

THE NEXT STEP AFTER *ROE*: USING FUNDAMENTAL RIGHTS, EQUAL PROTECTION ANALYSIS TO NULLIFY RESTRICTIVE STATE-LEVEL ABORTION LEGISLATION

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I. WHAT IS TO BE DONE?

On March 6, 2006, South Dakota Governor Mike Rounds signed into law the South Dakota Women's Health and Human Life Protection Act.¹ This event drew a great deal of national attention, due in large part to the language of section 2 of the statute, which stated:

No person may knowingly administer to, prescribe for, or procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being. No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being.²

As attorney Patricia Gray notes, the Act purports to allow an abortion to save the life of the mother, but even in that extremely restricted instance, the state directs that the attending "physician shall make reasonable medical efforts under the circumstances to preserve . . . the life of . . . [the] unborn child."³

On November 7, 2006, South Dakota voters rejected this legislation in a referendum by a margin of 56% to 44%.⁴ However, the specter of such extraordinarily restrictive abortion legislation existing at the state level remains

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¹ Women's Health and Human Life Protection Act, S.D. CODIFIED LAWS §22-17-12 (2006) (repealed by referendum on Nov. 7, 2006).

² § 22-17-8.

³ Patricia Gray, *Controversial South Dakota Abortion Law Overturned by Voters*, HEALTH L. PERSP., Nov. 11, 2006, [http://www.law.uh.edu/healthlaw/perspectives/2006/\(PG\)SDAAbortionBill.pdf](http://www.law.uh.edu/healthlaw/perspectives/2006/(PG)SDAAbortionBill.pdf).

⁴ *Id.*

a serious threat to women's reproductive rights. For many, this threat has been heightened by the recent changes in the composition of the Supreme Court with the retirement of Justice Sandra Day O'Connor and subsequent appointments of Chief Justice John Roberts and Justice Samuel Alito. These changes have fostered worry that if legislation similar to that passed by South Dakota were to survive state-level challenges and face federal review, the current Supreme Court would have no qualms about ruling that such restrictive state-level abortion legislation *is* constitutional, thereby overturning *Roe v. Wade*.⁵

A. *Restrictive State-Level Abortion Legislation*

The question before us, therefore, is what is to be done? What can we do to protect women's reproductive rights in the context of their fundamental right to bodily autonomy and liberty in the wake of overly restrictive state-level abortion regulations that might very well be upheld as constitutional by the current Court?

B. *Adding Equal Protection to Due Process*

As many legal scholars have recommended for decades, the answer to the question of how to strengthen reproductive rights is to add constitutional guarantees under the Equal Protection Clause to the current foundation of abortion rights based upon the Due Process Clause.⁶ There are two models available to invoke equal protection analysis in the context of abortion rights: sex discrimination and fundamental rights.

II. THE SEX DISCRIMINATION MODEL

Many eminent scholars have advocated adding equal protection analysis to due process guarantees to strengthen abortion rights.⁷ They do so by applying

⁵ 410 U.S. 113 (1973); *see, e.g.*, Clare Murphy, *Could This Be the End of Roe v. Wade?*, BBC NEWS, Mar. 6, 2006, <http://news.bbc.co.uk/2/hi/americas/4743118.stm> (forecasting the potential overturning of *Roe v. Wade* by the current Supreme Court and the consequences of such an occurrence).

⁶ *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985); DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Form of Status-Enforcing State Action*, 49 STAN L. REV. 1111 (1997); David H. Gans, Note, *Stereotyping and Difference: Planned Parenthood v. Casey and the Future of Sex Discrimination Law*, 104 YALE L.J. 1875 (1995).

⁷ *See generally* sources cited in *supra* note 6.

the suspect classification model of the Equal Protection Clause to women's right to choose an abortion.⁸ Under this construction, they argue that prohibiting a woman's right to choose an abortion is an unconstitutional form of sex discrimination. As Reva Siegel argues, "state regulation of pregnant women is sex-based action," and, as such, "regulation aimed at pregnant women may not be premised on stereotypical assumptions about the sexes or perpetuate second-class citizenship for women."⁹ This is because, as Siegel notes, equal protection cases based on suspect classification analysis "prohibit the use of law to entrench family roles rooted in separate spheres ideology, not simply because this use of law restricts individual opportunity but also because this use of law enforces group inequality."¹⁰

A. *Abortion Restriction as Unconstitutional Sex Discrimination*

Though there have been disagreements about whether suspect classification analysis based on sex discrimination applies to classifications based on pregnancy, Siegel clearly demonstrates that it does.¹¹ She forcefully and definitively establishes that "an assertedly benign interest in protecting unborn life cannot save an abortion ban from claims of sex discrimination, if government recites woman-protective justifications to secure the statute's enactment."¹² This is because the Equal Protection Clause of the Fourteenth Amendment prohibits "government from pursuing a discriminatory purpose, not only when a discriminatory purpose is the sole purpose for the challenged action, but also when that purpose is a 'motivating factor' for the challenged action."¹³

Therefore, abortion restrictions that *intend* to force women to assume their stereotypical roles as mothers by prohibiting the termination of their pregnancies by means of an abortion violate the Equal Protection Clause.

⁸ See generally sources cited in *supra* note 6.

⁹ Reva B. Siegel, *Siegel, J., concurring*, in *WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION* 63, 72 (Jack M. Balkin ed., 2005); see also Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991 [hereinafter Siegel, *The New Politics of Abortion*]; Reva Siegel & Sarah Blustein, *Mommy Dearest?*, *AM. PROSPECT*, Oct. 2006, at 22; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992).

¹⁰ Siegel, *The New Politics of Abortion*, *supra* note 9, at 5.

¹¹ *Id.* at 7.

¹² *Id.* at 50.

¹³ *Id.*

Although the Constitution allows citizens to embrace freely traditional gender-differentiated roles if they so choose, the Equal Protection Clause does not allow the government to enforce those roles.¹⁴ Thus, even when the regulation of pregnant women is facially neutral, it is nevertheless unconstitutional, as Siegel explains, on Equal Protection grounds if and when “enforcing constitutionally proscribed views of women was a motivating factor in the law’s enactment.”¹⁵

B. Is Sex Discrimination “Safe” as a Suspect Classification?

The use of the suspect classification approach under the sex discrimination prong of the equal protection analysis significantly contributes to the arsenal that is necessary for women to retain their reproductive rights in the wake of increasing state-level legislation that would annul those rights. Many scholars, including Siegel and others, have done much to develop this line of analysis. However, the possibility remains that such efforts will not be enough in the decades to come.

The suspect classification analysis depends upon the *acceptance* of sex discrimination as a suspect classification in the context of the Equal Protection Clause in the first place. However, reliance on that crucial assumption may be jeopardized by the addition of Chief Justice Roberts to the Supreme Court. As the National Women’s Law Center noted in its August 2005 report on the nomination of Chief Justice Roberts to the Court, he has a history of objecting to and ignoring the heightened scrutiny of sex under the Equal Protection Clause.¹⁶ For example, he argued in 1981 that “special constitutional protection should not be given to any classification other than race.”¹⁷ Similarly, others note that memoranda written by Chief Justice Roberts during the Reagan administration asserted that “there should be no ‘heightened scrutiny’ of government laws and policies that discriminate based on sex” because to do so would be “‘an unjustified intrusion into legislative affairs’ and a ‘degree of judicial intrusion not invited by the Constitution.’”¹⁸

¹⁴ *Id.* at 52.

¹⁵ *Id.*

¹⁶ NAT’L WOMEN’S LAW CTR., THE RECORD OF JOHN ROBERTS ON CRITICAL LEGAL RIGHTS FOR WOMEN 14 (2005).

¹⁷ *Id.*

¹⁸ Nomination Watch, Roberts on Sex Discrimination Under the Equal Protection Clause of the Constitution: Out of the Mainstream (Like Robert Bork!), http://www.nominationwatch.org/2005/08/roberts_on_sex_.html (last visited Jan. 27, 2007). Of course, we must remember that when Roberts wrote these memos, he was acting as a representative of the Reagan administration. In addition, we should not assume that

Additional concerns regarding the confirmation of Chief Justice Roberts were raised by Congresswoman Rosa L. DeLauro in a letter to Senators Arlen Specter and Patrick Leahy, former Chair and former Ranking Member, respectively, of the Senate Judiciary Committee:¹⁹

As part of the Reagan Department of Justice, Roberts wrote legal memoranda that objected to giving special scrutiny to sex discrimination under the Equal Protection Clause and he ignored Supreme Court precedent. He also urged the Attorney General not to allow the Department of Justice to intervene in a blatant case of sex discrimination in the Kentucky prison system—in part, because heightened scrutiny would be applied *If Roberts's view of the Equal Protection Clause were to prevail, laws and policies based on stereotypes about women's abilities or role in society would not be struck down.*²⁰

Worries that the current Supreme Court could overturn *Roe* go hand in hand with worries that the current Court could overturn sex discrimination as a suspect classification under the Equal Protection Clause. Of course, this has not yet happened. At present, it remains fruitful to continue to develop this model of equal protection analysis in the context of abortion rights. However, the vulnerability of this approach in light of Chief Justice Roberts's addition to the Court also makes it prudent to pursue the second model of equal protection analysis: fundamental rights.

III. THE FUNDAMENTAL RIGHTS MODEL

A. *No Affirmative Right to State Protection*

It is well recognized that the Supreme Court has not interpreted the Due Process Clause to impose an affirmative obligation on the state to act to protect people from private injury. This interpretation can clearly be seen in *DeShaney*²¹ and *Gonzales*,²² both of which were argued on due process

he would necessarily treat the issue in the same way as a judge as he did in his representative capacity. That being said, however, at least we can assume that Roberts views the elimination of sex discrimination as a suspect classification under equal protection analysis to be a plausible constitutional stance.

¹⁹ Press Release, Congresswoman Rosa L. DeLauro, Female Lawmakers Urge Senate Judiciary to Question Roberts' Record on Women's Issues (Sept. 14, 2005), http://www.house.gov/delauro/press/2005/September/roberts_nom_09_14_05.html (last visited Jan. 27, 2007). "This letter was signed by 16 female members [of the House], including House Democratic Leader Nancy Pelosi." *Id.*

²⁰ *Id.* (emphasis added).

²¹ *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

grounds. *DeShaney* involved the tragic case of a seven year old boy, Joshua, whose father had all but beaten him to death, leaving the child with permanent brain damage.²³ Joshua's mother sued the state on due process grounds, claiming that it should have acted to protect Joshua from his abusive father.²⁴ However, the Court held that the right to due process confers "no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."²⁵ For this reason, the state is not required "to protect the life, liberty, and property of its citizens against invasion by private actors."²⁶

In *Gonzales*, a father abducted his three young daughters in violation of a state issued restraining order.²⁷ The police refused to respond to the mother's request that law enforcement officials find the father and the three children.²⁸ Instead, the father, left to his own devices, eventually drove up to the police station at approximately 3:20 a.m. and opened fire with a semi-automatic weapon.²⁹ The police fired back, killing the father. When authorities looked inside the father's car, they found the bodies of the three children, whom the father had already murdered.³⁰ The children's mother sued the state on due process grounds, claiming that the "town violated the Due Process Clause because its police department had 'an *official policy or custom of failing to respond* properly to complaints of restraining order violations' and 'tolerated[d] the non-enforcement of restraining orders by its police officers.'"³¹ The Supreme Court ruled, consistent with its finding in *DeShaney*, that due process principles do not mandate that the state must act.³² Thus, the enforcement of restraining orders on *due process* grounds is not mandatory.³³

The bottom line is that when it comes to the Due Process Clause, its primary power is in protecting people from the *interference of government* in

²² Castle Rock v. Gonzales, 545 U.S. 748 (2005).

²³ See 489 U.S. at 193.

²⁴ *Id.*

²⁵ *Id.* at 195.

²⁶ *Id.* (emphasis added).

²⁷ 545 U.S. at 751–53.

²⁸ *Id.* at 753–54.

²⁹ *Id.* at 754.

³⁰ *Id.*

³¹ *Id.* (emphasis added).

³² *Id.* at 768–69.

³³ *Id.*

their lives rather than obligating the *government to act* to provide benefits, protections, or privileges to people. Thus, although the Constitution empowers the state to act in many ways, if the state so chooses, there is (apparently) nothing on due process grounds and very little of anything in the Constitution that mandates that the *state must act*. This means that the government at the state and national levels, for example, *may* provide educational and health benefits; *may* provide for public safety by means of establishing a police force, fire department, armed services, and other such institutions; and *may* build roads and other such public works. However, on due process grounds alone, the American Constitution does not require government at the state and national levels to act in these ways. Rather, it merely *permits* the state to act in these ways.

B. *Similarly Situated*

There is one very important context in which the state *does* have an obligation to act. This exception refers to a context in which the state has *already acted* in a way that involves a fundamental right. Specifically, when the state acts to provide a benefit, protection, or privilege to people that involves a fundamental right, such as bodily integrity or liberty, then the state is required by the Equal Protection Clause to act to provide that benefit, protection, or privilege to other similarly situated people. As Jack Balkin states, “[F]undamental rights secured by our Constitution belong to the people of the United States, not to the government, and the people are the continuing source of both their content and their meaning.”³⁴ Balkin further explains that when the government unduly burdens fundamental liberties, it is in violation of the Due Process Clause. However, if and when governments “make arbitrary distinctions that burden the exercise of fundamental liberties for some persons but not others, they violate the guarantee of *equal protection of the laws*.”³⁵ Balkin includes in the list of fundamental liberties the right “to bodily security, family, reproduction, and childrearing.”³⁶

In *Gonzales*, for example, instead of pointing out how poorly the police *customarily* enforce restraining orders, as cited above, a more effective argument using the fundamental rights prong of the Equal Protection Clause

³⁴ Jack M. Balkin, *The Judgment of the Court*, in *WHAT ROE V. WADE SHOULD HAVE SAID*, *supra* note 9, at 31, 35.

³⁵ *Id.* at 36 (emphasis added).

³⁶ *Id.*

would have been for the plaintiff to find cases in which the *police did act* to enforce a restraining order. Then, on fundamental rights, equal protection grounds, the plaintiff could argue that she was similarly situated with others whom the *state did act to protect*, which then *obligated the state also to act* on her behalf and that of her daughters, since fundamental rights to bodily integrity and liberty were involved. Although state officials have a certain amount of discretion, it would be the burden of the state to justify why police in one particular instance provided protection to one victim but did not do so to other similarly situated victims.³⁷

C. Applying Fundamental Rights, Equal Protection Analysis to Abortion Rights

How does the fundamental rights model of equal protection analysis apply to women's right to choose an abortion as a means for terminating a pregnancy? The answer to that question entails recognition of a woman's right not only to choose an abortion, but even more fundamentally, her right to consent to pregnancy as a condition in her body resulting from the fetus's presence and implantation in her body. Briefly, the argument is as follows:

1. Pregnancy is a condition in a woman's body resulting from the presence of a fetus. Consent to sexual intercourse does not imply or necessarily entail consent to pregnancy.
2. Due to the massive transformation of a woman's body and liberty resulting from the fetus's presence in her body, if a woman does not consent to the massive transformation of her body and liberty resulting from the fetus, the woman is the *victim of serious harm to her body and to her liberty resulting from the fetus*.
3. The fetus has no conscious intentions or control over how its presence transforms a woman's body and liberty. Thus, if and when the state defines the fetus to be an unborn person with the same rights as a born person, *and* a woman does not consent to the condition of pregnancy, then the woman is the victim of harm resulting from a mentally incompetent unborn human being, who has the same *limitations*, not just rights, as a born human being.

³⁷ For a discussion of the fundamental rights model of equal protection analysis, see *Fundamental Interests and the Equal Protection Clause*, in GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN & MARK V. TUSHNET, CONSTITUTIONAL LAW 842-940 (3d ed. 1996).

4. As such, a woman who does not consent to pregnancy is *similarly situated with other victims* who suffered serious harm to their bodies and liberties inflicted by mentally incompetent human beings.
5. The degree of harm to a woman's body and liberty, if she does not consent to pregnancy, justifies her right to use deadly force to protect herself from this harm. This is established by state-level "use of deadly force" legislation.
6. Thus, women have a private right of self-defense to use deadly force to protect themselves against the harm of a nonconsensual pregnancy that entails massive transformations of their bodies and liberties as a result of a fetus. That is, women have a right to choose an abortion as the only means available to stop the harm of a nonconsensual pregnancy.
7. However, the *state already does act* to stop human beings, mentally incompetent or otherwise, from massively transforming the bodies and liberties of other people without consent.
8. Thus, once the state defines the fetus to be an unborn human being with the same rights *and, hence, limitations* as a born human being, the fundamental rights model of equal protection analysis *obligates the state also to act* to stop the fetus as an unborn human being from massively transforming the body and liberty of a woman without her consent.
9. Thus, since the state *already does act* to provide protection to people who are victims of harm resulting from other human beings, mentally incompetent or otherwise, women have a right to state assistance to protect themselves from the harm of a nonconsensual pregnancy resulting from an unborn human being. That is, women have a right to public funding of their abortions.
10. Therefore, to summarize, a promising way to combat restrictive state-level legislation, such as that ultimately rejected by South Dakota residents, entails reframing abortion rights as the right of a woman to consent to pregnancy; invoking state-level self-defense legislation to establish the right of a woman to use deadly force to defend herself from the serious harm of a nonconsensual pregnancy; and, finally, invoking the fundamental rights model of equal protection analysis to establish that once the state acts to stop human beings from harming other human beings *and* the state defines the fetus to be an unborn human being, then the state *must act* to stop the fetus from harming a woman.³⁸

³⁸ The fundamental rights model of equal protection analysis is especially powerful in contexts where the fetus has been legally defined to be an unborn human being, since the parallel between the fetus and a born

IV. ABORTION AS SELF-DEFENSE

A. *Back to the Past: The Thomson Argument*

Given the prospect that the Court may rule that it is constitutional for states to define the fetus as an unborn human being with the same rights as a born human being, the key to saving abortion rights at the state level is to return to a path previously articulated by moral philosopher Judith Jarvis Thomson in 1971, two years before the *Roe* decision.³⁹ In Jarvis's classic article, she asks us to imagine waking up one morning attached to a famous violinist.⁴⁰ As if that is not strange enough, she asks us also to imagine that this famous violinist will die if we sever the attachment.⁴¹ Thomson then poses the question: do people have a moral obligation to allow an attachment of another person to their bodies, which also by definition intrudes upon their liberty?⁴²

Thomson's answer was "no."⁴³ The reason is because the attachment of another human being to one's body and the attendant intrusion upon one's body and liberty is too great a demand to require a person to consent to such a demand as a condition for being moral.⁴⁴ To the contrary, she argued that people may detach themselves from another person, even if they do so with the full recognition that their action will result in the death of the attachée.⁴⁵ The analogy with pregnancy is obvious. The fetus is attached to a woman's body in a way that necessarily entails a serious intrusion upon her bodily integrity and liberty. The fetus, of course, is dependent upon its attachment for its survival and development. From the moral perspective, the issue is not the fetus's dependency, but rather whether women have a moral obligation to allow the fetus to remain attached to their bodies because of its dependency.

human being and the required concomitant state action becomes obvious in relation to stopping harm. However, the fundamental rights model also applies to situations in which the fetus is a state-protected entity without an established personhood status. This is because state and federal levels of government already routinely act to stop state-protected nonhuman entities—such as protected wildlife species—from harming human beings and in many cases from harming even the property of human beings. Hence, since the state already acts to stop state-protected nonhuman entities from harming human beings, the state is obligated to act to stop the fetus as a state-protected nonhuman entity from harming a woman. For a discussion of this point, see Eileen McDonagh, *My Body, My Consent*, 62 ALB. L. REV. 1057–118 (1999).

³⁹ Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

⁴⁰ *Id.* at 48.

⁴¹ *Id.* at 49.

⁴² *Id.*

⁴³ *Id.* at 61–62.

⁴⁴ *Id.*

⁴⁵ *Id.* at 66.

According to Thomson, women do not have a moral obligation to consent to fetuses' continued attachment.

B. *What the Fetus Is*

The power of Thomson's argument has always been that even if the fetus is defined to be an unborn human being with the same rights as a born human being, women still have a moral right to use deadly force to defend themselves from nonconsensual intrusion upon their bodily integrity and liberty. Granted, in the Thomson scenario, the use of deadly force entails no more than simply detaching oneself from another person. However, the presumption is that if more complicated means, including the use of deadly force, were necessary to detach oneself from another human being, a woman would be justified in using those means. For example, if the only way to detach oneself from a born person intruding nonconsensually upon one's bodily integrity and liberty was to kill the person prior to detaching her or him, then presumably, from a moral point of view, a person would be justified in doing so. Thus, in Thomson's scenario there is an implicit right to use deadly force, even though it is not elaborated upon in the context of her scenario.

V. CONSTITUTIONALIZING THOMSON'S ARGUMENT

In order to make Thomson's argument useful for legal contexts, the first step is to establish that pregnancy is a condition resulting from a fetus, and, second, that pregnancy entails serious harm to a woman's bodily integrity and intrusion upon her liberty, if and when a woman does not consent to be pregnant.⁴⁶ As to the first step, the sixth edition of *Black's Law Dictionary* defines pregnancy as the "condition [in a woman's body] resulting from the fertilized ovum."⁴⁷ As to the second step, from a legal perspective, there already is in place recognition that nonconsensual pregnancy constitutes

⁴⁶ For previous discussions about constitutionalizing Thomson's argument, see EILEEN MCDONAGH, *BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT* (1996); McDonagh, *supra* note 38, at 1057–118; Eileen McDonagh, *Models of Motherhood in the Abortion Debate: Self-Sacrifice Versus Self-Defence*, in *ETHICAL ISSUES IN MATERNAL-FETAL MEDICINE* 213 (Donna L. Dickenson ed., 2002); Eileen McDonagh, *Abortion Rights After South Dakota*, *FREE INQUIRY*, June/July 2006, at 34; Robin West, *Liberalism and Abortion*, 87 *GEO. L.J.* 2117, 2124 (1999). For a discussion of the legal right to be a bad Samaritan by refusing to give one's body to the fetus, see the classic article by Donald H. Regan, *Rewriting Roe v. Wade*, 77 *MICH. L. REV.* 1569 (1979). For an excellent application of the right of self-defense in medical contexts, see Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 *HARV. L. REV.* (forthcoming 2007).

⁴⁷ *BLACK'S LAW DICTIONARY* 1179 (6th ed. 1990).

serious bodily injury when it is the result of rape, incest, or medical negligence. There is also recognition that a medically abnormal pregnancy, by definition, constitutes a potential if not actual threat to a woman's health or life.⁴⁸

What about a medically normal pregnancy that results from consensual sexual intercourse? If a woman does not consent to a pregnancy condition resulting from the attachment of a fetus in her body and the necessary intrusion upon her liberty that the attachment entails, can it be established that this condition of nonconsensual pregnancy constitutes "enough" bodily harm and "enough" intrusion on a woman's liberty to warrant the use of deadly force to stop that attachment, particularly if and when the fetus is legally defined to be an unborn human being with the same rights as a born human being? The answer to that question is "yes."

A. *"Is Pregnancy Really Normal?"*

Although Thomson's argument has yet to be utilized in court cases dealing with abortion rights, it is interesting that the same year she published her insightful article, Warren Hern wrote what may be considered a companion piece, entitled *Is Pregnancy Really Normal?*⁴⁹ He notes that there is a widely held "teleological definition of a female as essentially a reproductive machine."⁵⁰ He cites a physician, for example, who defined a woman as "'a uterus surrounded by a supporting organism and a directing personality.'"⁵¹ Viewing pregnancy as "normal" and as "good" for women, as Hern observes, leads to the conclusion that women who seek an abortion must be "sick." Indeed, this is exactly the diagnosis that psychoanalyst May Romm contributed to the debate in 1953 when she typified an "intense conflict about a pregnancy or about giving birth to a child" as "'psychopathological.'"⁵²

Rather than some antiquated view of women and of pregnancy in the pre-feminist years of the early 1970s, we find the notion that women are meant to be pregnant, that pregnancy is good for women, and that women want to be pregnant whether they know it or not, to be alive and well in contemporary

⁴⁸ See, e.g., *Planned Parenthood of De. v. Brady*, 250 F. Supp. 2d 405, 408 n.4 (D. Del. 2003) (discussing physical harm that can result from abnormal pregnancies).

⁴⁹ Warren M. Hern, *Is Pregnancy Really Normal?*, 3 *FAM. PLAN. PERSP.* 5, 5-10 (1971).

⁵⁰ *Id.* at 5.

⁵¹ *Id.*

⁵² *Id.* at 7 (quoting psychoanalyst May Romm).

depictions of pregnancy. For example, the South Dakota Task Force on abortion rights used antiquated views as the foundation for the South Dakota legislation that so strictly restricted abortion rights.

B. South Dakota Task Force

As Reva Siegel notes, the South Dakota legislation was based on a seventy-one page report provided to the Governor of South Dakota and the Legislature in December 2005.⁵³ This report, which is the legislative history for the restrictive abortion regulation that eventually passed the legislature and was signed by the Governor, argues that abortions need to be restricted in order to protect the fetus; the report asserts that it is “‘a matter of scientific fact [that] an abortion terminates the life of a whole separate unique living human being.’”⁵⁴

However, as Siegel points out, what is not as expected is that over half of the report (approximately forty pages) focuses on how abortions must be prohibited in order *to protect women*.⁵⁵ The Task Force report asserts that “‘the abortion procedure is inherently dangerous to the psychological and physical health of the pregnant mother.’”⁵⁶ In this form of argument, abortion not only harms the fetus, but also women.⁵⁷ As David Reardon writes,

[F]rom a natural law perspective, we can know in advance that abortion is inherently harmful to women. It is simply impossible to rip a child from the womb of a mother without tearing out a part of the woman herself—a part of her heart, a part of her job, a part of her maternity If there is a single principle, then, which lies at the heart of the pro-woman/pro-life agenda, it would have to be this: *the best interests of the child and the mother are always joined*.⁵⁸

However, as Hern noted decades ago, we must critically examine the assumption that “human pregnancy is not only a ‘normal’ but is an especially *desirable* event from the viewpoint of woman’s physiological, psychological

⁵³ Siegel, *The New Politics of Abortion*, *supra* note 9, at 16 (citing REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION (2005), <http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>).

⁵⁴ *Id.*

⁵⁵ *Id.* at 17 & n.72.

⁵⁶ REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, *supra* note 53, at 66.

⁵⁷ Siegel, *The New Politics of Abortion*, *supra* note 9, at 24.

⁵⁸ *Id.* at 28 (quoting DAVID C. REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION 5–6 (1996)).

and social functioning, and that failure (or, worse, refusal) to become or remain pregnant is, therefore, pathological.”⁵⁹ Hern continues his critique of the assumption of the normality and desirability of the pregnant condition for women by clarifying that what is meant medically by a “normal” pregnancy is that it is a relatively “uncomplicated” pregnancy compared to an “abnormal” pregnancy that does pose serious medical complications to attending physicians.⁶⁰ To say that a pregnancy is uncomplicated, however, is not to say that it is medically “normal” in the sense that it poses no complications.⁶¹

To the contrary, as Hern emphasizes, a pregnant woman is, should, and must be, for her own sake, considered a “patient” of a physician when she is pregnant.⁶² This is because the ““manifold changes which occur in the maternal organism”” when a woman is pregnant render her especially vulnerable to

pathologic conditions which may seriously threaten the life of the mother It accordingly becomes necessary to keep *pregnant patients* under strict supervision and to be constantly on the alert for the appearance of untoward symptoms Indeed, antepartum care is an absolute necessity if a substantial number of women are to avoid disaster [when pregnant].⁶³

Hern discusses the way culture determines the meaning of “normal.”⁶⁴ In the context of pregnancy, he argues that in Western-oriented societies, viewing pregnancy as “normal” had instrumental advantages for human beings as a group, even though pregnancy might entail disadvantages for individual women.⁶⁵ However, as Hern emphasizes, given today’s current worldwide population growth, it is dubious, indeed, to view unlimited human reproduction as an instrumental advantage even for human beings as a group and much less so for each and every individual woman. To the contrary, unlimited human population growth “if anything, endangers survival of the species.”⁶⁶

Hern proposes that

⁵⁹ Hern, *supra* note 49, at 5.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* (quoting NICHOLSON J. EASTMAN & LOUIS M. HELLMAN, WILLIAMS’ OBSTETRICS 337 (12th ed. 1961) (emphasis added)).

⁶⁴ *Id.* at 5–6.

⁶⁵ *Id.* at 6.

⁶⁶ *Id.*

a woman seeking an abortion is making a circumstantial self-definition of pregnancy as an illness for which she considered the appropriate treatment to be abortion Similarly, the woman who perceives the signs and symptoms of a wanted pregnancy may also display illness behavior and seek medical attention in the form of prenatal care.⁶⁷

The point is, in both cases—whether the woman seeks to terminate her pregnancy by means of an abortion or to continue her pregnancy—a pregnant woman is in anything but a “normal” condition.⁶⁸ To the contrary, she is in a medically vulnerable position in which risks to her health and life are greater than when she is in a nonpregnant condition.⁶⁹

The medical risks to a pregnant woman’s health and life can be evaluated on a continuum from relatively uncomplicated to very complicated, but *all pregnancies* are conditions in a woman’s body that pose risks to her health and life over and above risks posed when her body is in a nonpregnant condition.⁷⁰ As Hern notes, in the beginning of the twentieth century, a very high proportion of deaths of women of childbearing age occurred as a result of causes associated with pregnancy and with puerperium.⁷¹ Even by 1930, for example, 11% of the deaths of women in the age group 15 to 45 were directly or indirectly related to maternity, and by 1959, this figure was still 3%.⁷² However, even as early as the 1970s, with the improvement of medical care, the number of cases of morbidity associated with maternity for women was steadily decreasing.⁷³

According to Hern, it is up to the woman to decide how to deal with the risks to her health and life entailed by the condition of pregnancy. She can refuse to consent to experiencing those medical risks by obtaining an abortion or she can consent to experiencing those risks by maintaining her pregnant condition.⁷⁴ If she does not consent, *all abortions are therapeutic terminations* of the risk of harm to the woman’s body and liberty resulting from a pregnant condition.

⁶⁷ *Id.* at 7.

⁶⁸ *Id.*

⁶⁹ *Id.* at 7–9.

⁷⁰ *Id.* at 9.

⁷¹ *Id.* at 8.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 7.

C. *What Happens to a Pregnant Woman?*

From a legal point of view, it needs to be established that a medically uncomplicated pregnancy is an intrusion upon a woman's bodily integrity and liberty that is profound enough that, if she does not consent to the pregnancy condition in the first place, she is justified in using deadly force to end the pregnancy. To assess adequately what happens to a woman's bodily integrity, not to mention her liberty, when she is pregnant would require serious study of medical texts. However, even a brief review discloses that every major system in a woman's body is affected by pregnancy, and in most cases, dramatically so.

Obstetric text books often devote an entire chapter to each major system in a woman's body that undergoes profound transformation. For our purposes here, however, we can discern the massive way pregnancy transforms a woman's body by even a cursory consideration of those changes, as briefly highlighted in Table 1 of the Appendix.⁷⁵ As is evident from Table 1, the answer to the question, "What happens to a pregnant woman?" is "a lot." Every major system in a woman's body is affected by the pregnant condition: her cardiovascular system, respiratory system, gastrointestinal system, metabolism, renal physiology, and endocrine system are all affected.⁷⁶ Blood volume increases by 50%; stroke volume of the heart by 35%; size and position of the heart change; lung volume decreases by 20%; respiratory rate by 15% (2–3 breaths per minute); the enlarging uterus displaces the stomach and intestines, causing the stomach, for example, to move from a horizontal to a vertical position.⁷⁷ Metabolically speaking, a pregnant woman is in a state of "accelerated starvation" due to the nutritional demands of a growing fetus; renal functions increase 50–60%; the pituitary gland enlarges by 135%; growth hormones dramatically increase; and, of course, a new organ, the placenta, is grown in the woman's body as a result of the fetus's presence.⁷⁸

Were these changes to occur over an extended period of time as the result of Person A's *nonconsensual* imposition on the body of Person B, most would recognize that Person A was imposing a condition of serious bodily injury upon Person B as well as a serious intrusion upon Person B's liberty. Without consent, such intrusion on one's body and liberty would constitute serious

⁷⁵ See *infra* Appendix tbl.1.

⁷⁶ See *infra* Appendix tbl.1.

⁷⁷ See *infra* Appendix tbl.1.

⁷⁸ See *infra* Appendix tbl.1.

bodily harm. For example, in the case of the growth of a new organ—the placenta—the harm to a woman, should she not consent to this new organ in her body, immediately constitutes grounds for her right to use deadly force to remove it. The placenta, let us remember, is an organ that grows to serve the developmental needs of the fetus and the fetus alone. No born human being needs a placenta; only unborn human beings need the organ for their survival and growth. When the placenta grows in a woman’s body as a result of the fetus’s presence, the placenta alone would constitute grounds for the use of deadly force to stop the growth and presence of the placenta. Even a cursory look at state self-defense statutes, such as those in South Dakota, supplies ample proof that no born person would be obligated to allow another born person to introduce new organs into their bodies without their consent, regardless of whether the person in question was a family member, including a biological child.

VI. SELF-DEFENSE IN SOUTH DAKOTA

A. *Killing the Fetus*

At the time of *Roe*, the American Bar Association defined abortion as “the termination of a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.”⁷⁹ If it is not the intention of an abortion to terminate pregnancy by producing a live birth, then the implication of an abortion is that it will terminate pregnancy by killing the fetus.⁸⁰ The key to abortion rights, therefore, is not a woman’s right to terminate a pregnancy *per se*. All pregnancies, after all, must terminate one way or another. The real problem for establishing women’s abortion rights is what justifies terminating a pregnancy with the knowledge that doing so will kill the fetus. This problem becomes crucial in the due process context, if and when the fetus is defined to be a person, as was acknowledged in *Roe*.

B. *What the Fetus Is*

The lead lawyer arguing for abortion rights in *Roe*, Sarah Weddington, conceded in oral argument before the Court in 1971 that there was a privacy right to kill the fetus by means of an abortion because the “state did not treat

⁷⁹ *Roe v. Wade*, 410 U.S. 113, 145–46 (1973).

⁸⁰ *Id.* at 145 n.40.

the fetus as a person with legal rights.”⁸¹ Later, in 1972, she was pressed on this point when *Roe* was reargued before the Court.⁸² As Justice Stewart pointedly asked Weddington, “[I]f—it were established that an unborn fetus is a person within the protection of the Fourteenth Amendment, you would have almost an impossible case . . . would you not?”⁸³

Weddington agreed, responding that “I would have a very difficult case” because if the fetus were a person, an abortion would be equivalent to killing a born child.⁸⁴ Justice Stewart followed up by asking Weddington, “So . . . you’d have to say that this [having an abortion when the fetus has the protection of a born human being] would be equivalent after the child was born if the mother thought it bothered her health [by] . . . having the child around, she could have it killed. Isn’t that correct.”⁸⁵ Weddington responded, “That’s correct.”⁸⁶

Of course, Assistant Attorney General of Texas, Robert Flowers, who was in charge of arguing against *Roe*, immediately picked up on Weddington’s admission that what the fetus “is” determines abortion rights.⁸⁷ Flowers asserted that “it is the position of the State of Texas that upon conception we have a human being, a person within the concept of the Constitution of the United States and that of Texas, also.”⁸⁸ Significantly, Justices Stewart and White affirmed Flowers’s contention.⁸⁹ As Justice Stewart stated, if the fetus is a person, Flowers “can sit down [because] you’ve won your case.”⁹⁰ Underscoring this point, Justice White reversed the question by asking Flowers, “You’ve lost your case, then, if the fetus or embryo is not a person, is that it?”⁹¹ Flowers replied, “Yes, sir, I would say so.”⁹²

An important component of *Roe*, therefore, is recognition by both parties that the Due Process Clause itself does not justify the use of deadly force to harm or to kill a human being while implementing one’s fundamental right to

⁸¹ SARAH WEDDINGTON, A QUESTION OF CHOICE 116–17 (1992).

⁸² *Id.*

⁸³ Transcript of Oral Argument at 20, *Roe v. Wade*, 410 U.S. 113 (No. 70-18).

⁸⁴ *Id.* at 20–21.

⁸⁵ *Id.*

⁸⁶ *Id.* at 21.

⁸⁷ *Id.* at 23.

⁸⁸ *Id.*

⁸⁹ *Id.* at 30.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

make choices about one's body or life. The right to read a book, for example, does not include a right to use a book to hit other people on the head with it. Similarly, the right to use contraceptives does not include the right to use them as a means for committing suicide or for otherwise harming oneself or another individual.

For this reason, as long as abortion rights are founded upon the Due Process Clause alone, it is imperative that any legal definitions of the fetus as a human being be clearly separated from the use of those definitions to determine women's right to an abortion on privacy grounds. The Court ordered as much in *Roe*. As Justice Blackmun noted, there are distinctly varied historical and contemporary definitions of what the fetus "is" and when human life begins.⁹³ For this reason, the Court refused to rule in *Roe* whether the fetus is a human being or when life begins. However, the Blackmun decision also stated that states may not use a particular definition of when life begins to undermine women's right to an abortion.⁹⁴ Thus, in *Roe*, the Court disallowed a state from adopting a theory of life that may override the rights of pregnant women.⁹⁵

C. *Since Roe*

A lot has happened since 1973 in the "development of man's knowledge" about when human life begins and what the "law" allows in terms of defining the beginning of life. In reference to "man's knowledge," it is now common for fetal sonograms and other depictions of the fetus to adorn the office walls of pro-choice and pro-life advocates alike as medical science permits early personifications of a fetus. Surgical procedures *in utero* are now possible for even very young fetuses, and it is common for medical practitioners to view the management of pregnancy as a task that involves two patients—the mother and the unborn child.

In reference to the law, the pattern since 1973 at the state and federal levels has been to grant increasing legal recognition to fetal personhood, particularly in cases where the fetus is injured in the context of an injury to a pregnant woman. As of 2006, when a fetus dies or is harmed as a result of injuries imposed upon its mother, at least thirty-six states have some type of fetal

⁹³ *Roe v. Wade*, 410 U.S. 113, 130–48 (1973).

⁹⁴ *Id.* at 162.

⁹⁵ *Id.*

homicide laws.⁹⁶ In thirty-one states, fetal homicide is defined by means of state statute, and in three by means of case law.⁹⁷ In addition, in fifteen of these states, fetal homicide laws apply even to the earliest stages of pregnancy, defined as “any state of gestation,” “conception,” “fertilization,” or “post-fertilization.”⁹⁸

At the federal level, we also have witnessed, since 1973, a growing recognition of the legal status of the fetus in terms of protections granted that are similar, or the same, as protections granted to a born person. In 2004, for example, Congress passed, and President Bush signed into law the Unborn Victims of Violence Act (UVVA).⁹⁹ This legislation makes it a separate crime to injure or kill a fetus while committing a federal or a military crime against a pregnant woman on the grounds that the fetus is an “unborn child” from the moment of conception.¹⁰⁰ This legislation defines an “unborn child” as a “child in *utero*” where that term refers to “a member of the species *homo sapiens*, at any stage of development, who is carried in the womb.”¹⁰¹

However, it is significant that the UVVA specifically exempts legal abortions. As the statute states,

⁹⁶ National Conference of State Legislatures, Fetal Homicide, <http://www.ncsl.org/programs/health/fethom.htm> (last visited Feb. 18, 2007) (fifty-state survey). These states include: Alabama, Alaska, Arizona, Arkansas, California, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *Id.*

⁹⁷ *Id.*

⁹⁸ See, e.g., ARIZ. REV. STAT. ANN. § 13-1102 (2007) (“any state of its [unborn child’s] development”); 720 ILL. COMP. STAT. 5/9-1.2 (2000) (“unborn child” defined within the statute as “any individual of the human species from fertilization until birth”); MINN. STAT. §609.266 (2005) (“unborn child means the unborn offspring of a human being conceived, but not yet born.”); NEB. REV. STAT. § 28-3289 (2005) (“unborn child means an individual member of the species *Homo sapiens*, at any stage of development in *utero*.”); N.D. CENT. CODE § 12.1-17.1-01 (2006) (“unborn child means the conceived but not yet born offspring of a human being.”); OKLA. STAT. tit. 63, § 1-730 (2005) (“unborn child means the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth including the human conceptus, zygote, morula, blastocyst, embryo and fetus.”); 18 PA. CONS. STAT. § 3203 (2005) (Unborn child and fetus: “Each term shall mean an individual organism of the species *homo sapiens* from fertilization until live birth”); S.D. CODIFIED LAWS § 22-1-2 (2006) (“unborn child, an individual organism of the species *homo sapiens* from fertilization until live birth”); UTAH CODE ANN. § 76-5-201 (2006) (“unborn child at any stage of its development”); WIS. STAT. § 940.04 (2006) (“unborn child means a human being from the time of conception until it is born alive.”).

⁹⁹ Unborn Victims of Violence Act (UVVA) of 2004, Pub. L. No. 108-212, 118 Stat. 568; see also Press Release, Office of the Press Secretary, President Bush Signs Unborn Victims of Violence Act of 2004 (Apr. 1, 2004), <http://www.whitehouse.gov/news/releases/2004/04/20040401-3.html>.

¹⁰⁰ 18 U.S.C.A. § 1841(a)(2)(A) (2006).

¹⁰¹ § 1841(d).

Nothing in this section [protection of unborn children] shall be construed to permit the prosecution of . . . any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law.¹⁰²

Nevertheless, pro-choice advocates vehemently opposed the passage of the UVVA on the grounds that the mere designation of the fetus as an “unborn child” from the moment of conception threatened women’s abortion rights as established by *Roe*. For example, Senator John Kerry (D–Mass.) stated,

This legislation elevates the legal status of a zygote, an embryo and a fetus by treating the ‘child in utero’ as a human being separate from its mother regardless of its stage of development Although this legislation exempts performing abortions from prosecution, this bill would clearly impact a woman’s right to choose to terminate her pregnancy, as that right is set forth in *Roe v. Wade* I have serious concerns about this legislation because *the law cannot simultaneously provide that a fetus is a human being and protect the right of the mother to choose to terminate her pregnancy.*¹⁰³

Planned Parenthood President Gloria Feldt said this legislation is “part of a deceptive anti-choice strategy to make women’s bodies mere vessels by creating legal personhood for the fetus.”¹⁰⁴ Planned Parenthood’s press release stated that the “bill . . . is part of ongoing attempts to bestow personhood on the fetus by granting it separate legal rights equal to and independent of those of the pregnant woman.”¹⁰⁵ Reporter Julie Rovner noted that expanding rights to the fetus would restrict those of the pregnant woman, and according to President Feldt, if the fetus “is” a person, then a woman becomes “a vessel for the bearing of children rather than a human being with equal status in the law to men.”¹⁰⁶

¹⁰² § 1841(c)(1).

¹⁰³ E-Mail from Sen. John Kerry (D–Mass.) on the Unborn Victims of Violence Act (June 27, 2003), http://www.nrlc.org/Unborn_Victims/kerryemailUVVA.html (emphasis added).

¹⁰⁴ Press Release, Planned Parenthood Fed’n of Am., Senate Passes Dangerous Unborn Victims of Violence Act (Mar. 24, 2004), <http://www.plannedparenthood.org/news-articles-press/politics-policy-issues/uvva-12510.htm>.

¹⁰⁵ *Id.*

¹⁰⁶ *Morning Edition: Legislation that Would Make It a Separate Crime to Injure or Kill a Fetus During Violent Crime Against a Pregnant Woman* (National Public Radio broadcast Mar. 22, 2004).

D. South Dakota Legislation

What is particularly significant about the South Dakota legislation that voters rejected in the November 2006 election, however, is the explicit *joining* of the definition of the fetus as a person with abortion restrictions. Attention, for the most part, has been directed to section 6 of that statute because it restricts abortions “unless it is necessary to preserve the life of the woman, or if there is serious risk of substantial and irreversible impairment of major bodily function of the pregnant woman.”¹⁰⁷ However, another problem with legislation like South Dakota’s is the way it defines the fetus to be an unborn human being with the same rights as a born human being in the *context of state regulation of abortion rights*. The following illustrate the ways the unborn human being, that is, fetus, was referenced or defined in the defeated South Dakota law:

Section 1: “life begins at the time of conception, a conclusion confirmed by scientific advances since the 1973 decision of *Roe v. Wade*, including the fact that each human being is totally unique immediately at fertilization.” “to fully protect . . . the rights, interest, and life of her unborn child” which “applies equally to born and unborn human beings, and that under the Constitution of South Dakota, a pregnant mother and her unborn child, each possess a natural and inalienable right to life.”

Section 2: When describing prohibited procedures, “the termination of the life of an unborn human being” is used twice.

Section 4: “the physician shall make reasonable medical efforts under the circumstances to preserve both the life of the mother and the life of her unborn child” or “the accidental or unintentional injury or death to the unborn child.”

Section 5: Terms used in this Act mean: (1) “Pregnant,” the human female reproductive condition, of having a living unborn human being within her body throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and child birth; (2) “Unborn human being,” an individual living member of the species, homo sapiens, throughout the entire embryonic and fetal ages of the unborn child from fertilization to full gestation and childbirth.¹⁰⁸

¹⁰⁷ Women’s Health and Human Life Protection Act, S.D. CODIFIED LAWS §22-17-12 (2006) (repealed by referendum on Nov. 7, 2006).

¹⁰⁸ *Id.*

E. What Would the Supreme Court Say "Today?"

In 1973, at the time of *Roe*, it was clear that the Court sought to disentangle the issue of what the fetus "is" from women's right to choose an abortion within the framework established by the Court. However, it is also apparent in *Roe* that the Court did this with the full recognition that if the fetus were to be legally defined to be a person in the context of abortion legislation, then there would be no due process right to kill it as a means to implement one's personal choice about how to live one's life or what to do with one's body. It is for this reason, we infer, that the Court ruled in *Roe* that a state may not use the definition of a fetus as a human being as a means for undermining women's right to choose an abortion within the constitutional framework established by the Court.

Now, the question becomes: will the current Court be bound by this restriction in *Roe*? Not likely. What is more likely is that the Court could simply say that if and when the fetus is legally defined to be a human being in the context of abortion regulation legislation, then it is constitutional for a state to prohibit a woman's right to choose an abortion as a right of privacy to make choices about her own body, her own reproductive options, or her own liberty, since such a choice entails the use of deadly force in relation to a human being, the fetus, albeit an unborn human being.

The reason such a possibility is so serious is because such a ruling by the Court would not require a total rejection of *Roe*. Rather, it would only be a rejection of the caveat the Court included in *Roe* that restricts a state from defining the fetus to be a person as a means to restrict a woman's right to choose an abortion. It is conceivable that the Court could rule that the sequence is backward. Namely, the first issue is the personhood status of the fetus; given that personhood status, the second issue is a woman's right to use deadly force in relation to the fetus. If and when the fetus is not defined as an unborn human being with the same rights as a born person, then a woman has a due process constitutional right to choose what to do with her body and her liberty, since exercising that right does not entail harm, much less death, to a human being. If or when, however, a state defines a fetus to be a human being in the context of abortion regulations, then a woman has no right to use deadly force to harm, much less to kill, the fetus.

What the Court could do, therefore, is leave *Roe* standing, but eviscerate *Roe*'s intent by allowing states to define the fetus to be an unborn human being with the same rights as a born human being in the context of abortion

restrictions, thereby rendering the right to choose an abortion on the basis of a due process right of privacy moot. The presumption is that the Court decides in good faith on the merits of the constitutional arguments provided in abortion cases. That being said, it would be easy for the Court to overturn *Roe* de facto without actually overturning *Roe* de jure by allowing states to define the fetus to be an unborn human being with the same rights as a born human being in the context of abortion regulations.

VII. WHAT THE FETUS *DOES*

To date, pro-choice strategy has been to oppose state- and national-level legislation that moves in the direction of defining the fetus as an unborn person with the same rights as a born person or even as a state-protected entity for which it is a criminal offense to kill in the context of a third party. However, there is another way to approach the problem of “what the fetus is,” and that is to distinguish between what is done to a fetus without the consent of the pregnant woman, such as a third-party injuring or killing the fetus, from what the *fetus does to the woman* in the context of whether she consents to the pregnant condition of her body.

To put it another way, if and when the Court allows states to define the fetus as an unborn human being in the context of abortion regulations, then what justifies a woman’s right to use deadly force to kill the fetus becomes one and the same as what justifies a person’s right to use deadly force to kill another person. What that means is that we must begin to scrutinize *state-level self-defense legislation* that specifies when it is permissible to use deadly force in defense of one’s bodily integrity and liberty. When we do, we find that at the very least, states across the country permit the use of deadly force in self-defense when a person’s life, bodily integrity, or liberty is sufficiently threatened by another person. And, in many states, such as South Dakota, the right to use deadly force extends to the defense of one’s home or place of business.¹⁰⁹ That is, state-level legislation provides wide latitude for the use of deadly force to defend oneself, to defend others, and to defend one’s property or the property of others.

¹⁰⁹ S.D. CODIFIED LAWS § 22-18-4 (2006).

A. *Defense of Self, Others, and Property*

South Dakota self-defense legislation justifies the use of deadly force not only in the case of a threat to one's life, but also "to prevent an illegal attempt by force to take or injure property in his lawful possession."¹¹⁰ It further specifies that "[h]omicide is justifiable when committed by a person when resisting any attempt . . . to commit any felony upon him or her, or upon or in any dwelling house in which such person is"¹¹¹ and "when committed by any person in the lawful defense of such person, or of his or her husband, wife, parent, child, master, mistress, or servant when there is reasonable ground to apprehend a design to commit a felony, or to do some *great personal injury*."¹¹²

B. *State-Level "Stand Your Ground" Legislation*

On Friday, February 17, 2006, South Dakota Governor Mike Rounds (Republican) signed House Bill 1134, Citizens Right to Self Defense, which removes a duty to retreat when a person is threatened in their home or in their place or work or any place where that person has a right to be.¹¹³ This legislation reads,

Any person is justified in the use of force or violence against another person when, and to the extent that, the person reasonably believes that such conduct is necessary to prevent or terminate the other person's trespass on, or other tortuous or criminal interference with real property or personal property A person does not have a duty to retreat if the person is in a place where he or she has a right to be.¹¹⁴

By passing this legislation, South Dakota followed in the footsteps of Florida, which was the first state to enact what is termed "stand your ground" legislation or "shoot-first laws."¹¹⁵ These are statutes that "allow the use of

¹¹⁰ *Id.*

¹¹¹ § 22-16-34.

¹¹² § 22-16-35 (emphasis added).

¹¹³ National Rifle Association Institute for Legislative Action, *Governor Rounds Protecting South Dakota's Second Amendment Rights!*, Mar. 10, 2006, <http://www.nra.org/CurrentLegislation/Read.aspx?ID=2043> (last visited Jan. 27, 2007).

¹¹⁴ H.B. 1134, 2006 Leg., 81st Sess. (N.D. 2006).

¹¹⁵ See generally Michelle Jaffe, Note, *Up in Arms over Florida's New "Stand Your Ground" Law*, 30 NOVA L. REV. 155 (2005).

deadly force to defend against forcible unlawful entry or attack.”¹¹⁶ These laws expand the latitude allowed for the legal use of deadly force in self-defense. For example, Florida’s law grants civil and criminal immunity to those who use deadly force in self-defense and who reasonably believe that such force is necessary to prevent “the commission of a forcible felony,”¹¹⁷ such as “treason; murder; manslaughter; sexual battery; aggravated stalking; aircraft piracy; unlawful throwing, placing, or discharging of a destructive device or bomb; [and] any other felony which involves the use or threat of physical force or violence against any individual.”¹¹⁸ In addition to South Dakota, other states that have adopted such legislation in the wake of Florida are Alabama, Alaska, Arizona, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Michigan, Oklahoma, and South Carolina.¹¹⁹ The power of this type of legislation is not so much that it removes the duty-to-retreat component of self-defense legislation, which has slowly been eroding over the years as a result of judicial decisions.¹²⁰ Rather, what is new about “stand your ground” self-defense legislation is that it is no longer necessary for people who use deadly force “to prove that they feared for their safety, only that the person they killed had intruded unlawfully and forcefully” on their property, including their vehicle.¹²¹ Thus, as Anthony J. Sebok, a professor at Brooklyn Law School stated, this type of legislation expands the “right to shoot intruders who pose no threat to the occupant’s safety . . . ‘In effect . . . the law allows citizens to kill other citizens in defense of property.’”¹²²

In a recent application of this type of law, for example, Florida police failed to arrest a man who had shot his neighbor twice in the course of an argument about how many garbage bags his neighbor had put out.¹²³ Although the police are still reviewing the evidence, the shooter was not arrested, exemplifying how “fewer people who claim self-defense are being charged or convicted” once this type of law is in place.¹²⁴

¹¹⁶ Center for Individual Freedom, Florida’s ‘Stand Your Ground’ Law: It Ain’t What the Bradys Say It Is (Oct. 13, 2005), http://www.cif.org/htdocs/freedomline/current/in_our_opinion/florida-self-defense-law.htm.

¹¹⁷ FLA. STAT. ANN. § 776.013 (West Supp. 2007).

¹¹⁸ § 776.08 (West 2005).

¹¹⁹ National Conference of State Legislatures, State Crime Legislation in 2006, <http://www.ncsl.org/programs/cj/2006crime.htm> (last visited Feb. 18, 2007).

¹²⁰ Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

C. *The Brady Campaign: A “D” for South Dakota and Many Other States*

There is yet another way we can establish that the laws governing self-defense in South Dakota and other states have very wide latitude, and that is by examining laws related to the possession and use of guns. The goal of The Brady Campaign to Prevent Gun Violence is not to ban or to confiscate guns; it does not seek to prevent people from possessing guns “for hunting, collecting, or personal protection.”¹²⁵ Rather, the Brady Campaign only seeks to encourage political officials “to take moderate steps that would make our homes and neighborhoods safer.”¹²⁶ In this regard, the Brady Campaign promotes gun laws that are designed to foster the safe use of guns. In this effort, despite the opposition of gun lobbyists, since 1997, the Brady Campaign evaluates state-level gun laws and gives each state a report card.¹²⁷ When we consider the report card for South Dakota in 2005, we find that this state received a “D.”¹²⁸ This is because the state of South Dakota has very little legislation that promotes the safe use of guns.

South Dakota, for example, does not

- limit gun sales to one per month;
- allow the Attorney General to regulate guns;
- hold gun owners accountable for leaving guns accessible to children;
- limit the purchase of assault weapons
- require state police to do background checks prior to gun purchases
- allow police to limit the carrying of concealed guns
- require background checks at gun shows
- require a license or a permit to purchase a handgun;
- allow police to maintain gun sale records;
- limit the sale of “Saturday Night Specials” (“junk” handguns);
- do background checks on the secondary sale of guns (“private gun sales”);
- require the registration of guns with law enforcement agencies;
- require safety training for purchasers of guns; and

¹²⁵ Brady Blog by Paul Helmke, <http://www.bradycampaign.org/blog/2006/11/29/> (Nov. 29, 2006, 11:40 EST).

¹²⁶ *Id.*

¹²⁷ *Most U.S. States Don’t Make the Grade When It Comes to Gun Violence Prevention Laws*, <http://www.stategunlaws.org> (last visited Jan. 20, 2007).

¹²⁸ Brady Campaign to Prevent Gun Violence, http://www.stategunlaws.org/viewstate.php?st=SD&choose_state=Go (last visited Jan. 22, 2007).

- allow cities to enact stronger gun safety regulations than the state's.¹²⁹

Putting aside for the moment the acquisition of guns for hunting or other recreational activities, the other major legal reason people would acquire guns, presumably, is to protect their person or their property. Thus, we can interpret the latitude that the state of South Dakota allows for the sale, purchase, possession, and use of guns to be further evidence that this state privileges self-defense, in this case, self-defense with the use of a deadly weapon. South Dakota is not alone. As the Brady Campaign reports, “overall, 32 states received a grade of ‘D’ or ‘F’ for the 2005 report card.”¹³⁰

D. No Exceptions for Family Members

Equally telling, state-level self-defense legislation makes no exceptions for family members. That is, being married to a person or being the child or parent of a person gives no more right to impose serious bodily injury or an intrusion upon a basic liberty of another person because of one's family-kinship relationship to that person. Thus, born children have no more right to impose serious injury upon their parents' bodies nor to intrude upon their parents' basic liberty than do any other born human beings. By extension, even if the fetus is to be defined legally as an unborn human being with the same rights as a born human being, it would have no more right to impose serious injury upon its mother's bodily integrity or to intrude upon her basic liberties than a born human being would have—which is to say, no right at all.

Currently, for example, parents' duty to care for their born children includes providing adequate food, shelter, clothing, and education. However, state laws do not include legal mandates that parents' duty of care includes the donation of body parts requiring even minimally invasive procedures, such as the donation of a pint of blood, much less the donation of body parts requiring more extensive intrusion, such as bone marrow or kidneys. This holds even when such donations are necessary to preserve the health or life of their children.

Concomitantly, not only do parents have a right to refuse to give their bodies to their children, but also no child has a right to take a parent's body or body parts without consent. Not only would current state-level self-defense

¹²⁹ *Id.*

¹³⁰ Brady Campaign to Prevent Gun Violence, State Legislatures Are Failing to Protect Kids from the Danger of Illegal Guns, <http://www.bradycampaign.org/facts/reportcards/2005> (last visited Jan. 20, 2007).

legislation recognize parents' right to use deadly force to stop a child's nonconsensual intrusion of their bodies and liberty without consent, but also the state itself would act to stop a child from so intruding.

E. Applying the Legal Right of Self-Defense to Nonconsensual Pregnancies

Self-defense statutes distinguish the right to life of a human being from the right to impose upon another person's bodily integrity or basic liberties. We can all agree that all human beings have a basic right to life. Once fetuses are defined to be unborn human beings with the same rights as born human beings, fetuses also can be deemed to have a basic right to life. However, possessing a basic right to life as a human being does not include any right to impose serious bodily injury upon another person or to intrude nonconsensually upon that person's basic liberties. That is what is made clear by self-defense legislation. Not only does no born person have a right to intrude nonconsensually upon the body or liberty of another person, but the person intruded upon has a right to use deadly force in relation to a born person who even threatens to do so, much less actually does so. Self-defense legislation, therefore, testifies to the separation between a right to life, which all human beings have, and the right to intrude upon the bodily integrity and liberty of another person without consent, which no human being has, including unborn human beings.

The contention here is that if a person does not consent to having a new organ located in his or her body, or does not consent to having his or her body radically transformed in a way that involves all primary bodily systems, including one's cardiovascular system, respiratory system, gastrointestinal system, metabolism, renal physiology, and endocrine system, then such alteration of a person's body constitutes *great personal injury* as well as a *great intrusion on one's liberty*. When such a personal injury results from the presence and attachment of a fetus, and when a state, such as South Dakota, defines the fetus to be an unborn person with the same rights as a born person, then the great personal injury resulting from the fetus results from an unborn person with the same rights as a born person. Since no born person has the right to transform a person's body so radically without the consent of the person involved, it follows that no unborn person has such a right.

VII. CONCLUDING CONSIDERATIONS: FETAL “INNOCENCE” AND “CONSENT TO SEX”

A. *The Innocent Fetus*

As discussed above, all pregnancies, even medically normal ones, constitute an enormous transformation of a woman’s body resulting from the presence and attachment of a fetus in her body, including the growth of a new organ in her body, the placenta. Due to the enormity of these transformations, every pregnancy constitutes some risk of harm to the woman. However, without consent, *all pregnancies constitute serious bodily harm and a serious intrusion of a woman’s liberty resulting from the fetus*. This is because legally what defines harm is not so much what transformations occur in people’s bodies as much as whether people consent to those transformations. For example, if person A takes a sharp instrument and cuts deeply into the body of person B, we do not know if this is legally a harm to person B until we know if person B consented to that transformation of her body. Even if we know that person A is a surgeon, for example, who cut into person B’s body to perform a life saving operation, we still do not know whether that transformation of person B’s body is legally a serious injury because we do not know whether person B consented to the transformation of her body.

If we apply that principle to pregnancy, we immediately see that the key to whether pregnancy constitutes serious harm to a woman’s body and liberty is whether a woman consents to the pregnant condition. Of course, the fetus is unconscious of how its presence and attachment dramatically transforms a woman’s body. Regardless of whether a fetus knows about or can control the transformations in a woman’s body and liberty resulting from its presence and attachment, a fetus is the only entity that can produce a pregnant condition in a woman’s body.

Thus, if the fetus is declared legally to be an unborn person with the same rights as a born person, then the fetus is an unborn human being lacking the mens rea to be legally responsible for the impact it has on a woman’s body and liberty. Fetuses, therefore, would be like born people who are mentally incompetent due to lack of mental capacity, the influence of drugs, insanity, or any other such attribute that rendered them unable to be knowledgeable or to control their impacts upon other people. Such people are legally “innocent” of a crime because they lack agency.

However, people's mental incompetence does not excuse them from state restrictions prohibiting nonconsensual intrusion upon the bodies and liberties of other people. Hence, declaring fetuses to be unborn human beings with the same rights as born human beings does not excuse fetuses from state restrictions prohibiting nonconsensual transformation of a person's (woman's) body and liberty. What is more, the state stops mentally incompetent people from harming other people with the full recognition that such people are legally innocent of criminal behavior.

B. Consent to Sex Versus Consent to Pregnancy

Some, of course, will say that if a woman consents to sexual intercourse with a man, then she has consented to the condition of pregnancy that may be subsequent to sexual intercourse if or when a sperm joins with an ovum and the fertilized ovum then attaches itself to the woman's uterus, thereby triggering the condition of pregnancy in a woman's body. However, the law does not require that people who consent to an action must necessarily consent to conditions that are subsequent to that action. For example, people who consent to sexual intercourse and subsequently contract HIV are not deemed to have consented to contracting HIV. To the contrary, they are free to eradicate HIV from their bodies. Similarly, people who consent to smoke and then find that they have lung cancer in their bodies are not required to consent to lung cancer in their bodies. Much to the contrary, they are free to eradicate the lung cancer.

Of course, the state does not have an interest in protecting the AIDS virus or cancer cells. However, as noted above, the fact that the fetus is a state-protected entity, or even legally declared to be an unborn human being with the same rights as a born human being, does not give the fetus a right to transform radically a woman's body and liberty, since no born person has such a right. To the contrary, a woman has a right to eradicate the pregnant condition in her body even if she consented to an action—sexual intercourse—that was an action upon which acquiring the condition depended.

VIII. THE NEXT STEP

The constitutional power of reframing abortion rights as a woman's act of self-defense as a means to stop the serious harm of a nonconsensual pregnancy increases in relation to the degree to which the state defines the fetus to be an unborn human being in conjunction with the latitude the state gives to the right

to use deadly force in self-defense. Interestingly, states such as South Dakota do both. Ironically, therefore, it is in precisely states such as South Dakota that the fundamental rights model of equal protection is particularly applicable. The conjunction of restrictive abortion rights legislation with the increase in the latitude recognized by states for the use of deadly force in self-defense, therefore, promises a way out of the box that has been *Roe*.

Crucial to implementing this new foundation for abortion rights in the wake of contemporary state-level challenges, however, is recognition that what is at stake is not merely a new way to frame abortion rights constitutionally, but also a new way to frame abortion rights politically. This is particularly true due to the way abortion advocates until now have used the strategy of invoking traditional imagery to obtain nontraditional rights for women.

A. *Using Conservative Arguments to Obtain Abortion Rights*

The current challenge to strengthen abortion rights follows in the wake of a long period in which pro-choice advocates used traditional, conservative, pro-choice arguments for the nontraditional right to obtain an abortion. Journalist William Saletan chronicles this process in his extraordinary book, *Bearing Right: How Conservatives Won the Abortion War*.¹³¹ As Saletan explains, by the mid-1980s, pro-choice strategists believed that it was crucial to women's interests to preserve abortion rights. However, they also noted that this was not a view shared by the general public. To the contrary, what most aggravated the public were conservative worries about what was perceived to be "big government" and the intrusion of government into people's private lives, for example, by imposing taxes and busing to achieve racial balance in educational institutions.¹³² The solution for abortion rights activists at this time was to join conservative, traditional views of limited government with the nontraditional goal of preserving a woman's right to choose an abortion.

Many mainstream pro-choice activists embraced this combination of traditional, conservative arguments to obtain nontraditional reproductive rights for women by arguing that the main reason women had a right to an abortion was because government should not intrude upon the private lives of people, including pregnant women, the husbands of pregnant women, and the physicians advising pregnant women. As Saletan puts it, pro-choice activists

¹³¹ WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR* (2003).

¹³² *Id.* at 2.

perceived that they could escape the unpopularity of promoting nontraditional goals for women—abortion rights—“by bearing right.”¹³³

Of course, there were some pro-choice activists—such as Patricia Ireland (President of the National Organization of Women), Pat Schroeder (a Colorado Democrat in the House), and Kathryn Kolbert (an attorney with the ACLU Reproductive Freedom Project)—who resisted this conservative solution to what the public considered to be the “radical” goal of retaining women’s right to an abortion. Among other things, they believed that education could sway the public to support abortion rights on more clearly feminist grounds.¹³⁴ However, those advocating a more direct, feminist approach to abortion rights rather than the conservative “get the government out of my uterus” approach were viewed by the pragmatists concentrated in the National Abortion Rights Action League (NARAL), Planned Parenthood, the National Women’s Political Caucus, the National Women’s Law Center, and the Women’s Legal Defense Fund, as hopeless “purists” who did not have a clue about the reality of passing (or defeating) bills in Congress much less electing politicians to office in the first place.¹³⁵

Thus, during the crucial years leading up to today, the dominant message delivered by pro-choice activists was an “anti-government, profamily rhetoric” that, while preserving the right of women to choose an abortion, gave up on related issues, such as abortion funding or resistance to parental consent regulations.¹³⁶ As Saletan reports, everywhere, politicians “proclaimed that abortion decisions ‘should remain in the family,’ where they could be made according to ‘traditional values.’”¹³⁷

B. Switching to Nontraditional Premises

Once the state defines the fetus to be an unborn human being with the same rights as a born human being, however, traditional, conservative arguments for abortion rights are moot because to the degree that the state acts to protect born human beings, the state is all but obligated to act to protect unborn human beings. For this reason, it is time to fight fire with fire, however untraditional the resulting framing of women’s right to an abortion may be. For if the state

¹³³ *Id.* at 4.

¹³⁴ *Id.* at 128, 222–25.

¹³⁵ *Id.* at 224.

¹³⁶ *Id.* at 120.

¹³⁷ *Id.* at 120.

acts to protect born people from harm resulting from mentally incompetent born human beings, and the state acts to protect unborn human beings from harm resulting from third party attacks on pregnant women, then it follows—from the fundamental rights model of equal protection analysis—that the state is obligated to act to protect women from the harm of a nonconsensual pregnancy resulting from the fetus itself, as discussed above.

Entailed in fighting fire with fire, however, is not merely the implementation of the fundamental rights model of equal protection analysis, but also the equally compelling requirement to expand the way we think of women—all women, including pregnant women—as fundamentally being the “same” as men. True, men do not have the capacity to be pregnant or to give birth. However, the doctrine of self-defense derives from the way society and the law accepts the right—and the needs—of men (in particular) to protect themselves, and their “castle”—a castle most often envisioned with a wife and family inside—from nonconsensual intrusion by others. This new, fundamental rights model of equal protection analysis as applied to abortion rights requires that we view women as having the same rights as men in relation to their bodies—their “castles.” Thinking of women’s bodies as “castles” means that women not only have the right to consent to the access of men to their bodies, but also the access of fetuses—unborn human beings—to their bodies. It is true that when women consent to sexual intercourse or to pregnancy, presumably, it is the best of all possible worlds for all involved. However, when women do not consent to sexual access to their bodies by men or to pregnancy access to their bodies by fetuses, then although men and fetuses respectively may be benefiting from nonconsensual access to women’s bodies and liberties, the major point is that women are not benefiting from that nonconsensual access.

Thus, women’s bodies and their liberties need to be viewed not only in terms of women’s special difference from men, that is, women’s capacity “to give” to others, including “to give” birth to babies, but also in terms of a property right to defend their bodies and their liberties from nonconsensual intrusion by others—*all others*—including fetuses. Of course, it took many years to achieve legal and political support in the courts of law and of public opinion respectively for women to have the right to consent to access to their bodies in relation to men. The “next step”—constitutionally and politically—is to obtain for women that same right to consent to access to their bodies in relation to fetuses. With the likelihood that state-level restrictive abortion

legislation will continue to be passed, the time to start taking that next step is now.

APPENDIX

Table 1. Summary of Some Transformations in a Woman's Body Resulting from a Fetus in an Uncomplicated ("Normal") Pregnancy

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
New Organ: Placenta ¹³⁹	Blue-red in color Discoid in shape 15–20 cm in diameter 2–4 cm thick 400–600 g in weight (15% of neonatal weight) ¹⁴⁰	The placenta is composed of fetal and maternal tissue. At term, 20% of the placenta is composed of fetal tissue. The umbilical cord can arise on any point on the fetal surface of the placenta. The placenta serves to transfer metabolic substances between the mother and the fetus, such as waste products. ¹⁴¹ The placenta weighs 1–2 pounds. ¹⁴²

¹³⁸ The term "uncomplicated pregnancy" as used here refers to what is often termed a "normal pregnancy." See Hern, *supra* note 49.

¹³⁹ Egton Medical Information Systems, PatientsPlus, Placenta and Placental Problems, <http://www.patient.co.uk/showdoc/40000159> (last visited Jan. 27, 2007).

¹⁴⁰ See Hern, *supra* note 49.

¹⁴¹ See Hern, *supra* note 49.

¹⁴² Ready Steady Baby! A Guide to Pregnancy, Birth and Early Parenthood, Pregnancy Body Changes, <http://www.hebs.com/readysteadybaby/pregnancy/pregnancy-body-changes-2.htm> (last visited Jan. 27, 2007).

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
Cardiovascular System	Blood volume progressively increases from 6–8 weeks gestation, reaching a maximum at approximately 32–34 weeks. ¹⁴³ Plasma volume by the 30th week increases on average by about of 50%. ¹⁴⁴	Maternal and fetal exchanges of respiratory gases, nutrients, and metabolites are facilitated by the increased blood volume, ¹⁴⁵ which also protects women from the impact of maternal blood loss at delivery; when women typically lose 300–500 ml of blood as a result of vaginal birth and 750–1000 ml of blood as a result of Caesarean sections. This blood loss is compensated with what is referred to as the “autotransfusion” of blood from the contracting uterus. ¹⁴⁶
Cardiovascular System	Blood constituents: The red cell mass increases by 20–30%. ¹⁴⁷	
Cardiovascular System	Cardiac Output: Cardiac output is 30–40% higher than in the nonpregnant state during the first 3 months of pregnancy. ¹⁴⁸ By the 36th to the 39th week, stroke volume increases by 35%. ¹⁴⁹ Immediately after delivery, cardiac output increases by 50% over the level in the pregnant woman's body prior to delivery. ¹⁵⁰	

¹⁴³ Christopher F. Ciliberto & Gertie F. Marx, *Physiological Changes Associated with Pregnancy*, UPDATE IN ANAESTHESIA, 1998, at 1, http://www.nda.ox.ac.uk/wfsa/html/u09/u09_003.htm.

¹⁴⁴ Egton Medical Information Systems, PatientsPlus, *Physiological Changes in Pregnancy*, <http://www.patient.co.uk/showdoc/40000161> (last visited Jan. 27, 2007).

¹⁴⁵ Ciliberto & Marx, *supra* note 143, at 2.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
Cardiovascular System	Cardiac Size and Position: Both the size and position of the heart change when a woman is pregnant. ¹⁵¹ The heart is enlarged and displaced to the left due to the upward displacement of the diaphragm as a result of the enlarging uterus. ¹⁵²	An ECG may reflect these size and position changes. ¹⁵³
Cardiovascular System	Blood Pressure: Venous pressure increases in the legs in later pregnancy so veins become distended especially in the legs. ¹⁵⁴	
Cardiovascular System	Aortocaval Compression: Both the inferior vena cava and the lower aorta become compressed when the pregnant woman lies down due to the enlarged uterus. ¹⁵⁵ In the later stages of pregnancy, this compression can reduce cardiac output by as much as 24% and cause diminished blood flow to kidneys and lower extremities. ¹⁵⁶	
Respiratory System	Respiratory Tract: Capillary engorgement and swelling of the lining in the nose, oropharynx, larynx, and trachea result from hormonal changes to the mucosal vasculature of the respiratory tract. ¹⁵⁷	Through gestation, there may be continuing nasal congestion, voice change, and upper respiratory tract infection. ¹⁵⁸

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Egton Medical Information Systems, *supra* note 144.

¹⁵⁵ Ciliberto & Marx, *supra* note 143, at 2.

¹⁵⁶ *Id.* at 2-3.

¹⁵⁷ *Id.* at 3.

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
Respiratory System	Lung Volume: Volume progressively decreases from the middle of the second trimester of pregnancy by as much as 20%. ¹⁵⁹	
Respiratory System	Ventilation and Respiratory Gases: Soon after conception, there is a progressive increase in minute ventilation, which peaks at 50% above normal levels around the second trimester. ¹⁶⁰ In addition, there is a 15% rise in respiratory rate (2–3 breaths/minute). ¹⁶¹	In response to the needs of the growing fetus, oxygen consumption increases, gradually, culminating in a rise of at least 20% at term. During labor, oxygen consumption is further increased (up to and over 60%) as a result of the exaggerated cardiac and respiratory work load. ¹⁶²
Gastrointestinal System	Mechanical Changes: The enlarging uterus causes a gradual displacement of the stomach and intestines. ¹⁶³	By the time of delivery, a woman's stomach is in a vertical position rather than the horizontal position of a nonpregnant woman. ¹⁶⁴
Gastrointestinal System	Physiological Changes: The gallbladder becomes hypotonic with slower and less complete emptying. ¹⁶⁵	There may be gallstone formation due to the thickening of the bile. ¹⁶⁶

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Egton Medical Information Systems, *supra* note 144.

¹⁶⁶ *Id.*

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
Metabolism	Metabolic Functions: All metabolic functions are increased during pregnancy to provide for the demands of fetus, placenta, and uterus. Carbohydrate metabolism evidences the most dramatic changes, though both protein and fat metabolism increase as well. ¹⁶⁷	From a metabolic perspective, pregnant women can be described as living in a state of "accelerated starvation" due to the nutritional demands of the growing fetus. ¹⁶⁸
Renal Physiology	Renal Functions: Renal plasma flow and glomerular filtration rate increase progressively during the first trimester. They reach a level at term which is 50–60% higher than in the nonpregnant state. ¹⁶⁹	Over the whole period of gestation there is retention of 7.5L of water and 900mmol of sodium. ¹⁷⁰

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 3.

Woman's Physical System	Transformations in a Woman's Body in an Uncomplicated Pregnancy ¹³⁸	Additional Information
Endocrine System	Glands: The condition of pregnancy alters the function of most endocrine glands, ¹⁷¹ including the pituitary, parathyroid, thyroid, adrenal glands, and ovaries. ¹⁷²	For example, the pituitary gland enlarges by about 135% during pregnancy; ¹⁷³ prolactin levels progressively increase approximately tenfold throughout gestation; ¹⁷⁴ growth hormones increase to levels of 10–20 ng/ml; ¹⁷⁵ an insulin-like growth factor 1 (IGF-1) dramatically increase in the second half of pregnancy; ¹⁷⁶ during pregnancy, the hormone human chorionic gonadotropin (better known as hCG) is produced by cells that form the placenta; ¹⁷⁷ in the early stages of pregnancy, hCG levels double every 72 hours, reaching their peak in the 8–11 weeks of pregnancy ¹⁷⁸ (a blood test can detect hCG about 11 days after conception, and a urine test can detect it about 12–14 days after conception.). ¹⁷⁹

¹⁷¹ THE MERCK MANUAL OF DIAGNOSIS AND THERAPY 2158 (Mark H. Beers et al. eds., 18th ed. 2006).

¹⁷² Felice Petraglia & Donato D'Antona, Maternal Endocrine and Metabolic Adaptation to Pregnancy (June 12, 2006), <http://www.patients.uptodate.com/topic.asp?file=antenatl/5391>.

¹⁷³ THE MERCK MANUAL OF DIAGNOSIS AND THERAPY, *supra* note 171, at 2159.

¹⁷⁴ Mark E. Molitch & Lisa P. Purdy, Endocrine Disorders of Pregnancy (May 1, 2002), <http://www.endotext.org/female/female14/female14.htm>.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ American Pregnancy Association, Human Chorionic Gonadotropin (hCG): The Pregnancy Hormone, <http://www.americanpregnancy.org/duringpregnancy/hcglevels.html> (last visited Jan. 20, 2007).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

