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## Retaining a Constitutional Right to Terminate a Pregnancy by Reinterpreting Pregnancy as an Implied Contract

Esra Coskun-Crabtree

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COMMENT

RETAINING A CONSTITUTIONAL RIGHT  
TO TERMINATE A PREGNANCY BY  
REINTERPRETING PREGNANCY AS  
AN IMPLIED CONTRACT

ESRA COSKUN-CRABTREE\*

INTRODUCTION .....	80
I. BACKGROUND .....	83
A. RIGHTS OF THE PREGNANT PERSON AND THE FETUS ..	83
B. BURDENS OF THE CURRENT APPROACH ON THE RIGHTS OF PREGNANT PERSON AND THE FETUS .....	86
1. <i>The Impact of Pregnancy and Childbearing on             Parents</i> .....	86
2. <i>“Consent to Pregnancy” to Balance the Rights of             the Pregnant Person and the Fetus</i> .....	88
C. FREEDOM TO CONTRACT AND PREGNANCY .....	91
II. ANALYSIS .....	93
A. IMBALANCE BETWEEN THE RIGHTS OF THE PREGNANT PERSON AND THE FETUS .....	93
1. <i>Current Approach’s Lack of Consideration for             Fetus’ Rights Beyond Birth</i> .....	94
2. <i>Current Approach’s Imperfect Balance of             Interests</i> .....	96
3. <i>Self-defense and State Protection under the             Equal Protection Clause</i> .....	99

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80	GOLDEN GATE UNIVERSITY LAW REVIEW	[Vol. 53]
	4. <i>What the Violations Really Entail for the Pregnant Person</i> .....	102
	B. REFRAMING PARENTING AS IMPLIED FREE CONTRACT .	104
	1. <i>Role of Duty of Care in the Pregnant Person's Decisions</i> .....	104
	2. <i>Benefits of the Proposed Contract Theory</i> .....	108
III.	COUNTERARGUMENTS .....	109
	A. INADEQUACY OF ADOPTION TO SUBSTITUTE FOR ABORTION .....	109
	B. GROUNDING THE CONTRACT THEORY BY RESPONDING TO CRITIQUES OF "CONSENT TO PREGNANCY" .....	111
	1. <i>Assuming a Certain Degree of Risk Entails Consent</i> .....	111
	2. <i>Whether the Fetus Is a Person Changes Its Culpability</i> .....	113
	3. <i>Consent Theory Severs Father and Fetus for Financial Responsibility</i> .....	114
	4. <i>Pregnancy Is Not Prima Facie Harm</i> .....	114
	CONCLUSION.....	116

## INTRODUCTION

A positive pregnancy test invites the person to make a choice: to terminate the pregnancy or to give birth. In *Dobbs v. Jackson Women's Health Organization*, the U.S. Supreme Court rejected that the Fourteenth Amendment's Due Process Clause gives the people a fundamental right to choose what happens to their bodies.<sup>1</sup> However, there were other constitutional limits on state power prior to the enactment of the Fourteenth Amendment.<sup>2</sup> One such limit is the Contracts Clause of Article I, Section 10 of the U.S. Constitution that prohibits the states from impairing the freedom to contract.<sup>3</sup>

The key issue in the abortion debate is not a woman's right "to exercise her right of choice as an isolated individual, but rather her right to consent to what a separate entity, the fetus, does to her when pregnancy results from its presence and implantation in her uterus."<sup>4</sup> Looking at the

<sup>1</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

<sup>2</sup> *The Bill of Rights*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/us-history/road-to-revolution/creating-a-nation/a/the-bill-of-rights> (last visited Jul 26, 2023) (explaining that the Bill of Rights limits state power).

<sup>3</sup> U.S. Const. art. I, § 10, cl. 1.

<sup>4</sup> Eileen L. McDonagh, *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, 62 ALB. L. REV. 1057, 1063 (1999), <https://heinonline.org/HOL/PrintRequest?collection=USjournals&handle=hein.journals/albany62&id=1071&print=section&div=37&ext=.pdf&format=PDFsearchable&submit=print%2FDownload>.

relationship between a pregnant person<sup>5</sup> and the fetus (and ultimately the born child) as an implied contract<sup>6</sup> offers a new paradigm to protect the right to terminate a pregnancy in the absence of a right under the Fourteenth Amendment.<sup>7</sup> If the pregnant person consents to the pregnancy, that is, chooses to give birth, this Comment argues, the person commits to an implied contract with the fetus (and ultimately the born child) to provide the child with an environment that will foster the child's development.

Some people are unwilling to enter such contractual relationships for various reasons. Instead, they seek abortions. Where the state restricts a person's ability to choose to enter the contract, i.e., limits the right to abortion, such laws unconstitutionally subject the person to involuntary servitude in violation of the Thirteenth Amendment of the U.S. Constitution and fail to protect the person equally with those similarly situated.<sup>8</sup>

Some states take actions that ultimately harm the child born out of an unwanted pregnancy.<sup>9</sup> The child is born to an unwilling parent.<sup>10</sup>

<sup>5</sup> Not all people capable of getting pregnant identify as a woman or use she/her pronouns. Use of said pronouns in this Comment generally mirrors language in the cited sources, especially when referring to real persons whose experiences are relayed. Otherwise, this Comment uses gender-neutral language to the extent practically possible and acknowledges that the issues discussed herein are not limited to women. See Jack Montgomery, *Equality Institute: Don't Say 'Pregnant Women' as 'People of All Genders Can Fall Pregnant'*, BREITBART (Oct. 11, 2018), <https://www.breitbart.com/europe/2018/10/11/equality-institute-dont-say-pregnant-women-all-genderspregnant/>; cf. Helen Lewis, *Why I'll Keep Saying 'Pregnant Women'*, THE ATLANTIC (Oct. 26, 2021), <https://www.theatlantic.com/ideas/archive/2021/10/pregnant-women-people-feminism-language/620468/>; Brooke Migdon, *Experts Warn Gender-Neutral Language Like 'Pregnant People' May Put Mothers at Risk*, HILL: CHANGING AMERICA (Feb. 1, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/592335-experts-warn-gender-neutral-language-like/>.

<sup>6</sup> An implied contract may be either implied in law or implied in fact. A contract implied in law occurs if one party confers a benefit upon the other party, which the other party retains. Justice requires that the party that conferred the benefit is paid the value thereof. *Contract implied in law*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (July 2022), [https://www.law.cornell.edu/wex/contract\\_implied\\_in\\_law](https://www.law.cornell.edu/wex/contract_implied_in_law). A contract implied in fact exists when there is a mutual agreement that is not explicitly stated by either party but is implied through actions. *Contract implied in fact*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE (July 2022), [https://www.law.cornell.edu/wex/contract\\_implied\\_in\\_fact](https://www.law.cornell.edu/wex/contract_implied_in_fact). This Comment refers to the decision to carry the pregnancy to term and to provide for the resulting child loosely as an implied contract in general because it requires that the pregnant person intends to enter the contract and implies this intent by not seeking an abortion like a contract implied in fact, but the fetus/child appreciates the benefit after the fact like a contract implied in law.

<sup>7</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

<sup>8</sup> See Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 484 (1990), [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID2669824\\_code337501.pdf?abstractid=2669824&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2669824_code337501.pdf?abstractid=2669824&mirid=1).

<sup>9</sup> See Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POL., POL'Y AND L. 299, 300 (2013), [https://read.dukeupress.edu/jhpl/article-pdf/38/2/299/575067/jhpl382\\_09paltrow\\_fpp.pdf](https://read.dukeupress.edu/jhpl/article-pdf/38/2/299/575067/jhpl382_09paltrow_fpp.pdf).

<sup>10</sup> *Id.*

Forcing a pregnant person into involuntary servitude not only violates that person's rights,<sup>11</sup> but also voids the contract between the parent and the child, as it is entered into under duress.<sup>12</sup> Such unconstitutional interference with contractual rights between pregnant people and their unborn children causes harm to both.<sup>13</sup>

This Comment suggests looking at the decision to carry a pregnancy to term as a decision to enter an implied contract with the fetus and the resulting child to bring the child to life and to provide for the child until the child reaches the age of majority. The Comment uses pre-*Roe* scholarship as a starting point to portray the relationship between a pregnant person and a fetus in the absence of a right to abortion under the Fourteenth Amendment.<sup>14</sup> The Comment focuses on the distinction between consensual and nonconsensual pregnancies<sup>15</sup> to show that the natural right to self-preservation<sup>16</sup> allows a pregnant person to terminate a non-consensual pregnancy because refusing to enter the contract and, consequently, terminating the pregnancy aligns with the Contract Clause's original intent to protect natural rights.<sup>17</sup> Part I explores the factual and legal background of the rights of a pregnant person and the burdens of pregnancy and childbearing. Further, it introduces and adopts McDonagh's consent model<sup>18</sup> as an equitable way to reconcile pregnant people's rights. Part II discusses how infringing the expecting woman's rights leads to a failure to protect the fetus's interests once it is out of the

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<sup>11</sup> See Koppelman, *supra* note 8 at 484 (1990).

<sup>12</sup> See STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 523 (4th ed. 2016) (explaining that contracts entered under duress are void).

<sup>13</sup> See Paltrow & Flavin, *supra* note 9 at 300.

<sup>14</sup> See Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971), <https://www.jstor.org/stable/2265091> (offering a series of analogies to pregnancy in which another person's life is at stake but the subject can withdraw life support with no moral objections).

<sup>15</sup> See generally McDonagh, *supra* note 4 (differentiating between consensual pregnancies as benign, and nonconsensual pregnancies as wrongful, because, in the former, the woman is explicitly willing for the fertilized ovum to implant itself, resulting in a consensual change in her body from nonpregnant to pregnant).

<sup>16</sup> Samuel Adams, *The Rights of the Colonists*, in 2 THE WRITINGS OF SAMUEL ADAMS 350, 351 (Harry Alonzo Cushing, ed., 1906), <https://archive.org/details/writingssamadam02adamrich/page/350> ("Among the Natural Rights of the Colonists are these First, a Right to *Life*; Secondly, to *Liberty*; thirdly, to *Property*; together with the Right to support and defend them in the best manner they can—Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature—").

<sup>17</sup> See *The Bill of Rights*, KHAN ACADEMY, <https://www.khanacademy.org/humanities/us-history/road-to-revolution/creating-a-nation/a/the-bill-of-rights> (last visited Jul 26, 2023) (explaining that the Bill of Rights limits state power under a natural rights theory, which holds that humans have certain God-given freedoms and liberties, which the state shall not usurp or otherwise infringe).

<sup>18</sup> See generally McDonagh, *supra* note 4 (differentiating between consensual and nonconsensual pregnancies based on a woman's willingness for the fertilized ovum to implant itself, thereby causing a pregnancy).

womb and needs the mother's care. Finally, Part III responds to various counterarguments to the ideas put forth in the earlier sections.

## I. BACKGROUND

A pregnant person has rights. Not only pregnancy, but also childbearing and childrearing impose burdens on a pregnant person. This section introduces the rights of and the burdens on the pregnant person, and the proposed rights of a child<sup>19</sup> once it is born.

### A. RIGHTS OF THE PREGNANT PERSON AND THE FETUS

Pregnant people have the same constitutional rights as all other people.<sup>20</sup> Specifically, the Thirteenth and Fourteenth Amendments of the U.S. Constitution, respectively, protect them from involuntary servitude and guarantee equal protection of the law.<sup>21</sup> Article I of the U.S. Constitution establishes the freedom to contract without state interference.<sup>22</sup> Case law establishes fetal rights where a person intends to carry a pregnancy to term.<sup>23</sup> When the intent is to terminate a pregnancy, the Model Penal Code defines when deadly force may be used for self-defense.<sup>24</sup>

The Thirteenth Amendment of the U.S. Constitution states that “[n]either slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.”<sup>25</sup> It protects persons from being compelled to serve another person against his or her will<sup>26</sup> and guarantees “the liberty *not* to have one’s body controlled by and for others.”<sup>27</sup> The Thirteenth Amendment also “does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other.”<sup>28</sup>

<sup>19</sup> See generally Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1516 (2018), [https://www.yalelawjournal.org/pdf/18.DaileyRosenburyPostMEProof2\\_Final\\_d67nbw8s.pdf](https://www.yalelawjournal.org/pdf/18.DaileyRosenburyPostMEProof2_Final_d67nbw8s.pdf).

<sup>20</sup> See generally U.S. CONST. amend. I, III-IX, XIII-XV, XIX, XIV, XVI.

<sup>21</sup> U.S. CONST. amend. XIII-XIV.

<sup>22</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>23</sup> See *Bonbrest et al. v. Kotz et al.*, 65 F. Supp. 138 (D. D.C. 1946) (recognizing a fetus as a distinct individual who has a right of action for injuries sustained as a result of allegedly being removed from her mother’s womb through professional malpractice); *Verkennes v. Cornica*, 38 N.W.2d 838 (Minn. 1949) (allowing a father recovery for the wrongful death of a stillborn child).

<sup>24</sup> MODEL PENAL CODE § 3.04 explanatory note (AM. L. INST. 2022).

<sup>25</sup> U.S. CONST. amend. XIII, § 1.

<sup>26</sup> *Id.*

<sup>27</sup> Koppelman, *supra* note 8 at 493-94.

<sup>28</sup> *Bailey v. Alabama*, 219 U.S. 219, 243-44 (1911).

Under the Fourteenth Amendment of the U.S. Constitution, “[a]ll persons *born* or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>29</sup> The fetus is not born yet; therefore, it is not protected by the Fourteenth Amendment.<sup>30</sup> Pregnant people are born persons; thus, states owe due process and equal protection rights to pregnant people.

The U.S. Constitution states that the states must refrain from impairing the freedom to contract: “No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.”<sup>31</sup> Modeled after an ordinance intended to bar legislative interference with private contracts,<sup>32</sup> the Contract Clause’s broad language covers every type of contract, including contracts in which the state is a party.<sup>33</sup> While the Contract Clause waned in importance following the enactment of the Fourteenth Amendment Due Process Clause,<sup>34</sup> the Court continued to apply it to invalidate state laws in the late 1970s.<sup>35</sup>

Under the Model Penal Code, one may use deadly force to stop a perpetrator when the actor believes that such force is necessary to protect oneself against four categories of injury:<sup>36</sup> (1) death, (2) serious bodily injury, (3) kidnapping, or (4) sexual intercourse compelled by force or threat.<sup>37</sup> The Model Penal Code defines “serious bodily injury” as “bodily injury which creates a substantial risk of death or which causes seri-

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<sup>29</sup> U.S. CONST. amend. XIV, § 1.

<sup>30</sup> McDonagh, *supra* note 4 at 1086.

<sup>31</sup> U.S. CONST. art. I, § 10, cl. 1.

<sup>32</sup> James W. Ely Jr., *Contract Clause*, CENTER FOR THE STUDY OF FEDERALISM (1996), [https://encyclopedia.federalism.org/index.php/Contract\\_Clause](https://encyclopedia.federalism.org/index.php/Contract_Clause) (giving an overview of the origins and historical application of Commerce Clause).

<sup>33</sup> Fletcher v. Peck, 10 U.S. 87, 137 (1810).

<sup>34</sup> Ely Jr., *supra* note 32.

<sup>35</sup> See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) (holding that the repeal of a statutory covenant limiting the ability of a port authority to subsidize rail passenger transportation from revenues and reserves violated the Contract Clause because the statute’s repeal had the effect of impairing a contractual obligation of the state); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (holding that subjecting private employers providing pension benefits under qualified plans to a “pension funding charge” upon termination of the plan or closing of an office within the state violated the Contract Clause because the statute operated as a substantial impairment of a contractual relationship by substantially modifying private contracts).

<sup>36</sup> To distinguish between injury as a legal term, and injury as a synonym of harm as used in colloquial language, this Comment will distinguish the two by using ‘injury’ solely as a legal term and ‘harm’ as the colloquial expression.

<sup>37</sup> MODEL PENAL CODE § 3.04(2)(b) (AM. L. INST. 2022); MODEL PENAL CODE § 3.04 explanatory note (AM. L. INST. 2022) (explaining how the third limitation on the use of self-defensive force relates to occasions when deadly force may be used).

ous, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”<sup>38</sup> This definition becomes significant once pregnancy is recognized as an injury<sup>39</sup> to justify the termination of a pregnancy as self-defense. The Model Penal Code allows use of force for self-defense because self-preservation is a natural right.<sup>40</sup>

In 1973, the U.S. Supreme Court federally protected women who sought abortions in *Roe v. Wade*.<sup>41</sup> The Court recognized women’s right to privacy and held that a statute criminalizing abortion “without regard to pregnancy stage and without recognition of the other interests involved, violates the Due Process Clause of the Fourteenth Amendment.”<sup>42</sup> It found the prohibition of abortions prior to viability unconstitutional.<sup>43</sup> It held that, “[f]or the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”<sup>44</sup> However, in *Roe v. Wade*, the Court did not discuss the implications of the Equal Protection Clause of the Fourteenth Amendment, nor the Thirteenth Amendment issues.<sup>45</sup> Regardless of the reasoning in *Roe v. Wade*, states continued to pass bills that violated the Constitution by limiting women’s access to abortion prior to *Dobbs v. Jackson Women’s Health Organization*.<sup>46</sup>

The Court has issued two landmark decisions since *Roe v. Wade*—one upholding it,<sup>47</sup> the other overturning it.<sup>48</sup> *Planned Parenthood v. Casey*, while affirming *Roe*’s privacy right for women, defined viability: when the fetus has a realistic possibility of maintaining and nourishing a life outside the womb, the fetus’s life interest outweighs the woman’s right to privacy.<sup>49</sup> *Dobbs v. Jackson Women’s Health* shifted the balance

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<sup>38</sup> MODEL PENAL CODE § 210.0(3) (AM. L. INST. 2022).

<sup>39</sup> See McDonagh, *supra* note 4 at 1074; Mary Ford, *The Consent Model of Pregnancy: Deadlock Undiminished*, 50 MCGILL L.J. 619, 630 (2005), <https://www.canlii.org/w/canlii/2005CanLIIDocs73.pdf> (citing *Shessel v. Stroup*, 313 S.E.2d 747 (Ga. Ct. App. 1984)).

<sup>40</sup> See Adams, *supra* note 16 at 351 (“Among the Natural Rights of the Colonists are these First, a Right to Life; Secondly, to Liberty; thirdly, to Property; together with the Right to support and defend them in the best manner they can—Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature——.”).

<sup>41</sup> *Roe v. Wade*, 410 U.S. 113, 164 (1973).

<sup>42</sup> *Id.* at 164.

<sup>43</sup> *Id.* at 164-65.

<sup>44</sup> *Id.*

<sup>45</sup> See generally *id.* at 113.

<sup>46</sup> *Whole Woman’s Health v. Jackson*, ACLU (Dec. 16, 2021), <https://www.aclu.org/cases/whole-womans-health-v-jackson>.

<sup>47</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>48</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

<sup>49</sup> *Casey*, 505 U.S. at 870.



further by denying outright the right to privacy and asserting that the states' interest in protecting potential life justifies steps taken to further it.<sup>50</sup>

#### B. BURDENS OF THE CURRENT APPROACH ON THE RIGHTS OF PREGNANT PERSON AND THE FETUS

Pregnancy and childbearing impacts both the health and the socioeconomic conditions of a pregnant person.<sup>51</sup> Parents owe additional duties to their born children until the children reach the age of majority.<sup>52</sup> States need to acknowledge the invasive nature of fetal life in nonconsensual pregnancies and recognize people's rights to be free from nonconsensual pregnancies in this broader context.<sup>53</sup>

##### 1. *The Impact of Pregnancy and Childbearing on Parents*

Carrying a baby to term imperils a pregnant person's own health, to the extent that abortion is medically safer than childbirth, even without complications.<sup>54</sup> In the U.S., maternal mortality has been on the rise for twenty years, placing the country 55th in the world for safety of child-

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<sup>50</sup> *Dobbs*, 142 S. Ct. at 2242 (2022) (asserting that “[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision”); *id.* at 2317 (J. Breyer, J. Sotomayor & J. Kagan, dissenting) (stating that “[the Court] says that from the very moment of fertilization, a woman has no rights to speak of. A State can force her to bring a pregnancy to term, even at the steepest personal and familial costs”).

<sup>51</sup> See generally McDonagh, *supra* note 4 at 1074; Ford, *supra* note 39 at 630; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 377-78 (1992), [https://openyls.law.yale.edu/bitstream/handle/20.500.13051/273/Reasoning\\_From\\_the\\_Body\\_\\_An\\_Historical\\_Perspective\\_on\\_Abortion\\_Regulation\\_and\\_Questions\\_of\\_Equal\\_Protection.pdf?sequence=2&isAllowed=Y](https://openyls.law.yale.edu/bitstream/handle/20.500.13051/273/Reasoning_From_the_Body__An_Historical_Perspective_on_Abortion_Regulation_and_Questions_of_Equal_Protection.pdf?sequence=2&isAllowed=Y); Emma S. Ketteringham, *Test and Report: Bad for Children and Families*, HUFFINGTON POST (June 25, 2014), [http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families\\_b\\_5175106.html](http://www.huffingtonpost.com/emma-s-ketteringham/test-and-report-bad-for-children-and-families_b_5175106.html).

<sup>52</sup> See generally Dailey & Rosenbury, *supra* note 19 at 1516.

<sup>53</sup> See McDonagh, *supra* note 4 at 1069 (redefining abortion as “a woman’s right to consent to the massive burdens and pains of pregnancy that result from . . . the fetus,” rather than “the right of a woman to choose what to do with her own body without government interference”); *cf.* Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2135 (1999), <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1673&context=facpub> (critiquing McDonagh for limiting bodily integrity to protection from the harm of fetal life to avoid contradicting precedent).

<sup>54</sup> Olga Khazan, *Why So Many Women Choose Abortion over Adoption*, THE ATLANTIC (May 20, 2019), <https://www.theatlantic.com/health/archive/2019/05/why-more-women-dont-choose-adoption/589759/>; Anna North, *Why Adoption Isn't a Replacement for Abortion Rights*, THE VOX (Dec. 8, 2021, 7:00 AM), <https://www.vox.com/2021/12/8/22822854/abortion-roe-wade-adoption-supreme-court-barrett>; Genevra Pittman, *Abortion Safer than Giving Birth: A Study*, REUTERS (Jan. 23, 2012, 2:20 PM), <https://www.reuters.com/article/us-abortion/abortion-safer-than-giving-birth-study-idUSTRE80M2BS20120123>.

birth.<sup>55</sup> Black women are predominantly at risk of deadly complications during childbirth.<sup>56</sup> Pregnant and postpartum women, especially Black women and women under 25, are at the highest risk of physical and emotional abuse and are twice as likely to die by homicide compared to other causes of maternal mortality.<sup>57</sup>

Even a normal pregnancy significantly alters a person's body.<sup>58</sup> “[S]ome hormones in a woman's body rise to 400 times their base level; a new organ, the placenta, grows in her body; all of her blood is rerouted to be available to the growing fetus; her blood plasma and cardiac volume increase forty percent; and her heart rate increases fifteen percent,” with some of these changes persisting for life.<sup>59</sup>

Case law corroborates the claim that imposition of pregnancy on a person against her will is an injury.<sup>60</sup> In *Shessel v. Stroup*, the Georgia Court of Appeals held that a pregnancy resulting from failed sterilization is a legal injury.<sup>61</sup> A Wisconsin rape statute lists as an injury pregnancy suffered as a result of rape.<sup>62</sup>

Childbearing and childrearing compromise a woman's opportunities for education and employment, and entangle her in economic dependency upon others—to fulfill both her own needs, and those of her child.<sup>63</sup> People capable of being pregnant represent half of the world's population and the world's potential, so their full participation in labor forces would significantly contribute to most national productivity growth rates.<sup>64</sup> If a fetus is born, it eventually becomes a child, and modern scholarship offers a new paradigm that recognizes children's rights: healthy and safe relationships with parents and others; education; rehabilitation if engaged in misconduct; and fostering of participation in the wider world.<sup>65</sup> In the long-term, the fetus will have a claim against the parent for these rights,<sup>66</sup> which forms the basis of the implied contract between the parent and the child at issue in this Comment. Women also want to be able to give the children they have by choice a life with such

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<sup>55</sup> North, *supra* note 54.

<sup>56</sup> *Id.*

<sup>57</sup> Cecilia Nowell, *Homicide Is a Leading Cause of Death in Pregnant People, a New Study Finds. Black Women Are at Greatest Risk*, LILY (Dec. 6, 2021), <https://www.thelily.com/homicide-is-a-leading-cause-of-death-in-pregnant-people-a-new-study-finds-black-women-are-at-greatest-risk>.

<sup>58</sup> McDonagh, *supra* note 4 at 1074.

<sup>59</sup> *Id.*

<sup>60</sup> Ford, *supra* note 39 at 630 (citing *Shessel v. Stroup*, 313 S.E.2d 747 (Ga. Ct. App. 1984)).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> Siegel, *supra* note 51 at 377-78; Ketteringham, *supra* note 51.

<sup>64</sup> UNITED NATIONS, GENDER EQUALITY: WHY IT MATTERS, [https://www.un.org/sustainable-development/wp-content/uploads/2016/08/5\\_Why-It-Matters-2020.pdf](https://www.un.org/sustainable-development/wp-content/uploads/2016/08/5_Why-It-Matters-2020.pdf) (last visited Jan. 18, 2023).

<sup>65</sup> See generally Dailey & Rosenbury, *supra* note 19 at 1516.

<sup>66</sup> See generally *id.*

rights, which they achieve by limiting the number of children they have according to their resources.<sup>67</sup>

Similarly, adoption imposes harms on both pregnant persons and their newborns.<sup>68</sup> Pregnant people anticipate feeling bonded with the fetus by the time of delivery, and birth mothers uniformly experience grief after placement.<sup>69</sup> Proponents of adoption underestimate the emotional toll of being forced to carry an unwanted pregnancy to term.<sup>70</sup> Some women believe that there are already enough children in need of homes.<sup>71</sup> Children in foster care spend an average of two years in the foster care system.<sup>72</sup> The darker a child's skin color is, the longer the child tends to wait to be adopted.<sup>73</sup> Adopted children deal with lifelong issues of abandonment and lack of identity.<sup>74</sup> Historically, only nine percent of never-married women chose to give their children up for adoption prior to nationwide constitutional protection of abortion in 1973.<sup>75</sup> After constitutional protection, this number kept dropping.<sup>76</sup> By 2014, only 18,000 children were being placed in adoption agencies each year, whereas there were about one million abortions every year.<sup>77</sup>

## 2. “Consent to Pregnancy” to Balance the Rights of the Pregnant Person and the Fetus

A pregnant person's personhood may be protected with the consent model, by seeking the pregnant person's consent to remain pregnant.<sup>78</sup> The major claims in the consent model are (1) that “the direct and immediate cause of pregnancy is not the act of sexual intercourse but the fetus's implantation in her uterus”; (2) “that pregnancy constitutes a massive intrusion on a woman's body, even where the pregnancy is ‘medically normal’”; and (3) “that women have a right to assistance in exercising their right to refuse consent to such an invasion of their bod-

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<sup>67</sup> See Rachel K. Jones et al., “I Would Want to Give My Child, Like, Everything in the World”: How Issues of Motherhood Influence Women Who Have Abortions, 29 J. FAM. ISSUES 79, 83 (2007), <https://doi.org/10.1177/0192513X07305753> (highlighting the role of finances and anticipated lack of support from family members in abortion decisions).

<sup>68</sup> Khazan, *supra* note 54 (asserting that sociological studies suggest that some women find adoption to be more painful than abortion).

<sup>69</sup> *Id.*

<sup>70</sup> North, *supra* note 54.

<sup>71</sup> Khazan, *supra* note 54.

<sup>72</sup> North, *supra* note 54.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Khazan, *supra* note 54.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See McDonagh, *supra* note 4.

ies.”<sup>79</sup> Thus, a fetus is an intruder and has no right to a woman’s body against her will.<sup>80</sup> “It is the fetus’s action in causing pregnancy that justifies the right of a woman to terminate its life in order to put an end to its intrusion/violence.”<sup>81</sup>

A man’s action of moving sperm into a woman’s body during intercourse merely puts her at risk of being pregnant.<sup>82</sup> As such, consent to intercourse does not constitute consent to pregnancy.<sup>83</sup> The level of risk is not high in all cases because intercourse does not guarantee pregnancy.<sup>84</sup> It is common enough for intercourse not to end in pregnancy that there are methods aiming for pregnancy in particular, such as in-vitro fertilization.<sup>85</sup>

In the consent model, since pregnancy itself is an injury, the sufficient basis for allowing an abortion is not what the woman can do with her body, but whether she consents to the fetus’s effect on her body.<sup>86</sup> While case law holds a man liable for the injury of pregnancy under certain circumstances,<sup>87</sup> in the consent model’s interpretation of non-consensual pregnancy, the fetus inflicts the injury.<sup>88</sup> A pregnant person’s refusal to continue the pregnancy and attempt to prevent the injury constitutes self-defense.<sup>89</sup> Consequently, the State has a duty to intervene positively to prevent or diffuse attacks by one private party—the fetus—to another—the pregnant person.<sup>90</sup>

The consent approach treats the fetus as an agent separate from the pregnant person, confers personhood to the fetus, yet still justifies abortions.<sup>91</sup> The assumption that the fetus is a person strengthens the understanding of the right to an abortion as a right to defend oneself against the harm of nonconsensual and invasive taking of one’s body by another.<sup>92</sup> If a grown child needed a parent’s kidneys, the parent would have the right to withhold consent to the donation of that kidney regard-

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<sup>79</sup> Ford, *supra* note 51 at 621-22.

<sup>80</sup> *Id.* at 622-23.

<sup>81</sup> *Id.* at 623.

<sup>82</sup> *Id.* at 624.

<sup>83</sup> *See id.* at 624.

<sup>84</sup> *Id.* at 647; *see infra*. Section III(B)(1).

<sup>85</sup> *Id.* at 647; *see infra*. Section III(B)(1).

<sup>86</sup> *See* McDonagh, *supra* note 4.

<sup>87</sup> *See* Ford, *supra* note 51 at 630 (citing *Shessel v. Stroup*, 313 S.E.2d 747 (Ga. Ct. App. 1984)).

<sup>88</sup> *Id.*; *see generally* McDonagh, *supra* note 4.

<sup>89</sup> *See* Ford, *supra* note 39 at 634.

<sup>90</sup> *Id.* (explaining that if a rape, a severe beating, or a murder is in progress, the victims do not only have a right of self-defense to try to stop the aggressors, but they also have a right to state assistance to stop the aggressors on their behalf).

<sup>91</sup> *Id.* at 625.

<sup>92</sup> West, *supra* note 53 at 2118.

less of the parent's role in bringing that child into the world,<sup>93</sup> and regardless of kidney donation's involvement of lower risks than any other major surgery.<sup>94</sup> Any degree of "responsibility of the parent for the child's existence does not imply the child's right to appropriate the parent's body against the parent's will."<sup>95</sup> No born person has the right to appropriate another's body for the assailant's own survival.<sup>96</sup> The state protects its citizens from private aggressions by born persons, and must extend this protection to the mother against aggressions from the fetus.<sup>97</sup>

The notion of "consent" to pregnancy helps distinguish voluntarily continued pregnancies from involuntary servitude<sup>98</sup> and from the kinds of harms that come with each kind of pregnancy.<sup>99</sup> Framing the issue as a person's right to consent to pregnancy rather than as her right to choose an abortion justifies the use of deadly force against a fetus because "the fetus's effects on her body constitute serious harm impinging upon her bodily integrity and liberty."<sup>100</sup> The consent model entails that "the state is obligated to act to stop harm to a woman's bodily integrity and liberty resulting from the fetus."<sup>101</sup>

One's right to choose what is done to one's body is a stronger right than one's right to choose what to do with one's life.<sup>102</sup> A person has a constitutional right to consent to or to refuse medical treatment.<sup>103</sup> However, in most states, people still do not have a right to choose a treatment to end their lives even when terminally ill.<sup>104</sup> Similarly, since the fetus is designated as an entity separate from a pregnant person, the pregnant person has a fundamental right to choose how this entity may affect the pregnant person's body and liberty.<sup>105</sup> Liberty and the right to defend it are natural rights.<sup>106</sup>

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<sup>93</sup> *Id.* at 2122.

<sup>94</sup> *Living Donor Surgery and Risks*, NAT'L KIDNEY FOUND., <https://www.kidney.org/transplantation/livingdonors/risks-of-surgery> (last visited Feb. 11, 2023).

<sup>95</sup> West, *supra* note 53 at 2122.

<sup>96</sup> *Id.* at 2118-19.

<sup>97</sup> *Id.* at 2119.

<sup>98</sup> See Koppelman, *supra* note 8 at 484.

<sup>99</sup> McDonagh, *supra* note 4.

<sup>100</sup> *Id.* at 1060.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1061.

<sup>103</sup> *Id.*

<sup>104</sup> *In Your State*, DEATH WITH DIGNITY, <https://deathwithdignity.org/states/> (Feb. 7, 2023) (listing states that now allow doctor assisted suicide).

<sup>105</sup> McDonagh, *supra* note 4 at 1061.

<sup>106</sup> Adams, *supra* note 16 at 351 ("Among the Natural Rights of the Colonists are these First, a Right to *Life*; Secondly, to *Liberty*; thirdly, to *Property*; together with the Right to support and defend them in the best manner they can—Those are evident Branches of, rather than deductions from the Duty of Self Preservation, commonly called the first Law of Nature——").

Therefore, the key issue in the abortion debate is not a woman's right "to exercise her right of choice as an isolated individual, but rather her right to consent to what a separate entity, the fetus, does to her when pregnancy results from its presence and implantation in her uterus."<sup>107</sup> While abortion discussions consider what a fetus *is*, they often overlook what the fetus *does* to a woman's body and mental well-being.<sup>108</sup> The state zealously advocates for and protects the fetus while ignoring the state's duty to protect the pregnant person from the injury of non-consented pregnancy, and to respect the pregnant person's constitutional rights.<sup>109</sup> Instead, when a person does not consent to remaining pregnant, the state must evaluate how a fetus affects the person's bodily integrity and liberty before the state evaluates how an abortion affects the fetus.<sup>110</sup> In this view, the right to an abortion is not "the right of a woman to choose what to do with her own body," but "a woman's right to [withhold] consent [from] the massive burdens and pains of pregnancy that result from [carrying] a separate entity, the fetus."<sup>111</sup>

### C. FREEDOM TO CONTRACT AND PREGNANCY

The right to free contract formation is applicable in the mother-child relationship context.<sup>112</sup> If a fetus is born, it eventually becomes a child, and children have rights.<sup>113</sup> Undertaking parenthood amounts to entering a contractual relationship with the child to facilitate exercise of those rights.<sup>114</sup> A contract requires offer, acceptance, mutual consent, consideration, legal consent, and capacity.<sup>115</sup> In the parenting context, while the legal consent by the fetus is missing in practice due to capacity, the state assumes the fetus's consent when determining fetal interest.<sup>116</sup> Further,

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<sup>107</sup> McDonagh, *supra* note 4 at 1063.

<sup>108</sup> *Id.* at 1068.

<sup>109</sup> See McDonagh, *supra* note 4; see, e.g., Koppelman, *supra* note 8.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 1069.

<sup>112</sup> See, e.g., Fletcher v. Peck, 10 U.S. 87, 137 (1810) (stating that the Contract Clause of the Constitution applies to all contracts).

<sup>113</sup> See generally Dailey & Rosenbury, *supra* note 19 at 1516 (introducing a new framework of children's rights based on the child's needs as a person).

<sup>114</sup> See generally *id.* (juxtaposing the current method of determining children's rights by focusing on parental authority with a new framework based on the child's needs as a person).

<sup>115</sup> MACAULAY, *supra* note 12 at 22.

<sup>116</sup> See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996) (offering the concept of anticipated consent to understand our obligations to potential persons, where the present deliberators anticipate the consent of future generations under conditions in which had the future generations been there as active participants in the discourse, they would have consented).

the implied contract imposes no obligations on the fetus.<sup>117</sup> Under the recently proposed paradigm, the child that the fetus becomes is owed healthy and safe relationships with parents and others; education; rehabilitation if engaged in misconduct; and fostering of participation in the wider world.<sup>118</sup> These needs unavoidably become components of the implied contract that the pregnant person has with the child once the person gives birth,<sup>119</sup> regardless of whether the person enters the contract willingly or under duress.<sup>120</sup>

Robin West's conception of the ethic of care<sup>121</sup> is instrumental in differentiating between entering a contract willingly or under duress.<sup>122</sup> The consensual relationship between the woman and the fetus, and the future relationship between the mother and the child is a relationship of care.<sup>123</sup> To be morally justifiable, care needs to be given willingly, not under duress or pressure.<sup>124</sup>

A contract for a service will not be consistent with the Thirteenth Amendment if the contractor cannot elect to break it.<sup>125</sup> The possibility and frequency of breaking contracts have led to the legal protection of expectation, reliance, or restitution interests of an individual when the other party has breached a contract.<sup>126</sup> A legal system that affords contracting parties second thoughts about an existing contract, naturally, allows individuals to not enter the contract in the first place.<sup>127</sup>

A state's action when forcing pregnant people into a contract is at odds with the Contract Clause.<sup>128</sup> Intercourse merely puts them at risk of being pregnant, but consent to intercourse does not constitute consent to pregnancy.<sup>129</sup> When the mother-to-be considers herself to be unlikely to

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<sup>117</sup> MACAULAY, *supra* note 12 at 521 (explaining that the contract is voidable by the minor to protect the minor's interest).

<sup>118</sup> See generally Dailey & Rosenbury, *supra* note 19 at 1516.

<sup>119</sup> See generally *id.*

<sup>120</sup> See generally Meghan Boone, *Reproductive Due Process*, 88 GEO. WASH. L. REV. 511, 518 (2020), [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID3631129\\_code2432420.pdf?abstractid=3515637&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3631129_code2432420.pdf?abstractid=3515637&mirid=1) (arguing that state-compelled pregnancy must be paired with pre- and post deprivation rights under the Constitution); Siegel, *supra* note 51 at 366-67 (outlining what due process entails for pregnant women denied abortions).

<sup>121</sup> See West, *supra* note 53 at 2141-47.

<sup>122</sup> See MACAULAY, *supra* note 12 at 523 (explaining that contracts entered under duress are void).

<sup>123</sup> West, *supra* note 53 at 2146.

<sup>124</sup> See *id.* at 2143-44.

<sup>125</sup> Koppelman, *supra* note 8 at 491-92.

<sup>126</sup> See MACAULAY, *supra* note 12 at 31.

<sup>127</sup> See MACAULAY, *supra* note 12 at 523 (explaining that contracts entered under duress are void).

<sup>128</sup> See U.S. CONST. art. I, § 10, cl. 1 (prohibiting states from interfering with private contracts).

<sup>129</sup> See Ford, *supra* note 39 at 634.

fulfill her duties, expresses this concern, and is unwilling to take on the responsibility, as demonstrated by desiring an abortion, forcing her into parenting results in a voidable contract entered under duress.<sup>130</sup>

## II. ANALYSIS

Infringing the pregnant person's rights leads to a failure to protect the fetus's interests once it is out of the womb and needs the parent's care.<sup>131</sup> Part A outlines the pregnant person's and the child's unmet interests<sup>132</sup> and analyzes the status quo under the U.S. Constitution.<sup>133</sup> Part B shows how the implied contract approach to the decision to give birth resolves these issues.<sup>134</sup>

### A. IMBALANCE BETWEEN THE RIGHTS OF THE PREGNANT PERSON AND THE FETUS

The fetal interest extends beyond birth, well into the formative years of the child the fetus becomes.<sup>135</sup> Limiting reproductive care imposes both the harms of pregnancy itself and the burden of meeting the fetus's extended interests on the pregnant person.<sup>136</sup> These impositions constitute more than a violation of the right to privacy and require an appropriate legal standard of review.<sup>137</sup>

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<sup>130</sup> MACAULAY, *supra* note 12 at 227 (outlining the elements of a contract).

<sup>131</sup> See Siegel, *supra* note 51 at 377-78; Ketteringham, *supra* note 51; Paltrow & Flavin, *supra* note 9 at 319 (critiquing that the State does not support mothers by providing accessible healthcare, childcare, and other welfare needs).

<sup>132</sup> See Paltrow & Flavin, *supra* note 9 at 332.

<sup>133</sup> See generally U.S. CONST. amend. XIII-XIV (prohibiting involuntary servitude and guaranteeing due process and equal protection under the law).

<sup>134</sup> See U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from impairing the obligation of contracts); see *infra*. Section II.B (analyzing decision to terminate pregnancy or carry to term under the contracts clause of the U.S. Constitution).

<sup>135</sup> See Paltrow & Flavin, *supra* note 9 at 332; Dailey & Rosenbury, *supra* note 19 at 1516.

<sup>136</sup> See generally Boone, *supra* note 120 at 518 (arguing that state-compelled pregnancy must be paired with pre- and -post deprivation rights under the Constitution); Siegel, *supra* note 51 at 366-67 (outlining what due process entails for pregnant women denied abortions).

<sup>137</sup> Cf. *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (balancing hardships pregnancy imposes on women with right to fetal life); *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022) (asserting that abortion is not mentioned in the constitution, is not "deeply rooted in this Nation's history and tradition" and is not "implicit in the concept of ordered liberty" without reference to hardships pregnancy imposes on women).



1. *Current Approach's Lack of Consideration for Fetus' Rights Beyond Birth*

Today, the laws of 21 states and the District of Columbia protect abortion, while the laws of 26 states and 3 territories severely limit access to abortion or prohibit it.<sup>138</sup> Those 26 states and 3 territories intervene in two ways to protect fetal rights above women's rights.<sup>139</sup> First, 13 states prohibit abortions.<sup>140</sup> Second, some of the remaining states decline to provide help to expecting women who have underlying health conditions that may put the fetus at risk and instead penalize them for those conditions.<sup>141</sup> The current model of protecting the interests of the fetus in the womb fails to protect its interests after birth.<sup>142</sup> Under the current system, the states acknowledge a fetus's interest only as an interest in being born, but they do not confer a benefit to the fetus beyond that.<sup>143</sup> In practice, any post-birth interests owed to the child are unduly imposed on the pregnant person.<sup>144</sup>

Abortion-restrictive regulation coerces women not only to bear children, but to rear children as well because social conditions virtually require this outcome.<sup>145</sup> A woman may form emotional bonds with a child during pregnancy, making it harder for her to separate from the child at birth.<sup>146</sup> She may fear that the child will not be adopted, and she may feel compelled to raise the child despite her reasons to seek an abortion.<sup>147</sup>

Infringing the pregnant person's rights may lead to a failure to protect the fetus's interests once it is out of the womb and needs parental care because the parent is free to pursue her own interests rather than the

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<sup>138</sup> *After Roe Fell: Abortion Laws by State*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/maps/abortion-laws-by-state/> (last visited Jul. 22, 2023).

<sup>139</sup> See Paltrow & Flavin, *supra* note 9 at 332 (concluding that state intervention will undermine rather than advance state interests).

<sup>140</sup> *United States*, CENTER FOR REPRODUCTIVE RIGHTS, <https://reproductiverights.org/our-regions/united-states/> (last visited Jul. 22, 2023).

<sup>141</sup> See Paltrow & Flavin, *supra* note 9 at 332 (concluding that state intervention will undermine rather than advance state interests).

<sup>142</sup> See Siegel, *supra* note 51 at 377-78; Ketteringham, *supra* note 51.

<sup>143</sup> See Paltrow & Flavin, *supra* note 9 at 319 (critiquing that the State does not support mothers by providing accessible healthcare, childcare, and other welfare needs).

<sup>144</sup> See generally Boone, *supra* note 120 at 518 (arguing that state-compelled pregnancy must be paired with pre- and -post deprivation rights under the Constitution); Siegel, *supra* note 51 at 366-67 (outlining what due process entails for pregnant women denied abortions).

<sup>145</sup> Siegel, *supra* note 51 at 371-72; see generally North, *supra* note 54; Khazan, *supra* note 54; Gretchen Sisson, "Choosing Life": *Birth Mothers on Adoption and Reproductive Choice*, 25 WOMEN'S HEALTH ISSUES 349 (2015) (discussing pregnant women making a choice between abortion or parenting, but rarely considering adoption).

<sup>146</sup> Siegel, *supra* note 51 at 371-72.

<sup>147</sup> *Id.*

fetus's.<sup>148</sup> The pregnant person has human rights and is entitled to political, economic, and social equality.<sup>149</sup> The pregnant person's human rights include the right to live free from violence and discrimination; to enjoy the highest attainable standard of physical and mental health; to be educated; and to earn an equal wage regardless of sex and gender.<sup>150</sup> The fetus's interests depend on the health and well-being of the pregnant person.<sup>151</sup> The birthing parent's care for the fetus does not end at birth.<sup>152</sup> Infringing on the pregnant person's rights may cause harm to her physical, mental, emotional, or social well-being.<sup>153</sup> This may affect her ability or willingness to care for the fetus before or after birth.<sup>154</sup> It may also create resentment, trauma, or conflict between the birthing parent and the fetus.<sup>155</sup> Therefore, infringing on the pregnant person's rights may not only violate her dignity and autonomy, but also jeopardize her relationship with her child.<sup>156</sup>

When government intervention prevents a person from obtaining reproductive health services, especially abortion, the unwanted child may be forced into an existence with limited access to basic needs.<sup>157</sup> Fetuses may be born to unwilling parents who cannot or will not give them "everything in the world."<sup>158</sup> The main interest of the fetus the states seek to protect is the right to start life; however, the state fails to adequately address the interests beyond birth as they are presumed to be provided by the parents.<sup>159</sup> The fetus has proposed rights in addition to birth from

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<sup>148</sup> See U.S. CONST. amend. XIII, § 1 (prohibiting involuntary servitude).

<sup>149</sup> *Women's Rights*, AMNESTY INTERNATIONAL, <https://www.amnesty.org/en/what-we-do/discrimination/womens-rights/> (last visited Mar. 12, 2023). While the U.S. Supreme Court does not account for most international law in its U.S. constitutional decisions, the modern human rights framework is closer to the Framers' original intent to preserve natural rights than the Court's approach.

<sup>150</sup> *Id.*

<sup>151</sup> Cf. Paltrow & Flavin, *supra* note 9 at 319 (stating that mothers need accessible healthcare, childcare, and other welfare support to care for their children).

<sup>152</sup> *Id.*

<sup>153</sup> See McDonagh, *supra* note 4 at 1073-75 (highlighting the social, physical, and psychological effects of pregnancy on a woman).

<sup>154</sup> See Jones, *supra* note 67 at 81-84 (surveying reasons provided for seeking an abortion).

<sup>155</sup> *Id.* at 83.

<sup>156</sup> See West, *supra* note 53 at 2141-47 (emphasizing the role of free choice in giving a moral meaning to parental duties).

<sup>157</sup> See Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1213 (2017), <https://www.gwlr.org/wp-content/uploads/2018/01/85-Geo.-Wash.-L.-Rev.-1163.pdf>.

<sup>158</sup> Jones, *supra* note 67 at 79.

<sup>159</sup> See Ocen, *supra* note 157 at 1213; Dailey & Rosenbury, *supra* note 19 at 1516 (proposing healthy and safe relationships with parents and others; education; rehabilitation if engaged in misconduct; and fostering of participation in the wider world as rights of the child in the modern paradigm).

birth to adulthood.<sup>160</sup> When a state violates the birthing parent's rights, the violation hinders the fetus's rights from birth to adulthood and highly restricts its life quality.<sup>161</sup>

## 2. *Current Approach's Imperfect Balance of Interests*

*Roe v. Wade* established that, even if a fetus is viable, "no state may protect a fetus by prohibiting an abortion, when what the fetus does to a woman threatens her health or life."<sup>162</sup> However, it took the threats pregnant people face due to their pregnancy lightly.<sup>163</sup> In overturning *Roe v. Wade*, the *Dobbs* court considered *Roe*'s light concept of harm, framing the issue as an infringement of pregnant people's privacy rights.<sup>164</sup> In fact, the inherent physiological, psychological, and economic harms of pregnancy go beyond a woman's right to privacy in making intimate life decisions.<sup>165</sup>

Pregnancy constitutes massive transformations of a woman's body and liberty.<sup>166</sup> "[E]ven in a medically normal pregnancy the fetus massively affects a woman's liberty every minute, every hour, every day, every week, and every month for nine months."<sup>167</sup> While the fetus neither intentionally nor with any level of culpability causes harm to a woman, the massive alteration of a woman's body and liberty resulting from carrying a fetus constitutes an injury.<sup>168</sup> The pregnant person may or may not consent to this injury. If the fetus's presence in a woman's body sufficiently injures her, the woman's right to defend herself from that harm outweighs the state's interest in protecting the fetus.<sup>169</sup> However, opponents of abortion fail to acknowledge the injuries women sustain in medically normal pregnancies.<sup>170</sup> "When a woman has not consented to a pregnancy, even a medically normal pregnancy still constitutes serious legal [injury]."<sup>171</sup> Injuries inflicted on women by fetuses include not only physiological harms, in terms of the natural effects of

<sup>160</sup> Dailey & Rosenbury, *supra* note 19 at 1451.

<sup>161</sup> Ocen, *supra* note 157 at 1213.

<sup>162</sup> McDonagh, *supra* note 4 at 1072-73.

<sup>163</sup> *Id.*

<sup>164</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2243 (2022) (taking *Roe* to stand for merely situating right to abortion similarly to rights in intimate sexual relations, contraception, and marriage).

<sup>165</sup> See McDonagh, *supra* note 4 at 1075 (highlighting pregnancy's further impact to woman's liberty in terms of her right to control her own body and to associate with whom she chooses).

<sup>166</sup> *Id.* at 1073.

<sup>167</sup> *Id.* at 1075.

<sup>168</sup> *Id.* at 1100-01.

<sup>169</sup> *Id.* at 1073.

<sup>170</sup> *Id.* at 1074.

<sup>171</sup> *Id.* at 1070.

pregnancy on women's bodies, but also those resulting from putting their existing children at a disadvantage throughout life by limiting their resources.<sup>172</sup> Abortion-restrictive states overlook the physical harms a woman's body endures throughout a pregnancy and the emotional and socioeconomic harms it may bring upon the children she already has.<sup>173</sup>

Compelling women to carry a fetus to term violates the Thirteenth Amendment.<sup>174</sup> Historically, women have had a subordinate social role and status, which surfaces in one iteration as abortion-restrictive regulation.<sup>175</sup> Not all pregnancies start out as the product of a free choice, as some are the result of an inability to choose.<sup>176</sup> For example, contraception reduces the risk of pregnancy but it is difficult to get access to contraceptive materials and information, especially for teenagers.<sup>177</sup> Women's opportunity to consent may be compromised due to youth, inexperience, lack of self-esteem, or the internalization of cultural norms dictating male dominance.<sup>178</sup> Thus, one cannot assume consent when a woman engages in sexual intercourse without explicitly saying "no" but neither affirmatively saying "yes."<sup>179</sup> Compulsion to continue a pregnancy subjects women to "involuntary servitude" and "makes them into a servant caste, a group which, by virtue of a status of birth, is held subject to a special duty to serve others and not themselves."<sup>180</sup> The Thirteenth Amendment prohibits only involuntary servitude; it does not pertain to women who choose to serve the fetus because they want to be mothers.<sup>181</sup>

The Thirteenth Amendment does not protect "one's right to control one's own body," but it guarantees "the liberty *not* to have one's body controlled by and for others."<sup>182</sup> The kind of servitude imposed on women has two burdens: (1) to "endure constant exhaustion, loss of appetite, vomiting, sleeplessness, bloatedness, soreness, swelling, uncontrollable mood swings, and, ultimately, hours of agony, often followed by deep depression," and (2) to raise the child to maturity.<sup>183</sup> Spe-

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<sup>172</sup> Paltrow & Flavin, *supra* note 9 at 316-17.

<sup>173</sup> See Siegel, *supra* note 51 at 272-77 (discussing the burden of pregnancy on a woman's body and life); Jones *supra* note 67 at 90 (discussing that socioeconomic conditions of women "are rarely, if ever, represented in discussions of women's pregnancy termination decisions").

<sup>174</sup> See Koppelman, *supra* note 8.

<sup>175</sup> Siegel, *supra* note 51 at 351.

<sup>176</sup> Koppelman, *supra* note 8 at 505; McDonagh, *supra* note 4 at 1090-91 n.169.

<sup>177</sup> Koppelman, *supra* note 8 at 505.

<sup>178</sup> McDonagh, *supra* note 4 at 1090-91 n.169.

<sup>179</sup> *Id.*

<sup>180</sup> Koppelman, *supra* note 8 at 484.

<sup>181</sup> *Id.* at 487.

<sup>182</sup> *Id.* at 493-94.

<sup>183</sup> *Id.* at 490

cifically, the first burden entails having the pregnant person's body controlled by and for the fetus.<sup>184</sup> The second burden entails control beyond her body for the child.<sup>185</sup>

States claim a counter-interest to that of the woman—preserving the fetus's interest in life.<sup>186</sup> However, a state has the burden to show that this interest is more important than the Thirteenth Amendment's prohibition of involuntary servitude.<sup>187</sup> While most current literature suggests that the state cannot carry this burden without showing that the fetus is a person,<sup>188</sup> weighing the state's duties toward actual versus potential citizens leads this Comment to conclude that any duty toward the born person is immediate, while any duty to the unborn person is merely potential.

In balancing the pregnant person's and the fetus's rights, whether and to what extent the fetus has constitutional rights are important questions. Inclusion of the word “born” in the Fourteenth Amendment is dispositive of the answer.<sup>189</sup> The fetus is not born yet; therefore, it is not protected by the Fourteenth Amendment.<sup>190</sup> Pregnant persons are born persons;<sup>191</sup> thus, states owe them due process and equal protection.<sup>192</sup> Prohibiting abortion violates pregnant people's Fourteenth Amendment due process and equal protection rights.<sup>193</sup>

When laws “impose upon women burdens of unwanted pregnancy that men do not bear” by prohibiting abortion, there is an infringement on the potential mother's equal protection rights under the Fourteenth Amendment.<sup>194</sup> The unequally-imposed burden is one of conferring a

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<sup>184</sup> *Cf. id.* at 484.

<sup>185</sup> *Cf. id.* at 493-94.

<sup>186</sup> See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2257 (2022).

<sup>187</sup> Koppelman, *supra* note 8 at 485.

<sup>188</sup> See Mary Anne Warren, *On the Moral and Legal Status of Abortion*, 57 THE MONIST 43, 43 (1973), <https://doi.org/10.5840/monist197357133>; see also Koppelman, *supra* note 8 at 517 n.159.

<sup>189</sup> U.S. CONST. amend. XIV, § 1.

<sup>190</sup> McDonagh, *supra* note 4 at 1086.

<sup>191</sup> *Roe v. Wade*, 410 U.S. 113, 157 (1973) (“The Constitution does not define ‘person’ in so many words. Section 1 of the Fourteenth Amendment contains three references to ‘person.’ The first, in defining ‘citizens,’ speaks of ‘persons born or naturalized in the United States.’ The word also appears both in the Due Process Clause and in the Equal Protection Clause.”).

<sup>192</sup> McDonagh, *supra* note 4 at 1100.

<sup>193</sup> ERA and Abortion Talking Points, COLUMBIA LAW SCHOOL CENTER FOR GENDER & SEXUALITY LAW (May 3, 2022), [https://gender-sexuality.law.columbia.edu/content/era-and-abortion-talking-points#!#\\_edn1](https://gender-sexuality.law.columbia.edu/content/era-and-abortion-talking-points#!#_edn1) (explaining that restrictions on abortion single out abortions from other medical procedures that carry similar risks, imposing undue burden on pregnant people).

<sup>194</sup> *Id.* at 482 (arguing that the real issue surrounding abortion is not privacy, but the equality of women based on the Equal Protection Clause of the Fourteenth Amendment); Koppelman, *supra* note 8 at 482 (quoting Silvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955,

benefit on another being, the fetus.<sup>195</sup> It is a deeply rooted principle of American law that an individual is ordinarily not required to volunteer aid to another individual who is in danger or in need of assistance.<sup>196</sup> No law compels any other group of people to act as good Samaritans.<sup>197</sup> Duty-to-aid cases, too, are voluntary in nature; not only is there no obligation to confer a benefit on someone else, but any such benefit may also be withdrawn if the initial action has not precluded others from coming to help.<sup>198</sup> Allowing use of her body is a benefit the woman confers to the fetus, and she may withdraw the benefit.<sup>199</sup> Even in the sole context of parenting, “there are no other circumstances in which a genetic parent’s duty to care for a born offspring obligates the parent to consent to a condition that affects a parent’s body, even if that condition is necessary for the offspring’s survival.”<sup>200</sup> Allowing body use, in whole or in part, is not among parental obligations.<sup>201</sup> Some effects of pregnancy on a body are non-reversible: “some hormones in a woman’s body rise to 400 times their base level; a new organ, the placenta, grows in her body; all of her blood is rerouted to be available to the growing fetus; her blood plasma and cardiac volume increase forty percent; and her heart rate increases fifteen percent,” with some of these changes persisting for life.<sup>202</sup> In other words, forced pregnancy is a deprivation of individual liberty that is selectively imposed on women<sup>203</sup> and other pregnant people.

### 3. *Self-defense and State Protection Under the Equal Protection Clause*

With injury being established as resulting from all pregnancies, abortion can also be framed as self-defense under certain state statutes and the Model Penal Code.<sup>204</sup> This definition of “serious bodily injury” aligns with the kind of harm pregnant people sustain from the presence of a fetus in their bodies.<sup>205</sup>

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1016 (1984), [https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4602&context=Penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4602&context=Penn_law_review));

<sup>195</sup> Thomson, *supra* note 14 at 65.

<sup>196</sup> Koppelman, *supra* note 8 at 483 (quoting Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1569 (1979), <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1344&context=articles&httpsredir=1>).

<sup>197</sup> Thomson, *supra* note 14 at 63.

<sup>198</sup> Regan, *supra* note 196 at 1593.

<sup>199</sup> Thomson, *supra* note 14 at 65.

<sup>200</sup> McDonagh, *supra* note at 1097.

<sup>201</sup> *See id.* at 1098; Thomson, *supra* note 14 at 55.

<sup>202</sup> McDonagh, *supra* note 4 at 1074.

<sup>203</sup> Koppelman, *supra* note 8 at 483.

<sup>204</sup> McDonagh, *supra* note 4 at 1075-78.

<sup>205</sup> *Id.* at 1074.

Regarding the fetus as a person who has the same rights as the person carrying it forms the basis of most arguments against abortion.<sup>206</sup> However, an assertion of fetal personhood alone is not sufficient justification for the continued use of a pregnant person's body.<sup>207</sup> A famous analogy likens pregnancy to being connected to another human being, a famous violinist, who uses the person's kidneys to stay alive, restricting the person's day-to-day activities in the process.<sup>208</sup> The violinist needs the continued use of the person's kidneys to stay alive, yet, this does not establish that the violinist has a right to be given the continued use of the person's kidneys for any amount of time—nine days, nine months, or nine years.<sup>209</sup> The violinist has no right against anyone that he or she should give him continued use of his or her kidneys.<sup>210</sup> “Having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself.”<sup>211</sup> Even parenting statutes do not require giving up organs or enduring bodily harm for one's child.<sup>212</sup>

Fetuses are not persons, just as acorns are not oak trees.<sup>213</sup> A nature preservation statute against cutting down oak trees would not protect acorns.<sup>214</sup> Similarly, a state's interest in protecting born persons does not necessitate protecting fetuses.<sup>215</sup> A fetus has the potential to become a born person, but a state's duty toward a potentially-born person cannot outweigh its duty toward an actually-born person subjected to injury by another.<sup>216</sup> Not only the actually-born person is owed protection, but also the duty to protect the actually-born person preexists the injury coming from the potentially-born person in the actually-born person's womb.<sup>217</sup> The unborn, unlike the pregnant person, may never get to fulfill its po-

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<sup>206</sup> Thomson, *supra* note 14 at 48; see West, *supra* note 53 at 2118 (framing an argument where the personhood of the fetus will not be fatal to right to abortion).

<sup>207</sup> See *generally id.* (offering a series of analogies to pregnancy in which another person's life is at stake but the subject can withdraw life support with no moral objections).

<sup>208</sup> *Id.* at 48-49.

<sup>209</sup> *Id.* at 55.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 56.

<sup>212</sup> See West, *supra* note 53 at 2122.

<sup>213</sup> Thomson, *supra* note 14 at 47.

<sup>214</sup> See *id.*

<sup>215</sup> See *id.*

<sup>216</sup> Boone, *supra* note 120 at 514 (stating that “the point at which the state's interest in potential life is sufficient to compel the continuation of the pregnancy does not simultaneously result in a decision that the pregnant person no longer has a protected liberty interest”).

<sup>217</sup> See U.S. CONST. amend. XIV, § 1 (defining citizens as born persons and prohibiting denial of equal protection of persons).

tential to be a citizen: it may be miscarried,<sup>218</sup> stillborn, or born in another state or country. The pregnant person, however, is an actual citizen, owed immediate protection.<sup>219</sup>

Under international human rights and most welfare-driven interpretations, the right to life entails the right to life with dignity, which includes well-being.<sup>220</sup> Under this interpretation, the states have a duty to current citizens to help maintain their physical and mental well-being.<sup>221</sup> Thus, while it is constitutional for a state to claim an interest in the protection of the fetus, it goes against human rights to achieve this objective by denying pregnant people their constitutional rights to liberty and to self-preservation, which the state provides to other born persons and to the fetus.<sup>222</sup>

In prioritizing the rights of the unborn, states disregard their duties to pregnant people.<sup>223</sup> States have a duty to protect individuals from harm by private parties; if a rape, a severe beating, or a murder is in progress, the victims do not only have a right to self-defense, but they also have a right to state assistance and protection.<sup>224</sup> Even a medically normal pregnancy causes enough change to constitute serious bodily injury,<sup>225</sup> situating pregnant persons similarly to victims of such aggressions. However, abortion-restrictive states do not protect a pregnant person from injury resulting from the fetus in the same way they protect the aggression victims who are similarly situated.<sup>226</sup> State interest in the protection of the fetus alone cannot negate the duty to pregnant people as states act to prevent, stop, or mitigate harm resulting from entities that are not people but are still under state protection.<sup>227</sup> For example, wildlife, like a fetus, is federally protected, and is fully innocent as it lacks human agency.<sup>228</sup> Yet, if one negligently walks into a forest and runs into a grizzly bear, one is justified in killing the bear rather than acqui-

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<sup>218</sup> See, e.g., Krissi Danielson, *Making Sense of Miscarriage Statistics*, VERYWELL FAMILY (Oct. 25, 2022), <https://www.verywellfamily.com/making-sense-of-miscarriage-statistics-2371721> (stating that between 10% and 20% of pregnancies end in miscarriage).

<sup>219</sup> U.S. CONST. amend. XIV, § 1 (defining citizens as born persons and prohibiting denial of equal protection of persons).

<sup>220</sup> See International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, <https://www.ohchr.org/sites/default/files/ceschr.pdf>; cf. U.S. CONST. amend. XIV, § 1.

<sup>221</sup> See *id.*

<sup>222</sup> McDonagh, *supra* note 4 at 1112-13.

<sup>223</sup> See Ford, *supra* note 39 at 634.

<sup>224</sup> *Id.*

<sup>225</sup> McDonagh, *supra* note 4 at 1074.

<sup>226</sup> *Id.* at 1090.

<sup>227</sup> *Id.*

<sup>228</sup> West, *supra* note 53 at 2123.



escing to being eaten by it.<sup>229</sup> Neither our negligence, nor the bear's lack of agency, diminishes one's right to self-defense.<sup>230</sup>

Liberal legalism is a doctrine that calls for like treatment of like cases, because humans share a universal essence that requires equal treatment.<sup>231</sup> Liberal legalism's emphasis on equal treatment of everyone because of the ways in which everyone is alike dictates the same outcome: a pregnant person who does not consent to her pregnancy<sup>232</sup> should have the right to self-defense when faced with serious bodily injury if others similarly situated are permitted to defend themselves.<sup>233</sup> This is true for any pregnancy, since even a medically normal pregnancy causes enough change to constitute serious bodily injury.<sup>234</sup> If an adult human were attacked by a born child intending to appropriate a body part against the adult human's will, the adult would be allowed to ward off the attack.<sup>235</sup> Denying self-defense to pregnant people implies that pregnant people are somehow differently situated than other people, as pregnant people are denied the means to stop the changes to their bodies that constitute serious bodily injury.<sup>236</sup>

#### 4. *What the Violations Really Entail for the Pregnant Person*

State laws must protect a pregnant person from the harm of a fetus to the person's bodily integrity and liberty as much as state laws protect other victims from similar harm to their bodily integrity and liberty.<sup>237</sup> The argument can be construed as: (1) "[b]odily integrity and liberty are a fundamental right"; (2) "[w]hen a woman does not consent to a pregnancy, the fetus situates her similarly to other victims of harm to their bodily integrity and liberty"; and (3) "the Equal Protection Clause mandates that the state protect a woman from the legal and/or medical harm of a nonconsensual pregnancy."<sup>238</sup> Therefore, the state's failure to protect her from this harm "deprives a woman of her constitutional right to equal protection and her fundamental right to bodily integrity and liberty."<sup>239</sup>

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<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 2124.

<sup>232</sup> See McDonagh, *supra* note 4, 1060.

<sup>233</sup> West, *supra* note 53 at 2124-25.

<sup>234</sup> McDonagh, *supra* note 4 at 1074.

<sup>235</sup> West, *supra* note 53 at 2125.

<sup>236</sup> *Id.*

<sup>237</sup> McDonagh, *supra* note 4 at 1085.

<sup>238</sup> *Id.* at 1083-84.

<sup>239</sup> *Id.* at 1084.

The right being protected here is not the “right to abortion” as the Supreme Court called it in *Dobbs v. Jackson Women’s Health*, but the “inviolability of the person,” protected since long before *Roe* was decided.<sup>240</sup> The right to bodily integrity is an undeniable fundamental right.<sup>241</sup> Whenever a fundamental right is affected by legislation that impacts different groups differently, it must be subjected to strict scrutiny.<sup>242</sup> The Supreme Court has recently rejected using strict scrutiny in *Dobbs* because it focused on *Roe* for the wrong reasons.<sup>243</sup> Moreover, pregnancy is a sex-linked characteristic because the ability to get pregnant is determined by one’s biological sex.<sup>244</sup> It is not true that only women can get pregnant, for some transgender men can also get pregnant.<sup>245</sup> Therefore, legislation that adversely affects pregnant people must be subject to intermediate scrutiny at minimum.<sup>246</sup> The Court needs to acknowledge the invasive nature of fetal life in nonconsensual pregnancy and recognize people’s right to be free from nonconsensual pregnancies.<sup>247</sup> An interpretation of the Constitution that provides a right to protection against private assault of one kind but not another is arbitrary, and therefore, must be stricken under even a low standard of review.<sup>248</sup>

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<sup>240</sup> See *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 252 (1891) (denying compulsory medical examination of the plaintiff by the defendant’s expert in a civil lawsuit because submitting one’s body to the touch of a stranger is “an indignity, and assault and a trespass”).

<sup>241</sup> West, *supra* note 53 at 2134; *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 287-88 (1990) (“Because our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. Our Fourth Amendment jurisprudence has echoed this same concern.”); *Washington v. Glucksberg*, 521 U.S. 702, 777-78 (1997) (recognizing bodily integrity and liberty as a fundamental right).

<sup>242</sup> West, *supra* note 53 at 2134.

<sup>243</sup> Compare *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2267-68 (2022) (arguing that privacy right as supported by precedent is far from the abortion issue), with *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (balancing hardships pregnancy imposes on women with right to fetal life).

<sup>244</sup> See Siegel, *supra* note 51 at 264-65.

<sup>245</sup> *Can Transgender Men Get Pregnant?*, PLANNED PARENTHOOD (May 15, 2023), <https://www.plannedparenthood.org/blog/can-transgender-men-get-pregnant>.

<sup>246</sup> West, *supra* note 53 at 2135 (suggesting that legislation that adversely and intentionally impacts by sex must be subject to strict scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (establishing that “classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives”).

<sup>247</sup> See McDonagh, *supra* note 4 at 1069 (redefining abortion as “a woman’s right to consent to the massive burdens and pains of pregnancy that result from . . . the fetus,” rather than “the right of a woman to choose what to do with her own body without government interference”); cf. West, *supra* note 53 at 2135 (critiquing McDonagh for limiting bodily integrity to protection from the harm of fetal life to avoid contradicting precedent).

<sup>248</sup> West, *supra* note 53 at 2135-36.

## B. REFRAMING PARENTING AS IMPLIED FREE CONTRACT

If treated as contracts, nonconsensual pregnancies would be void or voidable as opposed to being enforceable.<sup>249</sup> Legal scholars argue that interfering with one's choice by forcing one to make a contract goes against freedom of contract.<sup>250</sup> One has to understand the contract, its consequences, and enter the contract willingly.<sup>251</sup> Otherwise, the contract is void or voidable.<sup>252</sup> Not only our society values free choice, but also freedom to contract is constitutionally protected.<sup>253</sup> Compelling a woman to carry a fetus to term by prohibiting her from terminating the pregnancy conflicts with the ideas of free choice and freedom to contract.<sup>254</sup> Under contract law, the woman would not be held liable for what she failed to provide for the child she did not freely bear because her contract with the child would be void or voidable due to a lack of free choice.<sup>255</sup>

1. *Role of Duty of Care in the Pregnant Person's Decisions*

For this Comment, Robin West's conception of the ethic of care<sup>256</sup> is instrumental in differentiating between entering a contract willingly or under duress.<sup>257</sup> Women are, by nature, seen as nurturers and caregivers.<sup>258</sup> This view is consistent with abortion because abortion is not intended to prevent the giving or bestowing of care by women.<sup>259</sup> Abortion merely prevents the taking of women's bodies, their freedom, and their care, without their consent.<sup>260</sup> Making the abortion decision with the ethic of care better aligns with the interests of the fetus than a state's policy to protect the life of the fetus at all costs.<sup>261</sup> What makes

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<sup>249</sup> See MACAULAY, *supra* note 12 at 523 (explaining that contracts entered under duress are void).

<sup>250</sup> *Id.* at 514.

<sup>251</sup> See *id.*

<sup>252</sup> *Id.* at 521 (listing fraud, duress, breach of warranty, or unconscionability among defenses to contract).

<sup>253</sup> See U.S. CONST. art. I, § 10, cl. 1 (prohibiting the states from impairing the obligation of contracts).

<sup>254</sup> See MACAULAY, *supra* note 12 at 514.

<sup>255</sup> See *id.*

<sup>256</sup> See West, *supra* note 53 at 2141-47.

<sup>257</sup> See MACAULAY, *supra* note 12 at 523 (explaining that contracts entered under duress are void).

<sup>258</sup> Ford, *supra* note 51 at 635.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See generally West, *supra* note 53 at 2143 (advocating that the work of bearing, giving birth to, and raising children has moral value when done by choice); Jones, *supra* note 67 at 81-84 (concluding that women seek abortion services because they are motivated to be a good parent).

the decision ethical is also what prevents the contract from being void.<sup>262</sup> Care needs to be given willingly, not under duress or pressure.<sup>263</sup> Only then can the one who is cared for truly benefit from the relationship.<sup>264</sup>

In its discussion of the “abortion right” in *Dobbs*, the U.S. Supreme Court defined fetal interest narrowly, focusing only on whether the pregnancy is carried to term.<sup>265</sup> If the continuation of pregnancy is framed as a contract, *Dobbs* obliged a pregnant person primarily to give birth because it did not express a state interest in the needs of the child that the fetus will become after being born.<sup>266</sup> Pregnant people, on the other hand, consider the obligations they will have toward the child after birth, for many years to come.<sup>267</sup> By defining fetal life to include its extension beyond birth, pregnant people consider a more encompassing fetal interest than the states do.<sup>268</sup> Further, even a limited time of serious bodily injury cannot be imposed on a person without due process.<sup>269</sup> Yet, pregnancy requires a nine-month commitment to serious bodily injury.<sup>270</sup>

Pregnant persons choose to endure serious bodily injury and potential psychological, social, and economic harms, including any life-long commitments they have to the child, when they freely choose to give birth.<sup>271</sup> For most women, entering an implied contract to be the best parent they can be is a matter of readiness and resources: they do not want to have a baby until they can fulfill the duties of a parent.<sup>272</sup> Most women want to give their children a loving family, financial security, and a high level of care and attention.<sup>273</sup> This desire influences their decisions to terminate their pregnancies, especially when they have other children or plan on having children at a later time.<sup>274</sup> In contract law terms, their current contracts inform their decisions to exclude other contracts to fulfill obligations under the current contracts.<sup>275</sup> In addition to

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<sup>262</sup> Cf. MACAULAY, *supra* note 12 at 523 (explaining that contracts entered under duress are void).

<sup>263</sup> See West, *supra* note 53 at 2143-44.

<sup>264</sup> See *id.* at 2141-47.

<sup>265</sup> See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2276-77 (2022) (denying reliance interest without any reference to providing for the mother during pregnancy or the child after birth).

<sup>266</sup> See *id.*

<sup>267</sup> Jones, *supra* note 67 at 81-84 (surveying reasons provided for seeking an abortion).

<sup>268</sup> See generally *id.* (explaining the kinds of considerations pregnant people make before an abortion decision).

<sup>269</sup> See generally Siegel, *supra* note 51 at 272-80.

<sup>270</sup> See McDonagh, *supra* note 4 at 1074 (1999) (outlining the changes a body has to endure throughout pregnancy).

<sup>271</sup> See *id.* at 1073 (outlining the massive burden of pregnancy as harm when nonconsensual).

<sup>272</sup> Jones, *supra* note 67 at 95.

<sup>273</sup> *Id.* at 79.

<sup>274</sup> *Id.*

<sup>275</sup> See MACAULAY, *supra* note 12 at 134-35 (discussing reliance interest).

responsibilities for existing children, anticipated difficulties of raising a child, the desire to be a good mother and provide a good home, and future childbearing intentions all inform women's abortion decisions because they want what is best for their potential future children.<sup>276</sup> Pregnant people do not want this contract to foreclose their existing and future free contracts.<sup>277</sup>

When women who already have children face an unintended pregnancy, they consider how material conditions of motherhood will impact their families.<sup>278</sup> The women who intended the pregnancy may also change their minds if circumstances change; for example, if they lose their income or health insurance.<sup>279</sup> Some want to give birth for their own emotional fulfillment, but know that having one more child would diminish the quality of their existing children's lives, so they choose to abstain from giving birth.<sup>280</sup> Women may see abortion as "best for the child" under these circumstances.<sup>281</sup> They want to give the child everything the child needs without depending on anyone else, and they refuse to bring a child into the world unless they can take care of that child.<sup>282</sup> Some women do not consider giving the child up for adoption, either because they want to avoid the trauma of relinquishing a child they carried to term, or out of concern that the child may not be placed in a good home.<sup>283</sup>

The baby's health is another contract term for which mothers have strong preferences when they contract with their future children.<sup>284</sup> When women perceive that the health of a fetus is compromised due to advanced maternal age, drug use prior to finding out about pregnancy, or not getting prenatal care because of delayed recognition of the pregnancy, they often choose to terminate the pregnancy rather than have children whose health may be in question.<sup>285</sup>

Surveys of women seeking abortions reveal that women balance life quality of their current and future children in their decisions to terminate

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<sup>276</sup> Jones, *supra* note 67 at 81.

<sup>277</sup> See MACAULAY, *supra* note 12 at 134-35 (discussing reliance interest).

<sup>278</sup> Jones, *supra* note 67 at 82 (listing reasons for getting an abortion including but not limited to economic necessity; lack of adequate unemployment insurance should they lose their jobs; lack of governmental support in form of family allowances and subsidized daycare; lack of health insurance and difficulty in obtaining health care).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 93.

<sup>281</sup> *Id.* at 83.

<sup>282</sup> *Id.* at 91.

<sup>283</sup> *Id.* at 83.

<sup>284</sup> *Id.* at 93-94.

<sup>285</sup> *Id.*

a pregnancy.<sup>286</sup> In an analogous case to pregnant people's decision making processes, the English Court of Appeal determined the fates of infant conjoined twins of equal legal status, only one of whom was able to survive on her own.<sup>287</sup> Much like in a nonconsensual pregnancy, the stronger twin was involved in a nonconsensual physical relationship with the weaker twin.<sup>288</sup> The stronger twin was suffering physical harm and facing certain death as a result of the weaker twin's physical dependence on her body.<sup>289</sup> The stronger twin's only possible defense against the harm was to end the nonconsensual relationship through the removal of the weaker twin, which would also cause the weaker twin's death.<sup>290</sup> Faced with a choice between saving the life of one twin or losing both, the court ruled to proceed with a surgical separation.<sup>291</sup> While saving one life instead of none is permissible, it does not help decide in situations where "the choice is between one life of high quality or two lives of inferior quality."<sup>292</sup> However, women often practice this balance in abortion decisions.<sup>293</sup>

Pregnancy is not a static condition, but an act that follows a decision to contribute one's body to a new life.<sup>294</sup> When pregnancy is the result of a willing decision, it has a moral meaning.<sup>295</sup> Conversely, a nonconsensual pregnancy imposes upon women a passive and will-less moral role.<sup>296</sup> The consensual relationship between the woman and the fetus, and the future relationship between the mother and the child is a relationship of care.<sup>297</sup> The ethic of care must be consensual and morally free to be morally justifiable.<sup>298</sup> For the choice to be consensual, a woman must have the freedom to terminate the pregnancy if she does not consent to it.<sup>299</sup> Being consensual improves the quality of care, and it validates the implied contract that the mother will provide the child with an environment that will serve the child's best interest.<sup>300</sup>

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<sup>286</sup> See Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, PERSPS. ON SEXUAL AND REPROD. HEALTH 110, 110 (2005), [https://www.guttmacher.org/sites/default/files/article\\_files/3711005.pdf](https://www.guttmacher.org/sites/default/files/article_files/3711005.pdf); Jones, *supra* note 67 at 81-84.

<sup>287</sup> Ford, *supra* note 39 at 645-46.

<sup>288</sup> *Id.* at 645.

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 645-46.

<sup>293</sup> See Finer, *supra* note 286 at 110; Jones, *supra* note 67 at 81-84.

<sup>294</sup> West, *supra* note 53 at 2125-26.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 2128.

<sup>297</sup> *Id.* at 2146.

<sup>298</sup> *Id.* at 2143.

<sup>299</sup> *Id.*

<sup>300</sup> See *id.* at 2145.

## 2. *Benefits of the Proposed Contract Theory*

In order to promote equal protection of all parties through laws and to adequately support everyone involved—adult, minor, or unborn—this Comment advocates that the government take steps to consider everyone’s rights and the duties it owes to all parties, not just the unborn. Regardless of the fetus’s personhood, a fetus will have its best chances if the mother gets support.<sup>301</sup> Children born to unwilling mothers may be denied a fulfilling life, which defeats the purpose of protecting the fetus’s right to life as fervently as the State now does.<sup>302</sup>

If we instead considered an implied contract theory as this Comment has laid out, the implied contract theory complies with the Constitution, protects pregnant people’s constitutional rights under the Contracts Clause, Thirteenth Amendment, and Fourteenth Amendment, and accomplishes the broad version of the State’s interest in fetal life by expanding the State’s interest beyond birth. When carrying pregnancy to term by free choice is regarded as a contract to provide for the child, the willing parent has considered her circumstances and determined that she can provide for the child.<sup>303</sup> This careful consideration, based on a duty of care as explained in section B(1) of this analysis,<sup>304</sup> maximizes the child’s chances of obtaining healthy and safe relationships with parents and others; education; rehabilitation if engaged in misconduct; fostering of participation in the wider world; and whatever else parents wish to give.<sup>305</sup>

Further, some abortion decisions are motivated by a mother’s duties to the children to whom a woman has already given birth, or her anticipated duties to the children she intends to bear at a later time.<sup>306</sup> In that sense, entering a compelled contract with the current fetus may lead the woman to breach a current contract by failing to provide for the children she already has or may foreclose her ability to enter into a future contract by restricting her resources for any future children.<sup>307</sup>

Under the implied contract theory, if a parent freely enters a contract—that is, has an option to choose abortion but chooses to give birth—then the parent will not be deemed forced into involuntary servi-

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<sup>301</sup> See Jones, *supra* note 67 at 83 (highlighting the role of finances and anticipated lack of support from family members in abortion decisions).

<sup>302</sup> See *id.*

<sup>303</sup> See *id.* at 81-84.

<sup>304</sup> See West, *supra* note 53 at 2143-46 (discussing the role of “ethic of care”).

<sup>305</sup> See Dailey & Rosenbury, *supra* note 19 at 1516; Jones, *supra* note 67 at 81-84 (explaining the considerations made by pregnant people before an abortion decision).

<sup>306</sup> McDonagh, *supra* note 4 at 1108; Jones, *supra* note 67 at 79.

<sup>307</sup> See MACAULAY, *supra* note 12 at 108 (explaining that the inability to fulfill other contracts is a potential injury).

tude.<sup>308</sup> Considering women's relative powerlessness in their relationships with men also highlights the involuntary nature of pregnancy, where the pregnant person has not meaningfully consented even to the sexual intercourse that resulted in the pregnancy.<sup>309</sup>

Allowing contract theory to govern the birth decision and refraining from contracts entered under duress because abortion was prohibited ensures that the pregnant person's Thirteenth Amendment rights will not be violated.<sup>310</sup>

### III. COUNTERARGUMENTS

Opponents of abortion offer adoption as an alternative.<sup>311</sup> Part A explains why it is not an adequate alternative. As the proposed implied contract theory relies heavily on McDonagh's distinction of consensual and nonconsensual pregnancies,<sup>312</sup> Part B responds to its critiques.

#### A. INADEQUACY OF ADOPTION TO SUBSTITUTE FOR ABORTION

Opponents of abortion object to the burdens of forced parenthood by offering adoption as an alternative.<sup>313</sup> When faced with a nonconsensual pregnancy, adoption is not an adequate alternative for everyone.<sup>314</sup> Pregnancy is dangerous and adoption often brings about trauma.<sup>315</sup> Not only is pregnancy itself an injury and a violation of the person's constitutional rights and human rights, but also sociological studies suggest that some women find adoption to be more painful than abortion.<sup>316</sup> This Comment highlights the burdens of forced birth that women have to endure prior to abortion,<sup>317</sup> as well as the trauma that follows.<sup>318</sup> Birth mothers often experience significant grief and loss but cannot get support because adoption is not presented truthfully in society, and their injuries go unnoticed.<sup>319</sup>

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<sup>308</sup> Cf. Koppelman, *supra* note 8 at 507.

<sup>309</sup> *Id.* at 504-05.

<sup>310</sup> *See id.* at 507.

<sup>311</sup> North, *supra* note 54.

<sup>312</sup> *See* McDonagh, *supra* note 4 at 1060.

<sup>313</sup> North, *supra* note 54.

<sup>314</sup> Khazan, *supra* note 54.

<sup>315</sup> North, *supra* note 54.

<sup>316</sup> Khazan, *supra* note 54.

<sup>317</sup> McDonagh, *supra* note 4 at 1074.

<sup>318</sup> *See* North, *supra* note 54; Khazan, *supra* note 54; Sisson, *supra* note 145; Jones, *supra* note 67; Finer, *supra* note 286 at 110.

<sup>319</sup> North, *supra* note 54.



Some consider feeling bonded with the fetus to be an inconvenient point for the pro-choice side as supporters of abortion claim that a fetus is nothing more than a collection of cells.<sup>320</sup> This Comment disagrees with this reasoning because there are several stages from a fertilized egg to a fully-formed fetus to a born baby, just like from an acorn to an oak tree.<sup>321</sup> Between an acorn and an oak tree, there are several stages from seed, to sprout, to seedling, to sapling, to mature tree.<sup>322</sup> When a woman becomes aware of her pregnancy, the fetus is nothing more than a seed.<sup>323</sup> By the time the woman gives birth, it gains a human form, and the woman has spent enough time with it to have formed a bond.<sup>324</sup> While watching a squirrel eat an acorn does not offend a nature lover,<sup>325</sup> one may be found liable for damaging another's tree even to defend one's property.<sup>326</sup> Further, even though a bond may inevitably form between a mother and a fetus,<sup>327</sup> this bond will neither negate the mistreatment of the woman during pregnancy,<sup>328</sup> nor avoid the harms arising from adoption itself.<sup>329</sup>

Adoption may be harmful for the child, too.<sup>330</sup> Adopted children deal with lifelong issues of abandonment and lack of identity.<sup>331</sup> These psychological harms constitute another way in which states fail to protect fetal interests because the right to life entails mental well-being as well as physical health.<sup>332</sup>

Offering adoption as an alternative to abortion will not reduce the prohibition of abortion's overall harm to the woman and the child because providing the child a home elsewhere does not free the child from harm, nor does it negate the infringement of a pregnant person's rights

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<sup>320</sup> Khazan, *supra* note 54.

<sup>321</sup> See Thomson, *supra* note 14 at 47.

<sup>322</sup> See Texas A&M Forest Service, *Life Cycle of a Tree*, TREES OF TEXAS <http://texas-treedid.tamu.edu/content/howTreesGrow/#lifecycle> (last visited Feb. 13, 2023).

<sup>323</sup> See Thomson, *supra* note 14 at 48 (“A newly fertilized ovum, a newly implanted clump of cells, is no more a person than an acorn is an oak tree.”).

<sup>324</sup> Jones, *supra* note 67 at 95.

<sup>325</sup> See Samantha Burack, *Squirrel Eating an Acorn!*, Nature on Campus (May 9, 2017), <https://journeys.dartmouth.edu/natureoncampus/2017/05/09/squirrel-eating-an-acorn/> (expressing excitement over a squirrel eating an acorn in a post addressed to “avid nature lovers”).

<sup>326</sup> See *Booska v. Patel*, 24 Cal. App. 4th 1786, 1791 (1994) (stating that the plaintiff's right to trim a neighbor's encroaching tree is limited by the probability of harm to the neighbor's property).

<sup>327</sup> See generally North, *supra* note 54; Khazan, *supra* note 54; Sisson, *supra* note 145 at 351-53.

<sup>328</sup> See generally Ocen, *supra* note 157; Paltrow & Flavin, *supra* note 9.

<sup>329</sup> See generally North, *supra* note 54; Khazan, *supra* note 54; Sisson, *supra* note 145.

<sup>330</sup> North, *supra* note 54.

<sup>331</sup> *Id.*

<sup>332</sup> See International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, <https://www.ohchr.org/sites/default/files/cescr.pdf>.

and the injury inflicted upon her by continued nonconsensual pregnancy.<sup>333</sup>

B. GROUNDING THE CONTRACT THEORY BY RESPONDING TO  
CRITIQUES OF “CONSENT TO PREGNANCY”

McDonagh differentiates between consensual, or benign pregnancies, and nonconsensual, or wrongful ones, where consent means the woman’s explicit willingness for the fertilized ovum to implant itself, which results in a change in the body from nonpregnant to pregnant.<sup>334</sup> This distinction and its implications gather constructive criticism as well as direct opposition from other professors, legal researchers, philosophers, and clergy.<sup>335</sup> The implied contract theory of pregnancy relies heavily enough on McDonagh’s distinction of consensual and nonconsensual pregnancies<sup>336</sup> that this section will respond to its critiques.

1. *Assuming a Certain Degree of Risk Entails Consent.*

Mary Ford<sup>337</sup> notes that McDonagh’s account does not distinguish between different degrees of risk, and her view of how the assumption of risk relates to responsibility for subsequent injury is prone to criticism.<sup>338</sup> Robin West<sup>339</sup> considers what risk entails in different legal doctrines.<sup>340</sup>

“Risk” covers a wide spectrum of possibility: from situations where a consequence is possible but highly unlikely, to situations where a certain consequence will almost inevitably follow.<sup>341</sup> Thus, the claim that consent to sexual intercourse and accepting the risk of pregnancy does not equal consent to pregnancy is problematic.<sup>342</sup> Such an approach allows one to place oneself at risk of an uncertain outcome.<sup>343</sup> However, it

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<sup>333</sup> See North, *supra* note 54; Khazan, *supra* note 54; Sisson, *supra* note 145 at 350; Jones, *supra* note 67; Finer, *supra* note 286 at 110.

<sup>334</sup> Ford, *supra* note 39 at 626.

<sup>335</sup> See West, *supra* note 53 at 2130; Francis J. Beckwith & Steven D. Thomas, *Consent, Sex, and the Prenatal Rapist: A Brief Reply to McDonagh’s Suggested Revision of Roe v. Wade*, 17 J. LIBERTARIAN STUD. 1, 10-11 (2003), [https://mises-media.s3.amazonaws.com/17\\_3\\_1.pdf](https://mises-media.s3.amazonaws.com/17_3_1.pdf); Ford, *supra* note 39 at 642.

<sup>336</sup> See McDonagh, *supra* note 4 at 1060.

<sup>337</sup> Mary Ford is a lecturer in healthcare law and bioethics.

<sup>338</sup> Ford, *supra* note 39 at 636-38.

<sup>339</sup> Robin West is a legal scholar with extensive work on gender issues and feminist legal theory, constitutional law and theory, jurisprudence, and legal philosophy.

<sup>340</sup> West, *supra* note 53 at 2130.

<sup>341</sup> Ford, *supra* note 39 at 636-38.

<sup>342</sup> *Id.* at 636.

<sup>343</sup> *Id.* at 637-38.

does not allow room to hold another even partially responsible for any injuries one suffers should that risk come to bear.<sup>344</sup>

In contract law, consent to an assumed risk implies consent to the risked event.<sup>345</sup> In criminal law, consent to a risked criminal event does not imply consent to the crime.<sup>346</sup> In tort, consent to the risk may or may not constitute assumption of the risk, and hence, consent to the risked event.<sup>347</sup> Since McDonagh characterizes pregnancy as an injury, but not as a criminal assault, Ford sees tort law as the best vehicle to accommodate McDonagh's account of pregnancy, as in, consent to the risk of pregnancy may or may not imply consent to the pregnancy itself.<sup>348</sup>

Next, Francis Beckwith<sup>349</sup> and Steven Thomas<sup>350</sup> object to McDonagh's point that knowing that our actions negligently increase our risk of injury is not consenting to an injury.<sup>351</sup> It is true that one does not consent to cancer even though they may smoke cigarettes knowing that it increases the risk of cancer, because causing cancer is not the purpose of cigarettes.<sup>352</sup> However, one of the purposes of reproductive organs is reproduction.<sup>353</sup> Conversely, in today's society, limiting the purpose of sexual activity to procreation disregards available contraceptive methods<sup>354</sup> and most sexual activity, including all same-sex sexual activity. The demand for non-abstinence birth control options has led to an overwhelming variety of contraception methods, which justifies McDonagh's separation of sexual intercourse from pregnancy.<sup>355</sup>

To determine where pregnancy begins, Ford points out that artificial insemination and embryo transfer are more deliberately aimed at bringing about pregnancy than sexual intercourse.<sup>356</sup> This acknowledgement weakens the link between consent to sexual activity and consent to pregnancy, since there are alternatives solely for the purpose of bringing about pregnancy, while with sexual activity, pregnancy is merely a

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<sup>344</sup> *Id.*

<sup>345</sup> West, *supra* note 53 at 2130.

<sup>346</sup> *Id.* at 2130-31.

<sup>347</sup> *Id.* at 2131.

<sup>348</sup> Ford, *supra* note 39 at 638.

<sup>349</sup> Francis Beckwith is a professor of philosophy and church-state studies.

<sup>350</sup> Steven Thomas is a church elder.

<sup>351</sup> Beckwith & Thomas, *supra* note 330 at 10-11.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at 11.

<sup>354</sup> Hanae Armitage, *Contraception: An Evolution and History*, SCOPE: STAN. MED.'S BLOG (May 16, 2018), <https://scopeblog.stanford.edu/2018/05/16/contraception-evolving-the-options/#:~:text=IN%20the%201960s%2C%20activist%20Margaret,so%20began%20modern%2Dday%20contraception.>

<sup>355</sup> *See id.*

<sup>356</sup> Ford, *supra* note 39 at 647.

risk.<sup>357</sup> Combined with a variety of contraception methods available to individuals, people increasingly engage in sexual activity for purposes beyond reproduction.<sup>358</sup>

2. *Whether the Fetus Is a Person Changes Its Culpability.*

In McDonagh’s model, fetal personhood may be read in two ways: “the fetus has no capacity to possess rights or owe responsibilities; nevertheless, it can be an agent of injury and cause harm to women”; or “the fetus is a person, involved in a private pregnancy relationship with the pregnant woman [where] if the relationship is non consensual [*sic*], . . . the woman is entitled to use deadly force to defend herself.”<sup>359</sup> The first reading legally equates the fetus with a wild animal, capable of inflicting harm, while the second reading does not differentiate between the fetus and a born person.<sup>360</sup> “Use of deadly force against ‘born persons’ is only authorized in emergency situations; otherwise, the person presenting the alleged threat is entitled to due process of law.”<sup>361</sup>

One may overcome this argument with the proposed implied contract theory to allow room for withdrawing consent after it is given. Consent itself may be read as a form of contract where, once consent is given to the fetus to implant itself, the woman assumes duties to the fetus by contract. The contract may only be breached if entered under duress, due to undue hardship, or any other breach of contract defense.<sup>362</sup> For example, the woman is excluded from other contracts when she is pregnant with one child, so she cannot start a pregnancy with another child until completion of the first pregnancy.<sup>363</sup> Indeed, participants in a survey about women’s reasons for abortion have included the desire to have a child with the woman’s current partner rather than the unwanted child from a former partner.<sup>364</sup>

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<sup>357</sup> *Id.* at 636-38.

<sup>358</sup> Armitage, *supra* note 349.

<sup>359</sup> Ford, *supra* note 39 at 642.

<sup>360</sup> *Id.*

<sup>361</sup> *Id.*

<sup>362</sup> See generally MACAULAY, *supra* note 12 at 483 (listing reasons for when courts refuse to enforce contracts, notably contracts against public policy or contracts entered into under duress).

<sup>363</sup> *Cf. id.* at 134-35 (explaining reliance of lost opportunities where entering one contract excludes one from others).

<sup>364</sup> See generally Finer, *supra* note 286 at 112 (surveying patients at abortion clinics on their socio-economic backgrounds and other reasons that factored into terminating their pregnancies).

3. *Consent Theory Severs Father and Fetus for Financial Responsibility.*

For Ford, “by separating pregnancy from the sexual act, McDonagh severs the connection between men and reproduction, thereby removing any legal basis for holding them socially or financially responsible for the children that are genetically ‘theirs.’”<sup>365</sup> While it is true that separating sexual intercourse from pregnancy distances the father from the chain of causation of pregnancy, it does not exempt the father from any responsibility whatsoever, for, according to McDonagh, the duty of the father cannot be owed to the fetus, but to the born child.<sup>366</sup> Opponents of abortion may claim that similar to the woman not having legal obligations to give birth arising out of her consent to engage in sexual intercourse, the man may claim the same about parenting the born child.<sup>367</sup> However, “the [U.S.] Constitution allows the state to intrude upon a person’s economic assets with greater latitude than upon a person’s bodily integrity and liberty.”<sup>368</sup>

4. *Pregnancy Is Not Prima Facie Harm.*

Beckwith and Thomas consider two scenarios to argue that pregnancy is not a serious enough injury to justify an abortion.<sup>369</sup> In the first scenario, they equate the absence of consent of a comatose patient to the presence of non-consent.<sup>370</sup> In the second scenario, they fail to consider the heightened psychological harm caused by uncertainty of not knowing which twin brother is the biological father to a fetus.<sup>371</sup> This section addresses the flaws in their reasoning.

In the first scenario, a doctor examines a comatose patient to find out that she is pregnant unbeknownst to herself.<sup>372</sup> Considering unwanted pregnancy as morally equivalent to rape, the authors argue, “the doctor is morally required to perform an abortion to rid his patient of the ‘massive intrusion’ being imposed upon her by her unborn off-spring” if one follows McDonagh’s reasoning.<sup>373</sup>

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<sup>365</sup> Ford, *supra* note 39 at 626.

<sup>366</sup> *Id.* at 650-52 (arguing, by comparing the different forms of parenthood to compare the rights of men and women to consent to parenthood, that men cannot be cut out of the legal landscape of parenthood).

<sup>367</sup> *See id.* at 651.

<sup>368</sup> *Id.* (quoting McDonagh, *supra* note 4 at 1107).

<sup>369</sup> Beckwith & Thomas, *supra* note 330 at 4-6.

<sup>370</sup> *Id.* at 4.

<sup>371</sup> *Id.* at 6.

<sup>372</sup> *Id.* at 4.

<sup>373</sup> *Id.*

This Comment argues that the flaw in the critique’s reasoning stems from equating lack of acknowledgement with lack of consent, or rather, with active non-consent. “Under McDonagh’s thesis, the doctor in the midst of the situation, aware of the pregnancy in the absence of consent, must see it as the rape-in-progress of his unconscious patient.”<sup>374</sup> Since the woman has not had a chance to express her consent or lack thereof, the authors assume non-consent, and therefore injury.<sup>375</sup> However, McDonagh regards pregnancy as sufficient injury to warrant termination only when it is explicitly non-consented.<sup>376</sup> Absence of consent should not be equated with presence of non-consent.<sup>377</sup>

In the second scenario, a woman engages in sex with her husband for the express purpose of procreating a child, and is then raped by the husband’s twin brother hours later.<sup>378</sup> A month later, she discovers that she is pregnant, and there is a fifty-fifty chance as to the identity of the father—that is, the child may be the one she had consented to conceive, or one that is an intruder.<sup>379</sup> For the critics, abortion is unjustified in this case, as uncertainty is not sufficient grounds to withdraw consent to the pregnancy.<sup>380</sup>

Critics fail to see that uncertainty constitutes psychological harm, as the woman will be deeply troubled by not knowing.<sup>381</sup> While uncertainty alone may not justify an abortion, women are owed protection from any harm, physiological or psychological.<sup>382</sup> In this instance, this Comment argues that one must consider the heightened psychological harm to women caused by uncertainty.<sup>383</sup>

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<sup>374</sup> *Id.* at 6.

<sup>375</sup> *Id.* at 4-5.

<sup>376</sup> McDonagh, *supra* note 4 at 1063.

<sup>377</sup> See *False Dichotomy – Definition and Examples*, LOGICAL FALLACY (Sep 9, 2020), <https://www.logical-fallacy.com/articles/false-dilemma/> (explaining that it is a logical fallacy when one presents only two choices as if one is false and the other is true but there are other alternatives that the speaker has not considered).

<sup>378</sup> Beckwith & Thomas, *supra* note 30 at 6.

<sup>379</sup> *Id.* at 6-7.

<sup>380</sup> *Id.* at 6-8.

<sup>381</sup> See generally Kate Sweeny & Arezou Ghane Cavanaugh, *Waiting is the Hardest Part: A Model of Uncertainty Navigation in the Context of Health News*, 6 *Health Psychology Review* 147 (2012) (recognizing the anxiety of uncertainty and offering ways to cope with its painful experience).

<sup>382</sup> See West, *supra* note 53 at 2133 (reiterating that states must protect individuals against private violent assault and that citizens have a constitutional right to equal protection of the law).

<sup>383</sup> See generally Sweeny & Cavanaugh, *supra* note 376 (recognizing the anxiety of uncertainty and offering ways to cope with its painful experience).

## CONCLUSION

The current approach, which tends to disfavor abortion while simultaneously failing to provide necessary support, may result in children for whom life is limited by their mothers' social standing.<sup>384</sup> Current state interventions are objectionable on two grounds. First, in denying an abortion to a woman unwilling to become a mother, the states allow pregnancy to enslave her,<sup>385</sup> and therefore violate her Thirteenth Amendment right to be free from involuntary servitude.<sup>386</sup> Second, the child does not fully benefit from having been carried to term because the child is forced to be born to a mother who did not give birth by choice, often with limited ability to provide for the child.<sup>387</sup>

As a result, a woman may unwillingly fall behind on her duties to her existing children, putting all her children at a disadvantage.<sup>388</sup> Allowing a pregnant woman to obtain an abortion is the most beneficial approach to the woman and her existing children. This approach gives the future child a more desirable outcome by not setting the mother up for failure in the implied contract a mother makes with her children. Instead, a higher percentage of children are born to willing mothers with better prospects in life.

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<sup>384</sup> See Siegel, *supra* note 51 at 377-78 (explaining that childbearing and childrearing compromise a woman's opportunities for education and employment, and entangle her in economic dependency upon others); Ketteringham, *supra* note 51 (stating that parents with substance abuse problems often remain fit to care for a child, while being in the child welfare system renders children far more likely to have problems ).

<sup>385</sup> McDonagh, *supra* note 4 at 1077-78 (citing Koppelman, *supra* note 8 at 486-92 (arguing that "coerced pregnancy" constitutes slavery under the Thirteenth Amendment)).

<sup>386</sup> Koppelman, *supra* note 8 at 484; U.S. CONST. amend. XIII, § 1.

<sup>387</sup> See Jones, *supra* note 67 at 79.

<sup>388</sup> See *id.*