

This article has been accepted for publication in the *Journal of Medical Ethics* following peer review, and the Version of Record can be accessed online at <http://dx.doi.org/10.1136/jme-2022-108813>.

WHY THERE IS NO DILEMMA FOR THE BIRTH STRATEGY: A RESPONSE TO BOBIER AND OMELIANCHUK

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ABSTRACT

Christopher A. Bobier and Adam Omelianchuk argue that the Birth Strategy for addressing analogies between abortion and infanticide is saddled with a dilemma. It must be accepted that non-therapeutic late-term abortions are either, impermissible, or they are not. If accepted, then the Birth Strategy is undermined. If not, then the highly unintuitive claim that non-therapeutic late-term abortions are permissible must be accepted. I argue that the moral principle employed to defend the claim that non-therapeutic late-term abortions are morally impermissible fails to do so. Furthermore, the principle that people have a right to bodily autonomy can be used in an argument for the conclusion that non-therapeutic late-term abortions are permissible and is intuitively stronger than the intuition for the opposite of this conclusion. This is because people having a right to bodily autonomy explains the impermissibility of rape and sexual assault. Consequently, the posited dilemma is defused and does not undermine the Birth Strategy.

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Christopher A. Bobier and Adam Omelianchuk argue that the Birth Strategy,[1] which is the strategy of addressing certain analogies between abortion and infanticide by appealing to the moral significance of birth, is saddled with a dilemma. They argue, that if birth creates a morally meaningful change that explains why infanticide is impermissible despite newborns resembling late-term fetuses, then proponents of the Birth Strategy must accept either, that non-therapeutic

late-term abortions are impermissible, or not. Judging that late-term non-therapeutic abortions are impermissible undermines the Birth Strategy because birth is supposed to differentiate the moral status of infanticide and the moral status of abortion. But judging non-therapeutic late-term abortions to be permissible is highly unintuitive. So, either the Birth Strategy is undermined or the permissibility of non-therapeutic late-term abortions, which is highly unintuitive, must be accepted.

I argue that the moral principle Bobier and Omelianchuk employ to defend the claim that non-therapeutic late-term abortions are morally impermissible does not show such abortions to be morally impermissible. I explain that fetuses in unwanted pregnancies are not non-threatening. Consequently, Bobier and Omelianchuk's principle does not apply to abortion of unwanted pregnancies, including non-therapeutic late-term abortions. Therefore, the dilemma is defused and there is no problem with the Birth Strategy as a method of addressing analogies between abortion and infanticide.

Bobier and Omelianchuk defend the claim that non-therapeutic late-term abortions are impermissible with an appeal to the moral principle "that it is morally impermissible to deprive a non-threatening human being of a foundational human good-like life, a good on which all other human goods are based, without sufficient reason".[1] Based on this principle, they claim the judgment that non-therapeutic late-term abortions are impermissible is stronger than any principles that could be used as premises in arguments for the opposite conclusion, and that if proponents of the Birth Strategy are to defend themselves, they need to better explain why non-therapeutic late-term abortions are not impermissible.

However, this moral principle is not applicable to all cases of abortion. This is because fetuses in unwanted pregnancies are not non-threatening. Risk to a person's health or survival is not the only way a person can be threatened. A person can also be threatened by the possibility of having their bodies used against their will. Fetuses in unwanted pregnancy use pregnant people's bodies against their will by occupying them. Because of this, fetuses are not non-threatening. Because fetuses are not non-threatening, non-therapeutic late-term abortions do not violate Bobier and Omelianchuk's principle because such abortions do not deprive a non-threatening human being of a foundational human good-like life without sufficient reason.

Consider an analogy with rape and sexual assault. A rapist uses a victim's body without consent. The rapist in this case is a threat to the victim, and what makes this is the case is precisely that they use another's body against their will. Analogously, a fetus in an unwanted pregnancy is a threat to the pregnant person because it continues to use and occupy the pregnant person's body against their will. Just as a person's will determines the difference between rape and not, the pregnant person's will determines whether the fetus is intruding on their body. To use another analogy, the difference between a guest and a trespasser is determined by the will of the host. If a host does not want or no longer wants someone in their home or on their property, that person becomes a trespasser. Trespassers are worse than threatening because they in fact intrude on someone or their property. Their trespassing is the realization of a threat. Similarly, fetuses in unwanted pregnancies intrude on someone's body. So, fetuses in unwanted pregnancies, like trespassers, intrude on someone's body, and so are worse than threatening as they are the realization of the threat of having one's body used against their will.

Voluntary abortions involve unwanted pregnancy, for it is because the particular pregnancy is unwanted that its termination is sought. It could be objected that not all voluntary abortions are terminations of unwanted pregnancies. People may find themselves in circumstances where they abort reluctantly. It is possible that a person may not wish to have an abortion because they wish to continue a pregnancy, give birth, and have a child, but must abort for some reason, such as the discovery of some life-threatening complication in pregnancy or lack of viability. However, this would still count as an unwanted pregnancy because, while the person may want in general to go through with a pregnancy, they would not want to go through with this particular pregnancy given the risks and dangers it poses. While they may regret having to abort, such regret would concern their general interest in going through with pregnancy rather than a specific interest with going through with this particular pregnancy that poses risk to them.

If a fetus is understood as a human being that can potentially have a foundational human good-like life, and fetuses in unwanted pregnancies threaten a person by continuing to use and occupy a pregnant person's body against their will, fetuses in unwanted pregnancies are not non-threatening. In any case where a non-therapeutic late-term abortion is sought, if that pregnancy is unwanted, then the fetus in that pregnancy is not non-threatening. Thus, any case in which a non-therapeutic late-term abortion would be sought would also be a case of unwanted pregnancy. Therefore, non-therapeutic late-term abortions are not morally impermissible because they do not deprive a non-threatening human being of a foundational human good-like life.

The justification for the moral impermissibility of non-therapeutic late-term abortions is lacking because the moral principle posited does not apply in cases of abortion of unwanted pregnancies, including non-therapeutic late-term abortions of unwanted pregnancies. Still, while the impermissibility of non-therapeutic late-term abortions lacks justification, there may yet be a need for positive argument in support of this claim. If people have a right to bodily autonomy, then non-therapeutic late-term abortions are permissible. This is because, as mentioned, people's will over whether and how their bodies are used is morally determinate. This is because people have a right to bodily autonomy, which is the right to govern whether and how their bodies are used and what sorts of procedures they go through. This includes authority not only over whether their body continues to be occupied, such as by a fetus, but also whether they go through induced birth or caesarean section. This is because both induced birth and caesarean section make use of one's body in significant ways.[2] If people have a right to bodily autonomy, people have the authority to choose whether to undergo childbirth. Even in the later stages of pregnancy, pregnant people have a right to bodily autonomy that includes authority over whether to undergo childbirth. If a non-therapeutic late-term abortion would avoid having to undergo childbirth, it is within the pregnant person's rights to have, and so is permissible.

This argument is based on Judith Jarvis Thomson's argument for the permissibility of abortion. A slight difference between Thomson's argument and the one I present is that I focus on what is included in a right to bodily autonomy while Thomson focuses on what is not included in a right to life. Thomson takes a right to life to be a negative right to not be unjustly killed rather than a positive right to be preserved and provided for. Thomson argued that, even if we assume fetuses are persons and have a right to life, abortion is still permissible because the combination

of a fetus's right to life and need to occupy another's body does not entail a right to do so. Depriving a fetus continued use of another's body does not deprive it of anything it is entitled to by way of having a right to life.[3] Importantly, this applies to cases of late-term abortion as well. Thomson herself suggested that late-term abortion would not be permissible, but this is in tension with the core reasoning of her argument. Thomson states, "...while I do argue that abortion is not impermissible, I do not argue that it is always permissible." [3] Thomson goes on saying, "...a sick and desperately frightened fourteen-year-old schoolgirl, pregnant due to rape, may of course choose abortion", and, "It would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month [of pregnancy], and wants the abortion just to avoid the nuisance of postponing a trip abroad." [3] However, if what makes abortion permissible is that a fetus's supposed right to life does not entail a right to occupy another's body or have them surrender their right to bodily autonomy, then the stage of pregnancy is irrelevant. Following Thomson's reasoning, and in contrast to her comments about late-term abortion, there is nothing special about a late-term fetus that would make late-term abortions morally different from other abortions. Because the reason for the permissibility of abortion applies in all cases of abortion, including late-term abortion, late-term abortions are not impermissible.

Contra to Bobier and Omelianchuk's claim, it is not the case that the judgement that non-therapeutic late-term abortions are impermissible is stronger than any principle used an argument for the opposite conclusion. The principle that people have a right to bodily autonomy is stronger because it explains the impermissibility of rape and sexual assault. If we accept that rape and sexual assault are wrong, then we must accept that people have a right to bodily autonomy that is the right to govern whether and how their bodies are used. A fetus in the later stages of pregnancy uses and

occupies a person's body. If that person has a right to bodily autonomy and decides they do not wish for their body to be occupied or go through childbirth, then it is permissible for them to have an abortion, including a non-therapeutic late-term abortion. Denying this entails denying that people have a right to refuse having their bodies used against their will, including the right to refuse being used sexually. But it is obviously true that rape and sexual assault are impermissible. So, it is not the case that non-therapeutic late-term abortions are impermissible. Therefore, Bobier and Omelianchuk's dilemma for the Birth Strategy is undercut.

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