PAUL A. ROTH

PERSONHOOD, PROPERTY RIGHTS, AND THE PERMISSIBILITY OF ABORTION*

ABSTRACT. The purpose of this paper is to argue that the tactic of granting a fetus the legal status of a person will not, contrary to the expectations of opponents of abortion, provide grounds for a general prohibition on abortions. I begin by examining two arguments, one moral (J. J. Thomson's 'A Defense of Abortion') and the other legal (D. Regan's 'Rewriting Roe v. Wade'), which grant the assumption that a fetus is a person and yet argue to the conclusion that abortion is permissible. However, both Thomson and Regan rely on the so-called bad samaritan principle. This principle states that a person has a right to refuse to give aid. Their reliance on this principle creates problems, both in the moral and the legal contexts, since the bad samaritan principle is intended to apply to passive refusals to aid; abortion, however, does not look like any such passive denial of aid, and so it does not seem like the sort of action covered by the bad samaritan principle. In defense of the positions outlined by Thomson and Regan, I argue that the apparent asymmetry between abortion and the usual type of case covered by the bad samaritan principle is only apparent and not a genuine problem for their analyses. I conclude with a defense of the morality of the bad samaritan principle.

Two propositions often assumed to be true by opponents of abortion are:

(1) If the fetus is a person, then (all or almost all) abortions would be immoral.

(2) If the fetus is a person, then (all or almost all) abortions would be illegal.

(By "person" I mean someone whom we consider to have all and

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* As several of my footnotes indicate, I have profited from conversations on this paper with many people. I owe particular thanks to Susan Appleton, Sonya Meyers Davis, Larry Davis, and Richard Wasserstrom for their comments on earlier drafts.

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only the usual legal and moral rights.) The first proposition has been attacked by Judith Jarvis Thomson;[1] her arguments suggest that the truth of the antecedent in (1) does not entail the consequent. Yet, some opponents of abortion think they can achieve the goal of banning abortion not by convincing people that (1) is true, but via constitutional amendment or legislative fiat.[2] In other words, they assume that the antecedent of the second proposition is sufficient to establish the truth of the consequent. (2), if true, would seemingly circumvent any difficulty in arguing for the truth of (1). However, the assumption that (2) is true has been subject to extensive criticism by Donald H. Regan.[3] Indeed, by developing a suggestion contained in Thomson's article,[3a] Regan provides a legal argument to the claim that (2) is false. Nor surprisingly, however, criticisms of and gaps in Thomson's argument apply, *mutatis mutandis*, to Regan's work. My first goal in this paper is to suggest how the gaps that exist in Regan's argument might be filled. A second and more general concern is to use points made plain in my discussion of (2) to defend some of the moral intuitions which Thomson deploys in her critique of (1).

In Part 1, I sketch those portions of Thomson's argument with which I am concerned and I consider some of the criticisms which have been made of her position. Part 2 outlines Regan's argument and I indicate there how the problems noted in Part 1 afflict Regan's position. I then suggest how the problems with Regan's argument can be resolved. In Part 3, I examine the ramifications of the legal position outlined in 2 for some of the moral issues at stake in abortion and, more generally, I defend Thomson against

[1] Judith Jarvis Thomson, 'A Defense of Abortion,' in *The Rights and Wrongs of Abortion*, ed. M. Cohen, T. Nagel, and M. Scanlon (Princeton, N. J.: Princeton, University Press, 1974). [Reprinted from *Philosophy & Public Affairs* 1 (1971).]

[2] One proposed draft of the "right-to-life" amendment reads: "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health, or condition of dependency."

[3] Donald H. Regan, 'Rewriting Roe v. Wade' *Michigan Law Review* 77 (1979): 1569–1645.

[3a] Ibid., 1575–6.

certain challenges to the moral plausibility of her account. *My central claim in this paper is that the abortion issue cannot be resolved politically via (2), i.e., by granting a fetus legal personhood.* And the reasons why legal personhood does not save the fetus are, I further hope to show, morally illuminating.

1.

Even if the fetus is a person, there are, Thomson argues, at least two cases in which the fetus's right to life can be justifiably overridden. First the fetus-person's right to life does not take moral precedence over the pregnant woman's right to self-defense. Hence, if the fetus poses a threat to the woman's life, the fetus may justifiably be killed. (Thomson believes as well that there is no moral proscription against third-party intervention.) Second, and most important for our purposes, Thomson argues that a woman may choose to be a "bad samaritan." Someone is a bad samaritan just in case that person refuses to do an action which would be morally good but which the person is not obligated to do. For the case of the pregnant woman and a fetus, then, I shall focus on what I shall refer to as a "samaritan situation." A samaritan situation is one in which a person is (morally) free to choose to help or not; one is under no obligation – violates no one's rights – if one refuses to give aid in such situations. An abortion, in such cases, is simply an instance of a woman's choosing to deny the fetus the use of her body.[4] Not all cases of pregnancy are samaritan situations. Thomson is careful to indicate that only those cases where pregnancy is involuntary (e.g., as when due to rape) or where the woman has

[4] It might be objected, as my colleague Jim Doyle has emphasized to me, that only the call to perform a morally "heroic" act places one in a samaritan situation in my sense. What legally defines a samaritan situation, in other words, is the degree of sacrifice called for and not, as Thomson seems to assume, the issue of whether the responsibility is voluntarily assumed. However, as I argue in Part 2, an abortion (under the conditions I outline) is indistinguishable from other members of the class of legally countenanced cases of refusals to give aid.

taken all reasonable precautions and still becomes pregnant (pregnancy due to contraceptive failure) count as samaritan situations. In these cases, she claims that it is morally permissible to "unplug" the fetus from the womb since the fetus has been given no right to the use of the mother's body. As she says, "I am arguing only that having a right to life does not guarantee having either a right to be given the use of or to be allowed continued use of another person's body – even if one needs it for life itself."[5] The key to the analysis here, i.e., to the claim that a samaritan situation exists between the pregnant woman and the fetus, is the assertion that abortion constitutes a *withholding* of aid.

At least two objections might be suggested to the claim that abortion is ever a samaritan situation. Each reason concerns an asymmetry between abortion and the usual type of samaritan situation. For abortion, it could be charged, involves (a) a "laying on of hands," and (b) the intervention of a third party. However, the usual situation in which one refuses to give aid involves neither (a) nor (b); hence, the choice to have an abortion is not like choosing to be a bad samaritan – a *passive* refusal to give aid – but is more like actively doing harm to someone.

Thomson acknowledges that (a) *appears* to create an asymmetry between the situation in which a pregnant woman finds herself and the usual sort of samaritan situation: "A man who refuses to be a Good Samaritan, lays hands on no one, he manipulates no one; he merely refrains from giving aid.... So the decisive reason why I am wrong in making the assimilation is this: a reluctant samaritan merely does not save a life, whereas the mother actually kills the child."[6] Thomson's counter to this suggestion[7] is that it simply *assumes* that all cases of killings are morally more reprehensible than cases of letting die, and that this assumption will not do.

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[5] Thomson, 'Defense,' p. 12.

[6] Judith J. Thomson, 'Rights and Deaths,' in Nagel and Scanlon, *Rights and Wrongs*, p. 124. [Reprinted from *Philosophy & Public Affairs* 2 1973.]

[7] In addition to articles cited above, see also Thomson's 'Killing, Letting Die, and the Trolley Problem,' *The Monist* 59 (1976): 204–17.

In particular, it will not do because it does not establish a morally relevant distinction between abortions which many people will concede to be morally justified (e.g., when the fetus is killed in order to save the mother's life) and those cases where abortion seems unjustified. In other words, the relevant moral issue in abortion is *not* whether the fetus is directly killed or merely let die; hence, the fact that abortion involves a "laying on of hands" does not establish, *ipso facto*, that the situation of the pregnant woman is of a different moral order than the usual samaritan situation. Thomson denies, in short, that a samaritan situation exists only if there is a passive refusal to give aid.

The intervention of a third party (and, I would argue, the assimilation of the abortion case to a case of death due to omission – refusal to aid – rather than comission) is to be justified by invoking a woman's property right to her body. Just as we may order off an intruder from our property, and may even enlist someone's aid in expelling an intruder, so a woman may enlist the aid of someone to get an abortion. The situation is still a samaritan situation since the pregnant woman is refusing to aid the fetus by denying it permission to remain on her property. The fact that the fetus must first be removed from the property does not compromise the claim that a samaritan situation obtains since the fetus had no right to be on the woman's property (for the types of case of abortion which we are considering, in any case). And the woman is within her rights to ask another for help in removing the trespasser (indeed, the State ought to protect her rights).

> If Jones has found and fastened on a certain coat, which he needs to keep him from freezing, but which Smith also needs to keep him from freezing, then it is not impartiality that says, "I cannot choose between you" when Smith owns the coat. Women have said again and again "This body is my body!" and they have reason to feel angry, reason to feel that it has been like shouting into the wind. Smith, after all, is hardly likely to bless us if we say to him, "Of course it's your coat, anyone would grant that it is. But no one may choose between you and Jones who is to have it."[8]

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[8] Thomson, 'Defense,' pp. 9–10.

The non-intervention of a third party is not morally mandated; a refusal to aid, the choosing to be a bad samaritan, may involve calling upon a third party. The asymmetry suggested, then, by third-party intervention in the case of abortion is only an apparent and not a real moral difference.

The foregoing summary indicates that in order to dispel the appearance of asymmetries between the usual type of samaritan situation and the case of a pregnant woman choosing an abortion, Thomson must rely on the claim that one has a property right to one's body. This property right justifies the role of a third party and indirectly aids in assimilating the abortion case to acts of omissions. Refusal to aid, which is the key feature for moral purposes of the samaritan situation, applies to abortion insofar as the woman is plausibly understood as *withholding* that to which the fetus has no right, even if this withholding initially requires the action of positively removing the fetus from the womb. The removal is justified as a refusal to aid because the fetus's presence constituted an unwarranted use of the woman's body; the fetus has no right to return because the woman is free to choose to refuse to aid the fetus. If the woman could *not* claim, on the basis of a propertylike right to her body, the right to expel the fetus, no samaritan situation would obtain.

Yet it is the reliance on this notion of a property right which has been seen as a key weakness of Thomson's analysis by friendly und unfriendly critics alike. For example, in an article which is otherwise approving of Thomson's views, Mary Anne Warren remarks that "it is equally unclear that I have any moral right to expel an innocent person from my property when I know that doing so will result in his death."[9] This leads her to conclude that "it is probably a mistake to argue that the right to obtain an abortion is in any way derived from the right to own and regulate property."[10] Joel Feinberg, who has, on other grounds, defended

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[9] Mary Anne Warren, 'On the Moral and Legal Status of Abortion,' *The Monist* 57 (1973): 44.

[10] Ibid.

the moral permissibility of abortion, rejects outright the suggestion that a mother has a *moral* right to refuse the fetus the use of her property.

> Besides, whatever this, that, or the other legal statute may say about the matter, one is not *morally* entitled, in virtue of one's property rights, to expel a weak and helpless person from one's shelter when that is tantamount to consigning the person to a certain death.... The maternal right to abortion, therefore, cannot be founded on the more basic right to property.[11]

Similarly, John Finnis – who is quite critical of Thomson's position in all aspects – argues that the invoking of property rights will not do because this right can be made to serve the fetus's case as well. The property right to one's body, if such there is, "cancels out" in these cases.

> The child, like his mother, has a 'just prior claim to his own body,' and abortion involves laying hands on, manipulating, that body. And here we have perhaps the decisive reason why abortion cannot be assimilated to the range of samaritan problems and why Thomson's location of it within that range is mere (ingenious) novelty.[12]

Moreover, Finnis asserts that there is an asymmetry between the abortion situation and the samaritan situation which Thomson did not take into account and which establishes that the situations are morally distinct. For the pregnant woman, Finnis claims, has a responsibility for the well-being of the fetus, and this responsibility is just a special case of the obligation we all have not to jeopardize the well-being of others. This is what marks off the situation in which a pregnant woman finds herself from genuine samaritan situations. In other words, Thomson denies that a pregnant woman has any responsibility for her situation unless she chooses it. Finnis, however, seems to believe that a pregnant woman has a responsibility to the fetus which is not a matter of choice. "It is

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[11] Joel Feinberg, 'Abortion,' in *Matters of Life and Death*, ed. T. Regan (New York: Random House, 1980), pp. 204–5.

[12] John Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson,' in Scanlon and Nagel, *Rights and Wrongs*, p. 109. [Reprinted from *Philosophy & Public Affairs* 2 (1973).]

this (or some such) thesis about *responsibility* on which Thomson's whole argument, in the end, rests."[13] The three criticisms of Thomson we have considered, then, are: (i) the right to property cannot override the right to life; (ii) the property right of the woman to her body is no greater than the property right of the fetus to its body, and so the right claims cancel each other out; (iii) since the pregnant woman is responsible for another in a way in which those in true samaritan situations are not, she is not free to choose to refuse to give aid.

I suggest, moreover, that the last point isolates the moral uneasiness shared by Feinberg, Finnis, and Warren (whatever their other differences) with regard to Thomson's claim that a pregnant woman can choose to be a bad samaritan. This unease is well articulated by Finnis when he remarks that "What Thomson, then, fails to attend to adequately is the claim... that the mother's duty *not* to abort herself is not an incident of any special reponsibility which she assumed or undertook for the child, but is a straightforward incident of an ordinary duty everyone owes his neighbor."[14] Thomson's case fails, the suggestion is here, because the choice of whether or not to be a good samaritan is *not* supererogatory. We are obligated in certain cases to help others; people just do have that type of claim of right against us. If the fetus is a person, the pregnant woman cannot refuse to give aid.

At this point I want to turn to Regan's legal analysis of abortion, an analysis based on a pregnant woman's legal right to be a bad samaritan. In considering Regan's case, I will indicate how those asymmetries between the situation of the pregnant woman and the usual samaritan situation pose problems for Regan's analysis analogous to those scouted above. However, I will suggest how these difficulties are to be resolved in the legal sphere. In short, my argument is directed to filling a lacuna which is present in both Thomson's moral analysis and Regan's legal one. Both need to establish that, in fact, we have a property right to our body, and

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[13] Ibid., p. 90.
[14] Ibid., p. 91.

that an appreciation of this right suffices to dissipate the apparent asymmetries (noted above) between abortion and the usual sort of samaritan situations. I argue that we have the requisite legal right and, in addition, I argue that the legal considerations on this point which I use to amend Regan's analysis are also morally acceptable. Hence, the considerations serve to repair the gap in Thomson's argument as well.

In part 3, I will return to the moral problems cited above and argue, *contra* Feinberg, Finnis, Warren, and others, for the acceptability of Thomson's moral analysis using insights which the legal analysis brings into relief.

2.

My narrower goal, as I stated at the outset, is to suggest why the proposed legal "solution" to the abortion question will not accomplish what its proponents apparently hope it will, viz., to prohibit all or almost all cases of abortion. The personhood of the fetus is not sufficient legal protection from abortion.

The legal problems facing the fetus-person are explored in a fascinating piece by Donald Regan, 'Rewriting *Roe* v. *Wade*.' Regan develops the legal aspects of Thomson's suggestion that a pregnant woman is free to be a bad samaritan. It is on the basis of this suggestion that he proposes an interpretation of ("rewriting") *Roe* v. *Wade*. (The Supreme Court, in that decision, did *not* invoke the bad samaritan principle; rather, the right to privacy was the key concern in deciding in favor of the pregnant woman's right to abort.)

Regan offers the following succinct summary of his argument:

> In brief, our law does not require people to be Good Samaritans. I shall argue that if we require a pregnant woman to carry the fetus to term and deliver it – if we forbid abortion, in other words – we are compelling her to be a Good Samaritan. I shall argue further that ... we must eventually conclude that the equal protection clause forbids imposition of these burdens on pregnant women.[15]

[15] Regan, 'Rewriting,' p. 1569.

Understanding that we are still accepting, for the sake of argument, the assumption that the fetus is a person, the argument sketched above is:

(1) If pregnant women are free to be "bad samaritans," then for a wide range of circumstances,[16] abortions will be legally permissible.

(2) If pregnant women are not allowed to be bad samaritans, then they are being denied equal protection under the law.

(3) Pregnant women should not/cannot be denied equal protection.

(4) For a wide range of circumstances, abortions will be legally permissible (even if the fetus is a person).

The problematic premise in this argument is (2);[17] it is problematic, as we shall see, precisely because of the asymmetries noted in the discussion of the samaritan situation in the moral context.

One is entitled to be a bad samaritan, from a legal point of view, where one is not legally obligated to give aid. It is, Regan claims, "a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual."[18] Indeed, "the bad-samaritan principle protects even omissions that are certain to result in the death of the person denied aid."[19] This point is critical and, as shall be shown below, has been sustained in decisions of recent date. The right to life does *not* override the bad samaritan principle in law. Hence, "the fact that the fetus is cer-

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[16] I speak here of "a wide range of circumstances" but leave the precise range unspecified. My argument, if sound, justifies abortions for other than life or health threatening situations. This is sufficient, in turn, to show that the proposed "right to life" laws would fail to prohibit "nonessential" abortions.

[17] Professor Susan Appleton of Washington University Law School has pointed out to me that at least some of the problems raised with regard to premise (2) apply also to (1).

[18] Regan, 'Rewriting,' p. 1569.

[19] Ibid., p. 1575.

tain to die does not remove the woman from the scope of the principle."[20] Neither the right to life nor the innocence (moral and legal) of an individual gives an individual the right to require aid of others.[21]

Yet the step that appears problematic to critics with regard to Thomson's argument emerges as a problematic consideration for Regan as well. For Regan admits that the issue of whether or not the pregnant woman is in a samaritan situation represents the central problem for his analysis.

> Finally, it might be suggested that a reasonable American legislature would (or at least *could*) reject my argument at its very first step where I decide that securing an abortion counts as an omission in the context of samaritan law. For purposes of constitutional analysis, ..., I think this first step is the most problematic.[22]

> My principal nagging doubt is about the very first step of the argument, when viewed from the constitutional perspective. I think the general thrust of samaritan law requires that securing an abortion be treated as an omission in that context. Indeed, I have no doubt on that point. But might not a reasonable American legislature simply disagree?[23]

And the reason for doubting that abortion is an act of omission involves the fact that there occurs a laying on of hands. "It is clear that from one perspective securing an abortion looks like a positive act."[24]

The other asymmetry between abortion and the usual samaritan

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[20] Ibid.

[21] Although it is not my concern in this essay, it is worthwhile to note that Thomson's claim that the right to self-defense overrides the right to life (and so abortions to save the mother's life are morally permissible) is fully supported in the legal sphere. See the discussion of "innocent threats" by Sanford Kadish, 'Life and Rights in the Criminal Law,' in *Respect for Life*, ed. O. Temkin (Baltimore: The Johns Hopkins University Press, 1976), especially p. 68, 83 and fn. 32 on 99–100.

[22] Regan, 'Rewriting,' p. 1636.

[23] Ibid., p. 1646.

[24] Ibid., p. 1574.

situation – third party intervention – muddies the legal waters even further. For even if the woman is understood as refusing to give aid, that hardly looks like what the doctor is doing. In other words, even if a pregnant woman is covered by the bad-samaritan principle, it is not clear that the doctor is also covered.

> It will seem to some readers that even if the woman's act of securing an abortion can be viewed as an omission, the same cannot be said of the act of any doctor who assists her by performing the abortion. ... The question, then, is whether the doctor is shielded from liability by arguments establishing the woman's freedom to refuse aid.
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> I do not know of any authority on whether a third party may assist a potential samaritan who needs help in refusing aid. The reason for the lack of authority is clear. It is only in the unusual case, like the abortion situation, that anything resembling a positive act is necessary for the samaritan to refuse aid. There is some law on third-party intervention in the context of the right of self-defense (or, from the point of view of the third party, the context of defense of others). In that context, the currently dominant view, and the view which is still gaining ground, is that third parties are entitled to intervene.
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> *For myself, I find it easy to conclude that if the woman is free to secure an abortion, the doctor should be able to help her. Although I find it easy to conclude this, I do not have much to say in support of my conclusion.*[25]

These asymmetries – which parallel those which were noted in Thomson's analysis – raise doubts with respects to whether the rewriting of *Roe v. Wade* in line with the bad-samaritan principle will work. However, I believe the difficulties here are only apparent and that further considerations support Regan's intuitions that the asymmetries noted above do not undermine his case.

Is abortion more like a refusal to aid or is it a "positive act," an act of comission? Central to resolving this question – and so closing an important gap in the argument – is the issue of what sorts of claims one person might justifiably make against another for the use of that person's body. Indeed, what must be kept in focus throughout this analysis is just the fact that pregnancy is something that happens in and to the woman. In forcing a woman

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[25] Ibid., pp. 1578–79, emphasis mine.

to carry the fetus to term, i.e., in forbidding abortion, what is being sanctioned is, at the very least, the right of the fetus-person to the use of the woman's body as long as the fetus needs it. The physically invasive nature of pregnancy, and the woman's corresponding right to refuse aid, must be sharply contrasted with the sort of cases where property owners cannot legally expel intruders.

> In certain situations, there may be no privilege to use any force at all to expel an intruder. Just as the defendent may not kill a trespasser to eject him, he will not be privileged to put him out when he will be exposed to serious dangers of physical harm. A tramp on a railway train may not be thrown off at forty miles an hour, nor may a trespasser who is ill and unable to look out for himself be thrust out on a winter night, unless his illness is of a contagious character which threatens the inmates of the house. The necessities of the situation create a privilege to remain, which prevails over the vindication of the property right.[26]

Is abortion like throwing a tramp off a speeding train? The answer here is surely no. The idea here is that one cannot expel someone from the speeding train given that the train will stop soon and one can eject the tramp then. Likewise, one cannot expel the sick person given that, in a short time, the person can be safely expelled (in better health). But, given considerations related to the bad samaritan principle in the law, it would seem that in neither case is one *obligated* to assume the care and feeding of the people involved; a "privilege to remain" exists, moreover, only because there are other solutions (the train comes to a station, the person's health improves). Most importantly, Prosser's remarks suggest that if the continued presence of the person *does* constitute a threat to the well-being of those involved, the privilege to expel the trespasser prevails. And in the case of pregnancy, presence and care cannot be separated. Since pregnancy *requires* a woman to assume the care of the fetus involved and since pregnancy poses, by its nature, a serious potential threat to the physical and emotional

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[26] W. Prosser, *Handbook of the Law of Torts* (4th ed., 1971) section 21, pp. 115–16.

well-being of the pregnant woman,[27] abortion cannot be compared to the situations cited by Prosser where the right to expel trespassers is overridden due to a necessity imposed by the situation. The significant physical and emotional problems posed by unwanted pregnancy, together with, as I argue at length below, the fact that pregnancy involves coerced use of the body, are sufficient to dispel any apparent analogy between the situation of a fetus and Prosser's tramp on a train.

The fact that the fetus "commandeers" a woman's body is central to seeing that the pregnant woman is in a samaritan situation. Two recent cases directly involve "claims against the use of another's body." One case[28] concerns a ruling by a Pennsylvania court that "a healthy adult could not be compelled to be the donor for a bone-marrow transplant that represented the only realistic chance for the survival of his cousin, even though the transplant involves no significant risk to the donor."[29] (The man needing the transplant died about two weeks after the ruling.) The second case[30] also concerns a man needing a marrow transplant (the men in both cases were suffering from types of cancer). In this case, the man had been given up for adoption at birth. However, after it was discovered that he was suffering from a rare and generally fatal from of cancer (myelocytic leukemia, according to one published report), his one hope of treatment was to receive a marrow transplant from a sibling (or even a half-brother or sister).

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[27] See Regan's impressive list of problems attending pregnancy. Regan, "Rewriting," pp. 1579–83.

[28] This case is cited by Regan in fn. 21, p. 1585. See also the discussion by Eric Mack, 'Bad Samaritanism and the Causation of Harm,' *Philosophy & Public Affairs* 9 (1980): 230, fn. 1. The case and the one cited in my next footnote appear to be the only ones of their kind. The only extended legal discussion I have found of either case is Fordhanm E. Huffman, 'Coerced Donation of Body Tissues: Can We Live with McFall v. Shimp?' *Ohio State Law Journal* 4 (1979): 409–40. Huffman is unhappy that the law does not allow for coerced donation. My reasons for thinking that the law is morally acceptable on this point emerge in Part 3.

[29] Regan, 'Rewriting,' p. 1585. See also Mack, 'Harm,' p. 230.

[30] Reported in the *St. Louis Post-Dispatch* for Monday, April 20, 1981, p. 1.

He sued to have the court records on his adoption opened so he could locate the appropriate donors. The judge on the case, after consulting with the natural mother (who refused to give the requested information), ruled against the man.

Does a fetus, even if a person, have any more right to claim the use of the body of the pregnant woman than either of the aforementioned men had against their relatives? The cancer victims were not guilty of any moral or legal wrong, and they had a right to life if anyone does. Nonetheless, their undeniable "right to life" did *not* suffice to give either a legal claim for the use of another's body. The right to life did not override the right to refuse to give aid when the aid in question is the use of another's body. Hence, the fetus should have no legal recourse against the pregnant woman for the use of her body.

But, it will surely be objected, these men were not already hooked up to their prospective donors in the way in which a fetus is hooked up to the pregnant woman. However, this should make no legal difference. Just because a fetus is "closer" to the person who could aid it than the man needing the transplant was to his cousin does not materially affect the issue of whether aid ought to be given. Since the *ability* to give aid is *not* an issue, proximity should not be a consideration. The proximity of the fetus to the pregnant woman does not alter the fact that a samaritan situation exists.

My claim is that since the aid which the fetus requires is that the woman donate the use of her body, the woman is in a samaritan situation. For no one has the (legal) right to *compel* the inter vivos donation of, e.g., organs. It might be objected here that my suggested parallel is imperfect since no *permanent* donation is required. However, this misplaces the emphasis, for I do not see that *permanence* is what is at issue. The issue is, rather, what sort of aid one can be compelled to give on another's behalf. And all the precedents suggest that no one has a right to the *use* of another's body, whether or not the bodily resource needed is replenishable (e.g., blood), and whether or not the use is temporary (e.g., an afternoon's operation or nine months).

It should also be noted that an individual cannot require an institution, e.g., a hospital, to provide him with life-saving care. Consider the following example. A hospital owns the only dialysis machine in town.[31] The machine is capable of handling at most one patient. However, the machine is very expensive to operate and the hospital is faced with the question of whether to operate the machine or to use available funds for other projects. Moreover, at least two people in the town need to be dialysized in order to live. The first point to note is that the bad-samaritan principle extends to property use; the hospital, or the people, let us say, who make such decisions in the hospital administration, could simply refuse to treat either of the people needing treatment.[32] This would simply be a refusal to aid, and the needy patients would have no recourse against the hospital.

However, assume that the owners of the dialysis machine, although they have taken all reasonable precautions against people making unauthorized use of their machine, come in and find that someone is hooked up to it. Surely they can call the police and have the person removed. The fact that expelling the person will make it impossible for the person to go on living need not abrogate their right to expel that person.[33] The right to private property is

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[31] The dialysis machine example was suggested to me in conversation by Professor David Becker, Washington University Law School. Professor Becker was kind enough to discuss certain aspects of this case with me. However, the use to which I am putting the example and the conclusions I draw are my own. The legal aspects regarding the use of dialysis machines are searchingly examined in 'Scarce Medical Resources,' *Columbia Law Review* 69 (1969): 620–92.

[32] "It is well-established that private hospitals have no duty to furnish their services to everyone. ... The private hospital has relatively unlimited discretion in making selections." Ibid., p. 628.

[33] For medical treatment of this sort, the legal waters are uncharted. D. Sanders and J. Dukeninier, Jr., 'Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation,' *UCLA Law Review* 15 (1968): 357–413, explore some of the reasons which might justify termination of treatment. Even if treatment is not available elsewhere, failure to pay might be grounds. See especially the discussion on pp. 383–86. Moreover, since psychological

the right to exclude others from its use. Just because some people are given access to medical resources does not mean that, in excluding others, one violates some right.[34] Finally, a hospital can surely hire someone to help in the protection of its dialysis machine; and this person it hires may remove unauthorized and unwanted users from the machine. Using a third party does not compromise the right to refuse to give aid.

Despite the laying on of hands that occurs, and despite the intervention of a third party, the situation with regard to the use of the dialysis machine remains a samaritan situation, and the refusal to let certain people use it remains an omission despite the apparent asymmetries. If bars may have bouncers to remove unwanted patrons and stores may have guards to remove people who have no business in the store, pregnant women may have doctors intervene on their behalf and abort the fetus.

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factors play an important role in dialysis treatment, failure of a patient to be appropriately co-operative could also be grounds, even though termination of dialysis treatment will mean death to the person denied treatment. *Starting* the patient on dialysis does not, in all cases, commit the hospitals to continuing treatment. See discussion in 'Medical Advance' and 'Scarce Medical Resources.'

[34] "Hence, whenever there is an allocation problem there can be no malpractice problem" ('Scarce Resources,' p. 630). "Even if the service is started, then stopped, it will be difficult to demonstrate that a 'duty' has been violated' (Ibid., p. 629). Moreover, in case a medical program is terminated due to lack of funds (as apparently happened to a number of centers for the treatment of kidney disease established by federal funds when federal funds were later cut off), patients have, it seems, no legal recourse. Their right to life does not give them the right to have funds appropriated for their benefit.

Consider, in this regard, the following newspaper report. "A premature baby was denied admittance to a hospital with the special equipment needed to survive because of the hospital's financial policies – and died five hours after birth. ... Tampa General Hospital officials said space was actually available at its facility – but the hospital was under orders ... to admit no new patients to its financially strapped neonatal unit because it is in the process of cutting back the program.... [The hospital director] said that because of financial problems for hospitals statewide, he expects 15 babies in Florida to die every month while waiting for a baby specialty bed to open up." (*St. Louis Post-Dispatch*, p. 14A, Sunday, 5 July 1981).

My examples suggest not only why abortion may be viewed as a refusal to give aid but also which cases of pregnancy constitute samaritan situations. In particular, at least any pregnancy due to rape or contraceptive failure is one in which the pregnant woman is in a samaritan situation. The fetus, in such cases, is like a trespasser against whom precautions were taken. While a fetus cannot, of course, be accused of intentional trespass, it might be compared to a person who strays onto one's property. Lack of intent does not obviate the fact that one's property, in such cases, has been infringed upon. Even though the precautions may have proven ineffective, they do not abrogate the woman's right to refuse to aid the trespasser or someone like the trespasser nor her right to have them expelled.[35] The innocence of the fetus and its right to life give it no more claim to use of the woman's body-property than it did in the actual cases of the men needing the marrow transplants or in the case of the hypothetical person who, without permission, hooks up to a dialysis machine. In each case, the woman's property right to her body,[36] a right that includes essentially the right to exclude others from its *use*, gives her the right to have the unapproved users removed and, since the pregnancy occurred despite precautions, she has the right te refuse to give aid.

Pregnancy, if it has a proper analogue to other medical cases, is

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[35] Seizing another's bodily organs without consent, e.g., if done by a surgeon, counts as aggravated assault under the Model Penal Code. See J. Dukeminier Jr., 'Supplying Organs for Transplantation,' *Michigan Law Review* 68 (1970): 854. If a hospital has the right to determine treatment of unwanted dialysis patients, and if people, in general, have no obligation to donate the use of the body, and if coerced donation counts as aggravated assault, surely a woman has the legal right to "resist" the unwanted fetus.

[36] Cadaver parts are treated, for legal purposes, like property. So it is not unreasonable to say of a living peron that he or she has a propertylike right to, e.g., one's own kidney. "In giving the next of kin possession and control of the corpus, courts have often spoken of these rights as amounting to a property or quasi-property interest.... Therefore, it is likely that most courts would regard the removal of cadaver organs as takings of property" 'Note: Compulsory Removal of Cadaver Organs,' *Columbia Law Review* 69 (1969): 697.

properly compared to being forced to donate one's body parts (including marrow and blood). The law countenances no such enforced donations; even voluntary organ donations have to be carefully overseen. In any case, for a competent adult, voluntary consent is a necessary condition for establishing the permissibility of an organ donation.[37] It might be claimed, against my analogy, that in some cases courts have forced parents to give children required medical treatment, e.g., a blood transfusion, even when it was against the religious principles of the family involved, or forced people to undergo required medical treatments themselves, e.g., vaccinations or sterilization. But the former type of case is not analogous to pregnancy, for in *no* case has a parent (or any other person) been *required* to donate the use of his or her body to a child. The latter cases are not applicable here since the rationale in these cases was that the person's refusal of treatment jeopardized some overriding public interest. (That parents are required by law to, e.g., feed their children is not relevant here since, as I note below, by virtue of accepting the child at birth the parents have clearly assumed responsibility for it. The sort of pregnancies I am considering are those for which responsibility is denied.)

Finally, the *coercion* issue underlines the extreme differences between the abortion case and the case of throwing the tramp off the moving train, since in the latter case no coerced use of a body is at issue. A pregnant woman's refusal to acquiesce to the enforced donation or use of her body constitutes an omission, a straight-

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[37] The legal tangle involved in obtaining consent for organ donations from incompetents and minors is beyond the scope of this paper. A helpful overview of the problems here, including reference to most of the relevant literature, is John A. Robertson's 'Organ Donations by Incompetents and the Substituted Judgment Doctrine,' *Columbia Law Review* 76 (1976): 48–79. The chief consideration seems to be that there be substantial benefit to both donor and donee. However, Robertson observes, "the presence of benefit does not justify nonconsensual intrusion on competent persons. Rather, the determinative factor appears to be consent or choice" (Ibid., p. 56). In at least one case, in fact, organ donation was refused even though it was a life or death situation (see remarks on Lausier v. Pescinski, ibid., p. 53).

forward refusal to give aid.[38] *My claim, in short, is that to forbid abortions is tantamount to forcing pregnant women to donate their bodies (their "facilities") to another person and that this sort of enforced donation is without precedent or support in the law.* The survey of cases above gives no reason to think that the fetus, even if a legal person, is in any better position than the person needing dialysis (or any other scarce medical resource) or the person needing a marrow transplant.

Those who would argue that simply by engaging in sexual activity a woman assumes responsibility (must suffer the consequences) are also mistaken, at least in the legal context (and in the moral, also, as I argue below). For in choosing to let some people make use of a dialysis machine, and under certain circumstances, does not give a right to its use to everyone. If I open my door to let an invited guest in for dinner, must I feed everyone who happens to slip in at that moment? The suggestion that a woman *assumes* responsibility for pregnancy every time she has intercourse is simply absurd. Intercourse is not (or has not been, anyway) a "strict liability" situation. Every time we drive a car we assume the risk of killing or injuring someone. Does this mean that, *no matter* what precautions I take, and *no matter* what the circumstances, I am responsible if, in fact, I do get into an accident

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[38] In the end, whether to see abortion as an omission will depend on how we view the morality of the act. In a much-cited article, George P. Fletcher argues for viewing mercy killings as omissions ('Prolonging Life: Some Legal Considerations,' *Washington Law Review* 42 (1967): 999–1016. The problems here roughly parallel those noted for the abortion case since, e.g., pulling the plug looks, for all world, like an act of comission. Sanders and Dukeminier remark with regard to Fletcher's analysis that his "classification scheme, however, has no compulsion of its own. It is merely part of the syntax of justification. Legal classification should follow, not precede, agreement on the result most likely to maximize community ethical values" ('Medical Advance,' p. 386, fn. 92). Whether abortion is assimilated to the "syntax of justification," i.e., viewed as an omission, is not, then, a straightforward question about what counts as an "omission." My argument has been that there is good legal reason for seeing it as a type of omission, viz., a refusal to acquiesce to an attempted seizure or coerced use of one's body.

and someone is hurt? The knowledge that some consequence is merely a possible result of my action is not, in general, sufficient to make me responsible for that result if it occurs. Indeed, if I have taken all usual and reasonable precautions against just such an eventuality, I will, as a rule, not be held responsible if it occurs. The notion of responsibility that is invoked by people who would hold the woman responsible for *any* pregnancy does not deserve to be taken seriously.[39]

This is not to deny the importance, and the difficulty, involved in deciding just when a woman is to be assigned responsibility. Moreover, even though a woman may have taken all reasonable precautions against becoming pregnant, still, once pregnant, it might be thought that she is liable for any harm done to the fetus. But while there is some reason for holding the woman prima facie liable, I see no reason for assuming that this obligation is absolute. Certainly the pregnant woman, whatever her precautions, is now in a position to help; but my argument has been that, even when life is at stake, being in a position to help does not entail being obligated to do so. For the range of cases suggested above, the pregnant woman is in a samaritan situation and so may refuse to give aid to the fetus-person. The right to life and the innocence of the fetus do not give the fetus the right *not* to be removed from the woman's property and do *not* give it the right to use the body of a woman.[40] And

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[39] A person I knew was stopped at a light in his car in Ankara, Turkey when he was rammed from behind by a truck. The judge held, apparently in accord with Islamic law, that the driver of the car was partially responsible for the accident since if he had not been there, the accident would not have happened. Apart from problems about counterfactuals, unless someone wishes to introduce a similarly attenuated notion of responsibility into American law, there is no good reason for holding that a woman assumes responsibility for the fetus simply by virtue of engaging in sex and despite whatever precautions she takes.

[40] Susan Appleton pointed out to me that I fail to justify abortion in at least one case where abortion might be thought to be desirable, viz., the case where it has been determined that the fetus has some serious defect, despite the voluntary undertaking of the pregnancy.

while the range of abortions permissible under the bad samaritan rule is perhaps a long way from what is wanted by those who favor abortion on demand, the situation I have outlined is also vastly different from that imagined by opponents of abortion.

3.

Even on the assumption that my defense of Regan's first two premises establishes the soundness of his argument, does this argument have any moral significance? That is, one cannot, as a rule, infer what is moral from what is legal. Perhaps my argument does nothing more than bring into fine relief the unfortunate fact that our current legal system does not place the proper value on innocent life in need of aid to remain alive. Hence, one might conclude, my suggestions with regard to the legality of abortion under the assumption that the fetus is a person prove to be beside the moral point.

Regan observes that preserving life is not the highest value that one finds in our legal tradition.

> It might also be suggested that a reasonable American legislature would remember and be swayed by a fact that has somehow been pushed from center stage in my analysis, namely, that a *life* is at stake. This objection depends on a common assumption that preserving life is the highest value in our tradition. But the assumption is either stated too broadly or simply wrong. The equal protection argument I have made about abortion could not be made were it not that in many *other* cases involving potential samaritans our legal system prefers values such as non-subordination and physical integrity to the value of preserving life. It is simply not possible to claim that in our system preserving life takes precedence over everything else.[41]

If this is so, why is it so? I make no claim to describe how our legal system evolved. I wish to ask, in a more purely speculative vein, whether what has been bequeathed to us does, in fact, capture an important moral insight on this point. In doing so, I hope to complete my rebuttal of the three criticisms of Thomson's moral

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[41] Regan, 'Rewriting,' pp. 1635–36.

position which were noted in section 1; (i) the right to property cannot override the right to life; (ii) the property right of the woman to her body and the property right of the fetus to its own body cancel each other out for purposes of moral debate; (iii) the pregnant woman is, in some respect, responsible for the fetus's well-being and so she is not in a genuine samaritan situation.

I have indicated my answers to (ii) and (iii). As to (ii), no use is being claimed of the fetus body, while it in turn is requiring the use of the pregnant woman's body; the right claims are not alike and so do not "cancel out." The fetus's right to life is legitimately overridden when it is removed from the pregnant woman because the fetus had no right to be there in the first place. With regard to (iii) – the claim that the pregnant woman has a responsibility for the fetus – this claim is simply false for the range of cases I have considered. For (iii) entails that the fetus has the right to the enforced donation of the woman's body, but the law does not recognize such a right claim. (I raise the question below with regard to whether or not such rights *ought* to be recognized.) Moreover, if someone maintains that, no matter what precautions are taken, no matter what the circumstances are, that nonetheless once a woman is pregnant, she is responsible for the fetus, then what is needed is an explanation of the very odd notion of responsibility which is being appealed to here. The notion is odd, at the least, because it eliminates any distinction between consequences of my actions for which I am assigned moral responsibility and those for which I may be excused, since I am responsible, on this account, for anything that is a possible result of my action.

The interesting moral issue is whether the right to property can, in the context of moral debate, be plausibly understood as overriding the right to life. An example that has been raised by some legal commentators concerns whether laws which mandated the inter vivos donation of body organs to people would be constitutional.[42] The suggestion has been that such laws are "beyond the pale" of what is legally permissible.

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[42] Ibid., p. 1585.

If we consider what it is we would allow another as having the right to do in and to our own body, the refusal to give, e.g., one's extra kidney, does not seem morally *outre*. We may want to ponder the limits, from a moral point of view, of the right to be a bad samaritan. (See especially Mack, fn. 28.) But in the case of abortion the property at issue is one's body, and if we keep *this* fact squarely in mind, another's right to life does not clearly override my right to keep the integrity of my body that belongs to me. We have no prima facie duty to anyone that we should sacrifice pieces of or the use of ourself (e.g., our blood or marrow) for *that* individual person.

When Thomson, for one, denies that anyone has the right to require that someone else make a substantial sacrifice on another's behalf, she is apt to simply assert that this is so: "nobody is *morally required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, ... in order to keep another person alive."[43] However, moral intuitions on such matters are hardly in accord; John Harris, in fact, attempts to argue for the claim that it is reasonable to expect just such a sacrifice.[44] He poses his case for compulsory organ donation by imagining a "survival lottery," whereby the organ donor is chosen and compelled to donate his or her organs. The guiding moral intuition is this: There ought to be such a lottery because a failure to compel single individuals to donate their organs is to kill the (innocent) individuals who need them.[45] Harris reasons that the beneficiaries of the survival lottery can lay claim to all the values – freedom, security, respect for the individual – which might be brought up as objections to such a lottery. Hence, the core of his argument is that a system of compulsory donation is, *at worst*, no worse than our current policy of nondonation. Harris seems to think that any rejection of the lottery scheme must turn

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[43] Thomson, 'Defense,' p. 18.

[44] John Harris, 'The Survival Lottery,' in *Killing and Letting Die*, ed. B. Steinbock (Englewood Cliffs, N.J.: Prentice-Hall, 1980).

[45] Ibid., p. 150.

on a "moral intuition" that killing is worse than letting die.[46] But Harris, for his part, is skeptical about the ability of this distinction to bear the moral weight and concludes that "it is as well to be clear, however, that there is also a high, perhaps an even higher, price to be paid for the rejection of the scheme.... And we delude ourselves if we suppose that the reason why we reject their plan is that we accept the sixth commandment."[47] A world in which people lived in accord with the dictates of chance necessitated by such a lottery "would not be obviously more barbaric or cruel or immoral than our own."[48]

What is missing from Harris's analysis is the fact that those needing the organs would be taking something – another's body parts – which simply did not belong to them. This gives the person whose body it is at least one right claim which the donee cannot make. To simply declare such parts public property is to skirt and not resolve the difficulty posed by the fact that if a person has a natural right to anything at all, it is a right to his or her body.[49] The right claims of donor and donee are not evenly matched if we view body parts as the property of the individual who naturally has them.

This is still not a positive argument against compulsory donation. However, as the quotes cited above suggest, such rights are part of the classical conception of those rights which a state must

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[46] Ibid., p. 155.

[47] Ibid.

[48] Ibid., p. 152.

[49] Locke remarks that "every Man has a Property right in his own Person. This no Body has any right to but himself" (Book II, Chap. V, S 27. *Second Treatise of Government* in *Two Treatises of Government*, ed. P. Laslett (Revised Edition New York: New American Library, 1965) p. 328). Hobbes states that "as it is necessary for all men that seek peace to lay down certain rights of nature ... so it is necessary for man's life to retain some, as right to govern their own bodies" (*Leviathan*, Part I, Ch. 15, (New York: Library of Liberal Arts, 1958) p. 127). More recently, this view that we have an absolute right to the integrity of our body *qua* property is defended by Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974). See especially fn., p. 179 and p. 328.

respect. Abortion laws have stood as an exception to these rights. But given the other types of refusals to aid which are countenanced, such laws are probably more a consequence of sexism than any concern for the "right to life." In order to justify the use of a woman's body against her will would require a thorough rethinking of the nature and content of the individual's relation to the state.

These considerations suggest why property rights can override the right to life for the cases considered. They also provide a response to the general complaint, made by Finnis, that the pregnant woman's duty not to abort is a "straightforward" consequence of one's ordinary duties to one's neighbors.[50] My argument has been that there certainly is no straightforward duty to surrender oneself to use by another, and it is doubtful whether there is any such duty (even if not "straightforward".) The feeling that there is such a duty on the pregnant woman's part suggests only that certain people find it more plausible that a woman sacrifice her body on behalf of a stranger than most of us would if asked to give up a kidney.

Finally, it is sometimes suggested that the immorality of abortion (or of suicide) resides in the fact that it is "a choice against life."[51] A related suggestion is that the permitting of abortion is the first step down a slippery slope which would involve sanction-

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[50] A counterexample to my claim that we do not have any recognized obligation to donate our body to another's use might be thought to be the military draft. This suggestion is explicitly broached by Finnis (fn. 13, p. 91–92). This apparent counterexample fails for reasons well-stated by Regan: "The woman is being required to aid a specific other individual (the fetus); the draftee is not. Rightly or wrongly, our tradition distinguished between obligations to aid particular individuals and obligations to promote a more broadly based public interest. (This, incidently, is why the draft is only an apparent exception to the bad-samaritan principle. The bad-samaritan principle applies only when aid to specific individuals is in issue.)" Regan, 'Rewriting' p. 1606. An analysis of the full moral implication of Finnis' example and Regan's reply would take me beyond the scope of this paper.

[51] Finnis, 'Reply,' p. 94.

ing the slaughter of cripples, mentally retarded individuals, and any other "social undesirables."[52] Indeed, comparisons of abortion with genocide are favored by opponents of abortion who write on the subject in 'Letters to the Editor.' The intuition here, as I understand it, is that abortion is bound to undermine our respect and value for human life in general, and so society goes sliding down the slippery slope sketched above.

My skepticism with regard to this account of the immorality of abortion concerns the entailment relation assumed to hold between "abortion is morally permissible" and "abortion is a choice against life." If this relation is analytic it is morally trivial, for it depends for its truth only on the literal meaning of the term "abortion" and not the moral implications of the act vis-a-vis a general valuing of life. If the relation between the two statements is said to hold in some morally significant sense, then the relation is synthetic, i.e., a question of fact. In other words, whether abortion constitutes a choice against life, at least with regard to the *morally important* question of whether or not abortion has as a consequence, e.g., undermining respect for life, poses an issue to be settled by empirical investigation (not unlike the question of whether capital punishment deters people from committing murders can only be answered by conducting the appropriate sorts of studies and surveys). Although opponents of abortion are apt to assert that abortion is a choice against life as if it were obviously true that this morally undesirable consequence is entailed, the only consequence, as I have noted above, is one which is morally irrelevant. It is an important question, to be sure, whether permitting abortions does lead to a general devaluing of human life.[53]

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[52] For an illuminating discussion of some of the legal aspects of the interest government can claim in this area see Sonya Meyers Davis, 'The Refusal of Life-Saving Medical Treatment vs. The State's Interest in the Preservation of Life: A Clarification of the Interests at Stake,' *Washington University Law Quarterly* 58 (1980): 85–116.

[53] And, as pointed out to me by Ann Baer, at least one crucial moral difference between abortion justified for the reasons scouted above and what, e.g.,

But it is not a claim for which I have seen any empirical evidence that it is true, and its truth-value is an empirical matter.

One might complain that in importing a legalistic conception of bad samaritanism and of property rights into the abortion debate I am guilty of what Joel Feinberg has called "the Legalistic Mistake," i.e., "posing a moral question using a legal-like term," a practice which "uncritically imports the precision of that term in its strict legal sense, while excluding appeal to the kinds of criteria which alone can decide its use."[54] However, as I argued above, the act-omission distinction in the law is much influenced by our moral intuitions about what ought to be the case. I have not excluded any criteria for establishing this distinction; rather I have attempted to show, from a legal and moral point of view, why certain cases of abortion are extremely plausible candidates for description using the "syntax of justification," which sees certain acts as omissions and so as protected by the bad-samaritan principle. I have, indeed, attempted to follow Feinberg's suggestion that we can gain some insight into the nature of moral rights by looking at our legal rights, the place where our rights are " 'writ large'."[55]

I have not attempted in this essay to indicate just when a pregnant woman ought to be assigned responsibility for a fetus, i.e., just when, under the view I am defending, abortion would or would not be permissible. However, I suggest that a discussion of responsibility might only serve as a red-herring, at least insofar as

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the Nazis advocated, is that no one is now saying that a defective fetus *must* (or necessarily should) be aborted. Abortion is not justified, in other words, on the basis of racial doctrines or some morally reprehensible view that certain lives are just not of any worth. Rather, the problem is how to balance a number of legitimate but conflicting concerns. The assumption that the right to life overrides any other concern seems common but it is mistaken. But to say this is not, certainly, to deny the importance of such rights nor is it to assert that, *if* the fetus has such a right, the right is to be slighted because the fetus is, after all, "only" a fetus.

[54] Joel Feinberg, 'On Being "Morally Speaking a Murderer," ' reprinted in *Ethics*, ed. J. J. Thomson & G. Dworkin (Cambridge: MIT Press, 1968) p. 292.

[55] Ibid., p. 291.

it encouraged one to view a pregnant woman as an isolated or morally special case. The point which I intend my analysis to bring into relief is that the moral relation of a pregnant woman to a fetus is, in fact, just an aspect of the issue of whether, and to what extent, one is *obligated* to help another person. In other words, my claim is that a woman's right to an abortion is defined and delimited by our answer to the question of what rights those needing help have with respect to those who are in a position to help. What I hope to have clarified with regard to the debate on abortion by my arguments is at least this: first, that one's right to life does not, as a rule, override one's property right to one's body, and, in particular, the right to exclude others from the use of one's body/property. Second, insofar as bad samaritanism is countenanced as a legal and moral principle (and it is a legal norm, in any case), we ought not make an exception of pregnant women. I see no justification for making a pregnant woman surrender her body and assume responsibility for someone else's life when most of us seem content with denying that non-pregnant individuals have such a responsibility in analogous situations.

Abortion forces us to focus on issues of first importance. Not the least of these (and one which I have not touched on in this essay) is the question of when a human being is a proper candidate for personhood, i.e., for being granted all rights. Further analogies with the law suggest that we do not acquire our rights "all at once." A woman's right to exert control over what happens in and to her body is not sufficient to justify abortion on demand. But neither does the dubious legal maneuver of granting personhood to the fetus resolve, from a legal or a moral standpoint, the quandaries posed by the abortion issue.

Dept. of Philosophy
University of Missouri
St. Louis, MO 63121
U.S.A.