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ROBIN WEST
Georgetown University
PATRICIA IRELAND
National Organization for Women
KAREN O'CONNOR
American University
EILEEN MCDONAGH
Northeastern University

Breaking the Abortion Deadlock? Twenty-Five Years After *Roe v. Wade*

NOTE: A quarter-century has passed since the U.S. Supreme Court decided *Roe v. Wade* in 1973. In recognition of the intense debates that continue to surround the question of abortion rights, the editors present the following forum, based on Eileen McDonagh's recent book, *Breaking the Abortion Deadlock*, published by Oxford University Press. The discussion was first presented at the 1997 Meetings of the American Political Science Association in Washington, D.C., on a panel moderated by Sue Davis, University of Delaware.

Drawing upon medical and legal definitions of pregnancy as a condition in a woman's body resulting from a fertilized ovum, McDonagh forges a bold constitutional argument for abortion rights, one she places squarely in the tradition of American liberalism. She reframes the abortion issue, from a woman's right of privacy, to choose what to do with her own body without interference from the state, as *Roe* decided, to a woman's right to consent to what another entity, the fetus, does to her by implanting itself in her body. If a woman does not consent to the fetus's implanting itself, McDonagh argues, the woman is similarly situated with others whose bodily integrity and liberty are nonconsensually intruded upon, and the Equal Protection Clause requires that the state protect her as it does others. McDonagh's further claim is that reformulating abortion rights on the basis of a woman's right to consent to pregnancy also invokes a constitutional right to abortion funding.

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ROBIN WEST: Let me begin by delineating what I see to be the strengths and importance of Eileen McDonagh's original and powerful argument – which I will characterize briefly as a reconceptualization of the right to an abortion as a liberal right of individual self-defense against an unwelcome fetus, rather than as a privacy right of patients and doctors to choose within limits, a medical procedure free of criminal sanction by the state. Then I will talk a bit about why it might be difficult, but by no means impossible, to formulate a constitutional right on the basis of this argument, and then I will approach briefly what I think are a couple of weak points in Eileen's argument and how they might be improved.

The brilliant insight at the core of Eileen's book is the claim that the purely physical experience of an unwanted, nonconsensual pregnancy is that of a dangerous, invasive assaultive battery upon the body, and therefore ought to be thought of and responded to by the community and the state as a dangerous, invasive, assaultive battery upon the body. In this society, the way that we generally respond to the threat of dangerous, invasive, assaultive batteries upon our bodies is twofold: first, we give to each individual a quite general right of self-defense to protect oneself against precisely such assaults. And second, we turn to the state to assist us in our self-defense. Some of us, of course, think of the state as existing solely for the purpose of guaranteeing that such assaults do not occur, or at least are exceptional when they do. But, whether or not we ascribe to such a minimalist view, all of us regard the state as existing at least in part to provide individuals with protection against assault and battery. It is certainly a central – and perhaps *the* central – tenet of classical liberalism that the provision of such protection against private, violent aggression is the *raison d'être* of the state.

Let me comment quickly and sequentially on these two parts of Eileen's argument: first the reconceptualization of the unwanted pregnancy as an assault (rather than as a medical condition), and second, the consequent role of the state in protecting women against such assaults. First, the unwanted pregnancy as an assault. Let me contrast this, for a moment, with the choice paradigm, to try to show why, in my view, Eileen's argument is so important. The choice, privacy, and now liberty argument for abortion rights fashioned by the Supreme Court over the last twenty-five years and still embraced by the pro-choice and feminist community has one (at least one) unfortunate consequence: it erects an impenetrable wall of privacy around a pregnant woman, the pregnancy, and the decision to abort, thus rendering them untouchable. It is as impermissible, given the logic of this wall of privacy, to discuss the experience of pregnancy or the morality of abortion, as it is impermissible for the state to legislate regarding it.

There is, of course, a well-noted irony in this stance from a feminist perspective: it reinforces the very realm of familial and marital privacy that, in other contexts, has proven harmful for women. It has another unintended adverse consequence as well: it leaves to others the social task of describing, constructing, reconstructing, inventing, or fashioning from whole cloth not only the experience, perception, and reality of prenatal

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life, but also the lives, the character, the ethics, the motives, the experiences, the perceptions, and the reality of women who seek abortions. The result is an increasingly dense description of the fetus as innocent and passive – as at rest – and the woman who procures the abortion as acting whimsically or worse and engaging in acts of unindictable homicide.

Eileen's argument paints a very different picture: the fetus is depicted in her book as engaging in quasi-assaultive behavior, expropriating the woman's body without her consent in furtherance of its own interests, and the woman procuring the abortion is engaged essentially in an act of justified self-defense. The decision to procure an abortion, if Eileen's argument is right, is a morally and legally defensible act of self-defense. It makes no more sense to criminalize such a decision then it would to change the criminal law such that self-defense against aggression is no longer a justification for the injury inflicted on one's assailant.

The logic of the argument, however, goes a step further. If Eileen is right to describe the fetus as the assailant, or the aggressor, and the nonconsenting woman as the potential victim of a forced expropriation of her body, then the woman is not only morally entitled to abort, but it is also morally incumbent upon the state to pay for it. This is the most important consequence, practically, of the shift from choice to consent, and from thinking of the abortion as an act of justifiable self-defense against private aggression.

In this culture, whether or not we have a moral right to medical care, and hence the right to state funded abortion, if an abortion is deemed a medical decision, is a contested question. But whether or not we have the right to the assistance of the state in repealing assaults upon our bodies is not; it is the essence of liberalism that we have such a right. It has also been one of the core projects of feminism, of course, in the last two centuries to ensure that this right to state protection against the violence or potential violence of others be granted to women. Eileen McDonagh's project should be viewed, I think, as an attempt to deepen those liberal commitments. If women's bodies are to be accorded the same due regard as men's, then they too must be protected against violent and invasive assaults. The "right" to abort an unwanted fetus, and state aid in so doing, is comparable to the right to resist unwanted and nonconsensual intercourse: they both are instances of the liberal right of self-defense against assaultive and invasive takings of one's body, and it is the specific obligation of the state to assist the individual in so doing.

Let us not understate the historic importance of this argument to liberalism, to feminism, and to women's equality. John Stuart Mill argued powerfully in the last century that for women to be full and equal citizens, the institution of marriage would have to be transformed so that it would be experienced by both participants as a truly equal and friendly partnership. To achieve such a transformation, he famously argued, the legal regime constructing marriage, and specifically constructing a husband's economic, social, and sexual dominance of the wife within it, would have to be dismantled. Eileen McDonagh is making a comparable or parallel claim

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regarding the institution of pregnancy. If liberalism is to deliver on its promise of bringing full citizenship to women, then pregnancy will have to be transformed into a consensual partnership that respects the woman's liberty and bodily integrity. For that transformation to come about, the legal regime constituting pregnancy, and specifically the fetus's domination of the nonconsenting woman, must be dismantled, and it is toward this dismantling that Eileen has directed her considerable talents.

Using something close to the logic just laid out, Eileen argues in her book that this argument supports a more secure foundation for a constitutionally protected right to an abortion under the Fourteenth Amendment, and one which would clearly imply a right to funding as well. The argument, as she now spells it out, would invoke the "fundamental right" line of equal protection cases. We have a fundamental right to self-defense, and this right must be granted to women as well as men, otherwise women are being denied the protection of the law. Further we not only have a right of self-defense against the non-consensual pregnancy, but we have a right as well to the state's protection against private assault: The state is obligated to provide each of us (and equally) with protection against assaults. I think she is right to think that this creates a better argument for a constitutional right than that presently embraced by the Court (and by the pro-choice community). I also think, however, (and here Eileen might disagree) that the better argument is one that the Court is not likely to accept, at least not in the short- to mid-range future, and perhaps not in our lifetimes. There are two reasons.

First, the Court has never held that there is a constitutional right to protection against private assault, and it has clearly stated in dicta that there is no such right. Second, the Court has never held that private action alone (such as the private assaultive action of the fetus) even when followed by state inaction, which in turn proves injurious, sufficiently involves the state so as to trigger the so called "state action" requirement of the Fourteenth Amendment. I think this Court-constructed understanding of the Fourteenth Amendment is wrong and illiberal and an unfortunate understanding of the scope of the Fourteenth Amendment, as do many other commentators. But, I do not think that even a liberal, Clinton-appointee-dominated Court will change that fundamental law. Without a very fundamental change, it is hard to see how this argument can be grounded in a non-contested precedent.

Let me focus on the part of Eileen's argument that deals with tort principles of responsibility, as I think that it is presently unconvincing, but I also think that it is unnecessary. The problem which Eileen wants to address is this: even if we do not consent to an injury – and her book is an exploration of the consequences when women do not consent to pregnancy – an injury such as that which is manifested by a nonconsensual, normal pregnancy, still, we may, nevertheless, be responsible for it. In the private law of tort, actors are held responsible and liable for the injuries caused by *risks* they have created, even though they have not consented to compensating anyone for the injuries themselves. Eileen clearly sees the existence of this

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kind of liability as a danger to her argument and consequently spends a good bit of the book reporting and discussing the philosophical foundations of tort liability, meaning liability for (and, arguably, responsibility for) risks created, even where the actor never *consents* to bearing the cost of the ultimate injury.

Although I now see the relevance of this discussion, in my first reading, I have to admit, I did not. But I do not think that the argument works. Again, the general principle is that if I, as a store manager, negligently leave a wet floor in my store, and some customer slips and falls, I am liable and I have to pay for that injury, even though I did not consent at any point to pay somebody for such injuries. This looks bad for the overall argument; it suggests a pregnant woman may have consented to the risk of pregnancy by engaging in intercourse, even if she does not consent to the fetus's presence in her body. To rebut the implications of this tort-based argument, Eileen invokes exceptions to that general principle, which I call (she does not) the *bad man exception*. The bad man exception in tort liability is as follows: If I, as a store manager, negligently create a high risk of criminal assault on my premises (with, for example, poor lighting), instead of this high risk of someone slipping and falling, and a customer suffers a criminal assault, the store manager may *not* be liable, even though the store manager would be liable for the wet floor. And the difference is entirely attributable to the intentional criminality of the intervening actor. A rape or a robbery is a different kind of thing from a wet floor, and the risk of a rape or a robbery is a different kind of thing from the risk of a slippery floor, as intervening causes go. The former, the risk of criminality, it is sometimes said, "breaks the chain of causation" between the manager and the customer, while the wet floor does not. Even though we may be responsible for injuries caused by risks we have created, we are not responsible or liable for injuries, if the risk created is of potential criminality and the injury is criminal assault. To hold otherwise, according to a long string now of court cases, would be an affront to various norms of individualism: it treats the criminal in essence like a ball on a pool table, rather than as a willful actor in his own right.

Eileen's argument, I think, invokes a form of this sort of exception. It may be that we are responsible for injuries caused by risks we have created, but we are not responsible, even within tort principles, if the risk created is of criminality and the injury is a criminal assault. Same goes for nonconsensual pregnancy; the fetus in effect breaks the chain of causality.

There are two problems with that response. First the "bad man" exception in tort law is disappearing fast. Increasingly crime victims (often rape victims) *can* recover in tort for their injury against someone who negligently created the dangerous condition. But second, to the extent that it remains good law, the bad man exception in tort is justified by the willful intentionality of the third party actor, and there is no willful, intending third party actor here. The fetus may be, indeed, engaging in assault-like behavior, but it does not have any *mens rea:* there is no willful intent on the fetus's part. You may have a right to defend yourself against the fetus; you

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do, after all, have a right to defend yourself against mentally incompetent assailants. But the justification for that right cannot stem from a break in the causal chain between the intercourse and the pregnancy occasioned by the fetus itself. At least any argument that there is such a break in the causal chain, I think, cannot be buttressed by references to tort law.

I do not think that the scavenging from tort principles is convincing, nor do I think that it is necessary. The question here, after all, is *not* one of negligence for having created a risk of assaultive pregnancy. The question is whether a woman has a right to defend herself against the assault, should the assault come to pass. I think that she does have such a right, even if she was contributorily negligent in having created the risk. A prison guard or a hospital attendant has the right to defend against a criminally insane assailant, even if the guard or attendant's negligence caused the risk of assault. A zookeeper can defend himself against a dangerous animal, even if the zookeeper's negligence caused the animal's escape. There is no requirement, in other words, that one be non-negligent in the creation of a risk of assault, in order to be entitled to defend oneself against that very assault. Our rights of self-defense are not that tepid.

On the other hand, I do think that it is a direct consequence of Eileen's argument, should it enjoy widespread acceptance, that the woman who recklessly engages in unprotected intercourse and then procures an abortion is morally blameworthy, even if the abortion itself is an act of justified self-defense. The zookeeper and the prison guard, after all, can certainly be faulted for having acted in such a way that an innocent life has to be taken. Similarly, the woman who negligently engages in unprotected intercourse may be morally blameworthy even if the decision not to carry a pregnancy to term, when one has negligently caused the pregnancy, is a politically and legally justified decision and made within one's formal rights.

The father that Eileen often invokes, who justifiably defends himself against the assaultive attempts by his own born son to help himself to a necessary kidney or donation of blood, after all, can be morally faulted. He may be within his moral and legal rights to resist that imposition, but he may also be an immoral person to exercise this right in such a fashion. Similarly, a woman who heedlessly engages in unprotected intercourse, becomes pregnant, and procures an abortion, although within her moral and legal rights to do so, may be properly subject to moral censure for having created the risk in the first place. This, I think, is a necessary implication of Eileen's argument, but it is also an implication, I think, that the pro-choice community should not shy away from. The pro-choice argument grounded in privacy has sought quite consciously to avoid such an argument, and it may behoove us to reevaluate the costs of that strategy of avoidance.

It is useful to place this argument against a political background studied by another participant in our forum, Karen O'Connor, in her book, *No Neutral Ground.* O'Connor depicts the struggle over abortion in this country as a relentless politically pitched battle between social groups with utterly incommensurable views about the meaning of the most basic foun-

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dations of life. In the history she presents, there is no depiction of, and really no room for, reasoned collaborative debate. Indeed, the "neutral ground" that she outlines at the end of the book is not the neutral ground of consensus, agreement, or rational reconciliation; rather, it is the neutral ground procured from the barrel of the gun – the neutrality of enforced zones of free passage. No one, in Karen's presentation of history, ever convinces anyone of anything, and there is no reason to think that a change is imminent. The point of the struggle has profoundly not been to establish the truth of the matter, and everyone involved in the struggle seems to perceive it this way. Rather, it has been to find some way, at best, to accommodate these incompatible views of life. From the Supreme Court's pronouncement in *Roe* – I am thinking of its studied agnosticism regarding the question when life begins – to today, the Court has adopted what might be called the *managerial view* of the entire debate: the morality of abortion cannot be philosophically settled; rather, differences have to be accommodated. It is worth noting that, in this respect, it differs quite dramatically from at least the stance of the Supreme Court, but also of the Kennedy and Johnson administrations, belatedly, toward the civil rights struggles. The Court in 1954 did not declare itself neutral on the contested moral turf between integrationists and segregationists; it came down quite firmly on the side of the integrationists, which is not to say that it could not have done considerably more toward the end of making that commitment clear.

One wonders, in retrospect, whether this managerial strategy of the Court – the agnosticism on the part of the Supreme Court as well as the pro-choice movement's refusal to engage the question – was bound to lead to where we are now: no neutral ground, clinic bombings, killings, and pro-life martyrs. One is reminded of Oliver Wendell Holmes's quip that when two peoples or nations have utterly incompatible views regarding fundamental grounds of life, there is nothing to do but pick up guns and start shooting each other.

Is this how we have framed the abortion debate? I think the answer might be yes; partly for just that reason, I think McDonagh's book represents a healthy breath of fresh air. I personally, at least, know virtually no one, save Eileen McDonagh, who approaches the issue of the morality of abortion as one that might actually be resolvable by reference to tested and classical norms of argumentation. No one but McDonagh, in other words, seems to think that participants in this national debate should be open to persuasion. No one but McDonagh seems to argue as though the pro-life position is demonstrably wrong, and that if it can be shown to be wrong, that will and should have political, moral, and social, as well as legal consequences. No one but McDonagh seems to approach the issues as one calling for rational discourse, rather than a literal or figurative call to arms.

So the question Karen's book raises is this: is there room in this debate, given its history, for the neutral ground that might come from agreement, or is the debate in essence too far gone for that? Can we even conceive – can we even envision – the Supreme Court doing what Eileen is asking the Court to do? Could the Court possibly say, at this point, to the pro-life

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community, something like this: even if the fetus is a human being, there is no right to life, and it violates fundamental principles of liberalism to deprive women of the right to defend themselves against assaultive and aggressive behavior – as it was willing to say to segregationists something quite parallel – rather than, just to make my point clear, couch the right in the agnosticism of spheres of privacy. And, if the Court cannot do that, can anyone? Is there a way to reopen the abortion question as one calling for rational discourse rather than for zones of protection around clinics?

I am, to answer my own question, skeptical that the Court could or would make such a pronouncement. I do not think it any longer has the moral authority to do so. Nevertheless, I think it is tremendously important that the abortion debate be re-opened as a debate about liberalism, and as a debate about the meaning of the Constitution, and as a debate about liberty and equality as well as about personal morality, rather than as, exclusively, a political struggle. Winning this debate could lead, should lead, not only to securing a right against the violent excesses of an impassioned political force, but convincing co-citizens of the rightness of this argument – that the right to be free of nonconsensual pregnancy is directly implied by our most deeply held liberal and equalitarian social commitments.

PATRICIA IRELAND: I think this discussion is an important one. If I were to, in a very simplistic way, characterize McDonagh's book, I would say it presents at least a possible *solution* to the seemingly intractable polarization that has characterized the abortion debate by moving the debate from what the fetus *is* to what the fetus *does*. Because I am not an academic, I think I am better staying in my own arena of politics in this discussion; I am a lawyer, but it has been a long time since I have done any of the kind of legal analysis that we have been privileged to hear from Robin West and will hear from others.

I do think, however, that the politics of the abortion debate are very important as well. When we talk with the leaders of other women's rights groups, but especially those groups whose sole mission is preserving reproductive rights – birth control and abortion access – they are, at best, hesitant, and in the case of some, I would say that they are overtly hostile to the idea of shifting the debate to a question of a woman's consent, and a woman's right to consent to pregnancy. It may come under the category, "better the devil we know, than the devil we don't know," because the current theories and the current legal approach have reached a deadlock and do have us, in some ways, pulling our hair out and racking our brains.

The Supreme Court's current formulation of the constitutional protection for abortion can be said to rest in the hands of Sandra Day O'Connor, and the recent series of cases have created an "undue burden" on my mind, trying to figure out what the standard of review is. In that sense, I think that Eileen's book is very timely because we seem to be in a transition period with the Court, and there seems to be an openness to the discussion of shifting the ground on which that right stands. My fear, of course, is that at this point, it seems that the direction of the Court is to shift the ground

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away from the kind of protection for abortion rights that we would like to see. And so, I think that in part, the resistance or the hesitancy of some abortion rights supporters and organizations to adopting Eileen's argument may be that they have a fear of giving away the argument that the fetus is not a person. Especially in the early years, I cannot tell you the number of times that I heard abortion rights supporters railing about the Court and the politicians ignoring the lives of women in favor of what I heard described often as a "blob of cells." And I think that it is this side of the argument, the one our people have been relying on – saying that this is not a person – that they are loathe to give away.

I think that the other part of the resistance to Eileen's argument, as I have debated some of the anti-abortion folks, is that they reply that it is positioning a woman and a fetus as if they were at war. And that is counter-intuitive for many people who see pregnancy as a very positive and wonderful experience in a woman's life – a very fulfilling part of many women's lives. I return to the nature of social change, which often begins with people saying, "that idea is way too radical – you are off the charts and it will never work that way." I used to illustrate that idea – that today's radical notion often is tomorrow's given – by talking about the eight-hour workday, which in its original introduction was a very radical notion. But as I said that to more and more people, who looked at me quizzically because they have never worked an eight-hour day in their lives – they work twelve-, fifteen-, and eighteen-hour days – I have now dropped back to talking about childcare as a "communist plot" as a more recent example in our history. We wrangled a childcare bill out of Congress in 1972, and had worked very hard to do it, only to find the bill vetoed by Richard Nixon; in a veto message written by Pat Buchanan (just to be current), he called childcare the "Sovietization of American children." And now, even the most conservative politician in Congress agrees that we have a serious problem in caring for and raising our children, since most adult women will be in the paid workplace most of our lives and the overwhelming majority of our families now depend on the income of women. So, childcare is no longer such a plot. (Although the fall of the Soviet Union may have also helped in smoothing off that edge of the argument.)

The other problem that we have in movement politics and the politics of Congress is translating academic work into popular parlance. I think that we have to find ways to put this into the public's mind in a way that can be understood. I have found it very useful in talking about the McDonagh theory to analogize rape. Sexual intercourse, of course, if it is consensual, if it is making love, can indeed be a powerfully positive, loving, fulfilling, and satisfying act. If it is without consent, it is the same act, and it is brutalizing, humiliating, degrading, and illegal. I think that if we look at pregnancy in the same way, it can indeed be a very fulfilling, loving and satisfying act, or, if it is without consent, it can be a humiliating, degrading, and, in some cases, life-threatening experience.

And so, as I look at this in the politics of our country, I think Eileen's framework has the potential for at least developing the discussion in a new

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way at an important time. The last Congress, although most of us did not hear about it, and it did not reach the public consciousness, passed some fifty bills limiting access to abortion. Most of those were around the edges where abortion in some way touches government funding. We now find federal employees and their families are not allowed to have any coverage of abortion in their health policies. Military women and their families cannot use military facilities for abortion, even if they pay for it with their own money. All of those bills touch on some aspect of funding.

The sole exception was a bill, passed by both the House and the Senate and vetoed by President Clinton, that banned a very particular procedure known medically as *Intact D&E* or *D&X*. The key point for our discussion is that there is absolutely no exception for women's health. So having gotten much of the country to buy into the argument that anything dealing with government funding can be set off limits and the right of access to abortion, if it touches that funding in any way, can be eliminated, Congress and many of the states are now moving to eliminate any consideration of women's health. We now see abortion opponents on the floor of the Congress and state legislatures with diagrams of healthy Gerber-like babies that are about to be born, and they look for all the world like they are growing in a lab beaker or petri dish; it is as if women are nowhere in the picture. Indeed, the U.S. Senate very specifically voted down an exception from the ban which would have allowed the D&X procedure if the pregnancy threatened serious adverse consequences to a woman's physical health. Forget any mental health exemption – you could be driven to pathological, suicidal depression and that does not count – but even if you were at risk of falling into an irreversible coma, into a vegetative state, you could not have this procedure. Serious adverse consequences to a women's physical health do not count.

I think the way that legislation restricting abortion procedures has been proposed without regard to women's health and the growing acceptance of this disregard of women's health, brings us back in a more visceral way to Eileen's argument in favor of a woman's right to consent to be pregnant. Columnist Ellen Goodman was able to use some of McDonagh's argument effectively, in the context of the D&X (partial birth abortion) bans that have no exception for a woman's health. By expressing the argument in a popular and understandable way, Goodman was able to refocus the debate away from the specific abortion procedure and on to the impact on women's health as the main issue. (Ralph Reed, formerly of the Christian Coalition has said that the reason they won this in Congress is because they stayed on message and refused to talk about women's health.) I think this is where the next round of limits and this next round of political attacks are coming. Ellen Goodman wrote that if the issue is women's health, it is useful to ask what a woman or man's obligation or responsibility is to a born child and by that perhaps to determine what the responsibility and limits of freedom are in the case of an unborn child.

In relation to Karen O'Connor's arguments that Robin just sketched, the proposals that Eileen McDonagh has made to shift the philosophical and

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legal underpinnings will not resolve the pitched battle on abortion rights. I do not believe that there is, for the committed partisans on both sides, much room for rational, reasoned argument. I do not think McDonagh's argument will sway the adamant, vehement, anti-abortion people, some of whom are vicious and violent. Argument and discussion are not what it is about for them. I think, however, that the struggle politically in the country is for what most commentators call the "mushy middle" – that is, people who have a great ambivalence, perhaps, around abortion, but who are open to persuasion and discussion and who could be moved in some way politically. And I think that the argument may also have weight, ultimately, in the Court. I agree with Robin – I do not see it happening with this Court, although I say that, having been quite surprised on occasion. As the struggle has turned violent, we brought a lawsuit, *NOW v. Scheidler,* against some of the ringleaders of the anti-abortion violence under the federal anti-racketeering law. I sat at Counsel's table on the case as a lawyer, looking up at the Court, as they were hearing oral argument, recognizing that NOW had opposed confirmation of four or five of those nine Justices who were hearing the case, thinking, "we're dead, this is not going to happen" – only to find that six weeks later, which is a remarkably short time, we had a unanimous decision, with Scalia, with Thomas, with Rehnquist; each member voted that we could indeed use the federal anti-racketeering statute to sue anti-abortionists who might never dirty their hands lighting the match or pulling the trigger, but who organize and instigate the extortion, arson, bombings and murder at clinics. It was a very significant victory, and I had to acknowledge the integrity of some of the justices, who, despite their anti-abortion views, read the racketeering statute as Congress wrote it and upheld our right to proceed to trial.

That decision in *NOW v. Scheidler* was significant politically as well as legally. In early 1993, in another NOW case, the Supreme Court had ruled we could not sue the violent anti-abortion advocates for violation of women's civil rights. Although it was not what the Supreme Court's decision meant legally, our opponents successfully spun the press to say that they were not analogous to those who stood in the doorways of schools and courthouses using force and threats of force to stop African Americans from going to integrated schools or voting but rather that the pro-life movement is the new civil rights movement. A year later, we won our racketeering case and again, the legal significance was not what the headlines read – the headlines basically portrayed the pro-life people as more analogous to mobsters when they bomb clinics or harass women and doctors and health care workers. So, I think that the impact of Eileen McDonagh's work will shift some of the politics, and, perhaps, shift some on the Court. I doubt that it is the panacea that we would like to think it may be, but at the very least, what it does is force all of us to think in a new context. That holds out at least some hope of providing a new solution to what has been an intractable pitched battle for decades. Thank you.

KAREN O'CONNOR: It is nice to be in a room with many of us who have lived through Eileen's book. For many, many years we sat at various conven-

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tions in hidden corners and discussed her arguments, not necessarily always agreeing with her. Her book poses many questions I explored in my own book, *No Neutral Ground;* the fact that we are discussing them today makes me almost a little bit concerned, however, from the viewpoint of an abortion rights activist. Thus, I admit I am wearing two hats here: one as a woman strongly committed to abortion rights and the other as a political scientist who studies the role of litigation as a political tactic of interest groups.

As one who studies interest group litigation of the sort going back to Clement E. Vose's classic, *Caucasians Only,* I feel that sitting in this room discussing Eileen's book is the first stage of litigation – a way of getting to the "lobbying the law review" stage, to get the Court primed to hear her arguments as we have a serious discussion of issues that certainly have not yet percolated through the political process onto the public agenda. From the "Women and Politics" sort of practical side of studying politics, if you will – it almost makes me nervous that maybe that is what we are doing here. In part, because although I think there is tremendous merit in Eileen's argument as a tool for us to generate discussion about the politics of abortion, it makes me nervous, as an advocate, to worry about what kind of symbols are going to come into the debate, as Eileen's argument goes from this level to the next level of being seriously debated in the law reviews to the next level – litigation – in terms of setting an abortion rights agenda as people actually begin to talk about her arguments. All I can think of when we talk about setting a pregnant woman against her fetus is the symbol that has been so effectively used by the right to life movement – the "little feet." As I sit here, I begin to see posters of Little Feet vs Big Ol' size 10 or 11 shoes that some women have. I see some variation of "who is the innocent here?" in the text. How dare you even think or talk about using force, when in essence, you are certainly not dealing with any kind of real threat – this is the unborn, innocent fetus, an argument which, to some extent, McDonagh's argument almost reinforces. The poor, defenseless, innocent fetus argument is one that has been used quite effectively, and could be used so again.

I think how effectively the right to life movement, even in naming itself the *right to life* movement, has been in really setting the terms of the discourse. In an essence, abortion rights activists have been forced into a defensive posture. I think that one can agree that they have been, and continue to be, effective. Consider, for example, what is called the "partial birth" abortion bill. The minute I heard the name, I knew that pro-choice forces were in trouble. By defining it as such, how can you say, "I am in favor of partial birth abortion." It sounds like you are doing something terrible. And that, to me, means political death – at least in terms of pro-choice holding actions, let alone advances.

The problem that we potentially face in adopting Eileen McDonagh's argument – and with Patricia Ireland of NOW even being on the stage here talking about it, given that NOW has done so much for all of us as historically in terms of advancing our status in every way, shape and form – is that

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pro-choice activists may soon be shifting course. I see Ralph Reed of the Christian Coalition saying, "we stayed on course, we stayed on the message." In contrast, today I see McDonagh and Ireland possibly diffusing the message from one single idea, such as the "Who Decides?" campaign, to going off and further diffusing the abortion message by trying to translate McDonagh's sophisticated analysis to sound bites. To some extent pro-choice activists have had to streamline their message because the privacy argument has problems. While it is fairly easy to structure an anti-clinic violence message, it is more difficult to find new arguments to support pro-choice legislation. Still, the need is clearly there – we have a Congress that enacted over fifty pieces of legislation that in some way, shape, or form restricted abortion rights. Still, I am uncertain whether or not McDonagh's arguments – however persuasive – may do more harm than good in the long run.

One might ask what is going on with the political system that NOW and other women's rights organizations are unable to mobilize women effectively anymore? What is the threat to people? Clearly those of us who study political science and politics try to convince our classes every four years that there is a very real threat to abortion rights posed in every presidential election because it is the President who makes Supreme Court appointments, which can make all the difference in the world to the fact of particular legal doctrines. That is a little bit of a defeatist argument to get across the mushy middle or what Colin Powell calls the "sensible center." Somehow the language of abortion discourse of people who advocate abortion rights has somehow almost been given up to the right to life side. Politically, it is key that NOW and other pro-choice groups reclaim the discourse, then.

But, I am afraid that an argument like Eileen's will somehow make it on the public agenda if we actually seriously begin debating it beyond the confines of scholarly settings, elevating it to the next level of the pro-choice message. Once it is very seriously debated and strategized, and good symbols and good posters can be enunciated to define the right articulated by McDonagh, as you can see from our discussion here, a positive message is going to be difficult to articulate. Now, if we have any brave souls in the audience who would like to take a first stab at that – unless you can somehow translate her patent and complex argument into a ten-second sound byte, history will show, in terms of looking at the abortion debate and how it has evolved, that this change in the basis for the right to choose may be a more problematic political choice than the one now being followed.

EILEEN McDONAGH: I will respond to a few points raised in this very stimulating discussion.

I appreciate Robin's focus on the shift from choice to consent from the vantage point of liberal theory and constitutional law. Patricia Ireland emphasized that as well. This, of course, is the key to the project of finding a stronger way to frame abortion rights. Consent, does not substitute for choice; it subsumes choice, for without choice, there can be no consent.

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Yet, there are constitutional contexts in which the right to consent to what is done to you is a stronger right than your right to privacy to choose what to do with your own body. The Supreme Court recently ruled, for example, in *Vacco v. Quill* and *Washington v. Glucksberg* that there is no right of privacy to choose to commit suicide, even when you are at the end of life, the pain is unbearable, and you have the assistance of a physician. On the other hand, the Court upheld in *Cruzan* the right to consent to medical treatment, which includes the right to refuse medical treatment, even when that treatment is necessary to sustain your life. To some, of course, this is an irony; to me, it is an affirmation that the right to consent to what is done to you is an even more basic right in our society and in our law than the right of privacy to choose what to do with your own body.

When we shift to consent in the abortion issue, we are talking about something different than privacy. It is not just the right to choose what to do with your own body; rather, it is the right to consent to the effects of the fetus on a woman's body when she is pregnant. Even in a medically normal pregnancy, these effects are massive: some hormones rise 400 times; some proteins increase 1000 times their base level; a woman's respiratory system dramatically changes – cardiac volume increases 40 percent, heart rate increases 15 percent, blood pressure increases 15 percent; and a new organ is grown in a woman's body, the placenta. In a medically abnormal pregnancy, a woman can be threatened with permanent damage to her health or with death.

To get an idea of what is involved in even a medically normal pregnancy, imagine if a born person, for example, did any of the things a fetus does to a woman to Justice Scalia. We would all recognize that something was happening to him without his consent that was a major intrusion of his bodily integrity and liberty constituting serious harm. If someone took out – or put in – an organ without consent, we can assume that Justice Scalia himself would consider that to be serious harm, and that he would pick up the phone and call the police for help. This is because, as Robin West noted, not only would he have a right to defend himself against such serious nonconsensual intrusion, but to the degree that the state protects people from harm, he would have the right to government assistance to stop nonconsensual intrusion of his bodily integrity and liberty. So, too, with pregnancy. Black's Law Dictionary defines pregnancy as the "condition in a woman's body resulting from a fertilized ovum." The law defines injury in terms of the violation of a person's right to consent. Without consent, therefore, the effects of a fetus on a woman's body constitute serious harm. And to the degree that the state protects people from harm, the state has an obligation to protect a pregnant woman from harm.

Let me clarify the constitutional claim of a "consent to pregnancy" foundation for abortion rights. I recognize, as we all do, that as counter-intuitive as it is to live with *DeShaney*, at this point, there is no Due Process constitutional right to state protection against private assault. The consent-to-pregnancy argument does not challenge that precedent. Rather, the consent-to-pregnancy claim for state action rests on the Equal Protection

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guarantee that if the state protects some victims from harm, the state is then obligated to protect other victims from harm who are similarly situated. The claim is that nonconsensual pregnancy is serious harm. Thus, when the fetus imposes that serious harm, it situates a woman similarly with other victims of harm. The constitutional claim is that to the degree that the state protects people from harm imposed by state-protected entities, the state is obligated to protect a woman from the harm of a nonconsensual pregnancy imposed by a fetus.

Some pro-choice advocates consider shifting the focus from what the fetus "is" to what the fetus "does" to be risky, as Karen O'Connor's remarks illustrate, because it is a strategy that, at first glance, appears to concede too much to the pro-life opposition. Specifically, it accepts, rather than challenges, the depiction of the fetus as a state-protected entity separate from the woman. Yet, this is not really a concession as much as it is a recognition of how the Court has, as early as *Roe*, in fact established the status of the fetus. In *Roe*, the Court held that the fetus is a separate entity from a woman, noting that when she is pregnant, her privacy is "no longer sole." The Court also ruled in *Roe* that it was constitutional for the state to protect the fetus as a separate entity from the woman. In the decades since *Roe*, the Court has explicitly underscored and reaffirmed the constitutionality of the state's interest in protecting the fetus as a separate entity from the woman from the very moment of conception. It is the legitimacy of the state's interest in protecting the fetus as a separate entity from the moment of conception that accounts in part for the Court's ruling that it is constitutional for the state to prohibit abortion funding, even when the fetus is previable, the woman is indigent, and the pregnancy in question is a medically abnormal one that could leave a woman crippled for life.

The pro-choice strategy has been to attack and challenge depictions of the fetus as a separate entity from the woman deserving of state-protection, sometimes by depicting the fetus as being merely a "blob of cells." A consent-to-pregnancy argument, however, provides a different strategy, one that accepts the reality of the constitutionality of the state's protection of the fetus, but that challenges the *means* the state uses to protect the fetus as a separate entity.

Focusing on what the fetus "does" when it implants itself in a woman's body, gives us a way to identify how a fetus seriously harms a woman, if she does not consent to that implantation. In contexts other than abortion, the law already recognizes that a medically normal pregnancy is serious bodily injury, termed *wrongful pregnancy*. In civil cases, when a physician incompetently sterilizes a man or woman and pregnancy ensues, a woman can sue for hundreds of thousands dollars for damages, even if the pregnancy was medically normal, the child was born healthy, and the woman opts to keep the child rather than surrender it for adoption. The reason is because the pregnancy was nonconsensual, and, by definition, wrongful pregnancy constitutes serious injury. In criminal proceedings, wrongful pregnancy occurs when pregnancy is subsequent to rape or incest. When this happens, the perpetrator of the rape or incest receives punishments for the injury of

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nonconsensual pregnancy that are additional to those imposed for the injury of the rape or incest itself.

Identifying how a woman is harmed by nonconsensual pregnancy then gives us a new way to evaluate the *state's response* to that harm – specifically whether the state uses a means to protect potential life that denies to a woman protection from harm equal to that the state provides to others who are harmed. People have a constitutional right, based on Equal Protection guarantees, to protection by the state from harm equal to the protection the state provides to others who are harmed. Although the Court has established that it is constitutional for the state to protect potential life, it is not constitutional for the state to use a means of protection that denies to a woman that Equal Protection right.

If the state wants to protect potential life by offering, for example, positive, voluntary incentives to encourage women to consent to pregnancy, that certainly is a constitutional means to protect the fetus. To give an example, let us say the state is interested in protecting the economic interests of indigent people. The state can offer economic and voluntary incentives for wealthy people to donate money to poor people, by means of tax credits, as a way to redistribute income. But it would be unconstitutional for the state to protect indigent people by prohibiting the use of public resources to stop them from stealing from wealthy people, when the state uses public resources to stop other forms of stealing. Even if the law specifically allowed the wealthy to hire private body guards to protect themselves from theft, such a law would still be unconstitutional because it would deny to some – the wealthy – protection from the harm of theft that the state offers to others.

Yet currently the state uses exactly such a means to protect potential life. The state protects the fetus by prohibiting the use of public funds to stop it from seriously harming a woman by imposing nonconsensual pregnancy, even though the state uses public funds to protect people from harm inflicted on them by others. If the woman has sufficient private resources to stop the fetus herself, she is entitled to do so; before viability she may do so for any reason, while at every point in pregnancy, she may do so when her health or life is in danger. Yet, although the state uses taxpayers money to stop a born person from stealing even five dollars from another born person, the state prohibits the use of public resources to stop potential life from massive, nonconsensual intrusion of a woman's body and liberty. This is unconstitutional, because although the state may not have an obligation to assist a woman exercise her right of privacy to make a choice about her own life, to the degree that the state protects victims of harm, the state has an obligation to protect a woman who is the victim of harm imposed by the fetus.

As Robin asks, however, even if a consent-to-pregnancy argument strengthens women's abortion rights, are not there still serious moral and ethical issues? Specifically, is it morally and ethically right for a woman to have an abortion, if we recognize that she is in part responsible for creating the situation necessitating an abortion?

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To me this is part of the larger question that surrounds the abortion issue and the fact that all foundations for abortion rights raise moral and ethical issues. The reality of abortion is that you are killing something, so the question is what justifies killing something? Every logic or structure used to justify killing necessarily involves ethics. In the choice paradigm, justification for killing the fetus is based on what the fetus "is" – it is only a "blob of cells" that is killed in an abortion. The choice paradigm, therefore, justifies killing the fetus as an unimportant consequence of a woman's right to make a private choice. It is as if, for example, a woman makes a choice to go to the movies – and on her way to the movies, she inadvertently steps on something and kills it, a "blob of cells," that is, the fetus. In this justification for abortion rights, killing the fetus as a consequence of making a private choice about one's own life is much like stepping on and killing an ant or caterpillar while walking to the movies.

The ethical dimension of the choice paradigm, therefore, depends upon depicting the fetus as an unimportant casualty of an abortion, an entity that does not matter from the standpoint of either the law or ethics. The choice paradigm unravels, of course, to the extent that opponents can make the fetus matter. And pro-life advocates have successfully made the fetus matter, both in our courts and in our culture. The Court has made the fetus matter by recognizing the legitimacy of the state's protection of it. The Court's recognition that the fetus matters is the basis for prohibitions on abortion funding and support for restrictive abortion regulations, such as twenty-four-hour waiting periods. The public's recognition that the fetus matters accounts for the recent congressional success in passing legislation restricting abortion procedures, even though the measure ultimately was vetoed by President Clinton. As a result, acceptance of an argument that the fetus "exists and matters" is almost impossible for some in the pro-choice community, because such an argument is deemed responsible for virtually all the problems encountered by abortion rights advocates.

Because anti-choice proponents have made the specter of humanizing the fetus so politically damaging to women, as Karen O'Connor's book so brilliantly analyzes, the pro-choice side has been pushed further and further away from considering this possibility in any form whatsoever. The result is that the vast majority of the pro-choice community has been forced to ever *greater* dehumanization of the fetus, a position that runs counter to the way medical technology and legal reasoning over the last twenty-five years have increased people's awareness, if not concern, for the fetus. In addition, dehumanization as a justification for killing something raises ethical issues of its own, as the work of Robert Jay Lifton has so powerfully shown.

In contrast, the consent paradigm for abortion rights, by focusing on what the fetus does to a woman, reveals the way the fetus harms a woman if she does not consent to pregnancy. It is not necessary to dehumanize the fetus to find a justification for a woman's right to an abortion, because it is the fetus's harm of a woman that justifies an abortion. The consent paradigm thus uncovers a new issue: when a woman exercises her privacy right to go to the movies, the key consideration is no longer whether she inadver-

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tently steps on a "something" – a blob of cells, potential life, much less a person – but rather how that "something" harms her by nonconsensually intruding on her body and liberty. Not only does a woman have a right to protect herself from harm inflicted by potential life, but as Robin pointed out, she also has a right to state assistance in stopping that harm. This holds even if the woman has knowingly exposed herself to the risk of harm by taking a "route to the movies" that is known to be a dangerous one.

The consent paradigm, therefore, acknowledges that a woman may have been responsible for creating a situation of harm for herself, but that the degree of harm involved in a nonconsensual pregnancy does not require a woman to endure that harm. Such a view, we must remember, was introduced by moral philosopher Judith Jarvis Thomson two years before *Roe v. Wade*. Thomson argued that a woman is not immoral by choosing to be a bad samaritan by refusing to give her body to the fetus. To this we must add the idea that it is not just a woman's right to be a bad samaritan, but her right not to be a *captive samaritan*. That is, a woman has a right not to be captured by a fetus, and a woman has a right to state assistance to free herself from captivity.

From a political vantage point, I think the reluctance of pro-choice advocates to move from the choice to the consent paradigm is because of the difficulty in assessing the costs and benefits. Political and legal change, therefore, might occur as the costs associated with the choice paradigm keep rising. The rise of congressional initiatives to limit abortion procedures without regard to the impact such policies have on women's health, as Patricia Ireland so forcefully pointed out, is not only a serious problem and a wedge issue, but an issue that has left the pro-choice community with little resources in the way of rebuttal.

The very fact that we are debating abortion *procedures*, as if this is the cutting edge of reproductive rights for women, is a sign that something went wrong with abortion rights framed in terms of choice. We could see what was wrong with choice as early as 1977 when the Supreme Court first ruled in a series of three cases that the right to chose an abortion did not obligate the government to fund an abortion or to provide the use of public facilities to provide an abortion. In 1980, in *Harris v. MacRae* the Court went even further and ruled that it was constitutional for the state to disregard a woman's health needs by prohibiting the use of public funds to provide an abortion to an indigent woman suffering from a medically abnormal pregnancy that could put her in a coma for the rest of her life. Congressional legislation that restricts abortion procedures without sufficient guarantees for women's health, therefore, is but the latest in what has become a long history of policies in which the right to choose an abortion has proved inadequate as a protection for women's health. As Robin West pointed out, privacy and choice as a basis for abortion rights has erected a barrier between the woman and the state. As a result, the choice paradigm has done little more than strand vulnerable women in the private "state of nature" that the social contract and civil society, as proposed in liberal theory, is supposed to supplant.

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We need to use the consent paradigm to get back on track. Our answer to "partial birth abortion" legislation is to say that we need to go back and rethink funding. We need to use the consent paradigm to draw attention to the means the government employs for protecting the fetus and challenge the constitutionality of means that deny to women state protection of their bodily integrity and liberty equal to that the state provides to others.

As both Karen O'Connor and Patricia Ireland have articulated so well, of course, in politics, images count for a lot, and we must ask whether the consent paradigm is adequate as a rebuttal to depictions of the fetus as a Gerber-like baby. I think it is, and perhaps because of that conviction and the belief that there is a great deal to be gained by talking to others, including the opposition, since publishing this book, I have agreed to be on a number of pro-life radio shows. As a result, I have already gotten many of the responses that Karen has depicted: sentimental portrayals not only of the fetus's little feet, but of the little fetus itself.

I understand such feelings, and as a political scientist, I am aware of their political power. Yet, what I have been able to do, even in the somewhat stressful context of talking with anti-choice proponents, is to point out that although the fetus is innocent in the sense that it cannot control itself and has no conscious intentions, the fetus nevertheless massively alters a woman's body, whether it intends to or not. What is more, even though the fetus may be little, it is one of the most powerful entities in the world; it is the only entity in the world that can transform a woman's body from a nonpregnant to a pregnant position. The reality, therefore, is that the fetus is much more powerful than a born infant. Once a child is born, all the child can do is cry for help and hope that someone comes to its assistance. On the other hand, before birth, the fetus has the power to take over a woman's body and liberty, even without her consent.

Anti-choice proponents have only claimed that they want the fetus to be treated like a born person. If a born person were to intrude on body and liberty of a person without consent by imposing even a few of the things that happen to a woman when she is pregnant, we would call upon the state to stop that harm. There are no grounds for allowing greater latitude to a fetus to intrude upon the body and liberty of a person; so, to the degree that the state responds to calls to stop harm, the state must respond to the call of a woman seeking an abortion to stop the harm of a nonconsensual pregnancy. When I have presented this consent paradigm to anti-choice proponents, of course, it did not produce immediate converts to the prochoice community, but what it did produce was something quite remarkable: *silence*.

At the very least, therefore, the consent paradigm is effective for undercutting rhetoric that depends upon depicting the fetus as innocent and powerless. It remains to be seen if the consent paradigm will be effective for producing Court interpretations of abortion rights that include abortion funding. But if that should come to pass, it will be because of those engaged in serious debate and discussion about a consent foundation for abortion rights, as exemplified by our exchange here today.

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[QUESTION] PETER L. P. SIMPSON, CUNY: I was interested in the arguments, especially Eileen's. I have two problems with it, however: first, with the conclusion; and second, with the premise. The argument is that it's okay to use self-defense as justification for abortion. Well, the conclusion from that would seem to be not that you could kill the fetus but that you could remove it from the womb, and keep it alive artificially. After all, self-defense says that you can use force to resist the attack or the threat; once the threat is over, you are not entitled to continue your force.

Well, you can easily do that by just removing the fetus from the womb and keeping it alive – which would mean that you should introduce methods of abortion which keep the fetus alive. My impression of the pro-abortion position, however, is that they actually want the fetus dead, and this is rather murder than self-defense.

My other criticism is against the premise, the idea that the fetus is doing to the woman what some other adult might be doing, say, to Justice Scalia in his own bedroom. That seems to be based on a misunderstanding of what it is to be a woman. Indeed it is based on a misunderstanding of what it is to be a human being. What makes human beings human, and what makes us flourish and perfect, is being together with others. We cannot be the best that we can be without others. Thus, an essential element of being human is self-gift to others. That is true for men and women, but for women, pregnancy is the archetypical and most splendid instance of self-gift. And it is a privilege for a woman – not a burdensome duty but a privilege – to give herself to the fetus in pregnancy. And this is a gift unto death, like marriage. Marriage is a commitment of man and woman unto death. Nothing should stop you loving your spouse. Likewise, nothing should stop you loving your fetus, even if it costs you your own life. And there are plenty of instances of women, and not only women but animals, too, giving their lives for their offspring.

EILEEN McDONAGH: Your comments are well taken, but I would offer a few points of difference. States across the country, as well as the Model Penal Code, establish three contexts for the right to use deadly force: when you are threatened by death; seriously bodily injury (the loss of a limb or an organ for a protracted period of time, such as six weeks); or loss of liberty (such as rape, kidnapping, or enslavement). Although there is a duty to retreat in some contexts, obviously a woman cannot retreat from a fetus that harms her by imposing a nonconsensual pregnancy. What is more, the massive way a fetus imposes on a woman's bodily integrity and liberty meets the standards already set in law for the justified use of deadly force to stop that harm. What is more, techniques that could remove the fetus without killing would be more invasive of women's bodies than comparable abortion procedures, and, hence, constitute unacceptable burdens for women seeking to terminate their pregnancies. For these reasons, the use of deadly force is justified in stopping the harm of a nonconsensual pregnancy.

You raise the hypothetical question, however, what if it were possible to remove the fetus without killing it in a way that would be no more invasive of a woman than is a comparable abortion procedure; would pro-choice

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advocates support such techniques that allowed the termination of pregnancy without killing the fetus? I think there is an ongoing debate within the pro-choice community on this issue. There are some who want not only the right to terminate pregnancy, but also the right not to be a parent. Others, however, would not make the latter claim. Since we currently have no techniques for terminating pregnancy, other than an abortion, that are not unusually invasive of the woman, this is a moot issue.

Your second question raises some ethical and philosophical views. The only way a self-gift makes sense is if there is choice and consent. If something happens without choice or consent, it is one of two things. First, it could be a force of nature, such as a hurricane, fire, flood, or cancer, which does something, but obviously with no ethical dimension involving choice or consent. To the degree that we think of pregnancy as natural, or as the product of natural forces, we negate the ethical dimension involving human choice and consent. Second, the other way things can happen deterministically without choice or consent is by the application of coercion, such as enslavement. Between these two extremes, if relationships are ethical, they must involve choice and consent, which means that we can advocate that people *should give* themselves to others, but we *cannot demand* or *coerce* that giving behavior. So, too, with women and pregnancy. To say that pregnancy is so special, and that women are so special that they "have" to give themselves to a fetus undercuts the very dimension that makes all relationships ethical: the right of a person to "consent" to relationships. We can discuss the value of the self-gift of pregnancy, but if pregnancy is to be an ethical relationship between a woman and a fetus, it must include a woman's right to consent to that relationship.

LESLIE FRIEDMAN GOLDSTEIN, University of Delaware: Eileen McDonagh's argument, I think, is that consent has deeper, stronger roots in our legal tradition than choice does; however, as I thought about how consent works in our law, I came up with this potential counter-argument, and I am going to pose it in order to hear your reply. Two ways of consent working in our laws that are very important are (1) consent to medical treatment, and (2) consent to sexual intercourse. In the first case, consent distinguishes medical treatment from assault, and in the second, sexual intercourse from rape.

But consider the following example: a woman is feeling some sort of mild discomfort and she goes to the doctor and the doctor says to her, "Well, I can prescribe for you this medicine. This medicine has a certain one out of a hundred risk; one out of a hundred times people take it and experience very extreme discomfort for several months, but for ninety-nine out of hundred people, it relieves the mild discomfort you are feeling." Compare this to a woman on birth control pills, where there is a one out of a hundred chance that they will fail. Because of her mild discomfort from refraining from sex, she consents voluntarily to sex, and the invasion into her body of sperm. The one out of a hundred chance that the birth control pill will fail occurs, and the sperm and ovum unite and the egg grows into a fetus.

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In the first example, the woman consented to the entry of the "medicine," the combination of birth control pills and semen (both foreign substances) into her body, which ended up causing her very extreme discomfort for several months. How is this different from a woman who consents to take a birth control pill that fails, and, therefore, subsequent to sexual intercourse ends up with a fetus growing in her uterus? We treat the standard medical treatment case as one in which she consented to take the medicine, knowing the risk. You want us to treat this other as, she did not consent to the fetus growing in her uterus, even though she knew the risk. Explain to me why the two situations are different.

ROBIN WEST: I am not sure they are different. She did indeed consent to the risk, but that does not mean that later on she is not entitled to repeal the invasion of her body.

EILEEN MCDONAGH: I agree with Robin West, and we have been discussing this issue along with Mary Becker at the University of Chicago Law School for at least three months. What I think we have come to say is that we need to distinguish carefully between consenting to actions that may produce a risk of a subsequent condition and consenting to a condition that is subsequent to a consensual action. If a person consents to the action of taking a pill that has the risk that some condition will ensue, such as feelings of discomfort, consent to the action to take the pill does not obligate the person to consent to the subsequent condition, if it ensues. In your example of the pill, even if a patient consents to take medication that poses a one of out a hundred risk that a condition of discomfort will ensue, the patient's consent to take the medication does not constitute the patient's consent to the subsequent condition of discomfort. If another pill is available that can reduce or stop the patient's discomfort, the patient has the right to take another pill that will stop the discomfort that ensued from taking the first pill. It would make no sense to say to a patient that because you consented to the risk that a condition might occur, such as painful discomfort, you lose your right to stop that pain, even if there are means available for doing so.

So, too, with pregnancy. If you consent to an action, sexual intercourse, that poses the risk that the condition of pregnancy will ensue, you nevertheless retain your right to consent to the condition of pregnancy. And if you do not consent to the condition of pregnancy, you retain the right to stop the harm of nonconsensual pregnancy, even if you consented to an action, sexual intercourse, that created the risk that the harm of a nonconsensual pregnancy would ensue.

ROBERT DAVOLI, Sigma Partners, Boston: I hear a lot of concern about the consent to pregnancy argument from both a political culture and legal standpoint, based on a fear of straying from the status quo. So let us look at this hypothetically. Perhaps some of you read the article several months ago in *The New Yorker,* describing how Justice Scalia actually tried to browbeat Justice Kennedy into voting against abortion rights in *Casey* by referring to their common religious beliefs. And Justice Kennedy said, "Even though I don't believe in abortion, it is constitutional to invoke this

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right." Well, let us suppose that Justice Kennedy had not done that, and abortion rights based on privacy had been overturned in *Casey.* Now look at Eileen McDonagh's argument in that context. I would submit to Robin West, Karen O'Connor, and Patricia Ireland: What do you think is the legal and political strength of consent in relation to choice, particularly when we take into consideration the constitutional fragility of abortion rights based on privacy? Even some liberal constitutional law scholars think it is just a matter of time before the right to an abortion is overturned. And, in a way, I am waiting for that to happen because then I think the strength of consent will be even more obvious. Just imagine what would have happened in 1972, just before *Roe v. Wade,* if consent had been used as a basis for establishing the constitutional right to an abortion? Do you both not think, politically and legally, that would have made for a stronger case?

PATRICIA IRELAND: There were many of us who did not celebrate in 1973 when *Roe v. Wade* came down for a number of reasons, including a perception that *Roe v. Wade* confirmed the state's rights to intervene in a woman's decisions about whether to continue a pregnancy or not. And that clarified, codified, underscored right of the state to interfere was not the cause of celebration for many of us. Nevertheless, we have learned to live with it. I would defer in some ways to Robin West and others, but I think that it is pretty clear that the rights that were established under *Roe v. Wade* are present only in a substantially reduced form. And trying to figure out what undue burden is going to mean gives me a headache – but it is pretty clear that we do not have the full protection that we thought we did in 1973 with that compromised decision.

I also do not think that there is any question that, in the war of rhetoric and politics, consent is a much stronger concept. I think that there are caveats, concerns about how it will play out legally and constitutionally, but I think politically it is probably a stronger argument. I do think it is, as the first gentlemen spoke – I was hearing again the notion of how it is somehow counter-intuitive; it goes against a woman's nature to set up what is seen as a hostile relationship between the woman and a fetus. I think that argument is going to be difficult, but not impossible, politically to overcome, because there are so many people who do value women as independent individual humans with a right to set their own course and the power to determine what happens and consent to what happens to their bodies. This is why I keep always coming back to the analogy of rape; I think the nature of consent is something that, politically, people understand very well – and it is much stronger than choice.

ROBIN WEST: If the question is, "In a 'Post *Roe* World,' which would be an easier legal, moral, and political argument?", I think Eileen's argument is stronger. The privacy argument that was established in *Roe* had all sorts of problems. If it were to unravel completely, I would certainly feel more comfortable and on more solid ground explaining to people that even given the archetypically ethical relationship of a woman with a fetus who wants to be pregnant and is pregnant, it nevertheless has to be a *consensual*

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relationship. The same goes for sex. And I do think that people might find that easier to understand and to agree with than the privacy rationale.

KAREN O'CONNOR: I am just concerned about the consent argument, particularly when Patricia brought up that she uses rape as the analogy here. What has happened is – I have seen so much in the last years – we've changed rape; we have crafted it into different statuses. Now, "date rape" is really not as bad as other forms of rape because there is the question of consent. To some extent I worry that, as we talk about this consent argument, it is something that the public can hear. When Eileen was just talking I was writing, "Oh My God, what's the poster going to read" – and it is going to be "It's okay to kill a kid." In essence, when Eileen was sitting here talking, you were saying, "Even if we say it is a person, it's okay to kill it." I am just thinking in terms of the rhetoric that has developed around the abortion debate; that kind of language makes me uncomfortable in terms of what the political consequences are.

ROBERT DAVOLI: You have two choices. You can stay mired in the fact that you have two absolutes: pro-choice and pro-life, and that is fine. What will happen is that you will get *Webster* and *Casey,* and later you will get prohibitions of late term abortion procedures. Eventually, you will have no abortion right at all. Or you can take the germ, the seed, the concept of consent, which according to some legal scholars, has a very profound intellectual truth to it, and you can learn how to use it culturally and politically and be ready to attack when your abortion rights do go away – because it is going to happen. It is inexorable. From what I see, those are the only two choices – to stay mired in a clash of absolutes or to try something new.

EILEEN MCDONAGH: I could not share more the concern of everyone about unintended consequences. It is a question, I think, as Patricia Ireland put it, of the devil you know versus the devil you do not know, the bird in the hand and two in the bush, and all the other metaphors we think of. My only response to Karen O'Connor is that I think that we already have these posters, so that when a woman chooses to have an abortion, she is killing a child. Since anti-choice activists, on the basis of the choice paradigm, already depict what is going on in an abortion as a woman killing her child, I do not see the consent argument as creating that problem.

I think the focus on consent offers a different justification for an abortion. I am not saying that the fetus is a person, but I am saying that *even if* other people say the fetus is a person, the consent argument still holds. We can see the truth of this by looking at how the law treats born people and even born children. Once a child is born, the law does not require a parent to donate even a pint of blood; furthermore, the law would protect the parent against a nonconsensual taking of a pint of blood by a born child. For this reason, the law must also protect a woman against the harm of a nonconsensual pregnancy, and what justifies a woman's right to have an abortion as well as state assistance in obtaining one is not merely her right to make a private choice about her own life, but rather her right to be free of nonconsensual intrusion of her bodily integrity and liberty.

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[QUESTION] JULIA RICHES, Georgetown University: It is more a comment than a question. I agree fundamentally with your Equal Protection argument that women should have the same right to protection of their bodily integrity and liberty as men. Surely the catch with pregnancy is that there is not necessarily an analogous condition in men – and so you have pregnancy as a special case (is it an illness? is it a disability? and so on). So, who else is really going to be admitted as being similarly situated? At a theoretical level, I am 100 percent behind you; however, at a political level, I agree with Robin West and I am hesitant about whether this can be a viable, practicable argument in terms of Court strategies and interest group litigation.

EILEEN MCDONAGH: You raised something really important. I want to clarify that I am not comparing the situations of men and women. I am explicitly not saying that the obligation of the state is to treat men and women in the same way. That sex discrimination version of Equal Protection has been advocated by many people, including Ruth Bader Ginsburg. However, at least in terms of the current precedent set by the Court, not only is sex discrimination only at the intermediate level of scrutiny, but discrimination on the basis of pregnancy may not necessarily even be a form of sex discrimination. As far as I am concerned, although I agree that this is wrong, I consider sex discrimination as a basis for abortion funding to be a closed door. I was looking for doors that could open, so I did not even try that door.

I am claiming something different. I am claiming that the government needs to treat victims of bodily harm and liberty in the same way. And that a woman who is pregnant without consent is situated with other victims who suffer harm to their bodies and liberty. I am developing a fundamental right, Equal Protection argument that is different from a sex discrimination, Equal Protection argument.

Right now, it could be that the similarly situated argument might be easier to make because prohibitions on the use of state resources to provide abortions take the form of amendments to appropriation bills. The very fact that the amendment is in the context of a bill could be used as grounds for indicating that the amendment refers to people who are similarly situated to those the bill covers, but who are to be treated differently than the other people the bill covers. So, if the state is providing medical treatment to people, and adds an amendment that restricts the use of those funds to one particular group of people, that opens the door to the claim that the state is prohibiting the use of funds to people who are similarly situated. In any case, however the claim to similarly situated may be developed, a consent-to-pregnancy justification for abortion funding promises to open a new constitutional door specifically because it need not invoke a claim of sex discrimination.

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