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The Pregnant Woman and the Good Samaritan
Can a Woman have a Duty to Undergo a Caesarean Section?

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Abstract—Although a pregnant woman can now refuse any medical treatment needed by the fetus, the Court of Appeal has acknowledged that ethical dilemmas remain, adverting to the inappropriateness of legal compulsion of presumed moral duties in this context. This leaves the impression of an uncomfortable split between the ethics and the law. The notion of a pregnant woman refusing medical treatment needed by the fetus is troubling and it helps little simply to assert that she has a legal right to do so. At the same time, the idea that a pregnant woman fails in her moral duty unless she accepts any recommended treatment or surgery—however great the burdens—is also not without difficulty. This article seeks to find a way between these two somewhat polarized positions by arguing that, instead of being a question primarily about whether legally to enforce moral obligations, the 'maternal—fetal conflict' begins with previously unrecognized difficulties in determining when a woman's prima facie moral rights invoked in the treatment context should 'give way' to the interests of the fetus. This difficulty is mirrored within the law. Thus, how can we tell when a pregnant woman has the moral or legal duty to submit to a caesarean section? Seen in this way, the conflict is a problem which lies at the interface between moral and legal rights and duties, showing that there are important conceptual links between the ethics and the law. Against this background, this article explores the limits of a pregnant woman's right to bodily integrity by focusing upon the idea of her moral duty to aid the fetus through her body. Here we find difficulties in determining the existence and extent of this somewhat extraordinary duty. Such a duty is contrasted with both negative and positive duties toward others in the course of 'general conduct'. Attention to the social context of pregnancy and the refusal of treatment within this is also instructive. Overall, the purpose is to foster understanding and acceptance of the current legal position.

1. *Introduction*

English law is now clear that a pregnant woman has the legal right to refuse any medical treatment, for whatever reason or for no reason at all, whatever the consequences for herself or the fetus she carries. Yet, in giving the judgment of

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the Court of Appeal in *Re M.B.*[1] in 1997, Lady Justice Butler-Sloss expressly acknowledged that ethical dilemmas remain. This is consistent with the fact that, apart from reiterating that the fetus is not a legal person, the case did not address the question of why a *pregnant* woman, who is clearly not identical to one who is not pregnant, should have the same right as any other competent woman to refuse medical treatment. This was not seen as a task appropriate for a court of law. The following year, in *St George's Healthcare NHS Trust* v *S, R* v *Collins and others, ex parte S*,[2] Lord Justice Judge went a little further in making an important liberal statement about the limits of legal authority, stressing that a pregnant woman's legal right to refuse medical treatment is not diminished if others find her decision morally objectionable. Perhaps understandably, however, he left unanswered the question of the moral justifiability of a pregnant woman's choice to exercise her legal right to refuse medical treatment. In this regard, Judge LJ simply suggested that 'while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment'.[3] In other words, whatever her presumed moral obligations, her legal rights remain intact. In rejecting the prospect of legal enforcement of such duties, these cases leave an impression of an uncomfortable split between the law and ethics relating to a pregnant woman's rights. Underlying this is an assumption, reflected in the literature, that the problems of the 'maternal–fetal conflict' *begin* with the legal enforcement of moral duties.[4] This understanding is misleading.

Rather than being a question inhering (primarily at least) in whether legally to enforce moral obligations, it is my view that the problem of the 'maternal–fetal conflict' begins prior to the entry of the law, not only with the obvious complexity of exploring the moral status of the fetus (which I do not embark upon here) but particularly with previously unrecognized difficulties inherent in the question of determining when, if ever, the prima facie moral rights which are invoked in the treatment context should 'give way' to the interests of the fetus. Put another way, how easily can we determine when a pregnant woman has the moral duty to the fetus to submit to certain medical treatment or surgery—notably a caesarean section—on its behalf? This article seeks to throw some light on this question, thereby strengthening understanding and acceptance of the current legal position.

[1] [1997] 8 *Med LR* 217 at 225.
[2] [1998] 3 All ER 673.
[3] Ibid at 692.
[4] Consider this from John Robertson: 'Moral rights and duties are, of course, distinct from legal rights and duties. Finding that there are moral duties to avoid harmful prenatal conduct does not mean that those duties should always have legal standing'. *Children of Choice: Freedom and the New Reproductive Technologies* (1994) 177. Note also N. Rhoden: '[I]n this very private and bodily sphere, the issue of moral obligations, even very compelling ones, must be kept distinct from the issue of legal coercion of individuals to meet their moral obligations'. 'The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans', 74 *Cal L Rev* 1951, 1980 (1986). Sometimes, however, as my discussion indicates, clear moral duties do exist, about which the only residual problem is indeed the appropriateness of legal compulsion.

2. *The Context*

In the early days of medical law, a patient's right to refuse medical treatment was typically subject to four potentially countervailing state interests in: the preservation of life, the prevention of suicide, the protection of the ethical integrity of the medical profession, and the protection of innocent third parties.[5] With the exception of the last, the strength of these has waned over time, so that in general a competent adult can now refuse any treatment for any reason.[6] As regards a competent pregnant woman's refusal of medical treatment, notably a caesarean section, courts have focused upon the interest in the protection of innocent third parties, asking whether her right to refuse was strong enough to outweigh the fetus' claims. Different answers have obtained at different times in different jurisdictions.[7] Another question has been whether she has a duty in tort to submit to medical treatment.[8] Likewise an important moral question concerns the strength of the pregnant woman's right given the possible fetal harm or death consequent upon its exercise: in these circumstances, does she really not have a moral duty to submit to the caesarean on its behalf?

At least part of the reason we grant rights (moral or legal) in relation to the individual's very personal interests in the medical treatment context lies in the difficulty of judging the 'reasonableness' of matters which such rights protect[9] and, concomitantly, the 'reasonableness' of the decision to exercise a right in such contexts, at least where such rights are exercised—as they likely are—for 'serious' reasons. The cases of refusal for religious reasons or due to the invasiveness of certain treatment are here in point. This foreshadows the problem of trying to determine when an area of interest which is protected by a prima facie right should 'give way to' a duty. Thus, to state the problem at its clearest, if the medical treatment context generally invokes a patient's very personal interests in and rights to self-determination and bodily integrity, then how would we determine when, if ever, a woman has the duty—moral or legal—to accept

[5] See e.g. *Re Conroy*, 486 A 2d 1209 (NJ 1985).

[6] *Re T (Adult: Refusal of Treatment)* [1992] 4 All ER 649; *Thor* v *Superior Court* 855 P 2d 375 (1993).

[7] In addition to those cases already mentioned, see e.g. *Jefferson* v *Griffin Spalding County Hospital Authority*, Ga 274 SE 2d. 457 (1981) (caesarean ordered); *Re A.C.* 573 A 2d 1235 (DC App 1990) (reversing an earlier finding ordering caesarean, 533 A 2d 611 (DC App 1987); *Baby Boy Doe*, 632 NE 2d 326 (Ill App 1 Dist 1994) (caesarean not ordered); and *Re S (Adult: Refusal of Treatment)* [1992] 4 All ER 671 (caesarean declared lawful).

[8] See e.g. *Re A.C.*, Belson AJ (dissenting) arguing for such a duty; and *Winnipeg Child and Family Services (Northwest Area)* v *DFG* (1997) 152 DLR (4th) 193, in which the Supreme Court of Canada rejected interventions into the life of a pregnant glue-sniffer which had been sought to protect her unborn child, but the dissenting justices argued for intervention, including on the basis of the law of tort.

[9] For support see e.g. the US Supreme Court's decision in *Cruzan* v *Director, Missouri Department of Health*, 111 L ed 2d 224 (1990). The court considered that a competent person has a constitutionally protected liberty interest in refusing medical treatment. Justice O'Connor (who concurred with the joint opinion) stressed that the liberty guaranteed by the Due Process Clause protects, 'if anything', a person's 'deeply personal' decision to refuse unwanted medical treatment (at 249). See alsothe Court's abortion decisionin *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 120 L Ed 2d 674 (1992), in which the joint opinion (O'Connor, Kennedy, and Souter JJ) stressed that intimate decisions such as that of abortion, which concern the 'meaning of procreation' are the subject of *reasonable disagreement*, stating that '. . . reasonable people will have differences of opinion about these matters'. In contrasting different views about abortion, the joint opinion emphasized, '[t]hese are *intimate* views with infinite variations', stressing 'their *deep*, *personal* character': at 699 (first emphasis in original; second added).

medical treatment for the fetus?[10] This *is* the problem, in effect, of the 'maternal–fetal conflict' within the medical treatment context and it lies at the heart, not only of an ethical analysis of the conflict, but also of the relevant law. In effect, it is my view that the problem of the 'maternal–fetal conflict' within the medical treatment context lies at the interface between the subjective domain, which certain rights protect, and the objective quality that is inherent in the notion of duty. On this analysis, therefore, there are important conceptual links between the ethics and the law here and this supports the view that the problem is not primarily about the legal enforcement of moral obligations.

Located at the heart of this rights–duty interface, the 'maternal–fetal conflict' is riddled with tensions about the idea of a moral and legal right to make choices which may result in harm to the fetus. While there may be no legal objection to a pregnant woman's exercise of her legal right to refuse medical treatment—in the peculiarly narrow sense, for instance, that the fetus is not a legal person—morally her choice to exercise that right could on occasion be subject to criticism: for instance, if a woman declined a caesarean section in order to avoid an abdominal scar. Moreover within the law itself we might well feel uncomfortable with this scenario. Indeed, both legally and morally, reliance upon the fetus' lack of personhood—as in the cases of *Re M.B.* and *St George's*—is unsatisfactory: the question of fetal harm or death needs, so far as possible,[11] to be *justified*, not just *excused*. Thus, within both moral theory and the law, a deeper understanding of the possible justifications underlying the exercise of maternal rights is required.

For this reason, although I cannot elaborate upon this here,[12] I start with a position of a 'gradualist account' of fetal moral status, the strength of which lies in the simultaneous attention paid to maternal and fetal interests. The essence of such an account is the idea that the greater the development of the fetus, the stronger is the reason needed to justify harming it.[13] In this sense, where the fetus' development is advanced, the refusal of treatment or surgery for serious reasons arguably justifies the exercise of the right and explains the lack of duty(and, in turn, fetal harm or death) where the refusal for the trivial reason

[10] At least in the context of medical ethics and law, I would reject Hart's Choice Theory of Rights in favour of an approach which combines the ideas of interest and autonomy, as I consider that the former approach can do nothing to explain the significance of rights this context. Indeed, Hart has acknowledged that the Choice Theory cannot adequately explain either all legal rights or, more particularly, those which are part of social and political morality: in 'Bentham on Legal Rights', in A.W.B. Simpson (ed), *Oxford Essays in Jurisprudence* (1973), 196–8. It is beyond my scope, however, properly to defend this position here.

[11] Clearly, on some views neither abortion nor the refusal of medical treatment by a pregnant woman could ever be justified or could only be justified in extreme circumstances in which, say, the woman's life is at stake.

[12] *See* R. Scott, *Rights, Duties and the Body: Legal and Philosophical Reflections on Refusing Medical Treatment during Pregnancy* (forthcoming).

[13] Regarding abortion such arguments have been put forward in different ways by e.g. J. Feinberg 'Abortion' (1979) in his *Freedom and Fulfillment* (1992) at 37–75; and R. Dworkin, *Life's Dominion*: *An Argument about Abortion and Euthanasia* (1993), emphasizing the twin ideas of fetal investment in life and the woman's investment in her own life (and her reasons for abortion) as two aspects of the notion of the 'sacred'. In the context of 'maternal–fetal conflict', Kennedy adopts a gradualist account of fetal status in 'A Woman and her Unborn Child' *Treat Me Right* (1992) 364–84. Space prohibits discussion of the adaptation of this argument to the situation of the future child, but in essence I argue that the future child's interests are stronger where its mother's bodily integrity is not invoked by a treatment issue, as its location *within* the body of the pregnant woman is perhaps the most significant fact distinguishing it from a born child.

would not. In effect, the key to the reconciliation of the tensions underlying these cases lies in attention to a woman's reasons for exercising her right, the way these relate to her underlying interests in bodily integrity and in self-determination and to the moral claims of the fetus. (Elsewhere I argue that her reasons for refusing treatment can also be analysed in terms of their relation to the values inherent in the legal rights to refuse medical treatment on the one hand and to abort on the other, but there is not scope to address this here.)[14]

Situated at the interface between rights and duties, a pregnant woman's relationship to the fetus she carries can thus be analysed both in terms of her rights and her duties. Such an analysis breaks down some very difficult conceptual issues into manageable parts. Whilst elsewhere I consider a pregnant woman's relationship to her fetus explicitly in terms of her rights (focusing particularly on the question of refusing medical treatment for religious reasons, through which the moral interest and right to self-determination is explored),[15] this article focuses upon a woman's relationship to the fetus she carries in terms of her moral duty—by considering the extent of a duty that might be owed through or via the body. Yet, an argument based on duty must at some point address the question of how her duties relate to her rights: thus, in effect I am exploring her right to bodily integrity through the concept of duty.

3. *The Argument from Bodily Integrity*

> [H]aving a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself.[16]

A. *The argument*

Scholars and judges inclined to favour the fetus over the mother in the 'maternal–fetal conflict' within the medical treatment context often refer to the fetus as though it were an abstract entity, without a physical location inside the body of a woman, whose important interests in self-determination and bodily integrity it thereby affects and may be affected by.[17] Similarly, prior to the 1970s there

[14] See above n 12.

[15] Ibid. To give some indication, based on a gradualist approach I start by arguing that refusal for the serious reason *theoretically* justifies the unintentional harm to the fetus even allowing for its heightened claims at the point of birth. In *practice*, however, I point out that given the highly personal nature of religious faith and the reasons for refusing treatment which it may spawn—which means that others may well not 'share' those reasons but instead stand 'outside' the beliefs in question—we cannot accurately judge whether a religious reason for a refusal is *sufficiently serious* to justify fetal harm. In such cases, we must take its seriousness 'on trust', recognizing the place of religion in her life, a point which ultimately underscores the attribution of moral and legal rights in such a context.

[16] J.J. Thomson, 'A Defence of Abortion', 1 *Phil & Pub Aff* (1971) reprinted in P. Singer (ed.), *Applied Ethics* 37–56 at 46 (1986).

[17] This tendency has been observed by J. Gallagher, who notes that such opinions tend to depict it as an '*independent entity, abstracted from the reality of the woman's body*, much as though commentators had encountered it upon the street'. J. Gallagher, 'Fetus as Patient' in N. Taub and S. Cohen (eds), *Reproductive Laws for the 1990s* (1989) 185–235, 187 (my emphasis).

was a tendency on both sides of the abortion debate to consider that the essential question was whether it was wrong to destroy a fetus, without consideration of the necessarily implicated interests of the pregnant woman.

In 1971 Judith Jarvis Thomson shifted the debate's focus from the moral status of the fetus to the moral rights of a pregnant woman. She challenged the view that although a woman may have a right to bodily autonomy, the fetus is a person with a right to life which is more fundamental and hence overrides the woman's right. She criticizes this argument, not by questioning whether the fetus is a person with a right to life, which she accepts for the purposes of her argument, but by focusing on the nature of the right to life. Thus, she asks us to consider the following intriguing scenario:[18]

> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poison from his blood as well as your own.

The hospital director apologetically acknowledges that it was wrong of the society to kidnap you, but points out that he cannot now unplug you as this would kill the violinist, but, not to worry—it's only for nine months. Yet it could be for nine years. Regardless of whether it would be nice or kind of you to stay plugged in, Thomson asks, *are you morally required to do so*? She suggests we would regard this situation as 'outrageous'.[19] And yet, the director might argue, the violinist, as a person, has a right to life and this is stronger than your right to bodily autonomy.[20] (Notice that the violinist is 'plugged into' the person; whereas the fetus is of course *inside* the pregnant woman. This may account for Thomson's term 'bodily autonomy' rather than 'bodily integrity', in that it would seem that a highly significant impact of having the violinist plugged into one would be the restriction of one's movement. Thus, in recounting Thomson's argument I use the term 'bodily autonomy'; but as the discussion of her argument develops I adopt the term 'bodily integrity'. This seems appropriate since both Thomson and I are really concerned with a being—the fetus—which is *inside* the body of the pregnant woman. This is not to deny that the more advanced the pregnancy, the greater the restriction of movement.)

Thomson's response is to argue that the right to life does not entitle the violinist to whatever he needs to remain alive, particularly to the use of your body, unless you have granted him that right; nor does it give him a right against third parties that they should give him the use of your kidneys.[21] The 'right to

[18] Above n 16 at 38–39.
[19] Ibid at 39.
[20] I shall not spend time justifying the idea of a right to bodily autonomy or integrity, partly because such a right is widely accepted in moral theory (and law) but essentially because, as Joel Feinberg observes, above n 13 at 66, it is 'the limits of that right [that] are lost in the fog of controversy'. For an argument seeking to establish an individual's personal body rights, see S.R. Munzer, *A Theory of Property* (1990) ch 3.
[21] Above n 16 at 45.

life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself'.[22] Hence, even though you will kill the violinist, you do not violate his right to life when you reach round and unplug yourself: to do this you would have to kill him 'unjustly', but since he had no right to your body, his right to life is not violated when you unplug yourself.

(i) *Moral requirements*

Thomson's analysis of moral requirements focuses upon rights, which she sees as the principal component within justice, a conception which is itself open to challenge.[23] Central to her argument is the idea that to possess the right to use another's body one must have been granted it by that other. (Indeed, on her view, to possess any right one must have been granted it by another, a view which surely cannot apply to the right to bodily integrity and autonomy.) The surprise, perhaps, is to discover that even the fetus' right to life must depend on such grant. In the abortion context, this raises the question how a pregnant woman might be said to have given such a right to the fetus. The answer will lie in whether the mother voluntarily became pregnant.[24] Now, as Thomson recognizes, whether a pregnancy is voluntary is by no means a clear-cut thing: the spectrum from the involuntary (with rape at one end) to the voluntary (deliberate planned pregnancy) is obviously complex.[25] Nevertheless, she admits that where pregnancy *is* the result of a voluntary act undertaken in full knowledge of the possible consequences then, having been partly responsible for bringing this dependent fetus into existence, a woman has 'a special kind of responsibility for it, a responsibility that gives it rights against her which are not possessed by any independent person—such as an ailing violinist who is a stranger to her'.[26] In such a case—assuming for the sake of argument that the fetus is a person—abortion would be unjust killing, that is, it would violate the fetus' right to life. Here the woman's 'special responsibility' (arising from her voluntary conduct) implies or is tantamount to a duty owed by her to the fetus through which the fetus gains rights to her body. In other words, where there is a special responsibility for the fetus there is a duty and, following from this, a correlative right.

(ii) *Moral decency*

Yet this is not necessarily to suggest that where there is no special responsibility/duty and correlative right, people should not assist others. Indeed, Thomson argues there may well be circumstances in which you 'ought' to assist someone:

[22] Ibid at 46.

[23] For a different view of justice see D. Millar, *Social Justice* (1976) who argues that the criteria of justice are the distinct and irreducible ideas of rights, needs, and desert.

[24] Above n 16 at 48.

[25] Between these extremes, Joel Feinberg discusses the varying degrees of responsibility (or lack of) that may attach in different scenarios ranging from contraceptive failure which is entirely the fault of the manufacturer to pregnancy resulting from indifference at the time of intercourse: above n 13 at 68–9.

[26] Above n 16 at 48.

for instance, if the violinist only needed your kidneys for an hour; or if a fetus—even one that is the product of rape—only needed the use of your body for a similar period. But the difference lies in the sense of 'ought' here employed. The idea here is that you ought to let your body be used—not in the sense that you are *required* to do so—but rather in the sense that it would be morally *decent* of you. The difference between the cases of 'special responsibility' and those of moral decency is that in the latter neither the violinist nor the fetus gains rights from the fact that you 'ought' to help them. It might be 'self-centred, callous, indecent in fact, *but not unjust*',[27] if you decline to assist: Thomson insists that although moral indecency might be just as serious as injustice, the two charges are different, as one invokes the issue of rights and the other does not. On Thomson's view, then, morality is primarily about respecting rights, a position which is controversial and which I shall later question.

In explicating these ideas, Thomson goes so far as to allow her imaginary critic to derive a right from the 'morally decent' ought, but insists it is crucial we acknowledge there are occasions when you are not morally required to assist the violinist, just as there are occasions when the woman is not morally required to carry the fetus to term. On these occasions neither the violinist nor the fetus acquires rights against you or the woman. She writes:[28]

> Except in such cases as the unborn person has a right to demand it—and we were leaving open the possibility that there may be such cases—nobody is morally *required* to make large sacrifices, of health, of all other interests and concerns, of all other duties and commitments, for nine years, or even for nine months, in order to keep another person alive.

In fact, all this amounts to is a restatement of her position that we can derive a right from an ought when the ought implied a morally required duty, as is the case in the special responsibility scenario discussed earlier: that is, where a woman is voluntarily pregnant and hence has a duty to a dependent fetus which thereby acquires rights to her body. In the ensuing discussion, however, the contrast between the two moral domains is sharpened and it becomes clearer that the domain of the morally *decent*, while important, is in Thomson's view the domain of the morally optional. Further, we do now have more information about the requirements of the 'special responsibility' case in which rights are implicated, as it appears that a woman who has taken on this 'special responsibility' has an obligation to make large sacrifices (assuming that the fetus is a person).

As her article develops,[29] her analysis of the abortion issue hinges upon the distinctions between the 'Good' or 'Splendid' and the 'Minimally Decent' Samaritan. In essence, Thomson holds that you are not required to be (as good as) a Good Samaritan unless you have assumed special responsibility for someone

[27] Ibid at 51 (my emphasis).
[28] Ibid (emphasis in original).
[29] S.6, 51*ff*. My discussion concentrates upon those sections of her article most relevant to my concerns, but note that she also considers, for instance, self-defence arguments about abortion at length.

(become voluntarily pregnant, say). Yet this does not mean that where you have *not* assumed that responsibility (where, say, you did all you could to avoid becoming pregnant) it is necessarily morally appropriate to seek an abortion: '[t]here may well be cases in which carrying the child to term requires only Minimally Decent Samaritanism of the mother, and this is a standard we must not fall below'.[30] In other words, in the imaginary case in which continued pregnancy only calls for a relatively small level of sacrifice, then you 'ought' not to abort in the sense that it would be morally indecent of you to do so. In such a case the fetus has no rights against you and hence, on Thomson's argument, you could do as you wish with it: after all, you are not required to be morally decent. All the same, notwithstanding your 'technical freedom' to do so, it would be decent of you not to abort.

B. *Thomson's view of morality*

In explicitly excluding the idea of moral decency from the realm of justice, Thomson may well be invoking the concept of other virtues, such as charity. Importantly, however, although she claims that a charge of a lack of moral decency may be no less grave than one of 'injustice', her entire argument—which is intended to show that no rights are violated when a woman (who is involuntarily pregnant) aborts—in fact marginalizes the notion of imperfect duties which are, by definition, not instrumental to the protection of rights. She thus assumes such duties to be optional, in a manner which incorrectly suggests that imperfect obligations are supererogatory.

If Thomson argues (and her article is not clear on this point) that the general right to life—rather than fetus' (assumed) right—entails only negative duties, this does seem excessively libertarian. Indeed, few would now endorse the *laissez-faire* libertarian idea that the duties correlating to rights are only negative in character.[31] In this light, she could well have allowed a correlating positive duty to the right to life but limited this to one to provide 'manageable' levels of assistance, rather than 'large' sacrifices. Yet at heart this is a methodological point about Thomson's way of limiting what we can fairly ask of pregnant women. That is, if she had instead emphasized the point that pregnancy *always* or generally entails large burdens and risks, then she could alternatively have argued that the fetus' right to life does not entail the right to be carried for nine months inside the body of a woman, which, in effect, would be to say that the fetus does not have a right to life. It was, of course, because Thomson wished to *accept* the claim that the fetus has a right to life but challenged what this *entails,* that her argument evolved as it did.

Thus, although one might criticize Thomson for so sharply dividing the moral territory into the zone of rights/moral requirements on the one hand and general intrinsic duties/moral decency on the other, and then apparently marginalizing

[30] Ibid at 55.
[31] An obvious exception would be Nozik. See e.g. R. Nozick, *Anarchy, State, and Utopia* (1974).

the latter to the point of optionality, she does this because she is addressing a rights argument: namely, that the fetus has a right to life. As a result, the significance of moral decency, which she claims to be just as important as the domain of justice (as she has defined the latter), is reduced: as moral requirements are translated in terms of correlative rights and duties, and as Thomson's object is to limit moral requirements, so moral decency can only be optional, notwithstanding her evident desire that we should take moral indecency as seriously as injustice. As others have noted, rights arguments have a tendency to diminish the significance of other virtues.[32] In this sense Thomson's explanation of a pregnant woman's duties in terms of the distinction between the Good and the Minimally Decent Samaritan can be seen as a pertinent illustration of the way in which right-based arguments, as Onora O'Neill observes, make 'callous and kindly actions to others in need . . . equally permissible, provided that justice is not breached'.[33] (In a similar vein, consideration of the personhood argument as to fetal moral status indicates that rights arguments tend to obscure other important moral duties and concepts.)[34] Thus, Thomson leaves us with a narrow right-based morality in which the contrast between self and other is at its sharpest, softened only by her acknowledgment of the realm of the 'morally decent'. Such a morality is of course disputed in different ways by legal philosophers such as John Finnis[35] and Joseph Raz.[36]

C. *Limiting the obligations pregnancy imposes*

Reminded of the importance of imperfect duties, let us leave to one side the rights argument which prompted Thomson's approach and focus instead on this other domain of moral thinking. Although the fetus may well not be a person (in that it lacks those characteristics of moral persons, namely consciousness, rationality and agency, the ability to communicate, and self-consciousness), in any event pregnancy imposes duties which are unrelated to personhood and hence rights. As noted, I favour a gradualist account of fetal status which makes its lack of personhood/rights irrelevant to its appropriate moral treatment. But

[32] See e.g. Onora O'Neill, 'The Great Maxims of Justice and Charity' *Constructions of Reason: Exploring Kant's Practical Philosophy* (1989) at 219–33. She argues that both utilitarian and liberal thought have emphasized justice at the expense of charity and other virtues, and have thereby broken the link between the ideas of obligation and virtue. Whilst obligations were fundamental in Locke's thought, they tend now to be understood merely as the 'perfect' obligations which are the correlation of rights. Further, since there are no rights to charity, so charity has all but disappeared from our ethical map. In this light, charity is conceived either as personal preference, so that 'callous and kindly actions to others in need are equally permissible, provided that justice is not breached' or as superogatory, so that 'mundane help to others in need will be in the same category as saintly or heroic action': at 225.

[33] Ibid at 225. For a reminder that considerations of justice only constitute part of morality, see also B. Barry, 'And Who is my Neighbour?', Review of C. Fried, *Right and Wrong* (1977) 88 *Yale LJ* 629 at 642 (1979).

[34] The original formulation of the personhood argument was by M. A. Warren, 'On the Moral and Legal Status of Abortion', 57 *The Monist* 1 at 43 (1973). Given the rather narrow, 'technical' nature of personhood arguments—with their emphasis on the actual possession of certain characteristics as guaranteeing the possession of full and equal rights—by their very nature such arguments tend to exclude, except as tidying footnotes, any other terms of moral reference.

[35] See subsequent discussion below.

[36] See e.g. J. Raz, 'Right-based Moralities' in J. Waldron (ed.), *Theories of Rights* (1984) 182–200.

are the (imperfect) duties of pregnancy 'absolute' or can they be limited? Showing that we can lay down certain limits is, after all, the ultimate point of Thomson's article. Thomson does this by means of the notion of 'voluntariness', which she ties into the rights argument. Yet if the imperfect obligation is not a matter of choice, these obligations—those that are not correlated to rights—are potentially boundless. In this light, can we limit the obligations entailed in a voluntary pregnancy, recognizing that these are typically large, without relying on ultimately question-begging arguments about what the fetus' personhood/rights—or rather lack thereof—would entail?

To see what Thomson's argument offers to an understanding of the 'maternal–fetal conflict' within the treatment context, I shall draw out some of the crucial distinctions which are by no means explicit in her text, thereby appreciating the strengths and weaknesses of her argument. Thomson's argument is built upon two rather thorny philosophical distinctions, namely, that between positive and negative duties and between special and ordinary ones.

(i) *Duties of the body and duties of conduct*

My overarching distinction between duties which seriously invoke the body and duties of day-to-day conduct will now emerge. As noted, this is a distinction which Thomson does not herself make, perhaps to her cost. Indeed, unlike the issue of the moral duties of the Good Samaritan, the question of whether there is a duty to carry a fetus to term or—for my purposes—to submit to a caesarean section on its behalf, is complicated by the fact that such a duty rubs up against the moral interest in, and right to, bodily integrity (and self-determination, understood as an interest in making decisions regarding deeply personal matters). This is not true of the Good Samaritan, who acted in the course of general conduct: on my view (which appears consistent with aspects of Joseph Raz's thought[37]) the latter domain does not invoke these moral interests but only a very general sense of autonomy which thus does not merit the protection of any particular right.[38]

It is just possible, however, to conceive of treatment beneficial to the fetus which does not implicate these interests. For this reason, in due course it will be revealing to compare the idea of a maternal duty to submit to a caesarean section (which clearly does implicate these interests) with that of a duty to take a (fictitious) pill that is highly beneficial for fetal welfare but does not have adverse effects for the pregnant woman. It is also instructive to reflect in passing upon the idea of a pregnant woman's duties not to harm the fetus she carries *outside* the treatment context.

[37] On Raz's argument autonomy is a value from which specific rights may be derived: on his view, there are 'derivative rights' (*The Morality of Freedom* (1986) 247) which protect and advance aspects of the individual's autonomy and contribute to making autonomy possible (above n 36 at 195). Thus, I think it follows from aspects of Raz's thought that one's general conduct would not merit the protection of specific rights. This is because, by definition, specific rights protect quite particular interests and choices.

[38] Note my rejection of Hart's Choice Theory of Rights, at least in this context. See above n 10.

(i.i) *Positive and negative duties: bringing out ideas about reasonableness*. As we have seen, Thomson regards the right to life *only* as a right not to be killed directly (or at least 'unjustly'). Although it seems excessively libertarian to consider that the right to life invokes only negative obligations, her use of the distinction between positive and negative duties may be designed to bring out the following highly important point. At some level, she is drawing attention to the important differences in the way the right to life tends to operate in the differing cases of a fetus and a born person. Regardless of whether or not the right to life entails a right to positive assistance from others, not killing (or not physically harming) one's fellow citizens is *most usually* about not killing them in the sense of the negative duty not to harm. That is, only rarely does the right to life (for those of us who are not doctors, fireman etc. who may thereby have a special duty to assist to an extensive degree)[39] entail the *saving* of a life. Whilst every day we fulfil the obligation not to kill in the first sense, most of us will never be called upon to save another human being's life in any truly immediate sense, as the Good Samaritan apparently was. That is, whilst we might frequently be called upon to make a financial donation to a charity supporting a famine-stricken people and indeed can save lives in this way, or to give to homeless people begging on the street, generally speaking we may rarely, if ever, come across dying people in the street to whom we can render immediate one-to-one life-sustaining aid.

With regard to the fetus, the situation is different. It is one thing to say, as we shall see that John Finnis would, that abortion is killing, but one must also accept that not aborting is not merely not killing in the same way that I refrain from killing the passers-by on the street. Rather, not aborting (and hence not killing) means continuing to absorb and respond to the demands of the growing fetus and its impact upon one's health, both psychological and physical. In other words, at some level killing a fetus is *also* a matter of not continuing to do something.[40] More particularly, as the discussion in the next section will highlight, it is a matter of not continuing to render bodily aid, as well as emotional assistance. Thus, in some sense that may not be sufficiently clear in her text, Thomson has very appropriately drawn attention to the way in which carrying a fetus to term can, to some extent, be seen as an instance of a positive duty to assist.

I say 'to some extent' because I think there are limits to this argument regarding abortion. Thus, once a woman has decided to take an unplanned pregnancy to term (or has deliberately conceived) and has let the fetus keep on growing,

[39] I ignore contingencies of the current *legal* position in *Capital & Counties plc* v *Hampshire* [1997] 2 All ER 865.

[40] Callahan and Knight also recognize this point, observing '[t]he duty to avoid harming others is generally discharged by simply refraining from running them over with cars, avoiding dropping things on them, and so on'. By contrast, if pregnant women are not to harm their fetuses, then they must 'nurture' them. J.C. Callahan and J.W. Knight, 'Women, Fetuses, Medicine, and the Law' in H.B. Holmes and L. Purdy (eds), *Feminist Perspectives in Medical Ethics* (1992) 224–39, 232. However, the authors do not further draw out the differences between these negative and positive duties, although they do note that both parents and pregnant women have special positive duties toward children/fetuses. On women's special responsibilities for the fetus, see the last section of this article.

thereby taking on a commitment towards her fetus, we might say that aborting thereafter (except to protect her life or health) is morally different such that, even if such an abortion can still at some level be described as 'not assisting' the fetus, it might more appropriately be construed as harming it and thus breaching a negative duty in relation to it.[41] However, this intuition would require further defence which is beyond my current scope. In any event, regarding the issue of a caesarean section, this is much more easily describable (in comparison with not having a late abortion where there is no sudden risk to life or health from continued pregnancy) as being asked further to assist the fetus.

But why is it so important to emphasize this distinction between positive and negative duties and the way in which the breach thereof may harm others? I argue in this section that we can judge the reasonableness of the negative duty more easily than we can that of the positive duty. In other words, we can say more easily where there is a negative duty than where there is a positive duty. This may be because not breaching a negative duty not to physically harm others, for instance, driving a car in a careful rather than a careless way, is unlikely to have any very personal significance for the driver. By contrast, with regard to the issue of a positive duty, questions about the person who may be called upon to fulfil this duty may well be relevant to the existence and extent of the duty. Consider the following example.

A man cycling along a path by a river knocks into a small child, thereby pushing the latter into the water. This man has clearly broken a negative duty which he owed to this child not to cause physical harm to it. Now let us contemplate the rescue of this child by another man.

This second man is passing by and sees the child knocked into the river. Since he can swim, surely he should jump in and save the child. Indeed, in such a case there would not appear to be any physical risks to him involved in the rescue. Let us therefore factor these in by adding that the river is flowing fast, and over rocks. Should he still jump in? His swimming skills, which will surely affect the degree of risk to which he thereby subjects himself, may be relevant. Let us assume he can swim well and is fit and strong. Surely he should jump in and attempt the rescue. Suppose instead that he has only had a few swimming lessons or cannot swim at all; moreover, he is just recovering from a bad flu which has left him distinctly weak. Now the physical risks to himself are clearly greater than in the first example in which the river was not flowing fast, or in the second, in which he could swim well and was very strong, and so on.

The degree of risk to the rescuer thus varies depending not just upon the circumstances of the rescue (the slow/fast river etc.), but also upon his ability. Through these examples, we can see that the risks to the rescuer are slowly increasing to the point where, regarding the last case, there may be disagreement about whether the man should jump in at all. In effect, here there may be

[41] The sense in which abortion may arguably breach a negative duty is one which might profitably be discussed in the context of an examination of the relevance of the law of abortion to questions of maternal treatment refusal, which is beyond my scope here. See above n 12, ch 5.

disagreement about whether he has a (positive) duty to rescue the child, perhaps reflecting the understanding that 'ought implies can'. (This is not to deny that there may be various intermediate cases regarding which, even if the person probably could rescue the child, there will be disagreement about whether the duty lies.) To some extent, if we say that in this final case the man should not jump in, we may have in mind that in any event his rescue attempt is unlikely to be successful, apart from the point that he may catch pneumonia—or whatever—in the process. But this is to make an observation about the outcome, not the duty which may or may nor lie.

This example shows that factors about the *person* and his or her *abilities*/*capacities* may be relevant to the determination of the positive, but not the negative, duty. With regard to the reckless cyclist, for instance, if we later learn that he was speeding to the hospital to give blood to his own child, this may be relevant to his degree of culpability for the harm to the child he knocked into the river,[42] but does not of itself mean that he had no negative duty not to harm the child by the river, nor that he did not breach such a duty. It may be objected that where the rescue could only be effected at great cost, in some sense the rescuer's personal circumstances 'excuse' him if he declines, rather than that he has no positive duty; but the point is stronger than this because these facts about him actually affect the existence or degree of his positive duty.[43] In turn these observations may be bound up with the view, propounded for instance by Philippa Foot, that positive duties are less stringent than negative ones.[44] The suggestion is that the negative duties under discussion are ultimately more fundamental than the positive ones. Note further that the duties discussed here pertain to the domain of general conduct and hence do not invoke the individual's moral interests in self-determination and bodily integrity.

In fact Thomson herself illustrates her Samaritan argument with an example which, when compared with the bodily 'plugged-in' violinist scenario, is very much from the domain of general conduct (although she does not explicitly

[42] For instance, legally we may take facts about a person into account in determining whether they should be guilty of murder or manslaughter holding, for example, that in effect their responsibility was diminished.

[43] My approach might be described as 'appealing to costs' by a consequentialist. See e.g. the discussion in A. Menlowe, 'The Philosophical Foundations of a Duty to Rescue' in M. Menlowe and A. McCall Smith (eds), *The Duty to Rescue: the Jurisprudence of Aid* (1993) 5–54. Menlowe is primarily concerned with the appraisal of various consequentialist arguments. Within his argument my position would appear aligned with that of the 'moderate', who is concerned that 'an appeal to costs must be allowed because a moral system that does not allow such an appeal (a system without options) fails to reflect important facts about the nature of persons; and particularly with the 'positive argument [that] attempts to demonstrate that an adequate morality must recognize subjective reasons as a source of value' (at 43). Menlowe endorses the consequentialist approach of S. Kagan, *The Limits of Morality* (1989) who argues that any moderate position is inherently unstable because it will collapse into extremist accounts. Whilst I cannot address this further here, I note Menlowe's observation that '[c]onsequentialism requires at least that the option of favouring one's own interests is very limited' (at 40) and direct the reader forward to my next section, where the kind of duty with which I am truly concerned—the duty to aid another by submitting to surgery for that other's benefit—comes to the fore: this is a very specific kind of aid entailing very personal interests on the part of the rescuer.

[44] P. Foot, 'The Problem of Abortion and the Doctrine of the Double Effect' in B. Steinbock (ed.), *Killing and Letting Die* (1980) 156. Reprinted from the *Oxford Review*, No. 5 (1967) 156.

make this distinction herself). She is considering whether the right to life entails the right to be given the bare minimum:[45]

> But suppose that what in fact *is* the bare minimum a man needs for continued life is something he has no right at all to be given? If I am sick unto death, and the only thing that will save my life is the touch of Henry Fonda's cool hand on my fevered brow, then all the same, I have no [such] right . . .

She compares the situation in which Fonda would have to fly in from the West coast on the one hand with that in which he would merely have to cross the room to touch my brow on the other, and says:[46]

> Is it to be said . . . that I have a right to it when it is easy for him to provide it, though no right when it's hard? It's rather a shocking idea that anyone's rights should fade away and disappear as it gets harder and harder to accord them.

Since my concern is not with the rather narrow issue of rights but with moral requirements beyond their call, I shall ignore the rights focus of this passage and instead focus upon what Henry Fonda would have to do to save my life here. After all, as Brian Barry has suggested, rather than being forced into conclusions about rights, 'why can't we simply say that the further Fonda would have to come the less badly we would think of him if he doesn't?'.[47] Barry suggests we could condemn him for not crossing the room just because it would be so easy for him; in other words, that our praise or blame of Fonda—or any rescuer—will vary according to how easy it was to help, which supports my argument with regard to the swimming rescuer above. Thus, the ease of the assistance will depend upon the situation (as in Fonda's case) or the ability (as in my swimming rescue case) of the person. If Henry Fonda is sitting in an armchair across the room, then he most surely breaches a positive duty to come to my aid if he does not cross the room and cool my brow. By contrast, if he has to fly from the USA to London to do so, then I suggest no such positive duty is breached in his case.

Unaware of these problems as regards a pregnant woman's duty to submit to medical treatment, one leading scholar has simply suggested that the question is whether she is being 'reasonable'. John Robertson weighs the risks of surgery to a woman against the benefits to the fetus, writing '. . . a clear medical need that *reasonable* persons would not refuse would have to be established'.[48] Importantly, in Robertson's work the concept of reasonableness is strongly linked to the idea of conduct. Indeed, his emphasis on reasonableness is highly reminiscent of the legal tort of negligence—concerned with the idea of a duty

[45] Above n 16 at 45 (emphasis in original).
[46] Ibid at 51.
[47] Above n 33 at 653.
[48] J. Robertson and J.D. Schulman, 'Pregnancy and Prenatal Harm to Offspring: The Case of Mothers with P.K.U.',17 *Hastings CR* 23, 28 (Aug. 1987). See also K. Kinlaw, 'Commentary: Maternal Rights, Fetal Harms', 21 *Hastings CR* 22 (May–June 1991). On the risks of a caesarean section, she writes: 'These . . . are apparently medically 'reasonable' . . . as cesarean sections are regularly recommended by the medical team and accepted by expectant parents in order to promote the health and safety of the woman and fetus': at 23.

of care—which largely goes to issues of conduct, by act or omission.[49] He argues that a pregnant woman has duties to prevent harm to the future child when she may 'reasonably' do so, concomitant with those of a parent to a born child, suggesting that 'the timing of the conduct' does not affect the nature of the duty.[50]

Robertson's reasoning misses two important points. First, the difficulty of determining reasonableness with regard to a positive duty to assist is not appreciated. As the next section shows, these difficulties are accentuated when that positive duty literally means helping another through one's body, a supremely personal domain (protected by at least prima facie rights). Secondly, Robertson's argument obscures the fact that it is not time, so much as place, that is in issue (at least regarding the medical treatment context), in the sense, that unlike the born child, the fetus or the future child is within the woman's body.

Importantly, however, Robertson's ideas about reasonableness may well have validity in two ways. First, they may be relevant *outside* the medical treatment context, where we are considering a woman's general conduct and the way this may harm, particularly, the future child. For instance, given the certainty that extensive maternal smoking or alcohol abuse will harm the child, it seems highly arguable that a pregnant woman has moral duties not to smoke or consume more than minimal alcohol. Similar arguments might be made about participation in certain sports such as bungee-jumping, or about mundanely ordinary conduct, such as failing to take care in crossing a street or driving a car. By harming the fetus or future child in these ways a woman would arguably be breaching negative duties not to harm it, regarding which the most important issue may well be the appropriateness or otherwise of legal compulsion.[51]

Second, Robertson's ideas may have validity in the hypothetical case of the pill beneficial to fetal welfare. The spectrum elaborated in the swimming rescue case indicates that not all positive duties meaningfully invoke questions about the person and, in particular, their moral interests in self-determination and bodily integrity. Thus, vastly unlike major surgery, taking a pill impinges upon the body in the most minimal sense imaginable. In this sense, referring back to my criticisms of Robertson, 'place' is not in issue. Indeed, swallowing a pill is very much akin to an instance of conduct. Moreover, given our assumption that the pill has no possible adverse effects on the woman, it will be very hard to think of a reason, let alone a serious one, why a pregnant woman should refuse to take it. Importantly, this means that she indeed has the moral duty to take the pill for the benefit of the fetus or future child. Put another way, since swallowing the pill does not appear seriously to invoke her interests either in self-determination or bodily integrity, then arguably she would unjustifiably assert a right to refuse it.

[49] See also J. Parness, 'Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns', 5 *West Eng L Rev* 431 (1983), in which one of the opening questions is 'what constitutes *unreasonable conduct* or perhaps reasonable but unwarranted *conduct* toward the unborn?': at 432 (my emphasis).

[50] Above n 48 at 24 (my emphasis).

[51] See further above n 12, ch 6.

(i.ii) *Special and ordinary duties: bringing out the further idea of a duty through the body.* I now move from a positive duty of conduct with attendant physical risks to the idea of a duty that can only be realized through the body. The generally extensive nature of the burdens in pregnancy are here taken as given, such that there will be few/no pregnancies in which carrying the fetus only calls for a woman to be 'minimally decent' toward the fetus. Indeed, Thomson's imaginary pregnancy in which carrying the fetus to term only requires minimal burdens belies the reality that, as Donald Regan writes, '[i]t is very large burdens or nothing'.[52] Moreover, he notes, '[t]he fact that many women willingly undertake the burdens of pregnancy, for reasons of their own, is no reason to discount the burdens as they affect women to whom they are unwelcome'.[53] In any event, the caesarean section with which I am here principally concerned makes serious invasive demands. That natural birth is itself physically burdensome is not in point when a woman has no serious objections, religious or otherwise, to natural delivery.

For Thomson, we have seen that where a woman is morally required not to abort—where she has accepted responsibility for a pregnancy—she has a special duty to carry the fetus to term (make a large sacrifice) and thereby act in a manner which we would normally associate (it is considered) with the conduct of a Good or Splendid Samaritan. John Finnis is strongly critical of this view, alleging that the duty not to abort is not 'special', but is instead 'a straightforward incident of an ordinary duty everyone owes to his neighbour'.[54] He argues that she has failed to understand the relationship between special and ordinary duties for the following reasons: she thinks the entire problem is to do with rights and that these depend on grant or assumption; she considers that special responsibilities also depend on assumption or grant and hence that the entire problem has to do with special responsibilities.[55] Let us take these criticisms in turn.

First, as observed before, although Thomson insists that moral indecency may be as serious as injustice, the entire purpose of her use of this distinction is to focus on what she sees as the narrow core of moral requirements which involve rights. Finnis is therefore correct to consider that she thinks the whole problem is to do with rights. Further, on her argument, it appears that special responsibilities—such as that of continuing a pregnancy—also depend on grant or assumption, as the duty not to abort arises where one has assumed responsibility for the fetus, that is, become voluntarily pregnant. Finnis is thus right that Thomson is ultimately concerned with what is morally required, such that rights are effectively no more than a 'technical device' used by her to delineate the

[52] D. Regan, 'Rewriting *Roe* v *Wade*', 77 *Mich L Rev* 1569, 1591 (1979). He cites these burdens over some 2.5 pages of text, concluding (at 1582) that he 'suspect[s] it is an unusually lucky woman who does not put up with enough pain, discomfort, and disruption of appearance and emotional state to add up to a major burden'.

[53] Ibid at 1635.

[54] J. Finnis, 'The Rights and Wrongs of Abortion: A Reply to Judith Thomson', 2 *Phil & Pub Aff* 117–45 (1973). Reprinted in R. Dworkin (ed.), *The Philosophy of Law* (1977) at 129–52, 134.

[55] Ibid.

domain and extent of moral requirements. Thomson thus 'needs' a distinction which is of less concern to Finnis because, on his view, what is morally required of us is rather more considerable.

Indeed, there is considerable disagreement between Thomson and Finnis as to whether the Good Samaritan was doing more than the 'minimally decent thing' (Thomson); or whether he was only doing his 'ordinary neighbourly duty' (Finnis). Fortunately, I need not settle this difference. Rather, it is more to my point to question the extent to which a woman carrying a fetus to term can in fact be likened (to employ Thomson's terms), to the actions of the Good Samaritan; or (to use Finnis' terms) to question whether it is a matter of a woman's 'ordinary neighbourly' duty that she carry the fetus to term or, by implication, submit to whatever medical treatment is needed by the fetus (or future child).[56]

It should already be apparent that I think we have an 'ordinary duty' to assist others which may involve physical risks, notwithstanding my discussion of the difficulties of determining the existence or extent of this duty in complex cases. Similarly, I presume that Finnis would consider that his 'ordinary duty' will on occasion entail some degree of physical risk, such as rescuing a drowning child. Yet in such cases, while there may be physical *risks* to the rescuer, the rescue in itself will be effected by (possibly strenuous) swimming—an activity: thus, the rescuer is called upon to engage in an activity which he has likely partaken of before, albeit under pressure when performed as part of a rescue. This is a duty of conduct, if you like, which may carry some degree of physical risk.

There is something different, I suggest, about a duty which necessarily *inheres in* the body. It is very rare that one may have the opportunity to assist another in a way which makes serious and invasive demands of one's body—in effect, to *use* one's body to help or save another—such that it is quite hard to think of a suitable example, other than the cases of pregnancy and organ or tissue donation. Indeed, this accounts for the utterly unreal nature of Thomson's original example of the ailing violinist who is 'plugged in' to another person in order to survive. In the case of the donation of an organ, such as a kidney, the donor will run certain physical risks. But more than this, I emphasize here the sense in which the aid to the other truly occurs through the body—it is my kidney that someone needs. The incursion into the body, a very personal domain, which *necessarily* brings a certain degree of pain and discomfort, is important in itself, independently of the fact that—as a secondary issue—physical risks may attend this process.

There are several important aspects to this bodily rescue which distinguish it from the swimming case. Assuming at least that one has swum before, one can relatively easily imagine jumping into the river to save the child, even if one has never rescued whilst swimming; moreover, unless things 'go wrong', one will not encounter physical problems (rather than the demands of the swimming *per*

[56] In general, as I now move away from the abortion issue to that of 'maternal–fetal conflict', unless fetal death *in utero* is specifically in issue, the following discussion concerns either the fetus or the future child; but for simplicity I shall henceforth generally refer to the 'fetus'. Occasionally, I use the term 'unborn child' to cover both.

se). By contrast, since the opportunity for a truly 'bodily rescue' is so rare, to the extent that few (except pregnant women) will ever be called upon to assist another in this way, it is very likely that a potential 'bodily rescuer' will find it quite hard to imagine what this type of rescue will be like. Here the necessary pain and physical incursion into the body come to the fore. While some people may have few concerns about the donation of a kidney, I do not think we immediately assume that anyone who *is* concerned about this prospect is necessarily callous and thereby shirking his or her moral duty. A potential 'bodily rescuer' may or may not have experienced severe pain, with or without surgery: if he has, he knows that pain can be a completely overwhelming experience in which all else loses significance, so that in some sense the body dominates the mind; if he has not, then its prospect is simply an unknown quantity. In essence, the point in this section is that there is something more complex in the determination of the duty in the case of the 'bodily rescuer' than in the case of the 'swimmer rescuer'. There may be a specially psychological or emotional dimension because the means of rescue is so intimately part of the self. This difference means that there is some quality of empathy or understanding called for in our contemplation of someone being faced with a request, say, to donate a kidney, which would make us slow to condemn a person who was very apprehensive about such a procedure.[57] Importantly, the point is not that the prospect, say, of donating an organ will necessarily make someone lose all capacity for rational reflection, but rather, given the intensely personal and physical nature of such rescues, that it will be very understandable (in one sense, one might even say rational) that someone may have intense doubts and fears about such a prospect.[58]

Perhaps something of this complexity is captured in a story reported early in 1997 in which the sister of a woman dying of leukaemia initially refused to donate bone marrow. The sister whose bone marrow was needed had a 'terror

[57] Regarding these ideas of empathy or understanding, one physician has observed of the 'maternal–fetal conflict' cases that '. . . these cases are testimony to a concern for the well-being of the fetus'. W. Meeker, Letter to the Editor, 317 *New Eng J Med* 1224 (1987). Meeker criticizes G. Annas' view that the cases '. . . betray a profound suspicion of pregnant women and a failure to identify with them' in his 'Protecting the Liberty of Pregnant Patients', 316 *New Eng J Med* 1213 (1987). Annas' response (at 1224–5) is to note that Meeker's view depends on compassion for the fetus, but that he fails to extend this to the woman involved.

[58] I do not mean here to endorse, as for instance *per* Descartes, sharp distinctions between 'mind' and 'body', aligned in turn with 'reason' and 'non-reason' and, ultimately, ideas relating to 'male' and 'female' (for a critique of which see G. Lloyd, *The Man of Reason: Male and Female in Western Philosophy* (1984)). Rather, in suggesting that there are complex psychological elements pertaining to the determination of a very bodily duty, it might instead be argued that 'good' or 'true' reasoning must in this case attend to these considerations, which in turn here become 'part of' reason. However, it is beyond my scope to develop this point. For further thought on this theme, see e.g. S. Callahan, *In Good Conscience: Reason and Emotion in Moral Decision Making* (1991), who argues that a significant problem of the moral life is not, as is often thought, that our reason is tainted by our emotions, but rather that we are deficient in emotional responses. See also M. Nussbaum, 'An Aristotelian Conception of Rationality' *Love's Knowledge: Essays on Philosophy and Literature* (1990) 54–105, discussing the place and validity of the emotions in Aristotle's conception of practical reason. It is important to note, however, that it is very hard to say anything about these ideas without immediately begging questions about our definition of the terms 'reason' and 'emotion'. Indeed, as Nussbaum has expressed the point in connection with the thought that emotion may have a valid role to play in moral reasoning, the traditional distinction between reason and emotion should not be taken 'on trust'. M. Nussbaum, 'Feminists and Philosophy', A Review of L.M. Anthony and C. Witt, *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (1993), *New York Review of Books* (20 October 1994) 59, 63.

of hospitals'. When it emerged that she was reconsidering her decision not to donate (in which she was influenced by the realization that the procedure would not have to be performed in a hospital), the dying sister said she bore her sister no ill-will. She continued: 'I hope she loves me enough to do it, but everyone has a phobia and *no one can tell how that person is feeling*.'[59] Importantly, the dying sister did not condemn the other's reluctance to donate, as she had some kind of awareness that she could not really appreciate what the other felt in her contemplation of the procedure. Morally speaking, this 'gap' or 'haze' complicates our determination of the duty in these very personal situations.

These reflections are brought home by the case of *Re A.C.*[60] Ms C was dying of cancer and had, on medical estimates, at most two days to live. Her fetus was near viability. In these circumstances, the hospital sought an order for a caesarean delivery to which—in a state of great distress and slipping in and out of consciousness—she first consented and then refused. Apart from the legal questions which arose in the case, could we even say that a woman in this position clearly has the moral duty to submit to the caesarean? Whilst one woman may be content to submit to the surgery in these circumstances, if another thinks differently and prefers to die in a comfortable and arguably relatively peaceful manner, I do not think we can fairly say she is breaching a duty to give the unborn child the best chance of survival. Notice that in this example we have begun to flesh out the particulars of a given case, so that details about the circumstances of the person potentially owing the duty have come to light.

Regarding a woman's possible feelings in preferring not to submit to a caesarean birth, note might be taken of the increasing recognition of post-traumatic stress disorder following a bad birth experience, including natural delivery.[61] Interestingly, the research into this phenomenon has highlighted that the degree of distress suffered by women is:

[59] *The Guardian* (19 April 1997) 7 (my emphasis). Importantly, the word 'phobia' is not used here in a precise sense which usually means a paralysing fear. Rather, I think the phrase is here used to connote a recognition of deep fears and uncertainty. Thus, I do not mean to imply that where someone has a phobia, this is the end of the matter. In this regard, note should be taken of the decisions in *Re M.B.* [1997] 8 *Med LR* 217 and *Re L* [1997] 1 FCR 609, in which the women in question wished to have caesarean surgery, but had needle phobias which prevented them consenting to the surgery. These cases of truly paralysing phobias are different, I think, from those in which there are deep fears and doubts. I cannot discuss these here, but it is arguable that the judgment that it would be lawful to operate on these women notwithstanding their lack of consent was, exceptionally, justifiable in their best interests in the light of the fact that neither objected to the surgery itself. See also J.S. Mill, *On Liberty* (1859) in M. Warnock (ed.), *Utilitarianism* (1962) at 206–7, reasoning that the individual '. . . is the person most interested in his own well-being: the interest which any other person . . . can have in it, is trifling compared with that which he himself has . . . with respect to his *own feelings and circumstances*, the most ordinary man or woman has means of *knowledge immeasurably surpassing* those that can be possessed by any one else' (my emphasis). The point is of interest notwithstanding that Mill's concern here is not with determining duties toward others.

[60] 533 A 2d 611 (DC App 1987); 573 A 2d 1235 (DC App 1990). For further discussion, see above n 12.

[61] This research, published in the *British Journal of Psychiatry*, was conducted by Dr Janet Menage, a GP and counsellor. It is estimated that up to 1.5% of women who felt they had had a bad birth experience suffered symptoms consistent with PTSD. According to Dr Fiona Blake, a consultant psychiatrist at the John Radcliffe Infirmary in Oxford, the syndrome is underrecognized. She stresses that many women who do not suffer the full-blown syndrome would still benefit from a 'debriefing' following a traumatic labour. *The Guardian* (15 October 1996) 11.

> . . . less related to any specific procedure (such as forceps delivery) than to factors such as lack of consent for interventions, inadequate information, feeling ignored or powerless, hostility on the part of staff, and the degree of physical pain suffered.

This indicates the range of issues surrounding birth and attendant medical procedures which may affect a pregnant woman. Note that the refusal of a caesarean is most unlikely to be related to physical risk alone, notwithstanding the greater risks of death from a caesarean section, coupled with the possibility of damage to other organs.[62] Therefore it is both unnecessary and misleading to defend a woman's right to refuse such surgery with particular reference to the increased risks it imposes, as scholars supporting this right have typically done.[63] Indeed, there is only one known case in which a woman has refused a caesarean *because of* its physical risks, which in her case were accentuated by her morbid obesity.[64] By contrast, the swimmer who declines to jump into the river to save the drowning child is much more likely to be doing so purely on the basis of a risk calculation, albeit a hasty or even subconscious one.

Ultimately, then, an important component in determining the duty of the pregnant woman is the process of seeking to understand her difficulties (where these exist). At some level, this means that somewhere in the complex determination of her duty lies the question of our relationship to her.[65] These observations are relevant to a recent English decision, in which a Bangladeshi woman who, like her fetus, was also at risk of death without a caesarean and who had previously experienced a caesarean birth said she 'would rather die' than have another. This very strong feeling was apparently more significant than the particular issues of 'back pain' and 'pain around the scar' which she raised.[66] By contrast, we are not called upon to seek to *understand* the person—such as the cyclist who knocks the child into the river—who breaches a negative duty not to harm.[67]

In the light of the above, I now return to consider whether Finnis is right to categorize pregnancy—in which the fetus 'invades' (in a sense) and burdens the woman's body in an increasingly apparent way—within the domain of 'ordinary duty'. Rather obviously perhaps, one could argue that the essence of any ordinary

[62] The *Baby Boy Doe* decision cited above described the risk of death from caesarean birth as 1 in 10,000, compared with 1 in 20,000 to 50,000 in normal birth: 632 NE 2d at 328. The court noted the 'other complicating factors such as damage to other organs': ibid at 329. A woman is 12 times as likely to become ill when she delivers by caesarean rather than natural birth: National Institute of Health, US Department of Health and Human Services, Pub. No. 82–2067, *Cesarean Childbirth: Report of a Consensus Development Conference* (1981) 268.

[63] See e.g. Rhoden, above n 4.

[64] An unreported decision. J. Robertson, 'Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth', 69 *Va L Rev* 405 (1983) n 165. The woman weighed more than 157.7 kg.

[65] These points may relate to Christine Korsgaard's argument in which she rejects an 'objective realist' position (in which one only has reason to help another realize their ends if one *first* sees those ends as ones that one can share) and endorses an 'intersubjective' approach in which we *first* see the another as human and then share or try to share their ends. C. Korsgaard, 'The Reasons We Can Share: An Attack on the Distinction between Agent-relative and Agent-Neutral Values' *Creating the Kingdom of Ends* (1996) 275–310.

[66] *Rochdale (NHS) Trust* v *C* [1997] 1 FCR 274.

[67] Note two other points. First, the question of the legitimacy of the state *imposing* increased risks or burdens by compelling treatment is a separate (moral and legal) point, distinct from the question of the woman's moral *justification* toward the fetus for the exercise of her right (absence of duty). Second, in one of the classic scenarios in which caesarean delivery is needed, both the woman and the fetus may be at risk without this (as in *Rochdale*).

duty is that it should only require *non-extraordinary* sacrifices and risks. Finnis' view that the demands of pregnancy are only those of the 'ordinary neighbourly duty' may stem from the fact that pregnancy is very much an 'ordinary' state of affairs which carries 'ordinary', in the sense of 'inherent' or 'usual', sacrifices and risks for pregnant women. Crucially, however, this is not to say that those sacrifices and risks might not be *extraordinary* by comparison with what must, by definition, be the more regular demands that incidences of Finnis' ordinary neighbourly duty impose. The assistance to the fetus involves increasingly extensive physical invasion, burdens, risks, pain, and emotional involvement over a remarkably long period of time, culminating in what is generally considered an immensely painful experience—childbirth—which also carries a 1 in 20,000 to 50,000 risk of death.[68] As noted, the pain and risks of a caesarean section are deemed even greater.[69] Thus, it is misleading to characterize the duties of pregnancy as 'ordinary', notwithstanding the ordinary place of pregnancy in biological life.

By asserting that the duty not to abort, or (presumably and more importantly for my purposes), the duty to submit to a caesarean section where required by the unborn child—is an ordinary neighbourly duty, Finnis has effectively 'moved the goalposts'. He implies that very physical sacrifices and burdens can be part of that ordinary duty, a position I have questioned.[70] In effect, Finnis gives no guidance on the topic which most concerns Thomson, namely how much can *fairly* be required of someone, and of a pregnant woman in particular. At the same time, however, he cannot legitimately make use of the idea of an 'ordinary neighbourly duty' without giving some moral content to the idea of a 'special duty'. Yet, so far as the current discussion is concerned, he leaves us in the dark as to what a special duty would entail or how it might arise. It may be that Finnis ducks these issues because, while he questions and puzzles over the nature of *both* the rights to life and bodily autonomy, ultimately he accepts that the fetus has a right to life, but doubts a woman's interest in and possible right to bodily autonomy.

I have argued that Finnis fails to distinguish duties of ordinary conduct from duties seriously involving the body. More significantly, by analogizing the abortion issue to the range of Samaritan problems, the above discussion has revealed that Thomson herself may fail to give due significance to the body in general and the physical demands of pregnancy in particular. The story of the Good Samaritan is a story about the *conduct*, not the *body*, of the Good Samaritan. (Of course, the story of the plugged-in violinist is very much about the body, but it is the story of the Good Samaritan that does Thomson's moral work.) In this way she may have provided an opening for Finnis' argument that the duty not to abort is an ordinary neighbourly duty.

[68] As observed in the notes above, this was a finding of fact in the *Baby Boy Doe* decision, 632 NE 2d at 328.
[69] Ibid.
[70] Note that Feinberg argues that although we all have general duties to assist strangers in danger, these do not require that we make 'enormous sacrifices' or 'run *unreasonably* high risks': above n 13 at 66 (my emphasis).

Yet the situation of the pregnant woman is markedly different from that of the Good Samaritan, who was simply in the course of a journey when he stopped to help the injured man. Although his assistance was considerable and in this sense he 'went out of his way', it was a one-off involvement in which no important personal beliefs about himself were implicated (rather than beliefs about the good of helping others); nor were demands made upon his *body* in any serious way: the story is about the domain of general conduct. For this reason we do not face the problem of a reconciliation of his actions with the very personal domain that tends to be protected by rights (to self-determination and, in particular, bodily integrity). In this way, although he was fulfilling a positive duty to assist, it was a positive duty at the other end of the spectrum from that which would impinge upon these rights. Of course, none of this is meant to deny the goodness of the Samaritan; rather it is to point out that his story is much simpler than that of the pregnant woman, a point undermined by Thomson's otherwise powerful analogy.[71] I further develop these points in the next and final section, arguing that in determining the extent of a pregnant woman's duties, attention must also be paid to the context of pregnancy and hence of the duties in question.

To introduce this last argument, I note that, notwithstanding the above discussion, it may well be objected that the (voluntarily) pregnant woman's duties to the fetus are more stringent, for instance, than those the man walking by the river owes to the drowning child, because she is *specially related* to the fetus (having either deliberately conceived or declined to abort). Indeed, this ties in with Thomson's intuition that to be obliged to make large sacrifices a woman must be voluntarily pregnant. Hence, despite my arguments distinguishing the stringency of these duties (such as that ideas relating to reasonableness and the body may account for variations in stringency), it may well be harder to defend the idea that positive duties are less strict in the case of a special relationship, such as would appear to exist in the case of a woman's planned pregnancy. Thus, building upon and confirming some important aspects of the above discussion, I turn to the last significant point to be brought out about the duties of pregnancy.

(ii) *The social context of pregnancy*

In effect, the context of that special relationship may make a difference to the degree of obligation thereby imposed. I turn first to Joel Feinberg's argument that social organization may in some circumstances mean that positive duties are less strict than negative ones. Feinberg argues that the right to life does entail a right to positive assistance; but where, as in the case of pregnancy, the right's

[71] Like Thomson, Donald Regan is concerned with the issue of abortion. He writes: 'If we bear in mind that no other potential Samaritan is required to bear burdens as physically invasive as the burdens of pregnancy and childbirth, and if we bear in mind also that no other potential Samaritan . . . is subjected to burdens remotely comparable in magnitude to the burdens imposed on the pregnant woman, we conclude that laws forbidding abortion are at odds with the general spirit of Samaritan law', above n 52 at 1610, footnote omitted. Although these points are directed to the law, I suggest they apply equally at the level of moral theory, that is, concerning our determination of the moral duties of the pregnant woman to the fetus.

fulfilment requires large sacrifices then, presumably in the interests of reason and fairness, responsibility must have been assumed by the woman.[72] This conclusion relates generally to his views of the distinction between positive and negative duties. While, like Finnis,[73] he criticizes the view that negative duties are more stringent than positive ones, he argues that positive duties are less stringent where social organization would make the imposition of strict positive duties on everyone chaotic.[74] For instance, where certain individuals, such as firemen, have accepted special duties to assist others and thereby run exceptionally high—what passers-by would regard as unreasonably high—risks for others, then the (positive) duties of passers-by are reduced.[75] He argues that voluntarily pregnant women are in an analogous situation to that of firemen. Although a little bizarre, this comparison is worth developing.

Let us first note society's interests in each case. Put simply, if people are to be rescued from fires effectively (or to the best of society's ability), then society must appoint firemen. Further, if society wants to continue to exist, then some people—women in fact—have to bear children. Whilst it is true that society does not have an interest in *all* women reproducing, nevertheless the importance of deciding what the burdens upon any one woman can fairly be said to be lies partly in the implications for women more generally, including those contemplating pregnancy and those who are not planning or are unable to bear children. Thus, the issue ultimately has a political component, raising questions of justice.[76] With this aspect in mind, what can we say about the respective burdens upon the fireman and the pregnant woman?

From the fireman's point of view (rather than that of society) he can choose other ways of helping people that involve as much, lesser or different kinds of risk, although his job will then need to be filled by someone else. If the original fireman chooses to fight fires, however, he clearly knows he is obliged to take large risks to perform his job—thereby fulfilling his strict positive duty—while passers-by have a less strict obligation to help. The choice to have a child is different in that it is not so much the choice to help another being (though it will entail this) as to create one. Although a woman can choose whether or not to have a child, she cannot choose another way of having a child other than by going through a nine-month period of gestation ending in childbirth. (There is of course the possibility of surrogate motherhood, but this is irrelevant for our

[72] Above n 13 at 68.

[73] Above n 54 at 150–1, 142–3.

[74] Similarly, H.L.A. Hart has written about what he dubs 'role-responsibility': 'A sea captain is responsible for the safety of his ship . . . a sentry for alerting the guard at the enemy's approach . . . These examples of a person's responsibilities suggest the generalization that, whenever a person occupies a distinctive place or office in a social organization, to which specific duties are attached to provide for the welfare of others . . . he is properly said to be responsible for the performance of these duties, or for doing what is necessary to fulfil them.' H.L.A. Hart, *Punishment and Responsibility* (1976) 242. The implication is that people with such 'role-responsibilities' have a strict positive obligation to fulfil them.

[75] J. Feinberg, 'The Moral and Legal Responsibility of the Bad Samaritan' *Freedom and Fulfillment* (1992) 175–96 at 195.

[76] Donald Regan's argument regarding abortion appears in line with mine at this point: '[T]he fact that some women must bear children if the nation is to continue is no reason to impose the burdens of pregnancy on women who are unwilling, so long as there is an adequate supply of volunteers': above n 52 at 1635.

purposes since in such a case another woman simply takes on the risks and sacrifices.) Still, notwithstanding these differences, if a woman chooses to bear a child, is she under as strict an obligation to help (such as to accept whatever medical treatment is required by the fetus) as the fireman, as Feinberg's argument would seem to imply?

In fact the argument about social organization and strict positive duties, as exemplified by the case of the fireman, works differently if we apply it to the case of the pregnant woman. Society can choose whether to have a fire-service or to leave the job to those on hand to help, say, to a reasonable degree. There is at least a chance of success if the job is left to passers-by which is simply non-existent in the case of reproduction. Thus, although some women can choose to have children and others not, just as some people can choose to be fireman and others not, there remains the point that, in the case of fires, unqualified third parties can at least *try* to assist in a way that is impossible when it comes to reproduction: carrying a child for nine months only directly involves one woman for each child in the course of a process which is both dramatically essential to the continuation of society and an almost mundanely ordinary part of our social and biological lives. What then are the implications for the stringency of (voluntarily) pregnant women's positive duties toward the fetus? Does their peculiarly essential role heighten the degree of duty to which they are subject? After all, since they are the only people able to help fetuses directly, there is no question of chaos or confusion arising about who should be doing the rescuing which might arise (as Feinberg's argument implies) were we not to appoint firemen.

Here I note again the paradox that despite the ordinary and essential place of pregnancy in society, pregnancy may well invoke physical burdens and risks for the pregnant woman which are extraordinary by comparison with the bounds of what people are normally expected to do for one another, including those closely or specially related. For instance, we may think it desirable if a parent (the only compatible donor, say) agrees to donate a kidney to his ailing child, but I do not think we assume it necessary or unquestionably reasonable in the way that some may think it necessary or reasonable that the pregnant woman submits to the caesarean section as 'a matter of course', if you like. This seems connected with the fact that the possibility of a parent being called upon to donate a kidney is very much the exception, rather than the norm. The underlying point here, as we have already seen, is that serious bodily assistance is rather extraordinary outside the context of pregnancy.[77] Importantly, this is not to deny that we might well wish to argue that a parent has such a duty to his or her born child. But in reality such an argument would encounter at least some of the difficulties that

[77] That it is unlikely that a parent's refusal to donate a kidney to a born child would be called unreasonable seems implicitly supported by a passage in the latest English caesarean decision, *St George's Healthcare NHS Trust* v *S, R* v *Collins and others, ex parte S* [1998] 3 All ER 673. There is speculation in the judgment as to the possibility that one day medical advances could mean that a parent could save the life of his/her child by undergoing a very *minor* procedure, the refusal of which could (morally) be described as *unreasonable*: at 668. However, as noted at the start of this piece, the court carefully distinguished moral duty from legal compulsion.

we have met in seeking to determine the extent of a pregnant woman's rights and duties. Moreover, there is an underlying imbalance here: whereas we would probably have to mount an argument to establish parental bodily duties, conversely we must mount an argument to question assumptions regarding certain maternal prenatal duties.

In short, it is neither fair not just that a person (a woman) be considered to assume obligations which override her rights to self-determination and, especially, bodily integrity. If it is harder to see this in the case of pregnancy, this is simply because fetal needs impinge upon a woman's body as a matter of course. Hence, rather than insisting that voluntarily pregnant women owe a duty to the fetus entailing large sacrifices (and that women should not become pregnant unless they are prepared to make such sacrifices), biological facts at the heart of our social life may here lessen, rather than intensify, the positive duties to promote fetal welfare imposed upon pregnant women in this regard, so that these are indeed (as previous sections argued) less stringent than the negative ones. The implications are that a woman who either declines to abort or embarks upon a planned pregnancy does not thereby undertake to submit to *any* medical intervention deemed necessary for the fetus.[78] Indeed, in reality it is impossible to predict what special needs any given fetus will have during the course of its gestation. Thus, a woman has no opportunity to choose in advance—in order to avoid the question of certain fetal needs arising—without aborting: this is the only safe way to rule out the possibility of the fetus needing certain sorts of treatment, or a certain kind of delivery. Yet this, in effect, is to say that unless a woman is prepared to do anything for the fetus, notwithstanding, for instance, her religious faith, then she must either abort or decline to conceive. This would ignore the place of pregnancy within our (indeed any) society. Given the acute personal importance to the woman (and partner) of reproduction, we cannot say that either a pregnant woman must accept any treatment required by the fetus, in particular the highly invasive and potentially religiously problematic caesarean section, or not reproduce. The possible objection that such a woman should adopt, rather than reproduce, is highly unsympathetic to the reality of a woman's (or couple's) emotional involvement in reproduction.

This recognition of the social context of pregnancy (which also finds expression in relevant law[79]) is noticeably absent from Thomson's approach and there are

[78] I thus disagree with E.-H. Kluge, 'When Cesarean Section Operations Imposed by Court are Justified', 14 *JME* 206 (1988), who suggests that the fact that a woman has the opportunity to abort earlier in her pregnancy justifies the compelled caesarean section (at 209–10). As my discussion should show, this is a too simple answer to the problem.

[79] This 'social context' of pregnancy finds recognition in US cases on abortion and maternal liability for prenatal injury. Regarding abortion, see e.g. *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 120 L Ed 2d 674 (1992) *per* the joint opinion at 698–9. 'The mother who carries a child to full term is subject to constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by the woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love cannot alone be grounds for the State to insist that she makes that sacrifice. Her suffering is too intimate . . . for the State to insist . . . upon its own vision of the woman's role, however dominant that vision has been in the course of our history and . . . culture. [Her] . . . destiny . . . must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society': at 698–9. This reasoning is further developed in Justice Blackmun's opinion. On the question of maternal liability for prenatal injury, see *Stallman* v *Younquist* 531 NE 2d 355 (Ill

two principal reasons for this. First, her argument is at heart a response to a rights argument. Second, her argument works, and powerfully so, by analogy. Her use of the Good Samaritan argument skilfully brings into play a series of distinctions—albeit ones which have required considerable teasing out—on the one hand between positive and negative duties, and on the other between special and ordinary ones. Yet, just as the story of the Good Samaritan is a story about conduct, rather than the body, which means perhaps that Thomson does not give due significance to the body, so too it is a story which cannot tell us anything particular about the context of the relationship between the pregnant woman and her fetus. In this way her argument fails to acknowledge the extensive, indeed extraordinary, nature of the bodily burdens in pregnancy.

In the light of my conclusion that the 'social context' of pregnancy is relevant to this discussion, some comment is in order regarding what a context-attentive form of reasoning may or may not entail. The validity of moral, social, and political reasoning which emphasizes context has been endorsed, in particular, by some feminist philosophers. The idea of attending to the features of a particular context is sometimes contrasted with abstract, universal forms of reasoning such as those exemplified in different ways by Kantian and Utilitarian approaches. As Virginia Held has argued,[80] although a Kantian approach may develop ways of dealing with specific cases and contexts, still it tends to assume that abstract reasoning is, by definition, truer. Similarly, in the Utilitarian approach, one abstract idea (the Principle of Utility) is theoretically applicable to any moral problem, regardless of the context. Of course, these observations are generalized, but they highlight an underlying belief in an abstract reason typically shared by Kantians and Utilitarians alike. Importantly, in attending to the 'social context' of pregnancy and to the particular context of treatment refusal within this, my reasoning has not sought to reject the application of abstract principles *per se*. My point has rather been that in reasoning about the extent of maternal duties we must acknowledge the context of the maternal–fetal relationship; it is not that the context can provide 'the answer', as it were, in itself.[81]

1988), in which Justice Cunningham observed: 'As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life. In practice, the reproduction of our species is necessarily carried out by individual women who become pregnant. No one lives but that he or she was at one time a fetus in the womb of its mother': at 360.

[80] V. Held, 'Feminist Transformation of Moral Theory', *Philosophy and Phenomenological Research* 50 (Supplement, Autumn 1990) 321–44. Extracts reprinted in P. Singer (ed.), *Ethics* (1994) 166–70, 168. Held first expressed these views in *Rights and Goods: Justifying Social Action* (1984). Virginia Held's work is particularly prominent here; but other philosophers who might be mentioned in connection with context-attentive reasoning (and related themes) are: S. Sherwin, 'Feminist and Medical Ethics: Two Different Approaches to Contextual Ethics' in H.B. Holmes and L. Purdy (eds), *Feminist Perspectives in Medical Ethics* (1992) 17–31; C. Gilligan, *In a Different Voice* (1982) and C. Gilligan, J. Ward, and J. Taylor (eds), *Mapping the Moral Domain* (1988).

[81] My position would be consistent with Held's view that '[s]atisfactory principles for areas such as . . . family relations . . . cannot be derived from simple universal principles, but must be arrived at *in conjunction with* experience in the domains in question'. V. Held, 'Feminism and Moral Theory' in E. Kittay and D. Myers (eds), *Women and Moral Theory* (1987) 111–28 (my emphasis). Held is thus critical of Nel Noddings' overly simplistic and hence somewhat unhelpful rejection of principles in *Caring—A Feminine Approach to Ethics and Moral Education* (1984).

Given these observations it is somewhat paradoxical that the 'context' to which I have drawn attention is in fact so 'widespread'. Pregnancy *is* the means by which the human race reproduces and the women who either potentially or actually bear children make up approximately half the population. To attend to the 'social context' of pregnancy is thus to attend to an enormously significant feature of human life, such that to recognize the facts and demands of pregnancy is at the same time to 'get things right', morally speaking. Thus, the hugeness of this 'context' brings out the point that there need be no intrinsic conflict or tension between context-sensitivity (however specific and unique the context may be) and 'moral truth'. It is beyond my scope to embark upon a detailed study of this theme.[82] Importantly, however, these brief points support the pattern of the argument with regard to the strength of positive duties and social organization developed at the start of this section.

Finally, discussion of the importance of a context-sensitive approach is an appropriate point at which briefly to comment upon my reasoning generally. My approach may be an example of what Robert Audi has dubbed 'ethical reflectionism', which holds principally that reflection is and should be our 'basic method for justifying ethical judgments, especially general moral principles or general judgments of what has intrinsic value, and among our basic methods for discovering such judgments'.[83] I cannot discuss this in detail here but, in essence, intuitions may provide what Audi dubs the 'prima facie justified inputs'[84] within the process of ethical reasoning, which are then extended and systematized by means of 'reflective equilibrium'.

[82] For another discussion which stresses the importance of context, see H. Smith, 'Fetal–Maternal Conflict' in A. Buchanan and J.L. Coleman (eds), *In Harm's Way: Essays in Honour of Joel Feinberg* (1994) 324–43. Smith distinguishes between a causal and a contextual analysis of harm to the fetus/future child, rejecting a utilitarian analysis in favour of an approach which distinguishes between harming and rendering a lower level of aid. But in the light of the discussion in my article, her interesting analysis seems limited in several respects: for instance, in its emphasis upon rights to the exclusion of imperfect moral duties; and in its failure to distinguish between the moral duties of parents to born children on the one hand and pregnant women to the fetus/future child on the other. Moreover, her analysis ceases at what is perhaps the most difficult point, with which I have tried to grapple, namely, the determination of the level of care required of pregnant women, or rather, as she puts it, of 'parents' generally.

[83] R. Audi, 'Intuitionism, Pluralism, and the Foundations of Ethics' in W. Sinnot-Armstrong and M. Timmons (eds), *Moral Knowledge: New Readings in Moral Epistemology* (1996) 101–36, 121. Reflective equilibrium is of course the approach advocated by John Rawls in ss. 3–4 of *A Theory of Justice* (1972). Note Ian Kennedy's observation, from 'The Moral Status of the Embyro' in *Treat Me Right* (1992) 119–39 at 126 (my emphasis): 'There is a perfectly proper place for intuitive response in the sum total of moral views and values. Equally, there is a perfectly respectable argument for taking account of a strongly held and widely held sense of moral outrage or repulsion when considering any scheme for ordering affairs. Furthermore, the fact that such moral outrage can draw on some *reasoned argument as well as intuition* makes it doubly valid as a ground of objection.' Kennedy may assume that reason and intuition are independent of each other; whereas Audi's point would be that Kennedy's intuition has a valid place *within* his reasoning when coupled with a process of reflective equilibrium.

[84] Audi, above n 83 at129. See also G. Sayre-McCord, 'Coherent Epistemology and Moral Theory' in Sinnot-Armstrong and Timmons (eds), above n 83 at 137–89, who defends the coherence theory of justification by defending the epistemic value of the method of reflective equilibrium. As Sayre-McCord defines it, the coherence theory of justification can be described as holding that 'a belief is justified if, and then to the extent that, it coheres well with the other things a person believes . . . [who] . . . is justified in holding some belief if and only if the belief itself is justified and she holds it because it is justified'. In dealing with various criticisms, Sayre-McCord notes that the link between justification and truth is not provided by coherence itself, but by the 'evidential relations that bind beliefs into coherent sets': at 178.

4. *Conclusions*

In my view the 'maternal–fetal conflict' is a problem located at the interface between a woman's rights and duties, both moral and legal. Here I examined the relationship in terms of her moral duties, with reference to her interest in and right to bodily integrity.

I sought to limit the obligations pregnancy imposes, but not by arguing about what the fetus' hypothetical rights would entail, as Thomson did. This was particularly important given the potentially enormous scope of those obligations which Thomson had somewhat marginalized under the description of 'moral decency'. The important points to emerge were that rescuing another involves a positive duty with regard to which questions about the potential rescuer appear to become relevant in a way that they do not with regard to the breach of a negative duty not to harm others, creating areas of potential disagreement about the existence or extent of a duty in particular cases. Next, in discussing the idea of the ordinary neighbourly duty, I highlighted the fact that whilst such duties may subject us to physical risk, they do not seriously invade the body in the special sense of a duty that is, quite literally, to be realized through the body. In the light of the intensely personal nature of a prospective (positive) duty to rescue another through one's body (such as in the case of an organ donation, or the caesarean) I emphasized the increased *complexity* in our determination of the existence and extent of such duties. This is due to the emotional or psychological elements that are likely to be present in these intensely physical cases. Finally, I argued that whilst certain extraordinary burdens or risks may be an inherent part of pregnancy, they cannot be assumed to be part of a woman's duty, notwithstanding her special relationship to the fetus, in the light of pregnancy's 'social context'—its ordinary but truly essential place within society.

One might notice that recognizing the 'context' within which a woman will be asked to accept medical treatment for the fetus also involves the recognition that her interests and rights in self-determination and bodily integrity will thereby be called into play. This is where an argument from rights[85] would 'marry' the argument from duty under discussion here. My discussion contrasted the considerable but relatively brief nature of the Good Samaritan's non-bodily assistance (in the course of a journey) to the injured man, with the lengthy and intensely physically demanding nature of the pregnant woman's bodily assistance to the fetus. Although the Bible tells us that those who passed by before the Samaritan failed to stop and assist the injured man, implying that the conduct of the Samaritan was *exceptional*, we can also say that it was *unreasonable* of the priest and the Levite not to assist.[86] Additionally, it was a dereliction of a moral duty on their part. This is something which the discussion about a woman with

[85] See above n 12, ch 2.

[86] I cannot discuss here the point that the priest and the Levite may have thought the traveller 'dead and defiling to the touch of those whose business was with holy things', thereby displaying a 'pre-occupation with petty-fogging rules' implicitly criticized by Jesus. See G. B. Caird, *The Pelican New Testament Commentaries: The Gospel of St Luke* (1963) 148.

serious reasons (and rights) suggested we could not say of the pregnant woman who does not 'rescue' the fetus through her body.

With regard to the fact that rights are implicated in the situation of pregnancy, we should also notice that these may come into play for the first time at any point in pregnancy and will do so, very often, quite late: for instance, a caesarean birth will make demands on a pregnant woman in an unpredictable, if not totally unforeseeable, way at the very end of gestation. This is the 'context', in a sense, of the rights that are implicated in the 'maternal–fetal conflict'. To allow the woman her rights in bodily integrity and self-determination, then, is another way of saying that she cannot fairly be said to have the duty, in becoming pregnant, to make extraordinary sacrifices on the fetus' behalf.

This is not to say that she does not have a duty to 'do all she can'. This much is only 'reasonable'. Yet doing all she can will be doing all those things she does not have serious reason to refuse to do (including serious doubts grounding such reasons). In other words, to say that she must 'do all she can' is at the same time to allow for the constraints of her religious faith or her concerns and fears in relation, for instance, to invasive surgery, though the latter should be the subject of discussion with relevant parties. In this way, a woman who refused a caesarean in order to avoid an abdominal scar—a clearly trivial reason[87]—would not be doing all she could. Nor would the woman who refused to swallow the highly beneficial pill for no apparent reason. In such cases, the presence of a moral duty demonstrates the potential gap between the theoretical justification of a pregnant woman's rights and their exercise in practice.

These last cases are, of course, purely hypothetical. In such cases, since such women would not be doing all they could for the fetus they carry, hence neglecting their moral responsibility for it, the only real issue would indeed be the *in*appropriateness of legal compulsion of such moral duties.[88] Not surprisingly, however, it seems that pregnant women do exercise their legal right to refuse medical treatment for serious reasons relating to their underlying moral interests. For this reason the legal debate is not primarily about whether to enforce moral duties.

[87] The interest in bodily integrity is invoked but only trivially.

[88] I cannot go into these here. Essentially, however, there are important moral and legal reasons, in addition to considerations of public policy, against compelled interventions. See above n 12.