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YOU CAN'T LOSE WHAT YOU AIN'T NEVER HAD:
A REPLY TO MARQUIS ON ABORTION*

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Don Marquis's article, "Why Abortion Is Immoral",¹ has been anthologized very quickly and very widely. It is easy to see why. Marquis presents the most sophisticated and detailed argument against abortion in the literature. This makes it important to determine whether his argument succeeds. I will argue that it does not.

1. MARQUIS'S ARGUMENT

Marquis's argument takes the form of an inference to the best explanation. He begins with the assumption that it is morally wrong to kill me or you or any normal adult human in normal circumstances.² He then proposes an explanation of *why* this is morally wrong. He also criticizes several alternative explanations, usually by showing that these alternatives conflict with his (or our) moral intuitions (or beliefs) about other cases. He concludes that his proposal is the best explanation of the moral wrongness of killing, and this supports its underlying moral principle.

Marquis's proposed explanation is that it is morally wrong to kill a normal adult human except in extreme circumstances because it is morally wrong to cause "the loss to the victim of the value of its future" (192). He then claims that an abortion also causes a fetus to lose a valuable future, so abortion is also morally wrong except in the same extreme circumstances.

2. PREVIOUS CRITICISMS

Three criticisms of Marquis's article were published the following year. All three fail to refute Marquis's main argument.



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The first criticism, by Ann Cudd, accuses Marquis of “assuming that whatever rights of, or obligations to, fetuses there are, they must be absolute.”³ However, Marquis’s argument is not formulated in terms of either rights or obligations, and he admits several times that “the most extreme reasons” can justify abortion. His claim is that it would take the same strength and kind of reason to justify killing a fetus as it would take to justify killing a normal adult human. We would like to hear more about *which* circumstances are extreme enough to justify killing normal human adults and fetuses, but Marquis is definitely not committed to absolute rights.

The second response was by Peter MacInerney.⁴ His main claim is that fetuses lack the mental states that many philosophers take to be necessary for personal identity, so the fetus does not possess its future, since it is not the same as the person who will or would have that future. However, Marquis emphasizes that his argument avoids the concept of a person (192). Consequently, Marquis can respond that the fetus is the same *organism* as the body into which it will or would develop, even if it is not the same *person*. Marquis’s argument works just as well if he refers to the future of the organism. He does not need to refer to the future of a person.

The third response, by Alastair Norcross, claims that Marquis’s explanation implies that contraception is immoral in the same circumstances as abortion. Marquis denied this on the grounds that “Nothing at all is denied such a future by contraception” (201), but Norcross responds that “a mereological sum of a sperm and an ovum” is “a thing” that can lose its future.⁵ However, Marquis can just rephrase his point. Even if a mereological sum is a *thing*, it is not an *organism*. The organism with the relevant future does not exist until the sperm fertilizes the ovum, so contraception does not deny a future to that organism. The egg and the sperm might also be organisms, but abortion does not cause them the loss of a future, since these particular organisms would not exist after conception anyway. Neither is the same organism as the zygote after conception, because the egg and sperm are different from each other, and there is no reason to identify the zygote with one but not the other. In response, Norcross would probably ask why it matters whether something is the same organism, but the issue here is killing, and only organisms can have a life or be killed, so any moral principle

that restricts killing protects only organisms. Some opponents might also respond that Marquis's explanation still implies the immorality of those kinds of contraception that prevent a zygote from implanting or developing after conception. However, many people do not find this implication counterintuitive, so this objection would be at best inconclusive, at least for those people.

3. EQUIVOCATION

So far, then, it seems to me that Marquis is winning the debate. No critic has yet revealed a fatal flaw in his argument. However, there is such a flaw. That, along with the philosophical interest and widespread distribution of his argument, makes it worthwhile to look again at Marquis's argument.

In my view, the central flaw in Marquis's argument is a fallacy of equivocation. When Marquis applies his proposed explanation to abortion (192), his basic argument is this:

- (1) It is morally wrong except in extreme circumstances to cause anything the loss of a valuable future.
- (2) Abortion causes a fetus the loss of a valuable future.
- (3) Therefore, abortion is morally wrong except in extreme circumstances.

What does the term "loss" mean here? Losing a future is not like losing one's car keys, or even like losing money in the stock market. So, what *is* the loss of a future? The answer is not clear, and Marquis says nothing to clarify his idea.⁶

We can begin to understand losses by looking at examples. Suppose the winner of a race will receive a valuable trophy that is now held by an official. Lee and Kristin are the only racers, so Lee will win unless Kristin beats him; but Kristin wins the race. When Kristin wins, does she cause Lee *the loss of a valuable trophy*? One could answer both "Yes" and "No" in different ways. Kristin's act of winning the race causes Lee to lose the race and causes his loss of the race. Kristin thereby prevents Lee from gaining the trophy. This line of reasoning might make it seem that Kristin's winning causes the *loss* of the trophy to Lee. In another way, however, it seems odd

to say that Kristin causes Lee any *loss* of the trophy, because Lee does not own the trophy, and he does not have any right either to gain the trophy or to win the race.⁸ As the great sage Muddy Waters said, “You can’t lose what you ain’t never had.”

This suggests two ways to talk about losses. The first is neutral or non-moral:

- (NL) An agent’s act causes the *neutral* loss of something valuable to a loser if and only if (i) the agent does the act, and (ii) the loser does not gain or keep the valuable thing, but (iii) the loser would gain or keep the valuable thing if the agent did not do the act.⁹

Kristin’s act of winning the race *does* cause this *neutral* kind of loss to Lee of the trophy. Such neutral losses contrast with moral losses, which can be defined roughly like this:

- (ML) An agent’s act causes the *moral* loss of something valuable to a loser if and only if (i) the agent does the act, (ii) the loser does not gain or keep the valuable thing, (iii) the loser would gain or keep the valuable thing if the agent did not do the act, (iv) the loser has a moral right to the means necessary for gaining or keeping that valuable thing, and (v) the agent does not have a moral right to those means.¹⁰

Kristin winning the race does *not* cause a *moral* loss to Lee, since Lee did not own the trophy or have any right to gain the trophy or to win the race. Details might be controversial, but (NL) and (ML) represent two general approaches to losses.¹¹

This distinction creates two ways to read Marquis’s argument (1)–(3). First suppose that the argument refers to *neutral* losses as on (NL). It is clear that (2) abortion causes a neutral loss of a future to a fetus (assuming the fetus would live if the abortion were not performed). Since Marquis calls this premise “obvious” (192), here he seems to have neutral losses in mind. However, it is then less clear that (1) it is morally wrong except in extreme circumstances to cause a neutral loss of a valuable future. If the term “loss” does not imply any moral right, it is not obvious *why* it is morally wrong to cause such a neutral loss.

This problem is solved if Marquis refers to *moral* losses as on (ML). To cause a moral loss is to violate the loser's moral right when the agent has no moral right to do so. This makes it clearer why (1) it is normally morally wrong to cause the moral loss of a valuable future. However, it is less clear that (2) abortion causes the moral loss of a future to a fetus. If the term "loss" implies a moral right, then we cannot determine whether abortion causes any loss to the fetus until we determine whether the fetus has a moral right to the necessary means to its future. It would beg the question in this context to assume this controversial premise without any argument. Not only does Marquis not give us any argument for this claim, but also it is hard to see how he *could* give any such argument without running into all of the standard troubles which plague previous arguments against abortion (and which Marquis discusses forcefully in the first part of his article).

Thus, each use of the term "loss" makes one premise clearly true but leaves the other premise questionable. This seems to be a kind of equivocation. The point is not that readers cannot tell whether Marquis refers to moral losses or to neutral losses. At most places in his article, it is pretty clear that Marquis refers to neutral losses. Nonetheless, the terms in which the argument is formulated are ambiguous in this context, and the force of the argument for many readers depends on a confusion between these two kinds of losses. That is how the argument commits the fallacy of equivocation.

4. THE BEST EXPLANATION

To respond to this charge, Marquis needs to show that the argument works when the ambiguity is removed and the term "loss" is used in a single way throughout. But then does it refer to *neutral* losses or to *moral* losses? Marquis cannot always refer to *moral* losses, since then premise (2) would beg the question, as I just showed. The only viable alternative is for Marquis to stick to *neutral* losses throughout his argument. This use of the term "loss" makes it obvious that (2) abortion causes a loss of a valuable future, so all Marquis has to do to save his argument is to show that (1) it is morally wrong except in extreme circumstances to cause the neutral loss of a valuable future. He would probably claim that this is exactly what is supported by his inference to the best explanation.

But does Marquis's inference to the best explanation really support principle (1) about neutral losses? Despite some qualms, I will grant for the sake of argument that this principle does explain our moral intuitions in his cases better than any alternative that he mentions.¹² Nonetheless, I will argue that another explanation is even better.

Marquis claims that the explanation of why it is morally wrong to kill normal human adults and fetuses is that:

- (NE) It is morally wrong except in extreme circumstances to cause anything the *neutral* loss of a valuable future.

It should come as no surprise that my alternative explanation is:

- (ME) It is morally wrong except in extreme circumstances to cause anything the neutral loss of a valuable future when the loser has a moral right to the means necessary for that valuable future and the agent does not have a moral right to that means.

This is equivalent to

- (ME*) It is morally wrong except in extreme circumstances to cause anything the *moral* loss of a valuable future.

In comparing these alternatives, the first thing to notice is that they have exactly the same implications wherever the loser *does* have a moral right and the agent *does not* have a moral right to the necessary means. Consequently, no moral intuitions in such cases can show that either of these explanations is better than the other. These explanations differ only when the loser does *not* have a right to the means to its future or the agent *does* have a right to that means.

Before turning to those crucial cases, however, it is useful to consider other values. Recall the race between Kristin and Lee. Kristin causes Lee the neutral loss of a valuable trophy, but her act is not morally wrong, because Lee has no moral right to win the race or to gain the trophy. In contrast, suppose that Lee shows up for the race without any shoes, and Kristin happened to bring an extra pair that fits Lee. Lee will win if Kristin loans him her shoes, but Kristin will win if she refuses to loan him her shoes. It would be

nice for Kristin to loan Lee her shoes, but, since Lee has no right to the shoes, and Kristin does, it does not seem morally wrong for Kristin to refuse to loan Lee her shoes, or for Kristin then to win the race and the trophy. In contrast, suppose Lee brings his own running shoes, but Kristin steals them and she wins the race. These shoes are Lee's means of winning, he has a right to use them, and Kristin does not have any right to take them. In this case, Kristin does cause a moral loss to Lee of the trophy (as well as of the shoes). More generally, the difference between taking and stealing can be seen as an instance of the difference between causing a neutral loss and causing a moral (or legal) loss. Such cases suggest that the best explanation of these cases is not that it is morally wrong to cause the neutral loss of a valuable thing, but is instead that it is morally wrong to cause the neutral loss of a valuable thing when the loser does have and the depriver does not have a right to the necessary means to that valuable thing.

An opponent might respond that this case is irrelevant because what is lost is not a whole future. However, an explanation is better, because more coherent, if it avoids using different principles for losses of different kinds of values (without an adequate reason to use different principles). Thus, if my proposed explanation is better in the case of a valuable trophy, that makes (ME) better than (NE) in the case of a valuable future.

Moreover, (ME) also seems better than (NE) in cases where a whole future is at stake.¹³ For example, suppose Adam will die without a certain medicine. Beth has a milder case of the disease, so she needs the same medicine only to prevent her from being sick for nine months, from some risks of complications, and from longer-term adverse effects on career, feelings, etc. However, Beth owns the only dose of the medicine. She obtained it fairly and did not promise it to anyone. If Adam asks Beth to give him her medicine, would it be morally wrong for Beth to refuse? I don't think so.

It doesn't even matter if Adam has Beth's medicine in his physical possession. Suppose that Beth plans to take her medicine after eating in a restaurant. She puts her medicine into the pocket of a coat on a rack, but she mistakenly puts it into Adam's coat. When Beth comes for her medicine, Adam has already found it, and he refuses to return it to Beth. In these circumstances, is it morally permissible

for Beth to take the medicine from Adam, or to get the police to take it? I think so. It would be *nicer* for Beth to let Adam have the medicine, but Beth is *not* morally *required* to give it to Adam, and it would *not* be morally *wrong* for Beth to take her medicine from Adam. The reason is clear: the medicine is Beth's property, so she has a right to decide who uses it, and Adam has no right to it unless she gives it to him or he gets that right in some other way.

Nonetheless, Beth's act of taking her medicine from Adam causes Adam a neutral loss of a valuable future. Thus, (NE) implies that it is morally wrong for Beth to take her own medicine from Adam. In contrast, (ME) implies that it would *not* be morally wrong for Beth to take her medicine from Adam, since she does have and he does not have a right to her medicine.¹⁴ Thus, (ME) is a better explanation than (NE) of the moral wrongness in such cases.

The implications for abortion should be obvious. To stay alive, a fetus needs a place to grow, as well as blood and other fluids for nourishment, but what it needs belong to the pregnant woman and not to the fetus. Thus, (ME) does *not* imply that abortion would be morally wrong in circumstances where the fetus lacks a right to the womb and blood that are necessary for its future. Just as it is not morally wrong to prevent a doctor from taking blood or bone marrow out of a woman without her permission even to save someone else's life, so it is not morally wrong to stop a fetus from using its mother's blood and womb, unless it somehow gains the moral right to those means to its life. Thus, if (ME) or anything like it provides the best explanation, then Marquis's kind of argument cannot show that abortion is immoral in general.

5. RESPONSES

Of course, many responses are possible. One might respond that a fetus usually *does* have a moral right to the means to life, since its mother gave it that right when she voluntarily engaged in the sex that led to her pregnancy (assuming that she was not raped). I will not address the complex issue of responsibility here. My point for now is just that the fetus needs to somehow get that moral right to the means to its future in order for (ME) to apply and to make abortion morally wrong.

A second response might be that causing losses *is* sometimes morally wrong, even when the loser does *not* have a moral right to the necessary means to avoid loss. This happens when third parties are wronged or when the loss is insignificant or grossly disproportionate to any gain. For example, if Beth needs her medicine only to prevent one short, mild headache, but Adam needs it to save his life, then it seems morally wrong for Beth to refuse to give her medicine to Adam.¹⁵ If so, (ML) and (ME) need to be complicated somewhat. Even if so, however, to apply this concession to abortion, one would need to argue that the loss to the pregnant woman and others is so small or so disproportionate to the loss to the fetus that it is morally wrong to cause the latter in order to prevent the former, despite the disparity in rights. This would require a new argument, and the examples of Beth's medicine and of taking blood or bone marrow without consent suggest that such an argument will founder on the fact that unwanted pregnancy and birth usually do not cause only minor losses.

Opponents of abortion also might deny my intuitions. They might claim that it *would* be morally wrong for Beth to take her medicine from Adam when Adam needs it to stay alive and Beth needs it only to prevent nine months of illness and so on, and for one to refuse to donate blood or bone marrow when this is needed to save a life. I find this implausible, but it is hard to know what more to say when intuitions clash in this way. Still, we can say that it is *at least* not obvious that it would be morally wrong for Beth to take her medicine from Adam or for one to refuse to donate one's needed blood or bone marrow. Thus, Marquis has *at least* not shown that (NE) provides the best explanation of the moral wrongness of killing or that abortion is immoral.

A fourth response might be that (ME) fails as an explanation because (ME) cites *moral* properties. Marquis seems to demand an explanation in non-moral terms when he writes, "The point of the analysis is to establish which *natural* property ultimately explains the wrongness of the killing, given that it is wrong." (190; my emphasis) However, Marquis does not follow his own restriction. His explanation refers to "the *value* of its future" (192; my emphasis), and values are no more natural than rights.

(ME) still might seem circular in a way that (NE) is not, because (ME) cites moral rights to explain moral wrongness, and moral rights are themselves normally explained in terms of moral wrongness. This charge cannot be made against Marquis's reference to values. And I grant that it would be circular to say that it would be morally wrong to kill something because that thing has a right not to be killed. However, this is *not* what (ME) says. (ME) explains the wrongness of killing in terms of a moral right to the *means* to a valuable future, which, in the case of abortion, includes the pregnant woman's womb and blood. That right can be explained in terms of rights to decide what is done with that womb and blood. For example, the pregnant woman can sell or donate her blood to a blood bank, but nobody else can. She can consent to the surgical removal of her womb, but nobody else can (while she is competent). Thus, these rights can be explained and justified without referring to abortion or killing. (ME) is then useful as an explanation because it shows how this right fits into a more general moral structure that applies to many otherwise unrelated situations.

Nonetheless, some opponents, including Marquis, still might insist on removing *all* moral terms from any explanation or moral wrongness. This is hard, but not impossible. My notion of a right in (ME), like his notion of value in (NE), could in theory be replaced by a naturalistic description of the non-moral base on which moral rights supervene. Any such naturalistic replacement, however, would depend on a particular, substantive theory of moral rights, which is bound to be controversial. Since my points do not depend on any particular substantive theory, I do not need to replace the moral terms in (ME) with particular naturalistic terms. I can remain neutral among defensible substantive theories of moral rights, because any substantive theory would be inadequate if it did not imply that Beth has a right to her medicine and that a woman has a right to her blood and womb, so any defensible substantive theory of rights would make (ME) or its naturalistic replacement into a better explanation than (NE).

A very persistent opponent still might not believe that any such replacement is even possible. These doubts can be relieved somewhat by suggesting very briefly and schematically how one naturalistic replacement could work. Consider a rule-consequentialist

account of moral rights on which one has a moral right to something if and only if society is better off when a rule against certain interferences with certain people's use of similar things is entrenched into the moral attitudes and practices of almost all members of that society. Then (ME) can be restated as:

(ME**) It is morally wrong except in extreme circumstances to cause anything the neutral loss of a valuable future when doing so violates a rule whose entrenchment benefits society and which concerns the use of something that is a necessary means to that valuable future.

Many details need to be spelled out, but I hope that (ME**) is clear enough to illustrate one way to avoid any direct reference to moral rights in (ME). I am not claiming that this particular rule-consequentialist theory of rights is adequate, but this example at least shows the possibility of avoiding any apparent circularity in (ME).

Marquis has one move left. He explicitly warned that he "will assume, but not argue" that "whether or not abortion is morally permissible stands or falls on whether or not a fetus is the sort of being whose life it is seriously wrong to end" (183). Marquis might respond that my criticisms do not deny that fetuses are this "sort of being". In a way, this is correct. To defend abortion on my account, it is enough that the fetus lacks the right to the means necessary for its life, including the mother's blood and womb. I do not and need not deny that fetuses are the sort of being that *can* be given the right to the means to life and to the necessary means to life. Indeed, I need not deny that the fetus *has* a right to life or that it is seriously wrong for some people in some circumstances to kill a fetus.¹⁶ What I do deny is that Marquis has shown that it is "seriously wrong" for a pregnant woman to end the life of a fetus by getting an abortion. Even if my points concern only an exception to a general rule against killing, this exception *is* the rule in abortion. Marquis admits that killing can be justified in extreme circumstances, but he claims to have shown why "morally permissible abortions will be rare indeed" (194). The exception for which I argue will hold in almost all cases of abortion, at least if the pregnant woman did not give the fetus the

right to use her blood and womb. My argument thereby shows that morally permissible abortions will be common indeed.

6. CONCLUSION

Overall, then, Marquis's argument fails to show that abortion is immoral to the extent that he claimed. To save his argument, Marquis would need to show that a fetus has a moral right to the means it needs to gain its future or that the woman lacks a moral right to control her blood and womb or else that the pregnant woman's loss is so minor or so grossly disproportionate to the fetus's loss that it would be morally wrong for her to refuse to let it use her body, despite the disparity in rights. Such issues are controversial, and one of Marquis's main goals was to sidestep them. What I have tried to show is that he cannot really avoid them in the end.

NOTES

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¹ Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* 86, 4 (April 1989): 183–202. All page references in the text are to this article.

² The qualification "in normal circumstances" indicates that killing normal adults as a *general* kind of act is morally wrong only *prima facie*, but a *particular* act of killing a normal adult in normal circumstances where there is no special reason to kill is still morally wrong *overall*. Moral wrongness needs to be explained at both levels.

³ Ann Cudd, "Sensationalized Philosophy: A Reply to Marquis's 'Why Abortion is Immoral,'" *Journal of Philosophy* 87, 5 (May 1990): 262.

⁴ Peter K. McInerney, "Does a Fetus Already Have a Future-Like-Ours?" *Journal of Philosophy* 87, 5 (May 1990): 264–268.

⁵ Alastair Norcross, "Killing, Abortion, and Contraception: A Reply to Marquis," *Journal of Philosophy* 87, 5 (May 1990): 271–272. On pp. 275–276, Norcross does discuss whether a fetus has a right to its future. This issue is closely related to my concerns, and I am indebted to his remarks, but I focus on the right to the necessary means to its future rather than on the right to its future. See my notes 14 and 16.

⁶ Marquis sometimes writes of being "deprived" of a future (190), but "deprive"

is no clearer than “cause a loss”, since the former would presumably be explained in terms of the latter. (The moral connotations of “deprive” might even be clearer.) The notion of “cause” is also unclear in this context for much the same reasons, but I will focus on the term “loss” for simplicity.

⁷ This might seem disanalogous to abortion because only the fetus can have its valuable future, whereas any runner can win the trophy. However, nobody else can feel Lee’s feelings, but my point applies even if we refer to Lee losing the pleasure that he would feel if he received the valuable trophy. ⁸ Lee does have a privilege in Hohfeld’s sense of winning the race, assuming Lee has no duty not to win the race and it would not be wrong for him to win the race. However, Lee has no claim against Kristin that she not win the race or not interfere with his winning the race by beating him. Such Hohfeldian claims are what I call “rights” here and elsewhere.

⁹ Problems of overdetermination infect (iii) if someone else would prevent the victim from having the valuable thing even if this agent did not do the act that actually causes the loss. However, these problems do not affect my point here.

¹⁰ I include both (iv) and (v), rather than their disjunction or one without the other, because the conjunction weakens my later claims, especially (ME). In order to discuss abortion, I do not need to take any stand on cases where neither the agent nor the loser has a right to a means to life, or where both the agent and the loser have a right to a means to life, if such cases are possible.

¹¹ The moral approach to losses and the role of rights in determining what counts as a loss or as depriving are discussed by Bernard Gert, *Morality* (New York; Oxford University Press, 1988), pp. 111–116. Gert argues that one does not deprive or cause a loss to the next person in line if one buys the last bag of popcorn or the last ticket to a football game (or to a Muddy Waters concert). I am deeply indebted to Gert’s discussion here.

¹² I think that the desire account, which Marquis rejects, could be defended by including future desires and dispositional desires, but I will not develop that defense here.

¹³ Because fetuses are not guilty, I will focus on cases where the loser is not guilty. Nonetheless, the alternative explanations can also be tested by applying them to self-defense when killing an attacker is necessary to prevent the attacker from killing the defender. Such killing causes a neutral loss of a valuable future, but it does not seem morally wrong. Marquis can try to explain this by pointing out that a valuable future is also saved, but it also does not seem morally wrong to kill two attackers when this is necessary to save one life. The reason seems to be that both attackers have no right to do what they are trying to do. Thus, (ME) seems better than (NE) at explaining moral judgments about self-defense.

¹⁴ Adam might have a moral right to his future insofar as it would be morally wrong for Beth or some third party to kill Adam in ways other than by taking her medicine when killing is not necessary to get her medicine. See note 16.

¹⁵ This seems to be denied by Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy and Public Affairs* vol. 1, no. 1 (Fall 1971): 47–66, Section 5. It should be clear to anyone who knows Thomson’s article that many of my claims are just

applications of Thomson's views to Marquis's argument. However, in allowing that it might be morally wrong to cause a neutral loss for a grossly disproportionate gain, I avoid Thomson's apparent commitment to the absoluteness of property rights or rights to control one's body.

¹⁶ If one accepts that a fetus is the kind of being that can have moral rights, one might want to claim that a fetus has a moral right against third parties not to kill it, when they are not acting as agents of the pregnant woman, and when killing it is not necessary to protect the pregnant woman's rights (as might become the case after viability). Even if this is granted, however, we can still say that the fetus has no right against the mother that she not cause it the neutral loss of a valuable future by getting an abortion before viability.

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