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## Innocent Burdens

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# Innocent Burdens

James Edwin Mahon\*

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## *I. Introduction*

Judith Jarvis Thomson's 1971 article on abortion, "A Defense of Abortion,"<sup>1</sup> is the most reprinted article on abortion ever written, and is one of the most reprinted philosophy articles of all time.<sup>2</sup> Before Thomson's article, the abortion debate was largely a debate about the personhood of the fetus.<sup>3</sup> Was the fetus a person,

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\* I would like to thank everyone at the Symposium who asked questions at the presentation of this Article, in particular Teresa Collett and Kathy Greenier. I would also like to thank Melina Bell for her comments on the presentation. For a lively exchange about Thomson's argument that helped me to clarify my own interpretation of her argument, I would like to thank my former student Bret Reed. For discussions and exchanges about Thomson's argument and his interpretation of it, I would like to thank David Boonin, whose work I admire greatly. For discussions that helped me to clarify my own argument, I would like to thank Nicole Walker and Theresa Rosas. For comments on a subsequent draft of this Article, I would like to thank Joseph Mahon.

1. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 66 (1971), reprinted in THE PHILOSOPHY OF LAW 112 (Ronald Dworkin ed., Oxford Univ. Press 1977) [hereinafter *A Defense of Abortion*].

2. William Parent, *Preface to JUDITH JARVIS THOMSON, RIGHTS, RESTITUTION, AND RISK: ESSAYS IN MORAL THEORY*, at vii (1986).

3. See *A Defense of Abortion*, *supra* note 1, at 112 ("Most opposition to abortion relies on the premise that the foetus is . . . a person, from the moment

endowed with the same moral rights as you or I, or was the fetus not a person? It was assumed that if the fetus was a person with the same moral rights as you or I, then abortion—which would then be the killing of an innocent person—was immoral. Thomson’s article changed the debate about abortion in at least two ways.<sup>4</sup> First, it made the seemingly irresolvable debate about the personhood of the fetus irrelevant. Thomson simply assumed for the sake of the argument that the fetus was a person. Second, it rejected the assumption that killing an innocent person is (always) immoral. Thomson argued that, *even if* a fetus was a person from the moment of conception, endowed with the same moral rights as you or I (something that she did not believe), and *even if* abortion was the killing of an innocent person, abortion could *still* be morally permissible.<sup>5</sup> The trump card against abortion—that it was the killing of an innocent person—was, she argued, not a trump card at all.<sup>6</sup>

My aim in this Article is to defend Thomson’s argument from two important objections: the “Kill Versus Let Die Objection”<sup>7</sup> and the “Intend to Kill Versus Foresee Death Objection.”<sup>8</sup> Both objections hold that even if her argument is sound, it fails to establish that abortion is permissible. I shall argue that both of these objections fail, and that, if her argument is sound, it establishes that abortion is permissible. Many people—although not everyone—believe that her argument is sound. It follows that they should agree that her argument establishes that abortion is permissible.

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of conception.”).

4. See N. ANN DAVIS, *FACT AND VALUE: ESSAYS ON ETHICS AND METAPHYSICS FOR JUDITH JARVIS THOMSON* 82 (MIT Press, 2001) (discussing how Thomson changed the abortion debate by assuming the personhood of the fetus and arguing that this did not decide the question of the morality of abortion).

5. See *id.* at 112 (claiming that “[o]pponents of abortion commonly spend most of their time establishing that the foetus is a person, and hardly any time explaining the step from there to the impermissibility of abortion”).

6. See *id.* (claiming it is “false” that “directly killing an innocent person is always and absolutely impermissible”).

7. *Infra* Part III.

8. *Infra* Part IV.

*II. The Good Samaritan Argument*

Thomson's argument, at least with respect to pregnancy as a result of rape, is as follows.<sup>9</sup>

Imagine that you are pregnant as a result of rape, and assume that the fetus<sup>10</sup> is an innocent person with the same moral rights as you or I. Even if the fetus is an innocent person, you have not given the fetus permission to use your body. Because you have not given the fetus permission to use your body, the fetus has no *right* to use your body.<sup>11</sup> This is because no one has the right to use your body without your permission.<sup>12</sup>

If someone lacks the right to use your body, then that person lacks the right to use your body even if that person needs to use your body in order to live. You may, therefore, refuse to allow another person to use your body, even if the other person will die as a result of this refusal. Because the fetus has no right to use your body, you may refuse to allow the fetus to use your body, even if the fetus will die as a result of this refusal.

The way to refuse to allow a (pre-viable) fetus to use your body is to have an abortion. Because you may refuse to allow a fetus who lacks the right to use your body to use your body, even if the fetus will die as a result, it follows that having an abortion is permissible in the case of a pregnancy as a result of rape, at least before the fetus is viable.<sup>13</sup> Hence, abortion is permissible in the case of a pregnancy as a result of rape, at least before the fetus is viable, *even if* the fetus is a person with the same moral rights as you or I.

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9. In this Article I do not defend Thomson's entire argument, and this is not a summary of her entire argument. In this Article I only defend the first part of her argument, which is an argument about pregnancy as a result of rape. This is only a summary of the first part of her argument.

10. For the purposes of the argument, it makes no difference whether we are talking about a zygote, a pre-embryo, an embryo, or a fetus.

11. See *A Defense of Abortion*, *supra* note 1, at 120 ("I suppose we may take it as a datum that in a case of pregnancy due to rape the mother has not given the unborn person a right to the use of her body for food and shelter.").

12. See *id.* at 118 ("My own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body.").

13. See *id.* at 127 ("I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive.").

Of course, according to this argument, you *may* allow the fetus to use your body when you are pregnant as a result of rape. You are not prohibited from doing so. Simply because the fetus has no right to use your body, it does not follow that you may not grant the fetus permission to use your body. But because the fetus has no right to use your body, even if the fetus needs your body in order to live, if you do allow the fetus to use your body, then this is a *supererogatory* act on your part, and not the result of anything that is owed to the fetus.<sup>14</sup> If you allow the fetus to use your body, then you are being a “Good Samaritan.”<sup>15</sup> Hence the name for Thomson’s argument defending abortion is “the Good Samaritan Argument,”<sup>16</sup> although it has also been called the “Argument from Bodily Autonomy,”<sup>17</sup> or the “Feminist Argument.”<sup>18</sup>

As Thomson pointed out at the time of her writing in 1971, most states prohibited abortion even in the case of rape.<sup>19</sup> Although being a Good Samaritan was not a requirement of any other U.S. law, being a Good Samaritan *was* a requirement of those laws that prohibited abortion even in the case of rape.<sup>20</sup> Hence, states criminalizing abortion, even in the case of rape, were guilty of imposing a Good Samaritan requirement on pregnant women that they did not impose on anyone else.<sup>21</sup> This was a “gross injustice” against pregnant women:

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14. See *id.* at 124 (“Nobody is morally *required* to make large sacrifices . . . in order to keep another person alive.”).

15. See *id.* (describing the “Good Samaritan” as one who goes out of his way to help others in need at some cost to himself).

16. DAVID BOONIN, *A DEFENSE OF ABORTION* 133 (Cambridge Univ. Press, 2002).

17. JOEL FEINBERG, *MATTERS OF LIFE AND DEATH* 209 (Temple Univ. Press, 1980).

18. PETER SINGER, *PRACTICAL ETHICS* 132 (Cambridge Univ. Press 3d ed. 2011).

19. See *A Defense of Abortion*, *supra* note 1, at 127 (describing laws prohibiting abortion in the case of a raped minor as “insane”). The Texas statute at issue in *Roe v. Wade* allowed for abortion in the case of rape and incest. See *Roe v. Wade*, 410 U.S. 113, 117–18 (1973) (referencing TEX. REV. CIV. STAT. ANN. art. 1191–94, 1196 (West 1973)).

20. See *infra* note 23 and accompanying text (stating that most states oblige women to be Good Samaritans and to carry “unborn persons” inside them).

21. See *infra* note 23 and accompanying text (arguing that the only people

My main concern here is not the state of the law in respect to abortion, but it is worth drawing attention to the fact that in none of the United States is any man compelled by law to be even a Minimally Decent Samaritan to any person; there is no law under which charges could be brought against the thirty-eight who stood by while Kitty Genovese died.<sup>[22]</sup> By contrast, in most states in this country women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them. This doesn't by itself settle anything one way or the other, because it may well be argued that there should be laws in this country—as there are in many European countries—compelling at least Minimally Decent Samaritanism. But it does show that there is a gross injustice in the existing state of the law. And it shows also that the groups currently working against liberalization of abortion laws, in fact working toward having it declared unconstitutional for a state to permit abortion, had better start working for the adoption of Good Samaritan laws generally, or earn the charge that they are acting in bad faith.<sup>23</sup>

There are many objections to Thomson's argument.<sup>24</sup> All of them, I believe, fail. My concern here is with two objections that hold that even if her argument is sound, it fails to establish that abortion is permissible. These objections accept, for the sake of the argument, that a woman who is pregnant as a result of rape may refuse to allow the fetus to use her body, even if the fetus will die as a result of this refusal. They reject that this conclusion establishes that the pregnant woman may have an abortion.

### *III. The Kill Versus Let Die Objection*

John Finnis, an early critic of the Good Samaritan Argument, argued that Thomson's argument "does in the end rely

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in the U.S. legally required to be Good Samaritans are women).

22. As it happens, the tale of thirty-eight people just watching Kitty Genovese being murdered, and not helping her, is apocryphal. *See, e.g.*, STEVEN D. LEVITT & STEPHEN J. DUBNER, *SUPERFREAKONOMICS* 139–89 (HarperCollins, 2009) (discussing the altruistic impulse of human beings). Nevertheless, Thomson argues that none would have been breaking any law if they did so.

23. *A Defense of Abortion*, *supra* note 1, at 125.

24. *See, e.g.*, JOHN T. WILCOX, *THE ETHICS OF ABORTION: PRO-LIFE V. PRO-CHOICE* 212–25 (Prometheus Books, 1993).

on some version of the distinction, forced underground in her paper, between ‘direct killing’ and ‘not keeping another person alive.’”<sup>25</sup> This objection may be put as follows. Killing (“direct killing”) is a different act from letting die (“not keeping another person alive”). More importantly, killing is morally worse than letting die.<sup>26</sup> The moral bar for killing is higher than the moral bar for letting die.<sup>27</sup> Even if you may let someone die, it does not follow that you may kill that person. Indeed, the moral bar for killing could be so high that you may never kill a person—or at least, an innocent person (as opposed to a guilty person, or a person who is a threat (to one’s life or well-being), or a person who is an innocent threat, or a person who is innocently shielding a threat).<sup>28</sup> However, even if this claim is false, and even if there are circumstances in which you may kill an innocent person, killing is morally worse than letting die. Even if you may let someone die, it does not follow from this that you may kill that person. Any argument, therefore, that establishes that you may let someone die, does not establish thereby that you may kill that person.

Even if the Good Samaritan Argument establishes that I may refuse to allow the fetus to use my body, with the result that the fetus dies, it does not establish that I may *kill the fetus*. The most that the argument can establish is that, in the case of pregnancy as a result of rape, the pregnant woman is under no moral obligation to allow the fetus to use her body, even though the fetus will die as a result of this refusal. She may *let the fetus die*. However, she remains under the moral obligation not to kill the fetus. But abortion is the *killing* of a fetus, not the act of *letting* a

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25. John Finnis, *The Rights and Wrongs of Abortion*, 2 PHIL. & PUB. AFF. 117, 124 (1973), reprinted in THE PHILOSOPHY OF LAW 129, 135 (Ronald Dworkin ed., Oxford Univ. Press 1977).

26. See *id.* at 147 (distinguishing between “a denial of aid and succor to someone” and “an actual intervention that amounts to an assault on the body of that person”).

27. See *id.* at 142 (stating that a duty to refrain from doing injury to an innocent person is stricter than the duty to aid others) (citing Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 5 (1967)).

28. For more on innocent threats and innocent shields to threats, see SHELLY KAGAN, THE LIMITS OF MORALITY 83–182 (Oxford Univ. Press, 1989).

fetus *die*. Hence, the Good Samaritan Argument is irrelevant to the abortion debate.<sup>29</sup> Abortion is immoral.

Before continuing, it should be noted here that the exact opposite claim about the moral distinction between killing and letting die has been made. It has been argued that letting die is (or can be) morally worse than killing, because killing is (or can be) instant and painless, whereas letting die can be drawn out and painful:

To begin with a familiar type of situation, a patient who is dying of incurable cancer of the throat is in terrible pain, which can no longer be satisfactorily alleviated. He is certain to die within a few days, even if present treatment is continued, but he does not want to go on living for those days since the pain is unbearable. So he asks the doctor for an end to it, and his family joins in the request.

Suppose the doctor agrees to withhold treatment, as the conventional doctrine says he may. The justification for his doing so is that the patient is in terrible agony, and since he is going to die anyway, it would be wrong to prolong his suffering needlessly. But now notice this. If one simply withholds treatment, it may take the patient longer to die, and so he may suffer more than he would if more direct action were taken and a lethal injection given. This fact provides strong reason for thinking that, once the initial decision not to prolong his agony has been made, active euthanasia is actually preferable to passive euthanasia, rather than the reverse. To say otherwise is to endorse the option that leads to more suffering rather than less, and is contrary to the humanitarian impulse that prompts the decision not to prolong his life in the first place.

Part of my point is that the process of being “allowed to die” can be relatively slow and painful, whereas being given a lethal injection is relatively quick and painless.<sup>30</sup>

If it is accepted that killing is morally *better* than letting die, and hence that the moral bar for killing is *lower* than the moral bar for letting die, then the Good Samaritan Argument is

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29. See Finnis, *supra* note 25, at 148 (“[W]ithin the traditional casuistry, the violinist-unplugging in Thomson’s version is *not* the ‘direct killing’ which she claims it is, and which she *must* claim it is if she is to make out her case for rejecting the traditional principle about direct killing.”).

30. James Rachels, *Passive and Active Euthanasia*, 292 NEW ENG. J. MED. 78, 78 (1975).



immune to the objection that the most that it can establish is that in the case of pregnancy as a result of rape, the woman may let the fetus die. This is true because, if the argument establishes that the woman may let the fetus die, and if this is morally worse than killing the fetus, then the argument establishes that the woman may kill the fetus. Whenever an argument establishes that a morally worse act may be performed, it necessarily establishes that a morally better act may be performed. Because abortion is the killing of a fetus, rather than the act of letting a fetus die,<sup>31</sup> if the Good Samaritan Argument establishes that the woman may let the fetus die, it follows that the argument establishes that the woman may have an abortion. Abortion is permissible.

However, in response to the claim that letting die is (or can be) morally worse than killing—because killing is (or can be) instant and painless, whereas letting die can be drawn out and can be painful—it has been argued that what makes letting die morally worse than killing is not the act of letting someone die, but the extra suffering involved in letting someone die.<sup>32</sup> If letting die were instant and painless, like killing, it would be false that letting die is morally worse than killing. Hence, it has been argued that, *all things being equal*, it is false that letting die is morally worse than killing.<sup>33</sup>

The claim that letting die is morally worse than killing will not be defended here in order to save the Good Samaritan Argument from Finnis's objection. In any case, this argument is rejected by Thomson.<sup>34</sup>

The claim that, *all things being equal*, killing is morally worse than letting die, is, however, accepted by many. Hence, the Good Samaritan Argument will be defended from Finnis's objection—that abortion remains immoral even if the Good Samaritan Argument is sound, because abortion involves killing, and killing is worse than letting die, and the Good Samaritan

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31. *Supra* text accompanying note 29.

32. See Rachels, *supra* note 30, at 78 (suggesting that active euthanasia, for example, a lethal injection, is more humane than the process of simply being "allowed to die," which can involve far more time and suffering).

33. See *id.* at 79 (suggesting that many people incorrectly believe there is a moral difference between active and passive euthanasia).

34. *Infra* note 39 and accompanying text.

Argument can at best establish that in the case of pregnancy as a result of rape, the woman may let the fetus die.

Consider the following two cases. In the first case, a woman's ovum is harvested without her knowledge or consent. The ovum is placed in a petri dish. Sperm are added, and fertilization occurs, creating a zygote that develops into a pre-embryo. The woman is then informed that she must allow the pre-embryo to use her body (at least until viability), otherwise the pre-embryo will die (she is the only candidate for implantation).

In the second case, the pre-embryo is created in the exact same way. However, the pre-embryo is now implanted in the woman's uterus, without her knowledge or consent. The woman is then told that she must allow the pre-embryo to use her body (at least until viability), because the only alternative is to kill the pre-embryo.

According to Finnis's objection, the most that the Good Samaritan Argument can establish is that the woman in the first case is under no moral obligation to allow the pre-embryo to use her body, even if the pre-embryo will die as a result of this refusal.<sup>35</sup> She may refuse to allow the pre-embryo to use her body, even if the pre-embryo will die as a result. She may *let* the pre-embryo *die*, rather than allow the pre-embryo to use her body. However, Thomson's argument cannot establish that the woman in the second case is not under a moral obligation not to kill the pre-embryo. She may not *kill* the pre-embryo, if that is the only way to prevent the pre-embryo from using her body.<sup>36</sup> Because the only alternative to killing the pre-embryo is to allow the pre-embryo to use her body, it is true that she must allow the pre-embryo to use her body. The second case, however, is the abortion case, and not the first case. Hence, it follows that, even if the Good Samaritan Argument is sound, it is irrelevant to the abortion debate. Abortion is immoral.

In her response to this objection, which may be called the "Kill Versus Let Die Objection," Thomson argued that the objection can only be successful if it is already established that

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35. See Finnis, *supra* note 25, at 147–48 (suggesting that Thomson's Good Samaritan argument simply represents a choice not to provide assistance or facilities, and not a choice to kill).

36. See *id.* at 125 (claiming that the traditional rule is "[d]o not kill the innocent and just").

there is a profound moral difference between refusing to allow a person to use one's body, such that the person dies (that is, letting a person die), and killing a person.<sup>37</sup> She is skeptical, however, of there being any moral difference between letting a person die and killing a person.<sup>38</sup> In any case, she rejects the idea that there is a profound moral difference between the two:

So the decisive reason why I am wrong in making the assimilation is this: a reluctant Samaritan merely does not save a life, whereas the mother actually kills the child.

Now it had not actually escaped my notice that the mother who aborts herself kills the child, whereas a man who refuses to be a Good Samaritan—on the traditional understanding of Good Samaritanism—merely does not save. My suggestion was that from a moral point of view these cases should be assimilated. . . . To say “Ah, but if she refuses, she kills, whereas a man who refuses to set forth to give aid merely refrains from saving” is not only not decisive against my assimilation, it is *no* reason at all to think it improper—in the absence of a showing that (a) the difference between killing and not saving makes a moral difference, and indeed (b) the difference between killing and not saving makes a sufficiently profound moral difference as to make the assimilation improper. . . . It seems to me to be an interesting, and open, question whether or not (a) [it] is true . . . . However (b) [it] strikes me as false. . . .<sup>39</sup>

Thomson's response to this objection is defensible. Compare, for example, the following three cases: (i) a hysterotomy abortion, in which the fetus dies when removed from the uterus; (ii) a hysterectomy abortion, in which the fetus dies when the uterus containing the fetus is removed from woman's body; and (iii) a craniotomy abortion, in which “the child's skull is crushed to make it possible to get it out of the mother,”<sup>40</sup> that is, the fetus is killed, in order for the fetus to be removed from the uterus. Thomson may be arguing that although the first two abortion cases are cases of letting the fetus die, and do not involve killing

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37. Judith Jarvis Thomson, *Rights and Deaths*, 2 PHIL. & PUB. AFF. 146, 157 (1972); *Infra* note 39 and accompanying text.

38. *Infra* note 39 and accompanying text.

39. Thomson, *supra* note 37, at 156–57.

40. *Id.* at 151.

the fetus,<sup>41</sup> and the final abortion case is a case of killing the fetus, nevertheless, there is *no* moral difference between these three cases, or there is *no* profound moral difference between these three cases. Either the abortions in *all* three cases are equally immoral, or the abortions in *all* three cases are immoral—albeit unequally so, since one abortion is somewhat morally worse than the other two—or the abortions in *all* three cases are equally permissible, albeit unequally so, since one abortion is somewhat morally worse than the other two. That is to say, either the three abortions are morally equivalent, or they are sufficiently morally equivalent. However, the Good Samaritan Argument, if sound, establishes that the hysterotomy abortion and the hysterectomy abortion are permissible. It follows that the Good Samaritan Argument establishes that the craniotomy abortion is permissible, either because a craniotomy abortion is morally equivalent to the other two forms of abortion, or because a craniotomy abortion, even if somewhat morally worse than the other two forms of abortion, is sufficiently morally equivalent to the other two forms of abortion. This is because whenever an argument establishes that an act is permissible, it necessarily establishes that a morally equivalent act is permissible, and because whenever an argument establishes that an act is permissible, it *can* establish that a sufficiently morally equivalent act is permissible.

This response by Thomson may be called the “Moral Equivalence Response” (or, if it is preferred, the “Near Moral Equivalence Response”) to the Kill Versus Let Die Objection. Although this response is a defensible response, it is possible to argue that this response fails. It can be argued, against Thomson, that there *is* a moral difference between killing and letting die, and even that this moral difference *is* a profound moral difference. Indeed, Thomson herself may now believe this.<sup>42</sup>

Even if this response fails, however, it does not matter, because an alternative response to the Kill vs. Let Die Objection

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41. See BOONIN, *supra* note 16, at 193 (stating that hysterotomy and hysterectomy abortions are usually considered a case of letting die rather than killing).

42. See Judith Jarvis Thomson, *Turning the Trolley*, 36 PHIL. & PUB. AFF. 359, 372 (2008) (admitting “I find myself strongly inclined to think” that there is a “difference in weight between positive and negative duties”).

is available.<sup>43</sup> This response is not made by Thomson, despite being inspired by her. The alternative response I have in mind is as follows. Let it be granted, for the sake of the argument, that there is a profound moral difference between letting a person die and killing a person. Nevertheless, the Good Samaritan Argument, if sound, does establish that a pregnant woman may kill a fetus.

There are two arguments that can be made in favor of this response. The first argument, which I shall call the “Exclusive Argument,” is as follows. Let it be granted that the Good Samaritan Argument establishes that in the case of pregnancy as a result of rape, the pregnant woman may refuse to allow the fetus to use her body. If, however, the *only* way for the pregnant woman to exercise this refusal, that is, the *only* way for the pregnant woman to prevent the fetus from using her body, is to kill the fetus—if the *only* options are to allow the fetus to use her body or to kill the fetus—then she *may* kill the fetus. Hence, the Good Samaritan Argument does establish that a pregnant woman may kill a fetus.

The more general argument that lies behind the Exclusive Argument is that, because no one has the right to use your body without your permission,<sup>44</sup> if the only way to prevent a person from using your body is to kill that person, then you may kill that person. Even if it were true that if you have the options of preventing a person from using your body by letting that person die, or by killing that person, then you must let that person die, it would still be true that, if you only have the option of preventing a person from using your body by killing that person, then you may kill that person.

In making the Good Samaritan Argument, Thomson uses the following analogy. One morning you wake up in bed and find yourself kidnapped and hooked up to an unconscious famous violinist who is dying from a rare kidney disease and who needs to use your kidneys for the next nine months in order to repair

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43. See BOONIN, *supra* note 16, at 199–204 (making the different argument that the two ‘letting die’ forms of abortions involve greater risk to the pregnant woman, and therefore that the “killing form of abortion, which involves less risk to the pregnant woman, is permissible”).

44. See *supra* note 12 and accompanying text (describing the right to control the use of one’s body).

his own kidneys and live.<sup>45</sup> The kidnapping of the violinist and the hooking up of the violinist to you was entirely the work of the “Society of Music Lovers,” who wish to save the famous violinist’s life.<sup>46</sup> Her claim is that you may disconnect yourself from the violinist, even though he will die as a result, because he has no right to use your body without your permission.<sup>47</sup> The Kill Versus Let Die Objection is that, even if you may disconnect yourself from the violinist with the result that he will die, you may not, for example, “slit his throat” and kill him.<sup>48</sup> However, abortion is equivalent to slitting the violinist’s throat, because it involves killing the fetus. With respect to the Kill Versus Let Die Objection, the Good Samaritan Argument, even if sound, is irrelevant to the abortion debate. Abortion is immoral.

The Exclusive Argument in defense of the Good Samaritan Argument against the Kill Versus Let Die Objection is that if disconnecting yourself from the violinist is not an option, and if the only options are to remain hooked up to the violinist for nine months or to slit his throat and kill him, then you may slit his throat and kill him.<sup>49</sup> Even if the unconscious violinist has been kidnapped and does not intend to use your body for nine months, he has no right to use your body for nine months without your permission, and if the only way to prevent him from doing this is to kill him, then you may kill him.

The Exclusive Argument is sufficient to defend the Good Samaritan Argument from the Kill Versus Let Die Objection. Nevertheless, if the Exclusive Argument is the only way to defend the Good Samaritan Argument from this objection, then the Good Samaritan Argument remains open to a modified version of the Kill Versus Let Die Objection—a version not anticipated by those who advanced the original objection.

Quite simply, the original Kill Versus Let Die Objection makes the mistake of assuming that abortion always involves the

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45. See *A Defense of Abortion*, *supra* note 1, at 113 (discussing the hypothetical).

46. *Id.*

47. See *id.* at 113–14 (noting that we as human beings have a right to control what happens to our bodies, and therefore it would be “outrageous” to be told that you must remain forcibly plugged to the violinist).

48. *Id.* at 127.

49. See *id.* at 119 (noting that if the donor remained plugged into the violinist, it would merely amount to kindness, not a duty).

killing of the fetus.<sup>50</sup> This is false. It is true that the most common, and safest, forms of abortion involve the killing of the fetus.<sup>51</sup> Nevertheless, there are forms of abortion that do not involve the killing of the fetus, although they do lead to the death of the fetus, such as a hysterotomy abortion or a hysterectomy abortion.<sup>52</sup> These forms of abortion are rarer because they are more dangerous.<sup>53</sup> These forms of abortion are nevertheless available. If the Exclusive Argument is the only way to defend the Good Samaritan Argument, then this argument cannot establish that a woman may kill the fetus. The most that the Good Samaritan Argument can establish is that in the case of pregnancy as a result of rape, the pregnant woman may prevent the fetus from using her body by a form of abortion that does not involve killing the fetus, such as a hysterotomy abortion or a hysterectomy abortion. Because the vast majority of abortions are forms of abortion that involve killing the fetus,<sup>54</sup> it follows that Thomson's argument is irrelevant to the abortion debate, at least when one is talking about the more common, and safer, forms of abortion—which involve killing the fetus—and not the rarer, and more dangerous, forms of abortion—which do not involve killing the fetus, although they do involve letting the fetus die. The vast majority of abortions are immoral.

This objection may be called the “Modified Kill Versus Let Die Objection.” It is probably not a problem for the Good Samaritan Argument. First, strictly speaking, the Good Samaritan Argument is an argument for why a woman who is pregnant as a result of rape may terminate her pregnancy. It is not necessarily an argument for why she may “terminate” the fetus.<sup>55</sup> If the argument defends only certain forms of abortion,

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50. See BOONIN, *supra* note 16, at 193–94 (describing certain methods of abortion characterized as “letting die” rather than “killing”).

51. See *id.* at 193 n.43 (noting that the mortality rate for women who have an abortion by way of hysterotomy is far greater than those who use the saline solution, which would be characterized as killing).

52. See *id.* (describing the hysterotomy procedure as removing the living fetus through an abdominal incision of the uterus and subsequently allowing the fetus to die).

53. See *id.* (noting that a hysterotomy is more invasive than other procedures and therefore reserved for later stages of pregnancy).

54. *Supra* note 51 and accompanying text.

55. See *supra* note 51 and accompanying text (implying that the right to

namely those forms of abortion that lead to the death of the fetus and that do not involve killing the fetus, such as a hysterotomy abortion or a hysterectomy abortion, then it is still an argument that defends the permissibility of certain abortions. Second, the Exclusive Argument can be adapted. There are a number of other morally relevant factors to be taken into account when considering different forms of abortion, such as the threat to the pregnant woman's life, or health, as well as the risk, or the certainty, of her being unable to become pregnant again.<sup>56</sup> These morally relevant factors can be invoked to defend the choice of a *safer* form of abortion that involves killing the fetus over a *more dangerous* form of abortion that leads to the death of the fetus, and the choice of a form of abortion that does *not* jeopardize, or prevent, the woman from becoming pregnant again over a form of abortion that does. It can be argued that the *only safe way*, or *the safest way*, or the *best way* (with respect to future pregnancies) for a woman to prevent the fetus from using her body in the case of pregnancy as a result of rape is to have an abortion that involves killing the fetus. The Good Samaritan Argument would therefore remain relevant to the abortion debate, and the most common, and safer, forms of abortion would be permissible.

As it happens, it is not necessary to adapt the Exclusive Argument in order to defend the Good Samaritan Argument from Modified Kill Versus Let Die Objection. This is because an alternative argument can be made in favor of the Good Samaritan Argument. This second argument I shall call the "Inclusive Argument," and it is as follows. Let it be granted that the Good Samaritan Argument establishes that in the case of pregnancy as a result of rape, the pregnant woman may refuse to

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end one's pregnancy does not amount to a right to secure or guarantee the death of that child). To "terminate" something is to bring something that lasts over some period of time "to an end." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 1289 (11th ed. 2006). To terminate a pregnancy is to bring a *pregnancy* to an end, or to end a *pregnancy*. Properly speaking, therefore, one may terminate a pregnancy and not "terminate" a fetus. Indeed, it is better to avoid applying the term "terminate" to fetuses at all, and to restrict the term to pregnancies. My thanks to Melina Bell for clarifying this point about the use of the term "terminate."

56. See BOONIN, *supra* note 16, at 193 (noting, for example, that an abortion by way of a hysterectomy prevents a woman from giving birth in the future).



allow the fetus to use her body. If *one way* for the pregnant woman to exercise this refusal—that is, to prevent the fetus from using her body—is to kill the fetus, and if *all other* ways for the pregnant woman to exercise this refusal do not involve killing the fetus, but *do* involve the *death* of the fetus, then the pregnant woman *may* kill the fetus, nevertheless. If, for example, a woman who is pregnant as a result of rape and who wishes to prevent the fetus from using her body has the options of having a hysterotomy abortion, or a hysterectomy abortion, or a craniotomy abortion, then she may have a craniotomy abortion. It follows that the Good Samaritan Argument establishes that the craniotomy abortion is permissible and may be performed.

The more general argument that lies behind the Inclusive Argument is that, because no one has the right to use your body without your permission, if you only have the options of preventing a person from using your body by letting that person die, or by killing that person, then you may kill that person. This is because, in the case of certain circumstances that are sufficiently morally serious, both a morally worse act and a morally better act are morally permissible.<sup>57</sup> Even if one act remains morally worse, and the other act remains morally better, it is not the case that in such morally serious circumstances you may not perform the morally worse act.<sup>58</sup> You may.

According to the Inclusive Argument, if killing the violinist by slitting his throat is one option, and disconnecting yourself from the violinist such that he dies is another option, and these are the only two options for freeing yourself from the violinist, then you may slit the violinist's throat, rather than disconnect yourself from him such that he dies. Even if the unconscious violinist has been kidnapped and does not intend to use your body for nine months, he has no right to use your body for nine months without your permission, and if one of the only two ways—both of which are lethal—to prevent him from doing so is to kill him, then you may kill him.

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57. See Thomson, *supra* note 37, at 153–55 (providing an analogy, involving the bombing of children, in which indirect killing (morally better) and direct killing (morally worse) would both be permissible).

58. See BOONIN, *supra* note 16, at 221–26 (stating the contrary argument that it must be the case that performing the morally worse act involves less risk to the killer).

The Inclusive Argument does not require the rejection of the idea that there is a profound moral difference between letting a person die and killing a person. It simply requires the acceptance of the idea that *both* killing and letting die *are options* in the situation in which another person is using your body without your permission, and there is no way to prevent this person from using your body without your permission, other than these two ways. They are both options because the situation in which another person is using your body without your permission is sufficiently morally serious.

Consider the following case. You are a police marksman with a clear shot at the head of a schoolboy who is unknowingly carrying a bomb—placed in his school lunchbox by a group of terrorists—into a crowded school. The bomb is set to detonate as soon as the child enters the school building. You have been given the okay to take the shot. The child, however, is about to trip on a high voltage electric wire that will kill him. Your options—granted that you may prevent him from killing the other innocent schoolchildren and teachers,<sup>59</sup> and that these are the only two ways of preventing him from doing so—are to shoot him in the head and kill him, or to refrain from shooting him, and let him die from tripping on the wire. According to the Inclusive argument, you may kill the schoolboy, rather than let him to die from tripping on the wire.

The fact that you may kill the schoolboy does not entail that there is not a profound moral difference between killing and letting die. It simply entails that in a situation in which an innocent person is about to kill hundreds of innocent people, you may either kill the person or let the person die, when there are no other ways to stop him. It may still be true that if an innocent teacher comes between you and the schoolboy, such that your shot is blocked, and if the schoolboy is bumped out of the way by this teacher, such that the schoolboy does not trip on the wire, you may still *not* kill the teacher with a shot in order to get a clear shot at the schoolboy, but you *may* let the teacher trip on the wire and die, because of the profound moral difference

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59. I take it that you are morally obligated (if not also professionally obligated) to prevent the schoolboy from killing all of those other innocent people—at least if you can do so without killing any other innocent people. It would be immoral not to stop him if you (morally permissibly) could.

between killing and letting die. This is because the teacher himself is not an innocent threat.

It may be objected here that this case fails to be analogous to the case of a woman being pregnant as a result of rape, because there the fetus is not, or at least is not necessarily, a threat to her life or to her health. Hence, the fetus is not an innocent threat, to be either killed or let die. To this objection it may be countered that the fetus is nevertheless a burden, and is using the pregnant woman's body without her permission, albeit unintentionally. Thus the fetus is an innocent burden.

Nor does it matter that the fetus is not violating the right of the woman to her bodily autonomy, because a fetus cannot violate the rights of another, given that the fetus is not conscious, is not in control of his or her behavior, etc.<sup>60</sup> The schoolboy in the bomb example is not violating the rights of the other schoolchildren and teachers either, since he is completely unconscious of the bomb in his lunchbox. It is possible to be an innocent threat, or to be an innocent burden, without violating the rights of anyone.

Another author writing on Thomson has referred to the fetus in the case of pregnancy as a result of rape as an "innocent aggressor":

It might be thought that... [t]he violinist... being an innocent pawn in the hands of the well-meaning Society of Music Lovers, may not be resisted because he has not intentionally encroached on anyone's rights. I think this is mistaken... [S]elf-defense is available and may also be used.<sup>61</sup>

While it is true that someone who is using my body without my permission may be refused the use of my body—may be "resisted"—with the result that he dies *even if* his use of my body is unintentional and he is, therefore, not violating, or encroaching upon, my rights, it is not necessary to characterize this use of my body as an act of aggression or to invoke my right of self-defense. It is sufficient to characterize this use of my body as burdensome

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60. I would like to thank Melina Bell for this objection to an earlier version of this argument, and to thank David Boonin for discussion of this objection.

61. DAVID S. ODERBERG, *APPLIED ETHICS: A NON-CONSEQUENTIALIST APPROACH* 25 (Blackwell, 2000). Note that Oderberg does not believe that the "aggression" of the violinist, and hence of the fetus, is serious enough to warrant a lethal response.

and to point out that the other person *lacks* a right to burden me. Since he lacks a right to burden me, I do not violate his rights when I prevent him from burdening me.<sup>62</sup> As it has been said:

There are cases in which it is morally defensible to kill a person . . . . These include not only self-defense . . . but also cases . . . of justifiable termination of life-support in which one person chooses not to continue to bear the burden of providing life-support to another person, even though this choice has foreseeably fatal consequences for the person whose life-support is thus terminated.<sup>63</sup>

In the case of a woman who is pregnant as a result of rape and who detects the pregnancy before the fetus is viable, even if other forms of abortion that do not involve killing the fetus, but that lead to the death of the fetus, are available, the woman may still have an abortion that involves killing the fetus in order to prevent the fetus from using her body. Both are options because the situation in which the fetus is using your body without your permission is sufficiently morally serious.

The Inclusive Argument is able to defend the Good Samaritan Argument from both the Kill Versus Let Die Objection and the Modified Kill Versus Let Die Objection. It follows that if the Good Samaritan Argument is sound, it establishes what it needs to establish in order to prove that abortion of any form is permissible, at least when the woman is pregnant as a result of rape, and the fetus is not viable.

It should be noted that there is another argument that may be used to defend the Good Samaritan Argument from the Kill Versus Let Die Objection and the Modified Kill Versus Let Die Objection. This is the argument that a woman who is pregnant as a result of rape may kill the fetus even if there are other ways of preventing the fetus from using her body that do *not* result in the death of the fetus. That is, if, in addition to abortions that involve killing the fetus and abortions that involve the fetus dying without killing the fetus, there is a non-abortion option that

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62. I would like to thank David Boonin for clarifying in private correspondence that the argument concerns a lack of a right on the part of the fetus, as opposed to a violation of a right on the part of the fetus.

63. Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175, 179 (1984).

involves the fetus continuing to live without using the pregnant woman's body, then the pregnant woman may still kill the fetus.<sup>64</sup>

This third argument I shall call the "Permissive Argument." Thomson rejects this argument because the Good Samaritan Argument is, strictly speaking, an argument in defense of terminating a pregnancy—which *normally* involves having an abortion—rather than a defense of killing a fetus.<sup>65</sup> As it has been said, Thomson's view of abortion is "essentially a form of pregnancy termination . . . rather than . . . termination of the life of the fetus,"<sup>66</sup> at least if that pregnancy determination could be effected without the death of the fetus. In the case of a pre-viable fetus, the termination of a pregnancy is an abortion, since the fetus is not viable. Thus, in the case of a pre-viable fetus, to defend the termination of a pregnancy is to defend an abortion. The Good Samaritan Argument, therefore, defends abortion in the case of a pre-viable fetus. Given that the vast majority of pregnancy terminations involve pre-viable fetuses,<sup>67</sup> the vast majority of terminations of pregnancies are abortions. As a result, the Good Samaritan Argument defends the vast majority of abortions. However, in the case of a viable fetus, the termination of a pregnancy is not necessarily an abortion.<sup>68</sup> Consequently, in the case of a viable fetus, the termination of pregnancy may be a procedure that has the result that the fetus continues to live outside the uterus.<sup>69</sup> Hence, in the case of a viable fetus, to defend the termination of a pregnancy is not necessarily to defend an abortion. Thomson argues—at least if the fetus is not threatening the life, or the health, of the pregnant woman—that even if the

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64. See BOONIN, *supra* note 16, at 255 (suggesting that technology may enable future doctors to employ non-abortion procedures that will sustain a viable fetus's life outside the mother's womb).

65. I would like to thank Teresa Collett for helping me to understand this point.

66. DAVIS, *supra* note 4, at 93.

67. See GUTTMACHER INST., STATE POLICIES ON LATER ABORTIONS 1–2 (2014) (detailing the limitations on abortions post-viability).

68. Of course, "termination of a pregnancy" here means the early, or artificial, termination of a pregnancy. Birth might be said to be the natural termination of a pregnancy.

69. See BOONIN, *supra* note 16, at 255 (suggesting that science may eventually allow for the removal and survival of a viable fetus through the creation of an artificial womb).

woman is pregnant as a result of rape, the woman may not have an abortion in order to prevent the fetus from using her body if the fetus is viable, and hence, there is a way to terminate the pregnancy that has the result that the fetus continues to live outside the uterus.<sup>70</sup> If the fetus is viable, and at least is not threatening the life or the health of the pregnant woman, having an abortion, of any form, is immoral.

[W]hile I am arguing for the permissibility of abortion in some cases, I am not arguing for the right to secure the death of the unborn child. It is easy to confuse these two things in that up to a certain point in the life of the foetus it is not able to survive outside the mother's body; hence removing it from her body guarantees its death. But they are importantly different. I have argued that you are not morally required to spend nine months in bed, sustaining the life of that violinist; but to say this is by no means to say that if, when you unplug yourself, there is a miracle and he survives, you then have a right to turn around and slit his throat. You may detach yourself even if this costs him his life; you have no right to be guaranteed his death, by some other means, if unplugging yourself does not kill him. There are some people who will feel dissatisfied by this feature of my argument. A woman may be utterly devastated by the thought of a child, a bit of herself, put out for adoption and never seen or heard of again. She may therefore want not merely that the child be detached from her, but more, that it die. Some opponents of abortion are inclined to regard this as beneath contempt—thereby showing insensitivity to what is surely a powerful source of despair. All the same, I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive.<sup>71</sup>

Thomson does not offer any further argument here for the claim that if the fetus is viable, and hence, if it is possible to remove the fetus from the pregnant woman's body without the fetus dying as a result, then a pregnant woman may not have an abortion, even if the woman is pregnant as a result of rape, at least if the fetus is not threatening the life, or the health, of the pregnant woman. That is, she does not provide further support for rejecting the Permissive Argument. Presumably, her argument would be that if you have the options of preventing an

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70. *Infra* note 72 and accompanying text.

71. *A Defense of Abortion*, *supra* note 1, at 127.

innocent person from using your body by killing the person, or by removing the person such that the person dies, or by removing the person such that the person lives, then you must choose the option in which the innocent person lives. That is, if you have the options of killing the violinist, or disconnecting yourself from the violinist such that he dies, or of disconnecting yourself from the violinist such that he lives, then you must disconnect yourself from him such that he lives.

I will not defend the Permissive Argument here. It is not necessary to use the Permissive Argument to defend the Good Samaritan Argument from the Kill Versus Let Die Objection or the Modified Kill Versus Let Die Objection. It should be noted, however, that Thomson's rejection of the Permissive Argument is premised on the assumption that the fetus is a person with the same moral rights as you or I.<sup>72</sup> This is because the Good Samaritan Argument is premised on this assumption.<sup>73</sup> In her analogy, the unconscious violinist is a person with all of the usual moral rights.<sup>74</sup> It may be true that, if the fetus is a person and is viable and is not a threat to the life or the health of the pregnant woman, then a woman who is pregnant as a result of rape may not have an abortion. This argument may be irrelevant, however, if the fetus is not a person. Even if it is true that the Good Samaritan Argument, if sound, fails to establish that a woman who is pregnant as a result of rape may have an abortion if the fetus is viable, this may be irrelevant to the abortion debate if the abortion debate concludes that some or all viable fetuses are not persons. Michael Tooley, for example, holds that fetuses are not persons and do not have the same rights as you or I.<sup>75</sup> Hence, he holds that a woman who is pregnant as a result of rape may have an abortion even if the fetus is viable.<sup>76</sup>

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72. See *id.* at 127 (arguing that a "child" may not be killed should it be possible to "detach the child alive").

73. See *id.* at 113 (assuming for the sake of the argument that the fetus is a person).

74. See *id.* at 113 (the violinist is a person).

75. See Michael Tooley, *Abortion and Infanticide*, 2 PHIL. & PUB. AFF. 37, 62 (1971) (claiming that the main factor in determining personhood is when an organism has the ability to possess the concept of self as a continuing subject of experiences and other mental states).

76. See *id.* at 37 (suggesting that abortions are morally permissible).

*IV. The Intend to Kill Versus Foresee Death Objection*

In the previous section I argued that the Good Samaritan Argument does establish that a pregnant woman may kill the fetus in the case of pregnancy as a result of rape, at least when the fetus is not viable. It may be objected here that Thomson herself would reject this argument. This objection is based on an interpretation of Thomson's claim that you "have no right to be guaranteed his [the fetus's] death."<sup>77</sup> According to this interpretation, Thomson is saying here that you may *never* intend to kill the fetus. You may intend only to refuse to allow the fetus to use your body by intending to act in a way other than killing the fetus, foreseeing that this will lead to the fetus's death.

This objection may be put as follows. Intending is a different mental state to foreseeing. In particular, intending to kill someone is a different mental state to foreseeing the death of someone as a result of the act that you intend to perform that is not killing. More importantly, intending to kill someone is a morally worse mental state than the mental state of foreseeing the death of someone as a result of the act that you intend to perform that is not killing. The moral bar for intending to kill someone is higher than the moral bar for foreseeing the death of someone as a result of the act that you intend to perform that is not killing. Even if you may intend to act in a way other than to kill a person, foreseeing that the person will die as a result, it does not follow that you may intend to kill that person.

Indeed, the moral bar for intending to kill someone could be so high that you may never intend to kill someone—or at least, an innocent person (as opposed to a guilty person, or a person who is a threat (to one's life or well-being), or a person who is an innocent threat, or a person who is innocently shielding a threat).<sup>78</sup> However, even if this last claim is false, and even if there are circumstances in which you may intend to kill an innocent person, intending to kill someone is morally worse than intending to act in a way other than to kill a person, foreseeing that person's death as a result. Even if you may intend to act in a

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77. *A Defense of Abortion*, *supra* note 1, at 127.

78. *See supra* note 28 and accompanying text (discussing additional innocent threats and innocent shields to threats).



way other than to kill a person, foreseeing that person's death as a result, it does not follow from this that you may intend to kill that person. Any argument, therefore, that establishes that you may intend to act in a way other than to kill a person, foreseeing that person's death as a result, does not establish thereby that you may intend to kill that person.

With respect to the Good Samaritan Argument, the objection is that even if I may *intend to refuse* to allow the fetus to use my body, foreseeing the death of the fetus as a result, I may not *intend to kill* the fetus.<sup>79</sup> The most that the argument can establish is that in the case of pregnancy as a result of rape, the pregnant woman may intend to refuse the fetus the use of her body, foreseeing the death of the fetus as a result. It does not establish that she may intend to kill the fetus. But abortion is the intentional killing of a fetus. In the case of abortion, the pregnant woman intends to kill the fetus; she does not merely intend to refuse the fetus the use of her body, foreseeing the death of the fetus as a result. Hence, the Good Samaritan Argument is irrelevant to the abortion debate. Abortion is immoral.

Consider the following two cases. In the first case, you are a patient who checks into a hospital because you are suffering from a minor ailment. While you are there the doctor runs tests on you and realizes that you are a perfect organ match for five other patients, all of whom are dying because their respective organs—heart, lungs, kidneys, liver, and stomach—are cancerous. The doctor approaches you and tells you that you are a perfect organ match for five other patients who are dying. She asks you to give up your life and donate your organs to the five other patients, because otherwise they will die. You refuse, although you foresee the death of the five other patients as a result of this refusal. The five other patients die.

In the second case, you are a visitor at the hospital. You are aware of a situation identical to the situation described in the first case: there is a healthy patient whose is a perfect organ match for five other patients, all of whom are dying of cancerous

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79. See BOONIN, *supra* note 16, at 224–25 (noting that the permissibility of choosing to act, foreseeing death, does not entail the permissibility of intending death).

organs. In the middle of the night, you kill the healthy patient in a way that looks as though he died of a natural cause. The next day, his organs are transplanted into the five other patients. They all live.

In the first case, you form the intention to refuse to donate your organs, foreseeing the death of five people as a result. In the second case, you form the intention to kill someone (and foresee the saving of five lives as a result). Even if you may intend to refuse to donate your organs, foreseeing the death of someone as a result, it does not follow that that you may intend to kill someone. Intending to kill someone remains immoral, even if it is not immoral to refuse to donate your organs, foreseeing the death of someone as a result. There is a moral distinction between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result.

The distinction between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result, lies behind the Doctrine of Double Effect (or the Principle of Double Effect).<sup>80</sup> According to this doctrine, I may produce a bad effect, provided that I do not intend that bad effect, but instead intend to act in a way that is not immoral, or that is even morally praiseworthy, foreseeing the good, intended effect (which is my end, or a means to my (good) end), as well as foreseeing the bad, unintended effect (which is neither my end, nor a means to my end), where the good effect is sufficiently proportionately good that it compensates for the bad effect.<sup>81</sup> Acting this way is not immoral.<sup>82</sup>

For example, I may give a pregnant woman radiation treatment, which is not an immoral act, intending to cure her breast cancer, which is a good effect, which is a means to saving her life, which is my good end, foreseeing that I will kill the fetus, which is a bad effect, which I neither intend as a means to curing her breast cancer and saving her life, nor as an end, where saving

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80. See F.J. Connell, *Double Effect, Principle of*, in 4 NEW CATH. ENCYCLOPEDIA 1020, 1022 (McGraw-Hill 1967) (describing the Principle of Double Effect as a "rule of conduct" that determines when a person may lawfully perform an action that results in two effects, one bad and one good).

81. *Id.*

82. See *id.* at 1021 (describing the conditions of morally permissible behavior under the Doctrine of Double Effect).

the pregnant woman's life is sufficiently proportionately good that it compensates for the death of the fetus.

It is opposed to, on the one hand, my intending to act in a way that is immoral, which obviously is immoral, and may not be done.<sup>83</sup> For example, I may not intentionally kill a fetus (assuming this to be immoral). It is also opposed to, on the other hand, my intending to act in a way that is not immoral, or that is even morally praiseworthy, foreseeing the good, intended effect (which is my end, or a means to my (good) end), as well as foreseeing the bad, unintended effect (which is neither my end, nor a means to my end), where the good effect is insufficiently proportionately good and does not compensate for the bad effect.

For example, I may not give a pregnant woman a face-lift, which is not an immoral act, intending to remove wrinkles from the woman's face, which is a good effect, which is a means to making her happier, which is my good end, foreseeing that the anesthetic for the surgery will kill the fetus, which is a bad effect, which I neither intend as a means to removing her wrinkles and making her happier, nor intend as an end, because removing a woman's wrinkles and making her happier is not sufficiently proportionately good that it compensates for the death of the fetus.<sup>84</sup>

The Doctrine of Double Effect is formulated by *The New Catholic Encyclopedia* as follows:

1. The act itself must be morally good or at least indifferent.
2. The agent may not positively will the bad effect but may permit it. If he could attain the good effect without the bad effect he should do so. The bad effect is sometimes said to be indirectly voluntary.
3. The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.

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83. See *id.* (noting that the act itself must be morally good).

84. See *id.* (directing that the good effect must compensate *proportionately* for the bad effect).

4. The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.<sup>85</sup>

The Doctrine of Double Effect has been used by those who *reject* the Good Samaritan Argument to defend the permissibility of performing a life-saving medical procedure on a pregnant woman that will result in the death of the fetus:

On the other hand, suppose a woman is diagnosed with uterine cancer, and when operated on is discovered to be pregnant. Can the doctor go ahead and remove the woman's uterus, even though the child will again surely die? In the latter case, the initial act is removal of the uterus, an act not wrong in itself: its effects are the saving of the life of the mother, and the death of the child. The application of PDE [Principle of Double Effect] suggests there is indeed a proportionality between the two—life as against life. Crucially, there is no *intention* to kill the child, only to save the mother: the child's death is not a *means* to the saving of the mother, otherwise it would be a case of killing one innocent person to save another.<sup>86</sup>

It is important to point out that the argument about the moral distinction between intending to kill someone and intending to act in a way other than to kill a person while foreseeing that person's death as a result does not actually require the death of anyone. In the two hospital cases outlined above, it might happen that you merely form your intention (to refuse to donate your organs, in the first case, and to kill the healthy patient, in the second case), and that a miracle occurs (all five patients recover instantly) and that you never act on your intention. This would not affect the argument that it is morally worse to *intend* to kill someone than to *intend* to act in a way other than to kill a person, foreseeing that person's death as a result.

It is also important to point out that the argument about the moral distinction between intending to kill someone, and intending to act in a way other than to kill a person, foreseeing that person's death as a result, makes no mention of *motive*.<sup>87</sup> A

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85. *Id.*

86. ODERBURG, *supra* note 61, at 29.

87. See BOONIN, *supra* note 16, at 212 (describing the distinction as the intention of causing a death versus the foresight that a death will occur, making

motive is the *reason why* a person forms the intention to act that she forms, and not the intention to act itself.<sup>88</sup> A person may have any reason for forming the intention to kill someone. She may want to save five innocent lives, for example. Or she may want to carry out the court's sentence of death. Or she may want to get revenge for someone's murdering a member of her family. A person may also have any reason for forming the intention to refuse to donate her organs, foreseeing the death of five people as a result. She may want to continue to live, for example. Or she may want to annoy her parents, who are strict utilitarians. Or she may want to put pressure on the government to provide better preventative care for people in hospitals.

According to the objection based on this distinction, although you may intend to disconnect yourself from the violinist, foreseeing his death as a result, you may not intend to kill the violinist by slitting his throat. Even if the kidnapped, unconscious violinist has no right to use your body for nine months without your permission, you may not intend to kill him.

According to this objection, the most that the Good Samaritan Argument can establish is that, in the case of a woman who is pregnant as a result of rape and who intends to refuse to allow the pre-viable fetus to use her body, she may intend to have a form of abortion that does not involve the intention to kill the fetus. She may intend to have, for example, a hysterotomy abortion, or a hysterectomy abortion. These abortions involve the intention only to remove the fetus from the body of the pregnant woman, foreseeing that this will lead to the death of the fetus. This is permissible, at least if the Good Samaritan Argument is sound. The Good Samaritan Argument, however, cannot establish that a woman who is pregnant as a result of rape may have a form of abortion that involves the intention to kill the fetus. She may not have a craniotomy abortion, for example. This is because a craniotomy abortion involves intending to kill the fetus.<sup>89</sup> Because the vast majority of

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no mention as to the reasons why one chooses one act over the other).

88. See James Edwin Mahon, *Doing the Wrong Thing for a Good Reason*, in *THE GOOD WIFE AND PHILOSOPHY* 89–99 (Kimberly Baltzer-Jaray & Robert Arp eds., 2013) (explaining the difference between motive and intention).

89. See *supra* note 43 and accompanying text (describing a craniotomy abortion).

abortions are forms of abortion that involve the intention to kill the fetus,<sup>90</sup> it follows that even if the Good Samaritan Argument is sound, it is irrelevant to the abortion debate, at least when one is talking about the much more common, and safer, forms of abortion, which involve the intention to kill the fetus, and not the rarer, and more dangerous, forms of abortion, which do not involve the intention to kill the fetus,<sup>91</sup> although they do involve the intention to act in a way other than killing the fetus, foreseeing the death of the fetus as a result. The vast majority of abortions remain immoral.

This objection, which may be called the “Intend to Kill Versus Foresee Death Objection,” might appear to be endorsed by Thomson herself against her own Good Samaritan Argument. Thomson has argued elsewhere that a surgeon “may not even choose to cut up one where *five* will thereby be saved,” where this involves forming the intention to kill one person.<sup>92</sup> This implies that she holds that you may not form the intention to kill an innocent person, even to save another innocent person. She has also argued that, in the case of a bystander who sees that a runaway trolley is heading towards five innocent people standing on its track, who knows that there is one innocent person standing on a side track, and who knows that if he throws a switch he can divert the trolley, saving the five people, foreseeing the death of the person on the side track as a result, “I should think you may turn it all the same.”<sup>93</sup> This implies that she holds that you may form the intention to divert a trolley, foreseeing that this will lead to an innocent person’s death, in order to save an innocent person. Her conclusions about these two cases, therefore, imply that she holds that you may form the intention to act in a way other than to kill a person, foreseeing that

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90. See *supra* note 51 and accompanying text (noting that “most common, and safer, forms of abortion involve the killing of the fetus”).

91. See *supra* notes 53–54 and accompanying text (describing more invasive abortion procedures that do not involve directly killing the fetus prior to removal from the woman’s body that are more dangerous and thus rarely used).

92. Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 *MONIST* 204, 206 (1976).

93. Judith Jarvis Thomson, *The Trolley Problem*, 97 *YALE L.J.* 1395, 1397 (1985).

person's death as a result, in order to save another innocent person, but that you may not form the intention to kill someone, in order to save another innocent person.<sup>94</sup>

However, there is support for the contrary claim that Thomson would not endorse this objection to her own Good Samaritan Argument. In her later article, *Rights and Deaths*,<sup>95</sup> Thomson considers this moral distinction directly: "We need to know why it should matter so crucially whether the death a man foresees is, on the one hand, his end or means, or on the other hand, a merely foreseen consequence."<sup>96</sup> Here she argues that there is no morally significant difference between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result.<sup>97</sup>

Thomson considers two cases. In the first case, an aggressor nation has threatened us with death unless we agree to be enslaved by them. They will use a monster missile launcher to kill us if we do not submit to them. They were able to build only *one* missile launcher, however. The missile launcher has small tunnels, and only very young children—"two-year olds, in fact"<sup>98</sup>—can fit in the tunnels and operate the missile launcher. (Thomson does not explain this detail further, but it can be stipulated that the children have been trained to crawl through the tunnels and push colored knobs at the end of the tunnels; they remain innocent of wrongdoing). Unfortunately, the children also live in the missile launcher. "We are capable of bombing the site. Unfortunately, if we bomb to destroy the launcher to save our lives, we kill the children."<sup>99</sup>

In the second case, everything is the same except that the aggressor nation has many, many missile launchers. However, they have only *one* team of trained two-year olds. "We are capable

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94. Note that Thomson appears to have abandoned the position that you may form the intention to divert a trolley, foreseeing that this will lead to an innocent person's death, in order to save five innocent people. See generally Thomson, *supra* note 42).

95. Thomson, *supra* note 37.

96. *Id.* at 152.

97. See *id.* (noting that a man "who kills only indirectly" still foresees the outcome, death, and yet chooses to act anyway).

98. *Id.* at 153.

99. *Id.*

of bombing the site. Unfortunately, bombing the site will save our lives only if by bombing we kill the children.”<sup>100</sup>

About the first case she says “we only indirectly kill the children: their deaths are not our end, nor do we need their deaths if we are to achieve our end—our end would be just as well achieved if by some miracle the children survive the bombing.”<sup>101</sup> About the second case she says: “we directly kill the children: their deaths are necessary to the achieving of our end, and if, by a miracle, they survive the bombing, we must bomb again.”<sup>102</sup> That is, if the children survive the destruction of the missile launcher, *they* will have to be bombed. About these two cases she says:

Of course some very high-minded people may say we must not bomb in either case: after all, the children are innocent! Lower-minded people, like me, will say we can bomb in either case . . . . To accept this is also to grant that the difference between direct and indirect killing does not have the moral significance which has been claimed for it. The acts in both . . . are both permitted, though one is a direct, the other an indirect killing.<sup>103</sup>

Thomson’s argument here implies that she would reject the Intend to Kill Versus Foresee Death Objection to her own Good Samaritan Argument. This is because she argues that either there is no moral significant difference between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person’s death as a result, or there is no profound moral difference between the two. That is, she holds that one may do either, if one may do one of the two. In particular, one may intend to kill someone, if one may intend to act in a way other than to kill a person, foreseeing that person’s death as a result.<sup>104</sup> This response may be called the “Moral Equivalence of Intend to Kill Versus Foresee Death Response” (or, if it is preferred, the “Sufficient Moral Equivalence of Intend to Kill Versus Foresee Death Response”).

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100. *Id.*

101. *Id.* at 153–54.

102. *Id.* at 154.

103. *Id.* at 154–55.

104. *See id.* at 157 (claiming that Finnis, in his response to Thomson’s *A Defense of Abortion*, failed to prove that there is a morally significant difference between killing and letting die).



It seems that Thomson, therefore, would reject the Intend to Kill Versus Foresee Death Objection to her own Good Samaritan Argument. It seems that she would provide the Moral Equivalence of Intend to Kill Versus Foresee Death Response (or, if it is preferred, the Sufficient Moral Equivalence of Intend to Kill Versus Foresee Death Response).

Although Thomson's response to the Intend to Kill Versus Foresee Death Objection remains a defensible response, it may be argued that the Moral Equivalence of Intend to Kill Versus Foresee Death Response (or, if it is preferred, the Sufficient Moral Equivalence of Intend to Kill Versus Foresee Death Response), fails.<sup>105</sup> Even if this is the case, however, it does not matter because an alternative response is available. Once again, this response is not made by Thomson, although it is inspired by her. The alternative response I have in mind is as follows. Let it be granted for the sake of the argument that there is a morally significant difference between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result. Nevertheless, the Good Samaritan Argument does establish that a pregnant woman may form an intention to kill the fetus.

There are two arguments that can be made in favor of this response, just as there were two arguments that could be made in favor of the response to the Kill Versus Let Die Objection. Indeed, the two arguments are similar in all respects. They may even be called the "Exclusive Argument (Against the Intend to Kill Versus Foresee Death Objection)" and the "Inclusive Argument (Against the Intend to Kill Versus Foresee Death Objection)."

The Exclusive Argument against the Intend to Kill Versus Foresee Death Objection is as follows. Let it be granted that the Good Samaritan Argument establishes that in the case of pregnancy as a result of rape, the pregnant woman may intend to refuse to allow the fetus to use her body, foreseeing that this will lead to the death of the fetus.<sup>106</sup> If, however, the *only* way for the

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105. See BOONIN, *supra* note 16, at 213 (noting that most critics of abortion accept that there is in fact a moral distinction between intending and merely foreseeing death).

106. See *A Defense of Abortion*, *supra* note 1, at 123 (suggesting that a woman who is pregnant due to rape is not obligated to allow the fetus to use her body for life support).

pregnant woman to intend this refusal, that is, to intend to prevent the fetus from using her body, is to intend to kill the fetus—if the *only* options are to intend to allow the fetus to use her body, or to intend to kill the fetus—then she *may* intend to kill the fetus. Hence, the Good Samaritan Argument does establish that a pregnant woman may intend to kill the fetus.

The more general argument that lies behind the Exclusive Argument is that, because no one has the right to use your body without your permission, if the only way to intend to prevent a person from using your body is to intend to kill that person, then you may intend to kill that person.<sup>107</sup> Even if it were true that, if you have the options of intending to prevent a person from using your body by intending to act in a way other than to kill that person, foreseeing that that person will die as a result, or intending to kill that person, you must intend to act in a way other than to kill that person, foreseeing that person's death as a result, it would still be true that, if you have only the option of intending to prevent a person from using your body by intending to kill that person, then you may intend to kill that person.

The Exclusive Argument in defense of the Good Samaritan Argument against the Intend to Kill Versus Foresee Death Objection is that, if intending to disconnect yourself from the violinist is not an option, and the only options are to intend to remain hooked up to the violinist for nine months, or to intend to slit his throat and kill him, then you may intend to slit his throat and kill him. Even if the unconscious violinist has been kidnapped and does not intend to use your body for nine months, he has no right to use your body for nine months without your permission, and if the only way to intend to prevent him from doing this is to intend to kill him, then you may intend to kill him.

According to the Exclusive Argument, if a woman who is pregnant as a result of rape and who intends to prevent the fetus from using her body only has the option of having a craniotomy abortion, which involves intending to kill the fetus,<sup>108</sup> then she

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107. *Id.* at 117–18 (discussing further the idea that the fetus in this case that has no right to use a woman's body).

108. *See supra* note 51 and accompanying text (describing the craniotomy abortion).

may have a craniotomy abortion. It follows that the Good Samaritan Argument establishes that having a craniotomy abortion is permissible, and may be performed.

As it was pointed out above, however, it is not the case that a woman who is pregnant as a result of rape and who intends to prevent the fetus from using her body has only the option of intending to kill the fetus. A pregnant woman has the option of intending to prevent the fetus from using her body by, for example, intending to remove the fetus from the uterus, foreseeing that the fetus will die as a result (a hysterotomy abortion), or intending to remove the uterus containing the fetus from her body, foreseeing that the fetus will die as a result (a hysterectomy abortion).<sup>109</sup> If the Exclusive Argument is the only way to defend the Good Samaritan Argument from the Intend to Kill Versus Foresee Death Objection, then this argument cannot establish that a woman may intend to kill the fetus. The most that the Good Samaritan Argument can establish is that in the case of pregnancy as a result of rape, the pregnant woman may intend to prevent the fetus from using her body by intending a form of abortion that does not involve killing the fetus. Because the vast majority of abortions are forms of abortion that involve killing the fetus,<sup>110</sup> it follows that Thomson's argument is irrelevant to the abortion debate, at least when one is talking about the more common, and safer, forms of abortion, which involve killing the fetus, and not the rarer, and more dangerous, forms of abortion, which do not involve killing the fetus, although they do involve the death of the fetus.<sup>111</sup> Hence, the vast majority of abortions are immoral.

Once again, it is possible to defend the Exclusive Argument by adapting the argument. Because there are a number of other morally relevant factors to be taken into account when considering different forms of abortion, such as the threat to the pregnant woman's life or health, as well as the risk, or the certainty, of her being unable to become pregnant again, these

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109. See *supra* note 52 and accompanying text (describing hysterotomy and hysterectomy abortions).

110. *Supra* note 51 and accompanying text.

111. See *supra* notes 52–53 and accompanying text (discussing generally the safer, more common forms of abortion in comparison with the rarer, more dangerous forms).

morally relevant factors can be invoked to defend the choice of a safer form of abortion over a more dangerous form of abortion, and the choice of a form of abortion that does not jeopardize, or prevent, the woman from becoming pregnant again, over a form of abortion that does. It can be argued that the *only safe way*, or *the safest way*, or the *best way* (with respect to future pregnancies) for a woman to prevent the fetus from using her body in the case of pregnancy as a result of rape is to have an abortion that involves killing the fetus.<sup>112</sup> Because she may choose the safer, or the safest, or best form of abortion available, she may intend to kill the fetus. The Good Samaritan Argument would therefore remain relevant to the abortion debate, and the most common, and safer, forms of abortion would not be immoral.

Once again, however, it is not necessary to defend the Exclusive Argument by adapting the argument. This is because the Inclusive Argument (Against the Intend to Kill Versus Foresee Death Objection) can be made in defense of the Good Samaritan Argument. Let it be granted that the Good Samaritan Argument establishes that in the case of pregnancy as a result of rape, the pregnant woman may intend to refuse to allow the fetus to use her body.<sup>113</sup> If *one way* for the pregnant woman to intend to this refusal—that is, to intend to prevent the fetus from using her body—is to intend to kill the fetus, and if *all other* ways for the pregnant woman to intend to this refusal do not involve intending to kill the fetus, but do involve intending to act in a way other than to kill a person, foreseeing that person's death as a result, then the pregnant woman *may* intend to kill the fetus, nevertheless. If, for example, a woman who is pregnant as a result of rape and who intends to prevent the fetus from using her body has the options of having a hysterotomy abortion, or a hysterectomy abortion, or a craniotomy abortion, then she may have a craniotomy abortion. It follows that the Good Samaritan Argument, if sound, establishes that having a craniotomy abortion is permissible and may be intended.

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112. See BOONIN, *supra* note 16, at 193 n.43 (discussing the lower mortality rates associated with those forms of abortion characterized as “killing”).

113. See *A Defense of Abortion*, *supra* note 1, at 121 (implying that a woman may justly refuse to support the fetus in the case of a pregnancy due to rape).

The more general argument that lies behind the Inclusive Argument is that, because no one has the right to use your body without your permission, if you intend to prevent a person from using your body, and you have the options of intending to act in a way other than to kill a person, foreseeing that person's death as a result, and intending to kill that person, then you may intend to kill that person. This is because, in the case of certain circumstances that are sufficiently morally serious, both a morally worse intention and a morally better intention may be formed. Even if one intention remains morally worse and the other intention remains morally better, it is not the case that in such morally serious circumstances you may not form the morally worse intention. You may.

According to the Inclusive Argument, if intending to kill the violinist by slitting his throat is one option, and intending to disconnect yourself from the violinist, foreseeing that he will die as a result, is another option, and these are the only two options for freeing yourself from the violinist, then you may intend to slit the violinist's throat, rather than intend to disconnect yourself from him, foreseeing that he will die as a result. Even if the unconscious violinist has been kidnapped and does not intend to use your body for nine months, he has no right to use your body for nine months without your permission, and if one of the only two intentions that if acted upon will free yourself from him is the intention to kill him, then you may intend to kill him.

The Inclusive Argument does not require the rejection of the idea that there is a profound moral difference between intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result. It simply requires acceptance of the idea that *both* intending to kill someone and intending to act in a way other than to kill a person, foreseeing that person's death as a result, *are options* in the situation in which another person is using your body without your permission, and there are no other options for preventing this person from using your body. They are both options because the circumstances in which another person is using your body without your permission are sufficiently morally serious.

The Inclusive Argument is able to defend the Good Samaritan Argument from the Intend to Kill Versus Foresee Death Objection. It follows that if the Good Samaritan Argument

is sound, it establishes what it needs to establish in order to prove that abortion of any form is permissible when the woman is pregnant as a result of rape and the fetus is not viable.

It should be noted that there is a third argument that may be used to defend the Good Samaritan Argument from the Intend to Kill Versus Foresee Death Objection, just as there was a third argument that could be used to defend it from the Modified Kill Versus Let Die Objection.<sup>114</sup> Indeed, this third argument is similar in all respects. It may even be called the “Permissive Argument (Against the Intend to Kill Versus Foresee Death Objection).” This is the argument that a woman who is pregnant as a result of rape and who intends to prevent the fetus from using her body without her permission may intend to kill the fetus even if there are other ways of intending to prevent the fetus from using her body that do *not* result in the death of the fetus. That is, if, in addition to abortions that involve intending to kill the fetus, and abortions that involve intending to act in a way other than killing the fetus, foreseeing the death of the fetus, there is a non-abortion option that involves intending to act in a way other than killing the fetus, and the fetus continuing to live without using the pregnant woman’s body, then the pregnant woman may still choose an abortion that involves intending to kill the fetus.

Thomson would also reject this argument, just as she rejected the Permissive Argument against the Kill Versus Lie Die Objection. She would argue—at least if the fetus is not threatening the life, or the health, of the pregnant woman—that even if the woman is pregnant as a result of rape, the woman may not have an abortion in order to prevent the fetus from using her body if there is a non-abortion option that involves intending to act in a way other than killing the fetus, and the fetus continuing to live without using the pregnant woman’s body.<sup>115</sup> If the fetus is viable, and at least not threatening the life, or the health, of the pregnant woman, then having an abortion, of any form, is immoral.

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114. *Supra* Part III.

115. *See A Defense of Abortion*, *supra* note 1, at 127 (stating that abortion is not an option “should it turn out to be possible to detach the child alive”).

Presumably, again, her argument would be that if you have the options of intending to prevent an innocent person from using your body without your permission by intending to kill the person, or by intending to remove the person, foreseeing that person's death as a result, or by intending to remove the person, foreseeing that the person lives, then you must choose the option in which you free yourself from the innocent person and the innocent person lives.<sup>116</sup> That is, if you have the options of intending to kill the violinist, or intending to disconnect yourself from the violinist, foreseeing his death as a result, or of intending to disconnect yourself from the violinist, foreseeing that he lives, then you must intend to disconnect yourself from him such that he lives.

I will not defend the Permissive Argument against the Intend to Kill Versus Foresee Death Objection here. It is not necessary to use the Permissive Argument to defend the Good Samaritan Argument from the Intend to Kill Versus Foresee Death Objection. However, it should be noted, again, that Thomson's rejection of this Permissive Argument is premised on the assumption that the fetus is a person with the same moral rights as you or I.<sup>117</sup> Even if it is true that the Good Samaritan Argument, if sound, fails to establish that a woman who is pregnant as a result of rape may have an abortion if the fetus is viable, this may be irrelevant to the abortion debate if the abortion debate concludes that some or all viable fetuses are not persons.<sup>118</sup>

### V. Conclusion

My aim in this Article is a limited one. It is to defend Thomson's Good Samaritan Argument from two important objections that hold that, even if her argument is sound, it fails to

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116. See *id.* at 118–19 (suggesting that, in the most basic sense, “all persons have a right to life”).

117. See *id.* at 110 (assuming for the sake of the argument that the fetus is a person).

118. See Tooley, *supra* note 76, at 41 (criticizing the interchangeable use of “person” and “human being” given the particular characteristics and privileges, such as the right to life, that personhood entails).

establish that abortion is permissible. If I am right, then, if her argument is sound, it establishes that abortion is permissible, at least in the case of woman who is pregnant as a result of rape with a non-viable fetus. Because many people believe that her argument is sound, it follows that they should agree that her argument establishes that abortion, in this case at least,<sup>119</sup> is permissible.

It should be noted, however, that some people believe that the Good Samaritan Argument is *not* sound. Indeed, philosophers from entirely different backgrounds have rejected the argument. Peter Singer, for example, rejects the Good Samaritan Argument:

[A] utilitarian . . . would reject Thomson's judgment in the case of the violinist. The utilitarian would hold that, however outraged I may be at having been kidnapped, if the consequences of disconnecting myself from the violinist are, on balance and taking into account the interests of everyone affected, worse than the consequences of remaining connected, I ought to remain connected. . . . In rejecting Thomson's . . . judgment in the case of the violinist, the utilitarian would also be rejecting her argument for abortion. Thomson claimed that her argument justified abortion even if we allowed the life of the fetus to count as heavily as the life of a normal person. The utilitarian would say that it would be wrong to refuse to sustain a person's life for nine months if that was the only way the person could survive. Therefore, if the life of the fetus is given the same weight as the life of a normal person, the utilitarian would say that it would be wrong to refuse to carry the fetus until it can survive outside the womb.<sup>120</sup>

Singer himself believes that no fetuses are persons, and hence, that the unsoundness of Thomson's argument is irrelevant to the abortion debate.<sup>121</sup> Nevertheless, his consequences-based

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119. Thomson extends her argument to *all* cases of unwanted pregnancy where the fetus is non-viable, arguing that they are permissible, although she does make further distinctions between "decent" and "indecent" permissible abortions. See *A Defense of Abortion*, *supra* note 1, at 127 (noting that "[i]t would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion just to avoid the nuisance of postponing a trip abroad"). For the best analysis of her complete argument, see generally BOONIN, *supra* note 16.

120. SINGER, *supra* note 18, at 133–34.

121. See *id.* at 136 ("Because no fetus is a person, no fetus has the same claim to life as a person.").



argument that the Good Samaritan Argument is unsound must be answered.

David Oderberg also rejects the Good Samaritan Argument:

It is wrong to kill someone in order to escape physical inconvenience, whether that inconvenience lasts for a day or for nine months. . . . In the violinist case the good effect is your being released from nine months' inconvenience, and the bad effect is the death of the violinist. Is there a proportionality here? Evidently not. Hence you are not permitted to disconnect the tube, unpleasant though the prospect of your confinement may be—and this is really just an explanation of why your self-defensive acts must always be proportionate; in other words, the bad effects of your acts must always be proportionate to the good you are seeking to defend. . . . Consideration of her argument has led to the position that abortion is not justifiable even in the cases of rape (or, by parity of reasoning, incest)<sup>122</sup>

Oderberg believes that it is never permissible to intentionally kill another human being, regardless of the good consequences of doing so. It is never permissible to intentionally kill another human being even to save your own life. However, by availing of the Doctrine of Double Effect, he argues that you may “*knowingly but unintentionally*”<sup>123</sup> cause the death of another person when the other person is (intentionally or unintentionally) threatening one’s life: “the right of self-defence is precisely what it says, a right of defence, not a right of intentional homicide.”<sup>124</sup> Hence he argues that if it were possible—however implausible it may seem—in the case of an abortion to knowingly but unintentionally cause the death of the fetus, then the abortion would be permissible in order to save the life of the woman: “Can we imagine the doctor in the craniotomy case thinking, ‘I am crushing the child’s skull but I am not killing him, though he will in fact die?’ Does this ring true? It *might*.”<sup>125</sup>

However, even if such a knowing-but-unintentional-killing abortion would be permissible, it would be permissible *only* to save the life of the woman, since the good effect of saving the woman’s life is sufficiently proportionately good that it compensates for the bad effect of the death of the fetus. In the case of a non-life-threatening

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122. ODERBERG, *supra* note 61, at 26.

123. *Id.* at 28.

124. *Id.*

125. *Id.* at 30.

pregnancy that is the result of rape, where the good effect of the abortion is relieving the woman of the burden of pregnancy, and the bad effect of the abortion is the death of the fetus, even a knowing-but-unintentional-killing abortion would be immoral, since relieving the woman of the burden of pregnancy is not sufficiently proportionately good to compensate for the bad effect of the death of the fetus. His Doctrine of Double Effect-based argument that the Good Samaritan Argument is unsound must also be answered.

Thomson herself has said about her argument:

So this is an issue of great importance to women. Denial of the abortion right severely constrains their liberty, and among the consequences of that constraint are impediments to their achievement of equality. . . . But if abortion were murder, all that would amount to little. . . . If killing the fetus were murder, the woman would have to carry it to term, despite the burden on her of doing so. Morality, after all, does not permit us to commit murder in the name of avoiding such burdens.<sup>126</sup>

The Good Samaritan Argument for the conclusion that it is permissible to kill an innocent person—that the killing of an innocent person is not murder in the case of pregnancy as a result of rape—is all the more relevant given the difficulty of resolving the debate over the personhood of the fetus<sup>127</sup> and the continued insistence on the part of some on the anti-abortion side that abortion in the case of pregnancy as a result of rape is murder.<sup>128</sup> It would be good to devote more, or at least equal, time and energy to the Good Samaritan Argument.

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126. Judith Jarvis Thomson, *Abortion*, 20 BOS. REV. 11 (1995), <http://new.bostonreview.net/BR20.3/thomson.html> (last visited April 4, 2014) (on file with Washington and Lee Law Review).

127. See *A Defense of Abortion*, *supra* note 1, at 112 (describing the daunting and complicated task of this line-drawing as “dim”).

128. See, e.g., Pope John Paul II, *Evangelium Vitae*, VATICAN.VA (1995), [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/documents/hf\\_jp-ii\\_enc\\_25031995\\_evangelium-vitae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html) (last visited Mar. 3, 2014) (arguing that no event “however serious and tragic, can . . . ever justify the deliberate killing of an innocent human being”) (on file with the Washington and Lee Law Review); Michael Stokes Paulsen, *The Right to Life and the Irrelevance of Rape*, WITHERSPOON INST. (Sept. 11, 2012), <http://www.thepublicdiscourse.com/2012/09/6229/> (last visited Mar. 3, 2014) (“Rape is tragic, awful, horrible, gut-wrenching—an unspeakable crime of great emotional harm—but rape is essentially irrelevant to the morality of abortion.”) (on file with the Washington and Lee Law Review).