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## Prenatal Injury

Abstract: In this article, I confront Flanigan's recent attempt to show, not merely that women have a right to commit prenatal injury, but also that women who act on this right are praiseworthy and should not be criticized for this injury. I show that Flanigan's arguments do not work, and I establish presumptive grounds against any such right, namely: prenatal injury, by definition, involves intentional or negligent harm and, as such, may be subsumed under a wider class of actions that are presumptively wrong.

Keywords: abortion; prenatal injury; prenatal harm; right to life; right to choice

In Flanigan's recent "The Ethics of Prenatal Injury," she argues for three claims: (1) women have a right to abortion; (2) women have a right to commit prenatal injury; and (3) "women who commit prenatal injury are nevertheless praiseworthy and should not be criticized for prenatal injury."<sup>1</sup> In this article, I concentrate on (2) and (3), Flanigan's claims about the right to commit prenatal injury and the praiseworthiness of any pregnancy in which such a commission occurs. I show that Flanigan's arguments do not withstand critical scrutiny and, more, that there are strong presumptive grounds against a right to commit prenatal injury, or at least the praiseworthiness thereof. However, I should note that, even if my criticism of Flanigan is wholly successful, I do not think that it suggests, much less implies, anything about whether there is, or is not, a right to abortion, and I intend to remain silent on this here.

## Section 1. Prenatal Injury, Praise, and Blame

According to Flanigan, if women have a right to abortion, then women have a right to commit prenatal injury (a conditional claim I shall show to be mistaken).<sup>2</sup> However, as she points out, even if women have a right to commit prenatal injury, "one could maintain that prenatal injury...is suberogatory when it is due to choices like recreational drug use."<sup>3</sup> Therefore, after arguing for the right to commit prenatal injury, Flanigan sets out to show

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<sup>1</sup> (Flanigan, 2020, p. 2)

<sup>2</sup> Flanigan's argument for the right to abortion contains a curious and fatal lacuna.

According to Flanigan, "[a]bortion consists in a woman's refusing to allow a fetus to use her body or revoking her consent to the fetus's use of her body," and from this she infers that "abortion does not violate the fetus's rights" (Flanigan, 2020, p. 4). Flanigan supports the idea that a woman has a right to refuse to allow a fetus to use her body by appeal to the work of Thomson and Boonin (Thomson, 1971; Boonin, 2002). But, Flanigan provides no independent argument for the claim that a woman has a right to revoke her consent to the fetus' use of her body. This is a problem because consent, once given, is not, generally, unilaterally revocable. For example, I may refuse to let you into my house when you have nowhere else to stay. But, once I have given consent, if you become a tenant, you are entitled to various legal protections. Similarly, it might be argued, if a woman consents to let a fetus use her body, this initial consent establishes a presumption against abortion (i.e., against the unilateral revocation of this initial consent) that Flanigan fails to rebut, a presumption that is based on the nature of consent rather than on considerations about the right to life.

To make this concrete, note that, if my criticism of Flanigan's consent framework holds, and if we grant that a woman's refusal to allow a fetus to use her body does not violate the fetus' rights, then Flanigan establishes a right to abortion only up to pregnancy awareness (because after this point, consent, arguably, may be presumed), which is generally around 5.5 weeks (Branum and Ahrens, 2017). This is consistent with the most stringent heartbeat laws, which criminalize abortion at approximately 6 weeks—a considerably weaker conclusion than Flanigan wants.

This is not to say that there is a right to abortion up to pregnancy awareness, nor is it to say that there is no such right thereafter. In fact, I do not even want to say that there is no way to respond to the objection I have raised and, thereby, to fill the gap in Flanigan's argument. I am merely trying to point out that there is a lacuna in Flanigan's argument and, further, that this lacuna, left unanswered, is crippling.

<sup>3</sup> (Flanigan, 2020, p. 13)

that “prenatal injury is not suberogatory because even under these conditions, pregnancy is supererogatory.”<sup>4</sup> That is, Flanigan wants to show that a woman who commits prenatal injury is praiseworthy, not blameworthy (or even morally neutral), because of the benefits that pregnancy, even pregnancy that involves prenatal injury, confers.

I examine Flanigan’s argument for the right to commit prenatal injury in section 2 of this article. In this section, I grant this right for the sake of argument, and I concentrate on Flanigan’s arguments for the praiseworthiness of pregnancy with prenatal injury.

Flanigan has four main arguments for this thesis: (1) the rock-climber analogy argument; (2) the comparative harm argument; (3) the conception analogy argument; and (4) the error theory argument. I assess them in that order.

### **1.1 The Rock-Climber Analogy Argument**

Flanigan’s first argument is a rebuttal of the idea that “prenatal injury would be suberogatory in the same way that providing a low-quality rescue service is.”<sup>5</sup> To show how this rebuttal works, Flanigan uses an example.

Suppose that a rock climber is able to grab a rope holding a falling partner and, thereby, to prevent the latter not only from dying, but also from injuring himself. But now suppose that, instead of holding the rope steady, for a perfect rescue, the rock climber lets go of the rope in a controlled fashion, ensuring that the falling partner breaks his legs (but does not die). In this scenario, the rescue is low-quality and, therefore, suberogatory and subject to criticism. But (the argument goes—the argument that Flanigan is going to rebut), prenatal injury is similar to this kind of rescue: prenatal injury makes for a low-quality pregnancy. Thus, committing prenatal injury is suberogatory and subject to criticism.

According to Flanigan, there are two ways to rebut this argument. One involves accepting the analogy for the purposes of running a reductio: if we accept the analogy, then abortion is equivalent to the rock climber letting her partner die. But, this equivalence exposes a weakness in the analogy because abortion is not criticizable whereas letting a climbing partner die in such a scenario is so. Flanigan argues that criticizing women for getting abortions, on the grounds that they fail to provide life-sustaining standards, holds them “to much higher standards than the standards of criticism that apply to most people who are well-placed to save another’s life.”<sup>6</sup> For example, Flanigan points out that we do not criticize rich people who refrain from saving lives through charitable giving, nor do we criticize surgeons who could save more lives by working through the weekends. Thus, Flanigan concludes, we should not criticize women who get abortions, at least not on the grounds that are suggested by the analogy between pregnancy and rescue. Flanigan concludes that the analogy must be rejected and, therefore, that prenatal injury is not a low-quality service, suberogatory, or subject to criticism.

The second way to rebut the argument, according to Flanigan, is to note that “assessments of praiseworthiness or criticizability during pregnancy should depend on the overall good achieved through gestation.”<sup>7</sup> That is, Flanigan argues that “women who commit prenatal injury still provide morally significant benefits on balance,” and so their actions are praiseworthy rather than blameworthy (or even neutral).<sup>8</sup>

However, there are at least three problems with Flanigan’s reasoning. First, Flanigan is pressing too hard on the analogy in the thought experiment when, in her first rebuttal, she concludes that abortion is equivalent to the rock climber letting the partner die. What the rock climber who breaks her partner’s legs is supposed to have in common with the gravida who commits prenatal injury is that they both provide a low-quality service. But, this

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<sup>4</sup> (Flanigan, 2020, p. 13)

<sup>5</sup> (Flanigan, 2020, p. 14)

<sup>6</sup> (Flanigan, 2020, p. 14)

<sup>7</sup> (Flanigan, 2020, p. 14)

<sup>8</sup> (Flanigan, 2020, p. 14)

does not entail, or even suggest, that pregnancy is a form of rescue or, more specifically, that it is like holding the rope in a rock climbing fall—and that is a good thing, because these two are disanalogous in many morally relevant ways. For example: rock climbing is known to be a risky endeavor, and both climbers would be well aware of this from the outset; pregnancy does not have the same risk-profile, and the fetus never enters into a pregnancy with the same acceptance (or even awareness) of attendant risks. Thus, letting the rope go in the rock climbing scenario is not analogous to an abortion, and Flanigan’s *reductio* does not work.

Flanigan considers this problem in a footnote:

One may reject this analogy on the grounds that the climber will die without the intervention of his partner but a fetus will be born without injury if their mother doesn’t do anything. But this characterization implies that gestating is analogous to doing nothing rather than holding the rope. I characterize pregnancy as analogous to holding the rope because pregnancy consists in the active provision of bodily services.<sup>9</sup>

In this passage, Flanigan argues that pregnancy is like holding the rope in the rock climbing scenario because pregnancy is not analogous to doing nothing. But, this is fallacious; it rests on a false dilemma. It is true that gestating is not analogous to doing nothing. However, that does not mean that gestating is like holding the rope in the rock climbing scenario. The interactions between a fetus and a gravida are far too complex for either of these analogies to be useful in this context. So (*pace* Flanigan), we can accept that a rescuer who gratuitously injures a rescuee is like a gravida who commits prenatal injury inasmuch as both provide a low quality service and, for this reason, are criticizable, without accepting that failing to rescue is like getting an abortion.<sup>10</sup> Therefore, Flanigan’s first rebuttal of the claim that committing prenatal injury is suberogatory (and, thus, criticizable) does not work.

Second, holding some women to be criticizable for getting abortions does not involve holding these women to higher standards than apply to most people who are well-placed to save another’s life (*pace* Flanigan). For one thing, rich people who do not give to charity are often criticized, as are surgeons who do not employ their skills. For another thing, there are morally relevant disanalogies between, on the one side, rich people and surgeons and, on the other, gravidas. For example, rich people and surgeons are, generally speaking, fungible, at least as far as charitable giving and surgery are concerned; gravidas are not, at least as far as pregnancy is concerned. A surgeon who takes the weekend off to rest can be replaced with another surgeon; a gravida cannot hand off her fetus to someone else for the weekend. This is especially relevant given that efficiency dictates that rich people be strategic in their giving and surgeons take time off to recoup. It follows that, even if we had to conclude that abortion is like dropping the rope in the rock climbing scenario, Flanigan’s first rebuttal of the claim that committing prenatal injury is criticizable would not work.

The third problem with Flanigan’s reasoning has to do with her second rebuttal of the rock climber argument. Flanigan’s claim that assessments of praiseworthiness and criticizability during pregnancy should depend on the overall good achieved through gestation involves a subtle equivocation. To see this, suppose that Shane rescues Bebop from a burning building but stabs him seven times on the way out. Shane might say that we should not criticize her because, on the whole, once we tally up the stabs against the rescue, she did a good thing. But, in so doing, Shane would have missed the point: we do not criticize her for rescuing Bebop; we criticize her for stabbing him. In the same way, if we criticize a gravida for committing prenatal injury, we are not criticizing her for the entire pregnancy; we are criticizing her for the prenatal injury, and the latter is not erased or somehow

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<sup>9</sup> (Flanigan, 2020, pp. 9-1011).

<sup>10</sup> I should point out that I am not entirely comfortable with characterizing pregnancy as a service: this characterization seems to me to ignore the biological reality of pregnancy, which involves a far more complex, mutualistic interrelationship between gravida and fetus than a typical act of service. I adopt the “act of service” language only in order to put myself in dialogue with Flanigan, and my use of it should not be interpreted as endorsement.

cancelled by the balance.<sup>11</sup> I conclude that Flanigan’s rock-climber analogy argument does not withstand critical scrutiny.

## 1.2 The Comparative Harm Argument

Flanigan’s second argument is based on the premise that prenatal injury does not make a child worse off. Flanigan evidently thinks that the main reason, and perhaps the only reason, why prenatal injury would be criticizable is that it harms the resulting child. From this it follows that, if prenatal injury does not harm the resulting child, then prenatal injury is not criticizable.

In order to support this line of reasoning, Flanigan proposes a thought experiment:

[I]magine a woman who switched from using alcohol, which can cause Fetal Alcohol Spectrum Disorders, to smoking, which increases the risk of low birth weight and Cleft Palate. On this view, even if her child was born with a Cleft Palate, his mother benefited him by switching to smoking because counterfactually she would have subjected him to a greater risk. One may reply that smoking was still harmful, it was just a lesser harm than alcohol use. But then it is difficult to draw a line, since all pregnancies involve some level of avoidable risk so all pregnancy would [sic] harmful to the future child.<sup>12</sup>

Flanigan’s idea is that, because harm is comparative, any prenatal injury that is standardly taken to harm a fetus can be compared to a more significant prenatal injury, and such a comparison reveals that the putatively harmful prenatal injury is actually beneficial. For example, prenatal harm caused by smoking is actually a benefit when it is compared with the prenatal harm that could have been caused by alcohol use. Moreover, if we try to argue that the relevant contrast class for determining harm is a harmless, risk-free pregnancy, then, Flanigan argues, because “all pregnancies involve some level of avoidable risk,” all pregnancies will be harmful, and “cases of prenatal injury are not morally distinctive except in the degree to which they fall short of a maximally beneficial pregnancy.”<sup>13</sup>

One way to see that Flanigan’s argument does not work is to note that, carried to its logical conclusion, it does not merely show that no prenatal injury causes harm; it shows that no injury of any kind causes harm. For example, suppose that, when Shane was rescuing Bebop, the first six times she stabbed him, she twisted the knife

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<sup>11</sup> I should add that I do not accept that pregnancy is generally as good as Flanigan makes it out to be; I merely am accepting the premise here for the sake of argument. In my view, there are strong presumptive grounds against producing more humans, including: (1) environmental destruction and degradation, (2) overconsumption, and (3) the effects of all of this on our fellow creatures. This is not to say that having children is wrongful or a bad thing. But, it is to say that, with 8 billion humans already around, and with overall birth rates showing no signs of slowing (even if, in certain locales, they are so), having more children is not as morally praiseworthy as Flanigan thinks.

Flanigan does confront one argument against her pro-natalism. She considers Parfit’s famous Repugnant Conclusion, which states that we should reject any view that requires us to fill the world with people whose lives are barely worth living (Parfit, 1986). Here is her response:

One may worry that my claim that all pregnancy is supererogatory implies that women have moral reasons to create as many children as they can. It does, but this isn’t something to worry about. Though procreation is not required, women have moral reason to bring about a world that contains [sic] highest total amount of well-being. This may involve bringing about a world full of people whose lives are barely worth living but which contains the most possible well-being through its large population, a scenario that Derek Parfit called the Repugnant Conclusion...I do not think this scenario is repugnant, so I do not take it to be a reductio of the argument that pregnancy is praiseworthy, even in cases of prenatal injury. Rather, of all the implications of utilitarianism, the claim that it is good to create a world full of children who are glad to be alive strikes me as one of the less repugnant conclusions. (Flanigan, 2020, p. 17)

The problem with Flanigan’s response to the Repugnant Conclusion is on the surface: a world full of children who are glad to be alive might not be repugnant, but it is not the same as a world full of people whose lives are barely worth living. Formally speaking, Flanigan’s response is a red herring—it is no rebuttal of the Repugnant Conclusion.

<sup>12</sup> (Flanigan, 2020, p. 15)

<sup>13</sup> (Flanigan, 2020, p. 15)

on the pullout so that the wound would be bigger and more painful. But, the seventh time around, she thinks better of it and refrains from twisting. If Flanigan's line of reasoning is accepted, then this seventh stabbing actually benefits Bebop because it could have been worse. This, of course, is absurd, as is the putative reply that any rescue involves some level of avoidable risk (whence it is supposed to follow that Shane's stabbings are not morally distinctive). So, what has gone wrong?

First, when we ask whether smoking during pregnancy harms the resulting child, on a comparative notion of harm, we are asking whether the child is better off in a nearby possible world in which the only difference is that the gravida does not smoke during pregnancy; the comparison is not to a world in which the gravida uses alcohol instead of smoking. This latter comparison shows that using alcohol is more harmful than smoking, but it does not show that smoking benefits the future child, nor does it show that a gravida who switches from using alcohol to smoking is benefiting her future child.<sup>14</sup>

Second, there is a subtle, but nonetheless fatal, shifting of the goal posts in Flanigan's argument. She begins the argument with a bold denial: "I deny that prenatal injury does make a child worse-off."<sup>15</sup> But, as noted above, she concludes with the claim that, because all pregnancy is harmful, the harm caused by prenatal injury "is not morally distinctive" except in the degree of harm caused. But showing that something is harmless is not the same as showing that something is harmful but not morally distinctive. Indeed, these two are contraries: nothing can be both harmless *and* {harmful but not morally distinctive}.

Moreover, Flanigan's attempt to show that the harm caused by prenatal injury is not morally distinctive fails. For one thing, differences in degree can ground moral distinctions. It might be hard, in such cases, to draw a line—but the phenomenon of vagueness is not absent from morality, and things can be clear enough at the extremes. Indeed, there is a particularly apt example of this at hand: gametes are clearly not persons, whereas 25-year-old healthy, neurotypical adults are, but it is difficult to draw a line to determine the exact femtosecond at which the transition from non-person to person takes place. From this it may be seen that, once again, vagueness is not absent from morality, and we may infer (*pace* Flanigan) that precisely the fact that prenatal injury involves a much greater degree of harm than other injuries that take place during pregnancy can suffice to ground a moral distinction.

For another thing, Flanigan's argument is built on a false dilemma: either a pregnancy that involves prenatal injury is morally distinct from a pregnancy that does not involve prenatal injury because the former causes harm, or there is no moral distinction to be had. What leads Flanigan astray here is the question she poses: is one kind of *pregnancy* morally distinct from another? The question should be whether one kind of *harm* is morally distinct from another—or, more specifically: is prenatal injury morally distinct from other kinds of harm that take place during pregnancy? Once the question has been clarified, the answer is straightforward: prenatal injury *is* morally distinct from other kinds of prenatal harm because prenatal injury is harm caused by intent or by negligence, and harm caused by intent or by negligence is morally distinct from other kinds of harm (and, further, presumptively wrong).

I defend this way of characterizing prenatal injury in sections 1.4 and 2.3 below. For now, I want to advance to the final problem with Flanigan's comparative harm argument that I am going to mention: this shows that Flanigan's claim that all pregnancies are harmful to the future child is a red herring. This claim is also false.<sup>16</sup> But, the point for present purposes is that, even if all pregnancies were harmful to the future child—they are not, but even if, counterfactually, they were—this would be irrelevant because, when thinking about prenatal injury, we

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<sup>14</sup> It shows merely that the gravida is not harming the child as severely if she makes such a switch.

<sup>15</sup> (Flanigan, 2020, p. 15)

<sup>16</sup> Flanigan's defense of this claim is that all pregnancies involve some level of avoidable risk. However, this assertion is inadequate as a defense of the original claim. For one thing, not all pregnancies involve some level of avoidable risk in any relevant sense (i.e., this assertion, like the claim it is supposed to defend, is false)—and, for another, even if all pregnancies did involve some level of avoidable risk (they do not, but overlooking this), risk is not equivalent to harm (i.e., the assertion does not connect with Flanigan's original claim that all pregnancies are harmful).

are, again, talking about harm that is either intentional or the result of negligence. From this it may be seen that Flanigan's second argument, like her first, does not withstand critical scrutiny.

### 1.3 The Conception Analogy Argument

Flanigan's third argument is based on analogy with conception:

There are...impersonal reasons to ensure that each child has the best possible life. But as long as a child's life is beneficial on balance his existence is impersonally justified, so people should not be criticized for creating him. Similarly, if a fetus lacks moral status but will become a child that has moral status, then [*sic*] same standard ought to apply to cases of gestation. It may be criticizable to increase the amount of suffering in the world by creating a child whose life is not worth living, but short of that, people should not be criticized for failing to create the best possible life.<sup>17</sup>

According to Flanigan, even if a child does not have the best possible life, the creators of that child are not criticizable for creating him, provided his life is beneficial on balance. Flanigan then infers that the same applies to gestation: a gravida who inflicts prenatal harm is not criticizable for failing to create the best possible life provided that the resulting child still has a life worth living. To illustrate, Flanigan points out that "children who are born with disabilities or ailments related to prenatal injury still generally have lives worth living" and, therefore, the gravida who causes these disabilities or ailments is not criticizable.<sup>18</sup> Thus, as Flanigan suggests earlier in her article, if we "imagine an unnecessary drug that causes an unborn child to become very disabled when taken during pregnancy, such as a recreational drug or Thalidomide," then we may see that the gravida who takes these drugs should be praised, not criticized, because the resulting child, although disabled, still has a life worth living.<sup>19</sup>

However, this argument has at least two distinct problems.

The first lies in what Flanigan says about creation. Flanigan equates justifying someone's existence with justifying someone's creation. But, this equation is mistaken. In fact, not only are these two different, but, more problematically, it is not the case that someone's existence is justified if but only if her creation is justified. Hitler's existence was not justified (in Flanigan's language: his life was not beneficial on balance), but his creation might have been. Conversely, Jesse Jackson's existence is justified, but his creation was not (he was the child of rape). Justifying someone's existence does not translate into a justification of that person's creation. If, as per Flanigan's supposition, a gravida takes a recreational drug or Thalidomide during pregnancy, intentionally causing disabilities or ailments in her fetus, then (*pace* Flanigan) she is subject to criticism (and not praiseworthy), regardless of whether the child has a life worth living.

The second problem lies in what Flanigan says about prenatal injury. Flanigan says that we should not criticize people for failing to create the best possible life. But, this is a red herring. Prenatal injury is not about failing to create the best possible life—in fact, it is doubtful whether this conception of prenatal injury is coherent—and this may be seen from Flanigan's own examples. Prenatal injury involves willful or negligent harm, such as intentionally causing severe disability by taking a recreational drug or Thalidomide (Flanigan's examples), which *is* criticizable (*pace* Flanigan).

### 1.4 The Error Theory Argument

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<sup>17</sup> (Flanigan, 2020, p. 15)

<sup>18</sup> (Flanigan, 2020, p. 16)

<sup>19</sup> (Flanigan, 2020, p. 7)

Flanigan's fourth argument is that intuitions about whether prenatal injury is criticizable might be influenced by prejudice:

[P]opular intuitions about pregnancy are potentially colored by unjustified prejudices. Drug users, disabled people, obese people, poor people, and women—especially women who have sex—have historically been denounced for their permissible choices when denouncement was unwarranted. These considerations debunk or at least call into question intuitions that prenatal injury is criticizable.<sup>20</sup>

Flanigan's idea is that there is a readily available error theory to explain why prenatal injury is often taken to be criticizable and, therefore, the burden of proof should be on those who think that prenatal injury is criticizable.

The problem here, however, is straightforward. As already remarked in the foregoing, prenatal injury involves intentional or negligent harm, and there is a (well justified) presumption against such harm. That is, this aspect of prenatal injury (namely: that it involves intentional or negligent harm) suffices to establish a presumption (not a prejudice) in favor of its being criticizable, one that remains in place in light of the failure of Flanigan's other arguments.

Now, some might object at this point that, in characterizing prenatal injury as I do (i.e., as involving intent or negligence), I am appealing to states of mind that play virtually no role in consequentialist moral theories, such as utilitarianism. If this is correct, then (the objection continues), if Flanigan is operating on such a theory, she will not accept my characterization of prenatal injury, much less the criticisms of her argument that are based on it.

However, I think that there are at least two problems with this objection. One is that consequentialism in general, and utilitarianism in particular, need have no issue with accepting my definition of prenatal injury, or with distinguishing prenatal injury from the broader (genus) category of prenatal harm in the way that I do, notwithstanding the appeal to intent and negligence. To be sure, the consequentialist would not *evaluate* any action, much less any instance of prenatal injury, on the basis of intentions or negligence. But, that does not mean that the consequentialist cannot *distinguish* one action from another on the basis of intentions and other mental states, and thence compare the kinds of consequences such actions tend to have with similar kinds of actions that do not involve such mental states, or compare the consequences that a particular token such action would have with other possible action tokens. Indeed, such distinctions seem requisite in general, inasmuch as they are ubiquitous in law and morality, and in this particular case, inasmuch as (a) prenatal injury, as an action type, promises to have much worse consequences than prenatal harm that is not prenatal injury, and (b) failing to mark the distinction between prenatal injury and prenatal harm more broadly in this way promises to have bad consequences (bad consequences for society, for women, and for children).

The second problem with this objection is that there are reasons for thinking that Flanigan is operating on a broadly nonconsequentialist framework. One such reason is that Flanigan is talking about rights (the right to abortion and the right to prenatal injury). Another is that, as we shall see in section 2.7 of this article, Flanigan herself appeals to the distinction between performing an action, even a harmful one, and performing an action from malice or selfishness. Of course, consequentialists are able to accommodate both rights and the distinction between performing an action and performing an action from malice. But, any consequentialist theory that is sufficiently sophisticated to accommodate these also will be sufficiently sophisticated to handle my characterization of prenatal injury. Thus, it seems to me that this objection is a nonstarter: my characterization of prenatal injury may be accepted by consequentialists and nonconsequentialists alike, and this characterization also helps to explain why prenatal injury is presumptively wrong. But, this runs contrary to Flanigan's claim, noted at the outset of this article, that there is a right to commit prenatal injury. So, let us turn to her arguments for that claim now.

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<sup>20</sup> (Flanigan, 2020, p. 16)

## Section 2. The Right to Commit Prenatal Injury

Flanigan has seven arguments for the claim that women have a right to commit prenatal injury: (1) the injury-killing argument; (2) the reductio; (3) the doing/allowing argument; (4) the unavoidability of harm argument; (5) the identity argument; (6) the consent argument; and (7) the act/malice argument. I assess them in that order.

### 2.1 The Killing-Injury Argument

Flanigan's first argument is based on the idea that killing and injury are morally similar and, therefore, the right to abortion generates a presumption in favor of the right to commit prenatal injury:

[J]ust as it is generally impermissible to kill a person but not impermissible to have an abortion, it is generally impermissible to injure or cause a non-consenting person to become disabled but prenatal injury is not impermissible...those who maintain that abortion is [rightful] should maintain that prenatal injury is [rightful] too.<sup>21</sup>

As noted above, I do not want to take a stand here on whether there is a right to abortion. So, I propose to grant such a right for the sake of argument. Nonetheless, Flanigan's position here is unsustainable: it is not the case that there is a right to kill X if but only if there is a right to injure X. It is easy to miss this fact because, in general, at least when we are talking about humans, both killing and injury are generally contrary to right. But, on the one hand, there are situations, such as in the boxing ring, in which both parties are allowed to injure, even though neither is allowed to kill, and, on the other hand, there are situations, such as capital punishment and euthanasia, in which one party is allowed to kill, but not to injure, the other.

Flanigan might respond that, in cases in which the right to kill and the right to injure come apart, the subjects are moral agents, and, except for capital punishment, which Flanigan might not accept as rightful, the reason these rights come apart is that moral agents can give meaningful consent to one or another of them. But (Flanigan might continue) a fetus is not a moral agent, and, even if it were, it cannot give meaningful consent to injury or killing. So (Flanigan might conclude), the right to abortion still generates a presumption in favor of the right to commit prenatal injury.

But, this response breaks down when we consider livestock, or other animals, like dogs and cats. Generally speaking, these animals are not taken to be moral agents, nor are they taken to be able to give meaningful consent. Nonetheless, even in situations in which it is legal to kill them, it is not legal to torture them. For example, a beloved pet might be euthanized when its quality of life has diminished. But, if the owner were to vivisect the pet, she would be arrested. Similarly, even in the slaughterhouse, where killing rates are deliberately but nonetheless startlingly high, workers who brutalize animals are subject to arrest, even if, sadly, their misdeeds often go unpunished. This effectively rebuts the presumption in favor of the right to commit prenatal injury that Flanigan tries to justify on the basis of the right to abortion. Granting, for the sake of argument, that there is a right to abortion; granting, for the sake of argument, that a fetus is not a moral agent; granting, for the sake of argument, that a fetus cannot give meaningful consent; granting all of this, there is no presumption in favor of a right to prenatal injury—quite the contrary: there are presumptive grounds, independent of all of this, against such a right.

### 2.2 The Reductio

Flanigan's second argument for the right to commit prenatal injury is a reductio. Flanigan claims that the denial of this right has counterintuitive implications. Flanigan gives four examples to substantiate this claim:

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<sup>21</sup> (Flanigan, 2020, pp. 8-9)



1. “[I]magine a pregnant Somali woman decides to give birth and raise her child in Somalia, where there is poor nutrition and limited prenatal care, even though her uncle arranged for her to move to the UK before the birth. Is she required to flee her home country because Somalis have a lower quality of life and shorter life expectancy?”<sup>22</sup>
2. “[O]n this view it would also be impermissible for people with debilitating or disabling genetic conditions to procreate.”<sup>23</sup>
3. “If an alcoholic mother refuses to have an abortion and her child is born with fetal alcohol syndrome, can the child blame or otherwise sanction his mother?”<sup>24</sup>
4. “Imagine an obese woman who doesn’t lose weight while pregnant. Her child faces a significantly higher risk of developing type 1 diabetes because the mother was obese. When her child is born, he develops moral status and then develops diabetes. To the extent that blame is a sanction, can he blame his mother for failing to lose weight while pregnant?”<sup>25</sup>

The general problem with Flanigan’s argument is that none of the counterintuitive implications is, in fact, implied by a denial of the right to commit prenatal injury. However, each of Flanigan’s examples contains a different error, so it is instructive to go through them one by one.

The problem with Flanigan’s first example is that denial of the right to commit prenatal injury does not require us to conclude that the pregnant Somali woman must flee her home country. Being born in a place with a lower quality of life or a shorter life expectancy is not a prenatal injury, not even if it is done intentionally. So, this example is a red herring.

The problem with the second example is that, on most accounts, genes are identity-determining. A comparative account of harm cannot accommodate harms that are identity-determining, a fact that underlies the famous non-identity problem.<sup>26</sup> If this is accepted, then the second example does not involve injury, much less prenatal injury.

The problem with the third and fourth examples is that these children not only can blame their mothers for infliction of prenatal injury but also, as of the writing of this article, can sue them for the same in court, and many view this situation as rightful.<sup>27</sup> The fourth example is further complicated by two facts: (1) fetal harm due to obesity need not be intentional or negligent, and (2) it is unclear whether the gravida’s obesity is the difference-making-difference in the development of diabetes.

From this it may be seen that none of these examples is able to play the role Flanigan assigns to it. That is, all of Flanigan’s attempts to show that the denial of the right to commit prenatal injury has counterintuitive implications fail—none of the counterintuitive implications actually follows from the denial of the right to commit prenatal injury.

### 2.3 The Doing/Allowing Argument

Flanigan’s third argument for the right to commit prenatal injury builds on the doing/allowing distinction, a distinction sometimes grounded on the Doctrine of Double Effect.<sup>28</sup> According to Flanigan, arguments against the

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<sup>22</sup> (Flanigan, 2020, p. 9)

<sup>23</sup> (Flanigan, 2020, p. 10)

<sup>24</sup> (Flanigan, 2020, p. 12)

<sup>25</sup> (Flanigan, 2020, p. 12)

<sup>26</sup> (Kahn, forthcoming)

<sup>27</sup> (Kennedy, 1991)

<sup>28</sup> See (McIntyre, 2023, esp. section 3) and (Woollard and Howard-Snyder, 2022, esp. section 3).

right to commit prenatal injury tend to “characterize prenatal injury as a harmful act rather than a failure to benefit.”<sup>29</sup> But, citing Woollard, Flanigan notes that “whether an agent counts as doing harm or merely allowing harm depends on facts about what belongs to whom.”<sup>30</sup> Thus (Flanigan continues), the distinction between doing and allowing must be maintained; to compromise this distinction would undermine the authority people have over their most precious possession: their own bodies.<sup>31</sup> Crucially, then, because a woman’s body belongs to herself, Flanigan concludes that prenatal injury should be characterized as allowing a future child to be harmed rather than as actually causing the harm, which suffices to block any argument (including the argument made in section 1.4 of this article) against the right to commit prenatal injury which characterizes it as doing, rather than allowing, harm.<sup>32</sup>

This third argument is important inasmuch as not all prenatal harm is the result of prenatal injury. For example, the Zika virus can cause microcephaly and other disorders. But most, if not all, cases of this during the 2015-2016 Zika epidemic were not the result of prenatal injury: there is no evidence that, when pregnant women contracted the disease at that time, it was the result of intent or negligence, and there is every reason to think that it was not. Clearly, then, such cases should not be characterized as instances of prenatal injury or as *doing* harm—and, in fact, it is odd to characterize them even as *allowing* harm, although (prenatal) harm occurred.

Alternatively, consider that some prescription medications are known to have the potential to cause prenatal harm. A gravida might weigh the pros and cons, both for herself and for her fetus, of taking one or another of these medications and, after careful deliberation, come to the conclusion that she is warranted in doing so. For instance, even if we focus solely on the pros and cons for the fetus, we may note that, although anti-seizure drugs can cause birth defects, having a seizure during pregnancy also can harm the fetus. So, an epileptic gravida might face a difficult decision. Of course, there might be room for reasonable disagreement about any particular case, and there is also room for error. But, the point is that it seems at least *prima facie* plausible that in some, if not many, such cases, the gravida will be justified in taking the medication in question, and such a case, arguably, could be an instance of *allowing*, rather than *doing*, harm to the fetus—and, as such, an instance of prenatal harm, but not an instance of prenatal injury (where the harm is caused intentionally or by negligence).<sup>33</sup>

However, the existence of such cases—cases of *allowing*, rather than *doing*, prenatal harm—should not obscure the fact that there are also cases of prenatal injury—cases in which the harm is intended or the result of negligence, and which can be characterized accurately as *doing*, rather than *allowing*, harm. For example, suppose that a gravida deliberately finds a laboratory conducting experiments on the Zika virus, breaks in, and infects herself, and suppose she does this precisely because she wants to cause her fetus to develop microcephaly; or suppose (to use a slight variant of one of Flanigan’s examples) that a perfectly healthy gravida begins a heavy smoking regimen precisely because she wants her child to have a cleft palate; or suppose that a gravida finds a physician willing to cut off one of her fetus’ feet *in utero*, merely because she wants to keep it as a souvenir of her pregnancy—all of these cases, monstrous as they are, are logically, physically, and biologically possible, and all of them involve the deliberate doing, not merely allowing, of harm to the fetus. From this it may be seen that Flanigan’s third argument misses its target. Flanigan thinks that denying the right to commit prenatal injury requires denying the doing/allowing distinction. Although she is surely correct that some people might mistakenly classify instances of allowing harm as instances of prenatal injury, she is just as surely incorrect about the connection between the doing/allowing distinction and the right to commit prenatal injury: denying the right to

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<sup>29</sup> (Flanigan, 2020, p. 9)

<sup>30</sup> (Woollard, 2013, p. 317; Flanigan, 2020, p. 9)

<sup>31</sup> (Woollard, 2013, p. 317; Flanigan, 2020, p. 11)

<sup>32</sup> (Flanigan, 2020, p. 9)

<sup>33</sup> As noted at the outset of this section, the doing/allowing distinction is sometimes grounded in the Doctrine of Double Effect. However, it is worth pointing out that, even if this grounding project is not accepted, the decision to take medication in a case like the one described in the sentence to which this note is appended can be characterized and defended in terms of the Doctrine of Double Effect directly (rather than indirectly, through the doing/allowing distinction).

commit prenatal injury does not require rejecting the doing/allowing distinction and, indeed, the denial of this right can be based precisely on this distinction.

#### 2.4 The Unavoidability of Harm Argument

Flanigan's fourth argument builds on the fact that "all procreation consists in exposing a being that has moral status to the non-comparatively harmful experiences of pain, disability, or death."<sup>34</sup> Flanigan's idea is that, because all procreation involves such harmful experiences, there is nothing morally distinctive about procreation that involves prenatal injury as opposed to procreation that does not involve prenatal injury. Thus, if there is a right to procreate in general, then there is a right to procreate and to commit prenatal injury.

To see the problem with this argument, note that, although all humans are going to die, this does not mean that there is a right to murder. In the same way, even if all procreation consists in exposing a being to harm, outside of the womb even if not inside it, this does not justify intentionally or negligently inflicting harm on this being. As argued in the foregoing, the fact that harm is caused by prenatal injury (i.e., intentionally or through negligence) is morally relevant, and this suffices to block Flanigan's fourth argument. That is, there is a morally relevant distinction between harm (*simpliciter*) and harm caused by intent or neglect (as in prenatal injury), and, thus, the fact that all procreation consists in exposing a being to harmful experiences, if it is a fact, does not entail that prenatal injury is permissible. Moreover, not all procreation involves prenatal injury, and the act of procreation does not generate a right to engage in prenatal injury. I conclude that the unavoidability of harm argument does not withstand critical scrutiny.

#### 2.5 The Identity Argument

Flanigan's fifth argument, which I am calling the identity argument, is based on the idea, which she attributes to Barnes, that prenatal injury can injure a fetus in nontrivial ways that change the nature of the resulting child:

[W]hen mothers injure fetuses, they change their future children in ways that affect how those children conceive of their interests, and it is not always against a person's interests to have been disabled from birth.<sup>35</sup>

Flanigan seems to be challenging ableist prejudices in this passage, noting that a disabled child can have a fulfilling life and, indeed, even might have a better life than a non-disabled child, whence she infers that being disabled is not necessarily against a person's interests at birth. If this is correct, then, in some cases, committing prenatal injury might end up furthering, rather than thwarting, the resulting child's interests, and it seems strange to say that furthering someone's interests is contrary to right.

However, this argument has at least two problems.

First, it commits a *de re/de dicto* fallacy. To say that committing prenatal injury is contrary to right is not to say that furthering someone's interests is always contrary to right, even if, in some instances, prenatal injury might end up furthering the interests of the resulting child. To make the problem here more vivid, consider someone who murders her wealthy parent in order to receive her inheritance more quickly. To say that this murder is contrary to right is not to say that it is always contrary to right to try to get rich, even though, in this particular instance, that is what our murderer is doing. In the same way, to say that a given instance of prenatal injury is

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<sup>34</sup> (Flanigan, 2020, p. 10)

<sup>35</sup> (Flanigan, 2020, p. 11, citing Barnes 2014).

wrongful is not to say that furthering a fetus' interests is wrongful, not even if that prenatal injury does end up furthering the fetus' interests.<sup>36</sup>

The second problem with Flanigan's identity argument is that how a being conceives of its interests at time  $t+x$  seems irrelevant to whether an action at time  $t$  is an injury and, further, whether that injury is rightful. To see why this is so, note that Flanigan's idea about how an injury can change the way in which a being comes to conceive of its interests is as true of children and adults as it is of fetuses. For example, if Lynne cuts off her child's hands and feet, that child surely will conceive of its interests differently 5 years, or even just 5 months, later. But, even if these terrible injuries end up bringing about some later, fortuitous event, that does not make the injuries any less of an infringement of that child's rights. Similarly, if Shiela breaks both of her middle-aged father's legs and then runs over his face with a lawnmower, he surely will conceive of his interests differently 5 years, or even just 5 months, later. But, again, even if these terrible injuries end up bringing about some later, fortuitous event, that does not make the injuries any less of an infringement of Shiela's father's rights. From this it may be seen that Flanigan's identity argument does not work.

## 2.6 The Consent Argument

Flanigan's sixth argument is based on ideas about consent and relationships in which one party is dependent on the other. Echoing Little, who argues that, if a gravida does not consent to having a parental relationship with her fetus, then she may abort it, Flanigan argues that, "for the same reasons, a [non-consenting gravida] also would not have duties to continue to provide higher-quality gestational services."<sup>37</sup> Thus, if a non-consenting gravida wants to take recreational drugs that will have known and harmful effects on her fetus, she has a right to do so.

Flanigan extends this argument in a response to Savulescu and Snyder. Whereas Savulescu and Snyder argue (independently) that relationships of dependence, like the relationship between a gravida and her fetus, "generate special duties of assistance because failing to provide adequate conditions for dependents would show an unacceptable disregard for a specific person's basic needs," Flanigan argues that a relationship of dependence does not establish any special duties:

Such a relationship is instead evidence that someone is providing a person in need with more assistance than anyone else. The claim that providing for dependents is an enforceable requirement is even less plausible since people do not forfeit their rights by benefiting the needy when no one else can or will. Return to the example of the falling climber and his partner. Imagine the partner temporarily saved the climber, but then became fatigued. Even if he shouldn't let go, it would nevertheless be wrong for a bystander to threaten to assault the partner when he considered it. To say otherwise suggest [*sic*] that people who take on dependents forfeit their rights by doing so.<sup>38</sup>

However, there are at least three problems with Flanigan's argument.

First, Flanigan's attempt to extend Little's argument for the right to abortion into a right to commit prenatal injury is based on a false contrast. Flanigan argues that a gravida who consents to pregnancy but not to provide "higher-quality gestational services" has no corresponding duties and, therefore, has a right to commit prenatal injury. But, prenatal injury involves causing harm, either intentionally or through negligence, not failing to benefit or to provide "higher-quality gestational services," whatever that might mean. An analogy is instructive. Suppose that I agree to take someone on as a tenant. Then I am not legally bound to provide them with state-of-

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<sup>36</sup> It is worth pointing out that it is easy to come up with similar examples that do not involve questions of life and death. For instance, suppose that Cha steals money from Bartolome in order to fund a trip around the world. To say that this instance of stealing is wrongful is not to say that it is wrongful to try to get money to travel, even though, in this instance, that is what our thief is doing.

<sup>37</sup> (Flanigan, 2020, p. 11); (Little, 1999)

<sup>38</sup> (Flanigan, 2020, p. 12); (Savulescu, 2007); (Snyder, 2008; 2013 [NB. Flanigan mistakenly cites Snyder as 2014])

the-art appliances or anything of that nature. But, I am legally required to fix health and building code violations, and I am legally prohibited from inflicting harm on them or their property. So, not only is Flanigan's comparison misleading, but other, better comparisons show why there is no right to commit prenatal injury.

Second, Flanigan's response to Savulescu and Snyder is beset with similar issues. Flanigan compares gestation to benefiting the needy. This is a bad comparison precisely because, even when there is nobody else who is able or willing to benefit the needy, there might not be any substantive relationship between benefactor and benefitted. Moreover, inasmuch as many think that citizens must be guaranteed a minimum level of subsistence, the needy might have a legally enforceable right to benefits, not against specific individuals, but against the government. A parent-child relationship would be more apt for comparison in this context, and there, once again, we see the tide of the argument turning against Flanigan. Although a parent might put her child up for adoption, and although a parent does not have a moral or legal duty to provide her child with all the newest and best toys, a parent who abuses or neglects her child is subject to legal sanction—and it is the last of this trifecta (namely: abuse or neglect) that is analogous to prenatal injury. Just as there is no legal right for a parent to abuse or neglect her child, there is no right to engage in prenatal injury.

Third, consider Flanigan's climber analogy. Recalling the example explored in section 1.1 of this article, Flanigan likens prenatal injury to letting go of a rope holding a climber whom you have rescued when you get tired, and Flanigan asserts that it would be wrong for a bystander to threaten you with assault for considering letting go of the rope. But, this comparison breaks down at three points: (a) letting go of the rope is more like abortion than prenatal injury; (b) legal punishment rarely if ever involves assault, at least in the Western world; and (c) the legal punishment in this case would be for actually letting go, not for thinking about it.

From this it may be seen that Flanigan's sixth argument, like the previous five, does not get her where she wants to go. In fact, once we start to iron out the analogies, we can see that there is a strong case for the claim that people who take on dependents do forfeit rights by doing so, exactly the opposite of what Flanigan wants and needs to establish, for this shows why there is no right to prenatal injury.

## **2.7 The Act/Malice Argument**

Flanigan's seventh and final argument is that, if a person is legally allowed to X, then she is legally allowed to X for selfish reasons:

A final consideration against the permissibility of prenatal injury is that some cases of prenatal injury display a kind of malice or selfish disregard for a child's life and that it is impermissible to act on malicious or selfish reasons. As I am using the term, permissibility refers to acts which are within a woman's rights. If a person has a right to do something she has a right to do it out of malice or selfishness too.<sup>39</sup>

The key premise in Flanigan's argument is: if a person has a right to X, then she has a right to X from malice. However, there are two very different ways of filling in the details of this argument.

On one way of reading Flanigan's seventh argument, she is saying that, if there is a right to commit prenatal injury, then there is a right to commit prenatal injury from malice. But, Flanigan's goal is to show that there is a right to commit prenatal injury, not that there is a right to commit prenatal injury from malice. So, this reading of the seventh argument makes it question-begging.

On the second way of reading Flanigan's seventh argument, she is saying that, if, for example, a woman has the right to smoke during pregnancy, then she has a right to smoke from malice during pregnancy. Exercising the former right might cause harm inadvertently if, say, the gravida was unaware that smoking could harm her fetus and she had no easy way to find this out. This would not constitute prenatal injury (the injury is neither intentional nor negligent), so, the assertion of such a right is not question-begging. But, if we then accept the key premise in

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<sup>39</sup> (Flanigan, 2020, p. 12)

Flanigan's argument (namely: if there is a right to X, then there is a right to X from malice), then we seem to get the conclusion that there is a right to commit prenatal injury, for, we have granted that the gravida has a right to smoke, and, if the gravida smokes from malice, with the express intention of harming her fetus, then she is committing prenatal injury.

To see the problem with this second line of reasoning, consider that it is within my rights for me to raise my fist in front of me, even if, in so doing, I inadvertently and purely by accident clip someone in the chin. But, then the argument in the previous paragraph suggests that I have a right to raise my fist in this way with malice aforethought—or, in other words, to punch people whenever I like. This, of course, is absurd, whence it may be seen that this second line of reasoning does not withstand critical scrutiny.

The precise nature of the error in this second reading of Flanigan's argument can be explained in different ways. Some might prefer to reject the conditional premise, the premise that says that, if a person has a right to X, then she has a right to X from malice. Others might argue that smoking that inadvertently causes harm to a fetus, like raising a fist that inadvertently collides with someone's face, is not the same action, at least legally if not metaphysically, as smoking with the intention of causing harm to a fetus, or punching someone in the face. (That is, they might accept the conditional premise but argue that the X is not the same when comparing prenatal injury with prenatal harm which, *ex hypothesi*, is not prenatal injury.) For present purposes, however, I do not need to settle this. The point is merely that the foregoing reasoning shows not merely that Flanigan has failed in her attempt to establish a right to commit prenatal injury, but, more, that there is at least a presumptive case against any such right.

## **Conclusion**

In this article, I have given an in depth response to Flanigan's recent attempt to ground the right to commit prenatal injury. I began with Flanigan's attempt to show that prenatal injury is praiseworthy and not criticizable. I showed that Flanigan's arguments do not withstand critical scrutiny. I then turned to Flanigan's arguments for the right to commit prenatal injury. I showed that these arguments also fail to withstand critical scrutiny. Along the way, I offered presumptive grounds against any such right, and I offered a means for distinguishing prenatal injury from other, less pernicious forms of prenatal harm.

## Bibliography

- Barnes, Elizabeth. 2014. "Valuing Disability, Causing Disability." *Ethics*, Vol. 125, No. 1: 88-113.
- Boonin, David. 2002. *A Defense of Abortion*. Cambridge University Press.
- Branum, Amy and Ahrens, Katherin. 2017. "Trends in Timing of Pregnancy Awareness Among US Women." *Maternal Child Health Journal*, Vol. 21, No. 4: 715-726.
- Flanigan, Jessica. 2020. "The Ethics of Prenatal Injury." *Journal of Moral Philosophy*: 1-23.
- Kahn, Samuel. forthcoming. "An Identity Crisis in Philosophy." *Argumenta*.
- Kennedy, Mary K. 1991 "Maternal Liability for Prenatal Injury Arising from Substance Abuse during Pregnancy." *Duquesne Law Review*, Vol. 29, No. 3: 553-578. <https://dsc.duq.edu/dlr/vol29/iss3/5>
- Little, Margaret. 1999. "Abortion, Intimacy, and the Duty to Gestate." *Ethical Theory and Moral Practice*, Vol. 2, No. 3: 295-312.
- McIntyre, Alison. 2023. "Doctrine of Double Effect." *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/fall2023/entries/double-effect/>>.
- Parfit, Derek. 1986. *Reasons and Persons*. Oxford University Press.
- Savulescu, Julian. 2007. "Future People, Involuntary Medical Treatment in Pregnancy and the Duty of Easy Rescue." *Utilitas*, Vol. 19, No. 1: 1-20.
- Snyder, Jeremy C. 2008. "Needs Exploitation." *Ethical Theory and Moral Practice*, Vol. 11, No. 4: 389-405.
- Snyder, Jeremy. 2013. "Disregard and Dependency." *Business Ethics Journal Review*, Vol. 1, Issue 13: 82-85.
- Thomson, Judith Jarvis. 1971. "A Defense of Abortion." *Philosophy and Public Affairs*: 47-66.
- Woollard, Fiona. 2013. "If This Is My Body..." *Pacific Philosophical Quarterly*, Vol. 94, No. 3: 315-341. <https://doi.org/10.1111/papq.12002>.
- Woollard, Fiona and Howard-Snyder, Frances. 2022. "Doing vs. Allowing Harm." *The Stanford Encyclopedia of Philosophy* (Winter 2022 Edition), Edward N. Zalta & Uri Nodelman (eds.), URL = <<https://plato.stanford.edu/archives/win2022/entries/doing-allowing/>>.