

Where's the Crime?

In her essay “The Politics of Consent: Good, Bad, and Captive Samaritans,” E. McDonagh distinguishes herself from the majority of pro-choice advocates in that she does not attempt to argue against the “personhood” of the fetus. Instead, she approaches the abortion debate from a different angle. She claims that the humanity of the fetus has no relevance to the issue of abortion – in fact, she goes so far as to use the possible humanity of the fetus as the basis for her argument. However, by doing so, she allows critics to apply Constitutional rights to the fetus that he/she would not otherwise possess under the current law, including the right to life. Therefore, she must meet a much higher standard when asking the state to end that life.

McDonagh feels she can meet that standard using a variation of the “Bad Samaritan” law, which she calls the “Captive Samaritan.” She writes that even if the fetus “is a state-protected human life” (McDonagh 173), the fetus’ continued unwanted presence in the mother’s womb is a crime, an illegal intrusion into her person that holds her captive and forces her to donate her body to the preservation of the fetus. McDonagh goes on to argue that “the state must fund abortions as part of its police power, [. . .] a power that includes stopping human life from causing harm by intruding on the bodily integrity and liberty of others” (173). Of course, since the law has not yet addressed the legality of being a unwanted fetus in light of the fetus as a person, McDonagh attempts to establish the fetus’ acts as criminal by equating his/her situation with a crime of intrusion. She calls the existence of the unwanted fetus a type of “wrongful private act [. . .]

upon [the mother] without [her] consent” (172). This comparison falls short on many levels, but its most major logical flaws involve the issues of consent and, in regard to that, choice.

First, and most importantly, the act of consent implies choice. One chooses either to refuse or to grant permission for an act to take place, and then another person chooses whether or not to abide by that decision. However, *no woman can grant or refuse permission for the act of conception*. Whether controlled by nature or God, conception does not fall into the optional realm. Thus, women cannot choose whether they will become pregnant or not (although they can choose whether or not to try). McDonagh speaks of a mother not consenting to her “wrongful pregnancy” (173), however, since *no* mother consents to a pregnancy, the point seems moot. The desires of the mothers only become clear after the fetus has already arrived, when one welcomes the fetus’ existence and another wishes to end it.

This distinction remains important in establishing the criminality of the fetus’ act of coming into existence and living in a “hostile” uterus. Since no fetus can obtain consent before coming into existence, it seems unreasonable to punish those fetuses who have the misfortune of arriving, through no fault of their own, into a mother who wants nothing to do with them. Condemning these fetuses to die as a punishment for “imposing” (McDonagh 173) themselves on the mothers seems harsh when science has no way of notifying them that after they arrive, their mothers will not want them.

Second, McDonagh moves at this point from the actual “intrusion” of the fetus to its continuing existence, an existence that she characterizes as akin to someone “captur[ing] another in order to take needed body parts” (173). Although McDonagh’s argument that the mother does not consent to give her body parts to her child rests on more solid ground than her previous consent argument, flaws still exist. The woman in question may not want to give up her calcium, nutrients, etc. to the fetus, but how can the fetus know this? She cannot express her refusal of consent to him/her. The fetus cannot even see, much less comprehend that he/she is violating the mother’s wishes. McDonagh feels that the mother should refuse consent by terminating the pregnancy, therefore putting a stop to the loss of her “body parts.” However, since McDonagh acknowledges that the fetus has the same rights as everyone else, even if she does so simply for the sake of argument, then she cannot establish a justification for killing the fetus. Her “solution” simply goes too far for the “crimes” she claims the fetus commits.

Such a solution would never be proposed for any stage of life other than the fetus. For instance, if a grown man were donating blood to Helen Keller against his will, would he have the right to shoot Helen because he cannot get her attention and make her stop? By McDonagh’s logic, such actions would come under the heading of self-defense (173); however, the man from the example would no doubt find himself answering to the police for his quick trigger. Likewise, ending a fetus’ life in order to stop a loss of bodily fluids or discomfort seems like a very severe overreaction. When one concedes the “personhood” of

the fetus, one must remember that his/her life takes on a value as high as an octogenarian. Perhaps, if McDonagh really feels that the fetus should be made to answer for depriving his mother of nutrients for nine months, she can investigate civil action against the child as soon as he/she reaches a feasible age. Even then, she will probably have difficulty obtaining the capital sentence that she promotes in order to “stop” (McDonaugh 172) offending fetuses.

So far, the issues of choice and consent have dealt with the mother’s problems. However, the third choice aspect of consent also extends to the fetus. More specifically, the fact that fetuses have *no* choice in the matter affects the criminality of their acts, specifically, of continuing to exist by using the mother’s nutrients and uterus without her consent. The fetuses cannot “respect the mother’s wishes” by not choosing not to come into existence. They cannot refuse the mother’s nutrients in deference to her desire to withhold them. In view of this lack of choice, McDonagh’s equivalence of the continued existence of the unwanted fetus to criminal deeds, such as forcing someone to give up body parts, begins to seem shaky. After all, the law makes exceptions for people who commit crimes under duress for precisely the reason that they have limited choices, and no one expects them to abide by the same standards as those who would commit crimes willfully. Yet even people who have to choose between aiding a criminal who holds a gun on them or being shot themselves have more choices than a fetus. The laws of nature “force” the fetus into occupying the womb and using the mother’s nutrients to survive, while people under duress at least have the choice of refusing to cooperate and taking the consequences.

While McDonagh does acknowledge that fetuses do not live in a “moral community” (173), she does characterize the fetus in such a way as to equate him/her with criminals that do. When reading the paragraph about the need for the state to protect “the women [the fetuses] make pregnant without consent” (McDonagh 172), where she likens mothers to “victims of wrongful private acts” (172), one would think fetuses dropped out of the air, impregnating unsuspecting victims! Such characterizations damage rather than strengthen McDonagh’s case, because they make the differences between the fetus and the comparative criminal all the more stark. Since the fetus has no capacity to make a criminal choice, McDonagh’s argument that the state should treat fetuses in the same manner as kidnappers, thieves, etc. seems unreasonable.

Therefore, issues of consent and choice work together to weaken the logic of McDonagh’s claim that the state should fund abortions in spite of the fetus’ “personhood” in order to protect mothers’ “body parts” from “captivity” at the webbed hands of a fetus. Not only does the mother have difficulty in claiming that she refused consent to her “wrongful pregnancy,” she also may find it hard to justify ending a person’s life because she cannot communicate her lack of consent to him/her. After all, McDonagh’s misapplication of self-defense to the act of ending unwanted pregnancies does not change the seriousness of killing another human being. To do so over calcium deficiencies, the temporary loss of a uterus, and the other annoyances of pregnancy remains a tad drastic, and cannot really be justified using the purposefully narrow standards of self-defense. As for the fetus, his/her lack of choice and ability to comprehend “crimes” makes

the case against them very difficult to prosecute. Therefore, the criminality of the fetus' existence and use of the womb he/she unwittingly inhabits, even if against the mother's will, does not seem to rest on a very firm foundation. As a human, the fetus should be innocent until proven guilty. In her essay, McDonagh fails to establish that guilt beyond a reasonable doubt. Therefore, McDonagh should think twice before relegating the accused to death row without any trial or chance for appeal.

Works Cited

McDonagh, E. "The Politics of Consent: Good, Bad, and Captive Samaritans."

Breaking the Abortion Deadlock. [?]: [?], [?].