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What Does the Right to Life Really Entail? A Framework for Depolarizing the Abortion Debate

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I. INTRODUCTION

More than forty years after *Roe v. Wade*, much of the political debate about the morality of abortion centers on the contentious issue that the United States Supreme Court's majority opinion in *Roe* claimed to sidestep: Do the unborn have the same right to life as all human persons?¹ Bills and ballot initiatives specifying conception as the starting point of the human right to life are currently battlegrounds between pro-life and pro-

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¹ *Roe v. Wade*, 410 U.S. 113 (1973). In his majority opinion, Justice Blackmun says that the Court "need not resolve the difficult question of when life begins" and "is not in a position to speculate as to the answer." *Id.* at 159. However, the reasoning in the opinion suggests that the majority is not ascribing to the unborn a fully human right to life—at least not until the point at which the unborn is viable outside the womb, and, insofar as the Court gives states free reign to allow post-viability abortions, probably not even then.

The question of the validity of the Court's decision in *Roe v. Wade* has stimulated a wealth of commentary. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291 (2007); Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should be Overruled*, 59 U. CHI. L. REV. 381 (1992); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410 (1974); Michael W. McConnell, *How Not to Promote Serious Deliberation about Abortion*, 58 U. CHI. L. REV. 1181 (1991); John T. Noonan, Jr., *Commentary, The Root and Branch of Roe v. Wade*, 63 NEB. L. REV. 668 (1984); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007). I note at the outset that it is beyond the scope of this article to weigh in on that constitutional debate.

choice activists and were major points of contention in several key 2014 United States Senate races.² Underlying the controversy is the assumption that if the unborn have a fully human right to life from the moment of conception, then abortion is morally impermissible.

Despite the polarized political debate, opinion polls suggest that large numbers of people are looking for some sort of middle ground on the morality of abortion.³ Although 53% of Americans say that human life begins at conception, and 68% say that it begins before the end of the first trimester of pregnancy, only 11% say that abortion “should never be permitted,” and only another 12% say that it “should be allowed only to save the life of the mother.”⁴ Similarly, 47% of Americans describe themselves as “pro-choice,” but only 28% say that abortion “should be legal under any circumstances.”⁵ We cannot assume that an individual’s views on the morality and legality of abortion are always the same, but for most people the two are closely enough aligned to make it reasonable to conclude from these polls that the public is far more open to a nuanced position on the morality of abortion than the political debate suggests.⁶ What most people lack, however, is a framework for defending a middle position.

² For discussion of state personhood measures, see *State Policy Trends 2013: Abortion Bans Move to the Fore*, GUTTMACHER INST. (Apr. 11, 2013), <http://perma.cc/M628-NS6T>.

For discussion of the role of such measures in the November 2014 Senate races, see e.g. Jason Salzman, *Pro-Personhood Gardner Defeats Udall*, RH REALITY CHECK (Nov. 5, 2014, 12:04PM) <http://perma.cc/NNU5-KMLZ>; Laura Bassett, *Senate Candidate Joni Ernst Endorses Federal Personhood Bill for Fetuses*, HUFFINGTONPOST.COM (Oct. 16, 2014, 1:59PM) <http://perma.cc/M6ZX-X57V>. The related issue of the moral obligation to preserve the lives of pre-embryos is at the root of recent high profile disputes over the morality of forms of contraception that prevent fertilized eggs from implanting in a woman’s womb. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), which concerned the rights of corporations to refuse to abide by the contraceptive mandate of the Affordable Care Act, if their owners believe for religious reasons that these forms of contraception are immoral.

³ In a 2009 poll conducted by the Pew Research Center, 60% of Americans said that the nation “needs to find a middle ground on abortion.” See *Finding a Middle Ground on the Issue: Obama and Abortion*, PEW RESEARCH RELIGION AND PUBLIC LIFE PROJECT (Oct. 1, 2009), <http://perma.cc/D5VE-HDHB>.

⁴ *Abortion in America*, MARIST COLL. INST. FOR PUB. OP. (Jan. 2014), <http://perma.cc/RH4Q-WLKE>. In *Rethinking Roe v. Wade: Defending the Abortion Right in the Face of Contemporary Opposition*, 10 AM. J. BIOETHICS 34, 34–35 (2010), Bertha Alvarez Manninen suggests that increasingly many people – and in particular, many young people – are put off by arguments that devalue nascent life.

⁵ Lydia Saad, *Americans Still Split on Abortion: 47% Pro-Choice, 46% Pro-Life*, GALLUP (May 2014), <http://www.gallup.com/poll/170249/split-abortion-pro-choice-pro-life.aspx>. The Marist poll cited *supra* note 3 found that 50% of Americans say that they are pro-choice, but only 16% say that abortion should be allowed any time a woman wants one during the first six months of pregnancy.

⁶ The Gallup poll cited *supra* note 5 did not ask about people’s views on the morality of abortion. The Marist poll cited *supra* note 4 asked only the following question: “Regardless of whether or not you think it should be legal, do you believe that, in general, abortion is morally acceptable or morally wrong?” The poll found that 62% of Americans said that in general, abortion is morally wrong. Although this finding is consistent with the conclusion stated in my text above, the poll’s wording of the question is too vague to have much bearing on my conclusion.

In this article, I seek to provide such a framework. In her well-known 1971 article, "A Defense of Abortion,"⁷ Judith Thomson argued that even if the unborn have the same right to life as all human persons, it does not necessarily follow that pregnant women are morally obligated to preserve unborn life by carrying their pregnancies to term. Over the years, various academics have returned to Thomson's argument,⁸ but the factious contemporary political debate in the United States appears to be oblivious to it. I suggest that we can open the door to a middle ground in the abortion controversy by recasting Thomson's argument as an open-ended question: Assuming—even if only for the sake of argument—that the unborn have a fully human right to life from the outset of pregnancy, under what circumstances, if any, is it morally permissible for a pregnant woman to refuse to preserve unborn life? Framed in this way, many of the moral issues presented by abortion are not as unique as is sometimes supposed. Questions about the moral duty to preserve human life arise in many real-life situations, and I suggest that it can be very instructive to think about this broader context when considering the pregnant woman's obligation to sustain the unborn.⁹ Although my analysis directly addresses the individual moral decision-makers who make up the electorate, it has important implications for our elected representatives who craft and vote on abortion legislation and whose voices dominate the political arena.

In Part I, I identify factors that I propose determine whether any person is morally obligated to preserve another person's life. In Parts II – V, I use those factors to compare unwanted pregnancies to other types of real-life situations that raise similar concerns.¹⁰ I especially focus on one

⁷ Judith J. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

⁸ See, e.g., DAVID BOONIN, *A DEFENSE OF ABORTION* (2003); F.M. KAMM, *A DEFENSE OF ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* (1992); LAWRENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 129–35 (1990); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979).

⁹ Pro-life advocates commonly argue that it is morally wrong to terminate pregnancy because the unborn is a human person. But see, Don Marquis, *Why Abortion is Immoral*, 86 J. PHIL. 183 (1989). Don Marquis has argued that abortion is morally wrong because the unborn has "a future like ours." *Id.* at 191. My analysis here is just as pertinent to Marquis's view as to the more typical ones. In analogizing a pregnant woman's obligation to continue a pregnancy to the obligation of one person to preserve another person's life, I am suggesting only that we assume that both the person whose life is at risk and the unborn have the same right to continue living—not necessarily that both are human persons.

¹⁰ Throughout my discussion, I try to avoid the kinds of fantastical examples that abound in the abortion literature. Many of these were inspired by Thomson's analogy between unwanted pregnancy and the situation of awakening one morning to find that one's circulatory system had been plugged into that of an ailing violinist who needs to remain connected for nine months in order to survive. Thomson, *supra* note 7, at 48–49. For other fantastical examples, see Mary Anne Warren, *On the Moral and Legal Status of Abortion*, in *ARGUING ABOUT ABORTION* 227, 232–33 (Lewis M. Schwartz ed., 1993) (varying Thomson's violinist example so that the basis for choosing someone to plug into the violinist is a lottery of those who joined the Society of Music Lovers knowing that there was a 1 in 100 chance of being selected) and BOONIN, *supra* note 8, at 162 (varying the violinist example so that, after checking into the hospital for elective cosmetic surgery, one is plugged into the violinist as a result of a computer glitch.) Although I believe that hypothetical examples are valuable in helping us

factor that tends to be prominent in discussions of the moral permissibility of abortion: a pregnant woman's degree of responsibility for causing her pregnancy. Parts II - V of the article closely compare pregnancies that result, respectively, from rape, failed contraception, and the absence of birth control to other kinds of cases in which people have varying degrees of responsibility for creating predicaments where others need their help in order to survive.¹¹ Finally, in the concluding section, I discuss the distinctive implications of my analysis for legislators.

Although I often express my own views about the examples I discuss, my purpose is not to argue that people in one or another situation are or are not morally obligated to make particular efforts to preserve others' lives. Rather, I have three main goals. One is to demonstrate the importance of thinking about the moral obligation to preserve unborn life in ways that are consistent with one's views about the moral obligation to preserve human life in other contexts. A second goal is to provide those who believe that the unborn have, or at least might have, a fully human right to life with a framework for thinking in a disciplined way about when, if ever, it is morally permissible for themselves or others to have an abortion. A final goal is to defuse some of the divisiveness that currently characterizes the political debate about abortion by encouraging consideration and discussion of important questions that this debate typically overlooks.¹²

to keep focused on central considerations, I have reservations about appealing to fantastical examples because we lack context for them. It is therefore difficult to have confidence that our moral intuitions about those examples reliably transfer to real-life situations. Leslie Cannold argues along these lines in *THE ABORTION MYTH: FEMINISM, MORALITY, AND THE HARD CHOICES WOMEN MAKE* 6-8 (2000), criticizing Thomson's analogy for failing to recognize the realities of women's experiences of pregnancy.

¹¹ In *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996), Eileen McDonagh takes an approach different from mine in defending the right to abortion while conceding the possibility that the unborn have a fully human right to life. She proposes that a pregnant woman may morally choose abortion, because she has a right to defend her body against unwanted intruders who threaten her well-being. Thus, a woman with an unwanted pregnancy has the same right to defend herself against the unborn as anyone has to defend against an attack by an animal, a deranged person, or an adult child. *Id.* at 35-36. Insofar as one's right to self-defense is not predicated on whether one's own negligence contributed to the attack, McDonagh argues that a woman's degree of responsibility for the pregnancy has no bearing on her right to refuse consent to it. *Id.* at 176. I find McDonagh's analogies problematic. An attack by an adult child differs from an unwanted pregnancy, because an adult child, unlike a fetus, has agency. Animals and deranged people, like fetuses, lack agency, but in these cases, nothing good can result from the woman's failure to resist the attacks, whereas a human baby may result from a pregnant woman's failure to resist the intrusion of the fetus.

¹² Robin West has suggested that because of "the foundational incompatibility of values and worldviews" of the two sides on the abortion divide, it is very unlikely that they will ever reach common ground in the sense of finding shared premises from which they can reason together toward common conclusions on currently contentious issues. ROBIN WEST, *IN SEARCH OF COMMON GROUND ON ABORTION: FROM CULTURE WAR TO REPRODUCTIVE JUSTICE* 11 (Robin West et al. eds., 2014). West proposes that the two sides instead look for "common ground projects," such as working to reduce the economic motivations for abortion by advocating for more high quality, publicly available childcare. *Id.* at 12-13. Although I totally endorse such "common ground projects," I am not yet ready to abandon hope for progress toward the goal of conceptual agreement. Rather than approach this goal by presenting arguments for one or another side of the abortion divide with the hope that those on the other side will be persuaded by the soundness of those arguments, I identify questions that I believe

II. THE MORAL OBLIGATION TO PRESERVE HUMAN LIFE

The right to life that we attribute to all human persons does not include an automatic right to everything needed to preserve life. For example, suppose that a person suffering from acute leukemia cannot survive without a bone marrow transplant.¹³ Surely, not every person who is a good genetic match for supplying the needed bone marrow is morally obligated to take on the pain, emotional stress, dislocation, and medical risks that typically accompany making the donation.¹⁴ Even people critical of liberalism's tendency to value personal autonomy over caring for others should recognize that the right to the assistance needed for survival is far from absolute. At most, a being's right to life confers upon others a *prima facie* obligation to try to preserve that life, but there are many circumstances in which that obligation is defeasible.¹⁵

I suggest that, in general, whether A has a moral obligation to try to preserve B's life depends upon the following factors: (1) the onerousness for A of taking the measures necessary to preserve B's life; (2) the likelihood that expending the time, energy, and resources required to take these measures would result in A's failing to fulfill significant moral obligations to him- or herself or to others;¹⁶ (3) the probability that A's life-preserving efforts would actually succeed in preserving B's life and that they would not deter others who have a greater chance of preserving B's life from intervening; (4) the likelihood that B's life, if preserved, would be of at least minimally decent quality; (5) the amount of suffering B would probably experience if no one steps in to preserve his or her life; (6) the extent to which A is responsible for B's being in a needy predicament; (7) the chances that others would take the measures needed to preserve B's life if A does not do so; (8) the nature and closeness of B's personal relationship to A; and (9) the likelihood that A's failure to preserve B's life would lead to or significantly exacerbate societal problems.

people can agree have bearing on the determinations of the morality of particular abortions. My hope is that some common ground will emerge from discussion of these questions.

¹³ Others have discussed this sort of example. See, e.g., Guido Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX 5 (1991); Manninen, *supra* note 4, at 39.

¹⁴ Bone marrow donation is an outpatient surgical procedure requiring anesthesia, in which doctors use a needle to withdraw liquid marrow from the back of the pelvic bone. Most donors feel completely recovered within three weeks, and the bone marrow replaces itself in 4-6 weeks. For detailed information about what is involved in donating bone marrow, see *Donation FAQs*, BE THE MATCH, <http://perma.cc/Y92X-X48L> (last visited Aug. 13, 2014).

¹⁵ For extensive discussion of the notion of "defeasible obligations," see DAVID ROSS, *THE RIGHT AND THE GOOD* (1930).

¹⁶ Factors (1) and (2) overlap in cases where taking life-saving measures is so onerous for A that it interferes with A's other moral obligations. Nevertheless, the factors are distinct. It is not difficult to think of instances where trying to preserve a life would be burdensome for people but would not interfere with other moral duties, even to themselves.

Use of these metrics to assess A's moral obligation to donate bone marrow to a dying leukemia patient would raise questions such as the following: How painful would it be for A to donate bone marrow? What is the likelihood that A would suffer medical complications? What implications would A's taking the time to donate bone marrow have for A's job and family? How certain is it that A's bone marrow would in fact preserve the patient's life? Does the patient have other severe debilitating health problems, so that successful leukemia treatment would very likely prolong a life of suffering? How much suffering is the patient apt to experience before dying if he or she fails to receive a bone marrow transplant? Is A in any way responsible for causing the patient's illness? Are there other genetically compatible donors who would probably donate bone marrow to the patient if A refuses to do so? What is A's relationship to the patient: is the patient a family member, a friend, a mentor, a stranger, etc.? And finally, how likely is it that A's refusal to donate bone marrow would in some way have a negative impact on society? For instance, would it communicate a problematic disrespect for human life?¹⁷

I will not attempt here to rank or weight the relative importance of these considerations in general or in particular cases. Certainly there is no algorithm for calculating a person's moral obligation to preserve another person's life. And while I have tried to be comprehensive in listing the factors that would typically be most relevant, I recognize that there may be others that could have bearing in unusual circumstances.¹⁸ I have simply tried to provide a basic rubric for thinking about the moral duty to preserve human life generally that can be used to analyze the duty to preserve unborn life.

Throughout this article, I assume that the unborn have the same right to life as any adult person. However, the framework that I outline is adaptable for use by those who reject this assumption, either entirely or prior to a specified point in pregnancy, but who nevertheless believe that the unborn have *some* right to life because of their future potential. Basically, those who hold the latter view would consider all of the same factors (1)–(9) but would probably weight them differently from someone

¹⁷ Although I agree with Manninen, *supra* note 4, on various points, I disagree with her suggestion (*id.* at 44) that people never have a moral right to use other people's bodies for sustenance and so there is never a moral obligation to donate bone marrow. As I discuss below, I believe that there can be situations in which the answers to the questions listed here indicate that a person does have such an obligation.

¹⁸ One such factor would be whether saving a particular life is especially urgent because the lives or well-being of many others depend upon that person. An example would be a case in which the pilot of an airplane carrying many passengers had a medical crisis. Some might argue that this factor should be added to the list in the text because it arises frequently. Consider, for example, someone who is the sole caregiver for several young children. I have not included it, however, out of concern that outside of limited situations, its implications are too far-reaching. For example, I would hesitate to say that the fact that someone is a heart surgeon rather than a video game vendor should have bearing on the duties of others to save his or her life.

who attributes a fully human right to life to the unborn. For example, they would take into account the onerousness for a particular woman of carrying her pregnancy to term, her conflicting moral obligations, and so forth, but they would probably have a lower standard for how compelling these reasons would have to be in order to warrant concluding that the woman could morally elect to have an abortion.

It is important to recognize that, although my focus here is on the moral obligation to preserve life, the factors listed above also provide a framework for thinking about whether it is morally admirable to act to preserve life in situations where one does not have a duty to do so. To be sure, it is often commendable to go beyond one's moral obligations. Suppose, for example, that A cancels an eagerly anticipated trip to the Bahamas so that she can use her vacation from work to donate bone marrow to a needy stranger – an act that most people would not consider morally obligatory for A. In some situations, however, acting to preserve life may not be an admirable choice. For instance, suppose that despite having no vacation time owed her, A takes a week off from work to donate bone marrow to a stranger, with the predictable result that she loses her job and with it her ability to support her children. Decisions to preserve unborn life are subject to similar analysis.¹⁹

III. PREGNANCY THAT RESULTS FROM RAPE

Although only a small percentage of unwanted pregnancies are the result of rape,²⁰ close examination of a pregnant rape victim's moral obligations to the unborn can provide considerable insight into the broader issue of the duty to carry any pregnancy to term. The morality of abortion in cases of rape presents a dilemma for many pro-life advocates. According to a 2011 Gallup poll, 59% of those who describe themselves as pro-life believe that women whose pregnancies stem from rape can morally choose abortion.²¹ A substantial minority of pro-life advocates, however, consider this position incompatible with the belief that the human right to

¹⁹ Leslie Cannold argued along these lines, maintaining that most women who choose abortion do so because they believe that abortion is the most moral choice they can make in their situation—not because they are asserting their moral right to be bad Samaritans. CANNOLD, *supra* note 10, at 90–93, 134–36.

²⁰ A 2004 Guttmacher Institute study of women's reasons for seeking abortions found that less than .5% of those surveyed said that they desired an abortion because their pregnancy resulted from rape. See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, GUTTMACHER INST. (Sept. 2005), <http://perma.cc/S7C7-KWGH>. Since rape is so notoriously under-reported, and since those who fail to report it are unlikely to cite rape as their reason for desiring abortion, the actual percentages are undoubtedly somewhat higher. See Emily Thomas, *Rape Is Grossly Underreported in the U.S., Study Finds*, HUFFINGTONPOST.COM (Nov. 21, 2013, 11:07AM) <http://perma.cc/YJ59-3XXN>. Still, by any measure, pregnancies arising from rape are only a small fraction of unwanted pregnancies.

²¹ Lydia Saad, *Plenty of Common Ground Found in Abortion Debate*, GALLUP (Aug. 8, 2011), <http://www.gallup.com/poll/148880/plenty-common-ground-found-abortion-debate.aspx>.

life begins at conception. They maintain that the pregnant rape victim's right to autonomy in choosing whether to continue her pregnancy cannot override the unborn's right to life.

The metrics proposed above provide a basis for challenging the latter, absolutist position. If we assume that the unborn have the same right to life as the dying leukemia patient, we can assess the pregnant rape victim's moral obligation to provide her womb to the unborn by asking a series of questions analogous to those raised earlier about the duties of the prospective bone marrow donor. First, how onerous would it be for the woman to carry the pregnancy to term? Among the factors that might affect the answer are the woman's health, economic circumstances, support system, and moral and religious beliefs. Also relevant are the extent to which the pregnancy might exacerbate her vulnerability to violence, mental illness,²² and workplace discrimination.²³ It is safe to say, however, that for almost all women who become pregnant due to rape, carrying the pregnancy to term would be far more onerous than donating bone marrow, because of the longer duration and more intrusive nature of the physical burdens, the more serious possible medical complications, the exponentially greater emotional trauma, and the much more lasting impact on their future lives.

Second, to what extent would carrying the pregnancy to term prevent the rape victim from fulfilling other moral obligations, either to herself or to others? Of course, many variables influence the answer – in particular, the individual's work, school, community, and family commitments. For virtually any rape victim, however, carrying an unplanned and unwanted pregnancy to term would interfere with other moral obligations.

Third, how probable is it that continuing the pregnancy would in fact save the unborn's life? All pregnancies have some risk of miscarriage, and the risk increases if the woman has health problems, is near the end of her fertile years, or lacks access to nutritious food and good prenatal care.²⁴ For most pregnancies in 21st century developed countries, however, the probability of a successful birth is quite high.²⁵

²² See Christie L. Palladino et al., *Homicide and Suicide During the Perinatal Period: Findings from the National Violent Death Reporting System*, 118 *OBSTETRICS & GYNECOLOGY* 1056 (2011).

²³ See NATIONAL WOMEN'S LAW CENTER & A BETTER BALANCE, *It shouldn't be a heavy lift: fair treatment for pregnant workers*, (2013), available at <http://perma.cc/Z4LP-GHSA>.

The U.S. Supreme Court has agreed to hear *Young v. United Parcel Service, Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S.Ct. 2898 (2014), (involving a pregnant UPS delivery driver who was forced to take unpaid leave for the rest of her pregnancy and lose her health benefits when she requested light duty, despite the company's practice of allowing this accommodation for people with other short-term disabling conditions).

²⁴ *Miscarriage*, U.S. NATIONAL LIBRARY OF MEDICINE AND NATIONAL INSTITUTES OF HEALTH (Dec.3, 2014), <http://perma.cc/7QHM-GDAK>.

²⁵ Approximately half of all fertilized eggs are spontaneously aborted before a woman knows she is pregnant. The miscarriage rate after a woman knows she is pregnant is 15–20%. See *id.*

Fourth, would the likely quality of the life, if saved, be at least minimally decent? No doubt, people differ in their views of what this standard requires. For present purposes, suffice it to say that if we assume that the unborn have the same right to life as adult humans, then in general this standard—however one understands it—should be the same for the unborn as for the leukemia patient. One distinctive consideration would be the prospective infant's chances of being raised in a reasonably caring family. The pregnant rape victim would need to think about her own emotional capacities, as well as the prospects for a successful adoption. In American society today, adoptable infants in general are at a premium, but if the unborn were diagnosed with an untreatable disease or disability, then adoption prospects would be a relevant consideration.

Fifth, how much suffering would the unborn experience if the woman declines to provide her womb? The capacity of the unborn to experience pain is very controversial.²⁶ The authors of a 2005 review of the neuroscience research that is still considered the seminal work in the area concluded that perception of pain is unlikely before the third trimester.²⁷ This research, together with the option of administering fetal anesthesia before abortion, suggests that the concern that abortion causes the unborn to suffer carries little weight.

Sixth, what responsibility does the rape victim bear for causing the predicament of the unborn? Here the answer is clear: absolutely none. Not only did she refuse consent to the sexual intercourse that produced the needy life, but in addition she herself was victimized by its occurrence.

Seventh, does the pregnant rape victim have a moral obligation to preserve the unborn life, because, with current technology, no one else can do so prior to a gestational age of about 24 weeks if she refuses? It is helpful here to return to the leukemia example. Certainly, the claim that A is morally obligated to donate bone marrow to B is stronger if A is the only possible donor than it would be if others were willing and likely to donate in A's place. Nevertheless, if A is blameless for B's illness, it is difficult to see why A's status as the only possible donor automatically morally obligates A to make the donation. Surely the other factors identified earlier—i.e., the consequences of such a donation for A's health, job, family, etc.—require evaluation. The implications of the pregnancy for the rape victim deserve at least as much respect.

²⁶ Nine states have passed legislation that bans abortion after 20 weeks based on the claim that the unborn can feel pain at that point. See *State Policies on Later Abortions*, GUTTMACHER INST. (Aug. 1, 2014), <http://perma.cc/HB79-J76B>.

²⁷ Susan J. Lee, Henry J. Peter Ralston, Eleanor A. Drey, John Colin Partridge & Mark A. Rosen, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AM. MED. ASS'N 947, 947 (2005). For a discussion of the conceptual difficulties involved in deciding whether the unborn can experience pain, see William Egginton, *Can Neuroscience Challenge Roe v. Wade?*, N.Y. TIMES (Oct. 28, 2012, 5:00 PM), <http://perma.cc/4D6P-FLXB>.

Consider, too, that while no one but the rape victim can currently provide the unborn with the necessary womb, there might be other people whose actions could influence her ability and willingness to carry the pregnancy to term. Suppose, for instance, that a particular victim of rape would find it economically manageable to continue the pregnancy only if she received significant monetary compensation—say, the amount typically paid women for surrogate pregnancies. Moreover, suppose that in order to handle the pregnancy emotionally, she would need the help of a small community of sympathetic, available people. The possible moral obligations of others—even strangers—to contribute such moneys and such active support should not be overlooked.

Eighth, does the pregnant rape victim's biological bond to the unborn create a moral obligation to provide life-preserving services? After all, people have greater moral duties to their children than they have to strangers or acquaintances.²⁸ There are probably circumstances, for example, in which parents would be morally obligated to provide bone marrow to a critically ill son or daughter but not to many other people who are equally needy. If we assume that the unborn have the same right to life as any human person, does the pregnant rape victim's close physical bond to the unborn obligate her to carry the pregnancy to term?

The claim that biology alone can generate parental duties is untenable. The rape victim expressed her lack of consent to parenthood when she refused consent to sex. Suppose that a woman stole a man's sperm sample from a lab and artificially inseminated herself with it. To improve the analogy, suppose that she also sought the man out and sexually assaulted him. Would this man have a paternal obligation to donate bone marrow to the resulting child or to spend nine months caring for this child if the child needed his services to survive? Perhaps there are circumstances in which this man would be morally obligated to do these things, but the obligation would not sensibly derive from his parental relationship to the child.²⁹

Ninth, and lastly, would the rape victim's refusal to carry her pregnancy to term have negative societal ramifications? Pro-life advocates

²⁸ Various authors have raised this consideration. See, e.g., STEPHEN SCHWARZ, *THE MORAL QUESTION OF ABORTION* 118 (1990).

²⁹ Another argument that the pregnant woman's biological bond to the unborn generates special moral obligations is that these obligations derive from the simple fact that she had a role in creating the unborn. On this view, the rape victim is morally obligated to continue the pregnancy, not because of the closeness of her relationship to the unborn and not because she is in any way responsible for causing the pregnancy, but simply because the unborn would not exist and be in a needy situation were it not for her. The unsoundness of this argument is evident if we consider that it has the following implication: If A incurs an obligation to save B's life whenever B would not exist were it not for A, then by saving B's life once, A would become obligated to save it again should the need arise, because B would have died and thus would have had no need for a second rescue had it not been for A. David Boonin offers a variation on this argument in *BOONIN*, *supra* note 8, at 172.

often argue that abortion diminishes the value of human life.³⁰ If the unborn have a fully human right to life, then the decision to abort—like the decision to withhold necessary bone marrow from the leukemia patient—clearly communicates the belief that preserving human life is not always the highest priority. The issue, however, is whether the expectation that rape victims carry their pregnancies to term communicates a better societal message. Typically, the concern about undermining respect for human life is that it inures people to violence and therefore promotes more violence. But rape is an extremely violent act. To tell a pregnant rape victim that she must endure the pregnancy, even if she believes that it would be excruciatingly painful to do so, is, in my view, to communicate the message that the harm she experienced is tolerable—surely not a message conducive to curbing violence.³¹

If the unborn have the same right to life as other persons, would a pregnant rape victim *ever* be morally obligated under my analysis to carry her pregnancy to term? Suppose that a particular woman has no obligations with which the pregnancy would interfere, no career ambitions that might be threatened by pregnancy discrimination, no physical or mental health problems, easy access to nutritious food and good prenatal care, and every reason to think that if she decides not to raise the child, the infant could be adopted into a loving family. In my view, the woman's lack of responsibility for causing the pregnancy would morally entitle her to terminate it, even under these circumstances. However, my principal goal here is not to argue this point, but rather to underline the importance of using the same standards to assess her moral obligation to preserve the life of her unborn as one would use to determine any person's moral obligation to preserve life in analogous situations. Someone who maintains that the pregnant rape victim just described would be morally obligated to carry the pregnancy to term should also be prepared to argue that a man without conflicting obligations would have a duty to preserve the life of a child conceived by a woman who stole his sperm and sexually assaulted him, if that child needed his bone marrow or nine months of his care to remain alive. Similarly, this person should be prepared to acknowledge that a well-off stranger without conflicting obligations would be morally required to offer extensive monetary resources to a pregnant rape victim, if those resources would enable her to continue the pregnancy.

³⁰ See, e.g., RONALD REAGAN, ABORTION AND THE CONSCIENCE OF THE NATION 39 (2000) ("We cannot diminish the value of one category of human life—the unborn—without diminishing the value of all human life.").

³¹ In many states, men who become fathers as a result of rape have the same rights to custody as other fathers—a further message to the rape victim and others that nothing too terrible has happened. See Shauna R. Prewitt, Note, *Giving Birth to a 'Rapist's Child': A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 829 (2010).

Some authors have objected that the entire project of framing the moral right to abortion in terms of the duty to preserve life obscures an important distinction between killing and letting die.³² In their view, a woman's refusal to continue her pregnancy is morally different from the refusal of the only available donor to supply bone marrow to a leukemia patient or the refusal of a man to care for a child conceived with a stolen sample of his sperm, because the former requires active killing whereas the latter simply allows death to happen. Taking active measures to cause death, these authors maintain, is morally more problematic than passively watching while a series of events culminating in death very predictably runs its course.

I believe that it makes good sense to conceptualize abortion as a refusal to continue life-preserving services. Delivering a baby requires a great deal of active "labor." Perhaps less obviously, so does responsibly gestating a fetus. Even when there are no complications, a pregnant woman typically must manage nausea, heartburn, backache, and a host of other physical discomforts with an eye to avoiding injury to the unborn.³³ She must eat nutritiously, get enough sleep, avoid cigarettes, alcohol, and medications that could be harmful to fetal development, make time for frequent medical visits, and so forth. Should complications develop, she might need to make huge accommodations. For example, if her doctor prescribes bed rest, she will need to leave her job, withdraw from school, find someone to look after her children, etc. All the while, she must plan for the care of a baby—often a gargantuan undertaking if she is poor, single, or emotionally stressed. Even the decision to give the baby up for adoption requires extensive planning. Should she opt for an open or closed adoption? How can she prepare herself emotionally to give up the baby? How will she explain the decision to all the people—including her children—who expect pregnant women to become new mothers?³⁴ When a woman chooses abortion, she is deciding to discontinue making these efforts. Insofar as it is currently not technologically feasible prior to around 24 weeks of gestation to sustain fetal life outside the womb of the woman who has begun the gestational process, the only way for a pregnant woman to cease those efforts is to have an abortion.³⁵ In this sense, having

³² See, e.g., Baruch Brody, *Thomson on Abortion*, 1 PHIL. & PUB. AFF. 335, 338–39 (1972); John Finnis, *The Rights and Wrongs of Abortion: A Reply to Judith Thomson*, 2 PHIL. & PUB. AFF. 117, 141 (1973).

³³ For an extensive discussion of the physical effects of pregnancy on women's bodies, see McDONAGH, *supra* note 11, at 69–78.

³⁴ In *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2125 (1999), Robin West observes that it is common to view pregnancy as a condition, rather than the active process that it is.

³⁵ Donald H. Regan argues along these lines in Regan *supra* note 8, at 1574–575. Boonin suggests that hysterotomy abortions, in which a non-viable fetus is removed intact from the uterus and then allowed to die, are more plausibly described as instances of letting die than are abortions performed by other methods. BOONIN, *supra* note 8, at 193. To the extent that all methods of abortion

an abortion is quite different from the typical case of active killing in which one extinguishes a life that would have survived had one simply walked away.

I am also not persuaded that characterizing abortion as active killing commits one to the view that abortion is more morally objectionable than refusing to supply bone marrow. Without a doubt, it is often more reprehensible to kill than to allow death to happen. To illustrate with a well-known rescue hypothetical: Deliberately driving a trolley over a person who has fallen on the tracks, if this is the only way to rescue five others, is more troubling morally than purposely failing to stop a trolley to save a person dying alongside the tracks if, due to time constraints, one must pass this person by in order to rescue five others.³⁶ In some cases, however, allowing death to happen is the moral equivalent of active killing. For instance, silently watching a person unwittingly ingest a substance that one knows is poisonous is every bit as contemptible as actually providing the poison. And finally, permitting death to happen can arguably be an even greater evil than active killing. For example, allowing a young child in one's care to die slowly of neglect may be even more deplorable than killing him or her outright.

As others have persuasively argued, killing and letting die are not inherently morally different.³⁷ When an instance of the former seems more problematic than an instance of the latter, the reason is typically some

require active intervention with the same intent and inevitable result, the method used seems to me irrelevant to whether abortion is considered killing or letting die.

Suppose, however, that ectogenesis (i.e., the process of gestating a fetus in the lab) can someday produce outcomes comparable to those of pregnancy. This day, if it ever arrives, is still very far off: the percentage of infants born earlier than 24 weeks who survive has not increased significantly in the last decade; moreover, lasting disabilities and health problems are still the norm, rather than the exception, among infants born extremely prematurely. See *More Premature Babies Born at 24 Weeks are Surviving – But the Number Living With Disabilities Will Also Rise*, DAILY MAIL (Dec. 5, 2012, 3:25 PM), <http://www.dailymail.co.uk/health/article-2243233/More-premature-babies-born-24-weeks-surviving-number-living-disabilities-rise.html>. But if ectogenesis someday does become a viable alternative to pregnancy, abortion will then differ from refusing to preserve unborn life. As long as one assumes that developing embryos and fetuses have fully human rights to life, it would be difficult to defend the moral permissibility of aborting them rather than turning them over for ectogenesis. In assessing a pregnant rape victim's duty to continue her pregnancy instead of opting for ectogenesis, one would take into account, among other things, the onerousness for her of continuing the pregnancy and, should she desire to give the baby up for adoption, the extent to which planning for the care of the child would be more onerous if she carried the pregnancy to term than if she opted for ectogenesis. Consider, however, that if gestation outside the womb does become a viable option, then pregnant rape victims will have no more responsibility for preserving unborn lives than would anyone else. Factors (1) – (9) above could then be used to assess the duties of taxpayers to foot the bills for preserving those lives. If the current costs of neonatal ICUs are any indication, these bills will be huge. It will be interesting to see whether taxpayers will be willing to pay them.

³⁶ Many authors have presented variations of this example, which was introduced by Philippa Foot, *Killing and Letting Die*, in *KILLING AND LETTING DIE* 280, 282–83 (Bonnie Steinbock & Alastair Norcross eds., 2nd ed. 1994).

³⁷ Examples of authors who have argued for this “equivalence thesis” are James Rachels, *Active and Passive Euthanasia*, *id.* at 112, and Michael Tooley, *An Irrelevant Consideration: Killing Versus Letting Die*, in *id.* at 103.

other difference between the situations. Thus, in the above rescue example, if the driver of the trolley had not come along, the person dying alongside the tracks would probably still have soon died, whereas the person who had fallen on the tracks in all likelihood would still be alive. If the example were changed so that the person lying on the tracks were in as dire health as the person alongside the tracks, and if there were no possibility of anyone else rescuing either one, then running over the one and failing to stop for the other would be morally equivalent.

If the unborn are assumed to have the same right to life as leukemia patients, then whether a particular abortion would be more or less morally justifiable than a particular refusal to donate bone marrow would turn on many of the sorts of factors discussed earlier. For example, for the particular individuals involved, how would the health risks of continuing the pregnancy compare to those of donating bone marrow? What conflicting moral obligations does each person have? Are there others who could preserve the needy lives? And so on. By contrast, in comparing these behaviors, whether abortion is characterized as killing or as letting die does not, in my view, affect the moral calculus.³⁸

IV. PREGNANCY THAT OCCURS DESPITE PROPER USE OF HIGHLY RELIABLE CONTRACEPTION

By “highly reliable” contraception, I mean contraception that research indicates has a failure rate of less than one percent per year, when used according to manufacturers’ directions. Examples are birth control pills, Intrauterine Devices (hereinafter “IUD”s), and Depo-Provera injections.³⁹ Although, as discussed above, many self-described pro-life advocates are willing to treat pregnancy due to rape as an exception to their general belief that abortion is morally impermissible, it is difficult to find any who would make an exception for pregnancy that results from failed contraception. Pro-life advocates typically argue that, because it is common knowledge that no form of contraception is 100% effective, women who rely on contraception, unlike rape victims, are responsible for causing their pregnancies if the contraception fails.⁴⁰ Therefore, the

³⁸ Kamm suggests that considerations along some of the lines of (1)–(9) above can justify abortion, even if it is conceptualized as killing rather than letting die. She also suggests that various of these considerations can justify a third party—for example, a doctor—in carrying out a pregnant woman’s wish to abort the fetus. KAMM, *supra* note 8, at 80–123.

³⁹ See James Trussell, *Contraceptive Failure in the United States*, 83 CONCEPTION 397, 401 (2011). For a table showing first-year failure rates for “perfect” use of a wide variety of contraceptives, see *Contraceptive Use in the United States*, GUTTMACHER INSTITUTE (June 2014), http://www.guttmacher.org/pubs/fb_contr_use.html.

⁴⁰ See Clinton Wilcox, *A Critique of Judith Jarvis Thomson’s A Defense of Abortion, Part I, SECULAR PRO-LIFE PERSPECTIVES* (Mar. 13, 2013), <http://perma.cc/ZBR6-A9XS> (“there are pro-life people who argue that abortions can be justified in the case of rape specifically because of bodily rights,” but “if you consent to the act of sexual intercourse, you waive your right to bodily autonomy.”)

argument concludes, these women are morally obligated to carry their pregnancies to term.

Assuming, as before, that the unborn have the same right to life as any human person, the metrics identified in Section I can be used to evaluate this pro-life argument. Several of the metrics apply no differently to the case of failed contraception than to the case of pregnancy due to rape. To avoid repetition, the analysis that follows in this and subsequent sections addresses only issues not previously discussed.

First, how onerous would it be for the woman to preserve the unborn life? Again, the answer depends upon many variables. For some women, giving birth to a baby conceived as a result of contraceptive failure simply means less time than planned alone with a new spouse before having a child. For others, it means dropping out of school and abandoning dreams of a fulfilling career. For still others, it means making a wrenching choice between giving up a newborn for adoption, raising a child in poverty, or remaining financially dependent upon an abusive partner.⁴¹ Often, the onerousness of the pregnancy for a woman turns on such issues as her sexual partner's willingness to accept his obligations to the prospective child, her access to health insurance that covers pregnancy and delivery, the future assistance she can rely upon from family and friends, and her employer's policies regarding pregnancy and child care.

How much would the pregnancy interfere with the woman's other moral obligations? Individual circumstances of course vary, but because the pregnancy was unplanned, the chances of serious conflict are high. Most heterosexually active women today make commitments that assume the reliability of contraception. They take out student loans, take on long-term projects at work and in their communities, make promises to care for elderly relatives, and so forth.

Would an abortion be likely to produce or exacerbate significant societal problems? As noted earlier, the decision to have an abortion conveys the message that there are higher priorities than preserving human life. To evaluate the societal messages sent by particular decisions to abort, it is important to consider the nature of those higher priorities. Some people believe that it diminishes human life to deem almost any reason for abortion more important than preserving new life. However, I think that many people see a difference in the societal message conveyed when a woman's higher priority is, for example, keeping a job that she needs in order to support her children, and the message conveyed when her higher

⁴¹ Various authors have argued that for large numbers of women, carrying unplanned and unwanted pregnancies to term means never achieving equality with men. Some have gone on to argue that for this reason disallowing abortion in the U.S. would violate the Equal Protection Clause of the U.S. Constitution. See, e.g., Alison Jaggar, *Abortion Rights and Gender Justice Worldwide: An Essay in Political Philosophy*, in *ABORTION: THREE PERSPECTIVES* 120, 147–49 (Michael Tooley et al. eds, 2009); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 370 (1992).

priority is, for example, having sons rather than daughters. Aborting because of a preference for sons not only reinforces and legitimizes sex discrimination in our society, but it also helps set the stage for socially undesirable imbalances in male to female ratios within the population.⁴²

Next, to what extent is the woman who became pregnant despite properly using highly reliable contraception responsible for causing the unborn's needy predicament? In the case of pregnancy due to rape, the woman certainly bears no such responsibility. This is evident, even though the pregnant rape victim was not altogether incapable of avoiding the pregnancy. For example, she could have had her ovaries surgically removed or enlisted a bodyguard to stand watch over her at all times. In assessing a woman's responsibility for causing an unwanted pregnancy, the relevant question is not what she *possibly* could have done to prevent it, but rather what she *reasonably* could have done.

To assess responsibility in cases where pregnancy results from the failure of highly reliable contraception, it is again helpful to consider a roughly analogous situation in which one person might be called upon to preserve another person's life. Suppose that a Clevelander—let's call him Joe—slowly and carefully drives to work on a snowy road. Despite being equipped with anti-lock brakes and snow tires, his car skids and hits the car of a woman who is attentively driving her six year-old daughter to school. Suppose the child suffers life-threatening injuries.

Like the woman whose pregnancy results from the failure of highly reliable contraception—let's call her Sally—Joe engaged in an activity that entails a small but inescapable element of risk. He reasonably should have known that driving in the snow is a predisposing factor for auto accidents. Both Sally and Joe were very cautious. Sally correctly used a highly reliable contraceptive; Joe outfitted his car with winter safety equipment and drove slowly and carefully. Both Sally and Joe could have avoided their situations. Sally could have refrained from sex; Joe could have stayed home that day. As a result of their respective actions, an innocent life needs a great deal of care in order to survive.⁴³

Consider Joe's moral obligations to preserve the life of the injured child. If the child needs a blood transfusion and Joe's blood is suitable,

⁴² For discussion of the pros and cons of outlawing sex-selective abortions, see Farhat Moazam, *Feminist Discourse on Sex Screening and Selective Abortion of Female Fetuses*, 18 *BIOETHICS* 205 (2004).

⁴³ Kamm discusses the following challenge to the sort of analogy I am introducing here: The cases that I am comparing differ, because Joe's actions in driving on snowy roads made the child worse off than she would have been had Joe stayed home, but Sally's act of sexual intercourse did not make the fetus worse off than it would have been had Sally abstained from sex. Thus, Sally's degree of responsibility for her pregnancy may lack bearing on her duty to carry it to term. KAMM, *supra* note 8, at 91. I am not persuaded by this objection. If Sally declines to continue her pregnancy, the fetus will not be harmed relative to its status before conception, but it will be harmed relative to its current status. In my view, Sally's degree of responsibility for her pregnancy is therefore a relevant factor in assessing her duty to avoid inflicting this harm.

must Joe make the donation? If the child's chances of survival would be enhanced by medical care that is beyond the family's resources, must Joe pay for it—even if it means, for example, spending all the money he saved for his children's college educations or going deep into debt? If no one else is available to care for the child during her convalescence, must Joe provide the care—even if this requires neglecting his own children?

Although reasonable people might differ in their views of Joe's moral obligations to the child, few would argue that Joe must do all these things. Most people consider accidents like Joe's unfortunate but inevitable consequences of life in industrialized societies. Of course, there are ways to reduce dramatically the incidence of such accidents: Cleveland could install heated coils under all its roadways or close its roadways whenever it snows. Most people, however, would regard the economic costs of such measures prohibitive and are willing to accept some predictable loss of human life.⁴⁴ If individuals proceed cautiously, but accidentally cause life-threatening injuries, most people do not consider them morally obligated to do everything humanly possible to help those whose lives hang in the balance because of their actions.

Perhaps some might object that Joe's assumption of risk was more justifiable than Sally's, because, by driving to work, he was supporting his family and contributing to the nation's economy, whereas Sally was just indulging in self-gratification. Most people's views of Joe's moral obligations to the child, however, would not change if he had been cautiously driving to a movie rather than to work. Moreover, the value of non-procreative sexual intercourse more often than not goes beyond physical pleasure. Sex is a way of achieving intimacy in relationships.⁴⁵ Sexual dissatisfaction is a common reason for divorce.⁴⁶ Because American women tend to be fertile for over thirty years but typically want only two children,⁴⁷ the notion that, over the long term, they should choose abstinence over contraception is problematic from both psychological and social perspectives.

Another possible objection to analogizing Sally's situation to Joe's is that only Sally can preserve the life of Sally's unborn, whereas multiple people could save the child injured in Joe's accident. But suppose that

⁴⁴ For extensive discussion of such trade-offs, see GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION TRAGICALLY SCARCE RESOURCES* (1978).

⁴⁵ *Reasons for Having Sex Affect Your Satisfaction, Study Finds*, HUFFINGTONPOST.COM (July 3, 2013, 3:56PM), http://www.huffingtonpost.com/2013/07/03/reasons-for-having-sex-affect-satisfaction_n_3541593.html.

⁴⁶ Brien K. Ashdown, Jana Hackathorn & Eddie M. Clark, *In and Out of the Bedroom: Sexual Satisfaction in the Marital Relationship*, 2 J. OF INTEGRATED SOC. SCI. 40, 41 (2011).

⁴⁷ According to an analysis of government data by the Pew Research Center, and reported in the April 15, 2014 Wall Street Journal, the average number of children that American women say they ideally would like to have is 2.4. Quentin Fottrell, *Big Family Envy: Why Americans Want More Kids*, MARKETWATCH.COM (Sept. 9, 2014, 7:00 AM), <http://perma.cc/5UQ7-D6RY>.

because of the exigencies of the situation, only Joe could save the child's life. Certainly his moral obligations to the child would be greater than otherwise, but most people would still see them as limited. For example, few would maintain that Joe would be morally obligated to spend all the money he saved for his children's college tuition in order to provide the injured child with the very best medical care anywhere available.

Finally, one might argue that Sally has a greater moral obligation than Joe to provide life-preserving services because of the close relationship she bears to the unborn as a result of their biological bond. Although this bond may have greater bearing on the morality of abortion in Sally's case than in the pregnant rape victim's, it still seems an inadequate basis for assigning full parental duties to Sally. Deciding who has parental obligations is a complex and controversial issue. Most people in our society, however, do not regard biology as determinative. For example, they support laws that ascribe full parental obligations to adoptive parents and none to sperm donors who desire anonymity. Similarly, many oppose ascribing parental rights or obligations to women who bear children by surrogacy—even when the surrogate is genetically related to the offspring. By conscientiously using highly reliable contraception, Sally did everything she could short of abstinence to avoid parenthood. In my view, the care she took significantly reduces the extent to which her biological connection to the unborn creates a greater duty to preserve life on her part than on Joe's.⁴⁸

More so than in the case of pregnancy due to rape, people who believe that the unborn have a fully human right to life may reasonably disagree about the moral obligations of women whose pregnancies result from failures of highly reliable contraception. Again, my purpose here is not to promote my own viewpoint on this issue. Rather, it is to identify the myriad situation-specific factors that bear on such determinations and to demonstrate the importance of thinking about the moral duties of pregnant women in ways that are consistent with one's views about people's moral duties in analogous situations.

⁴⁸ Based on reasons similar to mine, David Boonin suggests that a woman has a stronger duty to her son or daughter than to strangers, not because she is the child's biological parent, but because she is the child's guardian. BOONIN, *supra* note 8, at 232. Making a similar point, Kamm differentiates between parents and creators. KAMM, *supra* note 8, at 142–44. I believe that the biological link can sometimes be significant—for example, in determining a man's moral obligation to a child born after his sexual partner decides not to have an abortion. For a defense of the view that men who wanted their sexual partners to have abortions should not be compelled to pay child support if the woman unilaterally decides otherwise, see Lisa Lucile Owens, *Coerced Parenthood as Family Policy: Feminism, the Moral Agency of Women, and Men's 'Right to Choose'*, 5 ALA. C.R. & C.L. L. REV. 1, 23 (2013).

V. PREGNANCY THAT OCCURS WHILE USING LESS THAN MAXIMALLY EFFECTIVE CONTRACEPTION

Actual rates of contraceptive failure are far higher than those that studies demonstrate are achievable with proper use of the most trustworthy methods.⁴⁹ In part, this is due to imperfect use of highly reliable contraceptives. In part, it is also due to the choice of birth control regimens that, even when used perfectly, have failure rates higher than those of the pill, Depo-Provera, and IUDs.⁵⁰ Since a woman's degree of responsibility for causing her pregnancy has bearing on her duty to carry it to term, it is important to look at women's reasons for not using the most reliable birth control methods, or for not using them entirely properly.

Often, highly reliable methods of contraception fail because women are not sufficiently cautious in using them. For example, women who take birth control pills occasionally miss a day, or those who use Depo-Provera are not careful to schedule their shots at the correct intervals. However, there are also more sympathetic reasons that many women do not use contraception in the way required for maximum effectiveness. In some cases, birth control prescribers neglect to give women complete instructions. For example, they do not mention that a woman must check the strings of her IUD after each menstrual period or that a woman must take her birth control pill at very close to the same time each day—something that tends not to happen naturally if a woman has different sleep patterns on weekdays and weekends. Similarly, medical providers often do not tell women that numerous medications can interfere with the pill's effectiveness. Among these are some widely used antibiotics, antidepressants, and diabetes medicines, as well as some popular natural supplements.⁵¹

There are also various reasons that large numbers of women use contraceptive methods that, even when employed perfectly, are not the most reliable. I will mention here only two reasons that figure prominently for many. The first is expense.⁵² Condoms cost less than most other forms of birth control, they can be purchased in small quantities so the expense can be spread over time, and they can be obtained without paying for a

⁴⁹ See *Contraceptive Use in the United States*, *supra* note 39.

⁵⁰ For example, birth control pills have a failure rate of .3% when used perfectly, but of 9% in typical use. Condoms have a 2% failure rate when used perfectly, but an 18% failure rate in typical use. For an extensive analysis of the effectiveness of contraceptives in the U.S., see William D. Mosher et al., *Intended and Unintended Births in the United States: 1982–2010*, CENTERS FOR DISEASE CONTROL AND PREVENTION (July 24, 2012), <http://perma.cc/N9LL-NJ6Y>.

⁵¹ For a list of these medicines, see *Does the pill interact with other medicines?*, NHS.UK, <http://perma.cc/LK6A-RTFS> (last reviewed Feb. 1, 2014).

⁵² The Affordable Care Act requires employers with 50 or more employees to provide health insurance for contraception. However, it is unclear at this point how many employers will follow Hobby Lobby's lead and claim faith-based exemptions from the law. See Hunter Stuart, *14 More Companies that Likely Will Deny Employees Birth Control*, HUFFINGTONPOST.COM (July 1, 2014, 12:47 PM), <http://perma.cc/YL45-YFNZ>.

doctor's visit.⁵³ Second, health concerns deter many women from choosing the most reliable forms of contraception. Copper IUDs sometimes cause heavy menstrual bleeding, cramps, and anemia.⁵⁴ Long-term use of Depo-Provera has been associated with bone density loss.⁵⁵ Birth control pills can raise blood pressure and blood cholesterol levels and can increase the risk of blood clots and stroke.⁵⁶ Moreover, the dangers are higher for women with underlying medical conditions, such as diabetes or hypertension.⁵⁷ Since a woman's need for birth control often spans several decades, many women fear exposing themselves to the health risks of the most effective forms of contraception for the full duration of their reproductive years. In light of the unavailability of hormonal contraceptives for men, women often turn to condoms, which not only pose no comparable risks, but also offer protection from sexually transmitted diseases ("STDs") and human immunodeficiency virus ("HIV").

To assess a woman's moral obligation to carry to term a pregnancy that occurred because she used less than maximally effective contraception, consider a variation on the car accident analogy discussed in Section III. Suppose that Joe's car was equipped with all-season tires instead of snow tires and that the lesser traction of these tires was partly to blame for the skid that resulted in the accident. Consider, in turn, the following alternative explanations for Joe's use of all-season tires. First, suppose that Joe was unaware of the safety advantages of snow tires. Second, suppose that Joe knew that snow tires are safer but had bought all-season tires to save money: Not only do snow tires cost more, but because they should be taken off in the warmer months, Joe would have needed two sets of tires instead of one. Third, suppose that Joe recognized the advantages of snow tires and had planned to buy them but had kept forgetting to do so.

Assume, as before, that the car accident results in life-threatening injuries to the child passenger in the other car. Reasonable people might disagree about Joe's moral obligations to try to preserve the child's life in

⁵³ A 2009 study of the effect of the recent recession on women's use of contraception found that among women ages 18-34 with household incomes of less than \$75,000, nearly twenty-five percent reported having put off a gynecological visit in the past year in order to save money. See *A Real-Time Look at the Impact of the Recession on Women's Family Planning and Pregnancy Decisions*, GUTTMACHER INSTITUTE (Sept. 2009), <http://perma.cc/GZ6G-BLE6>.

⁵⁴ Mayo Clinic Staff, *ParaGard (copper IUD) Risks—Tests and Procedures*, MAYO CLINIC (Jan. 21, 2012), <http://perma.cc/A4WB-B6WZ>. For risks of hormonal IUDs, see Mayo Clinic Staff, *Mirena (hormonal IUD) Risks—Tests and Procedures*, MAYO CLINIC (Jan. 21, 2012), <http://perma.cc/3K7S-NLC7>.

⁵⁵ Susan K. Flinn, *Depo Provera and Bone Mineral Density*, NAT'L WOMEN'S HEALTH NETWORK (Feb. 2011), <http://perma.cc/SJ4U-LGX2>.

⁵⁶ Mayo Clinic Staff, *Birth Control Pill FAQ: Benefits, Risks and Choices*, MAYO CLINIC (May 21, 2013), <http://perma.cc/T9PU-66AB>.

⁵⁷ Deborah Kotz, *Should You Stop Taking Birth Control Pills If You're Over 35?*, US NEWS AND WORLD REPORT HEALTH (January 13, 2009), <http://perma.cc/ZC7F-JKTK>.

each of the above situations. Many would consider Joe's obligations greater in all three instances than in the case where his car was optimally equipped for winter driving. As between the three, most people would probably consider Joe's moral duties greatest in the case where he knew that snow tires were superior but had forgotten to purchase them. Whether they would view Joe's duties to the child as lesser in the two other cases would depend upon their beliefs about whether Joe reasonably should have known the benefits of snow tires and whether Joe could easily have absorbed their extra cost. In any event, as discussed above, the issue of Joe's responsibility for causing the child's injuries would be only one of many factors relevant to determining his moral duty to try to preserve the child's life. Even if Joe had no good reason for not using snow tires, assessments of his moral duty to the child would still need to consider such other issues as his conflicting moral obligations, others' availability to provide life-preserving services, and so forth.

As before, my primary goal here is not to take a stance on whether particular women have moral duties to carry their pregnancies to term. Again, it is to point out the importance of thinking about this issue in a way that is consistent with one's beliefs about moral obligations in analogous contexts. Many people who consider abortion immoral if pregnancy results from a woman's failure to use contraception as effectively as possible take a narrow view of people's moral duties to innocent third parties in comparable situations—for example, when drivers' failures to use snow tires cause life-threatening injuries to innocent children. This is so, even though people's reasons for avoiding snow tires are rarely as compelling as the health worries that lead many women to avoid the most effective forms of birth control. Even when people hear about accidents like Joe's, they typically do not clamor for laws requiring snow tires in areas prone to winter storms. In fact, they often are accepting of safety hazards far greater than failing to use snow tires. For example, Congress's 1995 repeal of the 55 mph national speed limit continues to have widespread support, despite the 3.2% higher incidence of roadway fatalities attributable to the higher speed limits that states then instituted.⁵⁸ Whatever legislators' reasons for not adopting greater safety measures to avoid auto accidents, most people regard resulting accidents as regrettable inevitabilities. Few believe that those who could have taken steps to avoid these accidents are morally obligated to make restitution to victims. My purpose here is not to endorse or criticize this view, but simply to call attention to it.

⁵⁸ Lee S. Friedman, Donald Hedeker & Elihu D. Richter, *Long-Term Effects of Repealing the National Maximum Speed Limit in the United States*, 99 AM. J. PUB. HEALTH 1626, 1628 (2009).

VI. PREGNANCY THAT RESULTS FROM THE FAILURE TO USE BIRTH CONTROL

In this article, I do not attempt to be comprehensive in discussing women's moral obligations in the full range of circumstances under which unwanted pregnancy occurs. The analysis in previous sections provides a suggested template for analyzing the moral obligation to continue pregnancy in a variety of situations that I have not discussed here. However, insofar as I have paid particular attention to a woman's degree of responsibility for causing her pregnancy, I would like to comment briefly on the moral duties of women who become pregnant because they use no birth control at all. Nearly half of those of those who have abortions in the U.S. fall into this category.⁵⁹

In general, women who have unprotected sex bear more responsibility for causing the plight of their unborns than do women whose pregnancies result from failed contraception. Certainly some women are careless in their use of birth control. Moreover, the claim that abortion diminishes the value of human life is particularly persuasive when women repeatedly fail to use birth control and then seek multiple abortions.⁶⁰

It is important to recognize, however, that not all women who use no contraception are as responsible for causing their pregnancies as it initially might appear. In addition to the cost and health concerns discussed earlier, there are various explanations besides heedlessness for the failure to use birth control on the part of many who wish to avoid pregnancy. The decision to forgo contraceptives is sometimes the result of misinformation about birth control. A prime culprit is abstinence-only sex education in school, which typically overemphasizes the side effects of contraception and underplays its effectiveness.⁶¹ Some women do not use contraception because they are unduly trusting of a sexual partner who claims to have had a vasectomy. Others believe that they are unlikely to become pregnant.⁶² Sexual politics also often play a role. Many women participate in sex that, while not within most legal definitions of rape, is not truly

⁵⁹ *Facts on Induced Abortion in the United States*, GUTTMACHER INSTITUTE (July 2014), <http://perma.cc/LC2J-VBVX>.

⁶⁰ According to data collected by the Centers for Disease Control and Prevention, 8.5% of those who had abortions in 2010 had previously had three or more abortions. Karen Pazol et al., *Abortion Surveillance – United States, 2010*, CDC (Nov. 29, 2013), <http://perma.cc/P8SS-8M6H>.

⁶¹ For extensive discussion of abstinence-only sex education programs, see Gary J. Simson & Erika A. Sussman, *Keeping the Sex in Sex Education: The First Amendment's Religion Clauses and the Sex Education Debate*, 9 S. CAL. REV. L. & WOMEN'S STUD. 266 (2000).

⁶² According to a national study of women who gave birth after an unintended pregnancy that resulted from the nonuse of birth control, 36% gave as their reason for not using birth control that they did not think they could get pregnant. See Mosher et al., *supra* note 50. For an interesting discussion of the psychology behind many women's belief that they are infertile, see CANNOLD, *supra* note 10, at 77–78.

consensual.⁶³ Some women do not feel empowered to insist that their partner use a condom.⁶⁴ And some women fail to use contraceptives out of concern—not always misplaced—that they will be looked down upon as promiscuous if they come prepared for sex when they are not in a relationship.⁶⁵ Finally, in some instances women have unprotected sex because they want a baby but change their minds due to altered circumstances. For instance, they develop medical problems in the course of the pregnancy,⁶⁶ they unexpectedly lose their job, or a partner on whom they counted for support abandons them.⁶⁷

No doubt, reasonable people may disagree about whether the women just described have moral duties to carry their pregnancies to term. As before, I would urge taking a position on this issue only after reflecting on how one assesses moral obligation in other situations in which someone unintentionally, but with varying degrees of causal responsibility, places innocent life into a position of dependency. Thus, one might consider other variations on the accident scenario discussed above. What would be Joe's obligations to the injured child if the accident occurred because Joe had slept very little the night before, or had been remiss in having the brakes on his car checked, or was talking on his cell phone while driving? Would Joe be morally obligated to sell his house to pay for top-notch medical care for the child? Would he be obligated to quit his job if no one else could provide personal care? And so forth.

VII. CONCLUSION

In this article I have emphasized the complexities inherent in assessing the moral permissibility of abortion, even if one posits that the unborn have a fully human right to life from the outset of pregnancy. I have argued that in order to decide whether a particular woman can morally choose not to carry her pregnancy to term, one would need access to a great deal of specific information about that woman and her situation. This sort of inquiry can best be carried out by individual moral decision-makers—most obviously, the pregnant woman, but also others who know her and who are in a position to understand the relevant considerations.

⁶³ See SUSAN SHERWIN, *NO LONGER PATIENT: FEMINIST ETHICS AND HEALTH CARE* 103 (1992) ("Often the sexual coercion is not even recognized as such by the participants but is the price of continued 'good will' – popularity, economic survival, peace, or simple acceptance.")

⁶⁴ For the view that many men's refusal to use condoms can be explained in terms of the sexual double standard regarding responsibility for pregnancy, see CANNOLD, *supra* note 10, at 80–81,

⁶⁵ *Id.* at 81.

⁶⁶ See Rose Marchick, *Medical Reasons for Abortions*, LIVESTRONG.COM (May 4, 2011), <http://perma.cc/DA9F-JSPW>.

⁶⁷ For discussion of changed circumstances as a motivation for abortion, see Rachel K. Jones & Lawrence B. Finer, *Who Has Second-Trimester Abortions in the United States?* GUTTMACHER INST. (Dec. 16, 2011), <http://perma.cc/Z23C-5HCY>.

Lawmakers asked to craft and to cast votes on abortion legislation must take into account many factors that an individual decision-maker would not need to consider in the course of assessing the morality of a particular abortion. For example, in drafting legislation, lawmakers must be mindful of the importance of minimizing the potential that laws will be enforced arbitrarily and of ensuring that people have fair warning of prohibited behaviors.⁶⁸ They must also recognize that laws are almost inevitably over- or under-inclusive, or both, in terms of legislative objectives and cannot specifically provide for the multitude of fact situations that may actually arise -- each with its own set of morally relevant considerations.⁶⁹ In addition, legislators should be sensitive to the practical implications of enacting laws that large numbers of people are apt to violate.

Notwithstanding the many factors that differentiate the task of lawmakers from that of the individual moral decision-makers who make up the electorate, the decision-making framework that I have outlined has a great deal to say to legislators in their official roles. Moral issues lie at the heart of the abortion controversy, and lawmakers need to be aware of the many kinds of considerations discussed in this article in order to do their jobs fairly and responsibly. When legislators contemplate voting for or against laws that restrict women's access to abortion, it is important that they are cognizant of the extent to which these laws cannot help but fail to deal justly with every situation and that they make informed and well-considered judgments about the best ways to balance the relevant concerns.

Legislators, no less than political theorists, disagree as to the nature of the legislative role: Is it their job, as popularly elected representatives in a democratic society, to cast votes that primarily reflect the pressures placed on them by their constituents or should they instead vote in the way that, upon careful reflection, they believe best serves their constituents' interests? The former, pluralist, model undoubtedly is helpful in describing and understanding how legislators often have acted over the years.⁷⁰ At the same time, the alternative, deliberative, model enjoys significant historical support as a conception that was widely shared among the framers of the U.S. Constitution⁷¹ and that is reflected in the structure of the government that they put in place.⁷² Even though there may be

⁶⁸ See *Smith v. Goguen*, 415 U.S. 566, 572-74 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

⁶⁹ Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 347-53 (1949).

⁷⁰ See generally ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1956).

⁷¹ For example, THE FEDERALIST No. 57 at 370 (A. Hamilton or J. Madison) (Mod. Lib. ed. 1937), states: "The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society."

⁷² See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985) (explaining the way in which the Constitution structures the national government and the

reasons to resist using the deliberative model for all legislative decisions, it is in my view the appropriate model to use in an area like abortion that has been dominated for so long by polarized political rhetoric. I believe that the framework that I have suggested in this article can be helpful to legislators who conceptualize their task along these lines.

At the outset of this article, I suggested that the electorate is more interested in, and capable of, nuanced thinking on the abortion issue than lawmakers typically assume. If so, then legislators who use my framework may discover that the conclusions they reach about abortion are not that far apart from the views of their constituents. It is long past time for our elected representatives to stop selling the public short and to give this difficult, but not necessarily intractable, issue the careful and sensitive thought that it deserves.

federal-state relationship as at least partly an attempt to “bring about public-spirited representation” and to “provide safeguards in its absence”).

