Woman, Womb, and Bodily Integrity

Christyne L. Neff†

I. INTRODUCTION

Pregnancy, although a distinctly physical experience, has been treated in a distinctly non-physical manner within American jurisprudence. From among the several principles that might be invoked to protect a woman's right to terminate a pregnancy, courts have relied exclusively upon a broad and malleable notion of "privacy."[1] But the right of privacy, as framed by the courts, has failed to reflect the physical reality of women's lives. Moreover, privacy's balancing test has led to an alarming trend in American constitutional and common law toward permitting the state to intercede on behalf of its interest in a fetus, thus casting a woman as an adversary to her womb.[2] The

---

† J.D. Maryland, 1990. The author is currently a law clerk to Judge Lawrence Rodowsky, Maryland Court of Appeals. The author acknowledges with appreciation the support and encouragement of Professor Jana Singer of the University of Maryland School of Law.

1. Other legal principles that could be applied to protect women's reproductive rights include: the right to freedom from involuntary physical servitude established by the Thirteenth Amendment, Brief of *Amici Curiae* filed by The California Committee to Legalize Abortion *et al.* at 6-9, Roe v. Wade, 410 U.S. 113 (1973), *reprinted in* 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW - ROE V. WADE (1973) at 563, 584-87 (P. Kurland & G. Casper eds. 1990) [hereinafter C.C.L.A. *Amici* Brief, Roe v. Wade]; the guarantee against cruel and unusual punishment established by the Eighth Amendment, Brief of *Amici Curiae* filed by New Women Lawyers *et al.* at 34-43, Roe v. Wade, 410 U.S. 113 (1973), *reprinted in* LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW - ROE V. WADE (1973), at 612-21; the right to equal protection established by the Fifth and Fourteenth Amendments, Brief of *Amici Curiae* filed by New Jersey Coalition for Battered Women *et al.*, Right to Choose v. Byrne, *reprinted in* 7 WOMEN'S RTS. L. REP. 285, 296 (1982); the right to freedom of intimate association established by the First and Fourteenth Amendments, *see* Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); the freedom not to be a "good Samaritan," *see* Donald Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); and general protections left largely unexplored under the Ninth Amendment, Griswold v. Connecticut, 381 U.S. 479, 486-89 (1965) (Goldberg, J., concurring).

The right to privacy is grounded in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Griswold*, 381 U.S. at 484-85 (1965); *Roe*, 410 U.S. at 152-54, 167. Justice Black's criticism of the application of a privacy right has proven prophetic; in *Griswold*, he warned the majority, "[p]rivacy is a broad, abstract and ambiguous concept which can easily be shrunken in meaning . . . ." 381 U.S. 479, 509 (Black, J., dissenting).

2. In *Webster v. Reproductive Health Services*, the plurality reduced the scope of women's reproductive freedom guaranteed by *Roe* under the guise of balancing "the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort." 109 S.Ct. 3040, 3058 (1989). This drew a critical response from *Roe* author Justice Blackmun: "The plurality's balance matches a lead weight (the State's allegedly compelling interest in fetal life as of the moment of conception) against a feather (a 'liberty interest' of the pregnant woman that the plurality barely mentions, much less describes.)" *Id.* at 3077 n.11 (Blackmun, J., dissenting).

Cases in which a pregnant woman and her fetus are constructed as adversaries before the state are becoming dangerously commonplace. Examples include: criminal prosecution of women for pregnancy-related behavior deemed harmful to the fetus, *see* Lynn Paltrow, *When Becoming Pregnant is a Crime*, CRIM. JUST. ETHICS 41 (Winter/Spring 1990); court-ordered cesarean sections, *see* Nancy Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans*, 74 CALIF. L. REV. 1951 (1986); and tort law developments permitting a child to sue her mother for prenatal negligence, Stallman v.

right of privacy is not a meaningful concept for a woman if it allows the state conceptually to sever her womb and represent its contents as a separate and identifiable interest. When the state is able to make such a representation, there are no remaining safeguards for women, no "zones of privacy"[3] left.

Instead of the eroding right to privacy, what is required is a mode of legal analysis that comports with the physical reality of women's lives, a legal principle that can reunite women and their wombs under the law and provide a more effective shield from state interference. Such a principle already exists in our jurisprudence but has not yet been applied by the courts in their analysis of reproductive rights. The principle is the security of one's physical liberty, or bodily integrity, from governmental violation.

Bodily integrity doctrine safeguards the physical parameters of a person. Thus far, however, this protection has not been extended to pregnant women. When Justice Blackmun located women's right to choose in the general right of privacy, he gave women's bodily integrity short shrift:

> The privacy right involved . . . cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.[4]

Justice Blackmun's perfunctory dismissal notwithstanding, the right to bodily integrity is the cornerstone of all other liberties.[5] As John Stuart Mill writes, "[o]ver himself, over his own body and mind, the individual is sovereign" and "[e]ach is the proper guardian of his own health, whether bodily or mental and spiritual."[6] Thomas Jefferson believed that the true basis of democratic government "is the equal right of every citizen, in his person and property, and in their management."[7] American constitutional and common

---

Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988). *See generally* Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Janet Gallagher, *Prenatal Invasions and Interventions: What's Wrong With Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); and Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990).

3. Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

4. Roe v. Wade, 410 U.S. 113, 154 (1965) (citing Jacobsen v. Massachusetts, 197 U.S. 11 (1905); Buck v. Bell, 274 U.S. 200 (1927)). Justice Blackmun chose unlikely cases to support the dismissal of bodily integrity principles. In *Jacobsen*, the Supreme Court permitted a small Massachusetts town to mandate vaccinations of all persons in the town in the midst of a smallpox epidemic—a minor bodily intrusion that was certain to stave off a public health crisis. And although *Buck* was never explicitly overruled, the Supreme Court has since held state-mandated sterilization programs unconstitutional. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). Moreover, since *Buck* represented a low point in constitutional protection of women's reproductive freedom, it is surprising to find Justice Blackmun citing *Buck* for any purpose in the *Roe* opinion.

5. *See infra* notes 56-58 and accompanying text.

6. JOHN STUART MILL, ON LIBERTY 6, 8 (1873).

7. Gene Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WISC.

law principles incorporate these concepts of physical liberty and bodily integrity in a wide array of legal principles, each of which affirms the central importance of a citizen's bodily integrity.

This article will explore how privacy law has failed to protect a woman's right to decide whether to terminate her pregnancy. Reliance on "privacy," a doctrine vague both in origin and scope, has meant that a woman's right to decide is balanced against the state's right to interfere with her decision in furtherance of its own policies. I will suggest that where privacy law has failed, bodily integrity law could succeed by providing a narrower but more powerful protection of women's physical autonomy. This article argues that a state which deliberately restricts a woman's right to terminate her pregnancy, thus forcing her to endure an unwanted pregnancy, violates her fundamental right to bodily integrity. Although the right to bodily integrity is not absolute, the individual's interest in bodily integrity has in the past prevailed over the competing state interests involved thus far in the abortion debate, including the interest in "potential life." If the physical indivisibility of a pregnant woman is acknowledged, hypothetical abstractions about the rights of the "independent" fetus become irrelevant.[8] An equitable application of bodily integrity law could operate to reunite woman and womb under the law and resituate the abortion debate in the physical reality of pregnancy.

II. The Decline of Privacy Protections for Women

The problem lies not with privacy doctrine itself, but with the way it has been applied to the issue of women's reproductive rights. Certainly, rights of personal autonomy, self-determination, and privacy are critical to the attainment of a Constitutional jurisprudence protective of a broad array of personal liberties. Privacy encompasses "the right to be let alone,"[9] the right of a person to "shape his [sic] own life as he thinks best, do what he pleases, go where he pleases,"[10] as well as a right to "self-governance."[11] The Court applies the protections of privacy to those rights it deems "implicit in the concept of ordered liberty,"[12] "fundamentally affecting a person,"[13] or so important that they must remain inviolable.[14] The right of privacy has

---

L. Rev. 1305, 1327 (citing "Letters from Thomas Jefferson to Samuel Kercheval," July 12, 1816).

8. I am suggesting a reorientation in thinking that rejects the notion of a separate "fetal interest." In other cultures and in other times this adversarial framework is or was completely foreign. *See* Rosalind Petchesky, Abortion and Woman's Choice 327 (2d ed. 1990). I am suggesting, for example, that the state could re-label its interest in "potential life" as an interest in healthy parent-child relationships or an interest in the quality of life of parents and children.

9. Olmstead v. U.S., 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). For a recent discussion of the right to be let alone, see Jed Rubenfeld, *The Right of Privacy*, 102 Harv. L. Rev. 737 (1989).

10. Kent v. Dulles, 357 U.S. 116, 126 (1958).

11. Nichol, *supra* note 7, at 1305.

12. *Roe*, 410 U.S. at 152 (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

13. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

14. Rubenfeld, *supra* note 9, at 753.

spawned the right to integrity of one's personality,[15] and the right to "personhood" or to "selfhood."[16]

Perhaps because the right of privacy incorporates so much, it ultimately guarantees little.[17] When compared to the protections afforded bodily integrity,[18] privacy rights appear ethereal and vaguely defined. The Supreme Court's attempts to apply abstract notions of privacy to the inescapably physical question of abortion has resulted in a maze of abortion case law characterized by a preoccupation with ever-changing, artificially constructed classifications of trimesters and viability. Since *Roe v. Wade*, medical and legal definitions and redefinitions of the womb and its contents have gradually obscured what began as the central point of the discussion: a woman's constitutional right of privacy. It is now the fetus that dominates the debate. American jurisprudence has reached a stage where fetuses can be assigned counsel,[19] pregnant women are prosecuted and jailed for prenatal negligence,[20] and "personhood" is said to begin at conception.[21] Even commentators and judges arguing in favor of abortion rights have adopted this framework which functions to pit a woman against her womb.[22] In adopting for itself the role of defender of fetal rights,

---

15. Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1419 (1974).

16. Rubenfeld, *supra* note 9, at 739, 752. Some commentators argue that the Constitution does not affirmatively create rights, but simply places limits on governmental interference. *See, e.g.*, Henkin, *supra* note 15, at 1412; Rubenfeld, *supra* note 9, at 739. In this view, the privacy inquiry has erred by focusing upon the question, "should the Constitution protect the right to conduct the activity that has been proscribed by state law?" rather than "should people be free from the burdens imposed by the state in this law?" Applying this analysis to abortion, the question the Court should be asking is not "does a woman have a right to an abortion?" but, rather, "should a woman be free from the burdens established by the state when abortion is restricted?"

17. Although my discussion will focus on how the right of privacy has missed the mark for women, one need look only to Bowers v. Hardwick, 478 U.S. 186 (1986), to see how it has also failed to protect the right of lesbians and gays to engage in private sexual activity.

18. *See infra* text accompanying notes 56-113.

19. *See, e.g., In re* A.C., 533 A.2d 617 (D.C.App. 1987), *vacated*, 573 A.2d 1235 (1990) (counsel assigned to argue necessity of forced cesarean).

20. *See generally* Paltrow, *supra* note 2.

21. "The life of each human being begins at conception . . . . Unborn children have protectable interests in life, health and well-being." MO. REV. STAT. §§ 1.205.1(1)-.1(2) (1986). This passage is taken from the preamble of the Missouri abortion statute. The Supreme Court in *Webster* declined to address the constitutionality of the preamble on the grounds that the Court "is not empowered to decide . . . abstract propositions." *Webster*, 109 S.Ct. 3040, 3050 (1989) (citation omitted).

22. In *Rewriting* Roe v. Wade, Donald Regan asserts that, just as we do not impose "good Samaritan" requirements on one citizen to save another, we should not impose such a responsibility on a pregnant woman to "save" her fetus by not having the abortion she desires. 77 MICH. L. REV. 1569 (1979). While the argument succeeds in exposing the double standard which requires greater self-sacrifice on behalf of a fetus than we ordinarily require on behalf of a living person, it nonetheless casts the woman who chooses abortion as a "bad" Samaritan.

Along similar lines, Judith Jarvis Thompson has analogized the situation of a woman carrying an unwanted pregnancy to term to a person "shanghaied" and forced to provide life support to another person. *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971). Thompson argues that, just as we would not force one person to provide life support for another, we cannot force a pregnant woman to provide such life support for a fetus. *Id.* at 56-58. Again, however, the argument is premised upon the identification of two persons with competing interests. The fact that one is not legally bound to be responsible to third parties is important to the abortion debate. However, this article deviates from the "Samaritan" approach by insisting that a woman be viewed as a physical whole and not be severed into a woman and the competing interest inside her.

the state reveals its latent suspicion that a pregnant woman is untrustworthy, irresponsible, and an adversary to her fetus. Far from protecting a woman's ability to make such a significant personal decision on her own, privacy doctrine has permitted the state to exercise increasing control.

A. *Early Privacy Developments*

Much has been gained from the right of privacy in the short time since its debut in the arena of reproductive freedom in *Griswold v. Connecticut*. Until 1965, a state could prohibit the use of contraceptives by married couples; eight years later the right of privacy would include protections for a single woman seeking an abortion. The positive effect of these developments on women's lives was striking and immediate, making it all the more curious that the right has been so disabled when it comes to abortion.

The Court's first application of privacy law to reproductive issues appeared in *Griswold*. Justice Douglas' opinion laid the foundation for privacy law through a discussion of an area of constitutional law that provides near absolute protections: the First Amendment. Within the penumbras of the First Amendment, Justice Douglas discovered the "right to associate in private," and he further located privacy rights in the penumbras of the Third, Fourth, Fifth, and Ninth Amendments. He concluded that "[t]he present case . . . concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[23]

A few years later, in *Eisenstadt v. Baird*, the Court extended the application of privacy doctrine to protect the right of unmarried individuals to use contraception. It looked as if the right of privacy would take on meaningful form for women when Justice Brennan wrote, "[i]f the right of privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[24] The strength of *Griswold* and *Eisenstadt* lay in the fact that, after identifying the privacy interest and the legitimate state interest, these opinions held that the privacy interest prevailed absolutely.[25] The recognition of a privacy interest forced the state to find other ways to

---

23. 381 U.S. at 485.

24. 405 U.S. at 453.

25. *Griswold* held that a law forbidding the use of contraception was unconstitutional because of the law's destructive impact on the marital relationship, a relationship found to be "intimate to the degree of being sacred." 381 U.S. 486. *Eisenstadt's* explicit holding made a statute forbidding distribution of contraceptives to single persons, but not married people, unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. 405 U.S. 443, 453. Although the *Eisenstadt* case was decided under the equal protection doctrine, not under the right to privacy, the Court nonetheless cited language from *Griswold* and appealed to the privacy protections granted the sexual life of single persons. *Id.* at 453. In neither case did the Court undertake to strike a balance between state and individual interests by, for example, permitting the state to prohibit intrauterine devices but not condoms, or to restrict voluntary sterilization but not oral contraceptives.

further its legitimate interests—ways that did not trample rights of privacy.[26] While privacy provided a reliable constitutional protection for marital relations,[27] raising children,[28] and access to birth control,[29] that reliability began to unravel in *Roe v. Wade*.

B. Roe's *Fatal Flaws*

Roe v. Wade made legal abortion a realistic possibility for American women. Just as many Americans after *Griswold* quickly took for granted the right to use contraceptives, women should today be able to take for granted the right to a safe and legal abortion. This is not the case, however, and within the last few years some states have begun to limit abortion rights, either by enacting new restrictions or actually attempting to revive pre-*Roe* statutes. A look at the construction of the *Roe* opinion reveals the fatal flaws that have permitted this erosion.

Justice Blackmun began *Roe* with a comprehensive historical review of abortion laws and practices that could well have supported a decision granting women an absolute right of privacy with regard to abortion. Blackmun observed that, for much of history, and particularly during the nineteenth century, "a woman enjoyed a substantially broader right to terminate a pregnancy than she does today in the United States."[30] He also identified a strong but vaguely defined right of privacy founded in either the Fourteenth or the Ninth Amendment, a right "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[31] Most importantly, however, the holding in *Roe* hung on the pronouncement that "[t]he pregnant woman cannot be isolated in her privacy."[32] Thus, because of the state's newfound interest in protecting

---

26. In *Griswold*, the state argued that it had an interest in discouraging extra-marital relations. The Supreme Court responded by suggesting that the "means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to 'invade the area of protected freedoms.'" 381 U.S. at 498.

27. Loving v. Virginia, 388 U.S. 1 (1967) (invalidating miscegenation law).

28. Meyer v. Nebraska, 262 U.S. 390 (1923) (right to send children to foreign language school); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right to send children to private school).

29. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438.

30. 410 U.S. at 140.

31. *Id.* at 154.

32. *Id.* at 159. The idea that the pregnant woman is "not alone," and therefore her rights must be weighed against the competing "state interest in potential life," has become so embedded in the abortion debate in the U.S. that it is now rarely subject to question. Feminist historians have suggested that the discovery of this state interest is in keeping with a long tradition of social thought that identifies women's primary role as "preserver of the species" and thus insists that a woman's pregnancy is rightfully the subject of state interest and interference. *See* R. PETCHESKY, *supra* note 8; BEVERLY HARRISON, OUR RIGHT TO CHOOSE (1983); and MICHAEL GROSSBERG, GOVERNING THE HEARTH (1985). In the famous—or infamous—case of Muller v. Oregon, 208 U.S. 412 (1908), the Supreme Court upheld workplace regulations limiting the hours and conditions of women's employment while announcing that, since "healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." 208 U.S. at 421. Seen in this light, the "maternal-fetal" conflict appears not as a conflict between mother and fetus but rather as a battle fought by a woman who wishes to define herself as other than mother, and is therefore seen as one who is in conflict with her destiny.

potential life, "[t]he privacy right . . . cannot be said to be absolute."[33] Once these distinctions were drawn, Justice Blackmun used medical calculations of the risk of the procedure and the point of fetal viability to fashion the now-familiar trimester system.[34] It is interesting to note that Justice Blackmun found the answers he needed to the "abortion issue" in medical textbooks, not in law books.[35] The *Roe* decision relies to a significant extent on medical theories about women and their bodies rather than the legal principles traditionally applied to men.

Thus, rather than protecting the right of women to control the abortion decision in the same way that other rights had been protected under privacy law, Justice Blackmun chose to balance it against competing state interests. Although the state's interest in the fetus had never before found such a place in constitutional law, that interest was now established as one that could, by the third trimester, override a woman's right to privacy.

C. *Post-*Roe *Developments*

Consider some of the developments in abortion law since *Roe*: legislation

---

33. 410 U.S. at 154.

34. Justice Blackmun identified three legally-cognizable stages of pregnancy:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
> (c) For the stage subsequent to viability (the State in promoting its interest in the potentiality of human life) may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

Id. at 164-65.

Defining the womb and its contents independently finds its origins in the concept of "quickening" or movement outside the womb as defining the beginning of life in the womb. GROSSBERG, *supra* note 32, at 160. The "quickening" concept defined pregnancy and fetal development in a manner that was physically inaccurate for women (that is, women know they are pregnant long before "quickening") but comported with an outsider's, a man's, ability to define the pregnancy. Viability, although it has been given medical definitions, also suggests an artificial boundary for when a pregnancy becomes important to society—although the pregnancy may have differing importance to a woman long before or long after viability.

35. Laurence Tribe observes that "[p]arts of the *Roe* decision almost seemed to suggest that the right to decide about abortion belonged to the doctor, perhaps reflecting Justice Blackmun's background as a lawyer for the Mayo Clinic." LAURENCE TRIBE, ABORTION, THE CLASH OF ABSOLUTES 13 (1990).

Bob Woodward and Scott Armstrong invoked this medical background in an attempt to reconstruct the motivations behind Justice Blackmun's *Roe* opinion. ROBERT WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979). According to the authors, Justice Blackmun believed that state laws restricting abortions, or requiring the approval of a hospital committee or the concurrence of other doctors, needlessly infringed the discretion of the medical profession. *Id.* at 175. In the authors' opinion, "Blackmun . . . wanted an opinion that the medical community would accept, one that would free physicians to exercise their professional judgement." *Id.* at 182-83.

Justice Blackmun's tone in Doe v. Bolton, 410 U.S. 179 (1973), supports the suggestion of his tremendous deference to physicians:

> [The physician], perhaps more than anyone else, is knowledgeable in this area of patient care, and he is aware of human frailty, so-called "error," and needs. . . . We trust that most physicians are "good" [and] will have sympathy and understanding for the pregnant patient that probably are not exceeded by those who participate in other areas of professional counseling.

Id. at 196-97.

that proclaims that life begins at conception;[36] state prohibitions on the use of any public employee or facility for the performance of abortion;[37] federal regulations that restrict federally-funded doctors' ability to mention abortion to their patients;[38] and state legislation that requires viability testing.[39] When these statutes have been challenged in court, states have attempted to justify their actions as permissible extensions of the *Roe* decision.

1. *Trimesters*

Roe set up a balancing test between the woman's interests and the state's interest in potential life, and established a framework based on notions of viability and trimesters. Since *Roe*, the majority of the Supreme Court has modified the trimester analysis while the minority has predicted its doom.[40] Recent abortion cases have weakened the mechanisms created in *Roe* by permitting states to regulate and restrict abortion beyond the limits laid down in *Roe*. In 1989, the *Webster* majority could not reach an agreement on the legal significance of trimesters, but Justice O'Connor laid waste the trimester distinctions and declared that the state's interest in potential life existed throughout the pregnancy, even in the first trimester. If the trimester system is dismantled in favor of Justice O'Connor's "unduly burdensome" standard, women may lose all privacy protections under the constitution. Yet while this legally arbitrary system based on medical concepts remains intact, women's interests will continue to be weighed against "fetal interests," as medical advancements gradually undermine our fundamental rights.

2. *Viability*

All members of the Court appear to agree that the state has an important interest in protecting a viable fetus.[41] As 90% of all abortions are conducted

---

36. MO. REV. STAT. §1.205.1 (1) (1986) (upheld in Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989)).

37. MO. REV. STAT. §188.210 (1986) (upheld in *Webster*, 109 S. Ct. at 3052).

38. 42 C.F.R. §59.8(a)(3) (upheld in New York v. Sullivan, 889 F.2d 401 (2d Cir. 1989), *cert. granted sub nom.* Rust v. Sullivan, 110 S. Ct. 2559 (1990)).

39. MO. REV. STAT. §188.029 (1986) (upheld in *Webster*, 109 S. Ct. at 3057).

40. In City of Akron v. Akron Center for Reproductive Health, the majority recognized that abortion may be safer than childbirth up to the 16th week. 462 U.S. 416, 429 n.11 (1983). The Court also summarized its abortion jurisprudence to date and emphasized that a state "has an important and legitimate interest in protecting the potentiality of human life . . . [which] exists throughout the . . . pregnancy, [but] it becomes compelling only at viability. . . . [A state's] health interest does not become compelling until approximately the end of the first trimester." *Id.* at 428-29 (citations omitted). Justice O'Connor's dissent (setting the stage for *Webster*) went on to add, "In my view, [the] 'unduly burdensome' standard [which would hold that an abortion regulation is not unconstitutional unless it unduly burdens the right to seek an abortion] should be applied to the challenged regulations throughout the entire pregnancy without reference to [a] particular stage." 426 U.S. at 453 (O'Connor, J., dissenting).

41. *Webster*, 109 S. Ct. at 3058 (Missouri testing requirement designed to prevent abortion of viable fetus pursues "an end which all concede is legitimate"). Since *Webster*, Justice Brennan has been replaced by Justice Souter. However, it does not appear that Justice Souter will question the legitimacy of the state's

in the first trimester,[42] well before the point of viability, the Court's obsession with defining viability is not proportional to the reality of abortion. However, defining and redefining viability has become a convenient means of justifying increased state and medical intervention.[43]

Roe defined viability as the potentiality of living outside the womb.[44] In her dissenting opinion in *Akron*, however, Justice O'Connor rejected viability as a standard and argued that "potential life is not less potential in the first weeks of pregnancy than it is at viability or afterward."[45] And when the *Webster* majority upheld a Missouri abortion statute requiring viability testing of any fetus over twenty weeks gestational age,[46] it became clear that the state's interest even in a potentially viable fetus can outweigh a woman's supposedly fundamental privacy rights. Once the viability premise is accepted, "potential" viability can be interpreted as extending to the moment of conception.

---

interest in potential life.

42. Christopher Tietze, *Demographic and Public Health Experience with Legal Abortion: 1973-80,* in ABORTION, MEDICINE, AND THE LAW 297 (J. Butler & D. Walbert eds. 3d ed. 1986).

43. If the viability argument is to be meaningful, a woman who desires an abortion at twenty weeks should, instead, be able to deliver a healthy child into the arms of the state at that time. The state could say to women with unwanted pregnancies, "You may not have an abortion, but if you carry the pregnancy to twenty weeks we will take it off your hands." In fact the state could make no such guarantee, not only from the standpoint of providing for the social welfare of the child, but because a twenty week fetus will, in all likelihood, live a very short, painful life. A presumption of viability at twenty weeks, as upheld in *Webster*, does not mean that a healthy child could be delivered at that time. In light of this, what does it mean to say the fetus can live outside the womb?

If medical technology were to "advance" to the point of supporting a twenty-week fetus, or a ten-week fetus, outside the womb and the state were to agree to support the process and ultimately the child, the abortion option would still be necessary. As discussed below, under bodily integrity protections a woman should not be forced by the state to carry a pregnancy one week or one day longer than she chooses. In addition, choosing to have an abortion is often not only the choice to not be pregnant, but also the choice not to be a mother. Creating an artificial womb does not negate the burdens of parenthood, it only complicates them.

44. *Roe*, 410 U.S. at 160. Viability is said to occur between twenty four and twenty eight weeks. This estimate has remained relatively constant despite changes in medical technology. *Webster*, 109 S. Ct. at 3076 n.9 (citing *amicus* brief filed by American Medical Association) (Blackmun, J., concurring in part and dissenting in part).

45. City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting).

46. Section 188.029 of the Missouri Act provides:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions. In making this determination of viability, the physician shall perform or cause to be performed such medical examinations and tests as are necessary to make a finding of the gestational age, weight, and lung maturity of the unborn child and shall enter such findings and determination of viability in the medical records of the mother.

The medical community disputed the validity of viability testing, arguing that it is inconclusive, expensive and, to varying degrees, actually dangerous for the woman. Brief of *Amici Curiae* filed by American Medical Association *et al.* at 24, Webster v. Reproductive Health Servs., 109 S. Ct. 3040 (1989). Although the trial court in *Webster* found that twenty-three and one-half to twenty-four weeks is the earliest gestational age at which viability is reasonably possible, the Court found that a four week error in estimating gestational age supported viability testing at twenty weeks. 109 S. Ct. at 3055.

3. *Deference to Physicians*

Physicians play a central role in the court's view of abortion.[47] The doctor is given a primary role in the decisionmaking process[48] and a monopoly over implementing the decision when, for example, "it is permissible for the States to impose criminal sanctions on the performance of an abortion by a nonphysician."[49] In addition to limiting women's access to abortion, courts' reliance on physicians as abortion providers ensured women's dependence upon doctors to effectuate their abortion decisions. Despite the state interest in preserving women's health and safety, states have jeopardized women's health by requiring that abortions be performed in hospitals and by limiting the types of procedures that may be performed.[50]

4. *The State Interest in "Fetal Personhood"*

Justification of regulation and prohibition of abortion based upon an interest in fetal life is an anomaly in the law. For example, no Supreme Court Justice "has ever suggested that a fetus is a 'person' under the Fourteenth Amendment."[51] The courts have not claimed that the embryo/fetus is severable from the woman at any stage of gestation, nor has the law ever suggested that abortion should be classified as infanticide.[52] If a fetus is stillborn, the parents may have a cause of action for wrongful death[53] and, in some states, injuries to a woman that also injure her fetus may result in additional tort liability. Property, criminal, and tort law are used to vindicate the parent's interest in potential life.[54] Historically a woman has not been pitted against her fetus.[55]

5. *Summary*

The trimester paradigm, viability, deference to physicians, and the state interest in fetal life are interdependent pieces of abortion jurisprudence in the

---

47. *See supra* note 46.

48. *See, e.g., Akron,* 462 U.S. at 427 ("because abortion is a medical procedure, . . . the full vindication of the woman's fundamental right necessarily requires that her physician be given the room he needs to make his best medical judgment. . . . [T]his medical judgment encompasses both assisting the woman in the decisionmaking process and implementing her decision . . . .") (citations omitted).

49. *Id.* at 430 n.12.

50. *See, e.g., id.* at 431-32 (describing Ohio statute requiring that second trimester abortions be performed in hospitals).

51. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 779 n.8 (1986).

52. *But see* UTAH CODE ANN. § 76-5-201 (1990) (including unlawful abortion as criminal homicide).

53. *See, e.g.,* Wolfe v. Isbell, 291 Ala. 327, 333-34, 280 So. 2d 758, 763-64 (1977); Simon v. Mullin, 34 Conn. Supp. 139, 147, 380 A.2d 1353, 1357 (1977); Deborah Santello, *Maternal Liability for Prenatal Injuries,* 22 SUFFOLK U.L. REV. 747, 753-757, nn.54, 57 & 58 (1988) (collecting cases); PROSSER & KEETON ON THE LAW OF TORTS § 55 (5th ed. 1984) [hereinafter PROSSER & KEETON].

54. *Roe,* 410 U.S. at 162. *See also* Gallagher, *supra* note 2, at 38.

55. *See, e.g.,* Stallman v. Youngquist, 125 Ill. 2d 267, 531 N.E.2d 355 (1988) (explicitly rejecting contention that child can sue mother for injuries incurred while in womb).

United States. Reliance on definitions of trimesters and the "point of viability" requires states and the courts to look to the medical profession for guidance. When the medical profession cannot, with precision, determine when the fetus is viable, the state and the courts retreat to the abstract state interest in fetal life. Either way, women continue to lose ground in the battle for control of their reproductive power. As medical technology has better understood and detailed the physical characteristics of conception and gestation, the courts have taken a more active role in the relationship between individual women and their fetuses. Under privacy law the state "defends" the fetus "against" a woman's constitutional rights as a citizen of the United States, even though the fetus is utterly dependent upon that one woman. The law has not incorporated a holistic view of woman's relationship with the fetus. The physical reality of the absolute connectedness of the woman and her womb, the physical reality that the fetus is a part of her, and the enormity of the bodily intrusion implicated by a pregnancy against a woman's will, are all ignored.

III. AN ALTERNATIVE: BODILY INTEGRITY

Outside the abortion debate, courts have long recognized the central importance of a person's right to bodily integrity:

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[56]

Courts have consistently respected the principle of bodily integrity and zealously promoted it as sacred, inviolable, inalienable, and fundamental.[57] In addition to its common law roots, the right to be free from an invasion of bodily integrity by the state has found support in the First, Fourth, Fifth, and Fourteenth Amendments of the Constitution.[58] Although considered fundamen-

56. Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (limiting medical examination of woman alleging personal injury). The *Botsford* court was addressing the issue of a woman's bodily integrity: "To compel any one, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass . . . ." *Id.* at 252. That "especially women" were protected from bodily intrusions reflects the Victorian norms of the day: assuming the doctor to be a man, a female patient would be more corrupted than a male patient by a non-consensual medical examination. *See also* State v. Brown, 143 N.J. Super. 571, 574, 364 A.2d 27, 29 (1976) ("The right to life and security is not only sacred in the estimation of the common law, but it is inalienable.") (citation omitted).

57. "[T]he free citizen's first and greatest right, which underlies all others—the right to the inviolability of his [sic] person, in other words, his right to himself—is the subject of universal acquiescence." Pratt v. Davis, 118 Ill. App. 161, 166 (1906).

58. Alex Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795, 797-811 (1980); Norman Cantor, *A Patient's Decision to Decline Life-Saving Medical Treatment: Bodily Integrity versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 238-42 (1973).

The common law, Fourth, Fifth, and Fourteenth Amendment origins of bodily integrity doctrine

tal, individual interests in bodily integrity are often balanced against state interests such as public health, safety and welfare, the integrity of the medical profession, criminal investigation, and the preservation of life. As the following discussion will demonstrate, courts have held in the majority of cases that bodily integrity is the prevailing interest. Between individuals, a violation of bodily integrity may lead to criminal prosecution.[59] The following discussion will consider the law's treatment of bodily integrity doctrine as it has developed in four areas: assault and battery, informed consent, the right to refuse medical treatment, and search and seizure. This examination reveals that, despite weaknesses when invoked to protect the physical autonomy of women, it has generally provided comprehensive protection against unwanted physical intrusion.

A. *Assault and Battery*

The notion that individuals have the right to be free from non-consensual physical intrusion is deeply embedded in Anglo-American jurisprudence.[60] The tort law cause of action for assault and battery is one of the oldest legal means of protecting this right.[61] In the realm of criminal law, assault and

---

will be explored further in Part III. Bodily integrity is not mentioned specifically in the U.S. Constitution; rather, judicial interpretation holds it to be implicit in concepts of liberty. It is interesting to note that bodily integrity has not been relegated to a "penumbra" of liberty as privacy concepts have. Nor have constitutional strict constructionalists argued over the propriety of its existence as they have with privacy law.

An explicit Constitutional provision protecting bodily integrity would not necessarily better protect women from state enforced pregnancies. For example, the Federal Republic of Germany's Basic Law, Article 2, section 2 states, "Everyone shall have the right to life and to inviolability of his person." THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 14 (1987). However, this section has been applied only to protect the fetus' right to life, not the inviolability of a woman's bodily integrity. WALTER MURPHY & JOSEPH TANENHAUS, COMPARATIVE CONSTITUTIONAL LAW: CASES AND COMMENTARIES 422-23 (1977). It is thus clear that the central issue is not whether a right of bodily integrity is recognized but rather whether that right will be extended to pregnant women. For codes and constitutions of other nations that explicitly protect the inviolability of the person, see Meulders-Klein, *The Right Over One's Body: It's Scope and Limits in Comparative Law*, 6 B.C. INT'L & COMP. L. REV. 29 (1983).

The First Amendment's connection to bodily integrity includes the long line of cases dealing with medical treatment of Jehovah's Witnesses. Bodily integrity is framed within the freedom of religion contained in the first amendment. For a thorough discussion of these cases, see Cantor, *supra* at 238; *see also* David Richards, *Constitutional Privacy, The Right to Die and the Meaning of Life: A Moral Analysis*, 22 WM. & MARY L. REV. 327, 371 n.195 (1981).

59. That is, a battery by one individual on another is subject to criminal prosecution, although the degree of invasion may affect the degree of punishment or the extent of damages. *See infra* text accompanying notes 60-68. The exceptions to this general principle suggest that bodily integrity doctrine is not applied equally to women and men. Marital rape, for example, is still not a crime in many states and assault between spouses or intimates is often seen as less serious than stranger crime. *See, e.g.*, MARYLAND GENDER BIAS REPORT at viii (1989) (finding that domestic violence cases often treated as trivial and unimportant); Note, *To Have and to Hold: The Marital Rape Exception and the Fourteenth Amendment*, 99 HARV. L. REV. 1255, 1258-60 (1986). For a discussion of the problematic construction and application of rape law, see Susan Estrich, *Rape*, 95 YALE L.J. 1097 (1986).

60. The *Magna Carta* contains a provision protecting individuals from seizure by the state. *Magna Carta* (1217) chap. 61. The earliest case of appeal of felony for a battery is reported from 1198. *See* George Woodbine, *The Origins of the Action of Trespass*, 23 YALE L.J. 799, 814 (1924); *see also* James Barr Ames, LECTURES ON LEGAL HISTORY (1913) (debating origins of personal cause of action of trespass *vi et armis*—"with force and arms").

61. In 1861, Francis Hilliard wrote on tortious battery, "The plainest and simplest legal rights are

battery is equally entrenched.[62]

The threshold inquiry in a battery claim is the determination of whether a there has been a "touching" of the victim without her consent. Even a minimally intrusive act, such as a slap on the buttocks, may constitute an actionable battery.[63] The existence of a cause of action relies heavily on the court's finding of some physical contact between the two parties, contact made by the actor or by any substance put in motion by the actor.[64] The court must also find that the actor had the necessary intent to commit a battery. The intent requirement can be met by a finding that the actor knew that there was a substantial certainty that such a result would ensue.[65]

If the fundamental elements of a battery have been established, the court will look to the severity of the physical injury to assess the severity of the crime. A fist fight resulting in bruises is seen as less serious, for example, than a bullet wound or a stabbing. Similarly, when the harm is framed in terms of visible physical manifestations of intrusion and harm, courts more readily seek to vindicate the victim.[66]

Implicit in the law's protection against non-consensual contact or intrusion is protection from physical contact with *any* part of the body—inside or out—including any physical function or physical endowment and extending to "any thing which is attached to [the body] and practically identified with it."[67] This protection creates an inviolable shield around the body through which

---

those *of the person*. A man *owns* his body and limbs more unquestionably and unqualifiedly than his stock in trade or his farm. . . . [One's body] belong[s] absolutely to the individual; and to him alone." FRANCIS HILLIARD, 1 THE LAW OF TORTS 197 (2d ed. 1861) (emphasis in original).

In modern terms, a tortious battery is defined as an intentional harmful or offensive contact or apprehension of such contact by another person without the victim's consent. PROSSER & KEETON, *supra* note 53, at § 9; RESTATEMENT (SECOND) OF TORTS § 13.

62. Under modern criminal codes, the common law actions of assault, battery, and mayhem are gathered under the general category of assault. The Model Penal Code defines assault as "purposely, knowingly or recklessly caus[ing] bodily injury to another." MODEL PENAL CODE § 211.1 (1980).

63. Gates v. State, 110 Ga. App. 303, 138 S.E.2d 473 (1964).

64. *See, e.g.*, PROSSER & KEETON, *supra* note 53, at § 9 (putting deleterious drug into food or drink is battery); Mink v. University of Chicago, 460 F.Supp. 713 (N.D. Ill. 1978) (administering drug without knowledge of recipient constitutes battery).

65. MODEL PENAL CODE § 211.1.

66. In cases of rape and domestic violence, courts have taken less seriously injuries that were not physically graphic. In rape cases, for example, courts have implicitly or explicitly required physical signs of struggle to clarify the question of the victim's "consent," under the theory that

> [n]ot only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.

Brown v. State, 127 Wis. 193, 201, 106 N.W. 536, 538 (1906). For a recent discussion of the inadequacies of rape law, see generally Estrich, *supra* note 59, at 1094, 1105, 1117, 1123-30.

67. PROSSER & KEETON, *supra* note 53, at § 9. An early Alabama case illustrates the absolute nature of the protection: "It is to be assumed that every physical endowment, function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. . . . We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life, which may not be made the predicate for compensation in damages." Alabama Great South. R.R. v. Hill, 93 Ala. 514, 519, 9 So. 722, 724 (1890).

nothing may enter nor be extracted without consent.[68]

B. *Informed Consent*

The patient's interest in bodily integrity is a central element of the complex legal relationship between a physician and her patient. Violation of a patient's right to be protected from non-consensual touching by her doctor was originally identified as a battery.[69] The informed consent doctrine arises from the fundamental principle that, where a patient has not consented to a doctor's action,[70] the doctor commits a battery. "Underlying [the tort theory of liability for unauthorized medical treatment] is, of course, the general feeling that a person of sound mind has a right to determine, even as against his physician, what is to be done to his body."[71] In the area of informed consent and, as will be seen, the right to refuse medical treatment, the courts have never shown the deference to physicians which is so firmly embedded in privacy law.

Early patient consent cases dealt primarily with situations where consent was never obtained.[72] However, in later cases it became clear that the dynamics of the physician-patient relationship often resulted in the doctor possessing all the relevant information, so that the patient's ability to give a knowledgeable or informed consent was sometimes questionable. This imbalance of information lead to the present requirement that a physician provide an ade-

---

68. The victim's consent may not be relevant in an assault and battery case where an invasion of the victim's physical security has occurred, especially where the battery is a substantial or severe one. While the question of resistance or consent to the "touching" has not traditionally been an element of the offense, the "consent" issue has played a large part in sexual assault and rape prosecution. *See* Estrich, *supra* note 59, at 1177.

69. Marjorie Shultz, *From Informed Consent to Patient Choice: A New Protected Interest*, 95 YALE L.J. 219, 224-26. *But see* Charley v. Cameron, 215 Kan. 750, 528 P.2d 1205 (1974) (unconsented use of forceps in delivery did not constitute battery; when patient consents to treatment, she consents to all medically accepted procedures). Furthermore, if the patient is in an emergency situation and unable to give consent, the doctor may take action to save the patient's life without consent. Shultz, *supra*, at 223 n. 16.

The recent phenomenon of court-ordered cesaerean sections, as in the case of *In re* A.C., 533 A.2d 611 (D.C. 1987), *vacated and remanded*, 573 A.2d 1235 (D.C. 1990), will be discussed *infra*, in Part III.

70. Or has consented to a procedure other than the one performed. Richard Delgado & Helen Leskovac, *Informed Consent in Human Experimentation: Bridging the Gap Between Ethical Thought and Current Practice*, 34 UCLA L. REV. 67, 81 nn.59, 60 (1976).

71. Trogun v. Fruchtman, 58 Wis. 2d 569, 596, 207 N.W.2d 297, 311 (1973). An action for battery for an unauthorized medical treatment can be successful even if the treatment does not yield "bad results" as long as the physician laid hands on the patient or set some physical contact in motion and the patient experienced injury. *See* Alan Meisel, *The Expansion of Liability For Medical Accidents: From Negligence to Strict Liability by Way of Informed Consent*, 56 NEB. L. REV. 51, 73 n.63 (1977).

72. Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905) (patient consented to surgery on right ear and left ear was operated on instead); Schloendorff v. Society of New York Hospitals, 14 N.Y. 419, 105 N.E. 92 (1914) (surgery without consent); Pratt v. Davis, 118 Ill. App. 166 (1905) (consent given by husband of patient held insufficient, consent must be given by patient herself); Rolater v. Strain, 137 Pac. 96 (1913) (unauthorized removal of additional bones). *See also* Ruth Macklin, *Some Problems in Gaining Informed Consent from Psychiatric Patients*, 31 EMORY L.J. 345, 348 (1982). Some courts have maintained that only these kinds of "technical assaults" are actionable under a battery action. Shultz, *supra* note 69, at 234. *See also* Malloy v. Shanahan, 280 Pa. Super. 440, 421 A.2d 803 (1980) (informed consent doctrine applies only to surgical-type intrusive procedures, not therapeutic procedures; latter governed instead by contractual concepts).

quate explanation of the anticipated treatment; that is, that the patient's consent be informed.[73]

The informed consent doctrine provides the basis for asserting the values of bodily integrity even over the patient's health considerations. The courts' view of bodily intrusion now also includes more than just surgical intervention. In *Mink v. University of Chicago*,[74] the district court determined that "administration of a drug without the patient's knowledge"[75] constituted a battery under Illinois law. The court held that, although giving the women pills to ingest was not strictly an offensive non-consensual touching, it was indistinguishable in principle from giving drugs with a hypodermic needle.[76] The battery action consequently protected the bodily integrity of the patient by "punishing unconsented meddling with her body."[77]

Notably, in cases where the state is required to step in as decisionmaker for an individual, the value the state places on protecting that individual's bodily integrity, above all else, comes to the fore.[78] Generally, the varied informed consent cases establish that competent, coherent adults faced with non-emergency medical treatment have a right to first consent to the treatment and the resulting bodily intrusion.[79] These cases illustrate that the state may be more comfortable defining physical integrity than generalized concepts of liberty and privacy. Thus, the principle of physical integrity could provide a

---

73. Cantebury v. Spence, 464 F.2d 772, 793 (D.C. Cir. 1972) (dereliction of duty to adequately disclose impinges on bodily integrity); Sard v. Hardy, 281 Md. 432, 379 A.2d 1014 (1977) (duty to inform patient of procedure, risks, and alternatives). *See also* Delgado & Leskovac, *supra* note 70, at 80-86; Shultz, *supra* note 69, at 223; Meisel, *supra* note 71, at 75.

Informed consent has also been protected in federal statutes with regards to human subjects of medical experimentation. *See, e.g.*, 45 C.F.R. §46.116 (1990).

74. 460 F.Supp. 713 (N.D. Ill. 1978).

75. *Id.* at 716. In this case, women receiving prenatal care at a university hospital were administered the drug diethylstilbestrol (DES) as part of a medical experiment. The women were not informed that they were participating in an experiment nor were they told of the drug's harmful side effects until twenty-five years later.

76. *Id.*

77. Delgado & Leskovac, *supra* note 70, at 82.

78. The state, at a minimum, affords the incompetent individual physical security. Physical security is a tangible standard the state can readily apply. When the state is in the position of making medical decisions for an incompetent patient and applies the "substituted judgment" standard, it relies heavily on physical pain as a guideline.

> [T]he surrogate decision maker must prove that the burdens of continued life to the patient clearly and markedly outweigh the benefits before life-sustaining treatment may be withheld. The courts applying this objective balancing test have focused solely on physical pain as experienced by the incompetent patient . . . recurring, unavoidable and severe pain as the prerequisite to termination of life-sustaining treatment.

Kevin Quinn, *The Best Interests of Incompetent Patients: The Capacity for Interpersonal Relationships as a Standard for Decisionmaking*, 76 CAL. L. REV. 897, 900 (1988) (citation omitted).

Similarly, when the state assumes the right to make reproductive decisions for a mentally disabled person, the court places great weight on the physical intrusiveness or physical comfort associated with the state's proposal for reproductive restrictions. *See* Elizabeth Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 DUKE L.J. 806, 841 (supporting holistic approach to determining needs of mentally retarded persons in context of reproductive decisionmaking).

79. *See* cases cited *infra* note 88.

firm legal foundation for the definition and protection of women's reproductive rights.

C. *Right to Refuse Medical Treatment*

The necessary corollary to the right to consent to medical treatment discussed in the previous section is the right to refuse treatment. Courts have recognized that the right to consent to treatment has little meaning if the patient cannot refuse any or all treatment, despite the consequences.[80] The potency of bodily integrity law is made manifest here when the state's interest in, among other things, the "sanctity of life" does not succeed in overriding the individual's interest in bodily integrity.

The right to refuse treatment in the face of imminent death has been referred to as the patient's right to die.[81] Legal recognition of a right to die does not mean that the courts are actually sanctioning the individual's death or validating the patient's "right" to commit suicide. Rather, courts have treated with great respect an individual's right to weigh all options and make her own life or death decision, despite the opposition of the state, the hospital, or her family.[82]

---

80. *See, e.g., In re* Farrell, 108 N.J. 335, 529 A.2d 404 (1987).

81. Often patients wish to exercise this right via passive euthanasia. Passive euthanasia should be distinguished from active euthanasia. Active euthanasia involves action taken by the patient's doctor or family member to extinguish the patient's life; the administration of a lethal injection is one example. Active euthanasia is criminal in some states and is a clear violation of American Medical Association standards. Passive euthanasia, in contrast, describes the decision not to undertake extraordinary medical measures, or to cease such measures, where a patient is in a persistent vegetative state. Passive euthanasia has never been a crime and is permitted in certain cases under A.M.A. standards. *See* Phoebe Haddon, *Baby Doe Cases: Compromise and Moral Dilemma*, 34 EMORY L.J. 545, 555 n.31 (1985); Cantor, *supra* note 58, at 254.

82. Although courts generally defer to the wishes of the patient if those wishes are clear, they have examined the reasonableness of a patient's decision (or the patient's expressed desires before entering a permanent vegetative state) in order to assure that the patient is not motivated by suicidal desires and to ensure that the desire is voluntary. *See In re* Quinlan, 70 N.J. 10, 355 A.2d 647 (1976); *In re* Quackenbush, 156 N.J. 282, 383 A.2d 785 (1978); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986); Comment, *Suicidal Competence and the Patient's Right to Refuse Lifesaving Treatment*, 75 CALIF. L. REV. 707 (1987).

In *In re* President and Directors of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978, the court did not even go so far as to require a rational decision on the part of the patient:

> Nothing in [Justice Brandeis' "right to be let alone" opinion in *Olmstead*] suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.

Id. at 1017. *See also In re* Conroy, 98 N.J. 321, 355, 486 A.2d 1209, 1226 (1985) (right of competent patient to refuse treatment not affected by patient's medical condition).

Commentators have also suggested that the state cannot paternalistically decide what is a rational or morally sound reason for a patient to refuse treatment. "[T]he state's interest in preserving life [is] too chimerical to justify interference with an adult's private decision on how to control his body." Cantor, *supra* note 58, at 236.

I am primarily concerned here with cases in which the patient's wishes are clear. The majority of right to die cases involve a patient who has always been incompetent or a patient who has been in a long term vegetative state after having been competent at one time. Consequently, much of the court's time is spent

The state has generally protected individuals from compelled treatment except when the state acts pursuant to a police power[83] or *parens patriae* authority.[84] However, when an individual chooses to die rather than to accept medical treatment, the state is forced to examine how powerful it is willing to let the right to bodily integrity become.

Once it is clear that a patient has made the choice to refuse treatment and that death may be imminent, courts balance the inviolability of bodily integrity against a variety of state interests. The asserted state interests may include the integrity and liability of the medical profession,[85] protection of public morals,[86] the interests of third parties (primarily dependent minors)[87] and, the most frequently cited reason, the preservation or sanctity of the life of the patient.[88] However, there is general agreement that, in light of the fundamental importance and inviolability of bodily integrity, the state interest must be compelling in order to override the patient's wishes.[89] In the case of a compe-

---

in deciding whether the guardian (*Quinlan*, 70 N.J. 10, 355 A.2d 647); the court (Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977)); physicians, or a combination of all three (*In re* Colyer, 99 Wash. 2d 114, 660 P.2d 738 (1983)), are in a position to determine what the patient's wishes would be.

83. The state's desire to protect the public health and welfare has also overridden bodily integrity interests where the intrusion is small and the public health need great, as with vaccinations. Jacobsen v. Massachusetts, 197 U.S. 11 (1905); Cuse v. State, 237 Ark. 927, 377 S.W.2d 816 (1964). *See also infra* text accompanying notes 95-108.

84. The state exercises *parens patriae* authority on behalf of incompetent adults or children where no other guardian is available. *See, e.g., In re* Vasko, 238 A.D.128, 263 N.Y.S. 552 (1933).

85. *See, e.g.*, Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1143, 225 Cal. Rptr. 297, 305 (1986) ("It is incongruous, if not monstrous, for medical practitioners to assert their right to preserve a life that someone else must live, or more accurately, endure . . . .").

86. *See also* Richards, *supra* note 58, at 369-72 (discussing principle of "just paternalism").

87. *See In re* President and Director of Georgetown College, 331 F.2d 1010 (D.C. Cir. 1964), *cert. denied*, 377 U.S. 978; John F. Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); *In re* Jamaica Hospital, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985). Since these cases dealt with patients who were Jehovah's Witnesses for whom blood transfusions were ordered against the patient's will, the courts were in fact balancing the patient's right to religious liberty, not bodily integrity, against the state interests. Departing from this line of cases, a recent Jehovah's witness case in Massachusetts held that, absent compelling evidence that the child would be abandoned, the state interest in the child's well-being does not outweigh a patient's right to refuse medial treatment. Norwood Hospital v. Munoz, 59 U.S.L.W. 2847, (Mass. Jan. 15, 1991). *See also* Cantor, *supra* note 58, at 251-54 (arguing best interests of children not necessarily served by denying parents right to refuse treatment).

88. Most cases address each of these state interests and find them insufficient. *See, e.g., Bouvia*, 179 Cal. App. 3d at 1142 (listing and rejecting all state interests); *In re* Farrell, 108 N.J. 335, 349, 529 A.2d 404, 411 (1987) (finding none of listed state interests outweigh right to privacy and self-determination); Bartling v. Superior Ct., 163 Cal. App. 3d 186, 194, 209 Cal. Rptr. 220, 225 (1984) (listing state interests and concluding that most significant is "preservation of life"; state interests were overridden and court cautioned that judicial intervention was unnecessary and unwise); Eichner v. Dillon, 73 A.D.2d 431, 452, 426 N.Y.S.2d 517, 536 (1980) (state interests do not justify continuing life support against patient's will); Satz v. Perlmutter, 362 So.2d 160 (Fla. Dist. Ct. 1978) (public policy interests do not outweigh right to die); *In re* Colyer, 99 Wash.2d 114, 660 P.2d 738 (1983) (state interests not compelling when weighed against right to refuse treatment); *Quinlan*, 70 N.J. at 41, 355 A.2d at 664 ("State's interest . . . weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims."). *See also* Cantor, *supra* note 58, at 228; Richards, *supra* note 58, at 327.

But see Jamaica Hospital, 128 Misc. 2d at 1008, 491 N.Y.S.2d at 900 (state's interests in preserving life of unborn fetus outweighs pregnant patient's right to refuse blood transfusion). I would argue that in this case it was the patient's First Amendment rights, rather than bodily integrity rights, which the court considered and found wanting.

89. *See, e.g., Eichner*, 73 A.D.2d at 455, 426 N.Y.S.2d at 536; *Colyer*, 99 Wash. 2d at 118, 660

tent[90] adult who makes an informed decision to refuse medical treatment, the state's interest in the life of that adult has not prevailed.[91]

The Supreme Court heard oral argument on the right to die issue for the first time in the 1989-90 term.[92] The overwhelming trend amongst lower courts that had addressed the issue was to view the right to die as a private matter and "[n]early unanimously, those courts [addressing the right to die issue] have found a way to allow persons wishing to die, or those who seek the death of a ward, to meet the end sought."[93] The Supreme Court's decision in *Cruzan*, although it focused primarily on the question of "substituted judgement," preserves the right to die and reaffirms the individual right to bodily integrity.[94]

The right to die cases provide powerful support for the right to bodily integrity. In these cases courts have held that an individual's right to defend against bodily intrusion is so important that it may preempt even the state's interest in the sanctity of life. The fundamental point to be drawn from the right to die cases is that the state's interest in preserving life is not absolute, but may be outweighed by other compelling interests.

D. *Search and Seizure*

The Fourth Amendment[95] provides an arena[96] for direct confrontation

---

P.2d at 742.

90. Even in the case of incompetent adults, courts have been unwilling to override the wishes of the patient when they can be determined. *See, e.g.*, Superintendent of Belchertown v. Saikewicz, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re* Conroy, 98 N.J. 32, 486 A.2d 1209.

91. *But cf. In re* Jamaica Hospital, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (N.Y. Sup. Ct. 1985) (state's interest in life of a midterm fetus outweighs pregnant Jehovah's Witness' right to refuse blood transfusion).

92. Cruzan v. Missouri Dept. of Health, 110 S. Ct. 2841 (1990).

93. Cruzan v. Harmon, 760 S.W.2d 408, 413 (Mo. 1988) (en banc), *aff'd*, 110 S. Ct. 2841 (1990). The Missouri Supreme Court went on to make a rare deviation from this trend, ruling that an incompetent in a persistent vegetative state did not have the right to die. Significantly, all parties agreed that if Nancy Cruzan had been competent, she could not have been forced to accept or continue treatment.

94. 110 S. Ct. 2841 (1990). The Supreme Court developed its right to die principles by relying on bodily integrity cases. "This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. . . . The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment." 110 S. Ct. at 2846-47.

In *Cruzan*, the Court defined the right to die narrowly in terms of the express desires of the patient, explaining that the Constitution did not forbid Missouri's requirement that, absent clear and convincing evidence of the incompetent's wishes, a comatose patient, or a patient not competent to express a desire, is bound to continue life-sustaining treatment.

95. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

96. Until Mapp v. Ohio, 367 U.S. 643 (1961), constitutional search and seizure issues involving bodily integrity that arose from the states were decided under the due process clause of the Fourteenth Amendment. *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952).

between the government's interest in law enforcement[97] and the individual's interest in bodily integrity.[98] It was not until *Katz v. United States*[99] that the Supreme Court firmly established that "the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures . . . ."[100] In applying the Fourth Amendment to the human body the courts have faced the difficult task of defining which parts of a person are absolutely protected from government intrusion. Courts have permitted the government to pierce the skin of an individual with a needle[101] but not a surgical knife;[102] they also have permitted the government to view an individual urinate[103] but not necessarily remove their clothes.[104] The amendment's prohibition of "unreasonable searches and seizures" does not provide a defendant with absolute protection against non-consensual searches of person or property. Instead, Fourth Amendment rights often are determined by balancing the defendant's interest in bodily integrity against competing state interests. These opposing interests have forced courts to examine the human body and the protection afforded to it with extreme particularity. However, regardless of the reasonableness of the rest of the search or the legality of the arrest, if the bodily intrusion is sufficiently severe, evidence obtained as a result of the intrusion can be excluded from use at trial. In some cases found "shocking" by the Court, the offensiveness of the act appears to be directly related to the severity of the intrusion. *Rochin v. California,*[105] for example, involved a man who had been viewed by the police swallowing tablets in the course of a search. The police took him to the hospital and ordered doctors to force an emetic solution down Rochin's throat in order to pump his stomach—all against Rochin's will. The act was declared brutal and offensive to human dignity.[106]

---

97. This interest extends to both the criminal and the civil context. New Jersey v. T.L.O., 469 U.S. 325, 335 (1985).

98. Recently, the right to be free from bodily intrusion has been challenged under the Fourth Amendment outside the criminal context, in cases involving mandatory drug testing. *See, e.g.*, Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989) (upholding governmentally-regulated employer's right to conduct mass drug urinalysis under specific circumstances); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); *see also* Susan Levy, *The Constitutional Implications of Mandatory Testing for Acquired Immunodeficiency Syndrome—AIDS*, 37 EMORY L.J. 217, 237-42 (1988).

99. 389 U.S. 347 (1967)

100. *Id.* at 353.

101. Schmerber v. California, 384 U.S. 757 (1966).

102. Winston v. Lee, 470 U.S. 753 (1985).

103. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). The urinalyses were upheld as not excessively intrusive. One factor that minimized the intrusiveness was that employees were not required to be observed while urinating. *Skinner*, 489 U.S. at 626.

104. Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) (routine strip searches, including visual inspection of genitals, of all women arrested and detained in City of Chicago lockup); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1982) (strip search of thirteen year old child in high school after dog sniffing raid); Tinetti v. Wittke, 479 F. Supp. 486 (E.D. Wisc. 1979) (routine strip search, including visual inspection of genitals, of detainees in county jail without probable cause). *But see* Bell v. Wolfish, 441 U.S. 520 (1979) (strip searches of prisoners after visits from relatives or friends constitutional).

105. 342 U.S. 165 (1952).

106. *Id.* at 174.

In cases that are not found shocking, the Court similarly looks to the depth of the intrusion, and in addition considers factors such as the routineness and accuracy of the intrusive procedure, the risks, trauma, or pain associated with the procedure, and the medical environment in which the procedure is performed. In a case where police had ordered a blood alcohol test to be performed on an unconscious man, the Court found the police action constitutional because it was *not* brutal, *not* offensive, and did *not* shock the conscience when measured "by that whole community sense of 'decency and fairness.'"[107] Similarly, a blood test involving a small amount of blood and a urinalysis involving a "minimal" interest in bodily integrity have been held to be constitutional.[108] However, surgical probing beneath the skin, as well as body cavity searches, can be so severely and substantially intrusive as to be unconstitutional despite important state interests.[109]

These Fourth Amendment cases demonstrate that criminal defendants are protected against bodily intrusions by the state unless the intrusion is from a routine, accurate, and minimally intrusive procedure in the pursuit of an important state policy. If the procedure is significantly physically intrusive it will weigh heavily against any state interest and if it is found to be shocking, degrading, or offensive, the state interest frequently will be subordinated.

E. *Summary*

When viewed together, the preceding areas of law add up to a powerful right of bodily integrity. The assault and battery line of cases provide interesting lessons on what constitutes the "touching" in a physical intrusion. Touching may range from internal poisoning to a slap on the buttocks to a laceration, set in motion or caused directly by the actor. In every case, however, the harm from the intrusion always includes physical harm to the person, not solely psychological harm or harm to property. Under informed consent law, the absolute requirement for consent before anyone touches another or "meddles" with one's body in any way is paramount. The informed consent cases make clear that, except in very rare circumstances, an individual has a right to all information concerning proposed treatment, and right to full participation in any decision involving her body. The right to die cases go one step further to guarantee this participation, revealing great respect for and deference to a competent individual's decision despite strong competing state interests. And, finally, search and seizure doctrine demonstrates that, where the physical

---

107. Breithaupt v. Abram, 352 U.S. 432, 436 (1957).

108. *Schmerber*, 384 U.S. at 772. The *Schmerber* holding "that the . . . minor intrusion into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions," *id.*, was significantly narrowed in *Skinner*, where the majority held that the invasion was small in urine testing and the public safety interests great. 489 U.S. at 626-28. The *Skinner* dissent disagreed, insisting that "[c]ompelling a person to produce a urine sample on demand . . . intrudes deeply on privacy and bodily integrity." *Id.* at 645 (Marshall, J., dissenting).

109. *Winston*, 470 U.S. at 763-67.

intrusion is sufficiently severe, all state interests are overshadowed. It should therefore be apparent that the "right to do with one's body as one pleases" involves a great deal more than Justice Blackmun acknowledged in *Roe*.

The application of bodily integrity doctrine has not always been even-handed; on many occasions, the bodily integrity of women has received less protection than that of men.[110] A case that arose during the eugenics movement of the early twentieth century[111] provides a striking example of the Court's willingness to permit the state to violate women's bodily integrity. In *Buck v. Bell*,[112] Justice Holmes revealed the slight value placed on women's bodily integrity at the time when he concluded that "[t]he principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes."[113]

In re A.C.[114] provides another horrifying example of the Court's application of a double standard to a woman's bodily integrity. In 1987, the District of Columbia Superior Court judge appointed counsel for a twenty-six-week-old fetus, weighed its rights against those of its terminally ill mother, and decided in favor of the fetus. The court ordered that a cesarean section be performed on the woman. The operation was undertaken, and both the premature infant and A.C. died soon thereafter. The decision was later soundly vacated by the Court of Appeals sitting *en banc*.[115] Women's bodily integrity also has been compromised under abortion law, when the Court upholds procedures such as viability testing without regard to the woman's consent. These examples are not so numerous as to have erected an insurmountable barrier to rewriting bodily integrity law, but they do underscore the fact that bodily integrity law has not always been applied equally to women and men. The following sections will look more closely at the possibility of fairly applying bodily integrity doctrine to women, particularly pregnant women.

IV. Bodily Integrity Law and Pregnancy

A. *Pregnancy as a Physical Experience.*

The claim that pregnancy is a physical experience is not a radical proposition. However, the Supreme Court has not yet addressed the unique *physical*

110. *See supra* note 59.

111. Between 1907 and 1945, thirty-two states adopted statutes permitting mandatory sterilization of "deviant populations," and 45,000 people, mostly poor, mentally ill women, were sterilized by the state. R. Petchesky, *supra* note 8, at 87.

112. 274 U.S. 200 (1926).

113. *Id.* at 207.

114. *In re* A.C., 533 A.2d 611 (D.C. 1987), *vacated and remanded*, 573 A.2d 1235 (D.C. 1990).

115. 573 A.2d at 1252 ("We emphasize . . . that it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure such as a cesarean section.").

intrusion of an unwanted pregnancy on a woman.[116] This is true despite the fact that numerous *amici* briefs addressed the physical aspects of pregnancy.[117] Part III of this paper discussed court protection of individuals from physical intrusions. In order to understand the relevance of these cases and of bodily integrity doctrine in general, it is important to take a brief look at the actual physical changes experienced by a woman who undergoes pregnancy, and to consider how these may be experienced by a woman undergoing an unwanted pregnancy.

> The physical and functional alterations of pregnancy involve all the body systems, displacing body parts, depleting the body of its necessary elements and changing its chemical balance. . . .
>
> . . . .
>
> During pregnancy, enlargement of the uterus within the abdominal cavity displaces and compresses the other abdominal contents including the heart, lungs and gastro-intestinal tract. The resulting pressure has a direct effect on circulation of the blood and increase in venous pressure, sometimes leading to irreversible varicose veins and hemorrhoids and, with predictable frequency, to disabling thrombophlebitis. The gastro-intestinal tract experiences functional interference causing constipation and displacement of the urinary tract, thus urinary tract infections occur in six to seven per cent of all pregnant women and such infections, in turn, lead to kidney infections. . . . Tearing and overstretching of the muscles of the pelvic floor occurs frequently during delivery, causing extensive and irreparable damage to the pelvic organs and their supporting connections. Surgery is often required to return these organs to position. Bladder control may be permanently lost. The weight of the contents of the uterus cause sacroiliac strain accompanied by pain and backache, with the effects of the pressure being felt as far as the outermost extremities of the woman's body. The weight causes such pressure on the cervical spine as to result in numb-

---

116. The discussion in *Roe v. Wade*, is indicative of abortion caselaw in general. In *Roe*, Justice Blackmun's references to the physical burdens of pregnancy were limited to the following two passages, and even in these sections Justice Blackmun did not limit himself to the purely physical risks and consequences:

> The detriment that the State would impose upon the pregnant woman by denying [this choice] altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.

410 U.S. at 153.

"Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Id.* at 149.

117. *E.g.*, C.C.L.A. *Amici* Brief, Roe v. Wade, *supra* note 1, at 657-60. *Cf.* Regan, *supra* note 22, at 1579-83 (1979) (discussing physical burdens of pregnancy and childbirth).

ness, tingling and proprioceptive acuity reduction in the hands.

. . . .

During pregnancy estrogen levels exhibit severe increase, this phenomena accounting for the symptoms of nausea and vomiting occurring in one-half or more of all pregnant women. If this condition is prolonged, hospitalization is required. Evacuation of the contents of the uterus results in immediate and dramatic relief of symptoms. In severe cases blood protein may be destroyed. Bodies of women who have died from this condition exhibit the symptoms of starvation, acidosis, dehydration and multiple vitamin deficiencies.

The excess progesterone produced by the placenta causes fluid retention, increase in blood pressure, weight gain . . . and inability to sleep. At least forty per cent of pregnant women have symptomatic edema, distorting the hands, face, ankles and feet. A woman's lungs respire 45 per cent more air than normal in an attempt to obtain the needed oxygen, but oxygen absorbed is less that normal despite the extra effort of the crowded lungs.[118]

Although not every pregnant woman will experience all of these ills, the risks are high that she will experience many of them. Regardless of which of these she may experience, a woman always will be the source of nutrients, oxygen, and waste disposal for the parasitic embryo. If a woman carries the pregnancy to term, she inevitably will experience pain and discomfort during delivery or undergo full anesthesia and major surgery.

Of course, a woman who wishes to have a baby may feel that the various risks and almost certain pain are, on balance, worthwhile. However, as Donald Regan has suggested, "the question is not whether pregnancy is worthwhile, or whether it is a transcendent experience, for a woman who wants a child. The question is how burdensome it is for a woman who does *not* want a child."[119]

B. *Bodily Integrity and Abortion.*

The deep intrusion into a woman's body caused by pregnancy is indisputable. The physical effects of an unwanted pregnancy are similar to the effects of what, in other contexts, is considered battery: it presents risks of serious bodily harm and of permanent physical injury.

Modern abortion procedures provide safe and effective methods of terminating a pregnancy.[120] Thus it is true that pregnancy is a reversible physical

---

118. C.C.L.A. *Amici* Brief, Roe v. Wade, *supra* note 1, at 657-59 (citations omitted). *See also* Regan, *supra* note 22, at 1579-81.

119. Regan, *supra* note 22, at 1582.

120. Access to abortion is a meaningful choice only if a woman has ready access to health care. As abortion is a safe health care alternative, it should be a component in any federally sponsored health

state; even after conception and implantation, a woman can still make the decision whether or not to bear a child.[121] When the state acts to restrict women's access to abortion, the dynamics of pregnancy are radically altered. The direct result of the state action is that a woman must endure pregnancy—and all the pain, illness, and risk of injury which pregnancy involves—against her will. But for the state's restrictions, she would no longer be pregnant. Regardless of why she became pregnant, once she decides to terminate and cannot, the state is responsible for her continued state of pregnancy. From the moment a pregnant woman decides that she does not want to carry the pregnancy to term, from the moment she ceases voluntarily to participate in the pregnancy, it becomes a pregnancy against her will and a significant bodily intrusion. This bodily intrusion is, in effect, state action to commission the womb for use as a fetal incubator.[122] The state has entered the woman's body, seized control, and established an adversarial relationship between the woman and her womb.

Applying the language of bodily integrity law, specifically battery law, the state's action to deny a pregnant woman access to abortion is "substantially certain" to set in motion a forced pregnancy. The resultant forced pregnancy is a significantly deep intrusion, more in line with a severe beating than a slap on the buttocks. The intrusion of pregnancy physically "touches" countless organs and appendages of the woman, inside and out.

If the state denies access to abortion, the woman's opportunity to consent or not consent to this physical "meddling" with her body is rendered moot. Her options are eliminated, and thus she is forced to undergo pregnancy despite the fact that it may not be in her best medical interests. However, under informed consent doctrine a woman ordinarily would have the right to refuse the physical intrusion even if the intrusion were in her best interests. Informed consent law is designed to guarantee that a doctor must ultimately defer to the patient. In contrast, abortion caselaw has required a pregnant woman to defer to her physician and "his" best judgment. The pregnant woman has thus lost the power to make her own determination of what is in her best medical interests as well as the fundamental right to refuse an intrusion on her bodily integrity. If bodily integrity principles were applied equally

---

insurance program. The reality of health care in the United States is quite different, and consequently economics act as an additional bar to women's reproductive freedom.

The advent of RU486 presents new possibilities for safe, effective and possibly less expensive abortions. However, in the United States it is being kept off the market by anti-abortion lobbyists. *See* Sarah Ricks, *The New French Abortion Pill: The Moral Property of Women*, 1 YALE J.L. & FEMINISM 75, 75 (1989).

121. I begin this discussion of women's decisionmaking process at the point of her learning she is pregnant because the intention to have sexual intercourse is distinguishable from the intent to become pregnant. Understanding the reasons women become pregnant against their will is an important aspect of the discussion of what true reproductive freedom for women really would mean, but is beyond the scope of this article.

122. See MARGARET ATWOOD, THE HANDMAID'S TALE (1985), for an interesting fictional account of a world where women as incubators becomes a reality.

to women and men, a woman would have the right to know all her options and to make her own decisions, free of medical or state interference.

An equal application of the right to die principle would result in respect and deference to the pregnant woman's choice despite important competing state interests, even in the sanctity of life. The right to die cases provide absolute protection for an individual's decision, even though it may appear to contradict the interests of society, family, or the individual. Right to die cases establish protection for personal decisionmaking—protection that acts as a barrier to outside intervention. It may appear that the right to die analogy fails, since those cases involve the decisionmaker's own life and not that of a third party. Some would argue that fetus is a third, "innocent," party. This article disputes the assertion that there is an identifiable "fetal interest" separate from the pregnant woman's interests. The pursuit of an analysis that views the pregnant woman as a duality is itself a violation of woman's bodily integrity. As will be pursued further in the Part V, my feminist analysis of women does not permit this duality.

Even if the fetal interest is seen as separate from the woman's, however, bodily integrity principles override that interest if forced pregnancy is recognized as an extraordinary bodily intrusion. Parents seeking right to die protection have been permitted to refuse far less intrusive treatment, although minor children are left behind.[123] Similarly, individuals have been protected from bodily intrusion when third parties have sought court-ordered transfusions or organ transplants.[124]

Finally, the Fourth Amendment cases make clear that state action that operates significantly to intrude on one's bodily integrity is not constitutional, despite important state interests in criminal justice. Statutory interference with access to abortion is unequivocal state action. The search and seizure cases paid close attention to the risks involved with medical procedures, for example, with a surgical procedure to remove a bullet. The risks associated with pregnancy are far more numerous and include a substantial risk of surgery. The depth of intrusion of forced pregnancy defies comparison with that of any intrusion discussed thus far.

Recognition of a woman's bodily integrity does not discount the validity of the state's interest in potential life. Rather it mandates that the state find alternative methods for promoting its interests. Just as the Supreme Court, in

---

123. Norwood Hosp. v. Munoz, 409 Mass. 116, 564 N.E.2d 1017 (1991). The few cases that do force a parent to receive medical treatment because they would leave behind minor children all involve the parent's assertion of religious rights.

124. McFall v. Shimp, 10 Pa. D. & C. 3d 90 (Allegheny County Ct., Pa. 1978), which found there was no obligation to offer one's bone marrow to another; *see also* Curran v. Bosze, No. 70501 (Ill., Dec. 21, 1990), in which a noncustodial father unsuccessfully sought to force a child from a previous relationship to donate bone marrow to another of his children. It is generally accepted, for example, that a court cannot order a mother or father to donate a bodily organ to save the life of a child. Thompson, *supra* note 22, at 56, 58; *see* Regan, *supra* note 22, at 1569-74 (American jurisprudence generally has not required citizens to be "good Samaritans").

Eisenstadt and *Griswold*, mandated that states further their interests in a manner that does not trample individual privacy rights, the Court can require states to find ways to promote their interests in potential life that do not so negatively affect women's lives.[125]

V. REUNITING WOMEN AND THEIR WOMBS.

> [W]e need to explain . . . the harms and dangers of invasive pregnancy. We need to explain that this harm has nothing to do with invading the privacy of the doctor-patient relationship, or the privacy of the family, or the privacy of the marriage; but that rather, it has to do with invading the physical boundaries of the body and the psychic boundaries of a life.[126]

A bodily integrity critique of restrictive abortion laws recognizes the physical reality of pregnancy and childbearing and incorporates this understanding into fundamental principles of law.[127] The bodily integrity doctrine follows the direction of feminist jurisprudence generally in that it requires recognition of women as responsible moral agents and not mere "physical vessels for genetic messages."[128] The fetus is at all times integrally part of the woman carrying it, so that a pregnancy carried to term against her wishes will always be at odds with her bodily integrity. To value women's bodily integrity above the state's right to intrude is not to deny that an unwanted pregnancy may pose troublesome moral dilemmas; it is simply to insist that women themselves, in whose bodies these dilemmas unfold, must decide what is to be done.[129]

Pregnancy is, on one level, a process of biological cycles and physical changes. Each woman's physical experience with menstruation, sexuality, and ovulation is her physical legacy and, regardless of classifications and definitions imposed on her, will remain unaltered. Each woman's relationship to her womb and to a resultant pregnancy will be unique. For every woman, however, the experience occurs entirely within her own sphere of bodily integrity. A woman pursuing pregnancy and motherhood will be disappointed to find she

---

125. The state could begin to further its interest in potential life by improving the conditions under which women live in our society, so that women would have meaningful choices about whether to bear children without having to face the risk of poverty for their children and themselves. The state would do better to view parents as partners in efforts to improve the lives of our children, not as adversaries.

126. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 66 (1988).

127. As Lucinda Finley has observed: "The problem is not the uniqueness of something like pregnancy, but the view that our legal system has adopted towards "special" human qualities, particularly qualities that are special because they are inherently female in the sense that they cannot be experienced by a male." Lucinda Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 118, 140 (1986).

128. R. PETCHESKY, *supra* note 8, at 341.

129. "I choose to side with women, because they will have the responsibility for the results of that decision, and I trust their ability to weigh the alternatives carefully." *Id.* at 326.

has menstruated off cycle, indicating no pregnancy or an early miscarriage. A woman who never wanted to be pregnant will be devastated to find the absence of menses, and, if the embryo does implant, may look to abortion as a means of terminating the process. Her relationship to the embryo cannot be classified by time or date or viability testing. It is classified by her welcoming or rejecting the pregnancy.[130] And it is on this basis, and this basis alone, that the decision of whether or not to continue a pregnancy should be made.

Empowering women to control their own reproductive capacity will mean the demise of the traditional, male-created view of motherhood. As Adrienne Rich has written, however: "To destroy the institution [of mothering] is not to abolish motherhood. It is to release the creation and sustenance of life into the same realm of decision, struggle, surprise, imagination, and conscious intelligence, as any other difficult, but freely chosen work."[131] The courts can begin this transformation by recognizing that a woman's physical boundaries encompass her womb. I have argued that once we acknowledge these boundaries, it logically follows that bodily integrity protections must be applied to pregnant women and that state-enforced pregnancy is unconstitutionally intrusive. Integral to this process is the acknowledgement of a woman as a whole. A view of her as woman and also as womb violates her bodily integrity from the start. The necessary legal tools already exist in the form of bodily integrity law; these tools must simply be applied.

A woman's security in her own body is fundamental to her intellectual, psychological, and economical development. It is the foundation of individual control and self-determination. Without an absolute guarantee that her physical integrity will be protected, a woman is not free to pursue the rights and privileges enumerated in the Constitution. She is prevented from achieving economic independence, from fully participating in the workplace, and from achieving personal autonomy. Without this absolute guarantee, women's fundamental liberty rights may be "balanced" out of existence.

130. If a woman could implement her decision to terminate without the aid of doctors, the intimate and self-contained nature of the decision would be undeniable. It is no wonder that RU486, the abortifacient pill, represents freedom for many women. At present, RU486 requires the assistance of a medical professional. However, it marks the path towards unrestrained reproductive decisionmaking.

131. ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 272 (1979).