

CONSTITUTING CHILDREN'S BODILY INTEGRITY

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ABSTRACT

Children have a constitutional right to bodily integrity. Courts do not hesitate to vindicate that right when children are abused by state actors. Moreover, in at least some cases, a child's right to bodily integrity applies within the family, giving the child the right to avoid unwanted physical intrusions regardless of the parents' wishes. Nonetheless, the scope of this right vis-à-vis the parents is unclear; the extent to which it applies beyond the narrow context of abortion and contraception has been almost entirely unexplored and untheorized. This Article is the first in the legal literature to analyze the constitutional right of minors to bodily integrity within the family by spanning traditionally disparate doctrinal categories such as abortion rights; corporal punishment; medical decisionmaking; and nontherapeutic physical interventions such as tattooing, piercing, and circumcision. However, the constitutional right of minors to bodily integrity raises complex philosophical questions concerning the proper relationship between family and state, as well as difficult doctrinal and theoretical issues concerning the ever-murky idea of state action. This Article canvasses those issues with the ultimate goal of delineating a constitutional right of bodily security and autonomy for children.

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The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home . . . ; nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child

– *Commonwealth v. Fisher*, 1905¹

INTRODUCTION

When Anna Fitzgerald, the thirteen-year-old heroine of the popular novel *My Sister's Keeper*, appears in an attorney's office and says she wants to sue her parents “for the rights to her own body,” the attorney tries to give her the phone number for Planned Parenthood.² Anna is not seeking access to contraception or abortion, however—she is hoping to avoid being forced by her mother to donate a kidney to Anna's sister, who is dying of leukemia.³

The scene between Anna and her attorney highlights two peculiar features of minors' constitutional rights to bodily integrity. First, those rights are largely understood, and most fully developed, in the context of minors' sexual and reproductive rights. Indeed, it may seem odd even to speak of minors' bodily integrity rights in any other context. When the law regulates children's bodies in other contexts, it largely frames the issues in terms of family privacy, parental rights, or perhaps children's vaguely defined best interests.⁴

Second, minors do possess a constitutional right to bodily security and autonomy—in at least some contexts even against their parents. The most widely recognized context for this constitutional right is that of reproductive healthcare: some minors possess a right to seek abortion and possibly contraception without involving their parents.⁵ But, as this Article explains below, it is not clear precisely

1. *Commonwealth v. Fisher*, 62 A. 198, 200, 201 (Pa. 1905) (holding constitutional Pennsylvania's act permitting delinquent and neglected children to be committed to a “[h]ouse of [r]efuge”). The last words of the quoted sentence are “to lead it into one of its courts.” *Id.*

2. JODI PICOULT, *MY SISTER'S KEEPER* 20–23 (2004).

3. *Id.*

4. *See, e.g., Hart v. Brown*, 289 A.2d 386, 390, 391 (Conn. Super. Ct. 1972) (discussing sibling organ donation in relation to parents' rights and minor's rights, without specifying which rights of the minor were involved); *Oliner v. Lenox Hill Hosp.*, 431 N.Y.S.2d 271, 272 (Sup. Ct. 1980) (considering parent's legal “entitle[ment] to have a ‘bris’ [circumcision] performed for his infant son”).

5. *Bellotti v. Baird*, 443 U.S. 622, 647 (1979) (plurality opinion); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

how or why the constitutional bodily integrity right can be limited to this particular context. Indeed, courts routinely recognize a constitutional bodily integrity right of children not to be abused by state actors.⁶ This aspect of the bodily integrity right is not limited to sexual and reproductive health-care services, but instead extends to protect minors against all severe and unwanted state-imposed physical intrusions.

Spanning traditional doctrinal categories, this Article aims to examine and, ultimately, to provide structure for the amorphous constitutional right of minors to bodily integrity. It is the first Article in the legal literature to consider the landscape of regulation across such diverse areas as corporal punishment, parents' authority to grant or withhold consent for children's medical care, minors' access to abortion, and parental control over nonmedical interventions such as tattooing and ear piercing, with the aim of identifying a constitutional right that applies throughout.⁷ This Article also attempts to provide some theoretical explanations for the law's treatment of the subject of children's rights to bodily integrity independent of their parents. In particular, it grapples with the inherent theoretical difficulties attendant upon recognizing a meaningful constitutional right of children to bodily integrity, including the problem of identifying state

6. See cases cited *infra* notes 18, 26–28.

7. Some scholarship from the 1970s onward addressed the nascent constitutional rights of children, which found recognition beginning in the 1960s. For example, Professors Lee Teitelbaum and James Ellis considered the due-process rights of children, but their work was written before much of the doctrinal development discussed in this Article, and it focuses on the due-process right to liberty generally, rather than vis-à-vis the parents. Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 170–74 (1978). Other articles have discussed the constitutional bodily integrity rights of children in specific, limited contexts, such as growth attenuation, genital-normalization surgery, or sibling organ donation. See generally Doriane Lambelet Coleman, *Testing the Boundaries of Family Privacy: The Special Case of Pediatric Sibling Transplants*, 35 CARDOZO L. REV. 1289, 1328 (2014); Rhonda Gay Hartman, *Noblesse Oblige: States' Obligations to Minors Living with Life-Limiting Conditions*, 50 DUQ. L. REV. 333 (2012); Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children? The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87 (1999); Mary Koll, Note, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child's Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225; Anne Tamar-Mattis, Note, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59 (2006). In addition, Professor Caitlin Borgmann has described and critiqued the constitutional right against compelled bodily intrusions across multiple contexts, including corporal punishment, but her analysis focuses primarily on adults, and only on the right of individuals against the state. See generally Caitlin Borgmann, *The Constitutionality of Government-Imposed Bodily Intrusions*, 2014 U. ILL. L. REV. 1059.

action in the context of what often appears to be private decisionmaking. Drawing on the theoretical work of the historian and philosopher Michel Foucault, this Article argues that the pervasiveness of state power, which operates even within the otherwise-private family, deserves recognition in state-action doctrine. This Article thus advocates for a more robust concept of children's bodily integrity that would be enforceable, at least in some contexts, through a constitutional cause of action.

But why focus on the right to bodily integrity rather than any of the countless other aspects of the parent-child relationship that the law affects? Of course, children's rights are affected by parental and state control in numerous dimensions—not just with respect to their bodies. To a large extent, moreover, the parent-child relationship, and the role of the state within that relationship, is well-trodden ground, covered extensively by political theorists, philosophers, and legal scholars, among others.⁸ In part, this Article simply uses the concept of bodily integrity as a new lens to examine that relationship, thereby yielding some novel insights. At the same time, however, there is much that is unique, and uniquely interesting, about the issue of minors' constitutional right to bodily integrity.

First, the problem of minors' right to bodily integrity is one of overlapping and potentially conflicting constitutional privacy rights: that of the family as an entity, and that of the child as an autonomous citizen who is entitled to the protection of the state.⁹ This facet of the problem distinguishes it from many other aspects of the parent-child-state relationship, in which there is often no colorable right on the part of the child to compete with parental rights and state interests.¹⁰

8. See *infra* Part II.

9. Cf. Teitelbaum & Ellis, *supra* note 7, at 170–74 (noting that parental-rights cases such as *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) involved no conflict between parent and child, and that cases involving parent-child conflict present the problem of children's liberty interests more directly).

10. For example, when parents make decisions about their children's education, the children's constitutional rights are not usually involved. Some laws may impact children's rights to free speech or the free exercise of religion, *see, e.g.*, *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (implicating both), but it is not clear to what extent children possess such rights independently of their parents. Certainly, children's free-speech rights are more limited than adults' when they are acting independently in the school context or in the marketplace, *see, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 404 (2007); *Ginsberg v. New York*, 390 U.S. 629, 636–37 (1968); *but see* *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2742 (2011) (holding that minors have a right to access violent video games even if their parents do not approve), but few, if any, cases clearly address minors' First Amendment right to resist parental mandates. Similarly,

Indeed, though the minors' right to bodily integrity is often, albeit obliquely, referenced by courts and commentators alike,¹¹ it exists uncomfortably at the intersection of two unreconciled and potentially irreconcilable lines of doctrine: the line that recognizes minors' constitutional privacy rights, exemplified by *Planned Parenthood v. Danforth*¹² and *Bellotti v. Baird*,¹³ and the line that recognizes parents' right to make important decisions for their children, exemplified by *Meyer v. Nebraska*¹⁴ and *Pierce v. Society of Sisters*.¹⁵

Moreover, identifying children's right to bodily integrity raises particularly difficult but relatively unexamined questions about when state intervention in the family is justified. It is often taken for granted—by courts, by liberal philosophers, and by more conservative or parentalist thinkers—that the state's power to intervene in the family at least exists to prevent abuse, neglect, or similar harm to the child.¹⁶ Yet, this apparently agreed-upon limit begs a deeper question regarding the meaning of "abuse" and the state's authority to define and delimit that term. This Article problematizes some previously unquestioned assumptions about the propriety of state intervention in parental control over children's bodies.

This Article proceeds as follows. Part I describes the existing right of minors to bodily integrity. Drawing on the example of abortion, it queries whether the right of minors to bodily security and autonomy, even in the face of parental disagreement, can be extended beyond that seemingly *sui generis* context, and if so, what the scope of such a right might be. Proceeding from this background, Part II discusses the two predominant philosophical views of the family and its relationship to the state, both of which uncomfortably coexist in constitutional case law pertaining to children's and parents' rights. Part III then demonstrates how conflicting views of the family create two significant difficulties in identifying and enforcing children's right

children have a right to equal protection of the laws, which may be involved when the state permits or obstructs certain parental choices, but those rights again are generally treated as derivative, rather than independent, of the parents' rights. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 487 (1954).

11. Povenmire, *supra* note 7, at 100, 104–07; Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1139–42 (2012); Koll, *supra* note 7, at 235–42; Tamar-Mattis, *supra* note 7, at 88, 99–100.

12. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

13. *Bellotti v. Baird*, 443 U.S. 622 (1979).

14. *Meyer v. Nebraska*, 262 U.S. 390 (1923).

15. *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

16. *See Prince v. Massachusetts*, 321 U.S. 158, 168–70 (1944); *infra* Part II.

to bodily integrity within the family. First is the doctrinal problem of identifying state action in the context of minors' rights. Often, conflicts around minors' right to bodily integrity involve no apparent state actor, but state-mandated and state-enforced duties, immunities, and privileges permeate the parent-child relationship. The second difficulty is a conceptual one. The more expansive the judicial understanding of children's right to bodily integrity, the more the state is invited to intervene into both minors' and parents' decisionmaking. These two problems, which appear to be conceptually and doctrinally distinct, are in fact closely related to one another. Both are consequences of the diffuse nature of state power, which, according to Foucault, permeates even the most seemingly intimate relationships and simultaneously "governmentalizes" those private spheres.¹⁷

Finally, Part IV envisions a meaningful, but meaningfully delimited, right to bodily integrity for children within the family. It argues that a broadened understanding of state action in the parent-child decisionmaking context may provide a partial way forward toward vindicating a real but not overly expansive constitutional right of children to bodily integrity. In particular, a constitutional bodily integrity right should be recognized and applied whenever a minor validly invokes the jurisdiction of a court on her behalf. This means that minors should be able to vindicate bodily integrity rights against state actors in suits that are otherwise properly brought under 42 U.S.C. § 1983. This also means that minors are entitled to have courts, as state actors, take their constitutional rights into account when adjudicating disputes between private parties such as parents and hospitals. In terms of substantive standards, although parents should continue to be afforded discretion in decisionmaking for immature minors, courts should enforce younger minors' right to protection of their best interests and older, mature minors' right to autonomy in decisionmaking.

I. THE EXISTING RIGHT TO BODILY INTEGRITY

Children possess a constitutional right to bodily integrity, defined as a right against harmful or unwanted physical intrusions mandated or caused by government action, together with a right to seek desired

17. As explained *infra* Part III.B, these terms and the theory behind them are imported from the work of the French historian and philosopher Michel Foucault.

medical treatments or interventions.¹⁸ Moreover, this right applies even against the minor's parents in some cases. This Part endeavors to unpack this right, first by demonstrating its applicability when state actors are involved, and second by considering when and how the right is understood to apply to ostensibly private disputes. Minors' constitutional right to bodily integrity may be at issue in disputes between private parties when a minor attempts to engage in a constitutionally protected activity that the minor's parents disapprove of, or when the minor seeks immunity from harm imposed by his parents. This Part also considers the limits of this right, which has been only partially constitutionalized.

A. *The Right to Bodily Integrity Against the State*

The proposition that children have rights against unwanted bodily intrusions imposed upon them by the state is relatively uncontroversial. In *Ingraham v. Wright*,¹⁹ the Supreme Court acknowledged minors' liberty interest in "personal security."²⁰ *Ingraham* dealt with allegations that corporal punishments administered by school officials pursuant to Florida law were so severe and painful—including causing a hematoma in one student and "depriving [another student] of the full use of his arm for a week"—that they violated the students' right to due process.²¹ The *Ingraham* Court held that the minors had a *procedural* due-process right, but it also held that the only process due was the availability of a postdeprivation remedy.²² Moreover, the Court acknowledged that the right was limited by the scope of the traditional common-law acceptance of corporal punishment and the school's interest in discipline.²³ Nonetheless, in the process of analyzing the due-process

18. See, e.g., *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998). The term "bodily integrity" may not seem like a good fit for some of the situations discussed below, such as when minors seek interventions like cosmetic surgery or tattooing, which the parents resist. Those situations seem to invoke a form of bodily control but not necessarily "integrity," or wholeness, per se. "Bodily integrity" is nonetheless used throughout this Article because it is the term that is used in constitutional doctrine, which broadly encompasses a right to autonomy with respect to bodily interventions. Cf. Borgmann, *supra* note 7, at 1063 (identifying the right to bodily integrity as including both a "right to repel bodily intrusions" and a "right to affirmative decision making about one's body").

19. *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

20. *Id.* at 652.

21. *Id.* at 657.

22. *Id.* at 683.

23. *Id.* at 676.

claims, the Court also recognized that the right to freedom from unreasonable bodily restraint and punishment was a fundamental liberty interest protected by the Fourteenth Amendment.²⁴ This right may therefore provide the basis for a substantive due-process claim, as well as a procedural due-process claim, if either is infringed without sufficient justification.²⁵

Drawing on *Ingraham*, numerous cases have recognized that children's bodily integrity right is violated when children are mistreated by a state actor—usually in the context of a school or juvenile-detention center. For example, some cases vindicate minors' rights against excessive corporal punishment by school officials.²⁶ Those cases rely on the Supreme Court's holding that students have a "constitutionally protected liberty interest" in avoiding arbitrary or excessive corporal punishment.²⁷ Similarly, the bodily integrity right is invoked to support the claim that children have a constitutional substantive due-process right not to be physically or sexually abused by a state actor.²⁸ Thus, the bodily integrity right has been asserted extensively in the school and juvenile-detention contexts.

24. *Id.* at 673–74 (noting that this right is one of the "privileges long recognized at common law as essential to the orderly pursuit of happiness by free men" (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (quotation marks omitted))). The Supreme Court subsequently described *Ingraham* as establishing that "arbitrary corporal punishment represents an invasion of personal security to which . . . parents do not consent when entrusting the educational mission to the State." *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

25. *See Borgmann, supra* note 7, at 1104 (noting that lower courts have read *Ingraham* to imply the existence of a substantive due-process right against corporal punishment by state actors in some circumstances).

26. *E.g., P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996) (holding that children have a constitutional right against excessive physical punishment and assault by a public-school teacher); *Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987) (holding that a principal's physical assault on a student implicated the student's substantive due-process rights); *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (holding that a teacher who tied a second grader to a chair for almost two days at school was not entitled to qualified immunity for violating the child's right to bodily integrity).

27. *Ingraham*, 430 U.S. at 674.

28. *See, e.g., Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (observing that "[a] number of circuit courts have found due process violations when state actors have inflicted sexual abuse on individuals" (alteration in original) (quoting *Rogers v. City of Little Rock*, 152 F.3d 790, 795 (8th Cir. 1998)) (quotation marks omitted)); *Plumeau v. Sch. Dist. #40*, 130 F.3d 432, 438 (9th Cir. 1997) (citing *Ingraham* for the proposition that students have a constitutionally protected right to bodily integrity, and holding that the right was violated when a public-school janitor sexually abused a child); *Doe v. Rains Cnty. Indep. Sch. Dist.*, 66 F.3d 1402, 1407 (5th Cir. 1995) (stating that, although it "is fairly debatable as an original proposition," precedent clearly establishes that sexual abuse of a minor by a state actor constitutes a violation of the minor's right to constitutional bodily integrity).

On occasion, courts have upheld minors' bodily integrity claims outside the institutional context. For example, in *In re L.*,²⁹ a trial court asserted that a sixteen-year-old minor had a right to "free[dom] from unwanted infringements of bodily integrity" that weighed against her putative father's request that she undergo a blood test.³⁰ Because the father had sought a court order requiring the test to establish his legal paternity, the court took into account the minor's right to bodily integrity against the state.³¹ Relatedly, in the case of *In re E.G.*,³² a state supreme court alluded to the possibility that minors have bodily integrity rights with respect to end-of-life care.³³ In that case, the court considered whether a mature seventeen-year-old minor had the right to refuse lifesaving blood transfusions for leukemia.³⁴ Although the minor's mother agreed with her decision, the state filed a petition to have the minor declared medically neglected so that the treatment could be compelled.³⁵ The court ultimately upheld the minor's decision on the ground that she was "mature" and therefore permitted to refuse treatment under state common law.³⁶ However, the court also suggested, without deciding, that the minor might have a constitutional privacy right to refuse treatment.³⁷ Thus, though the scope of the right is unclear, there is little doubt that minors do possess a constitutional right to bodily security and protection against unwanted bodily intrusions that are imposed or mandated by state actors.

B. *The Right to Bodily Integrity Against the Parents and the State*

Courts have partially but inconsistently recognized children's right to bodily integrity. In the reproductive-health context, children appear to have the most expansive power, grounded in the Constitution, to make decisions about their bodies. Outside that

29. *In re L.*, 632 A.2d 59 (Conn. Super. Ct. 1993).

30. *Id.* at 61.

31. *Id.*

32. *In re E.G.*, 549 N.E.2d 322 (Ill. 1989).

33. *Id.* at 326.

34. *Id.* at 324.

35. *Id.* at 323.

36. *Id.* at 326.

37. *Id.* The mature minor's right to refuse potentially lifesaving medical treatment is also raised by the novel *My Sister's Keeper*. Spoiler alert: It turns out that the protagonist, Anna, is attempting to refuse the kidney donation to respect her terminally ill sister's desire to die without further invasive treatment. PICOULT, *supra* note 2, at 448.

context, however, a patchwork of state statutory and common law governs. As detailed below, parents are generally presumed by state law to be empowered to consent to bodily interventions on behalf of their children. Rarely has it been suggested that children's constitutional right to bodily integrity is implicated when state law delegates decisionmaking authority over children's bodies to the parents.

1. *Abortion and Contraception.* Minors' right to bodily integrity is uniquely salient in one area of constitutional jurisprudence—reproductive rights. In that area, the right may be understood as a constitutional right not just against the state, but also against the minor's own parents. The permissible extent and manner of a state's regulation of minors' reproductive health-care decisions has been the subject of relatively in-depth consideration by the Supreme Court, and the federal courts have promulgated a well-developed body of doctrine describing minors' rights to access contraception and abortion, regardless of their parents' wishes. In theory at least, this area represents the most expansive legal recognition for minors' constitutional liberty rights against their parents. It is not clear, however, whether this right extends beyond the abortion context. Although courts appear only to accept a bodily integrity right for minors within the family in that narrow set of cases, there is no clear rationale for limiting the right in this way.

A constitutional right to bodily integrity for minors was first recognized in the abortion context in the 1970s.³⁸ Soon after *Roe v. Wade*³⁹ was decided, states began passing laws requiring parental consent for minors seeking abortions.⁴⁰ The Supreme Court, however, did not lose much time in striking these laws down.⁴¹ In *Danforth*, the Court held that “the State does not have the constitutional authority to give a third party,” including the minor's parent, “an absolute, and possibly arbitrary, veto over the decision of the physician and his

38. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 53 (1976).

39. *Roe v. Wade*, 410 U.S. 113 (1973).

40. *See, e.g.*, Eve W. Paul, Harriet F. Pilpel & Nancy F. Wechsler, *Pregnancy, Teenagers and the Law*, 1976, 8 FAM. PLANNING PERSP. 16, 19 (1976) (noting that thirteen parental-consent requirements for abortion had been passed as of 1974, and that seven more were passed between 1974 and 1976).

41. *See, e.g.*, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 440–41 (1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Danforth*, 428 U.S. at 74; *Franklin v. Fitzpatrick*, 428 U.S. 901, 901 (1976) (mem.); *Gerstein v. Coe*, 428 U.S. 901, 901 (1976) (mem.).

patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent."⁴² At the same time, the Court emphasized that its opinion was not intended to imply an absolute right, possessed by all minors in all circumstances, to consent on their own to the procedure.⁴³ Instead, the Court appeared to welcome a more refined legal structure for parental involvement in minors' abortion decisions.⁴⁴

The Court had the opportunity to consider a more nuanced legislative scheme in adjudicating the constitutionality of Massachusetts' parental-consent law.⁴⁵ The Court outlined the requirements for a constitutional parental-consent law for abortion in *Bellotti v. Baird*.⁴⁶ The governing rule since *Bellotti* essentially has been that states may not require parental consent for minors seeking abortions unless they also provide a mechanism called a "judicial bypass," by which the minor can seek judicial permission to obtain an abortion on her own upon a showing either that she is mature and well-informed enough to consent to the procedure, or that the abortion would be in her best interests.⁴⁷ Whether parents disagree with the minor's decision or not, she thus appears to have a constitutional right to seek an abortion without their approval. Although *Bellotti's* rule applies only against the state in the sense that it constrains the scope of parental-involvement laws, the right to choose an abortion, in a sense, also takes the form of a right against both the state and the parents. That is to say, it limits the circumstances, the extent, and the reasons for which the minor may be prevented from having an abortion by either her parents or the state.⁴⁸

42. *Danforth*, 428 U.S. at 74.

43. *Id.* at 75 ("We emphasize that our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.").

44. *Id.*

45. See *Bellotti v. Baird*, 443 U.S. 622, 625–26 (1979) (plurality opinion); *Bellotti v. Baird*, 428 U.S. 132, 135–36 (1976).

46. *Bellotti*, 443 U.S. at 643–44.

47. See *Hodgson v. Minnesota*, 497 U.S. 417, 427 (1990). Although *Bellotti* was a plurality opinion, it has been treated by the Supreme Court and lower courts as delineating the relevant constitutional rule. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (citing *Bellotti*, 443 U.S. 622).

48. *Bellotti*, 443 U.S. at 627. In addition, the district court had considered whether the parents had "independent rights" in the minor's abortion decision that had to be protected by the court. *Baird v. Bellotti*, 393 F. Supp. 847, 856 (D. Mass. 1975), *vacated*, 428 U.S. at 134. On appeal, the Supreme Court noted this argument but declined to analyze it, speaking primarily of the parents' "role" rather than of their rights. *Bellotti*, 443 U.S. at 627, 637–39.

The Supreme Court has also recognized minors' right to make decisions affecting their own bodies with respect to access to contraception. In *Carey v. Population Services International*,⁴⁹ decided after *Danforth* and during the *Bellotti* litigation, the Supreme Court struck down by a 7–2 vote a state law prohibiting, among other things, the distribution of contraceptives to anyone under the age of sixteen.⁵⁰ The right recognized in *Carey* is strikingly nebulous, however. Although a four-Justice plurality in *Carey* rested its decision on a robust understanding of minors' constitutional privacy rights as virtually equivalent to adults', the concurring opinions, which provided the votes the majority needed to strike down the prohibition, were considerably more circumspect. Justice Brennan's plurality opinion, joined by Justices Stewart, Marshall, and Blackmun, declared that the state may not, consistent with the Constitution, "burden the right [of minors] to decide whether to bear children" without a medical basis for the regulation, nor "delegate[] the State's authority to disapprove of minors' sexual behavior to physicians, who may exercise it arbitrarily."⁵¹ Justices White and Stevens both concurred in the result primarily on the ground that there was a poor means–end fit between the state's goal of deterring sexual activity and its ban on contraceptives for minors.⁵² At the same time, both emphasized that no right of minors to engage in sexual activity could be derived from the Court's holding.⁵³ Justice Powell, who also concurred, was merely concerned about the infringement on the rights of married minors under the age of sixteen and on the rights of parents who wished to provide contraceptives to their children.⁵⁴

As this analysis of *Carey* suggests, a majority of the Court has not clearly held that minors have a right to access contraception when their parents disapprove. Indeed, that issue was not raised by the New York law at issue in *Carey*, which forbade those under sixteen from accessing contraception with or without parental consent.⁵⁵

49. *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977).

50. *Id.* at 694.

51. *Id.* at 697–99.

52. *Id.* at 702–03 (White, J., concurring); *id.* at 714–16 (Stevens, J., concurring) (using the amusingly apt metaphor that "[i]t is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets").

53. *Id.* at 702 (White, J., concurring); *id.* at 713 (Stevens, J., concurring).

54. *Id.* at 707–10 (Powell, J., concurring).

55. *Id.* at 681. Nonetheless, twenty-one states explicitly permit all minors to consent on their own to contraceptive services. GUTTMACHER INST., STATE POLICIES IN BRIEF: MINORS'

Nonetheless, both courts and commentators have inferred such a right, which may seem to be a logical corollary of the abortion right.⁵⁶

2. *Beyond Minors' Reproductive Rights?* In most other areas where minors' bodily integrity right may be implicated, regulation occurs through several common-law and statutory doctrines that rarely refer to one another or to the constitutional privacy right. As in the case of abortion and contraception, parents may—with the support of state law—authorize or withhold authority for various medical and nonmedical interventions for their minor children.⁵⁷ Corporal punishment, medical-treatment decisions, and nontherapeutic interventions like tattooing and piercing are generally regulated by state law, which presumes parents have broad decisionmaking authority in most cases.⁵⁸ Strikingly, constitutional claims are rarely raised or addressed in cases challenging the appropriateness of these bodily intrusions. Rather, common-law standards govern, and little or no mention is made of substantive due process or the right to bodily integrity.

ACCESS TO CONTRACEPTIVE SERVICES (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf. In some states, minors are allowed to access contraceptives for health reasons, and in several others, only married minors can access contraception without parental consent. *Id.* The states allowing minors to access contraception for health reasons are Florida, Illinois, and Maine. FLA. STAT. § 381.0051 (2012); 325 ILL. COMP. STAT. 10/1 § 1 (2012); ME. REV. STAT. tit. 22, § 1908 (2004). Those states also allow minors who are married or are themselves parents to consent on their own to contraception. *Id.* A few states have no explicit law on the topic. GUTTMACHER INST., *supra*.

56. See, e.g., *Arneith v. Gross*, 699 F. Supp. 450, 452 (S.D.N.Y. 1988); *Planned Parenthood Ass'n of Utah v. Matheson*, 582 F. Supp. 1001, 1007–09 (D. Utah 1983); Brenda D. Hofman, Note, *The Squeal Rule: Statutory Resolution and Constitutional Implications—Burdening the Minor's Right of Privacy*, 1984 DUKE L.J. 1325, 1341–42.

57. See, e.g., MISS. CODE ANN. § 41-41-3 (2013). Several statutes delegate authority to parents by negative implication, stating simply that minors are incompetent to provide consent for their own care in most circumstances. MD. CODE ANN., HEALTH-GEN. § 20-102 (LexisNexis 2009 & Supp. 2014); 35 PA. CONS. STAT. ANN. § 10101 (West 2012) (specifying that an individual must be over eighteen to give consent to medical treatment).

58. See, e.g., ARIZ. REV. STAT. ANN. § 13-3721 (2010); N.D. CENT. CODE § 12.1-31 (2012 & Supp. 2013). Other than tattooing and piercing, most elective, nontherapeutic interventions are not specifically mentioned in state statutory law. The widespread assumption of most commentators has been that parents have wide discretion to consent or withhold consent to such interventions, as with similar medical interventions. See, e.g., JULIE A. GREENBERG, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS 32 (2012); Susan Gilbert, *Children's Bodies, Parents' Choices*, 39 HASTINGS CENTER REP. 14, 14 (2009); Alicia Ouellette, *Body Modification and Adolescent Decision Making: Proceed with Caution*, 15 J. HEALTH CARE L. & POL'Y 129, 136 (2012).

For example, all fifty states have statutes purporting to distinguish permissible corporal punishment from abuse. Nearly all of those statutes use amorphous terms such as “reasonable,” “appropriate,” and “moderate” to characterize legitimate physical punishment and to distinguish it from abuse.⁵⁹ These vague standards are then given meaning through the common law. Thus, children’s constitutional rights are also almost entirely ignored in the family-discipline context, despite the fact that they crop up quite often in the institutional context. Within the family, unlike in the institutional context, the general understanding seems to be that children are without constitutional rights to avoid physical harm, except those conferred by statute or common law. Indeed, the Supreme Court famously held in *DeShaney v. Winnebago County Department of Social Services*⁶⁰ that the Due Process Clause did not provide a cause of action to a child who was severely beaten by his father, even though social workers had been alerted to past abuse of the child and declined to remove him from the home.⁶¹

In the medical-treatment context outside abortion and contraception, minors have long been subject to a common-law presumption that they are incapable of consenting on their own to healthcare and that parents are capable of providing informed consent on their behalf.⁶² There are a few circumstances in which those presumptions do not apply, but these circumstances arise from common-law and statutory entitlements, and do not appear to have

59. See, e.g., ALA. CODE § 13A-3-24 (LexisNexis 2005) (“reasonable and appropriate physical force”); IND. CODE ANN. § 31-34-1-15 (LexisNexis 2013) (“reasonable corporal punishment”); S.D. CODIFIED LAWS § 22-18-5 (2006) (“force used is reasonable in manner and moderate in degree”). Statutes may privilege corporal punishment against criminal prosecution, civil actions, or both. See, e.g., GA. CODE ANN. § 16-3-20 (2011) (immunity from criminal punishment); UTAH CODE ANN. § 53A-11-804 (LexisNexis 2013) (“Corporal punishment which would, but for this part, be considered to be reasonable discipline of a minor . . . may not be used as a basis for any civil or criminal action.”).

60. *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

61. *Id.* at 191. However, the *parents’* constitutional rights may be involved in courts’ findings that parents have the right to punish their children within reasonable limits, to make medical decisions for them, and so forth. See, e.g., *Sweaney v. Ada Cnty.*, 119 F.3d 1385, 1389–92 (9th Cir. 1997) (considering the possibility that parents have a constitutional right to engage in reasonable corporal punishment, but ultimately rejecting the plaintiff’s argument that the right is clearly established).

62. Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 15 HASTINGS L.J. 1265, 1266–67 (2000).

constitutional foundations.⁶³ For example, a number of states have adopted “mature-minor” laws, which allow minors deemed sufficiently mature to consent to medical treatment without parental involvement.⁶⁴ Much like those minors seeking a judicial bypass, mature minors in the healthcare context must be able to “appreciat[e] the nature, extent and probable consequences of the conduct consented to” and to “weigh the risks and benefits.”⁶⁵ Likewise, all states have adopted statutes allowing at least some minors to consent on their own to some forms of healthcare—most commonly, treatment for sexually transmitted diseases, outpatient substance-abuse and mental-health counseling, prenatal care, and treatment for sexual assault.⁶⁶ Most likely, these exceptions reflect the fact that legislatures are concerned about the potential deterrent effects on the minor if parental consent were required, as well as the public-health implications (such as the spread of sexually transmitted diseases) that might result.⁶⁷

Nonetheless, in the vast majority of cases, parents are empowered to consent to medical care on behalf of their children, limited only in extreme situations by neglect or abuse laws that may prevent them from denying necessary care or perhaps from imposing unnecessary treatments.⁶⁸ It is thus fair to say that parents routinely make decisions about medical care for their children that are

63. See, e.g., TENN. CODE ANN. § 68-34-107 (2013); *Cardwell v. Bechtol*, 724 S.W.2d 739, 745 (Tenn. 1987). Elsewhere, I have questioned whether it is truly meaningful to speak of minors’ incapacity to consent and parents’ capacity to consent for them as constituting default rules or background presumptions against which states must legislate. B. Jessie Hill, *Medical Decision-Making by and on Behalf of Adolescents: Reconsidering First Principles*, 15 J. HEALTH CARE L. & POL’Y 37, 38 (2012). Nonetheless, I concede that they are accurate premises in the vast majority of cases. *Id.* at 50.

64. See, e.g., ALA. CODE § 22-8-4 (LexisNexis 2006); 750 ILL. COMP. STAT. 30/3-2 (2012); W. VA. CODE ANN. § 16-30-3 (LexisNexis 2011).

65. *Cardwell*, 724 S.W.2d at 746 (quoting RESTATEMENT (SECOND) OF TORTS § 892A cmt. b (1977), and W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 18, 115 (5th ed. 1984)). Relatedly, minors may be considered “emancipated” for the purposes of medical and other decisionmaking if they exhibit indicia of independence, such as living on their own, serving in the military, or marrying. See FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 5.2.3 (3d ed. Supp. 2005).

66. HEATHER BOONSTRA & ELIZABETH NASH, MINORS AND THE RIGHT TO CONSENT TO HEALTH CARE, GUTTMACHER REP. ON PUB. POL’Y 4 (2000).

67. See, e.g., Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 323–24.

68. Alicia Ouellette, *Shaping Parental Authority over Children’s Bodies*, 85 IND. L.J. 955, 966–67 (2010).

medically indicated but not, strictly speaking, medically necessary or life-saving.⁶⁹ Parents can choose among reasonable medical options with respect to antibiotics, tonsillectomies, and other such interventions for relatively minor ailments.⁷⁰

Activities such as body piercing, tattooing, cosmetic surgeries, circumcision, and other nontherapeutic interventions are similarly regulated by state law, but there is a dearth of case law indicating the constitutional limits of parental authority in this domain.⁷¹ The underlying assumption appears to be that parents have the legal right not only to choose among reasonable therapeutic alternatives, but also to authorize some nontherapeutic interventions. Thus, for example, commentators have noted the increasing prevalence of plastic surgeries performed on teens, presumably authorized by their parents in all cases.⁷² In most states, tattooing and piercing of minors are permitted when the parent agrees, but tattooing of minors is prohibited entirely in some states regardless of consent.⁷³ A small number of states explicitly exclude ear piercing from their general body-piercing prohibitions, and two states specify that it is acceptable for a parent to permit tattooing of a minor only to cover up an existing tattoo.⁷⁴ Texas law specifies that the consenting parent or guardian must “consider[] [it to] be in the best interest of the [minor] to cover” a particular tattoo.⁷⁵

69. *Id.*

70. *Id.*

71. See, e.g., Alicia Ouellette, *Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child*, 39 HASTINGS CENTER REP. 15, 16 (2009). In the 2000s, there have been widely publicized attempts to outlaw circumcision. See, e.g., Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES, June 5, 2011, at A20.

72. Gilbert, *supra* note 58, at 14 (stating that 205,119 teenagers under eighteen had cosmetic procedures in 2007 and observing that ultimately, the decision depended on parents’ consent or financial support); Ouellette, *supra* note 58, at 129–30 (noting that almost 219,000 cosmetic surgeries were performed on teens in 2010, along with approximately 12,000 Botox injections); *id.* at 136 (noting that parents generally have decisionmaking authority regarding cosmetic body modification in the medical context).

73. NAT’L CONFERENCE OF STATE LEGISLATURES, TATTOOS AND BODY PIERCINGS FOR MINORS (2013), available at <http://www.ncsl.org/issues-research/health/tattooing-and-body-piercing.aspx>.

74. See *id.* (Tennessee and Texas). These provisions appear to be motivated largely by a concern for minors who bear gang-related tattoos. Cf. *In re Antonio C.*, 100 Cal. Rptr. 2d 218, 221–22 (Ct. App. 2000) (imposing a probation requirement on a juvenile of no further tattooing).

75. TEX. HEALTH & SAFETY CODE ANN. § 146.012(a-1)(1)(D) (West 2010).

An exception to the model of broad parental discretion exists only in those cases in which there is a strong likelihood of the parent confronting a conflict of interests—for example, when a parent seeks to permit a child to donate an organ or tissue to a sibling. In such cases, common-law rules appear to dictate that a court order is required for the sibling organ donation, and that the donation may proceed only if it is in the best interests of the donating minor.⁷⁶ Again, however, the standard adopted is explicitly grounded in the common law, without reference to constitutional rights.⁷⁷

Scholarly commentators have sometimes suggested that children's constitutional right to bodily integrity may be violated when parents authorize, and physicians perform, invasive surgeries on children that have little or no therapeutic benefit for the child.⁷⁸ For example, a controversial surgery sometimes performed on infants and toddlers is “normalization” surgery for children born with ambiguous genitalia—neither clearly male nor clearly female.⁷⁹ This procedure, which often has no medical benefit, is permanent, highly invasive, and usually painful.⁸⁰ Moreover, it often has long-term negative

76. *Curran v. Bosze*, 566 N.E.2d 1319, 1326 (Ill. 1990); Rhonda Gay Hartman, *Gault's Legacy: Dignity, Due Process, and Adolescents' Liberty Interests in Living Donation*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67, 76 (2008); Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 CONN. L. REV. 211, 220 (1991). Parents must also seek a court order for sterilization of a mentally incompetent child, whether minor or adult. Koll, *supra* note 7, at 246.

77. *But see* Hartman, *supra* note 76, at 86 (suggesting that medical decisionmaking by minors implicates constitutional due-process concerns).

78. Koll, *supra* note 7, at 254–61; Tamar-Mattis, *supra* note 7, at 91–93. Some cases have also recognized minor's “liberty interest” in not being confined for medical treatment without due process. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 597 (1979); *In re F.C. III*, 2 A.3d 1201, 1214 (Pa. 2010).

79. For an overview of medical treatment of intersex children, see generally GREENBERG, *supra* note 58; KATRINA KARKAZIS, *FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE* (2008).

80. *See, e.g.,* Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices”*, 40 HARV. C.R.-C.L. L. REV. 71, 105–14 (2005) (detailing the harmful physical and psychological effects of normalization surgeries); Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma . . . Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J.L. & MED. 625, 631–35 (2007). Though once widely accepted, normalization surgery has garnered significant opposition and advocates have worked to change the standard of care for infants with disorders of sexual development. GREENBERG, *supra* note 58, at 24–25. Nonetheless, the general assumption, in the absence of any relevant case law, appears to be that it is within parents' discretion to choose surgery, even when not medically necessary. For example, the American Academy of Pediatrics consensus statement notes that parents “now seem to be *less inclined to choose* surgery for” certain less severe intersex conditions, implying that they nonetheless have the authority to do so. Peter A. Lee, Christopher P. Houk, S. Faisal Ahmed &

consequences for the affected individual.⁸¹ Legal scholars have argued that allowing such surgeries violates the infant's right to bodily integrity.⁸² And a lawsuit brought in 2013 on behalf of a child who was subjected to the surgery while in foster care alleged both substantive and procedural due-process violations of the child's bodily integrity right.⁸³ This, however, remains one of the rare cases in which constitutional—rather than common-law and statutory—standards were invoked.

Surprisingly, with the exception of reproductive healthcare, constitutional rights and entitlements have not permeated the law of therapeutic and nontherapeutic medical interventions on minors to any significant extent. If children possess a constitutional right to bodily integrity, it should be implicated in all of these disparate contexts—not limited to reproductive healthcare. Yet, cases involving corporal punishment seldom, if ever, make reference to minors' rights in the healthcare context; similarly, cases dealing with minors' rights to make autonomous health-care decisions rarely look to the abortion and contraception precedents.⁸⁴ Nor do cases dealing with

Ieuan A. Hughes, *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488, e489 (2006), available at <http://pediatrics.aappublications.org/content/118/2/e488.full.pdf+html> (emphasis added); see also GREENBERG, *supra* note 58, at 32 (“Currently, parents can consent to these surgeries and they are not subject to an external oversight or approval.”).

81. Gurney, *supra* note 80, at 631–35.

82. See, e.g., Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 43–50 (2005); Tamar-Mattis, *supra* note 7, at 90–93; Ryan L. White, Note, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 FORDHAM INT'L L.J. 777, 821 (2014). The *Cardozo Journal of Law and Gender* has published a symposium on intersex and the law. Symposium, *Intersex Education, Advocacy, & The Law*, 12 CARDOZO J.L. & GENDER 1 (2005).

83. Complaint at 4, *M.C. v. Aaronson*, No. 2:13-cv-01303-DCN (D.S.C. May 14, 2013). The district court denied the defendants' motions to dismiss on grounds of qualified immunity, but the Fourth Circuit Court of Appeals reversed on January 26, 2015. *M.C. ex rel. Crawford v. Amrhein*, No. 13-2178, 2015 WL 310523, at *2, *5 (4th Cir. Jan. 26, 2015). Without deciding whether the surgery violated the infant's constitutional right to bodily integrity, the Fourth Circuit held that the law on this issue was not clearly established at the time the surgery took place, in 2006. *Id.* at *4. The defendants were therefore entitled to qualified immunity. *Id.*

84. *But see In re E.G.*, 549 N.E.2d 322, 326 (Ill. 1989) (citing Supreme Court precedent regarding minors' reproductive rights, in dicta, to show “that no ‘bright line’ age restriction of 18 is tenable in restricting the rights of mature minors, whether the rights be based on constitutional or other grounds”); see also Teitelbaum & Ellis, *supra* note 7 (examining minors' ability to assert liberty rights, against the wishes of their parents, in a variety of contexts).

circumcision address minors' right to bodily integrity, though parents' constitutional rights are sometimes invoked.⁸⁵

Although it may be defensible to view the minor abortion cases as simply *sui generis*,⁸⁶ it is not entirely clear how or why such doctrinal isolation can be justified. One might argue that pregnant minors are in a unique situation in that they are facing a decision with profound long-term effects on the minor's future—a decision that cannot, moreover, be delayed until the minor reaches maturity. However, many minors—such as those suffering from terminal cancer, drug addiction, or sexually transmitted diseases—are virtually indistinguishable from pregnant minors in terms of the gravity of their situations and the need for immediate treatment. Moreover, as the joint opinion in *Planned Parenthood v. Casey*⁸⁷ emphasized: “*Roe* . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”⁸⁸ This language suggests that the constitutional bodily integrity right is not limited to the right to choose abortion; courts' failure to acknowledge the Constitution's application beyond this domain is thus puzzling.

Additionally, the common-law and constitutional frameworks regarding medical treatment use overlapping standards such as maturity and best interests. It is therefore particularly surprising that the constitutional bodily integrity right recognized in the minor abortion cases has not permeated the medical decisionmaking context. As a result, unresolved conflicts remain. For example, it is uncertain how the mature-minor doctrine fits with statutory provisions requiring parental consent for minors seeking abortions. On one hand, a statutory requirement of parental consent would seem to constitute an explicit derogation of the common-law doctrine, rendering the mature-minor rule a nullity in the abortion context. On the other hand, the Supreme Court's abortion jurisprudence reincorporates that standard in holding that mature minors have a

85. *Cf. Oliner v. Lenox Hill Hosp.*, 431 N.Y.S.2d 271, 272 (Sup. Ct. 1980) (holding that a religious circumcision ritual should be performed on a newborn at the parent's request to respect the parent's religious rights).

86. *See, e.g., Emily Buss, What Does Frieda Yoder Believe?*, 2 U. PA. J. CONST. L. 53, 61 (1999).

87. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

88. *Id.* at 857.

constitutional right to seek abortions without parental consent—obviously (if not explicitly) referencing the common-law doctrine.⁸⁹

Thus, the right of children to bodily integrity is only partially constitutionalized. It has been recognized in some contexts, such as abuse by state actors and access to abortion. In other contexts—such as corporal punishment by parents, medical treatment, and nontherapeutic interventions—it has largely been ignored, even though the right would appear to be equally relevant. The reason for this disconnect may appear obvious at first glance: when a parent, unlike a public-school teacher or public detention-facility officer, denies a child’s right to bodily integrity, there is no state action, and therefore constitutional protections are not implicated. The Constitution thus protects children in public institutions but not in the home. Yet, as explained below, this apparent state-action distinction is deceptive and ultimately unsatisfying. As this Article argues, there is in fact no acceptable logical or doctrinal reason for this disconnect.⁹⁰

C. *The Nature and Scope of Minors’ Bodily Integrity Right*

Assuming minors have a constitutional right to bodily integrity—whether within the family or outside it—what does that right look like? And can it be universalized such that it applies equally to infants, who lack decisional capacity entirely, and to teenagers who are nearly adults? As noted above, the doctrine regulating children’s bodies falls largely within the domain of family law and has been only partly constitutionalized. At the same time, it appears that the Supreme Court’s constitutional bodily integrity cases look to common-law standards to delineate the contours of the constitutional right. In the course of recognizing minors’ constitutional right to choose abortion without parental involvement, the Supreme Court invokes the mature-minor doctrine, as well as the best-interests-of-the-child standard that is familiar to family law.⁹¹ These twin concerns

89. In one case, the Tennessee Court of Appeals held that a clinic was not liable for failing to comply with the state’s parental-notice law, in part because the minor was found to be a “mature minor.” The court also found, however, that the parental-notice law was unconstitutional. *McGlothlin v. Bristol Obstetrics, Gynecology & Family Planning, Inc.*, No. 03A01-9706-CV-00236, 1998 WL 65459, at *3 (Tenn. Ct. App. Feb. 11, 1998) (“Further as to the issue of plaintiff’s capacity to consent which is predicated upon T.C.A. 39-15-202, the Court finds that the record fails to rebut the presumption of capacity by the plaintiff to sign the consent to abortion document as a mature minor.”).

90. See *infra* Part III.

91. See *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979) (plurality opinion) (“A pregnant minor is entitled to such a proceeding to show either: (1) that she is mature enough and well

of the minor abortion cases—maturity and best interests—map neatly onto the two key aspects of the bodily integrity right as commonly understood: autonomy and bodily security. Especially in the case of older minors, who may be seeking control over their own medical care or access to nonmedical interventions, their maturity primarily entails a right to autonomy in making decisions about their own bodies, rather than a right to be secure in their person. For younger children, by contrast, the bodily integrity right primarily takes the form of a right *not* to be subjected to physical abuse, unnecessary medical treatment, and severe corporal punishment, rather than a right to autonomy *per se*. The right to this form of bodily security is essentially a right of children to have their best interests protected. These two forms of the bodily integrity right are arguably relevant to all minors, but the bodily security dimension is likely more important for younger minors whereas the autonomy right is often more important for older minors.

The cases that have already recognized a constitutional bodily integrity right for minors speak of the right as one against “arbitrary” or “unjustified” intrusions on the minor’s bodily security.⁹² In one case involving an allegation of excessive corporal punishment by a public-school teacher, the Fourth Circuit Court of Appeals explained that the substantive due-process right to bodily integrity protected minors against “violations of personal rights of privacy and bodily security” that are “severe, . . . disproportionate to the need presented, and . . . inspired by malice or sadism.”⁹³ Key to these understandings is a notion of protecting children from harm that is more than *de minimis* in quality, and that is not of such a nature as to be potentially beneficial to them.⁹⁴ For example, a medically necessary surgery is a

enough to make her abortion decision . . . independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.” (footnote omitted)); LESLIE J. HARRIS, LEE E. TEITELBAUM & CAROL A. WEISBROD, *FAMILY LAW* 589 (3d ed. 1996).

92. See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 673, 678 (1977) (“Among the historic liberties so protected was a right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.”).

93. *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

94. Cf. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451–52 (5th Cir. 1994) (“It is incontrovertible that bodily integrity [protected by the Fourteenth Amendment] is necessarily violated when a state actor sexually abuses a schoolchild. . . . [T]here is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it.” (footnote omitted)).

serious intrusion that may result in serious pain, but it is presumably not a violation of a child's right to bodily integrity if it relieves or protects the child from more serious illness or harm.

Indeed, bodily integrity in the sense of the basic ability to protect one's body from harm and unwanted intrusion is an essential aspect of the constitutional privacy doctrine in general, not simply as applied to children. Emphasizing the need for pure physical security, one scholar has similarly characterized the privacy right to bodily integrity as "a presumptive right to simple physical existence in and of itself."⁹⁵

Yet, autonomy is also an important aspect of the traditional understanding of the right. In the context of privacy doctrine as applied to adults, autonomy has long played a central role. In *Planned Parenthood v. Casey*, for example, the joint opinion explained that denying a woman the right to choose abortion "includes 'the interest in independence in making certain kinds of important decisions.'"⁹⁶ Speaking of the right to privacy in general, Professor Tom Gerety contends that the essence of privacy is "control over who, if anyone, will share in the intimacies of our bodies," which in his view is fundamental to human flourishing.⁹⁷ Gerety continues: "All of this comes in the end to a control over the most basic vehicle of selfhood: the body. For control over the body is the first form of autonomy and the necessary condition, for those who are not saints or stoics, of all later forms."⁹⁸ Indeed, this description helpfully connects the concepts of bodily integrity, privacy, and autonomy.⁹⁹

The minor abortion cases recognize two separate but related rights, providing a model for a more general right of minors to bodily integrity. The first is a right to autonomy in making certain fundamental decisions, which is represented by the exception allowing mature minors to consent on their own. For example, a

95. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1459 (1992).

96. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (quoting *Carey v. Population Servs. Int'l*, 431 U.S. 678, 684–85 (1977)); see also *id.* at 857 ("Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity . . ."). Indeed, it is interesting that the Court cites *Carey* and several other cases involving minors in this portion of its opinion. Professor Khiara Bridges and others have noted the evolution of the Court's language in substantive due-process cases from a rhetoric centered on "privacy" to one centered on "liberty," a move that has de-emphasized the importance of the family as compared to the individual. See generally Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 137–45 (2011).

97. Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977).

98. *Id.*

99. Thomas, *supra* note 95, at 1459.

concern for the autonomy of older, mature minors clarifies the Court's holding in *Bellotti v. Baird* that courts could not decide on minors' access to abortion based solely on their best interests, but rather that minors must be allowed to consent to an abortion if they are sufficiently mature to do so.¹⁰⁰ The second is the right to protection against bodily harm, which is roughly represented by the best-interests prong allowing judges to grant minors access to abortion without parental consent if it would be in their best interests. Those twin aspects of minors' bodily integrity rights assist in conceptualizing a bodily integrity right that can apply across factual contexts, both to older minors as well as to younger ones. For younger minors, it is the pure best-interests, or bodily protection, aspect of bodily integrity that is likely to be most relevant—for example in the form of protection from abuse and from unwarranted denial of medical care. For older minors, autonomy often comes into play, especially in the context of reproductive health and other forms of healthcare, as well as in choosing forms of bodily expression such as tattoos and piercings.¹⁰¹ It thus appears that the minor abortion cases can provide a model for a more universally recognized constitutional right of minors to bodily integrity.

II. CONFLICTING VIEWS OF THE FAMILY AND THE ROLE OF PARENTAL RIGHTS

Thus far, this Article has discussed the notion of children's constitutional right to bodily integrity as a freestanding right, whether against the state or against parents. However, any discussion of this right would be incomplete without an acknowledgement of the

100. See *Bellotti v. Baird*, 443 U.S. 622, 650 (1979) (plurality opinion) (holding that the state “cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made”); see also *id.* at 642 (noting the severe consequences of “denying a minor the right to make an important decision” such as the abortion decision). In addition, a large and growing literature recognizes the developing decisional capacity of adolescents and older minors, and calls on the law to grant minors autonomy rights that accord with their capacity. See, e.g., Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL'Y 251, 283–91 (2005); cf. Todres, *supra* note 11, at 1146–64 (urging that the law should take into account cultural understandings of and approaches to maturity).

101. Cf. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 77–78 (2006) (questioning whether the state should be able to exercise its “usual parental role toward children” when body modification is concerned, due to the expressive and identity interests involved, and analogizing body-modification cases to minor abortion cases).

profound importance of parental rights with respect to the very same set of issues. Though the contours of the “family-privacy” or “parental-rights” doctrine are notoriously vague,¹⁰² there is no question that parental rights include some measure of parental control over children’s bodies. To the extent that such a right exists, moreover, it seems inevitably to increase parents’ authority and limit children’s authority with respect to children’s bodies.¹⁰³ For example, the right is widely understood to ground parental discretion exercised in the context of body modification, medical decisionmaking, and corporal punishment.¹⁰⁴

The origins of the constitutional doctrine of family privacy may be traced to two *Lochner*-era cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Despite *Meyer*’s and *Pierce*’s questionable origins in a constitutional doctrine guaranteeing not only the “liberty of parents and guardians to direct the upbringing and education of children under their control,”¹⁰⁵ but also the freedom to contract and the right to pursue an occupation,¹⁰⁶ they have demonstrated considerable staying power. As recently as 2000, an eight-Justice majority of the Supreme Court affirmed the fundamental nature of parents’ rights to the custody and control of their children.¹⁰⁷

102. See, e.g., Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 1976 BYU L. REV. 605, 628 (“What the parental interest may mean—especially where it is pitted against the interests of children—remains to be developed more fully.”); David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 551 (2008) (noting the current uncertainty regarding the “boundaries and scope” of family privacy).

103. See generally Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 986–87 (1993) (“The problem may be stated in simple terms: any allotment of liberty to the parents necessarily diminishes the liberty of the child; conversely, any enhancement of a child’s liberty curtails that of the parents.”); Hill, *supra* note 63, at 62–63 (“It should now be clear that parents’ rights to make health care decisions for their children are fundamentally in conflict with children’s rights to bodily integrity, at least where those rights apply—for example, in the case of mature minors.”).

104. See, e.g., *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (noting that the constitutional right of parents to control their children includes the right to direct their medical care); James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189, 192–93 (2010) (noting the argument that parental rights ground parental authority to punish children for discipline).

105. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

106. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

107. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); see also David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1141 & n.85 (2001) (noting that eight Justices recognized the fundamental quality of parental rights in *Troxel v. Granville*).

Yet, the *Meyer* and *Pierce* cases also gave rise to individual constitutional privacy rights, such as the right to use contraception and abortion.¹⁰⁸ When these latter rights were applied to minors as well, an inevitable clash was created between children's constitutional rights and parents' constitutionally protected rights to family privacy and noninterference with their childrearing decisions.¹⁰⁹ Given these decisions, any right of the child to make autonomous decisions naturally reduces the parent's right to make those decisions on her behalf; any right of the child to claim the state's protection against neglect, exploitation, or harm by her parents automatically entails greater intervention into the private realm of the family than the parent would wish. Yet both kinds of rights share a pedigree, given that they originate from the same doctrinal bloodline.

In addition, the tension between parents' rights to familial privacy and children's rights to autonomy and protection arguably reflects a tension within broader philosophical approaches to the family—between liberal, individual-rights centered approaches and communitarian or “parentalist” approaches. The birth of children's constitutional rights, as distinct from those of their parents, may be loosely viewed as an outcropping or extension of the liberal view, which emphasizes the state's role in shaping future citizens and promoting liberal values, while still leaving room for parents to inculcate their own values. Familial rights, by contrast, fit more comfortably within the parentalism tradition, which embodies a traditional view, grounded in natural law, of the family as existing outside of, and largely beyond the reach of, the state. Neither tradition clearly dominates in constitutional jurisprudence.¹¹⁰

In both traditions, of course, children are understood as individuals with at least some needs and entitlements, and in both traditions, families are accorded special status, requiring some deference or presumption of noninterference from the state. Where the two traditions differ is in how they mediate the potential conflict

108. *Roe v. Wade*, 410 U.S. 113, 152–153 (1973).

109. Dailey, *supra* note 103, at 986–87.

110. Cf. Vivian Hamilton, *Principles of U.S. Family Law*, 75 *FORDHAM L. REV.* 31, 56 (2006) (noting that family-privacy law has been shaped by conflicting strands of liberal individualism and Biblical traditionalism). The liberal and parentalism traditions roughly match two predominant approaches to childhood in family law: the children's-rights approach, which reflects (and in many respects exceeds) the liberal viewpoint, and the dependency approach, which assimilates with the parentalism viewpoint. See, e.g., Susan Frelich Appleton, *Restating Childhood*, 79 *BROOK. L. REV.* 525, 540–41 (2014).

between the state's interest in according the children rights that may be exercised without parental consent and the duty owed by the state to tolerate some distinctiveness among families, which may not always conform to the state's desired value system.

This Part further explores the liberal and parentalist views of the family, as well as the ways in which each of those contrasting approaches is embodied in case law. Because neither approach dominates, the law pertaining to children's rights within the family evinces tremendous incoherence. In particular, disagreements between liberals and parentalists over the nature of the family and its relationship to the state result in disagreements over whether the state can be said to be acting, or intervening in the family, when the law delegates authority to parents over children's bodies.

A. *The Liberal View of the Family*

1. *An Overview of the Liberal View of the Family.* In evaluating the relationship between the family and the state, liberal theory tends to emphasize the importance of the family in serving the ends of the state. For example, Professor Linda McClain takes the position that families in democratic societies "are places of moral learning that may create the good person and may contribute to creating the good citizen," in part by helping children acquire the values and capacities that will enable them to participate in democratic self-government.¹¹¹ One such capacity is the capacity for autonomy, which develops as a child matures. As such, both parents and governmental institutions, such as schools, should support children's increasing claims to equality and increasing ability to make independent decisions.¹¹² Similarly, Professor Amy Gutmann argues that both parents and the state should act in a paternalistic manner toward children to ensure that they are eventually able to choose their own conception of the good life and to participate in democratic self-government.¹¹³

111. LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 67 (2006). As John Rawls explains, "the family is part of the basic structure of civil society," largely because "one of its essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next." JOHN RAWLS, *A THEORY OF JUSTICE* 398 (2d ed. 1997).

112. MCCLAIN, *supra* note 111, at 68–70.

113. Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 PHIL. & PUB. AFF. 338, 349–50 (1980); *cf.* Dailey, *supra* note 103, at 993 (describing the Supreme Court's view of "the family as facilitating the development of responsible individuals" and thus as "an instrument of the liberal state").

Liberal theorists conceive of the relationship among a child, her parents, and the state as deriving from this basic structure and function of the family. According to McClain, the role of the state vis-à-vis the family is to instill children with civic virtues and to protect children from harm, as in the case of abuse or neglect, but to abstain from forcing upon them any particular substantive vision of what constitutes a good or worthy life.¹¹⁴ To use explicitly Rawlsian terms, the state should avoid imposing the dictates of any particular “comprehensive . . . doctrine[.]”¹¹⁵ These civic virtues, which the state is justified in imposing on children, are the fundamental values that a democratic society requires its citizens to accept, such as equality and toleration for diversity.¹¹⁶ Thus, the state can and should act to mold children into good citizens, which involves protecting them to preserve their future options and capacities and allowing them to exercise some autonomy commensurate with their developing abilities.

The state’s obligation to protect children and instill civic virtues still leaves room for some measure of family privacy in the liberal vision. Because the state must refrain from imposing comprehensive doctrines—indeed, because it must avoid imposing any values on families except the most basic values fundamental to democratic self-government—a large discretionary realm remains for parents to teach children their own values and beliefs and to make decisions about their children’s best interests.¹¹⁷ As Gutmann puts it, “Some values must be imposed in any case. What is at issue here is not *whose* values but *what* values ought to be imposed upon children.”¹¹⁸ Thus, parents remain free to cultivate their values in their children, whereas the state maintains the authority to impose those values necessary to fostering future democratic citizenship and maintaining a full range of opportunities for children’s futures.¹¹⁹

Within the liberal philosophical framework, the state would have the power to protect children’s bodily integrity against parental abuse or neglect, consonant with its authority to protect individuals from

114. MCCLAIN, *supra* note 111, at 78–84.

115. *Id.* at 47; see JOHN RAWLS, POLITICAL LIBERALISM 36–39 (1993).

116. Professor Linda McClain writes of the government’s obligation to foster capacity, equality, and responsibility, MCCLAIN, *supra* note 111, at 4; Anne Dailey speaks of “family justice,” Dailey, *supra* note 103, at 1016–18.

117. See, e.g., MCCLAIN, *supra* note 111, at 47–48; Gutmann, *supra* note 113, at 350–53.

118. Gutmann, *supra* note 113, at 351.

119. Cf. BRUCE A. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE 154–59 (1980).

physical harm—physical security being a prerequisite for children’s future citizenship.¹²⁰ Beyond actions that constitute neglect, abuse, or that otherwise inhibit children’s future choices, however, it seems that in most cases the state would be required to tolerate differences in parental decisionmaking with respect to children’s bodies.¹²¹

At the same time, some liberal theorists contend that adolescents, who are in the process of developing the capacity to exercise the sort of autonomy that adult citizens may exercise, should in some cases be authorized to exercise that autonomy regardless of their parents’ wishes.¹²² This is because liberalism views consent, and therefore the capacity for rationality, as a prerequisite to and basis for individual-autonomy rights.¹²³ As Gutmann explains “adolescents must be granted some freedoms in order to help develop their capacities to exercise their freedoms as adults,” but only in ways that allow them to expand, rather than restrict, their future options.¹²⁴

This understanding of the relationship between autonomy and freedom could lead to some idiosyncratic results. It might suggest, for example, that minors ought to be permitted in some circumstances to choose abortion but not childbearing without parental consent, given that nonprocreation would keep the minor’s future options open but carrying a child to term would foreclose many future opportunities. Similarly, liberal theory might support a terminally ill minor’s right to accept but not to refuse life-prolonging medical treatment.

Moreover, the state would have a stake in judging the reasons why parents seek to make certain choices with respect to their children’s bodies because those reasons may indicate the values that are being supported and conveyed. Thus, the liberal view might accept a parent’s decision to deny a child medical care because that parent has made the informed judgment that the medical intervention is likely to cause the child significant discomfort with only a small chance of remedying the underlying condition—for example, in the

120. See, e.g., MCCLAIN, *supra* note 111, at 79–80 (mentioning the state’s *parens patriae* interest in children’s health and safety, and noting that “if a religiously motivated family practice seriously impaired a child’s development . . . , this would overcome the normal deference to parental authority and trigger a strong governmental interest in prevention, intervention, or amelioration”).

121. Cf. AMY GUTMANN, *IDENTITY IN DEMOCRACY* 69–73 (2003) (discussing parental discretion with respect to male and female circumcision).

122. See, e.g., Gutmann, *supra* note 113, at 354–55.

123. See, e.g., *id.* at 339–40.

124. *Id.* at 354–55.

case of an experimental cancer treatment. Such reasoning indicates the decision is being made with the child's best interests in mind. The liberal view might, however, reject a parent's decision to deny medical care based on a judgment that it is better for the child to die than to violate the parent's religious beliefs, because that judgment shows minimal concern for the child or her value as a citizen. Or, the liberal state may judge mild corporal punishment that is practiced to discipline a child differently from even mild physical pain inflicted on a child out of a sadistic desire to harm.¹²⁵ Relatedly, an evaluation of a minor's reason for making a particular decision—for example, seeking an abortion—would be relevant to determining whether the minor possesses sufficient capacity to exercise at least limited decisionmaking authority.

Finally, although liberalism views the state as limited in its authority to impose particular values on family life, we can infer that liberal philosophy considers the state to be the ultimate source of authority over children. The authority that parents have over their children may be seen as delegated by the state, which is in charge of determining the boundaries of its own power. This places liberal theories of the family in direct contradiction to natural-law-derived parentalism theories, which hold that parents' authority over their children is inherent, and that the state lacks authority to intervene except perhaps in cases of abuse or neglect, in which the natural family can be said to no longer exist in any meaningful sense.¹²⁶

2. *The Liberal View of the Family in Case Law.* Many cases—particularly constitutional-rights cases from the 1970s onward—appear to embody the liberal perspective.¹²⁷ Unsurprisingly, the abortion cases are the paradigm. As one would expect based on the liberal understanding of the state's role in the family, these constitutional cases show a preoccupation with the parents' reasoning process, and even sometimes an eliding of roles of parent and state. The state becomes, in some cases, a stand-in for the parent and vice versa. This result should be expected, given that liberalism views the

125. See *infra* Part II.A.2.

126. See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 887–88 (1984).

127. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 634 (1979); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 697–99 (1977); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75 (1976).

state as central and the families as acting, to a great extent, in the service of the state.

For example, in *Bellotti*, the seminal minor-rights abortion case, a woman representing a “class of Massachusetts parents having unmarried minor daughters who then were, or might become, pregnant” was permitted to intervene to defend the statute.¹²⁸ Yet, although the parents attempted to raise their own rights as parents to consent or withhold consent to their children’s decisions, the *Bellotti* Court never directly addressed those claims and instead recognized them only as an aspect of the *state’s* interest.¹²⁹

Furthermore, although Supreme Court jurisprudence gives minors a fairly wide range of autonomy with respect to the abortion decision—arguably more than they possess with respect to other important medical-treatment decisions, for example—it also demonstrates a strong preoccupation with minors’ reasoning and decisionmaking process in this context. In practice, courts hearing judicial-bypass petitions are consumed with evaluating the quality of the reasoning by the minors who come before them seeking abortions without parental consent. In any of thirty-seven states,¹³⁰ minors can avoid parental involvement in their abortion decisions only by going to court and seeking a judge’s approval through a judicial-bypass hearing. Professor Carol Sanger has examined the structure of these hearings, finding that courts often focus on the decisionmaking process of the teens who are seeking an abortion.¹³¹ Indeed, though the law is largely lacking in standards for determining whether a minor is mature enough to make the abortion decision on her own, an examination of her thought process is one obvious way to reach such a determination.¹³²

128. *Bellotti*, 443 U.S. at 627.

129. *Id.* at 638–39, 648.

130. Thirty-eight states require parental involvement in minors’ abortion decisions. Of those, twenty-six require parental consent and twelve require only parental notification. Thirty-seven states have alternate judicial-bypass procedures available. GUTTMACHER INST., STATE POLICIES IN BRIEF: PARENTAL INVOLVEMENT IN MINORS’ ABORTIONS 2 (2015), available at http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf.

131. Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 430 (2009).

132. *See id.* at 430–31. According to Professor Sanger, such hearings perform other functions as well: they are themselves punitive, shaming devices. Comparing bypass hearings to sixteenth-century French “pardon tales,” whereby those who had committed capital offenses sought the mercy of the sovereign, Sanger observes that teenagers’ bypass narratives “similarly seek to persuade by accounting for past actions” in a compelled story of remorse. *Id.* at 460, 466–67.

The Supreme Court cases also evince an unusual concern with *parental* reasoning and decisionmaking processes. Early in the *Bellotti* litigation, the Supreme Court decided to certify several questions about statutory construction to the Massachusetts Supreme Judicial Court.¹³³ In particular, the Court was concerned with whether an arbitrary third-party veto was created by the statutory phrasing, which required parental consent but provided for a judicial order bypassing the consent requirement “for good cause shown.”¹³⁴ The district court thus inquired of the Massachusetts Supreme Judicial Court what standards were to be applied in determining whether the abortion could go forward, both by the parents and by the court hearing a bypass petition.¹³⁵ In response, the Massachusetts Supreme Judicial Court asserted that both the court *and the minor’s parents* were permitted only to consider the minor’s best interests in deciding whether to allow the abortion.¹³⁶ Presumably, this meant the parents could not rely on their own religious or other ethical beliefs in withholding consent. With respect to parental decisionmaking under the statute, the court added: “There is, of course, no penalty if a parent does not apply the proper standard in deciding whether to consent to his or her child’s request for consent to an abortion. Our answer may be of assistance, however, in guiding parents’ consideration of the question”¹³⁷ The court’s caveat notwithstanding, it would be an understatement to say that it is unusual for courts to examine parental decisionmaking within intact families so closely; nonetheless, this micromanagement is arguably quite consistent with a liberal view of the family and the state’s not-insignificant role in shaping it.

This approach to parental decisionmaking is not just present in constitutional cases. In the case of *In re Marriage of Boldt*,¹³⁸ the Supreme Court of Oregon addressed the issue of who had decisionmaking authority over a twelve-year-old boy’s circumcision, when the divorced parents disagreed on the issue.¹³⁹ The court first stated, in a more parentalist vein, that the law granted “authority [to] the custodial parent to make medical decisions for his or her child,

133. *Bellotti v. Baird*, 428 U.S. 132, 134 (1976).

134. *Id.* at 134–35.

135. *Baird v. Attorney Gen.*, 360 N.E.2d 288, 292 (Mass. 1977).

136. *Id.* at 292–93.

137. *Id.* at 293.

138. *In re Marriage of Boldt*, 176 P.3d 388 (Or. 2008).

139. *Id.* at 389–91.

including decisions involving elective procedures and decisions that may involve medical risks.”¹⁴⁰ But the opinion quickly took a liberal turn. The court emphasized that, “although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States.”¹⁴¹ Thus, the parents’ reasons for choosing the procedure were scrutinized by the court and found to be appropriate. Although purporting to take a hands-off approach to parental decisionmaking in this domain, the court felt compelled to offer a liberal justification for its ruling by situating the decision as normal and socially acceptable.¹⁴²

In similar terms, the court in *Hart v. Brown*¹⁴³ focused on the reasonableness of the parents’ decision to authorize kidney transplantation from one seven-year-old twin to the other.¹⁴⁴ Articulating its standard for validating the operation, the court stated that “the natural parents would be able to substitute their consent for that of their minor children after a close, independent and objective investigation of their motivation and reasoning.”¹⁴⁵ The court ultimately found that the parents’ reasoning was “morally sound,”¹⁴⁶ based on the testimony of clergy and psychiatrists, and that the parents’ “motivation and reasoning are favorably reviewed by a community representation which includes a court of equity.”¹⁴⁷

The legality of a parent’s corporal punishment of a child also depends in part on the reasons or intent behind the act. In one case, the court showed a particular concern with the parent’s reasons for punishing the child in a particular way, even after suggesting that the

140. *Id.* at 393.

141. *Id.* at 394.

142. In addition, the court seemed uncomfortable with the prospect of forcing circumcision on an unwilling twelve-year-old: it therefore remanded for the trial court to determine whether the child truly agreed to the procedure, as the father had asserted, not because of the minor’s rights, but because opposition by the child might “affect [the] father’s ability to properly care for” him. *Id.* at 394–95.

143. *Hart v. Brown*, 289 A.2d 386 (Conn. Super. Ct. 1972).

144. *Id.* at 387.

145. *Id.* at 390.

146. *Id.*

147. *Id.* at 391.

parent's state of mind was irrelevant.¹⁴⁸ After first announcing that "we evaluate a claim of abuse by looking to the harm suffered by the child, rather than the mental state of the accused abuser, because '[t]he main goal of [the relevant law] is to protect children,'" the New Jersey appellate court then proceeded to evaluate the appropriateness of a mother's striking of her child in precisely those purportedly irrelevant terms.¹⁴⁹ Although first noting that the resulting injury was not particularly serious, the court then took into account "the reasons underlying" the mother's actions as well as the fact that she "accepted full responsibility for her actions" and "was contrite."¹⁵⁰ Thus, the case law generally supports the parent's authority to use nonexcessive force for disciplinary purposes, but not for other purposes.¹⁵¹ Indeed, one court referenced a nineteenth-century English case holding that the whipping of a two-and-one-half-year-old was excessive on the ground that "although a father might correct a child, such physical force . . . was beyond her capacity to understand."¹⁵² Presumably, the punishment could not be expected to perform its corrective or expressive function.¹⁵³

B. The Parentalist View of the Family

1. *An Overview of the Parentalist View of the Family.* The parentalist or communitarian perspective views the family as a bulwark against the standardizing force of the state, rather than as an instrument the state uses to fulfill its own ends.¹⁵⁴ Parentalism is

148. *Dep't of Children & Families v. K.A.*, 996 A.2d 1040, 1045 (N.J. Super. Ct. App. Div. 2010).

149. *Id.* at 1044 (quoting *G.S. v. Dep't of Human Servs.*, 723 A.2d 612 (N.J. 1999)).

150. *Id.* at 1045.

151. Dwyer, *supra* note 104, at 192–93. *But see* *Sweaney v. Ada Cnty.*, 119 F.3d 1385, 1391–92 (9th Cir. 1997) (holding that a mother did not have a clearly established constitutional right to hit her son with a belt without state interference as a means of discipline).

152. *In re Rodney C.*, 398 N.Y.S.2d 511, 515 (N.Y. Fam. Ct. 1977) (citing *R. v. Griffin*, [1869] 11 Cox 402).

153. The fundamental right to control the education and upbringing of one's children is often mentioned in passing, and some commentators have noted that this constitutional right may ground the law's privileging of reasonable corporal punishment. *See, e.g.*, Willis v. State, 888 N.E.2d 177, 180 (Ind. 2008); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 453–56 (2002). Within the parental corporal-punishment context, however, constitutional claims do not appear to have much traction. *Sweaney*, 119 F.3d at 1391–92 (holding that parental rights do not prevent the state from imposing criminal penalties when corporal punishment on a child is deemed excessive).

154. *See, e.g.*, Stephen L. Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 SETON HALL L. REV. 1194, 1209–10, 1222–23 (1997) (illustrating the value of

concerned with protecting the right of parents to immerse their children in their own values, even when those values conflict with the majority's.¹⁵⁵ Parentalists worry that “abandoning [youth] to their ‘rights’” is a very poor way to serve children’s interests and needs, which sound in care more than in liberation.¹⁵⁶ In these scholars’ view, parents are clearly the superior decisionmakers for their children because they love them and want what is best for them.¹⁵⁷ In contrast to liberal theorists, parentalists tend to believe that parents have some inherent rights over their children—by most accounts grounded in natural law—that extend well beyond the “right” to do what is in the children’s best interests and to shape them into well-qualified future members of the polity.¹⁵⁸

Of course, even the fiercest proponents of parental rights support exceptions to parental authority when the state’s interest is truly compelling—as in cases of abuse or neglect—but they would preserve a wide range of parental control when parents’ actions fall short of such extremes.¹⁵⁹ Where they differ from liberal theorists, then, is that parentalists would limit the state’s authority to intervene in the family to cases of abuse, neglect, and unfitness, whereas liberals would grant the state broader authority to create rules that would encourage the child’s development of basic citizenship values and exposure to many possible understandings of the good life.

Moreover, parentalists are critical of the view that minors with some capacity for autonomy can and should be permitted to make

families as potential centers of dissent and rejecting the “liberal vision” of the family as a “little citizen-making factory” that assists the state in its standardizing mission).

155. See, e.g., Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 948–50, 971, 998–99 (1996) (suggesting that, following the liberal approach, many parents will nonetheless want “to have it both ways: to use the state’s power to privilege and enhance their efforts to pass on their values to their children, while undermining the ability of parents in the minority to do the same”); Gutmann, *supra* note 113, at 351 (noting the argument that under the liberal view, the democratic state “is simply imposing *its* values upon children”).

156. Hafen, *supra* note 102, at 651 (quoting PANEL DISCUSSION REMARKS OF ALBERT SOLNIT, CHILD ADVOCACY CONFERENCE, MADISON, WISCONSIN, SEPT. 26, 1975).

157. *Id.* at 651–53; see also MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 46 (2005) (arguing that “the core of the parental rights doctrine guarantees children at least that the important decisions in their lives will be made by those who are most likely to know them best and to care the most for them”); cf. Brian Bix, *Philosophy, Morality, and Parental Authority*, 40 FAM. L.Q. 7, 17–19 (2006) (arguing that parental priority may be justified by parents’ superiority as decisionmakers for their children).

158. E.g., Hafen, *supra* note 102, at 616–17 (describing “plenary” parental authority over children derived from “natural individual rights” that “are thought to antedate the state in American political philosophy”); *id.* at 619–22.

159. GUGGENHEIM, *supra* note 157, at 36–37; Hafen, *supra* note 102, at 617.

decisions for themselves commensurate with that autonomy.¹⁶⁰ In their view, as long as a minor child is still within parental custody and control, there is no warrant for overriding parental prerogatives.¹⁶¹ Finally, whereas an evaluation of parents' and children's reasons is perfectly consonant with liberalism's understanding of the role of the state, parentalists would find such evaluation to be overly intrusive. So long as parents are fit, the state is neither competent nor authorized to evaluate the parental decisionmaking process; the state's inability to interfere in the family is virtually jurisdictional in nature.¹⁶² Thus, as applied to decisionmaking over children's bodies, it seems that any parental decision falling short of abuse or neglect could not be regulated—including practices, such as circumcision, tattooing, and piercing, that are permanent and may affect the child's future options or identity.¹⁶³ The notion of a child's right to bodily integrity, separate and apart from the parent's rights, is therefore largely inconsistent with the parentalist perspective.

2. *The Parentalist View of the Family in Case Law.* The language of cases such as *Meyer* and *Pierce* reflect a parentalist point-of-view. These cases emphasize that the Constitution supports parents' right to avoid the state's "standardiz[ing]" and indoctrinating force when it comes to children.¹⁶⁴ Indeed, one scholar has persuasively demonstrated that these cases view the child as mere property of the parents, and that the briefs in *Pierce* drew explicitly upon natural-law views of parental authority as natural and god-given.¹⁶⁵ In *Pierce*, for example, the Supreme Court sweepingly proclaimed that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize

160. See, e.g., Gutmann, *supra* note 113, at 354–55.

161. Hafen, *supra* note 102, at 648–49.

162. Cf. Bix, *supra* note 157, at 19 (arguing that, for reasons of both family privacy and institutional incompetence, "courts should not be investigating how good the reasons are" for certain parental decisions).

163. As discussed below, the definitions of abuse and neglect are themselves somewhat malleable. See *infra* notes 281–87 and accompanying text; see also Ian Hacking, *The Making and Molding of Child Abuse*, 17 CRITICAL INQUIRY 253, 253 (1991) (arguing that the general conception of child abuse has been in flux for more than thirty years); Hafen, *supra* note 102, at 617–18 (noting that "judicial perceptions of abuse and neglect have varied over time").

164. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

165. Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1102 (1992).

its children” through control over education.¹⁶⁶ Indeed, the Court continued, “[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁶⁷ For support, the Court drew upon its decision two years earlier in *Meyer*, in which it condemned as unconstitutional the Nebraska legislature’s “desire . . . to foster a homogeneous people” through a law prohibiting the teaching of foreign languages in the schools, and compared the state’s vision to the familial dystopias of Plato’s *Republic* and ancient Sparta, in which children were raised by the community rather than their own parents.¹⁶⁸

In emphasizing this concern about enforced homogeneity and “communal ownership” of children, *Meyer* and *Pierce* arguably reflect a fear of totalitarian influence by the state, against which family privacy serves as a necessary protection.¹⁶⁹ Indeed, this antitotalitarianism is also one plausible understanding of the goal and purpose of the privacy doctrine itself.¹⁷⁰ The constitutional law of privacy, according to one scholar, is concerned with preventing “a society standardized and normalized, in which lives are too substantially or too rigidly directed.”¹⁷¹ The concern would appear to be particularly great with respect to excessive intervention in the family, which is often viewed as both a refuge from society at large and as a place for the private formation of moral values and beliefs—even if those values and beliefs differ from those of society.¹⁷²

Similarly, early provisions of law apparently enacted for the protection of children—for example, laws preventing minors from entering military service without parental consent—were not understood to confer any rights upon the children themselves and were held to be waivable by the minors’ parents.¹⁷³ Even in *Prince v.*

166. *Pierce*, 268 U.S. at 535.

167. *Id.*

168. *Meyer*, 262 U.S. at 402.

169. This is the view of Professor Barbara Bennett Woodhouse. Woodhouse, *supra* note 165, at 1089–91.

170. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

171. *Id.*

172. See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 26 (1989) (describing the conventional or idealized view of the family); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504–05 (1983); Woodhouse, *supra* note 165, at 1090.

173. *Morrissey v. Perry*, 137 U.S. 157, 157 (1890).

Massachusetts,¹⁷⁴ which affirmed the power of the state to interfere with parental decisions by applying child-labor laws, the Court still endorsed the parentalist perspective in dicta. For example, the Court stated that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder,” and that there is a “private realm of family life which the state cannot enter.”¹⁷⁵ This language, which indicates the state’s powerlessness to control family life and affirms the notion of a sort of pre- or extrapolitical set of “obligations” that ground parental rights, is steeped in the parentalist mindset.

Deference to parents, rather than a concern for the interests of either the child or the state, thus drives the logic of those early parentalist cases. In light of *Meyer*, *Pierce*, and *Prince*, more modern cases, too, evince a strain of parentalism. For example, *Troxel v. Granville*—in which the Justices reaffirmed by an eight-to-one vote that family privacy is a fundamental constitutional right—is permeated with parentalist language.¹⁷⁶ In that case, the Court considered a Washington state statute that allowed any person to petition for visitation rights to a child and allowed the court to grant visitation merely on a finding that it would be in the child’s best interests.¹⁷⁷ The Supreme Court found the statute insufficiently deferential to parental rights.¹⁷⁸ Emphasizing that the statute did not require a showing of parental unfitness, the Court assumed that the state was disabled from interfering in the private family domain on a mere determination of best interests.¹⁷⁹ Moreover, the statute privileged the government’s decisionmaking over the parents’:

[T]he Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent’s estimation of the child’s best interests, the judge’s view

174. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

175. *Id.* at 166.

176. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (plurality opinion) (noting the “fundamental right of parents to make decisions concerning the care, custody, and control of their children”); *id.* at 66 (discussing “broad parental authority” (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979))); *id.* at 68–69 (“[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

177. *Id.* at 60.

178. *Id.* at 67.

179. *Id.* at 68–69.

necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests.¹⁸⁰

This Court's distress over the state court's readiness to intervene stands in stark contrast to the holdings in *Bellotti* and other cases in which the state courts closely scrutinize parental decisionmaking despite the parents' unquestioned fitness.¹⁸¹

Some state court cases have also assumed the parentalist viewpoint. For example, in *Oliner v. Lenox Hill Hospital*,¹⁸² a New York court found that a couple had the right, as parents, to have their newborn son circumcised by a religious practitioner called a mohel, rather than by a physician.¹⁸³ The court even appeared to treat the parents as the patients, rather than the child, holding that to deny the circumcision would violate a state law protecting "patient[s]" civil and religious liberties.¹⁸⁴ In a similar vein, the Delaware Supreme Court held that parents could not be required to allow their three-year-old child to undergo chemotherapy, which had a 40 percent chance of success in his case.¹⁸⁵ Although the court acknowledged the child's interests, it also emphasized the "primacy of the familial unit" and the "[p]arental authority to make fundamental decisions for minor children," in ultimately upholding the parents' right to deny treatment.¹⁸⁶

Finally, many commentators consider *Parham v. J.R.*¹⁸⁷ to be a profoundly parentalist case.¹⁸⁸ Decided the same year as *Bellotti*,

180. *Id.* at 67.

181. *Hart v. Brown*, 289 A.2d 386, 390–91 (Conn. Super. Ct. 1972); *Baird v. Attorney Gen.*, 360 N.E.2d 288, 292–93 (Mass. 1977); *Dep't of Children & Families v. K.A.*, 996 A.2d 1040, 1045 (N.J. Super. Ct. App. Div. 2010).

182. *Oliner v. Lenox Hill Hosp.*, 431 N.Y.S. 2d 271 (Sup. Ct. 1980).

183. *Id.* at 272.

184. *Id.* at 272 (citing N.Y. PUB. HEALTH LAW § 2803-c (McKinney 2011)).

185. *Newmark v. Williams*, 588 A.2d 1108, 1110 (Del. 1991).

186. *Id.* at 1115.

187. *Parham v. J.R.*, 442 U.S. 584 (1979).

188. Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 391–92 (1997); *But see* Ouellette, *supra* note 68, at 971 ("Although *Parham* is frequently cited as a strong authority for parental rights and as the case that reversed the trend toward protecting children's rights, it is actually a case in which the court found enough risk of error in parental judgment about what is in a child's best interests that it

Parham dealt with the liberty interest of children whose parents wished to commit them to mental hospitals, often indefinitely.¹⁸⁹ “[A]bsent a finding of neglect or abuse,” the Court held, the parents’ determination of the child’s best interests should normally be respected, and they should “retain a substantial, if not the dominant, role in the decision.”¹⁹⁰ The parents’ decision would be subject to review by an independent third party, but not necessarily by a state agent—a staff physician’s approval would suffice.¹⁹¹ Yet, it is less recognized that *Parham* contains elements of the liberal perspective as well. The Court’s recognition of a liberty right of children that applies to counteract the traditional presumption in favor of parental decisionmaking is in fact rather unusual; few other medical decisions, besides abortion, are constitutionally required to be subjected to any outside scrutiny. Indeed, the Court in *Parham* even discussed how the neutral party should make the decision, specifying that the child must be interviewed and all aspects of his background taken into account.¹⁹²

C. Summary

The parentalist and liberal perspectives coexist within constitutional privacy doctrine. The presence of these conflicting viewpoints on the nature of the family and the source of family authority has led to a notable incoherence within the case law. Indeed, this conflict may be partly responsible for the fact that children are recognized as independent rights-holders in some contexts but not others: the liberal individual-rights perspective dominates abortion jurisprudence, which is of relatively recent vintage, whereas more traditional notions hold sway with respect to corporal punishment and medical decisionmaking.¹⁹³

Another consequence of these conflicting perspectives, discussed below, is that state action is unusually difficult to identify in cases involving children’s right to bodily integrity within the family. Whether one perceives that the state has acted or not is a function of one’s baseline understanding of the relationship between the family

held that the constitution *required* procedural protections for the child before the parental decision could be implemented.”).

189. *Parham*, 442 U.S. at 587.

190. *Id.* at 604.

191. *Id.* at 604–07.

192. *Id.* at 606–07.

193. *Cf.* Hamilton, *supra* note 110, at 33 (arguing that the conflicting traditions informing family law have caused its incoherence).

and the state. If, as liberal philosophy assumes, the state is the source of all legitimate coercive force within society and is understood as simply delegating broad discretion to parents to make decisions for their children without state approval or intervention, then the state is, in some important sense, acting whenever it delegates authority to parents to make decisions on behalf of their children, who are themselves rights-holders. However, if parental authority over children preexists the state and cannot be touched by it, as parentalists and natural-law theorists assume, then the state acts only when it removes parental authority, not when it grants it. The parentalist perspective views removing parental authority over children as an intervention within the family, whereas allowing parental control is not.

The conflicting perspectives pervade the case law pertaining to minors' bodily integrity rights, rendering the concept of state action incoherent. For example, in *Danforth*, the Supreme Court struck down a statute requiring parental consent for minors seeking abortions, stating that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."¹⁹⁴ The case thus figures state action, according to the liberal perspective, as the allocation of control to the parent over the minor's abortion decision. From the parentalist perspective, however, one could just as easily understand parental-consent laws, which permit certain minors to access abortions without parental involvement, as intervening in the family to reduce parental rights.¹⁹⁵ Similarly, if there is state action when the law requires

194. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976). It is notable that the state seemingly can and does give the veto right over the minor's decision to a judge—by means of the judicial-bypass procedure—just not to a minor's parent. Moreover, not unlike *Roe*, *Danforth* speaks as much about the physician as it does about the patient, thus suggesting that *Danforth* is in fact a case about physician's rights. Nonetheless, it remains one of the strongest statements in the law of minors' health-care autonomy rights, and the physicians'-rights rationale has not found support in later cases. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (describing the physician's constitutional rights in the abortion context as "derivative of the woman's position").

195. In *Bellotti v. Baird*, a class of parents of unmarried minors had intervened on the side of the defendant and raised an independent claim of parental rights in the *Bellotti* litigation, but that claim was never directly addressed. Instead, the Court converted the apparent constitutional claim for violation of the parents' fundamental rights—through state laws that apparently granted minors permission to seek abortions without parental consent in some circumstances—into a mere "interest" in family integrity and parental decisionmaking that the

minors to seek parental consent for abortion, then there should logically also be state action when the common law grants parents the authority to make medical-treatment decisions for their children.¹⁹⁶ However, that doctrinal field is not permeated by constitutional claims, as one would expect, if courts understood states to be acting in ways that affect minors' bodily integrity.

III. INTEGRATING THE BODY OF LAW: DOCTRINAL AND CONCEPTUAL DIFFICULTIES

There are two principal problems that plague any attempt to identify and establish the contours of a constitutional bodily integrity right for children against their parents. The first problem is a doctrinal one—identifying state action. Most interactions in which parents affect or supersede minors' choices about their bodies do not involve state actors. Yet, it turns out that the problem of identifying state action in such cases is in fact quite complex. It is difficult to say with any clarity why and when courts identify state action in cases involving intrusion on minors' bodily integrity within the family.

The second problem is a conceptual problem that plagues any attempt to create or enforce a true privacy right for minors within the family. The creation of a privacy right inevitably—and ironically—invites the state to police the scope and applicability of that right. Although this irony appears to some degree whenever an individual attempts to assert a privacy right against the state, thereby inviting the judicial arm of the state to decide on the appropriate limits of her privacy, this irony is particularly acute with respect to privacy claims within the family. Any time a child asserts a bodily integrity right against her parents, she is inviting the state to examine both her own decisionmaking *and* that of her parents. The child is therefore requesting the state to intervene in the presumptively private domain, as well as to judge the suitability of the reasons for her decision. State regulation of an individual's reasons for a decision is, however,

state was permitted, but not required, to vindicate. *Bellotti v. Baird*, 443 U.S. 622, 627, 637–41 (1979) (plurality opinion).

196. *Cf.* Teitelbaum & Ellis, *supra* note 7, at 157 n.13 (“The Court presumably concluded that the existence of a statute creating a parental veto over the abortion decision constituted state action in *Planned Parenthood of Central Mo. v. Danforth*; otherwise the due process claim could never have been reached.” (citation omitted)); *In re L.*, 632 A.2d 59, 61 (Conn. Super. Ct. 1993) (finding that a man's attempt to get a court order requiring a sixteen-year-old girl to undergo blood testing for paternity was not a case of “coercive interference with the rights of another” but rather of “a private party . . . seek[ing] to employ the coercive hand of the court”).

directly in opposition to the notion of a true privacy or decisionmaking autonomy right.

A. *Doctrinal Difficulties in Identifying State Action*

Though identifying state action is rarely a straightforward proposition,¹⁹⁷ three state-action problems particularly plague cases involving minors' right to bodily integrity. The first is the problem that, although there may be state *action*, there is often no state *actor* involved in situations in which minors' bodily integrity right is implicated, at least until the moment of enforcement. This makes the state action more difficult to identify. The second problem is that the state actions impinging on minors' bodily integrity right are often broad common-law or statutory rules that, on their face, do not appear to infringe the minors' right; this effect is apparent only in their application. And third, there is the problem of identifying a relevant baseline for determining whether state action has occurred. Because of this baseline problem, even when a state actor is identifiable, it may be difficult to discern when the state has truly "acted" at all.

1. *No State Actor*. In the various doctrinal areas discussed above, decisions are made that affect children's bodily integrity in various ways, but they generally do not involve state actors. Instead, they involve parents, children, and sometimes other private parties, such as physicians. When a state actor is in the picture—for example, a public-school teacher or a social worker—courts have no difficulty recognizing the applicability of the constitutional right to bodily integrity.¹⁹⁸ By contrast, there is no apparent state action when a child suffers at the hands of an abusive parent, or when a parent consents to or withholds healthcare for a minor child, such as a tonsillectomy or circumcision, in a private-hospital setting.¹⁹⁹

197. See, e.g., Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 283 (2013).

198. See, e.g., *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451–52 (5th Cir. 1994); *T.M. ex rel. Cox v. Carson*, 93 F. Supp. 2d 1179, 1193 (D. Wyo. 2000).

199. Cf. *Kia P. v. McIntyre*, 2 F. Supp. 2d 281, 288 (E.D.N.Y. 1998) (“[I]nsofar as its employees provided medical care to Mora during her hospitalization, [the hospital] did not engage in state action that would subject it to liability under § 1983.”), *aff'd*, 235 F.3d 749 (2d Cir. 2000); *Novak v. Cobb Cnty.-Kennestone Hosp. Auth.*, 849 F. Supp. 1559, 1578 (N.D. Ga. 1994) (finding no state action when private physicians provided a blood transfusion to a child against the parents' wishes), *aff'd*, 74 F.3d 1173 (11th Cir. 1996).

Thus, in *DeShaney v. Winnebago County Department of Social Services*,²⁰⁰ the Supreme Court held that no constitutional cause of action existed for Joshua DeShaney, a toddler who was beaten by his father to the point of profound brain damage, even though the county social-services department was aware of the situation and had failed to remove Joshua from the abusive environment.²⁰¹ The Court's opinion in *DeShaney* framed the issue as whether the Due Process Clause of the Fourteenth Amendment entitled a child in Joshua DeShaney's circumstances to the affirmative protection of the state against private violence.²⁰² One might also conceptualize the issue, however, as one of state action. In this view, DeShaney's constitutional claim failed because there was no state actor that appeared to be directly responsible for the violation of his bodily integrity.

Yet, as the liberal perspective urges, parents' custody and control of their children can fairly be said to exist by virtue of common law, statutory law, or a combination of the two. Thus, the state-action concept "does not apply comfortably to children, who are routinely subject to privately undertaken action authorized by state law in some sense."²⁰³ Indeed, even in the case of Joshua DeShaney, the abusive father was entitled to maintain custody of him because of his legal rights as a parent; if a neighbor had sought to save Joshua by kidnapping him, the legal system would surely have operated to punish the neighbor and return Joshua to his parents. Similarly, the power of parents to make medical decisions for their children, with some exceptions, is granted by statute, common law, or both, in every state.²⁰⁴ Thus, state action is involved and the minor's constitutional right to bodily integrity is potentially implicated when a parent authorizes a medically unnecessary procedure or refuses to authorize medically necessary care for a child.²⁰⁵

200. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

201. *Id.* at 191–94.

202. *Id.* at 195–97.

203. Teitelbaum and Ellis, *supra* note 7, at 157 n.13. They note that there has arguably been state action in many cases by virtue of a common-law rule granting parental authority over children; but, they continue, "it is possible that these approaches prove too much as a general theory. Would it not follow that parental consent to a tonsilectomy [*sic*] or to enrollment in a private school will equally satisfy the state action requirement, and does that result seem consistent with the constitutional policies underlying that doctrine?" *Id.* at 158 n.13.

204. *See supra* notes 61–69 and accompanying text.

205. Moreover, the state acts in all of these situations by designating who the child's parents are in the first place—that is, who has a right to custody and authority to consent to medical

The problem, however, is that state action is only apparent at the moment in which the legal entitlements of a party are enforced; once a police officer or juvenile-court judge enters the picture, the state action becomes apparent. But in many other contexts, courts routinely recognize state action and apply constitutional rules in civil suits between private parties. For example, in *New York Times Co. v. Sullivan*,²⁰⁶ the Supreme Court held that the First Amendment imposed limits on the scope of a newspaper's liability for libel in a suit between private parties.²⁰⁷ "It matters not," the Court said, "that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."²⁰⁸

The Sixth Circuit's decision in *Blackard v. Memphis Area Medical Center for Women*²⁰⁹ is a case in point. In *Blackard*, parents, along with their minor daughter, sued a Tennessee abortion clinic for performing an abortion on the minor without parental consent while the state's parental-consent law was temporarily enjoined.²¹⁰ Given that the law was ultimately found constitutional and that the defendant clinic was not protected by the preliminary injunction because it was not a party to the suit, the parents of the minor argued that the clinic should have sought parental consent before proceeding.²¹¹ Yet, the Sixth Circuit held that parental consent could not have been required because the state had not created a judicial-bypass procedure as required by *Bellotti*.²¹² Though the suit between the parties was a private suit for battery, the court held, essentially, that common-law enforcement of the battery right would have

care. The rules of parentage are themselves legally constructed, not natural or inevitable, as demonstrated by the increasing prevalence of legally sanctioned families headed by same-sex couples. See, e.g., Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 293 (2006) ("[D]efault parentage rules, like all legal classifications, reflect choices made by the rulemaker.").

206. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

207. *Id.* at 265.

208. *Id.* (citation omitted). Similarly, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court considered whether judicial enforcement of a racially restrictive covenant among private parties violated the Equal Protection Clause. *Id.* at 4. The Court ultimately recognized both state action resulting from the operation of common-law rules and also the applicability of constitutional norms to the dispute between private parties. *Id.* at 17–18.

209. *Blackard v. Memphis Area Med. Ctr. for Women*, 262 F.3d 568 (6th Cir. 2001).

210. *Id.* at 570–71.

211. *Id.* at 570–72.

212. *Id.* at 577.

constituted state action that, as applied in this case, would have violated the minor's abortion rights.²¹³

In many cases involving infringements of children's bodily integrity within the family, however, children will not have access to courts, nor will anyone other than the parents be able to raise their children's right to bodily integrity.²¹⁴ The state action is thus obscured, leading courts to view the problem as one of individuals seeking protection against intrusions by "private actors" or state "inaction," when in fact, the state action is present in state-created rules and entitlements.²¹⁵ Indeed, the rule that prevents minors from accessing courts independently is, itself, a legal rule and hence a form of state action, rather than a natural or inevitable state of affairs.

A state-court case involving a minor's reproductive rights further demonstrates this difficulty. In *Powers v. Floyd*,²¹⁶ the Texas Court of Appeals considered whether a doctor who performed an abortion on a sixteen-year-old minor in 1974 without that minor's permission, but with her mother's permission, could be held liable for failing to obtain proper informed consent.²¹⁷ The court decided that, as a matter of state statutory law, the doctor was under no duty to obtain the minor's informed consent to the procedure because state law clearly granted authority over the minor's medical treatment to the parent.²¹⁸ At the same time, although the court acknowledged that the U.S. Supreme Court had recognized a right of mature minors to make their own abortion decisions after the abortion at issue had occurred,

213. *Bellotti v. Baird*, 443 U.S. 622, 650–51 (1979) (plurality opinion).

214. *Cf. Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15–16 (2004) (noting that even a parent does not always have the authority to raise the rights of his child in a lawsuit, particularly when the parent's and child's interests conflict), *abrogated by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). An exception is those cases in which a parent seeks to withhold medically necessary care. If a physician or hospital is alerted to the denial of care—for example, because the child has been taken to a doctor but the parent refuses to proceed with a recommended course of treatment—the hospital or department of social services will sometimes invoke the court's jurisdiction, seeking an order allowing the treatment to take place over the parents' objections. *See, e.g., In re Willmann*, 493 N.E.2d 1380, 1384 (1986). In addition, courts are often called upon to adjudicate minors' rights when parents disagree, or when parents may face a conflict of interest (such as sibling organ donation). In such cases, however, the courts generally do not perceive the case as implicating constitutional bodily integrity rights, likely because of the two other state-action problems discussed below.

215. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 204 (1989) (Brennan, J., dissenting).

216. *Powers v. Floyd*, 904 S.W.2d 713 (Tex. Ct. App. 1995).

217. *Id.* at 714. The doctor performed the abortion without telling the minor that she was pregnant or that the pregnancy was being terminated. *Id.* at 714–15.

218. *Id.* at 716–18.

it noted that those Supreme Court decisions “do not attempt to impose a legal duty upon a physician.”²¹⁹ Thus, as the court noted in passing, there would be no constitutional claim because “the constitution does not provide or create a right against a private actor absent state action.”²²⁰ It is not clear, however, why the Texas common law, statutes, and judicial enforcement thereof, would not constitute sufficient state action to implicate the minor’s constitutional right in this scenario, and therefore to require application of constitutional norms. *Powers* thus demonstrates the difficulty of identifying state action when no state actor is present.

2. *Facially Neutral Rules.* A second state-action problem inherent in cases dealing with minors’ bodily integrity right is that the relevant state action is usually in the form of broad, facially neutral rules, such as those that give parents the authority to make medical decisions for minor children, rather than rules that specifically reference particular procedures that parents can authorize for minors, such as laws requiring parental consent for abortion. When a law broadly delegates authority over medical decisionmaking for children or otherwise grants parents sweeping control over their children, it makes it possible for a parent to violate a child’s bodily integrity. It does not, however, mandate such a result in every case as parents may exercise their authority in a constitutional manner in the vast majority of cases. As a result, the infringement on minors’ bodily integrity results exclusively from particular applications of those facially neutral rules. There may be nothing constitutionally objectionable, for example, in the general common-law presumption or statutory rule that parents have the authority to make medical decisions for their minor children. Indeed, parents’ constitutional rights might even require such a presumption in favor of them as above all other decision-makers.²²¹ If that parental authority is used to prevent a minor from obtaining an abortion that is in her best interests or to impose unnecessary and unwanted cosmetic surgery on the minor, however, the bodily integrity right is implicated.

219. *Id.* at 716.

220. *Id.* (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974)). The court also noted that the minor abortion cases post-dated the abortion in the case at hand. *Id.*

221. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 68 (2000) (“[T]here is a presumption that fit parents act in the best interests of their children.”).

This problem calls to mind *Shelley v. Kraemer*,²²² which involved the constitutionality of a court enforcing a private contract—specifically, a racially restrictive covenant. Although the state had clearly acted in *Shelley* through its enforcement of common-law contract rules, the more difficult problem was determining whether the state action was the source of the constitutional violation, or whether the violation could be attributed only to a private actor.²²³ As numerous commentators have noted, *Shelley*'s attribution of private discrimination to courts enforcing private agreements pursuant to neutral-contract principles is potentially so expansive as to undermine any line between state-sponsored discrimination, which is unconstitutional, and private discrimination, which is not.²²⁴ For this reason, *Shelley*'s rationale has rarely, if ever, been applied in subsequent cases.²²⁵

Thus, in the case of children's right to bodily integrity, it is sometimes obvious that state action is present, but it is not clear whether the state action itself is violative of the child's right. For example, when a parent seeks to withhold medical care from a child, pursuant to the parent's general legal right to make medical decisions for his or her children, courts may become involved at the behest of hospitals or physicians who wish to impose care. In such cases, courts do not generally address whether the child's constitutional right to bodily integrity would be violated by a court order permitting the parent to withhold care.²²⁶ Instead, such cases are decided based on neutral principles of law such as a determination of the harm to the child and whether specific abuse or neglect statutes would be violated.²²⁷ Although the state is clearly acting in such cases when it

222. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

223. See, e.g., GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 1522 (4th ed. 2001) (articulating this interpretation of *Shelley*); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 458 (2007).

224. Rosen, *supra* note 223, at 459.

225. *Id.* at 458.

226. My research has not turned up any cases in which the minor's constitutional right to bodily integrity was referenced in connection with a parent's request to withhold medical care.

227. Indeed, in a related context, Professor James Dwyer has gone so far as to argue—in response to Professor Eugene Volokh's claim that child-custody conditions on parental speech are subject to First Amendment constraints—that constitutional rights are simply not relevant to child-custody determinations, in which the courts are exercising their *parens patriae* power rather than their police power. James G. Dwyer, *Parents' Self Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79, 125–26 (2012). *But see* Eugene Volokh, *Parent-Child Speech and Child Custody*

approves or disapproves the parent's decision, courts do not take the minor's constitutional rights into account because the parent's discretionary actions, taken pursuant to a general grant of legal authority, cannot easily be imputed to the state.

3. *Discerning "Action."* Finally, discerning a constitutional right of minors to bodily integrity invokes the unique problem of determining when the state has, in fact, acted. The problem is one of discerning the baseline against which state action, or intervention, is to be judged. This problem arises uniquely when one person asserts rights over another. When the individual rights of competent adults are involved, the baseline is clear—adults are assumed to have the liberty to engage in a particular action, and state action occurs whenever the government interferes with that liberty. Within the parent-child relationship, however, the baseline assumption is not always clear. As explained above, courts are likely to identify state action based on whether they are starting from a parentalist or liberal view of the family. From the liberal perspective, the state intervenes when it grants parents authority over minors' bodies; from the parentalist perspective, it acts when it intervenes to take away parental authority.

The baseline problem is apparent in cases involving state laws that grant minors access to contraceptives.²²⁸ In one case, the New York Appellate Division found a public-school condom-distribution program to be coercive and violative of parental rights because "parents [we]re being compelled by State authority to send their children into an environment where they [were] permitted, even encouraged, to obtain a contraceptive device, which the parents disfavor as a matter of private belief."²²⁹ In contrast to the abortion cases, the court's baseline assumption appeared to be one of parental control over minors' access to contraception. Moreover, the court discerned governmental coercion from the fact that children were required by law to attend school where they had access to the

Speech Restrictions, 81 N.Y.U. L. REV. 631, 649–56 (2006) (arguing that the First Amendment is implicated not only when courts issue orders restricting parents' speech, but also when courts make custody or visitation decisions based on such speech).

228. See, e.g., *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 277 (3d Cir. 1998); *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir. 1980); *Curtis v. Sch. Comm.*, 652 N.E.2d 580, 584–89 (Mass. 1995); *Decker v. Carroll Acad.*, No. 02A01-9709-CV-00242, 1999 WL 332705, at *1 (Tenn. Ct. App. May 26, 1999).

229. *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 265 (N.Y. App. Div. 1993).

program.²³⁰ Yet in other cases involving public-school condom-distribution programs, a number of courts found that there was no governmental coercion sufficient to raise a constitutional issue with respect to the parents' family-privacy or free-exercise rights.²³¹ In those cases, the courts rejected the argument that compulsory education constitutes governmental coercion, again raising the issue of baselines: a school-sponsored condom-distribution program seems coercive only if compulsory education laws are themselves seen as coercive, rather than as part of the status quo.²³²

A similar confusion also plagues the abortion cases. In *Hodgson v. Minnesota*,²³³ a majority of the Supreme Court upheld a parental-notification requirement for minors seeking abortions.²³⁴ In dissent, Justice Marshall noted that the majority assumed the intrusion on the minors' right—which here provided the state action forming the basis of the minors' constitutional claims—was justified by the need to protect family privacy.²³⁵ But, Marshall insisted, the family-privacy right was a right “*against* state interference with family matters,” whereas the notification requirement effected “governmental intrusion into family interactions.”²³⁶ Thus, *Hodgson* raises the question as to whether the state intrudes into the family when it permits minors to access abortions without parental notification, or whether the state intrudes into the family when it forces minors to notify their parents.

230. *Id.* at 265–66.

231. *See Parents United*, 148 F.3d at 277; *Doe*, 615 F.2d at 1168; *Curtis*, 652 N.E.2d at 584–89 (finding that a school condom-availability program “lack[ed] any degree of coercion or compulsion in violation of the plaintiffs’ parental liberties, or their familial privacy”); *Decker*, 1999 WL 332705, at *10.

232. *Parents United*, 148 F.3d at 276–77 (noting the argument regarding compulsory education, but essentially ignoring it because the condom program had a parental “opt-out”); *Curtis*, 652 N.E.2d at 586–87 (noting the compulsory education argument and the lack of an opt-out, but rejecting the notion that governmental coercion was therefore present).

233. *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

234. *Id.* at 461 (O’Connor, J., concurring). *Hodgson* involved a two-parent notification law that included no bypass mechanism for the minor, but also stated that a bypass mechanism would be created if the law were held unconstitutional without it. *Id.* at 426–27. Four Justices felt that the notification requirement was constitutional, with or without a bypass, and four Justices felt that it was unconstitutional, with or without a bypass. Only Justice O’Connor thought the requirement was unconstitutional without the bypass and constitutional with it, so she provided the deciding vote on both counts.

235. *Id.* at 483–84 (Kennedy, J., concurring in part and dissenting in part) (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) and *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

236. *Id.* at 471 (Marshall, J., concurring in part and dissenting in part).

Given the fundamental conflict between the liberal and parentalist understandings of the family, it is not surprising that courts cannot decide when the state has acted—that is, whether state intervention consists in granting or denying parental authority over children’s bodies. Indeed, numerous commentators have acknowledged the deep-seated confusion at the heart of the state-action concept.²³⁷ For example, the notion that nonintervention equates perfectly with the absence of state action has been roundly criticized.²³⁸ Professor Frances Olsen has argued that the terms “intervention” and “nonintervention” are incoherent in the family context, pointing out that political choices are inevitable, even when the government purports only to enforce the status quo rather than actively intervene.²³⁹ Olsen argues that “[t]he state constantly defines and redefines the family and adjusts and readjusts family roles” and is always empowering or disempowering the weaker or stronger members of a family depending on the rules it chooses to enforce or decline to enforce.²⁴⁰ Thus, for example, Olsen notes that laws may penalize those who take children away from the custody of their parents, “[y]et the state is not accused of intervening in the family when it forces children to live with their parents or when it prohibits doctors from treating minors without the parents’ knowledge and approval.”²⁴¹

Olsen’s critique is related to the classical feminist critique of the public–private distinction, which holds that the state-action requirement for vindicating rights to equality and bodily integrity systematically undermines women’s claims to the same.²⁴² As Professor Tracy Higgins explains the critique, “the principal threat to women’s liberty and equality comes not from public power but from private power.”²⁴³ Yet,

237. For a classic example, see Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1302 (1982).

238. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 42 (1987); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 835 (1985).

239. Olsen, *supra* note 238, at 835.

240. *Id.* at 842.

241. *Id.* at 853.

242. See Tracy E. Higgins, *Reviving the Public/Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 858–59 (2000) (“[A] meaningful right to freedom, bodily integrity, and security for women must include effective remedies against private violence.”).

243. *Id.* at 859.

a state's systematic failure to respond to abuses of private power will rarely, if ever, implicate constitutional concerns. Moreover, because state action is constitutionally relevant while private action is not, state efforts to intervene in the existing balance of power in the private sphere are viewed as unconstitutional violations of the rights of the powerful rather than an effort to balance or regulate conflicting rights.²⁴⁴

The distinction between intervention and nonintervention, or action and inaction, thus appears to be an arbitrary preference for the status quo—one that privileges those who possess greater physical, financial, or social power—rather than a meaningful constitutional distinction.

This problem is particularly acute in the case of children because of their inherent dependency. As the *DeShaney* Court confirmed, the Constitution provides only negative rights to government noninterference, rather than affirmative rights to “certain minimal levels of safety and security.”²⁴⁵ Yet for children, rights to safety and protection are at least as important as freedom from governmental intrusion in their lives. Being in a position of unique dependency, children rely on the government and others for the meaningful exercise of their rights, much like prisoners and active-duty members of the military.²⁴⁶ Although it may be true that adults have only a bodily integrity right against unwanted, government-imposed physical intrusion, it is not clear why children's constitutional right to bodily integrity should include no more than a mere right against government intervention or governmental interference with access to treatment.

B. Theoretical Difficulties in Identifying State Action

The doctrinal difficulties discussed above are rooted in theoretical problems with the very concept of minors' bodily integrity rights, particularly to the extent that the right is understood as a privacy right against harmful government intrusion. This Part therefore seeks to explain the doctrinal dilemma of state action. The theoretical difficulties underlying state action take two forms. First is

244. *Id.* at 859–60 (citing MACKINNON, *supra* note 238, at 42).

245. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

246. The idea that children have certain rights by virtue of their dependency is captured by Professor Joel Feinberg's concept of “[d]ependency-rights.” Joel Feinberg, *The Child's Right to an Open Future*, in *WHOSE CHILD? CHILDREN'S RIGHTS, PARENTAL AUTHORITY AND STATE POWER* 124, 125 (William Aiken & Hugh LaFollette eds., 1980).

the “paradox of privacy,” according to which the creation of privacy rights actually leads to greater, rather than lesser, scrutiny of the rightsholder’s choices.²⁴⁷ Second is the conundrum of separating state action from private action in the family context, where the state’s *parens patriae* role and duties are often conflated with the roles and responsibilities of the parents. These difficulties are usefully elucidated by Foucault’s theory of governmental power, which is described in detail below. Foucault helpfully demonstrates the pervasiveness of state power and its implications.

The very existence of a constitutional privacy right seems to preclude a genuine realm of nonintervention. The moment courts decide to carve out a domain for family or children’s privacy rights, they must begin to decide how and when this right may be exercised and its limits. This analysis generally takes the form of an intrusive inquiry into the reasoning and decisionmaking processes. The predominant focus on private reasons for taking action affecting the child’s body—whether the reasons of the parent or those of the child—conflicts with the very notion of a privacy right. It intrudes upon the decision in a way that is diametrically opposed to any meaningful understanding of privacy.²⁴⁸

In a related context, Professor Carol Sanger has argued that meaningful reproductive choice means exercising control not only over the abortion decision itself, but also “over the method and process by which [the] abortion decision is reached.”²⁴⁹ Using analogies to other protected rights, such as religious freedom, in which the state is generally viewed as powerless to influence the individual’s decision process, Sanger explains, “[I]f a choice is protected because of the profound significance it bears to the meaning of a person’s life, then the part of life devoted to the choosing—the thinking it through—has got to be protected as well.”²⁵⁰ Of course, there are numerous domains in which the state can be understood to regulate individuals’ private reasons for doing something: for example, hate-crime laws aggravate penalties if crimes

247. Cf. David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 529–30 (2000) (observing the same phenomenon with respect to familial privacy rights).

248. Cf. Seana Valentine Shiffren, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 845 (2005) (defending the constitutional value of the freedom to think and reason in the absence of governmentally compelled speech or associations).

249. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 358 (2008).

250. *Id.* at 391.

are committed for certain reasons. But those areas in which state regulation is based on an individual's reasons for acting are not areas that are protected by an individual right to privacy.

In addition, state action is made more complex by the troubling elision of roles that occurs when the state evaluates private reasons in this manner. The state-court judge may appear to take on the role of the parent; indeed, some have been unable to resist actively assuming that role.²⁵¹ For example, in one judicial-bypass case, a judge stated, "Let me just say, I'm very concerned about this young lady's welfare. Like counsel, I'm a mother."²⁵² The functions of discipline and punishment inherent in many of the ways in which minors' bodies are regulated—particularly with respect to judicial-bypass hearings and corporal punishment—tend to conflate the role of the state and the role of the parent. Thus, as the quote above indicates, judges ruling on bypass petitions sometimes use the hearing as an opportunity to chastise the petitioner, exercising a quasi-parental role. Moreover, much as the state is entitled to the legitimate use of violence for punishing wrongdoing, parental discipline is legally legitimate when it is for the purpose of punishment or otherwise in the interest of shaping the child into a better and more productive citizen.²⁵³

To make sense of these theoretical difficulties, it is helpful to draw on the writings of the philosopher and historian Michel Foucault. One of Foucault's most persistent concerns is with the meaning and function of power.²⁵⁴ Foucault's critical examination of power in all of its manifestations does not focus specifically on law, on the family, or on liberalism.²⁵⁵ Nonetheless, Foucault's theory of power and its effects may be understood as a challenge to liberalism's attempted reconciliation of parental prerogatives and democratic values with respect to children.

251. Sanger, *supra* note 131, at 451.

252. *Id.* (quoting *Ex parte Anonymous*, 803 So. 2d 542, 561 (Ala. 2001)).

253. *Cf.* Dailey, *supra* note 103, at 1005 (discussing the "public" role of families in shaping future citizens).

254. *See, e.g.*, Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777, 778 (1982) (observing that he became "quite involved with the question of power" as a means of studying the subject, which he identified as "the general theme of [his] research").

255. Note that although Foucault engaged in an extended critique of the economic theory of "American neo-liberalism" embodied most visibly by the economist Gary Becker, he did not present his own work as a critique of American liberal political theory per se; rather, I am inferring this critique from a juxtaposition of Foucault's work with that of John Rawls (who was a contemporary of Foucault's) and others such as Gutmann, who came later. *See generally* MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS* 239–66 (Graham Burchell trans., 2008).

Foucault contends that in modern society, social power is not simply a thing wielded by the state; it is itself an effect that may be manifested in many different forms, including in private relationships.²⁵⁶ Thus, according to Foucault, state power is everywhere.²⁵⁷ Unlike medieval society, in which power was concentrated in the sovereign, modern society manifests social power through multiple centers, particularly through the discourse that organizes, categorizes, and explains our experiences.²⁵⁸ In *The History of Sexuality*, for example, Foucault argues that the Victorian Era, supposedly characterized by a prudish disdain for speaking about sexuality, was actually an era in which particular kinds of discourse about sex—medical, psychological, moral, and so on—proliferated as a way of managing and controlling sex and sexuality.²⁵⁹

The case law that creates and delimits children's privacy rights results in a similar proliferation of discourse. Although superficially aimed at liberating children and granting them autonomy over their bodies, this case law in fact operates as a means to further manage and control both children's choices and those of their parents. This fact is evidenced by the judicial preoccupation with children's and parents' reasoning.²⁶⁰ In addition, every recognition of a right is at the same time an invitation for state intervention, as courts themselves must now determine the scope of the right. For example, although appearing to grant minors autonomy in reproductive decisionmaking, the minor abortion cases in fact simply subject them to judicial, rather than parental control.

Thus, according to Foucault, power in modern society is both expansive and diffuse: "Nobody knows this knowledge; no one wields this power."²⁶¹ Though power is sometimes coercive in form, acting directly on individuals' bodies, it also functions "by normalization, not by punishment but by control, [by] methods that are employed on

256. MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 93–94 (Robert Hurley trans., 1988).

257. *Id.* at 93.

258. *Id.* at 100–02.

259. *See id.* at 33–34 ("Sex was driven out of hiding and constrained to lead a discursive existence.").

260. *See, e.g.,* Baird v. Attorney Gen., 360 N.E.2d 288, 292–93 (Mass. 1977) (stating that a minor's parents may legally withhold consent to an abortion for some reasons but not others); Hart v. Brown, 289 A.2d 386 (Conn. Super. Ct. 1972) (carefully evaluating the moral soundness of the parents' reasons for authorizing kidney donation by a minor child).

261. Ian Hacking, *The Archaeology of Foucault*, in FOUCAULT: A CRITICAL READER 27, 28 (David Couzens Hoy ed., 1986).

all levels and in forms that go beyond the state and its apparatus.”²⁶² Foucault contends that scientific discourse about sex creates a domain of the normal, appropriate, and average that is demarcated from the pathological, and that this demarcation is both an instance of and an opportunity for the exercise of power.²⁶³

As this Article demonstrates, legal discourse is similarly preoccupied with individual decisions and how they compare to community norms.²⁶⁴ In *Marriage of Boldt*, discussed above, the court explicitly referenced social norms in upholding a parent’s decision to circumcise his twelve-year-old son for religious reasons.²⁶⁵ Similarly, state courts consider parents’ reasons for inflicting physical pain on their children when deciding whether to label the conduct as abuse or as a legitimate form of discipline. The conduct, of course, is also reviewed for “excessiveness” and judged by other similarly amorphous norms that call for decisionmakers to apply the judges’ own, or society’s, sense of what is normal and acceptable conduct.²⁶⁶ The concept of legitimate discipline, in particular, links the case law on children’s bodily integrity to Foucault’s work on social power.²⁶⁷

Moreover, though social power is often exercised in private settings, Foucault conceptualizes that power as nonetheless tied to the state.²⁶⁸ The private power is “governmentalized” because of the way its exercise is influenced by state-created norms and rules:

It is certain that in contemporary societies the state is not simply one of the forms or specific situations of the exercise of power—even if it is the most important—but that in a certain way all other forms of power relation must refer to it. But this is not because they are derived from it; it is rather because power relations have come more

262. FOUCAULT, *supra* note 256, at 89. Dean Martha Minow has stated, “Power is at its peak when it is least visible, when it shapes preferences, arranges agendas, and excludes serious challenges from discussion or even imagination.” Martha Minow, *The Supreme Court: 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 68 (1987). I am grateful to Professor Susan Frelich Appleton for bringing this quote to my attention.

263. FOUCAULT, *supra* note 256, at 33–34.

264. *See supra* notes 138 and 148 and accompanying text.

265. *See supra* note 138 and accompanying text.

266. *See supra* note 148 and accompanying text.

267. David Couzens Hoy, *Introduction to FOUCAULT: A CRITICAL READER*, *supra* note 261, at 1, 13. Social power is closely linked to the concept of “discipline” in two senses. First, the term “discipline” implies exercising control, and thus power, in the way a parent or a state disciplines individuals. Second, social power is bound up with academic disciplines, in that disciplines are the mechanisms by which knowledge is acquired and organized. *Id.*

268. Foucault, *supra* note 254, at 793.

and more under state control [O]ne could say that power relations have been progressively governmentalized, that is to say, elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions.²⁶⁹

Examples of this decentralized state power include obvious tentacles of the state such as prisons, schools, the public-welfare system, and public-health programs, as well as less obvious agents of sovereign power like private charities and the medical-scientific establishment, as well as the family itself.²⁷⁰ Foucault therefore envisions state power as permeating and shaping all aspects of human experience; it is nearly (but not entirely) inescapable.²⁷¹ All of these institutions, though manifesting state power, operate to a large degree independently of any centralized authority.

Furthermore, although the quintessential image of sovereign power may be that of the government acting upon individuals' bodies—for example, by arresting or imprisoning them—the real object of the modern disciplining state, according to Foucault, is control over individuals' minds and souls.²⁷² The state disciplines in many instances through internalized norms and standards, rather than through brute force. Moreover, one of the primary modes through which power performs these operations is a linguistic one—namely “discourse.”²⁷³ “[I]t is in discourse that power and knowledge are joined together. . . . Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.”²⁷⁴ Legal discourse is one such

269. *Id.*

270. *See, e.g., id.* at 784 (referring to “pastoral power” exerted by public arms such as the police as well as “private ventures, welfare societies, benefactors, and generally by philanthropists” in addition to “the family” and “complex structures such as medicine”).

271. Indeed, some commentators criticize Foucault for “describ[ing] power as so pervasive and irresistible as to make resistance seem futile”; Professor David Hoy suggests, however, that Foucault believed modern society had not yet been completely “normalized,” and that he wrote precisely in the hope of staving off such complete normalization. Hoy, *supra* note 267, at 13–14.

272. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 10–11 (Alan Sheridan trans., 1977) (describing a “‘non-corporal’ penalty” in which “[t]he body . . . serves as an instrument or intermediary”); *id.* at 17 (noting that in the modern penal system, “the ‘crimes’ and ‘offences’ on which judgement [*sic*] is passed are juridical objects defined by the code, but judgement [*sic*] is also passed on the passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity”).

273. *See, e.g.,* FOUCAULT, *supra* note 256, at 100–01.

274. *Id.*

discourse; other normalizing discourses include those practiced in the medical, scientific, psychological, and public-health disciplines.

Foucault's emphasis on normalization and on controlling minds rather than bodies helps to explain the "paradox of privacy," by which a proliferation of privacy rights can coexist with ever-increasing state intrusion in individuals' decisionmaking processes. The ultimate aim and inevitable result of state power is to control the mental processes—the individual's reasoning—rather than the underlying conduct. The existence of a privacy right therefore functions as a welcome invitation for courts to scrutinize those processes, while simultaneously protecting certain private conduct from state regulation.

Importantly, however, disciplinary power is often "positive" in the sense that its goal is not to repress, but to improve and extend the lives of individuals, to make them productive citizens. Foucault claims that such regulation in the interest of societal good and social mores is simply a newer form of power, but still exercised, as always, over human bodies.²⁷⁵ Foucault describes public-health regulation and related surveillance and management of health data as a form of "biopower"—power that is exercised on the level of the population as a whole and in the interests of society as a whole.²⁷⁶

Indeed, according to Foucault, it is precisely in the regulation of the body that the disciplinary and regulatory mechanisms tend to overlap.²⁷⁷ Foucault describes how "[c]irculat[ing] between the two" poles of individual discipline and population-level biopolitics "is the norm."²⁷⁸ Social norms become tools of both individual discipline and regularization of the population.²⁷⁹

To the extent the values imposed by liberalism create a certain harmony of ideals between the family and the broader democratic society, that harmony is a reflection of the way in which modern state power infiltrates all dimensions of human life, or in Foucault's words, "cover[s] the whole surface that lies between the organic and the biological, between body and population."²⁸⁰ Moreover, where minors

275. MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975–76, at 242 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 1977).

276. *Id.*

277. *Id.* at 250–51.

278. *Id.* at 253.

279. *Id.*

280. *Id.*

have been granted autonomy rights by courts to serve particular public-health goals, those rights may also be understood as an instance of this phenomenon.

One example of how social norms can both shape and construct the understanding of children's bodies and bodily integrity, revealing an exercise of power at the intersection of medical, familial, and social discourses, is in the context of defining child abuse.²⁸¹ Documenting the fluctuation of the concept of child abuse over time, philosopher and historian of science Ian Hacking observes that child abuse is a "normalizing concept."²⁸² Child abuse is defined and understood "in a framework of normalcy and pathology," but at the same time, the nature of the "normal" is not fixed.²⁸³ Rather, the normal is both a descriptive and prescriptive concept—"what is unusual becomes abnormal, and what is abnormal becomes wrong."²⁸⁴ Hacking uses the example of a commentator who suggests that it is abusive to allow children to sleep with their parents past the stage of infancy.²⁸⁵ Hacking notes that this practice was once commonplace and only subsided when a large number of families could afford homes large enough that children could have separate rooms from their parents.²⁸⁶ The concept of child abuse thus invokes a norm at the intersection of the individual and the broader society: what is "normal" in the sense of being common within a society becomes "normal" in the sense of appropriate and acceptable for the individual.²⁸⁷ This normalizing process is the modern manifestation of social power.

The Foucauldian perspective suggests that both the elision of roles and the attention to private reasoning are functions of the omnipresence of state power in modern society, and they are united

281. Hacking, *supra* note 163, at 285–88.

282. *Id.* at 286.

283. *Id.* at 287.

284. *Id.*

285. *Id.*

286. *Id.* The practice of cosleeping has become more common again, often due to the parents' parenting philosophy or the simple need to get some sleep. *See, e.g.*, Donald G. McNeil Jr., *More Infants Are Sleeping with Their Parents, and a Debate Ensues*, N.Y. TIMES, Jan. 15, 2011, at A9 (noting that the percent of infants who shared beds with parents more than doubled from 1993 to 2000).

287. The normalizing force of defining abuse provides one explanation for why those who are already marginal within society—racially, socioeconomically, and so on—may be more likely to be labeled as abusers. *See generally* Bridges, *supra* note 96, at 117 (arguing that indigent women and families lack the presumption of privacy and are more subject to "public" scrutiny).

by the concept of “discipline.” The law’s focus on private deliberation and reasoning is entirely expected if one understands the object of social power to be the “soul” rather than the body and the means by which that power is exercised to be the social norm. Indeed, Foucault claims that social norms operate to unite the disciplinary and the regulatory power—acting both at the level of the individual, who internalizes the norms, and the state, which enforces them.²⁸⁸

As exemplified by the term *parens patriae*, the concept of discipline itself unites parent and state in the goal of protecting children but also the goal of molding them into model citizens. The term *parens patriae* literally translates as “parent of his or her country,” but it means that the *state* acts as parent in certain situations.²⁸⁹ The identification of the parent with the state suggests that state power permeates the family as the family itself becomes governmentalized. Through the law’s management of children’s bodies within the family, family relations are studied, surveilled, and normalized. Some parents’ punishment is deemed legitimate, and others’ is not; some minors’ reasons for avoiding childbirth are strong enough, whereas others are not. Children’s healthcare is regulated in the interest of the greater good in that they receive some autonomy rights only to the extent that this autonomy serves the interests of public health—for example, through exceptions to parental-consent requirements for minors seeking access to testing and treatment for sexually transmitted diseases.²⁹⁰

Moreover, the elision of parental and governmental roles, brought about in part by the state’s regulation of the reasoning behind private decisionmaking with respect to children’s bodies, demonstrates the way in which state power permeates the family, imposing its power to normalize and standardize. The state acts as parent in exercising its *parens patriae* power. The metaphor becomes even more concrete when a judge steps into the parent’s role in a judicial-bypass hearing, or when the court stands in for community standards in examining the parents’ motivation for seeking to

288. FOUCAULT, *supra* note 275, at 253.

289. BLACK’S LAW DICTIONARY 1221 (9th ed. 2009).

290. *See, e.g.*, Elizabeth Scott & Clare Huntington, *Children’s Health in a Legal Framework* 2 (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 14-418), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2503685 (arguing that “the state intervenes to promote children’s health only in response to compelling social welfare needs such as reducing teenage pregnancy, juvenile crime, and communicable diseases,” or in response to abusive parents).

authorize an organ donation from one sibling to another.²⁹¹ Yet the parent also stands in for the state, disciplining the child in the interest of creating better citizens—and only when the discipline is for reasons the state considers legitimate. The state acts, in a sense, as a “civilizing mechanism[] . . . , reminding people subjectively of the locus of power”²⁹² and “satisfy[ing] the needs of social order.”²⁹³ At the same time, “relations of power” permeate the parent-child relationship, and it seems arbitrary to attribute any one exercise of power to the state.²⁹⁴

Foucault’s theory suggests a reason why the legal discourse of privacy within the family, in conjunction with the emergence of the legal discourse of children’s rights, likely only increases the power of the state rather than creating a true zone of privacy or empowerment for minors. Once both children and parents are understood as rights-holders, opportunities for adjudication of their respective rights proliferate.²⁹⁵ Eventually, the law occupies all available space within the parent-child relationship, as every decision with respect to children’s bodies carries possible implications for the minor’s right to bodily integrity. Moreover, the diffuse but omnipresent role of the state—which sets the background rules of parental custody and control over medical decisionmaking—creates not just legal but also potentially constitutional implications for every such choice by parent or child.

IV. REIMAGINING STATE ACTION AND CHILDREN’S RIGHTS

The doctrinal and theoretical incoherence of state action raises unique problems for the partially constitutionalized right of children to bodily integrity. The failure of courts to recognize and address these problems directly accounts for their failure to recognize a consistent and meaningful right of minors to bodily integrity. This Section therefore suggests a partial way out of the state-action problem by means of a more careful understanding of state power.

291. See *supra* notes 143–47 and accompanying text.

292. Sanger, *supra* note 131, at 470 (quoting NATALIE SEMON DAVIS, *FICTION IN THE ARCHIVE: PARDON TALES & THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE* (1987)).

293. *Id.* at 471.

294. Foucault, *supra* note 254, at 793.

295. The common law itself fits within Foucault’s understanding of diffuse and decentralized state power that acts within private as well as public domains.

The first step in reimagining children's constitutional right to bodily integrity is to consistently recognize the right across all doctrinal areas, including reproductive healthcare, end-of-life care, routine medical decisionmaking, nontherapeutic interventions, and corporal punishment. All of these domains implicate the bodily integrity right. So long as state action can be identified, there is no reason for applying constitutional doctrine to one kind of dispute but not the others.

The second step is to establish the content of the constitutional right to bodily integrity for children. As argued above, the content of that right is implicit in both the common-law recognition of the state's authority to intervene in the family on behalf of children and in the minor abortion cases. For younger minors, the right takes the form of a right to bodily security or protection—broadly, a right to have their best interests protected by the state against parents who fail to do so. For older, mature minors, the right becomes primarily an autonomy right to make their own decisions about their bodies when, and to the extent that, they are capable of doing so.

Foucault's theory of power—which appears to be particularly applicable in the context of children's right to bodily integrity—further suggests the arbitrariness of the state-action line drawn by cases such as *DeShaney*. It demonstrates that state power permeates and structures the family relationship. The third step in reconceiving children's right to bodily integrity is thus to consider the state as acting in some sense whenever parents act on their children's bodies without danger of legal sanction. If the state is acting as a parent, and the parent is acting as agent of the state, then it is not particularly meaningful to consider some violations as purely private and others as perpetrated by public actors. Under this new understanding of state action, in contrast to existing doctrine, every parental violation of a child's bodily integrity would become a potential constitutional violation, chargeable to the state. The problems of identifying state actors and state action would thus fall away in most cases.

Yet, the problems with this scenario are obvious. Many teenagers would, no doubt, be inclined to make a federal case—literally!—out of every prohibited tattoo, every detention by grounding, every rhinoplasty denied. Though in some sense it is accurate that a parent is drawing on the authority of the state when she controls her child's body in these ways, there is a danger that the scope of judicial intervention in family disputes would become overwhelming and ultimately harmful, both to families and to the courts.

At the same time, it may be possible to retain Foucault's understanding of state power while avoiding the problem of courts micromanaging family decisionmaking. This could be accomplished by providing a degree of substantive parental discretion or privacy within the family. Constitutional doctrine could and should recognize that parental decisions about children's bodies contain a constitutional dimension, without radically changing the existing legal rules and entitlements, by applying a deferential understanding of children's best interests. The doctrine can accommodate the notion that parents will generally act in their children's best interests and the state should intervene only when there is serious reason to doubt that this is the case. Parents would thus still be granted a realm of discretion to make most medical and nonmedical decisions for younger minors, whereas older minors would be granted greater power under the "autonomy" prong of the bodily integrity right. In other words, the best-interests requirement would be applied deferentially, such that judges could not second-guess reasonable decisions of fit parents.

Moreover, given that parents still hold the purse strings in most families, they would maintain a significant degree of *de facto* control over many decisions about nonmedically indicated interventions. Constitutional law neither can nor should alter this aspect of the status quo. The expense and other difficulties of minors' bringing suit therefore likely means that they would be unlikely to do so except in the most serious cases. Minors would continue to have access to courts to vindicate their own interests in the most limited of circumstances, where a guardian *ad litem* or other entity (such as a hospital seeking to provide medical care) is in a position to assert the minor's interests.

Finally, despite the elision of parental and governmental roles, it would require too radical a revision of constitutional law to designate every person who acts pursuant to a state grant of authority—such as a parent—a state actor for purposes of 42 U.S.C. § 1983.²⁹⁶ The need to identify a state actor according to conventional legal standards would thus remain in § 1983 lawsuits to vindicate minors' constitutional right to bodily integrity. Long-standing jurisprudence indicates that even if state action is present (here, based on the

296. 42 U.S.C. § 1983 (2012); *see* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 935 n.18 (1982) (distinguishing between the requirements of state action under § 1983 and of an action performed by a defendant acting "under color of state law").

underlying common-law entitlements giving parents authority over their children's decisions), a private individual cannot be sued unless he can be said to be acting under color of state law.²⁹⁷ If a mature minor wishes to vindicate her constitutional right to make her own medical decisions, for example, she could not bring suit under § 1983 unless she could identify a state actor who played a role in preventing her from doing so. In Joshua DeShaney's case, the social workers' decision to return him to the home would be sufficient, because they are state actors and state action would be identified in the social workers' decision to leave him in the custody of his abusive father.²⁹⁸ In most cases, however, parents would be considered private actors and therefore § 1983 would not apply.

This limitation on independent lawsuits to vindicate minors' constitutional bodily integrity right would significantly reduce the amount of judicial intervention that would result from reformulating state-action doctrine to recognize the pervasiveness of state power. But at the same time, the domain of parental discretion would begin to have meaningful substantive limits, grounded in minors' constitutional right. Though not radically changing the current substantive entitlements, the constitutionalization of this domain would not be entirely empty. It would have several significant effects for minors seeking to vindicate a right to bodily integrity.

First and foremost, the mature-minor and best-interest doctrines, derived from the common law but constitutionalized in the case of minors seeking abortions, would become constitutional standards across the board because they track closely the essential meaning of the bodily integrity right for minors. Though these standards already apply to minors seeking to exercise their right to access abortions, they would also apply to minors in other medical contexts, such as those facing decisions about end-of-life care. In contrast to the status quo, minors could not be denied medical care that was in their best interests, and mature minors would have a right to make their own medical decisions, even in those states that lack mature-minor rules.²⁹⁹ Currently, minors' rights in these situations are notably unclear and vary from state to state. Therefore, constitutionalizing the mature-

297. See, e.g., *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150–52 (1970) (noting that “our cases make clear” that the plaintiff was required to establish that the defendant was acting under the color of law to prevail under her § 1983 claim).

298. *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–95 (1989).

299. The standards for maturity and best interests are, of course, somewhat amorphous, but an attempt to define and clarify them is beyond the scope of this Article.

minor and best-interests standards across the board would help regularize the landscape and create greater predictability and protection for the minors themselves.

Second, in contrast to the current doctrine, minors in abusive homes would have a constitutional cause of action for the government's failure to protect them under this revised understanding of state action. Of course, the ability of a minor to sue the government for violation of his right to bodily integrity would be subject to limitations, both in terms of a requirement that the intrusion be severe enough to rise to a constitutionally cognizable level, and in terms of the requirements that must be met for municipal liability to attach under 42 U.S.C. § 1983, such as a showing of "deliberate indifference" on the part of a policymaker or a municipal pattern and practice of constitutional violations.³⁰⁰ But the minor would not be deprived of that right by a specious and arbitrary state-action requirement. If the minor were able to state a constitutional claim by identifying a state actor, such as a social worker or a police officer who returned her to an abusive home, that individual actor would be liable to the minor in a suit for damages, barring the assertion of immunities. Even if the individual state actor were immune from damages claims, the minor could seek an injunction to prevent her return to the home.

In addition, if a minor were otherwise able to invoke the jurisdiction of the court—through an action for an injunction to prevent a battery, for example, or through any other relevant cause of action under state law—she would be entitled to have constitutional bodily integrity norms applied in her case. If the alleged battery, such as corporal punishment or a medically unnecessary surgery, was found not to be in the minor's best interests, it could not be forced upon her.

Because the constitutional norms would have to apply in legal disputes between private parties, minors would be entitled to consideration of their right to bodily integrity when hospitals seek court orders to proceed with medical treatment in the face of parental refusals, for example. In medical-treatment disputes, this would require a consideration of whether the treatment is in a younger

300. *See* Bd. of Cnty. Comm'rs v. Brown, 520 U.S. 397, 407 (1997) (noting that "a showing of simple or even heightened negligence" would not suffice); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978) (acknowledging that local government customs are subject to scrutiny under § 1983).

minor's best interests, granting due deference to parental judgment. Such a requirement may or may not align with the current law applied in such disputes, given the variation in state law.³⁰¹ If the minor is older, courts will have to determine whether he is mature and well-informed enough to make the decision on his own, and if so, there will be no warrant for deferring to parents' wishes. Whether this process aligns with current substantive legal standards or not, it would be a departure from existing case law in which minors' constitutional bodily integrity right is rarely considered. Moreover, merely invoking constitutional law rather than state statutory or common law would force courts to try to conform their rulings to one another and would thereby create a degree of uniformity.

When minors seek access to nontherapeutic or nonmedical interventions, practical concerns regarding the ability to pay for the procedure may well prevent cases from getting to court in the first place. But for those minors who are old enough to have access to funds, a court would be required to allow tattooing or piercing, for example, irrespective of state law, so long as the minor can demonstrate her maturity. Though it is hard to imagine a scenario in which a minor could identify a source of funds but is not mature enough to make her own decisions, courts could also consider certain interventions to be in the minors' best interests. For example, a minor who can get vaccinated free of charge may argue it is in her best interests to do so, even if her parents object. A physician or hospital may be in a position to raise such a claim. Similarly, one who is in a position to raise the rights of a newborn may object on his behalf to genital normalization surgery.

Admittedly, the possibility of physicians or others raising the rights of minors might put some pressure on the doctrine of third-party standing, which is relatively limited. Courts might find themselves being forced to decide who is close enough to a minor to assert that minor's rights as against the minor's own parents. Yet at the same time, it should be expected that such lawsuits would be unusual, because of the cost and practical difficulties involved, as well as the deferential standard that would be applied in many cases. Instead, the constitutionalization of the children's bodily integrity right, while making a concrete difference for some minors, would perhaps primarily serve an expressive function for many other minors. It would alert adults, along with state-court judges, to the fact

301. See *supra* Part I.B.2 and text accompanying notes 62–70.

that minors have constitutional rights that must be considered along with the interests of the parents and the state.

CONCLUSION

The legal doctrine and system of regulation surrounding children's bodies are profoundly fragmented. Similar questions arise about the extent of parental control over children's bodies in numerous contexts—such as corporal punishment, medical decisionmaking, and reproductive rights—and courts generally apply substantively similar standards in analyzing these questions. Yet, children's constitutional right to bodily integrity has not been consistently recognized across those doctrinal areas, and it has been only partially constitutionalized.

This Article argues that the reason for this fragmentation lies in the unique difficulty of identifying state action in cases involving children's right to bodily integrity. This difficulty is partly a doctrinal one that is attributable to three separate factors. First, state action is difficult to identify when private actors, rather than state actors, are primarily responsible for the infringement of the minor's bodily integrity—even though the infringement is directly enabled by state laws delegating authority over children to parents. Second, and relatedly, it is difficult to impute infringements on minors' bodily integrity right to the state when the parents' actions are taken pursuant to facially neutral rules granting broad parental discretion, such as those authorizing parents to consent to medical treatment for their minor children, rather than rules authorizing specific interventions, such as those permitting sterilization of mentally incompetent minors or requiring parental consent for an abortion. Third, the fundamental, unresolved tension between the liberal and parentalism perspectives in the case law means that courts have difficulty identifying whether the state has actually intervened in the family—that is, whether state intervention consists of empowering parents or of empowering children. Moreover, these doctrinal difficulties reflect the tendency of state power to permeate every aspect of family life through a discourse that relentlessly seeks to examine the most private of domains. Ostensibly private settings such as the family are “governmentalized” through the application of legal and social norms, which threaten to turn the family into yet another tentacle of the state. Paradoxically, the recognition of privacy rights within the family only magnifies this tendency, as it invites judicial

intervention into, and examination of, parents' and children's decisionmaking processes.

Recognizing children's constitutional right to bodily integrity in each domain where the state plays a role in delegating authority over children's bodies would clear the way for a more robust and coherent doctrine. Indeed, the fundamental substantive principles of children's bodily integrity right have already been established in both constitutional and common-law cases—that is, older, mature minors are entitled to make decisions autonomously and younger, immature minors are entitled to have the state safeguard their best interests.

In addition, a broader understanding of state action in the context of children's rights is necessary. Because state power already determines the scope of parental authority over children, state action is present whenever a parent violates a child's bodily integrity pursuant to a delegation of authority from the state. Although parents should still be presumed to be acting in their children's best interests, their decisions should not be entirely immune from judicial consideration. Minors should be able to challenge the constitutionality of those parental decisions if they can overcome the practical and procedural hurdles to achieving judicial consideration of their constitutional claims.

Admittedly, this proposed revision of constitutional doctrine still relies upon murky concepts—such as maturity and best interests—that do not always admit of clear, bright-line rules. Moreover, the scope of substantive discretion to be afforded to parents under this proposed framework requires further judicial specification. However, despite leaving some questions unanswered, this Article suggests a way in which the children's constitutional bodily integrity right may be recognized and respected within the family without constitutionalizing every aspect of family life.