

A Defense of "A Defense of Abortion": On the Responsibility Objection to Thomson's Argument*

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In her 1971 article, "A Defense of Abortion," Judith Jarvis Thomson defended the following thesis: the impermissibility of abortion does not follow from the premises that every fetus is a person and that every person has a right to life. Her principal argument in support of this thesis turned on the claim that cases of a woman carrying a pregnancy to term should be subsumed under the broader category of Good Samaritanism. From the moral point of view, that is, a woman who carries a pregnancy to term is like a person who generously offers, at some considerable cost to herself, to provide what another needs but does not have the right to, while a woman who terminates a pregnancy is like a person who declines to offer such assistance. It is not the case that abortion violates the requirements of morality, therefore, but rather that continuing to incur the burdens involved in pregnancy goes beyond them. And her principal argument in support of this claim in turn rested on your sharing her response to a now (in)famous example:

You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's

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circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist is now plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment, and can safely be unplugged from you."¹

Thomson takes it that you will not think it impermissible for you to refuse to remain plugged into the violinist and that this will motivate you to conclude that the violinist's right to life does not include the right to your continued support of his life. But if this is so, then the fetus's right to life does not include the right to the continued support of the woman who is carrying it. If your unplugging yourself from the violinist is not a violation of his right to life, then a woman's aborting a fetus is not a violation of its right to life. Or that, at any rate, is the argument.

Since Thomson's argument turns crucially on the analogy between a woman's being pregnant and your being plugged into the famous violinist, her critics are left with essentially three lines of response: they can attempt to identify a morally relevant disanalogy between the two cases, they can embrace the conclusion that it would be impermissible for you to unplug yourself from the violinist, or they can reject the authority of such arguments from analogy. I will assume for the purposes of this paper that you accept the legitimacy of arguing from cases of the sort which Thomson exploits and that you agree that it would be morally permissible for you to unplug yourself from the violinist. The question, then, is whether there is a morally relevant disanalogy between the two cases. Numerous objections of this sort have been proposed in the literature, but I want here to focus on one such objection in particular, and surely the most common: the claim that even if Thomson's analogy is successful in every other respect, her argument can establish only that abortion is permissible in cases involving rape.² Your being plugged into the violinist against your

1. Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1 (1971): 47–66, reprinted in *Arguing about Abortion*, ed. Lewis M. Schwartz (Belmont, Mass.: Wadsworth, 1993), pp. 113–27, p. 114. All references to Thomson are to the pagination in the Schwartz edition.

2. The objection is ubiquitous in the literature. In addition to the proponents of the objection cited below, see also, e.g., Robert N. Wennberg, *Life in the Balance: Exploring the Abortion Controversy* (Grand Rapids, Mich.: Eerdmans, 1985), pp. 160–62; John T. Wilcox, "Nature as Demonic in Thomson's Defense of Abortion," in *The Ethics of Abortion: Pro-Life vs. Pro-Choice*, rev. ed., ed. Robert M. Baird and Stuart E. Rosenbaum (Buffalo, N.Y.: Prometheus, 1993), pp. 212–25, pp. 216 ff.; Mary Anne Warren, "On

will is like a woman's being impregnated against her will, it is conceded, but it is not like a woman's becoming pregnant as a result of consensual intercourse. As with the case of you and the violinist, the rape victim cannot be held responsible for the well-being of the fetus because she did not choose to be raped, but the woman who is not raped can and should be held responsible for the well-being of the fetus because she engaged in intercourse voluntarily. Call this the Responsibility Objection.

The Responsibility Objection can be developed in two importantly distinct ways, although the distinction is often overlooked in cursory rebuttals to Thomson which take the force of the objection to be virtually self-evident. On one version, the claim is that because the woman's pregnancy is the result of a voluntary action, she should be understood as having tacitly waived her right to expel the fetus or (what amounts to the same thing) as having tacitly granted the fetus a right to stay. This version, which I will call the Tacit Consent Version, agrees with Thomson that the fetus cannot have a right to the use of the woman's body unless the woman consents to give it such a right, but claims that (in nonrape cases) there is good reason to conclude that the woman has in fact so consented. The alternative version of the Responsibility Objection denies that consent, even tacit consent, is necessary in order for the voluntariness of the woman's intercourse to deprive the woman of her right to refuse to aid the fetus. On this version, which I will call the Negligence Version, the woman is like a person who is partly responsible for an accident which leaves an innocent bystander in need of her assistance (the bystander will die, e.g., unless he receives a series of physically demanding blood transfusions from her over the next nine months).³ One need not argue that by running the risk of causing such an accident the woman has tacitly consented to give such bystanders the use of her body in order to believe that she has nonetheless acquired a duty to save them which she would not have acquired if, say, someone else had been (partly) responsible for the accident. On either version, Thomson's argument

the Moral and Legal Status of Abortion," in Schwartz, ed., pp. 227-42, p. 232; Paul D. Feinberg, "The Morality of Abortion," in *Thou Shalt Not Kill: The Christian Case against Abortion*, ed. Richard L. Ganz (New Rochelle, N.Y.: Arlington House, 1978), pp. 127-49, p. 143; Judith A. Boss, *The Birth Lottery: Prenatal Diagnosis and Selective Abortion* (Chicago: Loyola University Press, 1993), p. 102; Alan Donagan, *The Theory of Morality* (Chicago: University of Chicago Press, 1977), pp. 169-70.

3. The example of the particular burden involved comes from L. S. Carrier, "Abortion and the Right to Life," *Social Theory and Practice* 3 (1975): 381-401, pp. 398-99, though very similar examples can be found in a number of other writers who press this objection.

fails to apply to cases in which the woman is (partly) responsible for the fact that she is pregnant.⁴

The claim that when a woman is partially responsible for her pregnancy the fetus has acquired the right to the use of her body seems to many people to be a devastating objection to Thomson's argument, and, although Thomson anticipates the objection, she does not provide a satisfactory reply. She responds by suggesting that a woman who becomes pregnant because of contraceptive failure cannot reasonably be thought of as being responsible for the pregnancy,⁵ but this reply is unsatisfactory for at least two reasons. First, and perhaps most obviously, even if one concedes to Thomson the case of contraceptive failure, the response itself seems to concede that a woman who fails to use contraception in the first place can be held responsible for her unwanted pregnancy and can thus be understood as having given

4. The Responsibility Objection is also at times given an indirect defense by appealing to the claim that if the objection is rejected, then there is no way to account for the presumed legitimacy of those laws which require men to pay child support to defray the costs of raising children conceived as a result of their having engaged in intercourse voluntarily. As one such critic has put it, "If such a minimal life-sustaining sacrifice [i.e., sustaining a pregnancy through to term] cannot be required of the mother before birth, how could even minimal child support be required of the father after birth?" (Keith J. Pavlischek, "Abortion Logic and Paternal Responsibility: One More Look at Judith Thomson's 'A Defense of Abortion,'" *Public Affairs Quarterly* 7 [1993]: 341–61, p. 348). This strategy merits a more detailed examination than I can give it here, but it should suffice for my present purposes to note that the nature of the burdens involved in the two cases is fundamentally different. The woman is required to suffer a distinctly intimate and physical burden while the man is required only to hand over some money. Of course, it might be pointed out that in order for the man to raise the necessary money he may also have to suffer a significant degree of physical pain and discomfort. As another such critic has pointed out, "If the father is a construction worker, the state will intervene unless some of the calories he expends lifting equipment go to providing food for his children" (Michael Levin, quoted in Francis J. Beckwith, "Arguments from the Bodily Rights: A Critical Analysis," in *The Abortion Controversy*, ed. Louis P. Pojman and Francis J. Beckwith [Boston: Lones & Bartlett, 1994], pp. 155–75, p. 164). But surely it does not follow from the fact that one can choose to earn one's money doing painful physical labor and then be required to make a financial sacrifice for a given cause that one can also be required to do a comparable amount of painful physical labor on behalf of that cause. If the state determined that it would be in the public interest to build a new highway, e.g., it would hardly follow from the claim that it would be morally permissible for the state to take some of the construction worker's income to help pay for the highway that it would also be morally permissible for the state to force the construction worker to help to build the highway. As a result of this difference in the nature of the burdens involved, an opponent of the Responsibility Objection to Thomson's argument need not be an opponent of child-support laws.

5. She is not completely explicit about this, but this is plainly the point of her examples of bars or screens failing to prevent unwanted burglars or people-seeds from getting in through a window (Thomson, p. 121).

the fetus a right to the use of her body. A significant number of unwanted pregnancies arise in cases where contraception is not used, and the result would then be that, so far as Thomson's argument is concerned, it is impermissible for these women to have abortions.

Second, and more important, it can plausibly be argued that, since contraceptive devices are known to be imperfect, a woman who has intercourse using one is responsible for the results since she knowingly and voluntarily runs the risk of becoming pregnant. Hunters, after all, can still acquire a duty to provide blood to an innocent bystander they have accidentally shot, even if they took every reasonable precaution to avoid this result short of not going hunting in the first place. So if Thomson cannot defend abortion in the case where contraception is not used, then she may well be unable to defend it even in the case where it is used, and if that is so then her defense of abortion will really be only a defense of abortion in cases of rape. And since only a very small fraction of abortions involve pregnancies arising from rape, and since a significant portion of those who generally oppose abortion are willing to make an exception in such cases anyhow, it will turn out that, if the Responsibility Objection is not defeated, Thomson's argument will prove a greater contribution to critics of abortion than to its defenders. In this sense, the Responsibility Objection is the most important of all of the many objections which have been aimed at her argument. I will argue in what follows, however, that neither version of the Responsibility Objection should be accepted and that if Thomson's argument succeeds in cases involving rape, then it succeeds in nonrape cases as well.

THE TACIT CONSENT VERSION

I will begin with the Tacit Consent Version, which seems to be the more common version of the Responsibility Objection and which, indeed, is often pressed even by those of Thomson's readers who are generally sympathetic with her conclusions. As one such writer has put it, "The fetus *does* have a right to use the pregnant woman's body [in nonrape cases] because she is (partly) responsible for its existence. By engaging in intercourse, knowing that this may result in the creation of a person inside her body, she implicitly gives the resulting person a right to remain."⁶ The Tacit Consent Version turns on two claims: (1) that because the woman's act of intercourse is voluntary, she should be understood as having tacitly consented to something with respect to the state of affairs in which there is now a fetus developing inside of her body, and (2) that what she should be understood as having tacitly

6. Bonnie Steinbock, *Life before Birth: The Moral and Legal Status of Embryos and Fetuses* (Oxford: Oxford University Press, 1992), p. 78.

consented to with respect to this state of affairs is, in particular, the fetus's having a right to have the state of affairs continue for as long as this is necessary for it to remain alive. Both claims should be rejected.

Let me begin with claim 1, the claim that the fact that the woman's act of intercourse is voluntary counts as evidence of her having tacitly consented to something with respect to the resulting state of affairs. There is surely something plausible sounding about this, since if the notion of tacit consent is to make sense at all it must arise from voluntary rather than involuntary actions, but I want to suggest that it rests on a confusion between a person's (a) voluntarily bringing about a state of affairs S and (b) voluntarily doing an action A foreseeing that this may lead to a state of affairs S. My claim is that only *a* is a plausible candidate for grounding tacit consent in the relation between an agent and a state of affairs she is (or is partly) responsible for having brought about, and that any attempt to apply tacit consent to nonrape cases of pregnancy must appeal to *b*.⁷ If this is right, then we have no grounds for concluding that the woman who has intercourse without contraception has tacitly consented to anything with respect to the state of affairs in which a fetus is now developing inside her body.

To see this, let us first consider what one would have to believe in order to affirm the claim that when a woman has voluntary intercourse without contraception and becomes pregnant as a result, she has tacitly consented to give the fetus a right to stay. In general terms, we could begin by saying that P has done a voluntary act A which caused the state of affairs S to exist, where S is the state of affairs in which Q is now infringing on P's right to X.⁸ We want to know what conditions would be sufficient to make it be the case that P has tacitly consented to give Q the right to continue doing this. We could say that it is sufficient that A be voluntary and that A cause S. But this would imply that P consented to S even if P had no knowledge that A could lead to S. And this would amount to saying that if a woman has intercourse without contraception and does not understand that intercourse can lead to conception, then she has tacitly consented to carry the fetus to term. Since this is plainly unacceptable, we must at least add the requirement that A cause S in a manner that is foreseeable to P.

Let us assume that these three criteria—voluntariness, causality, and foreseeability—are necessary in order to avoid unacceptable impli-

7. For two possible exceptions to this claim, see n. 10 below.


8. This formulation might seem to beg the question, since if we conclude that the voluntariness of P's doing A counts as evidence of P's having consented to S, then it won't be the case that S involves Q's infringing on some right of P's. Strictly speaking, then, we should say that S is the state of affairs in which Q is doing something that infringes on P's right to X unless P does or has done something to grant Q the right to do this.

cations.⁹ It seems correct that all three are satisfied in the case where a woman's pregnancy arises from voluntary intercourse: her action was voluntary, was the proximate cause of the pregnancy which now infringes on her right to control her body, and was the cause of this state of affairs in a manner that was foreseeable to her (assuming that she understood that intercourse can lead to pregnancy). But all of this will show that a woman who engages in intercourse without contraception has tacitly consented to something with respect to the resulting state of affairs only if these conditions are not merely necessary, but sufficient. And the claim that these conditions are sufficient for having consented is implausible. Now, of course, one could argue against the claim that these conditions are sufficient for consent by arguing that no conditions short of explicit consent are sufficient. But since I want to identify a feature of this position that should be unacceptable even to those who embrace the general notion of tacit consent, I want to assume that tacit consent in and of itself is a perfectly reasonable doctrine and to argue by means of an example that puts this assumption in a favorable light. So let us focus on a relatively uncontroversial instance of tacit consent: if you voluntarily leave some money on the table in a restaurant as you are leaving after your meal is over, then you have tacitly waived your right to it and have consented to allow the waiter to have it. You have made no explicit announcement that you intend to relinquish control of the money, of course, and have said nothing explicit which would indicate that you wish the money to go to the waiter rather than the chef or the busboy or the owner, but it nonetheless seems reasonable to maintain that your action amounts to a tacit declaration of just this sort. And surely it is the voluntariness of your act that makes this assessment reasonable, since if you had instead left the money on the table because you had been forced to do so by a knife-wielding assailant, we would not be inclined to say that you had tacitly consented to anything about it.

But now consider the cases of Bill and Ted, each of whom has recently voluntarily exited a restaurant having voluntarily placed some money on the table at which he was dining alone. In Bill's case, the state of affairs in which he is no longer in the restaurant and some of his money is on the table is a state of affairs he voluntarily brought about: after he finished eating, he stood up, took some money out of his wallet, placed it on the table, and walked out the door. In Ted's case, the state of affairs is not one which he voluntarily brought about, but rather one which foreseeably arose from a voluntary action of his.

9. These requirements are typically acknowledged and defended by those who defend the Tacit Consent Version of the objection. See, e.g., Richard Langer, "Abortion and the Right to Privacy," *Journal of Social Philosophy* 23 (1992): 23-51.

As Ted sat down to eat, he discovered that the crumpled wad of dollar bills in his pants pocket made him uncomfortable, so he put them down on the table while he was eating, intending to put them back in his pocket when it was time to leave. A friend who was leaving the restaurant when Ted sat down saw this and warned Ted not to put the money there on the grounds that he might forget about it, but Ted foolishly refused, and when the friend urged that he at least tie a piece of string around his finger to remind himself to put the money back in his pocket before leaving, Ted declined, saying that he didn't like the way having a piece of string tied around his finger "made him feel" while he was trying to enjoy a meal. Unfortunately, Ted was so lost in the rapture of his meal that he did indeed forget to put the money back in his pocket, and about ten minutes after he left the restaurant, he suddenly realized his mistake and headed back to clear things up.

Now clearly Ted has no one to blame but himself. It isn't as if someone else forcibly removed the money from his pocket and put it on the table. Still, it is surely unacceptable to say that by putting the money on the table when he sat down Ted tacitly agreed to let the waiter keep it if as a foreseeable consequence of this act the money was still on the table when he left. Yet if the three conditions identified as necessary conditions for consent are also taken to be sufficient, there can be no way to account for the distinction between the cases of Bill and Ted. In Ted's case, just as in Bill's, all three criteria for waiving one's rights are satisfied: Ted's putting his money on the table without tying a piece of string on his finger was voluntary, was the proximate cause of his leaving the money in the restaurant, which in turn was a foreseeable (even if unintended) consequence of his act. These three criteria cannot distinguish between the cases of Bill and Ted precisely because they overlook the distinction between *a* and *b* noted above. The cases are different because Bill voluntarily brings about the state of affairs in which he has left the restaurant with his money still on the table, while Ted does not. Ted voluntarily puts the money on the table foreseeing that this may result in the state of affairs in which he has left it in the restaurant. And the lesson of this is that **even if deliberately creating a state of affairs counts as consenting to the burdens it imposes on you (as in the case of Bill), it does not follow that being partly responsible for that state of affairs counts as such consent (as in the case of Ted).** 

This analysis has the following implications for the application of tacit consent theory to cases of voluntary intercourse.¹⁰ A woman who

10. It might be objected that very little, if anything, about cases of voluntary intercourse follows from my analysis of the sufficient conditions for consent on the grounds

is merely (partly) responsible for her unwanted pregnancy has not voluntarily brought about the state of affairs in which the fetus is making demands on her body. She has voluntarily brought about the state of affairs in which a man is having sexual intercourse with her, foreseeing that this might bring about the further state of affairs. In this respect, she is like Ted rather than Bill. And since Ted's relation to the unwanted state of affairs he has produced is not sufficient to warrant the claim that he has consented to it, the same is true of her. We cannot justifiably insist that she has tacitly consented to waive the right to the control of her body. Suppose that once she discovers that

that the analysis itself arises from a relatively trivial example. Relatively little is at stake in the question of who has the right to the use of (what was at least initially) Ted's money, but a great deal is at stake in the question of who has the right to the use of the pregnant woman's body. So one might well think that even if Ted has the right to take the money back from the waiter, it does not follow that the woman has the right to take the use of her body back from the fetus, and that attending to the example of tipping can thus do little to illuminate the moral problem of abortion. I certainly agree that the woman's right to abort the fetus does not follow from Ted's right to reclaim his money. There may be any number of important differences between the two cases. But viewing this as a problem for my analysis misconstrues the purpose of the example. I am not arguing that the woman has a right to abort the fetus because she has not consented to refrain from doing so. Rather, I am responding to an argument which claims that she lacks the right to abort the fetus because she has consented to refrain from doing so. That argument turns on the claim that the voluntariness of the action which produced the state of affairs justifies the attribution of consent, not on the claim that she is obligated to sustain the fetus because its very life is at stake. And the example of Bill and Ted demonstrates that this claim about consent is untenable. It may be worth noting, however, that the importance of the distinction between *a* and *b* which I have been arguing for would be revealed even if we focused on less straightforward and more controversial examples of consent. Suppose one believed, e.g., that if you take off your coat and put it in the arms of a homeless person who needs the coat in order to survive the winter, then you have tacitly consented to let him keep the coat for as long as he needs it. It might be thought that in some respects this is more representative of what is at stake in cases of abortion. Still, this would not support the conclusion that if you take your coat off on a windy day because you want to experience the pleasure of a chilling breeze against your bare skin, then you must let the homeless person keep it if, as a foreseeable (but unintended and undesired) consequence of your action, the coat is blown into his arms. Again, there may be good reason to believe that you would be obligated to let the homeless person keep the coat at that point, but the reason cannot plausibly be grounded in the claim that you have consented to let him keep it, and that is the claim I am concerned to address in this section. I have avoided appealing to such cases (you let someone into your house because it is cold outside, etc.) in developing my argument for the importance of the distinction between *a* and *b* because it is less clear that people will agree that you have consented to let the person keep the coat (or stay in your house) for as long as he needs to even in the case where you deliberately hand it to him (or let him in; perhaps you only mean to let him use the coat until you are ready to go home or to remain in your home until you are ready to go to bed), and I want to work from a case that puts the tacit consent claim itself in the most favorable possible light.

she is pregnant she endeavors to have the pregnancy terminated. Then she is like Ted when he returns to the restaurant to retrieve his money after he discovers that he has (foreseeably, but not deliberately) left it on the table. It seems clear that in Ted's case we must take this to mean that he has not agreed to waive his right to the control over the money. Similarly, we must take this to mean that she did not give and has not given the fetus a right to the use of her body. The mere fact that her pregnancy resulted from voluntary intercourse for which she is responsible, then, cannot be reasonably understood as evidence that she has consented to anything with respect to the fetus.¹¹

Let me make one further point about the distinction between voluntarily creating a particular state of affairs and voluntarily acting with the foresight that a particular state of affairs may result: its importance is revealed by seeing what happens when it is ignored, and it is ignored in an analogy often offered by proponents of the Responsibility Objection. Langer, for example, motivates his defense of the objection with the following example:

Imagine a person who freely chooses to join the Society of Music Lovers, knowing that there was a 1 in 100 chance of being plugged into the violinist if she joins the society. She certainly

11. Two exceptions might be urged here. One is the case of a woman who freely chooses to have an embryo implanted in her. This does seem to be a case in which she voluntarily brings about the state of affairs in which there is a fetus making demands on her body, rather than one in which she merely foresees that her action may lead to this state of affairs. It thus seems plausible to think of it as a genuine case in which, if one believes in tacit consent, one will have good grounds for thinking that consent has been given. The other is what might be called the case of intentional conception, one in which the woman deliberately refrained from using contraception because she wanted to become pregnant. She does seem to do more than merely foresee that the subsequent state of affairs may arise, and so it can again seem plausible to suppose that in this case she has consented to it. Each sort of exception seems plausible, but each raises difficulties. In the case of the embryo implant, we would need to be careful about specifying the content of the rights waiver that was consented to; as Sara Worley has pointed out to me, it may seem implausible to suppose that a woman who consents to have multiple embryos implanted in her as a part of infertility treatment should be understood as waiving the right later to remove one in order to improve the prospects of survival for the others. And as Marcia Baron has noted, such a woman might also be understood as tacitly agreeing only to bear at least one child by virtue of such a procedure without having agreed to bear all of them. In the case of the intentional conception, on the other hand, there is a sense in which it does not seem right to say that, strictly speaking, the woman intentionally becomes pregnant. She does what she hopes will lead to pregnancy, but there are many factors beyond her control which may lead one to conclude that the pregnancy should not be understood as a state of affairs that she voluntarily creates. I will leave the question about how to treat both cases open, and thus accept the possibility that my argument against the Tacit Consent Version does not apply in either or both of these cases. Since abortions arising from such cases are relatively rare, however, this is at most a very small concession.

does not desire to be plugged into the violinist, but at the same time she desires to join the society, and feels the one in one hundred odds are an acceptable risk. She goes ahead and joins, and much to her chagrin, her name is selected as the person to be plugged into the violinist. Is it unreasonable to say that she has waived her right to control over her own body? I think not.¹²

On this account, the woman who risks an unwanted pregnancy by voluntarily engaging in intercourse is like the woman who risks being plugged into the violinist by voluntarily joining the Society of Music Lovers. And since the second woman clearly waives the right to control of her body, so does the first.

The problem with the analogy is this. Langer says that the second woman "freely chooses to *join*" the society, and this sounds as if it means that her voluntary action just is the action of agreeing to abide by the society's rules. And since the society's rules include entering every member in a lottery to decide who will be plugged into the violinist, it follows that her act is the act of agreeing to be entered into the lottery, from which it of course follows that if her name is called she must be understood as having waived her right to control her body. This is because her voluntary action just *is* the act of entering the lottery, rather than an action with the foreseeable consequence that others will treat her as if she had. In order for the two cases to be parallel, then, we must assume that the first woman has similarly agreed to enter her name in a comparable pregnancy lottery by virtue of her having engaged in voluntary intercourse. But we cannot assume that she has so agreed because whether she has is precisely the question we are attempting to answer.¹³

The problem with the analogy becomes more apparent, I think, if we set it straight by simply having the second woman freely choose to do some action foreseeing that it may lead to the society's taking her and plugging her into the violinist as the woman foresees that her voluntary intercourse without contraception may lead to pregnancy. So suppose instead that you are this woman, and that the society was known to have hired kidnappers who were lurking in the park at night. Your friends warned you: don't go into the park alone at night

12. Langer, p. 42. Although he does not note this, the same example is used to make the same point by Warren, pp. 232–33.

13. It might be argued that in a society which legally prohibits abortion except in cases of rape a woman who engages in voluntary intercourse enters precisely such a lottery. Even if we think that such a woman has tacitly consented to carry the fetus to term, however, this would only be because she has tacitly agreed to obey a law, not because she has granted a right to the fetus. And Thomson's argument is addressed to the proponent of the claim that abortion is impermissible because it violates the fetus's right to life.

because there are kidnappers from the Society of Music Lovers lurking there, and if you do go then for God's sake carry some Mace. But you nonetheless voluntarily engaged in walking through the park, knowing that this might result in being kidnapped, and you didn't bring Mace with you just because you don't like the way that carrying protection "makes you feel" when you are trying to enjoy a stroll (after all, you told yourself, people take unprotected walks through the park all the time without becoming kidnapped).¹⁴ Being harsh, your friends might later say that you got what you deserved, but they could not truthfully say that you got what you had tacitly consented to. And so it is again with the woman whose unwanted pregnancy arises from voluntary intercourse without contraception. She may be partly responsible for it, but, as with the forgetful customer who is partly responsible for his money being on the table after he has left the restaurant, this partial responsibility cannot reasonably be taken as evidence of consent.¹⁵

My argument against claim 1 of the Tacit Consent Version has to this point focused on the distinction between deliberately bringing about a particular state of affairs and deliberately doing an action foreseeing that a particular state of affairs may arise as a result. But before turning to claim 2 of the argument, I want to note a further difficulty with claim 1 that remains even if we picture the woman as deliberately becoming pregnant rather than merely being partly responsible for her pregnancy. So return for a moment to the case of Bill, who deliberately left some of his money on the restaurant table after his meal and proceeded to walk out the door. Why are we so confident that this counts as evidence that he has consented to transfer

14. In constructing the analogy in this way, I do not mean to suggest that when a couple has intercourse without contraception this is always the result of a deliberate policy devised exclusively to increase their level of physical pleasure. The story might be modified to say that you thought you had Mace with you but at the last minute could not find it, or that you usually carry Mace but forgot this one time, or that you are deterred from purchasing Mace because you are made to feel shameful when you go to the store to buy it, or that your religious leaders have told you that it is immoral, and so on. I will stick with my version because I want to show that even in what amounts to a kind of "worse case" scenario for Thomson's argument, the woman's voluntary action does not give the fetus any more right to the use of her body than it would have in cases involving rape.

15. It might be thought that the concession here that it would be fair to say that you had gotten what you deserve plays into the hands of Thomson's critics. After all, wouldn't it then follow that the pregnant woman has also gotten what she deserves? But all that can plausibly be meant here is that it is fair to make you bear the costs of extricating yourself from the situation, since it is not as if someone else had forced you into the park. And the concession that in those cases in which the woman is (partly) responsible for her pregnancy she should also be (partly) responsible for bearing whatever physical, economic, and psychological costs an abortion may involve seems perfectly reasonable and surely consistent with Thomson's position.

his right to control the money to the waiter, rather than to the owner, or the busboy, or the customers at the next table? Or why isn't it simply a waiver of his right to the money with the result that whoever sees it first is entitled to take it? Presumably, this is because there is a well-established convention which constitutes the background against which the act is performed. If the act of leaving money on the table took place in a culture where there was no convention about tipping, then it would be unreasonable to take the act as consenting to transfer the right to the money to the waiter. And this suggests that there is at least one further necessary condition for an act to count as evidence of consent: it must take place in a culture where there is a convention by which it is so understood. Indeed, this is presumably true of explicit consent as well, insofar as a handshake, for example, will only be evidence of consent if it takes place in a context where it is so understood. But this creates a further problem with the attempt to use tacit consent theory as grounds for raising an objection to Thomson. It is unclear, to say the least, that in our culture there is such a convention, and it is certainly clear that in other cultures there is no such convention. Consider a woman in China who already has as many children as she is permitted by her culture to have.¹⁶ It just seems patently false to insist that if she engages in voluntary intercourse without using contraception then she is tacitly consenting to allow the fetus to stay. If anything, she will be understood as having tacitly agreed *not* to allow the fetus to stay, though I do not mean to press this suggestion. The point is simply that a person's act cannot be taken as tacitly consenting to anything unless it takes place in a context where it is generally understood as constituting such consent.¹⁷

I have been concerned to this point to argue against claim 1 of the Tacit Consent Version, the claim that, because the woman's act of intercourse is voluntary, she should be understood as having tacitly consented to something with respect to the state of affairs in which there is now a fetus making demands on her body. If my argument

16. I am aware that the following example simplifies in some respects the present policy of the Chinese government; if any of the simplifications affect the argument, we can simply treat this as a fictional version of China.

17. In addition, it is worth noting that not every act is a suitable candidate for counting as evidence of consent to something. If the act is such that refraining from performing it is itself a substantial burden to the agent, then viewing the act as consenting to S amounts to coercing the agent into consenting to S, and expressions of consent which are coerced are generally recognized to be nonbinding. And as Smith points out, a strong case can be made for saying that refraining from voluntary intercourse is a substantial enough burden to undermine the suitability of voluntary intercourse as a sign of consenting to anything (Holly M. Smith, "Intercourse and Moral Responsibility for the Fetus," in *Abortion and the Status of the Fetus*, ed. William B. Bondeson et al. [Dordrecht: Reidel, 1983], pp. 229–45, pp. 237–38).

has been successful, then the woman who has intercourse without contraception is not like you if you voluntarily plug yourself into the violinist, but is rather like you if you voluntarily engage in some pleasurable activity with the foresight that this might end up causing you to become plugged into the violinist. And in that case, if my suggestion has been accepted, you have not agreed to give the violinist the right to your body. But let us now suppose that I have been mistaken about this. Let us suppose that the woman is just like you if you freely walk into the violinist's room, sit down next to him, and plug yourself in. I will take it that this implies that you have consented to being plugged in. But what follows from this?

I think that there is at least one thing that does follow: suppose that the procedure involved in unplugging you from the violinist is itself somewhat painful and costly. If you were involuntarily plugged into the violinist, then whoever forced you to be plugged in should have to bear the costs of and compensate you for the suffering involved in the unplugging. But if you freely plugged yourself in, then you should have to bear these costs on your own. So we might say that freely plugging yourself into the violinist constitutes consent to bear the costs of unplugging yourself. But does it constitute consent to more, and, in particular, consent to remain plugged in for the nine-month period that the violinist requires? This too seems implausible. Suppose that because of your unique compatibility, the violinist will die unless you undergo a series of nine painful bone marrow extractions over the next nine months, and, with a clear understanding of the nature of the procedure and its potential risks, you freely volunteer to begin the treatment. After the second round of extraction, however, you find that the burden is considerably more than you are willing to bear on his behalf. Do we really believe that it would now be impermissible for you to discontinue providing aid to the violinist merely because you began the procedure voluntarily? This would seem implausible. It would be to say that the violinist's right to life does not entitle him to seven more extractions of bone marrow from you if the first two were done involuntarily, but that it does entitle him to seven more extractions if the first two were done voluntarily.¹⁸ And if I am right about this, then even if we picture the woman's unwanted pregnancy

18. Similarly, Kamm points out that voluntarily bringing someone into your house does not constitute a tacit agreement to let him stay. She also notes that accepting the view that voluntarily beginning to aid makes discontinuing aid impermissible would deter many people from offering aid in the first place, since once they started voluntarily it would become impermissible for them to discontinue, and they might be genuinely uncertain about whether they would be willing to provide all of the aid needed but willing to try as long as they would be free to stop if they so desired (Frances Myrna Kamm, *Creation and Abortion* [Oxford: Oxford University Press, 1992], pp. 23, 108).

as evidence of consent (and I have already argued that this is unwarranted), it should not be understood as consent to keep the fetus in her care for as long as is necessary for the fetus to survive.¹⁹ I conclude that both claims of the Tacit Consent Version should be rejected, and that the objection thus fails to undermine Thomson's analogy for typical nonrape cases such as those in which a woman voluntarily has intercourse without contraception. If Thomson's analogy is successful in rape cases, then the Tacit Consent Version fails to show that it is not also successful in nonrape cases as well.

THE NEGLIGENCE VERSION

Let us now consider what I am calling the Negligence Version of the Responsibility Objection. This version of the objection dispenses with the claim that the woman has tacitly consented to assist the fetus and instead argues that she is like someone who is partly responsible for an accident which has caused an innocent bystander to be in need of her assistance. Tooley, for example, argues that Thomson's position is undermined by considering a case in which you engage in a pleasurable activity knowing that it may have the unfortunate side effect of destroying someone's food supply. You did not intend to cause the loss of food, let us assume, but it nonetheless resulted from your voluntary actions, and in a manner that was foreseeable in the sense that you knew your actions risked causing a loss of this sort. Surely most of us will agree that you do owe it to the bystander or victim to save his life even at some considerable cost to yourself, even though you need not be understood as having consented to do so in virtue of your having undertaken the risky action voluntarily. But if this is so, then the woman whose pregnancy is the accidental but foreseeable result of her voluntary actions owes the fetus the use of her body even if she did not tacitly consent to this.²⁰

19. There may, of course, be other important differences between the bone marrow case and the pregnancy case. The cost in terms of suffering may be different, and refraining from giving more bone marrow might seem to be a case of letting die while refraining from continuing the pregnancy might be a case of killing. One might, then, consistently believe that you don't have to keep giving bone marrow while you do have to keep supporting a fetus. My point here is simply that this will have to be for reasons other than the fact that the support was begun voluntarily, so that the mere fact of voluntary initiation of support does not imply a duty to continue it. But the Tacit Consent Version depends on its being the case that the fact of voluntary initiation itself does imply such a duty.

20. Michael Tooley, *Abortion and Infanticide* (Oxford: Clarendon, 1983), p. 45. The same objection is made by means of similar examples by, e.g., Carrier, pp. 398–99; Francis J. Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," *International Philosophical Quarterly* 32 (1992): 105–18, pp. 111–12, and "Arguments from Bodily Rights," p. 164.

Let me begin by noting one reason to be suspicious of analogies with cases of negligence in general. Beckwith, for example, argues that the claim that voluntarily engaging in intercourse with the foresight that this might result in pregnancy imposes a duty to care for the offspring "is not an unusual way to frame moral obligations, for we hold drunk people whose driving results in manslaughter responsible for their actions, even if they did not *intend* to kill someone prior to becoming intoxicated."²¹ But in the case of drunk or negligent driving, we already agree that people have a right not to be run over by cars and then determine that a person who risks running over someone with a car can be held culpable if that person has an accident which results in the violation of this right.²² **In the case of an unintended pregnancy, on the other hand, the question of whether or not the fetus has a right not to be aborted is precisely the question at issue. So it is difficult to see how an argument from an analogy with negligence can avoid begging the question.**



But there is an even more fundamental problem with this version of the Responsibility Objection. The problem can be most clearly identified by asking precisely why we are so confident that the one who stands in need of your assistance has the right to it in the sorts of cases that Tooley, Beckwith, and Carrier employ. Presumably, as a first approximation, we would say something like this: it is because if you *hadn't* done the voluntary action which foreseeably led him to be in need of your assistance, he wouldn't be in need of your assistance in the first place. And this seems reasonable enough. But now consider that there are two distinct ways in which this counterfactual claim can be true: (1) if you had not done the action, he would not now exist (and so would not now exist in a state of dependency on you); and (2) if you had not done the action, he would now exist, but not in a state of dependency on you. Assuming that your voluntarily doing the action makes you responsible for the resulting state of affairs, we can recast this distinction as one between two different senses in which you might be responsible for the state of affairs in which P now stands in need of your assistance in order to survive:

- 1) you are responsible for the fact that P exists
- 2) you are responsible for the fact that, given that P exists, P stands in need of your assistance.

21. Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," pp. 111–12, and "Arguments from Bodily Rights," p. 164 (Beckwith makes this claim in the context of defending the father's responsibility to care for the offspring, but it is presumably meant to apply equally to the case of the mother).

22. Though even this claim is by no means unproblematic, as the*literature on moral luck demonstrates.

The first thing to note is simply that these two senses are distinct. As Silverstein has pointed out, one could be responsible for P's predicament in either, neither, or both senses, generating four distinct possibilities which can easily be conflated.²³ In Thomson's (kidnapping) version of the story, you are not responsible for the violinist in either sense 1 or sense 2. The proponent of the Negligence Version of the Responsibility Objection agrees that you are permitted to unplug yourself in this case and concedes that, unless there is another morally relevant asymmetry, this case is relevantly similar to that of a woman whose pregnancy results from rape. He then argues that in cases of voluntary intercourse the woman is responsible for the fetus, so that while Thomson's example is relevantly similar to rape cases it is not relevantly similar to nonrape cases. But in cases such as Beckwith's, Carrier's, and Tooley's, in which you cause an accident as a result of some voluntary action of yours, you are responsible for the bystander in sense 2 and not sense 1, while even in nonrape cases, the woman is responsible for the fetus only in sense 1 and not in sense 2. She is responsible for the existence of the fetus, that is, since her voluntary actions foreseeably caused the fetus to exist, but she is not responsible for the fact that, given the existence of the fetus, the fetus stands in need of assistance from her. In the cases of Beckwith, Carrier, and Tooley, there were numerous alternative courses of action available to you which would have resulted in the bystander's still existing and not in a state of dependency on you, but in the case of the pregnant woman, there was no course of action available to her which would have resulted in the fetus's existing and without needing assistance from her. So this condition of the fetus, given that it exists, is not something that she is responsible for. Because of this distinction, we cannot yet say that the rape case is unlike the nonrape case in a morally relevant way. We can say only that the rape case is like the nonrape case in terms of responsibility in sense 2 and is unlike the nonrape case in terms of responsibility in sense 1. And this means that the Negligence Version of the Responsibility Objection can be sustained only if we agree that the difference in terms of responsibility in sense 1 alone is itself morally relevant.²⁴ This assumption stands in need of

23. Harry S. Silverstein, "On a Woman's 'Responsibility' for the Fetus," *Social Theory and Practice* 13 (1987): 103–19, p. 106.

24. Note that my claim is not that it would be improper to use the term "negligent" to describe the behavior of a woman who has intercourse without using birth control (although something like "irresponsible" might be more apt). My claim is simply that, whatever we call her action, it lacks the feature of characteristically negligent acts such as those cited by Tooley, Beckwith, and others which plausibly justifies attributing a right to assistance to the one who stands in need of assistance as a foreseeable result of the action.

defense but is typically not even noted, let alone defended, by those who press the Negligence Version of the Responsibility Objection. The question, then, is what we should say about cases in which you are responsible for another in sense 1 but not in sense 2.

It is perhaps not immediately apparent how to go about answering this question. One wants to consider cases in which you do some action such that, had you not done it, this dependent person would not now exist, and given that you have done it, this person is now dependent on you. And it may seem that there really are no such cases other than those in which the act is simply the act of conceiving the person. If that is so, then we cannot usefully illuminate the case of voluntary intercourse by appealing to other cases and may simply have to conclude that we have a case here that cannot be resolved either way by appealing to more general principles. But this pessimism is premature. For there is another kind of action which is such that had you not done the action the person would not now exist: not the act of *creating* his life, but the act of *extending* it. Suitably constructed, such cases offer a means of testing the relative significance of the different senses of responsibility involved in the objection. And when they are consulted, the Negligence Version is undermined.

For consider first the following story:²⁵

Imperfect Drug: You are the violinist's doctor. Seven years ago, you discovered that the violinist had contracted a rare disease which was on the verge of killing him. The only way to save his life that was available to you was to give him a drug which cures the disease but has one unfortunate side effect: five to ten years after ingestion, it often causes the kidney ailment Thomson has described. Knowing that you alone would have the appropriate blood type to save the violinist were his kidneys to fail, you prescribed the drug and cured the disease. The violinist has now been struck by the kidney ailment. If you do not allow him the use of your kidneys for nine months, he will die.

In this story, you are responsible for the violinist in the first sense. He currently exists only because, in giving him the drug, you voluntarily acted in a way which foreseeably caused him to exist at this time. But you are not responsible for the violinist in the second sense. Given that he (still) exists, you are not responsible for his need of your kidneys because there was no course of action available to you seven years ago that would have caused it both to be the case that the violinist would now be alive and to be the case that he was not in need of the

25. This is a condensed and slightly modified version of an example given by Silverstein, "On a Woman's 'Responsibility' for the Fetus," pp. 106–7.

use of your kidneys.²⁶ This is what makes Imperfect Drug importantly different from what I will call

Malpractice: Same as Imperfect Drug, except that you could have given the violinist a perfect drug which would have cured him with no side effects. But out of indifference or laziness you chose to give him the imperfect drug.

In the case of Malpractice, you are responsible for the violinist in both senses. I suspect that most people will think that you do owe the violinist the use of your kidneys in Malpractice but that you do not in the case of Imperfect Drug. We might put the reason for this in a few ways. We might say that in Malpractice there is a clear sense in which you harmed him by giving him the drug you gave him, while in Imperfect Drug there is no sense in which you harmed him. Or we might put it like this: suppose that, in the first case, you had told the violinist that you could either give him the imperfect drug or no drug at all, and that if you gave him the imperfect drug you would refuse to lend him the use of your kidneys should he later develop the kidney ailment. Presumably, the violinist would have chosen to take the drug rather than the alternative. But suppose that, in the second case, you had told him that you could either give him the imperfect drug or the perfect drug or no drug at all, and that if you gave him the imperfect drug and he later developed the kidney ailment you would refuse to lend him the use of your kidneys. Presumably, for consistency the violinist would have chosen to take the perfect drug. So we can say that you do not incur a further duty to assist the violinist when you make the choice that leaves him best off, or is the one he would have selected, but that you do incur such a duty when you fail to do so. And either way, if this is our response, then we must conclude that if you are responsible for another in sense 1, this only imposes an obligation on you if you are also responsible in sense 2. And if this is so, then the Negligence Version of the Responsibility Objection fails: pregnancies which arise from voluntary intercourse are relevantly similar to Imperfect Drug rather than to Malpractice.²⁷ And so,

26. In his response to an objection raised by Langer, Silverstein is more clear that this is the central point of his argument. See Richard Langer, "Silverstein and the 'Responsibility Objection,'" *Social Theory and Practice* 19 (1993): 345–58, pp. 348–49; Harry S. Silverstein, "Reply to Langer," *Social Theory and Practice* 19 (1993): 359–67, pp. 361 ff.

27. Of course, one might maintain that even in Malpractice the doctor does not owe the violinist the use of his kidneys (and one could hold this even while believing that the violinist was nonetheless entitled to something as compensation or punitive damages). And it would then follow that Thomson's argument would be secure even if it turned out that the pregnancy case was more like Malpractice than like Imperfect Drug. Since this assessment seems controversial at best, and since I claim that Thomson's

again, if Thomson's argument succeeds in rape cases, it succeeds in nonrape cases as well.²⁸

A few objections which might be raised against this argument merit notice. The argument rests on the claim that if you are responsible for someone in sense 1 but not in sense 2, then you incur no duty to assist them at some cost to yourself. But this claim can be challenged in two ways. The first arises from the possibility that by being responsible for a person only in sense 1 you could still harm him or do other than he would have chosen to have you do, and thus still have a duty to provide the needed assistance. Consider, for example, the case of

Really Imperfect Drug: Same as Imperfect Drug except that the situation arose a few weeks ago, and the only way to save his life that was available to you was to give him a drug which in every case causes continuous excruciating pain for a few weeks which then ceases with the onset of kidney failure. Knowing that the drug would certainly cause both the pain and the kidney failure, and knowing that you alone would have the appropriate blood type to save the violinist once his kidneys failed and to enable him to then go on and live a healthy, happy, independent life, you gave him the drug which cured the disease and caused the pain to begin. The violinist has now been struck by the kidney ailment.

Let us assume, what some might deny, that the violinist is better off dying right away of the rare disease than taking the drug, if he is only going to endure a few weeks of agony and then die of the kidney failure anyhow. Let us also assume that he is better off still if he takes the drug and endures the pain and is then saved from the kidney failure and enjoys the rest of his life. In that case, while you are not responsible for the fact that, given that the violinist exists, he needs the use of your kidneys, it is nonetheless true that if you refrain from assisting him now, he will have been made worse off by your having given him the drug than he would have been had you let him die at

argument can be defended without it, I will not rely on it here though I do not mean to be insisting that it is mistaken.

28. One might well be inclined to object at this point that the woman is responsible for helping the fetus precisely *because* there was no way for her to make it the case that the fetus exists without making it the case that the fetus exists in a state of dependence on her, while there was a way for her to avoid making it the case that the fetus exists in the first place: she could simply have abstained from having intercourse. But this would seem equally to imply that you are responsible for aiding the violinist in Imperfect Drug. There was no way for you to make it the case that the violinist (still) exists without making it the case that he exists in a state of dependence on you, but there was a way for you to avoid making it be the case that he still exists in the first place: you could simply have abstained from giving him the drug.

that time (or that he would have chosen no drug at all over drug with no subsequent kidney assistance). And this makes it plausible to suppose that you now have a duty to save him from the kidney failure, even at some substantial cost to yourself. If we accept this analysis, then we must modify our original claim to read: if you are responsible for a person in sense 1 but not in sense 2, then you incur no duty to assist that person at some cost to yourself *unless his or her existence without your assistance is itself a harm*.²⁹

This modification of the argument will affect its ability to undermine the Negligence Version of the Responsibility Objection, however, only if we believe that a fetus is made worse off by being conceived and then aborted than it would have been if it had never been conceived in the first place. I cannot pretend to offer a conclusive rebuttal to this claim here, so it will have to suffice simply to note that the claim is controversial at best, unintelligible at worst (since the fetus would not "have been" anything had it not been conceived), and that proponents of the Negligence Version have thus far failed to make a convincing case for it or even to recognize that such a case is required by their position. But it may be worth noting, in addition, that the sorts of arguments typically offered in defense of the claim in other contexts are unsatisfactory.

Michael Davis offers one argument for the claim that the fetus is made worse off by being made to live a short time and then being killed than if it would have been if it had never existed at all by appealing to the following example:

To be killed is bad, so bad that merely being brought into existence for a time is not necessarily enough to make up for it. We would not, I take it, allow a scientist to kill a ten-year-old child just because the scientist had ten years ago 'constructed' the child out of a dollar's worth of chemicals, had reared it for ten years in such a way as to make it impossible for the child's care to be given to anyone else for another eight years, and now found the care of the child a far greater burden than he had expected.³⁰

But this example simply does not support the conclusion. For suppose we agree that we would not allow such a scientist to kill his or her child. Davis simply assumes that this must be so because the killing is so bad *for the child* that the high quality of the child's (short) life does

29. Silverstein himself accepts this emendation, and it also runs parallel to the notion of a "baseline" employed by Kamm, who argues that you are (or may be) obligated only to ensure that the violinist not be made worse off than he would have been had you not been hooked up to him in the first place. See Silverstein, "On a Woman's 'Responsibility' for the Fetus," p. 111; Kamm, e.g., pp. 26, 43, 89–90.

30. Michael Davis, "Foetuses, Famous Violinists, and the Right to Continued Aid," *Philosophical Quarterly* 33 (1983): 259–78, p. 277.

not make up for it. Only on this assumption would our saying that the scientist does something impermissible commit us to the claim that one is made worse off by being made to live a short time and then being killed than if one had never existed. But this assumption is unwarranted. It seems much more likely that our response to Davis's example (assuming that we share his response) reveals instead that we believe that some acts are impermissible even though they leave no one worse off than they would otherwise have been. Suppose, for example, that a woman knows that if she conceives a child now it will live a just barely worthwhile life and die at fifteen but that if she waits a month she will conceive a child who will live an extremely happy life to a ripe old age. We might well criticize her if she has the first child rather than the second, but that is no evidence that we think that *this* child is made worse off than if he had never lived. It is instead evidence that we think (if we do criticize her) that there are wrongs that harm no one. Similarly, if we share Davis's response to the scientist example, this is not because we think the child would have been better off never having been conceived.

A second defense of the claim that a fetus is made worse off by being conceived and then aborted than it would have been had it never been conceived arises from the following thought: death, especially premature death, is a great harm to the one who suffers it, while the provision of a very short amount of life, especially life of the sort one enjoys during the first few months after conception, is a relatively small benefit to the one who receives it. So one who is conceived and then aborted is granted a relatively small benefit and then a relatively great harm, which seems to add up, on the whole, to a worse state than that of one who is not conceived in the first place and who thus receives no benefit and no harm.

This argument is unacceptable for two reasons. In the first place, as Nagel has pointed out, "if death is an evil at all, it cannot be because of its positive features, but only because of what it deprives us of."³¹ But if to say that death is a great harm to the fetus is to say that death deprives the fetus of great goods it would enjoy if it were to go on living, this provides no support for the claim that the fetus would have been better off still if it had enjoyed no such goods in the first place.³²

31. Thomas Nagel, "Death," in his *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp. 1–10, p. 1.

32. This response is pressed persuasively by Kamm, who also argues that the claim is importantly at odds with our attitudes toward women who are prone to miscarriage: we do not think it wrong for them to try to have children even if it takes several attempts, but surely we would think it wrong if we thought this meant making several fetuses worse off than they would have been had they never been conceived. See Kamm, pp. 84–87.

In addition, the argument would seem equally to imply that a six-year-old child who leads a happy life and then dies in her sleep would have been better off never having been conceived. After all, the totality of the goods she is deprived of by death is much greater than the totality of goods she has so far enjoyed, and if the harm of death consists in the greatness of the good it deprives one of, then this would mean that the harms in her life greatly outweighed the benefits. But as tragic as her death is, the conclusion that she would have been better off never having been conceived is plainly absurd. Of course, it is open to the proponent of the Negligence Version to attempt to articulate and defend a conception of the nature of death on which it turns out both that the fetus is worse off being conceived and then aborted than not being conceived and that this is not so of the six-year-old who dies in her sleep,³³ but in the absence of such a defense, the attempt to defend the objection to Thomson's argument by appealing to cases such as *Really Imperfect Drug* is unsuccessful.

A second response to the argument I have developed to this point would be to insist that if you are responsible for a person in sense 1 but not in sense 2, then you can still incur a duty to assist that person at some cost to yourself even if his or her existence without your assistance is *not* itself a harm. And Langer offers what seems to be a plausible example to support this claim: his relationship with his one-year-old son: "I am responsible for his existence, but I am not responsible for the condition in which he finds himself. . . . He is in a condition which requires constant physical attention, long-term financial aid, and significant psychological nurture . . . I have caused his existence, but I certainly have not caused him to be in this terrible, needy condition. Do I not have an obligation to care for his needs?"³⁴ This is plainly a case in which someone is responsible for another in sense 1 but not in sense 2 (since there was no option available to Langer on which his son would both exist and not be in this needy condition), yet it is not (or at least need not be) the case that Langer's son would be harmed by being born and living for only a year as opposed to never being conceived in the first place. If it is necessary that Langer be guilty of harming his son by conceiving him in order for him now to have an obligation to care for him, then, since Langer has not harmed his son by conceiving him, he has no obligation to care for him. But Langer takes it that we all think he does have such an obligation since "the laws and moral intuitions of our society strongly

33. One might appeal in part to the idea that being unjustly killed is worse than simply dying in one's sleep, but this claim too is a bit difficult to make sense of and would in any event clearly beg the question at issue, which is whether or not the killing of the fetus is unjust.

34. Langer, "Silverstein and the 'Responsibility Objection,'" pp. 351–52.

oppose child abandonment."³⁵ And if that is so, then you can be responsible for assisting someone even if you are only responsible for them in sense 1 and not in sense 2 and even if you have not harmed them relative to their never having been conceived. And that is the sense in which a pregnant woman is responsible for the fetus she conceives as a result of voluntary intercourse.

Let us assume that we agree that you have a duty to care for your one-year-old son in such circumstances.³⁶ It does not follow from this that you always have a duty to assist those for whom you are responsible in sense 1 and not sense 2. It follows only that you can *sometimes* have such a duty. This would indeed force a further revision in our claim. Now we cannot even say that harming another is necessary in order for you to have a duty to assist them in those cases where you are responsible for someone only in sense 1. Even this revision, however, strong as it is, does not suffice to rescue the Negligence Version of the Responsibility Objection from the problem I have identified. The objection, remember, claims that nonrape cases are relevantly different from rape cases *because* they differ in terms of being responsible in sense 1; the objection is only forceful, then, if being responsible in sense 1 is, in and of itself, enough to make the difference between owing support and not owing support. It must, that is, be a sufficient condition for owing support. But the fact (assuming that it is fact) that you can *sometimes* have a duty to care for someone you are responsible for only in sense 1 does not show that being responsible in sense 1 is in and of itself sufficient to generate that duty. The argument presented above still shows that being responsible in sense 1 is not sufficient to generate this duty since it does not generate this duty in the case of Imperfect Drug. If this is a duty you only sometimes have when you are responsible in sense 1 but not in sense 2, then it is sufficient only in conjunction with (and perhaps only because of) other considerations. And the burden would then be on the proponent of the objection to show that these other considerations obtain in the case of pregnancy, and not just in the case of the father of the one-year-old. Otherwise, the claim that you have a duty to care for your one-year-old son for whom you are responsible in sense 1 but not

35. Ibid., p. 352.

36. Although it is worth noting that even this part of Langer's argument is subject to doubt. After all, it does not follow from the claim that "child abandonment" is immoral that a parent has a duty to provide for his child's needs. That would follow only if one also believed that a parent had a duty not to put this child up for adoption; but most people (especially, perhaps, opponents of abortion) believe that it is perfectly permissible for a parent to have someone else incur the costs of raising his child. So one might simply reply to Langer's question by saying no, he does not have an obligation to care for his son's needs. If he no longer wishes to be a parent, it is permissible for him to put his son up for adoption.

sense 2 is perfectly compatible with the claim that being responsible in sense 1 is not sufficient to make the nonraped woman have a duty to assist the fetus she is carrying if the rape victim does not have such a duty.

And, indeed, there is good reason to doubt that such a case could be made. For, in an ironic way, what seems plausible about the Tacit Consent Version seems to come back to haunt the Negligence Version. After all, a plausible case can be made for saying that a mother (to switch back to the woman's perspective and keep the analogy tighter) who brings a baby to term and takes it home with her has tacitly agreed to care for it. Nothing that was said in criticism of the Tacit Consent Version of the Responsibility Objection would count against this claim, since voluntarily bringing a baby home is voluntarily bringing about the state of affairs in which the baby is under one's care, while voluntarily having intercourse is only acting in a way which foreseeably may lead to the state of affairs in which there is a developing fetus in the womb. But if this is so, then we can account for Langer's duty to his son without conceding that responsibility in sense 1 is in itself sufficient to generate a duty to care. We can say that the mother (and father) of the one-year-old owe care to their child either because (a) such a duty follows from tacit consent alone which is reasonably inferred from bringing the child home after it is born but not merely from engaging in voluntary intercourse (in which case the fact that Langer is responsible for his son in sense 1 is entirely superfluous to accounting for his duty to care for him), or (b) such a duty follows from such consent only when it is conjoined with being responsible for the child in sense 1 (in which case the fact that he is responsible for his son in sense 1 is necessary but not sufficient). The first of the two accounts seems far more plausible, since account *b* is difficult to square with the assumption that the duty adoptive parents have to the children they adopt is the same as the duty biological parents have to their offspring.³⁷ But choosing between the two is not necessary: on either of these accounts, the morally relevant distinction that explains why the parent of a one-year-old son has a duty to care for him while the victim of rape does not have a duty to care for her fetus would fail to distinguish the woman whose pregnancy arises from rape from the woman whose pregnancy arises from voluntary intercourse.³⁸

37. Even if the "adoption" is really a kidnapping, as in the case where a woman steals a baby from the hospital and takes it home to raise as her own, we will still presumably believe that her duty to care for the infant is as strong as the duty of any parent to care for her child, and this would again favor account *a* over account *b*.

38. None of what is said in this paragraph, of course, implies or presupposes that a woman who declines to bring her newborn home has no duty to care for it at all. Suppose she gives birth in an abandoned field. One might hold the view that there are

A final objection to my rebuttal of the Negligence Version which merits attention is this:³⁹ in attempting to make the case for the claim that being responsible for another in sense 1 alone is not sufficient to distinguish rape cases from nonrape cases, I have followed the sort of example exploited by Silverstein, in which the doctor who is responsible for the fact that her patient is still alive does not owe him additional assistance unless she is also responsible for the fact that the patient is dependent on her given that he is still alive. This is the claim, in short, that cases of voluntary intercourse which result in pregnancy are morally like Imperfect Drug rather than Malpractice. But it is open to someone to agree that voluntary intercourse is like Imperfect Drug in this particular respect, but to insist that there is a much more important sense in which they differ and which undermines the analogy. In particular, one could argue as follows: in Imperfect Drug, the doctor is responsible for the patient's existence because she did an act, namely, the act of giving the patient the drug, which was done in response to the patient's needs. But in voluntary intercourse, the woman is responsible for the fetus's existence not because she was acting in response to its needs (after all, the fetus didn't exist at that point) but merely because she selfishly wanted to engage in a pleasurable activity.⁴⁰ And one could claim that the doctor is free of further

no positive duties to assist others, in which case one will hold that if she does not wish to raise the child herself she is morally free to walk away and leave the infant to die. But one need not hold this view. One could believe that there are positive duties to assist others at least in cases where the burden is relatively small and the benefit relatively great, and so hold that the woman would at least be obligated to incur the cost of carrying the child to town and providing for it until it could be taken to a hospital. But then she will have this obligation equally even if she comes across a newborn that someone else has abandoned in the field, so this will again fail to support the view that Thomson's argument is undermined by the difference between the voluntariness of intercourse in nonrape cases and the involuntariness of kidnapping in the violinist case. And in addition, it will be unlikely to follow that a woman would be obligated to sustain her pregnancy since the burdens of pregnancy are not so trivial. Of course, one might endorse the existence of a positive duty to assist another who will otherwise die even where the burden to you in doing so is quite substantial, provided that (a) the benefit to the other still significantly outweighs the burden to you and (b) you are the only one who can save the individual. This would justify a duty to continue the pregnancy even granting that the burden is substantially greater than what we are typically required to undergo for the benefit of others. But then it will seem equally to follow that you are obligated to remain plugged into the violinist in Thomson's story, since the benefit to the violinist significantly outweighs the burden to you and you are the only one who can save him. So even this view of positive rights will fail to undermine Thomson's analogy.

39. I am grateful to Alec Walen for bringing this objection to my attention.

40. One might well complain here that the importance of a sexual relationship to living a well-lived life is trivialized by picturing the woman as merely pursuing physical pleasure. The assumption that such pleasure is all that can be involved is surely too narrow, but I want to assume for the sake of the argument that this really is all the woman (and her partner) are seeking, and to question what follows from this.

responsibility not in virtue of the fact that she is only responsible in sense 1, but in virtue of the *way in which* she is only responsible in sense 1. Because she was acting in the patient's interest, she has done all she is obligated to do for him, but because the woman who engages in voluntary intercourse was not acting in the fetus's interest, she has not yet done all she is obligated to do for the fetus. Indeed, she hasn't yet done anything for the fetus. Thus, one could agree that the doctor owes aid in Malpractice but not in Imperfect Drug, and also agree that the woman who engages in voluntary intercourse is responsible in sense 1 but not sense 2, but still conclude that she owes aid to the fetus in virtue of her voluntary behavior while the doctor in Imperfect Drug does not.

Let us assume that this difference in the agent's motivation undermines the analogy between pregnancies which arise from voluntary intercourse and the case of Imperfect Drug.⁴¹ I believe that the point of the analogy can be sustained by turning to a new analogy which parallels voluntary pregnancy more closely than does Imperfect Drug. Indeed, this is a useful revision on its own, even if one does not think it a necessary one, because it reveals how easily even defenders of Thomson such as Silverstein can be led to impute a greater degree of responsibility to the pregnant woman than the circumstances warrant. In particular, the altruistic doctor deliberately causes the patient to live longer by her considerate act of giving him the drug. But the pleasure-seeking woman does not deliberately cause the fetus to come into existence so that she can experience pleasure; she deliberately engages in intercourse so that she can experience pleasure with the recognition that a fetus may come into existence as a result. Silverstein's case against the Negligence Version, then, by overlooking the distinction which undermines the Tacit Consent Version, rests on an example which compares the pregnant woman to one who is responsible in sense 1 in a more direct way than she really is. And if we reconstruct Silverstein's point with this distinction in mind, we can produce an analogy which avoids the potentially problematic discrepancy in motives. So instead, consider:

Pleasure-Seeking Doctor: You are a doctor who wishes to engage in a very pleasurable activity. The activity is such that if you engage in it, there is a good chance that it will cause some gas to be released which will result in adding extra years to the life of some violinist in the world, who will then contract the familiar kidney ailment from which only you will be able to save him by

41. Though it is by no means obvious that this assumption should be accepted. We might well think that this simply reveals a difference in the moral merit of their characters but not a difference in the obligations which arise from their actions.

the familiar means described above. There are certain devices which you can use during the activity which reduce the chances of gas emission but do not eliminate them entirely, but you do not like the way the use of such devices "makes you feel" when you engage in the pleasurable activity. So you engage in the activity, and without such devices. As a result, there is a violinist who has some extra time added to his life and then gets the ailment. He now stands in need of the use of your kidneys.

In this case, you are responsible for the violinist in sense 1, but not in sense 2. You are in this respect like the woman whose pregnancy is the result of voluntary intercourse. And in this case, unlike Imperfect Drug, you are responsible for the violinist's existence at this point, not because you were admirably responding to his needs, but because his present existence was (foreseeably but not intentionally) caused by an act you engaged in just because it would be pleasurable. The new example, then, eliminates the possibly relevant difference in motivations noted above. But now ask: Do you believe that you are obligated to provide the violinist with the use of your body? This seems to me most implausible. Why should the fact that you have already added some years to his life mean that you have to add more, just because your motive in performing the action that foreseeably added some years to his life was purely selfish? And if this is so, then my objection to the Negligence Version can be sustained even if one rejects the sort of example with which Silverstein attempts to press his.

I conclude, therefore, that there are good reasons to reject both versions of the Responsibility Objection and no good reasons to accept either. If Thomson's argument is successful in rape cases, then it is successful in nonrape cases as well. Whether or not Thomson's argument is successful in rape cases in the first place, of course, is another question. I am inclined to believe that it is, but that will have to be the topic of another paper.⁴²

42. Or two. See my "Death Comes for the Violinist" (unpublished), which responds to the objection that Thomson's analogy is undermined either by the importance of the distinction between killing and letting die or by the importance of the distinction between intending death and foreseeing it, and "A Further Defense of 'A Defense of Abortion'" (unpublished) which responds to a number of additional objections, including those which accept Thomson's analogy but hold either that unplugging yourself from the violinist is not permissible or that arguments from such analogies are unsound.