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Constituting Children's Bodily Integrity

B. Jessie Hill

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CONSTITUTING CHILDREN'S BODILY INTEGRITY

B. JESSIE HILL

ABSTRACT

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

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“The natural parent needs no process to temporarily deprive his child of its liberty by confining it in his own home. . . ; nor is the state, when compelled, as *parens patriae*, to take the place of the father for the same purpose, required to adopt any process as a means of placing its hands upon the child”
*Commonwealth v. Fisher, 1905*²

INTRODUCTION

When Anna Fitzgerald, the thirteen-year-old heroine of the popular novel *My Sister's Keeper*, appears in an attorney's office and says she wants to sue her parents “for the rights to her own body,” the attorney tries to give her the phone number for Planned Parenthood.³ Anna isn't seeking to access contraception or abortion, though—she is hoping to avoid being forced by her mother to donate a kidney to Anna's sister, who is dying of leukemia.⁴

The scene between Anna and her attorney highlights two peculiar features of minors' constitutional rights to bodily integrity. First, those rights are largely understood, and most fully developed, in the context of minors' sexual and reproductive rights. Indeed, it may seem odd even to speak of minors' bodily integrity rights in any other context. When the law regulates children's bodies in other contexts, it largely frames the issues in terms of “family privacy,” “parental rights,” or perhaps children's vaguely-defined best interests.⁵

¹ Professor of Law, Laura B. Chisolm Distinguished Research Scholar, and Associate Dean for Faculty Development and Research, Case Western Reserve University School of Law. Earlier drafts of this article were presented in faculty workshops at Cornell Law School, Mercer University School of Law, and UCLA School of Law and at the 35th Annual Health Law Professors Conference at Arizona State University. I would like to thank the participants in those workshops and others for their challenging and constructive criticism, especially Sherry Colb, Michael Dorf, Peter Gerhart, Gerald Lopez, Aziz Rana, Seana Shiffrin, Steven Shiffrin, Gary Simson, Alex Tsesis, and Eugene Volokh. Numerous research assistants have also provided valuable help along the way, including Jack Blanton, Alix Devendra, Rachel Estrin, and Sarah Kostick.

² 62 A. 198 (Pa. 1903) (holding constitutional Pennsylvania's act permitting delinquent and neglected children to be committed to a “house of refuge”). The last words of the quoted sentence are “to lead it into one of its courts.”

³ JODI PICOULT, *MY SISTER'S KEEPER* 22-23 (2004).

⁴ *Id.*

⁵ *See, e.g.*, *Hart v. Brown*, 289 A.2d 386, 390, 391 (Conn. Super. Ct. 1972) (discussing sibling organ donation in relation to parents' rights and minor's rights, without specifying which rights of the minor

Second, minors do possess constitutional rights to bodily security and autonomy, even as against their parents, in at least some contexts. The most widely-recognized context for this constitutional right is that of reproductive health care: some minors possess a right to seek abortion and possibly contraception without involving their parents.⁶ But, as the Article explains more fully below, it is not clear precisely how or why the constitutional bodily integrity right can be limited to this particular context. Indeed, courts routinely recognize a constitutional bodily integrity right of children not to be abused by state actors; this aspect of the bodily integrity right is not limited to sexual and reproductive health care services, but instead extends to protect minors against all severe and unwanted state-imposed physical intrusions.

Spanning traditional doctrinal categories, this Article aims to examine and, ultimately, to provide structure for the amorphous constitutional right of minors to bodily integrity. This examination—the first of its kind in the legal literature—ties together such traditionally disparate subjects as the law’s regulation of corporal punishment, parents’ authority to grant or withhold consent for their children’s medical care, minor women’s access to abortion, and parental control over non-medical interventions such as tattooing and ear piercing.⁷ This Article also attempts to provide some theoretical explanations for the law’s treatment of the subject of children’s rights to bodily integrity independent of their parents. In particular, it grapples with the inherent theoretical difficulties attendant upon recognizing a meaningful constitutional right of children to bodily integrity.

There are, of course, numerous ways in which the law regulates children’s bodies. Indeed, in some sense it is fair to say that all laws ultimately act on the body.⁸ This Article focuses only on the issue of minors’ constitutional rights within the family, however. The context of the family is the most problematic for recognizing children’s bodily integrity rights, because it involves two different—and often conflicting—claims to privacy: that of the family as an entity, and that of the child as an autonomous citizen who is entitled to the protection of the state. For this reason, it is the context in which children’s rights appear most distinct from those of their parents. In addition, as explained further below, it is a domain that is permeated by legally created entitlements and duties, yet it is also a domain in which state action is particularly difficult to identify.⁹ This difficulty therefore raises most acutely the problem of identifying and vindicating children’s *constitutional* (as opposed to common law or statutory) rights to bodily integrity.

But why focus on the right to bodily integrity, rather than any of the countless

were involved); *Oliner v. Lenox Hill Hosp.*, 106 Misc. 2d 107, 108 (N.Y. Sup. Ct. 1980) (considering parent’s legal “entitle[ment] to have a ‘bris’ [circumcision] performed for his infant son”).

⁶ *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).

⁷ Much scholarship from several decades ago addressed the nascent constitutional rights of children, which found recognition beginning in the 1960s. For example, Professors Lee Teitelbaum and James Ellis considered the Due Process rights of children, but it was written before much of the doctrinal development discussed in this article, and it focuses on the Due Process right to liberty generally, rather than vis-à-vis the parents. Lee E. Teitelbaum & James W. Ellis, *The Liberty Interest of Children: Due Process Rights and Their Application*, 12 FAM. L.Q. 153, 170-74 (1978).

⁸ See, e.g., Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1986).

⁹ See *infra* Part III.A.

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other aspects of the parent-child relationship that the law affects? Of course, children's rights are affected by parental and state control in numerous dimensions—not just with respect to their bodies. To a large extent, moreover, the parent-child relationship, and the role of the state within that relationship, is well-trodden ground, covered extensively by political theorists, philosophers, and legal scholars, among others.¹⁰ In part, this Article simply uses the concept of bodily integrity as a new lens through which to examine that relationship, thereby yielding some novel insights. At the same time, however, there is much that is unique, and uniquely interesting, about the issue of minors' constitutional right to bodily integrity.

First, as noted above, the problem of minors' rights to bodily integrity is one of overlapping and potentially conflicting constitutional privacy rights.¹¹ This facet of the problem distinguishes it from many other aspects of the parent-child-state relationship, in which there is often no colorable right on the part of the child to compete with parental rights and state interests.¹² Indeed, though minors' rights to bodily integrity are often, albeit obliquely, referenced by courts and commentators alike,¹³ they exist uncomfortably at the intersection of two unreconciled and potentially irreconcilable lines of doctrine: the line that recognizes minors' constitutional privacy rights, exemplified by *Planned Parenthood v. Danforth*¹⁴ and *Bellotti v. Baird*,¹⁵ and the line that recognizes parents' right to make important decisions for their children, exemplified by *Meyer v. Nebraska*¹⁶ and *Pierce v. Society of Sisters*.¹⁷

Moreover, the problem of children's rights to bodily integrity raises particularly difficult but relatively unexamined questions about when state intervention in the family

¹⁰ See *infra* Part II.

¹¹ Cf. Teitelbaum & Ellis, *supra* note 7, at 170-74 (noting that parental rights cases such as *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder* involved no conflict between parent and child, and that cases involving parent-child conflict present the problem of children's liberty interests more directly).

¹² For example, when parents make decisions about their children's education, the child's constitutional rights are not usually involved. Some laws may impact children's to free speech or free exercise of religion, see, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (implicating both), but it is not clear to what extent children possess such rights independently of their parents. Certainly, children's free speech rights are more limited than adults' when they are acting independently in the school context or in the marketplace, see, e.g., *Morse v. Frederick*, 551 U.S. 393, 404 (2007); *Ginsberg v. New York*, 390 U.S. 629, 637 (1968); but see *Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729 (2011) (holding that minors have a right to access violent video games, even if their parents do not approve), but few, if any, cases clearly address minors' First Amendment rights to resist parental mandates. Similarly, children have rights to equal protection of the laws, which may be involved when the state permits or obstructs certain parental choices, but those rights again are generally treated as derivative, rather than independent, of the parents' rights. See *Brown v. Board of Educ. of Topeka*, 347 U.S. 483, 487 (1954).

¹³ Mary Koll, Note, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child's Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225; Jonathan Todres, *Maturity*, 48 HOUS. L. REV. 1107, 1139-42 (2012); Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children? The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87, 100, 104-07 (1999); Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law's Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 88, 99-100 (2006).

¹⁴ 428 U.S. 52 (1976).

¹⁵ 443 U.S. 622 (1979).

¹⁶ 262 U.S. 390 (1923).

¹⁷ 268 U.S. 510 (1925).

is justified. It is often taken for granted—by courts, by liberal philosophers, and by more conservative or parentalist thinkers—that the state’s power to intervene in the family arises, at least, to prevent abuse, neglect, or similar harm to the child.¹⁸ Yet, this apparently agreed-upon limit begs a deeper question regarding the meaning of “abuse” and the state’s authority to define and delimit that term. This Article problematizes some previously unquestioned assumptions about the propriety of state intervention in parental control over children’s bodies.

This Article proceeds as follows. Part I describes the existing right of minors to bodily integrity. Drawing on the example of abortion, it queries whether the right of minors to bodily security and autonomy, even in the face of parental disagreement, can be extended beyond that seemingly *sui generis* context, and if so, what the scope of such a right might be. Proceeding from this background, Part II discusses the two predominant philosophical views of the family and its relationship to the state, both of which uncomfortably coexist in constitutional case law pertaining to children’s and parents’ rights. Part III then demonstrates how conflicting views of the family create two significant difficulties in identifying and enforcing children’s rights to bodily integrity within the family. First is the doctrinal problem of identifying state action in the context of minors’ rights. Often, conflicts around minors’ constitutional bodily integrity rights involve no apparent state actor, but state-mandated and -enforced duties, immunities, and privileges permeate the parent-child relationship. The second difficulty is a conceptual one. The more expansive children’s rights to bodily integrity are understood to be, the more state intervention is invited into both minors’ and parents’ decision-making. These two problems, which appear to be conceptually and doctrinally distinct, are in fact closely related to one another, as consequences of the diffuse nature of state power, which permeates even the most seemingly intimate relationships, and, conversely, the “governmentalization” of private spheres.¹⁹

Finally, Part IV attempts to envision a meaningful and meaningfully delimited right to bodily integrity for children within the family. That Part argues that a broadened understanding of state action in the parent-child decision-making context may provide a partial way forward toward vindicating a real but not overly expansive constitutional right of children to bodily integrity.

I. THE EXISTING RIGHT TO BODILY INTEGRITY

Children possess a constitutional right to bodily integrity, defined as a right against harmful or unwanted physical intrusions mandated or caused by government action.²⁰ Moreover, this right applies even against the minor’s parents in some cases. This Part endeavors to unpack this right, first by demonstrating its applicability when state actors are involved, and second by considering when and how the right is understood to apply against the minor’s own parents. This Part also considers the limits of this partially constitutionalized right, which consists of two elements: a right of older minors to

¹⁸ See *infra* Part III.C.; *Prince v. Massachusetts*, 321 U.S. 158, 168-70 (1944).

¹⁹ As explained *infra*, these terms and the theory behind them are imported from the work of the French historian and philosopher Michel Foucault.

²⁰ See, e.g., *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998).

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autonomy, and a right of all minors to protection of their bodily best interests.

A. *The Right to Bodily Integrity Vis-à-vis the State*

The proposition that children have rights against unwanted bodily intrusions imposed upon them by the state is relatively uncontroversial. In *Ingraham v. Wright*, the Supreme Court acknowledged minors' liberty interest in "personal security."²¹ *Ingraham* dealt with allegations that corporal punishments administered by school officials pursuant to Florida law were so severe and painful—including causing a hematoma in one student and "depriving [another student] of the full use of his arm for a week"—that they violated the students' rights to due process.²² Primarily, in that case, the Court held that the minors had a *procedural* due process right, but it rejected their claims in holding that the only process due them was the availability of a postdeprivation remedy.²³ However, in the process of analyzing the Due Process claims, the Court also acknowledged that the right to freedom from unreasonable bodily restraint and punishment was a fundamental liberty interest protected by the Fourteenth Amendment.²⁴ It may therefore provide the basis for a substantive due process claim, as well as a procedural due process claim, if it is infringed without sufficient justification.

Drawing on *Ingraham*, numerous cases have recognized that children's bodily integrity rights are violated when they are mistreated by a state actor—usually in the school or juvenile detention context. For example, some cases vindicate minors' rights against excessive corporal punishment by school officials.²⁵ Those cases rely on the Supreme Court's holding that students have a "constitutionally protected liberty interest" in avoiding arbitrary or excessive corporal punishment.²⁶ Similarly, the bodily integrity right is invoked to support the claim that children have a constitutional substantive due process right not to be physically or sexually abused by a state actor; thus, it has been asserted extensively in the school and juvenile detention contexts.²⁷

²¹ *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

²² *Id.* at 657.

²³ *Id.* at 683.

²⁴ *Id.* at 673-74. The Supreme Court subsequently described *Ingraham* as establishing that "arbitrary corporal punishment represents an invasion of personal security to which ... parents do not consent when entrusting the educational mission to the State." *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

²⁵ *E.g.*, *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996) (holding that children have a constitutional right against excessive physical punishment and assault by a public school teacher); *Webb v. McCullogh*, 828 F.2d 1151, 1158 (6th Cir. 1987) (holding that principal's physical assault on a student implicated student's substantive due process rights); *Jefferson v. Ysleta Indep. Sch. Dist.*, 817 F.2d 303, 305 (5th Cir. 1987) (holding that a teacher who tied a second-grader to a chair for almost two days at school was not entitled to qualified immunity for violating the child's right to bodily integrity).

²⁶ *Ingraham v. Wright*, 430 U.S. 651, 674 (1977).

²⁷ *See, e.g.*, *Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999) (observing that that "[a] number of circuit courts have found due process violations when state actors have inflicted sexual abuse on individuals") (citing *Rogers v. City of Little Rock, Arkansas*, 152 F.3d 790, 795 (8th Cir.1998)); *Plumeau v. Sch. Dist. No. 40 County of Yamhill*, 130 F.3d 432, 438 (9th Cir. 1997) (citing *Ingraham* for the proposition that students have a constitutionally protected right to bodily integrity, and holding that the right was violated when a public school janitor sexually abused a child); *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1407 (5th Cir. 1995) (stating that, although it "is fairly debatable as an original proposition," precedent clearly establishes that sexual abuse of a minor by a state actor constitutes a violation of the constitutional bodily integrity).

On occasion, courts have upheld minors' bodily integrity claims outside the institutional context. For example, in *In re L.*, a trial court asserted that a sixteen-year-old minor had a right to "freedom from unwanted infringements of bodily integrity" that weighed against her putative father's request that she undergo a blood test to establish his paternity.²⁸ Relatedly, in the case of *In re E.G.*, the Illinois Supreme Court alluded to the possibility that minors have bodily integrity rights with respect to end-of-life care. In that case, the court considered whether a mature seventeen-year-old minor had the right to refuse lifesaving blood transfusions for leukemia.²⁹ Although the minor's mother agreed with her decision, the state filed a petition to have E.G. declared medically neglected, so that the treatment could be compelled.³⁰ The Illinois Supreme Court ultimately upheld the minor's decision on the ground that she was "mature" and therefore permitted to refuse treatment under state common law, but it also suggested, without deciding, that E.G. might have a constitutional privacy right to refuse treatment.³¹ Thus, though the scope of the right is unclear, there is little doubt that minors do possess a constitutional right to bodily security and protection against unwanted bodily intrusions that are imposed or mandated by state actors.

B. *The Right to Bodily Integrity Vis-à-vis the Parents and the State*

1. *Abortion and Contraception*

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

A constitutional right to bodily integrity for minors was first recognized in the 1970s. Soon after *Roe v. Wade*³² was decided, states began passing laws requiring parental consent for minors seeking abortions. The Supreme Court, however, did not lose much time in striking them down. In *Planned Parenthood v. Danforth*,³³ it held that "the State

²⁸ *In re L.*, 632 A.2d 59, 61 (Conn. Super. Ct. 1993).

²⁹ 549 N.E.2d 322 (Ill. 1989).

³⁰ *Id.*

³¹ *E.G.*, 549 E.G. at 326. The mature minor's right to refuse potentially lifesaving medical treatment is also raised by the novel *My Sister's Keeper*. Spoiler alert: It turns out that Anna is attempting to refuse the kidney donation in order to respect her terminally ill sister's desire to die without further invasive treatments. PICOULT, *supra* note 3, at 448.

³² 410 U.S. 113 (1973).

³³ 428 U.S. 52 (1976).

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does not have the constitutional authority to give a third party,” including the minor’s parent, “an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding the consent.”³⁴ At the same time, the Court emphasized that its opinion was not intended to imply an absolute right, possessed by all minors in all circumstances, to consent on their own to the procedure.³⁵ Instead, the Court appeared to welcome a more refined legal structure for parental involvement in minors’ abortion decisions.³⁶

The Court had the opportunity to consider a more refined legislative scheme in a series of cases adjudicating the constitutionality of Massachusetts’ parental consent law. Ultimately, the Court outlined the requirements for a constitutional parental consent law for abortion in *Bellotti v. Baird*.³⁷ Essentially, the governing rule since *Bellotti* has been that states may not require parental consent for minors seeking abortions unless they also provide a mechanism by which the minor can seek judicial permission to obtain an abortion on her own, upon a showing that she is mature and well-informed enough to consent to the procedure, or that the abortion would be in her best interests.³⁸ Whether parents disagree with the minor’s decision or not, she thus appears to have a constitutional right to seek an abortion without their involvement. Although *Bellotti*’s rule applies only against the state in the sense that it constrains the scope of parental involvement laws, the right, in a sense, also takes the form of a right against both the state and the parents. That is to say, it limits the circumstances, extent, and reasons for which the minor woman may be prevented from having an abortion by either her parents or the state.³⁹

The Supreme Court has recognized minors’ rights to make decisions affecting their own bodies with respect to access to contraception, as well. In *Carey v. Population Services International*,⁴⁰ decided after *Danforth* and while the *Bellotti* litigation was ongoing, the Supreme Court struck down by a 7-2 vote a state law prohibiting, among other things, distribution of contraceptives to anyone under the age of sixteen.⁴¹ The right recognized in *Carey* is strikingly nebulous, however. Although a four-Justice plurality in *Carey* rested its decision on a relatively robust understanding of minors’ constitutional privacy rights as virtually equivalent to adults’, the concurring opinions, which provided the required majority to strike down the prohibition, were considerably more circumspect. Justice Brennan’s plurality opinion, joined by Justices Stewart, Marshall, and Blackmun, declared that the state may not, consistent with the Constitution, “burden the right [of minors] to decide whether to bear children” without a medical basis for the regulation,

³⁴ *Id.* at 74.

³⁵ *Id.* at 75 (“We emphasize that our holding...does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.”).

³⁶ *Id.*

³⁷ 443 U.S. 622 (1979).

³⁸ *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979) (plurality op.). Although *Bellotti* was only a plurality opinion, it has been treated by the Supreme Court and lower courts as delineating the relevant constitutional rule. *See, e.g.,* *Planned Parenthood v. Casey*, 505 U.S. 833, 899 (1992).

³⁹ *Bellotti*, 443 U.S. at 627. In addition, the district court had considered whether the parents have “independent rights” in the minor’s abortion decision that had to be protected by the court. *Baird v. Bellotti*, 393 F. Supp. 847, 856 (1975).

⁴⁰ 431 U.S. 678 (1977).

⁴¹ *Id.* at 694.

nor “delegate[] the State’s authority to disapprove of minors’ sexual behavior to physicians, who may exercise it arbitrarily.”⁴² Yet, Justices White and Stevens both concurred in the result primarily on the ground that there was a poor means-end fit between the state’s goal of deterring sexual activity and its ban on contraceptives for minors; at the same time, both emphasized that no right of minors to engage in sexual activity could be derived from the Court’s holding.⁴³ Justice Powell, who also concurred, was merely concerned about the infringement on the rights of married minors under the age of sixteen and on the rights of parents who wished to provide contraceptives to their children.⁴⁴

As this analysis of *Carey* suggests, then, a majority of the Court has not clearly held that minors have a right to access contraception when their parents disapprove; indeed, that issue was not raised by the New York law at issue in *Carey*, which forbade those under sixteen from accessing contraception with or without parental consent.⁴⁵ Nonetheless, both courts and commentators have inferred such a right, which may seem to be a logical corollary of the abortion right.⁴⁶

2. Beyond Minors’ Reproductive Rights?

In most other areas where minors’ bodily integrity rights may be implicated, regulation occurs through a patchwork of common-law and statutory doctrines that rarely refer to one another or to the constitutional privacy right. As in the case of abortion and contraception, parents may—with the support of state law—authorize or withhold authority for various medical and non-medical interventions for their minor children. Corporal punishment by parents, medical treatment, and non-therapeutic interventions like tattooing and piercing are generally regulated at the state level, where a broad role is given to parental discretion. Strikingly, constitutional claims are rarely raised or addressed in cases challenging the appropriateness of these bodily intrusions. Rather, common law standards govern and little or no mention is made of substantive due process or bodily integrity rights.

For example, all fifty states have statutes purporting to distinguish permissible corporal punishment from abuse. Nearly all of those statutes use amorphous terms such

⁴² *Id.* at 697-99.

⁴³ *Id.* at 702-03 (White, J., concurring); *id.* at 713-16 (Stevens, J., concurring) (using the amusingly apt metaphor that “[i]t is as though a State decided to dramatize its disapproval of motorcycles by forbidding the use of safety helmets”).

⁴⁴ *Id.* at 707-10 (Powell, J., concurring).

⁴⁵ *Carey*, 431 U.S. at 681. Nonetheless, twenty-one states explicitly permit all minors to consent on their own to contraceptive services. Guttmacher Institute, *State Policies in Brief: Minors’ Access to Contraceptive Services* (Oct. 1, 2014), available at http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf. In some states, minors are allowed to access contraceptives for health reasons, and in several others, only married minors can access contraception without parental consent. *Id.* The states allowing minors to access contraception for health reasons are Florida, Illinois, and Maine. Those states also allow minors who are married or are themselves parents to consent on their own to contraception. A few states have no explicit law on the topic. *Id.*

⁴⁶ See, e.g., Arneith v. Gross, 699 F. Supp 450, 452 (S.D.N.Y. 1988); Planned Parenthood Ass’n v. Matheson, 582 F. Supp. 1001, 1007-09 (D. Utah 1983); Brenda D. Hofman, Note, *The Squeal Rule: Statutory Resolution and Constitutional Implications—Burdening the Minor’s Right of Privacy*, 1984 DUKE L.J. 1325, 1341-42.

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as “reasonable,” “appropriate,” and “moderate” to characterize legitimate physical punishment and to distinguish it from abuse.⁴⁷ These vague standards are then worked out and given content through the common law. Thus, children’s constitutional rights are also almost entirely ignored in the family discipline context, despite the fact that they crop up quite often in the institutional context. Within the family, unlike the institutional context, the general understanding seems to be that children are without constitutional rights to avoid physical harm, except those conferred by statute or common law. Indeed, the Court famously held in *DeShaney v. Winnebago County Department of Social Services*⁴⁸ that the Due Process Clause did not provide a cause of action to a child who was severely beaten by his father, even after social workers had been alerted to past abuse of the child and declined to remove him from the home.⁴⁹

In the medical treatment context outside abortion and contraception, minors have long been subject to a common-law presumption that they are incapable of consenting on their own to health care and that parents are capable of providing informed consent on their behalf.⁵⁰ There are a few circumstances in which those presumptions do not apply, but they are circumstances that arise from common law and statutory entitlements, and they do not appear to have constitutional foundations.⁵¹ For example, a number of states have adopted “mature minor” laws, which allow minors deemed sufficiently mature to consent to medical treatment without parental involvement. Much like those minors seeking a judicial bypass, mature minors in the health care context must be able to “appreciat[e] the nature, extent, and consequences of the conduct consented to” and to “weigh the risks and benefits.”⁵² Likewise, all states have adopted statutes allowing at least some minors to consent on their own to some forms of health care—most commonly, treatment for sexually transmitted diseases, outpatient substance abuse and mental health counseling, prenatal care, and treatment for sexual assault.⁵³ Most likely, these exceptions reflect the fact that legislatures are concerned about the potential deterrent effects on the minor if parental consent were required, as

⁴⁷ See, e.g., Ala. Code § 13A-3-24 (“reasonable and appropriate physical force”); Ind. Code Ann. § 31-34-1-15 (“reasonable corporal punishment”); S.D. Codified Laws § 22-18-5 (“force used is reasonable in manner and moderate in degree”). Statutes may privilege corporal punishment against criminal prosecution, civil actions, or both.

⁴⁸ 489 U.S. 189 (1989).

⁴⁹ *Id.* at 191. However, the *parents’* constitutional rights may be involved in courts’ findings that parents have the right to punish their children within reasonable limits, to make medical decisions for them, and so forth.

⁵⁰ Rhonda Gay Hartman, *Adolescent Autonomy: Clarifying an Ageless Conundrum*, 15 HASTINGS L.J. 1265, 1266-67 (2000).

⁵¹ Elsewhere, I have questioned whether it is truly meaningful to speak of minors’ incapacity to consent and parents’ capacity to consent for them as constituting default rules or background presumptions against which states must legislate. B. Jessie Hill, *Medical Decision-Making by and on Behalf of Adolescents: Reconsidering First Principles* 15 J. HEALTH CARE L. & POL’Y 37, 38 (2012). Nonetheless, I concede that they are accurate premises in the vast majority of cases. *Id.* at 50.

⁵² *Cardwell v. Bechtol*, 724 S.W.2d 739, 746 (Tenn. 1987) (quoting RESTATEMENT (SECOND) OF TORTS 892A, comment b, and PROSSER AND KEETON, TORTS, s. 18, at 115 (5th ed. 1984)). Relatedly, minors may be considered “emancipated” for the purposes of medical and other decision-making if they exhibit indicia of independence, such as living on their own, serving in the military, or marrying. See generally FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 5.2.3 (3d ed. 2001).

⁵³ Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, Guttmacher Report on Public Policy 4 (Aug. 2000).

well as the public health implications (such as spread of sexually transmitted diseases) that would flow therefrom.⁵⁴

Nonetheless, in the vast majority of cases, parents are empowered to consent to medical care on behalf of their children, limited only in extreme situations by neglect or abuse laws that may prevent them from denying necessary care or perhaps from imposing unnecessary treatments.⁵⁵ It is thus fair to say that parents routinely make decisions about medical care for their children that is medically indicated but not, strictly speaking, medically necessary or life-saving.⁵⁶ Parents can choose among reasonable medical options with respect to antibiotics, ear tubes, and other such interventions for relatively minor ailments.⁵⁷

Activities such as body piercing, tattooing, cosmetic surgeries, circumcision, and other non-therapeutic interventions are similarly regulated by state law, but there is a dearth of case law indicating the constitutional limits of parents' authority in this domain.⁵⁸ The underlying assumption appears to be that parents have the legal right not only to choose among reasonable therapeutic alternatives, but also to authorize some nontherapeutic interventions. Thus, for example, commentators have noted the increasing prevalence of plastic surgeries performed on teens, presumably authorized by their parents in all cases.⁵⁹ In most states, tattooing and piercing of minors are permitted when the parent agrees, but tattooing of minors is prohibited entirely in some states regardless of consent.⁶⁰ Texas law specifies that the consenting parent or guardian must "consider[] it to be in the best interest of the [minor] to cover" a particular tattoo.⁶¹

⁵⁴ See, e.g., Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making for and by Children: Tensions Between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 324 (1994).

⁵⁵ Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955, 966-67 (2010).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ See, e.g., Alicia Ouellette, *Eyes Wide Open: Surgery to Westernize the Eyes of an Asian Child*, 39 HASTINGS CTR. REP., Jan.-Feb. 2009, at 15, 16. There have been widely-publicized recent attempts to outlaw circumcision. See, e.g., Jennifer Medina, *Efforts to Ban Circumcision Gain Traction in California*, N.Y. TIMES (June 5, 2011), at A20.

⁵⁹ Alicia Ouellette, *Body Modification and Adolescent Decision Making: Proceed with Caution*, 15 J. HEALTH CARE L. & POL'Y 129, 129-30 (2012) (noting that almost 219,000 cosmetic surgeries were performed on teens in 2010, along with approximately 12,000 Botox injections); *id.* at 136 (noting that parents generally have decision-making authority regarding cosmetic body modification in the medical context); Susan Gilbert, *Children's Bodies, Parents' Choices*, 39 HASTINGS CTR. REP., Jan.-Feb. 2009, at 14, 14 (stating that 205,119 teenagers under eighteen had cosmetic procedures in 2007 and observing that, "[i]f they are underage, they must convince their parents to give consent and, even if they are not underage, to give financial assistance. But sometimes it is the other way around, with parents wanting an intervention that they think is in the child's best interest. Regardless, the decision depends on the parents.").

⁶⁰ National Conference of State Legislatures, *Tattoos and Body Piercings for Minors*, <http://www.ncsl.org/issues-research/health/tattooing-and-body-piercing.aspx> (updated Oct. 2011), last visited Aug. 6, 2012. A small number of states explicitly exclude ear piercing from their general body piercing prohibitions, and two states specify that it is acceptable for a parent to permit tattooing of a minor only to cover up an existing tattoo. *Id.* (Tennessee and Texas). These provisions appear to be motivated largely by a concern for minors who bear gang-related tattoos; cf. *In re Antonio C.*, 83 Cal. App. 4th 1029, 1034-35 (Cal. Ct. App. 2000) (imposing a probation requirement on a juvenile of no further tattooing).

⁶¹ Tex. Health & Safety Code Ann. § 146.0125(a-1).

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An exception to the model of wide parental discretion exists only in those cases where there is a strong likelihood of the parent confronting a conflict of interests—for example, when parents seek to permit a child to donate an organ or tissue to a sibling. In such cases, common law rules appear to dictate that a court order is required for sibling organ donation, and that the donation may proceed only if it is in the best interests of the minor.⁶² Again, however, the standard adopted is explicitly grounded in the common law, without reference to constitutional rights or entitlements.⁶³

Scholarly commentators have sometimes suggested that children's constitutional rights to bodily integrity may be violated when parents authorize, and physicians perform, invasive surgeries on children that have little or no therapeutic benefit for the child.⁶⁴ For example, a controversial form of surgery sometimes performed on infants and toddlers is “normalization” surgery when a child is born with ambiguous genitalia—neither clearly male nor clearly female.⁶⁵ This procedure, which often has no medical benefit, is permanent, highly invasive, and usually painful.⁶⁶ Moreover, it often has long-term negative consequences for the affected individual.⁶⁷ Legal scholars have argued that such allowing such surgeries violates the infants' bodily integrity rights.⁶⁸ And a recent lawsuit brought on behalf of a child who was subjected to the surgery while in foster care alleges both substantive and procedural due process violations of the child's bodily integrity rights.⁶⁹ This, however, is one of the rare cases in which

⁶² Rachel M. Dufault, Comment, *Bone Marrow Donations by Children: Rethinking the Legal Framework in Light of Curran v. Bosze*, 24 CONN. L. REV. 211, 220 (1991); Rhonda Gay Hartman, *Gault's Legacy: Dignity, Due Process, and Adolescents' Liberty Interests in Living Donation*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 67, 76 (2008); *Curran v. Bosze*, 566 N.E. 2d 1319, 1326 (Ill. 1990). Parents must also seek a court order for sterilization of a mentally incompetent child, whether minor or adult. Koll, *supra* note 13, at 246.

⁶³ *But see* Hartman, *supra* note 62, at 85-99.

⁶⁴ Koll, *supra* note 13, at 254-61; Tamar-Mattis, *supra* note 13, at 91-93. Some cases have also recognized minor's “liberty interest” in not being confined for medical treatment without due process. *Parham v. J.R.*; *In the interest of F.C.* III.

⁶⁵ For an overview, see JULIE A. GREENBERG, *INTERSEXUALITY AND THE LAW: WHY SEX MATTERS* 16-25 (2012); Katrina Karkazis, *Fixing Sex: Intersex, Medical Authority, and Lived Experience* (2008).

⁶⁶ *See, e.g.*, Karen Gurney, *Sex and the Surgeon's Knife: The Family Court's Dilemma ... Informed Consent and the Specter of Iatrogenic Harm to Children with Intersex Characteristics*, 33 AM. J.L. & MED. 625, 631-35 (2007); Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of “Cultural Practices,”* 40 HARV. C.R.-C.L. L. REV. 71, 105-14 (2005) (detailing the harmful physical and psychological effects of normalizing surgeries). Though once widely accepted, normalization surgery has recently garnered significant opposition, and advocates have worked to change the standard of care for infants with disorders of sexual development. GREENBERG, *supra* note 65, at 24-25. Nonetheless, the general assumption, in the absence of any relevant case law, appears to be that it is within the parents' discretion to choose surgery, even when not medically necessary. For example, the AAP consensus statement notes that parents “now seem to be *less inclined to choose surgery for*” certain less severe intersex conditions, implying that they nonetheless have the authority to do so. Lee, et al., at e491 (emphasis added); *see also* GREENBERG, *supra* note 65, at 32 (“Currently, parents can consent to these surgeries and they are not subject to an external oversight or approval.”).

⁶⁷ Karen Gurney, *supra* note 66, at 631-35.

⁶⁸ *See, e.g.*, ; Ryan L. White, *Preferred Private Parts: Importing Intersex Autonomy for M.C. v. Aaronson*, 37 FORDHAM INT'L L.J. 777 (2014); Tamar-Mattis, *supra* note 13; Sara R. Benson, *Hacking the Gender Binary Myth: Recognizing Fundamental Rights for the Intersexed*, 12 CARDOZO J.L. & GENDER 31, 43-50 (2005). The *Cardozo Journal of Law and Gender* has published a symposium on intersex and the law. 12 CARDOZO J.L. & GENDER 1 (2005).

⁶⁹ *M.C. v. Aaronson*, No 2:13-cv-01303-DCN (D.S.C. filed 5/14/2013). The district court denied the defendants' motions to dismiss on grounds of qualified immunity on August 29, 2013.

constitutional, rather than common-law and statutory, standards are invoked.

Surprisingly, with the exception of reproductive health care, constitutional rights and entitlements have not permeated this area to any significant extent. If children possess a constitutional right to bodily integrity, it should be implicated in all of these disparate contexts—not limited to reproductive health care. Yet, cases involving corporal punishment seldom, if ever, make reference to minors' rights in the health care context; cases dealing with minors' rights to make autonomous health care decisions rarely look to the abortion and contraception precedents.⁷⁰ Nor do cases dealing with circumcision address the minors' rights to bodily integrity, though parents' constitutional rights are sometimes invoked.⁷¹

Although it may be defensible to view the minor abortion cases as simply *sui generis*,⁷² it is not entirely clear how or why such doctrinal isolation can be justified. One might argue that pregnant minors are in a unique situation, in that they are facing a decision with profound long-term effects on the minor's future—a decision that cannot, moreover, be delayed until the minor reaches maturity. However, many minors—such as those suffering from “adult” problems like terminal cancer, drug addiction, or sexually transmitted diseases—are virtually indistinguishable from pregnant minors in terms of the seriousness of their situations and the need for treatment without delay. Moreover, as the joint opinion in *Planned Parenthood v. Casey*⁷³ emphasized: “*Roe* ... may be seen not only as an exemplar of *Griswold* liberty but as a rule ... of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.”⁷⁴ This language suggests that the constitutional bodily integrity right is not limited to the right to choose abortion; courts' failure to acknowledge the Constitution's application beyond this domain is thus puzzling.

It is also particularly surprising that minors' constitutional bodily integrity rights within the family have not made an appearance outside the reproductive rights context, given that the common-law and constitutional frameworks govern the same sorts of issues those of medical treatment and minors' autonomous decision-making—and use overlapping standards such as maturity and best interests. For example, it is uncertain how the mature minor doctrine fits with statutory provisions requiring parental consent for minors seeking abortions. On one hand, a statutory requirement of parental consent would seem to constitute an explicit derogation of the common-law doctrine, rendering the mature-minor rule a nullity in the abortion context. On the other hand, the Supreme Court's abortion jurisprudence re-incorporates that standard in holding that “mature minors” have a constitutional right to seek abortion without parental consent—

⁷⁰ For one counter-example, see *In re E.G.*, 549 N.E.2d 322, 326 (Ill. 1989) (citing Supreme Court precedent regarding minors' reproductive rights, in dicta, to show “that no “bright line” age restriction of 18 is tenable in restricting the rights of mature minors, whether the rights be based on constitutional or other grounds.”); see also Teitelbaum & Ellis, *supra* note 7 (examining minors' ability to assert liberty rights, against the wishes of their parents, in a variety of contexts).

⁷¹ *Oliner v. Lenox Hill Hosp.*, 106 Misc. 2d 107, 108 (N.Y. Sup. Ct. 1980) (considering parent's legal “entitle[ment] to have a ‘bris’ [circumcision] performed for his infant son”).

⁷² See, e.g., Emily Buss, *What Does Frieda Yoder Believe?* 2 U. PA. J. CONST. L. 53, 61 (1999).

⁷³ 505 U.S. 833 (1992)

⁷⁴ *Id.* at 857.

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obviously (if not explicitly) referencing the common law doctrine.⁷⁵

Thus, the right of children to bodily integrity is only partially constitutionalized. It has been recognized in some contexts—such as abuse by state actors and access to abortion—but not others—such as corporal punishment by parents, medical treatment, and non-therapeutic interventions—where it is arguably equally relevant. As this Part has argued, there is no obvious logical or doctrinal reason for this disconnect. However, there is one reason, not addressed above, that may have surface appeal for distinguishing among these different contexts: when a parent, unlike a public school teacher or public detention facility officer, denies a child's right to bodily integrity, there is no state action and therefore constitutional protections are not implicated. The Constitution thus protects children in public institutions but not in the home. Yet, as explained below, this apparent state action distinction is deceptive and ultimately unsatisfying.⁷⁶

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

Assuming minors have a constitutional right to bodily integrity—whether within the family or outside it—what does that right look like? And can it be universalized, such that it applies equally to infants, who lack decisional capacity entirely, and to teenagers who are practically adults? As noted above, the doctrine regulating children's bodies falls largely within the domain of family law and has been only partly constitutionalized; at the same time, it appears that the Supreme Court's constitutional bodily integrity cases look to common-law standards to delineate the contours of the constitutional right. In the course of recognizing minors' constitutional rights to choose abortion without parental involvement, the Supreme Court obviously invokes the mature-minor doctrine, as well as the “best interests of the child” standard that is familiar to family law.⁷⁷ These twin concerns of the minor abortion cases—maturity and best interests—map neatly onto the two key aspects of the bodily integrity right as commonly understood: autonomy and bodily security.

The cases that have already recognized a constitutional bodily integrity right for minors speak of the right as one against “arbitrary” or “unjustified” intrusions on the minor's bodily security.⁷⁸ In one case involving an allegation of excessive corporal punishment by a public school teacher, the Fourth Circuit court of appeals explained that the substantive due process right to bodily integrity protected minors against “violations of personal rights of privacy and bodily security” that are “severe, ... disproportionate to the need presented, and ... inspired by malice or sadism.”⁷⁹ Key to

⁷⁵ In one case, the Tennessee appeals court held that a clinic was not liable for failing to comply with the state's parental *notice* law, in part because the minor was found to be a “mature minor.” The court also found that the parental notice law was unconstitutional, however. *McGlothlin v. Bristol Obstetrics, Gynecology & Family Planning, Inc.*, 03A01-9706-CV-00236, 1998 WL 65459 (Tenn. Ct. App. Feb. 11, 1998) (“Further as to the issue of plaintiff's capacity to consent which is predicated upon T.C.A. 39-15-202, the Court finds that the record fails to rebut the presumption of capacity by the plaintiff to sign the consent to abortion document as a mature minor.”).

⁷⁶ *Infra* Part III.

⁷⁷ *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

⁷⁸ *Ingraham v. Wright*, 430 U.S. 651, 673 (1977).

⁷⁹ *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980).

these understandings is a notion of protecting children from harm that is more than *de minimis* in quality and that is not of such a nature as to be potentially beneficial to them.⁸⁰ (For example, a medically necessary surgery is a serious intrusion that may result in serious pain, but it is presumably not a violation of a child’s right to bodily integrity if it relieves or protects the child from more serious illness or harm.)

Indeed, bodily integrity in the sense of the basic ability to protect one’s body from harm and unwanted intrusion is an essential aspect of constitutional privacy doctrine in general, not simply as applied to children. Emphasizing the need for pure physical security, Kendall Thomas has similarly characterized the privacy right to bodily integrity as “a presumptive right to simple physical existence in and of itself.”⁸¹

Yet, autonomy is also an important aspect of the traditional understanding of the right. In the context of privacy doctrine as applied to adults, autonomy has long played a central role. In *Planned Parenthood v. Casey*, for example, the joint opinion explained that denying a woman the right to choose abortion “includes ‘the interest in independence in making certain kinds of important decisions.’”⁸² Speaking of the right to privacy in general, Tom Gerety has contended that the essence of privacy is “control over who, if anyone, will share in the intimacies of our bodies,” which in his view is fundamental to human flourishing.⁸³ Gerety continues: “All of this comes in the end to a control over the most basic vehicle of selfhood: the body. For control over the body is the first form of autonomy and the necessary condition, for those who are not saints or stoics, of all later forms.”⁸⁴ Indeed, Gerety’s description helpfully connects the concepts of bodily integrity, privacy, and autonomy.⁸⁵

For example, a concern for the autonomy of older, mature minors is also the only way to make sense of the Court’s holding in *Bellotti v. Baird* that courts could not decide on minors’ access to abortion based solely on their best interests, but rather that minors must be allowed to consent on their own to an abortion if they are sufficiently mature to do so.⁸⁶ The minor abortion cases thus recognize both a right to autonomy in making

⁸⁰ Cf. *Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 451 (5th Cir. 1994) (“It is incontrovertible that bodily integrity is necessarily violated when a state actor sexually abuses a schoolchild and that such misconduct deprives the child of rights vouchsafed by the Fourteenth Amendment. Obviously, there is never any justification for sexually molesting a schoolchild, and thus, no state interest, analogous to the punitive and disciplinary objectives attendant to corporal punishment, which might support it.”).

⁸¹ Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1458 (1992).

⁸² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (citing *Carey*, 431 U.S., at 684–685); see also *id.* at 857 (“*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity”). Indeed, it is interesting that the Court cites *Carey* and several other cases involving minors in this portion of its opinion. Khiara Bridges and others have noted the evolution of the Court’s language in substantive due process cases from a rhetoric centered on “privacy” to one centered on “liberty,” a move which has de-emphasized the importance of the family as compared to the individual. See generally Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. GENDER & L. 113, 137–45 (2011).

⁸³ Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 266 (1977).

⁸⁴ *Id.*

⁸⁵ Thomas, *supra* note 81, at 1459.

⁸⁶ *Bellotti v. Baird*, 443 U.S. 622, 647–48, 649–51 (1979) (holding that the state “cannot constitutionally permit judicial disregard of the abortion decision of a minor who has been determined to be mature and fully competent to assess the implications of the choice she has made”); see also *id.* at 642 (noting the

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certain fundamental decisions—represented by the exception allowing mature minors to consent on their own—and the right to protection against bodily harm—roughly represented by the “best interests” prong allowing judges to grant minors access to abortion without parental consent if it would be in their best interests. Those twin aspects of minors’ bodily integrity rights also assist in conceptualizing a bodily integrity right that can apply across factual contexts, both to older minors as well as younger ones. For younger minors, it is the pure best interests, or bodily protection, aspect of bodily integrity that is likely to be most relevant—for example in the form of protection from abuse and from unwarranted denial of medical care. For older minors, autonomy often comes into play, especially in the context of reproductive health and other health care, as well as in choosing forms of bodily expression such as tattoos and piercings.⁸⁷ It thus appears that the minor abortion cases can provide a model for a more universally recognized constitutional right of minors to bodily integrity.

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

Thus far, this Article has discussed the notion of children’s constitutional right to bodily integrity, whether against the state or also against the parents, as a freestanding right. However, any discussion of children’s rights would be incomplete without an acknowledgement of the profound importance of parental rights with respect to the very same set of issues. Though the contours of the “family privacy” or “parental rights” doctrine are notoriously vague,⁸⁸ there is no question that the right includes some measure of parental control over children’s bodies. To the extent that such rights exist, moreover, they seem inevitably to increase parents’ authority and limit children’s authority with respect to their bodies.⁸⁹ For example, the right is widely understood to ground the discretion that parents are legally entitled to exercise in the context of body modification, medical decision-making, and corporal punishment.⁹⁰

The origins of the constitutional doctrine of family privacy may be traced to two

severe consequences of “denying a minor the right to make an important decision” such as the abortion decision). In addition, a large and growing literature recognizes the growing decisional capacity of adolescents and older minors and calls on the law to grant minors autonomy rights that accord with their capacity. *See, e.g.*, Kimberly M. Mutcherson, *Whose Body Is It Anyway? An Updated Model of Healthcare Decision-Making Rights for Adolescents*, 14 CORNELL J.L. & PUB. POL’Y 251, 283-91 (2005); *cf.* Todres, *supra* note 13, at 1146-64 (urging that the law should take into account cultural understandings of and approaches to maturity).

⁸⁷ *Cf.* Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 77-78 (2006) (questioning whether the state should be able to exercise its “usual parental role toward children” where body modification is concerned, due to the expressive and identity interests involved, and analogizing to the minor abortion cases).

⁸⁸ *E.g.*, David D. Meyer, *The Constitutionalization of Family Law*, 42 FAM. L.Q. 529, 551 (2008) (noting the current uncertainty regarding the “boundaries and scope” of family privacy); Bruce C. Hafen, *Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their “Rights”*, 1976 B.Y.U. L. REV. 605, 628.

⁸⁹ *See generally* B. Jessie Hill, *Medical Decision-Making by and on Behalf of Adolescents: Reconsidering First Principles* 15 J. HEALTH CARE. L. & POL’Y 37, 62-63 (2012); Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 986-87 (1993).

⁹⁰ *See, e.g.*, James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189, 192-93 (2010) (noting the argument that parental rights ground the authority to punish children for discipline); *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1203 (10th Cir. 2003) (noting the constitutional right of parents to control their children includes the right to direct their medical care).

Lochner-era cases, *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. Despite *Meyer*'s and *Pierce*'s questionable origins in a constitutional doctrine guaranteeing not only the "liberty of parents and guardians to direct the upbringing and education of children under their control"⁹¹ but also the freedom to contract and the right to pursue an occupation,⁹² they have demonstrated considerable staying power. As recently as 2000, an eight-justice majority of the Supreme Court affirmed the fundamental nature of parental rights to the custody and control of their children.⁹³

Yet, the *Meyer* and *Pierce* cases also gave rise to individual constitutional privacy rights, such as the right to use contraception and abortion.⁹⁴ When these latter rights came to apply to minors as well, an inevitable clash was created between children's constitutional rights and parents' constitutionally-protected rights to family privacy and noninterference with their childrearing decisions.⁹⁵ Any right of the child to make autonomous decisions naturally reduces the parent's right to make those decisions on her behalf; any right of the child to claim the state's protection against neglect, exploitation, or harm by her parents automatically entails greater intervention into the private realm of the family than the parent would wish. Yet both kinds of rights share a pedigree, originating from the same doctrinal bloodline.

In addition, the tension between parents' rights to familial privacy and children's rights to autonomy and protection arguably reflects a tension within broader philosophical approaches to the family—namely, between liberal, individual-rights centered approaches and communitarian or "parentalist" approaches. The birth of children's constitutional rights, as distinct from those of their parents, may be loosely viewed as an outcropping or extension of the liberal view, whereas familial rights fit more comfortably within the communitarian tradition. Neither tradition clearly dominates in constitutional jurisprudence.⁹⁶

In both traditions, of course, children are understood as individuals with at least some needs and entitlements, and in both traditions, families are accorded special status, requiring some deference or presumption of non-interference from the state. Where the two traditions differ is in how they mediate the potential conflict between the state's interest in according the children rights which may be exercised without their parents' consent and the duty owed by the state to tolerate some distinctiveness among families, which may not always conform to the state's desired value system.

⁹¹ *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

⁹² *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

⁹³ *Troxel v. Granville*, 530 U.S. 57 (2000); see also David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 U.C.L.A. L. REV. 1125, 1190 n.85 (2001) (noting that eight Justices recognized the fundamental quality of parental rights in *Troxel v. Granville*).

⁹⁴ *Roe v. Wade*, 410 U.S. 113, 153 (1973).

⁹⁵ Anne C. Dailey, *supra* note 89, at 986-87.

⁹⁶ Cf. Vivian Hamilton, *Principles of U.S. Family Law*, 75 FORDHAM L. REV. 31, 56 (2006) (noting that family privacy law has been shaped by conflicting strands of liberal individualism and Biblical traditionalism). The liberal and parentalist traditions roughly match two predominant approaches to childhood in family law: the children's-rights approach, which reflects (and in many respects exceeds) the liberal viewpoint, and the dependency approach, which assimilates with the parentalist viewpoint. See, e.g., Susan Frelich Appleton, *Restating Childhood*, 79 BROOKLYN L. REV. 525, 540-41 (2014).

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A. *Liberal Theory of the Family*

1. An Overview of the Liberal View of the Family

In evaluating the relationship between the family and the state, liberal theory tends to emphasize the importance of the family in serving the ends of the state. For example, Professor Linda McClain takes the position that families in democratic societies “are places of moral learning that may create the good person and may contribute to creating the good citizen,” in part by helping children to acquire the values and capacities that will enable them to participate in democratic self-government.⁹⁷ One such capacity is the capacity for autonomy, which develops as a child matures; as such, both parents and governmental institutions, such as schools, should support children’s increasing claims to equality and increasing ability to make independent decisions.⁹⁸ Similarly, Amy Gutmann has argued that both parents and the state should act in a paternalistic manner toward children so as to ensure that they are eventually able to choose their own conception of the good life and to participate in democratic self-government.⁹⁹

Liberal theorists conceive of the relationship among child, parents, and state as deriving from this basic structure and function of the family. According to McClain, the role of the state vis-à-vis the family is to protect children from harm, as in the case of abuse or neglect, and to instill children with civic virtues, but to abstain from forcing upon them any particular substantive vision of the good life. To use explicitly Rawlsian terms, the state should avoid imposing the dictates of any particular “comprehensive doctrine.”¹⁰⁰ These civic virtues, which the state is justified in imposing on children, are the fundamental values that a democratic society requires its citizens to accept, such as equality and toleration for diversity.¹⁰¹ Thus, the state can and should act to mold children into good citizens, which involves protecting them in order to preserve their future options and capacities, as well as allowing them to exercise some autonomy commensurate with their developing abilities.

The state’s obligation to protect children and instill civic virtue still leaves room for some measure family privacy in the liberal vision. Since the state must refrain from imposing comprehensive doctrines—indeed, since it must avoid imposing any values on families except the most basic values fundamental to democratic self-government—a large domain of discretion remains for parents to teach children their own values and beliefs and to make decisions about their children’s best interests.¹⁰² As Professor

⁹⁷ LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 67 (2006). *See also generally* Matthew B. O’Brien, *Why Liberal Neutrality Prohibits Same-Sex Marriage: Rawls, Political Liberalism, and the Family*, 1 *BRIT. J. AM. LEGAL STUD.* 411, 423 (2012).

⁹⁸ *Id.* at 68-70.

⁹⁹ Amy Gutmann, *Children, Paternalism, and Education: A Liberal Argument*, 9 *PHIL. & PUB. AFF.* 338, 349-50 (1980); *cf.* Dailey, *supra* note 89, at 993 (describing the Supreme Court’s view of “the family as facilitating the development of responsible individuals” and thus as “an instrument of the liberal state.”)

¹⁰⁰ MCCLAIN, *supra* note 97, at 47; *see* JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

¹⁰¹ Professor Linda McClain writes of the government’s obligation to foster capacity, equality, and responsibility, MCCLAIN, *supra* note 97, at 4; Anne Dailey speaks of “family justice,” Dailey, *supra* note 89, at 1016-18.

¹⁰² *See, e.g.*, MCCLAIN, *supra* note 97, at 47-48; Gutmann, *supra* note 99, at 350-53.

Gutmann puts it, “Some values must be imposed in any case. What is at issue here is not *whose* values but *what* values ought to be imposed upon children.”¹⁰³ Thus, parents remain free to cultivate their values in their children, whereas the state maintains the authority to impose those values necessary to fostering future democratic citizenship and maintaining a full range of opportunity for children’s futures.¹⁰⁴

Within the liberal philosophical framework, the state would have the power to protect children’s bodily integrity against parental abuse or neglect, consonant with its authority to protect individuals from physical harm—physical security being a prerequisite for children’s future citizenship.¹⁰⁵ Beyond actions that constitute neglect or abuse or that otherwise inhibit children’s future choices, however, it seems that the state would be required to tolerate differences in parental decision-making with respect to children’s bodies in most cases.¹⁰⁶

At the same time, some liberal theorists contend that adolescents, who have the developing capacity to exercise the sort of autonomy that adult citizens may exercise, should in some cases be authorized to exercise that autonomy regardless of their parents’ wishes. This is because liberalism views consent, and therefore the capacity for rationality, as a prerequisite to and basis for individual autonomy rights.¹⁰⁷ As Gutmann puts it, “adolescents must be granted some freedoms in order to help develop their capacities to exercise their freedoms as adults,” but only in ways that allow them to expand, rather than restrict their future options.¹⁰⁸

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

Moreover, the state would have a stake in judging the reasons why parents seek to make certain choices with respect to their children’s bodies, because those reasons may indicate the values that are being conveyed and whether they are consistent with the familial role in shaping future citizens. If a parent denies a child medical care because that parent has made the informed judgment that the medical intervention is likely to cause the child significant discomfort with only a small chance of remedying the underlying condition—for example, in the case of an experimental cancer treatment—

¹⁰³ Gutmann, *supra* note 99, at 351.

¹⁰⁴ Cf. BRUCE A. ACKERMAN, *SOCIAL JUSTICE AND THE LIBERAL STATE* 154-59 (1980).

¹⁰⁵ See, e.g., MCCLAIN, *supra* note 97, at 79-80 (mentioning the state’s *parens patriae* interest in children’s health and safety, enforced through abuse and neglect laws, and noting that “if a religiously motivated family practice seriously impaired a child’s development of his or her capacities, this would overcome the normal deference to parental authority and trigger a strong governmental interest in prevention, intervention, or amelioration”).

¹⁰⁶ Cf. AMY GUTMANN, *IDENTITY IN DEMOCRACY* 69-73 (2003) (discussing parental discretion with respect to male and female circumcision).

¹⁰⁷ See, e.g., Gutmann, *supra* note 99, at 339-40.

¹⁰⁸ Gutmann, *supra* note 99, at 354-55.

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that is very different from a judgment that it is better for the child to die than to violate the parent's religious beliefs. Or, the liberal state may judge mild corporal punishment that is practiced in order to discipline a child differently from even mild physical pain inflicted on a child out of a sadistic desire to harm.¹⁰⁹ Relatedly, an evaluation of a minor's reason for making a particular decision—for example, seeking an abortion—would be relevant to determining whether the minor possesses the sort of capacity that would enable her to exercise at least limited decision-making authority.

Finally, although liberalism views the state as limited in its authority to impose particular values on family life, we can infer that liberal philosophy considers the state to be the ultimate source of authority over children. The authority that parents have over their children may be seen as delegated by the state, which is in charge of determining the boundaries of its own power. This places liberal theories of the family in direct contradiction to natural-law-derived parentalism theories, which hold that parents' authority over their children is inherent, and that the state lacks authority to intervene except perhaps in cases of abuse or neglect, where the natural family can be said no longer to exist in any meaningful sense.¹¹⁰

2. The Liberal View of the Family in Case Law

Many cases—particularly relatively recent constitutional rights cases—appear to embody the liberal perspective. Unsurprisingly, the abortion cases are the paradigm. As one would expect based on the liberal understanding of the state's role in the family, these cases show a preoccupation with the parental reasoning process, and even sometimes an eliding of roles of parent and state. The state becomes, in some cases, a stand-in for the parent and vice versa. This result should be expected, given that liberalism views the state as central and the families as acting, to a great extent, in the service of the state.

For example, in *Bellotti v. Baird*, the seminal minor rights abortion case, a woman representing a “class of Massachusetts parents having unmarried minor daughters who then were, or might become, pregnant” was permitted to intervene in order to defend the statute.¹¹¹ Although the parents attempted to raise their own rights as parents to consent or withhold consent to their children's decisions, the Court in *Bellotti* never directly addressed those claims and instead recognized them only as an aspect of the *state's* interest.¹¹²

Moreover, while Supreme Court jurisprudence gives minors a fairly wide range of autonomy with respect to the abortion decision—arguably more than they possess with respect to other important medical treatment decisions, for example—it also demonstrates a strong preoccupation with their reasoning and decision-making process in this context. In practice, courts hearing bypass petitions are consumed with evaluating the quality of the reasoning by the minors who come before them, seeking

¹⁰⁹ See *infra* Part II.A.2.

¹¹⁰ See, e.g., Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 887-88 (1984).

¹¹¹ *Bellotti*, 443 U.S. at 626.

¹¹² *Id.* at 638-39, 648.

abortions without parental consent. In any of thirty-seven states,¹¹³ minors can avoid parental involvement in their abortion decision only by going to court and seeking a judge’s approval through what is known as a “judicial bypass” hearing. Professor Carol Sanger has examined the structure of these hearings, finding that courts often focus on the decision-making process of the teens who have chosen abortion.¹¹⁴ Indeed, though the law is largely lacking in standards for determining whether a minor is “mature” enough to make the abortion decision on her own, an examination of her thought process is one obvious way to reach such a determination.¹¹⁵

The Supreme Court cases also evince an unusual concern with *parental* reasoning and decision-making processes. Early in the *Bellotti* litigation, the Supreme Court decided to certify several questions about construction of the statute’s language to the Massachusetts Supreme Court.¹¹⁶ In particular, the Court was concerned with whether an arbitrary third-party veto was created by the statutory phrasing, which required parental consent but provided for a judicial order bypassing the consent requirement “for good cause shown.”¹¹⁷ The District Court thus inquired of the Massachusetts Court what standards were to be applied, both by the parents and by the court hearing a bypass petition, in determining whether the abortion could go forward.¹¹⁸ In response, the Massachusetts Supreme Judicial Court asserted that both the court *and the minor’s parents* were permitted only to consider the minor’s best interests in deciding whether to allow the abortion.¹¹⁹ Presumably, this meant the parents could not rely on their own religious or other ethical beliefs in withholding consent. With respect to parental decision-making under the statute, the court added: “There is, of course, no penalty if a parent does not apply the proper standard in deciding whether to consent to his or her child’s request for consent to an abortion. Our answer may be of assistance, however, in guiding parents’ consideration of the question...”¹²⁰ The court’s caveat notwithstanding, it would be an understatement to say that it is unusual for courts to examine parental decision-making within intact families so closely; nonetheless, this micro-management is arguably quite consistent with a liberal view of the family and the state’s not-insignificant role in shaping it.

This approach to parental decisionmaking is not just present in constitutional cases.

¹¹³ Thirty-eight states require parental involvement in minors’ abortion decisions. Of those, twenty-six require parental consent and twelve require only parental notification. Thirty-seven states have alternate “judicial bypass” procedures available. Guttmacher Institute, *State Policies in Brief: Parental Involvement in Minors’ Abortions* (March 1, 2013), *available at* http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf

¹¹⁴ Carol Sanger, *Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409, 430 (2009).

¹¹⁵ *See id.* at 430-31. According to Sanger, such hearings perform other functions as well: they are themselves punitive, shaming devices. Comparing bypass hearings to sixteenth-century French “pardon tales,” whereby those who had committed capital offenses sought the mercy of the sovereign, Sanger observes that teenagers’ bypass narratives “similarly seek to persuade by accounting for past actions” in a compelled story of remorse. *Id.* at 460, 466-67.

¹¹⁶ *Bellotti v. Baird*, 428 U.S. 132, 134 (1976).

¹¹⁷ *Id.* at 134-35.

¹¹⁸ *Baird v. Attorney Gen.*, 360 N.E.2d 288 (1977).

¹¹⁹ *Id.* at 292-93.

¹²⁰ *Id.* at 293.

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In the case of *In re Marriage of Boldt*, the Supreme Court of Oregon addressed the issue of who is entitled to decide whether a twelve-year-old boy should be circumcised, when the divorced parents disagreed on the issue.¹²¹ The court first stated, in a more parentalist vein, that the law granted “authority [to] the custodial parent to make medical decisions for his or her child, including decisions involving elective procedures and decisions that may involve medical risks.”¹²² Yet at the same time, the court seemed to take comfort in the fact that, “although circumcision is an invasive medical procedure that results in permanent physical alteration of a body part and has attendant medical risks, the decision to have a male child circumcised for medical or religious reasons is one that is commonly and historically made by parents in the United States.”¹²³ Thus, while purporting to take a hands-off approach to parental decision-making in this domain, the court felt compelled to situate the decision as a normal and socially acceptable one.¹²⁴

In similar terms, the court in *Hart v. Brown* focused on the reasonableness of the parents’ decision to authorize kidney transplantation from one seven-year-old twin to another.¹²⁵ Articulating its standard for validating the operation, the court stated that “the natural parents would be able to substitute their consent for that of their minor children after a close, independent and objective investigation of their motivation and reasoning.”¹²⁶ The court ultimately found that the parents’ reasoning was “morally sound,”¹²⁷ based on the testimony of clergy and psychiatrists, and that the parents’ “motivation and reasoning are favorably reviewed by a community representation, which includes a court of equity.”¹²⁸

The legality of a parent’s corporal punishment of a child also depends in part on the reasons or intent behind the act. In one case, the court showed a particular concern with the parent’s reasons for punishing the child in a particular way, even after suggesting that the parent’s state of mind was irrelevant. After first announcing that “we evaluate a claim of abuse by looking to the harm suffered by the child, rather than the mental state of the accused abuser, because “[t]he main goal of [the relevant law] is to protect children,” a New Jersey appellate court then proceeded to evaluate the appropriateness of a mother’s striking of her child in precisely those purportedly irrelevant terms.¹²⁹ While first noting that the resulting injury was not particularly serious, the court then took into account “the reasons underlying” the mother’s actions as well as the fact that she “accepted full responsibility for her actions” and “was contrite.”¹³⁰ As the court explained, “these factors form the prism through which we

¹²¹ 176 P.3d 388, 389-91 (Or. 2008).

¹²² *Id.* at 393.

¹²³ *Id.* at 394.

¹²⁴ In addition, the court seemed uncomfortable with the prospect of forcing circumcision on an unwilling 12-year-old: it therefore remanded for the trial court to determine whether the child truly agreed to the procedure, as the father had asserted, not because of the minor’s rights, but because opposition by the child might “affect [the] father’s ability to properly care for” him. *Id.* at 394-95.

¹²⁵ 289 A.2d 386, 387 (Conn. Super. Ct. 1972).

¹²⁶ *Id.* at 390.

¹²⁷ *Id.*

¹²⁸ *Id.* at 391.

¹²⁹ *K.A.*, 2010 WL 2178552, at *4.

¹³⁰ *Id.* at *5.

determine whether [the mother’s] actions were indeed ‘excessive.’”¹³¹ Thus, the case law generally supports the parent’s authority to use non-excessive force for disciplinary purposes, but not for other purposes.¹³² Indeed, one court referenced a nineteenth-century English case holding that the whipping of a two-and-one-half-year-old was excessive on the ground that “although a father might correct a child, such physical force...was beyond her capacity to understand.”¹³³ Presumably, it could not be expected to perform its corrective or expressive function.¹³⁴

B. *The Parentalist View of the Family*

1. An Overview of the Parentalist View of the Family

The parentalist or communitarian perspective views the family as a bulwark against the standardizing force of the state, rather than an instrument toward fulfilling the state’s ends. It is deeply suspicious of the claim that liberal philosophy leaves ample room for parents to immerse their children in their own values, even when those values conflict with the majority’s.¹³⁵ Parentalists worry that “abandoning youth to their rights” is a very poor way to serve children’s interests and needs, which sound in care more than in liberation; in these scholars’ view, parents are clearly the superior decision-makers for children because they love them and want what is best for them.¹³⁶ In contrast to liberal theorists, parentalists tend to believe that parents have some inherent rights over their children, by most accounts grounded in natural law, that extend well beyond the “right” to do what is in the children’s best interests and to shape them into well-qualified future members of the polity.¹³⁷

¹³¹ *Id.*; see also Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679, 686 (1966) (referencing the “older rule” regarding the parental privilege to discipline, according to which “the actor’s motive is decisive unless he inflicts permanent injury”).

¹³² James G. Dwyer, *Parental Entitlement and Corporal Punishment*, 73 LAW & CONTEMP. PROBS. 189, 192-93 (2010). *But see* *Sweaney v. Ada County*, 119 F.3d 1385, 1391-92 (9th Cir. 1997) (holding that a mother did not have a clearly established constitutional right to hit her son with a belt without state interference as a means of discipline).

¹³³ *Matter of Rodney C.*, 91 Misc. 2d 677, 681 (1977) (citing *R. v. Griffin*, 11 Cox 402 (1869)).

¹³⁴ The fundamental right to control the education and upbringing of one’s children is often mentioned in passing, and some commentators have noted that this constitutional right may ground the law’s privileging of reasonable corporal punishment. See, e.g., *Willis v. State*, 888 N.E. 2d 177, 180 (Ind. 2008); Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 AM. U. L. REV. 447, 453-56 (2002). Within the parental corporal punishment context, however, constitutional claims do not appear to have much traction. *Sweaney*, 119 F.3d at 1391-92 (holding that parental rights do not prevent the state from imposing criminal penalty for corporal punishment on a child that is deemed excessive).

¹³⁵ See, e.g., Gutmann, *supra* note 99, at 351 (noting the argument that under the liberal view, the democratic state “is simply imposing *its* values upon children”); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 948-50, 971, 998-99 (1996) (suggesting that, following the liberal approach, many parents will nonetheless want to “have it both ways: to sue the state’s power to privilege and enhance their efforts to pass on their values to their children, while undermining the ability of parents in the minority to do the same”).

¹³⁶ Hafen, *supra* note 88, at 651-53; see also MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 46 (2005); cf. Brian Bix, *Philosophy, Morality, and Parental Authority*, 40 FAM. L.Q. 7 (2006) (arguing that parental priority may be justified by parents’ superiority as decision-makers for their children).

¹³⁷ E.g., Hafen, *supra* note 88, at 616-17 (describing “plenary” parental authority over children derived from “natural individual rights” that “are thought to antedate the state in American political

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Of course, even the fiercest proponents of parental rights support exceptions to parental authority when the state's interest is truly compelling—as in cases of abuse or neglect—but they would preserve a wide range of parental control when parents' actions fall short of such extremes.¹³⁸ Where they differ from liberal theorists, then, is that parentalists would end the state's authority to intervene in the family at abuse, neglect, and unfitness, whereas liberals would grant the state broader authority to create rules that would encourage the child's development of basic citizenship values and exposure to many possible understandings of the good life.

Moreover, parentalists are critical of the view that minors with some capacity for autonomy can and should be permitted to make decisions for themselves commensurate with that autonomy.¹³⁹ In their view, as long as a minor child is still within parental custody and control, there is no warrant for overriding parental prerogatives.¹⁴⁰ Finally, whereas an evaluation of parents' and children's reasons is perfectly consonant with liberalism's understanding of the role of the state, parentalists would find such evaluation to be overly intrusive. So long as parents are fit, the state is neither competent nor authorized to evaluate parental decision-making process; the state's inability to interfere in the family is virtually jurisdictional in nature.¹⁴¹ Thus, applied to decision-making over children's bodies, it seems that any parental decision falling short of abuse or neglect could not be regulated—including practices, such as circumcision, tattooing, and piercing, that are permanent and may affect the child's future options or identity.¹⁴² The notion of a child's right to bodily integrity, separate and apart from the parent's rights, is therefore largely inconsistent with the parentalist perspective.

2. The Parentalist View of the Family in Case Law

The language of cases such as *Meyer* and *Pierce* reflect a parentalist point-of-view. Those cases emphasize that the Constitution supports parents' rights to avoid the state's "standardizing" and indoctrinating force when it comes to children.¹⁴³ Indeed, one scholar has persuasively demonstrated that those cases view the child as mere property of the parents, and that the briefs in *Pierce* drew explicitly upon natural law views of parental authority as natural and god-given.¹⁴⁴ In *Pierce v. Society of Sisters*, the Supreme Court sweepingly proclaimed, for example, that "[t]he fundamental theory of liberty

philosophy"); *id.* at 619-22.

¹³⁸ GUGGENHEIM, *supra* note 136, at 36-37; Hafen, *supra* note 88, at 617.

¹³⁹ See, e.g., Gutmann, *supra* note 99, at 354-55.

¹⁴⁰ Hafen, *supra* note 88, at 648-49.

¹⁴¹ Cf. Bix, *supra* note 136, at 19 (arguing that, for reasons of both family privacy and institutional incompetence, "courts should not be investigating how good the reasons are" for certain parental decisions).

¹⁴² As discussed below, the definitions of abuse and neglect are themselves somewhat malleable. See also Hafen, *supra* note 88, at 617-18 (noting that "judicial perceptions of abuse and neglect have varied over time"); see also Ian Hacking, *The Making and Molding of Child Abuse*, 17 CRITICAL INQUIRY 253, 253 (1991).

¹⁴³ *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

¹⁴⁴ Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1102 (1992).

upon which all governments in this Union repose excludes any general power of the state to standardize its children” through control over education.¹⁴⁵ Indeed, the Court continued, “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”¹⁴⁶ For support, the Court drew upon its decision two years earlier in *Meyer v. Nebraska*,¹⁴⁷ in which it condemned as unconstitutional the Nebraska legislature’s “desire...to foster a homogeneous people” through a law prohibiting the teaching of foreign languages in the schools, comparing the state’s vision to the familial dystopias of Plato’s *Republic* and ancient Sparta, in which children are raised by the community rather than their own parents.¹⁴⁸

As Professor Barbara Bennett Woodhouse has argued, the family-privacy cases *Meyer* and *Pierce* reflect a fear of totalitarian influence by the state, represented in those cases as a fear of “communal ownership” of children.¹⁴⁹ Yet, this anti-totalitarian vision is also one plausible understanding of privacy doctrine itself.¹⁵⁰ The constitutional law of privacy, according to Professor Jed Rubenfeld, is concerned with preventing “a society standardized and normalized, in which lives are too substantially or too rigidly directed.”¹⁵¹ The concern would appear to be particularly great with respect to excessive intervention in the family, which is often viewed as both a refuge from society at large and a place for the private formation of moral values and beliefs—even if those values and beliefs differ from those of society.¹⁵²

Similarly, early provisions of law apparently enacted for the protection of children -- for example, laws preventing minors from entering military service without parental consent -- were not understood to confer any rights upon the children themselves and were held to be waivable by the minor’s parents.¹⁵³ Similarly, in *Prince v. Massachusetts*, the Court affirmed the power of the state to interfere with parental decisions in order to protect children from harm in holding that the state could apply its child labor laws against a parent requiring her child to distribute religious literature; but the Court simultaneously endorsed the notions that “the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder,” and that there is a “private realm of family life which the state cannot enter.”¹⁵⁴ This language, which indicates the state’s powerlessness to control family life and affirms the notion of a sort of pre- or extra-political set of “obligations” that ground parental rights, is steeped in the parentalism mindset.

¹⁴⁵ *Id.* at 535.

¹⁴⁶ *Id.*

¹⁴⁷ 262 U.S. 390 (1923).

¹⁴⁸ *Id.* at 402.

¹⁴⁹ Woodhouse, *supra* note 144, at 1089-91.

¹⁵⁰ Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

¹⁵¹ *Id.*

¹⁵² See, e.g., SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 26 (1989) (describing the conventional or idealized view of the family); Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1504-05 (1983); Woodhouse, *supra* note 144, at 1090.

¹⁵³ *Morrissey v. Perry*, 137 U.S. 157 (1890).

¹⁵⁴ *Id.* at 166.

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Deference to parents, rather than a concern for the interests of either the child or the state, thus drives the logic of those early cases. More modern cases, too, evince a strain of parentalism. For example, *Troxel v. Granville*, in which the Justices reaffirmed by an eight-to-one vote that family privacy is a fundamental constitutional right, is permeated with parentalism language.¹⁵⁵ In that case, the Court considered a Washington state statute that allowed any person to petition for visitation rights to a child and allowed the court to grant visitation merely on a finding that it would be in the child's best interests. The Supreme Court found the statute insufficiently deferential to parental rights.¹⁵⁶ Emphasizing that the statute did not require a showing of parental unfitness, the Court assumed that the state was disabled from interfering in the private family domain on a mere determination of best interests. Moreover, it privileged the government's decision-making over the parents':

[T]he Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn *any* decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests

This Court's distress over the state court's readiness to intervene stands in stark contrast to that of the Court in *Bellotti* and other cases in which courts closely scrutinize parental decision-making despite the parents' unquestioned fitness.

Finally, *Parham v. J.R.*¹⁵⁷ is often considered to be a profoundly parentalism case.¹⁵⁸ Decided the same year as *Bellotti*, *J.R.* dealt with the liberty interest of children whose parents wished to commit them to mental hospitals, often indefinitely.¹⁵⁹ "[A]bsent a finding of neglect or abuse," the Court held, the parents' determination of the child's best interests should normally be respected, and they "should retain a substantial, if not the dominant, role in the decision."¹⁶⁰ The fit parents' decision would be subject to review by an independent third party but not necessarily a state agent—a staff physician's approval would suffice.¹⁶¹ Yet, it is less recognized that *J.R.* contains elements of the liberal perspective as well. The Court's recognition a liberty right of children that applies to counteract the traditional presumption in favor of parental decision-making is in fact rather unusual; few other medical decisions, besides abortion, are constitutionally required to be subjected to any outside scrutiny. Indeed, the Court in *J.R.* even discussed how the neutral party should make the decision, specifying that the child must be interviewed and all aspects of his background taken into account.¹⁶²

¹⁵⁵ 530 U.S. 57, 65 (2000) (plurality op.).

¹⁵⁶ *Id.* at 67.

¹⁵⁷ 442 U.S. 584 (1979).

¹⁵⁸ Ouellette, *Shaping Parental Authority*, at 971; Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 391-92 (1997).

¹⁵⁹ *Id.* at 587.

¹⁶⁰ *Id.* at 604.

¹⁶¹ *Id.* at 604-07.

¹⁶² *Id.* at 607.

C. Summary

The parentalist and liberal perspectives coexist within constitutional privacy doctrine. The presence of these conflicting viewpoints on the nature of the family and the source of family authority has led to a notable incoherence within the case law. Indeed, this conflict may be partly responsible for the fact that children are recognized as independent rights-holders in some contexts but not others: the liberal individual-rights perspective arguably dominates abortion jurisprudence, which is of relatively recent vintage, whereas more traditional notions arguably hold sway with respect to corporal punishment and medical decision-making.¹⁶³

Another consequence of these conflicting perspectives, discussed below, is that state action is unusually difficult to identify in cases involving children's rights to bodily integrity within the family. Whether one perceives that the state has acted or not is a function of one's baseline understandings. If, as liberal philosophy assumes, the state is the source of all legitimate coercive force within society and it is understood as simply delegating a wide swath of discretion to parents to make decisions for their children without state approval or intervention, then the state is, in some important sense, acting whenever it delegates authority to parents to make decisions for their children, who are themselves rights-holders. However, if parental authority over children pre-exists the state and cannot be touched by it, as parentalists and natural-law theorists assume, then the state acts only when it removes parental authority, not when it grants it. Removing parental authority over children is viewed by the parentalist perspective as intervention within the family, whereas allowing parental control is not.

The conflicting perspectives pervade the case law pertaining to minors' bodily integrity rights, rendering the concept of state action incoherent. For example, in *Planned Parenthood v. Danforth*, the Supreme Court struck down a statute requiring parental consent for minors seeking abortions, stating that "the State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy."¹⁶⁴ The case thus figures state action, according to the liberal perspective, as the allocation of control to the parent over the minor's abortion decision. However, from the parentalist perspective, one could just as easily understand parental-consent laws, which permit certain minors to access abortions without parental involvement, as intervening in the family to reduce parental rights.¹⁶⁵ Similarly, if there is state action

¹⁶³ Cf. Hamilton, *supra* note __, at 33 (arguing that the conflicting traditions informing family law have caused its incoherence).

¹⁶⁴ *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976). It is notable, of course, that the state seemingly can and does give the veto right over the minor's decision to a judge—by means of the judicial bypass procedure—just not to a minor's parent.

¹⁶⁵ In *Bellotti v. Baird*, a class of parents of unmarried minors had intervened on the side of the defendant and raised an independent claim of parental rights in the *Bellotti* litigation, but that claim was never directly addressed. Instead, the Court converted the apparent constitutional claim for violation of the parents' fundamental rights—through state laws which apparently granted minors permission to seek abortions without parental consent in some circumstances—into a mere "interest" in family integrity and parental decision-making that the state was permitted but not required to vindicate. *Bellotti*, 443 U.S. at 627, 637-41.

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when the law requires minors to seek parental consent for abortion, then there should logically also be state action when the common law grants parents the authority to make medical treatment decisions for their children.¹⁶⁶ However, that doctrinal field is not permeated by constitutional claims, as one would expect if courts understood states to be acting in ways that affect minors' bodily integrity.

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

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

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

A. Doctrinal Difficulties

Though identifying state action is rarely a straightforward proposition,¹⁶⁷ state action problems particularly plague cases involving minors' rights to bodily integrity. The first is the problem that, although there may be state *action*, there is often no state *actor* involved in situations where minors' bodily integrity rights are implicated, at least until the moment of enforcement. This makes the state action more difficult to identify. The second problem is that the state actions impinging on minors' bodily integrity rights are often broad common-law or statutory rules that, on their face, do not appear to impose

¹⁶⁶ Cf. Teitelbaum & Ellis, *supra* note 7, at 157 n.13 (“The Court presumably concluded that the existence of a statute creating a parental veto over the abortion decision constituted state action in *Planned Parenthood of Central Mo. v. Danforth* ..., otherwise the due process claim could never have been reached.” (citation omitted)); cf. In re L., 632 A.2d 59, 61 (Conn. Super. Ct. 1993) (noting, with respect to a man's attempt to get a court order requiring a sixteen-year-old girl to undergo blood testing for paternity, that “this is not a case where the state seeks coercive interference with the rights of another.... Rather, here, a private party, the movant, seeks to employ the coercive hand of the court.”).

¹⁶⁷ See, e.g., Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 283 (2013).

such burdens; the intrusion is apparent only in their application. And third, the problem of identifying a relevant baseline for judging state action plagues the issue of minors' bodily integrity rights in a distinct way. Because of the baseline problem, even where a state actor is identifiable, it may be difficult to discern when the state has truly "acted" at all.

1. No state actor

In the various doctrinal areas discussed above, decisions are made that affect children's bodily integrity in various ways, but they generally do not involve state actors. Instead, they involve parents, children, and sometimes other private parties such as physicians. When a state actor is in the picture—such as a public school teacher or a social worker—courts have no difficulty recognizing the applicability of the constitutional right to bodily integrity.¹⁶⁸ By contrast, there is no apparent state action when a child suffers at the hands of an abusive parent, or when a parent consents to or withholds health care for a minor child, such as a tonsillectomy or circumcision, in a private hospital setting.

Thus, in *DeShaney v. Winnebago County Department of Social Services*,¹⁶⁹ the Supreme Court held that no constitutional cause of action existed for Joshua DeShaney, a toddler who was beaten by his father to the point of profound brain damage, even though the county social services department was aware of the situation and had failed to remove Joshua from the abusive environment.¹⁷⁰ Although the Court's opinion in *DeShaney* framed the issue as whether the Due Process Clause of the Fourteenth Amendment entitles a child in Joshua DeShaney's circumstances to the affirmative protection of the state against private violence—and not as whether state action was technically present—one might also conceptualize the problem as one of state action.¹⁷¹ In this view, DeShaney's constitutional claim failed because there was no state actor who appeared to be directly responsible for the violation of his bodily integrity.

Yet, as the liberal perspective urges, parents' custody and control of their children can fairly be said to exist by virtue of common law, statutory law, or a combination of both. Thus, the state action concept "does not apply comfortably to children, who are routinely subject to privately undertaken action authorized by state law in some sense."¹⁷² Indeed, even in the case of Joshua DeShaney, the abusive father was entitled to maintain custody of him because of his legal entitlements; if a neighbor had sought to save Joshua by kidnapping him, the legal system would surely have operated to punish the neighbor and return Joshua to his parents. Similarly, the power of parents to make medical decisions for their children, with some exceptions, is granted by statute or

¹⁶⁸ See, e.g., *Bryan v. Erie County Office of Children & Youth*, 861 F. Supp. 2d 553 (W.D. Pa. 2012).

¹⁶⁹ 489 U.S. 189 (1989).

¹⁷⁰ *Id.* at 191-93.

¹⁷¹ *Id.* at 195-97.

¹⁷² Teitelbaum and Ellis, *supra* note 7, at 157 n.13. They note that there has arguably been state action in many cases by virtue of a common-law rule granting parental authority over children; but, they continue, "it is possible that these approaches prove too much as a general theory. Would it not follow that parental consent to a tonsillectomy or to enrollment in a private school will equally satisfy the state action requirement, and does that result seem consistent with the constitutional policies underlying that doctrine?" *Id.* at 158 n.13.

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common law, or both, in every state.¹⁷³ Thus, state action is involved and the minor's constitutional right to bodily integrity is potentially implicated when a parent authorizes a medically unnecessary procedure on a child or refuses to authorize medically necessary care.

The problem, however, is that the state action is only apparent at the moment in which the legal entitlements are enforced; once a police officer or juvenile court judge enters the picture, the state action becomes apparent. In many other contexts, courts routinely recognize state action and apply constitutional rules in civil suits between private parties. For example, in *New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment imposed limits on the scope of a newspaper's liability for libel in a suit between private parties.¹⁷⁴ "It matters not," the Court said, "that that law has been applied in a civil action and that it is common law only, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised."¹⁷⁵

The Sixth Circuit's decision in *Blackard v. Memphis Area Medical Center for Women*¹⁷⁶ is a case in point. In *Blackard*, parents, along with their minor daughter, sued a Tennessee abortion clinic for performing an abortion on the minor without parental consent while the state's parental consent law was temporarily enjoined.¹⁷⁷ Given that the law was found ultimately found constitutional, and that the defendant clinic was not protected by the preliminary injunction because it was not a party to the suit, the parents of the minor argued that the clinic should have sought parental consent before proceeding.¹⁷⁸ Yet, the Sixth Circuit held that parental consent could not have been required, because the state had not created a judicial bypass procedure as required by *Bellotti v. Baird*.¹⁷⁹ Though the suit between the parties was a private suit for battery, the court held, essentially, that common-law enforcement of the battery right would have constituted state action that would, as applied in this case, violate minors' abortion rights.

In many cases involving infringements of children's bodily integrity within the family, however, children will not have access to courts, nor will anyone other than the parents be able to raise the children's rights.¹⁸⁰ The state action is thus obscured, leading

¹⁷³ See *supra*.

¹⁷⁴ *New York Times Co. v. Sullivan*, 376 US 254, 265 (1964).

¹⁷⁵ *Id.* (citation omitted). Similarly, in *Shelley v. Kraemer*, 334 U.S. 1 (1948), the Court considered whether judicial enforcement of a racially restrictive covenant among private parties violated the Equal Protection Clause. The Court ultimately recognized both state action resulting from the operation of common-law rules and the applicability of constitutional norms to the dispute between private parties. *Id.* at 14-17.

¹⁷⁶ 262 F.3d 568 (6th Cir. 2001).

¹⁷⁷ *Id.* at 570-71.

¹⁷⁸ *Id.* at 570-71.

¹⁷⁹ *Id.* at 577.

¹⁸⁰ See, e.g., *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 16-17 (2004). An exception is those cases where a parent seeks to withhold medically necessary care. If a physician or hospital is alerted to the denial of care—for example, because the child has been taken to a doctor but the parent refuses to proceed with a recommended course of treatment—the hospital or department of social services will sometimes invoke the court's jurisdiction, seeking an order allowing the treatment to take place over the parents' objections. See, e.g., *In re J.J.*, 582 N.E.2d 1138, 1139 (Ohio Ct. App. 1990). In addition, courts are often called upon to adjudicate minors' rights when parents disagree, or when parents may face a

courts to view the problem as one of individuals seeking protection against intrusions by “private actors” or state “inaction,” when in fact, the state action is present in state-created rules and entitlements.¹⁸¹

A state-court case involving a minor’s reproductive rights further demonstrates this difficulty. In *Powers v. Floyd*,¹⁸² the Texas Court of Appeals considered whether a doctor who performed an abortion on a sixteen-year-old minor in 1974 without that minor’s permission, but with her mother’s permission, could be held liable for failing to obtain proper informed consent.¹⁸³ The court decided that, as a matter of state statutory law, the doctor was under no duty to obtain the minor’s informed consent to the procedure, because state law clearly granted authority over the minor’s medical treatment to the parent.¹⁸⁴ At the same time, while acknowledging that the Supreme Court later recognized a right of mature minors to make their own abortion decisions, it noted that those Supreme Court decisions “do not attempt to impose a legal duty upon a physician”; thus, the court noted in passing, there would be no constitutional claim, because “the constitution does not provide or create a right against a private actor absent state action.”¹⁸⁵ It is not clear, however, why the Texas common law, statutes, and judicial enforcement thereof would not constitute sufficient state action to implicate the minor’s constitutional right in this scenario and therefore to require application of constitutional norms. *Powers* thus demonstrates the difficulty of identifying state action when no state actor is present.

2. Facially neutral rules

A second state action problem inherent in cases dealing with minors’ bodily integrity rights is that the relevant state action is in the form of broad, facially neutral rules. As a result, the infringement on minors’ bodily integrity comes about only in the application of those rules. There may be nothing constitutionally objectionable, for example, in the general common-law presumption or statutory rule that parents have the authority to make medical decisions for their minor children; indeed, parents’ constitutional rights might even require such a presumption in favor of them as above all other decision-makers.¹⁸⁶ If that parental authority is used to prevent a minor from obtaining an abortion that is in her best interests or to impose unnecessary and unwanted cosmetic surgery on the minor, however, the bodily integrity right is implicated.

This problem calls to mind *Shelley v. Kraemer*. Although the state had clearly acted in *Shelley*, through the enforcement of common-law contract rules, the more difficult

conflict of interest (such as sibling organ donation). In such cases, however, the courts generally do not perceive the case as implicating constitutional bodily integrity rights, likely because of the two other state action problems discussed below.

¹⁸¹ *DeShaney v. Winnebago Cnty Dep’t of Soc. Servs.*, 489 U.S. 189, 195, 204 (1989).

¹⁸² 904 S.W.2d 713 (Tex. Ct. App. 1995).

¹⁸³ *Id.* at 714. The doctor performed the abortion without telling the minor that she was pregnant or that the pregnancy was being terminated. *Id.* at 714-15.

¹⁸⁴ *Id.* at 716-18.

¹⁸⁵ *Id.* at 716. The court also noted that the minor abortion cases post-dated the abortion in the case at hand.

¹⁸⁶ *See, e.g., Troxel v. Granville*, 530 U.S. 57 (2000).

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problem was in determining whether the state action was the source of the Constitutional violation, or instead whether the violation could be attributed only to a private actor.¹⁸⁷ As numerous commentators have noted, *Shelley's* attribution of private discrimination to courts enforcing private agreements pursuant to neutral contract principles is potentially so expansive as to undermine any line between state-sponsored discrimination, which is unconstitutional, and private discrimination, which is not.¹⁸⁸ For this reason, *Shelley's* rationale has rarely, if ever, been applied in subsequent cases.¹⁸⁹

Thus, in the case of children's rights to bodily integrity, it is sometimes obvious that state action is present, but it is not clear that the state action itself is violative of the child's rights. For example, when a parent seeks to withhold medical care from a child, pursuant to their general legal right to make medical decisions for their children, courts may become involved at the behest of hospitals or physicians who wish to impose care. In such cases, courts do not generally address whether the child's constitutional right to bodily integrity would be violated by a court order permitting the parent to withhold care.¹⁹⁰ Instead, such cases are decided based on such neutral principles of law as a determination of the harm to the child and whether specific abuse or neglect statutes would be violated.¹⁹¹ Although the state is clearly acting in such cases when it approves or disapproves the parent's decision, courts do not take the minor's constitutional rights into account because the parent's discretionary actions, taken pursuant to a general grant of legal authority, cannot easily be imputed to the state.

3. Discerning "action"

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

¹⁸⁷ See, e.g., GEOFFREY R. STONE, ET AL., CONSTITUTIONAL LAW 1522 (4th ed. 2001) (articulating this interpretation of *Shelley*); Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CAL. L. REV. 451, 458 (2007).

¹⁸⁸ Rosen, *supra* note 187, at 459.

¹⁸⁹ Rosen, *supra* note 187, at 458-70.

¹⁹⁰ My research has not turned up any cases in which the minor's constitutional right to bodily integrity was referenced in connection with a parent's request to withhold medical care.

¹⁹¹ Indeed, in a related context, Professor James Dwyer has gone so far as to argue—in response to Professor Eugene Volokh's claim that child custody conditions on parental speech are subject to First Amendment constraints—that constitutional rights are simply not relevant to child custody determinations, where the courts are exercising their *parens patriae* power rather than their police power. James G. Dwyer, *Parents' Self Determination and Children's Custody: A New Analytical Framework for State Structuring of Children's Family Life*, 54 ARIZ. L. REV. 79, 125-26 (2012). But see Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631 (2006).

The baseline problem is apparent in cases involving state laws that grant minors access to contraceptives.¹⁹² In one case, the New York Appellate Division found a public school condom distribution program to be coercive and violative of parental rights, since “parents [we]re being compelled by State authority to send their children into an environment where they [were] permitted, even encouraged, to obtain a contraceptive device, which the parents disfavor as a matter of private belief.”¹⁹³ In contrast to the abortion cases, the baseline assumption appeared to be one of parental control over minors’ access. Yet in other cases involving public school condom availability programs, a number of courts found that there was no governmental coercion sufficient to raise a constitutional issue with respect to the parents’ family privacy or free exercise rights.¹⁹⁴

Yet, a similar confusion also plagues the abortion cases. In *Hodgson v. Minnesota*,¹⁹⁵ a majority of the Court upheld a parental notification requirement for minors seeking abortions.¹⁹⁶ In dissent, Justice Marshall noted that the majority assumed the intrusion on the minors’ right—which here provided the state action forming the basis of the minors’ constitutional claims—was justified by the need to protect family privacy.¹⁹⁷ But, Marshall insisted, the family privacy right was a right “*against* state interference with family matters,” whereas the notification requirement effected “governmental intrusion into family interactions.”¹⁹⁸ Thus, *Hodgson* raises the question whether the state intrudes into the family when it permits minors to access abortion without notifying their parents, or whether it intrudes into the family when it forces minors to notify their parents.

Given the lack of agreement over whether the liberal or the parental account of the family is the correct one, it is not surprising that courts cannot decide when the state has acted—that is, whether state intervention consists in granting or denying parental authority over children’s bodies. Indeed, numerous commentators have acknowledged the deep-seated confusion at the heart of the state action concept.¹⁹⁹ For

¹⁹² See, e.g., *Parents United for Better Schs, Inc. v. School Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 277 (3d Cir.1998); *Curtis v. School Comm. of Falmouth*, 420 Mass. 749, 652 N.E.2d 580, 584-89 (Mass.1995); *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir.1980); *Decker v. Carroll Acad.*, 02A01-9709-CV-00242, 1999 WL 332705 (Tenn. Ct. App. May 26, 1999).

¹⁹³ *Alfonso v. Fernandez*, 195 A.D.2d 46, 56 (N.Y. App. Div. 1993).

¹⁹⁴ See *Parents United for Better Schs, Inc. v. School Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 277 (3d Cir.1998); *Curtis v. School Comm. of Falmouth*, 420 Mass. 749, 652 N.E.2d 580, 584-89 (Mass.1995) (finding that school condom-availability program “lacks any degree of coercion or compulsion in violation of the plaintiffs’ parental liberties, or their familial privacy”); *Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir.1980); *Decker v. Carroll Acad.*, 02A01-9709-CV-00242, 1999 WL 332705 (Tenn. Ct. App. May 26, 1999).

¹⁹⁵ 497 U.S. 417 (1990).

¹⁹⁶ *Id.* at 461 (O’Connor, J., concurring). *Hodgson* involved a two-parent notification law that included no bypass mechanism for the minor but also stated that a bypass mechanism would be created if the law were held unconstitutional without it. *Id.* at 426-27. Four Justices felt that the notification requirement was constitutional, with or without a bypass, and four justices felt that it was unconstitutional, with or without a bypass. Only Justice O’Connor thought the requirement was unconstitutional without the bypass and constitutional with it, so she provided the deciding vote on both counts.

¹⁹⁷ *Id.* at 483-84 (Kennedy, J., concurring in part and dissenting in part) (citing *Pierce* and *Prince*).

¹⁹⁸ *Id.* at 471 (Marshall, J., concurring in part and dissenting in part).

¹⁹⁹ For a classic example, see Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1302 (1982).

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example, the notion that nonintervention equates perfectly with the absence of state action has been roundly criticized. Professor Frances Olsen has argued that the terms “intervention” and “nonintervention” are incoherent in the family context, pointing out that political choices are inevitable, even when the government purports only to enforce the status quo rather than actively intervene.²⁰⁰ “[T]he state constantly defines and re-defines the family and adjusts and readjusts family roles”; the state is always empowering or disempowering the weaker or stronger members of a family depending on the rules it chooses to enforce or decline to enforce.²⁰¹ Thus, for example, she points out that laws may penalize those who take children away from the custody of their parents, “[y]et the state is not accused of intervening in the family when it forces children to live with their parents or when it prohibits doctors from treating minors without the parents’ knowledge and approval.”²⁰²

Olsen’s critique is related to the classical feminist critique of the public/private distinction, which holds that the state action requirement for vindicating rights to equality and bodily integrity systematically undermines women’s claims to the same.²⁰³ As Professor Tracy Higgins explains the critique, “the principal threat to women’s liberty and equality comes not from public power but from private power.”²⁰⁴ Yet,

a state’s systematic failure to respond to abuses of private power will rarely, if ever, implicate constitutional concerns. Moreover, because state action is constitutionally relevant while private action is not, state efforts to intervene in the existing balance of power in the private sphere are viewed as unconstitutional violations of the rights of the powerful rather than an effort to balance or regulate conflicting rights.²⁰⁵

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

Additionally, this problem is particularly acute in the case of children because of their inherent dependency. As the *DeShaney* Court confirmed, the Constitution provides only negative rights to government non-interference, rather than affirmative rights to “certain minimal levels of safety and security.”²⁰⁶ Yet for children, rights to safety and protection are at least as important as freedom from governmental intrusion in their lives. Being in a position of unique dependency, children rely on government and others for the meaningful exercise of their rights, much like prisoners and active-duty members

²⁰⁰ Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, ____ (1985).

²⁰¹ *Id.* at 842.

²⁰² *Id.* at 853.

²⁰³ See, e.g., Tracy E. Higgins, *Reviving the Public-Private Distinction in Feminist Theorizing*, 75 CHI.-KENT L. REV. 847, 858-59 (2000) (“[A] meaningful right to freedom, bodily integrity, and security for women must include effective remedies against private violence.”).

²⁰⁴ *Id.* at 859.

²⁰⁵ *Id.* at 859-60 (citing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 42 (1987)).

²⁰⁶ *Id.* at 195-96.

of the military.²⁰⁷ While it may be true that adults have only a bodily integrity right against unwanted, government-imposed physical intrusions, it is not clear why children’s constitutional right to bodily integrity should include no more than a mere right against government intervention.

B. *Conceptual Difficulties*

The difficulty of identifying state action, which leads to a fragmented bodily integrity jurisprudence for minors, raises doubts as to whether a robust, enforceable constitutional entitlement can develop. Yet perhaps more problematically, the very existence of a constitutional privacy right seems to preclude a genuine realm of non-intervention. The moment courts decide to carve out a domain for family or children’s privacy rights, they must begin deciding how and when it may be exercised, and what the limits are. This analysis generally takes the form of an intrusive inquiry into reasoning and decision-making processes.

The predominant focus on private reasons for taking action affecting the child’s body—whether the reasons of the parent or those of the child—conflicts with the very notion of a privacy right. It intrudes upon the decision in a way that is diametrically opposed to any meaningful understanding of privacy.²⁰⁸ In a related context, Carol Sanger has argued that meaningful reproductive choice means exercising control not only over the abortion decision itself but also “over the method and process by which [the] abortion decision is reached.”²⁰⁹ Using analogies to other protected rights, such as religious freedom, in which the state is generally viewed as powerless to influence the individual’s decision process, Sanger explains, “[I]f a choice is protected because of the profound significance it bears to the meaning of a person’s life, then the part of life devoted to the choosing—the thinking it through—has got to be protected as well.”²¹⁰ Of course, there are numerous domains in which the state can be understood to regulate individuals’ private reasons for doing something: hate crime laws aggravate penalties if crimes are committed for certain reasons, for example. But those areas in which the state regulates based on an individual’s reasons for acting are not areas that are protected by an individual right to privacy.

In addition, there is a troubling elision of roles that occurs when the state looks into and evaluates private reasons in this way. The state court judge may appear to take on the role of the parent—and some have been unable to resist actively assuming that role.²¹¹ For example, in one case, a judge considering a bypass petition stated, “Let me just say, I’m very concerned about this young lady’s welfare. Like counsel, I’m a

²⁰⁷ The idea that children have certain rights by virtue of their dependency is captured by Joel Feinberg’s concept of “dependency rights.” Joel Feinberg, *The Child’s Right to an Open Future*, in WHOSE CHILD? CHILDREN’S RIGHTS, PARENTAL AUTHORITY AND STATE POWER 125 (William Aiken and Hugh LaFollette, eds. 1980).

²⁰⁸ Cf. Seana Valentine Shiffrin, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839 (2005) (defending the constitutional value of the freedom to think and reason in the absence of governmentally compelled speech or associations).

²⁰⁹ Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 U.C.L.A. L. REV. 351, 358 (2008).

²¹⁰ *Id.* at 390.

²¹¹ Sanger, *supra* note 114, at 451.

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mother.”²¹² The functions of discipline and punishment inherent in many of the ways in which minors’ bodies are regulated—particularly with respect to judicial bypass hearings, and corporal punishment—tend to conflate the role of the state and the role of the parent. When the parental discipline is legally legitimate, for example, it is for the purpose of punishment or otherwise in the interest of shaping the child into a better and more productive citizen—much as the state is entitled to the legitimate use of violence for punishing wrongdoing.²¹³

To make sense of these conceptual difficulties, it is helpful to draw on the writings of Michel Foucault. Foucault is a philosopher and historian who has written on a wide range of topics, but one of his most persistent concerns is with the meaning and function of power.²¹⁴ Foucault’s critical examination of power in all of its manifestations does not focus specifically on law, on the family, or on liberalism.²¹⁵ Nonetheless, Foucault’s theory of power and its effects may be understood as a challenge to liberalism’s attempted reconciliation of parental prerogatives and democratic values with respect to children.

Foucault contends that in modern society, social power is not simply a thing wielded by the state; it is itself an effect that may be manifested in many different forms, including in private relationships. Thus, according to Foucault, state power is everywhere.²¹⁶ Unlike in medieval society, where power was concentrated in the sovereign, modern society manifests social power through multiple centers, and particularly through the discourse that organizes, categorizes, and explains our experience.²¹⁷ In *The History of Sexuality*, for example, Foucault argues that the Victorian era, supposedly characterized by a prudish disdain for speaking about sexuality, was actually an era in which particular kinds of discourse about sex—medical, psychological, moral, and so on—proliferated, as a way of managing and controlling it.²¹⁸ The legal discourse that creates and delimits children’s privacy rights functions in much the same way: the proliferation of case law, while superficially aimed at liberating children and granting them autonomy over their bodies, in fact operates as a means to further manage and control both their choices and those of their parents.

Thus, in modern society, power is both expansive and diffuse: in the words of Professor Ian Hacking, “[n]obody knows this knowledge; no one wields this power.”²¹⁹

²¹² *Id.*

²¹³ *Cf.* Dailey, *supra* note 89, at 1005 (discussing the “public” role of families in shaping future citizens).

²¹⁴ *See, e.g.,* Michel Foucault, *The Subject and Power*, 8 *CRITICAL INQUIRY* 777, 778 (1982) (observing that he became “quite involved with the question of power” as a means of studying the subject, which he identified as “the general theme of [his] research”).

²¹⁵ Note that, although Foucault engaged in an extended critique of the economic theory of “American neo-liberalism,” embodied most visibly by the economist Gary Becker, he did not present his own work as a critique of American liberal political theory *per se*; rather, this critique is inferred by me from a juxtaposition of Foucault’s work with that of Rawls (who was a contemporary of Foucault’s) and others such as Gutmann, who came later. *See generally* MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS* 239-66 (Trans. Graham Burchell 2004).

²¹⁶ MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY* 93 (1978).

²¹⁷ *See, e.g.,* FOUCAULT, *supra* note 216 [Hist. of Sex.], at 100-02.

²¹⁸ *Id.* at 33-34 (“Sex was driven out of hiding and constrained to lead a discursive existence.”)

²¹⁹ Ian Hacking, *The Archaeology of Foucault*, in FOUCAULT: A CRITICAL READER 27, 28 (David

Though power is sometimes coercive in form, acting directly on individuals' bodies, it also functions "by normalization, not by punishment but by control, methods that are employed on all levels and in forms that go beyond the state and its apparatus."²²⁰ Drawing on the example described above, regarding Victorian discourses about sex, Foucault contends that scientific discourse about sex creates a domain of the normal, appropriate, and average that is demarcated from the pathological, and that this demarcation itself is both an instance of and an opportunity for the exercise of power.

As this article demonstrates, legal discourse is similarly preoccupied with individual decisions and how they compare to community norms.²²¹ In *Marriage of Boldt*, discussed above, the court explicitly referenced social norms in upholding a parent's decision to circumcise his twelve-year-old son for religious reasons.²²² Similarly, state courts consider parents' reasons for inflicting physical pain on their children when deciding whether to label the conduct as abuse or as legitimate discipline. The conduct, of course, is also reviewed for "excessiveness" and judged by other similarly amorphous norms that call for decision-makers to apply their own, or society's, sense of what is normal and acceptable.²²³ The concept of legitimate discipline, in particular, links the case law on children's bodily integrity to Foucault's work on social power.²²⁴

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

It is certain that in contemporary societies the state is not simply one of the formal or specific situations of the exercise of power—even if it is the most important—but that in a way all other forms of power relation must refer to it. But this is not because they are derived from it; it is rather because power relations have come more and more under state control [O]ne could say that power relations have been progressively governmentalized, that is to say, elaborated, rationalized, and centralized in the form of, or under the auspices of, state institutions.²²⁵

Examples of this decentralized state power include obvious tentacles of the state such as prisons, schools, the public welfare system, and public health programs, as well as less obvious agents of sovereign power like private charities and the medical-scientific establishment, as well as the family itself.²²⁶ Foucault therefore envisions state power as

Couzens Hoy ed. 1986).

²²⁰ FOUCAULT, *supra* note 216 [Hist. of Sex.], at 89.

²²¹ *See supra*.

²²² *See supra* text accompanying note 121.

²²³ *See supra* text accompanying note 129.

²²⁴ David Couzens Hoy, *Introduction*, in FOUCAULT: A CRITICAL READER 1, 13. Social power is closely linked to the concept of "discipline" in two senses: in the sense of exercising control—in the way a parent or a state disciplines individuals—and in the sense of academic discipline—that is, a mechanism for acquiring and organizing knowledge.

²²⁵ Foucault, *supra* note 214 [SP], at 793.

²²⁶ *See, e.g., id.* at 784 (referring to "pastoral power" exerted by public arms such as the police as well

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permeating and shaping all aspects of human experience; it is nearly (but not entirely) inescapable.²²⁷ All of these institutions, though manifesting state power, operate independently of any centralized authority to a large degree.

Moreover, while the quintessential image of sovereign power may be that of the government acting upon individuals' bodies—for example, by arresting or imprisoning them—the real object of the modern disciplining state is control over individuals' minds and souls.²²⁸ It disciplines in many instances through internalized norms and standards, rather than through brute force. Moreover, one of the primary modes through which power performs these operations is a linguistic one—namely “discourse.” “[I]t is in discourse that power and knowledge are joined together. ... Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile and makes it possible to thwart it.”²²⁹ Legal discourse is one such discourse; other normalizing discourses include the medical, scientific, psychological, public health, and other disciplinary fields of study.

Importantly, however, disciplinary power is often “positive,” in the sense that its goal is not to repress, but to improve and extend the lives of individuals, to make them productive citizens and contributors to society. Foucault claims that such regulation in the interest of societal good and social mores is simply a newer form of power, but still exercised, as always, over human bodies.²³⁰ Foucault describes public health regulation and related surveillance and management of health data as a form of “biopower”—power that is exercised on the level of the population as a whole, in the interests of society as a whole.²³¹

Indeed, it is precisely in the regulation of the body that the disciplinary and regulatory mechanisms tend to overlap, according to Foucault.²³² “Circulat[ing] between the two” poles of individual discipline and population-level biopolitics, according to Foucault, “is the norm.”²³³ Social norms become tools of both individual discipline and regularization of the population.²³⁴ To the extent the values imposed by liberalism create a certain harmony of ideals between the family and the broader democratic society, that harmony is a reflection of the way in which modern state power infiltrates all

as “private ventures, welfare societies benefactors, and generally by philanthropists” in addition to “the family” and “complex structures such as medicine”).

²²⁷ Hoy, *supra* note 224, at 13-14 (noting that some commentators criticize Foucault for “describ[ing] power as so pervasive and irresistible as to make resistance seem futile,” but suggesting instead that Foucault does not believe modern society has yet been completely “normalized” by the threat of social power, and that Foucault writes precisely in the hope of staving off such complete normalization).

²²⁸ MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE MODERN PRISON 10-11 (Alan Sheridan trans. 1977) (describing a “‘non-corporal’ penalty” in which “[t]he body serves as an instrument or intermediary”); *see also id.* at 17 (noting that in the modern penal system, “the ‘crimes’ and ‘offences’ on which judgement is passed are juridical objects defined by the code, but judgement is also passed on the passions, instincts, anomalies, infirmities, maladjustments, effects of environment or heredity....”).

²²⁹ FOUCAULT, *supra* note 216 [Hist. of Sex.], at 100-01.

²³⁰ MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLEGE DE FRANCE 1975-76, at 242 (trans. David Macey 1977).

²³¹ *Id.*

²³² *Id.* at 250-51.

²³³ *Id.* at 253.

²³⁴ *Id.* at 253.

dimensions of human life, or Foucault's words, "cover[s] the whole surface that lies between the organic and the biological, between body and population."²³⁵

The philosopher and historian of science Ian Hacking describes one example of how norms both shape and construct the understanding of children's bodies and bodily integrity, revealing an exercise of power at the intersection of medical, familial, and social discourses.²³⁶ Documenting the fluctuation of the concept of "child abuse" over time, Hacking observes that child abuse is a "normalizing concept."²³⁷ Child abuse is defined and understood "in a framework of normalcy and pathology," but at the same time, the nature of the "normal" is not fixed.²³⁸ Rather, the normal is both a descriptive and prescriptive concept—"what is unusual becomes abnormal and what is abnormal becomes wrong."²³⁹ Hacking uses the example of one commentator who suggested that it was abusive to allow children to sleep with their parents past the stage of infancy.²⁴⁰ Hacking notes that this practice was once commonplace and only disappeared when a large number of families could afford houses large enough that children could have separate rooms from their parents.²⁴¹ The concept of child abuse thus invokes a norm at the intersection of the individual and the broader society: what is "normal" in the sense of common within a society becomes "normal" in the sense of appropriate and acceptable for the individual.²⁴² This normalizing process is the modern manifestation of social power.

The Foucauldian perspective suggests that both the elision of roles and the attention to private reasoning are functions of the omnipresence of state power in modern society, and they are united by the concept of "discipline." The law's focus on private deliberation and reasoning is entirely expected if one understands the object of social power to be the "soul" rather than the body and the means by which that power is exercised to be the social norm. Indeed, Foucault claimed that social norms operate to unite the disciplinary and the regulatory power—acting both at the level of the individual, who internalizes the norms, and the state, which enforces them. As exemplified, too, by the term *parens patriae*, the concept of discipline itself unites parent and state in the goal of protecting children but also of molding them into model citizens. The term *parens patriae* literally translates as "parent of the state (or country)," but it means that the state acts *as* parent in certain situations. The identification of the parent with the state suggests that state power permeates even the family, as the family itself becomes governmentalized.

In at least two important senses, Foucault's philosophy presents a challenge to

²³⁵ *Id.* at 253.

²³⁶ Hacking, *supra* note 142, at 285-88.

²³⁷ *Id.* at 286.

²³⁸ *Id.* at 287.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² The normalizing force of defining abuse makes gives one explanation for why those who are already marginal within society—racially, socio-economically, etc.—may be more likely to be labeled as abusers. See generally Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J. GENDER & L. 113, 117 (2011).

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liberal political theory. First, liberal theory appears to assume some stable set of values that are fundamental to any democratic society. Though the exact formulation of those values may vary somewhat, they generally revolve around Lockean and Millian concepts of equality, liberty, and toleration for pluralism, limited only by the necessity of preventing harm to innocent others.²⁴³ Yet Foucauldian philosophy insists that societal values themselves are historically contingent and constructed, and indeed they shaped in part by the very power structures (or “technologies”) that they seek to critique.²⁴⁴ As such, there is no position outside the societal power structure from which those universal values can be objectively identified.²⁴⁵

Second, liberalism understands limited intervention into the family for purposes of encouraging or even imposing fundamental democratic values to be justified by the greater good of society.²⁴⁶ But once the “greater good” is understood as a historically contingent understanding, born of state power in its quest to expand into all domains of social life—even when the end of that power is fundamentally beneficent, such as to create a more just, free, and tolerant society—the invasion of private domains in the interest of such goals appears simply to be one more exercise of raw social power. At the level of institutions—such as the family—Foucault argues that power is often primarily “disciplinary,” in that it is directed at the control of the individual’s body; at the level of the state, however, the power becomes “regulatory,” directed at the improvement and survival of the population as a whole.²⁴⁷

Thus, Foucault suggests a reason why the legal discourse of privacy within the family, in conjunction with the emergence of the legal discourse of children’s rights, likely only increases the power of the state, rather than creating a true zone of privacy or empowerment for minors. Once both children and parents are understood as rightsholders, opportunities for adjudication of their respective rights proliferate.²⁴⁸ Eventually, the law occupies all available space within the parent-child relationship, as every decision with respect to children’s bodies carries possible implications for the minor’s bodily integrity right. Moreover, the diffuse but omnipresent role of the state—

²⁴³ See generally Gerald Gaus & Shane D. Courtland, *Liberalism*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring 2011), available at <http://plato.stanford.edu/archives/spr2011/entries/liberalism/>.

²⁴⁴ Hacking, *supra* note 219.

²⁴⁵ Hoy, *supra* note 224, at 8; see generally Hacking, *supra* note 142, (delineating the ways in which the concept of child abuse has changed over time and suggesting that there is no clear, fixed, or permanent dividing line between normal and abusive treatment of children). As a consequence, the very citizen that the family and state are supposed to work together to shape is, in Foucault’s view, nothing other than an “effect” of the exercise of power on the individual. As he argues in *Discipline and Punish*, the “soul” of the person is not created and constructed by the social mechanisms of punishment, discipline, and supervision; it is through the construction of various concepts – “psyche, subjectivity, personality, consciousness,” on which “the moral claims of humanism” have been built, that the “soul” as an entity emerges. FOUCAULT, *supra* note 228, at 29-30. Thus, not only is there no enduring set of values outside the historically contingent set of social power relations in which we currently find ourselves, but there is not even a moral individual subject upon which that power acts: “The soul is the effect and instrument of a political anatomy.” *Id.* at 30.

²⁴⁶ See, e.g., Dailey, *supra* note 89, at 1005.

²⁴⁷ FOUCAULT, *supra* note 230 [Society defended], at 250-52.

²⁴⁸ The common law itself fits within Foucault’s understanding of diffuse and decentralized state power that acts within private as well as public domains.

which sets the terms for every decision in fixing the initial entitlements through background rules of parental custody and control over medical decision-making—creates not just legal but potentially constitutional implications for every such choice by parent or child.

IV. REIMAGINING STATE ACTION AND CHILDREN’S RIGHTS

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

Through the law’s management of children’s bodies within the family, family relations are studied, surveilled, and normalized. Some parents’ punishment is deemed legitimate, and others’ is not; some minors’ reasons for avoiding childbirth are strong enough, whereas others are not. Children’s health care is regulated in the interest of the greater good, as they become instruments of public health regulation.

Moreover, the elision of parental and governmental roles, brought about in part by the state’s regulation of private reasons with respect to children’s bodies, demonstrates the way in which state power permeates the family, imposing its power to normalize and standardize. The state acts as parent in exercising its *parens patriae* power; the metaphor becomes even more concrete when a judge steps into the parent’s role in a judicial bypass hearing, or when the court stands in for community standards in examining the parents’ motivation for seeking to authorize an organ donation from one sibling to another.²⁴⁹ Yet the parent also stands in for the state, disciplining the child in the interest of creating better citizens—and only when the discipline is for reasons the state considers legitimate. The state acts, in a sense, as a “civilizing mechanism[]... reminding people subjectively of the locus of power” and “satisfy[ing] the needs of the social order.”²⁵⁰ At the same time, “relations of force” permeate the parent-child relationship, and it seems arbitrary to attribute any one exercise of power to the state.²⁵¹

Foucault’s theory of power, which appears to be particularly applicable in the context of children’s bodily integrity rights, suggests the arbitrariness of the state-action line drawn by cases such as *DeShaney*. It demonstrates that state power permeates and structures the family relationship. It thus appears that state action should be understood to be present whenever parents act on children’s bodies. If the state is acting as parent, and parent as agent of the state, then it is not particularly meaningful to consider some violations as purely private and others as perpetrated by public actors. Every parental violation of a child’s bodily integrity would become a potential constitutional violation, chargeable to the state. The problems of identifying state actors and state action would thus fall away in most cases.

²⁴⁹ See *supra* ____.

²⁵⁰ Sanger, *supra* note 114, at 470-71.

²⁵¹ Foucault, *supra* note 214.

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Yet, the problems with this scenario are obvious. Many a teenager would, no doubt, be inclined to make a federal case—literally!—out of every prohibited tattoo, every detention by grounding, every rhinoplasty denied. At the same time, it may be possible to retain a degree of substantive parental discretion or privacy within the family. This would entail a recognition that parental decisions about children's bodies contain a constitutional dimension, but it would not radically change the existing legal rules and entitlements. Parents would be granted a realm of discretion, according to the understanding of minors' bodily integrity rights that I have outlined above, to make most medical and non-medical decisions for younger minors, and older minors would be granted greater power. In other words, the best-interests requirement would be applied deferentially, such that judges could not second-guess reasonable decisions of fit parents. Moreover, given that parents still hold the purse strings in most families, they would maintain a significant degree of de facto control over many decisions about non-medically indicated interventions. Finally, the expense and other difficulties of minors' bringing suit likely means that this option would not be exercised except in the most serious cases.

But at the same time, the domain of parental discretion would have substantive limits, grounded in minors' constitutional rights. Though not radically changing the current substantive entitlements, the constitutionalization of this domain would not be entirely meaningless. It would have several significant effects for minors seeking to vindicate a right to bodily integrity. First and foremost, the mature-minor and best-interest doctrines, derived from the common law but constitutionalized in the case of minors seeking abortions, would become constitutional standards across the board, since they track closely the essential meaning of bodily integrity rights for minors. Though these standards already apply to minors seeking to exercise their right to access abortion, they would also apply to minors in other contexts, such as those facing decisions about end-of-life care and other important medical decisions. In contrast to the status quo, minors could not be denied medical care that was in their best interests, and mature minors would have a right to make their own medical decisions, even in those states that lack mature-minor rules.²⁵² Currently, minors' rights in these situations are notably unclear and vary from state to state; constitutionalizing the maturity and best-interests standards across the board would help to regularize the landscape.

Moreover, minors in abusive homes would have a constitutional cause of action for the government's failure to protect them. Of course, the ability of a minor to sue the state for violation of his right to bodily integrity would be subject to limitations, both in terms of a requirement that the intrusion be severe enough to rise to a constitutionally cognizable level, and in terms of the requirements that must be met for municipal liability to attach under 42 U.S.C. § 1983, such as a showing of "deliberate indifference" on the part of a policymaker or a municipal pattern and practice of constitutional violations.²⁵³ But they would not be deprived of that right by a specious and arbitrary state action requirement.

²⁵² The standards for maturity and best interests are, of course, somewhat amorphous, but an attempt to define and clarify them is beyond the scope of this Article.

²⁵³ *Board of County Com'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 407 (1997); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 694 (1978).

Finally, despite the elision of parental and governmental roles, it would require too radical a revision of constitutional law to designate every person who acts pursuant to a state grant of authority, such as a parent, a state actor.²⁵⁴ The need to identify a state actor according to conventional legal standards would thus remain in lawsuits to vindicate minors' constitutional rights to bodily integrity. Long-standing jurisprudence indicates that, even if state action is present (here, based on the underlying common law entitlements giving parents authority over their children's decisions), a private individual cannot be sued unless he can be said to be acting under color of state law.²⁵⁵ If a mature minor wishes to vindicate her constitutional right to make her own medical decisions, for example, she could not bring suit under section 1983 unless she could identify a state actor who has played a role in preventing her from doing so. In Joshua DeShaney's case, the social workers' decision to return him to the home would be sufficient, since they are state actors, and state action would be identified in their decision to leave him in the custody of his abusive father. In most cases, however, parents would be considered private actors and therefore section 1983 would not apply.

But if a minor were otherwise able to invoke the jurisdiction of the court—through an action for an injunction to prevent a battery, for example, or through any other relevant cause of action under state law—she also would be entitled to have constitutional bodily integrity norms applied in her case. Additionally, since constitutional norms would have to apply in legal disputes between private parties, minors would be entitled to consideration of their bodily integrity rights when hospitals seek court orders to proceed with medical treatment in the face of parents' refusals, for example. This would be a departure from existing case law, in which minors' constitutional rights are rarely considered.

CONCLUSION

The legal doctrine and system of regulation surrounding children's bodies is profoundly fragmented. The law has created a conundrum for the nascent right of children to bodily integrity, which founders upon the problem of identifying state action. Even more troubling is the way in which the law has permeated every aspect of family life through discourse that relentlessly seeks to examine the most "private" of domains. Yet, a broader understanding of state action in the context of children's rights may provide a partial solution. While leaving some questions unanswered, it suggests a way in which children's constitutional rights may be recognized and respected within the family without constitutionalizing every aspect of family life.

²⁵⁴ See *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 924, 935 n.18 (1982) (distinguishing between the requirements, under section 1983, of state action and of an action performed by a defendant acting "under color of state law").

²⁵⁵ See, e.g., *Adickes v. Kress & Co.*, 398 U.S. 144, 150-52 (1970).