

Welfare, Abortion, and Organ Donation: A Reply to the Restrictivist

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Abstract: William Simkulet has challenged our recent argument that parents have an obligation to donate organs and tissues to the same extent that abortion is restricted. The central feature of our argument is that parents have a duty to protect their offspring. If this duty is sufficient to require gestation of a fetus, then it is also sufficient to require that the parent allow offspring the continued use of their organs and tissues. Simkulet challenges this argument on several fronts. In this paper, we refute each of these challenges and further clarify the contours of our argument. In particular, our rebuttal highlights the relation between special obligations and agent-neutral obligations and the biological foundation of the duty to protect.

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3,100 words

Introduction

We argued in a recent issue of this journal that if abortion is restricted¹, then there are parallel obligations for parents to donate body parts to their children. The strength of this obligation to donate is proportional to the strength of the abortion restrictions. If abortion is never permissible, then a parent must always donate any organ if they are a match. If abortion is sometimes permissible and sometimes not, then organ donation is sometimes obligatory and sometimes not. Our argument was based on the ideas that (a) a fetus has full moral status, (b) that parents have special obligations to their offspring, fetus or not, and that (c) this special obligation is to protect

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them. The result is the conclusion that abortion restrictivists cannot also consistently deny that organ donation should be compulsory.

In the same issue, William Simkulet criticizes our argument. While he offers several objections, his primary reason is that considering safehaven laws—laws that allow parents to anonymously relinquish newborns—allows restrictivists to consistently deny that organ donation should be compulsory².

In this paper, we respond to each of Simkulet's objections and, in doing so, further clarify the notion that abortion restrictivists are committed to taking a parent's organs, even when parents may object.

Objection to the vulnerability argument

We base our argument on the idea that the special obligation that holds between parent and offspring is a duty to protect, grounded in the latter's vulnerability to the former³. This is a duty that holds between any two individuals between which there is a vulnerability relation. Usually this obligation is weak: other values can override it. But sometimes the vulnerability between two people requires that one throw up a shield to protect the other. It requires more than just not harming a person. The protector must also not allow harm to come to the protectee. Ship captains must protect passengers; physicians must protect patients' information; the state must protect its citizens from invasion; adult children must protect their elderly parents. But its strongest and most common instance is between parent and offspring.

Since the strength of the duty to protect is proportional to the degree to which one is vulnerable to the other, a mother has a strong duty to protect her fetus (given that it has full moral status, which we accept for the sake of the argument). But children are also highly vulnerable to their parents.

Simkulet's first objection is to this vulnerability argument. He offers three reasons to reject the idea that the special obligation between parent and child or mother and fetus is based in vulnerability. Simkulet first introduces the example of an assassin and notes that victims are vulnerable to the killer. He writes: "it would be absurd to conclude

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that the mugger or assassin has a special obligation to protect the fetus...or their adult victims; rather the wrongness of harming their victims is better explained in virtue of it violating their targets' right to life" (p. 349). We agree, though the claim indicates a misunderstanding of the relation between special obligations and the duty to protect. Special obligations are agent-relative obligations. That a special obligation holds between two individuals in no way implies that there are not agent-neutral obligations or that sometimes these agent-neutral obligations override special obligations. Yes, the victim is vulnerable to the assassin and so the latter has a duty to protect the former. But this fact doesn't imply that when the assassin kills, the act is wrong *merely* because of the violation of this duty to protect (though this violation is *an* explanation). The assassin has an agent-neutral obligation to not harm an innocent victim. We agree that this explains the wrongness of their action. There is nothing about special obligations that complicates this matter.

Simkulet's second objection is that it can't be true that vulnerability generates a duty to protect, because "The wealthy and the powerful have the power to cause great harms to many vulnerable people, but it would be absurd to conclude that they have robust special obligations to protect and provide for them merely because they can harm them" (p. 349). But it is rather easy to notice that the wealthy and powerful actually *do* have stronger special obligations to protect others than people with less wealth and power. Here's one way this obligation plays out, at least in the United States: progressive marginal tax rates represent the wealthy's stronger obligation to protect other, more vulnerable, citizens. The state is supposed to be by the people and the state's primary obligation is to protect its citizens. Wealthy people bear a greater duty to protect, at least in the form of how much of their income they must put in the pot of resources that permit protection. This is but one reason to think that the wealthy do have a stronger duty to protect.

There are also other examples of groups who possess power and responsibility and are therefore obligated to protect those groups that they have great capacity to harm. Physicians have power over patients, and we expect the former to protect the latter, most notably in their privacy. Police officers have power over citizens. "To protect and serve" is the motto of many police departments. There are many other examples.

Third, Simkulet claims that because the strength of the duty to protect varies with vulnerability, and because fetuses are more vulnerable to the gestating woman than children are to their parents, our view is compromised. He writes that this conjunction “threatens to undermine Carrol [sic] and Crutchfield’s argument that parents of born [sic] children have the same special obligation to sacrifice their bodily autonomy as gestational mothers; to succeed, they need to ground a parent’s special obligations to their children in some feature that does not change with a child’s circumstances” (p. 349).

Although we of course agree that the duty to protect changes as vulnerability changes, there simply is no requirement that special obligations be grounded in “some feature that does not change with a child’s circumstances.” Without an adequate explanation for this requirement, it is a fiction useful only for the purposes of his argument. Furthermore, Simkulet assumes that a child is *less* vulnerable to their parent than a fetus is to the gestating woman. But no such argument is provided. If anything, a newborn and all children up to a certain age may be more vulnerable to their parent than a fetus is to a gestating woman. A gestating woman needs to shield a fetus from toxins and traumas, for the most part. A newborn requires physical protection as well, but additionally the parent must take specific actions oriented toward the infant to keep them alive or otherwise arrange for someone to do so. For instance, a five-year old maintains a need for physical protections and to be fed and sheltered, but also is highly vulnerable psychologically to their parents. The overall vulnerability of a fetus to their gestational parent is different, but not obviously greater. So, to the extent that vulnerability and thus the duty to protect vary by age, it is plausible that the duty to protect may become *stronger* rather than weaker. Moreover, our claim is about children who need an organ or tissue from their parents for continued health and, potentially, survival. This need just increases the degree to which they are vulnerable to their parents.

Coercion and Enforcement

Simkulet also objects to our argument on the grounds that there is a relevant difference between restricting abortion and compelling organ donation. The difference is that the former is an action and the latter an omission, and this difference in action/omission has implications for how each is coerced. Because abortion is an action, according to Simkulet it is more straightforward to coerce people from getting an abortion. He argues that failing to donate organs is an omission and thus its coercion is less straightforward. This difference in how easy it is to coerce is supposed to mean that policies that restrict abortion are relevantly different from policies that compel organ donation, such that restrictivists may claim the former without the latter.

This line of argument, as above, is incomplete. While it may be true that it is more straightforward to prevent someone from doing something than it is to force behavior (which we grant for the sake of argument, but it is easy to see how this is also not generally true), it doesn't follow from this that enforcing wrongful omission, such as failing to donate organs to one's child in need, is a significant political challenge. We punish omissions frequently. There are many examples: neglect of a child or elder, the failure to pay taxes, the failure to register a vehicle, the failure to obtain required permits, and the failure to pay child support.

Here's one way we may address omission: impose high taxes or garnish wages for those parents who fail to donate organs to their child then use that money to offset the costs of finding another donor and, if they're a living donor, support them in recovery for doing what the child's parents wouldn't. Or we may charge the parents with neglect, which the state already does for parents who violate their duty to protect their child in other ways.

Additionally, the difficulty in coercing either an action or omission doesn't affect the moral obligation to attempt to do so. It's difficult to enforce the prohibition of rape, due to difficulties in reporting, proving, and prosecuting it⁴. Yet rape still happens frequently. This doesn't mean that we should simply allow it.

Not only have we shown ourselves capable of coercing members of our society to perform actions, but we've also shown that we are capable of using this coercive force to infringe on bodily integrity, especially when the person is a threat to another, as a neglectful parent who fails to donate would be. For example, people who refuse

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psychiatric care when they are a risk to themselves or others are forced to undergo treatment and may be involuntarily committed, all because they failed to get the psychiatric treatment they need⁵.

Simkulet also claims that he doesn't see how the state can make it harder for parents to shirk their obligations without a massive change in how healthcare is provided. We also do not find the fact that there may be a massive change to healthcare sufficient to discharge moral obligation. Banning abortion was a massive change to healthcare, in that it is no longer provided in many states in the United States.⁶ Especially since *Dobbs*, restrictivist policies continue to be proposed, considered, and adjudicated. Many of these would constitute a significant change to the provision of health care. Just as abortion restrictivists surely find these significant changes to health care acceptable costs and altogether not reasons to reject new policy, so do we refuse potential changes as grounds to reject compulsory organ donation.

Safehaven Laws

Simkulet's main defense of restrictivism is that the existence of safehaven laws shows that the restrictivist can still force women to donate their organs during gestation and subsequently give birth to children without also forcing them (or the child's other biological parent) to do the same later in the child's life. Safehaven laws are supposed to promote child welfare, providing an option for parents who are unwilling to or incapable of caring for their child⁷. Simkulet believes that compelling organ donation in the context of safehaven laws would encourage those parents who don't want to donate to relinquish their child to the state, and that this is bad for the child. He writes (p. 353):

it is clear that restrictivist donation laws could threaten the welfare of children in two substantive ways—first, it disincentivizes regular, preventative medical care, and second, it encourages parents to surrender their children to the state to avoid being required to donate, making it less likely they will change their mind and donate in the future.

First, if decreased likelihood of receiving regular medical care is sufficient to undermine the obligation to donate organs, it is also sufficient to undermine restrictions upon abortion, as such restrictions also disincentivize standard medical care⁸. Additionally, parents are already obligated to secure medical care for their children. It is not an option for parents to refuse all medical care for their child, or to simply leave all medical conditions untreated. By Simkulet's reasoning, *all* parental obligations to secure treatment for medical conditions would be wrong, because for fair-weather and otherwise neglectful parents these obligations would disincentivize regular, preventative treatment. We think this position is incorrect. Adding an obligation to donate doesn't relieve parents of their existing obligations to care for the health of their children.

Simkulet claims that parents may delay checkups because their child may need an organ or tissue and the parent fears that if they refuse donation, the child may be taken away or the parent(s) may be punished. But parents who beat, starve, neglect, and molest their children are also disincentivized to seek medical care. It is incorrect to claim that these behaviors should be allowed simply because parents are disincentivized to seek care for the children that they neglect and abuse. If parents in the United States do not seek timely and appropriate medical care and this failure endangers or kills their children, parents are punished through the legal system⁹. This punishment for omission would remain the same if parental organ donation to children were compulsory.

Second, safehaven laws typically have strict time frames within which parents may surrender children. Safehaven laws are not generally an option for the sort of parent that Simkulet is imagining. The majority of safehaven laws require an infant be surrendered within 31 days of birth, with only 9 states accepting infants older than 31 days. Only one state accepts infants over 3 months old, with an age limit of one year. Thirteen states only accept infants with maximum ages between 3 and 7 days old¹⁰. Even if parents did discover a donation need within the time frame and wanted to surrender to avoid it, if there is evidence of child neglect or child abuse when an infant is surrendered under safehaven laws, most states remove parental protections from prosecution¹¹. Under Federal law, the Child Abuse Prevention and Treatment Act defines abuse and neglect as "any recent act or failure to act on the part of a parent or

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caregiver that results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or *failure to act that presents an imminent risk of serious harm.*" (italics ours)¹². The refusal to donate to a child who needs a tissue or organ constitutes a failure to act that presents an imminent risk of serious harm, therefore is neglect. Safehaven laws would not provide an avenue to evade coercion for failure to donate in the majority of states.

We concede that it is possible that parents might use safehaven surrender of their healthy infants within the time frames at greater frequency due to the fear that they might be required to donate in the future, but disagree that this is a reason to oppose compulsory organ donation. This is because there are many parental obligations that plausibly increase safehaven surrender frequency due to the parents' fear of failing to satisfy them. However, these requirements (e.g., providing food, shelter, etc) aren't wrong and shouldn't be excused simply because some parents will choose surrendering their infant rather than meeting them.

Third, Simkulet claims that although "restrictivist donation laws may threaten the welfare of children, restrictivist antiabortion laws do not seem to" (p. 353). This is wrong, because it is not plausible that denying a child the medical care they need to survive, or to avoid lifelong disease and disability, promotes their welfare. Simkulet fails to consider the children who will die or be seriously harmed because their capable parents are unwilling to donate. For these children, safehaven laws do not promote their well-being; instead safehaven surrender would result in serious illness and potentially death. What would most benefit the children in these cases would be policies mandating organ donation from a biological parent, as this is the only option that results in improved health or continued survival for the children. One cannot argue in good faith that a parent surrendering a child who needs that parent's organ to the state promotes child welfare. If a restrictivist argues that donation should not be mandatory and a parent may justifiably use safehaven laws even when a child will die or be seriously harmed due to this surrender, the restrictivist also needs to permit women to surrender fetuses unto death.

Fourth, Simkulet mentions that safehaven laws may allow parents to surrender children in response to discovering that their child requires donation. We reject this. The

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obligation to donate cannot be discharged upon surrendering one's child to the state or by securing other parents through adoption. The vulnerability, and thus the duty to protect, is derived from one's biological relation to the child. A parent may not discharge biological responsibility in organ donation just as they may not discharge it in a restrictivist's view of unwanted pregnancy.

Fifth, Simkulet's argument ushers in the consideration of welfare as a relevant moral value upon which policies ought to be based. This is not an argumentative path that will benefit the restrictivist, a position which is typically supported by reasons related to inviolable principles. Once welfare—outcomes—are in play, their consideration will most certainly serve the interests of anti-restrictivists.

Conclusion

Simkulet's objections not only fail to undermine our argument, they help to put its strength in relief. They help to highlight the ideas that vulnerability matters to the duty to protect, that the duty is in part biological and not discharged by severing the non-biological bonds that unite parent and child, and that the special duty to protect interacts with agent-neutral obligations. These ideas did not receive significant attention in our original paper.

But Simkulet's objections provide a dialectical opening that we originally were reluctant to approach. In our original paper, we made little mention of welfare (welfare of the child or parent), because to do so would have been to invite accusations of begging the question against the restrictivist. Often anti-restrictivist appeals to welfare are met with the restrictivist insistence that only deontological or teleological considerations matter. But Simkulet's objections openly incorporate the consideration of welfare—as if promoting welfare is best achieved by *forcing women to gestate unwanted fetuses while allowing children who need a similar organ to die*. We are not restrictivists, but it is easy to see that it is a poor dialectical move for the restrictivist to ground any argument in consequentialism.

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