Journal of Libertarian Studies
Volume 17, no. 3 (Summer 2003), pp. 1–16

www.mises.org

CONSENT, SEX, AND THE PRENATAL RAPIST

A BRIEF REPLY TO MCDONAGH'S SUGGESTED REVISION OF *ROE V. WADE*

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The abortion debate is often understood to hinge on the question of whether or not the fetus[1] is a full-fledged member of the moral community of persons and/or possesses a property or properties that make it the sort of being that it is prima facie wrong to kill. This is the position taken by Justice Harry A. Blackmun in *Roe v. Wade*[2] as well as

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We would like to thank Scott Klusendorf, Director of Bioethics, Stand to Reason, and an anonymous referee for their thoughtful comments and analysis that helped us to sharpen our arguments and make this a better article. We take full responsibility for all of its shortcomings.

[1]We use the term "fetus" in the popular sense as synonymous with "unborn." We are not using it in the technical sense of referring to the last stage in prenatal development after zygote and embryo. Thus, we are using the word fetus to refer to the unborn entity at all stages of its development prior to birth.

[2]Blackmun writes: "The appellee and certain amici argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus's right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." *Roe v. Wade*, 410 U.S. [1973] 113, 157–58.

partisans on all sides of the debate.[3] However, over the years, legal and constitutional theorists such as Judith Jarvis Thomson have put forth arguments by which they attempt to make the case that what is doing the moral work in the question of abortion is not fetal personhood but rather the bodily autonomy of the pregnant woman.[4]

Eileen L. McDonagh, in a provocative and sophisticated defense of this perspective, building on Thomson's work, proposes that we view pregnancy as an assault on the pregnant woman's body:

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[3]See, for example, Mary Ann Warren, "On the Moral and Legal Status of Abortion," in *Do the Right Thing: Readings in Applied Ethics and Social Philosophy*, 2nd ed., ed. Francis J. Beckwith (Belmont, Calif.: Wadsworth, 2002); Louis P. Pojman, "Abortion: A Defense of the Personhood Argument," in *The Abortion Controversy 25 Years After Roe v. Wade: A Reader*, 2nd ed., ed. Louis P. Pojman and Francis J. Beckwith (Belmont, Calif: Wadsworth, 1998); Michael Tooley, "In Defense of Abortion and Infanticide," in *The Abortion Controversy 25 Years After Roe v. Wade*; Francis J. Beckwith, *Politically Correct Death: Answer the Arguments for Abortion Rights* (Grand Rapids, Mich.: Baker, 1993); Baruch Brody, *Abortion and the Sanctity of Human Life* (Cambridge, Mass.: M.I.T. Press, 1975); Stephen Schwarz, *The Moral Question of Abortion* (Chicago: Loyola University Press, 1990); L.W. Sumner, *Abortion and Moral Theory* (Princeton, N.J.: Princeton University Press, 1980); and Don Marquis, "Why Abortion is Immoral," *Journal of Philosophy* 86 (April 1989).

[4]Judith Jarvis Thomson, "In Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (1971). See also Donald Regan, "Rewriting *Roe v. Wade*," *Michigan Law Review* 77 (1979); Laurence Tribe, *Abortion: The Clash of Absolutes* (New York: W.W. Norton, 1990), chap. 6; Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Belief* (New York: HarperCollins, 1993), pp. 257–58; David Boonin-Vail, "A Defense of 'A Defense of Abortion': On the Responsibility Objection to Thomson's Argument," *Ethics* 107, no. 2 (January 1997); and David Boonin-Vail, "Death Comes to the Violinist," *Social Theory and Practice* 23, no. 3 (Fall 1997).

Responses to Thomson's argument are plentiful, including Francis J. Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," *International Philosophical Quarterly* 32 (1992); Patrick Lee, *Abortion and Unborn Human Life* (Washington, D.C.: Catholic University of America Press, 1996), chap. 4; Keith Pavlischek, "Abortion Logic and Paternal Responsibilities: One More Look at Judith Thomson's Argument and a Critique of David Boonin-Vail's Defense of It," in *The Abortion Controversy 25 Years After Roe v. Wade*; and John T. Wilcox, "Nature as Demonic in Thomson's Defense of Abortion," *The New Scholasticism* 63 (Autumn 1989).

> 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. While it is not usual to think of pregnancy as an injury, that is exactly how the law already defines it when it is imposed on a woman without her consent. For example, when men or physicians expose women to the risk of pregnancy by means of rape or incompetent sterilization, and a pregnancy follows, the law clearly establishes that women have been seriously injured. The term the law uses for such a coerced pregnancy is wrongful pregnancy, and the law holds the perpetrators responsible for the injuries entailed by it. This book expands the concept of wrongful pregnancy to include what the fertilized ovum does to a woman when it makes her pregnant without her consent. It is the only entity that can make a woman pregnant, and when it does so without her consent, it imposes the serious injuries of wrongful pregnancy even if the pregnancy in question is medically normal. . . . [T]o the extent that the law protects the fetus as human life, the law must hold the fetus accountable for what it does.[5]

McDonagh is arguing that just as a woman may use lethal force to defend herself against a rapist (a person seeking to invade her body without her consent), this same woman may use lethal force to defend herself against a fetus (a person who has invaded her body without her consent). In fact, throughout her book, McDonagh repeatedly draws an analogy between nonconsensual sex (i.e., rape) and unwanted pregnancy, maintaining that the latter is morally indistinguishable from the former. So McDonagh, like Thomson, grants to abortion opponents the truth of their most important premise—the fetus is a human person—then argues that the premise is irrelevant since the anti-abortionist's biconditional premise—abortion is *prima facie* unjustified homicide if and only if the fetus is a human person—is mistaken. McDonagh suggests, by employing the jurisprudential logic of her case, that the

> policy inadequacies stemming from the *Roe* foundation for abortion rights can be corrected by restructuring the constitutional right to an abortion on an equal protection

[5]Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996), p. 7.

> foundation evoking a woman's right to consent-to-pregnancy rather than merely her right to choose an abortion.[6]

There are many ways that one may respond to McDonagh's argument, although in this brief essay we will raise two philosophical objections. First, we will argue by counterexample that explicit consent to pregnancy (or the lack thereof) is not sufficient for deciding the morality of an abortion. We hope to show that McDonagh's thesis, rather than justifying an abortion, can be employed to illustrate that pregnancy, unlike rape, is not a prima facie harm. At the very least, her position can be shown to be incompatible with, and even undermining to, what we believe are the moral intuitions behind the pro-choice position both popularly understood as well as upheld by the U.S. Supreme Court.

Second, we will argue that the rhetorical strength of McDonagh's case for her claim that consent-to-sex does not entail consent-to-pregnancy relies on moral intuitions that depend largely on a disputed philosophical anthropology.

TWO COUNTEREXAMPLES

Consider the following scenario. A young woman is involved in a car accident and is rendered unconscious by her injuries. She is brought to a hospital where, still comatose, she is examined by a doctor. While performing some tests, the doctor determines that the woman has been pregnant for several weeks. Furthermore, suppose that evidence comes to light to suggest that the woman is unaware of her pregnancy—perhaps her close friends know nothing of the pregnancy, her diary shows no knowledge of being pregnant, and so on.[7]

Adopting McDonagh's understanding of pregnancy as morally equivalent to rape or assault, what is the doctor's obligation to this unconscious patient? It would seem that, under these conditions, the doctor is morally required to perform an abortion to rid his patient of the "massive intrusion" being imposed upon her by her unborn offspring. After regaining consciousness, the woman would have to be

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[6]Eileen L. McDonagh, "My Body, My Consent: Securing the Constitutional Right to Abortion Funding," *Albany Law Review* 62 (1999), pp. 1059–60.

[7]For purposes of the thought experiment, we assume that she had no knowledge of the pregnancy while she was unconscious. Our conclusions, however, will only require that the physician have good reason to believe that the woman is unaware of her pregnancy.

told that she's undergone an abortion for a pregnancy of which she was not aware, for there was good evidence that no consent had been given and that she was under assault.

We submit that this conclusion, logically drawn, is grossly incompatible with our moral intuitions concerning pregnancy. It is hard to imagine that any doctor, in good conscience, would perform an abortion on this woman merely because he had no evidence that she had consented to the pregnancy. It is likely that those undergoing such an abortion would experience a tragic sense of loss; a sense of having been robbed of something precious in the pregnancy, something which, at the very least, deserved thoughtful consideration despite the difficulties of bearing a child. It is hard to imagine that a woman in such circumstances would not herself feel significantly violated. In other words, contra McDonagh, the abortion, not the pregnancy, would be more analogous to rape.

An anonymous referee suggests that "perhaps most recent" or ongoing consent may be an effective reply against our arguments. He writes:

> In the accident victim case, what matters is not whether the now-unconscious woman consented to pregnancy at the time of the conception, but whether she would consent to pregnancy now. If she would, then the doctor is not justified in proceeding with the abortion.

This reply may be consistent with the traditional pro-choice position, as we believe that it is, but it seems to miss the parallel between rape and pregnancy that McDonagh is trying to draw.

McDonagh's position compares pregnancy without consent to sex without consent, i.e., rape, a very serious charge. So to take McDonagh at her word, we identify a situation in which pregnancy occurs without consent in an unconscious patient; we then press the parallel: a man could be having sex with that same unconscious patient. In this light, it is hard to see how someone could dismiss the accident counterexample with the claim that what matters is whether the pregnant woman would consent to pregnancy now. To press the parallel, what matters is whether she would consent to sex now. Would anyone really allow a man to have sex with an unconscious woman? If not, though one would allow the pregnancy to continue, then this is evidence that McDonagh's parallel is ill-formed, which is precisely our point.

A traditional pro-choice advocate, sympathetic to the difficulties of this case, might respond to our accident-victim story by saying that the doctor should wait until his patient regains consciousness. To the

contrary, McDonagh reinforces the unfortunate conclusion we have drawn from the logic of her position:

> Some might suggest that the solution to coercive pregnancy is simply for the woman to wait until the fetus is born, at which point its coercive imposition of pregnancy will cease. This type of reasoning is akin to suggesting that a woman being raped should wait until the rape is over rather than stopping the rapist. Nonconsensual pregnancy, like nonconsensual sexual intercourse, is a condition that must be stopped immediately because both processes severely violate one's bodily integrity and liberty.[8]

Under McDonagh's thesis, the doctor in the midst of the situation, aware of the pregnancy in the absence of consent, must see it as the rape-in-progress of his unconscious patient. How could he do anything else but end the assault?

Someone may object to our use of the McDonagh quote by which we attempt to show that she would agree to performing an abortion on the unconscious woman. The objector may argue that the analogy we implicitly draw between waiting until the woman wakes up and waiting until the pregnancy comes to term seems forced. Such an objector might argue that the point of waiting until the woman wakes up is to see whether the pregnancy is voluntary, a reason that does not exist in the other case. But clearly in the analogy given above, where both women are unconscious during pregnancy or sex respectively, this reason exists in both cases. Therefore, this objection fails, for it relies on pro-choice intuitions, but those intuitions are contrary to McDonagh's argument.

Consider another counterexample to McDonagh's case. Imagine if a woman were raped by her husband's identical twin brother within five hours after having unprotected sex with her husband. Suppose that she and her husband engaged in sex for the express purpose of procreating a child. A month later she discovers that she is pregnant, but she does not know, and cannot know, if the child's father is her husband or the rapist. Would she be justified in having the abortion? Apparently not, according to McDonagh, for there would be a 50/50 chance that she would be killing an innocent person, someone whom

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[8]McDonagh, *From Choice to Consent*, pp. 11–12. Remember that coercive pregnancy, for McDonagh, is caused by the zygote's own implantation, and thus is not the result of rape or incompetent sterilization. It is wholly the "fault" of the fetus.

she consented to let live in her body. Yet, most pro-choice advocates would say that such an abortion would be justified because the fetus is not a person whether or not its father is the rapist.

Imagine that the police are able to identify the woman's rapist with only one piece of evidence: his DNA matches the DNA of the genetic material found on her person. The police subsequently arrest him, and he is convicted and given the death penalty. Suppose, however, that it is discovered several months later that the rapist and the husband are in fact two of three identical triplets, all of whom obviously have the same DNA. Assuming that the husband has been conclusively ruled out as the rapist, there is a 50/50 chance that the man on death row is the rapist. Would the state be justified in executing this man? Surely not, for there is a 50/50 chance of executing an innocent person. Consequently, if it is wrong to kill the man on death row, then it is wrong to kill the fetus without knowing whether it is truly the invited guest.

In reply to this counterexample, an anonymous referee writes:

> In the raped wife case, even if the fetus is her husband's and so was consented to at the time of conception, if the wife—on the grounds of her uncertainty as to whether the fetus is her husband's or the rapist's—withdraws her consent *now* to the pregnancy, she can seek an abortion.

This reply seems to misconstrue the analogy. Remember that the wife consented not merely to conceive a particular child, but to bring to term a particular child, a rights-bearing human being who is the desired fruit of a consensual union with her husband. He is not a "rapist," for he was an invited guest by both parties whose commingling resulted in his coming into being.

The death penalty, according to our laws and the moral principles we employ to justify them, is a punishment that can only be inflicted after a criminal defendant is allowed due process. If, for example, we were to discover, as in the above story, that there is a strong possibility that a convicted rapist about to be executed is innocent because of evidence not presented at trial, the state would not be justified in executing him, for the new evidence demands that there is still process due him. The convicted rapist is a *particular* individual who may or may not be guilty. Executing *him* without a new trial would be unjust, even if we found out after the execution that the state executed the guilty triplet.

In the same way, the child carried in the pregnant woman's womb may or may not be the invited guest. That uncertainty, rather than

justifying the abortion, requires abstaining from it, for appealing to the uncertainty of the unborn's identity as justification means that the pregnant woman would *not* have the abortion if she *knew* that the child was her husband's, just as the state would not execute the convicted rapist if it discovered that it was actually his triplet who committed the crime. When one's justification for acting is absent (i.e., the fetus is the rapist's child), then one is not justified in acting.

Because McDonagh concedes the full personhood of the unborn, withdrawing consent *now*, as the referee suggests, is not a real option,[9] for that fetus is a full-fledged member of the human community, no different in nature or rights than the woman that carriers her and the father who sired her. So, like the convicted rapist who may be her father, the fetus is entitled to due process.

If, however, McDonagh were to say in reply that the pregnant woman may withdraw her consent at any time even if she knows conclusively that the child is her husband's because bodily autonomy trumps all promises and the obligations entailed by them, then McDonagh's view reduces to an assertion of mere willfulness and nothing more. A consent that can be withdrawn at any time for any reason or for no reason—even if it results in the death of a mentally immature, rights-bearing, human being that one intentionally brought into existence and invited to be placed in a vulnerable position—is no "consent" at all. It is a will to power.

In the above two counterexamples, a consent-basis for deciding the morality of an abortion is clearly in opposition to the traditional pro-choice position as it is presented in the public square:

> A woman has the right to decide for herself when and whether to have a child. It means believing that women are moral decision-makers. It means believing that women can decide on their own, based on their personal beliefs,

[9]Of course, there could be countervailing reasons for justifying an abortion in a given case, even if one were to embrace a traditional pro-life position. For example, one could argue that when a continued pregnancy endangers a woman's life, then pregnancy termination is justified. But not because the fetus is not a person, and not because a woman has absolute autonomy over her body, but rather, because if the pregnancy continues it is likely that both will die, and since it is better than one should perish rather than two, morality justifies pregnancy termination. The intent is not to kill a human being, but rather, to save a life by a means that has the foreseeable side affect of killing another human being.

> health, and life circumstances, without government interference. And it means working toward a world where all women's reproductive options—whether it's motherhood, abortion, or adoption—are legal, safe, and accessible.[10]

McDonagh paints such a harsh picture of pregnancy, both biologically and morally, that compulsory abortion is demanded whenever the requirements for consent are not met (counterexample #1). On the other hand, McDonagh's concession of fetal personhood requires her to place so much emphasis on consent that her view may require carrying a pregnancy to term, even when traditional pro-choice philosophy would not (counterexample #2). The woman in either of the above scenarios could not be treated with pro-choice convictions; instead, she would be removed from the decision-making process for her own good. She could not decide on her own, based on her personal beliefs, health, and life circumstances, without interference. Instead, someone would decide for her, on the grounds that the prima facie harm of pregnancy (counterexample #1) or the sufficiency of consent (counterexample #2) requires interference in what the United States Supreme Court has called a matter involving one of "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [that] are central to the liberty protected by the Fourteenth Amendment."[11] In light of this, it is remarkable that McDonagh's work has been the subject of so much fanfare in pro-choice circles.[12]

Contra McDonagh, in the traditional pro-choice position there is a strong suggestion implicit that pregnancy is either a possible or prima facie moral good for the woman, one that may overshadow related difficulties, at least in a medically normal pregnancy. Pregnancy is significantly worthwhile at least to the extent that it demands the opportunity for serious moral decision-making. And this stands as a marked difference to McDonagh's analogies to rape, assault, or other bodily violations. After all, it is hard to believe that rape *could be* a moral good, whereas one can easily embrace a pro-choice position while maintaining that pregnancy is either a possible or *prima facie* moral

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[10]Planned Parenthood, *Pro-Choice Debate Handbook*, www.planned parenthood.org/politicalarena/Pro-Choice_Debate_Handbook.html, (9/29/99).

[11]*Planned Parenthood v. Casey*, 505 U.S., 833, 851 (1992).

[12]See the online transcript of "NOW Reframing Abortion Rights Briefing on 'Breaking the Abortion Deadlock, From Choice to Consent'," January 21, 1997, www.now.org.

good that could be trumped by other considerations (e.g., the rape in counterexample #2). Thus, from a traditional pro-choice perspective, pregnancy is a good that is minimally worthy of knowledge and the freedom to pursue that knowledge, that is, it demands recognition and reflection. A pregnancy in progress, despite its burdens upon the mother, invokes a deep understanding that something is happening that is or could be wonderful, that it is clearly not a prima facie harm and clearly not analogous to the evils of rape, assault, coercion, and the "expropriation of liberty."

CONSENT-TO-SEX AND CONSENT-TO-PREGNANCY

McDonagh makes a distinction between consent-to-pregnancy and consent-to-sex. The latter, in her judgment, does not entail the former, for if consent-to-sex entails consent-to-pregnancy, then there would be a tacit moral obligation on the part of the pregnant woman to care for, or at least not kill, the fetus. If this is the case, the best defense of abortion rights is to argue for the non-personhood of the fetus, something for which McDonagh does not want to argue. If the fetus is a not a person, then pregnancy does not entail the existence of a human person but merely the existence of a potential person. McDonagh, however, grants fetal personhood, and maintains that when pregnancy commences, a new human person has come into existence who did not exist prior to that moment. In order to justify the killing of this human person, then, McDonagh must argue that there is no tacit consent to caring for, or at least not killing, the child because consent-to-sex does not entail consent-to-pregnancy.

In order to make her case, McDonagh uses a number of analogies to make the point that we do not consent to an injury (e.g., pregnancy) even if we know that our actions (e.g., sex) negligently increase our risk of injury. To cite some examples: consenting to smoking cigarettes, living in an area known for hurricanes, or wandering into a forest occupied by grizzly bears does not mean that one is consenting to lung cancer, destruction to one's property, or becoming a meal. Analogously, consenting to sex does not mean that one is consenting to pregnancy.

We will raise only one objection here, even though one could marshal a number of criticisms of McDonagh's analogies on moral,[13]

[13]See, for example, Beckwith, "Personal Bodily Rights"; Lee, *Abortion and Unborn Human Life*, chap. 4; Pavlischek, "Abortion Logic and Paternal Responsibilities"; Wilcox, "Nature as Demonic in Thomson's Defense of Abortion"; and an essay sympathetic to, though critical of, McDonagh's

philosophical, and legal[14] grounds, including counter-analogies that appeal to intuitions that are consistent with an anti-abortion position. It seems to us that McDonagh's analogies "work" only because they presuppose a controversial philosophical anthropology that many reasonable people would find prima facie mistaken. If one can show that McDonagh's philosophical anthropology is controversial, then the moral intuitions that are grounded in it and to which she appeals in order to make her case are not prima facie correct. Let us explain.

Although McDonagh separates sex and pregnancy in her analysis, it is not clear to everyone that they are detachable-though-causally-related events, like wandering into a forest and being attacked by a grizzly bear. It seems reasonable to many people that sex is really part of pregnancy, since it is the act engaged in by agents from which pregnancy is the designed (though maybe not the desired) result. This is not the same as the way that lung cancer results from cigarette smoking. If one thinks of the human organism as a unified substance with certain natural purposes, then it seems correct to say that the *telos* (or purpose) of reproductive organs *is* reproduction (i.e., pregnancy), for sperm and ova seem designed for that very purpose. On the other hand, a cigarette is an artificial construct whose purpose is externally imposed upon it by an outside agent, its manufacturer. A cigarette is not a living organism, a unified substance, whose parts work together for a certain purpose because of its internal nature or essence. J.P. Moreland clarifies this notion when he writes that:

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perspective, Robin West, "Liberalism and Abortion," *Georgetown Law Journal* 87 (June 1999).

[14]For example, according to the prima facie case for negligence, one is liable for negligence if one (1) has a duty, (2) breached a duty, and (3) caused harm as a result of breaching the duty. One could argue against McDonagh in the following way: Since pregnancy is a foreseeable result of unprotected sex, and since for McDonagh a fetus is a human person, therefore, one who engages in sex has a duty to engage in due care so as not to bring into existence persons whose death due to abortion is foreseeable. There are a number of tort principles one could apply. For example, one could apply the Hand Formula —one is negligent when one does not act to prevent injury to another when the burden of prevention is less than the expected cost of the injury (*United States v. Carroll Towing Co.*, 159 F.2d 169 [2nd Cir. 1947])—or the responsibilities of a possessor of land for safety of trespasser, licensee, and invitee. See, generally, James A. Henderson, Jr., Richard N. Pearson, and John A. Siliciano, *The Torts Process*, 5th ed. (New York: Aspen Publishers, 1999), pp. 163–435.

> It is because an entity has an essence and falls within a natural kind that it can possess a unity of dispositions, capacities, parts, and properties at a given time and can maintain identity through change. . . . [Moreover,] it is the natural kind that determines what kinds of activities are appropriate and natural for that entity.[15]

Thus, to understand one's self and one's nature is to understand that one's sexual organs are designed for procreation. Once one understands and appreciates that, it seems that consent to sexual intercourse *does* entail consent to pregnancy whether or not one intends or desires such a state. Given this philosophical anthropology, and given McDonagh's concession that the fetus is a human person, one may look at McDonagh's case in another, less morally compelling, way: She maintains that it is permissible to engage in a pleasurable act whose design is to bring into existence a vulnerable, defenseless, and dependent human person, and if such a person comes into existence, one of the persons responsible for its existence and who is in a unique position to care and nurture it, can then destroy it without any justification except an act of will.

To put it another way, the mother, by virtue of the sexual act's reproductive purpose, consents to a process in which she plays a vital procreative, protective, and life-supportive role in relation to her unborn child—one that only she can fulfill. She has agreed to this knowing that doing so may put her child (a rights-bearing individual) in a vulnerable state of which he or she cannot opt out. "Withdrawing consent" only after a child comes to be and enters this vulnerable state from which he or she cannot escape would be unconscionable, for there was no child (and therefore no harm which could come to the child) at the time of consent, and it is only after another's existence and vulnerable state is realized that consent is withdrawn. This is like agreeing to take care of a neighbor's infant for the weekend, only to abandon her prior to her parents' return.

We could employ McDonagh's own comparison of a fetus to a mentally incompetent individual[16]—a comparison she uses to secure

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[15]J.P. Moreland, "James Rachels and the Active Euthanasia Debate," *Journal of the Evangelical Theological Society* 31 (March 1988), p. 86.

[16]McDonagh comments: "From the standpoint of the law, it is not necessary that you intend to harm in order for it to be recognized that you are causing harm. For example, some people who are born are legally viewed as being mentally incompetent because they are under the influence of drugs, or they

her claim to self-defense even when an assailant (i.e., the mentally ill individual or a fetus) is not responsible for his/her actions—to show a similar difficulty. Imagine inviting a mentally ill individual into a room with yourself, locking the door, and having prior knowledge that the individual *would* (without exception), under such conditions, make an attempt on your life.[17] Then, after defending yourself with lethal force, could you claim justifiable self-defense? If not, then neither can McDonagh claim that abortion is justified if either (a) consent to providing shelter and sustenance to the preborn entity is simultaneous with sex (pregnancy being a motivator for the sexual act, as in counterexample #2), or (b) consent to providing shelter and sustenance to the preborn entity is implicit in sex, consistent with a teleological view of human sexuality.

McDonagh may want to reject this alternate philosophical anthropology, and maintain that the human being is merely a collection of parts, a property-thing, like a car, computer, or cigarette, with no nature, essence, or natural purposes, that there are literally no such things as "reproductive organs" as such. But it is not clear how McDonagh can do so, given her reliance on notions such as "rights," which she seems to believe are essential moral properties that human beings (especially pregnant women) have prior to government (that is, by nature). This seems to imply that when human beings are denied their rights by government, they are not being treated in a way that is in accordance with their natural purpose (i.e., human beings are beings such that they have rights that ought to be respected by the state).

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are insane or they are mentally retarded, or for some other reason. And although mentally incompetent born people would be viewed as legally innocent of causing harm, because they do not have the ability to have intentions or control of their behavior, that does not mean they do not actually have great power to cause harm to others. So, if a born person who is incompetent were to attack you, we would all agree that such a person is innocent of any intentions of hurting you, yet such a person would still be able to hurt you a great deal, and the law would try to stop a mentally incompetent born person from hurting you, even though such a person intends no harm. The analogy with preborn life would be similar." See "NOW Reframing Abortion Rights."

[17]Not that we agree with McDonagh's illustration, for this too misconstrues the nature of pregnancy, in our opinion. The point is that even with McDonagh's position fully in play, the result is that an abortion under these conditions is unacceptable, morally and legally.

McDonagh may respond by saying that human beings do have a natural purpose but only when it comes to rights and not when it comes to sex and pregnancy. She may *say* that, but it is unclear how she can have it both ways philosophically, once she grants teleology as an appropriate category by which to reflect on the nature of human persons. Once teleology is allowed in, it is difficult to deny that sex as part of pregnancy seems prima facie correct. Even if one were to deny the metaphysical foundation that some believe grounds sex as part of pregnancy, one would have to admit that the belief that sex is part of pregnancy is *at least* as well grounded a moral intuition as McDonagh's analogy that a physically dependent human person (the fetus) is like a cancer, hurricane, or hungry grizzly bear.[18]

CONCLUSION

McDonagh takes a drastically one-dimensional view of pregnancy, exploiting its hardships to the point of implicitly advocating compulsory abortion. Her reliance upon consent may also, under certain circumstances, require carrying a pregnancy to term—what some pro-choice advocates would term "compulsory pregnancy." In so doing, McDonagh has provided for us a medium by which to discover the possible or prima facie good inherent in pregnancy, a good that cannot be reduced to mere consent. In addition, to ground her separation of consent-to-sex and consent-to-pregnancy, McDonagh relies on moral intuitions which depend on a disputed philosophical anthropology over which many reasonable people disagree.

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[18]One may raise, as one referee has, several objections to our suggested alternative to McDonagh's teleology (or dysteleology) of human sexuality. We do not dispute that there are difficult questions that this viewpoint's proponents must address, but that misses the point of our analysis. All we are trying to do is to show that McDonagh does not a have a prima facie case, which means that our burden is minimal. In order to meet this burden, we merely have to show that it is reasonable (*not* rationally required) to believe a view that maintains that procreation is part of the purpose of sexual intercourse. We believe we have done that.

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