

CAUSATION, RESPONSIBILITY AND FOETAL PERSONHOOD

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INTRODUCTION

At the core of much opposition to abortion is the view that the foetus¹ is a *person* possessing a right to life, and hence that abortion is tantamount to murder and can, as such, be legally restricted. Being based on a moral perception of unborn life which can be neither proved nor disproved, this viewpoint is one with which it is virtually impossible to argue successfully. Nonetheless, some commentators in this area have undertaken the difficult task of arguing that even if we do accept this moral position, it is still consistent to support the recognition of a fundamental right for a woman to have an abortion. Such an approach – based on analogies between the foetal/maternal relationship and other forms of human relationship – is inherently appealing both because it means that the need for arbitrary classifications as to when life begins are dispensed with² and also because it makes the pro-abortion argument without taking what might be viewed as the unpalatable step of dehumanising the foetus.³

Two expressions of this argument are, superficially at least, particularly compelling. First, there is Judith Jarvis Thompson's celebrated assertion (elaborated upon most notably by Donald Regan⁴) that a restrictive abortion law imposes a duty on a woman to act as an incubator which is wholly at variance with the traditional reluctance of the criminal law to require one person to help another.⁵ Secondly, there is Eileen McDonagh's more recent suggestion that because of the enormous burdens which any pregnancy causes to a woman, the foetus, as the human author of such burdens may

¹ For convenience, I shall refer to the unborn entity as the foetus irrespective of the stage of foetal development and in the knowledge that it is medically inaccurate to do so.

² Thompson, "A Defence of Abortion", 1 *J Phil & Pub Aff* (1971), 47 [hereafter Thompson].

³ E. McDonagh, *Breaking the Abortion Deadlock*, (1996) [hereafter McDonagh], p 12. Judith Scully (8 *UCLA Women's LJ*, 125 at 126) refers to McDonagh's article as *probably the most controversial contribution to the abortion debate since Roe v Wade*. See also Robin West, "Universalism, Liberalism and the Problem of Gay Marriage", 25 *Fla St UL Rev*, 705 at 725. On this issue see also Nancy Davis 'Abortion and Self-defense' Summer 1984 Vol. 13 (3) *J. Phil & Pub Aff* at p 175 [hereafter Davis].

⁴ Donald Regan "Rewriting *Roe v Wade*" (1979) 77 Mich. L. Rev. 1569 [hereafter Regan].

⁵ See A. Ashworth "The Scope of Criminal Liability for Omissions" (1989) 105 *LQR* 424, G. Williams "Criminal Omissions: The Conventional View" (1991) 107 *LQR* 86, and Markesinis, "Negligence, Nuisance and Affirmative Duties of Action", (1989) 105 *LQR* 104.

legitimately be killed in self-defence. These arguments have two major principled similarities. First, both operate on the premise that direct analogies may be drawn between the legal protection which will be afforded to the foetus and that afforded to any 'born' human, and secondly, both see the foetus as somehow being the cause of and hence having responsibility for its own existence. So Thompson regards the foetus as a burden *imposed* on the woman⁶ and McDonagh insists that the cause of pregnancy is not the act of sexual intercourse which will probably have preceded it, but instead the act of the foetus in implanting itself in the mothers womb.⁷

This article seeks to dispute both conclusions. It will be submitted first that, because rights are recognised and protected in the context in which they operate and not in some sort of legal or moral vacuum, the unique nature of pregnancy means that the protection afforded by law to unborn life may be equal in strength to that afforded to born life but will necessarily be different in operation. Analogies between the two forms of protection must, therefore, be drawn with great care if at all. Secondly, it will be argued that, on normal legal models of causation it is the consensual sexual act of parents which is the legal cause of pregnancy, even where that pregnancy is undesired, and thus that the arguments of both Thomson and McDonagh lead inexorably to a conclusion with which they would profoundly disagree.

SELF DEFENCE AND PREGNANCY

Many commentators have argued that where pregnancy poses a threat to the life or health of the mother, then abortion may be justified under traditional criminal law principles as an act of self-defence against what may rather artificially be termed a human aggressor.⁸ McDonagh, however, takes this argument one stage further. She points out that the impact even of a pregnancy which poses no unusual risks to health or life of mother, is substantial and unpleasant, provoking physical and hormonal changes, discomfort, increased blood supply and so forth.⁹ If a born person were to impose him or herself on a woman causing this level of burden, then this would be classified as a serious assault and the law would permit the person assaulted to take all necessary steps to end his or her ordeal even if this involved killing the assaulting party.¹⁰ If the foetus is to be protected as a person it should also be held accountable for what it does¹¹ and hence, abortion is *always* legitimate as an act of self-defence and a pregnant woman refused either access to or funding for abortion is being treated unequally as

⁶ Thompson at p 49.

⁷ McDonagh p 6 and at p 40.

⁸ Regan at p 1612. See also Brody, *Abortion and the Sanctity of Human Life* (1975) at pp 6-26, M. Otsuka, "Killing the Innocent in Self-Defense", 23 *J Phil & Pub Aff* (1994) at p 74 [hereafter Otsuka], and F. Kamm, *Creation and Abortion*, (1992) [hereafter Kamm].

⁹ McDonagh at pp 68-71. See also Regan pp 1579ff.

¹⁰ McDonagh *inter alia* at pp 10, 12, 36-39 and 81-83. See pp 84ff for an analysis of the range of situations where it is legitimate to kill in self defence under American law.

¹¹ *Ibid* at p 7.

compared to a person subjected to a non-pregnancy assault occasioning this much damage.¹²

The contention that the foetus bears causal responsibility for pregnancy will be disputed later but for the moment we will presume that such a conclusion is possible. Even still, however there are a number of arguments against justifying an abortion law on a self-defence analysis.¹³

The 'Attacker' is Innocent

It may be argued first, that the foetus, being morally innocent, is not an attacker for self defence purposes. McDonagh, however, argues quite correctly that such apparent innocence on the part of an attacker does not render invalid the use of force in self-defence.¹⁴ If a person acts automatically, (for example as a result of a fit brought on by an allergic reaction to a bee sting), then he or she will be acquitted of any crimes committed while in this state. Nonetheless, such legal and moral innocence does not prevent one from defending oneself from an attack by a person in such a state.¹⁵ What is determinative is the fact of attack and not the state of mind of the attacker.

Is Pregnancy an *Invited* Attack?

It is also argued that even if pregnancy *is* an attack, by consenting to intercourse a woman has consented to and even invited such attack and cannot legitimately seek to use destructive force to halt it.¹⁶ Put another way, consent to sex constitutes an implicit consent to all the natural and foreseeable consequences thereof including pregnancy.¹⁷ This argument is,

¹² *Ibid* at pp 131-132. Regan (p 1569ff) and Lawrence Tribe, *Abortion: The Clash of Absolutes*, (1991) [hereafter Tribe] at pp 131ff. also adopt an equality argument, premised on the view that if the law forces a woman to continue with pregnancy it is discriminating against her because no other member of society is required to act to help another person at such personal cost. For further variations on this theme see F. Olsen, "Comment – Unravelling Compromise", (1989) 103 *Harv L Rev* 105 and S. Callahan, "Abortion and the Sexual Agenda" at p 131 in Baird and Rosenbaum eds *The Ethics of Abortion*, (1989) for the view that "Women will never climb to equality and social empowerment over mounds of dead fetuses ...".

¹³ See Regan pp 1613-1618 for a list of such arguments. See also Davis at p 188.

¹⁴ McDonagh at pp 96ff.

¹⁵ See Regan pp 1611ff and McDonagh p 96. Similarly Judith Thompson, "Self Defence", 20 *J Phil & Pub Aff* (1991) 283 at p 287 says that if one was sunbathing on one's patio, and on the veranda above a malicious person pushes an enormously fat man down towards you and if that fat man would crush you, it is legitimate for you to use any means at your disposal to deflect that fat man away from you even where this would result in his death and despite the fact that he is innocent in respect of the potential harm to you.

¹⁶ See *R v Browne* [1973] NI 96 at 107 *per* Lord Lowry for the view that the need to act in self defence must not have been created by the conduct of the accused.

¹⁷ See *inter alia*, Holly Smith, "Intercourse and Responsibility for the Foetus", at p 229 in *Abortion and the Status of the Foetus*, (1983).

however, rather strained.¹⁸ In the case, for example of a woman who has used birth control yet through some mischance has become pregnant and who seeks an abortion as soon as she becomes aware of her condition, everything in her actions indicates that she does *not* consent to pregnancy and any presumption to this effect has been thoroughly rebutted.

The Nature of the Attack

It has been suggested that the defence of self defence cannot apply because of the nature of the 'attack' within pregnancy. In order to justify use of self defence it must generally be shown that an attack was immediate and threatening.¹⁹ In other words, one may not kill or injure someone in anticipation of harm at some later date even where such anticipation is founded on experience.²⁰ Hence, because pregnancy does not have the appearance of an immediate threat, the use of self defence principles does not apply to this situation. This argument may be rejected, however, both because McDonagh would say that pregnancy is a nine month immediate threat, and also because the inexorable nature of the harm involved means that requirements of immediacy may be dispensed with.²¹ It might also be argued that in as much as pregnancy is of limited and fixed duration, it should be possible to ask a woman to put up with the alleged attack for that limited period. As McDonagh points out, however, we would not ask a woman who was being raped simply to put up with (and indeed consent to) her ordeal, for its duration.²² We would instead allow her to take all possible means (including acts of violence against the perpetrator of her assault) to end the attack.

Is Pregnancy an Attack at All?

The most pressing criticism of the self defence approach, however, and one with which McDonagh does not deal is that whatever the impact of pregnancy, the foetus is doing nothing apart from involuntarily staying alive in the ordinary way and hence the 'attack' for self defence purposes comes in the form of simple foetal existence.²³ But self defence law does not entitle me to kill another if my health or life or bodily integrity is threatened by his or her simple existence. As Davis puts it:²⁴

¹⁸ Regan p 1592.

¹⁹ See Davis pp 185ff.

²⁰ It has been suggested that this reflects a view of responsive violence which is inappropriately male-centred. See McDonagh at pp 179-181. See also Nicholson and Sanghui, "Battered Women and Provocation", [1993] *Criminal LR* 728 and Donnelly, "Battered Women Who Kill and the Criminal Law Defences" (1993) 3 *ICLJ* 40.

²¹ Regan pp 1617-1618.

²² McDonagh at pp 11-12.

²³ Davis (p 203) comments that "... it is merely the ongoing connection of the foetus to the woman that poses the threat. . .". Similarly Otsuka distinguishes a human threat (ie, an innocent human action with dangerous consequences) and a human aggressor.

²⁴ Davis p 183.

“It is reasonable to suppose that a right of self defence entitles us to kill someone who is threatening our life, not someone whose presence causes us inconvenience or embarrassment, (however acute)”.

This illustrates two important flaws in the self defence approach to abortion arguments. First, it ignores the fact that when the law recognises rights it does so in the knowledge of the context in which they will operate. Thus it would not recognise a right to live while rendering the act of breathing or eating a criminal offence, because the latter rule would render the former right meaningless. The inexorable connection between the burdens of pregnancy and the simple existence of the foetus means that a legally recognised foetal right to life includes the right to be the source of such problems and hence is an implicit legal rejection of the possibility that women be allowed to abort their foetus as an act of self defence against the routine if burdensome consequences of pregnancy. If this seems unjust, then that is an argument against taking the step of recognising a foetal right to life, for such a state of affairs flows inevitably from such recognition.

This leads on to the second problem with the self-defence approach. McDonagh points out that the law would not tolerate a situation where one born person caused the same impact on another born person as pregnancy causes to a woman. Whether or not this is correct, it is also irrelevant. Pregnancy is a unique scenario within the human condition and hence the nature of the legal protection of this unique form of life will itself be unique. Put another way, the law may regard the maternal and foetal rights to life as being equally valuable but is not thereby committed to the view that the two are identical in nature and operation. Indeed such an approach would be patently absurd.²⁵ Consequently, analogies between legal treatment of born life and unborn life may be impossible to construct. As Davis puts it:²⁶

“There is a tension between emphasising the special nature of the relationship between the woman and the foetus. . . and attempting to defend elective abortions, e.g. modelling conflicts of interest between the woman and the foetus on conflicts of interests between post-foetal persons. If the relationship between the woman and the foetus is thought to be in itself a special one, then this undercuts the force of arguments by analogy”.

²⁵ Davis (pp 183-185) says that pregnancy is so unique that it is impossible even to characterise the issue as one where competing rights are being balanced. This fact answers Thompson’s concern (at p 64) that, if a state bans abortion, it should be required, in the interests of consistency, to impose a general duty to act in other analogous situations.

²⁶ Davis at p 81.

SAMARITANISM²⁷ AND PREGNANCY

Thompson's approach to the abortion problem is arguably even more sophisticated. She argues that the fact that a person possesses a right does not mean that that person may require other people to do all in their power to support that right. Hence, even if the foetus *is* a person and *does* have a right to life, this does not mean that it has a legal mandate to require its mother to undergo enormous burdens to support that right. If it did, then the law would be forcing the woman to act as a Good Samaritan – something which it is traditionally loathe to do.

Thompson sought to explain this approach using what she felt was an analogous fact scenario. One morning A wakes up in bed and discovers, to his or her surprise, that during the night a famous violinist has been plugged into his or her kidneys.²⁸ The Society of Music Lovers explains that the violinist was dying and that A was the only person with the appropriate kidneys to keep him alive. Thus he was connected to A, and this connection will continue for nine months. Admittedly the connection will pose huge problems but it is the only way to keep the violinist alive. In such a situation, the violinist's right to life does not amount to a right to use other people, against their wishes, to support his life.²⁹ Therefore while it would be remarkably charitable of A to support him, he or she is not obliged to do so. In the same way, pregnancy is a manifest violation of a woman's liberty (greater even than that imposed by the violinist), and a refusal to support unwanted unborn life should not constitute the act of unjust killing but merely a refusal to act as an incubator for nine months.

Clearly this is a most ingenious argument and indeed at first glance it appears very convincing. It contains, however, several flaws which may limit its application.

The Two Fact Situations are not Analogous

Not only is the analogy with the dying violinist fanciful in the extreme, it is also not directly analogous to the situation of pregnancy. As John Finnis noted in an early reply to Thompson,³⁰ the violinist's intrusion on the person of the victim, apart from being a violation of the victim's rights is also a breach of duty on the part of the intruder, and "...our whole view of the violinist's situation is coloured by the burglarious and persisting wrongfulness of his presence plugged into the victim".

Clearly the same arguments do not exist in respect of the foetus, especially if, as will be argued later, its existence is the result of an earlier action by its parents.

²⁷ Both Thompson and Regan refer to the term 'Samaritanism' – a reference to the Biblical figure of the Good Samaritan, (Luke 10: 30-37) who acted to help a stranger despite having no obligation to do so.

²⁸ McDonagh pp 48-49

²⁹ *Ibid* at p 47. See also Regan pp 1569ff.

³⁰ J. Finnis, "The Rights and Wrongs of Abortion", in Cohen, Nagel and Scanlon eds *The Rights and Wrongs of Abortion*, (1974) p 85 [hereafter Finnis] at p 110.

Is Abortion Really an Omission?³¹

For many people, it may seem ludicrous to speak of abortion as anything other than an action – a deliberate killing of an innocent entity. It is all very well for Thompson to speak of a woman refusing to be an incubator, but in reality she must do something to terminate what is otherwise a natural process leading ultimately to birth.

This argument is not insurmountable. At criminal law, after all, there may be certain grey areas of conduct, where it is not clear whether the impugned behaviour constitutes an act or omission.³² In *Airedale NHS v Bland*,³³ the removal of a feeding tube from a PVS patient which would result in his death was seen as an omission (that is, a failure to feed) but could legitimately also have been seen as an action leading to starvation. Indeed the forced removal of the dying violinist from the kidneys of the other could fit into either category of behaviour. Hence, if Thompson's thesis is otherwise sound, it would not be too difficult for the courts to accept this aspect of it.

The Duty to Act

A more pressing point, however, is that even if abortion is to be classified as an omission this does not necessarily legitimise it. The common law has developed a series of categories in which A is required to act on B's behalf, namely where a duty to act is created by contract or statute, where one person has consented to take responsibility to act on another's behalf, where the situation to be resolved has been created by the person required to act to resolve it, or where there is a special relationship (for example a parent/child relationship) between the two. In the abortion situation, the first two of these categories do not have application. Moreover, in as much as we have concluded that consent to sex does not amount to consent to pregnancy and we are prepared for the time being to accept that the sexual act is not the cause of pregnancy, we can discount the third and fourth categories of duty to act. We are left therefore with the question whether the relationship between the mother and the foetus is one which could be classed as 'special' for the purposes of determining whether the mother may validly be required to act to assist her foetus.

It has been argued in reply that parenthood and other recognised 'special relationships' are distinguishable in their nature from pregnancy because of the extreme physical invasiveness of the latter condition – an argument which serves to re-emphasise the point that pregnancy is a unique condition and that analogies either to it or from it will be difficult to construct. It has also been suggested that the pregnant woman has not done as much to

³¹ Regan pp 1574-1579.

³² See for example *R v Arthur* (1981) 12 BMLR 1, where a doctor on the request of parents of a child suffering from Down's Syndrome ordered the administration of a drug which would stop the child from seeking sustenance. The judge instructed the jury that this could be construed either as an action or an omission.

³³ [1993] 2 WLR 316.

establish a special relationship with her foetus as a parent has to establish a relationship with her child.³⁴

More convincingly, it may be said that the reason why a duty is imposed in the parent/child scenario is not because of the biological connection between the two (one will after all be required to take action to save a foster child or a child whom one has adopted), but rather because the parent in keeping his or her child rather than having it aborted or adopted has thereby voluntarily assumed *responsibility* for it. A decision by a pregnant woman, early in her pregnancy, to have an abortion, is as clear as possible a statement that she does not assume such responsibility for the foetus. Indeed it is arguably clearer than the equivalent statement made by a mother who puts her child up for adoption.

Causation and the Nature of Pregnancy

Even if we are prepared to view abortion as a (legitimate) refusal to act to help another, however, Thompson's argument still runs into two major problems. The first is that encountered by proponents of the self defence viewpoint, namely that the unique nature of pregnancy within the human condition means that even though the duties which a law prohibiting abortion imposes may not fit in with traditional criminal law rules governing behaviour *inter partes*, this is not *per se* a reason why they are invalid.³⁵ Thompson accepts the personhood of the foetus for the purposes of argument while insisting that a foetal right to life does not include a right to use its mother's body for support through the vehicle of pregnancy. But without such a 'sub-right', the principal right becomes illusory,³⁶ and those who create and those who enforce law are aware that this is the case. As Davis notes³⁷:

"Since the life and well-being of the foetus is sustained through its physical dependence on the woman's body, the very fact of being pregnant undermines a woman's autonomy."

Secondly, Thompson's argument, like that of McDonagh, is utterly dependent on the conclusion that a mother has no causal responsibility for pregnancy. So far, we have accepted this reasoning. The rest of this article, however, seeks to reject it, and in doing so, to suggest that the logic used by supporters of Thompson and McDonagh may justify the opposite conclusion to the one which they desire.

CAUSATION AND PREGNANCY

The reason why the causation question is so important is obvious. In law, ". . . doing or causing harm constitutes not only the most usual, but the

³⁴ Regan at p 1598.

³⁵ Regan (p 1570) admits that pregnancy is a unique fact situation but suggests that anti-abortion laws violate the spirit of the principle against Samaritanism.

³⁶ Finnis at p 88 sees Thompson's main failing as existing in the lack of precision with which she defines what she means by a right to life, and especially with which she explains what she sees such a right as entailing.

³⁷ Davis at p 200.

primary type of ground for holding people responsible".³⁸ If I am walking along a narrow hill top with another person, and through wilfulness or negligence I push that person over the cliff such that he is clinging on to my hand for survival, I will not be entitled as a matter of law to claim that in loosening his grip and letting him drop, I am merely refusing to be of active help to him. I have caused his predicament and hence I am responsible for it, however much such responsibility intrudes on my personal autonomy. On the other hand, if the person in the above analogy jumped off a cliff voluntarily and attempted to pull me with him, then irrespective of his intentions in so doing I will be entitled to do all in my power to release his grip in order to prevent any harm to myself. Hence, if we conclude that the parents of a foetus have caused its existence, then we are in a strong position to argue that legally they may be held responsible for its survival and *vice versa*.

Apart from her statement that the sick violinist is connected to the sleeping woman by a third party, Thompson does not dwell on the topic of causation. McDonagh however classifies the whole abortion debate as turning on this question. She argues that the view that sex causes pregnancy is no more than a *cultural assumption*³⁹ based on *rigid notions of male power and prerogatives*,⁴⁰ and if the foetus is to be regarded as a person, then the proper 'legal' cause of pregnancy is the act of the fertilised ovum implanting itself in its mother's womb.

A number of immediate points should be noted in respect of McDonagh's argument. First, by saying that the foetus should be held accountable for the burdens it causes, she is on dangerous ground, for she is necessarily accepting the conclusion that causation attracts responsibility within the pregnancy situation. On her logic, if the cause of pregnancy can be shown to be the act of intercourse of its parents then responsibility for pregnancy must switch to them and they must 'be held accountable'.

Secondly, as the American Supreme Court noted in the seminal case *Roe v Wade*,⁴¹ there is no clear consensus as to when life or indeed pregnancy begins. If it begins at implantation or later then McDonagh's argument that the fertilised ovum causes pregnancy may stand a chance of working. If on the other hand, it is seen to begin at the point of *fertilisation* then her arguments fail immediately because unless she aims to imbue sperm with personhood (and the anti-abortion movement does not make this argument) then she would have to accept that pregnancy is caused by the sexual act which led to fertilisation.⁴²

³⁸ HLA Hart and T. Honoré, *Causation In The Law*, (2nd ed, 1985) [hereafter Hart & Honoré] at p 64.

³⁹ McDonagh at 26-28.

⁴⁰ *Ibid.* at p 57.

⁴¹ *Roe v Wade* 410 US 113 (1973) at p 153.

⁴² Thompson (p 48) rejects the possibility of pregnancy starting at fertilisation arguing that the fact that an acorn has the potential to become an oak tree does not make the two identical. Finnis, however (pp 112-113), says that it is impossible to give an exact point at which the acorn becomes an oak tree, and on this basis, argues that life must be seen to begin at fertilisation. On this question see also

Thirdly, by separating the man/woman 'sex relationship' from the foetus/woman pregnancy relationship, she is drawn to the inexorable conclusion that the man has no legal responsibility for pregnancy, not having 'caused' it in the legal sense.⁴³ Despite this, however, she is prepared to require that the man owe a duty to the foetus in the sense of being required to provide financial and other assistance.⁴⁴ The only reason why this is legally warranted if the father is not the part cause of pregnancy, however, is because of another cultural assumption as to his significance within the whole state of affairs.

Fourthly, McDonagh confuses the different issues of causation and consent, a fact manifested in her assumption that, because a woman who consents to sex does not thereby consent to pregnancy, she should not be deemed to have caused it. Clearly, however, it is possible to cause something and indeed to attract responsibility in respect of something to which one does not consent. If I accidentally set fire to my house and it is burned to the ground, then, whereas it is absurd to say that I have consented to the destruction of my property (indeed I may have taken precautions to prevent such a calamity), I have undoubtedly caused it. Similarly the fact that a woman may not consent to becoming pregnant, and may have demonstrated this lack of consent through the use of contraception, does not mean that she has not *caused* the situation.

Finally, McDonagh is so concerned to find *a* generic cause of pregnancy, that she fails to recognise that what is actually relevant for legal purposes is the cause of *the* particular pregnancy in any case. If a pedestrian is killed in a road accident, we would not ask 'What is the cause of road death?' and expect to find an answer any more specific than 'a lack of blood to the brain of the deceased party' – the cause of *all* human death. Instead we would ask 'what is the cause of *this* road death?' Perhaps the car driver was drunk. Perhaps the pedestrian ran across the road without looking. Perhaps a hit man was hired to assassinate the pedestrian. So road death as a general concept will have different causes depending on the facts of the case, and we should analyse pregnancy in a similar way. Most sexual acts may not result in pregnancy, and pregnancy may result from actions other than sex.⁴⁵ But, for most women seeking abortions, their specific individual pregnancies *did* result from a sexual act.

Tribe, pp 116ff, Regan pp 161ff, Noonan ed *The Morality of Abortion*, (1970), *Abortion and the Status of the Foetus*, (1984), King, "The Juridical Status of the Foetus; A Proposal for Reform", (1979) 77 *Mich L Rev*, 1647, G. Williams, "The Foetus and the 'Right to Life'", (1994) 53 *Cambridge LJ* 71 and P. Bassen, "Present Status and Future Prospects; the Status of Early Abortion", 11 *J Phil & Pub Aff* (1982) at 314.

⁴³ See Hart & Honoré at p 62 for the view that responsibility may exist even without causation.

⁴⁴ McDonagh p 58.

⁴⁵ McDonagh never deals with the argument that even in cases of IVF related pregnancies, the parents of any embryo thus created will still be deemed, by their compliance with the procedure, to have causal responsibility for the pregnancy.

What is the Cause of Pregnancy?

Putting aside these criticisms of McDonagh's argument, we come to the question of whether it is actually correct to make the dual assertions that the sexual act is *not* the legal cause of pregnancy, and the 'actions' of the fertilised ovum are. This requires us to undertake a brief examination of causation rules.

At law, causation is divided into factual cause and legal or proximate cause. The former and far wider category comprises all the possible elements of an event, and is generally determined by reference to a 'but for' test of elimination for positive act and substitution for omissions. Thus one asks, 'but for the defendant's action or omission would the same result have occurred?' If the answer is no, then the defendant's action is a factual cause of the result.⁴⁶ For pragmatic reasons it is necessary, however, to set some limits to factual causation.⁴⁷ Thus courts in various jurisdictions have said that where one event is merely the setting in which a second event takes place (as for example where A injures B, B is taken to hospital where he makes a full recovery but just before being discharged, he is the victim of some act of gross professional negligence and dies as a result), the former event will not be deemed even to be a factual cause of the result, having been overtaken by the latter.

The second and more significant stage on the causation nexus is the determining of *legal cause* or those factual causes to which the law attaches responsibility. At common law the rule used to be that a person was deemed to have (legally) caused all the direct consequences of his or her action.⁴⁸ More recently the test has become one of foreseeability – was the risk of the harm emanating from the factual cause reasonably foreseeable.⁴⁹ In practice what is required is a commonsense-based analysis of whether a particular factual cause has contributed appreciably to the coming about of the events in question.⁵⁰

In her analysis, McDonagh concedes that sex may be a factual cause of pregnancy but insists that it is not its *legal* cause because not all unprotected sex leads to pregnancy and not all pregnancies derive from sex (for example in situations of IVF). Therefore, in her view, "Under the law the men cannot impregnate women. . . [I]n the eyes of the law, the fertilised ovum should be the legal cause of a woman's pregnancy".⁵¹

⁴⁶ See, *inter alia*, *R v White* [1908-1910] All ER 340 and *Barnett v Chelsea & Kensington Hospital Management Committee* [1969] 1 QB 428.

⁴⁷ *R v Jordan* (1956) Cr App Rep 152, *R v Smith* [1959] 2 All ER 193, *R v Cheshire* [1991] 3 All ER, 670 and *R v Kennedy* [1999] Crim LR 65.

⁴⁸ *Re Polemis* [1921] 3 KB 560.

⁴⁹ *The Wagon Mound (no. 1) Case* [1961] AC 388, *The Wagon Mound (no. 2) Case*. [1967] AC 617.

⁵⁰ Hart & Honore p1. Equally the same writers note (p 3) that elaborate causal language has seldom been used by the courts simply as a vehicle for judgements of policy.

⁵¹ McDonagh at p 42.

She accepts that it might be argued that even if the fetus *causes* the pregnancy, its parents, because they engaged in sexual intercourse where the consequence of pregnancy was foreseeable, may be deemed to be contributorily negligent in respect of it and, thus, may be legitimately prevented from seeking an abortion.⁵² She rejects this proposition, however, on the grounds that the sexual act does no more than create the *risk* of pregnancy⁵³; yet it is statistically less likely that sex will lead to pregnancy than it is that a woman's act in jogging in Central Park late at night will lead to her being attacked but we would not see such an innocent action as being even a partial legal cause of the attack.⁵⁴

There are immediate difficulties with this analogy. Again, she looks for *the* legal cause of a result with the implication that at law there can only be one such cause. This is incorrect. If I am walking down a street and negligently cross a road without looking, and am hit by a car driven by a driver who is exceeding the speed limit and then loses control of his car by virtue of suffering an allergic reaction to a sting from a killer bee, negligently released from a nearby apiary, then there may be three legal causes of my injury, with the court apportioning liability on the basis of policy considerations.⁵⁵ Likewise in the jogger situation, there may be two legal causes, namely the recklessness of the jogger and the malice of the attacker.

Secondly, she uses the analogy with the jogger in Central Park because she sees the statistical likelihood of a result following an action as a justification for imposing causal responsibility, and hence, if we are not to deem the action of the jogger to be the cause of an attack, so much less should we deem the act of the couple having sex as the cause of pregnancy. In fact, questions of causation are answered substantially by policy considerations and hence simple demonstration of statistical connection between action and consequence is not enough to establish causal responsibility.

In reality it is highly unlikely that the jogger's action is even a *factual* cause of her injuries. Within our analysis of factual cause, we must factor in the legal notion of overtaking cause or *novus actus interveniens*, where, for example, A stabs B leaving him in a state where he is likely to die, and C comes along and shoots B in the head killing him instantly. In such a case it may be said that A is no longer even the factual cause of B's death, in that his causal action has been overtaken by C's act. Such a *novus actus interveniens* may exist in the action of a third party, or of the victim, or in the form of an independent physical event. In the jogger situation, even though the act of jogging in Central Park late at night might be dangerous, it is merely the factual setting in which the independent fact of the attack took place. The actual attack becomes an overtaking and exclusive factual cause of the harm. (Moreover, even if the courts did conclude that factual cause was present in such a case, the policy considerations which are so influential

⁵² *Ibid* pp 43-44.

⁵³ *Ibid* at pp 49-50.

⁵⁴ For the relevant statistics on these comparative risks see *ibid* at pp 51-53.

⁵⁵ See for example B. Markesinis, *The German Law of Torts*, (1994) [hereafter Markesinis] at p 98. See also, *Baker v Willoughby* [1970] AC 467 and *Fitzgerald v Lane* [1987] 2 All ER 455.

in the determination of *legal* cause would militate against a situation where the exercise of a basic constitutional right to walk in a public place could be regarded as the cause of attack and injuries.)

Equally, all that McDonagh needs to do in order to keep alive the analogy between the Central Park jogger and pregnancy is to restate her proposition by arguing that sex is not even a factual cause of pregnancy because it merely creates a setting in which the foetus as a person, operating as an overtaking cause, implants itself in its mother's womb, thereby bringing about the undesired result. We might reply that whereas the policy considerations in the Central Park attack case militate in favour of the attacker being held absolutely liable, in the pregnancy situation, there is good policy in requiring a couple to take responsibility for this entity that they have created. This, however, presumes a view of policy that may not exist in a society which supports a woman's right to abortion on demand. Alternatively, we might say that pregnancy begins at fertilisation and hence the foetus is, by definition, the *result* rather than the cause of pregnancy. Again, this is unsatisfactory, because it presumes that pregnancy begins at fertilisation – a point on which there is no real consensus.

There are, however, two ways of looking at the situation which demonstrate why the 'act' of the foetus cannot be seen as an overtaking cause of pregnancy. First, the move of the foetus to implantation is an *involuntary* reaction to an earlier action of its parents.⁵⁶ It is true that it is in the best interests of the foetus (and McDonagh rather simplistically translates this as meaning that it *wants* to implant itself), but this is merely a fortuitous coincidence as far as the foetus, propelled into involuntary motion, is concerned.

The reason why this is important is because on normal causation rules, if A causes B to do something in involuntary fashion (for example when A throws B with such force that B strikes C) then A's action is still the cause of the harm to C.⁵⁷ Put another way, an involuntary reaction of B to A's earlier action does not break the chain of causation between action A and result C.⁵⁸ Indeed Hart and Honoré suggest that in such circumstances when we speak of B's behaviour, *we can hardly speak of an act at all*.⁵⁹ Furthermore, even if B would not have collided with C but for the fact that he was on a steep downward gradient when thrown, (that is without the presence of a natural

⁵⁶ At p 9, McDonagh notes that a foetus *cannot control its behaviour* but her assessment of the significance is limited to her conclusion that the moral innocence of the foetus does not preclude it from being a legitimate target for an action in self-defence.

⁵⁷ Hart and Honoré pp 41 and 136ff.

⁵⁸ Thus Hart and Honoré (at p 51) suggest that: "Though authority has not been traced, it seems certain that an act performed in a hypnotic trance or under a psychological compulsion implanted during a hypnotic trance would not negative causal connection." See also *Ricker v Freeman* (1870) 50 NH 420, 9 Am Rep 267 where the defendant seized the plaintiff and swung him around until the latter was dizzy, whereupon he stumbled and hit his head off a hook. Here the plaintiff's involuntary movements did not break the chain of causation between the defendant's assault and the harm caused.

⁵⁹ Hart and Honoré at p 142.

variable in the equation), A will still be the cause of any injuries to C. Most importantly of all, if A causes B to move in such a way that B collides with *him*, then A will be deemed to be the cause of his own injuries. A is the original human agency of a sequence of actions leading to a result and the absence of any subsequent voluntary action or coincidental natural intervention means that the chain of causation between the causal act and the result is not broken.⁶⁰ The significance of this for the pregnancy situation is obvious.⁶¹ The parents have caused the foetus involuntarily to implant itself, therefore the chain of causation between their act and the result (pregnancy) is not broken.

The second reason why the foetal 'act' in implantation may not be regarded as an overtaking factual cause of pregnancy is as follows. Apart from the 'backward' limits to factual causation to which reference was made and which explain why the action of the jogger cannot be seen as the factual cause of her attack, it is also necessary to set *forward* limits to causation. We should not regard the natural progression from a cause to a result, and all the immediate preceding conditions of that result, as themselves attracting causal responsibility.⁶² Thus, as has been pointed out, every human death is the result of a lack of blood to the brain. Yet in assessing the legal *cause* of any specific death we must pull back from this immediate proximate occurrence and look to an event rather further in the background. If A stabs B, and fatally wounds him, then we may say that A's action is the *cause* of death, and the lack of blood to B's brain is a non-coincidental and natural subsequent condition following A's action. As Hart and Honoré point out, factors "... which are present as part of the usual state or mode of operation of the thing under enquiry are mere conditions and normal ones at that".⁶³

It is possible, in this light and in as much as implantation flows naturally and non-coincidentally from millions of fertilisations annually, to characterise the move from fertilisation to implantation not as an (involuntary) action of the embryo, but rather as a non-coincidental subsequent condition of conception. Put another way, and without committing to a view that unborn life begins at fertilisation, the move to implantation is part of the process by which the cause (sex) generates the result (pregnancy).

⁶⁰ *Ibid.* pp 164ff. and 341.

⁶¹ Regan (p 1596) admits that "[The Mother] has voluntarily done an act which created a risk that aid would be required." Because he is operating on a consent and not a causation analysis, however, the significance of the mother's action in terms of assumption of responsibility is not appreciated.

⁶² Hart and Honoré pp 11-12.

⁶³ *Ibid.* at p 35. The same authors (p 11) point out that whereas the presence of oxygen (a prerequisite to fire) could not be seen as the cause of any specific fire, on the other hand, if a fire broke out in a factory where oxygen was specifically excluded, because of the negligent introduction of oxygen, then the presence of oxygen or possibly the act of allowing its admission could legitimately be seen as the cause of that fire. This is because in the latter case, the presence of oxygen could legitimately be seen as either paradoxically non-natural in the circumstances, as a coincidental condition or as part of the circumstances in which the cause operates.

Having determined that the sexual act is a factual cause of pregnancy we move on to look at legal cause. As was mentioned, the question of legal cause is answered substantially by policy. There are, however, two reasons for assuming that it would be likely that the sexual act in such circumstances could be deemed to be the legal cause of pregnancy. First, because the result is a reasonably foreseeable consequence of the action (whether or not the mother consents to it) and secondly, because it is likely to be seen as good policy in the legal order to which McDonagh refers, namely one in which the personhood of the foetus is afforded legal recognition.

Causation and Responsibility

As was mentioned earlier, the fact that from a legal perspective the sexual act will be seen as the cause of most pregnancies is of clear significance (if we continue to accept that the foetus is a person) because of the inevitable legal connection between causation and responsibility.⁶⁴ As Hart and Honoré point out, after all, the statement that someone has *caused* an event is no more than a normative judgement that they should be responsible for it. Hence if a foetus is 'caused' by its parents, there is a strong argument that for this reason it becomes their responsibility.⁶⁵

It may be argued, however, that in most cases of liability flowing from causal responsibility, A's causal act will have harmed B and the extent of A's liability will be merely to return B, as far as possible, to his original state.⁶⁶ If we see life (even a very short life) as an inherently good thing and if we regard the foetus as a living person, then conception, far from harming the foetus, actually benefits it, and abortion merely returns it to its previous neutral state. The situation, it is argued, is analogous with one where A gives B a bag of sweets as a gift, and then, after B has had only two sweets, A snatches the bag back. B may be disappointed, but A's intervention in his life has not harmed him. Rather it has benefited him to the tune of two sweets.

This is a clever argument, (if one so rooted in theory that it will have limited practical application); however, it proceeds and depends on one huge and unproved assumption namely that the state of being of a human before conception is identical to that after abortion. Thus, Kamm argues that abortion merely returns a foetus to the status it was in prior to conception, but she does not evidence this assertion, because it is impossible to do so. We simply cannot know whether, in metaphysical terms, an embryo is better

⁶⁴ Even Thompson (p 58) admits this possibility. She concludes, however, that because *there are causes and causes and the details make a difference*, therefore "... at most [the causation argument means that there are some cases in which the unborn person has a right to the use of its mother's body and therefore some cases in which abortion is unjust killing.]"

⁶⁵ See Kamm (p 153) for the view that on a benefit/burden analysis, whereas the mother *has* caused the foetus to exist, equally the cost of *not* running any risk of creating pregnancy (ie complete sexual abstinence) is so high that her responsibility for the foetus should be reduced.

⁶⁶ See Kamm pp 89, 144 and 334ff for analysis on this point, which she terms the 'cut-off' abortion argument.

off not being conceived, or being conceived or being aborted.⁶⁷ Equally, there are two reasons why, even if it is not possible to prove the fact of harm following the causal action, it may still be good policy to require people to take responsibility to care for the foetus whose existence they have caused. First, if it *is* a person then that ‘person’ has undoubtedly been placed by its parents in a situation of peril where it must depend utterly on its mother not to have that peril brought to fruition. Secondly, if we see the foetus as a person we can point to public policy arguments in favour of requiring parents to take responsibility for something of social value who is inextricably dependent on them and whose existence they have caused. Again, because of the unique nature of pregnancy, we should accept that it is impossible to find an analogous situation elsewhere in life.

Causation, Responsibility and Equality

The obvious criticism of this view of causal responsibility is one which underpins the arguments of Regan and Tribe in this area, namely that, whereas two persons have caused the situation of pregnancy, only one is required to take responsibility for it in the literal sense, and hence the principle is deeply discriminatory. Moreover, the extent of the burden of responsibility is enormous – unequalled in any other area where causal responsibility is apportioned by law. Regan,⁶⁸ indeed, argues that such discrimination is particularly problematic because it is targeted against a historically disadvantaged group, and relates to an inherent and unalterable characteristic.

The response to this argument again lies in the unique nature of pregnancy. Like it or hate it, men cannot become pregnant and any laws or social norms affecting pregnancy impact on them at best indirectly. This inequality is imposed by nature not by law and in as much as it focuses on physical possibilities and impossibilities it has no obvious equivalent within equality jurisprudence. The father in a pregnancy situation can be required to pay financial support, but there is simply no way to make him undergo an equal share of the burden of pregnancy. In other words it is an inherent fact of life that even though a woman and a man jointly cause and, hence, on our understanding of equality should be responsible for a pregnancy, it is the woman who will bear by far the greater practical impact of such responsibility. This may seem to be unfair, (just as, perversely it may seem unfair that men do not have the biological capacity to undergo pregnancy) but this is because nature has “unfairly” selected women as the primary workers in the field of reproduction, not because the law refuses to remedy the situation.

Causation and Rape Based Pregnancy

Analysing the abortion debate in terms of causation does explain one apparent anomaly. In the Republic of Ireland, as recently as 1983 the

⁶⁷ Regan (p 1599) argues that “When a pregnancy is terminated, the foetus is no worse off than it was before the . . . sexual act as a result of which [it] was conceived”. It is not clear where he received this information which is of absolute metaphysical significance.

⁶⁸ Regan p 1631.

Constitution was amended by popular referendum to include a new clause recognising and guaranteeing to protect the right to life of the unborn.⁶⁹ In 1992, however, there was public outrage there at the fact that a 14-year-old girl, allegedly the victim of rape, was denied access to an abortion.⁷⁰ Now clearly her foetus was as innocent and indeed as much a person as any other unborn life protected under the Constitution.⁷¹ Yet for some reason this was seen by many who would support the idea of a right to life of the unborn, as a different situation – one in which abortion was justified.⁷²

Tribe tries to explain this inconsistency using the language of consent.⁷³ He argues that people who would favour a rape-based exception to an overall ban on abortion would believe that whereas normally a woman consenting to sex implicitly consents to pregnancy, in the case of rape the absence of primary consent means that there is also an absence of this implied sub-consent. He goes on to say that if this view is to be consistent, and unless we are making a moral judgement on the nature of consensual sexual action, then we should also allow abortion in cases where a woman by using contraception, has clearly indicated that she does not consent to pregnancy. (Indeed although Tribe does not mention it, this logic would apply to all cases where a woman engaging in intercourse simply does not wish to become pregnant). Yet for many people there is still a substantial moral difference between the two types of case, a fact which suggests that their moral evaluation of the issue does not focus on presence or absence of consent.

In fact the only explanation for this apparent inconsistency lies in a view of the moral significance of the parents' causal role in the pregnancy situation. To take up Tribe's point, people *are* concerned with the nature of a woman's consent to intercourse, not as a moral judgement about her character, but because it is indicative of whether her action is voluntary and hence whether she is partly responsible for the pregnancy which she may wish to terminate.⁷⁴ A woman who is an involuntary participant in the procreative act has no responsibility for its consequences.⁷⁵ Her role in the events has not broken the chain of causation between the rapist and the pregnancy. To

⁶⁹ See J. Kelly, G. Hogan and G. Whyte *The Irish Constitution* (3rd ed, 1994) pp 790-810, and T. Hesketh *The Second Partitioning of Ireland* (1990).

⁷⁰ *AG v X* [1992] IR 1. For analysis see G. Whyte, "Abortion and the Law" (1992) *Doctrine and Life* p 253, and R. Byrne and W. Binchy '1992 Annual Review of Irish Law' (1994) at pp 154-208.

⁷¹ Thus Thompson (p 49) says that: "Surely the question of whether you have a right to life at all or how much of it you have shouldn't turn on the question of whether or not you are the product of rape".

⁷² Thompson at p 65 comments that, "... A sick and desperately frightened 14-year-old schoolgirl, pregnant due to rape may *of course* choose abortion and... any law which rules this out is an insane law". For the same conclusion see Davis p 183.

⁷³ Tribe p 132. For analysis of this point see Kamm pp 178-179.

⁷⁴ Regan (p 1609) admits that "... by having the sex, the pregnant woman has, (except in the case of rape) done something that gives us some reason to compel her to aid the foetus".

⁷⁵ As has been mentioned Thompson (p 58) seems to accept that causation-based analysis to pregnancy and abortion might justify a rape-based exception to an otherwise absolute ban on abortion.

return to Thompson's analogy she has had no part in the connection to her system of the metaphorical sick violinist and hence cannot be seen as responsible for it.⁷⁶

Causation and Responsibility in Context

One final point should be made. In analysing the arguments of McDonagh and Thompson, it was noted that recognition and protection of rights does not occur in a factual vacuum. As we saw, if we recognise a foetal right to life we are recognising a right to impose burdens on a woman. This principle must, however, operate both ways. In many countries, most notably America, the law recognises a constitutional right for women to have abortions. If, on our analysis, the act of abortion where pregnancy follows from a consensual act of intercourse is an abrogation of causal responsibility then so be it – parents are afforded a constitutional right not to be responsible for their actions. Equally, the fact that the law in such a case is recognising a right not to take responsibility for results caused by one's actions, where what is at stake is of undoubted social significance (even if it is not a person), might give the country governed by that law pause for thought.

CONCLUSION

It should be stressed that this is not an anti-abortion argument. It is merely an argument that the recognition or non-recognition of foetal personhood is of determinative significance in this debate. After all, if the foetus is *not* deemed to be a person, then the sexual act has merely caused an unwanted change to a woman's body just as overeating may cause such a change. If this is the approach taken, then, just as society cannot force me to have a diet because my obese appearance is aesthetically unpleasant, equally it has no right to intrude on what Thompson refers to as a woman's *prior claim* to her own body.⁷⁷ If on the other hand, a country recognises the right to life of an individual foetus then either because of rules of causation or more probably because of the unique nature of unborn life, that country is foreclosing the option of abortion. It is as simple as that.

Unfortunately though, this question which dominates the debate is unanswerable. The stage at which a foetus becomes a person (if it ever does so) cannot be proven either way because there is no medical, legal or theological certainty as to when life begins. The abortion debate is bitter and couched in absolute terms because the absolute moral conviction of one person is diametrically opposed to the absolute moral conviction of another, neither point of view can be proven and insecurity of argument breeds an unlistening vehemence. This is why any abortion law can hope to be consistent, practicable and reflective of the moral ethos of the society, which it governs, but can never hope to be right.

⁷⁶ I would agree with Tribe (pp 133ff) that a rape-based exception to a ban on abortion presents enormous practical difficulties. Accordingly this logic may work better as an explanation for a moral reaction than as the basis for a law.

⁷⁷ Thompson p 53-55.