Response to Eileen McDonagh's review of *Defending Life*.

By Francis J. Beckwith*

The Law and Courts Section of the American Political Science Association recently published a review of my recent book, *Defending Life: A Moral and Legal Case Against Abortion Choice* (Cambridge University Press, 2007). The review was written by political scientist Eileen McDonagh (Northeastern University), who is the author of the book, *Breaking the Abortion Deadlock: From Choice to Consent* (Oxford University Press, 1996). It is a real honor to have my book reviewed by someone of Professor McDonagh's stature. (Her review may be found online here: http://www.bsos.umd.edu/gvpt/lpbr/reviews/2008/07/defending-life-moral-and-legal-case.html)

She says many fine things about the book and the case I make for the humanity and personhood of the unborn. For example, she states: "Beckwith has written a careful and meticulous treatise about why the fetus should have a personhood status equal to that of a born human being from the moment of conception. This is exactly where legislation is heading, and his book may bolster those efforts." Nevertheless, as one would suspect, she is critical of certain aspects of my case for the prolife position. In this response, I will assess two of her critiques that I believe are central to her legal case for abortion rights. The first concerns my presentation of *Roe v. Wade*, and the second concerns her assessment of my critique of what she calls the self-defense argument for abortion rights.

1. *Roe v. Wade*

Concerning the Supreme Court's landmark opinion of *Roe v. Wade* and my assessment of it, Professor McDonagh writes, "He depicts the Court's ruling in ROE as permitting a woman to procure an abortion `for practically any reason she deems fit during the entire nine months of pregnancy'…. Of course, everyone even superficially acquainted with ROE knows that the Court did no such thing. The Court ruled from the outset that in the latter stages of pregnancy, such as the third trimester, there is no constitutional right to an abortion unless a woman's health or life is in danger." But in the book I do not deny that one can read the Court's opinion in the modest fashion that Professor McDonagh suggests. In

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fact, I go to great pains to show that that reading has not been borne out in actual practice or in subsequent opinions. Here's what I write:

> Thus [under *Roe v. Wade*] a woman could have an abortion during the first six months of pregnancy for *any* reason she deems fit. Restrictions in the second trimester should be merely regulatory in order to protect the pregnant woman's health. In the last trimester (after fetal viability, the time at which the unborn can live outside the womb) the state has a right, although not an obligation, to restrict abortions to only those cases in which the mother's life or health is jeopardized, because after viability, according to Blackmun, the state's interest in prenatal life becomes compelling. *Roe*, therefore, does not prevent a state from having unrestricted abortion for the entire nine months of pregnancy if it so chooses.
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> Nevertheless, the Court explains that it would be a mistake to think of the right to abortion as absolute.[1] For the Court maintained that it took into consideration the legitimate state interests of both the health of the pregnant woman and the prenatal life she carries. Thus, reproductive liberty, according to this reading of *Roe*, should be seen as a limited freedom established within the nexus of three parties: the pregnant woman, the unborn, and the state. The woman's liberty trumps both the value of the unborn and the interests of the state except when the unborn reaches viability (and an abortion is unnecessary to preserve the life or health of the pregnant woman) and/or when the state has a compelling state interest in regulating abortion before and after viability in order to make sure that the procedure is performed in accordance with accepted medical standards. Even though this is a fair reading of Roe's reasoning, it seems to me that the premises put in place by Justice Blackmun have not resulted in the sensible balance of interests he claimed his opinion had reached. Rather, it has, in practice, resulted in abortion on demand.
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> Because Justice Blackmun claimed that a state only has a compelling interest in protecting prenatal life after that life is viable (which in 1973 was between 24 and 28 weeks gestation), and because the viability line is being pushed back in pregnancy (now it is between 20 and 24 weeks) as a result of the increased technological sophistication of incubators and other devices and techniques, Justice Sandra Day O'Connor made the comment in her dissent in *Akron v. Akron Center for Reproductive Health, Inc.* (1983) that *Roe*

[1]"[A]ppellant and some *amici* argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time she alone chooses. With this we do not agree." (Ibid). The Court writes elsewhere in *Roe*: "The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell,* 274 U.S. 200 (1927) (sterilization)." (Roe v. Wade 410 U.S. 154 (1973))

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is on a "collision course with itself."[2] In other words, if viability is pushed back far enough, the right to abortion will vanish for all practical purposes. That is, in principle, a state's "interest" in a viable fetus can extend back to conception….

But there is a loophole to which abortion-choice supporters may appeal in order to avoid O'Connor's "collision course." Consider one state law written within the framework of *Roe*. Nevada restricts abortions after viability by permitting them after the 24th week of pregnancy only if "there is a substantial risk that the continuance of the pregnancy would endanger the life of the patient or would gravely impair the physical or mental health of the patient."[3] But this restriction is a restriction in name only. For the Supreme Court so broadly defined health in *Roe*'s companion decision, *Doe v. Bolton* (1973), that for all intents and purposes *Roe* allows for abortion on demand. In *Bolton* the court ruled that health must be taken in its broadest possible medical context, and must be defined "in light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the well being of the patient. All these factors relate to health."[4] Because all pregnancies have consequences for a woman's emotional and family situation, the court's health provision has the practical effect of legalizing abortion up until the time of birth if a woman can convince a physician that she needs the abortion to preserve her emotional health. This is why in 1983 the U.S. Senate Judiciary Committee, after much critical evaluation of the current law in light of the Court's opinions, confirmed this interpretation when it concluded that "no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy."[5]

Even former Chief Justice Warren Burger, who originally sided with the majority in *Roe* because he was under the impression that abortion after viability would only occur if the mother's physical life and health were in imminent peril, concluded in his dissent in *Thornburg v. American College of Obstetricians and Gynecologists* (1986) that *Roe* did,

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[2] *Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416, 459 (1983) (O'Connor, J., dissenting)

[3] Nevada Revised Statute, 442.250, subsection 3

[4] *Doe v. Bolton* 410 U.S. 179, 192 (1973).

[5] Report, Committee on the Judiciary, U.S. Senate, on Senate Resolution 3, 98th Congress, 98-149, June 7, 1983, 6. In another report, the Judiciary Committee concludes: "The apparently restrictive standard for the third trimester has in fact proved no different from the standard of abortion on demand expressly allowed during the first six months of the unborn child's life. The exception for maternal health has been so broad in practice as to swallow the rule. The Supreme Court has defined `health' in this context to include `all factors--physical, emotional, familial, and the woman's age--relevant to the well-being of the patient.' *Doe v. Bolton*, 410 U.S. 179, 192 (1973). Since there is nothing to stop an abortionist from certifying that a third-trimester abortion is beneficial to the health of the mother--in this broad sense--the Supreme Court's decision has in fact made abortion available on demand throughout the pre-natal life of the child, from conception to birth." (Report on the Human Life Bill--S. 158; Committee on the Judiciary, United States Senate, December 1981, p. 5)

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> contrary to his own earlier interpretation of the decision, support abortion on demand: "We have apparently already passed the point at which abortion is available merely on demand.... The point at which these [State] interests become `compelling' under *Roe* is at viability of the fetus.... Today, however, the Court abandons that standard and renders the solemnly stated concerns of the 1973 *Roe* opinion for the interests of the States mere shallow rhetoric."[6] Others had come to the same conclusion much earlier than Justice Burger.[7]
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> Moreover, it is not clear that when the Court refers to viability as the time when the state has a compelling interest in prenatal life that it is referring only to the physical survival of the unborn apart from her mother. Rather, it may be suggesting a largely philosophical notion of "meaningful life,"[8] a determination that is exclusively in the hands of the pregnant woman. Although in *Roe* "meaningful life" seemed to mean a life that is physically independent of its mother…, the Court made the point in a later opinion, "[T]here must be a potentiality of `meaningful life,' ... not merely momentary survival,"[9]

One can certainly challenge my reasoning on the scope of the abortion right affirmed by the Supreme Court. But it should be clear that in *Defending Life* I did not merely stipulate my position, as Professor McDonagh suggests. I offered an argument.

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[6]*Thornburg v. American College of Obstetricians and Gynecologists* 476 U.S. 747 (1986)

[7]See, for example, Victor G. Rosenblum and Thomas J. Marzen, "Strategies for Reversing *Roe v. Wade* through the Courts," in *Abortion and the Constitution*, eds. Dennis Horan, Edward R. Grant, and Paige C. Cunningham (Washington, D.C.: Georgetown University Press, 1987), 199-200; Thomas O'Meara, "Abortion: The Court Decides a Non-Case," *The Supreme Court Review* (1974): 344; Stanely M. Harrison, "The Supreme Court and Abortional Reform: Means to an End," *New York Law Forum* 19 (1974): 690; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," *California Law Review* 63 (1975): 1250; Jacqueline Nolan Haley, "Haunting Shadows from the Rubble of *Roe's* Right to Privacy," *Suffolk University Law Review* 9 (1974): 152-153; John Hart Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," *Yale Law Journal* 82 (1973): 921; John T. Noonan, Jr., "Raw Judicial Power," in *The Zero People*, ed. Jeff Lane Hensley (Ann Arbor, MI: Servant Books, 1983), 18; Charles E. Rice, "Overruling *Roe v. Wade*: An Analysis of the Proposed Constitutional Amendments," *Boston College Industrial and Commercial Law Review* 15 (December 1973): 309; Lynn D. Wardle and Mary Anne Q. Wood, *A Lawyer Looks at Abortion* (Provo, UT: Brigham Young University Press, 1982), p. 12; William R. Hopkin, Jr., "*Roe v. Wade* and the Traditional Legal Standards Concerning Pregnancy," *Temple Law Quarterly* 47 (1974): 729-730; John Warwick Montgomery, "The Rights of Unborn Children," *Simon Greenleaf Law Review* 5 (1985-86): 40; Stephen M. Krason, *Abortion: Politics, Morality, and the Constitution* (Lanham, MD: University Press of America, 1984), 103-104; and Roger Wertheimer, "Understanding Blackmun's Argument: The Reasoning of *Roe v. Wade*," in *Abortion: Moral and Legal Perspectives* (Amherst: University of Massachusetts Press, 1984), pp. 120-121.

[8]*Roe*, 410 U.S., 163

[9]Colautti vs. Franklin, 439 U.S. 379, 387 (1979), quoting from Ibid. However, given the Court's analysis in *Casey* (see below) and that opinion's understanding of *Roe*, it may reject *Colautti*'s definition of "meaningful life," though one may never really know for sure.

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2. The Self-Defense Case for Abortion Rights and the Irrelevancy of the Personhood Question

Professor McDonagh claims that the question of the unborn's personhood has become largely irrelevant: "Thus, as careful and as meticulous as is Beckwith in establishing why the fetus is a person from the moment of conception, his book is behind the times, since this question is becoming more and more moot as each year goes by." She seems to say in several places that the prolife movement has given a persuasive defense of the unborn's personhood that is difficult to rebut and that my marshaling of more arguments for it is redundant and not really where the action is. Because I come at the issue from the discipline of philosophy (with a graduate degree in law) and Professor McDonagh arrives at the same issue from the discipline of political science, it is understandable why she does not see the personhood issue as relevant. In philosophy, however, the personhood question is closely tied to several overlapping sub-disciplines in the field, including metaphysics, philosophical anthropology, and philosophy of mind. For this reason, the issue of personhood is in fact where the action is. David Boonin, for example, argues vigorously against fetal personhood (for most of gestation) in what is probably the most important philosophical defense of the prochoice position to be published in decades, *A Defense of Abortion* (Cambridge University Press, 2002). To be sure, he also offers a case for the sort of argument that Professor McDonagh offers—an argument that grants fetal personhood and attempts to show that the right to abortion still stands—but he also realizes that the personhood question is still a live and important issue. Thus, it seems to me that Professor McDonagh's assessment of where the debate now resides is probably a consequence of her training, academic discipline and the sorts of questions that interest political scientists who do jurisprudence and political philosophy. But the same goes for me as well. Neither one of us is "behind the times." We just live in different academic universes into which its residents occasionally crossover.

Professor McDonagh correctly outlines *Defending Life*'s central argument: "(1) the unborn entity, from the moment of conception, is a full-fledged member of the human community, (2) it is prima facie morally wrong to kill any member of that community, (3) every successful abortion kills a full-fledged member of the human community, and (4) therefore, every successful abortion is prima facie morally wrong." Although she is correct that the argument stands or falls on the veracity of premise 1 (that is, fetal personhood), that is true of premises 2 and 3 as well. This is why I dedicate chapter 7 (16,233 words to be ex-

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act, including endnotes) exclusively to establishing premise 2 by critiquing the sorts of arguments that Professor McDonagh suggests are state of the art. In that chapter I critique arguments offered by Professor McDonagh, Judith Jarvis Thomson, and David Boonin.

Because I have already dealt with Thomson's, Boonin's, and McDonagh's arguments in articles easily accessible on my personal website,[10] of which later versions make up portions of *Defending Life*, I will focus on Professor McDonagh's presentation of my critique of her argument. I should say, however, that much of my criticisms of her argument, as they appear in *Defending Life*, are offered in conjunction with my critiques of Thomson and Boonin, which are far more detailed than Professor McDonagh indicates in her review.

In several of her works, including her 1996 book, Professor McDonagh argues 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 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 prolifer'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 foundation evoking a woman's right to consent-to-pregnancy rather than merely her right to choose an abortion."[11] Essential to her case is her depiction of pregnancy's affect upon the pregnant woman. She writes in her review:

> It is not as if the fetus is a passive presence in a woman's body, however, something that

[10]Francis J. Beckwith, "Defending Abortion Philosophically: A Review of David Boonin's *A Defense of Abortion*." *Journal of Medicine & Philosophy* 31 (April 2006): 177-203; Francis J. Beckwith and Steven D. Thomas, "Consent, Sex, and the Prenatal Rapist: A Brief Reply to McDonagh"s Suggested Revision of *Roe v. Wade*." *Journal of Libertarian Studies* 17.3 (Summer 2003): 1-16. Both articles may be downloaded online from here: http://homepage.mac.com/francis.beckwith/downloads.htm

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

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she merely carries around with her for a period of nine months. To the contrary, the pregnant condition resulting from the fetus consists of a massive transformation that entails dramatic changes in every system of her body. In a medically normal pregnancy, for example, a new organ, the placenta, grows in a woman's body in response to the presence of the fetus; by about the 30th week of pregnancy, blood volume increases by about 50%; red blood cell mass increases by 20-30%; cardiac output is 30-40% higher than in a non-pregnant state during the first 3 months of pregnancy; the heart becomes enlarged and displaced to the left as a result of the way the enlarging uterus displaces the diaphragm; lung volume progressively decreases by as much as 20% from the middle to the second trimester of pregnancy; respiratory rate increases by 15% (2-3 breaths per minute); the enlarging uterus displaces the stomach and intestines from a horizontal to a vertical position; the gallbladder becomes hypotonic with slower and less complete emptying, which can result in gallstone formation due to the thickening of the bile; all metabolic functions increase during pregnancy in order to provide for the demands of the fetus, placenta, and uterus, and a pregnant woman from a metabolic standpoint can be described as living in a state of "accelerated starvation" due to the nutritional needs/demands of the growing fetus; renal plasma and flow increase to a level of 50-60% higher than in a non-pregnant state; and the endocrine system undergoes massive change as the pituitary gland, for example, enlarges by about 135% during pregnancy, prolactin levels increase tenfold, and other hormones increase double, triple, and quadruple their base levels.

Even in a medically normal pregnancy, therefore, what the fetus "does" is a very big deal. The key issue, therefore, is what justifies the fetus's massive transformation of a woman's body? Clearly, the fact that the fetus has no conscious intentions and cannot control what it does gives it no justification to impose itself on others, since no born person lacking mens rea has such a right. Similarly, the fact that the woman consented to sexual intercourse as an act prior to her condition of pregnancy gives the fetus no justification to impose itself on the body of its mother, since born children have no such right. Once born, for example, no state in the country requires a biological parent to donate even a pint of blood to a needy child, much less organs or other body parts. Hence, even after a woman has consented to sex, has consented to be pregnant, and has consented to be the parent of her born child, the parental duty to care for her offspring does not include the duty to donate her body. Pro-life advocates demand that the unborn child be treated in the same way as a born child. This would mean that since the duty to care for a born child does not include donating one's body to it, then neither does the duty to care for an unborn child include the donation of one's body. What is more, if a born child or someone acting on behalf of a born child were to take a body part from a parent without consent, the government would support the right of the parent to be free of such imposition, not the child's right to impose on a

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> parent's body without consent. Applying that principle to an unborn child that imposes on a woman's body without consent means that the government would support the right of a woman to be free of such imposition – that is, the government would support abortion rights.
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> The only answer, therefore, to the question of what justifies the massive transformation of a woman's body resulting from the fetus is the woman's consent. If a woman consents to the pregnant condition resulting from the fetus, then the way it massively transforms her body is permissible. If, on the other hand, a woman does not consent to the way it transforms her body, the fetus is imposing massive injury upon the woman. This is because morality and the law both stipulate that the key to defining injury is consent. If a surgeon performs an operation that saves a patient's life, that surgery is presumably a wonderful event, if and when the patient consented to the surgery. Without the patient's consent, that same surgery is a serious injury.

In the earlier version of my critique of her argument (that I co-authored with Steven D. Thomas and was published in the *Journal of Libertarian Studies*), I was careful to use the term "nonconsensual pregnancy" rather than merely "pregnancy." However, in the book chapter in which I assess her case, I do not use the adjective "nonconsensual," for two reasons: (1) Because the entirety of the chapter concerns the question of whether a woman intending to terminate her pregnancy is justified if the unborn is in fact a person, I did not think that the reader had to be told more than a few times at the chapter's beginning that the pregnancies in question were unwanted ones.[12] (2) The term "nonconsensual pregnancy" begs the question in favor of Professor McDonagh's conclusion, since the whole point of her case for abortion rights is that consent to sex does not entail consent to pregnancy. Because my whole point was to argue that there is in fact no such thing as noncon-

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[12]As I note at the chapter's beginning (notes omitted):

> Some abortion-choice advocates do not see the status of the unborn as the decisive factor in whether or not abortion is morally justified. They argue that a pregnant woman's removal of the unborn from her body, even though it is foreseeable that it will result in the unborn's death, is no more immoral than an ordinary person's refusal to donate his kidney to another in need of one, even though this refusal will probably result in the death of the prospective recipient.
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> In 1971, philosopher Judith Jarvis Thomson published what would become the most famous and influential argument of this sort. Others, including David Boonin and Eileen McDonagh, have defended revised versions of it. The focus of this chapter will be on Thomson's argument as well as refinements of it found in these other works.

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sensual pregnancy for those who engage in consensual intercourse, I thought the terminology made my case unnecessarily confusing.

Nevertheless, in her review, Professor McDonagh claims that I misrepresented her argument. She writes:

> I do not assume that all pregnancies are nonconsensual any more than I assume that all sexual intercourse is nonconsensual. Yet, [Beckwith] claims that "McDonagh's understanding of pregnancy as morally equivalent to rape" leads to the conclusion that pregnancy is a prima facie wrong (p.176). That is not my position. My position is that nonconsensual pregnancy is a prima facie wrong just as nonconsensual sexual intercourse (rape) is a prima facie wrong. Beckwith is smart, so I can only speculate why he would so blatantly misrepresent the self-defense foundation for abortion rights. Could it be that he cannot refute it any other way?

It seems to me that unless she believes that pregnancy is a prima facie harm, her case collapses. That is, for Professor McDonagh, it seems to follow that all pregnancies are prima facie harms unless they are explicitly trumped by the consent of the pregnant woman, given McDonagh's dire depiction of pregnancy (see above) combined with her claim (from the review) that "the fact that the woman consented to sexual intercourse as an act prior to her condition of pregnancy gives the fetus *no justification to impose itself on the body of its mother*, since born children have no such right." (emphasis added). So, even if a woman consented to have sex with the explicit intent to conceive a child, that child could still be terminated *in utero* at any time during the pregnancy if the mother changes her mind. Consequently, absent explicit consent of the pregnant woman, a third party would have warrant to conclude that a hostile intruder (the fetus) is wreaking havoc in the woman's body without her consent. If Professor McDonagh is right about the nature of pregnancy, consent, and the fetus, then this is a solid argument.

But she seems to back away from this position in her review in her assessment of an illustration that Steve Thomas and I offer in my book:

> 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

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pregnancy - perhaps her close friends know nothing of the pregnancy, a diary shows no knowledge of being pregnant, and so on.

Adopting either McDonagh's understanding of pregnancy as morally equivalent to rape or assault, or Boonin's[13] and Thomson's notion that pregnancy is a prima facie violation of the woman's bodily integrity, what is the doctor's obligation to his 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 the unborn. After regaining consciousness, the woman would have to be told that she's undergone an abortion for a pregnancy of which she was not aware, for there was no evidence that consent had been given and that she was under assault or that her bodily integrity was being violated.

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 who had undergone 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 ongoing or "perhaps most recent" consent may be effective as a 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." But such speculations about what an unconscious person's desires about her pregnancy's continuance *would be* makes sense if pregnancy is a prima facie good, as we believe that it is. But for that reason, the reply seems to miss the paral-

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[13]Boonin writes: "My claim has simply been that the fact that [the woman's] engaging in intercourse was voluntary provides no good reason to suppose that she has in fact [tacitly agreed to give up the right to the exclusive control of her body]… But the assumption that the right to control one's body is inalienable is open to doubt. Suppose, after all, that a woman made the following explicit agreement: Give me some money today, and tomorrow you can use my body in any way that you want even if by that time I have changed my mind and no longer want you to. Most of us would think this sort of contract to be simply invalid. As at least one writer sympathetic to the Good Samaritan argument [i.e., Thomson's argument] has urged, `one cannot legitimately enslave oneself by waiving in advance one's right to control one's body'…. And if this is so, then even if we thought that by her actions the woman could legitimately be understood as *attempting* to consent to waive this right, we would still have to conclude that she had not in fact done so." (Boonin, 166-167, quoting Roderick T. Long, "Abortion, Abandonment, and Positive Rights: The Limits of Compulsory Altruism," *Social Philosophy and Policy* 10.1 [1993]: 189).

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lel between rape and pregnancy that McDonagh is trying to draw, and the claim of Boonin and Thomson that pregnancy is a prima facie violation of bodily integrity.

To understand what we mean, consider another situation, one that takes the Thomson-McDonagh-Boonin (TMB) thesis at its word, and presses the parallels. Suppose that you come across a man having sex with that same unconscious patient and you correctly intervene to stop the ugly violation. 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, we could say, "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, and if one would allow the pregnancy to continue in the accident case, then this shows that the TMB parallels are ill-formed and that pregnancy is in fact a prima facie good, which is precisely our point.

Someone who maintains that pregnancy is a prima facie good, and is 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. McDonagh, to the contrary, 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.[14]

Boonin offers a similar analysis when he states:

> My claim has simply been that the fact that [the woman's] engaging in intercourse was voluntary provides no good reason to suppose that she has in fact [tacitly agreed to give up the right to the exclusive control of her body]… But the assumption that the right to control one's body is inalienable is open to doubt. Suppose, after all, that a woman made the following explicit agreement: Give me some money today, and tomorrow you can use my body in any way that you want even if by that time I have changed my mind and no longer want you to. Most of us would think this sort of contract to be simply invalid. As at least one writer sympathetic to the Good Samaritan argument [i.e., Thomson's argument] has urged, "one cannot legitimately enslave oneself

[14]McDonagh, *From Choice to Consent*, 11-12. For McDonagh, coercive pregnancy is the result of the implantation of the zygote, not the result of rape or incompetent sterilization. It is wholly the "fault" of the fetus.

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> by waiving in advance one's right to control one's body"…. And if this is so, then even if we thought that by her actions the woman could legitimately be understood as *attempting* to consent to waive this right, we would still have to conclude that she had not in fact done so.[15]

Consequently, under the TMB 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 (McDonagh), or at least a prima facie violation of the patient's bodily integrity of his unconscious patient (Thomson/Boonin). How could he do anything else but end the assault?

Someone may object to our use of the quotes from McDonagh and Boonin by which we attempt to show that they would agree that a physician should perform an abortion on the unconscious pregnant woman. The objector may argue that our implicit comparison between waiting until the unconscious woman wakes up and waiting until the pregnancy of a conscious woman comes to term seems forced. This objector might say 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 case of the conscious pregnant woman. But clearly in our second analogy, in which one woman is unconscious during pregnancy and the other during sex, this reason for waiting—the absence of consent--is present. Therefore, this objection fails, for it relies on the intuition that pregnancy is a prima facie good, but our point is that that intuition is not supported by TMB.

Here is Professor McDonagh's critique of this argument, as found in her review:

> The extent to which Beckwith fails to address the self-defense argument for abortion rights is evident in his following hypothetical. He asks the reader to imagine a situation where a young woman involved in a car accident arrives comatose at the hospital, where she is examined by a doctor. The doctor determines that she is pregnant and that neither the woman nor her friends are aware of her condition. According to Beckwith, the self-defense argument for abortion rights as represented in my work and others, is that "pregnancy is a prima facie violation of the woman's bodily integrity," and, thus, the physician is "morally required to perform an abortion to rid his patient of the 'massive intrusion' being imposed upon her by the unborn" (p.176). As noted above, of course, the self-defense argument for abortion rights prescribes no such thing. The crucial point is not whether the woman or her friends know whether she is pregnant, but rather whether the woman consents to be pregnant. Even if the comatose woman is the victim of rape, for example, that fact alone does not tell us whether she consents to be pregnant. Granted she did not consent to sexual

[15] Boonin, 166-167, quoting. Long, "Abortion, Abandonment, and Positive Rights," 189

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> intercourse, but we do not know whether she consents to the subsequent condition of pregnancy. Perhaps she is a Beckwith devotee, a pro-lifer who would consent to be pregnant regardless of whether she was raped. We simply do not know. And without knowledge of whether pregnancy is consensual, the only morally and legally required action is to find out if she did, or most likely would, consent to pregnancy. Only after it is established whether her pregnancy is consensual (or not), can any other decision be made about maintaining or terminating her pregnancy.
>
> Beckwith introduces rape in the context of an unconscious woman with the following scenario. Suppose you enter the hospital room with the same comatose woman and find "a man having sex" with her and "you correctly intervene to stop the ugly violation." He contends that the quickness with which a person would stop the sex in this example compared to the way a person might allow the comatose woman to continue to be pregnant by refraining from intervening proves that "pregnancy is in fact a prima facie good" (p.177). In fact, that scenario proves nothing of the sort. The reason a person would stop a man from having sexual intercourse with a comatose woman is because, by definition, we would assume that this form of sexual intercourse is occurring without the woman's consent, as defined by her comatose state. Without consent, that form of sexual intercourse is serious injury (rape), and that is why people would be morally and legally correct to stop it.

It seems to me, as I noted above, that Professor McDonagh is backing away from her strong claims about both the severe harm of pregnancy and the fetus' lack of justification to impose itself on the mother's body without her explicit consent. For what would be the justification for the doctor to withhold pregnancy termination without the woman's explicit consent? It seems to me that he or she would need another principle to not abort, such as: "Whenever we don't know whether a pregnant woman has consented to her pregnancy, we should assume that she has done so unless she tells us otherwise." But what would be the grounds for accepting that assumption? Remember it must be a reason strong enough to overturn two of Professor McDonagh's fundamental premises: (1) Pregnancy is a "severe violation of bodily integrity and liberty"; and (2) there is nothing intrinsic about the fetus that justifies its presence in the womb. It seems to me, as I noted in *Defending Life*, that the only reason that does the trick is because *pregnancy is a prima facie good*. But in that case, the strength of McDonagh's self-defense argument fails. For an intruder whose presence does harm cannot be a prima facie good.

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I want to conclude by taking issue with one other claim Professor McDonagh makes in her review: "Significantly, the Index of Beckwith's book contains no entry for `pregnancy.'" Actually, the Index contains *five* separate entries for "pregnancy": (1) "compulsory pregnancy argument, 122-23" (p. 291, under the entry "abortion-choice advocacy"); (2) "pregnancy, consent and rape, 176-81" (p. 292, under the entry "Boonin, David"); (3) "ectopic pregnancy. See *tubal* pregnancy" (p. 292); (4) "pregnancy, compared with, 176-79" (p. 294, under the entry "rape"); (5) "tubal pregnancy, 105, 165" (p. 295).

The other issues raised in Professor McDonagh's review, such as the burden of pregnancy, are addressed in *Defending Life* in some detail in my critique of a similar argument offered by Boonin. For this reason, I will not address these other issues here.

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