 85% and 93%<sup>7</sup>.

So, the prolife position might be more tenable to the public if such an exception can be made. However, doing so while maintaining the central claim that embryos and fetuses possess equal moral status to adults is not straightforward. As Steinbock notes, many who morally object to abortion ‘wish to make such an exception, but they have been hard-pressed, on their own argument, to account for it’<sup>8</sup>. Scarfone has recently argued that such a prolife position is incoherent<sup>9</sup>.

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<sup>5</sup> Basile, K. C., Smith, S. G., Liu, Y., Kresnow, M., Fasula, A. M., Gilbert, L., & Chen, J. (2018). Rape-Related Pregnancy and Association With Reproductive Coercion in the U.S. *American Journal of Preventive Medicine*, 55(6), 770–776.

<sup>6</sup> Clements, B. & Field, CD. (2018). Abortion and public opinion in Great Britain: a 50-year retrospective. *Journal of Beliefs & Values*.39:4, 429-444.

<sup>7</sup> Ibid.

<sup>8</sup> Steinbock, *op. cit.*, note 2, p. 94.

<sup>9</sup> Scarfone, *op. cit.*, note 3.

## **Life versus autonomy**

Scarfone frames the prolife position as a clash between the fetus's right to life and a woman's right to her bodily autonomy<sup>10</sup>. From the prolife viewpoint, the fetus's right to life trumps a pregnant person's right to their bodily autonomy, and so abortion is impermissible. He outlines a moderate pro-life argument as follows:

- (1) A fetus is a human being, a person, from the moment of conception, or else at some point during gestation.
- (2) A right to life is stronger than, or outweighs, a right to bodily autonomy.
- (3) Abortion is morally permissible for a pregnancy caused by rape.

The difficulty, Scarfone claims, is in (3)—arguing for exceptions in cases of rape and incest. According to Scarfone, the only plausible grounds for rape being an excusing condition is that it is an extreme violation of bodily autonomy. However, if the prolife position is that the right to life trumps a right to bodily autonomy (2), then a violation of bodily autonomy cannot serve as an excusing condition. Hence, it is incoherent to derive a moderate anti-abortion position from anti-abortion accounts that are predicated on (1), being a person. Therefore, prolife theorists who maintain fetuses have a right to life cannot coherently maintain a moderate, anti-abortion position.

## **Thomson's violinist**

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<sup>10</sup> Scarfone, *op. cit.*, note 3.

Scarfone's reasoning seems sound, and the combination of (1) and (2) are a fair representation of a commonly held prolife position based on accounts of fetal personhood. There is, however, an alternative possibility for framing a moderate prolife position that is not based on a conflict between the right to life and the right to bodily autonomy. Scarfone does mention this possibility, based on Thomson's violinist analogy, but does not seriously examine it.

Thomson's analogy is an argument for the permissibility of abortion that grants the fetus is a person<sup>11</sup>. She employs a thought experiment as an analogy to pregnancy: a famous unconscious violinist has been attached to your body while you are sleeping by the Society of Music Lovers, because you are the only person whose blood can help him recover from his kidney ailment. His condition requires nine months of treatment, and if you unplug yourself from him, he will die. Intuitively, this seems like an outrageous imposition, and so Thomson argues that no-one is obliged to remain plugged in to the violinist.

Thomson's violinist is often misconstrued as a conflict of rights. It is common to see her argument characterised as the woman's right to bodily autonomy overriding the fetus' right to life<sup>12</sup>. As David Boonin points out, however, this approach misses Thomson's point entirely. He states that 'Thomson's example is not meant to deny that the violinist's right to life outweighs your right to control your body'<sup>13</sup>. In fact, he believes that the right to life always trumps the right to bodily autonomy in a genuine conflict, and considers that Thomson would agree. Thomson's argument is intended to clarify our understanding of what the right to life entails. Crucially, Boonin explains that unplugging the violinist *does not violate their right to life*—there is no conflict. Thomson's analogy demonstrates that the right to life does not include

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<sup>11</sup> Thomson, *op. cit.*, note 4.

<sup>12</sup> Fischer, J. (2003). ABORTION, AUTONOMY, AND CONTROL OVER ONE'S BODY. *Social Philosophy and Policy* 20 (2): 286–306.

<sup>13</sup> Boonin, D. (2002). *A Defense of Abortion*. Cambridge University Press. 133-188.

the right to be supplied with life support. So, according to Thomson, abortion does not violate the fetus' right to life.

Boonin notes the same difficulty that Scarfone describes—if abortion is a violation of the fetus' right to life, justifying an exception in the case of rape is problematic, as the fetus conceived by rape still has the same right to life. If, however, prolife theorists avail themselves of Thomson's reasoning and agree that abortion does not violate the fetus's right to life, then they do not need to explain why the right to life is overridden for exceptions such as rape—it is never overridden. Scarfone's complaint of incoherency is not applicable.

As I have outlined earlier, the prolife theorist taking this approach must satisfy three conditions. Firstly, they must accept Thomson's analysis of rights—that a right to life does not include a right to life support. Secondly, they must show that Thomson's reasoning does not apply for non-rape abortion cases, and that it justifies permitting abortion in cases of rape. Thirdly, they must explain how abortions can be regarded as withdrawing life support.

There seems little difficulty for a prolife theorist to accept that a right to life does not include a right to life support. In other words, the right to life is a negative right only—the right not to be unjustly killed by others. Thomson's thought experiment illustrates that we have a strong intuition that we are not required to make significant sacrifices to support another human being's life, *ceteris paribus*.

### **The 'extreme' prolife position**

The so-called ‘extreme’ prolife position is free to attack Thomson’s argument on the grounds outlined by Kate Greasley. She explains that in the vast majority of cases, abortion is a positive act of killing—it is not merely a withdrawal of life support or a failure to rescue<sup>14</sup>. Therefore, it violates the fetus’s right to life (if it has one), and is impermissible. Further, she argues that ‘extraction’ abortions via an abortion pill or hysterotomy still involve an action being performed that results in the death of the fetus, and are still killing, just as switching off a patient’s life support in an intensive care ward also is an act of killing.

Another approach is to argue that parental responsibilities entail a pregnant woman cannot abort her fetus, just as these special responsibilities mean parents cannot kill their newborns.

### **The ‘moderate’ prolife position**

However, both Greasley’s argument and parental responsibilities are of no use to establishing a moderate prolife position—they are equally applicable to all abortions, whether or not the sex was consensual. As McMahan points out<sup>15</sup>, we do not believe a mother can abandon her parental responsibilities for a newborn child, letting it die, even if she did not want the child or consent to sex. So, *if* parental responsibilities prevent a woman aborting a fetus that was conceived via consensual sex, they should also prevent a woman aborting a fetus conceived through rape. Similarly, Greasley’s argument offers no way to distinguish between rape and non-rape cases.

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<sup>14</sup> Greasley, K. (2017). *Arguments About Abortion: Personhood, Morality, and Law*. Oxford University Press UK. pp. 47-51.

<sup>15</sup> McMahan, J. (2002). *The Ethics of Killing*. Oxford: Oxford University Press. pp. 362-378.

So, the task for the moderate prolife theorist is to explain why a woman is required to make significant sacrifices to support her fetus where her pregnancy results from consensual sex, but not in the case of rape. McMahan states that there is ‘a significant difference in a woman’s responsibility for a pregnancy that results from rape and her responsibility for a pregnancy that results from contraceptive failure’<sup>16</sup>. This suggests differentiating on the basis of responsibility in some way. In the vast Thomson literature, this is known as the *responsibility objection*. It claims that consensual sex generates a responsibility towards the fetus—its parents are responsible for its existence, and should therefore meet its needs for life support.

David Boonin has examined the responsibility objection in detail. He concedes that being voluntarily responsible for someone’s existence is sufficient to grant them a right to assistance if they require it to survive<sup>17</sup>. However, he denies this is the case for a pregnant woman engaging in consensual sex—she does not voluntarily bring someone into existence. Instead, she voluntarily engages in consensual sex while foreseeing that it *may* result in a fetus requiring her assistance. Boonin illustrates his point with a thought experiment he calls the *hedonist*<sup>18</sup>. The hedonist engages in a very pleasurable activity that has a side effect—there is a chance that it will release a gas that gives a few additional months of unconscious life to a comatose violinist who is about to die. Further, after that time, the hedonist will be able to bring the violinist out of the coma by giving him the use of their kidneys for nine months. According to Boonin, this is far more analogous to the woman who becomes pregnant from consensual sex than Thomson’s original violinist, and he argues there is no moral requirement for the hedonist to provide aid.

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<sup>16</sup> *Ibid*:

<sup>17</sup> Boonin, *op. cit.*, note 13. p. 184.

<sup>18</sup> Boonin, *op. cit.*, note 13. pp. 186-187.

In his critique of Boonin, Francis Beckwith suggests another thought experiment<sup>19</sup>. In his scenario, scientists create clones for infertile couples. Unfortunately, the clones have a genetic heart defect that is unavoidable, but that is correctable after birth. Beckwith argues that the scientists and the couples have a responsibility to ensure that these heart defects are repaired—as they voluntarily created the clones, they are responsible for their additional neediness. This seems plausible, but it does not necessarily counter Boonin’s claim—scientists are not engaging in an activity that has the side effect that it *may* create or extend life—this is the aim of their work. Beckwith’s analogy does include an aspect that Boonin’s does not, however, In Boonin’s example, the hedonist is not responsible for the initial state of the comatose violinist, whilst in Beckwith’s scenario, scientists are responsible for the creation of the clones, which are needy.

Along these lines, C’Zar Bernstein and Paul Manata have recently suggested a spelunking (cave diving) thought experiment<sup>20</sup>. In their scenario, whenever a spelunker descends lower than 50 feet in a cave, a non-spelunker contracts a fatal kidney disease. They can only survive by being connected to someone for 9 months. Spelunking helmets warn spelunkers if they descend below 50 feet, but this warning is not reliable, and some ignore it anyway. When someone contracts the disease, the responsible spelunker is forcibly connected to them by the state. Bernstein and Manata argue that the spelunkers are obliged to remain connected for 9 months, and cannot disconnect themselves. This is because they ‘*knowingly* engaged in a risky activity and are *morally responsible* for the consequences’<sup>21</sup>. This seems persuasive—as they note, in

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<sup>19</sup> Beckwith, F. (2006) Defending Abortion Philosophically: A Review of David Boonin's A Defense of Abortion, *Journal of Medicine and Philosophy*, 31:2, 177-203,

<sup>20</sup> Bernstein, C., & Manata, P. (2019). Moral Responsibility and the Wrongness of Abortion. *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 44(2), 243–262.

<sup>21</sup> *Ibid.*

such a scenario there would be a call to abstain from spelunking, and it is likely that it would be banned.

As with Boonin's hedonist case, the spelunker's actions affect others only as a foreseeable, possible side effect of their spelunking. However, as with Beckwith's case (and not Boonin's), those affected by the actions of the spelunkers were not initially in need of assistance. Of course, in Beckwith's case, the clones did not exist.

This provides a plausible argument that engaging in consensual sex that results in pregnancy entails a moral responsibility to provide the fetus with the life support that it requires. It is also clear that it is inapplicable to cases of non-consensual sex—to continue the analogy, a spelunker who is forced by someone else to descend below 50 feet is not responsible for the consequences. This provides a path for the prolife theorist seeking to moderate their position based on Thomson's reasoning, meeting the second condition that I identified.

### **Abortion as withdrawing life support**

Having argued that the responsibility objection can be sustained, the 'moderate' prolife theorist must meet the third condition—they must explain how aborting a fetus that was conceived by rape can be regarded as withdrawing life support rather than killing. This distinction is essential, given that the moderate prolife theorist believes that the fetus is a person from conception and therefore possesses a right to life. As Greasley notes, to directly kill the fetus given its moral status (as claimed by prolife theorists) requires a strong justification—it is homicide<sup>22</sup>. The only available justification for homicide is self-defence. Legitimate self-

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<sup>22</sup> Greasley, *op. cit.*, note 14. pp. 59-66.

defence requires that the threat is proportionate to the harm inflicted in self-defence, and that this harm is necessary to avert the threat. The fetus is not, in most cases, threatening the woman's life, and so citing self-defence is dubious. Moreover, self-defence is unable to distinguish between rape and non-rape cases—if the fetus is regarded as the attacker, then how the fetus got there does not seem to be relevant to the threat it poses. Therefore, abortions that directly kill the fetus should be unacceptable to the consistent prolife theorist. Clearly, surgical abortions do so. As we have seen, even 'extraction' abortions, both surgical and by medication, are arguably killing rather than letting die from withdrawing life support. The moderate prolife theorist could deny this and maintain that extraction abortions are not killing. However, this entails what seems to be an absurd position for a prolife theorist—abortion in the case of rape is permissible, but *only* if the abortion is performed in a certain way.

There is an alternative—they could adopt the view that in the case of the fetus, killing and letting die are equivalent. If this is accepted, then clearly any abortion method can be used in cases of rape, and their position is far more consistent. Unfortunately, this view leads to further difficulties—in particular, the problem of spontaneous abortion.

Toby Ord and others argue that if human beings possess full moral status from conception, then the huge numbers of miscarriages—spontaneous abortions—is a serious public health crisis, and prolife theorists who hold to this view are obliged to act in ways to reduce these deaths<sup>23</sup>. Ord estimates there are over 200 million spontaneous abortions annually<sup>24</sup>, far more than the approximately 56 million abortions each year<sup>25</sup>. Therefore, given the comparative seriousness

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<sup>23</sup> Ord, T., (2008). The scourge: Moral implications of natural embryo loss. *The American Journal of Bioethics*, 8 (7), 12–19.

<sup>24</sup> *Ibid.*

<sup>25</sup> Sedgh, G., et al. (2016). Abortion incidence between 1990 and 2014: global, regional, and subregional levels and trends. *The Lancet*, 388, 258–67.

of the problem, prolife theorists are morally obliged to divert resources away from opposing induced abortion and towards reducing spontaneous abortions. In response, prolife theorists Bruce Blackshaw and Daniel Rodger make two important points—firstly, the majority of spontaneous abortions are not preventable, and secondly, the killing versus letting die distinction explains why participating in induced abortions is far worse than failing to prevent spontaneous abortions<sup>26</sup>. Of course, prolife theorists do not directly participate in abortions themselves, but Blackshaw and Rodger cite Thomas Pogge’s point that all citizens in a democracy that allows legal abortion are participants<sup>27</sup>.

If the killing versus letting die distinction is denied, an explanation is required as to why failing to act on the millions of preventable spontaneous abortions is not seriously immoral. However, this is not the only difficulty for prolife theorists. Millions of children die annually from malnutrition<sup>28</sup> and preventable diseases. If there is no distinction between killing and letting die, they are also morally responsible for these preventable deaths. Alternatively, they will need to explain why the killing versus letting die distinction only holds for embryos and fetuses.

These difficulties are not insurmountable, but they seem to create a much more significant problem for prolife theorists than the one they solve—the uncomfortable position of maintaining that rape does not justify an exception for the permissibility of abortion.

## **Conclusion**

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<sup>26</sup> Blackshaw, B. & Rodger, D. (2019). The Problem of Spontaneous Abortion: Is the Pro-Life Position Morally Monstrous?, *The New Bioethics*, 25:2, 103-120.

<sup>27</sup> Pogge, T. (2010). *Politics as usual*. Cambridge: Polity. p. 127.

<sup>28</sup> UNICEF. (2018). Malnutrition rates remain alarming: stunting is declining too slowly while wasting still impacts the lives of far too many young children. Retrieved from: <https://data.unicef.org/topic/nutrition/malnutrition/#>.

Scarfone has argued persuasively that prolife theorists cannot justify an exception for the permissibility of abortion in rape cases based on an argument from bodily autonomy. Here, I have examined whether Thomson's analysis of rights can provide an alternative justification for allowing abortion in rape cases. I conclude that on the basis of the responsibility objection, a plausible case can be made. However, the cost of doing so for prolife theorists is very high—they must either accept that the manner in which the abortion is performed is morally relevant, or deny that there is a distinction between killing and letting die. Both options seem unacceptable for a prolife view. The most consistent path for prolife theorists is to maintain that abortion is not permissible, irrespective of whether the pregnancy ensued from consensual sex or rape.