CHAPTER 4

Abortion and the Right to Not Be Pregnant

James Edwin Mahon

In his 1979 article 'The Ethics of Abortion', and in the two chapters 'Abortion' and 'Defences of Abortion' from his 1984 book, *An Introduction to Practical Ethics*, Joseph Mahon mounts an argument against abortion and criticizes several defences of abortion, including that of Judith Jarvis Thomson.[1] In this essay I am concerned with Mahon's argument against abortion, Thomson's defence of abortion, and Mahon's criticisms of her defence. I reject his argument, and I defend Thomson from his criticisms.[2] Although I highlight two problems with her argument, I conclude by offering remedies for these problems.

1 Practical Ethics and 'A Defense of Abortion'

Judith Jarvis Thomson's 'A Defense of Abortion' was published in the very first issue of the journal *Philosophy & Public Affairs,* in 1971. The article that immediately followed it was 'Understanding the Abortion Argument', by Roger Wertheimer (1971). The third issue of the journal contained a response to Thomson by Baruch Brody (1972), 'Thomson on Abortion'. The fifth issue of the journal contained the article 'Abortion

J.E. Mahon
Department of Philosophy, CUNY-Lehman College, Bronx, NY, USA

A. Fives, K. Breen (eds.), *Philosophy and Political Engagement*,
DOI 10.1057/978-1-137-44587-2_4

and Infanticide', by Michael Tooley (1972). The sixth issue of the journal contained another response to Thomson by John Finnis (1973), 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson', as well as a response to Finnis from Thomson (1973), 'Rights and Deaths'.

It is not an exaggeration to say that the journal put the topic of abortion on the philosophical map and that Thomson's article did more than any other article, before it or since, to energize philosophical debate about abortion.[3] As Mahon says in introducing Thomson's argument, 'This paper has occasioned a large volume of discussion among professional philosophers, and is regarded as one of the best things yet written on this subject' (1984, p. 107). When James Rachels published the first edition of his important anthology of practical or applied ethics, *Moral Problems*, in 1975, he included Thomson's article. That book went on to sell 100,000 copies, in over three editions. Thomson's article remains one of the most reprinted philosophy articles of all time (Parent 1986).

Philosophy & Public Affairs was the official journal of the Society for Philosophy and Public Affairs. In his 1975 article 'Philosophy and Public Matters', Mahon points out that 'some North Americans engaged professionally in philosophy saw the need for a Society for Philosophy and Public Affairs (originally the Society for Philosophy and Public Policy), founded in May 1969 by Sidney Morgenbesser, Thomas Nagel, and others' (Mahon 1975, p. 7). Mahon returns to the subject of this society and their statement of purpose in 'The Emergence of Practical Ethics', the first chapter of *An Introduction to Practical Ethics*, where he says that 'The third area of ethics, and that which forms the subject area of this book, is that which, following the example of the young Australian philosopher, Peter Singer, I have called "practical ethics"', and which 'is a relatively recent phenomenon, and again one that is notably American in origin and practice' (Mahon 1984, pp. 12–13). The emergence of practical ethics in the late 1960s and early 1970s, Mahon says, had three causes. First, it was a reaction to the moral philosophy that had preceded it, which was dominated by metaethics and which was 'highly theoretical and abstract, rarely if ever concerning itself with real social and moral issues' (Mahon 1984, p. 16). Second, it was a reaction to the USA's involvement in the Vietnam War, which led to people questioning other 'issues of a practical and moral nature'. And, finally, it 'was a response, and the only decent response, to a widespread call for "involvement"' in the 1960s (Mahon 1984, p. 17).

What Mahon says here is correct and is repeated by Thomson (2013) herself in her autobiographical account of that time, 'How It Was'. But

there is more to the story of the emergence of the topic of abortion, in particular, at this time. The original 'mission statement' of the Society for Philosophy and Public Affairs did not even mention the topic of abortion:

> The subject is not political philosophy or ethics in the abstract but rather concrete contemporary problems like conscription, police power, methods and occasions of warfare, treatment of individuals charged with crimes, population control, compensation for social disadvantages, eugenics, and so forth (quoted in Thomson 2013, pp. 49–50).

While Mahon is right in saying, in the chapter 'Abortion', that 'when philosophy, and especially ethics, became "practical" in the late 60s, one of the first issues to be scrutinized was abortion' (Mahon 1984, p. 88), it is at least arguable that this was in part due to the then current debate in the USA over the legalization of abortion. The case of *Roe v. Wade* first reached the US Supreme Court in 1970, although it was not decided until 1973, after the court had met a second time. At the time of her writing, in 1971, abortion was still prohibited in most states in the USA. As Thomson says:

> in most states in this country women are compelled by law to be not merely Minimally Decent Samaritans, but Good Samaritans to unborn persons inside them … it does show that there is a gross injustice in the existing state of the law (Thomson 1971, p. 63).

When Ronald Dworkin anthologized Thomson's article in his collection, *The Philosophy of Law*, it was introduced as one of the essays that discussed 'issues of political philosophy that the United States Supreme Court has recently had to consider' (Dworkin 1977, p. 13). Thomson's own gloss on this is as follows

> Philosophers interested in ethics began publishing papers on topics that the standard philosophy journals had never published papers on before – we wrote on topics such as abortion, just war, the right to privacy, self-defense, and affirmative action and preferential hiring and the rights of women and minorities more generally. It was remarkable! Much of that material was first published in *Philosophy and Public Affairs*, which was founded by Marshall Cohen in 1971: it invited lawyers and political theorists to join moral philosophers in dealing with concrete moral issues and was an immediate success (Thomson 2013, p. 55).

Thomson's article was not merely groundbreaking because it addressed, with great philosophical sophistication, the topic of abortion—a topic that, more than 40 years later, continues to overshadow many important US Supreme Court cases.[4] It was also groundbreaking in terms of what it did for women. As N. Ann Davis has pointed out, the article was more instrumental than even John Rawls's *A Theory of Justice*, also published in 1971, in drawing more women into the growing philosophy and public affairs movement:

> The philosophy and public affairs movement did not begin with the publication of ADA ['A Defense of Abortion']. It already had roots, sources, and sustainers. But the publication of ADA helped expand its base. The reception of Thomson's article was no doubt affected by the recent publication of John Rawls's *A Theory of Justice*, which gave philosophers with interests in social and moral issues both the incentive to undertake serious work in moral and political theory, and an inspiring model of how work in that portion of philosophy could be both theoretically powerful and normatively rich. Nevertheless, it was the publication of ADA that provided the true catalyst in many cases: the spark that fused students' passionate interest in philosophy with the belief that the discipline might have a place for them, and the conviction that they might have something important to contribute to it. This was especially true, I think, for students of philosophy who were women. Thomson's work helped sustain both their self-esteem and their commitment through even the most difficult phases of graduate study (Davis 2001, pp. 85–86).

As Davis adds in a footnote: 'Within two weeks of the article's arrival in the library, every one of the female graduate students in philosophy had read it' (Davis 2001, p. 95, n. 5).

Thomson's article did more than draw women into the growing philosophy and public affairs movement. As Davis (2001, p. 85) says, 'Its style, too, was revolutionary'. It was not merely that Thomson argued for conclusions on the basis of moral intuitions about striking examples. All of these examples were also presented to readers in the form of a second-personal address:

> By casting her central example – the notorious, unconscious violinist – in the second person, Thomson showed philosophers that there was a viable alternative to the disengaged stance of the philosophical analyst, one that helped strengthen individual philosophers' convictions that they could – and should – be involved in social issues as committed participants, not merely as neutral observers or analysts (Davis 2001, p. 85).

Indeed, Thomson is responsible for what is surely one of the most famous sentences in all of moral philosophy: 'You wake up in the morning and find yourself back to back in bed with an unconscious violinist' (Thomson 1971, p. 113).

This revolution in style was extremely important because 'the topic of abortion' was one that 'had been tainted by people's (generally unvoiced) moralistic assumptions about sex and sexuality, and by their dismissive characterization of it as a "woman's problem"' (Davis 2001, pp. 88–89). By putting the example in the second person, Thomson made the male reader adopt the perspective of a pregnant woman:

> prior to the publication of ADA, women made only infrequent appearances in philosophers' examples. … Thomson's creation of an example that both sought to model the intense physicality and overwhelmingness of pregnancy… and involved men as players – I am assuming that most professional philosophers in the early 1970s were male, and that Thomson knew that was the case – was, I think, brilliant (Davis 2001, p. 96).

Her article was thus revolutionary in being a *feminist* work. Indeed, the Good Samaritan Argument, in addition to being known as the 'Argument from Bodily Autonomy' (Feinberg 1980, p. 209), is also referred to as the 'Feminist Argument' (Singer 2011 [1979], p. 132). When Thomson returned to the subject of abortion in 1995, she explicitly cast the abortion debate in terms of its importance to women's equality:

> So this is an issue of great importance to women. Denial of the abortion right severely constrains their liberty, and among the consequences of that constraint are impediments to their achievement of equality (Thomson 1995, p. 20).

Even if those who formed the Society for Philosophy and Public Affairs in 1969 did not intend it, 'when philosophy, and especially ethics, became "practical" in the late 60s' it also became feminist.

2 Thomson's Defence of Abortion

Thomson's defence of abortion is as follows. Everyone possesses the right to his or her own body. This is the right to bodily autonomy: 'My own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body' (Thomson 1971, p. 54). What

this right amounts to is the right to refuse to allow another person to use my body. No one has the right to use my body without my permission.

In the case of pregnancy as a result of rape, the fetus has no right to use the woman's body, because the woman has not given the fetus permission to use the woman's body. As she says: 'I suppose we may take it as a datum that in a 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' (Thomson 1971, p. 57). Since the fetus has no right to use the woman's body, the woman may refuse to allow the fetus to use her body. If she refuses to allow the fetus to use her body, she is not violating any right of the fetus. However, the *only way* for a woman to refuse to allow a (non-viable) fetus to use her body is for her to have an abortion. This is simply a fact about human biology. Hence, in the case of a pregnancy as a result of rape, at least when the fetus is not viable, abortion violates no right of the fetus (Mahon 2014, p. 1431). In such a case at least, abortion is not a violation of the right to life of the fetus, because the right to life is the right not to be killed unjustly, and such a killing is not an unjust killing. Thus, we are led to

> the conclusion that unborn persons whose existence is due to rape have no right to the use of their mothers' bodies, and thus that aborting them is not depriving them of anything they have a right to and hence is not unjust killing (Thomson 1971, p. 58).

Of course, the woman may choose to allow the fetus to use her body. She may choose not to have an abortion. But since the fetus has no right to use her body, it follows that, if she does allow the fetus to use her body, and does not have an abortion, this is a *supererogatory* act on her part. If she allows the fetus to use her body, then she is being a 'Good Samaritan' to the fetus.

Thomson provides an example to support her argument. Imagine that you are kidnapped by a group of musical enthusiasts and wake up to find yourself in bed, hooked up to a violinist who is unconscious. The violinist has also been kidnapped by the same group of musical enthusiasts. The violinist has failing kidneys and requires the use of your kidneys for nine months in order to repair his kidneys. At the end of the nine months, he will be woken up from his unconscious state, healthy again, and you will be free to return to whatever you were doing before you were kidnapped. If you remain hooked up to the violinist, he will live.

But if you disconnect yourself from the violinist, he will die. According to Thomson:

> If anything in the world is true, it is that you do not commit murder, you do not do what is impermissible, if you reach around to your back and unplug yourself from that violinist to save your life (Thomson 1971, p. 52).

Since the unconscious violinist has no right to use your body, you do not violate any right of his by unhooking yourself from him and killing him. You do not violate his right to life, since his right to life does not extend to a right to use your body.

3 Mahon's Argument Against Abortion

Mahon's argument against abortion is formulated provisionally as follows:

> Killing an innocent and defenceless human being is wrong.
> Killing a fetus is killing an innocent and defenceless human being.
> Therefore, killing a fetus is wrong.
> Therefore, abortion is wrong (Mahon 1984, p. 92).

In defence of the second premise, Mahon argues, 'the word "human" signifies, or denotes, a being at *some stage* of its development'. The life of this being, it is said, 'does not begin at birth but, on average, 38 weeks prior to its birth' (Mahon 1984, p. 93). The 'unborn or premature human being… is, as a rule, called the "foetus"'. Mahon distinguishes between being a 'human being' and being a 'person'. A 'person', he claims, is a

> biologically mature specimen of its kind, exhibiting in unequivocal measure those powers and proclivities, such as ratiocinative, moral, political, and productive powers and proclivities, that typify entities of that mature kind (Mahon 1984, p. 93).

By contrast, 'a human life, as distinct from the life of a person, begins at conception (or fertilization) and ends at death' (Mahon 1984, p. 95). To say that a fetus is a human being is simply to say that a fetus is member of the species *Homo sapiens*. Even if it were argued against Mahon that there are, or can be, persons who are not human beings (chimpanzees, dolphins, Martians, angels, God, et cetera), Mahon would still be correct in saying that (human) fetuses are human beings. Further, even if it were argued

against Mahon that fetuses are persons, Mahon would still be correct in saying that they are human beings.

In defence of the second premise, Mahon also argues that the fetus 'is incapable of harbouring malevolent intentions' and that the fetus 'is defenceless or completely vulnerable to attack' (Mahon 1984, p. 94). These twin claims are not controversial. Mahon does consider an objection to the second premise made by G.A. Cohen.[5] The objection is that 'the concept of a human being is too wide' in this second premise, since, according to it, 'a *zygote*, i.e., what exists from conception to implantation about a week later, would qualify as a human being', and it is 'absurd' to claim that to kill a zygote is to 'kill an innocent and defenceless human being' (Mahon 1984, pp. 94–95). While admitting that the objection 'appears to be a very strong one', Mahon in the end rejects the charge that it is absurd to claim that to kill a zygote is to kill an innocent and defenceless human being. Its apparent absurdity stems from 'the tendency to date membership of the human race from the point of birth' and from 'the tendency to automatically think of human beings in terms of persons' (Mahon 1984, pp. 95–96). Both tendencies are misleading, since it is false that something is not a human being until it is born, and it is false that all human beings are persons.

In defence of the first premise, Mahon considers the objection that 'it forbids killing when there is, demonstrably, a right to kill. To be more precise, we do, conceivably, sometimes have the right to take innocent and defenceless human life' (Mahon 1984, p. 94). The strongest version of this objection, Mahon considers, is to be found in Thomson's defence of abortion.

Mahon summarizes Thomson's defence of abortion as follows: 'certain persons do not have the right to life', and 'the fetus is such a person' (Mahon 1984, p. 108). That is, the fetus lacks a right to life. Note that Thomson would reject this characterization of her argument. She holds that the fetus does have a right to life (or rather, she grants this for the sake of the argument; her own position is that a fetus in the early stages of pregnancy lacks a right to life).[6] This is the right not to be killed unjustly (i.e., the right not to be murdered). As she says: 'the right to life consists not in the right not to be killed, but rather in the right not to be killed unjustly' (Thomson 1971, p. 57). She simply rejects the argument that because a fetus, like everyone else who is innocent, has a right not to be killed unjustly, it follows that a fetus has a right not to be killed. Her argument is that, even if a fetus has a right to life, it is still morally permissible to kill a

(non-viable) fetus, if this is the only way to stop the fetus from using your body. Human biology being the way it is, however, this *is* the only way.

The first of Mahon's criticisms of Thomson's argument that will be considered here is the criticism that the example involving the unconscious violinist fails to be analogous to pregnancy as a result of rape, because 'The woman is the *mother* of the fetus; no such relation exists, or at least no such relation has been postulated, between the kidney-captive and the violinist' (Mahon 1984, p. 110, emphasis in original).[7] Importantly, other philosophers have rejected the use of the term 'mother' to refer to the woman who is pregnant as a result of rape, although Thomson herself uses the term in her article. 'Mother', they argue, implies or connotes something more than the biological fact of being pregnant, in the form of a special relationship towards the fetus or a special responsibility for the fetus. In the case of unwanted pregnancy in general, and in the case of pregnancy as a result of rape in particular, however, there is nothing more than the biological fact of being pregnant. They would object to Mahon's characterization of the woman who is pregnant as a result of rape as a 'mother'.[8]

Mahon may be said to have considered Thomson to have responded in this vein to his disanalogy criticism. He says that 'She first points out that it is commonly believed that to say X is the mother of Y is to say that X has a *special responsibility* for Y' (Mahon 1984, p. 112), and he then quotes Thomson as saying: 'Surely we do not have any such "special responsibility" for a person unless we have assumed it, explicitly or implicitly' (Thomson, quoted in Mahon 1984, p. 113). The point is that 'mother' either does not imply any responsibility for caring for the fetus, or it implies having a responsibility for caring for a child that has been assumed, either explicitly or implicitly. Hence, someone who is pregnant as a result of rape is either a 'mother' who has not (or not yet) assumed responsibility for caring for a child or is not (or not yet) a 'mother'. As he says, 'Thomson attaches little fundamental importance to the hereditary relation between the mother and her unborn offspring', a hereditary relation which he characterizes as based on the fact that 'the make-up of the foetus is due, in part, to genes transmitted from the woman whose womb it occupies' (Mahon 1984, p. 113). What he says about the lack of importance of such a hereditary relationship for Thomson is quite correct, since such a relation exists in the case of a pregnancy that is the result of rape, and Thomson states explicitly that such a relationship does not imply any responsibility for caring for the fetus. The responsibility must be

assumed. As Mahon summarizes Thomson's position, 'What matters basically is whether she wanted the child. If she did, then it has rights against her, and she has obligations toward it. If she didn't, then it has no rights against her' (Mahon 1984, p. 113).

This is basically right, although the final sentence here is somewhat misleading, since it is not true that the fetus has no rights against the pregnant woman. Thomson does hold that a fetus has rights against a pregnant woman. Most importantly, the fetus has the right not to be killed unjustly. It is just that a fetus does not have the right against the pregnant woman to use her body, and this right is the relevant right here. Thomson is quite clear that, if it were possible for the fetus to survive without using the pregnant woman's body (to be removed from her body), then it would be a violation of the fetus's rights—indeed, it would be murder—for the pregnant woman to kill the fetus: 'I agree that the desire for the child's death is not one which anybody may gratify, should it turn out to be possible to detach the child alive' (Thomson 1971, p. 66). As N. Ann Davis has correctly stated, the right that Thomson is defending in her article is the right to not be *pregnant*: 'her view of abortion [is] as essentially a form of pregnancy termination that involves fetal detachment, rather than as the deliberate termination of the life of the fetus' (Davis 2001, p. 93).

Mahon's belief that Thompson has already responded to his disanalogy criticism leads him to make his main criticism. Characterizing her argument as the argument that 'one cannot be responsible for someone unless one has promised to, or assumed responsibility for that person at some stage', Mahon argues that this is false:

> I can be responsible for the victims of a car crash, for instance (i.e., have moral duties towards them), even if I have never seen the victims before in my life, without ever having given an undertaking to help them, and without my having chosen to be the person on whom they now depend for help. How far this obligation goes is, of course, another thing. I certainly do not think it goes so far as to give one's life. If I am right about this, then there is at least one circumstance in which an abortion is morally justified, namely, where a woman has been raped, where she is pregnant as a result of being raped, and where her life is in imminent danger as a result of that pregnancy. In such a case, she is not morally obliged to sacrifice her life (Mahon 1984, pp. 113–114).

In order for this criticism to apply to Thomson's argument, it must be the case that someone who is the victim of a car crash has a right to be helped

by a mere bystander, because the bystander is 'morally obliged' to help the victim. Similarly, a fetus has a right to use the pregnant woman's body, even in the case of pregnancy as a result of rape (at least when this does not involve the loss of the pregnant woman's life), because the pregnant woman is 'morally obliged' to bring the pregnancy to term.

It is important to see why Thomson would reject this criticism. According to Thomson, it is false that the car crash victim has a right to be helped by the bystander. The most that can be said is that the bystander ought to help the car crash victim. However, it does not follow from this that the car crash victim has a right to the bystander's help. From the fact that A *ought* to help B, it does not follow that B has a *right* to be helped by A. As she says:

> [S]uppose pregnancy lasted only an hour, and constituted no threat to life or health. And suppose that a woman becomes pregnant as a result of rape. Admittedly she did not voluntarily do anything to bring about the existence of the child. Admittedly she did nothing at all which would give the unborn person a right to the use of her body. All the same it might well be said … that she *ought* to allow it to remain for that hour … Now some people are inclined to use the term 'right' in such a way that it follows from the fact that you ought to allow a person to use your body for the hour he needs, that he has a right to use your body for the hour he needs, even though he has not been given that right by any person or act. They may even say that it follows also that if you refuse, you act unjustly toward him. This use of the term is perhaps so common that it cannot be called wrong; nevertheless it seems to me to be an unfortunate loosening of what we would do better to keep a tight rein on (Thomson 1971, p. 60).

It must be said that it remains ambiguous in Thomson's article as to what 'A has a moral obligation to B to ∅' means. It may mean the stronger 'B has a right to ∅ from A'. If it does, then 'A has a moral obligation to B to ∅' is not equivalent to, and cannot be derived from, 'A ought to ∅ (to B)'. Or, it may mean the weaker 'A ought to ∅ (to B)'. If it does, then 'B has a right to ∅ from A' is not equivalent to, and cannot be derived from, 'A has a moral obligation to B to ∅'. Because of this ambiguity in her article, it remains uncertain as to whether Thomson would argue that a bystander has no moral obligation to help a car crash victim, or whether she would argue that a bystander has a moral obligation to help a car crash victim, but that the car crash victim has no right to be helped by the bystander.

Nevertheless, Thomson does hold that the stronger 'B has a right to ∅ from A' is not equivalent to, and may not be derived from, the weaker 'A ought to ∅ (to B)'. As she says about moral requirements—which would appear to be equivalent to moral obligations—in discussing a variation on the violinist example in which the violinist only needs to use your kidneys for 1 hour in order to live:

> If anyone does wish to deduce "he has a right" from "you ought", then all the same he must surely grant that there are cases in which it is not morally required of you that you allow that violinist to use your kidneys, and in which he does not have a right to them, and in which you do not do him an injustice if you refuse (1971, p. 61).

Thomson would therefore reject Mahon's claim that a car crash victim has a right to be helped by a bystander, and that it would be unjust of the bystander not to help the victim.

Mahon could reply by adapting an argument from Peter Singer (1972). Imagine that you come across a child drowning in a shallow pond. Even if you have not assumed any responsibility whatsoever to take care of drowning persons, such as becoming a life guard, and even if the child is a complete stranger, it still seems that the child has a right to be rescued by you, when all it would take to save the child is to wade into the shallow pond and pull the child out of the water. In the case of pregnancy as a result of rape, it could be argued, the fetus is in a similar position to the child in the shallow pond. Without the use of the pregnant woman's body, the fetus will die. Even if the pregnant woman has not given the fetus permission to use her body, it still seems that the fetus has a right to use her body, when all it would take is 9 months of her time (or at least until the fetus is viable). Indeed, Thomson says that her argument holds even if 'pregnancy lasted only an hour, and constituted no threat to life or health'. Surely, the fetus has a right to use her body for 1 hour.

It is important to understand that Thomson would reject this argument. In her article, she provides the following counterargument, using a pair of examples:

> [T]o deprive someone of what he has a right to is to treat him unjustly. Suppose a boy and his small brother are jointly given a box of chocolates for Christmas. If the older boy takes the box and refuses to give his brother any of the chocolates, he is unjust to him, for the brother has a right to half of them. …

> Suppose that box of chocolates I mentioned earlier had not been given to both boys jointly, but was given only to the older boy. There he sits, stolidly eating his way through the box, his small brother watching enviously. Here we are likely to say, "You ought not to be so mean. You ought to give your brother some of those chocolates." My own view is that it just does not follow from the truth of this that the brother has any right to any of the chocolates. If the boy refuses to give his brother any, he is greedy, stingy, callous – but not unjust. …
>
> So my own view is that even though you ought to let the violinist use your kidneys for the one hour he needs, we should not conclude that he has a right to do so – we should say that if you refuse, you are, like the boy who owns all the chocolates and will give none away, self-centered and callous, indecent in fact, but not unjust. And similarly, that even supposing a case in which a woman pregnant due to rape ought to allow the unborn person to use her body for the hour he needs, we should not conclude that he has a right to do so; we should conclude that she is self-centered, callous, indecent, but not unjust, if she refuses (1971, pp. 56, 60–61).

According to Thomson, if you do not allow the violinist to use your kidneys for just 1 hour, then you are callous, self-centred, et cetera, but you are not unjust. This is because he has no right to use your kidneys. Similarly, if the woman who is pregnant as a result of rape does not allow the fetus to use her body for just 1 hour, she is callous, self-centred, et cetera. But she is not unjust. This is because the fetus has no right to use the pregnant woman's body. Likewise, if you do not help the child drowning in the shallow pond, by wading in and saving him, you are callous, self-centred, et cetera. But you are not unjust. This is because the child has no right to be rescued by you. As it has been said:

> If I choose to refrain from saving the toddler drowning in the mud puddle, I would not be violating the moral right of the toddler, but I would still be acting as a "moral monster" (Liberto 2012, p. 397).

Finally, if the woman who is pregnant as a result of rape does not allow the fetus to use her body for 9 months, then she is not callous or self-centred, et cetera. She is merely not being a Good Samaritan.

It is now possible to return to the first premise of Mahon's argument. It does seem that there is a right to kill an innocent and defenceless human being. When an innocent and defenceless human being is using your body without your permission, and the only way to refuse to allow this innocent

and defenceless human being to use your body is to kill this innocent and defenceless human being, then you have a right to kill this innocent and defenceless human being. This is because the innocent and defenceless human being lacks a right to use your body, and you have a right to your own body. Mahon's argument against abortion must be rejected.

4 Thomson and Indecency

Although I have defended Thomson's argument above, there are at least two problems with it. The first is a problem with her terminology. This requires some explaining. Thomson concludes the article with the following:

> First, while I do argue that abortion is not impermissible, I do not argue that it is always permissible. There may well be cases in which carrying the child to term requires only Minimally Decent Samaritanism of the mother, and this is a standard that we must not fall below. I am inclined to think it a merit of my account precisely that it does *not* give a general yes or a general no. It allows for and supports our general sense that, for example, a sick and desperately frightened fourteen-year-old schoolgirl, pregnant due to rape, may *of course* choose abortion, and that any law which rules this out is an insane law. And it also allows for and supports our sense that in other cases resort to abortion is even positively indecent. It would be indecent in the woman to request an abortion, and indecent in a doctor to perform it, if she is in her seventh month, and wants the abortion to avoid the nuisance of postponing a trip abroad (Thomson 1971, pp. 65–66).

Here, Thomson distinguishes between an abortion where the woman is not 'indecent' (the 14-year-old pregnant rape victim), and an abortion where the woman is 'indecent' (the 7-month pregnant woman who wishes to go on holiday). In saying that the woman in the second example is 'indecent', Thomson would appear to be saying that she is callous, self-centred, et cetera, although her action is not unjust. Her behaviour falls below the standard of being a 'Minimally Decent Samaritan', which is 'a standard that we must not'—that is, ought not—'fall below'. Nevertheless, this woman does not violate a right of the fetus.

A term that captures this type of behavior is *suberogatory*.[9] As Julia Driver explains: 'Suberogatory acts are acts that we ought not to do, but which are not forbidden … The suberogatory is "mere badness"' (Driver 1992, p. 291). Thomson, it would seem, holds that 'a frivolous

abortion… is bad' and that 'bad abortions' are 'suberogatory' (Driver 1992, p. 292).

If a pregnant woman who has an abortion in the seventh month of pregnancy to go on holiday is (merely) 'indecent', however, and the abortion is (merely) suberogatory, then this must be because, even in the seventh month of her pregnancy, the fetus has no right to use the pregnant woman's body. This means, first, that the fetus in this example must not be viable, because Thomson insists that 'should it turn out to be possible to detach the child alive' an abortion at 7 months would be a violation of the fetus's right not to be killed unjustly. Second, since there is no indication that the pregnancy was the result of rape, it means that whether or not the pregnancy is the result of rape is ultimately irrelevant to the question of whether or not the fetus has a right to use the woman's body. The only thing that is relevant is whether or not the woman wishes to allow the fetus to use her body.

If this is correct, then Thomson *does* give 'a general yes' to the question of the permissibility of (voluntary) abortion, at least when the fetus is not viable: (voluntary) abortion is *always* permissible.[10] Abortion *never* violates the right to life of a fetus. Thomson does indeed embrace the '"extreme" liberal position' that has been attributed to her by Driver: 'a liberal should view all (early) abortions as permissible even when the mother is quite healthy and could take care of the baby without difficulty' (Driver 1992, p. 289).[11]

The problem with this conclusion is that Thomson claims that she does *not* 'give a general yes or a general no' to the question of the permissibility of abortion, and that she does *not* 'argue that it is always permissible' to have an abortion when the fetus is not viable.

She could avoid the contradiction by arguing that her use of 'permissible' and 'impermissible' is equivalent to her use of 'decent' and 'indecent'. She could say that when she talks about 'a standard that we must not fall below' in our behaviour towards other people—the standard of being a Minimally Decent Samaritan, that is, the standard of being decent—she is talking about the standard of what is 'permissible' behaviour towards other people. The woman who has an abortion in the seventh month of her pregnancy would therefore be acting *impermissibly*. Meanwhile, the 14-year-old rape victim who has an abortion would be acting *permissibly*.

If Thomson defended herself in this way, however, she would have to admit that her use of 'permissible' and 'impermissible' is different from that of most moral philosophers and common usage.[12] Normally, when

you say that someone is acting callously, or self-centredly, et cetera, but is not violating anyone's rights, you are saying that she is *not* acting impermissibly. Indeed, suberogatory actions are precisely actions 'that are permissible, though bad' (Driver 1992, p. 291). If Thomson identified acting impermissibly with acting indecently but not violating anyone's rights, then she would be saying that someone can be acting both impermissibly and justly, which is a highly unusual claim. It would also mean that indecent abortions are not suberogatory actions after all, since suberogatory actions are those actions that 'are deserving of negative evaluation, without being actually wrong, where wrong just means "impermissible"' (Driver 1992, p. 286, n. 2).[13]

This first terminological problem with her argument can be remedied in one of two ways, in order to avoid a contradiction. Thomson can state explicitly that by 'impermissible' she merely means acting in a way that is 'indecent' (callously, self-centredly, et cetera), and that by 'permissible' she merely means acting in way that is 'decent' (not acting callously, self-centredly, et cetera). Or she can alter the claims in her conclusion. She can say that 'I do … argue that it is always permissible [although not always decent, to have an abortion when the fetus is not viable]', and 'I am inclined to think it a merit of my account precisely that it does *not* give a general yes or a general no [as to whether or not an abortion is decent, although it does give a general yes or a general no as to whether or not an abortion is permissible, namely, a general yes]'.

The second problem with her argument is a more serious problem, because it is a problem with the argument itself. *Why* is having an abortion (of a non-viable fetus) in the seventh month of pregnancy, in order to go on a holiday, (merely) 'indecent'? It seems clear that the pregnancy was desired, and that the woman originally expected to bring the pregnancy to term. More importantly, since the woman is in her seventh month of pregnancy, it might be thought that the fetus has acquired the right to use the woman's body by now. Has the fetus not acquired such a right? If so, what is her argument?

At one point in the article Thomson says: 'Suppose a woman voluntarily indulges in intercourse, knowing of the chance that it will issue in pregnancy, and then she does become pregnant' (Thomson 1971, p. 57). About this hypothetical situation, she comments:

> It seems to me that the argument we are looking at can establish at most that there are *some* cases in which the unborn person has a right to the use of

> its mother's body, and therefore *some* cases in which abortion is unjust killing. There is room for much discussion and argument as to precisely which, if any (Thomson 1971, p. 59).

The 'if any' here is very telling. Thomson provides no example of a case in which a non-viable fetus has acquired a right to use the woman's body. She provides no example of an abortion that is an unjust killing.

The closest that Thomson comes to providing an example of an unjust killing is the following:

> If a set of parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption, but rather take it home with them, then they have assumed responsibility for it, they have given it rights, and they cannot *now* withdraw support for it at the cost of its life because they now find it difficult to go on providing for it (Thomson 1971, p. 65).

Importantly, this is not a case of an abortion. It is a case of parents withdrawing 'food and shelter' from the child they have taken home with them, resulting in the child's death (since no one else is apparently available to take care of the child). The example is not analogous to pregnancy, because having a claim to food and shelter from other people is different from having a claim to use another person's *body* for food and shelter.

I take Thomson to hold that there is *no* case in which a (non-viable) fetus acquires a right to use the pregnant woman's body, and that *no* abortion (of a non-viable fetus) is unjust. The problem is that she has provided no argument for this conclusion.

This second problem, too, can be remedied.[14] In addition to its being true that no one has the right to use my body without my permission; it is also true that I may revoke this permission at any time. I am always free to refuse to allow another person to use my body, and I am always free to refuse to allow another person to *continue* to use my body, even if I have allowed the person to use my body up until now. My freedom to decide if someone may or may not use my body is *inalienable*. Since I may refuse to allow another person to use my body, even if this results in the person's death, I may refuse to allow another person to continue to use my body, even if this results in the person's death, despite the fact that I have allowed the person to use my body up until now. This argument is implied by her claim that 'if a human being has any just, prior claim to

anything at all, he has a just, prior claim to his own body', and, perhaps, by comments such as the following: 'Women have said again and again, "This is *my* body!" and they have reason to feel angry, reason to feel that it has been like shouting into the wind' (Thomson 1971, p. 53).[15]

Notes

1. The two other defences of abortion he criticizes are Kamm (1976) and Dooley-Clarke (1981). On a different point, I should apologize in advance for any confusion that results in my writing about someone who shares my name—namely, my father.
2. My defence of Thomson is very much in the spirit of Boonin (2002).
3. An equally historically important article on abortion is that by Philippa Foot (1967). It should not be lost on us that Philippa Foot was another prominent woman philosopher at a time when there were much fewer women in philosophy. Foot and Thomson, between them, may be said to have created the 'Trolley Problem', perhaps the most famous 'problem' of modern moral philosophy.
4. To give just one example, the recent 2014 US Supreme Court decision, *Burwell v. Holly Lobby*, essentially concerns the question of whether for-profit corporations are exempt from the mandate of the Affordable Care Act to pay for Plan B, *ella*, et cetera, for their employees, because those running the corporations consider these to be abortifacients rather than contraceptives. For the background to this debate, see Hrobak and Wilson (2014).
5. Sadly, G.A. (Jerry) Cohen, a friend of my father's from my father's sabbatical year at University College London in 1979–1980, died in 2009 and could not be a contributor to this volume.
6. As Thomson says, 'we have only been pretending throughout that the fetus is a human being from the moment of conception. A very early abortion is surely not the killing of a person' (Thomson 1971, p. 66).
7. Space constraints prohibit discussion of every one of Mahon's objections to Thomson's argument. I have selected the two most important criticisms.
8. For an argument against using the term 'mother' to refer to a woman who is an 'abortion candidate', see Nancy Davis (1984).
9. An older term for this kind of action was 'offence'. See Chisholm (1963). See also Mellema (1987) and Mahon (2006).
10. The assumption throughout this essay is that the abortion under discussion is a voluntary abortion, and not one that is coerced or performed without the consent of the pregnant woman.
11. Footnote 9 on the same page attributes this position to Thomson. Note that Driver says about this position that 'no consideration is given to the fetus in

determining the permissibility of the abortion' (1992, p. 289, n. 9). I would prefer to say that moral consideration is given to the fetus—Thomson assumes for the sake of the argument that a fetus is a person—but that the fetus, despite its moral status, is judged to fail to have a right to use the pregnant woman's body, which is the only right that would make the abortion impermissible.

12. My thanks to Melina Bell for discussion of the normal moral philosophical usage of these terms.
13. For this reason, Liberto (2012, p. 399) is incorrect when she says that Thomson 'suggests that it is probably morally impermissible for the older brother to refuse to share the chocolates' with the younger brother. The older brother is being callous, self-centred, et cetera, but he is not doing anything impermissible.
14. There remains a third problem. *Why* is having an abortion (of a non-viable fetus) in the seventh month of pregnancy, in order to go on a holiday, 'indecent' at all? What is the argument for this claim? Lack of space prohibits discussion of this third problem.
15. The argument of the penultimate section of this essay was first presented in a talk at 'Roe at 40—The Controversy Continues', a symposium at Washington and Lee University School of Law, on 8 November 2013. For discussions about the argument contained in that talk (a version of which was later published [Mahon 2014]), I would like to thank Melina Bell. For an exchange about what Thomson says in her article about permissibility, impermissibility, and indecency, I would also like to thank Jessica Gordon-Roth. For clarification of Thomson's argument, I would like to thank David Boonin. For a discussion about the suberogatory and Thomson's argument, I would like to thank Julia Driver. Over the years, I have benefitted from discussing Thomson's article with many different undergraduates and law students at Washington and Lee University, and I would like to take this opportunity to thank them for these discussions. I first discussed the topic of abortion with my parents, Joseph Mahon and Evelyn Mahon, as a teenager in the context of the passing of the Eighth Amendment to the Constitution of Ireland in 1983, which attempted to copperfasten a ban on abortion in Ireland. Years later, I helped proofread my mother's report to the Irish government, *Women and Crisis Pregnancy* (Mahon et al. 1998). I am happy that the occasion of my father's retirement from teaching philosophy has afforded me the opportunity to write on this topic, even if I disagree with the position he defended in his early writings (he has since moved on). Finally, I would like to thank the University of International Business and Economics in Beijing, China, for affording me the opportunity to complete work on this essay in the summer of 2015.

References

Boonin, D. (2002). *A defense of abortion*. Cambridge: Cambridge University Press.

Brody, B. (1972). Thomson on abortion. *Philosophy & Public Affairs*, 2(3), 335–340.

Chisholm, R. M. (1963). Supererogation and offence: A conceptual scheme for ethics. *Ratio*, 5, 1–14.

Davis, N. (1984). Abortion and self-defense. *Philosophy & Public Affairs*, 13(3), 175–207.

Davis, N. A. (2001). Fiddling second: Reflections on "A Defense of Abortion". In A. Byrne, R. C. Stalnaker, & R. Wedgwood (Eds.), *Fact and value: Essays on ethics and metaphysics for Judith Jarvis Thomson* (pp. 81–96). Cambridge, MA: MIT Press.

Dooley-Clarke, D. (1981, September 11). Just exceptions to moral principles. *The Irish Times*.

Driver, J. (1992). The suberogatory. *Australasian Journal of Philosophy*, 70(3), 286–295.

Dworkin, R. (Ed.). (1977). *The philosophy of law*. Oxford: Oxford University Press.

Feinberg, J. (1980). Abortion. In T. Regan (Ed.), *Matters of life and death*. Philadelphia, PA: Temple University Press.

Finnis, J. (1973). The rights and wrongs of abortion: A reply to Judith Thomson. *Philosophy & Public Affairs*, 2(2), 117–145.

Foot, P. (1967). The problem of abortion and the doctrine of double effect. *Oxford Review*, 5, 5–15.

Hrobak, R. M., & Wilson, R. F. (2014). Emergency contraceptives or abortion-inducing drugs? Empowering women to make informed decisions. *Washington and Lee Law Review*, 71(2), 1385–1428.

Kamm, F. M. (1976). Review of Marvin Kohl, The morality of killing: Sanctity of life, abortion, and euthanasia. *Philosophical Review*, 85, 124–126.

Liberto, H. R. (2012). Denying the suberogatory. *Philosophia*, 40(2), 395–402.

Mahon, E., Conlon, C., & Dillon, L. (1998). *Women and crisis pregnancy: A report presented to the Department of Health and Children*. Dublin: The Stationary Office.

Mahon, J. (1975). Philosophy and public matters. *Understanding*, pp. 5, 5–11.

Mahon, J. (1979, November 10). The ethics of abortion. *Irish Medical Times*.

Mahon, J. (1984). *An introduction to practical ethics*. Dublin: Turoe Press.

Mahon, J. E. (2006). The good, the bad, and the obligatory. *Journal of Value Inquiry*, 40(1), 59–71.

Mahon, J. E. (2014). Innocent burdens. *Washington and Lee Law Review*, 71(2), 1429–1472.

Mellema, G. (1987). Quasi-supererogation. *Philosophical Studies*, 52(1), 141–150.

Parent, W. (1986). 'Preface' to J.J. Thomson, *Rights, restitution, and risk: Essays in moral theory* (pp. vii–x). Cambridge, MA: Harvard University Press.
Rachels, J. (Ed.). (1975). *Moral problems.* New York: Harper & Row.
Rawls, J. (1971). *A theory of justice*. Cambridge, MA: Harvard University Press.
Singer, P. (1972). Famine, affluence, and morality. *Philosophy & Public Affairs*, 1(3), 229–243.
Singer, P. (2011 [1979]). *Practical ethics* (3rd ed.). Cambridge: Cambridge University Press.
Thomson, J. J. (1971). A defense of abortion. *Philosophy & Public Affairs*, 1(1), 47–66.
Thomson, J. J. (1973). Rights and deaths. *Philosophy & Public Affairs*, 2(2), 146–159.
Thomson, J. J. (1995). Abortion. *Boston Review*, 20(3), 11–15.
Thomson, J. J. (2013). How it was. In S. M. Cahn (Ed.), *Portraits of American philosophy* (pp. 47–61). Lanham, MD: Rowman & Littlefield.
Tooley, M. (1972). Abortion and infanticide. *Philosophy & Public Affairs*, 2(1), 37–65.
Wertheimer, R. (1971). Understanding the abortion argument. *Philosophy & Public Affairs*, 1(1), 67–95.