**Accepted for publication in the Journal of Medical Ethics**

**Fine-Tuning the Impairment Argument**

Bruce P. Blackshaw & Perry Hendricks

**ABSTRACT**

Perry Hendricks’ original impairment argument for the immorality of abortion is based on the impairment principle (TIP): if impairing an organism to some degree is immoral, then *ceteris paribus*, impairing it to a higher degree is also immoral. Since abortion impairs a fetus to a higher degree than fetal alcohol syndrome (FAS) and giving a fetus FAS is immoral, it follows that abortion is immoral. Critics have argued that the *ceteris paribus* is not met for FAS and abortion, and so we proposed the Modified Impairment Principle (MIP) to avoid these difficulties. Dustin Crummett has responded, arguing that MIP is open to various counterexamples which show it to be false. He also shows that MIP can generate moral dilemmas. Here, we propose a modification to MIP that resolves the issues Crummett raises. Additionally, Alex Gillham has criticized our appropriation of Don Marquis’ ‘future like ours’ reasoning about the wrongness of impairment. We show that his objections have minimal implications for our argument.

**INTRODUCTION**

Perry Hendricks’ impairment argument claims that since it is immoral to impair a fetus by giving it fetal alcohol syndrome (FAS), it is *ceteris paribus* immoral to have an abortion, since that impairs the fetus to a higher degree. This follows from his impairment principle, which states that if it’s immoral to impair an organism to the nth degree, then *ceteris paribus* it’s immoral to impair it to the n+1 degree.[1,2] We attempted to strengthen the argument by replacing the *ceteris paribus* clause with the modified impairment principle (MIP).[3] However, Dustin Crummett has argued that MIP is false[4] and Alex Gillham has criticized our appropriation of Don Marquis ‘future like ours’ reasoning.[5] Here, we respond to these criticisms.

**COUNTEREXAMPLES**

Crummett argues that MIP faces counterexamples whenever the n+1 degree impairment can be justified by a sufficiently good reason that is *not* present for a nth degree impairment.[4] He provides an example of flooding a room you are in with gas. In scenario (A), done for no reason, this *hinders* your ability to roll your tongue. In (B), this *removes* your ability to roll your tongue. However, in (B), this is done because otherwise the gas would flood into another room with people allergic to it, killing them.

Clearly, in (B) releasing the gas is permissible, and so this is a counterexample to MIP. As Crummett notes, Hendricks’ *ceteris paribus* clause prevented such counterexamples, since a valuable good obtains in one case (saving lives) and not in the other case, meaning that the clause is not satisfied. However, MIP contains no *ceteris paribus* clause, and so we cannot avoid this result. Hence, we must modify MIP.

Our solution is to add an *overrider provision*: a reason R only renders an impairment immoral *if it is not overridden by an opposing reason R\**. To illustrate this, suppose that a reason R makes impairing O to the nth degree immoral. Now, suppose that a reason R\* is stronger than R *and* counts in favour of impairing O to the n+1 degree. If both R and R\* obtain in this case, then R is *overridden* and it is not immoral to impair O to the n+1 degree. Put differently, since R\* is stronger than R, it overrides it and renders impairing O to the n+1 degree permissible. (This is a common condition in deontological ethics.[6]) Crummett’s cases (A) and (B) are a concrete example: in (A) the impairment is immoral, but in (B) the reason impairment would be immoral is overridden by an opposing reason (the impairment is necessary to save several lives). The modified impairment principle (MIP2) may be restated as follows:

MIP2: If it is immoral to impair an organism O to the nth degree for reason R, then, provided R continues to hold (or is present) *and there are no overriding reasons*, it is immoral to impair O to the n+1 degree.

When is the overrider provision satisfied? That is, how do we know when R\* overrides R? If R\* overrides R when impairing O to the n+1 degree, then it will also override R when impairing O to a lesser degree. Take Crummett’s example: if the overriding reason in case (B) were present in case (A) (i.e. if the impairment was needed to save lives), then the impairment referred to in case (A) would be permissible. So, if a reason R\* is suggested as an overriding reason for R, then we can check whether it is one by seeing if it would justify lesser impairments. If it does, then it is an overriding reason, otherwise, it is not.

Crummett’s example does not meet the overrider provision: MIP2 does not render it immoral to impair someone’s ability to use her tongue in (B), since saving the lives of several people overrides our reason for not causing the impairment.

**MORAL DILEMMAS**

Crummett also argues that MIP can generate genuine moral dilemmas, providing a trolley problem as an example.[4] In scenario (C), if I continue driving straight, I will hit someone and sever their leg, but if I turn, nothing bad happens. In scenario (D), if I continue driving straight, I will hit someone and sever both their legs, but if I turn the track loops back and I will hit them anyway.

In case (C) going straight ahead is immoral, since it impairs the person. In (D), going straight is immoral (by MIP, since it is a greater impairment than in (C)), but turning is also immoral. So, both options are immoral—a moral dilemma.

MIP2 does not generate a dilemma. In (D), the impairment is permissible because of an overriding reason—no matter what the driver does, he will sever the person’s legs. The overrider provision states that a reason that renders an impairment to the n+1 degree permissible must also render impairment to a lesser degree permissible. Clearly, if the trolley driver in (C) could also not avoid impairing the person, his action would be permissible. Therefore, MIP2 does not apply to (D) because of an overriding reason, and Crummett’s moral dilemma is avoided.

**A FUTURE LIKE OURS**

Gillham objects to the ‘strengthened impairment argument’ (SIA) based on its use of Don Marquis’ ‘future like ours’ (FLO) as a reason why impairment of a fetus by FAS is immoral.[5] He argues that if a fetus will never be born, it has no FLO to be deprived of, and so impairment by FAS would not be immoral.

Before responding to Gillham, it is important to make clear that the impairment argument is not wed to the FLO. We use FLO merely as *one possible explanation* of the wrongness of impairment.

There are two categories of cases to consider: first, where the fetus is killed unforeseeably, and second, where it is known that the fetus cannot survive to birth. The SIA explicitly refers to the former, and claims that deprivation of FLO provides an explanation of why impairment of a fetus by FAS is immoral, even if a FLO would not have been actual. In such cases, at the time of impairment, the fetus’s FLO is contingent on future events, and this raises the question of what future the fetus is being deprived of. Depending on one’s view of the problem of future contingents, it may not even be true or false that the fetus has a FLO. Mary Clayton Coleman makes a helpful proposal we can adopt—she suggests a ‘for all we know’ (FAWK) revision of Marquis’ account, grounding the wrongness of killing in the deprivation of FLO we believe it will have.[7] This highlights the notion of moral responsibility in deprivation of FLOs. Therefore, FAWK FLO explains the wrongness of inflicting FAS in cases of unforeseen death.

Gillham is correct that in cases where we know the fetus cannot survive because of a lethal condition, deprivation of FLO faces difficulties as an explanation. However, even if we grant that SIA fails in such cases, this only applies in a very limited number of cases. The fetus would need to suffer a condition that invariably leads to death before or soon after birth. However, for many so-called ‘lethal malformations’, long term survival is possible, and so it is not clear that such fetuses lack a FLO.[8] Diagnoses of the severity of such conditions also can be inaccurate.[9] So granting Gillham’s point is unlikely to affect the applicability of SIA to the vast majority of induced abortions.

Gillham raises one more scenario: FAS followed by a planned induced abortion. The implication is that inflicting FAS is not immoral because at the time of impairment, the fetus has no FLO to be deprived of—we *know* the abortion will prevent it from arising. There are several possible responses. Firstly, *at the time of impairment*, we cannot be certain that the abortion will occur—there may be a change of mind, or financial difficulties, or even a pandemic that temporarily shuts down elective medical procedures. Again, the FAWK revision to Marquis can be used here—for all we know the fetus does have a FLO, despite a firm intention to later abort. That is, any event that is a future contingent (accidental or deliberate) does not affect the wrongness of FLO deprivation in the present. Secondly, we have argued that deprivation of a FLO is a plausible reason for the wrongness of inflicting prenatal injury in cases where the fetus survives and where it is unforeseeably killed—the wrong-making property of inflicting prenatal injury is deprivation of FLO. It is not plausible that we can *prevent* or *alleviate* this initial wrong by a *further* deprivation of FLO. Note that this claim does not require assuming that such further deprivation of FLO makes the abortion itself immoral—that conclusion is derived from SIA.

Alternatively, we could understand the wrongness of prenatal impairment on account of it resulting in the deprivation of a *possible FLO*. Of course, the fetus has many *possible* FLOs—so, which one is relevant? The relevant one is the FLO the individual *would have* enjoyed if she were not impaired (lethally or otherwise); it is the one that *would have* been actual if she were not impaired. Of course, possible FLOs are contingent on future events, but the fetus nonetheless is deprived of these possible FLOs at the time of the impairment: these possible futures are cut off from her. The deprivation of possible FLOs (of the relevant sort, described above) provides a plausible explanation of the wrongness of prenatal injury both when the fetus subsequently dies accidentally and when it dies from an action intended to kill it. Whether the fetus is killed (lethally impaired) accidentally or intentionally, it does not change the possible FLO the fetus *would have had* if it were not to have been killed. And so, this issue is circumvented: impairment is immoral even when one intends to (and does) kill the fetus subsequently.

**RESTATING MARQUIS?**

Finally, Gilliam argues that in cases where SIA succeeds, it merely restates Marquis’ original argument, and so is insignificant.[5] However, Marquis makes no reference to prenatal impairment. SIA utilises FLO as a plausible reason as to why *impairment* by FAS is immoral*—not abortion*. SIA relies on our intuition that this is immoral, not intuitions regarding killing. Second, SIA does *not* claim that deprivation of FLO, or indeed reason R, is why abortion (or any higher degree of impairment) is immoral. Instead, it says that if R is the reason impairment of the nth degree is wrong, then provided R *holds* for n+1 degree impairment and the overrider provision is satisfied, the higher impairment is also wrong. This means that abortion *could* be wrong for a different reason than why giving a fetus FAS is wrong. So, SIA is importantly different to Marquis’ argument—it is predicated on our intuitions regarding prenatal injury, *not* a theory of the wrongness of killing.

**REFERENCES**

1. Hendricks, P. Even if the fetus is not a person, abortion is immoral: the impairment argument. *Bioethics* 2019;33:245-253.

2. Hendricks, P. (Regrettably) Abortion remains immoral: The impairment argument defended. *Bioethics* 2019;33(8):968-969.

3. Blackshaw BP, Hendricks P. Strengthening the impairment argument against abortion. *J Med Ethics.* Epub ahead of print: 5 June 2020. doi:10.1136/medethics-2020-106153.

4. Crummett D. MIP does not save the impairment argument against abortion: a reply to Blackshaw and Hendricks. *J Med Ethics.* Epub ahead of print: 2 September 2020. doi:10.1136/medethics-2020-106566.

5. Gillham A.R. Against the strengthened impairment argument: never-born fetuses have no FLO to deprive. *J Med Ethics*. Epub ahead of print: 24 August 2020. doi: 10.1136/medethics-2020-106579

6. Ross, W.D. *The Right and The Good*. Philip Stratton-Lake (ed.) Oxford University Press. 2002.

7. Coleman M.C. Spontaneous abortion and unexpected death: a critical discussion of Marquis on abortion. *J Med Ethics* 2013;39:89-93.

8. Wilkinson, D., Thiele, P., Watkins, A., & De Crespigny, L. Fatally flawed? A review and ethical analysis of lethal congenital malformations. BJOG: An International Journal of Obstetrics & Gynaecology, 2012;119(11), 1302–1308.

9. Kidszun, A., Linebarger, J., Walter, J. K., Paul, N. W., Fruth, A., Mildenberger, E., & Lantos, J. D. What If the Prenatal Diagnosis of a Lethal Anomaly Turns Out to Be Wrong? PEDIATRICS 2016;137(5), e20154514–e20154514.