

CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY. By Frances Myrna Kamm.¹ New York: Oxford University Press. 1992. Pp. viii, 227. Cloth, \$29.95; paper, \$11.95.

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In 1971 Judith Jarvis Thomson published a now-famous article on abortion.³ In it she argued that even if the fetus were a person, abortion would be morally permissible in some cases. She did so using the hypothetical case of a famous violinist with a severe kidney ailment, who required nine months of attachment to a specific person's circulatory system to avoid death. The Society of Music Lovers kidnapped the needed person and attached the violinist. Thomson maintained that the violinist's need to use the other's body did not create a right, and that the latter or a third party could permissibly remove him.

Frances Kamm, writing almost exactly twenty years later, picks up where Thomson left off. She too proceeds from the assumption that the fetus is a person, and then uses hypothetical cases (starting with the violinist) to offer somewhat different arguments that abortion would be permissible, though not in all cases. She further considers the morality of conception and responsibilities in pregnancy devolving on those who do not abort, touching upon related topics more briefly.

Kamm offers a densely written and challenging book, with intricate and often ingenious arguments. Indeed, those who do not practice this kind of analytic philosophy may well find it slow going. The author rarely pauses to reframe her argument in more accessible terms.⁴ It may help, then, to offer here a fuller summary than usual, even if it inevitably does some violence to an argument that hinges on detailed analysis of myriad hypotheticals.

The goal of *Creation and Abortion* is limited. Kamm aims to show that even if the fetus is assumed to be a person, it is plausible

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3. Judith Jarvis Thomson, *A Defense of Abortion*, in William Parent, ed., *Rights, Restitution, and Risk: Essays in Moral Theory* 1 (Harv. U. Press, 1986), reprinting 1 *Philosophy & Pub. Affairs* 47 (1971).

4. I should note that Thomson's piece, in contrast, is quite accessible.

to believe that many abortions are morally permissible. She does not seek to persuade us that such abortions are in fact morally permissible, but merely that it is plausible to believe so. Then, given our society's commitment to liberalism, we should be able to agree that it is morally permissible to allow those abortions.⁵

Her overall strategy is to present an argument that abortions are permissible, and then to show that the argument is plausible by applying and refining it in hypothetical cases. The demonstration uses her intuitions about those cases and appeals to ours. As part of that appeal to intuitions, her moral approach is nonconsequentialist, which she claims is the approach that most of us actually take.⁶

She pursues this strategy with three major related arguments.⁷ She starts with an argument for the permissibility of detaching a dependent person in nonabortion cases such as the case of Thomson's violinist. She then adapts that argument for abortion cases. Finally, she offers an argument that considers what burdens a voluntary creator of fetal life would have to bear in order to provide the fetus a minimum of life and health, and reconciles the obligation to bear some burdens with the permissibility of abortion.

Kamm labels the first of these arguments the "output cutoff argument," because the argument concerns the question of when can the person to whom the violinist is attached, or a third party, cut off the relevant "output"—the benefit of life that the violinist is enjoying due to the support. This argument becomes the foundation for her approach throughout the book.⁸ It has five steps.

Step 1 is that the violinist's "need to have your body . . . does not confer [a] right . . ." This is a point that Thomson also developed. She argued that even if the touch of Henry Fonda would magically save you from death, you do not therefore have a right to his touch, or to have him brought to your bedside.

With Step 2 Kamm begins to depart from Thomson. Kamm argues that the supporter has no special obligation to render or con-

5. Kamm states that the point of her section on liberalism is "to suggest that we need do no more than show that permissible abortion is one morally reasonable option."

6. Kamm explains that "[n]onconsequentialism does not ignore consequences . . . , it merely claims that factors other than consequences matter." For her more recent discussion of nonconsequentialism, see F.M. Kamm, *Non-consequentialism, the Person as an End-in-Itself, and the Significance of Status*, 21 *Philosophy & Pub. Affairs* 354 (1992).

7. Kamm also considers a fourth very briefly, the "immigration argument," maintaining that "abortion is permissible because creators owe to new persons still in the womb less than they owe to other people." This argument analogizes fetuses to immigrants who are not yet citizens.

8. Though the third major argument, the "benefit-burden approach," is initially presented as an alternative if the "output cutoff argument" for abortion is found inadequate, Kamm subsequently links the two and states that the latter argument "still provides the structure for this new approach."

tinue the support, even if she volunteered for attachment or engaged in acts that foreseeably resulted in attachment.⁹ Intentionally or foreseeably starting to give support does not preclude a later conclusion that support is too onerous. In effect, the support is given in installments, and you can decide to refrain from making the next one. There is one exception: if your volunteering meant that the violinist was not plugged into someone else who might have supported him.

The third step is by far the most complex. Here the argument is that detaching the violinist does not harm him relative to the opportunities he would have had if attachment had never occurred (what Kamm calls "preattachment opportunities"). If attachment had never occurred, he would be dead. Thus detachment (and ensuing death) robs him of nothing he would have had without your support, support to which he had no right (by Step 1) and which you have no special duty to give (by Step 2). Note that the violinist *is* harmed relative to his prospects once you have started support, and relative to his prospects if you were to complete all nine months. But the argument is that the correct base line for comparison is the condition in which he would have been without the support at all (that is, dead), since he never had a right to that support in the first place.

Step 4 is that the efforts involved in supporting the violinist are burdensome enough so that they can justify killing the violinist to stop those efforts. This step involves attending to the higher justification required for killing rather than allowing someone to die.¹⁰ Here Kamm emphasizes that the burden of support is not just a matter of its strenuousness, but also reflects the special onerousness of bodily invasions, especially "sexualized" ones. This helps establish the permissibility of the supporter or a third party actively killing the violinist, rather than just waiting for the means of attachment to fall out.

Finally, Step 5 requires that killing the violinist is the only way to end his imposition that is not excessively costly to you. In other words, if his imposition upon you could be ended without killing him, then killing him might not be permissible. The significance of this step is best understood through its later development in the

9. Thomson was less definite in her conclusions here, arguing that engaging in acts foreseeably resulting in attachment might make detachment impermissible in some cases, but deciding largely to "side-step this issue" in the context of her own argument. Thomson, *A Defense of Abortion* at 12 (cited in note 3).

10. It is a strength of this book, in my view, that it defends a moral distinction between the two practices, at a time when a number of the proponents of active euthanasia are arguing that there is none.

abortion context. There it opens up the long-debated question of whether a right to choose abortion implies a right to thwart the fetus's or child's continuation of life outside the body, in an artificial womb (were we to invent them) or the body of another. Kamm argues that the permissibility of detaching the violinist or fetus does not entitle the ex-supporter to thwart other means of support. For Kamm, this also helps explain the significance of viability. Once the fetus can live outside the womb, albeit with mechanical support, it is no longer permissible to kill it through the process of abortion, because that would deprive the fetus of life it could have independently of the woman.

When Kamm turns in chapter four to direct consideration of abortion, she uses this same five-step argumentative structure, but refines it for fetuses. Step 3 remains pivotal. Here Kamm argues that the proper base line for comparison in assessing harm to the fetus is its state if support had never begun. Yet here that state is not death, as in the case of the violinist, but preconception nonexistence. Thus the argument is that the fetus has not been harmed relative to "pre-attachment prospects" or nonexistence. Kamm admits that there are "obvious problems" with using nonexistence as a basis for comparison. But she suggests that we already do so, to some extent, when we ask whether further life for someone¹¹ is worse than the nonexistence of death. I return below to the problem of using preconception nonexistence as a base line.

Chapter five adds a new dimension, by considering that a voluntary creator may have an obligation to do more than just make sure the fetus is no worse off than if it never existed. On the assumption that the fetus is a person, its creator may be obliged to try to ensure some "minima" in terms of "number of years of life with some degree of health and welfare." The question then is how far must the creator go to secure those minima, when must pregnancy be completed to supply them, and when should a person abstain from creating because the minima will not be provided.

Kamm's approach is to compare the benefits and burdens to fetus and creator. In order to obtain the benefit of life, it is reasonable for the fetus to bear some risk of being harmed or aborted, according to Kamm. Put another way, given our "strong reasons to reproduce, demanding complete security for the fetus seems unreasonable." Otherwise, in order to provide complete security the creator would have to bear the cost of avoiding all conception ("abstinence" costs), or would have to carry the fetus to term ("car-

11. An example might be a person on a ventilator for whom there is a question of whether to terminate the life-sustaining treatment.

riage" costs) and undergo bodily invasion if needed for the fetus's health ("surgery" costs). Voluntary creators should try to secure the minima, but generally need not bear costs equal to those three. However, Kamm shows that the precise level of cost that should be borne will vary, depending on the circumstances.

Kamm's final chapter takes up three abortion-related topics. First she considers "informed consent" requirements mandating that a woman who is considering abortion be told "the nature, the fate, and the status of the fetus."¹² She makes the point that even if we believe the woman should be informed in order to make the best moral judgment, it is not clear why medical practitioners should play this role, and why the requirements should not apply whenever a weighty decision is being made, such as the choice to use a scarce medical resource. She secondly considers responsibilities in pregnancy, such as the possible responsibility to refrain from drug use and smoking. Applying the "benefit-burden approach" of chapter five, she concludes that a woman refraining from abortion may be obliged to make some sacrifices for the good of the fetus, and that punitive measures might be appropriate if she refused. Finally, Kamm looks at the problems presented by the prospect of an artificial womb. She concludes that a woman refusing safe external gestation might then be prohibited from aborting.

Creation and Abortion thus attempts to argue that some abortions would be permissible and that responsibilities in pregnancy would not be unlimited, even if the fetus were presumed to be a person. It does not attempt to draw the lines where one might without granting the personhood premise. It also does not draw the lines where one could based on other arguments, such as the need to achieve gender equality.¹³ One can thus be uncomfortable with a number of the lines drawn (and alternative approaches rejected) and still recognize that the book attempts the progressive task of locating possible points of agreement in the abortion debate.

One must also admire the tenacity with which Kamm goes about that task. She has invented a multitude of ingenious cases, each presenting a slight variation of its predecessor, to expose the difference that small distinctions make. Kamm generally proceeds with rigor and inventiveness.

12. Compare the Court's consideration of Pennsylvania's "informed consent" requirement in *Planned Parenthood of Southeastern Pa. v. Casey*, 112 S. Ct. 2791 (1992).

13. Kamm specifically rejects the adequacy of arguments for gender equality to demonstrate that abortion should be permitted. She argues that the "thin conception of equality" that we might be able to require all to accept, that is, the need for political equality and equal civil liberties, would not require the availability of abortion. She also argues that moral equality is consistent with differences in responsibilities.

Let me nonetheless raise questions, first about Kamm's argument, taking it on its own terms. Indeed, Kamm repeatedly raises questions about the argument herself. Here I focus on one rather central concern: the repeated strategy of using preconception nonexistence as a base line in order to argue that the fetus may be aborted, in part because it is made no worse off than if it had never existed.

This strategy is clearly of concern to Kamm as well. She takes pains to explore a number of the problems raised by using death as the base line in the violinist case and preconception nonexistence for the fetus. Yet after all of her work on this, it remains doubtful to me that someone who believed the fetus to be a person would find it plausible to use fetal nonexistence as the base line in assessing whether the aborted fetus is wronged. Comparisons to the violinist once he is dead (or perhaps to a respirator-dependent person after disconnection and death) do not seem to help much here. The violinist did exist before attachment, albeit on a downward dying course. When the author invites us then to imagine the violinist dead, we know what she means: a specific imagined person is now dead. But trying to envision preconception nonexistence is a different matter. As Kamm herself notes, there is no being who exists before conception. It is much less obvious what we are talking about.¹⁴

Kamm acknowledges these problems. She concedes that one cannot take the comparison to preconception nonexistence literally. Instead, she holds to the comparison "nonliterally." Yet that seems simply to put to one side the genuine problems posed by the strategy. After all, as Kamm has constructed the project of her book, the question is not whether she herself can somehow imagine preconception nonexistence taken "nonliterally." Instead, the question is whether someone who held the fetus to be a person would find the time before the person existed a plausible base line in determining whether later termination of that person's life was wrong. Unfortunately, Kamm never explores whether there is an alternative strategy that would work for those who remain unconvinced, while preserving the rest of her "output cutoff" (or later, "abortion cutoff") argument.

Stepping outside Kamm's argument, there are also limitations to her basic method.¹⁵ In particular, her appeal to intuitions, use of

14. As Kamm indicates, this leads us into territory explored by Derek Parfit in *Reasons and Persons* (Clarendon Press, 1984).

15. Assessment of Kamm's method may be somewhat hampered by the fact that she evidently presents it more fully in her forthcoming work, *Morality, Mortality*. As of the writing of this review, that work was not yet publicly available. Note that this review was

fantastic cases, and treatment of the law all merit comment.

The main limitation of any argument based on an appeal to intuitions, of course, is that the argument loses its plausibility if you do not share the intuitions. As noted above, Kamm claims to be trying to demonstrate the mere plausibility of the arguments, not trying to convince us to believe them ourselves. Yet even persuading us of their plausibility may require that we concur in her intuitions to a great extent.

Even if we do find those intuitions plausible, we have to wonder whether the intuitions generated here provide good guidance in the real world of abortion. Kamm relies heavily upon invented cases, creating not only some that might be true in the world as we know it, but also others that presume a different world. The question is whether this technique yields conclusions that are morally appropriate to guide human beings as we exist in this world.

Kamm defends her approach, arguing that

[t]he fact that these cases are hypothetical and often fantastic distinguishes this enterprise from straightforward applied ethics, in which the primary aim is to give definite answers to real-life dilemmas. Real-life cases often do not contain the relevant—or solely the relevant—characteristics to help in our search for principles.

The problem is that abortion *is* a real-life dilemma. The adequacy of moral argument on the subject should ultimately have something to do with whether it applies to the real problem. A detour into fantastic hypotheticals can surely be useful to clarify our thinking. Yet reliance on such hypotheticals without further work to show how the insights gained apply in the real world raises concerns. When cases are stripped of their actual context, detail and messiness, we may be losing much of what is morally important.¹⁶

Finally, we are left with the question of what all of this has to do with law. The relationship between morality and law is a pivotal question in the abortion debate. On that score, the book's subtitle is promising: "A Study in Moral and Legal Philosophy." However, the discussion of law and legal philosophy is relatively sparse.¹⁷

also written before publication of Ronald Dworkin's *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (Alfred A. Knopf, 1993).

16. See generally Martha Minow and Elizabeth V. Spelman, *In Context*, 63 S. Cal. L. Rev. 1597 (1990).

17. As an indication of how limited the discussion of law itself is, the entire book cites only *Roe v. Wade*, 410 U.S. 113 (1973), at the Supreme Court level. Below that level, it cites two further cases: *People v. Stewart*, No. M508197 (Cal. Municipal Ct., San Diego County, Feb 26, 1987), and *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988). An example of the book's generally cursory treatment of the law occurs in the discussion of punish-

The Introduction states that moral permissibility is "ordinarily more demanding" than legal permissibility. Thus Kamm goes on to state that "[t]he moral discussion is relevant to the issue of legal permissibility insofar as the legal discussion . . . must mimic the moral discussion." Yet this cannot be her view of the relationship of morality and law in this debate. Her own discussion of the implications of liberalism suggest greater complexity. It would have been useful for the author to present and defend more systematically her notion of how law and legal philosophy relate to her moral arguments.

Kamm's discussion of *Roe* itself is brief. Yet she does use *Roe* to set up the central question of whether the Court has to deny the fetus the status of a "person" in order to protect a woman's right to choose an abortion.¹⁸ Kamm's philosophical analysis suggests the answer may be no; at least some abortions could remain permissible. She does not pursue the point further, however, by considering exactly how her philosophical analysis might translate into law, or the Court's trajectory since *Roe*.

We should take Kamm's book as what it is, then—not concentrated analysis of the law, full engagement with the realities of abortion, or an argument that will persuade all of its truth or even plausibility. Rather it is an ingenious search for a coherent defense of the moral permissibility of many abortions, under the conciliatory assumption that the fetus is a person. In that sense, it is an impressive addition to a tradition Thomson pioneered, seeking common ground on extremely contested terrain.

ment and prosecution for pregnant women engaged in behavior that may harm the fetus. The author neither cites nor addresses the now substantial literature raising questions about a punitive response. See, for example, Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419 (1991); Lawrence J. Nelson and Nancy Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty, and Law in Conflict*, 259 JAMA 1060 (1988).

18. For further discussion of this point, see Laurence H. Tribe, *Abortion: The Clash of Absolutes* 135 (W.W. Norton, 1990).