

ABORTION AND RIGHTS: APPLYING LIBERTARIAN PRINCIPLES CORRECTLY

by Doris Gordon

I. RIGHTS AND OBLIGATION: A LIBERTARIAN FRAMEWORK

Abortion proponents equate unwanted pregnancy with involuntary servitude and slavery, often framing their arguments with “pro-choice” and other libertarian-sounding rights talk. After all, libertarians support the right to control one’s own body, and since 1974 the Libertarian Party’s platform has unconditionally supported abortion choice until birth.

Many libertarians, however, find abortion to be contrary to libertarian principles and goals. According to Ron Paul, “Today, we are seeing a piecemeal destruction of individual freedom. And in abortion, the statists have found a most effective method of obliterating freedom: obliterating the individual.”¹ Dr Paul, an obstetrician and a member of Congress (R-TX), was the Libertarian Party’s candidate for President in 1988.

The Libertarian Party’s “Statement of Principles” itself defends “the right to life.” In the past, the platform has said, “Children are human beings and, as such, have all the rights of human beings.”² Are children human beings prenatally? Despite the fact that this is the pivotal question in the abortion debate, the platform is silent.

In response to such shortcomings, Libertarians for Life (LFL) was formed in 1976. As is standard in libertarian discussion, LFL brings a philosophical, rather than a religious or merely pragmatic, perspective to the abortion debate.³ Being libertarian, LFL opposes the use of state power to enforce policies or principles that cannot be supported on the grounds of defense against aggressors. The state should not side with any aggressor at the expense of the victim. If abortion is an evil that violates rights, then libertarians, of all people, should not want the state to defend and protect the evil-doing.

Two tiers of human offspring?

The unalienable right not to be unjustly killed applies equally to all human beings. Day One in a human being's life occurs at fertilization—that is high school biology. If pregnant women are human beings, why not when they themselves were zygotes? A two-tiered legal policy on human offspring that defines a superior class with rights, and an inferior class without rights, is not libertarian.

In her 1963 article, "Man's Rights," Ayn Rand held a single-tier position. "There are no 'rights' of special groups," she said, "there are no 'rights of farmers, of workers, of businessmen, of employees, of employers, of the old, of the young, of the unborn.' There are only *the Rights of Man*—rights possessed by every individual man and by *all* men as individuals."⁴

Rand, whose philosophy of Objectivism helped found today's libertarian movement, was, however, an impassioned abortion choicer. She called "the unborn...the nonliving," and in the same breath said, "One may argue about the later stages of a pregnancy, but the essential issue concerns only the first three months."⁵ Elsewhere, she said "that a human being's life begins at birth."⁶

Inequality under rights goes against the idea of having rights. This inconsistency leads many to conclude that unwanted pregnancy must be an insoluble clash between the unalienable rights of two people: the child's right not to be killed and the woman's right to liberty. Some libertarian abortion choicers claim there is a solution. They argue that no one has a right to impose unchosen obligations upon others; therefore, even given prenatal humanity, abortion is a permissible escape from slavery. They think Rand supports their view. "No man can have a right," she said, "to impose an unchosen obligation, an unrewarded duty or an involuntary servitude on another man. There can be no such thing as 'the right to enslave'."⁷

Still, Objectivism denies that child support is slavery. In discussing born children, Nathaniel Branden, when he was Rand's closest associate, wrote, "The key to understanding the nature of

parental obligation lies in the moral principle that human beings must assume responsibility for the consequences of their actions.” He did not explain exactly why we must. Yet he was correct to insist that “the basic necessities of food, clothing, etc.,” are the child’s “by right.”⁸

Given this right of children, then the “insoluble” clash is solved, and unwanted pregnancy is neither slavery nor involuntary servitude. There may be a clash of needs between parent and child—but not a clash of rights.⁹ Given personhood, a human fetus has the same right as every innocent person not to be attacked and killed. What is more, since her parents owe her support and protection from harm, she has the right to reside in her mother’s womb and take nourishment there.

The non-aggression principle

The unalienable right to life, liberty, and property is, essentially, only one: the right to be free from aggression. This right stems from the obligation not to aggress against anyone; this right and this obligation are opposite sides of the same coin.

Libertarianism does not address morality in general. It addresses only one category of good versus evil: justice versus injustice, non-aggression versus aggression. To violate another’s rights is to be unjust. Libertarianism’s basic principle is the obligation not to violate rights. This non-aggression principle is the foundation, the *sine qua non*, of a moral society. We owe others non-aggression. People who commit murder, theft, kidnapping, rape, or fraud, or fail to pay their just debts, are aggressors.

No matter the circumstances, no individual or government may use the sword, except in fair responses to rights violations. Implicit in the non-aggression principle is the right of defense. We have no obligation to allow others to succeed in attacking us before we react. There is a related principle: no one has a right to negligently or intentionally endanger the innocent and then allow the harm to happen. If we endanger others without their consent, we incur a positive obligation to prevent the harm. This might be called the

non-endangerment principle: you endanger them—you protect them from the harm.

Non-aggression is an ongoing obligation: it is never optional for anyone, even pregnant women. If the non-aggression obligation did not apply, then earning money versus stealing it and consensual sex versus rape would be morally indifferent behaviors.

The obligation not to aggress is pre-political and pre-legal. It does not arise out of contract, agreement, or the law; rather, such devices presuppose this obligation. The obligation would exist even in a state of nature. This is because the obligation comes with our human nature, and we acquire this nature at conception.

Each of us has this obligation regardless of contrary personal opinions, consensus, or laws. We have it whether we wish to obey it or not. We have it even when others are not able to defend themselves. This obligation can neither be created nor destroyed. It is logically necessary to the concepts of liberty and property.

Nor should we confuse unalienable rights with “legal rights.” In an ideal world, legal rights would be concrete applications of the unalienable right to be free from aggression. Unfortunately, legal rights frequently are, instead, *grants of special powers and privileges* to some at the expense of others.

The Declaration of Independence states that governments derive “their just powers from the consent of the governed.” This assertion means that for government to derive a just power, the power must first reside in the individual. If I consent, my lawyers can derive from me a just power to handle my bank account. But they cannot derive from me a just power to handle my neighbor’s bank account, whether I consent or not.

If one does not have a just power, one cannot give it to one’s lawyer or to the government. The governed have no just power to aggress, so they cannot give politicians a *just* power to aggress. Even if 10 billion individuals told their politicians to aggress, the sum of their consents would still be zero. Making an action legal does not make it a

right under justice if it is inherently unjust. Legalized aggression is still aggression.

Can the state be neutral?

Politically, if an action is not an aggression, libertarian principles require non-intervention by the state; it should be neutral—on religion, for instance, or on the books we read.

Some people appeal to “neutrality” in order to sidestep the question of prenatal rights in the abortion debate. Their contention is that the “law should not get involved.” There is a distinction, however: the state can be “neutral” regarding only the *desirability* of an act, not the *right to perform* the act. Obviously, the state is not neutral in practice when it enables killing by legalizing it, subsidizing it, and giving it police protection.

Within its own boundaries, government cannot be neutral on whether there is a right to commit any act; it must take sides. For government to be neutral on whether there is a *right* to commit abortion, it would have to sit on its hands and let both sides fight it out in the streets—clearly an untenable option. But even though taking sides in any rights dispute is inevitable, the problem with abortion is that the government has refused to justify denying prenatal personhood. Under an illusory “neutrality,” the government is actively protecting the killing of the child. Libertarian principles firmly oppose legalizing aggression. When the state uses its coercive might to protect aggressors at the expense of their victims, libertarians normally, and properly, object.

Begging the basic question

Abortion choicers often talk as if abortion is something a pregnant woman does only to herself, as if abortion were a victimless-crime debate. But the charge against abortion is that abortion is homicide, the killing of one human being, or person, by another. Prenatal humanity is the pivotal question in abortion. If abortion were a victimless crime, it *should* be legal. If it is homicide, then what about

the victim? The law must not treat any homicide as if no one were killed.

The most notable evasion of the homicide charge was made by the United States Supreme Court on January 22, 1973. In two cases, *Roe v. Wade* and *Doe v. Bolton*, seven of the nine justices on the Court legalized abortion on demand until birth. To rationalize their decision, they inappropriately invoked the right of privacy—while sidestepping both the moral nature and the rights of the prenatal child.

Writing for the seven, Justice Harry A. Blackmun proclaimed, “We need not resolve the difficult question of when life begins.” His explanation for why not was unsatisfactory. He went on to explain: “When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary at this point in the development of man’s knowledge is not in a position to speculate as to the answer.”¹⁰ This admission of intellectual inadequacy on the main objection to abortion—homicide—merely serves to prove that the judiciary had no good reason to legalize abortion.

Even some respected constitutional legal scholars who support abortion choice, such as John Hart Ely, were appalled by *Roe*. In a 1973 article, he called *Roe* “frightening”¹¹ and explained why he thought “it is *not* constitutional law and gives almost no sense of an obligation to try to be.”¹²

How should courts act when undecided on pivotal questions affecting two parties and when they cannot avoid making a decision? Tossing a coin will not do in such cases. Their only reasonable course is to weigh the possible injuries that they would impose by a wrongful decision either way and then choose to avoid the worst possibility. When a human being’s life is on the block, a proper legal system gives the benefit of the doubt to life. This is why even advocates of capital punishment call for stringent proof. If individuals accused of felonies get the benefit of such doubt, why not the beings in the womb?

What possible wrongful injuries should the *Roe* Court have considered? The pregnant woman allegedly faces a partial and temporary loss of liberty; her fetus, however, allegedly faces the total and permanent loss of life and therefore liberty as well. The answer is obvious. The Court should have decided for life. Instead, the Court wrote that “the unborn have never been recognized in the law as persons in the whole sense.”

Interestingly, lack of legal personhood is not necessarily a disqualification for legal protection under current law. For example, eagles and their eggs are not considered persons, yet they have legal protection. In *Roe*, the Court went beyond a two-tiered view of humanity that perceives human fetuses as inferior to human adults, for it saw human fetuses as also inferior to eagle fetuses.

But legal personhood is no protection when the strong want to subjugate the weak. Many years ago, as Sir William Blackstone wrote, “By marriage, the husband and wife are one person in law, that is, the very being or legal existence of the woman is suspended during marriage or at least is incorporated and consolidated into that of the husband.”¹³ What *Roe* did was to suspend the very being and legal existence of the child during pregnancy.

Black people of African descent are called “Persons” in Article I, Section 2 of the US Constitution, and they were referred to as persons by Chief Justice Roger B. Taney in *Dred Scott*. But they were “not included, and were not intended to be included, under the word ‘citizen’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary,” Taney wrote, “they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.”¹⁴

In 1774, two years before he wrote the Declaration, Thomas Jefferson wrote, “The God, who gave us life, gave us liberty at the

same time: the hand of force may destroy, but cannot disjoin them.”¹⁵ Jefferson understood that holding slaves was not right, yet he held them. His position on abortion and when personhood begins may not be known, but his words at least appear to affirm that our lives and rights co-exist.

Confronting the inherent contradiction between freedom and slavery is *The Law* by Frédéric Bastiat, a Frenchman. Published in 1850, it is now basic libertarian reading. Bastiat asked, suppose a principle “sometimes creates slavery and sometimes liberty?” He replied, “This confusion of objective will slowly enfeeble the law and impair the constitution.”¹⁶ He also wrote, “We hold from God the gift which includes all others. This gift is life—physical, intellectual, and moral life.”¹⁷

Treating “personhood” as a legal privilege is wrong. Unalienable rights presume personhood. Since unalienable rights are pre-legal, so is personhood.¹⁸ Personhood is a natural metaphysical fact, not an arbitrary legal artifact. In the end, *Roe* left the door open to further hearing of when personhood begins, but the Court would rather not come to grips with it. Later, it rejected two cases on when one’s life begins that were brought by the fathers of aborted children.¹⁹

If the Court could have shown that abortion is not homicide, it would have done so. And that would have resolved the debate, at least for libertarians. Libertarians support the right to privacy. But homicide, the killing of one human being by another, is not a private matter. It is not a simple matter of choice. If it were, then “rights” would mean that the weak have no rights, and libertarianism and the very idea of rights would be meaningless.

II. SCIENTIFIC AND PHILOSOPHICAL FACTS OF LIFE: WHY ABORTION IS HOMICIDE

Biologically, when does life begin?

Why do people say, “Children come into the world at birth,” sounding as if storks bring them? Obstetricians know that at conception the woman has already reproduced, that they now have

not one but two patients to consider: mother and child. Since a pregnant woman is in the world, her womb is in the world, and so is the fetus in her womb; she has been in the world since Day One—conception. The media reported a case where one twin was born October 15, 1994, and his sister, January 18, 1995.²⁰ What their different birthdays will mark is only the dates each exited the womb.

When does the human being begin life—at least in simple biological terms? Unless abortion and related issues are raised, people generally know that their own lives had a neat beginning at conception.

A human being's growth is a continuum: from zygote, to embryo, to fetus, to newborn, to adult. Such terms do not indicate a series of discrete entities; they are merely useful labels for pointing to different stages of the development of the self-same individual. A frog is not the descendant of the tadpole; frog and tadpole are one and the same animal. The infant does not descend from the fetus; infant and fetus are one and the same individual.

There is a sharp distinction between before and after conception. A gamete, a sperm or an ovum, is a radically different kind of thing from the zygote that results when the sperm penetrates the ovum. By itself, no sperm or ovum has the power to mature into an adult. Gametes that do not unite end up as dead gametes. Those that do unite cease to exist; what exists then is a radically different *kind* of entity.

Fertilized ova, zygotes, have the power to mature into adults. Still, it is difficult to think that the zygote inside one's mother was "me." But by playing one's life in reverse, as if in a movie, getting younger day by day until we reach Day One, we find no way to identify any day when we were essentially different from the day before—until conception. The moment before, there was no "me." If a different sperm of my father had fused with my mother's ovum, it would not have been me but someone else, a boy perhaps.

Dr Edmund A. Opitz observed: "Nobel laureate and geneticist Francis Crick has estimated that the amount of information

contained in the chromosomes of a single fertilized human egg is equivalent to about a thousand printed volumes of books, each as large as a volume of the *Encyclopaedia Britannica*.” Dr Opitz added, “What does this mite of human life accomplish during these first 20 weeks? Our little genius, beginning as a fertilized egg, operating in cramped quarters, poor light and with unlikely materials, takes less than five months to manufacture a brain, plus a few minor organs. Not bad for a beginner?”²¹

Philosophy: When does personhood begin?

Life, personhood, and rights are separate and distinct subjects. In ordinary conversation, “life,” “human life,” and “human being” can be used interchangeably with “person” without difficulty. However, when abortion is at issue, they are not necessarily synonymous. Sometimes they are meant in a biological sense, at other times philosophically, and still other times, there is a switching back and forth, often without recognizing there has been a change in meaning.

Biology, a life science, does not delve into either personhood or rights. An inquiry regarding when personhood begins—and, therefore, when rights begin—must turn from biology to philosophy. In philosophy, a more precise label for entities with rights is not “human being” but “person.” Libertarian principles do not define “person”; they simply take personhood as a given.

How should we define “person”? A definition that is accepted even by many abortion proponents, especially among libertarians, is that a “person” is an animal with the capacity for reason and choice. This capacity, this rational nature, is what establishes us as beings with the obligation not to aggress.

Given this definition, the argument is: 1) animals with the capacity for reason and choice are persons; 2) human zygotes are animals with that capacity; 3) therefore human zygotes are persons.

Many would respond: Nice syllogism, but in reality, it’s impossible for human zygotes to have the capacity for reason and choice. Such skeptics apparently are using one meaning of “capacity”

and are failing to notice it has two meanings: 1) root capacity for functioning (a thing's already existing nature, which is there from the beginning of its existence), and 2) active capacity, actual functioning (a right-now demonstration of the root capacity). The meaning of "capacity" relevant to the syllogism—and sufficient for human zygotes to be persons—is 1) root capacity.

Another fact about the nature of personhood can help show why root capacity works, so let's digress to consider it.

Personhood: Developmental or a constant?

Since the human body is a thing that develops and grows, many people assume that therefore, so does personhood. The fact is, however, personhood is not developmental; it's a constant.

If personhood were developmental, then the right not to be killed (commonly called the right to life) would have to be developmental, too. But how can this right be developmental? Think of it this way: A human being cannot be partially killed and partially not killed. To be a person is to have the right not to be killed. This right cannot be put on a scale of degrees; it is an either/or, just as alive or dead is an either/or.

A "developmental" approach to personhood makes no sense. If the so-called "potential person" may be killed at whim, it is simply a non-person. If it is a person, we may not choose to kill it on a whim. A potential, partial, or lesser individual right not to be killed that can be set aside is, in effect, a non-right. A being is a person or not; there is no in-between moral, or even logical, class of beings.

In *Roe*, however, the Court assumed that there is another category of human offspring: "potential life," which lies somewhere between "non-person" and "person." In the Court's view, with the increasing physical development of human beings comes an increasing moral standing and, therefore, an increasing level of rights, until at some point in our development, we acquire "full rights."

Since human beings do not mature until adulthood, why not permit infanticide? Apparently seeking a time to start applying the

brakes, Blackmun wrote, “With respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb.”²² But what is meaningful? By whose standard? In ordinary language, “viable” means “capable of living or developing in normal or favorable situations.” To abortionists, “viable” requires survivability under hostile conditions. Either way, what does viability have to do with what an entity is, or with the right not to be killed? The principle the Court advanced here is that if you need help, you can be killed, but if you can manage, you cannot be touched. Under viability, the *more* a child needs the womb, the *less* right she has to stay there.

Moreover, viability is not a stable point. Since *Roe*, the age at which prematurely born children survive in incubators has been lowered. As Justice Sandra Day O’Connor wrote, “The *Roe* framework, then, is clearly on a collision course with itself.”²³ Given current medical technology, we can talk of viability at both ends of prenatal development. Zygotes in petri dishes and embryos in cold-storage are clearly living outside the mother’s womb. Indeed, if artificial wombs are eventually perfected, many children might not ever reside in a woman’s body.

Blackmun mixed technological medical problems with philosophical ones. Viability is not a test of personhood; it is a test of the level of medical technology and of the competence of medical personnel. The fact that they lack the ability to maintain a life does not give them or anyone else a right to take that life. *Their* inability is irrelevant to whether *another’s* death is a homicide or not.

Libertarian law professor Richard A. Epstein called the Court’s stand on viability “astonishing,” pointing out that *Roe* placed no meaningful barrier against abortion even after viability.²⁴

“...[T]he Court holds that the state is entitled, but not required, to protect its, the unborn child’s, interest. The reason for the entitlement is that the fetus is now capable of an independent life outside the mother. But the problem is, why should not the claims of the fetus [between vi-

ability and birth] be sufficiently strong to require, and not merely to permit, the state to intervene for its protection? After the Court expressed such firm views on the proper balance [between the claims of the woman against those of the fetus] until the onset of viability, it gave no explanation why the state must be allowed to make its own choice after that time.”²⁵

Two meanings of capacity

Let us return to “the capacity for reason and choice.” Abortion choicers often insist that “capacity” refers only to the second meaning given above—to the ability to demonstrate reason and choice right now. If this were its only meaning, then what about people generally recognized as persons, such as people who are profoundly retarded, people in coma, stroke victims, and the senile? They might not be able to reason or choose at a given moment. In fact, under such a definition, we all have grounds to worry if we sleep too soundly.

Most abortion choicers probably oppose equating fetuses with comatose and retarded humans. “[W]e all agree that they [retarded humans] are persons and we cannot justifiably kill them,” the Association of Libertarian Feminists took care to say.²⁶

Everyone begins life “mentally incompetent.” But if life-long “mentally incompetent” humans are persons, why not humans whose incompetence is temporary? Immaturity is no libertarian test for rights. The Libertarian Party platform states: “Individual rights should not be denied [or] abridged...on the basis of...age.”²⁷ It has also opposed “government discrimination directed at any...artificially defined sub-category of human beings.”²⁸

True, in one sense, capacity means a power that can be demonstrated right now. In another sense, however, capacity means a power that needs time to “warm up” or be “repaired.” Think of a computer program. It might have to undergo 167 steps before it can perform the task it was designed for. Still, we say this program has the capacity to function right from the beginning.

Capacity can refer to a being’s natural, underlying power to actualize reason and choice. When a talent is undeveloped, it is still an

actual talent. More strongly, even when one's capacity for reason and choice is undeveloped, one still has an actual capacity, an actual power. Human beings begin life with the capacity to actualize reason and choice; this capacity is in our genes. To kill human beings early in life is to destroy their capacity for reason and choice as well as their lives.

However much we change during life, our rational nature, our personhood, is a constant. Such a position is Aristotelian. Consider what Ayn Rand, an admirer of Aristotle, saw fit to quote approvingly when reviewing John Herman Randall's book on him. Once again, it shows what views Rand held when not addressing abortion:

"Objecting to 'the...[view that] 'anything may be followed by anything,'" Professor Randall writes: 'To such a view...Aristotle answers, No! Every process involves the operation of determinate powers. There is nothing that can become anything else whatsoever. A thing can become only what it has the specific power to become, only what it already is, in a sense, potentially. And a thing can be understood only as that kind of thing that has that kind of a specific power; while the process can be understood only as the operation, the actualization, the functioning of the powers of its subject or bearer.'"²⁹

Making judgments and free choices are activities of persons. If only the *present* capability to do these things counted, then personhood would be, in the words of one abortion choicer, "a state humans grow into, perhaps months or even a few years after birth."³⁰ Most abortion choicers, however, are not willing to admit even the mere possibility that choice on infanticide is a logical consequence of their argument.

No sperm or ovum can grow up and debate abortion; they are not "programmed" to do so. What sets the *person* aside from the *non-person* is the root capacity for reason and choice. If this capacity is not in a being's nature, the being cannot develop it. We had this capacity on Day One, because it came with our human nature.

In other words, to be an actual person, human beings need do nothing but be alive. We were all very much alive at conception.

One-celled human beings are not “potential persons”; they are persons *with* potential. When do human beings *become* persons? The answer is, human beings do not become persons; human beings simply are persons from Day One.³¹

Abortion choicers are divided on personhood

Planned Parenthood—which runs the largest chain of abortion clinics in the country—made a public confession of its ignorance on personhood in a full-page ad it ran in 1988. The headline read, “Nine Reasons Why Abortions Are Legal.” Only the third reason raised the question of when personhood begins. “On this question,” it said, echoing *Roe*, “there is a tremendous spectrum of religious, philosophical, scientific and medical opinion. It’s been argued for centuries.”³² And it has been argued vigorously among abortion choicers.

To Harvard law professor Laurence H. Tribe, “...as pregnancy progresses, the fetus’s value becomes ever harder to deny. To most of us, the more the fetus is like a baby, the more we must admit that the moral picture reveals two beings. Even someone who is strongly pro-choice but who has seen an ultrasound picture of a fetus may be offended by any suggestion that only one human life is at stake.”³³

Moreover, “Libertarians have quibbled endlessly over the question of when the fetus actually becomes capable of rationality and therefore a person,” wrote the Association of Libertarian Feminists. “The fact that there is no exact biological point of change that can be ascertained has presented a slippery problem for those who base their moral case [for abortion] on biological or even psychological criteria.”³⁴

Nor does the slippery slope necessarily end at birth. “In fact,” wrote Winston L. Duke, “there is little evidence that termination of an infant’s life in the first few months following extraction from the womb could be looked upon as murder. Recent studies suggest that cognitive development does not begin until the age of nine months.”³⁵

And in 1963, Planned Parenthood itself said, "Abortion requires an operation. It kills the life of a baby after it has begun. It is dangerous to your life and health."³⁶

If abortion choicers could disprove that abortion is homicide—to the satisfaction of their side at least—would they not advertise instead, "Nine Reasons Why Abortion Is Not Homicide?" They do not, because they lack even one good reason.

Who should decide?

Abortion choicers try to get around the intellectual chaos on their side by saying, "Let the woman decide." If one is free to decide whether another is a person, then whoever is strongest will do the deciding, and we all had better be thinking about our own prospects.

Besides, treating personhood as a matter of personal opinion can lead to strange results. Imagine two pregnant women debating prenatal personhood. One says that her fetus was a person at conception. The other says hers will not be a person until birth. Both fetuses were conceived the same day. As the women debate, a drunk driver hits them, killing both fetuses. What wrong has the driver committed? If it is a mother's choice whether her fetus is a person, then to be consistent, we would have to say that the death of one fetus is a homicide but the death of the other is only, say, destruction of property. This is absurd, of course, for the two fetuses were, objectively, the same kind of being when alive.

When unwanted, she is a fetus; if wanted, suddenly she is a baby or child. *Ms.* magazine, for example, referred to the fetus as a baby at least twenty times in a one and one-half page article.³⁷ A woman who miscarried does not say she lost her fetus. She says, "I lost my child," or "I lost my baby." A libertarian who supports abortion missed a meeting because of what he called "a death in the family." His wife had miscarried at five months.

III. MORE FACTS OF THE SITUATION: APPLYING LIBERTARIAN PRINCIPLES TO THEM

What about the woman's right to liberty?

To John Hart Ely and Laurence Tribe, "The point of *Roe v. Wade* was not that the Supreme Court had too little 'scientific' information about when life began or what a fetus was, but rather that the Government...could not override the rights of the pregnant woman." They added, "It was a question of rights, not an issue of biology or a matter of definition that *Roe* resolved."³⁸

Is prenatal homicide defensible on the level of rights? Only if childhood dependency is a capital offense against innocent parents, or if parents have an unalienable right to abandon their children and let them die.

Before considering why the child has the right to be in her mother's womb, let us examine what one abortion choicer³⁹ asserts is "the best philosophical defense of the pro-choice position." It is philosophy professor Judith Jarvis Thomson's famous article, "A Defense of Abortion," written in 1971, two years before *Roe*.⁴⁰ The kind of argument Thomson made is invoked by many abortion choicers, including libertarians.⁴¹

Calling an unwanted fetus an "unborn person" (for argument's sake only), Thomson attempts to prove the fetus an aggressor and her mother a victim. In the most famous part of her article, Thomson analogizes unwanted pregnancy to the case of a violinist with a life-endangering kidney problem. To save his life, his friends hook him up to a sleeping stranger, who clearly had not volunteered to be used as a dialysis machine. It is the stranger's right to decline to be a good Samaritan. If the stranger unplugs the violinist, who then dies, Thomson argues, it is not the stranger's fault. Similarly, Thomson argues, so do pregnant women have a right to unplug their children.

Her argument fails for various reasons, the most dramatic being that it is not a defense of abortion as it actually happens.⁴² As Thomson herself recognizes, there is no right to secure the violinist's

death, to slit his throat. The aborted child is not merely “unhooked” and allowed to die.

But does Thomson succeed in defending mere removal of the child, where death results from lack of sustenance? She wishes us to see abortion as essentially passive, as merely a refusal to aid the child. Assuming it were passive, would the mother’s refusal to aid her child be aggression or not?

Thomson has critics on the abortion choice side. One is Richard A. Posner, a legal scholar and a judge of the US Court of Appeals. He wrote:

“Thomson is right that we don’t force people to donate kidneys to strangers, or even to family members. But normally the potential donor is not responsible for the condition that he is asked to alleviate, in the way that a woman (unless she has been raped) is responsible, although only in part, for the fact that she is pregnant. The difference in evidentiary difficulty between asking who hit X and asking who failed to save X is a strong practical reason against liability for failing to be a good Samaritan. So although bystanders are not required to rescue persons in distress, someone who creates the danger, even if nontortiously, may be required to attempt rescue, and perhaps that is the proper analogy to the pregnant woman who wants to terminate her pregnancy.”

Posner is on the right track in noticing that the pregnant woman is not a mere bystander who may choose to save or not save an endangered person. Since she is a cause of the child’s predicament, then presumably the woman does have a duty to protect her child from harm. Once again, the duty to protect people we endanger is the foundation of parental obligation.

Unfortunately, Posner then changes the topic radically by talking, as Thomson did, about rescuing people that one did not endanger:

“Moreover, since tort law may require someone who begins a rescue, even if under no legal duty to make the attempt, to see it through to completion with all due care, abortion could be compared to the case

where, having agreed to donate a kidney, you change your mind on the operating table and if you are permitted to withdraw at that late date the intended recipient will die. Of course the woman does not, by virtue of agreeing to intercourse, agree to become pregnant. But perhaps we should ask whether she took reasonable measures to minimize the risk of pregnancy—whether, in other words, she was careless in permitting herself to become pregnant; for someone who tortiously endangers another has a clear legal duty to aid the endangered person.”⁴³

If Posner had discussed the obligation not to tortiously endanger another in the first place, he might have remained on track. Instead, he strayed to further topics, leading him to conclude, “All this is a great muddle...it does not provide a sure footing for judicial decisions.”⁴⁴

Among the points he raised that can be set aside is his rescue model. Rescue is irrelevant, because presumably the rescuer was a witness, not the one who caused the need for rescue.

Another is agreement, which raises such questions as: “Who agreed and who did not, and to what?” Even if the father and the mother agreed to conceive a child and succeeded in doing so, a third party is affected: the child. Where is the child’s agreement? In agreements between parents regarding children, the child should be a third party beneficiary, not a victim. An agreement has no standing against someone affected by the results of the agreement but who did not consent to it. The parties to an agreement cannot waive the non-aggression right of non-consenting people. Newly conceived children are not parties to any agreement. They certainly could not have been prior to conception.

Thomson failed to raise, let alone answer, critical questions. For example, what if it were the stranger’s fault that the violinist needs life support? Actually, Thomson’s violinist analogy serves as a good example of the concept of *chutzpah*. One illustration of this Yiddish term is a mugger who shouts, “Help! Help!” as he beats up his victim.⁴⁵ Contrary to Thomson, the zygote is not an attacker.

Defending the child's rights

When a child is conceived, the child is helpless. This can put the needs of parent and child in serious conflict. But it does not put their rights to be free from aggression in conflict. But what about the mother's needs in such difficult circumstances as, for example, when her life is in danger?

This issue is a "life-boat" problem. In such situations, everyone's life is at risk, but none of them is at fault. Because nobody has a right to attack the innocent, nobody caught in a dire circumstance has a *right* to attack any of the others. The mother's right to self-preservation does not turn her child into a mere "thing" that she may destroy at will. The doctor's goal should be to save both patients, mother and child, but they can only do the possible. The goal of premature deliveries is to help both. The goal of an abortion, however, is a dead fetus.

In any event, hard cases should not obscure fundamental issues. If abortion *per se* were not aggression, then hard cases would not raise the issue of rights. How we deal with others and their rights when we are in grave difficulties is a true test of whether we hold a one- or a two-tiered view of humanity.

What abortion choicers are saying is that in any pregnancy, the woman's liberty is paramount. However, liberty is not paramount. Life and liberty are equal rights; both are merely forms of the same basic right: the right to be free from aggression.

Because most abortion choicers recoil at a "right" to a dead fetus, they prefer to use euphemisms for abortion, such as "pro-choice," "pregnancy termination," and "reproductive rights." Interestingly, some libertarian abortion choicers insist they favor only an "eviction" abortion: the child is removed intact and alive; if she does not survive, that is too bad. Some try to deal with conflicting needs by noting the common understanding of the non-aggression principle:

Although we may not aggress against one another, we have no positive obligation under rights to *help* one another.

The eviction argument, however, overlooks at least two important distinctions: 1) killing versus letting die, and 2) who is causally responsible?

Killing versus letting die

Letting die at least does not shut off the possibility of survival, however theoretical and remote this possibility might be. For example, in hysterotomy abortions (which are similar to Caesarian deliveries), children have emerged alive.

In the real world, however, the evictionist's position gives only lip service to the moral distinction between intentional killing and letting die, and those who give such service are playing let's pretend with somebody else's life. Most abortions are intentionally destructive, not simple "letting die" procedures. Abortions do not merely place children in grave danger of death. In fact, the entire point of abortion is intentional destruction of the fetus.

In theory, we could enact a law that limits abortion to intact removal. On the surface, such a law would seem to reflect the non-aggression principle. When the cord is cut at birth, the parents can passively abandon their child by walking away. Eviction, however, is not passive; it is an active intervention against the child. Both attack and negligence can be forms of aggression.

Nonetheless, the heart of the eviction argument must still be addressed. What if the mother could leave right after conception as easily as the father? With *in vitro* fertilization, everyone can walk off without anyone attacking the child. If they do walk off, they put the child, of course, in harm's way. Have parents a right to leave children unattended in hazardous situations? If their children die, is that simply regrettable, like famine victims dying because no one gave them assistance? For parents, as regards obligations, is there no difference between their own children and the children of strangers?

To abandon one's child in the petri dish is similar to putting her on board one's airplane and then jumping out, leaving her on the plane to crash, and doing all this without the child's consent. Perhaps a stranger with a suitable womb will happen by who is willing and able to adopt her. However, what if this does not happen?

Interestingly, even most abortion choicers consider gross neglect and outright abandonment to be criminal behavior. When children have medical emergencies in the middle of the night, most parents do not go back to sleep saying, "So what if my child might die? I have the right to control my own body, don't I?"

It is true that the *means* a woman must use to mother her child before birth are quite different from the means she uses after birth. But what difference does it make, *in principle*, whether her child is in the crib or in her womb? When she nurses her infant or carries her in her arms, she is using the *same* body she used to carry that same child to term.

As even most abortion choicers know, parent and good Samaritan are not analogous roles. Parents owe their immature children support and protection from harm. Why are they *obligated*? Did we have the right before birth to be in our mother's womb?

Causation: Who is mugging whom?

A child's creation and presence in the womb are caused by biological forces independent of and beyond the control of the child; they are brought into play by the acts of the parents. The cause-and-effect relationship between heterosexual intercourse and pregnancy is well-known. The child did not cause the situation. The parents are the causative agents of both the pregnancy and their child's dependence.

Who among us could have chosen not to begin life, or not to inhabit our mother's body when conceived? Inhabiting the mother's body is a direct byproduct of the parents' volitional act, not the child's. What the prenatal child does, she does by necessity. This necessity is also a direct byproduct of the parents' volitional act.

No one survives without certain necessities of life and very immature children cannot obtain them without outside help. Childhood dependency is a fact of nature, like the liquidity of water. Abortion choicers know that the stork does not drop children on our heads. Yet, many insist, parents are not responsible for “accidental” pregnancies. This assertion raises two meanings of “responsible for”: 1) being the source or cause of a consequence, and 2) being accountable to others for the consequence, owing them.

One cause of the child’s existence, the union of a sperm and ovum, is natural. But it is dependent upon an antecedent cause, the human action that enables the two cells to come together. Nature does not do its part without human action. What parents cause to be is not just a child but a child with needs; it is a package deal. A child would not be in need of sustenance and in need of help if she did not exist.

The stork did not do it. The fact of parental agency refutes any assertion that the child is a trespasser, a parasite, or an aggressor of any sort.

Since a prenatal child is where she is because of her parents’ actions, she can be said to be acting as her parents’ agent—which places her alleged “guilt” squarely on her parents’ heads. We might even say that the mother aggressed against herself, except that, by definition, harming others can be aggression; harming oneself is not.

To conceive and then abort one’s child—even by mere eviction—is to turn conception into a deadly trap for the child. It is to set her up in a vulnerable position that is virtually certain to lead to her death. Conception followed by eviction from the womb could be compared to capturing someone, placing her on one’s airplane, and then shoving her out in mid-flight without a parachute. The child in the womb is like a captive; she is in the situation involuntarily, and she cannot fend for herself. A captive is not trespassing on the captor’s property, by definition. (Evicting or abandoning one’s child cannot be regarded as releasing her from captivity, because this does not terminate childhood inability.)

When abortion choicers liken the parent to the good Samaritan, they talk as if feeding one's own children is charity. It is a kindness to give charity, because nobody has an obligation under unalienable rights to do so. Giving to charity is a matter of choice, by definition. A good Samaritan is not a causative agent of another's need for support; good Samaritans are chance bystanders. In procreation, parents are not chance bystanders; they are active, cooperative participants, even when children are conceived *in vitro*. Conception and pregnancy is a common and foreseeable risk of even careful sex.

Under libertarian principles, parents have the same negative obligation towards their children that they have to strangers: non-aggression. The question is whether it follows that even given that parents are responsible for (caused) their child's existence, are the parents also responsible (accountable) for her support? Some abortion choicers claim that when parents let their child starve to death, they have not violated any positive right of the child and committed aggression. They are mistaken.

The non-endangerment principle

Basically, non-aggression is a negative obligation, like do not commit robbery. If we commit robbery, we owe the victim restitution and compensation. But we can also incur positive obligations even if we have not done harm. For example, a contract is not an initiation of force, yet by merely signing the contract, each party to it now owes each other performance. There is no aggression—until and unless a participant fails to perform.

Parental obligation does not arise out of contract, tort, the mere fact of conception, or out of the biological relationship of parent to child. It arises because the parents voluntarily (even if they did not intend it) gave themselves a life-or-death control over their child. To withhold their support is to endanger the child. Parents owe support because they have no right to use their control to cause danger and then let the harm happen.

The two central aspects to conception that are relevant to rights are: 1) It is voluntary on the parents' part, and not on the child's; the

situation is imposed on the child. 2) The parents' life-or-death control over the child is total; it is they who have established and control the entire situation. If the child dies due to their withholding or withdrawal of life support, they have not merely let her die; they have killed her.

There is a distinction between risky behavior and threats of harm. Life is a series of risks, and things do happen. We could compare parental obligation to lighting a barbecue in our backyard. Normally, lighting the fire presents only risks inherent in any controlled fire. But if the fire begins to spread to our neighbour's property, it now presents a threat of harm, and we caused the danger. If their property catches fire, we caused the harm as well as danger; we have initiated force. Since we may not initiate force, we may not threaten others with harm and then let the harm befall them.

Therefore, although the non-endangerment principle is essentially negative, it contains a positive obligation proviso: if we endanger innocent people without their consent, we must protect them from the harm because of our obligation not to aggress.

The child's right to be in the mother's womb

Some abortion choicers say that life is a gift to the child by the parents, a gift that does not bind the parents. A "gift," however, implies the option to refuse to take it, and beginning life is not an option for the child. Her life is thrust upon her, as is her need for life support and her inability to fend for herself. Conception does not make a child worse off (or better off) than before, because the child does not pre-exist conception. But she is created vulnerable to harm.

The parent-child relationship is unique as a situation; it is the only relationship that begins when one side causes the other side to exist. But parental obligation is not unique as an obligation—the obligation to act justly towards others is a universal, rather than a special, obligation.

Parental obligation is simply a concrete example of the obligation to not aggress. By taking care of their child in the womb, the parents

prevent an aggression that would happen if they were, instead, to tear her away from the life support she gets there.

The nature of childhood and growing maturity indicate a built-in boundary: when the child can fend for herself, the parents have fulfilled their obligation to her. Thereafter, things are in her hands.

Once again, however, in the case of procreation, the parents' power over children begins as being total. Therefore, if through their negligence or intent harm results to the child (because of the child's loss or lack of sustenance), then as a matter of practical fact, the parents have caused the harm. Thus, parental obligation does not stem from harm done; it stems from our obligation to avoid causing the innocent to be harmed.

Furthermore, threats of harm can be considered, in themselves, as forms of aggression. The kind and degree of prevention that is owed, however, depends upon the kind and degree of threat that is imposed. When we drive a car, at the minimum, we must stay alert and drive carefully. When people drive drunk, we have no obligation to wait until they hit someone before we take them off the road. Even before things happen, the obligation to drive responsibly is there. In this case, the essentially negative obligation that drivers have requires them to take positive preventative steps.

Conception is not, in itself, endangerment or a threat of harm; it is a normal, natural fact of life. Pregnancy automatically protects the child against the possible dangers of an unsupportive environment. Yet by conceiving a child, parents give themselves a life-or-death power over her, and they get this control without her consent. Children are "captives" of their parents.

If parents willfully use their powers as "captor" to put their child in harm's way (not feeding her, for example), they caused the danger without her consent. If the child is harmed (starves to death), they also willfully caused the harm without her consent. Even simple eviction from the womb initiates force and violates the child's rights

(in most abortions, however, the child is first dismembered, or poisoned, then evicted).

Many men want abortion legal because it enables them to escape their responsibilities to help support their children. Thanks to our human nature, all of us are quick to hold others accountable for their actions, while none of us wants to be held accountable for our own. But “Life, Liberty, and the pursuit of Happiness” does not mean that we may escape our obligations by killing our creditors.

Rather than abortion protecting parents from slavery, it imposes slavery upon children. It forces children to be more than good Samaritans; it requires them to die to serve another’s purpose. The right to control one’s own body, however, prohibits the choice to kill or abandon one’s child. For the prenatal child, the mother’s womb is home; this is where she *needs* to be—and this is where she has the *right* to be.

Notes

1. Ron Paul, “Being Pro-Life Necessary to Defend Liberty,” *LFL Reports*: #1, (1981).
2. Children’s Rights plank, Libertarian Party Platform, 1994. (Plank deleted in 1996.)
3. Some Libertarians for Life associates are religious; others are not. The writer is a Jewish atheist. Originally an abortion choicer, she changed sides in 1976. It was at the 1976 Libertarian Party convention that she conceived of LFL.
4. Ayn Rand, “Man’s Rights,” *The Objectivist Newsletter*, co-edited and published by Ayn Rand and Nathaniel Branden, vol. 2, #4 (April 1963), p. 13.
5. “A Last Survey,” *Ayn Rand Letter*, IV, November-December 1975, p. 383.
6. “The Age of Mediocrity,” *The Objectivist Forum*, June 1981, p. 3.
7. Rand, “Man’s Rights,” p. 14.

8. Nathaniel Branden, "What are the respective obligations of parents to children, and children to parents?", *The Objectivist Newsletter*, December 1962, vol. 1, #12, p. 55.
9. *Congressional Record*, 88th Cong., November 28, 1979, pp. E5825-E5826.
10. *Roe v. Wade*, 410 US 113, 159 (1973).
11. "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *The Yale Law Journal* 82 (1973), p. 935.
12. *Ibid.*, p. 947.
13. *Commentaries on the Common Law*, published between 1765-1769, quoted in Joan Kennedy Taylor, *Reclaiming the Mainstream: Individualist Feminism Rediscovered*, (Buffalo: Prometheus Books, 1992), p. 45.
14. "*Dred Scott v. Sandford*: March 6, 1857," *Landmark Decisions of the United States Supreme Court II*, Maureen Harrison and Steve Gilbert, eds., Landmark Decisions Series 1992, p. 16.
15. "Summary View of the Rights of British America," *The Portable Thomas Jefferson* (New York: Penguin, 1977), p. 21.
16. Frederic Bastiat, *The Law* (pamphlet), Dean Russell, trans. (The Foundation for Economic Education, Inc., 1987), p. 45.
17. *Ibid.*, p. 5.
18. Nadine Strossen, president of the American Civil Liberties Union, told Judge Robert Bork that we don't need the Ninth Amendment and the Constitution to have rights; we have rights by virtue of being human beings. (American Enterprise Institute Conference, C-Span 2, October 12, 1993.) I asked her, if having rights is pre-Constitutional, then why not our personhood, from which our rights flow? She only noted that here we disagree. (Private conversation, Women's Freedom Network Conference, American University, October 2, 1994.)
19. One was *J.M. v. Individually V.C., et al.*, October 1993. The other was *New Jersey v. Alexander Loce*, February 1994. Libertarians for

Life was a signatory to *amicus* briefs of the University Faculty for Life in both cases.

20. *The Washington Times*, January 19, 1995, p. A9.

21. Edmund A. Opitz, Letter to the editor, *Insight*, April 3, 1989, p. 4.

22. *Roe v. Wade*, 410 US 113, 163 (1973).

23. *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 US Reports 416 at 458, December 15, 1983.

24. The Court said in *Roe* (410 US 113, 163) that “for the stage subsequent to viability the State...may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” In *Doe* (410 US 179, 192), the Court defined “health” to include “all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.”

25. Richard A. Epstein, “Substantive Due Process by Any Other Name: The Abortion Cases,” in Philip B. Kurland, *et al.*, *The Supreme Court Review*, 1973 (Chicago: University of Chicago Press, 1974), p. 184.

26. Sharon Presley and Robert Cooke, “The Right to Abortion: A Libertarian Defense,” Association of Libertarian Feminists Discussion Paper, 1979, p. 3.

27. Discrimination plank, Libertarian Party Platform, 1994.

28. Children’s Rights plank, Libertarian Party Platform, 1994. (Plank deleted in 1996.)

29. “Books,” *The Objectivist Newsletter*, May 1963, p. 18. Rand differed, however, with Aristotle on “essence.” She thought of it as “epistemological,” whereas Aristotle thought of it as “metaphysical.”

30. Tom Flynn, "The Future of Abortion," *Free Inquiry* (Fall 1989), pp. 44-46. Flynn suggested that a pro-infanticide position would help withstand attacks against abortion, and that abortion-choicers would do well "to follow [their] rational line [of thinking] wherever it leads"—meaning euthanasia also.
31. See also John Walker, "Abortion and the Question of the Person," and "Power and Act," both elsewhere in this issue; and Stephen Schwarz, *The Moral Question of Abortion*, chapters 1-7 (Chicago: Loyola University Press, 1990).
32. "Nine Reasons Why Abortions Are Legal," Planned Parenthood Federation of America, Inc., *The Washington Post*, October 6, 1988.
33. Laurence H. Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton & Company, 1990), p. 138.
34. Presley and Cooke, "The Right to Abortion: A Libertarian Defense," p. 4
35. Winston L. Duke, "The New Biology," *Reason*, August 1972, p. 9. In endnote 26, Duke cited Jerome Kagan, "Do Infants Think?", *Scientific American*, March 1972.
36. Quoted in Madalyn Murray O'Hair, "Who Decides?", *American Atheist*, July 1989, p. 26.
37. Doug Hennessy and Martha Reilly, "Fetal Attraction: High-tech Tests for High-risk Pregnancies," *Ms.*, November 1988, pp. 22, 24.
38. John Hart Ely and Laurence H. Tribe, "Let There Be Life," *The New York Times*, March 17, 1981, p. A17.
39. Laurie Zoloth-Dorfman, responding to Paul Savoy, "The Coming New Debate On Abortion," *Tikkun*, Sept./Oct. 1993, p. 32.
40. Judith Jarvis Thomson's "A Defense of Abortion," originally published in *Philosophy and Public Affairs* 47 (1971), reprinted in a collection of her essays, *Rights, Restitution, and Risk: Essays in Moral Theory*, William Parent, ed. (Cambridge: Harvard University Press, 1986), pp. 1-19.

41. See Tribe. Murray Rothbard also defended abortion as ejection in *For a New Liberty: The Libertarian Manifesto* (New York: Collier Macmillan Publishers, 1978), p. 108.

42. See Doris Gordon, "Abortion and Thomson's Violinist: Unplugging a Bad Analogy," elsewhere in this issue.

43. Richard A. Posner, *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), p. 350 (footnotes omitted).

44. *Ibid.*, p. 351.

45. Leo Rosten, *The Joys of Yiddish* (Pocket Books, April 1977), p. 93.

Endnote

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