

PART I

WHY ABORTION SHOULD BE LEGAL

An Unusual Case

Robert McFall was an asbestos worker from Pittsburgh. In 1978, he was diagnosed with aplastic anemia. The doctors told him he'd die if he didn't get a bone marrow transplant. And they said he needed one soon. Preliminary tests for tissue compatibility were quickly conducted. Only one promising candidate was found: a cousin of McFall's named David Shimp. Before additional tests could confirm his compatibility, though, Shimp had a change of heart. He refused to submit to further testing. And he declared that he wouldn't give McFall any of his bone marrow even if it was needed to save McFall's life. Running out of options at that point, McFall decided to sue Shimp. In the motion filed by his attorney, McFall asked the court to order Shimp to undergo the additional testing and, if the results were positive, to order Shimp to give him the bone marrow he needed. The case of *McFall v. Shimp* was heard in the Common Pleas Court of Allegheny County by Judge John P. Flaherty Jr. in July of that year.

Judge Flaherty wasn't impressed by McFall's petition. While he clearly felt sorry for the man, he just as clearly felt his lawsuit was absurd. For the state to force Shimp to give McFall the bone marrow he needed, the judge wrote in his decision, "would change the very concept and principle upon which our society is founded," a principle, as he put it, of "respect for the individual." In fact, Judge Flaherty went even further than this, adding: "For a society which respects the rights of one individual, to sink its

teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence.” Needless to say, he denied McFall’s request for an injunction against Shimp. Judge Flaherty’s ruling was issued on July 26, 1978. Fifteen days later, Robert McFall was dead.

Now let’s not worry about legal jargon or technicalities. Judge Flaherty’s basic point was simple: it would be wrong for the state to force Shimp to give McFall the bone marrow he needed. I’ll bet you agree with Judge Flaherty about this. You might disapprove of Shimp’s refusal to donate the bone marrow his cousin needed, but you probably think it would have been wrong for the state to force Shimp to donate it once Shimp had decided he wasn’t willing to do so. Even McFall’s sister agreed that Shimp had the right to decide what to do. So for the purposes of this book, I’m going to assume you agree with the judge on this point. And assuming you do agree, I’m going to try to convince you that abortion should be legal even if you think every fetus is a person and has a right to life.

Now trying to use your belief about McFall and Shimp to support my claim about abortion may initially strike you as implausible, for two reasons. First, while Americans remain sharply divided over abortion, there’s one thing both sides of the debate generally seem to believe: that if the fetus is a person, then abortion should be illegal. The standard pro-life position says the fetus is a person and has a right to life, that abortion is therefore murder, and that because abortion is murder the government should prohibit it. The standard pro-choice response doesn’t say the government should sometimes permit murder. Instead, it says the fetus isn’t really a person and that because the fetus isn’t a person, abortion isn’t murder in the first place. People who are pro-life and people who are pro-choice disagree about whether abortion should be legal, that is, but they seem largely united in

the belief that whether the state should ban abortion depends on whether the fetus is a person. The main goal of this book is to convince you they're wrong about this. Abortion should be legal even if the fetus is a person. So whether you consider yourself pro-life, pro-choice, or somewhere in between, you'll probably start out thinking the claim I'm going to try to convince you of in this book is implausible.

The second reason what I'm going to try to do in this book may initially strike you as implausible has less to do with the claim I'm going to try to defend and more to do with the way I'm going to try to defend it. I've explained the basic facts involved in the case of *McFall v. Shimp*. I've said I'm going to assume you think it would have been wrong for the state to force Shimp to give McFall the bone marrow he needed. And I've said I'm going to try to use this belief of yours to support my claim that abortion should be legal even if the fetus is a person. But it may seem hard to imagine how this approach could possibly work. Neither Robert McFall nor David Shimp were pregnant. Nor, as far as I know, was anyone else involved in the case. Their dispute involved no fetus, no abortion, not even a uterus. So it may seem implausible to think a claim about the judge's ruling in this case could give us a reason to conclude anything about abortion, let alone give us a reason to conclude that abortion should be legal even if the fetus is a person.

I admit that on the face of it, the case of *McFall v. Shimp* has nothing to do with abortion. But I think we can extract a general lesson from the case and then apply that lesson to abortion. Once we see what that general lesson is, and what it commits us to, I think we'll see that abortion should be legal even if the fetus is a person. This conclusion is at odds with the way most people think about abortion and that may make them think the claim I'm going to try to defend in this book is implausible. But once we see what the general lesson of *McFall v. Shimp* is and what

it commits us to, I think we'll see that the claim that abortion should be legal even if the fetus is a person is quite plausible. In fact, I think we'll see that it's true.

So for the purposes of this book, I'm also going to assume, at least for the sake of the argument, that every human fetus is a person and that every human fetus has a right to life. In part I, I'm going to try to convince you that even if this assumption is true, abortion should still be legal. In part II, I'll discuss a variety of objections that can be raised against my position and try to convince you not to accept them. In part III, I'll then try to convince you that even if every fetus is a person, abortion should not only be legal but should also be much less restricted than it currently is. And I'll try to convince you of all this by depending only on assumptions I think you'll accept no matter what your current view of abortion is. This approach to trying to resolve the abortion debate may strike you as unusual and that might also make you initially skeptical. But look at it this way: the traditional approach of trying to resolve the debate over whether abortion should be legal by first trying to get everyone to agree about whether the fetus is a person doesn't seem to be working too well. The view I'm going to try to defend in this book offers the possibility of resolving the debate over whether abortion should be legal without having to wait until we've first resolved the debate over whether the fetus is a person. Because this would be such an important result if it could be achieved, it seems to me worth thinking about carefully, even if the chances of success at the outset seem slim. And thinking about this possibility carefully is what this book tries to help you do.

The Lesson of the Case

Let's start with the claim that abortion should be legal in cases of rape and work our way to other cases from there. And just to keep things simple, let's start by imagining a case where it's perfectly clear that the woman who wants to have an abortion did nothing to consent to the act of sex that led to her pregnancy. So consider the case of Alice, a 23-year-old software engineer from St. Louis. One day, while Alice was busy working at her desk, a stranger slipped a drug into her coffee that rendered her unconscious. While she was knocked out, this stranger had sex with her. Several weeks later, Alice discovered she was pregnant. She doesn't want to be. One thing I'm trying to convince you of in this book is that it should be legal for Alice to have an abortion in this situation and that this is true even if we assume the fetus developing inside her body is a person with a right to life.

Now what, you may be starting to wonder, does any of this have to do with the case of *McFall v. Shimp*? We can begin to answer this question by first answering a different one: Why are we so confident that it would have been wrong in that case for the state to force Shimp to let McFall use his bone marrow? As far as I can tell, there's only one plausible answer to that question. The state didn't have the right to force Shimp to let McFall use his bone marrow because McFall didn't have the right to use Shimp's bone marrow. If McFall did have the right to use Shimp's bone marrow, after all, it's hard to see what would have been wrong

with the state's stepping in to enforce that right. So if you agree that it would have been wrong for the state to force Shimp to let McFall use his bone marrow, you should agree that McFall didn't have the right to use Shimp's bone marrow.

I'm now going to assume you agree that McFall didn't have the right to use Shimp's bone marrow. I'm also going to assume you accept two other claims that weren't in dispute. First, McFall was a person who had a right to life. Second, McFall needed Shimp's bone marrow. So there are now three claims I'm assuming you accept: McFall was a person, McFall needed Shimp's bone marrow, and McFall didn't have the right to Shimp's bone marrow. If you accept these three claims, you're now in a position to draw an important conclusion: being a person doesn't give you the right to use another person's bone marrow even if you need to use it. After all, if being a person did give you the right to use another person's bone marrow if you needed to use it, then McFall would have had the right to use Shimp's bone marrow, since McFall was a person and McFall needed to use Shimp's bone marrow. But McFall didn't have the right to use Shimp's bone marrow even though McFall was a person and he needed to use Shimp's bone marrow. So being a person doesn't give you the right to use another person's bone marrow even if you need to use it.

The same goes for having a right to life. Having a right to life doesn't give you the right to use another person's bone marrow even if you need to use it. If it did, then since McFall had a right to life and needed to use Shimp's bone marrow, he would have had the right to use Shimp's bone marrow. But McFall didn't have the right to use Shimp's bone marrow even though McFall had a right to life and he needed to use Shimp's bone marrow. So having a right to life, like being a person, doesn't give you the right to use another person's bone marrow even if you need to use it.

And there's nothing particularly special about bone marrow. Suppose McFall had needed one of Shimp's kidneys or one of his lungs. If you agree it would have been wrong for the state to force Shimp to give McFall some of his bone marrow, I assume you'll also agree it would have been wrong for the state to force Shimp to give McFall one of his kidneys or one of his lungs. And if you agree the reason it would be wrong for the state to do this in the case of Shimp's bone marrow is that McFall had no right to use it, I assume you'll agree this is also why it would be wrong for the state to do this in the case of one of Shimp's kidneys or lungs. The crucial lesson we can draw from the case of *McFall v. Shimp*, then, isn't just a lesson about a person's right to control their bone marrow. It's a lesson about a person's right to control their body.

The lesson is this: the fact that someone is a person with a right to life doesn't mean they have the right to use another person's body even if they need to use that person's body in order to go on living. A person's right to life doesn't include the right to use another person's body, it doesn't entail the right to use another person's body, and it doesn't imply the right to use another person's body. From the fact that a person has a right to life, it doesn't follow that they have a right to use another person's body even if they need to use it. This fundamental proposition must be true if the case of *McFall v. Shimp* was decided correctly. So if you agree that it would have been wrong for the state to force Shimp to let McFall use his bone marrow in that case, you must agree that this fundamental proposition is true.

With this important lesson in mind, we can now see what the case of *McFall v. Shimp* has to do with the story of Alice. Alice was raped and now she's pregnant. We're assuming the fetus Alice is pregnant with is a person. So let's give the fetus a name. Let's call him Al. If people who defend the pro-life position are correct, Al has a right to life. For the purposes of this book, I'm simply assuming this is true. Defenders of the pro-life position then claim

that because the fetus has a right to life, abortion is murder and should therefore be illegal. But the lesson we just learned from the case of *McFall v. Shimp* can now help us see that this is a mistake. As we saw in that case, the fact that Robert McFall had a right to life didn't mean he had a right to use another person's body to preserve his life. But if that's true in the case of McFall and Shimp, it must be true in the case of Al and Alice, too. Either having a right to life is enough to give you the right to use another person's body when you need to use it or it isn't.

Even if Al has a right to life, then, that doesn't give Al the right to use Alice's body even if he needs to use it. If having a right to life was enough to give Al the right to use Alice's body, after all, then having a right to life would have been enough to give McFall the right to use Shimp's body. And it wasn't enough to give McFall the right to use Shimp's body. So Al's right to life doesn't include the right to use Alice's body even if he needs to use it. The state had no right to force Shimp to let McFall use his body because McFall had no right to use Shimp's body. In the same way, and for the same reason, the fact that Al has a right to life—and I'm simply assuming for the sake of the argument that this is a fact—doesn't mean Al has the right to use Alice's body. And if Al has no right to use Alice's body, then the state has no right to force Alice to let Al use her body.

But if the state has no right to force Alice to let Al use her body, then the state has no right to force Alice to carry her pregnancy to term. And if the state has no right to force Alice to carry her pregnancy to term, then it has no right to prevent her from having an abortion. All this is true even if we assume Al is a person with a right to life. After all, the state had no right to force Shimp to let McFall use his body, and McFall was clearly a person with a right to life. So if you agree that it would be wrong for the state to force Shimp to let McFall use his bone marrow,

you should also agree that abortion should be legal, at least in the case of rape, even if every fetus is a person with a right to life.

And it isn't just that you should think it should be legal for Alice to have an abortion in this case even if you think Al is a person. You should also think it should be legal for Alice to have an abortion in this case even if you think it would be immoral for Alice to have an abortion in this case. After all, you might think Shimp's refusal to let McFall have some of his bone marrow was immoral. Judge Flaherty certainly thought so. He called Shimp's behavior "morally indefensible." But the question before the judge wasn't "Would it be wrong for Shimp to refuse to let McFall use his body?" The question was "Would it be okay for the state to force Shimp to let McFall use his body if Shimp doesn't want to let McFall use it?" Judge Flaherty thought it was clear that Shimp was acting immorally, but he also thought it was clear the state had no business forcing Shimp not to act that way. So I'm not making any assumptions here about whether you think Shimp was acting immorally in refusing to let McFall use his body. Maybe you think he was and maybe you think he wasn't. The only assumption I'm making is that you think it would have been wrong for the state to force Shimp to let McFall use his body once Shimp decided he didn't want to let McFall use it.

This means when I try to argue from your belief about *McFall v. Shimp* to my claim about abortion, I'm not trying to draw any conclusions about whether it would be immoral for Alice to have an abortion, either. Maybe it would be immoral for Alice to have an abortion and maybe it wouldn't. My claim is simply that, regardless of whether it would be immoral for Alice to have an abortion, it would be wrong for the state to prevent her from having an abortion if that's what she decided she wanted to do. The goal of this book is to convince you that abortion should be legal, not to convince you that abortion isn't immoral.

Now, people who are pro-choice sometimes say things like this: “I’m personally opposed to abortion, but I think it should be the woman’s choice.” When people who are pro-choice say things like this, people who are pro-life sometimes complain that what they’re saying is inconsistent or hypocritical. If you really think abortion is immoral, they respond, you should also think abortion should be illegal. But the case of *McFall v. Shimp* shows that this is a mistake, too. There’s nothing inconsistent or hypocritical about saying it would be immoral for Shimp not to let McFall use his body while at the same time saying the state should let Shimp choose. In the same way, and for the same reason, there’s nothing inconsistent or hypocritical about saying it would be immoral for Alice not to let Al use her body while at the same time saying the state should let Alice choose.

One important feature of this book is that it aims to convince you that abortion should be legal even if you think every fetus is a person with a right to life. This is what creates the possibility that we might resolve the debate over whether abortion should be legal without first having to get everyone to agree about whether the fetus is a person. But another important feature of this book is that it aims to convince you that abortion should be legal even if you think abortion is immoral. This creates the possibility that we might resolve the debate over whether abortion should be legal without first having to get everyone to agree about whether abortion is immoral, too. That’s another reason to give the position I’m defending here a careful hearing even if you think the chances for success at the outset seem slim.

Changing the Case

Have I already convinced you it should be legal for Alice to have an abortion after she was raped even if Al's a person? Probably not. I hope I've convinced you that the fact that Al has a right to life can't be enough by itself to give him the right to use Alice's body. After all, if having a right to life were enough to give Al the right to use Alice's body, then the fact that McFall had a right to life would have been enough to give McFall the right to use Shimp's body. And I'm assuming you agree it wasn't enough to give McFall that right.

But maybe Al still has the right to use Alice's body even though McFall didn't have the right to use Shimp's body because of some other fact about Alice's situation, some fact that makes Alice's situation different from Shimp's. If there turns out to be a difference between Alice and Shimp that makes a difference in this way, then thinking it would be wrong for the state to force Shimp to let McFall use his body won't commit you to thinking it would be wrong for the state to force Alice to let Al use her body. And if that turns out to be the case, the argument I'm trying to defend in this book will turn out to be unsuccessful.

Here's an example. McFall wasn't already using Shimp's body when the court was asked to intervene. But if the state prevents Alice from having an abortion, it does this after Al has already started using Alice's body. In *McFall v. Shimp*, that is, the court refused to force Shimp to let McFall start using his body to keep

McFall alive. But if the state forbids Alice from having an abortion, it wouldn't force Alice to let Al *start* using her body to keep Al alive. Instead, it would force Alice to let Al *continue* using her body to keep Al alive. That's a difference. If you think Judge Flaherty made the right call in *McFall v. Shimp* but you aren't yet convinced it should be legal for Alice to have an abortion even if Al's a person, you might be responding to this difference between the two cases.

Suppose this difference between the two cases is bothering you. You're wondering whether it poses a problem for my argument. Here's what you should do. You should make up your own story about McFall and Shimp. It should be just like the real story except in your version of the story, Shimp should discover that McFall is already using his body to go on living, just like Alice discovers that Al is already using her body to go on living. You should then ask whether you think this change in the story makes a difference. Would it be okay for the state to force Shimp to let McFall continue using his bone marrow in this version of the story?

If your answer to this question turns out to be yes, this will show you think the difference between the state's forcing someone to let another person start using their body and the state's forcing someone to let another person continue using their body really does make a difference. And if you think that, you should reject the argument I've offered here. But if your answer to this question turns out to be no, and you think it would still be wrong for the state to force Shimp to let McFall use his body even if McFall had already started using Shimp's body, this will show you think the difference between the state's forcing someone to let another person start using their body and the state's forcing someone to let another person continue using their body doesn't really make a difference. And if you think this difference between the case of McFall and Shimp and the case

of Al and Alice doesn't make a difference, then you should reject this first objection to the argument I've offered here. If the difference between the cases doesn't make a difference, then as long as you agree it would be wrong for the state to force Shimp to let McFall use his bone marrow, you'll still have to agree it would be wrong for the state to force Alice to let Al use her uterus.

Since this approach to evaluating the merits of my argument may be unfamiliar to you, I'll go ahead and give you an example you can use here. If you don't like the example, feel free to come up with one of your own; any good example should produce the same results. In any event, here's one way you can change the story of McFall and Shimp to test this first objection to my argument. Suppose on the day after the judge ruled in Shimp's favor a distraught friend of McFall's slipped a drug into Shimp's coffee that rendered Shimp unconscious. Suppose while Shimp was unconscious this friend of McFall's then connected Shimp to a device that started slowly extracting bone marrow from Shimp and transferring it to McFall. I'll call this device a bone marrow transferring machine. Suppose when Shimp woke up, he discovered that due to no fault of his own, his bone marrow was already being used to keep McFall alive. And suppose Shimp decided he didn't want to let McFall continue to use his bone marrow.

This change to the story makes the case of McFall and Shimp more like the case of Al and Alice. It certainly doesn't make the case of McFall and Shimp exactly like the case of Al and Alice. There are plenty of other differences between the two cases, and I'll get to them later. But this change to the story does make the case of McFall and Shimp just like the case of Al and Alice in terms of the one specific difference I want to focus on right now: the difference between the state's forcing someone to let another person start using their body and the state's forcing someone to let another person continue using their body. Someone slips a drug into Alice's coffee, and when she wakes up Al is already

using her body to go on living. Someone slips a drug into Shimp's coffee, and when he wakes up McFall is already using his body to go on living. It's not Al's fault that he's now using Alice's body to go on living. But it's not McFall's fault that he's now using Shimp's body to go on living, either. In fact, if it helps, let's assume from here on out that McFall has lapsed into a temporary coma because of his condition and that he is just as innocent and helpless as Al is. So at least in terms of this particular difference, this revised version of the story of McFall and Shimp is just like the case of Al and Alice.

Now, suppose that after Shimp wakes up and says he's not willing to allow McFall to continue using his body, McFall's lawyer rushes back to the courthouse and asks Judge Flaherty to intervene. And suppose McFall's lawyer says something like this: "Look, your Honor, I admit it really would have been wrong for you to force Mr. Shimp to let my client start using his bone marrow yesterday. But things have changed. Today, my client is already using Mr. Shimp's bone marrow. All I'm asking this time is that you force Mr. Shimp to let my client *continue* to use it. Surely there'd be nothing wrong with your doing that."

I doubt you'll find this position plausible. If you agreed with Judge Flaherty's position in the real case of *McFall v. Shimp*, I bet you'll think the judge should say the same thing in this fictional version of the case. It's hard to see why anyone would think it would be wrong for the state to force Shimp to start helping McFall but okay for the state to force Shimp to continue helping McFall if Shimp woke up and found out his body was already being used to keep McFall alive in this way. If McFall had no right to use Shimp's bone marrow to begin with, why would McFall suddenly have this right simply because someone slipped a drug into Shimp's coffee and hooked him up to the bone marrow transferring machine? And if you agree that it would be wrong for the state to force Shimp to

keep McFall alive in this fictional version of the story, you should reject this first objection to my argument. If the fact that someone forced Shimp to let McFall start using his body isn't enough to give McFall the right to continue using Shimp's body, then the fact that someone forced Alice to start letting Al use her body can't be enough to give Al the right to continue using Alice's body, either. The fact that Shimp's body wasn't yet keeping McFall alive in the real-life version of the story while Alice's body is already keeping Al alive in the case of Alice's unwanted pregnancy therefore turns out to be irrelevant. So this first difference between the two cases provides no reason for you to reject the claim I've made so far: if you agree that it would be wrong for the state to force Shimp to let McFall use his bone marrow, you should agree that it would be wrong for the state to force Alice to let Al use her uterus. Even if Al is a person with a right to life, it should be legal for Alice to have an abortion.

Hypothetical Cases

I began this book by describing something that actually happened. Robert McFall really did need some of David Shimp's bone marrow and David Shimp really did refuse to give it to him. McFall really did ask the court to force Shimp to give him the bone marrow he needed and the court really did say no. I then said I was going to try to convince you that if you think it would be wrong for the state to force Shimp to let McFall use his bone marrow in this case, you should also think abortion should be legal even if every fetus is a person with a right to life. And I turned to the case of Alice to try to convince you this is true at least in the case of pregnancies arising from rape.

But here we are just a few pages later, and I've already changed the story of McFall and Shimp from something that actually happened to something bizarrely different. As far as I know, there's no such thing as a bone marrow transferring machine; I just made it up. For all I know, there will never be such a machine. Maybe there's even something about bone marrow that makes it impossible for a machine like that to exist. I don't know. In responding to the first objection to the argument I've offered here, then, it seems I've moved quite suddenly from historical fact to science fiction. And you might think this is a problem. That's because you might think it's reasonable for me to appeal to what you believe about something that actually happened but not reasonable for me to appeal to what you would believe about

something that never happened and that, for all I know, will never happen and maybe even couldn't ever happen. I began by saying I'd try to convince you that if you agree with what Judge Flaherty actually said, you should agree that abortion should be legal. But now I seem to be saying something quite different: that if you agree with something Judge Flaherty said in a strange make-believe story, then you should agree that abortion should be legal. And that seems to be another matter entirely.

Here's what's going on: I'm making an assumption. I'm assuming it's okay for me to appeal to your beliefs about cases that are purely hypothetical, even if the cases are somewhat strange or bizarre, and not just to your beliefs about actual, real-life cases. This is a pretty common practice among philosophers, though not so much among other people. Some people don't think this is a reasonable assumption. I think it is. Here's why I think you should, too. Suppose you reject my assumption. You agree it's okay for me to appeal to your beliefs about actual cases but you say it's not okay for me to appeal to your beliefs about strange, imaginary cases. So you agree that if your belief about the actual case of *McFall v. Shimp* turns out to commit you to saying abortion should be legal, then you really have to agree that abortion should be legal. But you claim that if it's merely your belief about my strange, imaginary version of the case that turns out to commit you to saying abortion should be legal, then this doesn't really mean you have to agree that abortion should be legal.

If that's your view, you should consider that your view has a very strange implication. It implies that whether abortion should be legal depends on whether the original case of *McFall v. Shimp* that I described is something that actually happened or just a strange story I made up. Now I've told you, of course, that the case of *McFall v. Shimp* is something that actually happened. But you don't really know that for a fact. Chances are pretty good you never heard of the case before you opened

this book. So for all you know, maybe I really did just make it up. Now suppose someone asks if you think abortion should be legal. If you start out thinking abortion should be illegal, and if you find no fault with anything else I say in this book but you insist it's only fair for me to appeal to your beliefs about actual cases and not to your beliefs about strange hypothetical cases, then you'll have to answer this question by saying something like this: "I don't know if abortion should be legal because I don't know if the case of *McFall v. Shimp* really happened. If it really happened, then abortion should be legal, but if it's just a strange, made-up story, then abortion should be illegal." I hope you'll agree this would be an unsatisfactory answer. How could the state's right to force a woman to carry her pregnancy to term depend on whether Robert McFall really tried to get the state to force his cousin to let him have some of his bone marrow? If you agree this implication is unacceptable, then you have to reject the claim that has this implication. If you reject the claim that has this implication, you'll have to agree that it's okay for me to appeal to your beliefs about strange, imaginary cases, and not just to your beliefs about actual, real-life cases, as I try to convince you that abortion should be legal. And that's what I'm going to do in much of what follows.

Contraceptive Failure

Barbara is a 19-year-old college student in Boston. A few weeks ago, she had sex with a guy she met at a party. She didn't want to get pregnant, so she insisted that he use a condom. Unfortunately for Barbara, the condom broke that night, and she's just discovered she's pregnant. To help us keep track of which fetus is Alice's and which fetus is Barbara's, let's call Barbara's fetus Bob. Although Barbara really hoped she wouldn't get pregnant, she knew she might because she knew that condoms sometimes break. And she went ahead and had sex with the guy she met at the party despite knowing this because she thought having sex with the guy would be fun. It was fun, but now she's pregnant with Bob and she wants an abortion. Should the state let her have one?

Barbara's relationship to Bob seems importantly different from Alice's relationship to Al. Alice didn't do anything to cause herself to get pregnant with Al. She was raped. But Barbara did do something to cause herself to get pregnant with Bob. She chose to have sex with the guy she met at the party. And even though Barbara tried to prevent this choice from causing her to get pregnant, she knew it might cause her to get pregnant all the same. And she chose to have sex with the guy anyway. This seems like a big difference.

Barbara's situation also seems importantly different from Shimp's situation. In the somewhat strange version of Shimp's

story that I used to try to convince you it should be legal for Alice to have an abortion, Shimp was like Alice and unlike Barbara in this respect. Shimp didn't do anything to cause himself to end up in the predicament he found himself in, either. He simply woke up one day and discovered that his body was being used to keep someone else alive. That's what happened to Alice. But it's not what happened to Barbara. Barbara did something that caused her to end up in the predicament she finds herself in and she did what she did knowing full well that doing it might cause her to end up in just such a predicament. Again, this seems like a big difference.

These differences between Barbara's situation and the situations of Alice and Shimp seem to show that the argument I've defended here, if it works at all, can only work in cases involving rape. I'm counting on you to think it would be wrong for the state to force Shimp to remain connected to the bone marrow transferring machine in the version of the story where Shimp is drugged and connected to the machine against his will, that is, and I've suggested that the case of Alice is relevantly similar to this version of the story. If I'm right about that, then your belief about Shimp in this version of the story commits you to believing the state should let Alice have an abortion even if Al is a person with a right to life.

But even if I turn out to be right about that, what I've said so far clearly doesn't apply to the case of Barbara. I can't say that if you think it would be wrong for the state to force Shimp to let McFall continue using his bone marrow in this case then you have to think it would be wrong for the state to force Barbara to let Bob continue using her uterus because there's a big difference between Shimp's situation and Barbara's situation. It's not Shimp's fault he finds himself keeping McFall alive, just as it's not Alice's fault she finds herself keeping Al alive, but it seems plausible to say that it's Barbara's fault that she finds herself

keeping Bob alive. And that may be enough to show that Barbara shouldn't be allowed to have an abortion even if Alice should be allowed to have one.

Now the fact that Bob has a right to life can't be enough to show he has a right to use Barbara's body. If Bob's right to life were enough to give him the right to use Barbara's body, after all, then McFall's right to life would have been enough to give him the right to use Shimp's body. And McFall's right to life wasn't enough to give him the right to use Shimp's body. But even though Bob's right to life can't be enough to give Bob the right to use Barbara's body, the fact that Bob has a right to life plus the fact that it's Barbara's fault that he started using her body might be enough to give him that right. And since it wasn't Shimp's fault that McFall started using his bone marrow and it isn't Alice's fault that Al started using her uterus, this would mean you could say Bob has the right to use Barbara's body without having to say McFall had the right to use Shimp's body or that Al has the right to use Alice's body. And this, in turn, would mean that even if I can use the case of McFall and Shimp to show it should be legal for Alice to have an abortion after she was raped, I can't use it to show it should be legal for Barbara to have an abortion after she freely chose to have sex with the guy she met at a party.

This looks like a problem for my argument. But I think it can be overcome. The way to do that is to change the story of McFall and Shimp again. What we need this time is an imaginary version of the story that's like the real case of McFall and Shimp, except this time Shimp's situation will have to be like Barbara's situation instead of like Alice's situation in this respect. We need a version of the story, that is, where Shimp doesn't simply wake up and discover that his body is being used to keep McFall alive. We need a version of the story where Shimp freely chooses to do something knowing full well that if he does it, it might cause him to end up in a situation where his body is being used to keep

McFall alive. In short, we need a version of the story where, just as it's Barbara's fault that Bob started using her body, it's Shimp's fault that McFall started using his body. This will undoubtedly make for an even stranger story. But as I already said, I'm assuming at this point you're okay with my appealing to your beliefs about such stories.

If we can come up with a suitable test case, one that's like the case of Barbara rather than like the case of Alice in this respect, we can ask whether we think it would be okay for the state to force Shimp to continue to keep McFall alive in this new version of the story. If you think the answer to this question is yes, then the problem with my argument will remain. If it would be okay for the state to force Shimp to keep McFall alive in a situation that really is like Barbara's situation, then it would be okay for the state to force Barbara to keep Bob alive and so okay for the state to prevent her from having an abortion. But if you think the answer to this question is no, then what at first seemed like a problem with my argument will turn out not to be a problem after all. If it would still be wrong for the state to force Shimp to continue to keep McFall alive even if Shimp's situation really were like Barbara's situation rather than like Alice's, then it would be wrong for the state to prevent Barbara from having an abortion, too, and not just wrong for the state to prevent Alice from having one. And it would be wrong for the state to do this to Barbara even if Bob is a person, since it would be wrong for the state to do this to Shimp even though McFall was a person. What we need, then, is a better version of the story of McFall and Shimp to apply to the case of Bob and Barbara—one where it's Shimp's fault that McFall is already using his bone marrow.

Here's one way to make the story of McFall and Shimp like the case of Barbara and unlike the case of Alice in this respect. Feel free again to supply your own example if you don't like this one. Suppose a few days after telling McFall he was unwilling

to let him use some of his bone marrow, Shimp went down to the hospital to visit him. Suppose when Shimp got there, McFall had already been hooked up to a bone marrow transferring machine in the hope that Shimp might change his mind. Suppose, in addition, the floor in McFall's room had recently been cleaned, washed, and polished and was extremely slippery as a result. Before Shimp entered the room, in fact, he was warned: "The floor in there is extremely slippery. If you walk in there, you might slip and fall and get stuck to the bone marrow transferring machine. And if that happens, it will start removing some of your bone marrow and transferring it to McFall." Suppose Shimp decided to take his chances despite this warning just because he thought it would be fun to visit his cousin. He put on special non-slip shoes and tried to walk very slowly, but he still ended up slipping and falling and getting stuck to the machine. As a result, Shimp is now lying on the floor next to McFall and the machine is removing some of his bone marrow and giving it to McFall.

I admit this is an extremely peculiar story, perhaps one only a philosopher would dream up. But I'm going to ask you to think about it anyway. The reason I'm going to ask you to think about it is that this version of the story of McFall and Shimp, strange as it certainly is, manages to make Shimp's situation just like Barbara's situation, and unlike Alice's situation, in this one very particular respect: it makes Shimp's situation like Barbara's situation in terms of whether or not the person whose body is currently being used to keep someone else alive freely chose to do something that foreseeably caused them to end up in such a predicament. Alice was raped while she was unconscious. She did nothing to cause her predicament. And Shimp did nothing to cause his predicament in the fictional version of the case that I compared to Alice. But Barbara did do something that caused her predicament: she freely chose to have sex with the guy she met at a party, knowing that doing so might cause her to end up

in a situation where someone else was now making use of her body to go on living. And in this newest version of Shimp's story, Shimp did something that caused his predicament, too: he freely chose to walk across the slippery floor knowing it might cause him to be in a situation where someone else was now making use of his body to go on living. Barbara took precautions to prevent her from ending up in such a situation. But so did Shimp.

Now suppose you agree that the fact that Bob is a person who needs to use Barbara's body isn't enough to give Bob the right to use Barbara's body. Remember, you have to agree that this fact isn't enough to give Bob the right to use Barbara's body if you agree that the fact that McFall was a person who needed to use Shimp's body wasn't enough to give McFall the right to use Shimp's body in the real-life version of that case. But suppose you also think this fact plus the fact that it's Barbara's fault that Bob's now using her body really is enough to give Bob the right to continue using her body. If that turns out to be the case, then Bob will have the right to use Barbara's body even if Al doesn't have the right to use Alice's body. And that would mean it should be illegal for Barbara to have an abortion after she freely chose to have sex with that guy even if it shouldn't be illegal for Alice to have an abortion after she was raped.

But if this is what you're thinking about Bob and Barbara, you'll have to say that McFall has the right to continue using Shimp's body in this new version of the story. After all, McFall is a person and McFall needs to use Shimp's body to go on living, and in this new version of the story it's Shimp's fault that McFall is now using his body. If you think it would be okay for the state to prevent Barbara from having an abortion because it's Barbara's fault her body is now being used to keep someone else alive, then you'll have to agree that it would also be okay for the state to force Shimp to let McFall continue using his body in this new version of the story because it's Shimp's fault his body is now

being used to keep someone else alive. Either the fact that it's your fault someone else is using your body to stay alive is enough to give them the right to continue using it or it isn't. That's why, as strange as this new version of the story surely is, you really do have to think about it if you want to figure out whether the fact that it's Barbara's fault that Bob is now using her body is enough to make it okay for the state to prevent Barbara from having an abortion.

So go ahead and think about it. Would it be okay for the state to force Shimp to let McFall continue using his bone marrow in this version of the story? If you think it would be okay for the state to force Shimp to let McFall continue using his bone marrow in this version of the story, then I'll have to admit my strategy here has failed. But my guess is very few people will think this. If you agree with Judge Flaherty's decision in the real case of *McFall v. Shimp*, as I'm assuming you do, then you agree it would be wrong for the state to force Shimp to let McFall start using some of his bone marrow. And if you agree it would be wrong for the state to force Shimp to let McFall start using some of his bone marrow, it's hard to see how you could think it would be okay for the state to force Shimp to let McFall continue using some of his bone marrow just because Shimp accidentally ended up starting to let McFall use some of it. If McFall had no right to use Shimp's bone marrow to begin with, why would McFall suddenly have this right simply because Shimp slipped on the floor and got stuck to the bone marrow transferring machine? If you were the one who slipped on the floor and accidentally got stuck to the machine, I doubt you'd think this gave the state the right to force you to remain attached to it.

So I suspect that upon reflection you'll agree the state wouldn't have the right to force Shimp to let McFall continue to use his bone marrow in the admittedly peculiar version of the story I've described here. You'll agree it would be wrong for the state to do

this even though McFall is a person, McFall needs Shimp's bone marrow, and Shimp could have avoided letting McFall start to use his bone marrow by not walking into the room in the first place. And if that's right, then you can't say Bob has the right to use Barbara's body just because Bob's a person, Bob needs to use Barbara's body, and Barbara could have avoided letting Bob start to use her body by not having sex with the guy she met at the party in the first place. Either the fact that it's your fault someone has started to use your body is enough to give them the right to keep using it if they need to keep using it or it isn't. If it's not enough to give them this right in this version of the case of McFall and Shimp, then it's not enough to give them this right in the case of Bob and Barbara. If it would be wrong for the state to prevent Alice from having an abortion after she was raped, then it would also be wrong for the state to prevent Barbara from having an abortion after she freely chose to have sex with that guy. It's Barbara's fault that Bob started using her body while it isn't Alice's fault that Al started using her body, but the modified version of the story of McFall and Shimp shows that this difference doesn't make a difference in terms of whether the state should allow them to have abortions.

I've covered a lot of ground already. It may help to briefly review what I've tried to do so far. I started by assuming you agree with Judge Flaherty's decision in the real-life case of *McFall v. Shimp*. It would be wrong for the state to force Shimp to let McFall use his bone marrow in that case, even though McFall was a person and McFall needed the bone marrow. I then tried to convince you of a few things based on this assumption. First, that if it would be wrong for the state to do this to Shimp in the real case of McFall and Shimp, then it would also be wrong for the state to do this to Shimp in a fictional version of the case where someone rendered Shimp unconscious and started using his bone marrow to keep McFall alive against his will. Second, if it would be wrong

for the state to do this to Shimp in this fictional version of the story, then it would also be wrong for the state to prevent Alice from having an abortion when she becomes pregnant as the result of rape. Third, if it would be wrong for the state to do this to Shimp in the real case of McFall and Shimp, then it would also be wrong for the state to do this to Shimp in a second fictional version of the story where Shimp slips on the floor and accidentally starts supplying McFall with some of his bone marrow. Fourth, if it would be wrong for the state to do this to Shimp in this second fictional version of the story, then it would also be wrong for the state to prevent Barbara from having an abortion when she accidentally becomes pregnant because the condom broke.

If I've been right about all this, then if you agree with Judge Flaherty's decision in the real-life case of *McFall v. Shimp*, you should also agree that it would be wrong for the state to ban abortion at least in cases where the pregnant woman was raped and in cases where the pregnant woman had sex voluntarily while unsuccessfully using birth control. Since you agree it would be wrong for the state to force Shimp to keep McFall alive even though McFall was a person with a right to life, you should agree it would be wrong for the state to force a pregnant woman to carry her pregnancy to term in these cases even if you think the fetus is also a person with a right to life. And since you might think Shimp's refusal to keep McFall alive is immoral in these cases even though it would be wrong for the state to force Shimp to keep McFall alive, you should agree it would be wrong for the state to prevent Alice and Barbara from having abortions in these cases even if you think it would be immoral for them to have abortions in these cases.

Some defenses of the claim that abortion should be legal depend on the claim that the fetus isn't really a person or on the claim that abortion isn't immoral. But the defense of abortion rights I've offered here doesn't depend on either of these claims.

Even if you think Al and Bob have a right to life, and even if you think it would be immoral for Alice and Barbara to refuse to let them use their bodies to go on living, you should still agree that it would be wrong for the state to prevent them from making that choice if that's the choice they decide to make. Or, at least, that's what you should think if you agree it would be wrong for the state to prevent Shimp from making the choice not to let McFall use some of his bone marrow.

Failure to Use Contraception

Carol is a 37-year-old cocktail waitress in Reno. She had sex with her ex-boyfriend a couple months ago. She didn't want to get pregnant, and she didn't have any birth control with her at the time, but she wanted to be spontaneous. So she decided to take her chances. She figured if she got pregnant, she could always have an abortion. Why worry about finding a condom, she said, when you can always use abortion as your form of birth control. Unfortunately for Carol, she got pregnant that night, and a second test has just confirmed this. She has no interest in keeping the child, let alone giving him a name, but to help us keep track of the different cases, let's call him Carl. Should the state let Carol have an abortion? Or does Carl have the right to use Carol's uterus?

In many respects, Carol's situation is like Barbara's. Unlike Alice, who was raped, Barbara and Carol each freely chose to have sex with someone knowing full well that doing so could get them pregnant. I've already tried to convince you it would be wrong for the state to prevent Barbara from having an abortion. If that's right, and if Carol's situation is basically the same as Barbara's, then it would be wrong for the state to prevent Carol from having an abortion, too. But there's also a difference between Barbara and Carol. While both of them knew they were running the risk of getting pregnant, Barbara tried to do something to minimize that risk while Carol didn't. Barbara insisted on using

birth control. She just got unlucky. Carol, on the other hand, did nothing to reduce her chances of getting pregnant even though she knew she could have done something. In this respect, Carol seems more responsible for her predicament than Barbara is for hers. And you might think this should make a difference. Even if you agree that Alice and Barbara should be allowed to have an abortion, you might be tempted to draw the line at Carol. That's because you might think, as many people put it, that abortion shouldn't be used as a form of birth control.

How can we figure out if this is a reasonable thing to say? By now, you can probably guess how I'm going to answer that question. We can figure out whether this is a reasonable thing to say by changing the story about McFall and Shimp yet again. This time, we need to make Shimp's situation less like Barbara's and more like Carol's. In the imaginary version of Shimp's story I compared to Barbara's situation, Shimp walked into McFall's slippery hospital room knowing that doing so might cause him to end up getting stuck to McFall's bone marrow transferring machine. Even though he put on special nonslip shoes and tried to walk very slowly, Shimp still ended up slipping and falling and getting stuck to the machine. I'm assuming at this point you agree it would be wrong for the state to force Shimp to let McFall continue using his bone marrow in this version of the story even though he knew the precautions he was taking might turn out to fail. And I've tried to convince you that if that's so, then you should also agree it would be wrong for the state to force Barbara to let Bob continue using her body even though she knew the precautions she was taking might turn out to fail, too. If the fact that it's Shimp's fault that McFall started using his bone marrow doesn't give McFall the right to continue using it, then the fact that it's Barbara's fault that Bob started using her uterus doesn't give Bob the right to continue using it.

But what about Carol? Carol's situation is like Barbara's, except Carol didn't take any precautions to avoid getting pregnant while Barbara did. So the way to change the imaginary story about Shimp that I compared to Barbara's situation is to have Shimp fail to take precautions to avoid letting McFall start using his bone marrow. After he's warned about the slippery floor in McFall's room, for example, suppose instead of putting on special nonslip shoes and walking very slowly, Shimp decided it would be more fun to spontaneously race across the room in his socks, and that's why he slipped and fell and ended up getting stuck to the bone marrow transferring machine. In this version of the story, Shimp seems more responsible for the fact that McFall has started using his bone marrow than he was in the version where he wore special nonslip shoes and walked very slowly. This seems true in the same way that Carol seems more responsible for the fact that Carl has started using her uterus than Barbara was for the fact that Bob had started using her uterus because Barbara, unlike Carol, was careful to use birth control. So the version of the story where Shimp races across the slippery floor in his socks seems to be the right one to compare to Carol's situation.

Let's suppose that's right. What do you think about this version of the story? Should the state have the right to force Shimp to let McFall continue using his bone marrow in this case? Should the fact that Shimp could have reduced his chances of slipping and falling by wearing the special nonslip shoes and walking very slowly make a difference? If you think it would be okay for the state to force Shimp to let McFall continue using his bone marrow in this case, then you really should draw the line at Carol. You should agree it would be wrong for the state to prevent Alice and Barbara from having an abortion. But you should conclude that it would be okay for the state to prevent Carol from having an abortion since Carol could have reduced her chances of having

Carl start using her uterus by using birth control. Or, at least, you should think this if you think Carl is a person.

But my guess is very few people will think it would be okay for the state to do this to Shimp even in this version of the story. If you agree with Judge Flaherty's decision in the real case of *McFall v. Shimp*, as I'm assuming you do, then you agree it would be wrong for the state to force Shimp to let McFall start using some of his bone marrow. And if you agree it would be wrong for the state to force Shimp to let McFall start using some of his bone marrow, it's hard to see how you could think it would be okay for the state to force Shimp to let McFall continue using some of his bone marrow just because he accidentally ended up letting McFall start to use some of it when he could have reduced the chances of this accidentally happening by wearing special nonslip shoes and walking more slowly. If McFall had no right to use Shimp's bone marrow to begin with, why would McFall suddenly have this right simply because Shimp's slipping on the floor was due to his own reckless behavior? If you were the one who slipped on the floor because you decided to run across it in your socks, I doubt you'd think that the fact that you could have been more careful would give the state the right to force you to remain attached to the bone marrow transferring machine you now found yourself stuck to. And so I suspect that, at least upon reflection, you'll agree the state wouldn't have the right to force Shimp to let McFall continue using his bone marrow in the version of the story I've described here, even though Shimp could have reduced his chances of winding up in a situation where someone else was using his body to go on living by wearing the special nonslip shoes and walking more slowly.

If I'm right about this and you agree that the fact that Shimp could have done more to prevent McFall from starting to use his bone marrow doesn't mean McFall now has the right to continue using it, you'll have to agree that the fact that Carol could

have done more to prevent Carl from starting to use her uterus doesn't mean Carl now has the right to continue using it. Either the fact that someone could have done more to prevent another person from starting to use their body to go on living is enough to give that other person the right to continue using their body or it isn't. And the fact that Carl has a right to life doesn't give him the right to use Carol's body either because if it did, then the fact that McFall had a right to life would have given McFall the right to use Shimp's body in the real-life version of the case. So the fact that Carl has a right to life doesn't give him the right to use Carol's body, the fact that it's Carol's fault that she accidentally let Carl start using her body doesn't give him the right to continue using her body, and the fact that she failed to take precautions to reduce the chances of that accidentally happening doesn't give him the right to use her body, either. There's a difference between the case of Carol and the case of Barbara, then, but this further modified version of the story of McFall and Shimp shows that the difference doesn't matter in terms of whether it would be okay for the state to prevent them from having an abortion. And if that's right, then you should agree that it would be wrong for the state to prevent Carol from having an abortion even though she could have reduced the chances of winding up in her predicament by finding some birth control before she had sex with her ex-boyfriend.

So, it should be legal for a woman to have an abortion if her pregnancy is the result of rape, it should be legal for a woman to have an abortion if her pregnancy is the result of contraceptive failure, and it should be legal for a woman to have an abortion if her pregnancy is the result of freely choosing to engage in unprotected sex. This is what you should think if you agree with Judge Flaherty's decision in the versions of the story of *McFall v. Shimp* I've appealed to here. Since you agree it would be wrong for the state to force Shimp to keep McFall alive in

these cases even though McFall was a person with a right to life, you should agree it would be wrong for the state to force a woman to carry her pregnancy to term in these cases even if you think every fetus is a person with a right to life. And since you agree it would be wrong for the state to force Shimp to keep McFall alive in these cases even if you think Shimp's refusal to keep McFall alive in these cases would be immoral, you should agree it would be wrong for the state to prevent Alice, Barbara, and Carol from having abortions in the cases I've described even if you think it would be immoral for them to have abortions in these cases.

Sex Selection

Dorothy and her husband live in Cleveland. They've been happily married for five years now and have an adorable 2-year-old son. They'd like to have one more child before Dorothy goes back to work full time and they'd like it to be a girl. Nothing against boys, mind you. They'd just like to have one of each. Dorothy was recently excited to learn she's pregnant again, but testing has since confirmed it's a boy. She was hoping to have Danielle, but instead she's pregnant with Daniel. She and her husband only want to have one more child and they really want it to be a girl this time. So Dorothy is planning to have an abortion. Should the state let her have one?

Even people who are strongly pro-choice as a general matter are often made uncomfortable by the subject of sex-selection abortion. There's no reason to think large numbers of women are having abortions based on the sex of their fetus in this country so it can be tempting simply not to talk about it. But that would be a mistake for two reasons. First, unlike abortion in more typical cases, sex-selection abortion is illegal in parts of the United States right now. If Dorothy and her husband lived in Arizona, Kansas, North Dakota, South Dakota, Oklahoma, Pennsylvania, or North Carolina, she'd be out of luck. It would be illegal for her to get an abortion there. Second, even if relatively few women in this country want to get an abortion because of the sex of their fetus, a law that prevents them from doing so has an impact on

all women who want to get an abortion. It means they all have to justify their decision to the government in a way they wouldn't otherwise have to.

Of course, if there's a good enough reason to ban abortion in these cases, the women who want them may just have to accept the consequences. But the reason I've given for thinking abortion should be legal in more typical cases applies just as plainly and forcefully here: the fact that a fetus is a person, assuming it is a fact, doesn't give it the right to use another person's body even if it needs to use it. This is true even if the person whose body the fetus needs to use refuses to let the fetus use it only because of the fetus's sex. After all, consider what happens if we tinker with the story of McFall and Shimp yet again and make it a sex-selection case, too.

Suppose Shimp would have been willing to let his cousin have some of his bone marrow if his cousin had been female. He finds himself connected to the bone marrow transferring machine because he slipped and fell onto it, but at first he doesn't complain. In fact, he says, he's happy to help out. But after he's been connected to the machine for a while, he takes a closer look at McFall and, with note of incredulity in his voice, utters the following words: "Wait a minute! *Robert* McFall? I thought you said it was *Roberta* McFall, his sister, who needed my bone marrow. I'd be willing to help Roberta out. She's a chick, and I'm a chivalrous kind of guy. Ladies first and all that. But *Robert* McFall? No way. He's a dude. Guys have to fend for themselves. So let me outta here." Suppose McFall's lawyer then asked the court to order Shimp to remain connected to the machine until McFall had received enough bone marrow from him and that the court refused to do so.

You might think it would be immoral for Shimp to refuse to let McFall have the bone marrow he needs in this case, given that

Shimp would have been willing to let McFall have it if McFall had been a woman instead of a man. And if you're like many people, you'll think that if Shimp were engaging in a commercial transaction of some sort it would be appropriate for the state to force him to treat his male and female employees or customers equally in a variety of ways. But if you agreed with Judge Flaherty in the actual case of *McFall v. Shimp*, I think you'll agree that if Shimp decides to let McFall have some of his bone marrow, he's doing something importantly different from what people do when they enter the public marketplace. He's simply giving McFall a gift. And in the case of giving people gifts, it's hard to believe you'll think it would be okay for the state to force people to treat men and women equally. If Shimp wants to give gifts to all his female friends and relatives and to none of his male friends or relatives, you might think that's morally objectionable, but I bet you'll think the law should let him do it. So even if you think Shimp's behavior is immoral in this version of the story, it's hard to believe you'll think the state should force Shimp to give McFall the bone marrow. If McFall didn't have the right to use Shimp's bone marrow in the real version of the case, why would McFall suddenly have this right just because Shimp would have been willing to donate the bone marrow to McFall if McFall had been a woman?

If you agree it would be wrong for the state to force Shimp to keep McFall alive even if the only reason Shimp refused to keep him alive was that McFall was male rather than female, then you should agree it would be wrong for the state to force Dorothy to keep Daniel alive even if the only reason she refuses to carry her pregnancy to term is that Daniel is male rather than female. I've already tried to convince you it should be legal for Alice, Barbara and Carol to have abortions. If you agreed with me about those cases, you should agree about the case of Dorothy, too. It should

be legal for a woman to have an abortion regardless of how she got pregnant and regardless of whether sex selection plays a role in her decision. And you should agree that it should be legal for a woman to have an abortion because of the fetus's sex even if you think every fetus is a person with a right to life, and even if you think having an abortion because of the fetus's sex would be immoral.

Genetic Screening

Elaine is a 43-year-old homemaker and mother of four who lives just outside Houston. When she and her husband found out she was pregnant again, they were surprised. Their youngest child is already 12 and they'd assumed Elaine was no longer fertile. Still, once they got over the initial shock and had some time to think about the implications for their family, they decided the news was an unexpected blessing and they began to prepare their home to welcome a fifth child, Evan. Then they found out Evan would have Down syndrome. After several long and anguished conversations, they agreed that it would be better if Elaine had an abortion. Should the state let her have one?

Abortions because of fetal abnormalities, like sex-selection abortions, make many defenders of abortion rights uncomfortable. Bans on such abortions are less common in the United States than bans on sex-selection abortions, but they do exist. It would be illegal for Elaine to have an abortion in North Dakota right now, for example, and Indiana and Louisiana have passed similar laws, though courts there have temporarily blocked them from going into effect. So this kind of case shouldn't be ignored, either. As was also the case with sex-selection abortions, the reason I've given here for thinking abortion should be legal in more typical cases applies just as clearly and forcefully to abortions based on fetal abnormality. And, again as was true in

the case of sex-selection abortions, we can see this by once more reworking the story of McFall and Shimp.

So suppose again that Shimp finds himself connected to the bone marrow transferring machine after he slipped and fell onto it, and that he doesn't complain about this at first. But suppose this time when Shimp takes a closer look at his cousin, he discovers not that McFall is male rather than female but, instead, that McFall has Down syndrome. And suppose when he finds out, he says something like this: "You're telling me *that's* my cousin? The funny-looking guy? Why didn't anybody warn me? I never met my cousin before, but I thought he was normal. No way I'm letting this guy have any of my bone marrow. I can't even stand to look at him."

As objectionable as Shimp's attitude clearly is in this version of the story, it's hard to believe you'll think this would make it okay for the state to force him to stay hooked up to the bone marrow transferring machine. As in the case of sex-selection abortion, you may well agree that if Shimp were engaging in a commercial transaction of some sort it would be appropriate for the state to force him to treat all his employees or customers equally in a variety of ways, regardless of any disabilities they might have. But, again as in that case, it's hard to believe you'll think it would be okay for the state to force people to treat others equally in terms of disabilities when it comes to giving gifts. And if you agree with Judge Flaherty's decision in the real case of *McFall v. Shimp*, you'll agree that if Shimp decides to let McFall have some of his bone marrow, he's simply agreeing to offer him a gift. So if McFall didn't have the right to use Shimp's bone marrow in the real-life version of the story, why would McFall suddenly have this right simply because he had Down syndrome and because Shimp would have let him have the bone marrow if he hadn't had Down syndrome? If you agree that it would still be wrong for the state to force Shimp to keep McFall alive even if the

only reason Shimp refused to keep him alive was that McFall had Down syndrome, then you should agree that it would be wrong for the state to force Elaine to keep Evan alive even if the only reason she refused to carry her pregnancy to term was that Evan had Down syndrome. As in the case of Dorothy's sex-selection abortion, you might think it would be immoral for Elaine to have an abortion for this reason. But, again as in the case of Dorothy's sex-selection abortion, if you agree it would be wrong for the state to force Shimp to let McFall use his bone marrow even though you object to Shimp's reason for not wanting to let McFall use it, you should agree it would be wrong for the state to force Elaine to let Evan use her uterus even though you object to Elaine's reason for not wanting to let Evan use it.

I've tried to convince you it should be legal for Alice, Barbara, Carol, and Dorothy to have abortions. If you agreed with me about those cases, you should agree about the case of Elaine, too. For that matter, you should agree it should be legal for Dorothy and Elaine to have abortions no matter how trivial their reason for wanting one is. Suppose the only reason Shimp was unwilling to donate bone marrow to McFall was that he had tickets to a Pirates game that he didn't want to miss. Even if you don't think Shimp's behavior was immoral in the real version of the story, you might very well think it's immoral in this version. But even if you think Shimp's behavior would be immoral in this version of the story, do you think that would make it okay for the state to force him to donate the bone marrow in this version? I doubt it. And if you don't think it would be okay for the state to do this, you should agree it should be legal for a woman to have an abortion not only regardless of how she got pregnant but regardless of why she doesn't want to remain pregnant. Since you should believe this because of what you believe about the different stories I've told about McFall and Shimp, and since McFall was a person with

a right to life in each of those stories, you should believe that it should be legal for a woman to have an abortion in all these cases even if you believe every fetus is a person with a right to life, too. And since you think it would have been wrong for the state to force Shimp to let McFall use his bone marrow in these cases even if you think Shimp acted immorally by refusing to let McFall use it, you should agree that it should be legal for a woman to have an abortion in these cases even if you think it would be immoral for her to do so.

Viability

A nervous young woman is pacing back and forth in the waiting room of a clinic in downtown Orlando. She came here to have an abortion. I've tried to convince you so far that it doesn't matter how she got pregnant or why she's unwilling to carry her pregnancy to term. Regardless of the circumstances that led her to walk into this clinic, the state shouldn't prevent her from carrying through with her plan. But one more thing might turn out to matter: how far along her pregnancy is. Does the view I've defended here mean abortion should be legal through all nine months of a woman's pregnancy?

Consider the case of Francine. Francine is nearly seven months pregnant. Until recently, she was thrilled about this. All the evidence showed she'd soon be delivering a healthy baby boy, and she'd already picked out a crib, changing table, baby clothes, and toys. She'd even settled on a name for her son: Frank. But a little over a week ago, Francine's boyfriend unexpectedly dumped her and headed out of town to be with another woman. Francine was devastated. After thinking about virtually nothing else since then, she's now decided she doesn't want to keep the baby. She wants nothing at all to do with her ex-boyfriend and she just can't picture herself raising a child on her own. Friends suggested she consider carrying the pregnancy to term and putting Frank up for adoption instead, but she can't stand the thought of having a child and then abandoning it to be raised by other people, either.

That's how she ended up in the waiting room of one of the few clinics in the country that performs late-term abortions.

Because Francine's pregnancy is so far along at this point, let's assume Frank is now viable. That means if Francine had a caesarean section today and Frank was removed from her body intact, Frank could survive outside her womb. He'd be born prematurely and he'd face some significant challenges at first, but let's assume for the sake of the example that he'd survive and ultimately be just fine. Should Francine be allowed to have an abortion at this late stage if that's the case?

This question makes many defenders of abortion rights particularly uncomfortable. They don't like the idea of defending abortion at such a late stage, but they don't see a good way to avoid defending it, either. The typical defense of abortion rights, after all, rests on the claim that the fetus isn't a person. Suppose Frank's lungs just became strong enough for him to survive outside the womb a few minutes ago. Ten minutes ago, he wasn't viable, but now he is. If typical defenders of abortion rights say Francine should have been allowed to abort Frank ten minutes ago but shouldn't be allowed to abort Frank now, they'd have to say that ten minutes ago Frank wasn't a person but now he is. And it's hard to see how just a little bit of extra lung development could make the difference between being a person and not being a person or between having a right to life and not having a right to life. As long as they rest their defense of abortion rights on the claim that the fetus isn't a person with a right to life before viability, then, defenders of abortion rights may well be stuck defending abortion rights after viability, too, whether they like it or not.

But the defense of abortion rights I've offered here doesn't depend on the claim that Frank isn't a person. Quite the opposite: I've been assuming all along, at least for the sake of the argument, that every human fetus is a person and that every human

fetus has a right to life. And I've been trying to convince you that abortion should be legal even if this assumption is true. So what does my approach to defending abortion rights imply about the case of Francine? Yet again, the answer lies in changing the story of McFall and Shimp.

So suppose when Shimp learned McFall needed his bone marrow, he decided to go ahead and help his cousin out. He went down to the hospital, had himself connected to the bone marrow transferring machine, and patiently waited in his bed as the bone marrow slowly made its way from his body to McFall's. Suppose after a few hours, McFall received just enough bone marrow from Shimp to enable him to survive on his own and that Shimp then changed his mind and no longer wanted to help his cousin out. I assume you'll agree that it would be wrong for the state to prevent Shimp from being disconnected from the machine at this point, especially since McFall could now survive without Shimp's assistance. But suppose at this point Shimp decided he wanted more than just to be disconnected from the machine. Suppose he said this: "I don't just want to stop helping keep McFall alive. I want to make sure he ends up dead. I don't like the idea of having a cousin and so what I want is not simply to avoid the burden of keeping him alive. I want to kill him."

Nothing I've said here suggests the state should let Shimp kill McFall at this point. The lesson we're entitled to draw from the case of *McFall v. Shimp* is that Shimp should have the legal right to decide not to let McFall use his body even if McFall needs to use his body to stay alive. This doesn't mean Shimp should also have the right to kill McFall if McFall could survive without Shimp's assistance. In the same way, and for the same reason, my defense of the claim that a woman should have the legal right to decide not to let the fetus use her body when the fetus needs to use her body doesn't mean she should also have the legal right to kill the fetus when the fetus can survive

without using her body. So the defense of abortion rights I've offered here doesn't mean abortion should be legal after the fetus is viable.

This doesn't mean abortion should be illegal after viability. There might be some other reason to think it should still be legal at that point. But if there is such a reason, you won't find it here. As far as this book is concerned, abortion should be legal at least up to the point of viability even if every fetus is a person, but perhaps legal only up to that point. Since the vast majority of abortions take place well before viability, this means abortion should be legal at least in the vast majority of cases, but perhaps not in all cases.

Infanticide

Gloria is a new mom. Three months ago, she gave birth to a delightful baby girl named Gabriella. Everyone calls her Gabby. Most of the time, Gloria is excited about this blessed event. But once in a while, she wonders if she's made a big mistake. She's just 19, still hasn't finished high school, and is starting to realize how difficult all this is turning out to be.

I'm going to go out on a limb here and assume you think it would be wrong for Gloria to kill Gabby at this point. One of the most popular pro-life arguments starts with this assumption and goes something like this: A 3-month-old infant has a right to life. There's no difference between a 3-month-old infant and an infant one second short of being 3 months old that could make the 3-month-old infant have a right to life now but not have a right to life one second earlier. So if a 3-month-old infant has a right to life, so does an infant who's one second short of being 3 months old. But there's also no difference between an infant who's one second short of being 3 months old and an infant one second before then that could make the infant one second short of being 3 months old have a right to life but not have a right to life one second before then. So if an infant who's one second short of being 3 months old has a right to life, so does an infant who's two seconds short of being 3 months old. We can keep going back, second by second, as far as we want in the infant's life and we're never going to find a point where we think the infant has a right

to life now but didn't have it one second earlier. And so we can keep repeating this argument over and over again until we get all the way back to the point when the infant was first conceived. So if we agree that a 3-month-old-infant has a right to life, we should also agree that the fetus has a right to life from the moment the fetus is conceived. And if it should be illegal for Gloria to kill Gabby when Gabby is 3 months old, it seems to follow that it should also be illegal for Gloria to have an abortion during any stage of Gabby's fetal development.

This kind of argument poses a potential problem for those who defend abortion rights by saying the fetus isn't a person. There are a variety of ways they can try to respond to this problem, but I'm not going to talk about them here. I'm not going to talk about them here because this kind of argument doesn't pose a problem for my defense of abortion rights in the first place. And it doesn't pose a problem for my defense of abortion rights because my defense of abortion rights doesn't depend on the claim that the fetus isn't a person. Making one more change to the story of McFall and Shimp can help make this clear.

So suppose again that when Shimp heard McFall needed his bone marrow, he went down to the hospital, had himself connected to the bone marrow transferring machine, and let McFall have all the bone marrow he needed. But now suppose three months after they both left the hospital feeling just fine, Shimp decided he'd made a big mistake. He now wishes he'd never let McFall use his body in the first place. He doesn't like having a cousin. He wants to kill him. Nothing I've said here suggests the state should let Shimp kill McFall at this point. Again, the lesson we're entitled to draw from the case of *McFall v. Shimp* is that Shimp should have the legal right to decide not to let McFall use his body even though McFall needs to use his body to stay alive, not that Shimp should have the right to kill McFall if McFall can survive without Shimp's assistance.

In the same way, and for the same reason, my defense of the claim that abortion should be legal even if the fetus is a person rests on the claim that a woman should have the legal right to decide not to let the fetus she's carrying use her body even though the fetus needs to use her body in order to stay alive. The claim that a woman should have the legal right to decide not to let the fetus use her body when the fetus needs to use her body doesn't mean she should also have the right to kill the fetus once the fetus can survive without using her body. For the same reason, it doesn't mean she should have the right to kill the fetus once it's developed into an adorable 3-month-old infant who is surviving outside her body. Or into a surly teenager, for that matter. So while some defenses of abortion rights might run the risk of committing their defenders to the claim that it should be legal to kill 3-month-old infants, the defense of abortion rights I've offered here doesn't.

Feticide

Heather was a 26-year-old accountant who had recently moved to San Diego with her boyfriend when she found out she was pregnant. She'd been dating the guy for a while and they were starting to get serious. Heather was going to have a little boy and had already decided she wanted to name him Heath. She was really excited about it. But when she broke the news to her boyfriend, he said he wasn't ready to become a father. Heather was devastated and seriously considered having an abortion. But after thinking it over, she decided to carry the pregnancy to term. She hoped her boyfriend would come around. But if he didn't, she was prepared to raise Heath on her own.

Just a few weeks after she made her big decision, though, Heather was shot and killed in an attempted robbery. The robber could see that Heather was pregnant, but he shot her anyway. They eventually caught the guy who did it. And they didn't just charge him with one count of homicide. They charged him with two: one for killing Heather and one for killing Heath. That's because under California law, if you kill a pregnant woman and the fetus dies as a result, the fetus counts as a second homicide victim. Nearly forty states have laws like this. They're known as fetal homicide laws, or "feticide" laws for short. They differ in the details, but what they have in common is this: they identify a particular set of crimes that might be committed against a pregnant woman and they say if her fetus is killed or injured as a

result of committing one of these crimes, or at least if it's killed or injured during a certain specified stage of fetal development, then the fetus can be treated as a victim of the crime, too. And it doesn't matter if the pregnant woman survives the attack. Even if Heather had pulled through the surgery after she was shot, the shooter still could have been charged with homicide for killing Heath. There's a federal law like this, too. The Unborn Victims of Violence Act of 2004 lists over sixty federal crimes and says the woman's fetus counts as a legal victim if the fetus is injured or killed during the commission of any of them.

People who are pro-life sometimes point to these feticide laws and complain that there's a double standard here. If Heather wants to carry her pregnancy to term and an armed robber kills Heath, the law says killing Heath is murder. If Heather wants to have an abortion and the abortion kills Heath, the law says killing Heath isn't murder. It's almost as if whether Heath is a person, or whether Heath has a right to life, somehow depends on whether Heather wants to have him. And that's absurd. So if it's murder when the armed robber kills Heath, these pro-life people say, it should be murder when Heather has an abortion, too. And if it's murder when Heather has an abortion, then it should be illegal for Heather to have an abortion.

Many people who are pro-choice seem to come to a similar conclusion about feticide laws, but from the opposite direction. They think abortion should be legal because they think the fetus isn't a person and they object to feticide laws precisely because such laws treat the fetus as if it is a person. They think it should be legal for Heather to have an abortion and because of this they think Heath shouldn't be counted as a second victim when a crime is committed against Heather. So there's something a lot of people on both sides of the abortion debate seem to agree about here: feticide laws and laws against abortion should stand or fall together. Pro-life people who think this think the

two kinds of law should stand together while pro-choice people who think this think the two kinds of law should fall together, but they both think there's some kind of inconsistency or double standard involved in having one kind of law without the other.

I think people on both sides of the abortion debate who hold this view are mistaken. There's nothing inconsistent about saying abortion should be legal and also saying the fetus should count as a second victim in cases like that of Heather and Heath. And once again, I think the case of McFall and Shimp can help us see this. So suppose Shimp decided he was willing to let McFall have some of his bone marrow. He walked down to the hospital and connected himself to the bone marrow transferring machine and the machine slowly started removing some of his bone marrow and giving it to McFall. And suppose before McFall received enough of Shimp's bone marrow to survive, an armed robber shot and killed Shimp, knowing full well that by killing Shimp he would also be depriving McFall of the bone marrow supply he needed.

In this version of the story, killing Shimp also means killing McFall by depriving McFall of the bone marrow Shimp was giving him. So it wouldn't be particularly unreasonable if the state decided to charge the robber with two counts of homicide: one for killing Shimp by shooting him and one for killing McFall by cutting off his supply of bone marrow. But nothing about treating the case this way suggests it would be okay for the state to force Shimp to let McFall have the bone marrow if Shimp decided not to let McFall have it. Saying Shimp should have the right not to let McFall use his bone marrow if he doesn't want to let him use it doesn't mean other people should have the right to prevent McFall from receiving Shimp's bone marrow if Shimp decides he does want to let McFall use it. And when the robber killed Shimp, he prevented McFall from receiving the bone marrow Shimp was giving him. So it's perfectly consistent to say the state should

allow Shimp to decide whether to let McFall use his bone marrow while also saying the state should treat McFall as a second victim if an armed robber kills both of them. Shimp has the right to deprive McFall of the use of his bone marrow because it's Shimp's bone marrow and Shimp has the right to decide what to do with it. That doesn't mean an armed robber has the right to deprive McFall of Shimp's bone marrow because Shimp's bone marrow doesn't belong to the armed robber. I'm pretty sure you'll agree with me about this regardless of whether you see yourself as pro-life, pro-choice, or somewhere in between.

But if I'm right about that, you should say the same thing about feticide laws and laws against abortion, whether you're pro-life, pro-choice, or somewhere in between. There's nothing inconsistent about saying Heather should have the right not to let Heath use her uterus if she doesn't want to let him use it and also saying other people shouldn't have the right to prevent Heath from using Heather's uterus if she does want to let him use it. And when the robber killed Heather, he prevented Heath from using Heather's uterus. He had no right to do this. When the robber killed Heather, he also killed Heath by depriving him of the life support Heather was giving him, just as when the robber killed Shimp, he also killed McFall by depriving him of the bone marrow Shimp was giving him.

Saying there were two victims in the case of McFall and Shimp doesn't mean it would have been okay for the state to force Shimp to let McFall use his bone marrow if he didn't want to let him use it. In the same way, and for the same reason, saying there were two victims in the case of Heather and Heath doesn't mean it would have been okay for the state to force Heather to let Heath use her uterus if she didn't want to let him use it. Heather has the right to deprive Heath of the use of her uterus because it's Heather's uterus and Heather has the right to decide what to do with it. That doesn't mean an armed robber has

the right to deprive Heath of the use of Heather's uterus because Heather's uterus doesn't belong to the armed robber. Again, there's nothing inconsistent about saying these two things—no hypocrisy or double standard. If anything, there's clearly a single standard operating in both cases: Shimp and only Shimp gets to decide whether to let McFall use his bone marrow, and Heather and only Heather gets to decide whether to let Heath use her uterus.

Some defenses of abortion rights depend on the claim that the fetus isn't a person. Those defenses of abortion rights do seem to commit their defenders to opposing feticide laws. But the defense of abortion rights I'm offering in this book doesn't depend on the claim that the fetus isn't a person. So accepting my defense of abortion rights doesn't commit you to opposing feticide laws. What accepting my defense of abortion rights does commit you to is accepting that abortion should be legal at least up to the point where the fetus is viable. I've tried to convince you to accept this if you think Judge Flaherty made the right call in *McFall v. Shimp*, even if you think every fetus is a person with a right to life and even if you think abortion is immoral. And I've tried to explain why nothing I said to convince you of this means abortion should be legal after the fetus is viable, or that it should be legal to kill infants or teenagers, or that it should be legal to kill or injure the fetus of a woman who's decided to carry her pregnancy to term. I'm now finished explaining what my position is, and what it isn't, and offering it an initial defense. You probably have some objections at this point. Let's move on to them.