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INTERCOURSE AND MORAL RESPONSIBILITY
FOR THE FETUS

In her ground-breaking paper on abortion, Judith Jarvis Thomson [3] examines an argument against abortion that strikes a responsive chord with many people. As stage-setting for this argument, she makes the following two assumptions: (1) First, it is assumed that the fetus is a person, that is, has all the basic rights that normal adults do, and, in particular, the right to life. (Neither Thomson nor I believe this assumption is correct, but we may allow it for purposes of examining the argument in question.) (2) Second, it is assumed that the right to life does not entail the right to anything and everything necessary to maintain one's life. Thus, I have a right to life, but this right does not give me the right to use your kidneys if they are necessary to support my life. Similarly, a fetus's right to life does not entail the right to whatever is necessary for its support. For example, to use a case of Donald Regan's, suppose a woman carrying a two week old fetus is discovered to have a terminal disease that will kill her before the fetus reaches a state of independent viability [1]. However, advances of science have made it possible to remove such a fetus and transfer it to the womb of another woman where it would undergo normal development and be delivered as a healthy child. In this particular instance no willing surrogate mother can be found. Despite this, would we say that the fetus has the right to the use of another woman's body, just because it has a right to life — i.e., that another woman may be forcibly conscripted and compelled to serve as host to the fetus until it can survive by itself? Presumably we would not — we do not feel that the fetus's right to life gives it the right to *whatever* resources it needs to sustain that life. We may grant, then, Assumption (2).

With this background, the argument with which we are concerned enters onto the stage. It begins by pointing out that the case of a woman who becomes pregnant in the normal way seems intuitively quite different from the case of the conscriptee into pregnancy just described. We may trace this intuitive difference to the following facts. The normal pregnant woman voluntarily engaged in intercourse, knowing that doing so might result in pregnancy. If she did not want to become pregnant, she took a risk — and lost. Through her action she brought the fetus into existence, brought about its presence inside her, and brought about its dependence on her for continued

life. None of this is true of the conscriptee, who did nothing to bring on her artificial pregnancy, and may have done everything to avoid it. Since the normally pregnant woman is responsible in this sense for her pregnancy, and in particular for the need of the fetus to use her body if it is to survive, it may seem plausible to say that by her acts she has *given* the fetus the right to use her body – something that could not possibly be said of the conscriptee. Since she has given it the right to use her body, it would be wrong of her now to deny it that use by procuring an abortion – just as it would be wrong of me to forcibly take back my lawnmower from you after granting you the right to use it for the afternoon.

Let us call this the *Responsibility Argument* ([3], pp. 57–59). Abstractly characterized, it amounts to the claim that if (A) one person depends on the continued use of another person's body in order to survive, and (B) the second person acted in a manner that brought about this state of affairs, then (C) the second person has thereby transferred the right to the use of his or her body to the dependent person, and would be wrong to deny the dependent person that use. Additional details may of course prove relevant, for example the fact that the second person *knew* that dependence would result from his or her action. We can consider these as the occasion warrants.

Thomson contends that there are at least some cases of natural pregnancy – and perhaps a great many cases – in which the responsibility argument does *not* succeed in showing that abortion would be wrong. Many readers have found her treatment of this argument suggestive but unsatisfactory either because it is insufficiently detailed, or because the analogies she employs to show its failure are inapt. In this paper I propose to examine the Responsibility Argument in greater depth, or more accurately to *begin* that examination, since completion of the task surpasses the limits of the present occasion.

I

Before turning directly to a consideration of the Responsibility Argument, let me clarify some related issues.

First, there is a great deal of debate about the question of whether a woman's having an abortion should properly be considered as 'killing the fetus', or merely as throwing the fetus back on its own (inadequate) resources and so 'allowing the fetus to die'. Many of us have different moral responses to situations that differ only with respect to a death's being brought about by a killing or a letting die, so that it may be important to settle this issue. Which view we ought to accept may depend on the mechanics of the abortion

in question. For example, we may feel that an abortion produced by suctioning out the fetus, whose body is rended limb from limb in the process, is undeniably a killing of that fetus. On the other hand, an abortion produced by merely detaching the fetus from the uterine wall and then discarding its intact body may be much less clearly a case of killing. In this later case we may feel that 'allowing the fetus to die' does not provide an adequate description of what happens, either. Perhaps it would more accurately be called 'discontinuing life support'. But even this category has two subcases that can elicit differential responses. Sometimes we discontinue support by *ceasing to supply it*, as when someone stops giving insulin injections to a comatose diabetic. At other times we discontinue support by *removing the dependent person from the supply*, as when we disconnect someone from a respirator. Many people feel the second of these is morally worse than the first, and it seems clear that abortion must fall into this category. However, there is no universal agreement that removing a person from a life-support source counts as *killing* that person. Until we have a better account of the nature of these distinctions, and why they are important (if indeed they are), I believe it is better to steer clear of them, and I shall try to do so in what follows.

Second, it may be important that in the case of abortion we are talking about a person who needs the continued use of another person's *body* in order to live. There are many cases in which one person needs continued use of the personal possession of some other person in order to live – for example, his medicine, or his shelter, or his food – but not his body *per se*. Since we tend to feel that the body deserves special moral protection beyond that needed for mere material possessions, it may be that what is necessary in order to give away the right to one's material possession, such as a medication. Hence wherever possible I try to construct parallel examples involving the use of bodies rather than other possessions.

Third, it is not clear to me (despite Thomson's first background assumption stated before) that success of the Responsibility Argument turns on the dependent party's being a *person*, i.e., a being with initial basic rights of its own, and in particular a right to life. Our concern is whether or not certain activities of the prospective mother amount to giving the fetus a right, and it may well be that one can give or transfer rights to creatures who would otherwise have none of their own. For example, if I leave a will in which I stipulate that the income from my estate is to be used for the maintenance of my twenty-six cats, it seems to me that I have *given* the cats the right to this use of that income, even though cats may have no

natural rights of their own. Hence the Responsibility Argument *may* be important both for people who believe that fetuses are persons, and also for people such as myself who believe they are not.

Fourth, it needs to be pointed out that the dilemma raised by abortion is not a dilemma involving a *simple* conflict between a woman's right to bodily integrity and a fetus's right to life. Many conservative arguments against abortion assume that the dilemma is of this simple nature, assert with great plausibility that the right to life is stronger than the right to bodily integrity, and so conclude that abortion is always wrong. But to see a genuine case involving a *simple* conflict between two rights, we must look elsewhere. For a relevant example, consider Jones, the driver of a subway train. Jones' train is rounding a bend, on the other side of which the tracks fork and he must steer either right or left. To his horror, as he comes round the bend Jones sees the bodies of two unconscious persons lying on the tracks (flung there perhaps by an automobile accident), one on the left track and one on the right. He cannot stop the train in time to avoid hitting one of these persons. If he steers right, the person lying on that track will be killed. If he steers left, the other person (whose body is halfway off the track) will merely suffer bodily injury equivalent to that typically undergone by a woman during pregnancy and labor: several weeks of nausea, recurrent backaches, hemorrhoids, constipation, insomnia, loss of balance, leg cramps, extreme urgency of urination, discomfort during sexual intercourse, followed finally by a substantial period of severe abdominal pain. Whichever way he steers, Jones will breach a person's right, but if we ask which right it is better to breach in this situation, the answer is clearly that it is better to breach the second person's right to bodily integrity than the first person's right to life. Here the two rights are in simple conflict. Their relative priority, and the import of that priority for the decision that ought to be made, are clearcut. But in the case of pregnancy, the woman's right and the fetus's (supposed) right are *not* in such simple conflict — the rights are related to each other in a much more intimate fashion, and that fact prevents us from interpreting the problem according to the simple model provided by the subway train case. It is for this reason that it is so important to grasp the second assumption Thomson makes, namely the assumption that a right to life does not entail the right to anything and everything necessary to sustain that life.

II

In this paper I shall restrict myself to the following three questions:

- (I) If (A) one person depends on the continued use of another person's body in order to survive, and (B) the second person acted in a manner that brought about this state of affairs, has the second person thereby *waived* her right to the use of her body in favor of the first person?
- (II) Even if a woman has not explicitly waived her right to the use of her body in favor of the fetus, may the state legitimately *stipulate* that engaging in intercourse counts for legal purposes as waiving one's right?
- (III) If a person has waived her right to the use of her body in favor of another person in the manner described in Question (I), what is the *scope* of that waiver?

There are many ways to lose or transfer a right besides waiving it. For example, a felon *forfeits* (but does not waive) his right to vote, and his right not to be incarcerated; and I *lose* (but do not waive) my right to my land if the government claims it under eminent domain. In this paper I shall concentrate on the question of *waiver* alone. This means that our results will necessarily be limited. If we discover that few or no women *waive* the right to their body in favor of the fetus by engaging in intercourse, we will still not know whether or not they lose that right in some other fashion when they engage in intercourse. Hence we will not be able to conclude decisively that the Responsibility Argument is unsuccessful. However, our answer to the question about waiver may place us in a better position to carry forward the enquiry into other possible forms of loss.

To *waive* a right is to *voluntarily relinquish* it. Hence a pregnant woman has waived her right to the use of her body in favor of the fetus only if she has voluntarily given up that right in favor of the fetus. Thomson assumes this can never happen. She says, "I suppose we may take it as a datum that in the case of pregnancy due to rape the mother has not given the unborn person a right to the use of her body for food and shelter. Indeed, in what pregnancy could it be supposed that the mother has given the unborn person such a right? It is not as if there were unborn persons drifting about the world, to whom a woman who wants a child says 'I invite you in'" ([3], p. 57). Evidently Thomson supposes that I cannot give something (including a right) to someone — or waive my right in favor of that person — unless

the person actually exists at the time of the gift or waiver. This seems wrong. Clearly, I can place a piece of jewelry in a safe deposit box as a gift for my children, or write a will leaving my estate to them, even though at the time of these acts I have no children (and am not pregnant). Of course the gift is not completed until it is received, and that requires the existence of the recipient. But I have done everything I am required to do in order to make a gift at the time I place the jewelry in the safe deposit box or sign my will. Hence Thomson's own reason for thinking that a woman cannot waive the right to the use of her body in favor of a presently nonexistent fetus seems spurious.

To determine whether or not a woman engaging in intercourse can, or does, thereby waive the right to her body in favor of the fetus, we must look more closely at the concept of waiving a right. What is it about an act that accomplishes a waiver of right, that makes it true that the agent voluntarily relinquishes her right? One possible account might be the following:

- (i) A person, *S*, voluntarily relinquishes a right to *X* in favor of a second person, *T*, just in case *S* voluntarily performs an act, *A*, and *A* results in *T*'s breach of *S*'s right.

I shall use the term 'breach' to denote an act that is contrary to a right, but shall leave it open what the moral status of that act is. Thus if I cause your death, I breach your right to life. If the breach is justified (e.g., I must kill you in self-defense), I shall say that the right is *overridden*. If the breach is unjustified (e.g., I kill you in the course of robbing you), I shall say that the right is *violated*. According to Account (i), if a woman voluntarily engages in intercourse, becomes pregnant, and so causes the fetus to breach the woman's right to the exclusive use of her body, then the woman has voluntarily relinquished her right in favor of the fetus by engaging in intercourse. It does not matter what the woman's *state of mind* was at the time of intercourse. Her ignorance that intercourse might result in pregnancy, or her desire not to become pregnant, is wholly immaterial to the question of whether she waives her right.

It is clear on very little reflection that Account (i) does not provide a plausible analysis of what it is to voluntarily relinquish a right. To voluntarily perform an act that happens to have a certain upshot is not to voluntarily cause that upshot. For example, to voluntarily pull the trigger of my shotgun is loaded. On Account (i), we would have to say that I voluntarily relinquish my right to vote in favor of my neighbor if I ridicule his favorite candidate

and so induce him to slash the tires of my car and prevent me from voting on election day. Clearly my behavior does *not* constitute a *waiver* of my right to vote, even though it results in my *inability* to exercise my right.

This may suggest that in order to waive a right, one needs not only to perform certain actions voluntarily, but also to have a certain mental attitude toward the right that is affected by the performance of those actions. Thus we might be tempted by the following analysis:

- (ii) A person, *S*, voluntarily relinquishes a right to *X* in favor of a second person, *T*, just in case
- (a) *S* voluntarily performs an act, *A*,
 - (b) *A* results in *T*'s breach of *S*'s right,
 - (c) *S* believed *A* would or might have this result, and
 - (d) *S* was willing that *A* have this result.

On this second view, a woman who voluntarily engages in intercourse, but does not understand the biological connection between intercourse and pregnancy, does not thereby waive her right to the use of her body in favor of the fetus. However, a woman who voluntarily engages in intercourse knowing that it may result in pregnancy, and being willing that this should happen, thereby waives her right in favor of the fetus. Such a view is significantly more plausible than the first account, and I suspect many people suppose it to be true. Indeed, something like this follows directly from the very popular view about rights advocated most prominently by Michael Tooley.¹ According to this view, one person violates another person's right to *X* only if the right-holder *desires X*. If the right-holder does not desire *X* — i.e., is willing to lose *X* — then no one who removes *X* can violate his right. In effect such a right-holder waives his right.

However attractive account (ii) may be, it still falls short of the truth. Just as losing my *car* is different from losing my *right* to my car, so *wanting to lose my car* is distinct from *wanting to lose my right to my car*. And it is the desire to lose my right, not the desire to lose my car, that seems relevant to the question of my waiving my right to my car. In other words, I must want not just that my right to the car be *breached*, but that my right to it be *lost*. I must desire a change in my moral status vis-à-vis the car, not just a change in my physical possession of the car. To see this, consider the following example. I am an under-cover policewoman who desires to apprehend and bring to justice a certain notorious purse snatcher. To this end I slowly stroll along streets he is known to frequent, positioning my purse

for easy snatchability. I succeed; he steals the purse. According to Account (ii), my behavior and mental state constitute a waiver of my right to my purse in his favor — in other words, he does no wrong in taking it, because I have in effect given it to him. But clearly this is incorrect. I want him to take it precisely because his doing so will be illegal and so enable me to charge him with theft. He cannot defend himself in court by claiming that the purse was already his when he relieved me of it, since I wanted him to take it. Of course what is illegal and what is immoral are sometimes distinct, but I think none of us suppose I have given him the *moral* right to my purse any more than I have given him the *legal* right to it. Hence Account (ii) must be rejected.

This suggests a third, and for our purposes, final account:

- (iii) A person, *S*, voluntarily relinquishes a right to *X* in favor of a second person, *T*, just in case *S* wants
- (a) that *S* lose her right to *X*, and
 - (b) that *T* gains the right to *X*.

On this view, a woman waives her right to the use of her body in favor of a fetus just in case she explicitly wants her right to be transferred to the fetus. Merely having intercourse, even knowing that this may result in pregnancy and even being willing for this to happen, does not constitute waiver of one's right to one's body in favor of the fetus. Hence the answer to the first question I posed at the beginning of this Section is 'no': the Responsibility Argument does not establish that a pregnant woman has *ipso facto* waived, and therefore given away, the right to the use of her body. Possibly there are *some* women who do waive their rights in the manner required by Account (ii). But I suspect there are rather few. Hence if the Responsibility Argument is to succeed in showing that a pregnant woman, even a willing one, has transferred her right to the fetus, it must be through some other form of gift than waiver, at least in the vast preponderance of cases.

III

If I waive my right to the use of my car in favor of someone else, then he does me no wrong — he acts within *his* rights — if he uses the car. But if he uses my car without *knowing* that I have waived my right in his favor, then he is blameworthy for his act, since he acts in the belief that he is violating my right. And if society takes upon itself the task of enforcing

my rights, and it also does not know I have waived my right in his favor, then society has reason to compel him to cease using the car. Since, on Account (iii), my waiving my right is brought about by a mental state of mine, to which only I have privileged access, there is a strong probability that persons in whose favor I waive a right and society in general will rarely be able to tell whether or not I have waived that right. To avoid resulting inconvenience to the smooth regulation of interpersonal affairs, we commonly employ certain external modes of behavior as signals of our internal states. Thus I may say to someone, "I hereby waive my right to use my car in your favor", or more commonly, "You may use my car this afternoon", and such statements serve as evidence that I waive my right in his favor.

However, if these statements merely functioned as *evidence* of my waiver, other persons would still be in a difficult position, since I could always claim later that I didn't want to transfer my right, despite what I said. And no one could dispute my word. For this reason society may legitimately stipulate that certain kinds of behavior simply *count*, legally speaking, as a waiver of my right — *whatever* my accompanying mental state. Thus society might hold that anyone who has signed a consent form to a surgical operation has thereby waived his right not to be physically touched by the surgeon, provided the patient understands (or should understand) the content and the legal effect of the form. Under such a system, the patient could not subsequently sue the surgeon for assault by claiming that he *mentally* withheld consent when signing the form.

In view of this we might ask whether society could stipulate that voluntarily engaging in intercourse (at least with the knowledge that doing so may lead to pregnancy) counts, legally speaking, as waiver of one's right to the use of one's body in favor of a fetus who is conceived thereby. If such a stipulation would be legitimate, then it could be argued that a society which so stipulated could justifiably make abortion illegal for any woman who understands the biological connection between intercourse and pregnancy, and who is not pregnant as a result of rape. Such a woman would have legally waived her right in favor of the fetus, and would no longer have the right to evict the fetus as a 'trespasser'.

However, reflection suggests that it would not be legitimate for any society to make this stipulation. Not just *any* act can be designated as a legally binding sign of waiver. In particular, society cannot designate an act as a sign of waiver if failure to perform that act would be *independently costly* to the agent. Designating such an act as waiver would amount to *coercing* the agent to waive her right. For example, no society may say

that failure to pay \$500 to the Registrar on election day shall count as a waiver of one's right to vote. Such a scheme would impose a heavy cost on anyone who wishes to retain his right to vote, and so is coercive in effect. Presumably the right to vote is a right that society may not coerce its citizens to give up, and similarly the right to the exclusive use of one's body is a right that society may not coerce its citizens into giving up in favor of other individuals. (At least this is true except in extreme national emergencies.) On the scheme under consideration, in order for a woman to retain her right to the use of her body, she would have to abstain from intercourse, since engaging in intercourse would count as waiving this right. But abstinence from intercourse is extremely costly for most people. Indeed, it may not be wholly under voluntary control ([1], pp. 1594–1595). Hence designating sexual intercourse as a legally binding sign of waiver would amount to society's coercing women into giving up their exclusive rights to their bodies. Such coercion is surely illegitimate. We can conclude that no society may stipulate that a woman who voluntarily engages in intercourse has thereby, from a legal point of view, waived her right to the use of her body in favor of the fetus.

The foregoing argument rests on the implicit assumption that contraceptive measures are not available. As things now stand, of course, such measures *are* available, and the argument must take this into account. Could the state legitimately stipulate that sexual intercourse *without* the use of contraceptives counts as a waiver of one's rights in favor of the fetus? If the use of contraceptives were cost-free, or virtually so, then in terms of the foregoing argument it would appear that the state could make this stipulation. But in the present state of affairs, this is not the case. All contraceptives cost money. The most effective ones (the Pill and the IUD) carry substantial health risks. Other less effective contraceptives, such as diaphragms, foams, and condoms, are found by many couples to interfere with the spontaneity and pleasure of intercourse itself. Any form of contraceptive may be contrary to the religious views of some segments in the population. Thus the use of contraceptives is not cost-free for a great many people. To settle our question decisively, we would have to determine what *level* of cost may legitimately be imposed by the state on the refusal to waive one's right. But I am inclined to think that the use of contraceptives imposes a high enough cost on a large enough segment of the population so that the only acceptable uniform policy is one which does *not* stipulate that intercourse without benefit of contraceptives counts as a waiver of one's rights.

IV

I have now argued that a woman does not waive her moral right to the use of her body merely by engaging in intercourse, even if she knows that pregnancy may result, and is willing for this to happen. To waive a moral right, one must want that right to be lost, not just want it to be breached. I have also argued that no society may legitimately stipulate that engaging in voluntary intercourse counts as a legally binding waiver of one's right to the use of one's body.

It is difficult to know how many women actually waive the moral right to the use of their bodies in favor of the fetus. Possibly none do, but perhaps there are some. It is with regard to these women (assuming they exist) that we may now turn to our third question: what is the *scope* of their waiver? How *much* is such a woman obliged to do for the fetus, or to allow it to do to her body? In particular: if she discovers after conception that pregnancy threatens to end her life or seriously impair her health (although the fetus would survive), is she obliged to let the pregnancy continue? Shall we say "She waived her right in favor of the fetus, and now cannot change her mind; she must not end the pregnancy even though it threatens her life or health", just as we would say of someone who sets up an irrevocable trust in favor of his child, and then discovers he faces financial ruin without those funds, "He gave the money to the child, and now cannot change his mind; he cannot take the money from the trust even though leaving it there threatens his financial future"?

To decide what the scope of the pregnant woman's waiver is in these circumstances, we must first distinguish four different types of case.

- (A) At the time of intercourse, the woman believed there was no genuine risk of the threat in question, and waived her right on that understanding.
- (B) At the time of intercourse, the woman did not consider the question of whether or not pregnancy might constitute a threat to her life or health, and waived her right in that mental state.
- (C) At the time of intercourse, the woman believed pregnancy might endanger her life or health, and waived her right only on condition that it does not, reserving the right to withdraw use of her body from the fetus if her life or health should be endangered.
- (D) At the time of intercourse, the woman believed pregnancy might endanger her life or health, and waived her right even in that event.

It may be difficult to imagine a woman, about to engage in intercourse, explicitly waiving her right in favor of the fetus. It may help us therefore, in considering the question before us, to consider at the same time what we would say in parallel cases where explicit waiver of right is easier to visualize. One such case would be that of a woman who formally contracts with a couple to serve as a surrogate womb for a fetus conceived by them but which they are unable to carry to term. Another such case would be that of a person who contracts to donate an organ (for example a kidney or quantity of bone marrow) to someone who needs such an organ transplant to sustain life. In both of these parallel cases the performance of the contracted action may pose an unexpected danger to the contractor's life or health. The surrogate mother is of course subject to all the physiological hazards that may imperil a natural mother, and the removal of a donor's organ may prove risky for unforeseen reasons. In such an event, what would we say — that the surrogate mother and the organ donor must fulfill their contracts nonetheless, or that they may legitimately back out? Clearly the answer to this question may depend on what understanding of the risk was entertained by the contractor, such as those detailed in the above four possibilities.

Returning to the naturally pregnant woman, it seems clear that if she may waive the right to her body at all, she may certainly waive it conditionally or in the qualified fashion described in Case (C) above. In such a case, she has certainly not granted the fetus a right to use her body in a manner that endangers her life or health. Hence she is not required by the 'terms' of her waiver to permit the pregnancy to continue when it does endanger her. Similarly, a woman who agreed to serve as surrogate womb for a fetus only on the condition that her life is not thereby endangered would not be obliged by the terms of her contract with the biological parents to allow the pregnancy to continue when a life-threatening condition arises. I think one could argue successfully that natural mothers caught in cases of types (A) and (B) also need not continue their pregnancies. But a case of type (D) is more difficult, since there the woman explicitly *does* grant the fetus the right to use her body even if its doing so endangers her life or health. Must we conclude, therefore, that such a woman cannot legitimately end her pregnancy when the contemplated threat materializes?

In answering this question, the first point we must be clear about is the fact that a waiver of one's future rights is like a promise: it establishes a *presumption* that one ought to allow the future breach to occur, but it does not show that one ought *all things considered* to allow the breach. For example, suppose a man of heroic impulses promises a distraught stranger

to rescue her pet dog, even if it should cost his own life. The dog has been swept away in the icy currents of a flooding river, and the hero swims out with a thin rope to tie around the dog so that it may be pulled to shore by its owner. But as he gets farther out, he sees clearly that although he will be able to reach the dog and tie the rope around it, thus ensuring its survival, by then he will be so exhausted that he himself will be unable to swim back. The rope is not strong enough to pull him in. Certain death stares him in the face if he completes the rescue. No doubt his promise establishes a *presumption* that he ought to swim on nonetheless, but no one would say that all things considered he *must* do so — even though his own self interest is the only consideration that militates against his doing so. It is morally permissible for him to break his promise, and leave the dog to its fate. From this case we may conclude that the *mere* fact that a woman in a case of type (D) waives her right to the use of her body in favor of the fetus does not by itself show that she must, all things considered, allow the fetus to use her body in a way that imperils her life or seriously threatens her health.

But what distinguishes cases in which the person *must* all things considered allow the granted right to be breached (or must fulfill the promise) from cases in which this is *not* morally required? Perhaps the most obvious suggestion here is that what ought, all things considered, to be done depends on the *relative value* to the two concerned parties of performance versus non-performance. In the case of the hero's promise to rescue the dog, the rescue has moderate value to the dog's owner (and considered in itself as prevention of death to an animal). But the rescue has great negative value for the hero — he will die as a result. Since the disvalue to the hero is radically greater than the value to the dog's owner, we find on balance that the hero need not fulfill his promise.

In the case of the naturally pregnant woman, the disvalue of continuing the pregnancy is extremely high — she will die, or her health will be seriously impaired. On the other hand, the disvalue to the fetus of terminating the pregnancy seems equally high — it will certainly die if aborted, whereas it would live if not. We may be inclined to say that where the stakes are equal, as they apparently are in this case, the fact of the promise (or the waiver of right) tips the balance in favor of the person to whom the promise was made or in whose favor the right was waived.

However, it is not clear that this principle is correct. Such a situation is created when one person contracts to donate an organ to another person who will die without a transplant, and it is then discovered that the donor himself would lose his life if the organ is removed. The stakes for either party

are equally high in such a case, and yet I am inclined to say that the prospective donor need not carry through as promised. It may be that a certain level of self-sacrifice is not morally required, even to fulfill a promise where the stakes are equally high for the other person.

The details of such a case may make a difference. For example, suppose that when the person who requires a new organ advertised for donors, several suitable prospective donors presented themselves. Smith is chosen and signs the contract, stipulating willingness to donate the organ even if his life should be endangered thereby. It is then discovered that indeed his life will be imperiled by the donation. Meanwhile the other possible donors have unfortunately disappeared. May Smith back out of his contract in this situation? I am somewhat less inclined to say that he may than I was in the previous case that involved no other prospective donors — largely, I suspect, because Smith's agreeing to donate the organ and then backing out would leave the transplant candidate *worse off* than he would have been if Smith had never signed the contract in the first place. The transplant candidate is worse off because if Smith had never signed, another donor could easily have been found and the transplant would have gone through, whereas now no other donors are available, and if Smith backs out the transplant candidate must die. But even so I am reluctant to say that Smith is morally obliged to donate his organ at the cost of his own life.

Thus even if the stakes are equal for both parties to the dispute, it is unclear that the naturally pregnant woman in a case of type (D) is obliged, all things considered, to allow the pregnancy to continue when it is discovered that doing so will cost her her life. (And I suspect we would arrive at the same result in the case where the stakes are not so apparently equal, i.e., a case in which abortion would kill the fetus but merely prevent serious impairment of the woman's health.) However, I believe that it is incorrect to see such a case as one in which the stakes are equal for both parties. Of course it *appears* they are: both the woman and the fetus stand to live or die, depending on which decision is made. But this fact only shows the stakes to be equal if life and death are of equal value and disvalue to the two parties. And this does not seem to be so. To settle the question decisively we would have to have a compelling account of *why* (and when) life is a good and death an evil. Debate on this question goes back at least to the Epicureans, who claimed (without convincing anyone) that death could not be an evil to the person who dies [2]. I do not believe we have a fully satisfactory account of why death is an evil and life a good, but it seems to me that the centerpiece of such an account must be the thesis that life is a good,

and death an evil, to a presently existing person insofar as that person presently has the desire to go on living, and has projects and plans that will be frustrated if his or her life is cut short. According to such an account, life is clearly a good and death an evil for normal adults, including most pregnant women. But the account does *not* imply that life is a good and death an evil to a fetus, or at least an early fetus. For a fetus has no cognitive desire to live (although like all organisms it may physiologically resist death), and it certainly has no plans or projects that would be frustrated if its life were cut short. Of course, if the fetus survives, there will be a person some years from now whose life is (probably) valuable to him or her. But this fact does not show that it is in the interests of the fetus *now* — the *present* person — that such a life exist. So far as I can see, it is all one to the fetus whether someone genetically identical with him will exist and be happy in the future, or someone genetically distinct from him, or no one at all. Nothing in which *he* is concerned rides on the issue. From this point of view it appears that future life is not a good to the present fetus, and death not an evil. And it follows from this that the stakes are not equal in the case we are considering: the pregnant woman has a great deal to lose by dying, but the fetus has very little. Hence the case is more like that of the hero who promises to rescue the dog than it is like the case of the organ donor whose organ is the only hope of survival for the transplant candidate. Hence even if we had said, as we did not, that the organ donor must fulfill his contract, we need not say this of the pregnant woman whose life is endangered. The harm to her in dying is far greater than the harm to the fetus in dying.

It might be protested that the case of the naturally pregnant woman is really more like that of the donor who agrees to make the donation, thereby making other prospective donors unavailable, and then wants to back out of his contract. For the woman in getting pregnant and then withdrawing the right to use her body from the fetus has made the fetus *worse off* than it would have been if she had never granted it the right in the first place — for then it would never have been conceived, and so not need to die. But this seems a mistake. It is not at all clear that the fetus is worse off by being conceived and then aborted than it would be never having lived at all ([1], p. 1599). If the abortion is early, the fetus has no sentient existence at all. If the abortion is late term, then the fetus may feel pain during the process, although that pain can hardly be compared with the sort of pain fully mature human beings feel. Perhaps a painful existence is worse than no existence at all. But then (if Freud is right) the fetus may experience pleasure during

its uterine life as well, and perhaps the pleasure balances out the pain. In reality these are imponderables. The main point is that the pain to the fetus (if any) is not nearly so great a disvalue to it as losing her life is to the woman. Even if her total course of action makes the fetus marginally worse off, I do not think this is enough to show that she may not discontinue the pregnancy in order to save her life.

V

According to the Responsibility Argument, if one person depends on the continued use of another person's body in order to survive, and the second person acted in a manner that brought about this state of affairs, then the second person has thereby transferred the right to the use of her body to the dependent person, and would be wrong to deny the dependent person that use. I have argued that these circumstances fail to show that the second person has *waived* the right to the use of her body in favor of the dependent person, even if we assume the second person wanted the breach of her right to occur, and even if she knew that it would occur if she acted in the manner described. The only hope for the Responsibility Argument to succeed, then, is if it can be shown that a person who acts in this manner loses her right in some other fashion than by waiving it. I have also argued that no society can legitimately stipulate that engaging in intercourse counts as legally waiving the right to one's body in favor of the fetus, since doing so would amount to coercing women to renounce their rights. In the last section I have argued further than even if a woman explicitly waives her right in favor of a fetus on the recognition that her life could be endangered thereby, nevertheless she is not obliged, all things considered, to allow the pregnancy to continue if the threat to her life materializes. We may break a promise or fail to allow a previously granted breach of our right when we stand to lose our life, and when the stake for the other party is less extreme. And I have argued that death is less of an evil to the fetus than it is to the woman who carries the fetus.

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NOTE

¹ See, for example, [4]. In this and subsequent versions of his argument, Tooley qualifies his view in various ways that are immaterial to the point made in the text. He does not actually discuss the notion of *waiver*.

BIBLIOGRAPHY

1. Regan, D. H.: 1979, 'Rewriting *Roe v. Wade*', *Michigan Law Review* 77, 1569–1646.
2. Silverstein, H. S.: 1980, 'The Evil of Death', *The Journal of Philosophy* 77, 401–423.
3. Thomson, J. J.: 1971, 'A Defense of Abortion', *Philosophy and Public Affairs* 1, 47–66.
4. Tooley, M.: 1972, 'Abortion and Infanticide', *Philosophy and Public Affairs* 2, 44–45.