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Common Law Fundamentals of the Right to Abortion

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ANITA BERNSTEIN†

INTRODUCTION	1142
I. ABORTION PROHIBITION = STATE-IMPOSED DETRIMENT	1148
A. <i>Physical Detriments: Pain, Morbidity, Mortality</i>	1149
B. <i>Non-Physical Detriments</i>	1154
C. <i>Offsets: A Few Benefits of Remaining Pregnant</i>	1155
II. PRIOR VOLUNTARY CONDUCT NEEDED BEFORE THE STATE MAY IMPOSE DETRIMENT: THREE COMMON LAW POSSIBILITIES DISPATCHED	1159
A. <i>Consent</i>	1160
B. <i>Undertaking</i>	1165
C. <i>Crime and Punishment</i>	1168
III. COMMON LAW RIGHTS AND DOCTRINES PERTINENT TO ABORTION	1171
A. <i>One May Repel an Invader with Deadly Force</i>	1171
B. <i>One May Withhold Benevolence and Favors</i>	1183
IV. HOW COMMON LAW FUNDAMENTALS OF THE RIGHT TO ABORTION FELL FROM VIEW: A SHORT POLITICAL HISTORY	1191
A. <i>Old Law, New Choice: Abortion Technology Moves Forward</i>	1192
B. <i>Patriarchy</i>	1197
C. <i>Individualism</i>	1201
D. <i>The Parallel to Slavery</i>	1204
CONCLUSION	1208

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INTRODUCTION

Anyone who wants to learn how the common law regards abortion has quite the trove to go through.¹ Unsurprising to find a volume this hefty: the common law goes back a long way,² and actions taken to terminate unwanted pregnancies go back even longer.³ Decisional law has for many centuries reported claims that individuals extinguished, or attempted to extinguish, life inside the body of a pregnant woman. Much of this case law falls in the domain of crimes—that is to say, prosecution of abortion-furnishers like physicians and midwives who acted on purpose—but common law courts have also long adjudicated the ending of prenatal life by accident: for example, through the careless operation of a cart or automobile.⁴

Secondary authorities have also weighed in on the common law of abortion. Icons like William Blackstone and Edward Coke described judge-made law of abortion and shared their views of what it ought to say.⁵ Legal scholars continue this application of the common law to abortion into

1. This Article uses “the common law” in an American perspective, meaning judge-made doctrines that entered the law of the United States from English antecedents. In ascribing positions and perspectives to the common law, I write mindful that it has long been opaque, manipulable, and hard to pin down. See F. Rosen, *Introduction to THE COLLECTED WORKS OF JEREMY BENTHAM: AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION*, at xxxi, xxxix (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 2005) (1996) (noting these and other infirmities that Bentham tried to reform more than two centuries ago).

2. Conventions of legal history site the beginning of the common law in 1066 with the crowning of William the Conqueror. See JOHN HUDSON, *THE FORMATION OF THE ENGLISH COMMON LAW*, at xi, 21-22 (1996).

3. JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* 30 (2006) (“Unquestionably abortions were attempted in all human societies and in all eras.”); Gina Kolata, *In Ancient Times, Flowers and Fennel for Family Planning*, N.Y. TIMES, Mar. 8, 1994, at C10.

4. See generally Horace B. Robertson, Jr., *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1401-07 (reviewing case law from England, Ireland, and the United States).

5. See *id.* at 1405-06; see also *infra* Part IV.

the current millennium.⁶ Historians and sociologists who write about abortion, focusing on legal regulation in general rather than the common law in particular, take an interest in the same sources.⁷

In the United States, state power to regulate abortion is understood as governed more by constitutional than common law—but even in constitutional decisional law one finds secondary material about what the common law provides. *Roe v. Wade*,⁸ the principal Supreme Court decision on abortion, articulated the right to terminate as a prohibition on criminalization during the first trimester of pregnancy rather than anyone's common law entitlement, finding this constraint on government action in and around the Fifth and Fourteenth Amendments of the Constitution.⁹ To reach this conclusion Justice Blackmun, in his opinion for the Court, reviewed an array of non-constitutional precedents, including treatises on canon law, nineteenth century English statutes, treatises by Coke and Blackstone and Bracton, twentieth century case law and statutes from England, and American receptions of British common law at the state level.¹⁰ Other American judicial authors continue this primary-secondary hybridization by including in their post-*Roe* rulings a discussion of what the common law had to say about abortion.¹¹ The secondary literature is voluminous.

6. Most of this scholarship deems the common law opposed to abortion. See, e.g., DELLAPENNA, *supra* note 3 (investigating centuries of Anglo-American abortion regulation, both judicial and statutory); William J. Maledon, Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME LAW. 349 (1971) (reviewing English and American decisions).

7. See, e.g., KRISTIN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 13-17, 137 (1984) (reviewing decisional law as a backdrop for contemporary sociology); LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997) (providing nineteenth and twentieth century history).

8. 410 U.S. 113 (1973).

9. See *id.* at 164.

10. *Id.* at 116, 133-41.

11. See, e.g., *Williams v. State*, 550 A.2d 722, 724-26 (Md. Ct. Spec. App. 1988); *Pro-Choice Miss. v. Fordice*, 95-CA-00960-SCT, 716 So. 2d 645, 651 (Miss. 1998).

An apparently mature corpus, in short. Judicial decisions and reflections by thoughtful writers have reflected on what the common law of abortion provides and where it should change. Alongside this maturity, the common law of abortion paradoxically is also underdeveloped. Its applications have not yet gained force. Judges and scholars who built and described the common law of abortion, I argue in this Article, have mistaken the periphery for the center.

Their contributions have assigned the starring role of abortion law to someone whose actions have an impact on the body of a pregnant woman. For the common law of crimes, this protagonist is the abortionist.¹² Tort law related to abortion focuses on a defendant who collided with a pregnant individual.¹³ Writers who study the common law of abortion also assign a leading role to what is inside the human body that experienced impact, an entity whose label changes based on its gestational stage.

English unfortunately lacks a unitary generic word for this life-form.¹⁴ Instead a succession of nouns—among others blastocyst, zygote, embryo, and fetus—make reference to developmental stages and thus link calendrical age with the

12. Though unfortunately pejorative, “abortionist” suits my purpose better than “abortion provider,” which can be an institution or an intermediary; this Article has in mind individuals who participate in terminations.

13. Via “pregnant individual” I seek to avoid the question of whether pregnancy should be perceived as something a man can experience. Compare THOMAS BEATIE, *LABOR OF LOVE: THE STORY OF ONE MAN’S EXTRAORDINARY PREGNANCY* (2008), with Katha Pollitt, *Who Has Abortions?*, *NATION* (Mar. 13, 2015), <http://www.thenation.com/article/who-has-abortions> (“I’m going to argue here that removing ‘women’ from the language of abortion is a mistake.”). References to a woman make accurate reference to pregnancy as regulated before the onset of trans-awareness, and so in discussing the past I will sometimes use “woman.” Nowhere do I wish to imply that pregnancy is gender-neutral. See Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 *HARV. C.R.-C.L. L. REV.* 329, 330 n.2 (2010) (stating that pregnancy is “a female experience because pregnancy and the capacity for pregnancy are central to the cultural and legal construction of gender”).

14. “Conceptus” appears in some lexicons, but definitions are not uniform. Some sources understand this term to become obsolete after an embryo transitions to the fetal stage.

identity of the unborn.¹⁵ This linguistic premise clashes with the argument of this Article, as the common law does not divide unborn entities into categories. For want of a better term I use the neologism Zef, an acronym for zygote-embryo-fetus.¹⁶

At every age and stage, the Zef crosses boundary lines patrolled by the common law. As an intruder-occupant whose invasion imposes serious consequences on its host (another suboptimal noun to which I resort *faute de mieux*¹⁷) and that cannot be evicted by responses that are less than fatal to it, such as slight force or verbal orders to leave, a Zef can lawfully be the target of deadly force.¹⁸ Other common law fields support this justification with reference to individual interests and prerogatives. So a Zef that is allowed to stay inside its host thereby receives beneficence, or what tort law

15. This language gap resembles the lack of a male counterpart to “cow” that forces English speakers to use a narrower word focused on husbandry, or the wishes of human masters. A male cow castrated for the sake of exploitation after its death is a “steer,” when the motive for castration is to obtain toil, often the pulling of a plow, the animal becomes an “ox;” we do have a word for male cattle left intact, but agrarian agendas ensure that only a rare male domesticated cow retains the identity of “bull” that he started with. His female counterpart might lead an unhappy life, but at least the word “cow” references a creature that, like a person, is an end in itself.

16. See Paul Langham, *Between Abortion and Infanticide*, 17 S.J. PHIL. 465, 465 (1979) (rendering the term as “ZEF”). Further impeded by deficiency in the English language, I intend no gratuitous depersonalization when I refer to the Zef as “it” rather than “he” or “she” and when I call it an entity. Decades ago, a student author noted this limitation of the English language and chose very different diction. Maledon, *supra* note 6, at 350-51 (rejecting “embryo” and “fetus” because they refer to gestational stages, and using “unborn child”). From the other side of the abortion binary, I esteem this work for its intellectual honesty and tireless research, done back when research was harder to do. William Maledon remained in the abortion debate after he graduated from law school: his clerkship for Justice Brennan took place during the fateful 1972 Term. CLARKE D. FORSYTHE, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* 271 (2013).

17. “Host” in some contexts implies willingness to extend an etymologically-related offering, hospitality, to an occupant. I use host more broadly to mean someone harboring an occupant that can be described with multiple nouns, including parasite and guest.

18. See EILEEN L. McDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996) (offering a book-length application of self-defense to abortion).

calls "rescue;"¹⁹ but the Zef has no legal entitlement to this favor unless an exception to the rule of no duty governs the pregnancy. By providing for self-defense and defense of property in parallel to the criminal law, tort clarifies that the right to withhold rescue includes the power to take affirmative steps necessary to effect this decision.²⁰ The body of a pregnant individual is a locus of property rights that include possession and dispossession.²¹ Unjust enrichment, a venerable common law doctrine, condemns the wrongful gains of a Zef inside its host when its host does not wish the pregnancy to continue; the common law of contracts supports the decision to withhold what another has demanded without giving anything in exchange.²²

Applying these common law doctrines to abortion calls for willingness to consider the pregnant person a person. The premise that the common law of abortion also applies to the pregnant individual herself—not just her hirelings and handlers and the strangers who run into her; not just the Zef her body houses—may seem obvious,²³ but it has escaped notice.²⁴ Case law and scholarly commentary alike have barely considered the common law of abortion from the inside of a human being. This Article, examining the common law of abortion from a premise that a pregnant individual holds the duties and rights that the law ascribes to persons, fills a void.

Part I of this Article reviews the ways in which pregnancy, whether unwanted or wanted, imposes

19. See *infra* notes 204-24 and accompanying text.

20. See *infra* notes 239-42 and accompanying text.

21. See *infra* notes 194-99 and accompanying text.

22. See *infra* Part II.B.

23. In the phrasing of William Blackstone, the starting point of "every man's person being sacred" means "no other having a right to meddle with it in any the slightest manner." 3 WILLIAM BLACKSTONE, COMMENTARIES *120.

24. For a rare exception, see Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L. F. 335, 336 (1971) (adverting to "the long period during which English and American women enjoyed a common-law liberty to terminate at will an unwanted pregnancy, from the reign of Edward III to that of George III"); see also McDONAGH, *supra* note 18, at 19 (assessing abortion as the exercise of a fundamental right).

unambiguous detriment on a person. Understood with bad effects in mind—the physical pain, mortality, and morbidity of pregnancy would suffice even when one puts aside financial detriments and emotional risks—a state-imposed prohibition of abortion makes a human being suffer by not letting her have otherwise attainable relief from hardship. Any adverse physical, emotional, or financial consequence is worth enduring when one wants what comes with it, but detriments of pregnancy are horrifying when the pregnant person lacks this desire.

The remainder of the Article focuses on the common law. Part II starts by looking for conditions that the common law regards as sufficient to explain or justify detriment that the state chooses to impose. It finds three possibilities, all of which demand prior voluntary conduct by the individual who suffers, and concludes that pregnancy fits none of them. Because nobody deserves to suffer via state action merely for having a Zef inside of her, there is indeed a “common-law liberty to terminate at will an unwanted pregnancy,” a liberty that extends further than its expositor, Cyril Means, Jr., realized.²⁵

Up until the late eighteenth century, according to Means, the common law “allowed all women, married or unmarried, moral or immoral, to terminate their pregnancies at will.”²⁶ Means supported his assertion with reference to the law of crimes. No common law prosecutions before quickening, he claimed.²⁷ Right or wrong about the fourth month of pregnancy as the approximate start of criminalization—the historical record is contested²⁸—this conclusion neglects the depth of the liberty Means found. Part III provides a necessary expansion. The right to reject one’s pregnancy comes not only from the law of crimes but also tort, property, contract, and equity. It pervades the entire common law.

25. Means, *supra* note 24, at 336.

26. *Id.* at 374-75, 382.

27. *See id. passim.*

28. DELLAPENNA, *supra* note 3, at 13-14 (explaining the author’s goal of “[d]ispelling the [m]yth[s]” propagated by Means).

The last task of this Article is to take on the challenge implicit in its claim. If Ye Olde Common Law gives individuals a right to rid themselves of pregnancy, one would have expected to hear the news before 2015.²⁹ As the contemporary pop star Rihanna has asked, where have you been?³⁰ Part IV offers an answer. Working with evidence educated mainly by Joseph Dellapenna, I contend that until recently—no earlier than the late nineteenth century—abortion was simply too dangerous for a rational actor to choose for herself. By the time a woman could safely end her pregnancy and move on, the common law had already taken form. In addition, as the remainder of Part IV shows, female individuals historically lacked full access not only to common law courts but also to condoned self-regard, a central commitment of the common law. Without condoned self-regard common law rights recede from view, even though they are always there.

I. ABORTION PROHIBITION = STATE-IMPOSED DETRIMENT

When the state bans abortion, or takes steps to make it unattainable, pregnant individuals receive an order from the government: they must endure their condition even if they find it abhorrent. From there, other experiences are not certain to occur, but are likely: the individual can expect to go through childbirth and become a mother to a new person.³¹ Pregnancy, childbirth, and parenthood can be intensely desired and pursued, of course.³² An abortion prohibition does

29. A tiny literature does exist. In addition to the remarkable assertion made by Cyril Means in 1971, *see supra* note 24, antecedents of my thesis include McDONAGH, *supra* note 18; Susan E. Looper-Friedman, "Keep your Laws Off my Body": Abortion Regulation and the Takings Clause, 29 NEW ENG. L. REV. 253, 275-78 (1995) (locating an abortion right in the common law of property). This Article goes further, however, in finding the right to terminate unambiguous, deeply rooted, and pervasive in the common law.

30. *Where Have You Been Lyrics*, METROLYRICS, <http://www.metrolyrics.com/where-have-you-been-lyrics-rihanna.html> (last visited Aug. 27, 2015).

31. On the gender of pregnant persons, *see supra* note 13.

32. *See infra* Part I.C.

not get in the way of a pregnant person who wishes to be pregnant.³³

Unless all pregnant persons fall into the contended or resigned category, however—and we know they don't³⁴—abortion bans amount to a detriment for individuals that is backed by the police power of the state. Commanding that someone must remain pregnant against her will makes her suffer in ways analogous to penalties that governments have in the past imposed on criminals and some still use: imprisonment, flogging, torture, surveillance. Forced childbearing is in some ways more severe than any of these punishments. Its impact is lifelong. Its hurtful consequences, which can include severe pain and death, are exceptionally intimate. It cuts deeper into the invaded person. One cannot, as Jed Rubenfeld has put the point, “name a single prohibitory law in our legal system with greater affirmative, conscriptive, life-occupying effects than those imposed by a law forcing a woman to bear a child against her will.”³⁵ Because this compulsion can be ended through interventions that are safe and effective for the person burdened, all legislation that bans or restricts abortion applies detriment to persons who are pregnant and do not wish to remain so, even if prohibitors believe they are merely letting nature take its course or being kind to a baby.

A. *Physical Detriments: Pain, Morbidity, and Mortality*

To consider this set of detriments, assume for parity's sake that whether she undergoes abortion or parturition, a pregnant individual receives the best available support to make a priority of her comfort. Early termination can be done in two ways, chemically and surgically. The chemical method, as practiced today, starts with a two-pill sequence with the

33. See Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1582 (1979) (“[T]he question is not whether pregnancy is worthwhile . . . for a woman who wants a child. The question is how burdensome it is for a woman who does not want a child.”).

34. See *supra* note 3 (noting millennia of abortion-desiring human history).

35. JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* 225 (2001), quoted in Andrew Koppelman, *Originalism, Abortion, and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917, 1942 n.146 (2012).

first pill, mifepristone, taken in a medical office and the second pill, misoprostol, taken later at home; or surgically, with an aspiration procedure on a table.³⁶ The abortion-pill method produces cramps that can be eased with pain pills.³⁷ The surgical method, also used in later-term abortions, is performed with anesthesia; patients report slight to moderate pain.³⁸

Slight to moderate pain is not what most individuals who have given birth report about their experience. "In quantitative ratings of pain severity," researchers have found, "the pain of a first labor exceeds cancer pain by a considerable margin and falls just shy of the pain of limb amputation sans anesthesia."³⁹ Some writers say otherwise,⁴⁰ and women have reported that the experience of giving birth gave them more physical pleasure than pain.⁴¹ Evidence, however, indicates that intense pain during the delivery of a baby is the norm and low-pain birth the exception.⁴² Some of the evidence comes from signs of pain shown by nonhuman animals as they give birth,⁴³ some from what researchers

36. See Beverly Winikoff et al., *Two Distinct Oral Routes of Misoprostol in Mifepristone Medical Abortion: A Randomized Controlled Trial*, 112 OBSTETRICS & GYNECOLOGY 1303, 1304 (2008).

37. See *id.*

38. Eliane Bélanger et al., *Pain of First-trimester Abortion: A Study of Psychosocial and Medical Predictors*, 36 PAIN 339, 339 (1989).

39. FRANK T. VERTOSICK, JR., *WHY WE HURT: THE NATURAL HISTORY OF PAIN* 106 (2000).

40. The British obstetrician Grantly Dick-Read, for example, argued in the mid-twentieth century that women about to give birth can gain comfort by applying themselves to the task. GRANTLY DICK-READ, *CHILDBIRTH WITHOUT FEAR* 35-36 (4th ed. 1972).

41. NANCY BARDACKE, *MINDFUL BIRTHING: TRAINING THE MIND, BODY, AND HEART FOR CHILDBIRTH AND BEYOND* 86-89 (2012); INA MAY GASKIN, *INA MAY'S GUIDE TO CHILDBIRTH* 157-60 (2003).

42. WILLIAM CAMANN & KATHRYN J. ALEXANDER, *EASY LABOR: EVERY WOMAN'S GUIDE TO CHOOSING LESS PAIN AND MORE JOY DURING CHILDBIRTH* 25-26 (2006) (noting also that many women believed that the degree of pain associated with labor had been understated).

43. Forrest Wickman, *Is Giving Birth Easier for Other Animals?*, SLATE (Sept. 27, 2012, 6:14 PM), http://www.slate.com/articles/health_and_science/explainer/

describe as anatomical tradeoffs imposed by evolution for a large human brain.⁴⁴

Babies emerge through an experience that one (male) physician calls “terror and violence.”⁴⁵ The uterus squeezes hard to expel a fetus, putting pressure on the abdomen, back, perineum, bladder, and bowels.⁴⁶ Crowning stretches the opening of the vagina,⁴⁷ and what precedes crowning is a sharp pushing stage described in one metaphor as a “ring of fire.”⁴⁸ The alternative to a vaginal delivery, a C-section or cesarean, slashes the abdomen open with a scalpel and leads to other sources of pain, catalogued by the *What to Expect When You’re Expecting* writers under a rubric of the usual postpartum symptoms.⁴⁹ This roster includes but is not limited to breast engorgement, lochia, postpartum fatigue and, if extended labor occurred, pain around the perineum.⁵⁰

Next, mortality and morbidity. Data comparing death from childbirth with death from abortion became available in 2012. Elizabeth Raymond and David Grimes, two physicians who reviewed records on both childbirth and abortion during the years 1998–2005, found that the risk of death from childbirth was fourteen times greater than the risk of death from abortion.⁵¹ An individual who becomes pregnant in the

2012/09/animals_giving_birth_dolphins_bear_newborns_easily_but_hyenas_risk_death_.html.

44. VERTOSICK, *supra* note 39, at 110.

45. *Id.* at 108 (adding that during childbirth “[t]he vagina and rectum can be torn irreparably, the pelvic bones separated, the bladder smashed”).

46. Alice Lesch Kelly, *The Truth About Labor Pain*, FIT PREGNANCY, <http://www.fitpregnancy.com/pregnancy/labor-delivery/truth-about-labor-pain> (last visited Aug. 25, 2015).

47. *See* VERTOSICK, *supra* note 39, at 108.

48. CAMANN & ALEXANDER, *supra* note 42, at 30.

49. *Delivering by Cesarean Section (C-Section)*, WHAT TO EXPECT, <http://www.whattoexpect.com/pregnancy/c-section> (last visited Aug. 26, 2015).

50. *Id.*

51. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012). This paper, published in the official journal of the American College of Obstetricians and Gynecologists, received criticism from writers opposed to abortion rights. Much of it is *ad hominem*—labeling Raymond

United States and does not terminate the pregnancy is very likely to survive the experience even if her pregnancy is identified as high risk, but *ceteris paribus* her risk of not surviving is significantly higher than it would be if she chose termination, with its mortality rate estimated by the Centers for Disease Control as .67 deaths per 100,000 abortions.⁵² Comparisons are pertinent here: abortion is less fatal than another medical intervention taken for granted as safe enough, penicillin, with its one fatal reaction in 50–100,000 courses, or Viagra, with a death rate of 5 per 100,000 prescriptions.⁵³ Even aspirin exposure was documented to cause fifty-four deaths in 2004.⁵⁴

One harm of pregnancy that bridges the gap between mortality and morbidity is domestic violence, because this harm can both kill a person and (merely) lessen her health. Pregnancy is a well-studied precipitator of intimate battering.⁵⁵ A significant minority of pregnant individuals in the United States experience physical violence, most of it domestic in nature, “with a resultant fetal demise of 5%.”⁵⁶

and Grimes pro-choice and the like—but not all. For example, emergency room coding procedures may fail to record complications of abortion, and the Guttmacher Institute, still affiliated with Planned Parenthood, provides much of the current data used for abortion policymaking even though it is a private organization with a point of view about whether abortion should be legal and available. See FORSYTHE, *supra* note 16, at 235–42.

52. KATHA POLLITT, PRO: RECLAIMING ABORTION RIGHTS 135 (2014) (reporting the mortality rate from abortions for a seven year period from 2003–2009).

53. *Id.*

54. Peter A. Chyka et al., *Salicylate Poisoning: An Evidence-Based Consensus Guideline for Out-of-Hospital Management*, 45 CLINICAL TOXICOLOGY 95, 96 (2007). Contaminated aspirins and suicides are excluded from this count.

55. Loraine Bacchus et al., *Prevalence of Domestic Violence when Midwives Routinely Enquire in Pregnancy*, 111 BJOG 441, 444 (2004).

56. Howard A. Werman & Robert E. Falcone, *Trauma in Pregnancy*, TRAUMA REP., July 1, 2008, at 1 (estimating domestic violence victims as “[t]en to thirty percent” of all “pregnant females”). For a lower estimate, see Donna St. George, *Many New or Expectant Mothers Die Violent Deaths*, WASH. POST, Dec. 19, 2004, at A20 (“4 percent to 8 percent”). Abortion opponent Clarke Forsythe takes a different view of the connection. See FORSYTHE, *supra* note 16, at 322–24 (arguing that *Roe v. Wade* has increased male rage and also enables a batterer to pressure his partner to terminate against her wishes).

Terminating a pregnancy in contrast to keeping it also makes a person better off on the morbidity front. Although no counterpart to the Raymond-Grimes study of mortality can be done, ill health following pregnancy is too vast and varied to be catalogued. “For every woman who dies of pregnancy-related causes,” a World Health Organization study has observed, “20 or 30 others experience acute or chronic morbidity, often with permanent sequelae that undermine their normal functioning.”⁵⁷

The presence of a Zef strains the body of its host in numerous ways.⁵⁸ Occupation by a Zef commandeers the entire cardiovascular system of a host, causing decreased blood flow to the lower extremities and thereby disposing pregnant women to edema, blood-vessel varicosities, and the more serious complication of thrombophlebitis.⁵⁹ About 70% of pregnant women experience increased pigmentation on the skin of their faces; even more experience bleeding from their gums or oral pharynx.⁶⁰ Among the permanent side effects of pregnancy that occur frequently are weight gain, stretch marks, pelvic floor disorder (associated with urinary and rectal incontinence), varicose veins, and the loss of dental and bone calcium.⁶¹ Giving birth to children is linked with a

57. Tabassum Firoz et al., *Measuring Maternal Health: Focus on Maternal Morbidity*, 91 BULL. WORLD HEALTH ORG. 794, 794 (2013). The report adds that “non-uniform criteria” confound efforts to measure maternal morbidity. *See id.* (noting that studies disagree on basic methodological points such as whether to include nausea as morbidity and how to cover conditions present before the pregnancy began).

58. *See* Regan, *supra* note 33, at 1574, 1579-82 (using a summary called “The Physical Burdens of Pregnancy and Childbirth” to argue that the rule of no duty to rescue, *see infra* Part III.B, means that pregnant women are entitled to terminate their pregnancies). Regan relied on a medical text published in 1975, *see* Regan, *supra* note 33, at 1579 n.6, but his catalogue of pain resembles what current descriptions say.

59. McDONAGH, *supra* note 18, at 72.

60. *Id.*

61. *The Effects of Pregnancy*, LIZ LIBR., <http://www.thelizlibrary.org/site-index/site-index-frame.html#soulhttp://www.thelizlibrary.org/liz/004.htm> (last visited Aug. 25, 2015).

higher lifetime risk of Alzheimer's disease.⁶² Even one of the gentlest physical harms is costly: researchers have concluded that pregnancy-related nausea causes Britain to lose more than 14 million hours each year of work.⁶³

B. *Non-Physical Detriments*

Termination has financial as well as physical and emotional consequences that befall a population likely to lack money: most pregnancy-terminators are mothers,⁶⁴ and financial burdens vex millions of this group in the United States, where 45% of children live in poor or low-income households.⁶⁵ Many such mothers were poor or low-income before they became pregnant, of course. An individual who starts out not poor and with no children can expect a dramatic decline in her income after becoming a mother.⁶⁶

"The price of motherhood,"⁶⁷ a phrase coined by journalist Ann Crittenden, makes reference to lost wage income. Mothers perform uncompensated childrearing work that one study priced at \$508,700 a year.⁶⁸ That this labor generates

62. Monica Colucci et al., *The Number of Pregnancies is a Risk Factor for Alzheimer's Disease*, 13 EUR. J. NEUROLOGY 1374, 1376 (2006). Giving birth to even one child is enough to raise the risk of Alzheimer's. *See id.*

63. Roger Gadsby et al., *A Prospective Study of Nausea and Vomiting During Pregnancy*, 43 BRIT. J. GEN. PRAC. 245, 248 (1993).

64. RACHEL K. JONES ET AL., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS, 2008, at 8 (2010).

65. SOPHIA ADDY ET AL., NAT'L CTR. FOR CHILDREN IN POVERTY, BASIC FACTS ABOUT LOW-INCOME CHILDREN: CHILDREN UNDER 18 YEARS, 2011, at 1 (2013). "Poor" in this study means income of \$18,530 or less for a family of three; "low income," which meets only basic needs, means income of \$37,060 for a family of three. *Id.* at 1-2.

66. Anyone inclined to condemn as greedy or selfish a person who chooses abortion for financial reasons ought to recall that *homo economicus*, the construct that understands human beings as rational maximizers of their own wealth, pervades American law generally, not just the common law.

67. ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED (2001).

68. The method of this study was to add up the median pay of seventeen occupations into which mother-work can be classified. *Id.* at 8. A more conservative count would value this labor at an annual salary of about \$100,000. *Id.*

no salary helps to explain why women remain poorer than men even though they work more hours a day than men almost everywhere in the world,⁶⁹ and even though the law of many nations, including the United States, forbids pay discrimination on the basis of sex. A pregnant individual committed to choosing between retention and termination as *homo economicus* would include not only the \$241,080 price tag for the future child's expenses⁷⁰ but also the societal expectation, if not the overt demand, that she toil through years of long hours for no pay.

Then comes work in the paid sector, where the detriment of becoming a mother amounts to a wage penalty of seven percent per child.⁷¹ According to *The Price of Motherhood*, a college graduate forfeits a million dollars of earnings over her lifetime as a consequence of this status.⁷² Subsequent research has compared the results of job applications from pairs of candidates identical in all respects except parental status.⁷³ Men received no penalty, and sometimes benefited, when they were identified as fathers.⁷⁴ Women identified as mothers were penalized in several ways, including perceived competence and starting salary.⁷⁵

C. Offsets: A Few Benefits of Remaining Pregnant

For many individuals, remaining pregnant is well worth the costs reviewed in this Part. We may infer as much from a single data point: as of 2010, most women in the United States aged 15 to 50—the majority is slim, about 53%—have

69. *Id.* at 8-9.

70. Kevin Concannon, *What Does It Cost to Raise a Child?*, USDA BLOG (Aug. 14, 2013, 2:34 PM), <http://blogs.usda.gov/2013/08/14/what-does-it-cost-to-raise-a-child>.

71. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204, 219 (2001).

72. CRITTENDEN, *supra* note 67, at 88.

73. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1309-10 (2007).

74. *Id.* at 1321.

75. *Id.* at 1321, 1326.

had at least one child.⁷⁶ All these women came of age when contraception and abortion were legal, even if they had limited access to these goods,⁷⁷ and some fraction of the nulliparous 47% must have at least lamented, if not fought, infertility.⁷⁸ This much arithmetic suggests that the majority of American women prefer to carry at least one pregnancy to term over their lifetimes.

Keeping rather than terminating a pregnancy furnishes an individual with physical benefits, not just detriments. Hormone shifts associated with full-term pregnancy reduce lifetime risks of developing particular cancers—multiple pregnancies are more protective than one—and lessen the incidence and severity of menstrual cramps after the pregnant person gives birth.⁷⁹ Whereas physicians once advised women with multiple sclerosis not to become pregnant, pregnancy may make relapses less likely, and one study found that carrying a pregnancy to term reduces the risk of developing this disease.⁸⁰ Increased pelvic blood flow has been credited for “stellar” second-trimester sex.⁸¹ For many female smokers, becoming pregnant is a reason to try to give up their habit. Not all try—some fail; some “conceal or underreport their smoking behavior” when researchers

76. *Profile America Facts for Features: Mother's Day: May 13, 2012*, U.S. CENSUS BUREAU (Mar. 19, 2012), https://www.census.gov/newsroom/releases/pdf/cb12ff-08_mothersday.pdf.

77. Because of poverty, for instance, or because they spent their teen years outside the United States or in geographically disadvantaged regions.

78. The CDC estimates that 12% of women ages fifteen to forty-four “have difficulty getting pregnant or carrying a pregnancy to term.” *Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/reproductivehealth/Infertility/#a> (last visited Sept. 13, 2015).

79. Sarah McCraw Crow, *6 Surprising Benefits of Pregnancy*, AM. BABY, <http://www.parents.com/pregnancy/my-body/changing/benefits-of-pregnancy> (last visited Sept. 13, 2015).

80. A.-L. Posonby et al., *Offspring Number, Pregnancy, and Risk of a First Clinical Demyelinating Event*, 78 *NEUROLOGY* 867 (2012); *Health Benefits of Pregnancy and Motherhood*, <http://www.whattoexpect.com/first-year/photo-gallery/health-benefits-of-pregnancy-and-motherhood.aspx#/slide-6> (last visited Sept. 13, 2015).

81. Crow, *supra* note 79.

ask⁸²—but pregnancy remains a powerful engine for an important public health initiative,⁸³ and quitting smoking, for an individual, means more expected years of life.⁸⁴

Emotional and psychological upsides to remaining pregnant can be more extensive. Although it is possible for a woman to become a parent by other means, pregnancy is the standard route to motherhood, and motherhood delivers unique joys at least some of the time. Becoming a parent through pregnancy is different from—and may feel stronger than—both motherhood by adoption and fatherhood because of the singular physical connection between the child and the person who knew the child intimately from his or her genesis. Carrying a pregnancy to term can become an occasion of justified pride.

Another emotional benefit of remaining pregnant, though darker, has force: termination means stigma.⁸⁵ When one politician published a memoir that reported her two abortions, for example, she explained extreme circumstances behind her decisions.⁸⁶ Supreme Court decisional law also depicts abortion as a grim choice: termination-choosers are likely to face regrets, wrote Justice Anthony Kennedy for the Court in *Gonzales v. Carhart*.⁸⁷ Hollywood notoriously

82. C. Tracy Orleans et al., *Helping Pregnant Smokers Quit: Meeting the Challenge in the Next Decade*, 174 W. J. MED. 276, 276-77 (2001).

83. *See id.* at 277.

84. *Tobacco-Related Mortality*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/tobacco_related_mortality (last updated Aug. 18, 2015).

85. In her first of many bestselling books about etiquette, pro-choice Judith Martin noted the normative demands of this stigma: “Miss Manners firmly believes that there are certain honest, understandable, deeply felt emotions that ought never to be expressed by anyone. First among them is that one does not want a child one is going to have.” JUDITH MARTIN, *MISS MANNERS’ GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR* 19 (1982).

86. WENDY DAVIS, *FORGETTING TO BE AFRAID* 172-79 (2014). The first of the terminated pregnancies was ectopic and threatened Davis’s life; the second abortion killed a fetus doomed to die. *Id.*

87. *Gonzales v. Carhart*, 550 U.S. 124, 132, 159 (2007). Moreover, officious strangers have a First Amendment right to get close to them against their will and try to talk them out of terminating, said *McCullen v. Coakley*, even though meddlers must refrain from approaching other strangers to argue with them

resolves most of its abortion narratives with contrivances that preempt the procedure.⁸⁸ Here, shame creates another benefit to remaining pregnant rather than choosing termination, no less real from being socially constructed.

All that said, benefits outweigh costs only if one wishes the first-time parenthood or the larger family that will follow this pregnancy—or, for the minority of pregnancies that involve surrogacy, if the pregnant person is receiving acceptable compensation. Only desire can make the gains of remaining pregnant greater than the detriments.⁸⁹ From here, whenever the government forbids or significantly limits the delivery of any therapeutic intervention, this exercise of state power burdens the individual deprived. The Supreme Court has said as much with respect to abortion,⁹⁰ and its decisional law on a variety of other prohibitions agrees.⁹¹

about their behaviors and plans. 134 S. Ct. 2518, 2536, 2541 (2014). The National Organization for Women has suggested to the Chief Justice of the United States that because “what is good for the goose is good for the gander,” he ought to take down the 100-foot buffer zone that protects him from being bothered on his way into a building. Statement of NOW President Terry O’Neill, *Roberts’ Court Enables Violence at Abortion Clinics; NOW calls on Chief Justice to Take Down his Own Buffer Zone*, NAT’L ORG. FOR WOMEN (June 16, 2014), <http://now.org/media-center/press-release/roberts-court-enables-violence-at-abortion-clinics>.

88. Mireya Navarro, *On Abortion, Hollywood is No-Choice*, N.Y. TIMES, June 10, 2007, § 9 (Magazine), at 1 (noting the custom of feature films not even to mention the word when a protagonist experiences unplanned or inconvenient pregnancy).

89. See Regan, *supra* note 33, at 1582 (contending that “pains and discomforts” feel worse during unwanted pregnancies).

90. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992) (“The woman’s right to terminate her pregnancy . . . is a rule of law and a component of liberty we cannot renounce.”).

91. Regardless of whether litigants who complain about being deprived of therapies win or lose, the Court acknowledges that their deprivation amounts to a real injury. Compare *Bell v. Wolfish*, 441 U.S. 520, 535, 539 (1979) (holding that pretrial detainees have a Fourteenth Amendment right to medical care and that the withholding of this care constitutes punishment), with *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (concluding that although the federal Controlled Substances Act outranks state laws permitting therapeutic uses of marijuana, patients might have a “medical necessity defense”). See also *United States v. Rutherford*, 442 U.S. 544, 552, 558 (1979) (refusing to recognize a terminal-illness exception to the legal rule that prescription drugs must be safe and effective while also noting that the unapproved substance desired by plaintiffs, Laetrile, “may ultimately prove safe and effective for cancer treatment”).

II. PRIOR VOLUNTARY CONDUCT NEEDED
BEFORE THE STATE MAY IMPOSE DETRIMENT:
THREE COMMON LAW POSSIBILITIES DISPATCHED

Governments force detriments on individuals all the time. They lock people up; they impose penalties that can include fines, prison terms, and death; they enter judgments against civil litigants and criminal defendants who have lost in court; they garnish bank accounts; they take away assets through civil forfeiture; they tell creditors that they must accept pennies on the dollar. One could read the Bill of Rights as a recitation of oppressions that the state would try to inflict if it could (otherwise, why bother to amend the Constitution?): impinge on religious freedoms, take away firearms, compel the quartering of soldiers in citizens' homes, and so on. Although state-imposed detriments befall individuals every day, how and when the state may impose them is limited by constraints that originate in the common law as well as the Constitution.

The common law offers three possibilities that permit the imposition of detriment by the state. Each requires prior voluntary conduct of a particular stripe. First is consent. Integral everywhere in the common law, consent obliges an individual to endure a detriment because she said yes to it before it occurred. A second and related common law category, found in non-criminal doctrines including contracts and torts, is an undertaking by the burdened individual. Whereas consent means acceptance of the very thing or condition that the individual complains of—a prizefighter says yes to a punch aimed at his head; a land possessor invites a visitor and then objects to her presence—an undertaking, when enforced on an obligor by the common law, means having volunteered for an obligation that must be fulfilled or paid for even if it comes to feel unwelcome or oppressive. Finally, the state may impose detriment deliberately, as punishment in response to the antisocial conduct of a wrongdoer.

A. Consent

Members of our species have been known to welcome demanding house guests,⁹² a slap on the face,⁹³ the slash of a surgical incision,⁹⁴ and the infliction of pain or bondage on our bodies.⁹⁵ We might crave penetration of our intimate orifices, even risky types of penetration. We can be penetrators or aggressors ourselves. To manage our entries into the geography of another person in a respectful way and have our boundaries crossed on our own terms, the common law precept of consent has long been at hand.⁹⁶

Consent is present in every common law field. It insulates aggressors from criminal and civil liability for many of the blows, intrusions, and demands they inflict on volunteers. *Volenti*, as a great common law judge famously wrote, *non fit injuria*.⁹⁷ One might read this Latin to say pro-choice. A detriment that one accepts in advance is not a detriment at all.

92. Harry L. Levy, *The Odyssean Suitors and the Host-Guest Relationship*, 94 TRANSACTIONS & PROC. AM. PHILOLOGICAL ASS'N 145, 147 (1963) (discussing forbearance toward burdensome house guests in the *Odyssey*).

93. A television commercial for Mennen aftershave, airing around the time *Roe v. Wade* came down, featured a brisk slap along with "Thanks! I needed that!" from the man whose face lay at the receiving end. D HEINE, *Circa 1973-1974 Mennen Skin Bracer TV Commercial*, YOUTUBE (Feb. 13, 2011), <http://www.youtube.com/watch?v=mEtcHdDyEvo>.

94. The year 2012 saw more than a million of the American top-five cosmetic surgeries—breast augmentation, nose reshaping, eyelid surgery, liposuction, and facelifts. *14.6 Million Cosmetic Plastic Surgery Procedures Performed in 2012*, AM. SOC'Y PLASTIC SURGEONS (Feb. 19, 2013), <http://www.plasticsurgery.org/news/past-press-releases/2013-archives/14-million-cosmetic-plastic-surgery-procedures-performed-in-2012.html>. On the intersection of surgery and the common law, see JOHN C. P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 644-46 (3d ed. 2012) (discussing express consent).

95. Andreas A.J. Wismeijer & Marcel A.L.M. van Assen, *Psychological Characteristics of BDSM Practitioners*, 10 J. SEXUAL MED. 1943, 1943-44 (2013) (reporting positive mental health associated with this practice).

96. Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *134 (adverting to a common law right of "[t]he preservation of a man's health from such practices as may prejudice or annoy it").

97. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (Cardozo, J.) (meaning to the willing, there is no injury).

The common law realm where agreement and acceptance are most fundamental is contracts. In his monograph about the centrality of Lord Mansfield to the development of modern common law,⁹⁸ James Oldham pays particular heed to this field. English contract law contained little theory or predictability when Mansfield took the bench.⁹⁹ Pressing “basic fairness and the intentions of the parties as governing principles,” Mansfield interpreted contracts with an eye to learning what those who agreed to them wanted.¹⁰⁰ The core of an agreement, he maintained, is acceptance.¹⁰¹ Manifestations like consideration or a signature are tools for the court to learn about that acceptance rather than ends in themselves.¹⁰² Consent as central to contract means that common law courts should uphold—and indeed they do uphold—unwise agreements, economically inefficient agreements, and agreements that look like bad deals to an outsider. Randy Barnett defines what he calls his “consent theory of contract” in both normative and descriptive terms.¹⁰³ Consent, he writes, makes a contract both enforceable in court and deserving of enforcement.¹⁰⁴

Next, torts. *Volenti non fit injuria*, though applicable elsewhere in the common law, gets mentioned with reference to torts in particular. Courts use the *volenti* maxim to mean assumption of risk when the harm happened by accident, and consent when the plaintiff has brought an intentional tort action.¹⁰⁵ Consent makes the plaintiff responsible for the

98. JAMES OLDHAM, *ENGLISH COMMON LAW IN THE AGE OF MANSFIELD* (2004). Mansfield was chief justice of the Court of the King's Bench from 1756 to 1788. *See id.* at 8-9, 11.

99. *See id.* at 79.

100. *See id.* at 79, 84-85.

101. *See id.* at 84-86.

102. *See id.*

103. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986).

104. *Id.* at 305.

105. *See Wash. Metro. Area Transit Auth. v. Johnson*, 726 A.2d 172, 179 & n.2 (D.C. 1999) (quoting RESTATEMENT (SECOND) OF TORTS § 496 A, to observe that distinctions between *volenti non fit injuria* and assumption of the risk are “of terminology only, and the rules applied are the same in either case”).

harm to himself that he complains of, on the ground that he agreed in advance. Agreed, that is, either to accept what he suffered (for an intentional tort claim) or the risk that he would suffer harm (for negligence).

Formed and articulated by common law courts to guide claims for harm attributed to therapeutic treatment decisions,¹⁰⁶ the doctrine of informed consent covers both negligence and the intentional tort of battery.¹⁰⁷ The Supreme Court, again playing the role of secondary source about the common law,¹⁰⁸ said in 1990 that "the common-law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment."¹⁰⁹ Informed consent extends to acceptances as well as refusals of medical interventions. One review of decisional law from several common law jurisdictions found that courts have "upheld the rule that unless the circumstances of emergency apply, a medical or surgical procedure that goes beyond the scope of a patient's express consent should be regarded as trespass"—the quintessential common law wrong—"even when there was no evidence of an express prohibition."¹¹⁰

Although battery occupies the large share of attention to consent as it functions in tort law, consent can be applied to any common law tort claim.¹¹¹ One state supreme court recently relied entirely on common law reasoning to hold that lack of consent is part of the *prima facie* case for the tort of

106. JERRY MENIKOFF, *LAW AND BIOETHICS* 157 (2001).

107. DAN B. DOBBS, *THE LAW OF TORTS* 242 (2000).

108. See *supra* notes 8-10 and accompanying text for a discussion of *Roe v. Wade* and the role of common law values in the Court's opinion.

109. *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 277 (1990).

110. Danuta Mendelson, *Historical Evolution and Modern Implications of Concepts of Consent to, and Refusal of, Medical Treatment in the Law of Trespass*, 17 J. LEGAL MED. 1, 31 (1996).

111. *Wiley v. Carpenter*, 23 A. 630, 631 (Vt. 1892) (quoting THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TORTS* 163 (1879) ("Consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to.")).

trespass to land, rather than an affirmative defense.¹¹² In other words, consent is so central to the tort that the plaintiff itself must labor to show its absence at the time that the invasion to land occurred at the pain of getting the action dismissed. Other courts have shared the view that consent is central to claims of trespass to land;¹¹³ they have applied it also to conversion,¹¹⁴ trespass to chattels,¹¹⁵ and false imprisonment.¹¹⁶

On to the common law of crimes. Consent makes “moral magic,” writes philosopher Heidi Hurd, in that actions that the criminal law deems odious become benign when the person at the receiving end consented to them.¹¹⁷ Similar to the common law of torts, the common law of crimes also understands consent as vitiating the aggressor’s responsibility for actions that inflict harm.¹¹⁸ The importance

112. See *Env'tl. Processing Sys., L.C. v. FPL Farming Ltd.*, 457 S.W.3d 414, 423-24 (Tex. 2015).

113. See, e.g., *Barfield v. Sho-Me Power Elec. Coop.*, 10 F. Supp. 3d 997, 1015 (W.D. Mo. 2014) (holding that consent to an easement for electric power lines did not include consent to using the easement for telecommunications); *Grygiel v. Monches Fish & Game Club, Inc.*, 787 N.W.2d 6, 18 (Wis. 2010).

114. *Maples v. United Sav. & Loan Ass'n*, 686 S.W.2d 525, 527 (Mo. Ct. App. 1985).

115. *Buchanan Marine, Inc. v. McCormack Sand Co.*, 743 F. Supp. 139, 141 (E.D.N.Y. 1990).

116. *Faniel v. Chesapeake & Potomac Tel. Co. of Md.*, 404 A.2d 147, 150 (D.C. 1979).

117. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121, 123 (1996). For partial disagreement with Hurd, suggesting that the reference to “magic” is overstated, see Michelle Madden Dempsey, *Victimless Conduct and the Volenti Maxim: How Consent Works*, 7 CRIM. L. & PHIL. 11, 12 (2012).

118. Because the common law of crimes has no conception of victim standing, however, criminal law is freer than tort to ignore acceptance of the action by the person whom it hurt. See MICHELLE MADDEN DEMPSEY, *PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS* 185-89 (2009) (providing a hypothetical in which the victim’s acceptance of abuse is overshadowed by the community’s intervention on her behalf). Thus, the common law of crimes usually declines to consider consent in murder prosecutions, see, e.g., *State v. Fuller*, 278 N.W.2d 756, 761 (Neb. 1979) (quoting *Turner v. State*, 108 S.W. 1139, 1141 (Tenn. 1908), that “[m]urder is no less murder because the homicide is committed at the desire of the victim”), and the common law holds that suicide is a crime, though most contemporary legislatures disagree. Thomas J. Marzen, “*Out, Out Brief Candle*”: *Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST.

of consent in the law of contracts, torts, and crimes, in sum, shows that consent is foundational to the common law. At the same time, the common law uses care in its applications of consent. Foremost, it does not presume that consent is present.

In 2012, a politician provided a helpful lesson on how presuming consent to be pregnant cannot justify abortion prohibitions. During his campaign to move from the House of Representatives to the Senate, Todd Akin suggested that bans on abortion need no rape exception because pregnancy of itself implies acceptance.¹¹⁹ According to Akin, a “female body” that does not wish to provide gestation following rape “has ways to try to shut the whole thing down.”¹²⁰ Regarding physiology, Akin’s statement was wrong. Pregnancy occurs with and without willingness to house and feed anyone.¹²¹ If pregnancy of itself proved that the pregnant individual consented, then a common law rationale to compel gestation and childbirth could take form. But pregnancy provides no such proof.

Assumption of risk to support the prohibition of abortion is a bit more plausible as a variation on consent, though it is

L.Q. 799, 804 (1994). Prosecutions of individuals who inflicted bodily harm during sadomasochistic encounters have resulted in both convictions and acquittals in the United States and the United Kingdom. See Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239 (2001) (reviewing cases and arguing that courts should not accept consent as a defense when harms are severe). Nevertheless consent of the victim or putative victim suffices to extinguish responsibility for a host of crimes. See, e.g., *Aldrich v. People*, 79 N.E. 964, 965 (Ill. 1906) (providing that consent is a defense for larceny); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 8.13 at 466-67 (1986) (noting the role of non-consent in burglary).

119. Jonathan Weisman & John Eligon, *G.O.P. is Pressing Candidate to Quit Over Rape Remark*, N.Y. TIMES, Aug. 21, 2012, at A1.

120. Lori Moore, *The Statement and the Reaction*, N.Y. TIMES, Aug. 21, 2012, at A13. Akin later stood by what he said, though he added that the quotation was misleading because he had also said that “ways to try to shut that whole thing down” following “legitimate rape” can fail. TODD AKIN, *FIRING BACK: TAKING ON THE PARTY BOSSES AND MEDIA ELITE TO PROTECT OUR FAITH AND FREEDOM* 10-11 (2014).

121. See Pam Belluck, *Health Experts Dismiss Assertions on Rape*, N.Y. TIMES, Aug. 21, 2012, at A13 (assembling evidence from interviewed experts and peer-reviewed research).

also unavailing. The idea here is that the pregnant person knew and accepted the risk of pregnancy associated with her conduct and thus may be forced to accept what befell her as the consequence of her gamble. Assumption of risk fails because it requires knowledge and voluntariness.¹²² Neither knowledge nor voluntariness can be inferred from an act of sexual intercourse in the recent past, even though many (possibly even most) persons who experience penetration of their vaginas by penises know that this action can generate a risk of pregnancy, and some fraction of those who understand this risk agree to it.

Regarding the knowledge element, pregnancy can occur when the person who is pregnant relied on a trustworthy contraceptive that failed; reasonably believed assurances about the infertility of her partner or herself; or otherwise acted prudently to reduce the likelihood of conceiving. Conception is not especially likely to result from sex even without contraception if one counts all pregnancies as the numerator and all acts of vaginal intercourse as the denominator of the same fraction.¹²³ As for voluntariness, putting aside the inaccuracy of “legitimate rape” as asserted by Representative Akin,¹²⁴ it is often absent even when the penetrated person manifested enough acquiescence to thwart a rape prosecution. “[T]he set of nonconsensual acts,” as Andrew Koppelman has put the point, “is considerably larger than the set of deeds that produce criminal convictions.”¹²⁵

B. *Undertaking*

The second common law opportunity to impose detriment on an individual comes from the undertaking she or he may

122. See DOBBS, *supra* note 107, at 535 (stating elements of assumption of risk).

123. See McDONAGH, *supra* note 18, at 52 (noting that “for all but six days of a woman’s ovulatory cycle, the probability is zero that conception will follow sexual intercourse”); see also *id.* at 57 (arguing that what causes pregnancy is not “sexual intercourse” but a fertilized ovum). A newer book rates the odds of a presumed-fertile woman’s becoming pregnant from a single act of unprotected sexual intercourse as 1 in 20. MICHAEL BLASTLAND & DAVID SPIEGELHALTER, *THE NORM CHRONICLES* 82 (2014).

124. See *supra* notes 119-20 and accompanying text.

125. Koppelman, *supra* note 35, at 1943-44.

have made. Express contracts, contracts implied in law, and contracts implied in fact all posit that courts may hold a promisor to the terms of what he agreed he would do. Randy Barnett's understanding of assent as a source of moral as well as legal obligation in the law of contracts, noted above with reference to the related common law concept of consent,¹²⁶ applies to undertaking too. Barnett observes that "a promisor incurs a contractual obligation the legal enforcement of which is morally justifiable by manifesting assent to legal enforcement and thereby invoking the institution of contract."¹²⁷

As the common law scholar Joseph Henry Beale noted more than a century ago, the law of undertakings partakes of contract and tort. An undertaking fails to be a contract, on the one hand, when consideration is absent, but is also not a source of tort liability, on the other, in that tort liability lands on individuals regardless of whether they volunteered.¹²⁸ "One has only to be born or to immigrate into a society, in order to undergo the [tort] duty of respecting the persons and property of his neighbors," Beale wrote, "but in order to be required to exercise the active care required of an undertaker, the obligor must 'take the trust upon himself.'"¹²⁹

Undertakings arise with forethought and are manifested by behaviors. A drowning person catches attention from a swimmer or the Coast Guard,¹³⁰ for example; a sorority leader signs up as "guardian angel" to keep an eye out for perils that a freshman rush-week pledge.¹³¹ The common law does not leap to find undertakings in the absence of evidence that they occurred. Losing cases abound for plaintiffs who had hoped that defendants had undertaken to engage in conduct useful

126. See *supra* notes 103-04 and accompanying text.

127. Barnett, *supra* note 103, at 305.

128. Joseph H. Beale, Jr., *Gratuitous Undertakings*, 5 HARV. L. REV. 222, 222 (1892).

129. *Id.* at 224.

130. See JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 112 (5th ed. 2013).

131. *Coghlan v. Beta Theta Pi Fraternity*, 987 P.2d 300, 305 (Idaho 1999).

to them.¹³² Indeed, the entire category would dissolve if courts presumed an undertaking to exist whenever a needy claimant could have benefited from kindness from someone else. Because pregnancy can befall a person who did nothing except become inseminated, courts have no reason to infer from pregnancy alone that a pregnant individual committed herself to do anything for anyone. “[T]he obligor must ‘take the trust upon himself’” (or herself) before the law will impose obligation.¹³³

Even if one were willing to infer an undertaking to remain pregnant from the fact of pregnancy itself, common law precepts provide that the obligor may abandon this undertaking when fulfilling it would demand too much of her. Contracts scholar Anthony Kronman describes this imperative as a “prohibition against self-enslavement.”¹³⁴ Certain classes of agreements whose formation fulfills all the checklist elements for validity become unenforceable as inconsistent with freedom itself.

Gathering examples of forbidden waivers that look alike to him in this respect, Kronman defines self-enslavement inductively. Courts, he observes, do not permit promisors to waive their right “to engage in a particular profession, obtain a discharge in bankruptcy, initiate a divorce action, or breach a contract of employment and substitute money damages for

132. See *Udy v. Custer Cty.*, 34 P.3d 1069, 1073 (Idaho 2001) (“[P]ast voluntary acts do not entitle the benefited party to expect assistance on future occasions, at least in the absence of an express promise that future assistance will be forthcoming.”); *Folsom v. Burger King*, 958 P.2d 301, 311 (Wash. 1998) (refusing to interpret an expired contract as creating a voluntary undertaking, even though the defendant had left its security equipment on the plaintiff’s premises and this behavior looked like an expression of willingness to continue the old obligation); E. ALLAN FARNSWORTH, *CHANGING YOUR MIND: THE LAW OF REGRETTED DECISIONS* 41-42 (1998) (noting the law’s disinclination to enforce undertakings absent reasonable reliance by the claimant); Dan B. Dobbs, *Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress*, 50 ARIZ. L. REV. 49, 57 (2008) (“Significant limitations accompany liability for undertakings.”).

133. Beale, *supra* note 128, at 224.

134. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 775 (1983).

the promised performance.”¹³⁵ What unites these stances about waiver is a position that anyone “who would give away too much of his own liberty must be protected from himself[.]”¹³⁶ If the promises that an individual might have made to eschew divorce, bankruptcy protection, or a particular occupation are unenforceable because her freedom to choose these options is too precious to give away, then whatever promise she might have made to endure the severe detriments of unwanted pregnancy and unwanted motherhood (it bears repetition that no such promise can be inferred from an episode of sexual intercourse¹³⁷) must be unenforceable for the same reason.

Related concern for liberty emerges at the level of remedy, where American contract doctrine limits what victors can receive. Courts can agree that a contract is valid and that it was breached but refuse to give a litigant the performance she wants: they restrict her recourse to monetary damages. Some promisees do receive specific performance,¹³⁸ but confining redress to money is the default in the event of a breach.¹³⁹ The withholding of specific performance under the law of contracts emphasizes the common law’s disinclination to burden individuals with conditions that they find difficult to tolerate, unless some voluntary action of theirs earned them this fate.

C. *Crime and Punishment*

A final possibility that might permit a ban on abortion as state-imposed detriment comes from the common law of crimes. Common law supports and enables the rendering of criminal penalties much worse than unwanted pregnancy

135. *Id.*

136. *Id.*

137. *See supra* note 123 and accompanying text.

138. U.C.C. § 2-716(1) (AM. LAW INST. & UNIF. LAW COMM’N 1999) (allowing specific performance of contracts for the sale of goods when the goods are unique, “or in other proper circumstances”); RESTATEMENT (SECOND) OF CONTRACTS § 357 (AM. LAW INST. 1981).

139. Ben Depoorter & Stephan Tontrup, *How Law Frames Moral Intuitions: The Expressive Effect of Specific Performance*, 54 ARIZ. L. REV. 673, 682 (2012).

and its sequelae. Detriments for prior voluntary behavior that common law courts have found acceptable range from slight inconvenience to a violent death at the hands of the state.

The common law cannot, however, tolerate the imposition of gestation, parturition, and unwanted parenthood as a penalty. States that seek to codify a categorical criminal ban on abortion of the kind found on the law books in Chile, Côte d'Ivoire, El Salvador, Kuwait, Poland, Ireland, and dozens of other countries gain no support for such codification from the common law.¹⁴⁰ Becoming pregnant is inherently not a common law crime because the common law imposes two defining elements that pregnancy, without more, does not fulfill: *actus reus* and *mens rea*.

Translatable as culpable act and culpable mental state respectively,¹⁴¹ the two elements demand that the pregnant person have engaged in conduct condemned by the law while aware of the nature of what she was doing.¹⁴² Because an individual can be impregnated when she is asleep, comatose, or made unconscious by drugs, the fact of her pregnancy does not demonstrate any self-awareness on her part, and the common law insists on consciousness when deeming an individual criminally culpable.¹⁴³ *Mens rea* is even more dramatically absent in impregnation for the same reason: even if one deems the reception of semen into one's body to be an act, which seems a stretch, a person can become

140. See *Abortion Laws Worldwide*, WOMEN ON WAVES, <http://www.womenonwaves.org/en/page/460/abortion-laws-worldwide> (last visited Sept. 1, 2015) (gathering examples of laws found around the world that prohibit abortion either without exception, or permit it only to save the life of the individual who is pregnant).

141. The common law jurist Sir Edward Coke put this point as "*actus non facit reum, nisi mens sit rea*," approximately "an act does not make for guilt unless the mind of the actor be guilty." 3 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 54 (London, M. Flesher 1644).

142. See JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 177-78 (2d ed. 1960).

143. See generally Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269 (2002) (summarizing common law precursors to the Model Penal Code and contemporary American legislation).

pregnant with no mental participation in what has happened to her.¹⁴⁴

Even if a pregnant individual did something that warrants punishment, the penalty here—again, gestation followed by severe physical pain followed by unwanted parenthood—does not align with any rational penal objective that a state might pursue. Rationales of punishment in Anglo-American law divide into retribution and consequentialism.¹⁴⁵ In other words, the reasons to punish an offender that make sense to the common law are (only) two; either the offender earned by her past conduct the suffering that the punishment imposes, or the imposition of a penalty will deter misconduct in the future. Neither of the two rationales for punishment accords with a ban on abortion. Forced gestation, parturition, and motherhood are incoherent retribution for whatever misconduct the pregnancy is understood to manifest. As for consequentialism, even if severe punishments of the pregnant individual benefit the Zef, and it is not certain that they do,¹⁴⁶ these penalties also impose harms on entire societies that might not have done anything deterrable. Nor have societies earned suffering.

144. Sexual intercourse can take place without awareness that it is occurring; without awareness of the association between it and the risk of pregnancy; and without awareness of how difficult it is to undo or reverse the implantation of a fertilized ovum.

145. See Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 852-65 (2002) (reviewing and comparing retribution and consequentialism).

146. Bans on abortion benefit a Zef only if (1) they reduce the chance that a pregnant person will choose abortion, an effect to which I am willing to stipulate *arguendo*, and (2) being extinguished in an abortion imposes a detriment on a Zef that is greater in magnitude than the detriment, from its perspective, of being born against the will of the person who is pregnant. Abortion prohibitors may suppose that of course every Zef wishes to remain alive inside a human body until it is ready to leave even when the person housing it wants the pregnancy to cease, but this belief may be mistaken. See Lynn Beisner, *I Wish my Mother had Aborted Me*, ROLE REBOOT (Aug. 6, 2012), <http://www.rolereboot.org/culture-and-politics/details/2012-08-i-wish-my-mother-had-aborted-me> ("Even given the happiness and success I now enjoy, if I could go back in time and make the choice for my mother, it would be abortion.").

III. COMMON LAW RIGHTS AND DOCTRINES PERTINENT TO ABORTION

The doctrines on point are numerous; they are arranged here around two broad common law precepts about freedom.

A. *One May Repel an Invader with Deadly Force*

The common law has long maintained that the intentional killing of another person can constitute an acceptable response to circumstances.¹⁴⁷ More than merely excused, this homicide is justified.¹⁴⁸ Intentional termination of pregnancy falls within not only self-defense but related privileges that include defense of others and defense of habitation, or the castle metaphor that defends domination over one's intimate environment and property.

As we will presently see, other doctrines in the common law align with what self-defense teaches when they conclude that a host need not do favors for a Zef or provide it with what amounts to free room and board.¹⁴⁹ Self-defense goes especially far in support of abortion, however, because even if abortion is understood as the deliberate kind of homicide—more directly harmful than mere indifference or disinclination to sacrifice—this privilege still approves of it. Self-defense is also unique among the common law doctrines that underlie the legal right to terminate because it offers justification to furnishers of abortions as well as persons who take action to cease being pregnant themselves. Accordingly it is the most powerful constituent of the common law defense of abortion. Five stances, or precepts, present in the law of self-defense combine to support a common law right to end a pregnancy.

147. "Self-defense is a basic right, recognized by many legal systems from ancient times to the present day." *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010). The Court also noted that "[c]iting Jewish, Greek, and Roman law, Blackstone wrote that if a person killed an attacker, 'the slayer is in no kind of fault whatsoever.'" *Id.* at 767 n.15 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *182).

148. *See infra* notes 187-91 and accompanying text.

149. *See infra* Part III.B.

The first precept is that persons have an interest in the integrity and safety of not only their lives and health but the physical space in which they live. One contribution of this first point about self-defense is that it answers a favorite slippery-slope challenge to the asserted right to terminate pregnancy: *If we let you kill your Zef, then where does that right stop? Do we have to let you kill your baby, toddler, preteen, and any other dependent you don't value?*

The slope turns out not slippery at all. Only invasion from within one's body threatens the life and health and habitation of a person. Some statements of the privilege say that an individual who chooses to kill an invader must reasonably believe that the invader threatens her with imminent death or serious bodily harm.¹⁵⁰ Such a belief is reasonable in support of killing a Zef, as a tour through the bodily harms and the risk of death occasioned by pregnancy will confirm.¹⁵¹ The Zef-threat is "imminent"¹⁵²; occupancy has occurred now, and thus the state of being pregnant imposes its danger now.¹⁵³ Most individuals who become pregnant survive their pregnancy, so the risk of death that the Zef presents is typically not high,¹⁵⁴ but self-defense has never set

150. MODEL PENAL CODE § 3.04(2)(b) (AM. LAW INST., Proposed Official Draft 1962).

151. See *supra* Part I.A.

152. Cf. Ashley D. Brosius, Note, *An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense*, 100 IOWA L. REV. 775, 790-92 (2015) (analyzing the imminence requirement of self-defense in the context of intimate partner violence).

153. Some writers disagree. See, e.g., LAURIE SHRAGE, ABORTION AND SOCIAL RESPONSIBILITY: DEPOLARIZING THE DEBATE 69 (2003) (stating that "most abortions are not urgent"); Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2127 (1999) (asserting that "pregnancy, even when nonconsensual, does not typically threaten death, lasting bodily injury, or even an immediate disruption of the woman's life plans and projects the way a violent assault by a born person most often does") (emphasis omitted). This opposition to the application of self-defense to abortion holds abortion to an ad-hoc high standard. The danger that has sufficed to justify fatal violence in decisional law has not had to be as severe or urgent as what these writings demand.

154. "Pregnancy complications" ranks as the sixth leading cause of death for women ages 20–34, according to CDC data. *Leading Causes of Death by Age Group, All Females-United States, 2010*, CTRS. FOR DISEASE CONTROL &

more-probable-than-not hurdles of proof. The criterion of serious bodily harm makes the privilege available under circumstances not dire enough to pose a risk of death.¹⁵⁵

Because self-defense is an option rather than an obligation, a host can welcome what the presence of a Zef does to her.¹⁵⁶ She can discount the detriments of pregnancy and parturition, ascribe them to nature or the will of God, seek to lessen their impact through conscientious behaviors (dietary supplements or restrictions, medical attentions), put them out of her mind, or even enjoy them. But happy or stoic responses to danger are not the only ones the law will approve. Just because other people—even, for all we know, most other people—embrace a condition that comes with risks of death and severe hurt does not mean that you or I have to embrace that condition too. An ideology of mandatory self-abnegation cannot coexist with the privilege of self-defense. If we may not apply the necessary amount of harm to protect our bodies from destruction or extraordinary pain, then our common law right to look out for ourselves has been trammled.

The geography of pregnancy expands and clarifies the application of justified deadly force. Defense of habitation, a privilege closely related to self-defense, honors the same interest—safety from a threat to one's life and body—by focusing on the home as a locus of the privilege.¹⁵⁷ “The house

PREVENTION, http://www.cdc.gov/women/lcod/2010/WomenAll_2010.pdf (last visited Sept. 3, 2015).

155. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 456 n.15 (2d ed. 1986) (noting that deadly force may be applied to resist rape because rape is among “the most extreme intrusions” even when it does not cause death or physical injury); Gregory A. Diamond, Note, *To Have but Not to Hold: Can “Resistance Against Kidnapping” Justify Lethal Self-Defense Against Incapacitated Batterers?*, 102 COLUM. L. REV. 729, 745-46, 745 n.96 (2002) (noting the position of the Model Penal Code and most jurisdictions that deadly force may be used to prevent or escape kidnapping).

156. Self-defense could be obligatory rather than mandatory, contrary to the common law. See David B. Kopel, *The Torah and Self-Defense*, 109 PENN ST. L. REV. 17, 36 (2004) (describing the provision in Jewish law of *pikuach nefesh*, which compels individuals to save human lives whether they want to or not).

157. “Because a home provides a ‘sanctuary’ or ‘castle’ where one is free from both governmental and private intrusions, ‘our law has long recognized that the home provides a kind of special sanctuary in modern life.’” F. Patrick Hubbard,

of every one is his castle,” proclaimed the great common law jurist Sir Edward Coke.¹⁵⁸ Switching to Latin in the middle of his proclamation, Coke went on to declare that “each man’s home is his safest refuge.”¹⁵⁹ This “castle doctrine” is not understood literally, as almost nobody gets to live in a castle. Its metaphor about the geographic boundary around every personal space forms two rules related to the defense of habitation. First, the possessor of a dwelling place may take reasonable measures, as severe as they need to be, to keep invaders out. Second, although a person when attacked out in the world usually must retreat before he may apply deadly force to an assailant, he has no such duty when an invader has entered his home.¹⁶⁰

The first castle-doctrine rule implies a common law right to practice contraception—an issue outside the scope of this Article but related to its claim—while the second rule speaks more directly to abortion by emphasizing how personhood depends on, and indeed is formed by, a zone of intimate space.¹⁶¹ Every Zef makes costly demands on the interior of its host. Understood by its behaviors, it is a ruthless invader.

Having an unwanted visitor inside one’s brick-and-mortar “castle” is unwelcome and perhaps frightening, but trivial compared to the invasion of pregnancy.¹⁶² When the Zef is wanted by its host, the “terror and violence”¹⁶³ that it will visit on her are none of the law’s business. Understood as gross anatomy, however—apart from frames like optimism, religious faith, or ambitions about oneself as a mother-to-be—the depredations wreaked by a Zef are much worse than what decisional law permits individuals to ward

The Value of Life: Constitutional Limits on Citizens’ Use of Deadly Force, 21 GEO. MASON L. REV. 623, 638 (2014) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 886 (2010) (Stevens, J., dissenting)). The human body is also a locus of freedom from governmental and private intrusions.

158. *Semayne’s Case* (1604) 77 Eng. Rep. 194, 194; 5 Co. Rep. 91 a, 91 a.

159. *Id.* at 195, 91 b (“domus sua cuique est tulissimum refugium.”).

160. *Beard v. United States*, 158 U.S. 550, 555 (1895); *Regina v. Smith* (1837) 173 Eng. Rep. 441, 441; 8 Car. & P. 160, 160.

161. See Mae Kuykendall, *Restatement of Place*, 79 BROOK. L. REV. 757, 772-73 (2014) (exploring how place is central to identity).

162. See *supra* Part I.A.

163. See VERTOSICK, *supra* note 39, at 106 (describing childbirth).

off with deadly force. If the common law takes the external habitation of a person seriously, *a fortiori* it must take the internal space of a person's body more seriously. If the invasion of a cottage or hovel bestows rights on a possessor to cause harm, then the invasion of a person from the inside bestows stronger versions of these rights.

Once the invasion no longer takes place from inside, the privilege to inflict deadly force upon a Zef ends. There is no longer anything to defend against: no intimate invasion, no threat to a metaphoric castle, no peril to the physical welfare of a host. The erstwhile Zef has outgrown its awkward acronym. It is now a baby (and is eligible to qualify for other nouns, such as toddler, as it ages) who does not occupy the interior of any other person. It can be passed to an array of caregivers. Killing it as a source of danger becomes comparable to shooting an invader after the invader has departed and no longer can harm the shooter; in that setting, common law precepts deny the privilege of self-defense.¹⁶⁴ Habitation and its castle doctrine help to alleviate confusion about the beginning and end of self-defense in the context of terminating pregnancy. The outline of the host's body delineates her interests and her entitlement to defend herself with deadly force.

The second self-defense precept pertinent to abortion is that the application of deadly force can be justified even when the target of that force bears no moral responsibility for the peril. For the defense to apply, the killed aggressor need not have acted in a blameworthy way.¹⁶⁵ Nor must self-defense be

164. See, e.g., *Woolfolk v. State*, 644 S.E.2d 828, 830 (Ga. 2007) (disallowing self-defense when the confrontation had ended and the victim had retreated to her car); *Commonwealth v. Kendrick*, 218 N.E.2d 408, 412 (Mass. 1966) (noting that the privilege of self-defense ends "when the necessity ends"); David W. Robertson, *The Aggressor Doctrine*, 1 S.U. L. REV. 82, 84 (1975) (emphasizing prevention as central to self-defense). The "fleeing felon" category provides a limited exception, see *infra* notes 164-74 and accompanying text, but fleeing felons are acting culpably when they experience deadly force from the aggressor and deadly force is necessary to stop their crime; both in their aggressive culpability and their power to complete a crime if not stopped, they are very different from a Zef.

165. Cases featuring mistake support the point. See *Commonwealth v. Scott*, 73 A.3d 599, 601, 605 (Pa. Super. Ct. 2013) (reversing to require a jury instruction when a defendant contended he had fired a shot in self-defense and hit the wrong person); Caroline Forell, *What's Reasonable?: Self-Defense and Mistake in*

the sole motive for the use of force.¹⁶⁶ Self-defense does not tolerate the application of deadly force to what Shlomit Wallerstein in her study of the defense calls “innocent bystanders,”¹⁶⁷ but the Zef is not among bystanders, or individuals harmed by a person who feels threatened and hurts them in a panicky effort to survive.¹⁶⁸ The Zef has occupied the inside of a person and ranked its interests above hers, even though it lacks consciousness or motive.

A defender’s right to use deadly force is available even when the aggressor has no intent to harm. What this aggressor has is “bad luck,”¹⁶⁹ and this misfortune makes him “causally responsible for the aggression that created a situation in which either he or the defender will have to suffer the consequences.”¹⁷⁰ Deadly force applied to kill the unlucky aggressor-invader does not violate the aggressor’s right to life, Wallerstein concludes, and does not wrong him.¹⁷¹ As applied in real-life conflicts, the common law of self-defense aligns with this philosophical account. Critics of self-defense as applied to abortion misread the right to rid oneself of an internal invader as narrower than it is.¹⁷² A crabbed interpretation of the privilege, limiting deadly-force options to the purest of innocent victim-assailants and the

Criminal and Tort Law, 14 LEWIS & CLARK L. REV. 1401, 1408-13 (2010) (discussing a 1992 case where a Louisiana homeowner, having shot and killed a Japanese exchange student who had come onto his premises on Halloween, was acquitted of manslaughter after claiming self-defense).

166. Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 1014 n.43 (2005) (adverting to “multiple reasons”).

167. *Id.* at 1001-02.

168. As human shields or even food, for example.

169. Wallerstein, *supra* note 166, at 1029.

170. *Id.* at 1031.

171. *Id.*

172. See Nancy Davis, *Abortion and Self-Defense*, 13 PHIL. & PUB. AFF. 175, 185-87 (1984) (arguing that “the clearest cases” of justified self-defense involve aggressors who started the confrontation by acting in a blameworthy way, defenders who bore no responsibility for their predicament, and the very fast infliction of deadly force with little reflection beforehand).

most urgent circumstances that befall them, is simply not present in the common law.¹⁷³

The third self-defense precept is that threats to life and health are at the center of the privilege to inflict deadly force, but they are not necessary for it to exist. Consider the common law privilege to apply deadly force to a fleeing felon. The fleeing-felon doctrine shares the willingness of self-defense to condone deadly force for the sake of preventing danger¹⁷⁴—but its danger can be more remote than a threat to life, health, or habitation. The fleeing-felon category teaches how capaciously the common law extends a justification to kill another person.

Fleeing-felon licenses to kill as furnished by the common law are so generous to shooters that they went too far even for the Supreme Court circa 1985, a tribunal strongly inclined to think that targets of the police deserve what they get.¹⁷⁵ The Court agreed with the State of Tennessee that the common law had indeed long allowed “the use of whatever

173. Christopher W. Behan, *When Turnabout is Fair Play: Character Evidence and Self-Defense in Homicide and Assault Cases*, 86 OR. L. REV. 733, 749-50 (2007) (observing that the common law of self-defense permits defendants to attack the character of the persons they killed, but most U.S. jurisdictions give the prosecution no opportunity to mount a counterattack on the defendant's character); Major David Bolgiano et al., *Defining the Right of Self-Defense: Working Toward the Use of a Deadly Force Appendix to the Standing Rules of Engagement for the Department of Defense*, 31 U. BAL. L. REV. 157, 167 (2002) (noting that the common law does not modify its broad privilege to use deadly force with requirements that might discourage its use, such as a duty to consider non-lethal alternatives or try a gentler response first). The killing of a Japanese exchange student mistakenly perceived by a homeowner as an invader resulted in an acquittal that required only a couple of hours' deliberation and met with support in the defendant's community. See Forell, *supra* note 165, at 1408-13.

174. See John Simon, Note, *Tennessee v. Garner: The Fleeing Felon Rule*, 30 ST. LOUIS U. L.J. 1259, 1264 (1986).

175. One noted Supreme Court advocate has recalled “Supreme Court decisions from the 1970s that gave the green light to oppressive police investigative practices.” Walter Dellinger, *The Court May No Longer Be the Head Cheerleader for the War on Drugs*, SLATE (June 25, 2014, 4:27 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_roundup_does_today_s_cellphone_decision_mean_the_court_like.html.

force was necessary to effect the arrest of a fleeing felon”¹⁷⁶ but deemed this much power obsolete for modern policing and struck it down as an unlawful seizure under the Fourth Amendment.¹⁷⁷ Dissenters duly noted that the majority had jettisoned a “venerable common-law rule” accepted in “nearly half the States.”¹⁷⁸

Contemporary court decisions have allowed non-police defendants to get away with killing other persons who were fleeing and thus posing no threat to anyone’s life or health.¹⁷⁹ In *State v. Cooney*, the South Carolina Supreme Court reversed a murder conviction following the shooting of a man whom the shooter had good reason to think had stolen from his plumbing business.¹⁸⁰ The court held that the defendant was entitled to a jury instruction justifying deadly force because he had acted in pursuit of a fleeing felon.¹⁸¹ The facts of another case put the killer in a more sympathetic light—the victim had lunged at him before running away—but, as with *Cooney*, deadly force was not necessary to guard against danger.¹⁸² The common law as applied in the United States has condoned numerous applications of deadly force upon persons who posed no imminent threat to life or health, with both private citizens and police officers doing the inflicting.¹⁸³

The fourth precept: self-defense is asserted in behalf of, and not necessarily by, a threatened person. The privilege to defend others as well as oneself means that the common law justifies the violence of termination done by someone other

176. *Tennessee v. Garner*, 471 U.S. 1, 12 (1985).

177. *Id.* at 11-15.

178. *Id.* at 22-23 (O'Connor, J., dissenting).

179. Two such cases are analyzed in Hubbard, *supra* note 157, at 634-35.

180. *State v. Cooney*, 463 S.E.2d 597, 598 (S.C. 1995). The shooter was white, and the “fleeing felon” he killed was black. Hubbard, *supra* note 157, at 623.

181. *Cooney*, 463 S.E.2d at 599.

182. *People v. Couch*, 461 N.W.2d 683, 684, 689 (Mich. 1990).

183. See Jane Y. Chong, Note, *Targeting the Twenty-First-Century Outlaw*, 122 YALE L.J. 724, 763-64 (2012) (noting condoned powers of private actors enlisted as *posse comitatus*); see also *id.* at 762 (“[N]umerous federal courts have determined that a common law rule authorizing the use of deadly force [by the police] against a fleeing felon does not violate the Eighth Amendment.”).

than the pregnant host if the person who terminates acted to defend her.¹⁸⁴ It thus recognizes a defense that justifies action taken to kill a Zef even when the actor is not himself invaded or physically threatened by pregnancy.

Defense of others admittedly adds complication to the common law defense of abortion. Whereas defense of self-positis a simple binary of a defendant who felt threatened and a victim whose conduct posed a threat, any claimant who enters the scene to defend a host by killing a Zef makes an external judgment about who is the aggressor and who needs defending, a debatable assignment of labels.¹⁸⁵ Opponents of abortion would presumably disagree about the status of the Zef as aggressor against which deadly force may justifiably be applied.¹⁸⁶ So might other observers, regardless of their ideology. Nevertheless the fourth point stands in general terms: the common law privileges the choice to kill an invader for the sake of defending another person.

Fifth and last, applications of deadly force that meet the criteria for self-defense are not excused, which implies non-responsibility for wrongful conduct, but instead justified, which means the action was warranted.¹⁸⁷ This classic division showcases a telling feature of abortion bans in the United States: prohibitions do not punish the host who

184. *But see* Davis, *supra* note 172, at 188 (arguing that the outsider's privilege is not as strong as that of the host). The narrower focus of this Article, confined to what the common law rather than ethics says about abortion, identifies parity between the privilege to defend oneself and the privilege to defend another.

185. Thus an opponent of abortion might claim defense of others as a privilege for her violent interference with a termination by contending that she is looking out for the Zef just as the abortion provider is looking out for the host. The trouble with this contention is that defense of others justifies the use of force only against unlawful force. DOBBS, *supra* note 107, at 169 n.4. If termination of pregnancy is covered by self-defense and (for the person performing the termination) defense of others, then its violence is not unlawful, and an opponent of the procedure may not use defense of others as a privilege to interfere with the termination.

186. The killers of abortion providers such as physicians George Tiller and Barnett Slepian might have thought of themselves as acting in defense of others, whereas they could not have claimed self-defense.

187. Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 DUKE L.J. 1, 3-4 (2003) (summarizing a consensus on the definitions of excuse and justification).

chooses to terminate and instead focus on conduct by persons or entities that perform the procedure or make it possible.¹⁸⁸ Why?¹⁸⁹ After all, one who hires a contract killer shares criminal responsibility for homicide.¹⁹⁰ Criminalizers of abortion who impose no penalties to the host must believe that her actions are in effect excused. The host has taken affirmative steps to kill what is inside her, but she is also a victim—of a seducer, perhaps, or of abortion-promoting ideology. Proponents of criminalization do not speak clearly on the point.¹⁹¹

The common law of self-defense brings clarity to this murkiness about whether a host may be punished for terminating a Zef. If one of the self-defense privileges (self-defense, defense of habitation, defense of others) applies, then the killing of a Zef becomes justified. The host is

188. Abortion crimes that decline to punish the pregnant individual have been codified both before and after *Roe*. See *Roe v. Wade*, 410 U.S. 113, 116-17, 164, 117 n.1 (1973) (invalidating a Texas statute providing that “any person” who “shall use towards [a pregnant woman] any violence or means whatever externally or internally applied, and thereby procure an abortion . . . shall be confined in the penitentiary not less than two nor more than five years”); *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 903, 913-14 (D.N.D. 2013) (overturning North Dakota’s criminalization of furnishing (but not of having) an abortion later than the sixth week of pregnancy). A bill passed by the United States House of Representatives in 2013 penalized the provision of abortions after the twentieth week but declined to include pregnant individuals in this punishment. See *Pain-Capable Unborn Child Protection Act*, H.R. 1797, 113th Cong. § 1532(d) (2013) (noting that the law forbids prosecution of a woman who receives an abortion in violation of the act for violating or conspiring to violate the act).

189. See Anna Quindlen, *How Much Jail Time?*, NEWSWEEK, Aug. 6, 2007, at 68 (considering why anti-abortion demonstrators do not have an opinion on criminal punishment of women who have abortions); see also AtCenterNetwork, *Libertyville Abortion Demonstration*, YOUTUBE (July 30, 2007), http://www.youtube.com/watch?v=Uk6t_tdOkwo (showing that anti-abortion demonstrators either do not think women who have abortions should face criminal consequences or do not know whether criminal punishment would be appropriate).

190. See 18 U.S.C. § 1958 (2012) (codifying murder for hire as a federal crime); Richard G. Jones, *Legal Saga Ends for Man Who Hired Wife’s Killer*, N.Y. TIMES, May 13, 2006, at B5 (describing pursuit by New Jersey prosecutors of the death penalty against the hirer of a killer).

191. Responses to the Quindlen essay and the YouTube video interviewing opponents of abortion rights, see *supra* note 189, exist, according to my searches of terms like “quindlen jail time,” but tend to get taken down from the Internet.

responsible for the killing but not culpable. Excuse, rarely used to support full acquittal of a homicide, does not fit the intentional killing of a Zef by a host. A host's choice to impose deadly force on a Zef must be either justified or an act that is culpable and calls for her punishment. Because the Zef threatens her life, safety, and bodily integrity, her application of deadly force to the Zef is warranted; because this deadly force is warranted, it is justified. Consistent with this analysis, the common law did not punish pregnant women who acted to terminate their own pregnancies.¹⁹²

Common law doctrines from property build on and extend the five precepts from self-defense beyond criminal law. Here we return to the body as its owner's habitation, occupied inside and out.¹⁹³ Just as the common law of crimes recognizes a privilege to apply deadly force to the Zef in its role as an unwelcome and dangerous intruder, the common law of property contains numerous forms of action that recognize the right of a host to attain what may be described as quiet title to herself.¹⁹⁴ Other common law forms of action that apply by analogy to abortion include ejectment, eviction, and estrepement.¹⁹⁵ Possessors may evict and eject unwanted occupants from everywhere they possess, says the common law—even a place they value much less than their own bodies, such as an outbuilding.

This deference continues in the common law position that possessors may tell would-be entrants to go away from a locus they own or control even when their rejection appears harsh, unreasonable, or antisocial. As phrased in a leading treatise, the most central tenet of property law “entails the right to exclude others from some discrete thing.”¹⁹⁶ Courts do not balance the good of exclusion against the good of access. They

192. See *infra* note 274 and accompanying text.

193. See *supra* notes 157-60 and accompanying text.

194. See RESTATEMENT (FIRST) OF PROPERTY § 222 (AM. LAW INST. 1936) (defining quiet title).

195. See, e.g., *Voss v. Green*, 389 A.2d 273, 274 (Del. Super. Ct. 1978) (noting that plaintiffs brought an ejection action while defendants sought a writ of estrepement).

196. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES*, at v (2007).

side overwhelmingly with excluder-possessors in trespass cases, even when an entrant had compelling reasons to get inside.¹⁹⁷ They also furnish possessors with injunctions as well as damages,¹⁹⁸ even though common law judges rarely use their injunctive powers in tort actions.¹⁹⁹ If in practice the law of abortion hewed faithfully to the common law, then although courts might find it difficult to apply exclusion against a Zef they would have no tolerance for—and, upon the petition of a possessor, would swiftly enjoin—a requirement on the books of some states that imposes entry into “some discrete thing” in a manner unfortunately not at all unique: vaginal penetration that is unwanted by the person penetrated and that gives her no benefit.²⁰⁰

Once an entry occurs, the common law of property-and-torts, mirroring the rule of limited duty to most categories of visitors,²⁰¹ continues to side with possessors. For trespass to land claims, tort munificently drops its usual demand that a plaintiff allege injury—it will infer that disruption to the blades of grass on the possessor’s premises is enough²⁰²—and

197. See Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1091 (2011) (arguing for a shift in the common law to permit a larger set of nonconsensual entries).

198. *Id.*

199. See Howard W. Brill, *Equitable Remedies for Common Law Torts*, 1999 ARK. L. NOTES 1 (surveying numerous common law subcategories of tort to note that injunctions are rare).

200. Several jurisdictions have chosen to compel ultrasound examinations of abortion patients. See Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 28-29, 29 n.142 (2012). Statutes compelling providers to use the examination technology that provides the clearest image of the Zef make an indirect but unambiguous demand that the patient undergo penetration of her vagina with a transducer probe, regardless of whether she wants or needs that penetration. *Id.* at 28-30.

201. See *infra* notes 206-11 and accompanying text.

202. This capacious understanding of a possessor’s entitlements applies to claims against government intruders and private landholders alike. *Dougherty v. Stepp*, 18 N.C. (3 & 4 Dev. & Bat.) 370, 370-71 (1835) (“From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage.”); *Entick v. Carrington* (1765) 19 Howell’s State Trials 1030, 1066 (“By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon

withholds the favoritism about mistake that it gives actors who claim self-defense. Thus whereas someone who inflicts physical harm on another person in the mistaken but reasonable belief that this victim is his deadly enemy has a good claim for self-defense, an entry into another's land that the entrant reasonably but mistakenly believes is his own does not defeat a trespass claim.²⁰³

B. *One May Withhold Benevolence and Favors*

Picture a blind man who starts to cross the street and walks into the path of an approaching automobile, unaided by a heartless bystander who watches the blind man walk and who "by a word or touch," moreover "without delaying his own progress," could easily have acted to prevent the accident.²⁰⁴ No duty to that bystander, says tort law, and thus no liability, no matter how easy the rescue intervention would have been.²⁰⁵ Same result when "A comes across B, who is lying face down in a puddle, seemingly unconscious and likely to drown if he remains that way, and A can easily flip B over with his foot, thereby saving his life," and A does not bother, walking on by.²⁰⁶

Grisly hypotheticals like these function as illustrations but the carnage of no-duty is not hypothetical. Numerous individuals known to decisional law failed to receive help when they were in peril, suffered physical injury that they attributed to the inaction of a particular person, complained in court, and were rebuffed by judges who held that tort

my ground without my license, but he is liable to an action, though the damage be nothing.").

203. DIAMOND ET AL., *supra* note 130, at 328; GOLDBERG ET AL., *supra* note 94, at 653.

204. RESTATEMENT (SECOND) OF TORTS § 314 cmt. c, illus. 1 (AM. LAW INST. 1965).

205. *Id.*

206. Elizabeth A. Weeks, *Beyond Compensation: Using Torts to Promote Public Health*, 10 J. HEALTH CARE L. & POL'Y 27, 37 (2007).

recognizes no affirmative obligation to rescue.²⁰⁷ The most memorable cases are old, but the rule persists.²⁰⁸

The common law no-duty stance bestows numerous freedoms to act without care for the welfare of a fellow human being. Judges did not come to recognize the tort of intentional infliction of emotional distress until the twentieth century, and to this day they rarely encounter a claim they approve.²⁰⁹ This aversion to redress leaves both intentional and reckless outrages undeterred. Heedless conduct (for example sloppy financial advice, poor auditing of a business investment vehicle, careless obstruction of a public highway or utility needed for someone to earn her living) generates numerous varieties of financial loss, most of which have no remedy in tort on the ground that the person who acted carelessly owed the victim no duty of care.²¹⁰ No-duty rules also bar claims for physical injuries attributable to conditions on land. The common law indulges possessors by denying recourse for injury to visitors except those present after the owner-possessor made it clear he wanted them. As far as the common law cares, you may keep your home and yard strewn

207. Consider Carl Buch, an eight-year-old boy who roamed into a mill and got his hand severely mangled in a machine; the judges who rejected his claim assumed that his injury could have been prevented by a warning. *Buch v. Armory Mfg. Co.*, 44 A. 809 (N.H. 1898). After Joseph Yania jumped into a trench filled with water and drowned, more than inaction was present; a court conceded *arguendo* that the defendant, standing nearby, had lured Yania to jump. *Yania v. Bigan*, 155 A.2d 343, 345 (Pa. 1959). Another drowned plaintiff, Albert Osterlind, had rented a canoe from the defendant Hill. Both Osterlind and a friend who joined him in the canoe were visibly drunk at the time of rental. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 623 (2010). When the boat overturned, Hill heard Osterlind's cries for help but "utterly ignored" them. *Osterlind v. Hill*, 160 N.E. 301, 302 (Mass. 1928). All three plaintiffs in these cases lost on the ground that defendants owed them no duty, and none of the three decisions has been overruled. *Osterlind*, 160 N.E. at 302; *Buch*, 44 A. at 811; *Yania*, 155 A. at 346.

208. So says the Restatement. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 (AM. LAW INST. 2012) ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other unless a court determines that one of the affirmative duties provided in [other sections] is applicable.").

209. GOLDBERG ET AL., *supra* note 94, at 683-86.

210. See Anita Bernstein, *Keep it Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773 (2006).

with skateboards, spilled grease, shaky banisters, cut-glass coffee tables with sharp edges, terrifying works of art on the wall: do as you like. You need not make your premises reasonably safe for any visitor except one who holds the favored label of invitee.²¹¹

“Easy rescue” summarizes the academic contention that the law ought to require more in the form of rescue when the needed effort would not burden the rescuer much. Jeremy Bentham favored this reform,²¹² and a much-cited philosophical defense of easy rescue contends that this development would accord not only with moral theory—of both the utilitarian and deontological kind—but line-drawing that modern courts can achieve. While every no-duty rule applies to the right to cease housing and nurturing a Zef in that it gives another example of how pervasively the common law tolerates indifference to the welfare of another person, easy rescue is particularly pertinent.²¹³

From the perspective of a host-rescuer, aid to a Zef is the opposite of easy. It always comes at a price even when one’s pregnancy is deeply wanted. Pregnancy in the best-case scenario is protracted, risky, and financially costly. The degree of rescue demanded by a perilous or unwanted pregnancy compounds these burdens. Rearing the child that will result from an unterminated pregnancy is never easy. Tort law does not demand even the easiest rescues. It permits a potential rescuer to escape responsibility after rendering nothing at all.

An example of an easy rescue that the common law permits individuals to withhold even though the consequence of refusal will be dire is recounted in *McFall v. Shimp*,²¹⁴ where David Shimp refused to give his cousin Robert McFall

211. See generally GOLDBERG ET AL., *supra* note 94, at 88, 94-96.

212. JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 292-93 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) (contending that a duty should be imposed on “every man to save another from mischief, when it can be done without prejudicing himself”).

213. See Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980).

214. 10 Pa. D. & C. 3d 90 (Ct. Com. Pl. 1978).

a donation of bone marrow that he was uniquely able to provide.²¹⁵ McFall died shortly after failing to win the donation injunction he sought in court.²¹⁶ Donating bone marrow is not as easy as tapping a blind stranger before he enters the path of an automobile, or using one's foot to push someone's face out of a puddle, but it is much easier than unwanted pregnancy followed by unwanted childbirth followed by unwanted parenthood.²¹⁷ Still too awful for a court to inflict on the unwilling: "[f]orceable extraction of living body tissue causes revulsion to the judicial mind," wrote the *McFall* judge.²¹⁸ Court-ordered extraction of bone marrow would "raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends."²¹⁹

McFall showcases what appears to be an especially severe instance of no duty, but its holding comports with the common law's refusal to conscript human bodies to help another person. Consider *Curran v. Bosze*, where a noncustodial parent tried to enlist his three-year-old twins for blood testing for the benefit of his older child who required a donation of bone marrow to stay alive.²²⁰ The twins' custodial parent refused to consent and the Illinois Supreme Court sided with her.²²¹ Like *McFall* of *McFall v. Shimp*, the older child in *Curran* died soon after failing to win an injunction.²²² A couple of years earlier another Illinois court had ordered the same touching of the twins' bodies, the extraction of blood with a needle, when Nancy Curran wanted to establish a genetic relationship between them and

215. Perhaps appalled by their father's callousness, defendant's four children all volunteered to donate but were deemed ineligible. Michele Goodwin, *My Sister's Keeper?: Law, Children, and Compelled Donation*, 29 W. NEW ENG. L. REV. 357, 386 (2007).

216. *Id.* at 386-88.

217. *See id.* at 387 & n.103.

218. *McFall*, 10 Pa. D. & C.3d at 92.

219. *Id.*

220. 566 N.E. 2d 1319, 1320-21 (Ill. 1990).

221. *Id.* at 1320-21, 1345.

222. Goodwin, *supra* note 215, at 388, 390.

Tamas Bosze.²²³ The *Curran* court declined to permit another round of that invasion. To explain its ruling, the court in a long opinion relied entirely on the common law.²²⁴

No case contrary to *McFall* and *Curran* exists in the annals of published American judicial decisions. The only qualification to the sweeping prohibition asserted in these decisions is that judges sometimes permit the extraction of organs and tissue from young children for the benefit of siblings.²²⁵ Courts take that position, however, only after putting themselves through the paces of substituted judgment. They allow this extraction only after they conclude that the minor donor values the life of her or his relative enough to accept physical invasion in service of that end.²²⁶ Substituted judgment as a common law doctrine functions, at least in principle, to protect a human body from incursions that the possessor of that body would not want.²²⁷

Let us now consider whether any other tort precepts can aid a Zef at the expense of its host notwithstanding the common law rule about rescue. The possibility of an undertaking has already been dispatched.²²⁸ Two other possibilities remain. First, a special relationship exception to no-duty might be present. Tort law says that rescue efforts are owed by jailers to their locked-up inmates, employers to employees, hospitals to patients;²²⁹ it recognizes other rescue-compelling relationships as well.²³⁰ From here, just as a

223. Today paternity is established by noninvasive testing, but in November, 1987, blood was drawn. *Curran*, 566 N.E. 2d at 1320.

224. *Id.* at 1326-31.

225. Goodwin, *supra* note 215.

226. *Id.* at 398.

227. *See Curran*, 566 N.E. 2d at 1330-31 (reviewing decisions where courts refused to support the petitions of parents who were trying to save their sick children). The common law also declines to cooperate with the harvesting of body parts from corpses. *See infra* notes 244-46 and accompanying text.

228. *See supra* Part II.B.

229. RESTATEMENT (THIRD) OF TORTS § 40 (2012). Tort law only obliges reasonable efforts at rescue, not successful completion of those efforts.

230. GOLDBERG ET AL., *supra* note 94, at 83-88.

parent owes affirmative duties to his own child, a host might owe affirmative duties to a Zef.

This status relationship disappears, however, because statuses on point do not exist. Decisional law expects a pair of nouns as labels for the defendant and the plaintiff: innkeeper-guest, prison-prisoner, school-student, and so on.²³¹ Zef is not an authentic common noun as far as case law is concerned,²³² and “host” is no better than the clearly inadequate “woman” or “mother” to describe the putative rescuer as parallel to the word “parent” used to reference a person who owes a duty of care to her or his own child. No matched set of nouns suggests no status relationship.²³³ And as already discussed, a born child is different from a Zef.²³⁴

The other tort possibility that might rescue the unwelcome Zef from termination comes from the distinction between misfeasance and nonfeasance. Abortion could constitute affirmative infliction of harm. To my mind this position is stronger than the attempt to find a status-relationship exception to the no-duty rule. Killing seems different from letting die.²³⁵ Perhaps it is not different,²³⁶ but even so tort monitors the line between misfeasance and nonfeasance. “[I]f abortions are to be acts of refusing to help, and not deliberate acts of killing,” philosopher Laurie Shrage

231. Even a famous outlier, *Farwell v. Keaton*, 240 N.W.2d 217 (Mich. 1976), said the plaintiff and the defendant were “companions on a social venture.” *Id.* at 222.

232. On June 14, 2015, I searched for “zef” in the cases database of Westlaw and got sixty-nine hits. All turned out to be proper nouns, mostly first names of individuals.

233. See Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 131-32 (2003).

234. See *supra* note 164 and accompanying text.

235. Judith Jarvis Thomson, *Killing, Letting Die, and the Trolley Problem*, 59 MONIST 204 (1976).

236. See Rosalind S. Simson, *What Does the Right to Life Really Entail? A Framework for Depolarizing the Abortion Debate*, 14 CONN. PUB. INT. L.J. 107, 118 & n.35 (2014) (assembling sources that equate letting die with killing).

continues, “then abortions should be limited to removing the fetus and not include extinguishing its life.”²³⁷

Agreed: but until technology emerges to effect this ideal of abortion via removal of a living Zef rather than the elimination of its life,²³⁸ the second argument also is defeated, this time because tort has no quarrel with the decision of a host to kill the Zef inside her.²³⁹ The host has the same self-defense rights in tort as she has under the law of crimes,²⁴⁰ the consequence of the affirmative defense changing from justification in criminal law to no liability in tort.²⁴¹ Invasion of one’s body against one’s will is an onslaught that tort law permits an individual to repel and resist.²⁴² Because the privilege of self-defense defeats a claim of battery brought by

237. SHRAGE, *supra* note 153, at 70. *But see* McDONAGH, *supra* note 18, at 79 (“If the intention in the termination of a late pregnancy is to preserve the life of the fetus, this is not, strictly speaking, an abortion at all.”).

238. See Stephen G. Gilles, *Does the Right to Elective Abortion Include the Right to Ensure the Death of the Fetus?*, 49 U. RICH. L. REV. 1009, 1011 (2015) (envisioning artificial wombs). Remaining pregnant, giving birth, and then relinquishing the neonate for adoption strikes some observers as a reasonable alternative to abortion for a pregnant individual who does not want to be the mother of a new child. See *Henderson v. Stalder*, 287 F.3d 374, 377 (5th Cir. 2002) (reviewing a Louisiana statute that created an optional license plate slogan, “Choose Life,” and sent its revenue to nonprofits that offer adoption-not-abortion guidance to pregnant clients). It has not proved convenient for relinquishers. See JOE SOLL & KAREN WILSON BUTERBAUGH, *ADOPTION HEALING: A PATH TO RECOVERY FOR MOTHERS WHO LOST CHILDREN TO ADOPTION* (2003) (describing emotional distress); J. A. Aloï, *Nursing the Disenfranchised: Women Who Have Relinquished an Infant for Adoption*, 16 J. PSYCHIATRIC & MENTAL HEALTH NURSING 27, 29 (2009) (observing that severe grief is compounded by both the absence of social recognition of any loss and a belief that the birth mother lost her baby voluntarily, through selfishness).

239. See Regan, *supra* note 33, at 1575 (arguing that although “removing the fetus in a way which renders it inviable” looks like an act, “it ought to be viewed as an omission, or as part of a course of conduct amounting in overall effect to an omission,” because “[i]t is the only way, in the real world, for a pregnant woman to discontinue the burdensome course of aid to the fetus”).

240. See Alex Dzioba, *No Defense for Self-Defense: Determining Whether Courts Should Order Insurers to Represent Insureds Who Have Acted in Self-Defense*, 82 FORDHAM L. REV. 205, 223 (2013).

241. Tort does not recognize excuses, only justifications. John C.P. Goldberg, *Inexcusable Wrongs*, 103 CALIF. L. REV. 467, 485 (2015).

242. Dzioba, *supra* note 240, at 223 (citing cases).

or on behalf of the terminated Zef, any obligation that a host might have to remain pregnant against her will, thereby rendering benevolence to an entity she may regard as an intruder, cannot be found in the common law of torts.

The common law of property maintains the same posture as tort when deeming human bio-matter amenable to harvest from corpses. We have considered how the common law declines to help a desperately ill person when an incursion into the body of another human being—something trivial in comparison to the hardships of unwanted pregnancy, parturition, and motherhood—would give the ill person her only chance to live.²⁴³ The same disinclination appears after death in the common law's refusal to recognize property rights in a human corpse.²⁴⁴ No property right means nobody has authority to transfer any part of a cadaver to a buyer or donee.²⁴⁵ Persons who want to use the organs or fluids of a dead body are out of luck unless their legislature anticipated their need in advance. Why the remains of a deceased individual may not be exploited to help the living is not obvious: after all, if not put to use the organs will rot.²⁴⁶ The common law says let them rot unless their late proprietor consented to their removal. In its rules about property as well as its rules about torts, it rates freedom to control one's body higher than the possibility of gain to families or communities, including the preservation of beloved human life.

Consistent with this doctrinal posture, unjust enrichment complements the tort side of the common law defense of abortion by recognizing wrongful gain as well as wrongful loss. Both of these consequences exist when a pregnancy is unwanted. When present against the host's will, the Zef receives unjust enrichment, or what is "materially identical" to the "payment of a non-existent debt."²⁴⁷ Just as the common law provides that a host need not render costly

243. See *supra* Part III.B.

244. See Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L. 57, 58 (1989); Looper-Friedman, *supra* note 29, at 276.

245. Hansmann, *supra* note 244, at 58.

246. Christopher Robertson, *Framing the Organ System: Altruism or Cooperation?*, 4 AM. J. BIOETHICS 46, 47 (2004).

247. PETER BIRKS, *UNJUST ENRICHMENT* 3 (2d ed. 2005).

beneficence to a Zef, it also condemns the receipt of benefits obtained by an unwelcome invader. Because the Zef had no entitlement to the beneficial conditions it took, objection to the exploitative taking by the host is enough to render this enrichment unjust. Lack of a remedy to recoup the gain of the invasion does not make this wrong right.

IV. HOW COMMON LAW FUNDAMENTALS OF THE RIGHT TO ABORTION FELL FROM VIEW: A SHORT POLITICAL HISTORY

Social conditions, which always influence how rules of law are read and applied, have impeded understanding of common law rights related to the termination of pregnancy. The common law has consistently had no trouble recognizing entitlements to repel an intruder with deadly force and to withhold favors or benevolence. It has been less able to perceive a pregnant individual as a holder of these common law rights.

This inability is manifest in academic writing that criticizes or rejects the right to terminate pregnancy. When one law review article contended that this legal entitlement cannot exist because “[n]o person’s freedom extends as far as killing or harming another person,”²⁴⁸ the author may have believed what he wrote (and his cite-checkers let it pass), even though the most glancing familiarity with the law—and not only American common law: one could limit one’s source to statutory law, international law, religious law, customary law, or the law of any other nation-state—leads one to numerous examples of perfectly legal killing and hurting.²⁴⁹ Michael Stokes Paulsen had to overlook the same sources when he wrote that *Roe v. Wade*, by granting a “private license to some human beings to kill other human beings,”

248. Dwight G. Duncan, *When is a Human Being Not a Legal Person?: Lethal Ramifications at the Beginning of Life*, 8 U. ST. THOMAS J. L. & PUB. POL’Y 82, 85 (2013).

249. See, e.g., PAMELA BARMASH, *HOMICIDE IN THE BIBLICAL WORLD* 152, 206 (2005) (noting approval of self-defense); PIETER SPIERENBURG, *A HISTORY OF MURDER: PERSONAL VIOLENCE IN EUROPE FROM THE MIDDLE AGES TO THE PRESENT* 65-142 (2008) (describing privileges and tolerance for male killers).

installed “a moral atrocity”²⁵⁰ rather than business as usual. The error extends beyond the academy.²⁵¹

The common law frees, and always has freed, individuals to terminate their pregnancies, albeit through noninterference and inaction rather than overt affirmation of a right.²⁵² Historical circumstances have made this liberty hard to observe. One crucial such fact, in place for millennia: the absence of safe and effective termination technology.

A. *Old Law, New Choice: Abortion Technology Moves Forward*

Safety and effectiveness are fundamental not only to abortion but to any potential solution to a problem that an individual can choose. These two values pertain especially to an intervention that, like this one, addresses bodily integrity and health.²⁵³ “Safe” in this context means not dangerous to the individual’s life and well-being. “Effective” means that the abortion must eliminate the Zef completely from her body.

As was noted, human beings have for centuries desired abortions.²⁵⁴ In this quest they have faced a formidable

250. Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1021 (2003).

251. For example, Katha Pollitt saw a sign at the 2013 March for Life in Washington, DC: “BABIES GESTATING IN UTERO MAY ENGAGE IN SELF-DEFENSE AND STAND THEIR GROUND CUS UTERI ARE THEIR RIGHTFUL HOMES FOR 9 MONTHS.” POLLITT, *supra* note 52, at 155. This senseless assertion—who ever stopped “babies gestating in utero” from “stand[ing] their ground” if they want to try?—implicitly denies the pregnant person her right to self-defense against an unwelcome occupant by recognizing a privilege for invaders rather than the person who experiences an invasion. Only if a person lacks common law rights can the interior of her body be someone else’s “rightful home[.]” over her objection. *See id.*

252. Justice Blackmun said as much in his review of abortion in the common law. *See Roe v. Wade*, 410 U.S. 113, 116, 135 & n.26 (1973) (noting the view of “some scholars” that the common law was never applied to abortion, and suggesting that anti-abortion pronouncements by Sir Edward Coke about common law provisions “may have intentionally misstated the law”).

253. *See* Anita Bernstein, *Enhancing Drug Effectiveness and Efficacy Through Personal Injury Litigation*, 15 J.L. & POL’Y 1051, 1069, 1071, 1099 (2007).

254. *See supra* note 3 and accompanying text.

barrier: Zefs, like other life forms, cling to life when threatened.²⁵⁵ Safety and effectiveness again. Against this struggle, abortion technologies had to be powerful enough to eliminate the Zef (i.e. effective) yet gentle (or safe) enough to preserve the life of the pregnant individual. In his study of abortion history, Joseph Dellapenna argues persuasively that this combination did not come together until the nineteenth century.²⁵⁶

Would-be terminators of pregnancy did have pre-modern techniques to try. Dellapenna divides these methods into “injury,” or external manipulation of the pregnant woman’s body in a way designed to force miscarriage; “ingestion,” the insertion of pregnancy-destroying substances into the mouth or vagina; and “intrusion,” the pushing of an object or implement through the cervix into the uterus.²⁵⁷ All three categories endangered the pregnant woman. Methods of the “injury” category caused certain physical trauma.²⁵⁸ Ingestion methods were almost certainly less effective—and also less safe, because of risks of overdose.²⁵⁹

Intrusion techniques, featuring the insertion of probes into the vagina, have the sparsest historical record of the

255. For a satirical expression of this point, see *New ‘Anti-Abortion Pill’ Kills Mother, Leaves Fetus Alive*, THE ONION (May 10, 2006), <http://www.theonion.com/article/new-anti-abortion-pill-kills-mother-leaves-fetus-a-1955> (reporting the invention of a drug called UR-86, “a ‘safe and effective method’ for terminating pregnant women while leaving their unborn children unharmed”).

256. DELLAPENNA, *supra* note 3, at 333. Historian John Riddle notes a contrary view, arguing that until the late Middle Ages, lay people knew how to terminate pregnancy safely and effectively. See JOHN M. RIDDLE, *CONTRACEPTION AND ABORTION FROM THE ANCIENT WORLD TO THE RENAISSANCE* 7-10 (1992). He engaged a pharmacologist from the Boston University School of Medicine to review the abortifacient properties of the herbs, unguents, and juices he read about. DELLAPENNA, *supra* note 3, at 23. Riddle published his findings first, giving Dellapenna a chance to refute them. See *id.* at 23-24. When a science journalist reviewed the dispute, she noted the lack of evidence that any of these methods Riddle located could work. See Kolata, *supra* note 3. Kolata did report that experts found Riddle’s hypothesis about pre-modern contraception and abortion “tantalizing.” *Id.* at C10.

257. DELLAPENNA, *supra* note 3, at 32-56.

258. *Id.* at 32.

259. *Id.* at 37.

three. Though dangerous because of ignorance about reproductive anatomy and severe risks of infection, these methods did launch the modern era wherein a rational individual would consider terminating her pregnancy.²⁶⁰ Shortly before World War I, abortion by dilatation and curettage became available.²⁶¹ This technique, whose applications go beyond elective abortion, involves opening the cervix and scraping out the contents of the uterus.²⁶² For dilatation and curettage to function safely and effectively, patients and providers needed complementary technologies, especially anesthesia and antibiotics, which evolved through the middle of the twentieth century and continue to change.²⁶³ The intrusion approach to abortion moved forward with the development of vacuum aspiration, today the most common method of terminating pregnancy in the first trimester,²⁶⁴ and technologies of introducing fluids like saline or prostaglandin solutions into the uterus.²⁶⁵

Safe and effective ingestion technology also arrived late in the twentieth century with the emergence of mifepristone or RU-486, the “abortion pill.”²⁶⁶ In the United States the abortion pill combines ingestion with intrusion, as patients return to clinical settings for (intrusive) follow-up examination.²⁶⁷ Ingestion takes time. Merely swallowing an abortion pill does not effect an instant termination.

260. *Id.* at 51-53.

261. *Id.* at 333.

262. Carol A. Turkington, *Dilatation and Curettage*, in 2 GALE ENCYCLOPEDIA OF MEDICINE 1183, 1183 (3d ed. 2006).

263. DELLAPENNA, *supra* note 3, at 333-34.

264. Obos Abortion Contributors, *Aspiration Abortion*, OUR BODIES OURSELVES (Apr. 2, 2014), <http://www.ourbodiesourselves.org/health-info/vacuum-aspiration-abortion>.

265. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 75-76 (1976) (ruling on the constitutionality of a ban on saline amniocentesis as an abortion technology).

266. JONATHAN EIG, *THE BIRTH OF THE PILL: HOW FOUR CRUSADERS REINVENTED SEX AND LAUNCHED A REVOLUTION* 314 (2014) (noting release of RU-486 in France in 1988 and 2000 in the United States); Winikoff et al., *supra* note 36.

267. Winikoff et al., *supra* note 36, at 1304.

Several conclusions may be drawn from this review of abortion technology. Foremost among them for our purposes: abortion as a choice for a pregnant woman is historically new. It arrived not before 150 years ago, and for most of the United States population only in the twentieth century. Earlier times were the age of no choice.

Speaking for myself, I acknowledge having trouble letting go of the belief that in days of old, persons seeking to end pregnancy received efficacious therapies from an unlettered yet sage female network. If a lengthy footnote by Joseph Dellapenna is any guide, other writers have also been cherishing this notion.²⁶⁸ Yet there is little reason to think that abortion was until modern times an option for someone who intended to survive the experience. Knowledge of female reproductive anatomy, anesthetics, antibiotics, analgesics, clean running water, and dissemination of written data have been essential developments.²⁶⁹

If the best available abortion technology was for most of human history dangerous and ineffective, then legal prohibitions of abortion of the past make sense as harm reduction. Most termination-choosers wish to remain alive and most societies oppose behaviors and substances that lack therapeutic benefit and bring a high risk of messy, unpredictable, and painful death. In this light, to swear “by Apollo the physician, and Aesculapius, and Health, and All-heal, and all the gods and goddesses” that one will not “give

268. DELLAPENNA, *supra* note 3, at 18 n.87 (citing thirty-three books, twelve articles and book chapters, and two Supreme Court amicus briefs as manifesting the proposition “that women in the past controlled abortion and performed the procedure routinely, safely, and easily”); *see also* REAGAN, *supra* note 7, at 9 (noting ancient uses of juniper and other substances as abortifacients, but not reporting evidence that anything worked). If pregnant women had had access to an easy fix—a convenient, safe, cheap, effective way to end their condition without ending their own lives—then this lost technology would please a large constituency today, when more than a third of the world’s people live under national governments that ban or severely restrict abortion and access grows increasingly difficult in the United States as well. *See* Emily Bazelon, *The Post-Clinic Abortion*, N.Y. TIMES, Aug. 31, 2014, (Magazine), at 22-23.

269. *See* DELLAPENNA, *supra* note 3, at 333-35; *see also* Kolata, *supra* note 3 (quoting a historian who found that gynecological texts from the medieval period translated from Latin into the vernacular “suppresse[d] the contraceptive information,” suggesting that “women were not being trusted”).

to a woman a pessary to produce abortion,” as the all-male physicians of classical Greece may have sworn,²⁷⁰ becomes benevolent rather than oppressive—men promising to refrain from giving a woman something very likely to hurt her and very unlikely to meet her needs.

Safety-and-effectiveness also explains the hostility to abortion professed by nineteenth century feminist leaders like Susan B. Anthony and Elizabeth Cady Stanton, a posture tendentiously remembered by anti-abortion activists who claim that abortion must be bad for women if even the legendary feminists of yore frowned on it.²⁷¹ What these leaders frowned on, of course, was oppression of women. They took particular interest in the oppression of unwanted motherhood. They cherished birth control, with many arguing “that wives had the right to unilaterally choose when to engage in sexual relations with their husband, abstaining periodically or abstaining permanently unless procreation was desired.”²⁷² When feminists were opposing abortion back in the middle of the nineteenth century, the best possible safeguard against unwanted motherhood was an entitlement to keep semen away from one’s vagina. Iffy contraceptive technologies of the day took second place. From the perspective of a woman who valued the integrity of her body, abortion ranked lower than almost anything.

In hindsight, back in the unsafe-and-ineffective era the common law did all it could to support the bodily integrity of pregnant women. Regardless of who is right in the debate over where common law judges stood on abortion as a crime,²⁷³ unquestionably the common law confined whatever punishments it doled out to third parties. No application of the common law of crimes ever punished a woman who

270. Hippocrates, *The Oath*, INTERNET CLASSICS ARCHIVE, <http://classics.mit.edu/Hippocrates/hippooath.html> (last visited Sept. 20, 2015).

271. See Tracy A. Thomas, *Misappropriating Women’s History in the Law and Politics of Abortion*, 36 SEATTLE U. L. REV. 1, 3-4, 27 (2012).

272. *Id.* at 29 (citing historian Linda Gordon).

273. Compare JOHN KEOWN, *ABORTION, DOCTORS AND THE LAW: SOME ASPECTS OF THE LEGAL REGULATION OF ABORTION IN ENGLAND FROM 1830 TO 1982* 3-7 (1988) (concluding that the common law prohibited abortion, at least after quickening), with Means, *supra* note 24 (describing abortion as a “common-law liberty”).

sought to rid herself of her own pregnancy;²⁷⁴ nineteenth century maneuvers to make women culpable for abortions they chose for themselves had to change the common law.²⁷⁵ Moreover, by providing that pregnancy starts with quickening²⁷⁶—and not other markers like insemination, a pregnant-looking silhouette, or the visible onset of labor, all of which would give powers and opportunities to non-pregnant persons—common law regulation of abortion put foremost that which the pregnant woman felt, thought, and believed about herself.²⁷⁷

B. *Patriarchy*

Defined by its leading historian as the institutionalization of male dominance over women in society,²⁷⁸ patriarchy has shaped the law in numerous ways. One dramatic instance of this effect found in the common law was the rise of coverture as a legal disability. Coverture, as restated by its great spokesman William Blackstone, imposed an array of detriments on married women with respect to their personal property.²⁷⁹ By her entry into marriage a wife forfeited most of her existence as a legal

274. The seventeenth century *Regina v. Webb* comes closest. *Webb* reported, in French, the indictment of Margaret Webb, who “once ate a certain poison called ‘ratsbane’ with the intention of getting rid of and destroying the child in the womb of the said Margaret” and “then and there got rid of and destroyed the same child in her womb.” DELLAPENNA, *supra* note 3, at 193 (citing to a translation of the case). Margaret Webb was never punished for her willful ingesting of ratsbane; she was promptly pardoned by the general pardon that covered offenses committed before August 7, 1601. *Id.* at 194. The general pardon of 1601 did not extend to murder, *see id.*, which meant that whatever crime Webb was, or could have been, found guilty of was not understood to be murder.

275. DELLAPENNA, *supra* note 3, at 298 & n.295 (citing eighteen U.S. statutes including New York’s misdemeanor, later elevated to a felony).

276. Karen M. Weiler & Katherine Catton, *The Unborn Child in Canadian Law*, 14 OSGOODE HALL L.J. 643, 645 (1976).

277. REAGAN, *supra* note 7, at 10 (describing legal reliance on quickening as “implicitly” respectful of women’s autonomy).

278. GERDA LERNER, *THE CREATION OF PATRIARCHY* app. 238-39 (1986) (referencing an appendix called Definitions).

279. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442.

person, Blackstone wrote.²⁸⁰ She lived under what might be called “husbandry” in the sense of management and control²⁸¹:

By marriage, the husband and wife are one person in law[]; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and *cover*, she performs every thing[.] . . . [T]hough our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void.²⁸²

From there a married woman could not make a contract, Blackstone added, and could neither sue nor be sued for personal injury.²⁸³ Later writers noted other consequences of coverture, including a rule that a married woman could control neither the property she brought into the marriage nor her wage earnings acquired during the marriage.²⁸⁴ A husband who wanted to sell her property to pay off his debts could do so without her consent.²⁸⁵

The Blackstone synthesis, published in 1765, illustrates how convention and social power affect the interpretation and functions of the common law. Blackstone read his English legal history tendentiously.²⁸⁶ Writing as a “new Tory” and a commoner on the rise in a conservative milieu, he left out of his *Commentaries on the Laws of England* powers that women, married and unmarried alike, had enjoyed without interference during the common law’s

280. *Id.*

281. *See supra* note 15.

282. 1 WILLIAM BLACKSTONE, COMMENTARIES *442-44.

283. *Id.* at *442.

284. Claudia Zaher, *When a Woman’s Marital Status Determined Her Legal Status: A Research Guide on the Common Law Doctrine of Coverture*, 94 L. LIBR. J. 459, 460-61 (2002).

285. *Id.*

286. *See* MARY RITTER BEARD, MAKING WOMEN’S HISTORY: THE ESSENTIAL MARY RITTER BEARD 181 (Ann J. Lane ed., Feminist Press 2000) (1977).

heyday.²⁸⁷ His big readership in Britain and the new United States, finding the *Commentaries* “easy reading” and “convincing,”²⁸⁸ drew inferences about the past that they reproduced going forward.

When the relatively nuanced development that Blackstone found in the common law hardened into prescriptions that added new controls over women, patriarchy proceeded in a familiar path: innovations that strengthened institutional dominance came in as they often do, gradually rather than brutally.²⁸⁹ Neither Blackstone nor his audience had an agenda to take rights or privileges away from anyone, just as in the war-torn second millennium B.C., a woman and a man would have found it convenient rather than oppressive to share in the surpluses of plow agriculture by living together under the protection and control of the man.²⁹⁰ Limits on sexual freedom for a woman in the early agrarian household, born from new learning about how to breed livestock, set a base for more comprehensive control of all her freedoms, just as Blackstone’s collection of detriments found in coverture went on to beget more detriments.

Substantive and procedural deprivations within patriarchy built on one another. By denying married women the opportunity to hold property in their own name and applying the property rubric to a wealth of good things, coverture took wealth from women. By removing the opportunity for women to litigate in their own right, coverture alienated women from the machinery or procedures of common law courts. Withdrawal and exclusion

287. *See id.* at 181-83. One well-documented example of what did not interest Blackstone is the category of feme sole trader, which permitted a married woman abandoned by her husband to petition for permission to jettison the constraints of coverture. *See* Yvonne Boyer, *First Nations Women’s Contributions to Culture and Community through Canadian Law*, in *RESTORING THE BALANCE: FIRST NATIONS WOMEN, COMMUNITY, AND CULTURE* 69, 73, 89 n.21 (Gail Guthrie Valaskakis et al. eds., 2009).

288. BEARD, *supra* note 286, at 181.

289. *See* ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 70 (3d ed. 2014).

290. LERNER, *supra* note 278, at 211 (describing how patriarchal dominance became the norm in Western civilization).

altered the substance of the common law; deteriorations made shortfalls of procedure look normal. Rights-consciousness necessarily dwindled among women and male domination in law consequently had to increase.

Thus when a nineteenth century denial of a law license for no reason other than the applicant's gender made its way to the Supreme Court, some judges who ruled against the excluded lawyer sided against her on the procedure-ish ground that as a married woman she could not make a contract and all lawyers need contracts to do their work, whereas other judges reached the same result by concluding that the Creator did not intend for women to practice law in His dominion, a substantive judgment.²⁹¹ Upholding the denial of a law license on the sole ground that the lawyer was a woman sent a message of rejection and exclusion to all women. Restrictions that derived from coverture thus replicated themselves as they expanded the swath of deprivation. Being cut off from the courts prevented women from asserting abortion-related interests as their own legal entitlements and rights.

In a parallel juridical universe of equal access for all genders, the decisions that individuals wanted to make about their pregnancies could have been expressed in terms of self-defense, property, unjust enrichment, no duty to rescue, and other concepts that entered the common law through the writs and rights that venturesome men conceived and installed. A woman might find invasion of her body and uncompensated state-compelled beneficence just as odious as a man does—for all we know, even more.²⁹² Because the common law disabled most women from owning and managing property while insisting that persons needed law-based power to hold and manage property as a condition of participation in the system, however, the right of a woman to apply deadly force to an entity located inside her and to refuse costly sacrifice could not flourish in judicial decisions. Nobody with power to shape the common law was vulnerable to invasion by a Zef. If men and women had held access to the

291. *Bradwell v. Illinois*, 83 U.S. 130, 130-33 (1872).

292. Cf. James C. Cox & Cary A. Deck, *When are Women More Generous than Men?*, 44 *ECON. INQUIRY* 587, 588 (2006) (reporting a study showing that women are more sensitive than men to "the costs of generosity").

common law on the same terms, then judges could have encountered this Article's thesis against a backdrop of wide-ranging, familiar common law liberties.

This backdrop might have developed differently if common law judges knew from the start that the freedoms they recognized applied to everyone. Condoned self-regard is a harsh ideology. The pitiless common law—featuring family members denied bone marrow and left to die, fleeing felons shot by persons whose lives they did not threaten, refusals to grant specific performance of promises—might have looked too mean and severe if women and other subordinated groups were entitled to dole out its deprivations.²⁹³ Condoned self-regard would have been mitigated in another way if women inherently feel connected to and responsible for other persons, as scholars have argued,²⁹⁴ and as participants added their sense of connection to common law doctrine.

We who assess the modern common law cannot know what a different history would have yielded. We inherited the jurisprudence we have. The conclusion for present purposes is straightforward: when they admitted women into this interlocking system of the common law, extending them formal equality,²⁹⁵ courts and legislatures recognized entitlements about invasion and indifference that were always there and that remain alive.

C. *Individualism*

In a pattern related to but distinct from the effects of patriarchy, individualism also obscured the common law

293. See generally Mary Anne Franks, *Real Men Advance, Real Women Retreat: Stand Your Ground, Battered Women's Syndrome, and Violence as Male Privilege*, 68 U. MIAMI L. REV. 1099 (2014) (discussing bias against minorities as well as women).

294. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 34-35 (1988); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 12-19 (1988); see also Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181, 1191-92 (1991) (claiming that "women active in the pro-life movement most commonly see their efforts as 'a defense of female nurturance against male self-interest'" (quoting feminist anthropologist Faye Ginsburg)).

295. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 24-26 (1999) (describing the entry of formal equality into American law).

right to terminate a pregnancy. "Individualism" as used here means a perspective that seeks to posit out group-based markers that help to constitute identity. Group memberships tell us where we belong, what our communications express, and whom we implicate when we act.

A disinclination to consider parties and litigants as representatives of larger communities or cohorts pervades all of the common law. Individualism takes form in bright-line common law rules—for example, the rejection of group defamation as a cause of action—and also in tenets that subordinate contrary interests, for example the common law ideal of testamentary freedom for someone who possesses wealth. By contrast, legal concepts that identify groups with reference to distributive justice owed—hate speech, hate crimes, intergenerational obligation (not just the environmental sort, which rests on newer awarenesses, but even the civil-law idea that ancestors and descendants share property), social or communal title to land, and group-based remedies like reparations for wrongs like slavery—have always been, and remain, foreign to the common law.

Like every legal system, however, the common law has always classified individuals as members of groups.²⁹⁶ And so coverture, for example, enforced generalizations about married men and married women. Estates in land passed with reference to categories of individuals. The common law came up with labels for groups, some of which survive, to signify hierarchies of privilege.²⁹⁷

Individualism in the common law might, at this first blush, look like crude conservatism overlaid by hypocrisy: whenever recognition of a group would mean the transfer of wealth or power, or at least a challenge to existing distributions, the common law keeps its distance and insists on regarding each person as an individual. No common law

296. The aggregation of persons into groups lessens the danger of arbitrariness in the exercise of state power. The rule of law demands that individuals be treated with reference to the categories they represent.

297. Favored labels in its jurisprudence include invitee, holder in due course, landlord, and land possessor. Disfavored common law statuses include trespasser, bastard, and gratuitous bailee. Other roles—mortgagee, licensee, grantee, fellow servant—advert to detriments and powers that vary depending on what members of other groups want or assert.

crime of hate speech, no reparations, no group defamation. But when recognition of a group affirms the status quo ante—demeaning children who were born out of wedlock, keeping land visitors in their place—then the common law embraces aggregation.

Conservatism-and-hypocrisy may indeed explain the common law's selective acceptance of both individualism and aggregation, but in accounting for how the common law right to terminate pregnancy fell away from view, I would draw a narrower inference: individualism, like the gender-based restrictions noted above, functions in the common law as both cause and effect. Whether on purpose or by happenstance, it begat more of itself. Lawyers, judges, jurors, and scholar-synthesizers like Blackstone had several traits in common: racial identity, apparent sexual orientation, and gender. Their religion, class, and wealth levels were a bit less homogenous but not varied enough to stray much from a prosperous Protestant center.

Variety in these ranks would have altered the common law. For example, if children could have spoken for themselves, then themes of dependency and shared responsibility would have become more overt in its doctrines.²⁹⁸ Diversity in class and wealth would almost certainly have altered the common law of land ownership and use, and might have expanded the category of property to enlarge rights related to employment, education, or housing.²⁹⁹ Homogeneity of the persons entitled to hold power and make decisions meant that the common law did not have to confront group memberships that might have challenged its procedures or its substantive commitments.

Once it focused on group membership just enough to diminish persons based on conditions they had acquired at birth or by social assignment, the common law could proceed as if membership in an aggregation derives entirely from volunteering. Put up your real property as collateral and you

298. See BARBARA BENNETT WOODHOUSE, *HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE* 6-8 (2008) (noting the omission).

299. See Charles A. Reich, *The New Property*, 73 *YALE L.J.* 733, 773 (1964) (arguing that this expansion of property would be consistent with common law antecedents).

become a mortgagor. Assume a position of trust and you're a fiduciary. The common law did not have to think about socially constraining group memberships like race, gender, age, wealth, or religion—conditions that thwarted its cherished liberties altogether—because its principals did not have to think about them. Resembling the self-replication of coverture,³⁰⁰ a blinkered exclusion generated more exclusion.

A legal system that develops this way can attain great insights and results, but it will fall short of its own ideals whenever a problem amenable to its regulation is experienced disproportionately by members of an excluded group. Insiders complain effectively when they do not get their due; institutions have trouble hearing the same protests from persons understood to have little or no voice. And so the common law, evolving to meet the needs of an ever-larger population in new locations, did not readily extend the benefits of doctrine, including the right to terminate one's pregnancy, to persons otherwise qualified for inclusion.

D. *The Parallel to Slavery*

Women captured in combat, accompanied by their children, became the first slaves of human history.³⁰¹ Young and predominantly female populations could be installed smoothly into the patriarchal household because in their appearance and social roles they resembled the wives and offspring who already lived there. Patriarchy as a background condition helped enable slavery to take root.

The nineteenth century struggle against chattel slavery inspired eloquent linkages to coverture. Unjust deprivations of fundamental rights—to vote, sue, own property, enter into contracts, and choose one's employer and employment—connected otherwise different American experiences.³⁰² Suffragist Angelina Grimké, acknowledging what current observers might call her privilege, wrote that as a woman she

300. See *supra* notes 289-93 and accompanying text.

301. LERNER, *supra* note 278, at 212-16.

302. See generally AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998).

was “compelled to drag the chain and wear the collar on my struggling *spirit* as truly as the poor slave was on his body.”³⁰³ Her adversaries agreed about the resemblance but deemed it a good rather than a bad thing: both slavery and patriarchy elevated a male lord to rule over his home and holdings. To these defenders, both religion and secular government recognized the necessity of obedience and command in both slavery and marriage.³⁰⁴

In the contemporary abortion debate, both proponents and opponents of abortion rights have enlisted American slavery to support their polar-opposite views. To proponents of the right to terminate, the Thirteenth Amendment ban on forced work includes the work of compulsory gestation and childbearing.³⁰⁵ Opponents of abortion rights for their part depict the unborn in utero as a counterpart to the slave Dred Scott, classified by the antebellum Supreme Court as among “beings of an inferior order” who were “so far inferior, that they had no rights which the white man was bound to respect.”³⁰⁶ I make a narrower claim here.

Slavery presents an example—multiple examples, it turns out—of how the common law failed to live by its own doctrines. Before emancipation, judges had occasions to consider numerous questions of criminal and civil responsibility that exposed the incompatibility of the common law with the demands of law-backed enslavement. The entire crime of homicide, for example, becomes incoherent if a victim is deemed a person in some legal respects but not in others.³⁰⁷ The privilege to beat one’s slave for no reason may or may not include the privilege to kill

303. Letter from Angelina Grimké to Sarah M. Douglass (Feb. 25, 1838), in 2 LETTERS OF THEODORE DWIGHT WELD, ANGELINA GRIMKÉ WELD, AND SARAH GRIMKÉ 1822–1844, at 572, 574 (Gilbert H. Barnes & Dwight L. Dumond eds., 1965) (1934), quoted in Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641, 1661–62 (2012).

304. Tsesis, *supra* note 303, at 1664.

305. See *supra* note 35 and accompanying text.

306. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1856).

307. See Jenny Bourne Wahl, *Legal Constraints on Slave Masters: The Problem of Social Cost*, 41 AM. J. LEGAL HIST. 1, 7–8, 7 n.22, 8 n.23 (1997) (noting inconsistencies in prosecutions of owners who killed their slaves).

him.³⁰⁸ Other common law crimes also cannot be reconciled with the classification of human beings as chattel. The common law typically makes its duties applicable to all persons uniformly unless their past voluntary conduct obliged them to do more; for slaves alone judges added ad hoc constraints, without explanation.³⁰⁹

Tort proved equally confounded by the contradictions between slavery and the common law. Just as slavery made the common law crimes of assault, battery, rape, kidnapping and others harder to punish coherently, the status of enslavement is necessarily "bursting with an infinite number of potential torts" not limited to assault, battery, and false imprisonment.³¹⁰ When masters leased their slaves out to hirers who paid these masters for bondage labor, could a slave and a free man work together in the common law's "fellow servant" relationship?³¹¹ As a scholar of tort law concluded, slavery and law "can exist only in a space in which the other is absent."³¹²

This incompatibility pervades the common law. Contract law, for example, forbids the enforcement of any bargain where one person relinquishes all his rights to another.³¹³ A slave had no civil remedy for this loss, but in principle the common law condemned it. As for property, the classification of human beings as chattel challenged the antebellum common law to follow the logic of this assertion.³¹⁴ One

308. Andrew Fede, *Toward a Solution of the Slave Law Dilemma: A Critique of Tushnet's 'The American Law of Slavery,'* 2 LAW & HIST. REV. 301, 313 (1984).

309. For example, the crime of "insolence" to whites." *Id.* at 313.

310. Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209, 1216-17 (2004).

311. See *Ponton v. Wilmington & Weldon R.R.*, 51 N.C. (6 Jones) 245, 246-47 (1858) (ruling yes). One might also wonder whether physical harm to the slave experienced at a for-hire worksite constituted personal or economic injury.

312. Hylton, *supra* note 310, at 1219.

313. See EDLIE L. WONG, NEITHER FUGITIVE NOR FREE 41 (2009); see also *supra* notes 134-36 and accompanying text.

314. For example, the colonial legislature in Virginia, aware that English common law provided that "a child, even one born out of wedlock, followed the status of the father," Paul Finkelman, *Slavery in the United States: Persons or Property?*, in THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO

property-related complication arose whenever slave owners tried manumission, the freeing of slaves by testamentary instrument. Courts in states near the Union border tended to uphold this provision in a will, but further south, where industrial businesses had less interest in freed slaves as workers, this facet of testamentary freedom was too disruptive to honor.³¹⁵ Then there was the common law of evidence, regularly ignored by judges when a master wished to testify that his slave, on trial for a crime, had an alibi.³¹⁶ On and on.

That the common law and slavery do not coherently coexist is clear, I hope: less obvious is the affirmative obstacle that the common law posed to slavery. “[T]he common law vested all people with certain legal rights, so the first step in the accommodation process” between English common law and New World slavery “was to legally ‘dehumanize’ slaves and thereby strip them of [their] common law civil rights.”³¹⁷ The common law went along with this accommodation, as I argue pervasively in this Article, because it was blinkered by skewed membership in its decision-making ranks. Misunderstandings about who counts obscured what it did and failed to do.³¹⁸

My “parallel to slavery,” then, is not the more familiar comparison of slavery to abortion, nor of slavery to forced childbearing. Instead slavery functions here as a precedent for reanimation of the common law. The instance of slavery demonstrates how the common law neglected its principles even though the principles were intelligible and unchallenged. This parallel helps retrieve the abortion right furnished in the common law because it indicates that even though the common law does not always honor the

THE CONTEMPORARY 105, 111 (Jean Allain ed., 2012), had to import a Roman law about livestock to supersede the common law when it wanted to classify the child of a free father and a slave mother as a slave. *Id.*

315. See Fede, *supra* note 308, at 316.

316. *Id.* at 317-18. The common law rule provided that an interest in the outcome of the dispute rendered a witness incompetent. *Id.* at 317.

317. *Id.* at 312.

318. See *supra* Part II.B.

“elementary human rights to personal integrity”³¹⁹ that it stands for, these commitments can be rehabilitated. Emancipation of American slaves restored to human beings the common law rights they had held all along but that had lain out of view under the cloud or tarpaulin of subordination.³²⁰ Recognizing the common law right to terminate one’s pregnancy would enable a similar restoration.

CONCLUSION

Individuals hold—and as long as the common law has been in place, they have always held—a legal right to terminate their pregnancies. Their desire not to be pregnant is the only reason they need to exercise this common law right. The entitlement to end one’s pregnancy before the birth of a child existed in the law of crimes, torts, property, contracts, and equity, read separately and together, long before the United States Supreme Court found it in the Constitution.³²¹

As a state-imposed detriment, prohibition of abortion is a burden that the law may not force on an individual unless she earned adversity via her prior voluntary conduct.³²² Nothing about being pregnant against one’s will demonstrates this desert. Common law doctrines go further in support of a right to terminate. They unite around

319. Fede, *supra* note 308, at 309.

320. The great abolitionist Frederick Douglass provided an example when he wrote about the common law precept of self-defense twisted and mocked by antebellum law. Justification operated, but in reverse: “Should a slave, when assaulted, but raise his hand in self-defense, the white assaulting party is fully justified by southern, or Maryland, public opinion, in shooting the slave down.” FREDERICK DOUGLASS, *MY BONDAGE AND MY FREEDOM* 82 (William L. Andrews ed., Illini Books 1987) (1855).

321. I include equity in this roster even though it is distinct from the common law, because equity and law have operated together over centuries in common law legal systems. See Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2086-87 (2001) (noting that although the roots of restitution law lie more in courts of law rather than courts of equity, “restitution and unjust enrichment have often been associated with equity in a broader sense”).

322. See *supra* Part II.

allowing a person to rank herself above everyone else: they teach what this Article has called condoned self-regard. Self-defense, defense of others, defense of property, and “the castle doctrine” maintain that invasion of a person’s body is a wrong that may be fended off. Non-criminal common law fields set a default wherein aid to another person is optional, not mandatory. Thus even if abortion kills a person, which may not be the case,³²³ the common law supports this action at the election of the one who is pregnant. The catchphrase “pro-choice,” an awkward fit with any constitutional right—the Constitution says nothing in its text about choice—aptly describes the common law of abortion.

Volunteering and choice pervade all the common law. Differing here from statutes and administrative regulations, the common law expects rights and entitlements to be asserted by, rather than thrust upon, the persons affected. As individuals we might have a defense in a criminal prosecution or civil action; we could have an affirmative civil claim against another person. We can take these things or leave them. Whenever we decline opportunities that the common law gives us, our entitlement fades to the background. We are free to say no to condoned self-regard. We may also say yes. Unless our liberty has been limited in consequence of our prior voluntary conduct or we fulfill the elements of *actus reus* and *mens rea* when we act,³²⁴ the common law condones our self-regard at all times, including the times that an exploitative life-form grows unwelcome inside us.

323. This Article has proceeded as if the Zef were equivalent to a person because this posture derives from its source material: the common law, understanding rights and wrongs with reference to the interests of an individual, personifies entities, including corporations and the government. See Orin S. Kerr, *How to Read a Legal Opinion: A Guide for New Law Students*, 11 GREEN BAG 2D 51, 52 n.1 (2007) (noting that English case law uses Rex and Regina to name the state as adversary of a criminal defendant); Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 667-68 (2014) (observing that the common law cannot protect biodiversity because of its methodological insistence on “legal personality”). On the compatibility of possible personhood for the Zef with a strong right to terminate, see Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48 (1971).

324. See *supra* Part II (establishing that pregnancy of itself does not qualify for either limitation on freedom).

Doctrines and precepts that inform this Article are familiar, although readers may disagree with parts of them or prefer not to see them applied to abortion. The common law unquestionably does regulate termination-related behaviors that case law and scholarship have covered so well: that is, variations on a theme of pushing up against someone else's uterus. At the same time—and at a deeper level—it also recognizes the actions and agendas of the uterus-possessor herself. It will honor her decisions to reject, expel, decline to help, and, under well-delineated circumstances, even kill. Rights reaching into the interior of our bodies are fundamental to the common law.