ABORTION AND SEXUAL MORALITY

ROGER PADEN

Philosophical discussions, unlike their popular counterparts, tend to treat the question of the morality of abortion separately from questions of sexual morality.[1] This may be a mistake. If two assumptions—that the fetus is a person at conception and that the "negative" theory of rights[2] is correct—are warranted, then the morality of abortion may be a function of sexual morality. If this thesis proves to be true, it will require a radical revision in the philosophical discussion of abortion. It might also have an impact on policy. Judith Thomson in her article, "A Defense of Abortion"[3] presents an argument, based on the assumptions mentioned above, that is generally sound. However, as it stands, it is incomplete. An investigation of her argument will help to advance my thesis.

1

Thomson develops her argument within the context of a negative theory of rights. I will maintain that perspective. Her argument turns on the concept of the right to life, specifically on the limits one person's right to life places on the behavior of others. To explore this point, she assumes, for the sake of argument, that a fetus is a person and therefore has a right to life equal to that of all other persons. Given that

---

[1] See, for example, the essays contained in Joel Feinberg, ed. *The Problem of Abortion,* 2nd edition, Wadsworth Publishing Co., Belmont, CA. 1984.

[2] By this I mean the theory developed in Henry Shue, *Basic Rights,* Princeton University Press. 1980.

[3] *Philosophy and Public Affairs,* V.1, n.1, 1971, pp. 47-66.

Diálogos, 50 (1987) pp. 145-154.

assumption, the question of the morality of abortion turns on whether the fetus's right to life obligates the woman to refrain from aborting it. Thomson argues, on the basis of a negative conception of rights, that it does not.

According to the negative theory of rights, a person's right to life obligates others to avoid murdering him, but it does not obligate others to allow him the use of their resources to keep him alive. One does not violate his rights, or as Thomson puts it, "kill him unjustly,"[4] by failing to give him the means of survival. If this were not true, then the failure to give aid to the starving, blood to accident victims, or (spare) organs to the terminally ill, would constitute a violation of their right to life. A person's right to life, on this negative view, does not require others to give up that to which they have title in virtue of their rights—even when this is necessary to keep him alive. The failure to do so certainly might contribute to his death, and might be called "killing," but if so it is a "just killing," which does not violate his right to life. Accordingly, abortion, properly conceived of as the withdrawal of a life giving-substance, namely the woman's body (to which she has title in virtue of her rights), from a person who has no right to it, must be thought of as a just killing. Therefore, Thomson concludes, the fetus's right to life, by itself, does not make abortion immoral.

This conclusion, however, would not follow if the woman had given the fetus the right to use her body. If she had done so, then the withdrawal of her body would be the withdrawal of a thing to which the fetus had title; would, upon the fetus's subsequent death, be a violation of its rights; and would be, therefore, unjust. Thomson considers this possibility in her discussion of the following question: "But doesn't her partial responsibility for [the fetus] being there itself give it the right to the use of her body? If so, then her aborting it would be depriving it of what it does have a right to, and thus doing it an injustice."[5]

Thomson's suggestion that the woman might have given to the fetus the right to use her body by engaging in sex follows from the modern idea that people's obligations to each other arise only out of their mutual natural rights and/or as a result of their actions. As the fetus has no natural right to the woman's body, if it acquires that right,

---

[4] *Ibid.*, p. 57.

[5] *Ibid.*, pp. 57-58.

it must arise from the woman's actions. If abortions were always immoral, then fetus's rights to use women's bodies must arise from the only act in which all pregnant women have participated, intercourse. Therefore, if abortions were immoral, it is only because by engaging in sex women undertake an obligation to their fetus to grant it the use of their bodies. It is Thomson's belief that this action creates no such obligation, and that, therefore, not all abortions are unjust. However, before accepting her conclusions, we should examine all the arguments which might show that this act does create such an obligation. If none of them succeed, then we must accept Thomson's conclusions.

2

Although there are many arguments that might demonstrate that a woman has an obligation to her fetus,[6] I will, following Thomson, limit discussion to those arguments which are based on the negative theory of rights. Thus, any argument that begins with the assumption of some universal obligation to care for others beyond the care needed to respect another's rights, will be ignored. Moreover, those arguments that begin with duties that fall on those occupying special roles, if those roles were not freely adopted, will also be ignored.[7] As Thomson writes, nicely summarizing this position, "Surely we do not have any 'special responsibility' for a person unless we have assumed it, explicitly or implicitly... [Parents] do not, simply by virtue of their biological relationship to the child who comes into existence, have a special responsibility for it. They may wish to assume responsibility for it or they may not wish to."[8]

This last needs amendment. These parents may have acted so as to assume responsibility, or they may not have so acted. However, their obligations do not depend on their desires but on their behavior. If the parents have done something which has the consequence that they now have an obligation, they have that obligation regardless of their wishes. It is possible, that is to say, to acquire an obligation unintentionally. In what follows I will present a model of how this might be done.

---

[6] E.g. see R.M. Hare, "Abortion and the Golden Rule." *Philosophy and Public Affairs*, V. 4, n. 3 1975, pp. 201-20.

[7] Thomson, *op. cit.*, pp. 57-60.

[8] *Ibid.*, p. 65.

Suppose that I made a promise to meet you at a restaurant across town for lunch next week. Unfortunately, by the day of the event I have forgotten the promise and fail to remember it until just after noon, too late to keep the appointment. I have failed to meet my obligation. I might, of course, be able to produce an excuse, but if it is unacceptable, I cannot simply retire, accepting my share of unexcused guilt. If I remember in time, I must call you to inform you of my mistake, to set your mind at rest so that you can enjoy a quiet lunch. If I fail to do this I will be blamed for both failures—"You mean to tell me that you not only forgot our date, but then you didn't call me to tell me that you wouldn't make it...!" That I was twice remiss, entails that I failed at two obligations. The first was the obligation to keep my promises. The second was the obligation to act responsibly to contain the damage of my first failure so that no one suffers any additional harm.

In this example there are two obligations. However, only the first was explicitly and voluntarily assumed. Only those who make promises have this obligation. The second obligation was not explicitly made, nor was it implicit in the promise.[9] Rather it was the result of a general obligation that only came into play with the promise. This, a general obligation to be responsible, has two parts. The first part is the requirement to "act responsibly," that is, to act in a manner which is neither negligent or reckless (nor criminal, nor immoral). However, there is more to it than this idea, because the duty to be responsible also requires of us that we "take responsibility" for our actions. This means that if we do act in a negligent or irresponsible manner, i.e. violate our responsibility, and as a result cause harm to another or place others in such a position that they are dependent on us, then we have the further duty or obligation to see to it that the harm they suffer is limited, or to see to it that they suffer no additional avoidable harm as a result of their dependent position. Thus, "being responsible" means both "acting responsibly" or carefully, i.e. neither negligently or recklessly, and, if one has acted negligently or recklessly, "taking responsibility," i.e. acting so as to limit further harm to the other.

---

[9] This obligation is best thought of as a separate obligation, because by doing so not only are a variety of obligations explained in the most parsimonious manner, but any infinite regress is blocked.

Once this idea of responsibility is made explicit, many examples of it might be found. The obligation to apologize after minor transgressions might be based on it, as might be the requirement that we carry liability insurance for our car. The practice of suing for damages might also rest on it. Clearly, there exist some limits to the liability to which we might so expose ourselves. Presumably, there should be some correspondence betwen the harm or danger threatened, and the degree of liability assumed. However, we need not now tarry on this issue.

The important point is that this example shows that it is possible to assume an obligation without intending to undertake it. The obligation arises out of the performance of a certain kind of action, one, such that, by performing it we become responsible to those affected by it to ensure that they suffer no avoidable harm, either directly or while they are dependent on us due to it. This sort of obligation is indispensable to the theory of negative rights. Without it, it would be difficult in many cases to delineate our rights and discover what counts as their violation.

The application to the abortion case is clear. If the act of sex is such that we are responsible in the way described above to those who are affected by it, and since it is an act which often creates another person in a dependent position, then, because of this, the partners are obligated to ensure that the fetus suffers no avoidable harm during the period of dependency. This obligation, of course, initially falls almost entirely on the woman.[10] As the withdrawal of her body through abortion would be an avoidable harm, she is obligated to let the fetus use her body. As the fetus is entitled to the use of the woman's body, the withdrawal of the body in an abortion would constitute the unjust killing of the fetus. Therefore, an abortion would violate the fetus's right to life.

If this argument is sound, it allows us to bridge the gap between the biological fact of parenthood and a moral obligation which would make most abortions wrong, by showing that they both result from an action which itself is morally charged. Having acted in a way that makes them "responsible" for the welfare of the fetus while it is dependent on them, a couple would find themselves, perhaps unintentionally, under an obligation to take care of it during this period. They

---

[10] The father also is under the same obligation. However, he cannot carry the fetus.

have placed themselves in a position in which an abortion would violate its right to life.

3

The argument, however, cannot be this simple. Even granting this notion of moral responsibility and the theory that obligations can follow from the failure to act responsibly, it has not shown that a couple engaging in sex are acting in such a way that they can be held responsible in the manner discussed above. This has not been demonstrated because it has not been shown that having sex, by itself creates the obligation to be responsible. There are many kinds of action, but only some of them entail this kind of obligation. Although this obligation may provide the moral ground for the legal practice of suing each other for damages, the fact that these suits sometimes fail shows that such obligations do not arise from all actions. For these kinds of lawsuits to succeed the plaintiff must prove that the defendant acted in either a criminal, a reckless or a negligent manner. So it is with moral responsibility. One does not unintentionally place oneself under an obligation with every action, but only with negligent or reckless actions.[11]

Negligent or reckless behavior is behavior in which one acts either in conscious disregard of substantial and unjustifiable risk to a third party, or when one unknowingly puts a third party at substantial and unjustifiable rish respectively, or when one acts in the revelant manner so as to place a third party in a state of unjustifiable dependence on oneself.[12] The argument of the last section failed to demonstrate that the couple had an obligation to the fetus, because it did not address itself to the question of whether the couple's action was in this sense, negligent or reckless. It is possible in many cases to argue that their actions were not.

It is possible to argue that such actions, even when they result in the placing of an innocent third party at risk or in a state of dependence, are not negligent in several ways. These arguments can be divided between two classes, excuses and justifications. There are several kinds of excuses. First, I may try to excuse myself by arguing that my

---

[11] Or with criminal or immoral behavior. However, I need not discuss these cases.
[12] The American Law Institute, *Model Penal Code,* Philadelphia, 1956, pp. 125-127.

behavior was coerced. If I 'acted' involuntarily or under duress, then, as I am not the author of my act, I am not responsible for it; cannot be called negligent for doing it; nor acquire any obligation as a result of it. Second, I might argue that I am not responsible for the consequences of my actions because at the time of the act I was incompetent. Third, I might argue to the same end, that although I am competent and acted voluntarily, I cannot be reasonably held responsible for knowing that my act would endanger another for a variety of epistemological reasons. Negligence is parasitic on simple responsibility. As we are often not responsible for our "actions," we cannot, for those acts, be negligent and therefore, we cannot be thought to be morally irresponsable.

The application to the case at hand of this notion of excuses is clear. Those pregnancies which are the result of rape, or are the result of actions of a woman judged incompetent, i.e. of a woman who is insane, severely retarded, a minor..., or are the result of the actions of a woman kept ignorant of the possible outcomes of sex, cannot in virtue of these excuses be thought to result from negligent or reckless acts on the woman's part. Because she was not then simply responsible, she could not be thought negligent. Thus, she does not now have any obligation to the fetus. These excuses essentially argue that some sexual encounters cannot be considered to be negligent actions because they are not actions in the full sense of behavior arising out of free rational deliberation.[13]

Another way to excuse behavior, even when it is a free act that did endanger another, is to argue that the danger was not unreasonable. One can so argue, by arguing that the danger was slight, or by arguing that all reasonable precautions were taken to insure that the action was safe. We often do things that are inherently dangerous, but which aren't considered negligent or reckless, if we go about them carefully. Driving a car, for example, is dangerous, but driving itself is not negligent or reckless. As long as care is taken to drive under proper conditions, to avoid driving while intoxicated, to obey all traffic laws and to drive safely, driving in-itself is not a negligent or reckless act. The same is true of hunting or of conducting possibly dangerous experiments. As long as all reasonable precautions are taken to ensure that none is harmed, such inherently dangerous behavior does not

---

[13] In addition to these excuses there are others, some of which only diminish responsibility.

place the actor under an obligation to those who might be accidentally harmed or made dependent by that behavior.

The application to the case at hand is to contraceptive practices. It might be argued that if a couple uses any of a variety of contraceptive techniques which are both available and acceptable,[14] then, since they are taking precautions, their behavior is not a violation of their obligation to take care. If this is the case, then aborting a fetus which was conceived as a result of contraceptive failure would not violate any obligation to it, for no such obligation was undertaken.

However, it is not as simple as this, because, due to the use above of the word "reasonable," in "all reasonable precautions," and the word "some," in "some endangering behavior," it is not immediately evident that contraceptive practices count as reasonable precautions nor that the reasonable precaution clause even applies to this case. This would follow from the fact that excuses of this kind, *pace* Austin,[15] must be accompanied by a justification of the act in question.

A justification of an action can take several forms. An act can be justified by its high probability of producing some great good. Scientists, for example, might be justified in endangering the public if their experiments might produce some beneficial results. On the other hand, an act might be justified by some overriding obligation. A bodyguard might take some action which endangers innocent people, say discharging his revolver in a crowd, if he is attempting to prevent the kidnapping of his charge. It is still possible to do these things negligently or recklessly, but, if reasonable precautions are taken, then, even if others are endangered, the actors have not violated their trust or assumed a new obligation.

This point is incorporated into legal theory through its developed concept of "negligence." To find someone guilty of negligence, several factors have to be weighed, including; (1) the magnitude of the risk an action involves, (2) the value of the thing put at risk, "the principal object," (3) the value of the object or act for the sake of which the risk was incurred, "the collateral object," (4) the probability that the collateral object can be attained through the act, and (5) the probability of

---

[14] The acceptability of and the moral need for contraception is itself a moral issue.

[15] J.L. Austin, "A Plea for Excuses," *Aristotelean Society Proceedings*, N. 58. 1957-57, pp. 1-30.

attaining the collateral object through a different route.[16] The reason that the law considers these factors is easily understood. Most acts involve risks to third parties. It is often difficult, perhaps (conceptually) impossible, to reduce these risks to zero. Moreover, because it is always possible to make an action marginally safer, one cannot be required to reduce the risks to some finitely small "lowest possible level." Thus, in most cases, to require "abolute safety" or even the greatest technically possible safety, is to place an impossible burden on the actor. If we are to continue to act, then some relativized standard must be adopted. Given this, it is clear that the determination of acceptable risk must be a complex project which necessarily involves appeals to such moral factors as the relative value of competing goals and the character of the various competing actions, as well as the technical assessment of the probability that an act will achieve its end. However, if acceptable risks are to be evaluated relative to these factors, then so too must risk-reducing precautions. Consequently, the validity of a "reasonable precaution" excuse must also be a function of these factors. Therefore, the strength of these excuses is, *ceteris paribus*, inversely related to the moral wickedness of the act which incurs the risk. Precautions which would not count as reasonable in the normal course of events may be reasonable if the risk-incurring action has a high moral value.[17] Conversely, normal precautions will not be reasonable if the risk incurring act is itself immoral.

Returning to the case at hand, in order to determine whether or not a woman has undertaken an obligation to her fetus by engaging in sex, we must know several things. First, we must know something about the encounter in question and some things about the participants, such as, the presence of coercion, the ages and mental states of the participants. Second, we must know what precautions were taken to prevent conception. Finally, and most importantly, we must determine the moral character of the act which produced the fetus, for it is upon this that the validity of proposed excuses, as well as the need for excuses will depend. It is only through an evaluation of these factors that a determination of the morality of an abortion can be made, because it is only through such a process that the effective rights of the participants can be determined.

---

16 Henry Terry, "Negligence," *Harvard Law Review*, V. 29. 1915, pp. 40-50.
17 *Ibid.*, p. 43.

4

I will not continue the argument any further. As it stands, if the argument is correct, then the morality of abortion is, at times and in part, a function of the moral character of sexual activity. Of course, there are a lot of loose ends to be cleared up if the argument is to stand. For example, I have said nothing about competing obligations and little about the limits of liability. Moreover, the argument depends on many unargued and highly questionable assumptions, such as the assumption of the personhood of the fetus and the assumption of the "negative" theory of rights, used by Thomson. However, I will not argue these points here.

The conclusion of this argument has a number of consequences that might seem counter-intuitive, or even absurd from the philosophical perspective which separates the question of the morality of abortion from the question of sexual morality. Moreover, they make laws on abortion impossibly complex and legally problematic. However, given the assumptions, I think the conclusion is sound. Moreover, the conclusion shows that the popular debate of this issue is not as mistaken as might otherwise be thought. In particular, the conclusion shows that what is at issue in the abortion debate is not necessarily the death of the fetus, nor the woman's right to body, but rather sexual morality. The conclusion shows that many seemingly irrelevant popular arguments are not as irrelevant as they appear. For example, the statements often made by anti-abortionists about the 'irresponsibility' of the 'promiscuous women' who seek abortions, as well as their desire to force these women to accept their responsibility through a ban on abortions, follows from this conclusion together with their moral judgement of sex. The widely held opinion that women who are pregnant as a result of rape have an especially strong ground for seeking an abortion, follows from this conclusion. Finally, a feminist position that the abortion debate is less a debate on the definition and relative value of life, than a debate about sexual morality and its social control also follows from this conclusion. Of course, not all of these positions can be correct, but they are united by the underlying logic discussed in this paper. To reach a critical understanding of the public debate on abortion and to develop an adequate philosophical understanding of the issue, this underlying logic must be understood.

University of Florida