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Scully, Judith A.M.

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BOOK REVIEW

BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT. By Eileen L. McDonagh. New York: Oxford University Press, 1996.

Judith A.M. Scully*

ABSTRACT

In her 1996 book, *Breaking the Abortion Deadlock: From Choice to Consent*, Eileen L. McDonagh reframes the abortion debate in terms of the relationship between a pregnant woman and the fetus that intrudes upon her body against her will. Drawing upon familiar concepts of consent and self-defense, McDonagh argues that a woman who does not consent to pregnancy is justified in the use of deadly force to protect herself against the unwanted fetus. McDonagh further argues that the Due Process and Equal Protection Clauses of the United States Constitution require the state to assist women facing nonconsensual pregnancies in stopping the aggressive occupation of their bodies against their will. By placing the issue of consent at the center of the pregnancy relationship, McDonagh circumvents the traditional debate over fetal personhood while constructing a provocative argument for mandatory government funding of abortions.

In this Review, Professor Judith A.M. Scully outlines McDonagh's innovative approach to the abortion debate, and she applauds its potential to free women from compulsory pregnancy and parenthood. However, Scully criticizes McDonagh's failure to resolve the question of fetal personhood, and the attendant contradiction in her refusal to accord any rights to the fetus that she characterizes as an aggressive assailant. Scully further asserts that McDonagh's focus on abortion as self-defense may obscure, or even prevent, efforts to ensure the safety of abortion as a medical procedure and to promote women's overall health and well-being.

* Associate Professor of Law, West Virginia University College of Law. B.A., University of Chicago, 1983; J.D., George Washington University National Law Center, 1986.

Scully ultimately concludes that McDonagh's theory falls somewhat short of "breaking the deadlock" in the abortion debate.

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I. INTRODUCTION

Eileen McDonagh's *Breaking the Abortion Deadlock*¹ is probably the most controversial contribution to the abortion debate since *Roe v. Wade*.² Her analysis presents a new way of thinking about pregnancy, women, and a woman's right to autonomy and bodily integrity.³

McDonagh implies that a fetus may be a human being and that abortion may be murder, but surprisingly, given these premises, her analysis is firmly planted in the garden of pro-choice politics. Her unorthodox approach to a woman's right to terminate a pregnancy rests on the following principles that many will find shocking:

1. EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996).

2. 410 U.S. 113 (1973).

3. The United States Supreme Court first articulated the right to bodily integrity over a century ago, explicitly noting that such a right is fundamental to the common law: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (refusing to order a plaintiff in a tort action to submit to a surgical examination).

More recently, Justice Stevens, in *Planned Parenthood v. Casey*, 505 U.S. 833, 915 (1992), declared, "One aspect of [a woman's constitutional interest in liberty] is a right to bodily integrity, a right to control one's person."

- (1) Men do not cause pregnancy. Fertilized ova do. Consequently, consenting to sex with a man is not the same thing as consenting to a pregnancy caused by a fertilized ovum.
- (2) When a fetus implants itself in a woman's womb without her consent, using her blood, organs, and other parts of her body for purposes of its survival, it commits an aggressive act similar to kidnapping, rape, or slavery.
- (3) Because a woman facing an unwanted pregnancy is confronted by an aggressor that occupies her body, she has the right to defend herself by terminating the pregnancy.

McDonagh's theory is daring, and she admits that "[f]ew people are going to be comfortable with the idea that the fetus is not innocent but instead aggressively intrudes on a woman's body so massively that deadly force is justified to stop it."⁴ She acknowledges that women who embrace her abortion-as-self-defense theory run the risk of being portrayed as "antimothers," or "monsters who kill their children."⁵

"It is assumed," McDonagh states, "that to be a mother, if not a woman, entails sacrificing and giving yourself to others, including giving oneself to a fetus when pregnant. Consequently, [when a woman refuses to] sacrifice herself for the benefit of potential life,"⁶ she is viewed as antimother, antiwoman, antinature, and just plain evil. Contrary to the sweeping generalization that all women who seek abortions are evil, McDonagh points out that, for some women,

abortion stems from a desire to fulfill their traditional role as good mothers. They base their decision on whether they have the resources, emotional and economic, to be a good mother to children they already have and to children that will be born. When they feel they lack such resources, they would rather bring no child into the world than bear one that will jeopardize the lives of others or will suffer from a lack of attention and care.⁷

My childhood babysitter was such a woman. In 1969, when I was seven years old, abortion was illegal in the state of New York. My thirty-seven-year-old babysitter became pregnant. She was already the mother of two children, one of whom was severely disabled. This child presented such an emotional, financial, and intellectual challenge to his mother that she could not

4. McDONAGH, *supra* note 1, at 192.

5. *Id.*

6. *Id.* at 19-20.

7. *Id.* at 191.

bear the thought of having another child. She died from a wound resulting from a self-induced abortion.

It was not until many years after her death that I knew the truth about what had happened. At the time of her death, I was told that my babysitter had stepped on a thorn in her rose garden that had infected her blood and eventually killed her. Since she was considered to be a "good mother," it was difficult for the community to admit that she was found lying on a cold bathroom floor hemorrhaging from knitting needles inserted in her uterus in an attempt to eliminate an unwanted pregnancy. No one wanted to speak the truth about what had happened because to do so would have required the community to admit that even "good mothers" sometimes desperately wanted to have abortions, and that they would risk their lives trying to get one.

Two years after my babysitter died, in 1971, the state of New York decriminalized abortion. Shortly thereafter, the United States Supreme Court rendered its decision in *Roe v. Wade*,⁸ holding that a woman has a constitutional right to privacy which includes a limited right to terminate a pregnancy. Specifically, *Roe* held that, at and subsequent to the point of fetal viability,⁹ the state is free to prohibit abortion altogether, except where it is necessary for the preservation of the woman's life or health.¹⁰ During the second trimester (from approximately the thirteenth to the twenty-fourth weeks), the state may regulate the abortion procedure in ways that are reasonably related to maternal health.¹¹ The Court further stated that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician."¹²

Justice Blackmun concluded in *Roe* that the "right to privacy . . . founded in the Fourteenth Amendment's concept of personal

8. 410 U.S. 113 (1973).

9. Viability is the point at which a fetus is capable of life outside a woman's womb. *Roe*, 410 U.S. at 160 (citing L. HELLMAN & J. PRITCHARD, *WILLIAMS OBSTETRICS* 493 (14th ed. 1971)). At the time that *Roe* was decided, a fetus was capable of meaningful life outside the woman's womb at about 28 weeks or the beginning of the third trimester. Since then, advances in medical technology have pushed viability back to 24 weeks. See MCDONAGH, *supra* note 1, at 25 (citation omitted). See also *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 554 n.9 (1989) (citing Brief for Amer. Med. Assoc. as *Amici Curiae*).

10. 410 U.S. at 163-64.

11. *See id.* at 164.

12. *Id.* In practice, the effect of placing the abortion decision in the hands of the physician is that, unless a woman can find a doctor willing to perform the abortion, she effectively has no right to obtain one.

liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."¹³ However, the right to privacy in which Justice Blackmun located the right to terminate a pregnancy is unstable, because it is implied, but not explicit, in the Constitution.¹⁴ It is a judicially created right that has caused much controversy¹⁵ and may be diminished or rendered less meaningful at any time.¹⁶

Although *Roe* represented a victory for the pro-choice movement, in the twenty-four years since the Court handed down its decision, it has become apparent that the legal rhetoric involving "choice" and "privacy" has not protected the right of most women in the United States to terminate their pregnancies.¹⁷

13. *Id.* at 153. As defined by *Black's Law Dictionary*, the right to privacy is that right which "prevents governmental interference in intimate personal relationships or activities" and grants the individual the freedom to make "fundamental choices involving himself, his family and his relationship with others." BLACK'S LAW DICTIONARY 1195 (6th ed. 1990).

14. The Fourteenth Amendment does not explicitly refer to a "right to privacy." It simply states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, § 1.

15. The fact that the right to privacy is controversial is evidenced by the Court's inability to reach a consensus on what rationale supports it. *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (5-4 plurality opinion; 5 separate opinions); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (7-2 plurality opinion; 5 separate opinions); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (6-1 plurality opinion; 2 justices took no part; 4 separate opinions); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (7-2 plurality opinion; 6 separate opinions).

16. The Court's first application of privacy law to reproductive issues appeared in *Griswold v. Connecticut*, 381 U.S. 479 (1965). *See* Lackland H. Bloom, Jr., *The Legacy of Griswold*, 16 OHIO N.U. L. REV. 511, 512 (1989) ("If *Griswold* is remembered for one thing, it is surely for having effectively given birth to the concept of an independent constitutional right of privacy."). A few years later, in *Eisenstadt v. Baird*, 405 U.S. 438 (1972), the Court extended the application of the privacy doctrine to protect the right of unmarried individuals to use contraception.

Since then, however, the Court has limited the right to privacy. *See, e.g., Bowers*, 478 U.S. 186; George W. M. Thomas, Note, *Privacy: Right or Privilege: An Examination of Privacy After Bowers v. Hardwick*, 39 SYRACUSE L. REV. 875, 890 (1988) ("The *Bowers* decision represents a significant narrowing of the Court's conception of the right of privacy."); G. Sidney Buchanan, *The Right of Privacy: Past, Present, and Future*, 16 OHIO N.U. L. REV. 403, 510 ("[T]he present Court is in the process of limiting and even contracting the right of privacy.").

For further discussion of the erosion of the right to privacy, see Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 327 (1991).

17. In 1992, in *Planned Parenthood v. Casey*, 505 U.S. 833, the Supreme Court rolled back constitutional protection for abortion rights. The Court held that states may impose restrictions on abortion so long as they do not unduly burden a woman's right to choose. 505 U.S. at 837. "Following the *Casey* decision, legislation to

For example, low-income and no-income women have limited access to abortion services because shortly after *Roe* was decided, the federal government and several state governments enacted legislation refusing to provide funding for abortions.¹⁸ Teenagers also have limited access to abortion as a result of parental notification and consent laws.¹⁹ In addition, access to abortion services has been severely limited by the fact that medical students are not being taught how to perform abortions, which has resulted in a shortage of adequately trained doctors.²⁰ Bomb threats, intimidation, protests, and murders of doctors at abortion clinics by so-called "pro-lifers" further diminish the number of women who are actually able to choose to terminate a pregnancy.²¹

make abortion more difficult for a woman to obtain has been introduced in nearly every state. In addition to public funding bans and parental consent and notice laws, states are now permitted to impose mandatory waiting periods." NATIONAL ABORTION AND REPRODUCTIVE RIGHTS ACTION LEAGUE (NARAL) AND THE NARAL FOUNDATION, WHO DECIDES? A STATE-BY-STATE REVIEW OF ABORTION AND REPRODUCTIVE RIGHTS iii-iv (5th ed. 1995).

18. In 1977, just four years after the *Roe* decision, Congress passed the Hyde Amendment prohibiting Medicaid funding for abortions. This restriction has prevented many poor women from having abortions and has caused other poor women to delay having abortions while they raise the necessary funds for the procedure. Laurie Nsiah-Jefferson, *Reproductive Laws, Women of Color and Low-Income Women*, in REPRODUCTIVE LAWS FOR THE 1990s 23, 26 (Sherill Cohen & Nadine Taub eds., 1989).

"Currently, the use of federal Medicaid funds is prohibited unless an abortion is necessary to save the woman's life or the pregnancy is the result of rape or incest. Only twelve states and the District of Columbia currently provide local funds for Medicaid abortions." NARAL AND THE NARAL FOUNDATION, PROMOTING REPRODUCTIVE CHOICES: A NEW APPROACH TO REPRODUCTIVE HEALTH 30 (1994) [hereinafter PROMOTING REPRODUCTIVE CHOICES].

19. "Under the guise of promoting family communication and of protecting pregnant teenagers, many states have passed some form of legislation mandating parental involvement with the minor's abortion decision." ACLU REPRODUCTIVE FREEDOM PROJECT, PARENTAL NOTICE LAWS: THEIR CATASTROPHIC IMPACT ON TEENAGERS' RIGHTS TO ABORTION 1 (1986). These laws force teenagers to either forgo abortion as an alternative to unwanted pregnancy or delay their abortion decisions until after the first trimester, thereby increasing the risks to their health and well-being.

20. See PROMOTING REPRODUCTIVE CHOICES, *supra* note 18, at 26. Only 12% of residency programs in obstetrics-gynecology include abortion training in first trimester abortions, and only 7% provide training for second trimester abortions. *Id.* (citing Helene Cooper, *Medical Schools, Students Shun Abortion Study*, WALL ST. J., Mar. 12, 1993, at B1).

21. Since 1977, opponents of choice have directed almost 2,000 reported acts of violence toward abortion providers. In addition, they have committed more than 16,000 acts of clinic blockades, bomb threats, harassing phone calls and other disruptions. *Incidents of Violence & Disruption Against Abortion Providers, 1997*, MEMBERSHIP NEWS, (Nat'l Abortion Fed'n, Wash., D.C.), July 24, 1997.

The right to an abortion is an elusive one that is being chipped away piece by piece.²² Since *Roe v. Wade* was decided in 1973, many women in the United States have lost access to abortion services.²³ It is apparent that *Roe* did not guarantee a woman's right to *have* an abortion, it merely guaranteed her right to *choose* to have one. Consequently, although *Roe* made abortion legal, it did not make abortion accessible or available. In fact, it would be more accurate and honest to say that *Roe* guaranteed nothing to many women other than the right to *think* about having an abortion.

McDonagh attempts to address this issue. Her abortion-as-self-defense theory includes an analysis of why she believes that the Due Process and Equal Protection Clauses require the government to provide fully-funded abortions to all women. She argues that a woman who faces the aggressive takeover of her body by a fetus is entitled to the state's assistance in fending off the attack. Furthermore, if the state wishes to define the fetus as a human being, then the fetus's attack must be stopped by the state just as any other assault and battery would be. Because the state's only option in stopping the fetus's illegal intrusion is abortion, the state must provide funding for all women who seek abortions just as it endeavors to protect all human beings from intrusions on their bodily integrity.

Although McDonagh's analysis of these issues leave many questions unanswered, she deserves credit for attempting to develop a legal theory that would protect the rights of all women

22. In a series of cases decided in 1977, the U.S. Supreme Court ruled that it is constitutional for a state to deny funding and access to public hospitals to help women obtain abortions in medically normal pregnancies. See *Beal v. Doe*, 432 U.S. 438 (1977); *Maher v. Roe*, 432 U.S. 464 (1977); *Poelker v. Doe*, 432 U.S. 519 (1977).

In *Webster v. Reprod. Health Services*, 492 U.S. 490 (1989), the Court ruled that it is constitutional for a state to prohibit the use of all public facilities, public personnel, and public funds for abortions not necessary to save a woman's life.

In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court ruled that it is constitutional to prohibit even the discussion of abortion as part of federally funded family planning programs.

23. In the United States, women cannot obtain legal abortions in 83% of counties, 93% of non-metropolitan areas, and 51% of metropolitan areas. In all of North and South Dakota, for example, there is only one abortion provider. Clinics in many areas are increasingly forced to rely on "circuit riders," physicians willing to fly and drive hundreds of miles to serve women who live in areas where no doctors are willing to perform abortions. PROMOTING REPRODUCTIVE CHOICES, *supra* note 18, at 26 (citing Sandra G. Boodman, *The Death of Abortion Doctors*, WASH. POST, Apr. 20, 1993, Health Sec. at 7; Sandra G. Boodman, *A Firm Belief That "What Goes Around Comes Around,"* WASH. POST, Apr. 8, 1993, at A16).

whose bodily integrity has been compromised by an unwanted pregnancy.

In Part II of this Review, I will examine McDonagh's theory of consensual pregnancy. In Part III, I will describe McDonagh's theory of wrongful pregnancy as a legal injury imposed upon women by an unwanted fetus, and I will examine her theory of self-defense as it pertains to nonconsensual pregnancies. In Part IV, I will explain McDonagh's abortion funding argument in detail. Lastly, I will argue in Part V that although McDonagh's abortion-as-self-defense theory provides a new way of analyzing the right to abortion, it does not, as the title of her book suggests, break the deadlock in the abortion debate.

II. CONSENSUAL PREGNANCY

At the core of the question of whether a woman has the right to terminate a pregnancy is the perception of what a woman's role in society should be. Our society considers childbearing to be the duty of all women because women and only women have the capacity to give birth. Included in this view are the following assumptions: (1) that *all* women are ready, willing, and able to procreate, and (2) that women are natural nurturers and should therefore be primarily responsible for childrearing. Thus, in the United States, as in most societies, biology provides a central justification for the subjugation of women: because women have the potential to give birth and raise children, it becomes impossible for a "proper woman" to choose *not* to do so.

Unfortunately, the laws of this country do not recognize that, although the ability to bear children is indeed a blessing to some women, it is simultaneously burdensome to health, mobility, independence, and sometimes to life itself. And in some cases, the law creates additional burdens.²⁴

Instead of viewing procreation as a woman's natural role in society, McDonagh suggests a different paradigm. She asserts that women who consent to carrying a pregnancy to term should be viewed as "good samaritans" who "donate their bodies and

24. See *Chambers v. Omaha Girls Club*, 629 F. Supp. 925 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987) (firing of African American woman when she became pregnant was justified under bona fide occupational qualification and business necessity defenses). See also BARBARA LINDEMANN & PAUL GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 437-56 (Paul W. Cane, Jr. et al., eds., 3d ed. 1996). "Certain employment policies and practices related to childbearing have placed unique burdens on female employees." *Id.* at 437.

liberty to needy fetuses so that new lives may be born.”²⁵ In other words, she suggests that some moral credit be ascribed to a woman for her contribution to society in fulfilling the role of mother. However, McDonagh cautions against “*requiring* women to be good samaritans by giving themselves to fetuses.”²⁶ In fact, McDonagh argues that women have a right to refuse to donate their bodies to a fetus in the same way that they may refuse to donate blood or a kidney to another person.²⁷

Opponents of abortion would argue that a woman has a moral responsibility to carry a pregnancy to term, particularly when she engages in consensual sex that results in a pregnancy.²⁸ In response to this assertion, McDonagh contends that there are two relationships involved in reproduction: a sexual relationship between a man and a woman, and a pregnancy relationship between a fetus and a woman. She argues that the issue of consent arises in each relationship: a woman has a right to consent to the way in which a man intrudes on her body and liberty when he has a sexual relationship with her, and she also has a right to consent to how a fetus intrudes on her body and liberty in a pregnancy relationship. Just because a woman consents to one relationship does not mean that she consents to the other. McDonagh states:

Recasting abortion rights in terms of a woman’s right to consent to what the fetus does to her body will show that the fundamental liberty at stake in the abortion debate is not merely women’s right to choose what to do with their own bodies but, more important, their right to consent to what another private party, the fetus, does to their bodies and their liberty when it makes them pregnant.²⁹

According to McDonagh, to properly separate sexual intercourse from the pregnancy relationship, it is important to “understand not only what the fetus does to a woman in pregnancy

25. McDONAGH, *supra* note 1, at 10.

26. *Id.* at 10-11.

27. *Id.* at 11 (citing Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); F.M. KAMM, *CREATION AND ABORTION: A STUDY IN MORAL AND LEGAL PHILOSOPHY* (1992)).

28. In *Doe v. Bolton*, 410 U.S. 179, 208 (1973), Chief Justice Burger referred to “nonconsensual pregnancies” as “those resulting from rape and incest.” Similarly, the Hyde Amendment embraced this distinction between consensual and nonconsensual pregnancies when it prohibited the use of federal funds to reimburse the cost of abortions under the Medicaid program *except* under specified circumstances, one of which was when women are the “victims of rape or incest.” McDONAGH, *supra* note 1, at 28 (citation omitted).

29. McDONAGH, *supra* note 1, at 39.

but also what the man does not do."³⁰ First and foremost, it is McDonagh's contention that men do not cause pregnancy. She states that although sperm is a necessary ingredient to a woman's pregnant condition, the act of depositing sperm inside a woman's body does not in and of itself ensure that she will become pregnant. Men cannot and do not control whether their sperm will fuse with an ovum. "For this reason," McDonagh argues, "it does not make sense to say that men cause conception, much less that men cause pregnancy."³¹

McDonagh explains in detail:

The sperm may or may not move to the site of fertilization. An ovum may or may not also move to the site of fertilization. Even if sperm and ovum do move to a common site of fertilization, they may or may not unite. And even if an ovum and a sperm unite, the fertilized ovum may or may not move to a woman's uterus, much less implant itself there.³²

....

Researchers point to how it is the timing of sexual intercourse in relation to women's ovulatory cycles, not sexual intercourse per se, that is the important factor for predicting whether pregnancy will ensue. An ovary of a fertile woman releases an ovum approximately once every twenty-eight days The only time, therefore, that a woman's body has an ovum in it that can join with a sperm is on the day of ovulation when an ovary has released an ovum. For this reason, "[c]onception can occur only near the time of ovulation."³³

....

What this means is that for all but six days of a woman's ovulatory cycle, the probability is zero that conception will follow sexual intercourse. . . . The probability that conception will follow sexual intercourse is only .10 when intercourse occurs five days before ovulation and is a maximum of only .33 for the one day of the month when ovulation itself actually occurs. This means that even when women engage in sexual intercourse at the absolutely most maximum probable time for conception to occur, the one day of ovulation, it does so only for 33 out of 100 women. What is more, conception itself does not always lead to a sustained pregnancy. Even when conception does occur, only two-thirds of those conceptions followed in a controlled study culminate in a live birth. The probability

30. *Id.*

31. *Id.* at 42.

32. *Id.* (citing LEON SPEROFF ET AL., *CLINICAL GYNECOLOGIC ENDOCRINOLOGY AND INFERTILITY* (5th ed. 1994)).

33. *Id.* at 51 (quoting Allen J. Wilcox et al., *Timing of Sexual Intercourse in Relation to Ovulation: Effects on the Probability of Conception, Survival of the Pregnancy, and Sex of the Baby*, 333 *NEW ENG. J. MED.* 1517 (1995)).

that a sustained pregnancy will be subsequent to sexual intercourse, therefore, ranges from a minimum of .00 to a maximum of .22, the latter representing the probability that a woman who has sexual intercourse on the one day of ovulation will have a live birth.³⁴

McDonagh goes on to point out that, “[e]ven after one month of concerted effort to become pregnant, only one out of four women in the reproductive age range will become pregnant following sexual intercourse. For most couples, it requires six months of unprotected sex before pregnancy ensues.”³⁵ Because the likelihood that sexual intercourse will result in pregnancy is so small, McDonagh appears to argue, it would be inaccurate to say that men cause pregnancy. Instead, McDonagh shifts the responsibility for pregnancy to the fertilized ovum that eventually becomes a fetus.

“[F]rom the very moment of conception,” McDonagh argues, “the fetus is ‘in charge of the pregnancy,’ that is, ‘in charge of the woman’s body’ in which it ‘organizes pregnancy,’ even to the point of deciding when to be born.”³⁶ What is important, McDonagh states, is not whether the fetus is a person, but what the fetus physically does to the woman’s body. Specifically, McDonagh asks “what the fertilized ovum ‘does’ as it causes pregnancy by implanting itself in a woman’s body and maintaining that implantation for nine months.”³⁷

During pregnancy, the fetus embeds itself into a woman’s uterus. It causes a complex new organ, the placenta,³⁸ to grow, reroutes her circulatory system, and alters her endocrine system by affecting her glands and hormonal secretions. In some instances, hormones elevate to 400 times their normal levels. Glands and other organs increase dramatically in size and weight. The pituitary gland in particular enlarges, and within nine months, it is double its pre-pregnancy weight. “The increase in the size and weight of the pituitary gland . . . can stimulate the growth of tumors in a woman’s body.”³⁹ Cardiac volume, stroke

34. *Id.* at 52 (footnote omitted) (citing Wilcox et al., *supra* note 33, at 1517-19).

35. *Id.* at 53 (citing SPEROFF ET AL., *supra* note 32, at 817).

36. *Id.* at 54 (quoting Laura R. Woliver, Rhetoric and Symbols in the Pro-life Amicus Briefs to the *Webster* Case 12 (1992) (paper presented at the Annual Meeting of the American Political Science Association)).

37. *Id.* at 5-6.

38. The placenta is an “organ of metabolic interchange between fetus and mother.” *STEDMAN’S MEDICAL DICTIONARY* 1371 (Marjory Spraycar ed., 26th ed. 1995).

39. MCDONAGH, *supra* note 1, at 77.

volume, heart rate, and pulse increase significantly. The rate of blood flow to the lower extremities decreases, causing retention of fluids, varicose veins, and sometimes blood clots.⁴⁰

A woman's respiratory system also undergoes many changes during pregnancy. Her lungs respire forty-five percent more air than normal, sometimes resulting in hyperventilation.⁴¹ Blood volume also increases about forty-five percent. Nausea and vomiting, changes in appetite, and changes in a woman's skin pigmentation also occur.⁴² McDonagh notes that "[w]hile all of these transformations are normal to pregnancy, they are nonetheless extraordinary."⁴³ According to McDonagh, "[p]regnancy is a massive, ongoing set of processes, caused by a fertilized ovum, which keeps a woman's body physically operating and changing every second, minute, hour, day, week, and month for nine months."⁴⁴

"If a woman does not consent to pregnancy," McDonagh argues, "the fetus has intruded on her liberty in a way similar to that of a kidnapper or slave master."⁴⁵ In other words, "[w]hen the fetus takes over a woman's reproductive capacities against her will, it becomes the master of her body and her liberty, putting her in the position of its slave."⁴⁶ The intrusion caused by a fetus is comparable to a situation in which a child injects its parent with hormones, uses the parent's blood, destroys the parent's cells, and grows new organs in the parent's body for nine months without the parent's consent. In such a scenario, McDonagh, argues, the parent would have a valid claim that the injuries he or she suffered were significant. In fact, the law would view the parent as the victim of the child's coercive intrusion on the parent's bodily integrity and liberty. Furthermore, the child's actions would not be legally permissible.⁴⁷ A parent's obligation to pro-

40. *See id.* at 72.

41. *See* Neff, *supra* note 16, at 349 (citing Brief for The California Committee to Legalize Abortion as *Amici Curiae* in *Roe v. Wade*).

42. *See* MCDONAGH, *supra* note 1, at 70-73.

43. *Id.* at 72.

44. *Id.* at 71.

45. *Id.* at 75.

46. *Id.* at 76.

47. In *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (1978), for example, a court held that one adult cannot compel another to donate bone marrow. The court stated, "[f]or a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of *one* of its members and suck from it sustenance for *another* member, is revolting to our hard-wrought concept of jurisprudence." *Id.* at 92. *See also* cases cited *infra* note 85.

vide for a child's material needs does not extend to a legal requirement to donate a part of his or her body, however minimal the donation or however great the need.⁴⁸

McDonagh therefore concludes that if a woman is not bound by parental duty to donate her body to her *born* child, she cannot be bound to donate her body to a fetus.⁴⁹ This is particularly true, she claims, in light of the fact that no born person could claim a right to appropriate the body of another to serve its own needs.

Both positive law legislated by the state and common law as adjudicated by the courts affirm that no private person may take another's body, liberty, or even property without consent and also that no private party may coerce others to give or donate their bodies to others without consent. This holds true even if the life of the person needing the body parts of another is at stake, even if kinship ties link the potential donor and recipient, and even if the bodily intrusions involved are only minimally invasive physical procedures such as blood tests.⁵⁰

Consequently, when a woman is faced with an unwanted pregnancy, the fundamental right she should invoke is her "right to bodily integrity and liberty, that is, her right to consent to what is done to her body by another entity, the fertilized ovum."⁵¹ Thus, McDonagh offers a foundation that is more stable than the Supreme Court's grounding of the right to abortion in the freedom to act without government interference.

III. ABORTION AS SELF-DEFENSE AGAINST WRONGFUL PREGNANCY

A. *Wrongful Pregnancy*

If a woman does not consent to be pregnant, McDonagh argues that the law must recognize the pregnancy as an injury — the injury of wrongful pregnancy. Wrongful pregnancy is currently recognized as an injury incurred when a physician fails to competently sterilize a man or a woman, and a child is subsequently born. Even when the pregnancy involves no medical complications, the woman opts to carry the pregnancy to term, and the child is born completely healthy, the pregnancy itself still

48. See McDONAGH, *supra* note 1, at 103.

49. *Id.* at 103-04, 103 n.110.

50. *Id.* at 102 (footnote omitted).

51. *Id.* at 32.

constitutes an injury.⁵² Pregnancy is also recognized as an injury in cases⁵³ and statutes involving sexual assault.⁵⁴

McDonagh argues that in every situation where a woman does not consent to be pregnant, she experiences the injury of wrongful pregnancy. She supports this argument by comparing pregnancy to other acts that take on alternate meanings under the law in the absence of consent. For example, the law generally views consensual sexual intercourse as noninjurious. Without consent, however, intercourse becomes the crime of rape.⁵⁵ "Similarly," McDonagh notes, "if one person travels with another, that is called a vacation. But if one person coerces another to travel, that is called kidnapping. The legal distinction between the two hinges on consent."⁵⁶ She points out that if a patient consents to the actions of a surgeon — that is, cutting into a person's body — the surgeon's invasive conduct is legally permissible. "Without consent, however, regardless of the success of the operation . . . it is a legal injury."⁵⁷

The only difference between noninjury and injury in the context of rape, kidnapping, and the conduct of the surgeon is consent. Whether one consents to a particular action or event determines whether or not any harm has occurred. It is this paradigm that McDonagh insists is relevant to the issue of pregnancy.

52. *Id.* at 85. McDonagh cites *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984), as an example.

Brenda Stroup underwent a sterilization procedure performed by Dr. Herbert Shessel. A month later she discovered she was pregnant, and subsequently she gave birth to a healthy child. Later the Stroups sued Shessel for malpractice, seeking damages.

The court affirmed in this context that pregnancy is a legal injury. . . . [B]ecause [Stroup] did not consent to her pregnant condition, she was judged by the law to have suffered injury.

McDONAGH, *supra* note 1, at 85-86 (citation omitted).

53. California courts, for example, have established that normal pregnancy constitutes great bodily injury when it occurs subsequent to rape. McDONAGH, *supra* note 1, at 86-88 (citing *People v. Caudillo*, 21 Cal. 3d 562 n.20 (1978) (a normal pregnancy resulting from a rape constitutes a high level of injury); *People v. Sargent*, 86 Cal. App. 3d 148 (1978) (a normal pregnancy resulting from a rape constitutes "a significant and substantial bodily injury or damage.")).

54. For example, McDonagh points out that a Wisconsin statute "specifically lists pregnancy as one of the conditions, along with disease, used to determine the 'extent of injury' suffered in the aftermath of a sexual assault." McDONAGH, *supra* note 1, at 86 (citation omitted).

55. *See id.* at 90.

56. *Id.*

57. *Id.* (citing Marjorie Maguire Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 224).

Simply stated, if a woman does not consent to a pregnancy, the pregnancy is wrongful and it constitutes an injury.

B. *Self-Defense*

The injury incurred in a nonconsensual wrongful pregnancy is the appropriation of a woman's body against her will. A woman's entire body is altered by a pregnancy. Her tissues and cells are destroyed, a new organ grows inside her body,⁵⁸ her body is depleted of necessary elements, body parts are displaced within the abdominal cavity,⁵⁹ and her blood system is rerouted.⁶⁰ Given the serious nature of these changes, McDonagh concludes that a woman whose body is appropriated in this manner is justified in using deadly force to prevent further harm.

McDonagh notes that the use of deadly force in self-defense is generally recognized as appropriate not only in response to life-threatening situations, but also in response to situations where a person is threatened with "serious physical injury" or "great bodily harm."⁶¹ McDonagh's contends that, like the person who is kidnapped or the woman who is raped, a woman who faces a nonconsensual pregnancy not only is entitled to defend herself against the threatened injuries of the wrongful pregnancy, but she is also entitled to assistance from the state in doing so.

IV. MANDATORY ABORTION FUNDING

By making consent and the injury of wrongful pregnancy the focal points of her analysis, McDonagh develops an argument for mandatory state funding of abortions. In a two-step process, she

58. STEDMAN'S MEDICAL DICTIONARY, *supra* note 38, at 1371.

59. See Neff, *supra* note 16, at 348.

60. See McDONAGH, *supra* note 1, at 70 (citing Harold Fox, *Placental Structure in Health and Disease*, in MODERN ANTENATAL CARE OF THE FETUS 35-36 (Geoffrey Chamberlain ed. 1990)).

61. McDonagh explains:

All states affirm the right of people to use deadly force to defend themselves from absolute threats to their life. . . . States also affirm that people have a right to use deadly force to stop private parties from imposing serious amounts of quantitative injuries, even if these injuries stop short of actually threatening death. Forty-two states, for example, have passed statutes that explicitly affirm people's right to use deadly force when another private party threatens them with a sufficient quantity of bodily injury, referred to variously as "serious bodily harm," "serious physical injury," "great bodily harm," "great personal injury," "in peril of bodily harm," "grievous bodily harm," or as in the case of Michigan, "brutality."

Id. at 93.

explains why the government's failure to provide funding for abortions violates the Fourteenth Amendment's Due Process Clause, and then argues that the Equal Protection Clause of the United States Constitution requires that the government provide funding for abortions for all women facing unwanted pregnancies.

McDonagh argues that the state's refusal to fund abortions allows preborn life to appropriate a woman's body, and possibly threaten her life, without her consent. Since nonconsensual pregnancies are wrongful pregnancies that constitute an injury perpetrated by a fetus, women facing such pregnancies are entitled to defend themselves by aborting the fetus. However, McDonagh recognizes that the right to self-defense "is not enough":

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. It is the job of the state to protect victims of wrongful private acts by stopping the perpetrators. . . .

When a fetus seriously injures a woman by imposing a wrongful pregnancy . . . 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.⁶²

A. *The Due Process Clause and Abortion Funding*

When the state fails to provide funding for abortions, poor women are effectively denied the right to defend themselves. More importantly, when the state denies abortion funding to poor women, it embraces a policy of compulsory motherhood and encourages the perpetration of injuries related to wrongful pregnancy. In doing so, the state converts the private actions of the unwanted fetus into state action.⁶³

State governments generally criminalize private wrongful acts to deter private aggression. In the case of the aggressive acts committed by the fetus, however, the state not only fails to halt

62. *Id.* at 105.

63. *See id.* at 119-20. According to McDonagh, there are three ways a state "can become so involved in private action that the law views the action of a private party to be the action of the state": (1) by delegating public authority to a private actor; (2) by establishing a close relationship with a private party; and (3) by failing to stop, and thereby tolerating or sanctioning, private action. *Id.* at 117 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988)).

the fetus's attack, but in preventing the woman from stopping the fetus herself, it gives preferential treatment to the fetus. The rationale used by most states to deny funding for abortions is that they wish to protect the "potential life of the fetus."⁶⁴ McDonagh argues that this rationale expresses a preference for the injuries caused by the fetus and transforms the actions of the fetus into action by the state. In essence, the state makes itself a party to the fetus's imposition of harm and thereby sanctions the wrongful pregnancy.⁶⁵

Once a state sanctions the action of a private party, McDonagh argues that the action is thereby adopted by the state.⁶⁶ In the case of abortion funding, the state sanctions the imposition of injuries against a woman by enacting statutes that expressly prohibit the use of state resources to stop the injuries caused by the fetus. This action by the state, McDonagh contends, is a violation of the Due Process Clause. She concludes that, even if the state has an interest in protecting the fetus, "that interest does not make it constitutional for the state to encourage the fetus to impose a wrongful pregnancy as a *means* for protecting it because to do so is tantamount to state *encouragement* of private violence . . ."⁶⁷

B. *The Equal Protection Clause and Abortion Funding*

Having established that the Due Process Clause is violated by the state's refusal to provide abortion funding, McDonagh argues that the Equal Protection Clause requires the government to provide abortion funding.⁶⁸

64. *Id.* at 120 (quoting *Harris v. McRae*, 448 U.S. 297, 324 (1979) (holding that it is constitutional for states to encourage childbirth in order to protect the "potential life of the fetus")).

65. *Id.*

66. *Id.* at 116. In supporting this proposition, McDonagh points to the 1883 *Civil Rights Cases* which held that "the private 'wrongful act of an individual . . . is simply a private wrong or a crime of that individual' . . . but such a private wrongful act is not an action by the state, unless 'sanctioned in some way by the State, or . . . done under State authority.'" *Id.* (citing *Civil Rights Cases*, 109 U.S. 3, 17 (1883)). She also notes, however, that contrary authority makes it "difficult to generalize about how private action can become state action." *Id.* at 119.

67. *Id.* at 122.

68. McDonagh remarks that, "[b]efore joining the Supreme Court, Justice Ruth Bader Ginsburg argued that restrictions on abortion funding violate the equal protection clause because they . . . deprived women of equal opportunities to education and employment." *Id.* at 130 (citing Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 375-76. (1985)). Similarly, Guido Calabresi argued that prohibition of abortion funding "is

McDonagh asserts that if the state uses its police power to protect some people from wrongful acts, such as murder, rape, or other serious injury, it must also protect similarly situated victims. Thus, she argues, to the extent that the state protects other victims of private injuries, the Equal Protection Clause requires the state to protect pregnant women from the private injuries committed by fetuses. Since a woman facing a wrongful pregnancy is similarly situated to the victims of wrongful acts such as rape or kidnapping, the state is equally obligated to intervene on behalf of women victimized by wrongful pregnancies.⁶⁹ If the state spends tax dollars to stop private parties from injuring others, then it must spend tax dollars to stop fetuses from injuring women faced with unwanted pregnancies.⁷⁰ McDonagh says the state "must stop the fetus in the same way that it stops any private aggression . . . by using the least amount of force necessary but enough force to get the job done."⁷¹

When a woman's body is invaded by an unwanted fetus, McDonagh argues that the first task of the state is to set her free. She reasons that "abortions are the [only] technique for stopping the fetus, and to the extent that the state stops born people from intruding on others, it must fund abortions as the means necessary to stop preborn life from massively invading a woman's bodily integrity and liberty."⁷² In other words, the state must fund abortions as a means of stopping the fetus from inflicting the harm of wrongful pregnancy.

According to McDonagh, "[w]hile abortion-funding policies have been directed primarily to indigent women, equal protection analysis mandates public funding of abortions for *all* women,"⁷³ just as the state protects all victims of private injuries

an unconstitutional form of sex discrimination because it situates men and women unequally in relation to the reproductive consequences of sexual activity." *Id.* (citing GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 97 (1985)).

Despite the ostensible attractiveness of these theories, the Supreme Court has declared that discrimination on the basis of pregnancy is not sex discrimination. *Geduldig v. Aiello*, 417 U.S. 484 (1974). The Court reasoned in *Geduldig* that pregnancy is not a sex classification because, although only women can be pregnant, the category of nonpregnant people contains both men and women. MCDONAGH, *supra* note 1, at 131 (citing *Geduldig*, 417 U.S. at 497).

69. MCDONAGH, *supra* note 1, at 142.

70. *Id.* at 150.

71. *Id.* at 151.

72. *Id.* at 146.

73. *Id.* at 151 (emphasis added).

without regard to economic status. "Such policies require a new recognition that society as a whole, through the state's use of tax dollars, must support the bodily integrity and liberty of all women, not merely those who lack the funds to defend themselves."⁷⁴

McDonagh suggests that even in a "minimalist" state that limits itself to maintaining law and order by protecting its citizens from private injuries, equal protection would require broad public funding of abortions for all women who wanted them. Abortion is the only procedure available that "stops one private party, the fetus, from imposing injury on another private party, the woman. . . ."⁷⁵ Therefore, McDonagh contends, even the minimalist state would be "obligated to provide abortion funds to the degree that it provides funds to protect victims of private aggression."⁷⁶

V. CONCLUSION

McDonagh's theory of abortion-as-self-defense is innovative and provocative. It provides readers with a new way of thinking about women, pregnancy, and abortion rights.

Prior to McDonagh's book, the abortion rights discourse was dominated by the ongoing debate about "when life begins." On one side are those who believe that life begins at conception, that a fetus is a human being, and that elimination of a fetus is tantamount to murder. These individuals conclude that a woman's right to terminate a pregnancy should be restricted because the fetus's right to life generally outweighs a woman's right to choose when and whether to have children. On the other side are those who argue that life does not begin at conception, that fetuses are not human beings, and that abortion is not murder. Therefore, they conclude, women have the right to choose whether they will carry a pregnancy to term. This dialogue quickly becomes monotonous because it inevitably produces a stalemate.

McDonagh's theory contributes to the abortion debate by breaking the deadlock between the pro-choice and anti-choice discourse on when life begins. With consent and self-defense at the center of McDonagh's theory, there is no longer any reason

74. *Id.*

75. *Id.* at 153.

76. *Id.*

to focus on the fetus's right to life. The question is whether a woman consents to being pregnant. If she does not consent, the fetus is viewed as an aggressor that attacks the woman and the woman is therefore justified in forcibly removing the fetus from her body in self-defense.

This abortion-as-self-defense theory embraces the notion that women who have sex are not duty-bound to become mothers. McDonagh argues that a woman's biological capacity to house and nurture a fetus in her body for nine months does not require that she be held captive by pregnancy. Thus, McDonagh's theory rejects the concept of mandatory pregnancy and the notion that a woman must be prepared to become a mother every time she engages in sexual intercourse.

According to McDonagh, sex and pregnancy involve two separate relationships with two separate entities. Each relationship requires separate consent. In separating the act of intercourse from the act of pregnancy, McDonagh creates a paradigm in which compulsory pregnancy and parenthood can no longer be framed as a punishment for sexual intercourse. When compulsory pregnancy and parenthood are inextricably linked to sexual intercourse, women are discouraged from viewing sex as anything but a solely procreational activity. In such a paradigm, sex loses its utility as an expression of love or sharing of one's self and becomes, instead, an act that few women can afford to engage in more than three or four times in a lifetime. By rejecting the notion of compulsory pregnancy and parenthood, McDonagh might help women achieve a healthier perspective on both sexual intercourse and pregnancy.

Another important contribution of McDonagh's theory is that it lends a new perspective to the abortion debate: the voices of women in hostile relationships with their pregnancies. These women view the fetus as an aggressor even though such a concept runs counter to traditional family values, the harmony of family life, and women's traditional roles as wives and mothers. McDonagh places these women at the center of the abortion debate and provides a clear statement of what such women feel when they face unwanted pregnancies. McDonagh's theory speaks directly to the humiliation and degradation felt by women who no longer have control of their own bodies. This perspective provides support for the demand that a woman's right to terminate a pregnancy be viewed within the context of her right to bodily integrity. McDonagh's description of a fetus's appropri-

tion of a woman's body provides further, compelling evidence that some women's experience of pregnancy is alienating, disruptive, and harmful to their well-being.⁷⁷

Although McDonagh has made many contributions to the abortion debate, she also raises new questions, potential problems, and challenges for the pro-choice movement. First, McDonagh does not resolve the question of whether a fetus should be defined as a person, or as something different. On one hand, McDonagh seems to argue that it is less important to decide what a fetus is than it is to recognize what a fetus does to a woman.⁷⁸ On the other hand, she argues that

to the extent that the state treats the fetus as human life, it must not only protect it from harm but also stop it from causing harm to others. Consequently, to the degree that the state stops human life from intruding upon the bodies and liberties of others, the state must stop the fetus from imposing pregnancy upon women without consent.⁷⁹

At various times in her argument, McDonagh tolerates the possibility, and sometimes even concedes, that the fetus is a person. But if this is true, McDonagh must also acknowledge that the fetus possesses certain rights of personhood. For example, if a fetus is a human being, it might be entitled to a legal hearing and legal counsel prior to being aborted.⁸⁰ In addition, if the fetus is characterized as a person, women may be held liable for injuries to their fetuses. This creates complicated legal problems. For ex-

77. Although McDonagh focuses on the oppression and unhappiness of motherhood when pregnancy is unwanted, she acknowledges that when a pregnancy is wanted it is indeed a spiritual experience filled with joy. Yet she reminds the reader that romantic images of motherhood evolve from wanted pregnancies in which fetuses are not aggressors but welcome guests or invitees.

No species would survive if mothers viewed offspring solely as aggressors. The key word here is *solely*. The view of pregnancy as intrusive aggression by a fetus does not substitute for all other views but rather expands the continuum of legal and social constructions of pregnancy so that it, too, has the same latitude as other intimate relationships, such as sexual intercourse.

Id. at 82. Thus, McDonagh does not exclude the possibility that motherhood and pregnancy can also be a joyous experience.

78. *Id.* at 39.

79. *Id.* at 8.

80. See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. 1990) (court appointed legal counsel to a fetus); *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (Georgia court appointed an attorney to represent the interests of an unborn child in a proceeding where the mother was ordered to undergo a Caesarian section without her consent).

ample, women have been subjected to criminal prosecution⁸¹ or forced surgery⁸² because their fetuses were characterized as persons. And the high courts of three states, South Dakota, Missouri, and West Virginia, have permitted wrongful death lawsuits on behalf of nonviable fetuses.⁸³

McDonagh's consensual pregnancy theory is also problematic because one of her major premises — that a woman has the right to refuse to donate her body to a fetus in the same way that she may refuse to donate blood or a kidney to another person⁸⁴ — is flawed. Although courts have generally refused to justify the invasion of one's body to save the life of another,⁸⁵ that rule is frequently ignored in the case of pregnant women. On several occasions, courts have held that a pregnant woman may be forced to have surgery in order to save the life of a fetus.⁸⁶ These

81. See *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992) (involving criminal prosecution of a mother who ingested a controlled substance prior to giving birth, for delivery of a controlled substance to the infant during the 30 to 90 seconds following the infant's birth, but before the umbilical cord was severed). See *People v. Hardy*, 469 N.W.2d 50 (Mich. Ct. App. 1991) and *State v. Gray*, No. L-89-239, 1990 WL 125695, (Ohio Ct. App. Aug. 31, 1990), for similar cases in which charges were brought against mothers who delivered drug-affected newborns. See also *In re Baby X*, 293 N.W.2d 736 (Mich. Ct. App. 1980) (newborn suffering from narcotics withdrawal symptoms due to prenatal maternal drug addiction is neglected and within jurisdiction of the probate court); *In re Smith*, 492 N.Y.S.2d 331 (Fam. Ct. 1985) (person under Family Court Act includes unborn child who is neglected as the result of mother's conduct); *In re Ruiz*, 500 N.E.2d 935 (Ohio Com. P. 1986) (mother's use of heroin close to baby's birth created substantial risk to the health of the child and constituted child abuse).

82. Court orders have been obtained for Caesarian sections in 11 states. Among 21 cases in which court orders were sought, the orders were granted in 86% of the cases. Eighty-one percent of the women involved were Black, Asian, or Hispanic, 44% were unmarried, and 24% did not speak English as their primary language. All the women were treated in a teaching hospital clinic or were receiving public assistance. See Veronica E. B. Kolder, et al., *Court-Ordered Obstetrical Interventions*, 316 NEW ENG. J. MED. 1192, 1192-93 (1987).

83. See Frances A. McMorris, *Courts Are Giving New Rights to Fetuses*, Wall St. J., Sept. 4, 1996, at B1.

84. McDONAGH, *supra* note 1, at 11.

85. See *Curran v. Bosze*, 566 N.E.2d 1319 (Ill. 1990) (holding that children cannot be forced to donate bone marrow without custodial parent's consent); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994) (asserting that courts should not balance rights of competent women to accept or refuse medical treatment against fetal rights); *In re Richardson*, 284 So. 2d 185 (La. Ct. App. 1973) (refusing to order removal of a kidney for transplantation in an older sibling); *McFall v. Shimp*, 10 Pa. D. & C.3d (1978) (refusing to compel plaintiff's cousin to donate bone marrow to plaintiff).

86. See *Jefferson v. Griffin Spalding County Hosp. Auth.*, 274 S.E.2d 457 (Ga. 1981) (ordering Caesarian section against mother's religious beliefs); *In Re Madyun Fetus*, 114 DAILY WASH. L. RPT. 2233 (1986) (authorizing hospital to perform Cae-

cases indicate a trend among doctors and hospitals caring for pregnant women to pursue a course of action that is believed to be best for the fetus, even when the woman carrying the fetus is unwilling to consent to the proposed treatment. Although McDonagh is correct in her assumption that women's bodies *should not* be invaded in order to save the life of another, courts have not embraced this concept as a principle of law.

A third problem with McDonagh's theory is that it would permit abortions even in the final weeks of pregnancy — a result that the majority of the American public probably would not support.⁸⁷ McDonagh argues that, because pregnancy is an ongoing condition, it requires not only a woman's initial consent but also her continuing consent to the ongoing bodily changes involved in a pregnancy. "Even 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."⁸⁸ 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

sarian section because protection and safety of fetus constitutes a compelling state interest). See also *In re* President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. Cir. 1964) (authorizing blood transfusion to save patient's life); *Raleigh Fitkin-Paul Morgan Mem'l Hosp. v. Anderson*, 201 A.2d 537 (N.J. 1964), (granting hospital authority to administer blood transfusions to a pregnant woman contrary to her religious conviction); *In Re Jamaica Hosp.*, 491 N.Y.S.2d. 898 (Sup. Ct. 1985) (finding that, although the state does not have a compelling interest under *Roe v. Wade*, it maintains a "highly significant interest" in the life of an 18-week-old fetus and this interest outweighs the woman's right to refuse a blood transfusion because of religion).

87. Ninety percent of all abortions are performed during the first three months of pregnancy, when abortion is an exceptionally safe procedure. Nine percent of abortions are performed during the fourth and fifth month; and only 1% of all abortions are performed after the fifth month. *Abortion After Twelve Weeks*, THE TRUTH ABOUT ABORTION: A FACT SHEET SERIES FROM THE NAT'L ABORTION FED'N (Nat'l Abortion Fed'n, Wash., D.C.) (June 1990). The recent debate in Congress and in several states regarding late-term abortions demonstrates the public's — and legislators' — discomfort with the termination of a pregnancy in its final weeks. See Ann Devroy, *Late-Term Abortion Ban Vetoed*; "Small but Vulnerable" Group of Women Needs Procedure, *Clinton Says*, WASH. POST, Apr. 11, 1996, at A1; Jeff Woods, *Tennessee 12th State to Ban "Unspeakable" Late-Term Abortions*, NASHVILLE BANNER, May 28, 1997, at A4.

88. MCDONAGH, *supra* note 1, at 79.

becomes viable, it would seem appropriate to weigh its right to life against the continuing intrusion upon the woman's bodily integrity. Furthermore, although first trimester abortions are safer than childbirth,⁸⁹ third trimester abortions present difficulties and health hazards⁹⁰ that should be avoided to preserve the woman's health. 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.

McDonagh's abortion-as-self-defense theory also fails to address the need to ensure the safety of abortion as a medical procedure. To move the abortion debate entirely outside of the medical sphere ignores the fact that women need access to quality abortion services so that they need not resort to back-room butcher shops that leave them hemorrhaging to die. Nor should women be pushed to such desperate acts as killing their fetuses with loaded guns,⁹¹ or using drugs or alcohol to destroy them. When we speak of a woman's right to self-defense against a wrongful pregnancy, we should remember that abortion is a medical procedure to terminate an unwanted pregnancy. Regardless of the legal theory used, safeguards for the protection of women's health must be maintained at all costs.

McDonagh's view of abortion as self-defense against unwanted pregnancy appears to overlook the health consequences of repetitive abortions, and the risk that women might use abortion as a regular form of contraception when indeed it should be used only as a last resort.⁹² My point is not that the law should be used to limit the number of abortions a woman may have, but that a theory of abortion rights should recognize that women need adequate medical counseling in order to determine whether

89. "The risk of death associated with childbirth is about eleven times as high as that associated with abortion." *Abortion in the United States*, FACTS IN BRIEF (The Alan Guttmacher Inst., New York, N.Y.).

90. "The risk of death associated with abortion increases with the length of pregnancy, from one death in every 500,000 abortions at 8 weeks or less to one per 30,000 at 16-20 weeks and one per 8,000 at 21 or more weeks." *Id.*

91. See Leonard Stern, *Where We Begin*, MONTREAL GAZETTE, Nov. 23, 1996, at B1, available in 1996 WL 4214404. Brenda Drummond, a 28-year-old Ontario woman, shot her fetus through her own womb shortly before it was born alive but injured. She was charged with attempting to murder her unborn child. Eileen McDonagh has said that if she were representing Drummond, she would offer an argument of self-defense.

92. The majority of women who choose abortion do so not as their primary means of birth control, but because their primary means of birth control failed. PROMOTING REPRODUCTIVE CHOICES, *supra* note 18, at 15.

abortion is appropriate, given their own unique set of emotional as well as physical health concerns.

McDonagh's self-defense model of abortion may actually *preclude* consideration of a woman's overall health and well-being. By 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.

Furthermore, although McDonagh describes public funding of abortions as one of the primary goals of the pro-choice movement, the fact remains that funding abortions alone does not guarantee access. So long as there is a shortage of providers willing to perform abortions, government funding of abortion services will be a meaningless gesture for some women. In the final analysis, McDonagh's argument brings us only somewhat closer to universal access to abortion than did the Supreme Court's opinion in *Roe v. Wade*.

Finally, it is important to recognize that legal theory in and of itself is insufficient to change cultural attitudes, politics, and public policy. Community advocacy and public education are the keys to all successful social movements. The fact that McDonagh's legal theory might secure for women the right not only to an abortion, but to abortion funding as well, is a remarkable advancement in pro-choice theory. However, an exclusive focus on McDonagh's self-defense, equal protection, and due process theories could obscure the impact of these theories on the lives of real women. The struggle to preserve and extend abortion rights is not merely a theoretical or ideological one. It is a struggle to preserve, improve, and maintain healthy relationships among women, their children, and the rest of the world. Isolating abortion as the solitary act of an individual faced with an unwanted pregnancy could lead us to ignore the fact that policies related to abortion must be considered in relation to health care, child care, housing, and economic development policies in order to improve the status of women and children in our society.

While McDonagh offers a new perspective on the meaning of pregnancy and a woman's right to defend herself against an unwanted intrusion by a fetus, there is room for further inquiry

into the potential impact of her theory on women who seek to terminate their pregnancies. Ultimately, McDonagh's abortion-as-self-defense theory falls short of "breaking the deadlock" in the abortion debate.