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# ABORTION: MODELS OF RESPONSIBILITY*

ABSTRACT. My focus within the topic of abortion is on several models that are used to support the position that a woman has a responsibility to sustain the fetus she carries because she brought about its existence. I consider the following models: a creator, strict liability, fault, and a contract. Although each of these models has been used by opponents of abortion to support the position that women should "accept the consequences" of engaging in sexual intercourse, I argue that none of the models is adequate.

As both the popular and scholarly controversies about abortion continue, attention has remained focused either on the pregnant woman's rights or on the fetus's rights. As a result, several commonly assumed models of responsibility remain insufficiently examined. I am interested in models used to support the position that a woman has a responsibility to sustain the fetus she carries because she brought about its existence.[1]

The terms in which my discussion will be couched are those used in the following inference. The woman is causally responsible

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[1] One of the most general statements of this kind of position is Joel Feinberg's in 'Abortion,' *Matters of Life and Death*, ed. Don Regan (New York: Random House, 1980) p. 212. He puts forward this principle in a section of his article in which he assumes for the sake of argument that the fetus is a moral person. I discuss his position in Section 3 of this paper.

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for the existence of the fetus; her action caused it.[2] It is supposed to follow that a woman has a "special responsibility" to the fetus that she has to no one else, a responsibility that requires her to continue her pregnancy.[3]

Those who make this inference are not simply confused by the ambiguity of the term "responsible."[4] Instead, they rely on models of responsibility such as the following: (1) a creator, (2) strict liability, (3) fault, and (4) a contract. All except the creator model

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[2] I will exclude the man's responsibility from consideration. Although he may be equally responsible for the existence of the fetus, at the present time he cannot provide an alternative to uterine pregnancy. The first implications of "causal responsibility" thus fall on the woman. This will change with the advent of commonplace extra-uterine gestation.

[3] "Special responsibility" is used in a similar manner by Judith Jarvis Thomson in 'A Defense of Abortion,' *Philosophy and Public Affairs* 1 (1971): 47–66. See p. 58. Although I am borrowing terminology from Thomson, I hasten to point out certain differences between us. Thomson assumes for purposes of argument that the fetus is a person; I leave open the status of the fetus. Thomson couches her discussion of a woman's special responsibility in terms of giving the fetus the right to use her body. I prefer not to shift to talk about a fetus's rights but to keep the focus on a woman's responsibilities to the fetus. Although I talk about a woman's responsibilities throughout the paper, most of my points could also be made by talking about her obligation to the fetus.

[4] Let me clarify the kind of responsibility that interests me here. (i) The kind of responsibility that allegedly follows from causal responsibility should be distinguished from "behaving responsibly" toward the fetus once one has decided to remain pregnant, that is, eating properly, not smoking, etc. (ii) Nor should one think that the responsibility to continue pregnancy is the same as or somehow follows from a woman's having the responsibility to *decide* whether to continue her pregnancy. For the latter is more akin to having the right to decide whether to continue pregnancy. Someone maintaining this view would assert that in our present social conditions a woman's right to decide takes precedence over the rights of the father of the fetus or of the society at large. For an interesting discussion of the issues involved here see Alison Jaggar, 'Abortion and the Right to Decide,' in *Women and Philosophy*, ed. Carol C. Gould and Marx W. Wartofsky (New York: Putnam, 1976), pp. 346–60. I am stipulating in my paper that neither the man nor the society at large has any interest in the outcome of the woman's decision.

are "quasi-legal": their origin is in the law even if the legal concepts are often stretched into common-sense notions in everyday use. I will argue that none of these models is an adequate basis for supporting the conclusion drawn by opponents of abortion, namely that the person who caused the pregnancy has a responsibility to remain pregnant. Let us dispense quickly with the creator model before turning to the more interesting quasi-legal models.

## 1. THE CREATOR MODEL

The general principle of the creator model is that creators should not destroy what they create. In the context of pregnancy the principle becomes this: a person who created a fetus should not destroy it, but sustain its life.[5] In terms of responsibility, it means that causal responsibility for the existence of a fetus implies a special responsibility for sustaining its existence. I oppose this principle on two grounds: first, that if being the creator gives someone special rights or responsibilities at all they include destroying one's creation rather than sustaining it; second, that if some creations are so valuable that they should not be destroyed, it is irrelevant who created them.

Let us look at a few examples of creators of good things.[6] God is, of course, the model creator; God is said to give life and to take

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[5] Two points here: (i) For brevity I have chosen to reconstruct a frequently heard "creator model" rather than to treat in detail any one version of it. Some of the debates in the *Congressional Record*, 21 May 1981, are good examples of the use of this model.

(ii) Note that a fetus is unlike most other things in that if a woman does not destroy it, she does sustain it. One can usually refrain from destroying something and yet fail to sustain it; e.g., God might not sustain people, plants, and animals after creating them. This distinction has moral importance because it is the difference between refraining from harm and bringing aid.

[6] Of course, not all creations are good. We also create toxic waste and smog. In such cases the creator certainly has no responsibility to refrain from destroying the product. Her right, even responsibility, is rather to clean it up, to destroy it.

it away. Opponents of abortion sometimes base their stand on this very claim – that only the one giving life should take it away. A mere woman should not make decisions that belong only to God. But we can think of God merely as a model of a creator rather than as the literal creator. If we do, then we can say that because a woman is in part the creator of the fetus (and by stipulation the man's interest and responsibility are irrelevant) only she can destroy the fetus.

An artist is another good model. She creates something that may be beautiful or ugly, be full of meaning or not, or express emotions marvelously or poorly. Suppose an artist creates something, has not sold it or given it to someone else, then wants to destroy it. Perhaps it makes her feel disgust every time she thinks of it or sees it. It damages the image she has of herself as a creative person. Most people would think that she has the right to destroy such a work. If there is any reason to argue that she does not have this right, it would be that we consider works of art to have value either in themselves or for people. Because of this we might think we should preserve works of art, although the works may have no right to be preserved.[7] This feature of art might cut a wedge into an artist's unqualified right to destroy what she creates. It supports someone's trying to reason with an artist not to destroy her work because it is of great value or because other people will want to see it and be touched by it. It supports, in short, putting the issue into the arena of moral conflict: should her right prevail, or should an object of value be preserved?

We should note that even if we were not prepared to argue that an artist has an unqualified right to destroy her work (which no one else owns), it is clear that if anyone can destroy her work, she can.

A similar case is that of a scientist who creates a food supple-

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[7] Some people believe that works of art do have rights. See, for example, Alan Tormey, 'Aesthetic Rights,' *Journal of Aesthetics and Art Criticism* 32 (1973): 163–70.

ment that is extremely nutritious, tasty to the world's most malnourished, and inexpensive. I would consider the scientist's right to destroy her creation similar to that of the artist: because of the great value to other people, her right to destroy the formula might not be absolute. Again, the issue is best considered by weighing the different moral factors. Notice that we are asking the artist and the scientist to consider the value of refraining from destroying their creations. This does not mean that we are warranted in taking the further step to ask them to sustain their creations. For that step would require much more support than anything argued here.

The examples discussed do not support the principle that creators have a responsibility not to destroy. They support instead the conditional principle that *if* anyone can destroy something, its creator can (as long as no one else has acquired rights to it, e.g., of ownership). I state this principle in a conditional form to call attention to the possible exception for things of intrinsic value or of great value for other people. A creator has more right to destroy her creation than anyone else does, but *anyone's* right to destroy something of great value must be weighed morally against the value of the creation. The creator is not in a position of special responsibility to refrain from destroying the creation. For comparison, consider finding a valuable unowned object. The moral conflict would be the same. Whatever responsibility one has not to destroy objects of great value comes simply from their being objects of great value, not from the fact that one created them oneself.

The position I support here might seem unsatisfying to those who would rather support the principle that a creator has an absolute right to destroy her creation. What I have tried to show is that anti-abortionists cannot use the creator model to support their position. For the creator has no unique responsibility to refrain from destroying or to sustain her creation. An anti-abortionist is left with an obvious and familiar next move – to say that all of us, creators or not, must refrain from destroying fetuses, for fetuses are people (or at least of very great value). But this move gains nothing; it merely returns opponents of abortion

to their usual ground for debate. It does not rest on the creator model at all.[8]

## 2. STRICT LIABILITY

Pregnant women (particularly poor pregnant women) are sometimes told to "accept the consequences" of having sex. The consequence that they are to accept is not merely the literal one – becoming pregnant – but remaining pregnant. Of course, remaining pregnant is not the immediate consequence of having sex, but we can overlook this error.

The model that underlies this view of sex and pregnancy often stems from the law, either from the idea of fault or of strict liability. Although these models are often not kept distinct in either

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[8] Although the issue of fetal value and personhood is beyond the scope of this paper, I cannot resist making a few comments. (i) I agree with a recurrent point in the philosophical literature (beginning with Thomson's article cited above) that even if a fetus is a person, it still must be *argued* that abortion is impermissible. (ii) In any case I think that the question whether the fetus is a person is doomed from the start. The concept of a person, whether construed ontologically or morally, is "all or nothing": it is not one that admits of gradual development or degrees. (A person living only because of a respirator is not 42% of a person.) Yet human development is gradual: it includes a set of processes which take time. It is too much to expect of an "all or nothing" concept that it should be definitively applicable to such a set of processes. It is even less realistic to expect that we could find necessary and sufficient conditions for personhood which will settle comfortably with our moral intuitions about what kinds of beings can be justifiably killed. A mere concept cannot easily bear the weight of and provide answers to our most important moral questions. A few of the many interesting articles on these issues are Mary Anne Warren, 'On the Moral and Legal Status of Abortion,' *The Monist* 57 (1973): 43–61, reprinted in *Today's Moral Problems*, second ed., ed. Richard Wasserstrom (New York: Macmillan, 1979); Jane English, 'Abortion and the Concept of a Person,' *Canadian Journal of Philosophy* 5 (1975): 233–43; Lawrence C. Becker, 'Human Being: The Boundaries of the Concept,' *Philosophy and Public Affairs* 4 (1975): 334–59; Alan Zaitchik, 'Viability and the Morality of Abortion,' *Philosophy and Public Affairs* 10 (1981): 18–26.

popular or philosophical literature, they differ in important ways. Let me distinguish between the models as they apply to pregnancy.

Of the several kinds of strict liability, the kind most relevant to this discussion is that of a person who engages in certain kinds of dangerous activities classified as ultra-hazardous or abnormally dangerous, for example, blasting hillsides, cropdusting, or fumigating with harmful gases.[9] If something goes awry while someone

[9] Although strict liability is extremely controversial both in criminal law and in torts, I want to put that aside and explain briefly why I have excluded two other forms of strict liability. (i) Product liability. Like ultrahazardous activities, product liability is part of tort law. Under product liability manufacturers can be held liable for the damages caused by a defect in their product even if they have exercised reasonable care to avoid the defect. Because in a typical sex-pregnancy case there is no question of liability for a defective product, I will not discuss product liability further. I am indebted to Professors Barbara Brudno and Gary Schwartz for information about tort law. Anyone with an interest in strict liability in tort law should consult William L. Prosser, *Law of Torts*, 4th ed. (St. Paul, Minn.: West, 1971) or William L. Prosser, John W. Wade, and Victor E. Schwartz, *Torts: Cases and Materials*, 6th ed. (Mineola, N.Y.: Foundation Press, 1976), especially pp. 719–28 on ultrahazardous activities. (ii) In strict liability cases in the criminal law one can focus merely on the question of whether the illegal act was committed without concerning oneself with whether the agent had the requisite intention (or knowledge, or relevant mental state—*mens rea*) to do the act. For example, (a) someone selling narcotics without a written order, or (b) a director or officer of a bank borrowing an excessive amount of money from her own bank can be held strictly liable for her actions even if she did not know that what she sold were narcotics or that the money was from her own bank. The difficulty in trying to use this kind of strict liability as a model for thinking about responsibility in sex-pregnancy cases is that the model is supposed to generate a responsibility to sustain the fetus, not a punishment. Consider the bank director. She is in position $x$, does $y$ (which is illegal for someone in position $x$), and so can be punished. Now consider pregnancy. She is in position $x$ (is capable of becoming pregnant) does $y$ (has sexual intercourse), but we don't know whether we can punish her (unless we hold very strange views about sexuality). We want to know what further responsibility she has to the fetus. Strict criminal liability will not help us for it tells us only whether to punish the woman. [My information about strict criminal liability as well as the cases mentioned here come from Richard Wasserstrom, 'Strict Liability in the Criminal Law,' *Stanford Law Review* 12 (1960): 731–45.]

is engaged in this kind of activity, she is liable for the consequent harm, even if she exercised great care to avoid it. The agent can be released from strict liability by the occurrence of an "act of God", such as an earthquake or flood. Her liability is further limited by factors that need not concern us here, for example, that the harm caused be within the limit of the risk, and that the harmed person not have assumed the risk.[10]

If we analyze sexual intercourse and pregnancy on a strict-liability model we would say that sexual intercourse is an activity that carries with it the risk of becoming pregnant, even if reasonable care is taken to prevent it. So whenever one voluntarily engages in sexual intercourse, one is liable for the consequences. Note that neither negligence nor actual knowledge of the likely consequences plays a role in strict liability (although one should have known the risks). For our purposes here, the absence of negligence or certain other types of fault on the part of the agent is the most important feature that distinguishes strict liability from the fault model.

The legal notion of fault is very broad; it overlaps with our moral idea of fault, but is by no means coextensive with it. Consider Prosser: "In the legal sense 'fault' has come to mean no more than a departure from the conduct required of a man by society for the protection of others and it is the public and social interest which determines what is required."[11] To make the idea of fault more useful in discussing pregnancy, it will help to narrow our focus to negligence and recklessness.

If we focus on negligence we would apply the fault model to pregnancy as follows: a reasonable person would foresee becoming pregnant as a risk of having sexual intercourse (and a risk that increases with the irresponsible use of contraceptives). She is liable for becoming pregnant if she and her partner were negligent, that is, if they did not take reasonable care to prevent conception. A

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[10] See Prosser, *Law of Torts*, pp. 517–25.

[11] Ibid, p. 18.

person who uses "reliable" contraceptives would have no responsibility to continue a pregnancy.[12]

In some ways, strict liability is more interesting than the fault model; for example, it has the scope deemed appropriate by many opponents of abortion. It is not just the careless who assume the risk of pregnancy, but all women who voluntarily engage in sexual intercourse. Under strict liability an "act of God" can take away agency, and so cancel liability. Because "acts of God" have not caused many pregnancies lately, the agency of a woman is instead taken away by coercion in the form of rape. The woman who is raped is excused from liability for pregnancy.

Richard Werner relies on a strict-liability model to argue that killing sentient fetuses is unjustifiable. He imagines a case in which a man

> derives great satisfaction from taking target practice with this gun. Unfortunately, he lives in a very crowded community; so he builds the most elaborately protective shooting range possible.... He is, nevertheless, aware that it is only 99 percent effective in stopping bullets and that the use of the range could eventually result in the death of some innocent human. But because of the great satisfaction he derives, he begins firing his gun in the basement anyway. Now if this man eventually kills someone, surely he is morally responsible for their death. In firing the gun he knew that one of the foreseeable and natural consequences of his actions may be the killing of an innocent human. Like the two engaging in intercourse, this man has created a special obligation through his actions, they by engaging in intercourse, he by firing his gun in a crowded community.[13]

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[12] Two points here. (i) I do not deal with the question whether on this model a woman is liable if a man who purports to be in charge of contraceptives is negligent. Presumably she's not. Nor do I deal with the argument that it is really the drug industry and medical establishment who are negligent for failing to produce contraceptives that are both safe and effective. (ii) I am not distinguishing between liability for $x$ and responsibility for $x$, although there may well be a distinction.

[13] Richard Werner, 'Abortion: The Ontological and Moral Status of the Unborn,' *Social Theory and Practice* 3 (1974): 201–22. Page references are to the revised version reprinted in Wasserstrom, *Today's Moral Problems*, second ed., p. 70. Note that Werner is discussing abortion after 8–10 weeks. He finds early abortion morally permissible.

The first question is whether this is a strict-liability example at all. Werner includes elements of both the fault model (the emphasis on knowledge of the foreseeable consequences) and strict liability (the elaborate precautions taken). Although strict liability does not require knowledge of the foreseeable consequences, people usually do not take elaborate precautions unless they do foresee some undesirable possible consequences. I categorize this example as one of strict liability because of its emphasis on the absence of even a hint of negligence.[14]

I have two different kinds of criticism of the strict liability model. The first concerns the overall tone of the model – that of an optional dangerous ("ultrahazardous") activity. No strict liability in the law applies appropriately to a particular kind of dangerous or risky activity freely undertaken, not to common activities.[15] Few people are legally required or socially pressured every day of their lives to blast hillsides, dust crops, or fumigate. Sexual intercourse, on the other hand, is surrounded by some of the most pervasive pressures in contemporary life, and is a complex psychological and perhaps physical need. We are bombarded with messages about the importance of sex; it plays an important role in people's emotional lives and major life decisions; it is encouraged or required in some religions; it may be a good in itself. Furthermore, in many states, it is even legally required of wives (and sometimes husbands).[16] In short, although sexual intercourse

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[14] Another possible interpretation is that in spite of his elaborate precautions, the gunman's actions are reckless: the consequences risked are too grave for a frivolous activity. If one prefers this interpretation, my criticism of Werner would then fall under my discussion of the fault model. This interpretation of Werner would weaken his analogy between sexual intercourse and firing a gun. For it would be difficult to argue that *all* voluntary sexual intercourse is reckless.

[15] In law the fact that some activity is commonly undertaken is a factor which weighs against its being appropriate for a strict liability standard. See Prosser, *Law of Torts*, pp. 506–507, 512 for a discussion of the differences between British and American theories about the inappropriateness of strict liability to "usual and normal" activities.

is voluntary on most particular occasions, to ignore the entire cluster of legal-social-psychological interconnections with sexual intercourse is to oversimplify and distort the role it plays in our lives. It is not a completely optional uncommon dangerous activity. For this reason alone I would reject the strict-liability model.

It is difficult to think of common, pleasurable, socially important activities with which to analogize sexual intercourse. The most suitable example that I can think of is driving a car. Consider life in Los Angeles without a car. Life there is often difficult but not impossible without a car; some pleasures would be denied one, but one could live adequately. Although some recommend the value of not driving, many people either enjoy it or *feel* it necessary. And among the young, at least, there is considerable social pressure to drive and great anticipation of the day it becomes legal to do it.

Note that in the case of driving a car we do not hold people strictly liable.[17] When we voluntarily get behind the wheel we are not liable for everything that happens (save acts of God). There are obvious risks; accidents do happen. For this reason we insure ourselves, and in most states, look for the person who is to blame, have degrees of fault, negligence, recklessness, and so on.

Even if we set aside the difficulty that sex is a common activity and focus on a "common-sense" notion of strict liability (the main feature of which is that one need not show negligence), it is still difficult to find good analogies. Judith Thomson has found it helpful to devise hypothetical examples. She imagines a person seed who drifts in your window through a defective screen (which you had installed specifically to keep out people seeds); it roots in the carpet (an event you knew to be possible). Thomsom says:

> Someone may argue that you are responsible for its rooting, that it does have a right to your house, because after all you could have lived out your life with

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[16] See, for example, Shana Alexander, *State-by-State Guide to Women's Legal Rights* (Los Angeles: Wollstonecraft, 1975).

[17] See Prosser, *Law of Torts* p. 507.

bare floors and furniture, or with sealed windows and doors. But this won't do – for by the same token anyone can avoid a pregnancy due to rape by having a hysterectomy, or anyway by never leaving home without a (reliable!) army.[18]

Although this example, like Werner's, includes elements from both the fault model and strict liability, it is relevant to my discussion of strict liability because the person has taken all the precautions thought necessary to keep out people seeds. I interpret Thomson to be arguing against the applicability of a strict-liability model to sex-pregnancy cases by pushing the "change-your-life-style-or-accept-the-consequences-of-it" line to absurdity. She is admitting that certain lifestyles have certain risks: by going out alone in public one increases the risk of rape; by including sexual intercourse or carpets and furniture in one's lifestyle one risks unwanted fetuses or people seeds. However, in order to avoid pregnancy one cannot be morally required to forego a "normal" life – whether that includes going out in public alone or the specific choice to have sexual intercourse. It is not difficult to see the absurdity of holding a rape victim responsible for avoiding pregnancy. It's the specific choice to have sex that makes people balk. What makes Thomson's use of rape confusing in an argument against a strict-liability model is that a rape victim is already excused on this model. Against strict liability Thomson would have been better off to use a "voluntary" example.

In spite of this difficulty Thomson's point is well taken. Her opponent begins with a notion very much weaker than causal responsibility – *but for* one's keeping carpets nothing would have rooted – and generates from it a moral responsibility not to disturb the person seed rooting there.[19] Even if one had a genuine case of causal responsibility here, this inference assumes, not provides, an answer to the question whether causal responsibility implies any other kind of responsibility.

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[18] Thomson, 'A Defense of Abortion,' p. 59.

I now want to turn to my second criticism of the strict-liability models, which concerns differences within the structure of strict-liability examples and sex-pregnancy cases that make strict-liability an unsuitable model for a responsibility to continue one's pregnancy. If we look again at the example of shooting a gun we can see that strict-liability cases do not have the proper structure to serve as a model for sex-pregnancy.[20] There are, of course, some similarities between sexual intercourse and shooting a gun. In each there is (1) an activity, (2) a risk of a consequence which, if it occurs, places (3) an obligation on the agent. In the activity of (1) shooting a gun, the consequences risked are (2) injuring or killing someone. Such an event would obligate you (3) to compensate the injured party or the dead person's heirs. In (1) sexual intercourse the consequence risked is (2) creating a fetus. Note that the consequence risked in sexual intercourse is not any injury or harm, but the creation of something (that you do not want). The "injury" that anti-abortionists worry about (i.e., abortion) is not what is in the "risked consequence" category; creation occupies the place that injury should occupy.

In fact, using this model it is very difficult to find a place for injury in the case of sexual intercourse. It will not do to say that becoming pregnant is an injury to the woman, for then it is she who is due compensation rather than the fetus. Nor will it help to point out that anti-abortionists conceive of abortion itself as the

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[19] On the difference between cause and necessary condition see H. L. A. Hart and A. M. Honore, *Causation in the Law* (Oxford: Clarendon Press, 1959), chap. 5. This work is, of course, relevant to many other issues discussed in this paper as well.

[20] I do not mean to suggest that the law would in fact apply a strict liability standard to Werner's gunman. I am using Werner's example, but analyzing it in a way which he did not—on the model of an ultrahazardous activity in tort law. Werner did not spell out his example in a way that makes it amenable to connecting what I will be calling (2) the risked consequence with (3) the subsequent obligation. In addition, I am not limiting my consideration (as did Werner in his example) to fetuses older than 8–10 weeks.

ultimate injury to the fetus. For then the injury is not the immediate consequence of the activity in (1): the injury is coming from the "wrong direction." This would not be a use of the strict-liability model at all.

Even apart from following the analogy closely, it is difficult to construe "injury" so that a fetus is injured. Whatever initial plausibility there is to considering abortion an injury to the fetus comes from thinking of death to an already functioning person as an injury. But in the case of a fetus we would be saying that it is injured because it is worse off by having existed briefly with no experiences than it would have been not to have existed at all. To say this is problematic. First of all, one needs to make intelligible and then support the claim that it is worse to exist briefly as a fetus than not to exist at all. Then one has to show that this constitutes an injury to the fetus. Neither of these enterprises is something I can envision succeeding.[21]

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[21] Four points here: (i) Onora O'Neill, in her article 'Begetting, Bearing, and Rearing,' in *Having Children*, ed. O'Neill and William Ruddick (New York: Oxford, 1979), p. 29., makes a similar point and quite rightly calls attention to the obscurity of comparing existing and nonexisting (and difficult to individuate) beings. O'Neill's brief discussion of strict liability is the only one I know of in the philosophical literature on abortion.

(ii) I am assuming that an earlier abortion is possible so that the issue does not arise about a fetus's feeling pain or having other experiences. On this matter of "sentience" see Werner's article cited above.

(iii) Another interpretation of injury was suggested to me by Mary Anne Warren: when one creates a fetus one causes something akin to injury – a "hypothetical injury." That is, by creating a fetus you are putting someone in a place in which they might get injured by you. Because of the hypothetical injury inflicted on the fetus, you then owe it the compensation of not injuring it, i.e., you should refrain from doing what you could do to it, namely, kill it. This interpretation seems wrong to me. Not only do I feel uncomfortable generally with hypothetical entities invented to save a philosophical view, but in this case in particular it seems more plausible to use the sort of interpretation Feinberg does: by becoming pregnant one puts someone in a dependent position. I will discuss Feinberg in Section 3.

A further difficulty exists for an anti-abortionist who wants to use a strict-liability model. Any model that categorizes the creation of life as an "injury" is not in keeping with the anti-abortionist's usual view of fetal life as an unqualified good and of a value equal to any human being. An anti-abortionist cannot very well both maintain the high value of fetal life and use the strict-liability model.

In this section I have argued that a strict-liability model is inadequate to support an inference from causal responsibility for pregnancy to a responsibility to continue pregnancy. Let us determine now whether the fault model will fare any better.

## 3. THE FAULT MODEL

As I noted above in contrasting fault with strict liability, the notion of fault from tort law is terribly broad. The way to make it most relevant to sex and pregnancy is to focus on negligence in the use of contraceptives (and secondarily on recklessness in failing to use them at all). For it is this kind of situation that is usually brought to mind when someone attributes fault to a woman for becoming pregnant.

The first of my difficulties with the "quasi-legal" fault model is that it is both of improper scope for and irrelevant to the major concerns of each party in the abortion controversy. The anti-abortionists (whether religious or not) tend to place the greatest emphasis in their argument on the value of fetal life. Even if they do not claim that the fetus is a person with rights, they at least argue that the fetus is of such great value that it cannot justifiably be killed. The fault model does not suit the anti-abortionists because in their view all fetuses have equal value – whether their conception was the result of negligence or of a manufacturer's

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(iv) Another possible interpretation of "injury to the fetus" is that the fetus is injured because it has lost its future. This idea was suggested by a related point in Warren Quinn's paper, 'Abortion: Identity and Loss' (forthcoming in *Philosophy and Public Affairs*).

defect in a carefully used contraceptive.[22] The fault model would allow abortion in the latter case. It thus makes the argument on the wrong grounds for the anti-abortionist – in addition to prohibiting abortion in far too few cases.

There are similar difficulties with the fault model from the point of view of those favoring the right to choose abortion. The principle that usually underlies their position is a form of the right to self-determination for women (or the right to bodily autonomy, or, for a more limited range of cases, the right to self-defense). In this case, too, the fault model is far too limited: autonomy should extend even to negligent women.

Janet Radcliffe Richards makes an interesting point about anti-abortionists' treatment of negligent women. She notes that if a person had been careless about his or her electric wiring and did nothing about it in spite of constant warning, the insurance company, family, and friends would not say after a fire, "It's all your own fault, you must take the consequences, so now we will forcibly prevent your getting a new house even by your own efforts, and make sure you live in a tent for the rest of your life," unless they intended to punish the person for carelessness.[23] In other cases they would merely refuse to help the person bear the consequences brought on by negligence.

My second objection concerns the structure of the fault model. The same structural difficulty that we found in the strict-liability model occurs in the fault model. In each, there are three categories: (1) the activity, (2) the consequence risked which, if it occurs, places (3) an obligation on the agent. In the fault model the cate-

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[22] To a lesser degree most of the models discussed here are open to this objection. For example, the strict-liability model would allow as to excuse the rape victim from liability. Yet isn't the fetus she carries valuable? Of course, some anti-abortionists would not even permit abortion for the rape victim, but some would compromise on this point. They might see it as a choice between the lesser of two evils rather than accepting that it devalues the particular fetus.

[23] Richards, *The Sceptical Feminist* (London: Routledge and Kegan Paul, 1980), pp. 223–24.

gories would be filled by (1) having sexual intercourse while using contraceptives negligently, (2) creating a fetus, (3) being obligated to sustain the fetus. The difficulties are the same as for strict liability: (a) the consequences risked is not an injury or harm; (b) if abortion is to be construed as the "injury," it is not an injury that is the immediate consequence of (1) – it "comes from the wrong direction"; (c) if one tried to interpret the death of the fetus as an "injury" then one is required to make intelligible and defend the claims that existing briefly with no experiences is worse than not existing and that such existence constitutes an injury to the fetus.

Although I have treated the "quasi-legal" fault model briefly, I believe that I have shown its inadequacy.[24] I want now to consider a different kind of fault principle proposed by Joel Feinberg:

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[24] Two points: (i) In the interest of brevity I have not considered examples of the use of, and opposition to, the fault model. The most familiar example is probably Judith Thomson's burglar who climbs in the window that you opened to air out a stuffy room. See 'A Defense of Abortion,' pp. 58–59.

(iii) There are at least two ways one might argue that I have missed the mark here. (a) I might have been too charitable about the underlying models of opponents of abortion who use the "accept the consequences" approach. Janet Radcliffe Richards provides an interesting argument for the view that beneath the rhetoric of anti-abortionists there are many "anti-woman" and "anti-sex" sentiments. See *The Sceptical Feminist*, pp. 218–26. (One might add that there are "anti-poor-people" feelings. Garry Trudeau in "Doonesbury" [Los Angeles *Times*, July 3, 1981] captures this feeling. He has a member of Congress telling the President that denying "abortions to incest and rape victims" is not part of his mandate. The President replies, "Well, fellahs, I have to differ with you on that. The American people elected me to punish promiscuous poor people.... They were most clear on that point.") (b) I might have focused on the wrong "causal" connection. One could focus on the fact that only the pregnant woman is in a "causal" position to sustain the fetus. It might be this fact rather than her having sex that leads to her responsibility to sustain the fetus. This inference would be a version of the principle "only you are in a position to do a great good, so you should do it." Even if this principle has some merit, it is by no means a replacement for a strict-liability model. Among other things, it does not excuse a rape victim from responsibility.

> We will soon reach a general principle, namely, that whether or not a woman has a duty to continue her pregnancy depends at least in part, on how responsible she is for being pregnant in the first place, that is, on the extent to which her pregnancy is the consequence of her own voluntary actions. This formula, in turn, seems to be an application of a still more general moral principle, one that imposes duties on one party to rescue or support another ... to the degree that the first party, through his own voluntary actions or omissions, was responsible for the second party's dependence on him.[25]

This principle might be thought to be an example of the use of the "quasi-legal" fault model, but, in fact, differs from it. Feinberg's principle is in different respects both wider and narrower than the fault model.

The principle is narrower than the fault model because Feinberg focuses on the particular obligation to rescue or support someone whose dependence you caused.[26] Feinberg's principle does not require a person to alleviate or rectify a broad range of harms caused.

The principle is wider than the fault model because it is meant to cover a fuller range of cases than the fault model. Feinberg considers seven circumstances of conception, ranging from (i) rape through (vii) deliberate conception. He finds a woman (and her partner) fully responsible for pregnancy in cases (iv) through (vii): negligence, recklessness, indifference toward pregnancy, and deliberate conception. The cases that might be considered paradigms of the quasi-legal fault model, negligence and recklessness, constitute only half of Feinberg's cases of responsibility. And although it is probably appropriate to extend the fault model to indifference toward pregnancy, the case of deliberate conception would be beyond its scope.[27]

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[25] Feinberg, 'Abortion,' p. 212. Remember that he assumes for the sake of argument that the fetus is a moral person. See note 1 above.

[26] The obligation to rescue or aid someone in peril is particularly problematic in tort law. See Prosser, *Law of Torts*, pp. 340–48. The law often does not coincide with our sense of what is morally right in these cases.

[27] One could, I suppose, try to make the fault model cover Feinberg's cases (iv)–(vii). To do this would require that one liken deliberate conception to the cases of intentional misconduct in tort law, e.g., intentional interference

Feinberg's first two cases in the spectrum of circumstances of conception are (i) rape and (ii) manufacturer's defect in the contraceptive. In these cases the woman is not causally responsible for the pregnancy. The first interesting case is (iii): "Pregnancy caused by contraceptive failure within the advertised 1 percent margin of error (no one's fault)."[28]

Although Feinberg considers this case a borderline case of responsibility for pregnancy, he is willing to say that the woman is not obligated to remain pregnant if we "judge the 1 percent chance of pregnancy to be a *reasonable* risk for a woman to run in the circumstances."[29] Feinberg quite rightly calls our attention to the moral judgment that we make by calling this risk reasonable.

An alternative way to resolve case (iii) is to point out that because contraceptive failure rather than the woman herself caused the pregnancy, the inference from a woman's causal responsibility to a further responsibility to the fetus does not apply.

Cases (iv) and (v) are those that fall squarely within the fault model:

> iv. Pregnancy caused by the negligence of the woman (or the man, or both). They are careless in the use of the contraceptive or else fail to use it at all, being unaware of a large risk that they *ought* to have been aware of.
> v. Pregnancy caused by the recklessness of the woman (or the man, or both). They think of the risk but get swept along by passion and consciously disregard it.[30]

Feinberg relies on the fault model here. He says of case (iv):

> the actions of the parents in the circumstances were faulty and the pregnancy resulted from the fault (negligence), so they are to a substantial degree responsible (to blame) for it. It was within their power to be more careful or knowledgeable, and yet they were careless or avoidably ignorant.[31]

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with person or property. This seems implausible and not to lend itself to the most charitable interpretation of Feinberg's principle. If Feinberg is using the fault model, then he is subject to the other criticisms I made of the model.

28 Feinberg, 'Abortion,' p. 212.

29 Ibid., p. 214.

30 Ibid., pp. 212–13.

31 Ibid., p. 213.

To rely on the fault model, however, is not to defend it. Feinberg defends only his own general principle. He does so by analogy with a bystander's duty ro rescue a swimmer. A bystander's duty to rescue a swimmer in danger becomes stronger the more responsible the bystander is for the swimmer's plight. The late-arriving bystander has no duty; the one who in error told the swimmer the water was safe has a duty to "make some effort at rescue;" but the "bystander" who pushed the swimmer out of the boat must attempt to rescue him at any cost "since the bystander's own voluntary action was the whole cause of the swimmer's plight."[32]

Let us now discuss Feinberg's principle in its application to his "most voluntary" case – deliberate conception. For if it fails there, it will not fare better in what I consider to be the weaker cases of negligence or recklessness. I do not quarrel here with his application of the principle to the bystander and the swimmer. However, I do not think that the analogy is a useful one for the responsibility for pregnancy, even in the case of deliberate conception.

Feinberg is saying to the bystander and the pregnant woman: you are "the whole cause of" this problem situation (in which the swimmer or the fetus becomes dependent on you for survival), so now you must try to alleviate the problem (save the swimmer or sustain the fetus). Although he is correct that in both cases one creates a dependency, the difficulty with thinking of the fetus in the same framework as the swimmer-at-risk is the significant difference in their prior status. Before the swimmer was pushed from the boat he was presumably better off than afterward. The "bystander" made his life significantly worse. This is one feature of the case that makes it intuitively plausible to think that the bystander must try to restore the former quality of the swimmer's life by rescuing him. The fetus's prior status is different: the fetus did not exist at all. There is nothing to individuate to say that "its"

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[32] Ibid., p. 212. The bystander cases come from Sissela Bok, 'Ethical Problems of Abortion,' *Hastings Center Studies* 2 (1974): 35.

life was made better or worse. There is no quality of life to restore. We have unfortunately reached a point similar to those reached in the strict liability and fault discussion: we are in the position of comparing nonexistence with existence for a short time without human experiences. Although I am willing to say that the latter is no worse than the former, even to say this might be unintelligible.[33]

There is also a difficulty with the tone of Feinberg's analogy. Although he does not ascribe any motive to the bystander who pushes the swimmer from the boat, the action is meant to be morally wrong. Our tendency to agree that the bystander must rectify his act depends in part on the act's being morally wrong. However, there is nothing analogously immoral in deliberate conception. The woman who deliberately conceives is not committing an immoral act to be "rectified." If her circumstances change and she decides to abort the fetus, it is most unlikely that her reasons are themselves morally wrong. In fact, her reasons are probably very similar to those of a woman who was not on Feinberg's view responsible for her pregnancy (such as a pregnancy caused by a manufacturer's defect in the contraceptive). Each woman's reasons might stem from a feeling that having a child at this time presents unbearable physical, economic, psychological, or social burden. We are then left to wonder why Feinberg's principle should count to outweigh this kind of reason in the case in which she changed her mind, but give support to it when a manufacturer's defect caused the pregnancy. I do not think that it is enough that Feinberg tells us that his principle is to apply when other things are equal. This does not tell us why we should want to apply his principle at

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[33] One might wonder whether I would extend this kind of criticism to other analogies as well as Feinberg's. In fact, I would say that one of the major difficulties with many of the analogies used in philosophical articles on abortion is that the unusual situation of the pregnant woman and the previously nonexistent fetus is one which is not easily illuminated by analogies from other parts of our experience. It is incumbent upon authors to give reasons why we should agree that their analogy is even *relevant* to pregnancy, let alone strong enough to support their position on abortion.

all. For that he depends on his analogy, which I am arguing is inadequate.

Although Feinberg's principle looked more promising than the fault model, it, too, is flawed. However, there is another model which has been used in the case of deliberate conception.

## 4. THE CONTRACT MODEL

Many people, even among those generally in favor of abortion, assume that a woman who deliberately attempts to become pregnant (and succeeeds) is responsible for continuing the pregnancy. However, the contract model that sometimes underlies this position is even weaker than Feinberg's principle.

Strictly speaking, a contract is "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."[34] When we use this idea in nonlegal contexts, we often focus on a promise or agreement that allows others to rely on our doing what we agreed to do. Thus, an act which in itself is not obligatory becomes so because I agreed to do it. If I deliberately undertake to clean off my desk or gather names of good Indian restaurants when no one else is involved, I would not typically be obligated to finish my task. But if I agree to paint a room after someone else cleans it out, then I am obligated to complete my task, my part of the contract. In this sort of case it is creating expectations in someone else or allowing someone to rely on me that obligates me to complete my task (or make amends if I do not).[35]

Mary Anne Warren seems to rely on the contract model in discussing Thomson's famous violinist case. Note the last sentence in the quotation below. Warren thinks that if you voluntarily join the society to protect famous violinists

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[34] *Restatement of the Law: Contracts,* 2nd ed. (St. Paul, Minn.: American Law Institute, 1981), vol. 1, p. 5.

[35] By "expectation" I mean an ordinary "psychological" use of the word.

you did deliberately place yourself in a position in which it might happen that a human life would be lost if you did not [cooperate in saving him]. Surely this is at least a prima facie reason for supposing that you have an obligation to stay in bed with the violinist [to save his life]. Suppose that you had gotten your name drawn deliberately; surely *that* would be quite a strong reason for thinking that you had such an obligation.[36]

Although Warren does not offer support for the final claim, her overall point is well taken. In this case one has entered into an agreement, a "contract," which has important implications for other people. It creates the expectation that you can be counted on to cooperate in saving the violinist's life. Of course, if there were many members willing to take your place to save the violinist, your refusal to live up to your agreement would not be at the cost of his life. In that case we might be angry with you or fail to understand why you had gotten your name drawn, but we would not levy the same severity of moral judgment on you.

Before examining the contract model, I want to mention a few of the ways in which even "voluntary" pregnancy is not so completely voluntary as Warren's volunteer-violinist-saver (or, for that matter, as Feinberg's "bystander" who pushes the swimmer out of the boat). The woman today who deliberately becomes pregnant does so from a background of factors she has not chosen. First, women do not deliberately become the half of the species that has the offspring. The vast majority of women do not choose to have appropriately functioning reproductive systems – they just have them. Nor do women design the connection between sexual inter-

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For example, if one travels away from one's spouse and children, they often have this kind of expectation of receiving a telephone call. They need not be aware of it every single moment, but they would be disappointed if they received no call. (This is in contrast with the use of "expectation" in "The average upper-middle class child's economic expectations are higher than those of the child on welfare.")

[36] Warren, 'On the Moral and Legal Status of Abortion,' p. 41 (Page references as reprinted in Wasserstrom). I should point out that Warren is not opposed to abortion, but critical of Thomson's famous violinist case. See Thomson, pp. 48–50, *passim*.

course and pregnancy. Nor do they ask to be put under great social pressure to be mothers. Both Warren's and Feinberg's characters (even if they have weird psychological histories) are much more the "master" of their situations than is the woman who deliberately chooses pregnancy today.

Is it appropriate to think of a contract as the basis for the special responsibility one has to the fetus? In answering this question I will examine whether anyone has expectations that are thwarted or whether anyone is made worse off by our failing to "honor the contract."

Consider the possibility of a contract between the woman and the fetus. If we envisage the fetus as one of millions of unborn people out there in a "prenatal orphanage" waiting to be conceived, then I am making it worse off by conceiving it and aborting it, for I am depriving it of a chance to be conceived by someone who might continue the pregnancy. This, of course, is silliness; for real babies are not made this way. There is no one to individuate until conception. The fetus who is conceived and aborted early is no worse off than if it had not been conceived.[37] Neither can the fetus be said to have any disappointed expectations. For a fetus (even if it is a person) has no expectations to disappoint. In fact, it is very strange to think of a fetus entering into any kind of contract – legal or moral, implicit or explicit. Contracts require rational beings, not something at the rudimentary developmental level of a fetus. (We don't, for example, allow people to enter into legal contracts until they are 18-years old.)

One can anticipate this reply: "Of course, a fetus cannot enter into a literal contact; it is a figurative contract. The woman *did* something that allows a 'contract' with the fetus to follow from it." This reply sounds like an obscure way of saying that a woman is obligated to the fetus (by this figurative contract) because of the nature of her activity of sexual intercourse. If this interpretation is correct, one is better off dropping the "figurative contract"

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[37] The difficulties I raised in note 21 have not disappeared.

language and seeing this model for what it is – either a disguised strict-liability model or, if properly qualified, the sort of principle Feinberg uses. For fetuses can no more enter into figurative contracts than they can into real ones: there are no expectations disappointed and the fetus is no worse off than if it had not been conceived at all.

Is it relevant that a woman could have made an agreement with another adult to have a baby? Strictly speaking, it is not.[38] For we are not looking for a responsibility to another adult, but for a responsibility to the *fetus* that arises because a woman deliberately becomes pregnant. Insofar as the contract model is the basis for

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[38] Although I have excluded both the interest and responsibility of men from this paper, I will waive my stipulation in order to sketch briefly how I would deal with a "contract" to have a baby made with another adult. First, notice that whatever responsibility a woman has in an adult/adult contract it is *not* a responsibility to the fetus but to an adult (and thereby not relevant to the main argument of this paper). But I would not put too much stock in her responsibilities to the other adult either. Consider first an "average" case: a heterosexual couple agrees to have a baby. The burdens are entirely the woman's during pregnancy (save, perhaps, a little male vacuuming during the last trimester). Her compensation under this contract is primarily emotional.

In a "surrogate mother" case, a woman is often paid to bear the child of a man. Here although the burdens are entirely hers, the sperm donor (and often his wife) pay expenses and some other money to her. Because in both the surrogate mother case and the "average" case the woman bears the burdens and the risks, the law in the United States does not require that a woman get a spouse's (or other relevant person's) permission for an abortion. This seems appropriate under the "rights commensurate with responsibilities (or burdens)" principle. But this does not imply that a woman who decides to abort the fetus for purely personal reasons does not owe something to the man (or woman) with disappointed expectations. In the surrogate mother case, it seems appropriate that she return most of the money she has "earned." (Note that current legal opinion in the United States would not even go this far because such "contracts" are considered invalid.) It is more difficult to think of compensating one's spouse or lover; but one should at least apologize and promise to try to know one's own mind and feelings better before doing it again. The central point here is that the woman may owe *something* to the disappointed man, but she does not "owe" him a baby.

the alleged responsibility, and a fetus cannot enter into any kind of contract, there is no basis for responsibility.

After considering both the contract model and Feinberg's principle, we are still left without a model to support the view that a woman who deliberately becomes pregnant is thereby responsible for continuing the pregnancy.

## 5. SUMMARY

None of the models I have examined is very useful to an opponent of abortion. None supports the view that a pregnant woman has a special responsibility to continue the pregnancy because she caused it. (1) The creator model raises an interesting question about the conflict between someone's right to destroy a valuable creation and the importance of preserving it, but lends no credibility to the view that a creator, above other people, must refrain from destroying her creation. (2) Strict liability fails because of serious disanalogies, both in "structure" and because sex is a commonplace activity rather than an abnormally dangerous one. (3) The fault model is inadequate because of similar difficulties in structure and because its focus is irrelevant to the main concerns of people in the abortion debate. Feinberg's principle, although better than the fault model, is not helpful because of the dissimilarities in the prior status of his swimmer and of the fetus.(4) The contract model is implausible because a fetus cannot enter into a contract, even a figurative one.

The failure of these models leaves those who differ about abortion with numerous issues to discuss, but precludes an anti-abortionist from using any of the above models to argue that a pregnant woman must continue her pregnancy because she is causally responsible for it.

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