Colleagues,

This is a rough draft of a paper that is part of a symposium on abortion and the first amendment. The thought crime angle at the very end is a bit procrustean and mostly an attempt to fit the topic into the symposium topic than the core of the paper, so take it with a large grain of salt. Because of the journal, the paper was also under a strict word limit so there is plenty more to say on this (including by all of you!) Please do not circulate or cite to this draft without permission.

Thanks,
Glenn
Are All Abortions Equal? Should There Be Exceptions to the Criminalization of Abortion for Rape and Incest?

I. Glenn Cohen

There was a moment in the 2012 campaign, when Mitt Romney attempted to “pivot” to the center and get away from the statements of those like Todd Akin who made comments about how in cases of “legitimate rape” the victims’ bodies “have ways to try and shut that whole thing down.” The way Romney did it was to make clear that while he was against abortion, he would of course make an exception for women who had been raped or whose pregnancy was the result of incest. This has become something of a moderate orthodoxy to those who oppose abortion. Abortion should be criminalized, yes, but with these exceptions carved out. This shibboleth has found its way not only in the public position taken by many Pro-Life politicians, but also in legislation across several U.S. states, and even in the Hyde Amendment, which prohibits federal funding for abortion makes an exception for these kinds of abortions. Many legal writers have also accepted, to some extent, this compromise position either by praising it as their own particularly attacking those who would not make this exception.

My goal in this article is to put pressure on this position. I will suggest that as a normative matter it may be much harder to defend than those who support the compromise think. The goal is not to argumentatively put a nail in the coffin of this position, but instead to suggest why these exceptions are a surprising place for uncontested agreement. That is the main contribution of this article.

The topic of this symposium is abortion and the First Amendment. The connection of my argument to the First Amendment is admittedly on the looser side, but at the every end of this article I will examine a second stand-alone claim: If the rape and incest exception cannot be justified in the ways I explore it remains possible to defend it as follows: there are good and bad reasons/motivations to have abortions, the state can legitimately judge those reasons/motivations and rule rape and incest in the “good” category, and therefore criminalize all other abortions but not these. This way of thinking about these exceptions, as providing state-endorsed reasons/motivations for having an abortion will not only disturb some (particularly for those with libertarian inclinations) but rub up against a persistent First Amendment concern – freedom of thought – and introduce thought crime into the regulation of abortion. Whether one finds this second argument persuasive depends more heavily on one’s political theoretical priors.

I. Is An Exception Permitting Abortions for Rape or Incest Normatively Justified?

I will begin this section by making a prima facie case against exceptions for rape and incest. The basic claim can be captured by the slogan “all abortions are equal.” After making the case, I will then consider objections to the claim.
One aside: as I discuss in more depth below in some jurisdictions the incest exception is duplicative of the rape exception (i.e., all acts of incest covered by the statute are also sex without legally valid consent) while in some jurisdictions the incest exception extends more broadly. Justifications of exceptions for incestuous sex that are voluntarily consented may be even harder to defend. For now, though, I largely focus on the rape exception.

a. All Abortions Are Equal.

Let me first argue for two related points. First, that the slogan “all abortions are equal,” with perhaps a modification or two, gels best with the underlying premises of Pro-Life arguments. Second, that the rape and incest exceptions, at initial glance, seem to be in conflict with those premises.

i. What Do Pro-Life Individuals Believe?

Most individuals who think abortion is morally problematic and should be prohibited – from now on I will say “Pro-Life” for simplicity though of course many “Pro-Choice” advocates object to that language as unfairly claiming a moral high ground – do so because they subscribe to two core beliefs:

(1) *Fetuses are persons and/or get some of the rights of persons from early on in their development, particularly the right of inviolability.*

I put the claim this way because there will be some disagreements as to when personhood begins. Some views are Actual Attainment of Capacity X views that peg personhood to attainment of a capacity (ability to feel pain, sentience, higher reasoning, etc, or some combination), others are about Potential to Attain Capacity X views (which peg personhood to being the kind of thing that in the ordinary course of things would have one or a combination of those capacities), and some are Speciesist (all living human entities are persons by virtue of that fact, regardless of their actual or potential attainment of capacities). Some hold that fetuses *are* persons while others claim that even though they are non-persons they ought to have the rights of persons. There will also be sharp disagreements about the content of the rights of persons. Some persons (children, the incompetent) may be persons but not be entitled to the right to vote, or their autonomy rights may be diminished, while others might disagree. In any event there is only one stick in the bundle of rights of persons that is really relevant in our discussion and it is the most basic – inviolability. It can have many definitions, but at the very least it means a right not to have one’s existence ended except for a very good reason.

(2) *Whatever interest the mother has in protecting her bodily integrity, protecting her reproductive autonomy, etc, does not outweigh her fetus’ right of inviolability.*

Again I phrase the proposition broadly to recognize a few things: first, those who think that abortion is morally wrong and should be criminalized do not need to give no value to the mother’s interests, only to claim that the fetuses right to inviolability trumps that
interest. Moreover, for our purposes we can be agnostic as to exactly what the conflicting interest of the mother is, whether conceived as a right of bodily integrity, a right relating to reproduction, a more general autonomy right connected to important life choices, or some combination thereof. For our purposes what matters is that for those who are “Pro-Life” this interest or constellation of interests in the typical abortion case is trumped by the fetus’ right of inviolability.

This is, I think, a statement of the underlying logic of Pro-Life arguments that captures roughly 90% or more of such argumentation. There are other kinds of Pro-Life arguments I have mentioned elsewhere in my writings, for example a view that while fetuses are not persons or deserving of the rights of personhood, a prohibition against killing them is justified as prophylaxis that prevents the corrupting of our sensibilities or putting us on a slippery slopes where killing of person-like entities ultimately leads to killing of actual persons. Few enough Pro-Life advocates treat this as the primary basis for their support for their position, that for present purposes I think we can put such arguments to one side. Much of what I say will apply to these other arguments, though I think less forcefully. In my discussion below of a view I associate with the late Ronald Dworkin, I will return to this critique that my account mischaracterizes the views Pro-Life individuals really mean to.

ii. The Conflict Between the Rape and Incest Exceptions and These Premises.

The two premises underlying the Pro-Life position at first seem to directly conflict with the rape and incest exception. If fetuses are persons or at least have the personhood right of inviolability and “regular” abortions are wrong for this reason, then so should abortions for pregnancies that result in rape or incest. After all, from the perspective of violating the rights of a rights bearing entity, all abortion are equal.

Why should the circumstances giving rise to the pregnancy matter? To put it as provocatively as I can: Imagine if we were to give the same prerogative to kill to mothers of already-born infants or even children. Would anyone defend a statute, which held that mothers who kill three-month-olds will not face criminal charges if and only if those children are the result of rape or incest? But notice that for those who are Pro-Life and subscribe to the two premises, this is akin to what abortion is: the fetus has the same inviolability rights/personhood as the three-month-old child (premise 1), and the differentiating fact that the child is in the womb of the mother is not enough to give the mother the prerogative to terminate the fetus in the ordinary abortion case (premise 2), so why should it make a difference in this case?

II. Can the Exceptions Be Saved?

Can the Pro-Life supporter of a rape and incest exception avoid this conflict? I will examine several possible lines of argument. One implication of this “slice and dice” analysis of various arguments, though, is worth emphasizing: it is entirely possible that
some readers will find none of these arguments convincing on their own but think the exceptions are justified by an overlapping consensus among them.

a. Saving the Exceptions by a Gestation Plus Model?

One possible approach to justify these exceptions would be to adopt a “plus” model of prerogatives/rights/reasons. On this view, premise 2 should be re-understood: it suggests only that the woman’s control of her body, reproductive autonomy, etc, standing alone is insufficient to give her a prerogative to terminate her fetus. But, the premise does not stand for the proposition that this interest may not be combined with other interests to generate the prerogative. The interest in ridding herself of a fetus that was the result of rape or incest, when combined with the existing interests in bodily integrity, reproductive autonomy, etc, become jointly sufficient even where neither set of interests was individually sufficient.

Adopting this reformulation would allow the Pro-Life individual to both justify the criminalization of ordinary abortions and the criminalization of infanticide for children that are the product of rape or incest, but not the abortions of children who are the product of rape or incest. Formally this reformulation does the trick, it generates the right set of results in the three cases (regular abortion prohibited, infanticide of children who are the product of rape and incest prohibited, abortion of fetuses who are the product of rape and incest permitted). But is it persuasive? I will explain why I am not fully convinced.

If we pressed, what is it about this fetus or the circumstances leading to its creation that justify differential treatment from “regular” abortions? I imagine our interlocutor might give two different answers that I will take in turn: trauma and victimhood/consent.

i. Gestation Plus Trauma

Why is this abortion not like all other abortions, is the question. One possible answer: the fact that the fetus and its pregnancy are constant reminders of the trauma of the rape and incest, which is a different and additional kind of harm to the ordinary case of unwanted but consensual pregnancy. One can find analogues of this idea in the writings of several academics:

Larry Tribe writes “Nothing is more devastating than a life without liberty. A life in which one can be forced into parenthood is just such a life. Rape is among the most profound denials of liberty and compelling a woman to bear her rapist’s child is an assault on her humanity.” Susan Sherwin writes “if the fetus is the result of rape or incest, then the psychological pain of carrying it may be unbearable, and the woman may recognize that her attitude to the child after birth will be tinged with bitterness”

Many women who are the victims of rape and incest most certainly experience regret and trauma. At first glance that argument is unavailing because the trauma is one the law cannot correct since the bad act has already occurred. Instead the argument has to be that
there is a “continuing violation” from the pregnancy itself that the law can correct through an abortion prerogative, almost as though every day of pregnancy is a repetition of the rape or incest. It is important that it be the pregnancy that is the violation, that while rights to bodily integrity and reproductive autonomy that standing alone are insufficient to justify abortion, this additional interest tips the balance towards the termination of a person and gives women who are its victims a prerogative to terminate their fetus.

That approach faces a challenge of underinclusivity: such an argument should justify a prerogative that extends beyond the rape and incest cases.

Imagine a woman who is under a persistent and so far resistant-to-treatment schizophrenic delusion that her pregnancy is the result of rape or incest. If the experience of trauma is the necessary “added ingredient” she seems to have the ingredient even though her pregnancy was not the result of rape or incest.

Perhaps that example seems far-fetched, or distinguished because it was a syndrome and not a person who has caused the trauma, etc. In any event, the point can be made another and simpler way: why limit the exception to this particular kind of trauma? A woman who was abused as a child and associates child-rearing with that trauma may feel as severe psychological repercussions of an unwanted child as the prior women.

But one need not be so dramatic, any woman, whatever her prior history or life, who would experience the same amount of trauma from the pregnancy should be treated the same. To put the point another way, what is normatively mandated is not a rape and incest exception but a “trauma from pregnancy” exception.

But of course, as Justice Kennedy told us in Gonzales v. Carhart (to the chagrin of many feminists and others) it was “unexceptionable to conclude” that some women who have abortions later feel “regret” resulting in “severe depression and loss of esteem.” And as Jeannie Suk has documented, the idea of “abortion trauma” is the result of fertilization of the concept of trauma around women’s bodies that has its roots in the rape trauma and battered women’s syndrome discourse. Which is to say, abortion’s relationship with trauma is fraught, and for some (especially in the Pro-Choice community) the threat of validating the notion of abortion trauma may outweigh whatever trauma-mitigating effect these exceptions can offer.

In fact, we can press further. Why limit the exception to “trauma” at all? The definition of what counts as “trauma” is fuzzy owing no doubt in part to its contingent historical development from Freud’s work in seduction to the diagnosis of shell shock in World War I. If we understand trauma to represent just one category of mental states causing significant emotional harm to individuals, many cases involve similar emotional harms. To give just one example, for a mother who would prefer to end her pregnancy, raising a profoundly disabled child might be thought to also impose significant mental suffering on the mother over her lifetime. This example is useful because like the rape case (but
perhaps unlike some of the other hypotheticals) the trauma and the pregnancy have the same “cause” and are inextricably linked such that one cannot end one without the other.

To be sure this is a very different kind of set back of interests, but at least for some mothers who would seek abortions, the effect on their welfare may be just as large if not larger. To put the point sharply if somewhat philosophically: imagine I offered you early in your life a “get out of abortion criminalization” free card, which gave you the ability to have an abortion in one of two circumstances – (1) abortion of a healthy and neurotypical child that is the product of rape or incest, or (2) abortion of a fetus with profound mental and physical disabilities – but you could only choose, in advance, one or the other. Imagine further that you were choosing behind a veil where you believed the risk of either eventuality was equal. It seems to me at least as plausible that many would choose the latter rather than the former card, which suggests the two are arguably on the same footing in terms of the impact on the mother’s welfare. Yet, Pro-Life individuals are firmly against the termination of pregnancies in the latter situation. Of course as with all veil type arguments one might worry that the ex ante perception of likelihood is creeping back in to your decision even when you are told to ignore it.

All this is to say if trauma is the additional interest that justifies the rape and incest exceptions, there is nothing categorical about rape and incest in this regard that should lead to us to limit the exceptions to those two circumstances. Instead, Pro-Life individuals would want something much more similar to the European-style regulation of abortions where any individual for whom pregnancy will cause them distress can make their case before experts to get an abortion, such as the French approach to criminalizing abortion while allowing early abortion if the pregnancy put the mother in “in a state of distress.” There is nothing special, in my view, about the fact that in this case the distress has a physical origin (the rape) – all forms of distress ultimately affect the body the same way – through the brain and the rest of the nervous system – indeed the only way we experience anything.

At most, this would suggest (in theory) that there may be an evidentiary presumption that victims of rape and incest would have made the requisite showing, but the exception would not be limited to them nor would it necessarily encompass every person who was a victim of rape or incest. This would replace the slogan “all abortions are equal” with the more cumbersome “all abortions causing mental distress of a requisite threshold are equal.” It would make room for the rape and incest exceptions on the Pro-Life view, but in a way that I think most Pro-Lifers would find both over- and underinclusive. This is why I do not find this justification for these exceptions and only these exceptions persuasive.

A peer reviewer helpfully pushed back that in many areas of tort the law eschews subjective psychological measurements in favor of more objective reasonable person test, so why not conclude that a “reasonable woman” would not find pregnancy traumatic except in the case of rape and incest and for that reason leave only these exceptions? I will be unable to fully consider the tort analogy in this constrained space but instead offer a few points why I disagree: First, many of the reasons why tort law may want to limit
emotional distress injuries strike me as less applicable here. There is an administrability concern that quantifying damages emotional distress is harder to measure than physical injury, but we are not seeking to carefully reticulate or quantify damages just to grant an exception. In tort providing or failing to provide liability is a two-edged sword in that it may deter socially desirable activity,2 not so here where there is no person outside the mother-fetus dyad whose behavior we are trying to incentivize or prevent. Second, the “duality” of tort’s treatment of physical versus mental harm is increasingly under attack and forms a poor touchstone, I think, for further analogical extension. Many authors suggest that tort is wrong to adopt an eggshell skull but not psyche rule wherein you take your victim as you find her for physical injuries but not emotional ones.16 As is particularly relevant for our purposes, the second-class treatment of emotional harms is thought by some to itself be an attack on women, that the “recurring injuries in women's lives are more often classified as lower-ranked emotional or relational harms.”18 Finally, at most this line of argument seems to suggest there should be a rebuttable presumption of sufficient trauma in abortions for rape and incest to permit abortion, but that women seeking abortions for other reasons have an opportunity to prove that their trauma from continued pregnancy reaches the same threshold.

All this, I think, establishes a serious underinclusivity problem (and perhaps a less serious overinclusivity problem). But how much should it bother us? That will depend to some extent on one’s views about two factors: (i) how morally problematic is under and over-inclusivity in the law, when it comes to permitting the termination of a person and burdening women with unwanted pregnancy? (ii) how difficult would it be to move from rule to standard here, and what would be the costs? Both in terms of encouraging malingering or fraudulent claims of trauma on the one hand the cost to women who cannot make the requisite showing of emotional distress (because of lack of resources, lack of sophistication, etc) but really do suffer it on the other. Different readers will undoubtedly weigh these differently.

Apart from underinclusivity and these other problems, the gestation plus trauma approach faces a different challenge relating to points I have made elsewhere about distinguishing the right not to be a gestational parent (abortion) from the rights not to be a genetic and legal parent.20 The abortion right, at least as a constitutional matter, is usually thought of (or at the very least I have argued is most plausibly construed as) a bodily integrity right not to gestate an unwanted fetus. The trauma argument is over-inclusive, in that it trades on the trauma not of pregnancy but of parenthood. To the extent legal parenthood is the cause of the trauma – rearing a child whose face is a constant reminder of one’s rape or incest – that element of the trauma can potentially be disposed of by adoption out of the child (it may turn on whether individual state’s family law require the consent of the man who engaged in incest or rape before adoption takes place). To the extent genetic parenthood is the trauma then we are really talking about a right to kill a fetus not a right to stop gestating one.20 That, re-raises the question why we should distinguish infanticide from abortion of children who are born out of rape or incest if one believes in the two premises discussed above.

ii. Gestation Plus Self-Defense
A different strategy for saving these exceptions would focus not on the fact that the two exceptions have as a common denominator trauma, but instead victimhood. The pregnancy is not only unwanted, but so is the sex act that gave rise to it. The woman is herself a victim and the abortion prerogative the law grants her is meant to reflect that reality.

1. A Word on Incest and Consent.

While many of the existing statutory exceptions in abortion law treat abortion and rape together, the question of consent and self-defense is a place where, once one takes a deeper look, the rape exceptions and some of the existing incest exceptions as codified diverge. In Louisiana and Utah, the exception for incest does not require that the incestuous sex occur without consent (which would make it redundant, perhaps, to the rape exception). Nor does it specify that the victim has to be a minor, which would be a more implicit recognition of lack of consent and the presence of statutory (if not forcible) rape. Thus, these statutes could seem to allow women who conceive of children through adult and consensual incestuous sex to have abortions. By contrast, the Arkansas statute does require that the pregnant woman be a minor when the incestuous sex occurred.

It is not clear why adult incest abortions but not other kinds of abortions should be permitted. Perhaps one might argue that some forms of incestuous sex, even if they begin in adulthood, have an element of coercion embedded to them. That seems plausible to me in cases of cross-generational incestuous sex, but not, perhaps, in cases of adult brothers and sisters close in age – think of the film *Lone Star* (spoiler alert!).

In what follows I will discuss arguments that hinge on victimhood and lack of voluntariness. Here I just want to emphasize that such arguments, even if they do succeed, may only save some incest exceptions that incorporate victimhood/involuntariness into themselves, but not those that do not.

Incest exceptions not tied to voluntariness seem even harder to justify. If they are meant to accomplish eugenic aims of avoiding the creation of children perceived to be psychologically or genetically compromised, many Pro-Life advocates (as well as many Pro-Choice ones!) should find them repugnant. More to the point, such statutes would seem to face harder line drawing questions as to why permit abortion of only these and not other potentially “compromised” fetuses. I have discussed these issues in prior work. From now on, though, I will mostly focus on the rape exceptions as well as incest exceptions that are keyed to lack of voluntariness.


In some ways, focusing on victimhood would draw analogies between the rape and incest exceptions and other exceptions for abortion that are sometimes accepted by Pro-Life individuals and thought compatible with these two premises.
Consider exceptions sometimes made for the life or health of the mother. This exception can be understood as analogous to self-defense. Just as with regular adult persons, the right to inviolability is overcome or forfeited when the person’s actions threaten one’s life, so the fetus’ right to inviolability (premise 1) can be viewed as overcome when the fetus threatens the mother’s life.

Some may find this analogy controversial, and it is not my purpose here to fully evaluate it. Instead my point is that whatever one thinks of the analogy as to the health/life exception, the same analogy fails as to rape and incest exceptions and cannot be used to avoid conflict with the two premises.

The first is the timing problem. The criminal law permits self-defense only to prevent serious injuries or threats of death, and even then in some jurisdictions only when one is in immediate danger and where the force used in self-defense is proportional to the threat, while other authorities such as the Model Penal Code permit deadly self-defense for “kidnapping or sexual intercourse compelled by force or threat.” Even if we were to recognize rape or incest as involving the kind of serious injury the law has in mind (some forms of each might qualify, others might not), the act of self-defense is not aimed at preventing the rape or incest. The rape or incestuous sex act the law seeks to prevent has already occurred once the woman is pregnant and allowing the killing of the fetus will do nothing to stop it.

Can the timing problem be overcome? Caroline Whitbeck says something we might adapt into a partial rejoinder, a version of the “continuing violation theory” discussed above. She writes: “Small wonder that a woman pregnant by rape frequently experiences her pregnancy as a nine-month continuation of that rape. Not only does she, like many raped women, wake up at night screaming, but when she does she finds that her body is still possessed by another” – which she analogizes to the horror of “being taken over unwillingly by some human or demonic force.…”

This continuing violation theory, it seems to me, proves too much. Many unwanted pregnancies can feel like possession or domination. In some cases the violating party may not be an outside entity but could instead be our own set of desires or motivations at Time 1, the point when the sex act giving rise to pregnancy occurred. To give one example: A woman who becomes pregnant from a boyfriend whom she believes is faithful but then learns he actually has a family and wife he has been hiding may feel no less the subject of a continuous violation. The same may be true of a woman who conceives after an intoxicated one-night stand. Indeed, in these cases, the feeling of invasion may be especially acute because she experiences this as a kind of self-violence, a life divided against itself. To be clear, this is not a claim that the trauma from these kinds of pregnancies is always or often on par with the trauma from rape. Indeed, it is not a claim about trauma at all. Instead, it is a claim that if pregnancy is the continued violation that justifies an act of self-defense against an innocent third party in rape or incest, similar continuing violations exist in other forms of pregnancy.
The continuing violation theory also proves too much in a different sense, in that it is not
only the gestation that can be a form of continuing violation. Suppose, to use something
that might make a good episode of Scandal, a woman is raped by her state Senator ten
months before the election without becoming pregnant. She has tried to induce the
authorities to bring charges against him but they do not believe her story, or they believe
her but due to a 4th Amendment violation they are unable to use the hard evidence they
acquired linking him to the crime. Watching him on TV or hearing him on the radio
every day is a constant reminder of her rape, and feels like a continuation thereof. If she
killed the Senator in a painless way, would she have a valid claim to self-defense? No.
The state would never give her a prerogative to kill the Senator without criminal penalty,
but why not if the continuing violation theory is true? (Notice that in one respect this case
is a stronger one for giving a prerogative to kill, since here, but not in abortion, it is the
original perpetrator who is at fault who will be killed, a point I discuss below).

So why treat the two cases differently and indeed permit the killing in the case where it
seems less justified? The answer cannot be that the fetus is not as much of a person or at
least has a much weaker right of inviolability. That argument is ruled out by premises 1
and 2 of the standard Pro-Life view above, and even if the argument were available it
seems to me to be an argument for at most reduced penalty not non-criminalization.
Instead, to justify the distinction one would have to argue, I think, that the mix of the
prerogative to stop gestating when added to the prerogative to end the “continuing
violation” is just enough to justify the abortion case but not the Senatorial case where the
gestation right is not involved, much more explicitly a balancing view. Is that a possible
argument? Perhaps, but it feels more like moral alchemy to me and a bit of a just-so
story.

But timing is not the only problem. There is also the problem of victim identity. It is
unclear why the faultlessness of the mother should give her a prerogative to kill the fetus.
It would be one thing if it gave her a prerogative to kill her assailant after the fact (rather
than prevention). That would be controversial, to be sure, like the Scandal case above,
and I would not be inclined to support it. But at least the act of killing and the act of
victimhood would be balanced such that the victim has the ability to act retributively
against the wrongdoer. But if abortion is serving this function in the case of rape and
incest, it is targeting a true innocent.

Instead, defending the rape and incest exceptions on a self-defense theory feels much
more like something from Euripides’ Medea, with a mother killing her children to punish
the man who wronged her, their father. American family law usually cuts against
punishing children for parental misdeed in contexts such as child support.

And if one returns to the doctrinal perspectives it is clear that American criminal law, at
least, has largely accepted that self-defense can only be intentionally used against an
assailant and not an innocent third-party, which the fetus unquestionably is in this case.
Though many jurisdictions will allow an accused to make use of self-defense when they
inadvertently or unintentionally kill an innocent third party in the course of defending
themselves, here the termination of the fetus appears to be intentional (in the sense of
the intended result of the action taken, even if not *desired* in the sense used in the principle of double effect type arguments).

Even if we ignored the timing problem above, the closest analogue I could imagine to these cases would be the following: an assailant charges you with a knife attempting to kill you. The only defensive weapon you have in your possession is a grenade. You throw the grenade knowing it will inevitably also kill the innocent person standing behind the assailant. My understanding of American criminal law is in such a case you would not be able to validly call on self-defense if prosecuted. Nor would you be able to call on the separate defense of “necessity” or “choice of evils.” American criminal law rejects this as a defense for murder, and many jurisdictions, even where they do accept the defense, require that the ratio of individuals saved to harmed must exceed 1:1, which they do not in this case.

For these reasons, the fact that the victim is not the perpetrator seems like a second impediment to this argument even if we put to one side the larger problem of preventing versus punishing the rape or incest.

Finally, we encounter another version of the *line-drawing/underinclusivity* problem, to the extent the argument depends on the lack of voluntariness of the pregnancy. There are many cases where sex or pregnancy is unwanted and the individual is a “victim” that will not fall into the category of rape or incest. The least controversial will be the case of the failure of a condom or birth control. The woman took precautions to avoid pregnancy and is the victim – here of technology or medicine rather than a man, but a victim who bears little or no fault nonetheless. So if “faultless victim” pregnancy is what ties together these exceptions, in theory the category should be larger than just rape and incest, but that seems to be an enlargement the Pro-Life camp is unwilling to make.

Can this third problem be overcome? One possibility would be to trade on degrees of voluntariness. In the case of failed birth control the sex is voluntary even though the result is one that the woman sought to prevent. This is similar to an argument I’ve raised elsewhere as to the conditions of waiver for a baseline right not to be a gestation parent, as well as other rights not to procreate. Women who do not engage in consensual sex have in no way waived their right not to be a gestational parent. Women who engage in such sex, the argument would go, have waived that right and must accept the consequences that flow from it, including pregnancy, notwithstanding the fact that they may have taken precautions. This, it seems to me might too heavily penalize women’s sexuality, a point that others have forcefully made.

In sum, arguments of gestation plus self-defense face three problems: timing, victim identity, and underinclusivity.

b. Saving the Exceptions Through Ascribing Less Value to the Fetus Created by Rape (or Incest).
The prior attempts to reconcile Pro-Life premises with rape and incest exceptions have centered on the second premise. I have shown how they run into problems. What if, instead, we were to relax the first premise that “Fetuses are persons and/or get some of the rights of persons from early on in their development, particularly the right of inviolability”? In particular, could we differentiate fetuses that result from incest and rape from other fetuses as to their worth or inviolability rights?

One attempt to craft such an approach can be seen in work of the late Ronald Dworkin in his famous book *Life’s Dominion*. This is far too short a space to give this subtle work its complete due, but I will try to present it accurately if in abbreviated fashion: Dworkin’s argument is that Pro-Life advocates do not actually believe that fetuses are persons or have the personhood right of inviolability, but instead that that human life has an intrinsic value. For him the difference between liberal and conservatives is how much weight they place on the natural versus human creative investments in life. Conservatives generally place a greater value on the “natural” investment by god in human life and for this reason find abortion morally impermissible. But, as he puts it, “moderately conservative people, who believe that the natural contribution normally outweighs the human contribution will find two features of rape that argue for an exception.” Namely, that (1) rape is a “brutal violation of God’s law and will” and an insult to God’s creative power and (2) rape is a desecration of its victim’s investment in her own life and tips the scale in the human versus natural direction because it destroys her self-realization and is an offense to the sanctity of life and reproduction. A similar argument could be made about incestuous sex, I suppose.

This kind of argument, it seems to me, faces two problems. The first is sociological. I am not sure Dworkin is right that this is what Pro-Life advocates believe. It is hard to tell what the average Pro-Life American believes – can you imagine the poll by CBS that would ask them to choose between intrinsic value in the philosophical sense versus fetal personhood in the philosophical sense? But certainly there is a growing faction in Pro-Life movement that seeks to establish by law that fetuses are persons, and many legal academics defending Pro-Life positions also seek to establish that claim.

The second and I think more important problem is philosophical. It presses on the connection Dworkin draws between the level of intrinsic value of fetal life and the circumstances of their conception. Frances Kamm has a characteristically sharp response on this point:

If Rembrandt had created The Nightwatch under coercion (the threat of death), the painting would not have been any less valuable. This makes one doubt Dworkin's claim that the fetus (and why not the full-grown person?) that results from a rape has less intrinsic value because it began in the frustration of the woman's life. (It may, of course, have less personal value, that is, be less important to the woman.) Notice also how human creativity in producing a fetus differs from the human creativity necessary to make an artwork. The role of deliberate decisions in making a new infant is always limited. The process of pregnancy, even one that is deliberately begun, is more like something that
happens to one than like something one does. If marks on a canvas result from pushing someone's hand on it, the result may not be a painting, because many deliberate decisions do not take place. But raping someone is more like pressing a start button that sets a long process in motion, most parts of which would not have been undertaken through deliberate decision. It is unlikely to make such a great difference to the nature or objective value of the entity that results. Therefore, it is possible to tell that something is a fetus, and for it to have its full value as such, independent of whether (as in rape) there was no deliberate human creation involved as its cause.

For these reasons I think this strategy is unlikely to save the rape and incest exceptions.

c. Saving the Exceptions by Arguing There is No Basis for a Duty to Gestate

A final argument to save the rape and incest exceptions, and in general the one I find the most persuasive, flips the argument on its head in a Hohfeldian way: instead of discussing under what circumstances women have (rape and incest) or do not have (all other cases) a right to abort, we ask under what circumstances they owe a duty to the fetus to gestate it and suggest that no duty is owed uniquely in the circumstances of rape and incest.

The most famous argument along these lines – though aimed at showing that all abortions are morally justified not that rape and incest abortions are special – is associated with Judith Jarvis Thomson’s *A Defense of Abortion*. She asks us to imagine that one morning one wakes up having been kidnapped and hooked up to an unconscious famous violinist dying from a rare kidney disease, but who will survive if one allows him to use you as a human dialysis machine for nine months. The violinist is not at fault for your predicament, instead the kidnapping and attachment was the work of the Society of Music Lovers who are devoted to his music and saving his life. Should you unhook yourself, the violinist will die. Thomson argues that one has a right to disconnect oneself from the violinist in this situation, that his mere need does not create an obligation upon you to sustain him, though it would not be immoral if you did – superogatory to sustain him, but not immoral to disconnect. She then argues that this is what abortion is like. In doing so she argues that even if the fetus is a person, that does not change the prerogative to disconnect – after all there is no dispute that the violinist is a full person as well.

As Thomson puts it:

I am not arguing that people do not have a right to life. . . I am arguing only that a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person’s body—even if one needs it for life itself. So the right to life will not serve the opponents of abortion in the very simple and clear way in which they seem to have thought it would.

Thomson’s key philosophical move is to change the abortion case from one of commission – killing the innocent fetus – to omission (a failure to act as a good
Samaritan in sustaining the fetus). Doing so allows the abortion case to be analogized to legal holdings like that of *Mcfall v. Shimp*, that an individual has no duty to donate life-saving bone marrow to his or her cousin.42

So far, so good. But it has been proposed (typically by critics of Thomson’s thought experiment) that its very set up draws a distinction between voluntary and involuntary pregnancy, a distinction that would allow us – contrary to “all abortions are equal” – to put abortions that are the product of rape to one side.43 As Manninen summarizes this line of thought, the “Responsibility Objection”:

[I]f a woman concedes to voluntary sexual intercourse, she has incurred a responsibility to care for the fetus, since she is responsible for its existence and subsequent dependence on her body for sustenance. Consequently, she has a moral obligation to sustain it until birth, an obligation that ought to be legally enforced by proscribing abortions. According to those who espouse this objection, the germane disanalogy between the typical case of abortion and *McFall v. Shimp* (or the violinist example) is that Shimp was in no way causally responsible, and therefore not morally responsible, for McFall’s condition. Similarly, the reason why we cannot be forced to give blood or donate nonvital organs is because we are not responsible for the afflictions suffered by these needy patients. But, since a woman is responsible for the fetus’ dependence on her body, the objection goes, she can be compelled to surrender her body in order to provide the fetus sustenance.44

One can use the responsibility objection to suggest that women who are raped are not responsible for the dependency, and thus have a prerogative to abort, but women who get pregnant outside of rape are responsible and thus should not have the prerogative. Such a distinction would save at least the rape (and possibly in some cases the incest) exception for abortion for those who are Pro-Life while justifying the prohibition on other kinds of abortions.

Nonetheless, I do not find this move persuasive for two kinds of reasons. The first reason is internal to the argument and accepts the equation of responsibility and duties to gestate. The second argument will challenge the premise connecting responsibility and duties to gestate altogether.

1. The Objection Proves Too Much and Too Little.

Rape is, by definition, sex without a form of consent deemed adequate by the law. But the connection of sex in rape to pregnancy is contingent. To put it crudely in a way that is intended to offend readers in order to make the philosophical point: women who are raped are not responsible for the sexual activity, but they are responsible for their pregnancy, in the sense that in many instances they could have taken steps to avoid pregnancy in the case they are raped. Most women could remain on birth control all the time, and in the event that they are raped no pregnancy would have resulted. (I say “most” because minors or poor women may not have access to birth control, and some
women may not be able to take birth control for medical reasons or be required to use a method of birth control that is more invasive like an IUD, so we would have to carve out exceptions.)

At this point, dear reader, you are no doubt cringing. That is my intention. By putting the point this way I want to reunite the rape victim with those who suffer unwanted pregnancy from voluntary sex, to the contrary of the responsibility objection. Why expect, and in a real sense “blame” for failing to do so, one set of women (those who engage in occasional voluntary acts of sex) to take steps to avoid unwanted pregnancy but not the other (rape victims)?

One distinction would be that (at least some) women who engage in voluntary sex have more birth control options in that they can try to persuade their partner to use a condom – fair enough – and that being on birth control all the time in case one is raped is more burdensome than only in the periods where one intends to be sexually active or to become pregnant – again fair enough. But these distinctions, it seems to me, are differences in degree not kind. Most women could take steps to avoid pregnancy all the time through regular use of birth control (perhaps we would want to carve out an exception for women discussed above who cannot take birth exempt their rape from the rule against abortion). By failing to do so it might be argued they are responsible for their pregnancies, even if some (rape victims) are less responsible than others in that they were deprived of one non-reproduction strategy, abstinence.

Once one begins to think along these lines, precautions to avoid pregnancy and their burden, it seems harder to draw the line at only rape victims. Many poor women in America have little access to good birth control. Others face sex partners who pressure them to avoid condoms. The costs to them of avoiding pregnancy may similar to those of rape victims and their pregnancies may be in a real sense involuntary in the same morally relevant way (even if not precisely the same) as the pregnancies of rape victims.

What we would want instead is some analysis of how many options were available to a particular woman, whether she took precautions that failed, how costly it would have been to take more precautions. Such an analysis would not neatly split the world into rape victims versus all other pregnancies, but instead include some rape victim and some other unwanted pregnancies on one side, with others on the other side of the line.

This dovetails nicely into pushing the argument in the second direction: many non-rape pregnancies are again the product of something less than adequate consent. Consider again cases where a male partner has misrepresented the fact that he had a vasectomy, a condom has defects (intentionally put there or merely poor manufacturing), a hysterectomy is improperly performed, or other birth control attempts fail. In each of the cases, the woman has taken steps to avoid reproduction and yet despite her best efforts they have failed. Why should their involuntariness of pregnancy not be given the same treatment as the rape victim? One answer is that they failed to use the ultimate form of birth control – abstinence. But in so doing I think the argument ultimately buys into a Madonna/whore dichotomy that would deny women sexuality. There are Madonnas who
are chaste women and in tragic circumstances are sullied by rape, and then there are whores who go out and have sex and deserve what they get. This gels with the notion that pregnancy is for women the “price of pleasure,” but for many that will seem like a disturbing and gender imbalanced way of seeing the world.

One might object that criminal law, unlike tort law, does not ordinarily permit considerations of “contributory negligence” and also that in the rape case we have a perpetrator but not in the other cases. These are distinctions, but I am not sure why they should matter for this argument. The existence of a perpetrator working against one’s interest rather than circumstance or negligence seems to me relevant as to one’s duties against that perpetrator, but less relevant (if at all) as against one’s duties to an innocent third party. Similarly contributory negligence is about apportioning fault as between the tortfeasor and victim in determining what the tortfeasor owes the victim; no one is suggesting that the woman is at fault for “getting raped” in this (again perhaps cringe-worthy) argument as to what kind of punishment the tortfeasor deserves. The rape will be punished as all rapes ought to be punished. The question is about the duty to gestate. That duty and the way in which it is inflected by the birth control activities of the rape victim runs not to the violator but to an innocent third party. In a strange way this echoes a set of doctrines in family law that hold parents liable for child support to children even when the birth of those children are the result of deception over birth control or even statutory rape, on the theory that malfeasance by one parent cannot waive the rights of support of the child.

As I said before not everyone will buy into such over and underinclusivity arguments to the same extent. Sometimes we need rules and not standards for administrability reason. But even if you, dear reader, view these exceptions that way, ask yourself: do politics and the law treat the rape and incest as merely a somewhat contingent exception arrived at through careful administrability analysis or do they treat it as something much more morally talismanic?

2. What Role does Responsibility Have in Creating a Duty to Gestate?

The second type of argument against this distinction between rape and non-rape cases is to show, as Thomson did, that there are many examples where:

someone may voluntarily engage in a certain action and yet this would not entail that all her rights in regard to the situation are thereby voided. For example, if you deliberately leave your window open late at night, knowing full well that there is a burglar on the loose, and as a result you get robbed, you may perhaps be called many things, such as naive or irresponsible, but you do not thereby forfeit your right to not have your house burglarized. As Thomson states, we do not respond to such a situation by saying: “‘Ah, now [the burglar] can stay, she’s given him a right to the use of her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in. . . .’” Thomson is not necessarily denying that in some situations voluntarily acting in a certain manner entails some incurred
responsibility for the outcome of that action. What she seems to be questioning is
the degree of responsibility that can be incurred from voluntarily engaging in a
certain action. Consider a shop owner who is careless about securing his business
against burglary, perhaps by failing to fix a damaged door or lock. If his business
is indeed burglarized or vandalized, perhaps his insurance company would refuse
to cover the incurred costs because of his negligence. Yet, he is not so responsible
for his negligence that he forfeits his right to his property and thereby gives
the burglar “permission” to invade. The right to decide who is allowed on his
property remains with him unconditionally. Similarly, if a woman is walking
down the street at night in a neighborhood with a high crime rate, and is beaten,
her wallet is stolen, and she is raped, her actions may be described as careless to
some extent, but this does not at all mean that her assailant had a right to act
against her in such a way. Simply because she voluntarily engaged in an action
that had such a foreseen consequence, it does not thereby follow that she forfeits
her right to her bodily security.47

Indeed, as Regan48 and Manninen49 point out we may in tort have duties to aid those who
we have put into harmed states, but there is no case law suggesting we must do it with
our bodies! That is, as Manninen puts it “I have never heard of a situation, for example,
that someone at fault in a car accident was forced to give blood to aid the victim of the
accident, or to donate a nonvital organ if the accident led to organ failure for the victim.
Even in attempted murder or assault cases, there has been no situation (again, as far as I
am aware) where the assailant has been forcibly restrained in a manner that compromises
his bodily integrity in order to aid the victim’s recovery.”50

Indeed, to de-gender the point, one could imagine a re-play of McFall v. Shimp involving
a father not a cousin. No court in America would force a father to donate his bone
marrow to a child who was the result of a one night stand who needed it, even though he
is causally responsible for the child’s existence and even if he was the only person who
can save his child’s life. Manninen recounts a case in the UK with similar actual facts:
the UK social services tracked down a man who was the genetic father to a son he never
knew. The child was born from a previous relationship where the mother surrendered the
child for adoption without his consent. The child later required organ donation of an
organ that was not vital to the donor. The father was a match but was unwilling to donate.
One could not imagine the state compelling him to donate the organ. Yet he is as
“responsible” as the woman who becomes pregnant outside of rape. It is no answer on the
Pro-Life point of view to say the child in this case is more developed than the fetus, since
from the point of view of the Pro-Life’s first premise fetuses are just as much persons as
children.

What this example shows is that “there is a gap between contending that the woman is
responsible for the fetus’ dependence on her body and concluding that the only way for
her to fulfill this responsibility is to completely surrender the use of her body, even if
doing so goes against her will, for nine months. The success of the ‘Responsibility
Objection’ requires that this gap be filled.”51 One possible objection is that McFall and
similar case law in this regard is just wrongly decided and we should, contrary to current
doctrine, say that parents have a legally enforceable obligation to provide solid organs to their children or potentially other individuals in some circumstances. That would be a major legal revision and one that many libertarians and even many liberals would resist but has been proposed by some, such as Cécile Fabre, who have proposed that under certain circumstances the law should require organ donation, even of life-sustaining solid organs. That path remains open to the Pro-Life advocate.

To summarize: distinguishing pregnancies resulting from rape from other kinds of pregnancies on the no duty to gestate argument requires emphasizing the responsibility of women in regular sexual encounters and non-responsibility in the case of rape. I have offered three reasons why I am skeptical: (a) women who are raped are not responsible for sex, but they are in some degree responsible for pregnancy, (b) many women who are not raped are equally not responsible for the their pregnancy, and (c) it is unclear why being responsible for pregnancy should lead to an obligation to gestate when it would not impose obligations derived from violating bodily integrity on genetic fathers vis-à-vis the children for whom they are responsible for creating.

* * *

I do not purport to have made a knock-down case against incest (and particularly) rape exceptions to abortion for those who subscribe to Pro-Life premises. I do, though, hope to have raised some serious questions about these abortions and whether they can so easily be distinguished from “normal” abortions. I also hope to have raised questions about the emerging consensus that to reject such exceptions renders you “a crazy.”

III. Rape, Incest, Abortion, and Thought Crime

The primary argument of this paper has been an internal critique of the rape and incest exceptions for abortion as a tenable middle ground that, in particular, Pro-Life individuals can support.

Here I want to offer a second related but quite separate critique, albeit admittedly in a less filled out form and recognizing that this argument will only appeal to those who hold particular political theoretical priors.

There is a very different way of justifying these exceptions: the state simply prefers some reasons (or perhaps more accurately “motivations”) for having an abortion over others. There are good and bad reasons to have abortions, the state can legitimately judge those reasons and rule rape and incest in the “good” category for having abortion, and therefore criminalize all other abortions.

No one ever articulates the exceptions in these ways. Imagine the same conversation as to murder: “There are good and bad reasons or motivations to commit murder, and the state is free to endorse some reasons for purposefully killing another person (for money, for example) and render it non-criminal while it criminalizes the same act with the same mental state of purposefulness when done with a different set of reasons (e.g., murder for revenge, murder of someone because they are of a particular race).” Perhaps our failure to
speak this way is part of a tendency Dan Kahan has identified elsewhere, the masking of “incessant illiberal conflict over status” such that “[c]itizens of diverse commitments converge on the [] idiom to satisfy social norms against contentious public moralizing; public officials likewise converge on it to minimize opposition to their preferred policy outcomes.”

Let me begin by trying to forestall a potential source of confusion. Take a crime such as murder. It is uncommon in criminal law to distinguish various categories of an act based on the level of intent or mental state; think of the Model Penal Code’s mens rea distinctions between purpose, knowing, and reckless intents for example. That is not the distinction I am drawing. The intent/mental state in rape, incest, and “normal” abortions are all the same: the purposeful termination of a fetus. Nor is this grading by consequence, another common feature of many pieces of criminal law. The consequences are the same in all these abortions, a fetus that might otherwise be born is terminated. Instead the differentiation is one of motivation or reason, why the individual chose to act with a particular mental state/intent with a particular act having particular consequences.

Why do some think this is a problem? Because it turns abortion into a thought crime, to use Orwell’s term from *1984*. The same act done with one thought (i.e., reason/motivation) is criminal and with another thought (i.e., reason/motivation) is non-criminal.

Some political philosophers claim that a deep commitment of liberal legality is that we are free to think whatever we want to think and the state has no right to penalize us for bad thoughts, even if it can look to our intent/state of mind or the consequences of our actions. The exceptions seem to run against that commitment.

Sonu Bedi has made a similar point about another set of proposed exceptions for abortion undertaken for sex-selective purposes. As he writes there “A thought crime [is] one where an agent’s motivation is not just relevant but sufficient to take an act from the domain of the non-punishable to the domain of the punishable. Ignoring a woman’s sexist motivation in procuring an abortion suddenly renders her act of abortion legal. On the other hand, discounting an agent’s bias in committing a hate motivated assault or murder does not transform the act from a punishable one to a non-punishable one. Assaulting or murdering is already a crime.” It is not the difference between allowing a self-defense or not; it would be the difference in forbidding the defense if the defender was also motivated by hatred for his assailant but allowing the defense when s/he was also motivated by jealousy.

Some find thought crime troubling because it:

[undermines the criminal law’s liberal premises. Taking account of motivation is tantamount to considering an agent’s character. Motivation or bias can reveal an agent’s character, or at least provide some glimpse into it. For instance, an individual who assaults a victim because of their race, sex, or sexuality may very well be racist, sexist, or homophobic. The bias may point to a deficient or even...]}
vicious character. After all, homophobia and racism are bad character traits. The law’s focus on bias or motivation, then, is a way to get at an agent’s character. Taking aim at why an agent commits the act is how the law punishes character or a particular character trait. . . . [This is to endorse] A theory that takes the proper goals of criminal law to be the punishment of vice and the cultivation of virtue. Now these are distinctively non-liberal goals... It [is a theory that] concerns itself with regulating how people think rather than what they do.58

Mill is perhaps the most famous defender of freedom of thought as the bedrock of all other liberties. He writes in On Liberty that all liberty depended on “the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects.”59 The idea is also deeply rooted in the writings of John Milton and Blackstone, Madison.60 It finds tribute in Supreme Court opinions such as Lawrence v. Texas, Ashcroft v. Free Speech Coalition, going all the way back to Griswold v. Connecticut, the fountainhead from which all U.S. constitutional abortion law sprang.61

Some, like Bedi, find thought crime disturbing. Others view it as justifiable on some theories of retributive justice, or unexceptionally present in many aspects of criminal law, such as looking to motive in determining whether an accused’s sentence death-eligible.62 My point is again not to categorically oppose rape and incest exceptions as clearly unacceptable on this ground. Instead, I want to show that these exceptions can be understood as thought crime legislation, which some may oppose on political theoretical grounds.

Are there also real, justiciable, First Amendment claims against these statutes for these reasons? Of that I am more skeptical. Counting against such a claim is the Supreme Court’s decision in Wisconsin v. Mitchell, upholding as not violating the First Amendment a Wisconsin statute that increased the penalty for a crime based on a hate-based motivation.64

Mitchell might be distinguished from our case, though, in two ways, as not being about a true attempt to criminalize thought crime. First, in our case the motivation/reason for committing the crime is being used not merely to grade the severity of punishment for what is already crime no matter what the motivation/reason (as was the case with the statute in Mitchell), but instead to render behavior that is otherwise non-criminal criminal because of the motivation/reason for acting. Our kind of case is one the Supreme Court has never opined on, but some may view that as a distinction without a difference.

Second, with the kind of hate crime law upheld in Mitchell one might defend the distinction based on the claim that the hated group is victimized more by the crime than in a case where the motivation is something different. This would then turn what appears as a motivation/reason based distinction into one based on the consequences of the action, the circle of victimhood is broader because of the motivation.
To be frank, I am not sure I think this consequence-based justification for hate crimes is really all that persuasive to begin with: one could imagine non-hate motivated crimes that are mistakenly understood by the victimized community as being based on hatred for them and hate-motivated crimes where the “listener” community does not interpret it as such. Thus, this justification should justify not thought crime but perceived-as-hate crime whatever the actual motivation or reason. But, that said, even this distinction seems less plausible in the case of exceptions to abortion. There is no reason to think that the perception of being victimized will be greater for abortions not motivated by rape or incest than from abortions stemming from rape or incest. While hearing about a gay bashing down the street may provoke fear in a gay man in the neighborhood, hearing about an abortion will not have the same effect on an adult or child because if they can hear about it is “too late” (they are already born!), and it seems to me unlikely to think that most listeners would understand a woman’s reason for aborting her fetus will carry over to animus or victimization to an adult or child. Further, we are far less likely to “hear” about abortions than we are crimes like robbery, assault, and murder, done to adults in our community motivated by hate, simply because abortions are quintessentially private in a way many crimes are not. Finally, if there is an effect on the “listener community” in these abortions it actually seems to run in the other direction – it is children who are born of rape and incest that are likely to feel as though they are victims of animus by the state singling out rape and incest for the exception to criminalization. Thus, if anything, this line of argument would push to view these kinds of abortions as the most important to criminalize.

Would the Supreme Court see it that way? To be frank, probably not. It is more likely that this doctrinal ship has already sailed with *Mitchell*.

In any event, for those who hold some political philosophical priors about thought crime, these concerns related to the heart of the First Amendment may prove a second, independent, reason to find these exceptions may be problematic.

IV. Conclusion:

Supporting exceptions for rape and incest has become the new litmus test for being “merely Conservative” instead of being part of a “war on women.” Politics is evolving in such a way that those who would seek to prohibit these kinds of abortions are marginalized and treated as on the fringe. In this article, my goal has been to partially rehabilitate that “fringe” position. I have not tried to put a nail in the coffin of these exceptions but instead to show that they raise some serious problems.

I have done so by showing that the slogan “all abortions are equal” is the more natural one for those who subscribe to Pro-Life premises. I then examined three families of views (gestation plus models, ascribing less value to fetuses stemming from rape, and no duty to gestate in the case of rape) and shown why I find each of them strained. I have also offered a second distinct line of argument relating to the way these exceptions turn abortion legislation into thought crime legislation, and opined on why some may find that discordant with the First Amendment.
My treatment, given the short space for a symposium piece, has not been exhaustive. There may be other arguments for the rape and incest exceptions. It also remains possible that while none of these arguments themselves prove the day that they could be combined so that they are jointly persuasive. So it goes. I hope, though, to have done enough to raise the flag of caution on these exceptions and at least cause readers to pause in uncritically endorsing them as a theoretical matter.

But what about politics? Well, how you read this article will depend quite generally on your views on abortion. For those who think all abortions should be prohibited, my conclusions will perhaps buttress and legitimate their viewpoints. For those who defend the “moderate Conservative” position of having these, but only these exceptions, my argument will undermine them. For those who are Pro-Choice, though, I think the terrain is more malleable. One could view my argument as a threat that rehabilitates the hardest of the hardcore. One could also view my argument as a kind of Trojan Horse that helps to defend the hard-line, allows them more prominence in the Republican party and in so doing turns off voters leading to Pro-Choice victories. This is a bit of Leninite “the worse the better” approach.

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References


17. Id.


30. For example the Model Penal Code provides that where one negligently or recklessly injures an innocent person in the course of an otherwise legitimate self-defense, one does not have a valid defense in “a prosecution for such recklessness or negligence towards innocent person,” i.e., reckless manslaughter or negligent homicide. Model Penal Code § 3.09(3) (1981)


32. E.g., N.Y. Penal Law § 35.05 (1909).


36. *Id.*, at 95.

37. *Id.*, at 95-97.

41. Id., at 560.
44. See Manninen, supra note 41, at 41.
47. See Manninen, supra note 41, at 41-42 (quoting Thomson, supra note 39, at 58). In response to the burglar analogy, Eberl writes “A fetus, though, is not an amoral agent responsible for actions, and, without begging the question at hand, cannot be said to be in violation of civil and moral law by virtue of being present in a pregnant woman’s body; a fetus is an innocent, while the burglar is not.” Jason T. Eberl, “Fetuses Are Neither Violinists nor Violators,” The American Journal of Bioethics, 10, no. 12 (2010): 53-54, at 53. I am not sure is right that this is the key distinction. Imagine that instead of a burglar, we imagine a homeless man who has accidentally been given your address as a safe house where he can stay (a 9 was put down instead of a 6 in the address on your street). He enters your house through your unlocked door and sets up camp. He, like the fetus, is a moral innocent. And yet that does not give him the right to remain.
49. See Manninen, supra note 41, at 42.
50. Id., at 43.
51. Id.
52. Id.
57. *Id.* at 350, 352.