1999

Liberalism and Abortion

Robin West
Georgetown University Law Center, west@law.georgetown.edu

87 Geo. L.J. 2117 (1999)

REVIEW ESSAY

Liberalism and Abortion

ROBIN WEST*

First in a groundbreaking book, *Breaking the Abortion Deadlock: From Choice to Consent*, published in 1996,[1] then in various public fora, from academic conference panels to Christian radio call-in shows,[2] and now in a major law review article entitled *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*,[3] Eileen McDonagh has sought to redefine drastically our understanding of the still deeply contested right to an abortion, and hence, of the nature of the constitutional protections which in her view this embattled right deserves. Her argument is complicated and subtle, but its basic thrust can be readily summarized. A woman's right to an abortion, McDonagh argues, should be understood as a right to defend herself against the nonconsensual invasion, appropriation, and use of her physical body by an unwelcome fetus, *rather than* as a right to choose medical procedures free of interference by the state.[4] We have a right to an abortion not because we have a right to be free of moralistic state legislation that interferes with our medical choices, but rather because we have a right to defend ourselves against the nonconsensual, invasive takings of our bodies, and we have a right to so defend ourselves even if it requires the use of deadly force against a human life.[5] Of course, unlike most assailants, a fetus unquestionably lacks intentionality and agency. But just as unquestionably, a fetus uses and appropriates the pregnant woman's body, occasioning substantial physical changes and dislocations within her, a good number of which are potentially injurious.[6] When the use and appropriation of her physical body occurs without the woman's consent, that use and appropriation, and the physical changes and dislocations they engender, are *harms*. Their occurrence, then, is tantamount to a noncriminal assault, against which a woman may defend herself just as she would be entitled to defend herself against such an assault by another human being.[7] The woman's right to terminate a nonconsensual pregnancy should be understood as part and parcel of her

* Professor of Law, Georgetown University Law Center

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

2. *See, e.g.*, Robin West et al., *Breaking the Abortion Deadlock? Twenty-Five Years After* Roe v. Wade, 12 STUD. AM. POL. DEV. 204 (1998) (recording of panel discussion at 1997 Meeting of the American Political Science Association, moderated by Sue Davis). For McDonagh's discussion of her participation on radio talk shows, see *id.* at 222.

3. 62 ALB. L. REV. (forthcoming 1999) (manuscript on file with author).

4. *See* MCDONAGH, *supra* note 1, at 6-7.

5. *See id.* at 15-17, 93-96.

6. *See id.* at 84-91.

7. *See id.*

paradigmatically liberal right to defend herself against any assaultive appropriation by others of her physical self.

Two implications follow from McDonagh's reframing of the basic right to terminate a pregnancy, both of which are of great significance to the abortion debate. First, if the right to an abortion is indeed best understood as a right to defend oneself against the nonconsensual appropriation and use of one's body by a fetus, then it no longer matters whether or not the fetus is a "human being" or a "person"; a woman, no less than a man, has a right to defend herself against the nonconsensual appropriation and use of her physical body by any human life, born or unborn, whether or not that person is genetically linked, whether or not that person is an intentional agent, and whether or not that person is a fetus, an infant, or an adult. Given McDonagh's premises, the "personhood" of the fetus is no longer fatal to the right to an abortion; in fact, if anything, this characteristic clarifies the right's contours.[8] Second, so reframed, the right as defined by McDonagh strongly implies a correlative right *to state funding*.[9] In liberal societies governed by the rule of law, we typically have not only a right to defend ourselves against nonconsensual appropriations of our bodies or body parts, but we also have a firm expectation (whether or not a right) that the state will assist us in perfecting that defense. The very *raison d'être* of even a bare bones, minimalist, night-watchman state requires as much. States exist, largely, to ensure that we are protected against precisely such assaultive invasions. To whatever degree the state protects individuals against invasive assaults by others, the state must provide comparable protection for those suffering nonconsensual pregnancies. The only way it can do so, realistically, is by funding abortions.

Both implications of McDonagh's argument—that the right is not dependent upon the nonpersonhood of the fetus, and that it seemingly implies at least a moral and political (and possibly a legal and constitutional) right to state funding for abortions—distinguish it from the "argument from choice" that dominates the pro-choice movement, pro-choice rhetoric, and to a lesser extent Supreme Court abortion jurisprudence. Thus, it is widely assumed, and in fact was conceded in oral argument in *Roe v. Wade*[10] itself, that the right to an abortion—understood as the right to choose an abortion free of state interference—would have to give way to the fetus's right to life, if the fetus were to be understood as a person.[11] McDonagh takes no position on whether this concession is warranted, but argues instead that if we understand the right to an abortion as a right to defend oneself against nonconsensual, invasive takings of one's body by others, the right is strengthened rather than weakened by the assumption that the fetus is a person; again, no born person would have the right

8. *See id.* at 10-11.
9. *See id.* at 8-9, 10-11, 107-24, 139-42; McDonagh, *supra* note 3, at 68-73 (manuscript).
10. 410 U.S. 113 (1973).
11. *See* id. at 164-65.

to appropriate the body of another toward the end of the assailant's own survival, and this is true, as noted above, whether or not the aggressor was genetically linked to the victim and whether or not the aggressor was an intentional agent.[12] Similarly, the argument for abortion from "choice" has been unsuccessful in sustaining the claim that the right to an abortion embraces the right to state funding. Congress has explicitly refused to fund poor women's abortions,[13] and the Court has explicitly upheld its power to do so.[14] Again, McDonagh takes no position one way or the other on the correctness of the Court's decision. Rather, she argues, were the right to an abortion understood as originating in our right to defend ourselves against nonconsensual, assaultive invasions of our bodies, the right to funding would logically, legally, and perhaps constitutionally follow; the right to an abortion, so understood, is a part of our right to be protected by the state against private violence, rather than our right to make private medical decisions free from state interferences. To whatever degree the state protects us against similar private aggressions by born persons (or other assaultive entities), the state must then protect us in this realm as well.[15]

For both reasons, McDonagh's argument, if successful, is not only provocative but practically and politically important. If it is a good argument, it should be embraced and propounded by both the political and legal wings of the pro-choice movement. It gives an argument for abortion rights that implies the right to funding which is strengthened rather than weakened by the increasingly apparent humanity of the fetus, and it does so through the traditional legal method of analogizing pregnancy and fetal life to lived experiences and circumstances which, if not exactly common, are at least potentially available to all of us. It ought to embolden and empower the embattled abortion rights movement, even while it occasions a rethinking of the legal and moral assumptions that to date have overdetermined the logic of that movement's central arguments. It proffers a stark and fecund constitutional argument for reproductive freedom that builds on and accepts, but also transforms as it deepens, existing privacy jurisprudence. It is a liberal and individualistic argument, respectful of the institutions as well as the moral precommitments of liberal legal jurisprudence. It could conceivably find its way into the Court's reasoning over the next few years. If that were to come to pass, it would be a momentous step forward for women's equality, and for the autonomy of women and men both, in relation to their reproductive lives. Needless to say, by strengthening women's equality and autonomy, it might thereby improve not only women's civic and economic life but the quality and justice of family life as well.

I have commented elsewhere, however, on the substantial contribution I think

12. *See* MCDONAGH, *supra* note 1, at 9, 138.
13. *See* Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1980).
14. *See* Harris v. McRae, 448 U.S. 297, 315 (1980).
15. *See* MCDONAGH, *supra* note 1, at 142.

this book makes to the abortion debates.[16] In this review essay, I want to show that the importance of this extraordinary book is not limited to the unquestionably novel argument it puts forward for abortion funding, or to any other short- or long-term contribution to the abortion wars. I want to suggest instead that the book reaches well beyond abortion politics, and that it makes an original and much needed contribution to liberal theory, and hence to liberal feminism. The uniqueness and importance of McDonagh's argument is that it takes very seriously the liberatory and egalitarian promises of both Kantian liberalism and the rule of law in liberal societies, and it takes very seriously the possibility of extending those liberatory and egalitarian promises to citizens who happen to be women, and to those women who happen to be pregnant. If what it means to be human is, importantly, to be free, and what it means to be free is to have the power to will oneself, through giving or withholding consent, to those institutions, or obligations, or others, or conditions, that later become defining, then women must be given the right to consent or not consent to those institutions, obligations, others, and conditions that define and confine us. Justice, in short, requires as much. Pregnancy, McDonagh is arguing, is not only a "natural condition," it is also precisely such an institution, obligation, and condition—and the fetus is one such "other"— that triggers this liberal demand of justice, and hence of a woman's consent. For pregnancy in a liberal society to constitute a just condition, it must be a relation between a woman and a fetus to which the woman has given her full and voluntary consent.

A good part of contemporary liberalism, as well as a good part of modern feminism—from John S. Mill's work on marriage[17] to Catharine MacKinnon's work on sex[18]—has been committed to the task of extending *to women* what is in essence the promise at the heart of liberalism: if we render those social and legal institutions that define, constrain, or enrich our lives *consensual*, they will facilitate, rather than restrict our freedom, and that will in turn deepen our societal commitment to justice. For that to happen, however, the institutions themselves must be radically transformed. Thus, for women to be equal and free, Mill argued, they must be equal and free in their marriages; for that to happen the institution of marriage must be transformed, from its legal superstructure to the defining psychology of its participants. For women to be equal and free, MacKinnon has argued in this century, they must be equal and free in their sexual lives; for that to happen our sexual institutions must be transformed, from their legal superstructure to their defining psychology. McDonagh's work is squarely in that liberal and liberal feminist tradition, and it is no overstatement to say that it is of comparable importance to both Mill's and MacKinnon's work. For women to be equal and free, McDonagh is arguing, they must be

16. *See* Robin West et al., *supra* note 2, at 205-11.

17. *See* John S. Mill, *On Marriage, in* ESSAYS ON EQUALITY, LAW, AND EDUCATION 35 (John M. Robson ed., Routledge & K. Paul 1984) (1833); John S. Mill, *The Subjection of Women, in* ESSAYS ON EQUALITY, LAW, AND EDUCATION, *supra*, at 259 (1869).

18. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

equal and free in their reproductive lives. For that to happen the institution of pregnancy must be transformed, again from its legal superstructure to its defining psychology. Without her consent, a woman's pregnancy works an injustice upon her. Until that is clearly recognized and rectified, women's lives, particularly their reproductive lives, will remain an anomaly in a liberal polity.

There are other commonalities between McDonagh's current project, and Mill's and MacKinnon's work on marriage and sex respectively. The arguments put forward by the three have striking structural similarities. All three social critics have argued the moral necessity of women's consent to the justice of a defining institution, have then highlighted the present lack of it, have emphasized that the lack of a woman's consent implies an act of violence upon her, which had theretofore been unrecognized or unacknowledged but which carries substantial psychic and physical harms, and then have tried to hold that violence and the unacknowledged and uncompensated harm it causes to the critical light of the demands of justice. In all three cases, furthermore, the responses by critics to these arguments have been much the same. In all three cases the argument that some important institution, convention, or condition that defines or colors women's lives can only be morally justified if it is consensual, has been met first with the claim that the institution, convention, or condition so targeted—patriarchal marriage, sex, pregnancy—is a *natural* condition, or at any rate impervious to change, and then with the claim that the alleged harms the institution purportedly visits upon women are in any event trivial or nonexistent.[19] Accordingly, in all three cases, the argument for liberal reform has been dependent upon both a clear showing that the institution in question is nonconsensual, harmful, and changeable, and a resolute insistence that liberalism demands that the state take the harm seriously. Eileen McDonagh is the next on a short but impressive list of political writers to show in detail the liberatory and radical consequences of taking liberalism seriously and applying it in an evenhanded and rigorous fashion to the conditions of women's lives. McDonagh's book, in short, deepens our appreciation of liberalism and its promise, just as it deepens our understanding of the work that needs to be done to secure its fruits.

In the four sections of this essay, then, I want to examine the book as an exemplary model of and contribution to liberal, liberal legalist, and liberal feminist theory, arguing in each section that the book (and the article) exemplify not only the strengths of liberalism, feminism, and liberal feminist reasoning in law, but also their limitations. Let me be clear, however, at the outset, that I want to explore the quality, strengths, and limits of liberal legalism that I think this book exposes so as to strengthen, not discredit, its central argument regarding abortion rights. I basically agree with Eileen McDonagh that the

19. For a contemporary example, see Richard A. Epstein, *Two Challenges for Feminist Thought*, 18 HARV. J.L. & PUB. POL'Y 331 (1995) (asserting that differential treatment is the result of biological evolution and therefore natural).

general argument for protecting women's reproductive integrity that she has spelt out in this book is superior to the privacy, equality, or due process-liberty arguments the Court and the pro-choice movement have employed to date. By examining the ways in which that argument is served, and some of the ways it may be disserved, by its fundamental liberal assumptions, we may strengthen both her basic argument and the liberal theory that animates it.

I. LIBERALISM, FORMAL EQUALITY, AND ANALOGICAL REASONING

McDonagh's basic argument is captured without too much slippage in a few basic analogies, the first of which appears in the affirmative presentation of the argument in her book, and the remainder in her responses to objections, and some of which are elaborated more carefully in her forthcoming law review article. The first analogy I've already noted. A nonconsensual pregnancy, McDonagh argues, is basically analogous to an assault by a born person in need of body parts, an assault against which one clearly has both the right to defend oneself and a legitimate expectation that the state will assist in that self defense. We surely have such a right of self-defense, even as against a genetically-linked born child. For example, if a grown child of "Justice John Doe" were to find himself or herself in need of one of Justice Doe's kidneys, Justice Doe would clearly have the right either to consent or not to consent to the donation of that kidney, even to his own child and regardless of the fact that Justice Doe was responsible for bringing that child into the world in the first place.[20] Furthermore, if Justice Doe refused to consent to the donation of his kidney and his grown child attempted to appropriate the kidney by force, Justice Doe would have a legitimate expectation, and perhaps a right, that the state would assist him in resisting his child's assault. The position of the woman pregnant without her consent, McDonagh argues, is basically analogous to the position of the woman or man assaulted by a grown child in need of one of their body parts. If the intercourse was voluntary, she may be partly responsible for having brought the fetus into existence. But likewise, the parent of the grown (or at any rate the born) child is also partly responsible for having brought that child into existence. In either case, the partial responsibility of the parent for the child's existence does not imply the child's right to appropriate the parent's body against the parent's will. Thus, if the pregnant woman refuses to consent to the fetus's appropriation and use of her body, then that appropriation and use is a (noncriminal) assault and a harm, against which she has the right to defend herself. Like Justice Doe, she can defend herself against that assault even with lethal force, if required, and like Justice Doe she has a legitimate expectation, and possibly a right, that the state will come to her assistance in achieving that end.[21]

The second analogy central to McDonagh's argument appears as a response

20. *See* MCDONAGH, *supra* note 1, at 138-39.
21. *See id.* at 142.

to two separate (but related) anticipated objections. The two objections are straightforward. The first I've already noted: the fetus lacks agency. We are not justified in using lethal force, the objector might argue, against an agent who is in no way responsible for the harm that agent is occasioning, even if we are justified in using lethal force against an intentional wrongdoer. Not so, McDonagh argues; we are justified in defending ourselves against *unintentional or nonculpable* assailants no less than intentional wrongdoers. We are, for example, justified in defending ourselves against wildlife, even if that wildlife is federally protected, and even if fully innocent, and even if our own negligent acts wound us up in our sorry predicament; we can kill a grizzly bear rather than acquiesce in her desire to eat us. We are justified in defending ourselves against the criminally insane (and hence "not culpable" attackers). We are justified in defending ourselves against natural disasters. Grizzlies, the criminally insane, and natural disasters all lack agency, but this does not diminish the force of our right to defend ourselves against them.[22] Likewise, the fetus's lack of agency does not imply that our right to defend ourselves against it is diminished.

The second objection is somewhat more complicated, but (in my view) potentially more damaging; if we consent *to the risk* of pregnancy when engaging in consensual intercourse, haven't we thereby consented to the pregnancy itself? McDonagh thinks not and again resorts to analogies (some of the same analogies as above). We are sometimes morally and even legally responsible, McDonagh concedes, for those conditions or events the risk of which we essentially gave rise to by our own actions, particularly if the action was negligent or reckless. If we slip on a wet floor, we are at least partly responsible for the resulting injury if we created the mess in the first place and for some reason neglected to clean it up. Nevertheless, McDonagh argues, in my view correctly, it does not follow that we *consent* to the injury even if it's true that our actions negligently increased the risk of the injury's occurrence. Thus, we don't consent to the presence of the cancer in our lungs even if we increased the risk of its occurrence by smoking cigarettes. We don't consent to the devastation a hurricane does to our residence even if built in a high risk area. We don't consent to the grizzly bear's consumption of us even if we negligently entered the wrong area of the forest. We don't have to permit the cancer to thrive within us or acquiesce in the harm done to our property or allow the grizzly to eat us; we can expel the cancer to the best of our ability and repair the damage done to our home, we can and do defend ourselves, with lethal force if necessary, against grizzly bears. Consent to a risk of harm, she concludes, does not imply consent to its occurrence.[23]

I don't want to examine here the merits of these arguments. Some objections are relatively obvious, and a number of them are catalogued and convincingly

22. *See id.* at 34-36; McDonagh, *supra* note 3, at 46, 50-51 (manuscript).

23. *See* MCDONAGH, *supra* note 1, at 43-44, 66, 141-42; McDonagh, *supra* note 3, at 40-43 (manuscript).

responded to in *My Body, My Consent.* I want to look instead at the reliance on analogy—a reliance at least as crucial to McDonagh as it was twenty years ago to Judith Thompson's famous and similar, but more limited, liberal argument for abortion rights, which turned on the similarity of the pregnant woman's dilemma to that of a person involuntarily hooked up to a famous and medically needy violinist, against her will, and for nine months of her life.[24] The heavy reliance on analogical reasoning at the heart of McDonagh's case—the fetus analogized to a born person assaulting a parent toward the end of procuring necessary body parts, to a natural disaster, to a grizzly bear, to a criminally insane assaulter, and to a disease—is, perhaps, the most brilliant and memorable feature of McDonagh's argument, even if, for many readers and critics, it is the most off-putting. What I want to stress here is that whether we view those analogies, and the methodological reliance upon them, as brilliant or unfortunate, that reliance itself is a direct consequence of the liberalism and, more specifically, of the liberal legalism that animates the entire vision.

A liberal society requires that our universality be acknowledged and respected—we share universal traits that demand respect—and the rule of law in a liberal society demands that like cases be decided alike. Equality and liberty both, from a liberal perspective, are dependent upon the recognition and the equal treatment accorded our universality. It is imperative, therefore, in a liberal society, that pregnant women be treated equally to nonpregnant persons. Pregnant women share in the universal traits that in turn demand equal respect and dignity, and it is the heart of liberalism to bestow that equal respect, dignity, and treatment, and in spite of their manifest distinguishing characteristic: pregnant women and only pregnant women are physically and biologically attached, or connected, to other human life. And it is imperative from a liberal *legal* perspective that the state, through its laws, treat pregnant women similarly to other persons similarly situated—like cases must be treated alike. The core conviction of liberal legalism is surely that our universally shared human essence requires this equal treatment; law must treat us equally, because of the profoundly important ways in which we are *alike*. To do otherwise is chauvinist, nationalist, racist, alienating, subordinating, discriminating and, from a liberal perspective, illegal to boot. Liberalism requires a communal and state recognition of our shared universal nature, and liberal legalism requires a rule of law that accordingly treats likes alike.

Thus, the overpowering need for analogical thinking. The heart of the liberal impulse is to recognize and acknowledge the universality of the human condition, and Eileen McDonagh, to her great credit, expresses that heart better than any current liberal theorist. The pregnant woman who does not consent to her pregnancy, she points out, is not unlike others suffering nonconsensual assaults, and it is that *similarity* we must emphasize and respond to if we are to treat her

24. *See* Judith Jarvis Thomson, *A Defense of Abortion*, *in* RIGHTS, RESTITUTION, AND RISK (William Parent ed., 1986).

justly. By examining and responding to the similarities, we can best appreciate the demands of justice. If others similarly situated are permitted the right of self-defense, then so must she be as well. If others legitimately expect the protective assistance of the state when so doing, then her expectation must be honored as well. To do less—to treat her dissimilarly when she is in fact similarly situated—is to in effect throw her out of the legal community, or, alternatively, to allow her to remain but only at the price of her exploitation. It is to use her rather than to equally regard her. Equal regard—the heart of liberalism—requires that pregnant women be treated similarly to those with whom they are similarly situated. The imperative of equal treatment at the heart of liberal legalism animates the need to locate those to whom she is similarly situated and, therefore, the search for analagous conditions.

This is why the ethical and even emotional heart of McDonagh's argument lies squarely in its driving analogy. If a man (or a woman) were to be attacked by a born child intent on appropriating some needed body part against the man's will, the man would be allowed to ward off the attack, and could expect the state to assist him in doing so. Why should the pregnant woman be treated or viewed any differently? If we *do* treat and view her differently, might it be because we have become so thoroughly accustomed to viewing and treating pregnant women as the natural nurturers of human life, and their bodies as the natural vehicles for that function, that we are comfortable regarding her will, her consent or lack of it, her drives, interests, and subjectivities that may be contrary to that end, as simply beside the point? If we insist on the utter *differentness* of the nonconsensually pregnant woman from the attacked man, might it be because we have for two millennia viewed women, but not men, as the creatures who distinctively contribute their earthly bodies to the cause of human survival, and do so without their "consent," their will, or their desire to do so, ever really being a serious issue? If we view women as distinctively different in this way, might it be because we view them as basically will-less, as creatures who distinctively, even by definition, nurture because their nature compels it, rather than because they have decided to do so? If we view women as distinctively different in this way, then, isn't it because we view them as creatures for whom liberalism cannot possibly have been forged, and as creatures whom a liberal state cannot possibly protect from nonconsensual assaults, and particularly from invasive, nonconsensual assaults, on their bodies?

Eileen McDonagh's analogies force these questions. If we are going to honor the universal in the human being, and if we identify the universal as, in part, the capacity to freely will our most significant actions, including above all else the act of supporting other human life, and if we are going to include pregnant women in that class of people capable of moral freedom, then we are going to have to acknowledge that the category of nonconsensual assaults that infringe the rights of persons includes the category of nonconsensual pregnancies. That in turn might force us to see all pregnancies, consensual and nonconsensual, in a new light. We might come to see pregnancy as an *act*, rather than a condition,

that in turn follows upon a decision to contribute one's physical body to a new life. If so, then like all such acts it has moral meaning when it is the result of a willed decision to do so. To view a nonconsensual pregnancy in this way—as an assault—and to view a pregnancy in this way—as the act that follows the decision to assist another human life to come into being—is concededly an awkward and unfamiliar accommodation. We are no more accustomed to thinking of nonconsensual pregnancies as assaults than we are accustomed to thinking of consensual pregnancies as actions following upon willed and free decisions. But it is an awkwardness and discomfort and unfamiliarity that should feel, by now, familiar. It is the awkwardness and discomfort and unfamiliarity that has accompanied every liberal advance in including within the scope of the human community that which had been previously excluded, and then treating and respecting it accordingly.

That very reliance on analogy, however, also reveals the limits of McDonagh's argument, which may in turn suggest a limit to the power of liberal legalism, at least in the area of abortion rights. Of course, a fetus is not a born person, nor is it a hurricane, or a cancer, or a grizzly bear, and while being invaded and attacked by an unwanted fetus might be similar in some ways or for some purposes to being attacked by a born person (with or without agency), or a grizzly bear, or a cancer, it is not identical. Analogies highlight the differences as well as the similarities of whatever is being analogized, and that is certainly the case here as well. Thus, there are differences between fetuses on the one hand and born humans, grizzly bears, and natural disasters on the other to which the analogies, rather dramatically, direct our attention. Of course, not all differences matter. But here there are, I think, at least three such differences that might be salient.

First, an attack by a born person, to begin with the narrowly political, threatens the peace—and hence threatens the state—in a way that the invasion of a woman by an unwanted fetus does not. Perhaps this is not a difference that *ought* to matter to a liberal state, which perhaps ought to care more about protecting rights than its own security, but, nevertheless, it may well be at least *one* reason the individual is given so much greater protection against the overt violence done by a born person than against the covert violence done by a fetus, even in a liberal regime. A sovereign—any sovereign, including a liberal sovereign—has a much greater stake in deterring or in some way suppressing overt, visible, born-person-on-born-person violence than in deterring or in some way suppressing fetal-maternal conflicts. To put the point crudely, the sovereign—even the liberal sovereign—has not conferred rights in the latter situation in part, perhaps, simply because it (unlike its subjects) has no need or interest in doing so. Subordination of the woman to the fetus's needs, even if that subordination constitutes an invasion and appropriation of her body, can happily coexist with a regime that accords legal equality of born citizens by enforcing a peace among and between them.

The second difference goes to the nature of the harm. Even acknowledging

the profound alterations of a woman's physical body occasioned by a normal pregnancy, that pregnancy, even when nonconsensual, does not typically threaten death, lasting bodily injury, or even *an immediate* disruption of the woman's life plans and projects the way a violent assault by a born person most often does. Women who are undergoing nonconsensual pregnancies are typically *not* in fear of their lives; they don't worry that the fetus will kill them, and for a good part of their pregnancy they can go about their normal life routines. The fear of death or serious bodily injury which is such a great part of the harm occasioned by assaults by born persons is not such a salient part of the assault occasioned by most—certainly not all—nonconsensual pregnancies. This is not to underplay the very real physical changes wrought by *all* pregnancies: wanted, unwanted, consensual, and nonconsensual. But those changes are, simply, different from the changes we typically associate with violent assault. And the differences, by definition, are going to have to be addressed in some way other than the analogical.

McDonagh recognizes this point, and her response, although partial, is an important one. A nonconsensual pregnancy, McDonagh argues, can be analogized to assaults, particularly for purposes of clarifying our moral, legal, and political intuitions; nevertheless, the physical *harm* brought on by a nonconsensual pregnancy is misunderstood, underappreciated, and, for the most part, *sui generis*. To underscore and make real that physical harm, McDonagh abandons analogy and relies instead on an elaborate and detailed description of the physical effects, particularly but not only the debilitating physical effects, of both normal and risky pregnancies.[25] This utterly nonanalogical and lengthy description of exactly what it is that a fetus does to a woman's body is one of McDonagh's most important contributions to the literature. It is the best description I know of, outside of a medical textbook, of the effects of pregnancy on a normal adult female body. There is, I think, no way to read it in good faith and not concede at least the plausibility of her basic point: if even a small number of these profound physical effects—the *four-hundred-fold increase* of some hormones, for example, that a pregnancy prompts in a woman's body—were to be wrought upon a victim's body, without consent and by a born assailant toward the end of the assailant's physical survival, no matter how innocent and needy the assailant, those effects would be immediately and noncontroversially recognized as a *harm*, and a harm against which the victim has a right of self-defense.

Nevertheless, in my view McDonagh doesn't go far enough toward the end of simply accounting, descriptively, for the differences in the nature of the harm occasioned by nonconsensual pregnancies and the harm occasioned by garden variety assaults. This may be, in part, because her deeply liberal convictions repel her from difference and draw her instead to emphasize the commonalities shared by assaultive nonconsensual pregnancies and other sorts of experiences. The heavy reliance on the physical harms of pregnancy, although driven by the

25. *See* MCDONAGH, *supra* note 1, at 69-78.

laudable liberal urge to identify the common ground between ordinary injuries and pregnancies, risks missing entirely the psychic harms such pregnancies occasion. Those psychic harms may be not only *sui generis*, but impossible to describe in either analogical or medical terms. If so, they are going to be precisely what is missed in a rigorously liberal attempt to capture the harmfulness of nonconsensual pregnancy. But they may also be what definitively characterizes the changes of a pregnancy, when nonconsensual, as harmful.

I have written at length elsewhere on what those psychic harms may be,[26] so I will only briefly recapitulate them here. They are not at all at odds with or even discontinuous with the essential thrust of McDonagh's argument. Subjectively, or experientially, the central point is just this: the nonconsensual pregnancy, unlike the nonconsensual assault, threatens not so much to end your life "from the outside," so to speak, but to "take over" your life from the inside. The fear is not that my life will end but that my control over its course will end. A more objective way to characterize the injury, and in terms that might be more continuous with McDonagh's, is that it so flagrantly precludes the possibility of the woman becoming or experiencing herself as a free and moral person—as that person is understood, paradigmatically, by liberalism itself.

A free moral person, it has been the central lesson of liberalism to convey, is someone who *freely decides* to undertake moral action. It is hard to avoid the conclusion that the woman who has no choice but to remain pregnant *against her will* is, from a liberal perspective, something considerably less than human. In some sense she is engaging in moral action—she is sacrificing her own body for the well-being of another. But she is doing it unwillingly, without her consent, and without any decision on her part to do so. Her moral being is more like the morality of the chestnut tree that provides shade than it is like the moral being of the civic volunteer giving time and effort and resources in the community. Her moral essence is passive and will-less, when nonconsensual, and this passive, will-less moral role is imposed upon her by a community and a state that are unwilling to act on her behalf to prevent it. If she keeps the baby she eventually bears, of course, she will continue to live out this antiliberal moral mode for a good part of her adult life. Her moral essence is so increasingly and cumulatively premised upon her will-lessness and nonconsensuality, that she can eventually become thoroughly alienated and differentiated from the rich, hopeful, and promising conception of moral action—the freely willed moral deed—defined by liberalism as the essence of human freedom. The woman who is pregnant against her will embodies nonfreedom, because she embodies the very act—unwilled sacrifice of one's body for the life of others—that is freedom's antithesis.

The last difference goes to the other side of the balance. McDonagh's liberal insistence on the analogical similarity between the nonconsensually pregnant woman and the assaulted victim misses the substantial payoff of a pregnancy:

26. *See* ROBIN WEST, CARING FOR JUSTICE (1997).

the four-hundred-fold hormonal increase on a nonpregnant person doesn't result in something as wondrous and as innocent (in the eyes of some) as a healthy human baby. If we combine this difference with the first two—the fetus's use of the woman's body does not threaten the peace and only rarely rather than typically threatens death or lasting bodily injury—it looks much less clear that the liberal balance between the woman's bodily integrity and freedom on the one hand, and fetal and newborn life on the other, ought to be struck in the same way as the balance between the assailee's bodily integrity and freedom on the one hand, and the born person's survival chances with the withheld kidney on the other. The response to the objection that it ought not be, I think, might surely be *informed* by analogies. It is, though, in my view, an undue reliance on and deference to liberal legalism to think that that response can be *limited* to the realm of analogy, hypothetical, and thought experiment, for the simple reason that *there is just nothing quite like the pregnant woman's relation to the fetus, whether consensual or not.* Striking the correct balance, from a liberal perspective, between the constraints on women's freedom and the invasion of their bodily integrity occasioned by nonconsensual pregnancies and the value of the lives those pregnancies nurture, requires us to look away from thought experiment and to the world: to the effects, in a liberal but still patriarchal society, of withholding this freedom from women; to the quality of the judgments women make when granted the power of decision; to the consequences of conferring that power, alternatively, on husbands and fathers, on the state, on courts, on legislatures, or on doctors. In my view, women, their children, their families, and liberal society generally are all best served by conferring the power of consent, nonconsent, and choice on pregnant women themselves, and given that assumption, the strength of the case for protecting women from the harms of nonconsensual pregnancies through a liberal right to be free of such burdens is quite clear. But the argument for this conclusion comes at least partly from experience in the social, lived-in world; it cannot come solely from the nature of fetal life, the logic of rights, and analogies and hypothetical forms of arguments we can then use to understand their contours.

I will comment much more briefly on the problems that plague the particular analogies and the methodological use of analogies McDonagh employs to respond to the two objections recited above. To the first objection—that fetuses lack agency—McDonagh is right to point out that cancers, grizzly bears, and insane assailants also lack agency, yet we routinely characterize their effects as harmful, and feel fully justified in expelling them from our body, if we are capable of doing so. But the analogies raise problems—perhaps, here, more than they solve. Simply put, the more closely we identify (or analogize) the fetus to natural phenomenon that lack agency, or events the harm of which we are entitled to defend against, even if we've partly assumed the risk of their occurrence—such as grizzlies, hurricanes, or even cancers—the greater the cost done to the claim that we have a legitimate expectation, and possibly a right, to state protection against the harms occasioned. That is, even if we have a right to

state protection against private violence, it seems to be one that is limited to state protection against harms done by human beings, even if not to those human beings who are also intentional agents. We may have a right to defend ourselves against the cancer that invades our body, but it is by no means clear in this culture that we have a right to the state aiding us in our attempt to do so, and likewise the grizzly and the hurricane. The stark argument, in other words, that we must have a right to state funding of abortion to whatever degree we have a right to state protection against violence, is strengthened by whatever intuitive appeal attaches to the proffered analogy between the fetus and a human assailant, but it is weakened, and dramatically so, where the fetus is analogized to increasingly natural phenomena.

McDonagh is careful not to mix metaphors or analogies, and there's no *logical* difficulty in analogizing the fetus to one sort of thing for one purpose and another sort of thing for another. But nevertheless, at some point the multiplicity of analogies start to work against each other. The fetus, in other words, is analogized to a born person for purposes of making out the original right of self-defense, to a natural phenomenon to highlight the irrelevance of the arguable assumption of risk involved in the original act of intercourse to the right of self-defense, and then, finally, to a criminally insane assailant to illustrate the irrelevance of the fetus's lack of agency to the woman's right to state assistance. But this comes to seem somewhat arbitrary—if we mix up the analogies, we get different results. If the fetus is "most like" a grizzly or a cancer, the woman may have a right to resist it, but she surely has no right to state assistance in doing so.

And finally, there are also problems with McDonagh's analogical response to the following objection: that a woman who is pregnant against her will, but as a result of voluntary intercourse, has implicitly consented to the pregnancy because she at an earlier time (when engaging in intercourse) voluntarily assumed the risk of conception. Again, McDonagh's response is that a woman who consents to intercourse does not necessarily consent to the pregnancy; by analogy, if we engage in risky behaviors we may have consented to an increased risk of disease, but it doesn't follow that we've consented to the disease, in the important sense of having no right to attempt to expel it. For McDonagh, this is an important, even central and defining issue; she does not intend her argument to extend only to pregnancies that result from rape or from non-negligent contraception failure. But is it really the case that consent to the risk of pregnancy does not entail consent to the pregnancy? Analogies can be piled on, and on either side. In contract law, clearly, consent to an assumed risk does imply consent to the risked event; if it didn't, no contract would be secure. If we analogize a voluntary agreement to have intercourse to a voluntarily entered contract, the risked event, pregnancy, does look consensual if the agreement to assume its risk was consensual. In criminal contexts, by contrast, McDonagh's argument looks sound; consent to a risked criminal event does not by any means imply consent to the crime—walking through a dangerous neighborhood, it's

clichéd but true, does not trigger your consent to the redistribution of your cash and jewelry to muggers. In tort, the situation is complicated and conflicted; consent to a risk might or might not constitute assumption of the risk, and hence consent to the risked event.

My point here is not to settle these warring intuitions, but rather to suggest that the analogical method so central to liberal legal reasoning, and so central to the logic of this book, is not going to resolve them—for reasons, again, which might tell us something about the limits of liberal legalism at least as important as what it tells us about the logic of abortion rights. A fetus is not a cancer, an insane assailant, or a grizzly bear; intercourse is not a wet floor, and an agreement to have intercourse is not (typically) a binding contract with contractually assumed risks. If we think that (or decide that) consent to intercourse *doesn't* entail consent to the risked pregnancy, it can't simply be because one or the other of these analogies is "correct." It must also be because of our understanding of intercourse and our understanding of pregnancies. Thus, if we think, as I do, that intercourse is often less informed and voluntary than a perusal of rape statistics might suggest, and that nonconsensual pregnancies are far more harmful than is commonly understood, we will be *much* less inclined to think that what is perceived to be consensual intercourse, and what is perceived to be full knowledge of the risk of pregnancy, constitutes consent to pregnancy. If we think that intercourse is uncomplicated when consensual, and that even a nonconsensual pregnancy is relatively harmless when normal, we will be more inclined to think that consensual intercourse constitutes consent to pregnancy. Neither liberalism, nor analogous reasoning, I am afraid, are going to further us down the path of resolving these questions. Rich descriptions of the largely unrecognized and misunderstood harms of nonconsensual pregnancies—which McDonagh has gone a long way toward providing—and rich accounts of the ambiguities of the voluntariness of intercourse—which she only brackets, rather than highlights—however, might.

II. LIBERALISM AND CONSTITUTIONAL ARGUMENTS

American liberal legal theory, distinctively, embraces existing American constitutional law, doctrine, institutions, and practices, viewing constitutionalism as no less constitutive of liberalism than liberalism is of constitutionalism. To put the same point another way, American liberal legalists, perhaps uniquely, are committed not only to the rule of law as understood by liberal theory, but also to the rule of law as adjudicated by American Supreme Court Justices under the United States Constitution through the vehicle of judicial review. As a consequence, they are committed to the decidedly odd equation of liberal political theory with adjudicated constitutional law doctrine; they read liberalism through the gauze of constitutional doctrine, and constitutional doctrine through the lens of liberal theory.[27] Sometimes, the overall effect of this near

27. The secondary literature on this phenomenon is enormous. Perhaps the best example of a

instinctual equation is to liberalize, and dramatically, existing American constitutional doctrine. Constitutional law, when interpreted so as to accord with liberal justice, is a somewhat different creature—and an obviously more liberal one—than constitutional law interpreted according to some other political theory, or according to no political theory at all. At other times, however, and particularly when the constitutional law or doctrine in question is unequivocally non- or antiliberal at its core, the effect of the synthesis is to dilute the power of liberal critique, rather than to ennoble, enlarge, and constitutionalize the reach of liberalism. McDonagh's constitutional argument, briefly stated above—that women have not only a right to defend themselves against nonconsensual pregnancies but a constitutional right to state funding to assist them in doing so—shares in this conundrum. Her attempt to reconstruct not only the moral and political basis of abortion rights, but also the legal argument for their constitutional protection along lines true to liberalism and constitutional doctrine both, runs the risk of diluting liberal critique without substantially increasing the chance of liberalizing and strengthening constitutional law. Let me first explain her doctrinal conflict and then return to the liberal constitutionalist's general dilemma, of which McDonagh's argument is an instance.

Both in her book and now more pointedly in her article, McDonagh makes clear that she wants to argue that a pregnant woman has not only a moral and political right, grounded in liberalism, to expect the state to protect her against nonconsensual pregnancies, but a *constitutional* right to that protection as well—and hence that the congressional refusal to fund abortions for poor women is flatly unconstitutional.[28] I agree with her that the refusal to fund these procedures *ought* to be regarded as unconstitutional, and I agree that under one possible reading of the Fourteenth and Fifth Amendments it is unconstitutional. But McDonagh wants to go one step further. She wants to urge that the unconstitutionality of that refusal is clear from Supreme Court precedent on the subject, from *Roe v. Wade*,[29] to *Planned Parenthood v. Casey*,[30] to *Deshaney v. Winnebago*.[31] It's only the Court's failure, to date, to fully appreciate the implications of what it has already decided that has precluded it from seeing as much. On that doctrinal point I think she is simply wrong, although I understand and admire her adamant insistence to the contrary.

Of course, McDonagh recognizes, and insists, that if her reconceptualization of the basic right to abortion were to take hold on the Court, the Hyde Amendment,[32] as well as much else regarding abortion funding, would have to

---

conscious attempt to integrate liberalism and constitutionalism is Ronald Dworkin's early refutation of positivism, TAKING RIGHTS SERIOUSLY (1977). An early critical attack on the entire phenomenon addressed in the text that has well sustained the test of time is MARK V. TUSHNET, RED WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). I criticize the general trend in Robin West, *Constitutional Skepticism*, 72 B.U. L. REV. 765 (1992).

28. *See* MCDONAGH, *supra* note 1, at 107-54; McDonagh, *supra* note 3, at 68-93 (manuscript).

29. 410 U.S. 113 (1973).

30. 505 U.S. 833 (1992).

31. 489 U.S. 189 (1989).

32. Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1980).

be re-thought.[33] What she wants very much to deny, though, is that there is a deeper inconsistency between her own liberal vision of the state, and the vision of the state currently embedded in much of American constitutional law. If liberalism is embedded in constitutional law as she claims it is, and if liberalism requires state funding of abortions as she claims it does, then the abortion funding cases (as well as the congressional acts themselves) are simply mistakes, and remediable mistakes at that. It is obviously another story entirely, though, if the inconsistency runs deeper.

And, although I know she disagrees, there *is* a deeper inconsistency, which is hard to conceal and which goes directly to her conception of the purpose of law itself. At the heart of McDonagh's political and constitutional argument is the liberal claim that states *must* protect individuals against private violent assault. That is, after all, what states are for, at least as understood in the liberal tradition, from John Locke and Thomas Hobbes through to Robert Nozick and John Rawls. Whatever else states may or may not do, they exist to make life less brutish and nasty and a little longer by prohibiting acts of private violence—and hence subordination—among citizens. The Constitution, read through the interpretive gauze of liberalism, must surely then require as much; citizens do, after all, have a constitutional right to equal protection of the law. What that clause simply *has* to mean, McDonagh concludes, conceptually and literally, is that citizens have a right to equal protection of the law *against private assaults*.

The problem is that the Supreme Court has clearly stated that the individual does not have such a right. As the Court put it in *Deshaney*, there are not only no positive rights in the Constitution, but more specifically, there is no "guarantee of certain minimal levels of safety and security,"[34] and "no constitutional duty to provide substantive services for those within its border."[35] If this means what it seems to mean—that there is no constitutional right to state protection against garden variety violence—if, on the facts of *DeShaney*, a four-year-old child has no constitutional right to protection against the near-lethal violence inflicted upon him by a grown man—then it is very hard to see, first, how our Constitution can be said to echo Lockean or Hobbesian liberalism, but more specifically, to see how it could be that a woman has a constitutional right to protection against the usually nonlethal harms occasioned by a fetus. If there is no constitutional right to be protected by the state against private violence, that seemingly takes the force out of the constitutional argument that because the Constitution reflects in a broad way a liberal consensus that there should be state protection against private assault, and because a nonconsensual pregnancy can be so characterized, there must be some form of constitutional right to state assistance in the latter situation.

McDonagh's response is credible, but ultimately I think unconvincing. First

33. *See* MCDONAGH, *supra* note 1, at 125-54; McDonagh, *supra* note 3, at 68-93 (manuscript).
34. 489 U.S. 189, 195 (1989).
35. *Id.* (quoting Youngberg v. Romeo, 457 U.S. 307, 317 (1982)).

of all, she argues, the *DeShaney* quote is dicta, but more important, the question she needs resolved was not clearly presented in that case in any event. *DeShaney*, in other words, is not on point. McDonagh's argument is *not* that there is a substantive liberty, due process-styled right to the equivalent of a police force in this situation—the existence of which, she concedes, was denied in *DeShaney*—but, rather, that there is a fundamental interest in bodily integrity, and, therefore, an *equal protection*-based right to an equal degree of protection against nonconsensual pregnancies that invade that interest, as exists against other comparably invasive assaults.[36] We do not have a right to a police force, she concedes. But we do have a right—based on the Equal Protection Clause—to the same level of protection accorded other similarly situated persons, at least where such a fundamental interest as the interest in bodily integrity is at stake. And the only way the state can realistically provide that equal protection is through state funding of abortion.

Again, just to clarify, McDonagh's argument is not that we have such a right to state funding of abortion because a suspect class is affected; she acknowledges that *Geduldig v. Aiello*,[37] which held that pregnancy does not define a sex-linked characteristic and hence that the category of pregnant people does not constitute such a class, notoriously cuts off that line of argument.[38] Rather, McDonagh argues, we have such a right because the interest being protected—the interest, here, in bodily integrity—is what the Court has called on past occasions a "fundamental" right or interest.[39] Wherever a fundamental right or interest is affected by legislation that impacts differently on different groups, then that legislation must be subject to "strict scrutiny," and it must be so subjected regardless of whether or not a suspect class is affected. So, whatever degree or kind or amount of protection is provided to similarly situated persons against the sorts of invasive assaults on the body most closely analogous to the invasive assault occasioned by a nonconsensual pregnancy must also be provided to nonconsensually pregnant women. And, McDonagh concludes, such protection is considerable.[40] Hence, the state must protect against these assaults, which again, realistically means simply that the state must fund abortions.

The problem with this response is that to shift the focus from substantive due process—the constitutional basis for the right at issue in *DeShaney* itself—to fundamental interest-equal protection by no means solves the *DeShaney* problem. Surely if a woman is entitled to have her fundamental interest in her bodily integrity protected against the harms brought on by a *fetus*, then four-year-old Joshua DeShaney is entitled to have his fundamental interest in his bodily integrity protected against the near lethal harms brought on by his stepfather. The "fundamental interest" in bodily integrity revitalized and then relied on in

36. *See* MCDONAGH, *supra* note 1, at 138-42; McDonagh, *supra* note 3, at 27-40 (manuscript).
37. 417 U.S. 484 (1974).
38. *See id.* at 496-97.
39. *See* MCDONAGH, *supra* note 1, at 142; McDonagh, *supra* note 3, at 27-32 (manuscript).
40. *See* MCDONAGH, *supra* note 1, at 143-52; McDonagh, *supra* note 3, at 32-40 (manuscript).

McDonagh's argument must extend (at least) to our fundamental interest in protecting our bodily integrity against all acts of violence that portend death or serious bodily injury, not *just* those that are occasioned by fetal life. It is, in other words, always our fundamental interest in bodily integrity that is threatened by violence. If this fundamental interest-equal protection line of analysis is right, then the *DeShaney* dicta is simply wrong, and we do, after all, have a constitutional right to some level of police protection against violence—or at least, we all do so long as some of us do. But this head-on collision with the *DeShaney* dicta is precisely what the dodge into the fundamental interest-equal protection line of authority was designed to avoid.

Alternatively, McDonagh could avoid the *DeShaney* problem by arguing that *Geduldig*[41] is wrong—that, contra *Geduldig,* pregnancy is clearly a sex linked characteristic, and legislation that adversely and intentionally impacts upon pregnant women must therefore be subject to strict scrutiny. Under such scrutiny, the ban on abortion funding for poor women could conceivably fall. Again, though, McDonagh wants to avoid the burden of arguing the wrongness of well-established cases. Indeed, much of her book and the bulk of her law review article are aimed toward showing that precedent and law are clearly on her side. All the Court needs to do, she insists, is acknowledge the assaultive, invasive nature of fetal life in a nonconsensual pregnancy for what it is, make the connections it has thus far failed to make, and overturn only the abortion funding decisions themselves. It need not overrule, or even seriously reexamine, anything beyond that. The liberal result here, far reaching and momentous though it may be, is squarely in line with the Supreme Court's own pronouncements on virtually all related subjects—from liberty, to equality, state action, and, except for the funding cases, even the abortion cases themselves.

Although McDonagh herself is not a lawyer, this insistence in McDonagh's work on the happy harmony between the result demanded by a far reaching liberalism and American turn of the century constitutional doctrine, is a mark of her indebtedness to liberal legalism—American liberal lawyers routinely assume the convergence of liberal commitments and American constitutional doctrine. And, again, that insistence is in some ways a strategic or practical strength of McDonagh's overall approach. If she is right that a recognition of women's rights to be free of nonconsensual pregnancies would be in line with the liberal tradition and constitutional doctrine *both*, then that's obviously important to know, for it means that the Court would have to do very little to accommodate such a recognition. But I'm not sure, here, that the flame of not upsetting the constitutional applecart is worth the candle expended to get there. To put it crudely, what we gain with this argumentative dance around *DeShaney* and *Geduldig* is basically a very small chance that the Court will accept an

41. *Cf. Geduldig*, 417 U.S. at 494 (holding, under rational basis review, that the Equal Protection Clause does not compel states to classify normal pregnancy and delivery as a "disability" for the purpose of paying state employee benefits).

anti-*DeShaney* holding because it is cast in terms that disguise its true nature. But this small-chance gain comes at the cost not only of forthrightness, but also of the consistency of liberalism itself. A Constitution, after all, that provided a right to protection against private assault but only if the sort of assault resembled one type of attack and not if it resembled another type of attack, and only if it was within the logic of one line of precedent, but not if it was within the logic of another, would be decidedly illiberal, as well as irrational. To be more precise, a Constitution that demanded equal protection of the law for women whose autonomy and physical integrity is threatened by fetal life within them, but not for four-year-old boys whose lives are threatened by their parents, would not be one liberals would or should be inclined to support.

The hard truth—certainly for liberals—is that the Court took a drastically illiberal turn in *DeShaney*: to suggest that citizens have no right to state protection against private violence, and hence that a state could constitutionally decide for any or no reason to withdraw its police protection from some class of citizens—say, children, or pregnant women, or poor people—against others, does as much violence to Lockean and Hobbesian understandings of the liberal compact as it is possible to imagine. As long as the *DeShaney* dicta is a good snapshot view of our constitutional law as envisioned by this court, then our constitutional law is illiberal. It might be better simply to acknowledge that fact, than to insist that contrary to the evidence of one's senses a square peg can fit in a round hole, and for two reasons.

First, simply as a practical or political matter, the cost of acknowledging the inconsistency between *DeShaney* and the result McDonagh argues here may not be as high as first appears: if the dicta from one case, such as *DeShaney*, or one line of cases, looks wrong because it is illiberal, such a claim can be incorporated into a sound liberal-legal argument which might nevertheless be accepted by the Court. Courts do from time to time overrule themselves or disown prior dicta. Such could happen here: contrary to the dicta and arguably the holding of *DeShaney*, we all could have a right to state protection against private assaultive invasions, nonconsensual pregnancies could be such assaultive invasions, and the failure to fund abortions could be accordingly unconstitutional. On the other hand, of course, the Court might not accept an invitation to overturn or narrow the *DeShaney* opinion. But it won't be more inclined to issue a decision that implicitly does so because the nature of the inconsistency has been obfuscated.

More likely, though, in my view, the inconsistency between McDonagh's premises and the Court's apparent understanding of constitutional principles signals a real and lasting conflict between liberal principles on the one hand and constitutional law as interpreted by the Court on the other. If that's right, then liberal legals, who almost by definition have identified liberal political moral theory with the best and deepest political interpretation of the constraints of majoritarian processes imposed by the U.S. Constitution, clearly have a dilemma: they can continue to support the limits on government imposed by the Constitution, as interpreted by the Court through the mechanism of judicial

review, or they can continue to support liberal principles. It seems to me that while this is an unhappy choice it is also an easy one; principled political and moral liberals owe their loyalty to liberalism, and not to liberalism as watered down—or polluted by—illiberal constitutional authority. There are other ways to secure a more liberal society than by employing an ambiguous constitutional text to urge a conservative court to police or prod a recalcitrant legislature toward liberal outcomes. McDonagh's book has already altered the academic discourse on abortion and may effect a sea change in the fundamental way we view liberalism in relation to women's lives and bodies as well. If it does, then she will have achieved a change in the liberal landscape that may be of more lasting importance than a chance at affecting the language of what could turn out to be another in a string of hollow Supreme Court victories.

III. LIBERALISM, CONSENT, AND LEGITIMATION

Liberalism rests heavily, and in some versions exclusively, on the moral significance of consent. Liberal feminist reforms and liberal feminism theory, particularly in the latter half of this century, have clearly born the mark of this reliance. To take just one example, the rape reform movement—one of the most important and surely the most successful of the feminist reform movements of third wave feminism—has rested squarely on the liberal foundational claim that the giving of consent justifies an act and the lack of consent marks such an act as coercive. Consensual sex, according first to feminist rape reformers but now to conventional wisdom as well, is legally nonproblematic (whatever may be its moral status), but nonconsensual sex is rape, clean and simple,[42] and it is rape whether or not it is committed against a prostitute, whether or not the victim had a history of promiscuity, whether or not it is accompanied by acts of violence, and whether or not the victim fought back. Consent is necessary to the value, and hence legality, of intercourse, and at least in some jurisdictions the lack of consent is sufficient to establish the criminality of the intercourse.

To continue for a moment with the example, it is clear that establishing the harms and eventually the criminality of nonconsensual sex has been a tremendous breakthrough for women. Women in marriage, prostitutes, women with "promiscuous" sexual histories, women who don't fight back, and women who are sexually defrauded in nonviolent ways—all of whom were not protected under traditional rape law—are all, at least nominally and theoretically, now protected against sexual assault by the criminal law of rape. There are, however, risks, or costs, in the use of consent as a marker of the line between criminality and legality, perhaps the greatest of which is what critical legal scholars refer to as the risk of "legitimation." The risk of legitimation is simply the risk that the insistence on the criminality of nonconsensual transactions, or events, or distribu-

42. The classic treatment is SUSAN ESTRICH, REAL RAPE (1987). I have discussed this liberal understanding of rape in Robin West, *A Comment on Consent, Sex and Rape*, 2 LEGAL THEORY 233 (1996).

tions, such as rape, or theft, or slavery, tends to *legitimate*, or valorize, or in some other way put beyond the realm of criticism, consensual acts, events, or distributions, even where unwarranted. Although, as I will try to show in a moment, there surely is no logical implication, it is a short and unfortunate step from the insistence on the harmfulness and criminality of a nonconsensual transaction to the inference that the same distribution, if consensual, must therefore be *good*. Thus, the criminality of theft, for example, further legitimates the value, as well as the legality of consensual bargains—hence, commerce—as the criminality of slavery further legitimates the value and legitimacy of wage labor. Likewise, the criminality of nonconsensual sex tends to legitimate, or valorize, all forms of consensual sex, including those of which we should be or remain critical. Liberalism, to put the criticism in a nutshell, properly condemns coercive and nonconsensual political transactions, but it does so by glossing or trumpeting the value of anything that meets a threshold of consensuality.

Clearly, as a logical matter, the inference underlying the phenomenon of legitimation is unwarranted; the wrongness of a nonconsensual transaction, event, or distribution does not logically imply the goodness, value, rightness, or justice of a consensual transaction. All that follows from the wrongness of a nonconsensual, coercive transaction is that if the consensual transaction is wrong, bad, harmful, or unjust, it is so for reasons other than its nonconsensuality. That slavery is wrong does not imply that wage labor is good, it only means that if wage labor is wrong, it is so for reasons other than its nonconsensuality. That theft is wrong (and criminal and harmful) does not imply that consensual commerce is good, or just, or valuable, it only implies that if a consensual exchange is unjust, or wrong, it is so for reasons other than its coerciveness. Put baldly, this is all obvious. It has, however, clearly been a part of the legacy and residue of traditional liberalism to suggest the contrary. The consensuality of a transaction, transfer, event, distribution, or social system, in liberal societies, inexorably comes to be viewed as not only a necessary condition of its justice or value, but a sufficient condition as well.

This is an unwarranted implication, though, that is widely drawn and that broadly matters. It is deeply connected, in liberal societies, to the tendency to conflate legal and ethical, or legal and political norms of value. If consent is both the marker of legality and illegality, or noncriminality and criminality, *and* the marker of value and lack of value, then it follows syllogistically that the dividing line between criminality and noncriminality, or legality and illegality, will also be the dividing line between that which is valued and that which is not, or that which is perceived to be good and that which is not. The bottom line consequence of that development, in turn, is that our moral vocabulary, and then our moral discourse, is eviscerated. That which is criminal or illegal is so because it is nonconsensual, and that which is nonconsensual is bad; that which is consensual, then, is both legal and good. We become incapable of even talking about, much less judging, the value, the goodness, or the moral worth of

that which is legal, and hence, that which is consensual. A risk of liberalism, then, is that the reliance on consensual ethics that is at its core comes to exhaust not only our legal universe but our moral universe as well. That which is consensual comes to be seen as both legal and good—consent comes to be our moral marker of what we value and should value, as well as our legal marker of what we criminalize.

This risk of undue legitimation—the unwarranted valorization of consensual transactions, events, or acts, following upon the condemnation of the nonconsensual transfers effectuating the same result—is hard even to *identify* within liberal feminism, much less to come to grips with, partly because of the overriding liberal assumptions of so much of our contemporary and academic discourse, but also because of the glaring illiberality of so many of the social and private institutions that continue to affect adversely so many women's lives. Worry of the risk of unduly legitimating or valorizing consensual transactions, in other words, may itself seem unduly precious, or bourgeois, when so many women's lives are seemingly governed by illiberal measures of force and coercion. Nevertheless, in liberal societies particularly, we should not lose sight of it. Women consent to events and transactions and arrangements all the time—day in and day out—that do us considerable harm: from marriages, to love affairs, to one-night stands, to unequal pay for comparable work, to sexually harassing work and school environments, to second shifts in the home, and to mommy tracks at work. The harm these consensual relations, environments, transactions, events, acts and transfers occasion becomes increasingly hard to describe, to quantify, to identify, to name, or to recognize as the language and apparatus of consent-based ethics overtake our moral as well as legal discursive world.

Feminist reform movements that are themselves grounded in liberalism, and in the liberal reliance on consensual ethics, then, pose a particular dilemma for feminism generally: even where those reforms are well worth the risk, by positing, advocating, and then achieving the criminality of coercive institutions in women's lives, they risk further legitimating the consensual transactions that also do women real harm. The rape reform movement is an example. Again, it is an unquestionable gain for women that courts, state legislatures, and intellectual and political elites are now convinced that nonconsensual sex is what rape is, rather than sexual penetration, with force, with someone not one's wife, and against the will of the victim, so long as she is a stranger, is relatively chaste, and fights back. But that very accomplishment has arguably made it harder, not easier, to identify the wrongs done women by consensual sex: the harms done, for example, by sex-for-money, surrogacy contracts, promiscuous sex, harassing sex, and (most broadly) sex that is consented to but not desired. In a social world that equates the legal with the consensual, and the consensual with the valuable, the harms done by consensual transactions become anomalous.

Eileen McDonagh's emphatic and overdue elucidation of the harms occasioned by nonconsensual pregnancies—and her attempt to marshal the powers of law to protect women from those harms—is an important breakthrough for

abortion politics, liberalism, and feminism, but like the rape reform movement before it (as well as the movement toward contractualizing the entire institution of marriage), it too, by relying on the nonconsent marker as the trigger for the apparatus of justice, runs the risk of unduly valorizing or legitimating that which is consensual—in this case consensual pregnancies. Nonconsensual pregnancies are harmful in the ways McDonagh has helpfully elaborated and in additional ways as well, which I have tried to suggest above. But consensual pregnancies can also be harmful, and we need to take care not to further obscure the point by focusing on the harms of nonconsensual ones. An undue reliance on the ethic of consent runs a serious risk of defining out of existence these harms, and hence a serious risk of putting these harms both conceptually and politically beyond the reach of any conceivable political reform.

Let me just briefly elaborate. First, a woman may consent to a pregnancy for any number of reasons that she nevertheless, to the core of her being, doesn't *want*; second, she may have even wanted pregnancies which are profoundly counter to her best interest. Of course, a woman may have perfectly good—meaning sufficient—reasons to consent against her own desires, or to desire a pregnancy that is not in her own best interest. She may become or remain pregnant even if she does not wish to because she is opposed to both contraception and abortion for moral or religious reasons. She may want to become pregnant, or want to remain so, to please her mate, her community, or her extended family, or she may desire a pregnancy simply because it is expected of her to desire a pregnancy. Such consensual pregnancies—both wanted and unwanted—take a toll. Engaging in the work of pregnancy, the expectation and reality of motherhood that follow, undergoing the physical changes, and giving oneself over to it, are all transformative experiences. The transformation may be joyous, and wondrous, and even miraculous, and is experienced as such by many, many women, but if the pregnancy is unwanted, such an experience is not likely. Putting one's body in the service of the creation of new life when one doesn't want to do so is not as harmful as doing so where one has not consented, but it carries its own costs: it is likely to severely inhibit one's own possibilities, or, loosely, one's place and impact in the world.

We need to work toward a world in which women are free to terminate pregnancies to which they do not consent. But we also need to work toward a world in which women become and remain pregnant only when they truly desire to do so, and in which they desire to do so only when they truly wish to create new life. It may well be that law *per se* has little to contribute to these latter efforts. But we need, at least, to take care that our legal discourse—its assumptions, its values, its premises, and its ethics—doesn't make the work of creating such a world greater than it need be by defining our options in such a way as to obviate the need for it.

Lastly, we need to be careful not to create a discursive world that throws a blanket cloak of legitimacy around the institutions that structure consensual, wanted, and even well advised pregnancies. Such institutions are not all that

they could or should be, and that we freely consent to them should not place them beyond the scope of rational critique. Let me illuminate the point with a more familiar analogy. Consensual wage labor is obviously an ethically superior system of productive labor than slavery. Yet even consensual, wanted, and well advised productive employment is not as safe, meaningful, well compensated, rewarding, or in essence *unalienating* as it could or should be—or would be in a world that respected not only autonomy but also the value and importance of unalienated labor and the right of the laboror to engage in it. Likewise, consensual pregnancy would without question be a superior system of reproduction to the blend of coercion, ideology, and choice within which pregnancies are now undertaken. But as with productive labor, even fully consensual, wanted, and well advised pregnancies, and the reproductive labor and then the parenting to which they lead, are not as safe, well compensated, rewarding, or unalienating as they could or should be—or would be in a world that respected the relational work of bearing, giving birth to, and raising children. We need to lay the liberal groundwork for consensuality in our reproductive lives. But we also need to keep our eye on the larger prize, and that is a world that both conceptualizes and values the unalienated relational work of pregnancy, childbirth, and child rearing. We should not, to pursue the metaphor, let our vision of that prize be clouded by the seductive but limiting claim that so long as our reproductive or productive lives are consensually undertaken, then all is as it should be, and that is all we can legitimately demand of a liberal social order.

IV. CONCLUSION: LIBERALISM, ABORTION PRACTICE AND RHETORIC AND AN ETHIC OF CARE

Let me conclude by taking up a feature of Eileen McDonagh's argument which is shared with virtually all liberal and liberal feminist arguments for abortion rights. Liberal and liberal feminist arguments for abortion are blatantly, and in the minds of some even notoriously, at odds with what has come to be called an "ethic of care," at least since that ethic has been elaborated by feminist moral philosophers, developmental psychologists, and lawyers in the almost twenty years since publication of Carol Gilligan's *In a Different Voice*.[43] Killing a fetus—particularly if one regards it as an unborn child—is not a caring thing to do. Further, the noncontextualized, absolute, liberal right to do so, supported by analogy, syllogistically and rationally derived from major premises, destructive of and devoid of reference to relationality, and so seemingly fatal to the very genesis of the capacious and naturalistic inclination to physically nurture, and taken with so little empathic regard for fetal interests, is as far from such an ethic as one could imagine, and likewise as close as one could possibly be to the form of moral reasoning now so firmly identified in the minds of many as "Kohlbergian," or "Jakean," or at any rate masculine. The "ethic of

43. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

care" Gilligan identified in her book, and which has now been embraced by many feminists as an overlooked (largely because of its identification with women) kind of moral reasoning, which could be, but to date hasn't been, applied to legal, political, and constitutional questions, would seemingly incline us to *humanize so as to further care* for the fetus, not to humanize it so as to clarify our constitutional and political right to kill it. It would seemingly incline us to endorse the connection and identification of the pregnant woman with the life within her, not to follow through on the implications of the Court's insistence that the two lives and interests are separate, and hence each in need of state protection. It would seemingly urge us to acknowledge and valorize, rather than disclaim and rebut, the woman's natural connection to the fetus, and it would embrace ethical courses of action and an ethical system premised upon it, rather than a course of action and ethical system premised upon the woman's individual and individuated agency, the consequence of which is to sever rather than honor that connection.

On the other hand, forcing a woman to nurture unborn life when it is against her will, against her desire, and against her interest to do so, is an almost paradigmatically illiberal action for a state to take; for all of the reasons Eileen McDonagh and others have so well identified, it reeks of involuntary enslavement. The woman who does so is living the consequence of that illiberality; she is subservient, submissive, dominated, exploited, unequal, and possibly *dead*—the last being a possibility if she is poor, the pregnancy life threatening, and the state has refused to come to her assistance in terminating it—all as a direct result of our illiberal refusal to acknowledge and enforce her rights. The subservient, dominated, exploited, damaged, or dead woman who is or was pregnant without her consent and who is minimally forced to give her body over to a fetus, and maximally forced to sacrifice her very life, and all without any violation of her rights and without any claim to the state's protection, is as major a departure from liberalism and liberal legalism's promised "equal protection of the law" as it is possible to imagine. If we are going to remain true and nonhypocritical in our liberal political morality, then we are going to have to acknowledge that the state must grant pregnant women full sovereignty over their bodies, even when it implies that to exercise that sovereignty, women will be in the position of uncaringly willing the end of another human life.

Not exclusively, but nevertheless largely because of its apparent implications for abortion rights, liberal feminists have accordingly been harsh critics of the ethic of care, and of any political morality that might be built upon it. The ethic of care, from a liberal perspective, emphasizes and then valorizes precisely the interrelationships, the dependency, the lack of agency, the identification with care and nurturance, the relegation to the private sphere, and in short the sex and gender linked differences that have been used, when an excuse was needed, to justify the two-century-long project of continuing the subordination of women even in a liberal society that should seemingly be committed to ending it. Even

worse, by naturalizing those differences, the ethic threatens to actually endorse the extension of that subordination into the modern liberal legal era that otherwise holds tremendous promise for legally challenging it. The commitment to formal equality, equal liberty, universality, and equal protection, all structural features of contemporary legal liberalism, all seemingly imply the *illegality* and perhaps the unconstitutionality of the patriarchal subordination of women. And yet, it is precisely the logic of those commitments—to formal equality, equal liberty, universality, and equal protection—which the logic of an ethic of care perversely cast in doubt. Eileen McDonagh sees and understands this conflict, and comes down cleanly on the side of liberalism, both with regard to abortion politics, and with regard to political theory more generally.

Although a full elucidation of the relation between liberalism and an ethic of care is well beyond the scope of this essay, I want to suggest in these closing comments that the apparent opposition between the two of them, although understandable, suggests the *failings of each*, and not the failure of one or the other of them, and the continuing opposition between the two of them is ultimately in the service of neither. Liberalism needs to incorporate an ethic of care if it is to be a sound conception of public and private life, and an ethic of care needs to incorporate constraints of justice informed by a liberal regard for the dignity of the individual self if it is to constitute a sound basis for private and public life. Liberal critics of an ethic of care, as well as communitarian and difference-feminist critics of liberalism, are right to see the antithesis between the two. But they are wrong to suggest that the consequence of that antithesis is or should be the annihilation of the other; what we clearly need, both in theory and in political life, is reconciliation. In part because of the labors of liberal feminist critics of an ethic of care,[44] the first half of this equation has become easy to see, at least in theory if not in practice. The ethic of care, and caring relations in general, must be consensual to be morally free and hence morally justifiable, and this is surely as true of the care enacted in a pregnancy as in other relationships in life. For the relationship between mother and fetus to be a morally valuable one, and for the nurturance bestowed by the mother upon the fetus—often at considerable sacrifice—to be morally worthy, it must be a consensual relationship, and the giving must be by choice. For it to be a consensual relationship, the woman must have the freedom to terminate the pregnancy, should she withhold her consent. What I want to insist here is that correlatively, although it is much less often acknowledged, both liberalism and the liberal argument for abortion need the ethic of care. Let me first make the point with respect to liberalism, and then focus on the abortion debate in particular.

44. Linda McClain's work, some of which is critical of my own use of an ethic of care, has been the most far-reaching in this regard. *See, e.g.*, Linda C. McClain, *"Atomistic Man" Revisited: Liberalism, Connection, and Feminist Jurisprudence*, 65 S. CAL. L. REV. 1171 (1992); Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339 (1996).

First, on the relation of a liberal vision and an ethic of care. As has been shown and decried by scores of theorists from a range of disciplines, classical liberalism in its typical incarnation—with its commitment to a clear division between public and private spheres, full formal equality of citizens, respect for autonomy and individuality, and a high regard for the chosen life plans of all citizens—seemingly requires the subordination of women (or some other class) if the society it governs is going to extend past one generation. The work of bearing, giving birth to, and raising children (to say nothing of house keeping, cooking, and sexual servicing) is at "right angles" with the independence, autonomy, and rational self-regard, the individuating, self-making, market labor and the equalizing civic and political deliberations held in such high esteem by liberal theory and liberal institutions. Consequently, if the equal regard for citizens that liberalism promises is an equal regard for individual, independent, autonomous, self-regarding, self-chosen, and self-creating adult agents, then it will have to be noncitizens, or some relatively oppressed or subordinated group of citizens, who do the communitarian, interdependent, nonautonomous, sometimes chosen and sometimes unchosen, other-regarding, other-creating, and profoundly nonindividuating work of bearing, caring for, and raising children. Obviously, liberalism will work most smoothly if that work, done in the private sphere by nonindividuated, dependent, interdependent, other-regarding, and other-creating people, is undertaken both cheerfully and ethically—in accordance, say, with an "ethic of care" that constitutes the antithesis of but also the private complement to liberal values and aspirations, but is nevertheless itself sufficiently rich to confer meaning and rewards upon the illiberal lives played out within it—rather than by force or compulsion. Should, though, it come to pass that women are neither forcibly nor ideologically driven into illiberal private lives, but welcomed into liberalism's empire, the need for that other-identified, other-creating, other-regarding, nonindividuating, dependency-creating work is not going to wither and die. The need for the work still remains, so long as our liberal utopia aspires to outlast one generation.

How will this need be met, in a liberal society that presumes and honors the autonomous, individuated, self-regarding, self-creating nature of all citizens, women and men, mothers and non-mothers, alike? In a liberal capitalist economy marked by substantial divisions of wealth, of course, wealthy people can simply contract the work out, creating yet another subordinate, albeit paid, class of female workers living illiberal private lives within a liberal public world, while poorer citizens catch-as-catch-can on their own. We are to some degree living out the illiberality of this path. Alternatively, and more appealingly, we could recraft liberalism so as to acknowledge, honor, and fully compensate the relational and interdependent work of childbearing and child rearing. To do so, though, we will have to *fuse* an ethic of care, to date so thoroughly identified with the private world of femaleness, with our sense of "the public" and of "public citizenship," not use the liberal ethic and the values that accompany it as a hammer to bludgeon the ethic of care into smithereens. We will have to

incorporate into the meaning of citizenship a commitment to the care and nurturance of the young and the weak, and, in general, re-think what it means to be an individual within a liberal society so as to recognize the degree to which individual personhood requires dependencies and interdependencies forged with others. If we are going to do so, we need to enlarge upon, and incorporate into the public sphere, the ethic of care heretofore conscribed to the private, not further denigrate it as we celebrate women's participation in the public, liberal worlds of politics and commerce.

The liberal argument for abortion, particularly if grounded in consent and liberal consent-based ethics, also needs the ethic of care, and for at least two reasons. First, without it, it is going to be difficult, and maybe impossible, to make convincing the claim that liberalism *ought* to be extended to women's reproductive lives in the manner urged by McDonagh or by other liberal theorists. There is no logic, nor is there any power on earth, that can *compel* this society or any other to extend the reach of liberalism to include women's lives, or women's reproductive choices. The logical coherence, as well as the political structures, of both liberalism and reproduction could be preserved by simply defining women's lives, or at least women's reproductive lives, as beyond the reach of liberalism's empire. Recognizing women's rights to consent or not to consent to pregnancies will ultimately depend, therefore, not on the Supreme Court accepting an argument that the logic of liberal legalism demands it (although I think it does), but rather, on making the case that such a recognition would be a good—and not just the right—thing to do. The case on the merits, so to speak, requires a showing not just that the logic of liberalism requires such a right, but also that the world is a better place for its inclusion of such a right. That, in turn, requires a showing that consensuality improves the quality of caring and caring work, as well as the quality of the ethic that gives that work moral meaning and urgency. Proponents of abortion rights, in other words, have to make clear that this expansion of the empire of consensual ethics is not only demanded by the logic of liberalism, but also that it will do more good than harm.

To make such a case obviously depends, minimally, on a showing that extending liberalism and its promises to women's reproductive lives will not come at the cost of the ethic of care upon which the survival of the society depends. Less obviously, but relatedly, I think, it depends on a showing that such an expansion of liberalism will not only not destroy, but will actually improve the quality of the ethic of care, as well as the lives of those who depend upon it. For the liberal argument for women's right to an abortion to be persuasive, it must be the case that in the liberal consensual utopia the ethic of care will remain a meaningful and even strengthened ethic, governing relations between strong and weak, as well as between equals, dependents, and interdependents. It must remain a meaningful ethical constraint on choice, even when—or especially when— the relations it governs are grounded in *consent* rather than nature, force, or ideological compulsion. Thus, the decision to terminate a

pregnancy, in a world where the right to do so is absolutely clear, *ought* to be made in a way that gives due regard to the interests of the fetus, just as the decision of the parent of the born child to give or withhold a needed body part ought to be so made. When such decisions are made recklessly, or negligently, or unthinkingly, or uncaringly, they ought to be subject to moral condemnation. Likewise, the decision to conceive, bear, and raise a child, once the consent to the pregnancy is proffered, ought to be made in an ethical and caring way.

The liberal right to terminate or continue a pregnancy could, I think, vastly improve, by clarifying, the moral dimensions and hence the moral quality of the decision to do so. If we have the freedom to do or not to do some act, it becomes relevant, where it is not otherwise, whether or not we have done so morally. But the language of liberal rights, recklessly embraced, can also annihilate the ethical discourse—whether an ethic of care, or any other—that gives moral deliberation content. If we embrace without qualification the liberal ethic and language of rights, individualism, consent, or choice, at the cost of all other constraining ethics, we will lose not just the vocabulary of moral condemnation, but the sense of it as well. The ethic of care provides the necessary heart, content, and language for moral criticism of the legal choices that liberalism guarantees, in the context of abortion rights no less than elsewhere in the rights-plowed fields of liberal utopia. For that reason alone, liberalism, and liberal rights, require the integrity of care.

Finally, liberal advocates of abortion rights need to insist, not just concede, that in a liberal utopia that includes the nonconditional right to withhold consent to pregnancy, the ethic of care structures the relationship that is being consented *to* when a woman *does* give her consent to a pregnancy. Both the consensual relationship between mother and fetus, and the eventual relationship between mother and child, *is* a relationship of care, both ideally and in fact, and that relation of care, even assuming its consensuality, is not well described by the consensual ethics of neo-classical liberalism, and its participants are not well protected by liberal political structures, at least as those structures are lived out in this society. The pregnant woman who consents to the pregnancy does nevertheless continue through the pregnancy to subordinate her immediate interests to the fetus, and the parent does so vis-à-vis the child to an even greater degree. That a woman consents to the relationship makes her a willing participant, but it does not change that basic fact about it. The parent, once the child is born, quintessentially is not the autonomous, self-regarding, self-creating individual envisioned by liberal theory; the parent, quintessentially, acting as a parent, acts in regard to the child's interests, acts toward the end of creating the child's identity, and accepts considerable constraints and limitations on his or her own autonomy by doing so. The incompatibility between the autonomous individual of liberal theory and the interdependent and dependent life of a primary caregiver is profound, and although it is substantially lessened, that incompatibility is by no means obviated by the insistence that the parental role only be undertaken voluntarily. If we abandon both the language and

content of an ethic of care—particularly if we do so in order to obtain the right to terminate a pregnancy—we will lose not only our ability to describe adequately the contours of our caring relations with children and with the others for whom we care or upon whom we depend for care. We will lose as well our claim to the injustice of a liberal polity that refuses to recognize, or value, or even accommodate, its dimensions.