

“Danger Invites Rescue”: An Argument for Legal Protection of Unborn Life

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IS REAL DIALOGUE ON THE ISSUE OF ABORTION even possible at this moment? Even on Catholic campuses—where we might be expected to share common ground—has our context of acrimony and derision made it impossible to speak to those who disagree with us? I believe we can, but this will require a re-grounding in the basic practices of charitable and disciplined discourse. In this essay, I follow the example of St. Thomas Aquinas. Aquinas offers us a model of treating intellectual opponents with seriousness and dignity, listening carefully, and then responding to the most important and strongest of their arguments. In particular, Aquinas does not hesitate to note the true good present in the arguments of opponents.

In this essay, I engage what I take to be the central commitment of the pro-choice movement: bodily autonomy. This is a commitment well worth taking seriously because bodily autonomy under the law is indeed a good. Particularly for women, once considered the property of their husbands, to say that one’s body is one’s own is an essential claim relevant in many situations—including, for example, the right to make decisions about one’s own medical care.

I will proceed here on philosophical and legal terms, rather than explicitly theological or religious ones. On a Catholic campus, fruitful dialogues can also happen with those who claim the Catholic theological tradition as their own (and should), but proceeding on philosophical grounds will include all those committed to a pro-choice position.

Most famously, an argument in favor of abortion on the basis of bodily autonomy was articulated in 1971 by moral philosopher Judith Jarvis Thomson.¹ Thomson offered a central analogy: a pregnant woman can be compared to an individual who, while asleep, has been hooked up to another human being dependent on this connection to remain alive. Thomson’s central thesis—which has now gained wide acceptance—is simple: the first individual has no obligation to

¹ Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy & Public Affairs* 1, no. 1 (Fall 1971): 47–66.

participate in this macabre set-up by maintaining the connection. Abortion is essential on Thomson's view because without it a woman is compelled to maintain the connection by continuing a pregnancy and delivering a child whether she wants to or not.

Pro-life advocates must face this challenge. Should a woman be forced to do these two things? In legal terms, does this not in fact constitute a violation of her bodily autonomy?

Before proceeding, I want to note that there is a fundamental challenge that could be raised to this question. It is, in fact, misleading to use the term "force" as I have just done. In the case of pregnancy, removing the option of abortion does not constitute direct force at all. The compulsion arises only from the normal functioning of a human body.² For my purposes here, though, I want to set this question aside and turn to a slightly altered form of the question: Can we enforce a legal prohibition that results in such an obligation?

It is an especially important question because of the impact that carrying a pregnancy to term and having a child often has on women. Women already face specific societal challenges and, in many cases, are often adversely affected socioeconomically when they give birth. For women who lack significant support from family and friends, it can be daunting indeed.

My primary suggestion on this question is that a different analogy opens up a very different line of thinking. Rather than someone who has been compelled into a strange medical experiment, a pregnant woman might be compared to a person who comes upon another person in distress. In such cases, there is indeed a moral obligation to offer assistance, and in several US states this obligation is legally enshrined in so-called "duty-to-rescue" laws. Put simply, the duty to rescue states that upon learning that another person is in urgent danger, one should offer assistance, especially when the endangered person's condition is life-threatening.

In general, there is in the US what many regard as an odd lack of "duty-to-rescue" laws. Indeed, US law actually stands in stark contrast to the treatment of the issue in the rest of the world.³ In several states, however, the duty to rescue is recognized. The Rhode Island Supreme Court puts it this way: "Danger invites rescue. The cry of distress is

² In chapter 8 of *The Rights of Women: Reclaiming a Lost Vision* (Notre Dame, IN: University of Notre Dame Press, 2021), Erika Bachiochi makes a striking case for the way in which female biology was conceived to be a hindrance to the rights of women, such that technological manipulation of female reproduction became the *sine qua non* in the struggle to secure those rights.

³ Marin Roger Scordato, "Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law," 82 TUL. L. REV. (2008), 1447–1503, scholarship.law.edu/cgi/viewcontent.cgi?article=1045&context=scholar.

the summons to relief.”⁴ In Rhode Island, the principle has yielded this law: “Any person at the scene of an emergency who knows that another person is exposed to, or has suffered, grave physical harm shall, to the extent that he or she can do without danger or peril to himself or herself or others, give reasonable assistance to the exposed person.”⁵

No analogy is perfect, of course. On the one hand, we might note that a pregnant woman offering assistance to an unborn child must do so in the form of more deeply personal assistance than do most bystanders at the scene of an emergency. On the other hand, we might want to note that she is more than just a bystander. She actually has a unique relationship to this imperiled person. This is important legally, since duty-to-rescue laws are much more widely recognized where a special relationship exists between the people involved, including hosts and invited guests on private property, employers and employees, and parents and their children.

My central point, though, is just this: the law does often create obligations impinging on bodily autonomy. In cases where a human life is in danger, they sometimes do so dramatically. Referring to legal obligations (rather than simply moral obligations) also helps make something else clear. These laws restrict individual choice for a good reason. We live not simply in a series of individual choices, but in a society, a culture. As we build a culture and shape a society with law, we want a world in which we positively value human life. In urgent cases, sometimes, we do want to compel one another—even with force of law—to do what can be done to save a life. Broadly speaking, we want a world in which we are ready to consider the ways in which we may find ourselves obligated, even when it is not something we have chosen.

As the decision of the Fourth District Court suggests, this analogy also indicates that certain calculations must be made. For example, a bystander should not be required to offer assistance when it means sacrificing her own life. Following the recent decision of the Supreme Court in *Dobbs v. Jackson*,⁶ these are the sorts of calculations that must be made with great care at the level of state legislation. Abortion bans written with exceptions for the life of the mother must make those exceptions clear and generous, so that physicians caring for women experiencing ectopic pregnancies, miscarriages, and other life-

⁴ *Wagner v. International Railway Co.*, 133 N.E. 437, 437, 438 (N.Y. 1921) (Cardozo, J.), h2o.law.harvard.edu/cases/1451.

⁵ “2012 Rhode Island General Laws :: Title 11—Criminal Offenses :: Chapter 11-56—Duty to Render Assistance :: Chapter 11-56-1 - Duty to Assist,” law.justia.com/codes/rhode-island/2012/title-11/chapter-11-56/chapter-11-56-1.

⁶ 19-1392 *Dobbs v. Jackson Women’s Health Organization* (06/24/2022), www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf.

threatening conditions have leeway to provide life-saving care. One implication of true bodily autonomy is that no law should require a mother to sacrifice her life for her child.

The analogy to duty-to-rescue laws, though, creates a clear onus: to look for a way to save a life. It does so by compelling action that will always, to one extent or another, impinge on the individual freedom of the bystander.

Finally, the analogy to bystander laws has one more implication of crucial importance. Although it is not articulated explicitly in law, a situation of emergency creates an obligation not only for the individual who first comes upon it and attempts to provide primary rescue, but for others as well. If I am out for a walk and come upon a child drowning in a stream, I will wade in to help. But now a new situation has emerged: both the child and I are hoping for others to appear. They may wade in, as well, to form a human chain, and help us safely to land. They may call 911. They may pull a blanket from their car trunk to help us warm up when we are out of the water. Their efforts, as well as mine, are essential.

In this way, the analogy to bystander laws makes especially clear that a pro-life world is not one in which one person alone must make calculations regarding whether and how she can accomplish a rescue. It is a world where all of us should ask what part we should play. Concretely speaking, this will mean not only individual assistance to pregnant women, but also laws and policies that support families, including mandatory family leave and child tax credits. The Pregnant Women Support Act, introduced in Congress in 2006 and 2009, includes a number of crucial initiatives: free home visits by registered nurses for teenage or first-time mothers, support for pregnant and parenting college students, prohibition of discrimination against pregnant women in health care by banning description of pregnancy as a “pre-existing condition,” and more. Pro-life advocates like Democrats for Life worked hard to include some of these provisions in the Affordable Care Act in 2010.⁷ Much more of this sort of work lies ahead of us.

Ultimately, what the analogy to bystander laws suggests is this: there are very good reasons—even if this entails using the force of law in ways that impinge on bodily autonomy—to legislate the preference to save a human life. There are also reasons for others to ask themselves what they, too, are compelled to do in order to render aid. This is a world in which the pro-life position says: “If you can, please save that life. We will help you.” Bodily autonomy is not an issue to take lightly; this is a world worth giving our best efforts to build. **M**

⁷ H.R.3590—“Patient Protection and Affordable Care Act,” www.congress.gov/bill/111th-congress/house-bill/3590.

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