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## *The Consent Model of Pregnancy: Deadlock Undiminished*

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**Mary Ford\***

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In this article, the author examines what is perhaps the most comprehensive attempt so far to discover an alternative to the orthodox “conflict” model of adjudicating maternal/fetal issues: Eileen McDonagh’s “consent model” of pregnancy. This model is essentially a refined version of the orthodox model, but is remarkable in that it claims to provide a legal justification for abortion rights while conceding the issue of “fetal personhood”. Referring to the diverse criticisms of other commentators and adding her own analysis from the perspective of United Kingdom law, the author asks whether it is possible, as McDonagh claims it is, to adopt a purely legal approach to fetal personhood that is capable of sustaining a framework for adjudication without collapsing into the problematic metaphysics of personhood.

Dans cet article, l’auteure se penche sur ce qui constitue peut-être à ce jour la tentative la plus exhaustive de proposer une alternative au modèle traditionnel consistant à décider des questions maternelles/fœtales en se basant sur le «conflit» : le «modèle du consentement» à la grossesse d’Eileen McDonagh. Ce modèle est essentiellement une version perfectionnée du modèle traditionnel, mais il est digne d’attention en ce qu’il prétend fournir une justification au droit à l’avortement tout en concédant la question de la personnalité du fœtus. En se référant aux critiques diverses d’autres commentateurs et en ajoutant sa propre analyse basée sur le droit en vigueur au Royaume-Uni, l’auteure se demande s’il est possible, comme le revendique McDonagh, d’adopter une approche purement légale de la personnalité du fœtus qui soit capable de soutenir un cadre décisionnel sans s’emmêler dans la complexe métaphysique de la personnalité.

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## Introduction

In her groundbreaking book *Breaking the Abortion Deadlock: From Choice to Consent*,<sup>1</sup> Eileen McDonagh claims that the analysis of abortion rights that she proposes resolves the troublesome question of the moral status of the fetus by focusing not on what the fetus *is*, but rather on what the fetus *does* in pregnancy.<sup>2</sup> McDonagh's first major claim is that the fetus *causes* pregnancy when it implants in the woman's uterus.<sup>3</sup> McDonagh uses this as a starting point from which to claim that the right to abortion is not, as has traditionally been thought, simply an example of a woman's right to decisional autonomy; while decisional autonomy is certainly an element of the right, McDonagh claims, the key element in abortion rights is the right to bodily integrity.<sup>4</sup> Thus, for McDonagh, abortion rights are important not only because they are an example of a woman's right to make autonomous decisions about her life, but also, and more centrally, because the right to seek an abortion is essential in order to protect women's bodily integrity—the control they have over what happens to their bodies. In other words, for McDonagh, the abortion issue is not only about choice; it is primarily an issue of consent.

The fatal error that has dogged the abortion debate thus far, according to McDonagh, has been a failure to identify the fetus as the coercer in pregnancy.<sup>5</sup> It is the fetus that actually makes the woman pregnant when it implants itself in her uterus. Abortion is not, therefore, about expelling the coercive imposition of masculine force on the body of a woman; rather, what is rejected and expelled in the act of abortion is fetal force, since the fetus is the coercive agent: "A woman seeking to terminate her pregnancy does not wish to expel the coercive imposition of a man on her body. On the contrary, she seeks to expel the coercive imposition of the one and only agent capable of making her pregnant: the fetus."<sup>6</sup>

McDonagh claims that the fetus is the direct cause of pregnancy, whether or not the act of sexual intercourse that preceded the pregnancy was consensual. In other words, if a woman consents to having sexual intercourse with a man and subsequently becomes pregnant, the direct and immediate cause of pregnancy is not the act of sexual intercourse but the fetus' implantation in her uterus. Accordingly, neither the woman nor the man can be said to have "caused" her to become pregnant. Similarly, if pregnancy occurs after an act of nonconsensual intercourse (a rape), the rapist has not caused the woman's pregnancy on McDonagh's model: he has inflicted a grave harm on her, but the additional harm of any resulting pregnancy is not his

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<sup>1</sup> Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996) [McDonagh, *Breaking the Abortion Deadlock*].

<sup>2</sup> *Ibid.* at 5-6.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.* at 6.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

responsibility, but that of the fetus. Clearly, in such circumstances, the woman cannot be held responsible at any stage of the sequence of events from conception to implantation, certainly not on McDonagh's model and arguably not on any other. McDonagh writes:

[F]ounding abortion rights on the conditions under which sexual intercourse occurs prior to pregnancy misses the point. The fetus is the direct cause of pregnancy, and if it makes a woman pregnant without her consent, it severely violates her bodily integrity and liberty.<sup>7</sup>

McDonagh's second and third major claims, respectively, are: (1) that pregnancy constitutes a massive intrusion on a woman's body, even where the pregnancy is "medically normal" (i.e., not subject to any of the additional medical risks that may accompany pregnancy); and (2) that women have a right to state assistance in exercising their right to refuse consent to such an invasion of their bodies. On the harm associated with "medically normal" pregnancies, McDonagh writes:

Even in a medically normal pregnancy, the fetus massively intrudes on a woman's body and expropriates her liberty. If a woman does not consent to this transformation and use of her body, the fetus's imposition constitutes injuries sufficient to justify the use of deadly force to stop it.<sup>8</sup>

Of paramount importance here is the point McDonagh makes about the use of "deadly force". The severity and scale of the intrusion that pregnancy represents entitles women to take extreme measures to bring it to an end, even where the only way to do so is by killing the fetus/intruder. McDonagh claims that in so arguing, she is simply regarding the fetus the way any other intruder would be regarded, even those intruders who are, irrefutably, persons:

Since no born people have a right to intrude massively on the body of another, ... to the degree that the state stops people from harming others by intruding on their bodies and liberty, including the mentally incompetent or those in dire need of the body parts of others, similarly the state must stop fetuses that intrude on women's bodies without their consent.<sup>9</sup>

This, according to McDonagh, is how her thesis is able to "break the abortion deadlock": she is prepared to concede the issue of fetal personhood to the anti-abortion lobby, believing that she can construct an argument for abortion rights that holds good even if we accept, for the sake of argument, that fetuses are persons and ought to be treated by the law in the same way that born persons are treated. "Even if the fetus were a person", she writes, "a woman is justified in killing it because of what it does to her when it imposes wrongful pregnancy."<sup>10</sup> This is so because "[e]ven if the fetus is constructed to be a person, it gains no right to take over a woman's body

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<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.* at 7.

<sup>9</sup> *Ibid.* at 9.

<sup>10</sup> *Ibid.* at 10.

against her will. And if and when it does, she has a right to say no, whatever might be her reasons for activating that right.”<sup>11</sup>

The “fundamental liberty” at stake in all of this, according to McDonagh, is the right of a woman to consent to any pregnancy relationship she might become involved in.<sup>12</sup> Throughout, McDonagh’s focus is on what the fetus *does*, not what the fetus *is*.<sup>13</sup> It is the fetus’s action in causing pregnancy that justifies the right of a woman to terminate its life in order to put an end to its intrusion/violence.<sup>14</sup> McDonagh suggests that the reason this right has been ignored, both historically and more recently in the legal and political debates over abortion rights, is that our culture has traditionally reserved norms of self-defence for men, while simultaneously ascribing norms of self-sacrifice to women,<sup>15</sup> such that the extreme physical subjugation and coercion that pregnancy represents has been “normalized” and not recognized for what it is: a massive violence justifying the use of deadly force in self-defence.

## I. McDonagh’s Consent Model

Having briefly introduced McDonagh’s arguments, I now propose to draw out certain strands in order to subject her claims, and the counterclaims of her critics, to critical analysis. It is helpful to observe here that McDonagh’s argument is reducible to two broad stages: in the first stage, she claims that women have a right to consent to the pregnancy relationship; in the second stage, she claims that the state should intervene to protect women from the massive intrusion of nonconsensual pregnancy. These stages provide the basis for McDonagh to argue that women have a fundamental right to abortion, based on the right to bodily integrity, as well as a fundamental right to state assistance (primarily in the form of funding) to enable them to exercise the first right, based on (indeed, an example of) the right to self-defence.

Before considering the main advantages and disadvantages of the consent-based approach, as articulated by McDonagh and her critics, however, I will give a fuller account of certain more specific claims McDonagh makes, under the following headings: “Causation and the Separation of Pregnancy from Sexual Intercourse”; “Consent”; “Wrongful Pregnancy and Self-Defence”; and finally what McDonagh calls the “Politics of Consent”.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.* at 18.

<sup>13</sup> *Ibid.* at 15.

<sup>14</sup> *Ibid.* at 17.

<sup>15</sup> *Ibid.* at 19.

### **A. Causation and the Separation of Pregnancy from Sexual Intercourse**

McDonagh describes the association between pregnancy and sexual intercourse as “virtually a cultural icon”,<sup>16</sup> implying that it is a mere construct born of our traditional ways of thinking about gender and reproduction. She notes that the US Supreme Court has maintained the view that sex *causes* pregnancy, “or more specifically, that a man’s impregnation of a woman causes her pregnant condition”<sup>17</sup>—a view that, as we know, McDonagh wishes to challenge and replace with her own view that the “direct cause” of pregnancy is the fetus, the “agent” that causes a woman to become pregnant when it implants itself in her body:

Whereas a man can cause a woman to engage in a sexual relationship with him, a man cannot cause a woman’s body to change from a nonpregnant to a pregnant condition; the only entity that can do that is a fertilized ovum when it implants itself in a woman’s uterus.<sup>18</sup>

The action of the man in “[m]oving sperm into a woman’s body” during the act of intercourse, McDonagh affirms, certainly represents one of the “factual sequential links” leading to pregnancy.<sup>19</sup> She maintains, however, that this action “is not the legal, or most important, cause of a woman’s pregnant condition. It is merely a preceding factual cause that puts her at *risk* for becoming pregnant.”<sup>20</sup> This is so because “pregnancy is a condition that follows absolutely from the presence of a fertilized ovum in a woman’s body.”<sup>21</sup> This being the case, she continues, “we can identify the fertilized ovum to be the legal cause of a woman’s pregnancy state.”<sup>22</sup> In the eyes of the law, too, therefore, “the fertilized ovum should be the legal cause of a woman’s pregnancy.”<sup>23</sup>

One of the most striking features of McDonagh’s model is her extensive use of analogy to illustrate and support her claims. She draws one such analogy when she remarks:

Men and women who contribute to a situation in which it is foreseeable that a fertilized ovum might be conceived and make a woman pregnant against her will contribute no more to the woman’s harm than does a woman who walks down a street late at night contribute to her own rape ... Men and women who engage in sexual intercourse, therefore, cannot be held as contributing to the

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<sup>16</sup> *Ibid.* at 26.

<sup>17</sup> *Ibid.* at 27.

<sup>18</sup> *Ibid.* at 40.

<sup>19</sup> *Ibid.* at 42.

<sup>20</sup> *Ibid.* [emphasis added].

<sup>21</sup> *Ibid.* at 41.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.* at 43.

harm imposed on a woman by a fertilized ovum making her pregnant without consent.<sup>24</sup>

However, it is clear that this likening of pregnancy to rape is more than just a useful analogy for McDonagh. She obviously regards the two scenarios, rape and pregnancy, as sharing significant factual and legal similarities when she writes that “a fetus making a woman pregnant without consent is similar to a rapist intruding upon and taking another’s body in pursuit of his own interest, to the detriment of the woman’s interests ...”<sup>25</sup>

McDonagh believes that one of the strengths of this approach is that it treats the fetus as an agent, an individual with an existence separate from that of the pregnant woman—a point over which advocates and opponents of abortion rights have traditionally clashed:

Many advocates for women’s reproductive rights stoutly claim that there is no body other than the woman’s to consider in the abortion issue. They adamantly reject depictions of the fertilized ovum as an entity separate from the woman, much less as an entity with the full status of a person. Their assumption is that such a construction of the fetus undermines women’s autonomy by implying that fetuses have interests separate from their mothers and that those interests are grounds for restricting abortion, which destroys the fetus.<sup>26</sup>

McDonagh points out, however, that “the view of the fetus as an entity separate from its mother, with its own interests, already is solidly embedded in [US] Supreme Court reasoning about abortion rights.”<sup>27</sup> She cites the case of *Roe v. Wade*,<sup>28</sup> in which the court ruled that the fetus is not a born person (but not that it is not a person at all) and that when a woman becomes pregnant, her privacy is “no longer sole”, thus granting the fetus “an identity and body separate from the pregnant woman’s,”<sup>29</sup> and also the case of *Planned Parenthood v. Casey*,<sup>30</sup> in which it was held that the state has “legitimate interests from the outset of the pregnancy in protecting the life of the fetus.”<sup>31</sup> The case law shows, according to McDonagh, that insofar as the consent model countenances the possibility of fetal personhood, it does nothing new constitutionally, since a strong argument could be advanced, on the basis of existing authority, that a fetus is already effectively a person under the American constitution.

As I shall discuss when I come to consider criticisms of the consent-based model, McDonagh may have difficulty convincing abortion rights advocates that her model does not compound what most of them would presumably regard as the

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<sup>24</sup> *Ibid.* at 44.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 47 [footnote omitted].

<sup>27</sup> *Ibid.*

<sup>28</sup> 410 U.S. 113 (1973) [*Roe*].

<sup>29</sup> *Roe*, *ibid.* at 159, cited in McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 47.

<sup>30</sup> 505 U.S. 833 (1992) [*Casey*].

<sup>31</sup> *Casey*, *ibid.* at 2804, cited in McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 47.

jurisprudential “mistake” of treating the fetus as a person, thereby threatening to entrench a legal view of the fetus that may damage the “fundamental liberty” at stake in the abortion debate. McDonagh will also face challenges from others who claim that her approach treats the fetus merely as a cipher that is burdened with all the negative features and consequences of personality and individuality, without attracting any of the positive entitlements or protections that ought to accompany personhood. Still more criticism will centre on the fact that, by separating pregnancy from the sexual act, McDonagh severs the connection between men and reproduction, thereby removing any legal basis for holding them socially or financially responsible for the children that are genetically “theirs”. But, as I will show, causation is far from the only controversial part of McDonagh’s thesis.

### **B. Consent**

McDonagh laments that the persistent failure of commentators and judges to identify the fetus as the cause of pregnancy has meant that the right of a woman to consent to a pregnancy relationship with a fertilized ovum is “[t]he one type of consent that is completely missing from the abortion debate ...”<sup>32</sup> Since the notion of “consent to pregnancy” is so new to the debate, it requires a definition, and McDonagh obliges with the following: “In the context of pregnancy, consent means a woman’s explicit willingness, based on her choice between resistance and assent, for the fertilized ovum to implant itself and cause her body to change from a nonpregnant to a pregnant condition.”<sup>33</sup>

One major difference between a consent-based approach and the traditional, choice-based approach to abortion rights is that “whereas choice refers to only one individual, consent necessarily refers to a relationship between two entities, both of whom have at least some attributes of a person ...”<sup>34</sup> However, choice and consent are complementary, not rival elements in the justification of abortion rights, as McDonagh acknowledges: “Consent is ... built on choice. There can be no valid consent unless there is valid choice; when choices are undermined, so, too, is the validity of consent.”<sup>35</sup> In other words, consent must be authentic, and not coerced, if it is really to protect bodily integrity and sovereignty in the way McDonagh envisages.

So how is “consent to pregnancy” to be constituted? We must be able to distinguish between consensual and nonconsensual (“wrongful”) pregnancy in order to know when the use of deadly force is justified, so it will be necessary to have a definition not only of consent, as seen above, but also of its expression. This definition will be crucial, since without it there is no way to distinguish between justified and wrongful uses of deadly force in abortion. McDonagh explains that

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<sup>32</sup> McDonagh, *Breaking the Abortion Deadlock*, *ibid.* at 60.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.* at 62 [footnote omitted].

<sup>35</sup> *Ibid.* at 64 [footnote omitted].



[t]he act of seeking an abortion stands for a woman's lack of consent to be pregnant since abortion is a procedure that terminates pregnancy. A woman who chooses an abortion, therefore, is not submitting to a pregnancy caused by a fetus. To the contrary, she is stopping a fetus from making her pregnant by having an abortion.<sup>36</sup>

On McDonagh's analysis, then, we need no other evidence than that a woman is seeking an abortion in order to reach the conclusion that the pregnancy is "wrongful" and the use of deadly force is justified. Definitionally, the wish to abort equals lack of consent, which in turn entails the right to abort. The wish to abort entails the right to abort for McDonagh because of the way the concept of consent operates in her analysis. She justifies this by reiterating her analogy between pregnancy and rape:

A woman must have a right to consent to the way in which a man necessarily intrudes on her body and liberty when he has a sexual relationship with her, and so, too, must she have a comparable right to consent to how a fetus necessarily intrudes on her body and liberty when it has a pregnancy relationship with her.<sup>37</sup>

Developing her earlier argument that the fetus, and not the act of sexual intercourse, is the real, "direct" cause of pregnancy, McDonagh explains what this discovery means in the context of consent:

Sexual intercourse merely causes the risk that pregnancy will occur, and consent to engage in sexual intercourse with a man, for any and all fertile women, implies consent to expose oneself to that risk.

Consent to expose oneself to the risk that one will be injured by a private party, however, is not a legal proxy for consent to the actual injuries ... Consent to jog alone in Central Park does not stand as a proxy for consent to be mugged and raped, should others so attack you.<sup>38</sup>

The view that women who have sex "cause" their own subsequent pregnancies, and thereby consent to them, is not only factually wrong, according to McDonagh; it is also pernicious, a reflection of "our puritan heritage or our dominant, bourgeois middle-class morality," within which the notion of purely recreational sex is anathema.<sup>39</sup> On such a view, she explains, "enabling a woman who has consented to sexual intercourse to have an abortion does nothing more than facilitate her escape from the utterly just punishment of a subsequent pregnancy."<sup>40</sup> Among the advantages of the consent-based model is that it allows us to free ourselves from this oppressive, patriarchal view of sexuality.

The nature of the fetal "attack" in pregnancy is also relevant to the notion of consent, since McDonagh's approach depends not only on establishing the need for

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<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.* at 65.

<sup>38</sup> *Ibid.* at 66.

<sup>39</sup> *Ibid.* at 65.

<sup>40</sup> *Ibid.*

consent, but also on justifying the use of the kind of deadly force that the law permits us to use in order to repel an attack by a born person. McDonagh describes in some detail the “aggression” perpetrated by the fetus upon the woman during pregnancy, and the extent to which the presence of the fetus alters and debilitates her body, which is of course compounded if the pregnancy is medically complicated or abnormal.<sup>41</sup> This “quantitative intrusion” would in itself justify the use of deadly force, since the law would permit citizens to refuse to submit their bodies to such intrusion by a born person, even where refusal would mean that person’s death.<sup>42</sup> However, McDonagh also identifies what she calls “qualitative intrusion,”<sup>43</sup> the way in which even a medically normal pregnancy curtails the freedom of the pregnant woman. She argues, in effect, that even without the transformations and intrusions that occur internally, causing medical risk to the woman, the “intrusion” constituted by the curtailment of the woman’s freedom would suffice equally well to justify the use of deadly force. “Qualitative intrusion” means that the fetus

wholly controls her body, her freedom of movement, and her reproductive services. When a woman is pregnant, as the Court noted [in *Roe*], her privacy is no longer sole. She can go nowhere without the fetus; every action she takes necessarily includes the fetus. The circulation of her blood, her endocrine system, and her menstrual cycles are now controlled by the fetus. As long as it maintains a pregnant condition in her body, for up to nine months she is decidedly not let alone, and she is anything but free.<sup>44</sup>

McDonagh explains what she sees as the legal significance of this feature of pregnancy by way of another analogy: “If a woman does not consent to pregnancy, the fetus has intruded on her liberty in a way similar to that of a kidnapper or slave master.”<sup>45</sup>

Continuing the slavery analogy, McDonagh tells us that “[w]ithout consent, the totality of the fetus’s appropriation of a woman’s body for its own sake is ... involuntary servitude if not enslavement ... [I]t becomes the master of her body and her liberty, putting her in the position of its slave.”<sup>46</sup>

Because the “harms” and “intrusions” inherent in pregnancy are ongoing throughout the gestation of the fetus, the consent required to render pregnancy benign, rather than wrongful, must also be ongoing. Thus, on the consent-based account of abortion rights, not only does the right to consent enable a woman to

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<sup>41</sup> *Ibid.* at 69-73.

<sup>42</sup> See Judith Jarvis Thomson, “A Defense of Abortion” (1971) 1 *Phil. & Pub. Affairs* 47. This is the celebrated “violinist” article, in which Thomson argues that just as we have the right to be “bad Samaritans” and refuse to donate our bodies to sustain other born individuals, women have a similar right to refuse to sustain a fetus.

<sup>43</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 73.

<sup>44</sup> *Ibid.* at 74-75.

<sup>45</sup> *Ibid.* at 75.

<sup>46</sup> *Ibid.* at 76 [footnote omitted].

refuse consent upon the initial discovery that she is pregnant; it also entails an ongoing right to withdraw her consent at any stage during the pregnancy.<sup>47</sup>

The many criticisms of McDonagh's analysis of consent, her contrasting of consensual/benign and nonconsensual/wrongful pregnancy, and her various analogies will be discussed fully later. At this point I will address only the problem that McDonagh herself has anticipated with the operation of consent in her model, namely the claim that the woman's right to withhold or withdraw her consent to the pregnancy relationship is undermined by the existence of a duty of care owed to the fetus. Her pre-emptive response begins with the persuasive point that, "[t]hrough parents do have a duty to care for their children, that duty does not include the use, or taking, of a parent's body."<sup>48</sup> A parent could not, for example, be compelled by law, on the basis of his or her parental duty, to donate a kidney—or even to give blood—in order to save the life of one of her children; such an intrusion on the parent's body, if coercive, could not be legitimate, even for such a worthy cause. Accordingly, McDonagh argues, "[a] woman is thus not bound by parental duty to give the kind of care that includes donating her body to a fertilized ovum, as its parent, even if the fertilized ovum is thought to have the same status as a born child."<sup>49</sup> McDonagh concludes from this analogy, that "[r]ather than a duty of care, [a woman] has a right to defend herself against the fetus's serious injury."<sup>50</sup>

McDonagh complicates her argument unnecessarily when she writes that "[b]efore assessing a woman's duty of care, we must first assess whether she has consented to the pregnancy initially."<sup>51</sup> This is an anomalous statement, given that McDonagh has already posited the right of a woman to withdraw her consent at any stage during pregnancy. That the latter is McDonagh's true position is corroborated later, when she writes that "[a] woman who initially consents to be pregnant might change her mind as the pregnancy progresses and she experiences its bodily alterations."<sup>52</sup> If she does change her mind, she can exercise the right to withdraw her consent at that point, since "[e]ven if a woman has consented to be pregnant at one time, this does not bind her to continue to consent in the future, given the changing conditions defining the experience of pregnancy."<sup>53</sup>

As McDonagh formulates the right to consent, therefore, the existence of prior consent would seem to be completely irrelevant to the question of ongoing consensuality; if prior consent might imply a duty of care, then the right to withdraw consent at any time is inevitably undermined. Since the problematic statement is anomalous, I will take McDonagh's authentic meaning to be that which her arguments

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<sup>47</sup> See *ibid.* at 79.

<sup>48</sup> *Ibid.* at 78.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* at 79.

<sup>53</sup> *Ibid.*

overwhelmingly suggest, namely that pregnancy imposes no duty of care, and that a previously consenting pregnant woman need simply seek an abortion in order for the withdrawal of consent to be established and for the right to abortion as self-defence to be justified.

### C. Wrongful Pregnancy and Self-Defence

The term “wrongful pregnancy” is not an invention of McDonagh’s; it is already a well-established legal concept, which usually refers to the imposition of pregnancy on a woman against her will—although the defending party is usually a rapist, sometimes a doctor who has performed a failed sterilization procedure, but never a fetus. Nonetheless, the US case law on wrongful pregnancy seems to support McDonagh’s claim that the law ought to regard pregnancy as an injury. In the case of *Shessel v. Stroup*,<sup>54</sup> which involved a failed sterilization, pregnancy was held to be a legal injury. A Wisconsin rape statute lists pregnancy along with disease as a factor indicative of the “extent of injury” suffered as a result of rape.<sup>55</sup> Most notably, a series of California cases upholds the idea that a medically normal pregnancy is sufficiently harmful to a woman’s interests to be regarded as a legal injury if it occurs as a consequence of rape. These cases describe pregnancy variously as “great bodily injury”,<sup>56</sup> “a high level of injury”,<sup>57</sup> “significant and substantial bodily injury or damage”,<sup>58</sup> and “injury significantly and substantially beyond that necessarily present in the commission of an act of [rape].”<sup>59</sup> Elsewhere, pregnancy has been included in a category of “personal injury” alongside pain, disease, and disfigurement.<sup>60</sup>

As mentioned above, all of this case law blames a man, not a fetus, for inflicting the injury of nonconsensual pregnancy. According to McDonagh’s argument on causation, the law has failed for a long time to identify the fetus as a cause of pregnancy at all, let alone the direct cause, or the cause of wrongful pregnancy in particular. McDonagh uses the language of coercion to emphasize the culpability of the fetus in wrongful pregnancy, referring to “what the fetus does to a woman when it coerces her to be pregnant,” and talking of the fetus “forcing pregnancy on her against her will.”<sup>61</sup> She repeatedly describes lack of consent as “the key component of all injuries” and the “defining component of all injuries within human relationships,”<sup>62</sup> adding that, from the legal point of view, the important factor in defining an “injury”

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<sup>54</sup> 316 S.E.2d 155 (Ga. Sup. Ct. 1984).

<sup>55</sup> *Wisconsin Rape Shield Law*, Wis. Stat. § 972.11 (2004).

<sup>56</sup> *United States v. McIlvain*, 130 P.2d 131 at 137 (C.A. 1942).

<sup>57</sup> *United States v. Caudillo*, 146 Cal.Rptr. 859 at 870 (Sup. Ct. 1978).

<sup>58</sup> *United States v. Sargent*, 150 Cal.Rptr. 113 at 115 (C.A. 1978).

<sup>59</sup> *United States v. Superior Court (Duvall)*, 244 Cal.Rptr. 522 at 527 (C.A. 1988).

<sup>60</sup> *United States v. Brown*, 495 N.W.2d 812 at 814 (C.A. 1992).

<sup>61</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 89.

<sup>62</sup> *Ibid.* at 90.

is not so much what is done to one party by another, but “whether the other person consents to it.”<sup>63</sup>

Seeking to justify the use of deadly force in self-defence against the intrusion of a fetus, McDonagh begins by distinguishing between two different types of privacy. First, there is “privacy as decisional autonomy”, or freedom from state interference:

As established in *Roe*, a woman’s right of personal privacy as defined by her decisional autonomy is governed and limited by what the fetus is, not by what it does. As long as the fetus is pre-viable, justification for a woman’s right to an abortion rests simply on whether she chooses to have one or not ... Once the fetus is viable, however, a woman no longer has the right to exercise personal privacy by choosing an abortion, and a state may prohibit her right to choose one.<sup>64</sup>

There is another form of privacy, also acknowledged by the *Roe* court, namely “privacy as self-defence”. McDonagh explains this type of privacy as follows:

The law also recognizes the right of people to use deadly force when threatened with qualitative injuries that intrude on their basic liberty or bodily integrity even while threatening no objective physical injuries per se, much less threatening their lives. Thirty-six states explicitly affirm a person’s right to use deadly force when threatened with forcible rape, even when that rape is not aggravated by physical injuries. Thirty-five states legislatively recognize the right to use deadly force against kidnapping.<sup>65</sup>

Whereas the first form of privacy recognized in *Roe* is limited by the burgeoning state interest in the fetus as an individual with emerging interests, the second form of privacy is not:

By contrast [with decisional autonomy], a woman’s right of self-defense in relation to the fetus as established in *Roe* is governed and limited by what the fetus does, not by what it is. At any point in pregnancy, regardless of whether the fetus is or is not viable, if what it does imposes a sufficient amount of injury on the woman, no state may prohibit her from using deadly force to stop it, even if the state has a compelling interest to protect [the fetus].<sup>66</sup>

Quoting Justice Rehnquist in his dissent in *Roe*, McDonagh concludes that “women have always had a right to defend themselves with deadly force when sufficiently threatened by the intrusion of a fetus.”<sup>67</sup> The operative phrase here is “sufficiently threatened”; although *Roe* sets a precedent for a right to abortion based upon what the fetus does to a woman’s body, the court in *Roe* only applies this self-defence privacy right to medically abnormal pregnancy. McDonagh would extend the right to cover all cases of pregnancy, whether medically abnormal or not, since she believes that even

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<sup>63</sup> *Ibid.*

<sup>64</sup> *Ibid.* at 92.

<sup>65</sup> *Ibid.* at 93 [footnote omitted].

<sup>66</sup> *Ibid.* at 92-93.

<sup>67</sup> *Ibid.* at 96 [footnote omitted].

“normal” pregnancy constitutes a “sufficient threat” to women’s qualitative freedom insofar as it enslaves them, or at least commits them to involuntary servitude, as we have seen.

By basing abortion rights primarily on consent and the right to defend oneself against attack, McDonagh believes she has discovered a more secure basis for such rights than those who would ground them in the ideology of autonomy and freedom from state interference. This is because the right to be free from state interference is far from being an absolute right. Although some state interventions have been deemed excessive by US courts (e.g., forcible stomach-pumping),<sup>68</sup> McDonagh reminds us that

[i]t is constitutional for the state to prohibit one’s choice to engage in homosexual activity, to contract for prostitution services, and to sell one’s organs. In addition, it is constitutional for the state to require people to obtain vaccinations in order to prevent the spread of disease and to be conscripted for military service.<sup>69</sup>

These examples apply equally to the United Kingdom context. On the other hand, “courts affirm that the right of a person to be free from intrusion by another person is absolute. There are no exceptions.”<sup>70</sup> Thus, while the state may have limited power to intrude on a person’s body, no private party has such power. Privacy, in the form of self-defence, “‘defines a sphere of individual dominion’ into which private parties may not intrude without consent.”<sup>71</sup> Such privacy is addressed not to the state, but to other private individuals, and so it is more wide-ranging in character. As such, basing abortion rights on the right to freedom from the intrusion of a private party (the fetus) is preferable to basing them on the more limited right to be free from interference by the state. Following *Roe*, there is already a limited element of self-defence in abortion rights, but it applies only to pregnancies that are medically abnormal. If McDonagh can successfully extend the self-defence justification to cover *all* cases of pregnancy, she would appear to have placed abortion rights beyond the reach of their opponents by elevating them to the private sphere, and removing the “state interest” factor, with all its erosive potential.

In order to establish the right to abortion throughout pregnancy and the right to state assistance, however, reliance on citing the right to self-defence alone will not suffice; as McDonagh explains, “[i]t is the job of the state to protect victims of wrongful private acts by stopping the perpetrators. The right of self-defence is meant to be a fall-back option for those times when the state cannot do its job ... [I]t is not a policy preference.”<sup>72</sup> She continues, “[T]o the degree that it is the job of the state to protect the fetus as human life, it becomes the job of the state to restrict the fetus as

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<sup>68</sup> See e.g. *Rochin v. California*, 342 U.S. 165 (1951).

<sup>69</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 100 [footnotes omitted].

<sup>70</sup> *Ibid.* at 103 [emphasis added].

<sup>71</sup> *Ibid.* at 101 [footnote omitted].

<sup>72</sup> *Ibid.* at 105.

human life from intruding on the bodily integrity and liberty of others.<sup>73</sup> The court in *Roe*, while acknowledging a woman's right to seek abortion in order to defend herself against the risks and harms of medically abnormal pregnancy, affirmed only her individual right of self-defence, not any right to assistance from the state.<sup>74</sup> This quest for state assistance takes us into the arena of what McDonagh terms "the politics of consent",<sup>75</sup> and under this heading I will examine the basis on which she demands state assistance for women who seek to exercise abortion rights.

#### D. The Politics of Consent

The argument over state funding for abortion has, according to McDonagh, been complicated and misleading. Once again, the problem is the failure to identify the fetus as the "cause" of pregnancy, coercing women to be pregnant against their will:

[F]ailure to identify what the fetus does to a woman when it causes pregnancy has resulted in rulings that undermine women's rights by allowing the state to establish repressive regulations, such as twenty-four-hour waiting periods, and most serious of all, prohibitions against the use of all public funds, facilities, and personnel for the performance of abortions.<sup>76</sup>

Until now, advocates of abortion rights have been unable to justify their demands for state funding. Judith Jarvis Thomson's famous "violinist" scenario<sup>77</sup> attempted to establish that

even if the fetus is a person, and even if its life hangs in the balance as a needy recipient of a woman's body, a woman still has the right to be a bad samaritan by refusing to give her body to the fetus.

This bad samaritan argument for abortion rights still does not go far enough. It claims only that women have a right to refuse to donate their bodies to a fetus.<sup>78</sup>

For McDonagh,

[t]he issue is not merely that women have the right to be bad Samaritans by refusing to give their bodies to a fetus. Rather, if a woman does not consent to pregnancy, the issue is that the fetus has made her its *captive samaritan* by intruding on her body and liberty against her will, and thus on the woman's right to be free from that status.<sup>79</sup>

The problem is that the "masculinized" norm of self-defence is supported by equally masculinized notions of how self-defence ought to be achieved, i.e., without external

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<sup>73</sup> *Ibid.*

<sup>74</sup> See *ibid.* at 163.

<sup>75</sup> Such is the title of c. 9 in *ibid.*

<sup>76</sup> *Ibid.* at 176 [footnote omitted].

<sup>77</sup> See Thomson, *supra* note 42.

<sup>78</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 171 [footnote omitted].

<sup>79</sup> *Ibid.* at 171-172 [emphasis in original].

help.<sup>80</sup> A “real man”, a “good provider” is one who can provide adequate protection for himself and his property (including his sexual partner(s) and their children?) without recourse to outside agencies. Partly as a result of this masculine ideal, “current abortion-funding policies ... strand women in a state of nature, at the mercy of fetal intrusion of their bodies without the assistance of the state to stop the fetus on women’s behalf from imposing wrongful pregnancy.”<sup>81</sup> According to McDonagh, “the problem with abortion funding is not that the state is too involved; it is not involved enough. The state stands by in order to protect the fetus as human life while it imposes serious injury on the woman.”<sup>82</sup>

McDonagh’s argument concerning self-defence can be summarized as follows. First, we need to get beyond the masculine notion of privacy as “the right to be left alone.” *Roe* is an example of legal authority for the view that privacy also includes the right to self-defence, and specifically, for the view that abortion rights are based at least in part on this second “type” of privacy. Second, when considering privacy-as-self-defence, we must be aware that that right, too, is commonly understood in a masculinized way, as the right to defend oneself without assistance. Establishing an ideological basis for state funding of abortion requires us to understand that self-defence entails the state duty to intervene positively to prevent or diffuse attacks by one private party upon another. McDonagh explains this point in the following way:

If a man is raping a woman or a mugger is inflicting a severe beating on someone or one private party is killing another, of course the victims have a right of self-defense to try to stop that injury themselves, but they also have a right to state assistance to stop the private parties on their behalf ... When a fetus seriously injures a woman by imposing a wrongful pregnancy, therefore, of course she has a right to stop it from injuring her, but she also has a right to state assistance in stopping it on her behalf.<sup>83</sup>

## II. Advantages of the Consent Model

The consent model affirms the widely held notion that the fetus is a morally valuable entity, without treating the issue of moral status as decisive, as the *Roe* court did. This allows McDonagh to avoid dehumanizing the fetus. For those who claim the right to seek abortion on the basis of autonomy and choice, a necessary element of the justification for the right is the contrasting of the fact that the woman is a person whose freedom of choice ought to be protected with the claim that the fetus is a nonperson and has no legal rights. While McDonagh also claims that the fetus has no legal rights, she justifies her claim without needing to resort to claims about the moral status of the fetus. This means that we can acknowledge and protect abortion rights without having to regard the fetus as something other than human, a view that would

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<sup>80</sup> See *ibid.* at 179.

<sup>81</sup> *Ibid.* at 183.

<sup>82</sup> *Ibid.* at 182.

<sup>83</sup> *Ibid.* at 105.



run contrary to common sense and would require us either to ignore, or to dismiss as mere fantasy, the narratives of women who experience trauma or grief, and who feel that in having an abortion, they have lost something of value, or even killed a human being. As such, this approach is more consonant with the actual experiences of real women.

Moreover, by contrast with the individualistic notion of “choice”, consent is relational: it focuses on both the woman and the fetus (although as will be seen when I come to consider the disadvantages of the approach, it excludes the possibility that relationships between men and pregnant women, or even men and “their” fetuses, may be relevant). Such a relational approach is better able to avoid criticisms that it is too individualistic or atomistic, criticisms often levelled at the “rights talk” so prevalent in the rhetoric of choice. By focusing not only on individual rights (important as these are for the consent-based approach) but also on relationships, accounts like McDonagh’s can accommodate notions such as caring, hospitality, and community, which are often regarded as being either irrelevant or even threatening to a rights- or choice-based argument. According to McDonagh’s model, abortion does not contravene the “ethic of care”—the notion that women are, by nature, nurturers and caregivers—since what abortion prevents is not the *giving* or bestowing of care by women, but the *taking* of women’s bodies, their freedom and their care without their consent.

McDonagh acknowledges that her model is at odds with current social assumptions about abortion; for most people, to contemplate fetal personhood (even just for the sake of argument) is to throw grave doubt on the moral and legal validity of the practice of abortion. McDonagh does not, however, take this discrepancy to be indicative of any problem with her argument; rather, she is confident that it arises because our current social norms, particularly those relating to women and reproduction, derive from our cultural heritage of patriarchy, and in particular, from a combination of puritanical and bourgeois morality that reserves norms of self-defence for men while imposing norms of self-sacrifice on women.

### III. Difficulties for the Consent Model

There are many criticisms of McDonagh’s consent-based justification of abortion rights, and it will be helpful to categorize them under several headings. First, I will consider problems with the notion of “self-defence” as it operates in McDonagh’s account. I will then consider those criticisms that challenge her use of the concepts of “causation” and “consent”, respectively. Finally, I will address some “miscellaneous” criticisms and difficulties.

## A. Self-Defence

### 1. Is Pregnancy an Invited Attack?

Neville Cox points out that McDonagh could be challenged on the basis that “consent to sex constitutes an implicit consent to all the natural and foreseeable consequences thereof including pregnancy,”<sup>84</sup> and that as such, a woman who becomes pregnant following consensual sexual intercourse has “invited” pregnancy, or to borrow McDonagh’s terminology, has “invited the fetus to make her pregnant.” Cox disagrees with this criticism:

This argument is, however, rather strained. In the case, for example of a woman who has used birth control yet through some mischance has become pregnant and who seeks an abortion as soon as she becomes aware of her condition, everything in her actions indicates that she does *not* consent to pregnancy and any presumption to this effect has been thoroughly rebutted.<sup>85</sup>

McDonagh would also reject the argument that pregnancy is an “invited attack”; as we have seen, she regards the action of a woman having consensual sexual intercourse merely as “putting oneself at risk” of pregnancy, and insists that the acceptance of a risk does not necessarily entail any acceptance of the actual injuries, should they occur. Just as a jogger who chooses to run alone through Central Park accepts a degree of risk but does not consent, by any stretch of the imagination (or the law) to be mugged or raped, a woman who engages in consensual sexual intercourse accepts the risk of pregnancy, but does not consent to the actual attack of a fetus or the injury it perpetrates by invading her body and later, by effecting ever more drastic changes upon it throughout the gestational process. Although whether or not someone uses contraception may hint at their intentions regarding pregnancy, or indicate that they are willing to accept a greater or lesser degree of risk, McDonagh would argue that, whatever degree of risk they accept, they are not consenting to the actual injury of pregnancy itself.

McDonagh’s claim that a woman’s consent to sexual intercourse, and acceptance of the attendant risks, does not entail consent to pregnancy is problematic because the concept of “risk” covers a wide spectrum of possibility. At one end there is the situation where it is possible, although highly unlikely, that certain consequences will occur if a certain action or course of action is undertaken; at the opposite end of the spectrum of risk, there is the scenario wherein, if a person behaves in a particular way, certain consequences will almost inevitably follow. For example, if a man walks along a pavement, it is possible, although highly unlikely, that a car will mount the pavement and kill or injure him. If he crosses a busy road using a designated crossing-place and paying reasonable attention to the traffic, it is more likely, but still *unlikely*, that he will come to harm. There are of course varying degrees of risk associated with

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<sup>84</sup> Neville Cox, “Causation, Responsibility and Foetal Personhood” (2000) 51 N. Ir. Legal Q. 579 at 581.

<sup>85</sup> *Ibid.* at 581-82 [emphasis in original].

walking on or near roads. If the same man were to jump out on a major motorway in front of a car approaching at seventy miles per hour, we can say with some confidence that he is likely to be hurt or killed. It is still not a certainty, since any number of outlandish events could intervene to rid the danger; he is still only “at risk” of harm. But on McDonagh’s analysis, we must nonetheless say that he has not consented to the actual harm he will almost inevitably sustain. This is a philosophical point; of course, the law would take a quite different view on who was responsible for the harm in such a case. What about a man who steps in front of an express train with the intention of committing suicide? His death is not guaranteed; again, unlikely events could intervene to thwart his plan. According to McDonagh, he would still be “putting himself at risk” of injury and death, and would not have consented to any injury he sustains as a result of his actions. Moreover, if he clearly intended to bring about his own death, yet survived, horribly injured, he could claim quite plausibly, on McDonagh’s logic, that he certainly did not consent to be so injured.

The differences between these examples and the pregnancy scenario are clear. First, pregnancy can be undone, which makes it more meaningful to talk about consent or lack of consent in the pregnancy context than to argue about consent in the context of an action whose consequences are irreversible. If I become pregnant despite my intention to avoid pregnancy, I can invoke the language of consent, or cite the absence of consent, in support of my claim that I ought to be able to remedy my pregnant state. I cannot seek to return to a living or intact state if I have been killed or maimed as a result of my risk-taking. Another difference is that, at least according to McDonagh, pregnancy involves the commission of a “wrongful act” by another party, whereas my examples do not. Is this difference relevant to the way we treat the issue of risk?

I would argue that it is possible to separate the actions of the two agents in McDonagh’s model—the first party’s (i.e., the parent’s) assumption of risk, and the second party’s (i.e., the fetus’s) wrongful act—since although the wrongfulness or harmfulness of the fetal “attack” becomes relevant when we come to consider other issues under the heading of “self-defence”, it is not important to the question whether the pregnant woman has “invited” the fetus into her body. If we accept this, we can use the above analogies to argue that one weakness of McDonagh’s theory is her view of how an assumption of risk relates to responsibility for subsequent injury. In the above hypothetical examples, McDonagh would be compelled to absolve both the man on the motorway and the man who steps in front of a speeding train of any responsibility for their subsequent injury or death. She is unable, on the basis of what she proposes in *Breaking the Abortion Deadlock*, to distinguish between different degrees of risk, and is thus unable to ascribe responsibility to those who assume the level of risk found at the higher end of the spectrum while admitting that some levels of risk are very low and ought to entail no legal responsibility for consequences. It is very difficult to imagine a scenario in which a human agent, in performing an action, could actually guarantee a particular result, since almost nothing is certain and there is always the possibility, however slight, that unplanned events will intervene and alter

the outcome. This being the case, all we can ever do is “place ourselves at risk” of a given outcome, so that if risk and outcome are separated as they are in McDonagh’s model, we could never hold anyone even partly responsible for any wrongs or injuries that they suffered.

Regarding McDonagh’s discussion of risk and responsibility, Robin West asks, “[I]s it really the case that consent to the risk of pregnancy does not entail consent to the pregnancy?”<sup>86</sup> Clearly, West believes that the matter is by no means settled:

In contract law, clearly, consent to an assumed risk does imply consent to the risked event; if it didn’t, no contract would be secure ... In criminal contexts, by contrast, McDonagh’s argument looks sound; consent to a risked criminal event does not by any means imply consent to the crime ... [I]n tort, the situation is complicated and conflicted; consent to a risk might or might not constitute assumption of the risk, and hence consent to the risked event.<sup>87</sup>

Obviously, if we could categorize abortion under one of these headings, we would have a clearer idea of how the law would treat the assumption of risk inherent in the abortion context. Unfortunately, none of these areas of law seems to completely accommodate the circumstances of pregnancy and abortion. Clearly, it would make no sense to categorize the “attack” of pregnancy—even wrongful, nonconsensual pregnancy—as a criminal offence, since the fetus (the direct cause of pregnancy, according to McDonagh) cannot be held criminally responsible. Moreover, as West notes, “an attack by a born person ... threatens the peace—and hence threatens the state—in a way that the invasion of a woman by an unwanted fetus does not.”<sup>88</sup> This being so, another reason for criminalizing certain kinds of behaviour—namely the state’s duty to maintain public order and deter offenders—has no application in the context of wrongful pregnancy, since the fetus does not threaten public order (although it threatens the pregnant woman’s internal physical and psychological order as well as the order of her social functioning) and cannot be deterred from causing pregnancy by the threat of sanctions.

Any attempt to regard pregnancy as a contract, for example a contract for services between the pregnant woman and the fetus, would founder on the absence—indeed, the impossibility—of mutuality.<sup>89</sup> By a process of elimination, we arrive at tort law—and this area of law does seem best able to accommodate McDonagh’s account of pregnancy, since she characterizes pregnancy as a harm, but not a criminal assault. As West comments, the relationship between risk and responsibility is unclear in tort law; consent to a risk “might or might not” imply consent to the risked harm. At the very least, then, we can say that it is by no means clear, in law, that consent to risk does not

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<sup>86</sup> Robin West, “Liberalism and Abortion” (1999) 87 *Geo. L.J.* 2117 at 2130.

<sup>87</sup> *Ibid.* at 2130-2131.

<sup>88</sup> *Ibid.* at 2126.

<sup>89</sup> Although pregnancy may be the subject of a surrogacy contract, such contracts are currently unenforceable in United Kingdom law, and are anyway contracts between the pregnant woman and the “commissioning couple (or individual)”; at any rate, contract cannot apply to wrongful pregnancy.

imply consent to be harmed. This raises serious doubts about one of the main premises on which the consent model of abortion rights is built.

## 2. Is Pregnancy a Sufficient Attack to Justify the Use of Deadly Force?

As Robin West observes, “[P]regnancy, even when nonconsensual, does not typically threaten death, lasting bodily injury, or even *an immediate* disruption of the woman’s life plans and projects the way a violent assault by a born person most often does.”<sup>90</sup> Because of this, some commentators have raised the issue of whether the attack represented by pregnancy is sufficiently serious to justify the use of deadly force in self-defence. Neville Cox rebuts this charge as follows:

It has been suggested that the defence of self-defence cannot apply because of the nature of the “attack” within pregnancy. In order to justify use of self defence it must generally be shown that an attack was immediate and threatening ... [H]ence, because pregnancy does not have the appearance of an immediate threat, the use of self defence principles does not apply to this situation. This argument may be rejected, however, both because McDonagh would say that pregnancy is a nine month immediate threat, and also because the inexorable nature of the harm involved means that requirements of immediacy may be dispensed with.<sup>91</sup>

As Cox points out, moreover, McDonagh cites rape and kidnap as examples of instances where deadly force may be used in self-defence even where there is no immediate threat to life. For West, however, the seriousness of the attack inherent in pregnancy does not consist solely in the threat of physical harm, either immediate or remote, or even in actual physical harm. She remarks that, although McDonagh catalogues in elaborate detail the physical effects of both medically normal and abnormal pregnancies, she “risks missing entirely the psychic harms such pregnancies occasion.”<sup>92</sup> West argues that “the nonconsensual pregnancy, unlike the nonconsensual assault, threatens not so much to end your life ‘from the outside,’ so to speak, but to ‘take over’ your life from the inside. The fear is not that my life will end but that my control over its course will end.”<sup>93</sup>

The danger West describes constitutes an immediate threat not to a woman’s life, but to what is often regarded as being important about her life, the woman’s personhood. This should be of particular concern to those states that regard themselves as (or aspire to be) modern liberal democracies since, as West reminds us, one of the central lessons of liberalism has been to establish the notion that “[a] free moral person ... is someone who *freely decides* to undertake moral action. It is hard to avoid the conclusion that the woman who has no choice but to remain pregnant

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<sup>90</sup> West, *supra* note 86 at 2127 [emphasis in original].

<sup>91</sup> Cox, *supra* note 84 at 582 [footnote omitted].

<sup>92</sup> West, *supra* note 86 at 2128.

<sup>93</sup> *Ibid.*

*against her will* is, from a liberal perspective, something considerably less than human.”<sup>94</sup> In other words, our “moral personhood”, on the liberal account, depends upon our capacity to exercise moral autonomy in our relationships with other moral agents. To be forced into a moral relationship seems to contravene this ideal: “The woman who is pregnant against her will embodies nonfreedom, because she embodies the very act—unwilled sacrifice of one’s body for the life of others—that is freedom’s antithesis.”<sup>95</sup>

As such, we can (and it would seem that liberals *must*) take wrongful pregnancy seriously enough to warrant deadly force in self-defence even where the pregnancy poses no immediate threat to life or health. However, this argument is unlikely to persuade nonliberals (many of whom ascribe moral value to unchosen projects and relationships),<sup>96</sup> and will not necessarily persuade those liberals whose liberal beliefs are grounded in consequentialist, rather than Kantian, philosophies.

### 3. Is Pregnancy Really an Attack at All?

This criticism centres on the claim that McDonagh’s characterization of pregnancy as a “fetal attack” is mistaken for several reasons. First, the fetus, far from perpetrating a deliberate attack, is innocent, both in the sense that it is innocent of any wrongful intention and in the sense that it is not criminally competent. Second, and more important, is the claim that it is impossible to separate what the fetus is from what the fetus does.

Recall that McDonagh has claimed that one of the main advantages of her thesis is that it corrects the previous error of focusing on what the fetus is (usually by debating its moral status) and focuses, instead, on what the fetus does to a woman when it makes her pregnant without her consent. If it is impossible to separate the two conceptually, two consequences follow: first, if McDonagh wishes to maintain her claim that previous commentators and judges were in error, she must find new grounds for her criticism; second, and related to the first point, McDonagh has achieved nothing by “refocusing” the debate away from the nature of the fetus and onto its behaviour, except perhaps to invent a false and confusing distinction.

Is it possible, then, to separate fetal nature from fetal behaviour? Cox contends that it is not:

[W]hatever the impact of pregnancy, the foetus is doing nothing apart from involuntarily staying alive in the ordinary way and hence the “attack” for self defence purposes comes in the form of simple foetal existence. But self defence

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<sup>94</sup> *Ibid.* [emphasis in original].

<sup>95</sup> *Ibid.*

<sup>96</sup> See e.g. Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) at 33-34, 69.

law does not entitle me to kill another if my health or life or bodily integrity is threatened by his or her simple existence.<sup>97</sup>

This last point concerning the application of the law on self-defence to a threat posed by another's mere existence is somewhat precarious, since the situation rarely, if ever, arises wherein one person's health, life, or bodily integrity is threatened by the mere existence of another.<sup>98</sup> It is for precisely this reason that pregnancy is so often described as being a completely unique condition.<sup>99</sup> As mentioned above, Judith Thomson wrote a famous article that claimed the exact opposite of what Cox is saying, namely that if my life or bodily integrity is threatened by another born person, even in the course of doing what he or she must do simply to continue to exist, then the law ought to allow me to be a "bad Samaritan" and defend myself by withdrawing the support on which that person depends for his or her survival.<sup>100</sup> Cox anticipates this argument, and responds by pointing out that

[Thomson] accepts the personhood of the foetus for the purposes of argument while insisting that a foetal right to life does not include a right to use its mother's body for support through the vehicle of pregnancy. But without such a 'sub-right', the principal right becomes illusory.<sup>101</sup>

He puts the point slightly differently elsewhere when he says that

when the law recognises rights it does so in the knowledge of the context in which they will operate. Thus it would not recognise a right to live while rendering the act of breathing or eating a criminal offence, because the latter rule would render the former right meaningless.<sup>102</sup>

One obvious problem with Cox's response is that McDonagh is not proposing a fetal right to life; although her model tolerates the notion of fetal personhood for argument's sake, she does not regard it as entailing any positive legal right to continue existing. This is so because the brand of personhood she ascribes to the fetus is comparable to the kind of purely legal personhood that companies and other such entities possess, without having any right to exist. The difficulties inherent in this purely legal notion of fetal personhood will become even more apparent during consideration of the next question.

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<sup>97</sup> Cox, *supra* note 84 at 582 [footnote omitted].

<sup>98</sup> The case of *Re A (Children) (Conjoined Twins: Surgical Separation)*, *infra* note 115, might be considered analogous. See Part III.A.6, below, for further discussion of this case.

<sup>99</sup> See Part III.A.5, below, where I consider the claim that the genuine uniqueness of pregnancy invalidates much of McDonagh's heavily analogical approach.

<sup>100</sup> Thomson, *supra* note 42.

<sup>101</sup> Cox, *supra* note 84 at 586 [footnote omitted].

<sup>102</sup> *Ibid.* at 583.

#### 4. Is the Fetus Entitled to Legal Due Process?

Judith Scully points out that “if a fetus is a human being, it might be entitled to a legal hearing and legal counsel prior to being aborted.”<sup>103</sup> If the fetus can be regarded as an agent or a legal person, as McDonagh is prepared to assume for the purposes of her model, then it could indeed be claimed that such an entity ought to be entitled to due process of law—a least where the pregnancy is medically normal (i.e., where it poses no immediate threat to a woman’s life or health). Failing to recognize such an entitlement, it may be argued, is to treat the fetus as a “legal person” only in the negative sense.

It is helpful here to distinguish between two possible understandings of fetal personhood in McDonagh’s model. The first possible understanding can be summarized as follows: the fetus has no capacity to possess rights or owe responsibilities; nevertheless, it can be an agent of injury and cause harm to women in the pregnancy context. This understanding treats the fetus as the legal equivalent of an animal, and if this is all McDonagh means by “fetal personhood”, it is difficult to see how her model improves upon traditional discourse about abortion. Such an understanding of fetal personhood would hardly be capable of “breaking the abortion deadlock”. On the second possible understanding of fetal personhood, the argument proceeds as follows: the fetus is a person, involved in a private pregnancy relationship with the pregnant woman. If the relationship is non consensual, it constitutes wrongful pregnancy and the woman is entitled to use deadly force to defend herself against the unwanted intrusion. This understanding does not differentiate between the fetus and a born person; it is a stronger version of fetal personhood, and on the face of it, much more promising. This seems to be closer to what McDonagh means when she analogizes the fetus to a rapist, and claims that deadly force is permitted in self-defence even where the attacker is a person.

This second, more promising way of understanding what McDonagh means by fetal personhood, however, also causes problems for McDonagh’s model. Use of deadly force against “born persons” is only authorized in emergency situations; otherwise, the person presenting the alleged threat is entitled to due process of law. Medically normal pregnancy is not a “gunman situation” where deadly force may be used without due process. However great the intrusion that any pregnancy represents, “emergency” usually implies some immediate threat to life or health, so that where pregnancy is medically normal and there is no immediate threat, it seems inappropriate to speak of an emergency situation. Where pregnancy is medically abnormal and places the life or health of the woman in danger, this is *already* regarded as an emergency under current law, and abortion is authorized in such cases as a matter of medical necessity. There is no need to resort to the legal right to self-defence.

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<sup>103</sup> Judith A.M. Scully, Book Review of *Breaking the Abortion Deadlock: From Choice to Consent* by Eileen McDonagh (1997) 8 UCLA Women’s L.J. 125 at 145.



A key problem for McDonagh's thesis is, therefore, that it ultimately fails to "break the abortion deadlock". What opponents of abortion advocate is the ascription of moral personhood to the fetus, and McDonagh, by offering this purely legal notion of personhood, is debating at cross-purposes rather than proving why their argument fails even if the issue of fetal personhood is "conceded". The fetus is treated as a "person" only as a heuristic device, in order that concepts such as assault and self-defence can be applied without obvious absurdity; a closer examination reveals the "personhood" of the fetus to be a mere cipher.

### 5. Is Pregnancy a Unique Case?

In the course of her argument, McDonagh draws many analogies between pregnancy and other events or conditions:

The fetus ... is analogized to a born person for purposes of making out the original right of self-defense, to a natural phenomenon to highlight the irrelevance of the arguable assumption of risk involved in the original act of intercourse of the right to self-defense, and then, finally, to a criminally insane assailant to illustrate the irrelevance of the fetus's lack of agency to the woman's right to state assistance.<sup>104</sup>

"[A]t some point", Robin West observes, "the multiplicity of analogies start to work against each other."<sup>105</sup> Furthermore, as McDonagh herself acknowledges elsewhere,

[a] possible objection to situating women who suffer harm resulting from a fetus with other victims of harm is that pregnancy is a unique condition; thus, when a fetus attacks a woman's body, it does not situate her similarly with anyone else whom the state protects from harm.<sup>106</sup>

Such an objection is raised by Nancy Davis, who argues that the uniqueness of pregnancy as a condition is such that it is impossible even to characterize the issue as one where competing rights are being balanced.<sup>107</sup> Davis writes, "If the relationship between the woman and the fetus is thought to be in itself a special one, then this undercuts the force of arguments by analogy."<sup>108</sup> This is potentially a very damaging criticism, given the centrality of analogical reasoning to McDonagh's model. McDonagh responds as follows:

The flaw in this objection is the assumption that any one situation can be wholly different from another; all situations involve some similarities and some

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<sup>104</sup> West, *supra* note 86 at 2130.

<sup>105</sup> *Ibid.*

<sup>106</sup> Eileen L. McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding" (1999) 62 Alb. L. Rev. 1057 at 1110 [McDonagh, "My Body, My Consent"].

<sup>107</sup> Nancy Davis, "Abortion and Self-Defense" (1984) 13 Phil. & Pub. Affairs 175 at 184-85.

<sup>108</sup> *Ibid.* at 181.

differences. It is a matter of judgment, therefore, to what degree situations should be considered similar or different in relation to each other.<sup>109</sup>

She continues:

If the fetus were considered a person, for example, its location within and attachment to the body of another person might be considered unique to [fetuses] as a class, but the harm resulting from the fetus is not unique, since harm often results from one person's effect on another person. Under state protection, if the fetus is considered to be a living entity that is not a person, then harm resulting from it also is not unique, since harm often results from living entities that are not people. Thus, whether the fetus is a person or a nonperson, it similarly situates a woman with others who are harmed.<sup>110</sup>

This is, in my opinion, a disappointing and somewhat clumsy response, which fails to get to the heart of the “uniqueness” objection. When critics claim that pregnancy is unique, they are not necessarily claiming that it is unique on the basis of the status of the fetus as a person or a non-person. Rather, they are making the claim that the whole set of circumstances associated with pregnancy is unique, particularly with regard to the operation and exercise of individual rights. While I ultimately agree with McDonagh that the objection from uniqueness must fail, I prefer West's explanation of why this must be so.

Although West notes that “McDonagh's liberal insistence on the analogical similarity between the nonconsensually pregnant woman and the assaulted victim misses the substantial payoff of a pregnancy,” namely “a healthy human baby,”<sup>111</sup> she also observes that “[e]quality and liberty both, from a liberal perspective, are dependent upon the recognition and the equal treatment accorded our universality.”<sup>112</sup> As West explains, “liberal legalism requires a rule of law that ... treats likes alike. Thus, the overpowering need for analogical thinking.”<sup>113</sup> In other words, before we can promote equality, a key value in liberal social and legal systems, we must have some method of determining which cases are “alike” in the relevant sense, so we can then treat like cases alike. As such,

[e]qual regard—the heart of liberalism—requires that pregnant women be treated similarly to those with whom they are similarly situated. The imperative of equal treatment at the heart of liberal legalism animates the need to locate those to whom she is similarly situated and, therefore, the search for analogous conditions.<sup>114</sup>

According to West, then, although it may be difficult to find situations that are “like” pregnancy, it is necessary to draw parallels whenever possible, in order to be able to

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<sup>109</sup> McDonagh, “My Body, My Consent”, *supra* note 106 at 1110.

<sup>110</sup> *Ibid.* at 1110-1111.

<sup>111</sup> West, *supra* note 86 at 2128-2129

<sup>112</sup> *Ibid.* at 2124.

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.* at 2125.

attain, insofar as is possible, the liberal ideal of treating like cases alike. As McDonagh points out, the practical implementation of this ideal will inevitably involve subjectivity, since judgments will be required regarding the degree to which certain sets of circumstances exhibit relevant similarities. The fact that treating like cases alike will be necessarily and intrinsically subjective in practice, however, does not mean that we should not attempt to find as close an approximation to the ideal as we are able to find for any given case. The most basic tenets of liberal legal theory demand as much.

### 6. A Better Analogy?

The British legal scholar Vanessa Munro has identified parallels between pregnancy and the comparatively recent British case of *Re A (Children) (Conjoined Twins: Surgical Separation)*.<sup>115</sup> In that case, the English Court of Appeal had the unenviable task of determining the interdependent fates of infant conjoined twins Jodie and Mary. Having referred to *Re A*, Munro writes that

[m]aternal-foetal relations represent another relational context characterized by ambiguous bodily boundaries within which the law's attempt to super-impose the highly abstract and individualist framework of rights analysis has proven manifestly inadequate.<sup>116</sup>

The case of the conjoined twins corresponds to McDonagh's model of nonconsensual pregnancy in a number of important respects. Jodie (the stronger twin) was involved in a nonconsensual physical relationship with the weaker twin, Mary; Jodie was suffering physical harm and facing certain death as a result of Mary's physical dependence on her body, and Jodie's only possible defence against the harm would be the removal of Mary, which would end the nonconsensual relationship and inevitably cause Mary's death. The relationship was beneficial only to Mary, and harmful only to Jodie, making it more similar to McDonagh's pregnancy model than to other more "symbiotic" twin conjoinments. Another similarity to McDonagh's model is that both of the twins in *Re A* were deemed to be "persons" in law. It is therefore instructive to examine the case for evidence of how the UK courts might approach a right to abortion based on the right to self-defence.

The court in *Re A* allowed the surgical separation to proceed. The rationale for this decision was complex, but can be summarized by saying that the judges, faced with a choice between saving the life of one twin or losing both, preferred the option that saved the greater number of lives—a "quantity of life" calculus, in effect. By this logic, if both twins would have survived in their conjoined state, it would seem that the court would not have sanctioned the deliberate killing of Mary. While such killing was considered permissible in order to save one life instead of none, it would not

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<sup>115</sup> [2000] 4 All E.R. 961 (C.A.) [*Re A*]; Vanessa Munro, "Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights" (2001) 10:4 *Social & Legal Studies* 459.

<sup>116</sup> Munro, *ibid.* at 472.

appear, on the logic of *Re A*, to be justified if the choice is between one life of high quality or two lives of inferior quality. The implication of this for the model proposed by McDonagh is that, unless the life of the pregnant woman was actually threatened by the pregnancy, the killing of the fetus (viewed as a legal person) would be impermissible.

While the facts of *Re A* do not represent a perfect analogy with pregnancy, this is not in itself a reason to dismiss it as irrelevant; it seems to be at least as strong as any of the interchangeable analogies offered by McDonagh herself. Moreover, as noted in Part III.A.5, above, analogies (even if imperfect) are necessary, since to treat pregnancy as completely legally unique is to embrace a kind of particularism that is incompatible with coherent legal regulation and with the philosophical justifications underpinning the liberal legal system itself, such as non-discrimination and legitimate expectation.

## **B. Causation**

### **1. Is the Fetus Really the Cause of Pregnancy?**

Neville Cox presents a compelling challenge to the notion that the fetus ought to be regarded as the only cause of pregnancy. He begins by pointing out that

as the American Supreme Court noted in the seminal case *Roe v Wade*, there is no clear consensus as to when life or indeed pregnancy begins. If it begins at implantation or later then McDonagh's argument that the fertilised ovum causes pregnancy may stand a chance of working. If on the other hand, it is seen to begin at the point of *fertilisation* then her arguments fail immediately because unless she aims to imbue sperm with personhood (and the anti-abortion movement does not make this argument) then she would have to accept that pregnancy is caused by the sexual act which led to fertilisation.<sup>117</sup>

In other words, if we take pregnancy to begin at fertilization or conception, as many do, then the fetus cannot be regarded as the cause of pregnancy, since it cannot be the cause of an event at which it comes into being. For those who take pregnancy to begin at this earliest of stages, then, McDonagh's arguments about causation are a non-starter. Logic precludes the possibility that the fetus is the cause of pregnancy unless we take pregnancy to begin at a point, such as implantation, when the fetus is already in existence. McDonagh herself seems to take implantation as the onset of pregnancy, stating as she does that the fertilized ovum causes pregnancy "when it implants itself in a woman's uterus."<sup>118</sup> Her position is not always crystal clear, however, since on the very next page, she describes pregnancy as "a condition that follows absolutely from the presence of a fertilized ovum in a woman's body,"<sup>119</sup> thereby implying that as soon

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<sup>117</sup> Cox, *supra* note 84 at 587 [footnotes omitted, emphasis in original].

<sup>118</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 40 [footnote omitted].

<sup>119</sup> *Ibid.* at 41.

as the fetus exists, the woman is pregnant (the view that precludes the fetus as a cause of pregnancy).

Leaving aside this apparent confusion in McDonagh's definition of when pregnancy begins, however, it is obvious that we must address the possibility that pregnancy begins with implantation in the uterus, and that it is therefore logically possible that the fetus is the cause of pregnancy. Cox levels two arguments against this possibility. First, he contends:

McDonagh is so concerned to find *a* generic cause of pregnancy, that she fails to recognise that what is actually relevant for legal purposes is the cause of *the* particular pregnancy in any case. ... Most sexual acts may not result in pregnancy, and pregnancy may result from actions other than sex. But, for most women seeking abortions, their specific individual pregnancies *did* result from a sexual act.<sup>120</sup>

This is a problematic point, since it seems to suggest that in cases where pregnancy has not resulted from sexual intercourse, McDonagh's argument that the fetus causes pregnancy may hold good. But this cannot be what Cox means to imply, since the nonsexual means by which pregnancy can occur—artificial insemination and embryo transfer—are, if anything, more deliberately aimed at bringing about a pregnancy than is the act of sexual intercourse. Sexual intercourse may be engaged in for recreation, as an act of intimacy, or for procreation, but people engaging in artificial insemination and embryo transfer invariably do so for the purpose of reproduction, not pleasure. As such, in cases where pregnancy does not follow from intercourse, the claim that pregnancy has been “caused” by the actions of the parents is an even stronger one, since intention can be established with considerably less difficulty.

Much more convincing is Cox's argument that McDonagh has erred in failing to accurately distinguish between the factual cause and the legal or “proximate” cause of pregnancy.<sup>121</sup> According to Cox's account, the first step in determining legal cause is to ask what is the factual cause of the event. This entails asking the question: But for *x*, would the event have occurred? If the answer is no, then *x* is a factual cause. This process is of course limited by the doctrine of *novus actus interveniens* (“new intervening act”). The law then decides to which of the factual causes it will attach responsibility. As Cox explains, at this stage, the test is “a commonsense-based analysis of whether a particular factual cause has contributed appreciably to the coming about of the events in question.”<sup>122</sup> The problem with McDonagh's model, he says, is that she “looks for *the* legal cause of a result with the implication that at law there can only be one such cause. This is incorrect.”<sup>123</sup>

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<sup>120</sup> Cox, *supra* note 84 at 588 [footnote omitted, emphasis in original].

<sup>121</sup> *Ibid.* at 589.

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* at 590 [emphasis in original].

Even if we leave aside the question of when pregnancy really begins, and accept that the fetus comes into existence before that point, the fetus can only be regarded as *one* of the factual causes of pregnancy; even on this construction of the beginning of pregnancy, all pregnancies are caused by the implantation of a fetus in the uterus only in the same way that all human deaths are ultimately caused (in the most immediate sense) by lack of blood to the brain. This does not necessarily mean that it is this “cause” to which the law will attach responsibility, however. When deciding the cause of death, the law will not merely conclude that the relevant cause is lack of oxygen to the brain; rather, determining the legal cause of death involves looking beyond the immediate, scientific cause to the surrounding circumstances, to factors such as dangerous driving, assault, and so on.<sup>124</sup> As Cox says, “If A stabs B, and fatally wounds him, then we may say that A’s action is the *cause* of death, and the lack of blood to B’s brain is a non-coincidental and natural subsequent condition following A’s action.”<sup>125</sup>

Cox offers his own view of the causes of pregnancy, claiming that “the move of the foetus to implantation is an *involuntary* reaction to an earlier action of its parents.”<sup>126</sup> His argument runs as follows:

[O]n normal causation rules, if A causes B to do something in involuntary fashion (for example when A throws B with such force that B strikes C) then A’s action is still the cause of the harm to C. Put another way, an involuntary reaction of B to A’s earlier action does not break the chain of causation between action A and result C. Indeed Hart and Honoré suggest that in such circumstances when we speak of B’s behaviour, *we can hardly speak of an act at all ...* If A causes B to move in such a way that B collides with *him*, then A will be deemed to be the cause of his own injuries.<sup>127</sup>

Applying this principle to pregnancy, Cox continues: “The parents have caused the foetus involuntarily to implant itself, therefore the chain of causation between their act and the result (pregnancy) is not broken.”<sup>128</sup> Here, Cox attempts to establish: (1) that the fetus’s actions, insofar as they are “actions” at all, are involuntary; and (2) that the actions of the parents in having intercourse (or otherwise mixing gametes) create the fetus and so “cause” its involuntary and inevitable effect on the woman’s body. However, Cox’s account suffers from the same chronological problem as the assertion that the fetus “causes” pregnancy, where pregnancy is taken to begin at fertilization, since it is doubtful whether we can regard the parents as having “caused” a fetus (which did not exist at the time of their actions) to do anything at all. Could not the coming-into-existence of a fetus constitute the kind of new intervening act that would break the chain of causation? Cox wants to answer in the negative, saying that the chain of causation between the parents’ act of intercourse and the fetus’s act of

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<sup>124</sup> *Ibid.* at 588.

<sup>125</sup> *Ibid.* at 592 [emphasis in original].

<sup>126</sup> *Ibid.* at 591 [footnote omitted, emphasis in original].

<sup>127</sup> *Ibid.* at 591-92 [footnotes omitted, emphasis in original].

<sup>128</sup> *Ibid.* at 592.

implantation remains intact. In terms of the example he has given, the parents' behaviour simultaneously creates the fetus and throws it into the woman's uterus. This is a rather strained interpretation of the facts, however. I believe that Cox's conclusion can more plausibly be reached, and the underlying intuition more adequately captured, by starting from the claim that it is impossible to separate what the fetus is from what it does; from this, it follows that when the parents engage in an act that can foreseeably create a fetus, they are engaging in an act that can foreseeably cause a fetus to implant (since what it is and what it does are conceptually inseparable).

Notwithstanding the theorizing above, how then would the courts actually decide on the legal cause of pregnancy? Cox observes that "questions of causation are answered substantially by policy considerations,"<sup>129</sup> and identifies

two reasons for assuming that it would be likely that the sexual act ... could be deemed to be the legal cause of pregnancy. First, because the result is a reasonably foreseeable consequence of the action (whether or not the mother consents to it) and secondly, because it is likely to be seen as good policy in the legal order to which McDonagh refers, namely one in which the personhood of the foetus is afforded legal recognition.<sup>130</sup>

I believe that the most valuable part of Cox's analysis of causation is his account of the difference between legal and factual causes. Of particular value is the analogy he draws between legal causes of death, which are never taken to be simply the most precise and immediate scientific cause (i.e., lack of oxygen to the brain), and the legal causes of pregnancy, as well as the associated claim that the law would not treat what is arguably the biological definition of pregnancy (implantation) as being its legal cause.

## 2. Fathers' Rights and Responsibilities

Many feminist commentators have complained, rightly in my view, that theorizing about pregnancy, and in particular, the rhetoric of the fetal-rights debate, has traditionally marginalized women to the point of invisibility. Such has been the focus on the emerging "person" of the fetus and its welfare that the pregnant woman and her interests can be forgotten, or at least "suspended" until after she has given birth.<sup>131</sup>

One of McDonagh's aims in *Breaking the Abortion Deadlock* is to redress this injustice by providing a framework for theorizing, legislating, and adjudicating about

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<sup>129</sup> *Ibid.* at 590.

<sup>130</sup> *Ibid.* at 593.

<sup>131</sup> See e.g. Rachel Roth, *Making Women Pay: The Hidden Costs of Fetal Rights* (Ithaca, N.Y.: Cornell University Press, 2000); Cynthia R. Daniels, *At Women's Expense: State Power and the Politics of Fetal Rights* (Cambridge, Mass.: Harvard University Press, 1993); Lynn M. Morgan & Meredith W. Michaels, eds., *Fetal Subjects, Feminist Positions* (Philadelphia: University of Pennsylvania Press, 1999).

abortion rights that places the pregnant woman squarely at its centre. While she certainly succeeds in refocusing attention and concern on the experience and interests of women, McDonagh achieves this mainly by eliminating men from the landscape of pregnancy and childbirth. McDonagh would, of course, argue that men ought not to be regarded as being involved in the pregnancy relationship anyway, since it is, by definition, a relationship between the pregnant woman and the fetus. Indeed, she argues that it is precisely because we have failed, in the past, to characterize pregnancy in this way (as a bilateral relationship between a woman and a fetus) that policy-makers and judges have allowed external interests (e.g., the interest of the state in the continuation of fetal life) to limit the right of a woman to terminate an unwanted—or to use McDonagh’s term, “nonconsensual”—pregnancy. By re-characterizing pregnancy as a bilateral relationship, according to McDonagh, we are able to resist such limits on this right.

There is another, less welcome consequence of this bilateralism, however. As discussed above, in order to regard pregnancy as an attack to which consent may be given or withheld (an understanding pivotal to McDonagh’s argument as a whole), it is necessary to first sever the connection, both in cultural iconography and in the law, between an act of sexual intercourse and any subsequent (“resulting”) pregnancy. Unless we abandon the notion that sex causes pregnancy, we cannot embrace the proposition that the cause of pregnancy is the fetus, exercising its coercive influence to change a woman’s body from a nonpregnant to a pregnant state in pursuit of its own self-interest. I have already identified some ontological and epistemological problems with the notion that the fetus can plausibly be regarded as causing pregnancy, but this element of McDonagh’s theory also encounters a more practical problem, namely that treating pregnancy as anything other than a consequence of sexual intercourse impairs (perhaps fatally) the ability of the law to attribute responsibility for the pregnancy, and even more importantly, for the resulting child, to the genetic father:

[B]y separating the man/woman “sex relationship” from the foetus/woman pregnancy relationship, she is drawn to the inexorable conclusion that the man has no legal responsibility for pregnancy, not having “caused” it in the legal sense. Despite this, however, she is prepared to require that the man owe a duty to the foetus in the sense of being required to provide financial and other assistance.<sup>132</sup>

I suspect that, in fact, McDonagh regards the duty of the man as existing not toward the fetus, but rather toward the born child. To understand why, it is necessary to consider that McDonagh recognizes three different sorts of parenthood: genetic parenthood, pregnancy parenthood or “gestational parenthood”, and social parenthood.<sup>133</sup> She argues that “[w]hile men are critical to reproduction, their role

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<sup>132</sup> Cox, *supra* note 84 at 588 [footnotes omitted].

<sup>133</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 58-59.



does not extend over all phases.”<sup>134</sup> So, although men cannot be gestational parents, they *can* be genetic and social parents, and are therefore not excluded from the parenting function on her model. The problem, she contends, is that “the law is prone to elevate genetic parenthood above all other types of parenting,”<sup>135</sup> whereas in her own view, “[of] all the ways to be a parent, none is more significant and important than producing the social bonds of care and nurturing, or social parenthood.”<sup>136</sup> Since men share this ability with women, “[s]eparating sex from pregnancy in no way impinges upon men’s interest in their empowerment as progenitors.”<sup>137</sup> Rather than undermining the parental responsibility of men, maintaining a distinction between sex and pregnancy helps highlight “men’s roles as genetic and social parents and underscor[es] the relationship between the fetus and the woman during pregnancy parenthood.”<sup>138</sup>

For McDonagh, the necessity of separating sex from pregnancy arises from the need for a woman to be able to say that although she may have consented to the act of sexual intercourse that preceded her pregnancy, she nonetheless refuses to consent to the presence of the fetus in her body. Turning this on its head, however, a man could invoke the language of consent and the separation of sex from pregnancy to claim that while he consented to engaging in sexual intercourse with a woman, he did not consent to becoming either a genetic or a social parent. If having sex should not lead to legal obligations for a woman, why should it for a man? Why should a man be obliged by law to provide financial or other support for a child that, on McDonagh’s analysis, he did not “cause” or “create”? Why should a woman, by consenting to a pregnancy relationship with a fetus, be able thus to impose legal obligations on a man, regardless of his consent to parenthood? McDonagh responds to this objection rather weakly: “The flaw here is the failure to recognize that the [US] Constitution allows the state to intrude upon a person’s economic assets with greater latitude than upon a person’s bodily integrity and liberty.”<sup>139</sup>

This is wholly unsatisfactory as an answer, however, since state intrusion must always have some form of justification in a liberal democracy. McDonagh’s insistence that the fetus is the only legal cause of pregnancy divorces the father’s sexual act from any subsequent pregnancy and child, thereby denying the state any justification for impinging on his finances, since no legal link exists between the man and the pregnancy, or between the man and any child that may eventually be born.

Why insist, then, that a woman’s consent is necessary before her legal relationship with the fetus (and later the child) can be established, if a fetus, by

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<sup>134</sup> *Ibid.* at 59.

<sup>135</sup> *Ibid.* at 58. See the case of *Leeds Teaching Hospitals NHS Trust v. A*, [2003] EWHC 259 (QB), for evidence that this may also be true in the UK.

<sup>136</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 59.

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> McDonagh, “My Body, My Consent”, *supra* note 106 at 1107 [footnote omitted].

implanting itself in the uterus of a woman, may coerce a man into a legal relationship with it? The problem here is that whereas McDonagh identifies three types of parenthood, she only recognizes the relevance of consent in the context of pregnancy, or gestational parenthood. Consent is not an issue in the two sorts of parenthood that may apply to men. Following an act of consensual sexual intercourse, on McDonagh's model, women have the ongoing ability to withdraw their consent, and avoid the responsibilities of parenthood; men, by contrast, have no corresponding opportunity to consent, or refuse to consent, to become a parent. As such, McDonagh's model is discriminatory and endows women with the power to decide, for men, whether or not they will become parents. This power incorporates both the right to prevent a man from developing a relationship with a child he wants, and the right to force parenthood on a man who does not wish to be a father.

Returning to McDonagh's claim that the law "elevates" genetic parenthood above gestational and social parenthood, it is now possible to respond that, at least for the purposes of attaching parental responsibility, genetic parenthood is the *only* stage at which both men and women can be held to have consented to become parents, without discriminating unfairly between the genders by endowing women with power over men's parental identity.

### 3. Implications for Wrongful Pregnancy

At present, under United Kingdom law, actions for wrongful pregnancy can be brought against "either a physician who incompetently sterilizes a person or a man who rapes a woman."<sup>140</sup> One consequence of McDonagh's approach is that the current grounds for wrongful pregnancy actions would be undermined, or even disappear; neither a man nor a surgeon can be held responsible, legally, for a pregnancy that occurs subsequent to rape or incompetent sterilization if the fetus alone "causes" the pregnancy in the legal sense. It is not available to McDonagh to appeal to the fact that, in each of these scenarios, the woman has not consented to expose herself to the risk of pregnancy, since McDonagh elsewhere contends that the fact a woman has chosen to expose herself to such a risk is irrelevant for the purposes of establishing wrongfulness of pregnancy.<sup>141</sup> As such, while the rapist may be held criminally responsible for the act of rape, and the surgeon may be liable in civil law for medical negligence, the ground of wrongful pregnancy will not be available as a basis for any civil action against either of them, nor will pregnancy be available for consideration as a factor aggravating the crime of rape. Indeed, no one can be held liable for any instance of wrongful, nonconsensual pregnancy on McDonagh's account since the agent that causes every pregnancy, the fetus, lacks mental competence. The fetus may be destroyed, therefore, but not held responsible. This extinction of responsibility is

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<sup>140</sup> *Ibid.* at 1096 [footnote omitted].

<sup>141</sup> See text accompanying note 38.

disconcerting since McDonagh is, on her own analysis, identifying a significant harm, suffered exclusively by women, for which no party may ever be held responsible.

### C. Consent

#### 1. Is Pregnancy the Kind of Intrusion to Which the Law Would Permit Consent?

As shown earlier, McDonagh discusses at length the nature of fetal aggression and the justification of deadly force in self-defence. She does not, however, devote much of her discussion to the question of the nature of consent, namely, what form it might take, and why consent to pregnancy ought to be possible despite her characterization of pregnancy as analogous to assault, rape, or slavery.

As McDonagh describes it, pregnancy is an horrific attack. Given that she characterizes it as an assault, and given the severity that she ascribes to it, we are entitled to ask whether the law would in fact regard consent to such an “act” as valid under any circumstances. If consent is necessary in the context of sexual intercourse, McDonagh’s argument runs, then it must be all the more necessary in the context of pregnancy, since pregnancy is even more invasive than intercourse in a number of ways: the physical impact is much more prolonged; the physical changes effected upon the body of the woman are extensive; and the woman is potentially placed in a health- or life-threatening situation. However, it is precisely this seriousness and enormity of effect that raise doubts about whether pregnancy, as described by McDonagh, is the kind of thing to which consent could reasonably be given.

If, as I will suggest, it is possible to treat all pregnancies, at least initially, as nonconsensual and therefore “wrongful”, on McDonagh’s model, then it follows that all fetuses are inescapably “rapists”, albeit without *mens rea*. Can an attack analogous to rape really be validated by *ex post facto* consent? If pregnancy begins as an uninvited, intrusive “rape”, how can the addition of consent transform it into something benign, even wonderful? These are the questions to which I turn now.

If we take the example of Scottish criminal law, we see that the courts there have held that consent is no defence to a charge of assault. In Scotland, in the case of *Smart v. H.M. Advocate*,<sup>142</sup> the court stated:

If there is an attack on the other person and it is done with evil intent that is, intent to injure and do bodily harm, then, in our view, the fact that the person attacked was willing to undergo the risk of that attack does not prevent it from being the crime of assault.<sup>143</sup>

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<sup>142</sup> [1975] S.L.T. 65 (H.C.J.).

<sup>143</sup> *Ibid.* at 66.

Of course, McDonagh recognizes that the fetus possesses no “evil intent” (as she puts it, “the fetus is innocent ... of conscious intentions”) and does not suggest for a moment that we are dealing with criminal conduct.<sup>144</sup> Nevertheless, since pregnancy is characterized in her model as a massive intrusion, it is pertinent to ask whether it is the type of intrusion that could be rendered benign by the presence of consent. McDonagh certainly does not consider her model to be incompatible with benign, “good Samaritan” pregnancy, or with the moral ideals of nurturing, caring, and relationships generally. She attempts to demonstrate this possibility of “consensual pregnancy” by way of yet another analogy, between pregnancy and live organ donation.

McDonagh points out that the law permits persons to consent to considerable physical intrusions that will leave them permanently physically depleted, and that may also place their health in great future danger, in order to benefit another person. Although the emotional benefit of knowing one has helped either to save the life of another person or to improve their quality of life dramatically cannot be ignored, donating one’s kidney to a patient in need of a transplant is, nonetheless, unquestionably of no physical benefit to the donor. Indeed, such a donor has endangered him or herself quite considerably in that any future disease or failure of the remaining kidney will now pose a much greater threat than it might have had he or she not donated. This analogy is potentially very promising as a support for the idea that pregnancy can be consensual despite its intrinsically invasive and physically dangerous nature.

Certainly, if the law permits us, under certain circumstances, to consent to having our bodies massively invaded and permanently depleted or endangered in order to provide sustenance to another, it seems likely that the law will also permit women to consent to donate their bodies to fetuses temporarily. However, this is where the analogy begins to break down. The law allows one person to consent to an invasion or harm chiefly for the benefit of another person; but, as has already been shown, McDonagh has failed to establish that the fetus is really a “legal person” in the relevant sense of having the status, rights, and dignity of a person under law. Her characterization of the legal personality of the fetus undermines her argument because she has concentrated only on the *neutral* aspects of fetal personality (how the personhood of the fetus does not negate the right of the woman to defend herself) and its *negative* aspects (how the fetus may plausibly be regarded as an “attacker”, an agent of harm). Ultimately, her treatment of fetal personality has not been authentic, since the legal personhood of the fetus is not central to her thesis, and is not necessary for the application of the two main premises of her model: the fetus as the cause of pregnancy; and the right of the woman to refuse her consent to a relationship with the fetus and to exercise her refusal by the use of deadly force.

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<sup>144</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 96.

A development of the organ-donation analogy demonstrates quite clearly how the lack of *authentic* fetal personhood in McDonagh's model places the possibility of consensual pregnancy in grave doubt. A woman may undoubtedly give her consent to surgery to remove one of her kidneys for donation to her daughter; however, could a childless woman with a family history of hereditary kidney disease opt to have a healthy kidney removed and kept in storage in case a future child required a transplant? It seems highly unlikely that such a procedure would be countenanced by medical practitioners, or that the woman's informed consent would be sufficient to establish its permissibility. Why? It could be argued that in the former case, there is a known need for the organ, and compatibility has been established, while this is not the case in the latter scenario. However, even if we expand the example of the childless woman such that she knows for certain that (1) she is fertile and intending to become pregnant, (2) any child she bears will definitely be affected by the hereditary disease, and (3) she would be a compatible donor, it is still difficult to imagine the law supporting her desire to have her healthy kidney removed, thereby debilitating herself and placing her life in danger.

I would suggest that the relevant difference between the two scenarios sketched above is that in the first scenario, the intended beneficiary is an existing person, whereas in the second scenario, there is no person yet in existence who could benefit from the "samaritanism" being proposed. McDonagh's account of pregnancy is more analogous to the second scenario than to the first since the fetus is not yet a legal person in the relevant, positive senses; it is not recognized as a being with a life as valuable as that of the woman donating her body to it, and thus endangering herself for its benefit.

My claim here, then, is that although the law will occasionally allow one person to volunteer to be endangered in order that another person may benefit, this permission is based on assumptions about the equal value of human lives and the social valuing of samaritanism when practised *between persons*. If persons attempt to engage in purported acts of samaritanism by endangering or disadvantaging themselves for the benefit of a creature that the law does not regard as the moral equivalent of a person, then it is doubtful whether this would be regarded as authentic samaritanism at all. The law cannot, of course, always intervene to prevent people from risking their lives to save a pet; however, we can be reasonably sure that such behaviour would not be encouraged. It is likely that people wishing to donate their kidneys to animals (were that biologically viable), or to children not yet in existence, would be dissuaded and ultimately thwarted by the refusal of the medical profession or the courts to support such a sacrifice, despite the presence of clear and authentic consent. In short, samaritanism must benefit someone, and it is doubtful whether the fetus would count as "someone" on McDonagh's model, given the emptiness and negativity of the "personality" she ascribes to it.

Although McDonagh fails in her own attempts to establish the possibility of benign pregnancy, there are other reasons to suppose that, even if pregnancy is a massive intrusion, it is the kind of intrusion that can be rendered benign and even valuable by consent. In the famous British case of *R. v. Brown*,<sup>145</sup> the issue under consideration was whether consent ought to be recognized as a defence to charges of assault in respect of injuries inflicted in the course of sado-masochistic sexual encounters. In his judgment, Lord Lowry opined that “it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason,”<sup>146</sup> and that “[s]ado-masochistic homosexual activity cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.”<sup>147</sup> As Lord Templeman noted, however, “the courts have accepted that consent is a defence to the infliction of bodily harm in the course of some lawful activities.”<sup>148</sup>

In his article “Consent, Sado-Masochism and the English Common Law”, Brian Bix discusses the kinds of activity to which, although potentially injurious, consent may nonetheless be given:

[I]n England, there are a variety of types of physical attacks or intrusions which, as a matter of common law, cannot constitute a criminal assault, usually because of some type of consent by the person being assaulted: boxing, “contact sports”, surgery, and rough horseplay.<sup>149</sup>

Bix analyzes the ability of consent to render intrusions lawful by reference to a number of criteria, the last of which is “the moral value or public value of the activity in question.”<sup>150</sup> Although Bix cautions that this criterion is “[susceptible] to bias in its application”<sup>151</sup> and should therefore “be considered only at the end, after the strong presumption in favor of liberty and autonomy [has] been considered,”<sup>152</sup> he concedes that it appears frequently “in one form or another, in the relevant judicial opinions.”<sup>153</sup>

The “public value” criterion does seem to go to the very heart of determining which behaviours will and will not be rendered lawful by consent, despite Bix’s insistence that other criteria should predominate. Monica Pa discusses how the consent defence operates to privilege certain “valuable” behaviours over other forms of activity that are not considered to be of social value:

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<sup>145</sup> [1994] 1 A.C. 212 (H.L.) [*Brown*].

<sup>146</sup> *Ibid.* at 254.

<sup>147</sup> *Ibid.* at 255.

<sup>148</sup> *Ibid.* at 234.

<sup>149</sup> Brian Bix, “Consent, Sado-masochism and the English Common Law” (1997) 17 *Quinnipiac L. Rev.* 157 at 164 [footnote omitted].

<sup>150</sup> *Ibid.* at 174.

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.* at 175.

<sup>153</sup> *Ibid.* [footnote omitted].

[I]f actual bodily injury occurs, no consent defense is [normally] available because a breach of the peace occurred, and the State has a compelling interest in punishing this behavior. The individual cannot consent to an injury inflicted against the community.

The consent defense is an exception to this general rule where public policy deems it worthy to protect a socially desirable activity.<sup>154</sup>

The key element in deciding whether or not something is the kind of activity to which consent is possible, then, would seem to be the value that society attaches to it. The judges in *Brown* regarded such determinations of value as matters of policy for the legislature to decide.<sup>155</sup> The implications for McDonagh's model of pregnancy are clear. First, consensual pregnancy would undeniably be regarded as "conducive to the enhancement or enjoyment of family life" and "conducive to the welfare of society", in Lord Lowry's words. Second, it would certainly be considered to be "in the public interest" for women to consent to pregnancy at least some of the time. Third and finally, given these considerations, we can conclude with some confidence that Parliament and the courts, having recognized the "moral and public value" of pregnancy and childbirth, would be willing to regard a woman's consent to pregnancy as rendering the pregnancy relationship lawful. As such, it is finally possible to refute the objection that McDonagh's model, in characterizing pregnancy as an attack, leaves no scope for consensual, benign instances of pregnancy.

However, all of this means only that pregnancy *could* be benign *if* consent were actually possible, practically speaking. I turn now to consider the possibility that this is not the case.

## 2. Is Consent to Pregnancy Really Possible?

The British case of *R. v. Olugboja*<sup>156</sup> hinged upon the difference between consent and "mere submission". In that case, the court drew the distinction as follows: "[T]here is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent."<sup>157</sup>

With this distinction between consent and mere submission in mind, it is clear that, on McDonagh's model, pregnancy cannot, at least initially, be consensual. Since, on that model, the woman can do nothing to prevent the fetus from attacking her by implanting itself in her uterus, consent to pregnancy is only possible retrospectively, once the woman is already pregnant; she cannot consent to become pregnant, only to *remaining* pregnant. Even then, her right to withdraw consent at any moment remains, so that it will only be possible to describe a pregnancy as "consensual" with any real

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<sup>154</sup> Monica Pa, "Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex" (2001) 11 *Tex. J. Women & L.* 51 at 64 [footnote omitted].

<sup>155</sup> *Brown*, *supra* note 145 at 245-46, Jauncey L.J.

<sup>156</sup> [1982] Q.B. 320 (C.A.).

<sup>157</sup> *Ibid.* at 332.

confidence once the pregnancy is over (unless, of course, the pregnancy ends in abortion). Moreover, no mutuality is possible. Since the fetus is characterized as an aggressor, we are not dealing with any kind of metaphorical “agreement” or “arrangement” between parties; we are being asked to understand pregnancy as a relationship between two parties wherein one party has the right to consent or refuse consent, but the issue of consent never arises for the other party.

In other areas of law, consent means something more than merely submitting to a pre-existing situation; for example, in medical law, the ideal of “informed consent” recognizes the right of patients to agree to or refuse medical treatment, having been given all the relevant information and been allowed the chance to weigh it and arrive at a decision *before* treatment commences. The patient’s right to consent entails a duty on the part of healthcare professionals to seek consent before attempting to provide treatment. Similarly, in contract law, parties to an agreement consent to the contractual terms in order for the contract to be constituted; they do not merely submit to the terms and thus acknowledge the agreement retrospectively. In these examples, to say that someone has consented, either to medical treatment or to the terms of a contract, implies that they had the option not to consent.

By contrast, in the context of pregnancy as McDonagh construes it, the pregnant woman has never had the option to give prior consent—she cannot prevent the fetal “attack” and the resulting pregnancy by refusing to consent to it. In addition, consent in the contexts of medical law and the law of contract refers to a relationship that, without being necessarily equal, has some possibility of mutuality—there is more than one active “party” with rights or responsibilities. In pregnancy, however, one party involuntarily imposes a condition upon another, who may, after the fact, choose either to submit to the condition or to repel it by destroying the accidental “aggressor”. The woman’s right to consent is not reflected in any duty on the part of the fetus to seek her consent before implanting itself in her uterus—the very idea is, of course, absurd. It is therefore difficult to see how this relationship can be consensual in its ordinary legal sense.

A related problem is the distinction between coercion and control that emerges from the slavery analogy McDonagh employs. The problem is that the legal definition of slavery offered by McDonagh herself refers not to “coercion”, but to “control”—there is no mention of the “will” of the slave, or of lack of consent.<sup>158</sup> Under this definition, then, slavery is still slavery even if the slave “consents” to it. This is so because, although coercion always entails an element of control, the reverse is not the case: control need not necessarily be coercive. This distinction between coercion and control is essential to the relevance of consent, a concept that is, of course, fundamental to McDonagh’s model. McDonagh describes pregnancy as an attack; it always begins as coercion, but this element of coercion may subsequently be removed by the addition of the woman’s consent. Control, on the other hand, is unaltered by

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<sup>158</sup> McDonagh, *Breaking the Abortion Deadlock*, *supra* note 1 at 74.



consent, even taking into account the Rousseauian notion of “agreeing to be bound”; one who agrees to be bound is bound—is *controlled*—nonetheless.

How apt, then, is the slavery analogy? Could the willingness of a slave to be a slave render the “slavery relationship” legally benign on account of its consensuality? If not, and if the analogy between pregnancy and slavery is a fair one, then why is it that the consent of a woman to be pregnant can render the pregnancy relationship benign? In fact, the analogy with slavery threatens to undermine the power of consent in McDonagh’s model by casting doubt on the notion of “benign, consensual pregnancy” altogether. In Western legal systems, slavery would never be recognized as a legitimate relationship between consenting parties. We are not permitted to “contract out” of our fundamental human rights. If pregnancy were to involve a similar alienation of personhood—even a temporary one—the law would struggle to recognize the possibility of benign pregnancy.

The above factors, taken in combination, imply that speaking about “consent to pregnancy”, or about a particular pregnancy as “consensual” or “nonconsensual”, seems inappropriate; rather, when the fetal “attack” meets no resistance from the woman, it seems more appropriate to describe her lack of resistance as “submission”, not consent. This is problematic mainly because it undermines the possibility of consensual pregnancy, as discussed earlier. But it is also problematic in another way: if pregnancy cannot be described as “consensual” until after it is complete, then all pregnancies are “voidable” relationships that may be terminated at any point, should the woman’s feelings change. This may have serious social consequences for our understanding of the nature of pregnancy. Pregnant women themselves, and society at large, may become wary of treating even a well-established and apparently consensual pregnancy as anything other than a “conditional” good, with family, friends, and the woman herself all reluctant to invest any emotional energy or expectation in something that may at any time be re-characterized as something coercive and therefore undesirable.

### 3. The Problem of Legitimation

A related criticism is that McDonagh’s model equates “consensual” with “good”, or “valuable”. I have already argued that her notion of “consent to pregnancy” is closer to submission than to our ordinary understanding of consent. Other commentators have responded to McDonagh’s argument by asking whether the authenticity of consent is what really matters.

Robin West notes that “[l]iberalism rests heavily, and in some versions exclusively, on the moral significance of consent.”<sup>159</sup> While she acknowledges that it is proper to condemn coercive and nonconsensual transactions, West also notes the danger that “[t]he consensuality of a transaction, transfer, event, distribution, or social

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<sup>159</sup> West, *supra* note 86 at 2137.

system, in liberal societies, inexorably comes to be viewed as not only a necessary condition of its justice or value, but a sufficient condition as well.”<sup>160</sup> The emphasis on consent above all else, she writes, means that “[t]hat which is consensual comes to be seen as both legal and good—consent comes to be our moral marker of what we value and should value, as well as our legal marker of what we criminalize.”<sup>161</sup> West is keen to show that consensual relationships can be damaging, too:

Women consent to events and transactions and arrangements all the time—day in and day out—that do us considerable harm: from marriages, to love affairs, to one-night stands, to unequal pay for comparable work, to sexually harassing work and school environments, to second shifts in the home, and to mommy tracks at work.<sup>162</sup>

We must therefore look beneath the consensual surface of relationships to discover whether the voluntariness they embody is authentic or not. West argues that caregiving such as that undertaken in pregnancy must be *authentically* consensual in order to be “good” and not harmful; McDonagh’s model, she claims, is guilty of overemphasizing the superficialities of consent, at the expense of this need for real voluntariness in the giving of care.<sup>163</sup>

These are powerful arguments. It is easy to imagine a number of reasons why women might submit to a pregnancy other than because they are undertaking the responsibility of caregiving with authentic voluntariness. The physical and emotional pressure exerted by the pregnancy itself can be tremendous. Hormonal fluctuations, feelings of responsibility or even guilt for causing the pregnancy (however misplaced McDonagh would regard these as being), social pressures, and the influence of traditional norms of pregnancy, motherhood, and femininity could combine quite powerfully to inhibit the ability of a woman to say “no” to the pregnancy relationship. As Monica Pa comments, “[l]iberal formulations of ‘consent’ ignore how patriarchal institutions create inequalities of power that make voluntary consent impossible.”<sup>164</sup> Furthermore, as Pa concludes, “[t]he question is not whether consent existed, but rather, the hows and whys of consent.”<sup>165</sup>

#### **D. Miscellaneous Criticisms**

##### **1. Late Abortions**

“[Another] problem with McDonagh’s theory,” according to Judith Scully, “is that it would permit abortions even in the final weeks of pregnancy—a result that the

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<sup>160</sup> *Ibid.* at 2138.

<sup>161</sup> *Ibid.* at 2139.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> Pa, *supra* note 154 at 88 [footnote omitted].

<sup>165</sup> *Ibid.* at 89.

majority of the American public probably would not support.”<sup>166</sup> Scully elaborates the point as follows:

McDonagh appears to argue that a woman’s right to withdraw her consent to pregnancy can be exercised at any time, even in the ninth month of pregnancy. This conclusion seems extreme, and it fails to adequately address the fact that, at some point in time, a fetus becomes viable and no longer needs to rely on a woman’s body for survival. If a fetus is a person and it has a right to life, then, at the point at which it becomes viable, it would seem appropriate to weigh its right to life against the continuing intrusion upon the woman’s bodily integrity ... Thus, at the point of viability, it seems reasonable to limit a pregnant woman’s ability to decide to terminate a pregnancy because she no longer consents to being pregnant.<sup>167</sup>

There are a couple of problems with this argument. First, although McDonagh treats the fetus as a “legal person”, she does so only in a negative sense, and does not ascribe to it all of the incidents of legal personality usually applied to human beings, such as a right to life. The problems inherent in her notion of fetal personality have already been addressed in Part III.A.4, above. Given that she does not recognize the fetus as a person in the strong sense of having a right to life, it is fair to assume that McDonagh would not accept any need to weigh the competing rights of fetus and mother at the point of viability.

Second, even if we were to accept that the fetus has a right to live, and that this right is not limited by its dependence upon the body of the pregnant woman after the point of viability, in order to grant it independent existence, it must first be delivered, either vaginally or by Caesarean section. If, on McDonagh’s model, a woman cannot be forced to undergo the intrusion of pregnancy against her will, then surely by the same logic she cannot be forced to undergo the intrusions of serious surgery or childbirth unwillingly? If a woman chooses abortion post-viability, it will be problematic to try to force her to undergo birth or Caesarean delivery instead; the latter procedures are distinct from abortion, and her right to consent to medical treatment surely means that she cannot be compelled to undergo one procedure instead of another.

A potential counter-argument is that, in the United States, the fetus is emerging as a “second patient” in medical law, raising the issue of balancing the woman’s refusal to consent to a Caesarean against the fetus’s right to life as a serious possibility. In the UK, this problem does not arise because several important cases have clarified the area, securing the right of the competent pregnant woman to consent or refuse consent to medical treatment, meaning that a competent patient cannot be compelled to undergo a Caesarean section against her will.<sup>168</sup>

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<sup>166</sup> Scully, *supra* note 103 at 147 [footnote omitted].

<sup>167</sup> *Ibid.* at 147-148.

<sup>168</sup> The leading case is *St George’s Healthcare NHS Trust v. S.*, [1998] 3 All E.R. 673 (C.A.).

## 2. Women's Well-Being

Judith Scully argues that

[b]y framing abortion as an act of war, McDonagh suggests that a woman's primary health concern should be elimination of the fetal attack, not her overall well-being. Within the self-defense framework, what right does a woman have to demand competent health care? In our attempts to advance the abortion debate, we must not lose sight of the fact that abortion is a medical procedure that is supposed to further the health interests of the woman.<sup>169</sup>

In other words, McDonagh's focus on repelling the fetal "attack", rather than on the welfare of women generally, ignores the need to secure state provision of safe abortions and good-quality backup services, such as pre-abortion counselling and aftercare. Scully points out that the "consent model" is incapable of discouraging certain things that are dangerous for women, such as unfettered access to abortion and repeated abortions, and criticizes it on the basis that it overlooks "the risk that women might use abortion as a regular form of contraception when indeed it should be used only as a last resort."<sup>170</sup>

This particular criticism of the consent model is unwarranted. The purpose of legal models of pregnancy is chiefly to provide better ways for lawyers and lawmakers to understand and adjudicate maternal-fetal issues; such models are addressed primarily to legal academics, judges and practitioners who are concerned with issues of legal coherence, clarity, and justification. They seek to provide frameworks for judicial decision making, not for decision making by women faced with unwanted pregnancies. When deciding whether or not to seek an abortion, a pregnant woman is likely to be concerned with her own health, perhaps the health of the fetus, her future prospects of motherhood, possibly her relationship with her partner and her extended family, her existing children, her financial situation, her career, and many other factors. When legislatures decide what abortion laws to have, or when judges decide how to dispose of a particular case involving maternal-fetal issues, it would be paternalistic of them to concern themselves with these factors in the same way. Public policy considerations are likely to play a part in their deliberations, but it would be inappropriate for a judge to decide a case on the basis that he thought a woman was simply wrong to choose an abortion in her circumstances. Because the issues and responsibilities of judges and the issues and responsibilities that pregnant women must contend with are quite different, it is perfectly possible to endorse a legal model that permits late abortions and repeated abortions so long as those educating and counselling women warn them of the dangers of taking full advantage of these legal rights.

Jurisprudence is not designed to educate women about their reproductive health, and Scully herself admits that the law should not be used to limit the number of

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<sup>169</sup> Scully, *supra* note 103 at 149.

<sup>170</sup> *Ibid.* at 148.

abortions a woman may have.<sup>171</sup> Health education programs aimed at encouraging women to practise contraception or abstinence, rather than relying on abortion as a means of dealing with unwanted pregnancies, are of course vital; however, there is no reason to suppose that the adoption by the courts of a consent model, rather than the orthodox conflict model, would be inimical to the success of such programs. Moreover, the health factors involved in pregnancy and the medical advice that is given accordingly will be the same whatever model the courts adopt. As such, public bodies' and health care professionals' duties to provide information and advice on reproductive health are not threatened by the prominence of one academic theory or another.

McDonagh's model certainly provides *legal* justification for abortion whether it be the first or fifth abortion a woman seeks; however, it is a fallacy to suggest that because the law permits greater access to abortion, women who are receptive to health education will not choose to avoid unwanted pregnancies in other ways. Just because women have a legal right to abortion does not mean that they will simply throw caution to the wind, become pregnant numerous times, and seek repeated abortions; there are overwhelming health reasons (and for many women, strong moral reasons) not to do so, and these reasons are likely to be at least as influential to women planning their reproductive lives as the legal rights they possess. As Scully notes, legal theory will inevitably (and very rightly) be complemented by measures designed to shape cultural attitudes and patterns of behaviour, since “[c]ommunity advocacy and public education are the keys to all successful social movements.”<sup>172</sup>

### 3. Masculinization of the Fetus

Despite McDonagh's assurances that her model avoids “dehumanizing” the fetus, the very way her model operates, and her use of language, combine to masculinize the fetus, regardless of its actual sex. As noted above, McDonagh has analogized wrongful pregnancy to the crime of rape, thus likening the fetus to the rapist—the paradigmatic perpetrator of masculine violence on women.<sup>173</sup> Elsewhere, she compares the fetus to a “slave master”.<sup>174</sup>

While she masculinizes the fetus, however, she simultaneously feminizes pregnancy. One aim of McDonagh's thesis is to redefine pregnancy as a relationship between a woman and a fetus—a relationship in which the male progenitor exists, at best, as a shadowy figure, either purely historical (the “genetic parent”) or in a kind of suspended animation until the birth of the child, when “social parenthood” can attach to him. This banishment of the masculine is evident in her discussion of how pregnancy begins, where McDonagh refers to the precursor of the fetus (prior to

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<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.* at 149.

<sup>173</sup> See text accompanying note 25.

<sup>174</sup> See text accompanying note 45.

implantation) as the “fertilized ovum”, choosing this term over “product of conception”, “conceptus”, “cytoblast”, “zygote”, or any of the other ungendered terms available to her. Of all the alternatives, “fertilized ovum” is the most effective in demasculating the event of conception and the beginnings of life. Pregnancy begins, on McDonagh’s model, quite literally on feminine terms.

There is a palpable tension in the juxtaposition of the feminine terminology of “fertilized ovum” with the masculine terminology of penetration, invasion, and injury used to describe the behaviour of this entity. In its behaviour, the fetus is decidedly masculine, performing the stereotypically patriarchal role of colonizing, terrorizing, and depleting a woman. The language McDonagh employs in these parts of her analysis echoes the idea of the fetus-as-monster, which appears elsewhere in the feminist canon.

In a fascinating essay, Ernest Larsen discusses Mary Shelley’s *Frankenstein* as a metaphor for pregnancy.<sup>175</sup> At the centre of the narrative, he tells us, is a “man-created monster”,<sup>176</sup> the “incarnation of phallic violence”.<sup>177</sup> Larsen writes that “[t]he tale exteriorizes pregnancy, making it into a momentous, exacting and, as described, incredibly disgusting feat that occurs in the laboratory of the young manly natural philosopher Frankenstein rather than in the natural laboratory of the womb.”<sup>178</sup> Larsen claims that Shelley is making a conscious link between “fetality” and “fatality”: “Mary Shelley ... can be credited with creating (giving birth to) the image of the fetus as monster, the fetus as revived corpse, the fetus as a pile of used body parts.”<sup>179</sup>

He goes on to describe the 1931 film of the novel as “fetal horror”, and quotes Garrett Hardin’s reference, in his 1974 book *Mandatory Motherhood*, to uses of fetal imagery by the pro-life movement:

Suppose the six-foot-tall projected picture of a twenty-four-week-old embryo came to life, stepped down off the screen, and walked toward you ... You would probably run screaming from the room. At that size the creature would look less like a human being than it would like the Man from Mars constructed for a horror movie.<sup>180</sup>

Having discussed *Frankenstein* and other Hollywood films in which women give birth to monsters, Larsen remarks:

The popularity of such images of the fetus as monster seems a repeated confirmation of what fetality might often feel like—an invasive experience of the monstrous—to the pregnant subject. Pregnancy, in such representations, subjugates the thematics of horror, contains the fantasy, nurtures it. That which is unknown or unknowable, unnamed or unnamable, unstable, but ever more

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<sup>175</sup> Ernest Larsen, “The Fetal Monster” in Morgan & Michaels, *supra* note 131.

<sup>176</sup> *Ibid.* at 237.

<sup>177</sup> *Ibid.* at 238.

<sup>178</sup> *Ibid.* at 237-38.

<sup>179</sup> *Ibid.* at 238-39.

<sup>180</sup> Garrett Hardin, *Mandatory Motherhood* (New York: Basic Books, 1974), cited in Larsen, *ibid.* at 239.

insistent, hidden from sight yet imperiously present to the body, is that thrilling territory of fear that marks out the site of horror. And all these qualities mark the fetus, *every fetus*, as a potential monster. ... Fetality contains horror, the expressive extremity of feeling that horror films sanction.<sup>181</sup>

Larsen concludes by reassuring the reader, lightheartedly, that “[t]he fetus—in the overwhelming number of cases—is not a monster. In the overwhelming number of cases it first has to be delivered into the world and then grow up to become one.”<sup>182</sup> Although Larsen seeks here to distance himself from the claim that “fetality” equals monstrosity by stating that this is not so “in the overwhelming number of cases”, he implicitly acknowledges that in some cases, the fetus *is* monstrous. This is hardly the kind of sentiment that requires no further justification, and while the rest of Larsen’s essay contains plenty of evidence that many representations of the fetus contain elements of the monstrous, nowhere does he provide any adequate explanation of why the fetus is so represented. He comes close a couple of times: first, when he traces the origins of Mary Shelley’s horrific “metaphor for pregnancy” to events in her own family history, such as death in childbirth and infant mortality, and to the general dangers inherent in pregnancy at the time when she lived and wrote; and second, when he suggests that Hollywood representations of pregnancy (and its aftermath) as horrific might reflect “what fatality might often feel like ... to the pregnant subject”.<sup>183</sup> At any rate, Larsen’s concluding minimization of fetal monstrosity remains unconvincing.

McDonagh’s model, and Larsen’s discussion, reveal that “personification” of the fetus as a “separate entity” with personhood or person-like characteristics does not always work to the fetus’s advantage. Ascribing person-like attributes to fetuses and embryos does not necessarily entail that they will be treated like born persons and afforded greater legal protection than is currently the case. On the contrary, they may be regarded as malign agents of injury—as “monsters”, even—to be repelled using deadly force. Claiming that the fetus ought to be regarded as a legal person may, in the end, turn out to be a bad strategic choice for opponents of abortion.

## Conclusion

McDonagh’s “consent model” is “innovative and provocative,” providing a “new way of thinking about women, pregnancy, and abortion rights,”<sup>184</sup> and several elements in her analysis represent valuable contributions to the literature on legal interventions in pregnancy. In particular, her emphasis on relationships rather than intrinsic moral status is to be welcomed, as it represents a significant shift in thinking

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<sup>181</sup> Larsen, *ibid.* at 240-41.

<sup>182</sup> *Ibid.* at 249.

<sup>183</sup> *Ibid.* at 240.

<sup>184</sup> Scully, *supra* note 103 at 143.

that seems to offer legal theory an escape route from the familiar intractable debates about the metaphysics of personhood and moral status.

Unfortunately, as promising as this approach may seem at first, it fails on account of major flaws in the way McDonagh employs such concepts as self-defence, causation, and consent. As Judith Scully has remarked, “McDonagh’s analysis ... leave[s] many questions unanswered.”<sup>185</sup> During the course of the present analysis, I have addressed these holes in her thesis, and demonstrated that, upon further scrutiny, the inadequacies of the consent model become even more apparent. Significantly, the failure of McDonagh’s attempt to discover a “purely legal” way of understanding fetal personhood lends credence to suggestions that legal notions of personhood are too thin and “cipherous” to provide solutions to maternal-fetal issues. This means that if we persist in framing such issues as conflicts of rights and interests, courts will continue to be forced to return, time after time, to the troublesome metaphysics of personhood and questions of the nature and moral status of life before birth—to the very source of the “abortion deadlock”.

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<sup>185</sup> *Ibid.* at 131.